A "Penumbra" Area in the Constitution.[7]

In this part of our Argument, it will be proper also to comment upon another point that is clearly pertinent to this discussion. Looking back today over more than a century and a half of the actual working out of our Federal government, lawyers and legal scholars know and see clearly that the "Founding Fathers"—partly by design and partly by inherent inability to predict future events—left what may be called a "penumbra" area in the Constitution so far as Federal elections are concerned.

Indeed we find Story commenting on this fact in his classic work on the "Constitution" where he says (1st ed. 1833, sec. 814):

> "It was obviously impractical to frame and insert in the Constitution an Election Law which would be applicable to all possible changes in the situation of the Country, and convenient for all the States."

And, therefore, as Story points out, the Constitution leaves the matters of Federal elections "in the first instance to the States."; but Story at the same place goes on to point out that "in extraordinary circumstances the power is reserved to the National government", to regulate fully all matters in this field.

"IT IS A CONSTITUTION WE ARE EXPOUNDING."

This point about the *elastic* nature of the language of the Constitution, with respect to elections to which Story refers, was stressed by Chief Justice Stone (then Justice Stone) as late as 1941 in the well known election case of *United States* v. *Classic,* 313 U.S. 299. In discussing the

[7] See dissenting opinion of Mr Justice Douglas in *United States* v *Classic,* 313 U. S 299, where the terminology "penumbra of a statute" is used.

particular provision of the Federal Constitution concerning Congressional elections Article I, Section 2, he said:

> "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 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 continuous revision with the changing course of events, but as a revelation of the great purposes which were intended to be achieved by the Constitution as a continuous instrument of government. (Citing several cases.) If we remember that 'it is a Constitution we are expounding' we cannot rightly prefer, of the possible meaning of its words, that which will defeat rather than effectuate the constitutional purpose." (Italics added.)

This language in the opinion of Chief Justice Stone, we say, clearly supports our contention about the "penumbra" area of the Constitution in the field of Congressional elections.

ANALOGY OF PRESIDENTIAL ELECTIONS.

This historical fact about what we have called the "penumbra" area in the Constitution concerning Federal elections is clearly indicated by what happened in our early history in the field of Presidential elections. Many lawyers and students of political science have forgotten that it was the original design and purpose of the constitution to leave the selection of a President and a Vice President entirely in the hands of a small group, namely the so called "Electoral College". The original purpose and plan was to require and permit that group of supposedly wise and able men to select the best man for

President. The school boy of today hardly realizes that a complete popular revolution took place in the first few decades of our Federal government, with the result that by the time of the election of Andrew Jackson, the people themselves by popular ballot selected the President and Vice President. That democratic process of popular election of our Chief Executive long ago became solidified and has stood the test of more than a century of actual working out. But it must be remembered that there is nothing whatever in the Constitution that either justifies or permits a popular election of the President under our governmental system.

The point to be remembered is that it was the political genius of the American people which proceeded, on its own initiative, to fill in the interstices left by the "Founding Fathers" in the process of Federal elections. The genius of the people from time to time has made up for this "penumbra" area in the Constitution and has perfected and made work a machinery and design that was left rather imperfect and incomplete by the Constitution itself.

THE "PENUMBRA" AS TO CONGRESSIONAL ELECTIONS.

The same point is true with regard to Congressional elections, although here the Constitution was considerably more explicit. However it is an historical fact, which again few lawyers and political scholars realize, that a similar growth and development in the process of Congressional elections (like that we have outlined for the election of President) has taken place through the years in the field of Congressional elections. The first important assertion of power of Congress over Congressional elections did not take place as we have seen until sometime after the "popular revolution", which had completely changed the scheme of our Federal government with respect to Presidential

elections. Nevertheless, we find the same growth and the same devolopment in our governmental system concerning Congressional elections themselves. We find likewise that the political genius of the American people, even in this field, has proceeded to develop and work out a machinery, that as Story points out, was left vague and uncertain in the Constitution itself.

This point, we say, is significant and pertinent on this Argument. If anyone challenges us to point our finger to any express provision of the Federal Constitution guaranteeing in precise terms the right of Illinois citizens to have their Congressional districts set up and constituted on a fair and equal basis, we answer by saying: who can point to a precise and articulate provision of the Federal Constitution clearly authorizing popular elections for President of the United States? We say that the idea of equal voting power in the Congressional districts of Illinois is inherent in the fabric and the philosophy of the Constitution itself. We say that the 1901 Act of the State of Illinois here under attack clearly violates that inherent idea of our Federal Constitution.

THE ACT OF 1842 OPPOSED ON "STATES-RIGHTS" GROUNDS.

The historical fact is that it was not until the year 1842 that Congress took any significant action under its constitutional powers to "make or alter" the laws of the States with regard to Congressional elections. We have already seen that by an Act passed in that year and already cited, Congress asserted its power as against the States to compel Congressmen to be elected "by districts" in the future.

For our present purposes (and particularly in view of the Argument of the Attorney General of Illinois in the case at bar as to "State Sovereignty" etc.), it is interest-

ing to note that even when the Act of 1842 was before Congress there was considerable opposition to it on the part of the so called "States' Rights" group of that day. Thus we read in Hines' "Precedents" (Vol. 1, p. 170 *et seq.*) of the long debates which took place in Congress over the Statute of 1842. We there learn that Stephen A. Douglass (the famous but unsuccessful defender of the doctrine of "States' Rights" in a far larger field) spoke and argued at length on the thesis that Congress could not compel the States to elect their Congressmen by districts if the States determined to do otherwise. That argument of Douglass today sounds like a hollow and antequated theory and contention. More than a 100 years of compliance by the States with the Act of 1842 has completely overwhelmed the contentions for which Douglass stood, concerning Federal elections. What will be the accepted view a century hence, we say, of the defiance of the inherent principle of equal voting rights which characterizes the State of Illinois in this year of 1946?

Point VI.

APPELLANTS' RIGHT TO REPUBLICAN FORM OF GOVERNMENT.

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.

Republican Form of Government Guaranteed.

Section 4 of Article IV of the Constitution of the United States provides:

> "Section 4. The United States shall guarantee to every State in this Union a Republican form of government."

Inspired by that language of the Federal Constitution, the Enabling Act of Congress of April 18, 1818 (3 Stat. L. 428), under which Illinois was authorized to form a government and enter the Union, contained a specific limitation and requirement which became forever binding thereafter on the State of Illinois, as follows:

> "* * * providing that the same (State government of Illinois) shall be Republican * * *."

That language of the Act of 1818 is specifically relied upon by the Complaint below (Record p. 11) as grounding the rights of the Appellants in this case.

When the State of Illinois, acting under the Enabling Act of 1818, proceeded to draft its first Constitution of 1818, the Preamble of that Constitution accepted the pledge about the Republican form of government, because the Preamble

recites that the government of the State of Illinois shall forever be

> "consistent with the Constitution of the United States, the Ordinance of Congress of 1787, and the law of Congress approved April 18, 1818" etc.

We respectfully urge and charge that as a result of the combination of those three basic charter provisions, the Appellants in this case have a constitutional right to all the privileges that flow from a Republican form of government. We further say that one of the basic and essential rights of a Republican form of government is the right of equality at the ballot box, the right to be equal to other voters in voting for members of Congress.

In making that claim we are not unmindful of the rulings of this Honorable Court in certain cases in the past, concerning the guaranty in the Federal Constitution about the Republican form of government. This Court first discussed and considered that question in the early case of *Luther* v. *Borden,* 7 How. 1. That case, it will be remembered, grew out of the so-called "Shay's Rebellion" in the State of Rhode Island, and involved particularly the claim of the Plaintiff for civil damages because the government of Rhode Island had permitted revolutionary persons to injure and damage the Plaintiff's premises. Another well-known case in which this Court has considered the guaranty with respect to Republican form of government is *Pac. Telephone Co.* v. *Oregon,* 223 U. S. 118. There also the facts of the case showed that the plaintiff was insisting that a *coercive course of action against the State itself,* should be taken by the Courts. A recent case referring to the guaranty with respect to the Republican form of government is *Coleman* v. *Miller,* 307 U. S. 433, involving the question whether the General Assembly of the State of Kansas might change or revoke its prior action concerning the

Federal Child Labor amendment. Here again we find something in the nature of *coercive* action against the State was involved.

The basic reason why this Court has refused to *coerce* any State under the guaranty of a Republican form of government found in the Federal Constitution is inherent in the fact that the judicial process cannot go that far. The Courts are right in so holding.

But when the guaranty of a Republican form of government is urged and relied upon by citizens, whose rights have been denied or impaired by the State, a different situation exists. In such a case as that here at bar, the only relief sought, or needed to be given by the Court, is a holding which would strike down as invalid and unconstitutional, an arbitrary and discriminatory State statute. We say therefore that a very different view and a very different application of the guaranty about a Republican form of government, is here involved. In the situation which exists in the case at bar we respectfully assert that the Court has clearly within its power the capacity to defend and protect the citizen; and that the guaranty with respect to a Republican form of government is properly citable as an additional reason why this Court should grant relief to the Appellants here.

A Leading Massachusetts Opinion.

We need hardly apologize for the fact that cases and opinions supporting our contention on this particular point are few. It is, therefore, with considerable satisfaction that we are able to cite and urge upon this Court, a classic opinion from one of the leading courts of the Union. In "*Opinion of the Justices,*" 10 Gray (76 Mass.) 613, we find an express statement of the doctrine upon which we here

rely. That *"Opinion of the Justices"* was rendered in 1858 to the House of Representatives of Massachusetts, which had asked the Massachusetts Court for an opinion as to the force and effect of the *"21st Article of Amendment of the Constitution of Massachusetts,"* under which the Mayor and Aldermen of the city of Boston (as well as County Commissioners in other Counties) were "empowered to apportion the number of Representatives" assigned to the various counties of Massachusetts. The precise question presented to the Court was whether the County authorities had an arbitrary and unlimited power in the premises; or whether they were required to apportion the county into Legislative Districts based upon the fundamental concept of equality of population. The Massachusetts Court through all its six members, including Chief Justice Lemuel Shaw, in a vigorous opinion held that the basic right to equality of voting was inherent in the law of the land; and that the Court had a right and duty to strike down any arrangement for Districts which might be set up by any County, that denied the voters equal voting rights on a population basis. In so doing the Massachusetts Court said:

> "Nothing can more deeply concern the freedom, stability, the harmony and the success of a representative Republican government, nothing more directly affect the political and civil rights of all its members and subjects, than the manner in which the popular branch of its legislative department is constituted. * * *
>
> "The great object to be attained (by the Mass. Const.) manifestly was * * * in conformity with the theory of representation to secure as nearly as possible an equality in the ratio of Representatives and legal voters throughout the Commonwealth. * * *
>
> "Thus it will be perceived that the great principle of equality of representation, or the nearest practical approximation to it, which lies at the foundation of

> this whole constitutional provision (concerning redistricting) is to govern * * * so as to bring that approximation as near as may be to true equality."

Here we have in the language of the Massachusetts Court, almost a century ago, a doctrine announced, which clearly supports the contention of the Appellants in the case at bar. The Massachusetts Court specifically holds that it is inherent in a Republican form of government that the citizens shall be equal at the polls, so far as population requirements are concerned, in the selection of the persons who are to represent them in the Legislature.

A Leading Modern Case.

The doctrine about a Republican form of government, so strongly announced in the Massachusetts opinion of 90 years ago, has been specifically adopted and approved by a leading modern decision in Massachusetts, *Attorney General* v. *Apportionment Coms.,* 224 Mass. 598, 113 N. E. 581, decided in 1916. That case is so pertinent on this particular point of our Argument (and is also so pertinent in other respects in this Brief) that we are discussing it here in some detail. That case was an original proceeding in the Supreme Judicial Court of Massachusetts, brought by the Attorney General against the "Apportionment Commissioners" of Suffolk County (Boston) to have the Court declare invalid the action of the defendant Board in apportioning the 54 Legislative districts in Suffolk County, and to direct the Board to do the job over again in conformance with the Constitution. The Massachusetts Court granted the relief prayed and struck down the existing Apportionment Act for Suffolk County. The Court in its opinion refers particularly to the right of an equality of voting under a Republican form of government and says:

> "Scarcely any right more clearly relates to the civil

liberty of the citizen and the independence and the quality of the free man *in a Republic* than the method and conditions of his voting and the efficacy of his ballot, when cast for Representatives in the Legislative Department of the government."

The Massachusetts Court in that recent case then refers, with approval, to the decision in the "Opinion of the Justices" above mentioned, and the Court then quotes from that Opinion the first paragraph above quoted in this Argument, specifically referring to a "Republican government." The Massachusetts Court in the recent case above cited then continues:

"The right to vote is a fundamental, personal and political right. The equal right of all qualified to elect officers is one of the securities of the Bill of Rights (Mass. Const.). * * *

"Unlawful interference with the right to vote, whether on the part of public officers or private persons, is a private wrong for which the law affords a remedy, although it may also have significant political results. * * *

"The circumstance that political considerations may be connected with rights affords no justification to Courts for refusal to adjudicate causes rightly pending before them. Such a controversy, even though political in many of its aspects, is of judicial cognizance."

(Citing among other cases *McPherson* v. *Secretary of State,* 146 U. S. 1.)

McPherson vs. Secretary of State.

The *McPherson* case, decided by this Honorable Court in 1892, by clear implication, has a strong bearing on this Argument about the force and effect of the guaranty of a Republican form of government. In that case the Supreme Court of the United States confirmed a judgment of the

Supreme Court of Michigan, 52 N. W. 469, in which the State Court had held valid, under the Federal Constitution, a State law requiring Presidential Electors to be chosen (at the election in 1892) by districts in the State instead of at large as was, and is, the usual custom. Before coming to the merits of the question before the Court, Chief Justice Fuller in his opinion discusses the question as to whether the political controversy involved was a justiciable question and said:

> "It is argued that the subject matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a Presidential Elector are political in their nature; that the Court has no more power finally to dispose of them; and that its decision would be subject to review by political officers and agencies such as the State Board of Canvassers, the Legislature in Joint Convention, the Governor or finally the Congress.
>
> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising since the validity of the State law is drawn in question as repugnant to such Constitution and laws."

It is particularly to be noted that the Supreme Court in the *McPherson case* holds that it had jurisdiction and that a judicial "controversy" was involved notwithstanding the political aspects of that question; and the language of the Court in the last paragraph above quoted is particularly significant in any consideration of the claim of the Appellants to relief in the case at bar.

Finally we cite and rely on the language of Mr. Justice Douglas of this Honorable Court, in his dissenting opinion in the *Classic case, supra,* where he said:

> "Free and honest elections are the very foundation of our Republican form of government."

Summary on This Point.

We will not further labor this particular question about the effect of the constitutional guaranty of a Republican form of government, in protecting the right of citizens at the ballot box. It may perhaps be said that our contentions in this respect are novel and unusual. But we respectfully submit that it cannot be said that the point is without logic or good sense. Moreover we say that the authorities we have cited lend strong support and validity to our contention.

Point VII.

WOOD v. BROOM—AND THE "ERROR" ABOUT THE ACT OF 1911.

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." The Fact Is That a Similar Provision of Federal Law Had Been Enacted Into the Revised Statutes of 1878 and Is Still in Full Force and Effect, Even Today.

CONGRESSIONAL ELECTIONS UNDER THE "REVISED STATUTES."

It is perhaps not generally known that the so-called Revised Statutes" of the United States were twice enacted by Congress into the *"permanent law"* of the United States. The so-called "First Edition" of the Revised Statutes was enacted by Congress in 1874. (See Act of June 1874, 18 Stat. L. 113.) An examination of that "First Edition" shows that Congress devoted a special part of "Chapter 2" of that official compilation to the subject—

"APPORTIONMENT AND ELECTION OF REPRESENTATIVES."

Eight Sections of the Revised Statutes are there given which are generally concerned with the subject matter of "Congressional Apportionment." Section 23 thereof is the particular provision upon which the Appellants so strongly relied in their Complaint below (R. p. 9) as being one of the basic grounds on which their right to relief in this case is bottomed.

"SECOND EDITION" OF THE REVISED STATUTES.

The so-called "Second Edition" of the Revised Statutes of the United States was reenacted in 1878 and published in that year. The plain truth is that the "Second Edition" was required because of certain defects or imperfections in the "First Edition"; and it has, therefore, been called a "perfected" edition of the Revised Statutes. (See "PREFACE TO THE CODE OF LAWS OF THE UNITED STATES", appearing at the front of the so-called "United States Code" published by the Government Printing office, Washington, June 1926.) An examination and comparison of the text of the "First Edition" and the "Second Edition" of the Revised Statutes shows that the two are identical so far as the eight Sections concerning "APPORTIONMENT AND ELECTION OF REPRESENTATIVES" are concerned.

SECTION 23 OF THE REVISED STATUTES.

One of the provisions, as we have seen of both the "First" and the "Second Edition" of the Revised Statutes, is Section 23 with which we are here particularly concerned in this Argument. We have given this extended Legislative History of that Section of the Revised Statutes, because we consider the point as to the present validity and vitality of that Section one of the decisive issues on this Appeal. As this Court knows the Revised Statutes of the United States are by the very terms of their own language (see Rev. Stat. of the U. S. 1874, Title Page) made the "general and permanent law" of the United States.

The language of Section 23 of the Revised Statutes is as follows:

> "SEC. 23. In each State entitled under this apportionment to more than one Representative, the number to which such State may be entitled in the Forty-third,

> and each subsequent Congress, shall be elected by Districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of Representatives to which such State may be entitled in Congress, no one District electing more than one Representative."

We call particular attention to the fact that Section 23 of the Revised Statutes has two provisions which are controlling upon this Argument:

> (a) That the provisions of the Section are applicable to "each subsequent Congress" following the enactment of the Revised Statutes.
>
> (b) That the Section specifically requires that Congressional districts shall contain "as nearly as practicable an equal number of inhabitants."

We think it is obvious, therefore, that the Illinois Statute of 1901 is unconstitutional and void, for the particular reason that it violates the language of Section 23 of the Revised Statutes above quoted.

A LEADING AUTHORITY ON THIS POINT.

The question here is of course whether the provisions of Section 23 of the Revised Statutes in question are in truth the "permanent law" on the point as we contend. For obvious reasons it is impossible to cite judicial decisions in support of our contentions in this respect. Nevertheless, we feel lucky in being able to cite as authority on this point, at least by clear implication, one of the leading constitutional scholars and authorities of the United States The late Professor John W. Burgess of Columbia University in his well known and standard treatise "Political Science and Constitutional Law", published in 1890 quotes what he calls "the Act now in force" on the point of equality of population in Congressional districts (be-

ing the Act of January 16, 1901; 31 Stat. L. 733) and then says in his book, Vol. 2, p. 48:

> "I think it cannot be reasonably doubted that the power to determine the *manner* of holding Congressional elections includes the power to prescribe the *district ticket* as against the *general ticket* or *vice versa*. But does it include the power to require the States to construct the districts of contiguous territory and of as nearly equal population as is practicable? *It is perhaps too late to raise any doubts on this point. Congress has certainly gone no further than a sound political science would justify.*"

Here in language written more than half a century ago a great authority practically says that the rule as to equality of Congressional Districts was even then embedded in our Constitutional Law and that it was "too late" to raise any questions about its validity. Moreover he says that "sound political science" in America requires that rule to be applied.

The "United States Code" On This Point.

We come now to a consideration of the so-called "United States Code" of 1925 and to its treatment of Section 23 of the Revised Statutes of the United States discussed above. It is common knowledge among all lawyers that as stated in the "Preface" to the "United States Code" of 1925:

> *"No new law is enacted and no law is repealed. It (the Code) is prima facie the law. It is presumed to be the law. The presumption is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code. Because of such possibility of error in the Code, and of appeal to the Revised Statutes and Statutes at large, a table of statutes repealed prior to December 7, 1925 is published."*

We have already strongly urged that for some unfortunate reason Section 23 of the Revised Statutes of the United States was through "error" omitted from the "United States Code" of 1925. In lieu thereof the Compilers of the "Code" mistakenly substituted the language of the obviously *temporary statute* of August 8, 1911 already cited.[8]

THE "UNITED STATES CODE" AND SMILEY v. HOLM.

We have urged above that since the "United States Code" of 1925 is merely a compilation of existing statutes, and did not repeal any part of the prior permanent Law of the United States, therefore, Section 23 of the Revised Statutes of 1878, concerning equality of population in Congressional Districts is still in full force and effect. It is interesting to note that Chief Justice Hughes stressed an analogous point in the *Smiley* v. *Holm Case, ante,* in considering the force and effect of the "United States Code." In that case it had been argued before the Supreme Court of the United States that the language of the temporary Act of 1911, cited *ante,* concerning Congressional Districts, had been carried into the "United States Code" and was, therefore, to be considered as having been "reenacted" by that compilation. Chief Justice Hughes said, in rejecting that contention:

> "Inclusion in the Code does not operate as a reenactment; it establishes *prima facie* the laws of the United States, general and permanent in their nature,

[8] An examination of the original official printed "Code" shows that no explanation or reason whatever was given by the Compilers for omitting Section 23 of the Revised Statutes Also an examination of the "Tables" attached to the "Code" and referred to in the language of the "Preface" given above shows that Section 23 of the Revised Statutes had not been repealed when the "Code" was compiled in 1926; and indeed, has not been repealed since that time

in force on the 7th day of December, 1925. Act of June 30, 1926, 44 Stat. L. 1."

That language of Chief Justice Hughes has a clear implied inference with respect to the point we are here urging about the *permanence* of Section 23 of the Revised Statutes of the United States. As we have already seen in this Brief, Section 23 was carried over from the Act of 1872 into the Revised Statutes and it was therefore actually "reenacted" in the way in which Chief Justice Hughes carefully points out *was not done by the "United States Code" of 1925.* In other words, the foregoing language of Chief Justice Hughes in the *Smiley* v. *Holm Case,* by analogy, is a plain statement that the original provisions of the Act of 1872 (17 Stat. L. 28) concerning *equality of population* in Congressional Districts was twice "reenacted" into the permanent law of the United States: first, by the passage of the "First Edition" of the Revised Statutes in 1874, and, second, by the passage of the "Second Edition" of the Revised Statutes in 1878.

Legislative History of This Idea of Equal Population of Districts.

Since this point about the requirement of "an equal number of inhabitants" in each Congressional District is so important on this Argument, it will be helpful to give the "Legislative History" of this provision. The first decisive step by Congress in asserting its power over Congressional Elections as against the States, was taken, as we have seen, in 1842, when Congress first asserted the requirement for "district election" of Congressmen. The second decisive step taken by Congress in this direction occurred in 1872, to require that Congressional Districts in every State must contain *"as nearly as practicable an equal number of inhabitants."* (Act of February 2, 1872,

17 Stat. L. 28.) The language of the Act of 1872 was, with some slight revision and changes, covered into the Revised Statutes (First Edition) of 1874 and was again reenacted in the Revised Statutes of 1878, where it is now found in Sec. 23 thereof. The full significance of that Statute, and its strange omission from any consideration in the well-known case of *Wood* v. *Broom,* 287 U. S. 1, is an important point on this Argument. Here, however, we will merely bring down to date, the Legislative story of this Congressional requirement as to "equality" of Districts.

REPEATED CONGRESSIONAL ACTION ON THIS POINT.

Notwithstanding the fact that the requirement of Congress about "equal population" of Congressional Districts was inserted in the *Revised Statutes of 1878—and thereby became a part of the permanent laws of the United States*—Congress regularly and repeatedly reenacted the same provision, following each Census, from 1880 down to 1910. Thus after the tenth census in 1880 Congress again specifically required Congressional Districts to be of equal population (Act of February 5, 1882; 22 Stat. L. 5). Congress did the same thing after the census of 1890. (Act of February 7, 1891; 26 Stat. L. 735.) Congress again made the same requirement following the census of 1900 (Act of January 16, 1901; 31 Stat. L. 733.) Following the census of 1910 Congress passed a further statute to this same effect. (Act of August 8, 1911; 37 Stat. L. 13.)

THE UNITED STATES CODE OF 1925.

It is this particular provision of the Act of 1911 that was covered into "The United States Code," in 1925, where it appears in Title 2, "The Congress" Sec. 3, of that Compilation. Here was the beginning of this serious "error" in the "United States Code" of 1925, about which we are now speaking. That Code should have carried both the provisions of the Act of 1911 (Title 2, U. S. C. A. Sec. 3) and the provision of Section 23 of the Revised Statutes.

SUMMARY AS TO "UNITED STATES CODE" OF 1925.

It is obvious therefore that the United States Code of 1925, by oversight, omitted from its text, Section 23 of the Revised Statutes of 1878. The language of Section 23 of the Revised Statutes requiring that Congressional Districts shall contain *"as nearly as practicable an equal number of inhabitants"* is still in full force and effect and is binding on the State of Illinois with respect to the antiquated Act of 1901, here under attack. This oversight was not before the Supreme Court of the United States in the *Wood* v. *Broom Case*, 287 U. S. 1, and has never been called to the attention of this Court. This error should now be corrected by this Court in the case at bar.

Point VIII.

THE NORTHWEST ORDINANCE OF 1787.

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 Permitting Illinois to Become a State of the Union, and Also By Virtue of the First Constitution of Illinois of 1818, the Provision of the Northwest Ordinance Concerning "Proportionate Representation" was Specifically Written Into and Made a Permanent Part of the Organic Law of Illinois. The Illinois Congressional Apportionment Act of 1901 Is Now in Gross Violation of That Principle of "Proportionate Representation".

"Proportionate Representation".

One of the primary grounds upon which the Plaintiffs relied in their Complaint (R. p. 9) is the guaranty contained in the so called Northwest Ordinance of 1787, which insures that the people of Illinois will forever "be entitled to the benefit * * * of a proportionate representation of the people in the Legislature." This Court will take judicial notice of the fact that Illinois is one of the five states of the Union organized out of the so called Northwest Territory, and therefore that state is subject (so far as the provisions of the Northwest Ordinance are still applicable) to the provisions of that document insofar as they have become an integral part of the constitutional law and government of the State of Illinois. The so-called Northwest Ordinance was adopted by the Congress of the United States during the period of the Articles of Confederation, July 13, 1787, and is entitled

> "An Ordinance for the government of the Territory of the United States Northwest of the Ohio River."

Elsewhere in this Brief we have shown that the provisions of the Northwest Ordinance were required to be adopted by the State of Illinois by the Enabling Act of the Congress of April 18, 1818 (3 Stat. L. 428), authorizing the admission of the State of Illinois into the Union; and the Brief further shows that the First Constitution of Illinois adopted in 1818 in its Preamble obligated the State to become a member of the Union "consistent with * * * the Ordinance of Congress of 1787." In other words the State of Illinois, unlike other states outside the Northwest Territory, has agreed forever to incorporate into its organic law the provisions of the Northwest Ordinance and, therefore, the particular provision that is now about to be discussed. The Complaint specifically states (R. p. 10) that the State of Illinois is now particularly bound by and required to comply with the following specific provisions of the Northwest Ordinance of 1787:

> "Sec. 12. It is hereby ordained and declared by the authority aforesaid" (that is, "The United States in Congress assembled") "that the following Articles shall be considered as Articles of Compact between the original States and the people and States in the said Territory, and forever remain unalterable, unless by common consent, to-wit:
>
> * * * * *
>
> ARTICLE II.
>
> "The inhabitants of the said Territory shall always be entitled to the benefits * * * of a proportionate representation of the people in the legislature * * *"
>
> (For text of the Northwest Ordinance, and particularly for the above provision see the Constitution U.S.C.A., Vol. 1, p. 18, *et seq.*)

MODERN EFFECT OF NORTHWEST ORDINANCE.

The Supreme Court of the United States in a number of early cases hereafter cited has discussed in a general way the effect of the provisions of the Northwest Ordinance in the States *outside* of the area of that Territory. Some of these decisions arose in connection with the slavery provisions of the Northwest Ordinance; and it must be said in all fairness that in this day and generation the holdings of these early slavery cases do not offer much valid help for questions like that raised in the case at bar. The fact is, however, as we have already stated, the State of Illinois is in a peculiar and special category in this respect, because of the provisions of the Enabling Act permitting Illinois to join the Union and the provisions of the Preamble of the Constitution of Illinois of 1818, both of which have already been mentioned. Accordingly it is not necessary to discuss at length those early cases of the Supreme Court of the United States arising from States which are not organized out of the area of the Northwest Territory, and particularly which did not have the binding provisions of their Enabling Acts and of their first Constitution as the State of Illinois does.

NOTE: These early cases are here cited without comment:

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.
Messenger v. *Mason,* 10 Wall. 507.
Clinton v. *Englebrecht,* 134 Wall. 434.
Langdean v. *Hanes,* 21 Wall. 521.
Morton v. *Nebraska,* 21 Wall. 660.

PARTICULAR EFFECT IN ILLINOIS.

The result is that the question which is here being raised can only be settled and discussed by giving particular attention to the effect of the Northwest Ordinance (and the special provisions relied on in the case at bar) so far as they effect the State of Illinois alone.

It will be observed from a reading of the language of the provisions of the Northwest Ordinance above quoted, concerning "Proportional Representation", that the recitals of Art. II of that Ordinance are made "A Compact" between the original States and the people in the States in said Territory. One of the particular provisions of that "Compact" is set out above in "Art. II" of that Ordinance; and that provision (at least on its face) purports to be a perpetual guaranty of "the benefits * * * of a proportionate representation of the people in the Legislature" to the people of the State of Illinois. It was for this reason that the Complaint specifically charged (and the Appellants here charge) that the antiquated Congressional apportionment act of Illinois of 1901, here under attack, is in gross violation of the provisions of the Northwest Ordinance above set out.

ENABLING ACT OF 1818.

The Complaint below (R. p. 11) particularly charged that the Enabling Act of Congress of April 18, 1818 (3 Stat. L. 428) authorizing the admission of Illinois into the Union provides among other things that the State of Illinois must accept and abide by the provisions of the Ordinance of 1787; the recitals of the Enabling Act of April 18, 1818, with respect to that point, being as follows:

> "Provided that the same shall be Republican and not repugnant to the Ordinance of the 13th of July

> 1787, between the original States and the People and the States of the Territory Northwest of the Ohio River."

Now whatever may be the rule with respect to other States of the Union, it is difficult to see how anyone can say or contend that the provisions of the Northwest Ordinance of 1787, and particularly the provision with respect to "Proportionate Representation of the people in the Legislature" did not become and is not now a part of the organic law of the State of Illinois. To state the matter affirmatively the Enabling Act admitting Illinois to the Union specifically compelled that State never to adopt or maintain any law which might be "repugnant to the Ordinance of the 13th of July 1787." When the matter is thus stated it becomes crystal clear that the Act of Illinois of 1901, here under attack, is in direct violation of and is completely "repugnant to" the provisions of the Northwest Ordinance concerning "Proportionate Representation."

ILLINOIS CONSTITUTION OF 1818.

The Complaint further particularly charged (R. p. 12) that the First Constitution of the state of Illinois in the year 1818, which was approved and adopted under the power and authority of the Enabling Act of Congress of April 18, 1818, already mentioned, particularly undertook and agreed in its Preamble to become a member State of the Union, subject to and consistent with (among other things) the Ordinance of Congress of 1787, and the law of Congress approved April 18, 1818. The Complaint further charged that the Preamble of the Constitution of Illinois of 1818, specifically accepted "the right of admission into the general government as a member of the Union consistent with * * * the Ordinance of Congress of 1787 and the Law of Congress approved April 18, 1818." Accord-

ingly the Complaint specifically charged that the antinquated Act of Illinois of 1901, here under attack, was in gross violation of the Preamble of the First Constitution of Illinois and, therefore, of the basic organic law of that State as it stands today.

A SIGNIFICANT CASE AS TO THE NORTHWEST ORDINANCE.

Fortunately we have been able to locate a striking and interesting decision by the Supreme Court of Indiana, decided in 1896, expressly holding that the guaranty contained in the Northwest Ordinance concerning "proportionate representation in the Legislature" is still binding and enforcible in the states organized out of the Northwest Territory. In *Denny* v. *State,* 42 N. E. 929, an action was brought by a citizen and a taxpayer and voter asking the state Supreme Court to strike down and hold as unconstitutional a statute of Indiana passed in 1895, creating Legislative districts in that state; the Petitioner contending that the Legislative districts created under the Indiana statute were so grossly unequal in population as to violate both the Constitution of Indiana and the provision of the Northwest Ordinance above set out in this Brief concerning "proportionate representation in the Legislature." In the *Denny* case, the Petitioner sought a writ of mandamus to compel the Secretary of State (and other State Officials) to hold the forthcoming election under a prior state statute of 1893, which had likewise set up the Legislative districts for the state. The Supreme Court of Indiana took jurisdiction in the premises and sustained the contention of the Petitioner that the Indiana Act of 1895 was unconstitutional and void, because of its gross discrimination against the voters, based on the matter of inequality of population in

the Legislative districts. In so holding the Indiana Supreme Court said:

> "An apportionment law that violates the Constitution must be held invalid quite the same as any other. * * * In recent years the validity of Apportionment Acts has been before the Courts of last resort in at least four States besides our own. In two of these cases, in Wisconsin and Michigan, the Courts held the Acts unconstitutional. In the other two cases, in New York and Illinois, the Acts were held constitutional." (Citing *State* v. *Cunningham* (Wisc.), 51 N. W. 724, 53 N. W. 35; *Board of Supervisors* v. *Secretary of State* (Mich.), 52 N. W. 951; *Giddings* v. *Secretary of State* (Mich.) 52, N. W. 944; *People* v. *Rice* (N. Y.), 31 N. E. 921; *People* v. *Thompson* (Ill.), 155 Ill. 451, 40 N. E. 307; *Parker* v. *State* (Ind.), 32 N. E. 836.)

THE ORDINANCE OF 1787 AND THE COURTS.

Coming now to the particular point with which we are here concerned, namely the validity and vitality of the provisions of the Northwest Ordinance here in question, so far as the case at bar is concerned, the Indiana Supreme Court cited and relied on the particular provision of the Northwest Ordinance relied on by the Appellants here. In so doing the Supreme Court of Indiana said:

> "The principle of proportionate representation has always obtained in Indiana, even from a time preceding the formation of the Constitution of the United States. From the passage of the Ordinance for the government of the Northwest Territory July 13, 1787, out of which Territory our Commonwealth was afterward formed, this principle of proportionate representation has been of the very essence of our local self government. The Ordinance of 1787 names proportionate representation in the same category with the writ of *habeas corpus*, trial by jury, and due process of law, as fundamental rights to which the people of this territory shall al-

ways be entitled. * * * So that for 100 years the unvarying law of this terirtory and State has been, as affirmed by the Fathers of 1787:

> " 'The inhabitants of the said territory shall always be entitled to the benefit of * * * a proportionate representation of the people in the legislature.' " * * *

Here then we have one of the most highly respected courts of the Union holding flatly that the provision of the Northwest Ordinance, upon which the Appellants rely in the case at bar for knocking out the antiquated Statute of 1901, is still in full force and effect and forever grants to the people of the five states organized out of the Northwest Territory the right of equal representation.

CONCLUSION ON THIS POINT AS TO NORTHWEST ORDINANCE

We, therefore, conclude the discussion in this Brief about the guaranties found in the language of the Northwest Ordinance by saying that the particular question here involved is one clearly of first impression before the Supreme Court of the United States. That Court could, of course, conceivably hold that the language of the Northwest Ordinance, upon which these Appellants rely became, so to speak, *functus officio* upon the adoption of the Federal Constitution of 1789; and that, therefore, its provisions are no longer to be relied upon as a live and vital guaranty of equality in voting rights in the year 1946. That, we say, is a theory and a ruling which this Court might conceivably take if it were not for—

(a) The requirements which the Congress of the United States wrote into the Enabling Act of 1818 permitting Illinois to enter the Union, such requirements particularly forbidding the state of Illinois to pass a law "repugnant" to the provisions of the Northwest Ordinance; and

(b) The recitals in the Preamble of the First Constitution of the State of Illinois of 1818, under which that State bound itself forever to adopt a form of government that would be "consistent with * * * the Ordinance of 1787 and the Law of Congress approved April 18, 1818."

In view of the matters recited in (a) and (b) above we say that it would be logical and sensible and right for this Honorable Court to hold that the provisions of the Northwest Ordinance, particularly relied upon by the Appellants in the case at bar, are violated by the antiquated statute of 1901 of the State of Illinois.

Point IX.

THE ILLINOIS CONSTITUTION PER SE.

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 by the Illinois Supreme Court as Being Applicable to All Elections of Every Kind. Therefore, It Should Clearly Apply to Congressional Elections. The Act of 1901 Here Under Attack Is in Clear Violation of That Constitutional Provision.

Proir to the arising of this particular controversy over Congressional Districts in Illinois, it has always been the understanding of lawyers in that State that the provision of Section 18 of Article II of the Illinois Constitution of 1870: "ALL ELECTIONS SHALL BE FREE AND EQUAL", applies to elections of all kinds, including Primary Elections. (See Opinion of Attorney General of Illinois, 1915, p. 229.) It was also understood everywhere that while the above provision did not require "absolute uniformity of regulation" in all parts of the State, the provision did require that "the vote of every elector shall be equal in its influence on the result, to every other vote." (See *People* v. *Hoffman,* 116 Ill. 586, decided in 1886; also *People* v. *Wanek,* 241 Ill. 529.)

Moran v. Bowley.

Such was the state of the law in Illinois when the case of *Moran* v. *Bowley,* 347 Ill. 148, 179 N. E. 526, came before the Supreme Court of that State in 1931. This case was a direct attack on a so-called "new" Illinois Congressional Reapportionment Act, which had been passed by the General Assembly of Illinois in 1931. The Supreme Court in the *Moran* v. *Bowley* Case held that the 1931 Act was void

and unconstitutional because it violated the principle of *equal population* of Congressional Districts required by Federal law; and also particularly because the Act violated Section 18 of Article II of the Illinois Constitution above quoted. In so holding the Opinion in that case said:

> "Section 18 of Article II of the Constitution of this State provides that all elections shall be free and equal * * *. Members of the House of Representatives (of the United States) should be chosen by a method giving every voter a voice approximately equal to that of every other voter. Any plan of districting which is not based upon approximate equality of inhabitants will work inequality in right of suffrage and of power in elections of the Representatives in Congress. The Redistricting Act of 1931 is not only obnoxious to the Laws of Congress, but also to the Constitution of this State."

Here then we have in the *Moran* v. *Bowley* case, the Supreme Court of Illinois taking the logical and sensible view that the provision of the Illinois Constitution above quoted, guarantees equal elections even for Members of Congress.

THE ILLINOIS COURT REVERSES ITSELF.

Ten years after the decision on this particular question in the *Moran* v. *Bowley* case (and in 1941) we find the Illinois Supreme Court completely reversing itself on this particular point in the case of *Daly* v. *Madison County,* 378 Ill. 357, 38 N. E. (2d) 160. In that case the Supreme Court took what we regard as an amazing position, for evasion and sophistry, when it said, with respect to the provision of the Illinois Constitution above quoted:

> "With reference to the creation of Congressional * * * Districts * * * the requirements of Section 18 of Article II of the Constitution are primarily addressed to the Legislative Branch of the government. Absolute equality cannot be attained. To argue that this Section in all cases requires that such Districts be equal in

> population, so that every vote cast in one District would have the same effect as every vote cast in every other District, is to assert a millennium which cannot be reached."

We repeat that such language of the Illinois Court amounts to both evasion and sophistry. The evidence before the Illinois Court (just as before this Court in the case at Bar) shows that the 7th Congressional District in Illinois is eight times more populous than the 5th Congressional District in that State. To talk about demanding "absolute equality" of voting and about "a millennium which cannot be reached," in Illinois, is, we say, intellectual evasion and pure sophistry.

ILLINOIS SUPREME COURT DISTRICTS.

Perhaps the explanation for this curious performance by the Illinois Supreme Court arises in part out of the gross discrimination which exists in the Judicial Districts from which the members of the Illinois Supreme Court are themselves elected. The fact is that the Supreme Court District, from which the Justice came who wrote the Opinion in the *Daly* v. *Madison County* case, had in 1940 a population of 606,803; while the Supreme Court District in which Cook County is located had a population of 4,463,003. The Constitution of Illinois, Section 5, Article VI, clearly demands that the General Assembly of the State shall regularly revise the Supreme Court Districts from time to time and that this shall be done "upon the rule of equality of population as nearly as county boundaries will allow." Notwithstanding this provision the General Assembly has made no change in the Districts of the Supreme Court since the Act of 1874 (Rec Stat. of Ill. Ch. 37, Sec. 1.) If the Supreme Court of Illinois had been properly redistricted, as contemplated by the Illinois Constitution,

several of the Judges, who took part in the decision in the *Daly* v. *Madison County* case, would not have been upon the Bench.

It is not pleasant for an Illinois lawyer to call attention to these things. But they must be mentioned if the truth is to be told. We say they are part and parcel of the intolerable fabric of lawlessness and complete repudiation of Constitutional rights, in the matter of elections, which has long blanketed the citizens of the great and noble State of Illinois.

ILLINOIS CITIZENS DENIED FEDERAL RIGHTS

It is unnecessary to discuss at further length the inconsistency of the Supreme Court of Illinois in its rulings and holdings found respectively in the *Moran* v. *Bowley* case and in the case of *Daly* v. *Madison County*. It is sufficient to say that no lawyer and no Judge upon the bench can possibly lay those two opinions and those two decisions alongside each other and find any scintilla of agreement or consistency in them. Those two decisions in Illinois are as violently conflicting as night and day.

This point is significant and cogent upon this Argument, because it shows clearly that the citizens of Illinois, including these Appellants, have been denied their Federal constitutional rights by the very actions of the Supreme Court of Illinois itself. That Court by its official action has foreclosed Illinois citizens from any relief whatever, in the Illinois courts, against the intolerable situation in Illinois in regard to Congressional elections, which is conceded and admitted upon this Record. Thereby the Supreme Court of Illinois has created a situation which forces these Appellants to seek relief in the Federal courts, on the ground that their civil rights under the Federal Constitution have been directly denied.

Point X.

THE DECLARATORY JUDGMENT PROCESS.[9]

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

THE FEDERAL DECLARATORY JUDGMENT ACT AND POLITICAL RIGHTS.

This Court has on numerous occasions protected political rights, especially the right to vote in federal elections.

Ex parte Siebold, 100 U. S. 371 (1880).
Ex parte Yarbrough, 110 U. S. 651 (1884).
Smith v. *Allwright,* 321 U. S. 649 (1944).
(See discussion of these cases elsewhere in this Brief.)

The Declaratory Judgment, while having its historical roots in equity, nevertheless goes beyond and makes unnecessary a classification of rights as legal or equitable because the declaratory judgment is *sui generis* in protecting all rights against impairment. In Borchard on Declaratory Judgments, 2d ed., p. 868, it is shown that the declaration has been used on many occasions to protect election rights, including the propriety or regularity of an election, the legality of its conduct, the statutory qualification or eligibility of the candidate or nominee, the term for which he has been elected and the duty to hold a new election, the computation of the ballots, the right to vote and other compliance with the election laws. (See for example the leading case of *State ex rel Ekern* v. *Dammann, Secretary of State of Wisconsin,* 1934, 215 Wis. 394, 254 N. W. 759.

[9] This part of this Brief has been written by Professor Edwin Borchard of Yale Law School, who is Of Counsel in this case Professor Borchard is the author of the standard text, "Borchard on Declaratory Judgments," 2nd Ed , 1941

THE DECLARATORY JUDGMENT PROCESS IN THIS CASE.

The *declaration per se,* is the essential element of every judgment; and the declaration is probably all that will need to be given in this case. An ancillary injunction is also sought in the Complaint (Record p. 26) to prevent the Defendant Board, as State election officials, from performing future duties under the Act of 1901, if they should refuse to respect the judgment of this Court holding that Act invalid.

The Illinois Legislature is not made the defendant in this case, for the reason that it cannot be coerced by the Courts. That has been repeatedly decided by the Illinois Courts when they declined to give judicial aid to Mr. Fergus, in his historic struggle to compel reapportionment of the State Legislative Districts in Illinois.

People ex rel Fergus v. *Marks,* (1926) 321 Ill. 510, 152 N. E. 557.

Fergus v. *Kinney,* (1929) 333 Ill. 437, 164 N. E. 665.

People ex rel Fergus v. *Blackwell,* (193) 342 Ill. 223, 173 N. E. 750.

(See discussion of these cases elsewhere in this Brief.)

In the case at bar, three State election officials who have state-wide duties to perform in carrying out elections are the named defendants. They can be restrained from performing illegal functions by the Federal Courts, if that should become necessary; since they are the instruments selected by the Illinois election laws for the performance of important duties for all elections, including federal duties. It matters not that they happen to be State officials also, for in the election of members of Congress, under the Con-

stitution (as well as under the election laws of Illinois), they perform federal duties.

Ex parte Seibold, supra.
Ex parte Yarbrough, supra.
United States v. *Classic, supra.*

APPLICATIONS OF THE DECLARATORY JUDGMENT PROCESS.

It is said by some strict legal theorists that the Declaratory Judgment is procedural only and has not added to the jurisdiction of the Federal Courts. In a sense this is true. In another sense, it is inaccurate. For example, even defendants, like patent infringers and insurance companies as debtors, can now initiate suits under the federal Act, whereas before its enactment they could not sue, but only defend. Whether this is called an increased jurisdiction over persons, but not over subject matter, is immaterial.

THE DECLARATORY JUDGMENT PROCESS AND ELECTION CASES.

This Court has in several election cases passed upon impairments of the plaintiffs' right to vote, in Congressional elections.

State ex rel Smiley v. *Holm, Secretary of State* (1932), 285 U. S. 352, reversing the Minn. Supreme Court in 238 N. W. 494.

Koenig v. *Flynn, Secretary of State* (1932), 285 U. S. 375, affirming the New York Court of Appeals in 179 N. E. 705.

Carroll v. *Becker, Secretary of State* (1932), 285 U. S. 380, affirming Missouri Supreme Court in 45 S. W. (2) 533.

The discriminations in this case are in violation of numerous federal guaranties. It therefore requires no ex-

tension of "jurisdiction" to assume power to decide this case.

As pointed out elsewhere in this Brief, equity has on numerous occasions protected the right to a free and non-discriminatory election. In *State ex rel Smiley* v. *Holm, supra,* which was a Bill in Equity, a declaration of rights and an injunction were asked, as is particularly observed in passing by Chief Justice Hughes, in his opinion in that case. The case of *Giles* v. *Harris,* 189 U. S. 475 (1903) (so strongly relied on below by the other side in this case, and also strongly urged upon this Court) would seem clearly to have been overruled in *State ex rel Smiley* v. *Holm,* in so far as it may have held that Equity would not interfere in election cases. The modern doctrine is therefore clear, even in the Federal Courts, that Equity is available to protect political rights.

The Declaratory Action had its roots in Equity, as is described at length in Borchard's book, *supra,* pp. 128 *et seq.* By the English Rules of 1883 and 1894, it was recognized that the relief was not confined to equitable issues, but also extended to legal issues—in which many election issues fall—and indeed extends to the protection of rights classifiable as neither equitable nor legal.

In many State cases the Declaratory Judgment is the favorite device to challenge the conduct of election officials, and thereby, of the election laws under which they act.

> *State ex rel. Ekern et al.* v. *Dammann,* 215 Wis. 394, 254 N. W. 759.

In *Attorney General* v. *Suffolk County Apportionment Commissioners,* 224 Mass. 598, 113 N. E. 581 (1916), the Massachusetts Court (prior to the coming in of the Declaratory Judgment idea) made a *declaration* holding void a State Legislative re-districting Act.

Therefore, even if the impaired right were not classi-

fiable—a matter now unimportant—it does not prevent the ministrations of the declaratory action for its protection.

The Appellants here are discriminated against in somewhat varying degrees. The grievance of the Appellant Chamales, for example, residing in the existing 7th Congressional District, grows out of the fact that he is discriminated against by the 1901 Act so grossly that *his vote amounts to less than one-eighth as much* as that of a citizen of the near-by 5th District. His grievance is, therefore, *justiciable* in every sense.

The mere fact that Defendant Board is made up of State election officials, who under mandate of the Statute of their State deny the Appellants their constitutional rights, does not make this suit one against the State of Illinois, within the prohibitions of the 11th Amendment.

Ex parte Young (1908), 209 U. S. 123.
Richardson v. *McChesney* (1910), 218 U. S. 487.

If this were so, every attack upon the construction of a State Statute, for violation of constitutional rights protected by the 14th Amendment, would be an action against the State.

The Declaratory Judgment Proceeding is Peculiarly Suited to a Determination of the Important Questions of Public Rights and Civil Rights Involved in This Case.

DECLARATORY JUDGMENT IS APPROPRIATE RELIEF HERE.

This case presents a most appropriate fact-situation for the rendering of a Declaratory Judgment. The Appellants are adversely affected by the antiquated distribution of Congressional voting power in the State of Illinois. The discrimination involved affects these Plaintiffs in their personal rights to vote, in that the 1901 Act unlawfully and

grossly discriminates against them. The Appellees are State public officials charged with ministerial, but important duties, in carrying into effect the voting machinery for members of Congress under the Illinois Act of 1901. The major issue involved is the constitutional rights of the parties to vote in Congressional elections, on an equality with all other Illinois citizens. The sole effect of the judgment (if one is granted) will be to strike down the Act of 1901. Thereafter, if it becomes necessary, the Court may enjoin future action by the Appellee Board under that Act. A judgment by the Court in this case will decide for all future Congressional elections in Illinois the significant issue as to the invalidity (or validity) of the Illinois Act of May 13, 1901.

The *declaration* alone will (in all probability) completely serve the Appellants' purpose; since the three Appellees, constituting the State Certifying Board, will be automatically bound thereby, like every other citizen or official. But the Court clearly has the power, if necessary, to make its judgment effective by an injunction, as will be noted in the next Point. The declaration suffices because, to use the language of Chief Justice Peaslee in *Tirrell* v. *Johnston, Attorney General,* 86 N. H. 530, 532 (1934):

> "When the law is settled it will be obeyed. It is therefore immaterial whether the proper proceeding is an application for a restraining order or a petition for a declaratory judgment. A final interpretation of the law in either form of proceeding would be binding upon these parties (public officials)."

The same doctrine was well stated by Justice Dore in *Socony-Vacuum Oil Company* v. *City of New York,* 247 App. Div. 163, 168 (1936):

> "We do not, however, deem it necessary to grant the injunctive relief requested. Respondents admit that the issue presented is essentially one of law. We are certain that when the law is settled it will be obeyed

> by responsible public officials, that an injunction would be nothing more than a mere formality, and that it is not here necessary for one branch of the government to restrain another in order to obtain obedience for declared law. *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10.)"

Finally we have the doctrine stated by Mr. Justice Stone in *Texas* v. *Florida, Massachusetts and New York,* 306 U. S. 398, 412 (1939):

> "The fact that the Court, for reasons of policy or convenience, does not exercise the power which it possesses and which has been traditionally exercised in like cases between private suitors does not deprive the suit of its character as a case or controversy cognizable by the Court in an original suit. See *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123, 132, 133, 134; *Nashville, C. & St. L. Ry.* v. *Wallace, supra.*"

EFFECT OF DECLARATORY JUDGMENT IN THIS CASE.

The declaration of the unconstitutionality of the Act of 1901 will almost certainly galvanize and stimulate the Illinois Legislature into performing its duty under the Federal Constitution, in regard to Congressional Districts of reasonably equal population—a duty it has defiantly refused to perform for 35 years. Defendants' motion to dismiss below admits the well pleaded facts of the Complaint and establishes the existence of the Plaintiffs' grievance. The judgment and opinion of this Court (like the opinion of the lower court from which the present appeal is taken) will serve as a standing indictment of the lawlessness and inaction of the Legislature of Illinois in repudiating, for a full generation, its duties in the premises. That judgment and opinion will rebuke those officials of the State of Illinois who have since 1901 failed to do their constitutional duty; and by failing to re-district the State since the Act of 1901 have thereby denied the Appellants their constitutional rights as citizens and voters.

If It Becomes Necessary, the Court, Later On, Can Make the Declaratory Judgment Effective by Granting the Ancillary Injunction Prayed For in This Case, or by Directing the District Court to Grant "Further Relief" Under Section 2 of the Declaratory Judgments Act.

MAKING DECLARATORY JUDGMENT EFFECTIVE.

This Court, like any court, has the right to require that its judgment be effective.

Great Lakes Dredge & Dock Co. v. *Huffman* (1943), 319 U. S. 293, 299.

Coffman v. *Breese Corporations* (1945), 323 U. S. 316.

Alabama State Federation of Labor v. *McAdory* (1945), 325 U. S. 450, 462.

Civil rights have been protected by this Court on numerous occasions by enjoining the enforcement of State Statutes or Ordinances, which impair the rights of citizens.

Adkins et al v. *Children's Hospital* (1923), 261 U. S. 525.

McCabe v. *Atchison, Topeka & Santa Fe Railway Co.* (1914), 235 U. S. 151.

Truax v. *Corrigan* (1921), 257 U. S. 312.

Hague v. *C. I. O.* (1939), 307 U. S. 496.

Douglas v. *City of Jeannette* (1943), 319 U. S. 157.

Fraenkel, Our Civil Liberties (1944), p. 243.

There will be ample time, after this Court's judgment and opinion comes down, in which to consider the question of further injunctive relief. In fact, down to the first week

in September, 1946,[11] the Appellee Board can be enjoined from certifying Congressional candidates (by districts) to the County Clerks in Illinois for the general election, to be held on November 5, 1946. (See Smith-Hurd, Illinois Annotated Statutes, Volume on "Elections", Chap. 46, Sec. 7-60.)

To reiterate what has just been said, it is not likely that the Defendants will defy a declaratory judgment of this Court, which becomes *res adjudicata*, even if it is true that the Supreme Court cannot compel the Illinois Legislature to redistrict the State or direct how that shall be done. Only certain election officials, the instrumentalities of the Federal Government in affording the necessary machinery to hold elections for members of Congress, are the defendants in this case. They can be bound by the judgment of this Court and enjoined from illegally proceeding under the Act of 1901 if it becomes necessary.

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[11] As shown in another part of this Brief the Appellees as a Certifying Board performed one important State-wide election function in Illinois concerning Congressional candidates, *for the Primary Election* of April 9, 1946 As indicated, they made this certification, *after* the judgment below was entered, and while this Appeal was pending in this Court. It is also shown elsewhere in this Brief that in September, 1946, the Appellees will again perform a similar election function for all Congressional candidates in Illinois for the General Election in November, 1946. The Brief further shows that these identical Defendants will still be in office for the Illinois elections in 1948, and will therefore perform these same election duties prior to the Primary Election two years from now. There will, therefore, be repeated occasions when the defendants theoretically could be coerced by injunction as above suggested

CONCLUSION.

We think it will be generally admitted that the mere announcement of an opinion of the Supreme Court of the United States in this case will be completely decisive. It will decide not only this litigation, but also the entire controversy in Illinois concerning Congressional apportionment. Indeed, the effect of the opinion in this case will be much wider than that, because it will also settle permanently, similar issues existing in other States, where, as the Complaint indicated (R. p. 29) excessively large Congressional Districts exist in a number of other States of the Union.

It is obvious, not only from the inherent subject-matter of this case, but also from the attention which the case has attracted in the Public Journals and Press, from the day it was started, that this case is one of large public importance. It is for these reasons that we have made the Brief so long and so full; and for this fact we crave the Court's indulgence. We have tried to give the Court what help we could in determining the important and unusual and complicated questions which have been presented to the Court.

In this case it seems obvious and necessary that the Brief should not only be a Brief and Argument in the ordinary sense; but also that it should be in the nature of a Treatise and Source-Book, for the information of the Court. For this purpose we have attached to the Brief in the Appendix, data and material, that ordinarily would not be presented in a Brief of this kind.

A "HARD" CASE.

It will hardly be disputed that this controversy presents what the lawyers call a "hard" case. That was obvious in the District Court, where the Court (as clearly indicated by its written opinion below) first was inclined one way and then felt compelled to turn in the opposite direction.

When a "hard" case like the one at bar is presented to a Court, no lawyer can fail to have in one sense a feeling of sympathy for the Court and a desire to give it the fullest help and light that is possible. But, on the other hand, in a case charged with so much public interest as this case, we say (in so far as it is proper to say it) that we envy the Court its opportunity to strike a blow for essential political justice and for the democratic idea. The opinion of this Court in the present case will probably prove to be the "last battle" in a long struggle that has been carried on by the citizens of Illinois to uproot and destroy the intrenched and static and grossly discriminatory political stituation that has existed in the State for more than a generation so far as its Congressional Districts are concerned.

THE SCALES OF JUSTICE.

We think it obvious in this case that the scales of justice weigh heavily in favor of the Appellants and all the other citizens and voters in Illinois who, like them, have been grossly discriminated against for so many years in their highest right and privilege as citizens of a democracy —their right to vote for Members of Congress. It is only on the procedural side, we say, that there can be any possible doubt about the right of the Appellants to relief in this case and about the duty of the Court to grant that relief. We have striven with the best resources of Advocacy to present the case to the Court fully and fairly

and adequately. We have had the utmost professional courtesy and professional cooperation from the able Counsel on the other side, and for this we pay them our respect.

THE "ILLATIVE SENSE" OF THE LAWYER AND JUDGE.

The Century Dictionary defines the term "Illative sense" as follows:

> "*Illative sense,* a name given by J. H. Newman to that faculty of the human mind whereby it forms a final judgment upon the validity of an inference."

This intriguing phrase or term which is really a useful and valuable idea in Legal Logic, was originated and coined by Cardinal Newman. We find it discussed at length in that unusual treatise about Logic and Reasoning in their higher brackets, "GRAMMAR OF ASSENT." Newman there says:

> "Sometimes I say this illative faculty is nothing short of genius." (p. 320)

And again:

> "We often hear of the exploits of some great Lawyer or Judge or Advocate who is able in perplexed cases, when common minds see nothing but a hopeless heap of facts, foreign or contrary to each other, to detect the principle which rightly interprets the riddle and to the admiration of all hearers converts a chaos into an orderly and luminous whole." (p. 360)

Such a capacity, in a word, is what Newman means by the "illative sense". And it must be remembered that Newman in his early years at Oxford was universally recognized as the greatest authority in England as a teacher of Logic.

The above quotation from Newman has a clear cogency and aptness to the case at bar. Here we have in the present controversy what to many minds may seem (to use

Newman's phrase) "a hopeless heap of facts, foreign or contrary to each other". Moreover the numerous issues and questions which arise in the case at bar certainly present a perplexed situation to what Newman calls the "common mind."

It is for these reasons that we say this case is peculiarly one which calls for the application of the "Illative sense," both on the part of Counsel and on the part of the Court, for its analysis and determination.

And now, having presented the case to the Court with out best efforts, we rest in the assurance that full justice will be done by whatever decision the Court shall make.

Respectfully submitted,

URBAN A. LAVERY,
Attorney for Appellants.
Chicago, Illinois.

Of Counsel:
EDWIN BORCHARD,
New Haven, Connecticut.
KENNETH C. SEARS,
Chicago, Illinois.

Dated, Chicago, Illinois, February 28, 1946.

APPENDIX.

EXHIBIT A—Opinion of Three-Judge Court below.

EXHIBIT B—Table of Congressional Apportionment figures (largest districts) in all States of the Union.

EXHIBIT C—Synopsis of Federal Apportionment Acts, 1792 to 1929.

EXHIBIT D—Portions of Congressional Debates on 1929 Apportionment Act.

EXHIBIT E—Extracts from recent work, "Chief Justice Stone and the Supreme Court."

EXHIBIT F—Photostat of typical "Certification" made by Illinois Certifying Board for April 9, 1946 Primary Election.

Exhibit A.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

KENNETH W COLEGROW, PETER J. CHAMALES and KENNETH C SEARS, *Plaintiffs,* *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, *Defendants*	No 46-C-46 Before Special Three-Judge Court Honorable Evan A. Evans, Presiding, Honorable Michael L Igoe, Honorable Walter L LaBuy, Judges

MEMORANDUM.*

Plaintiffs bring this suit as citizens of the State of Illinois to secure a declaratory decree, and relief incident thereto, against the defendants who, as officials of the State of Illinois, are charged with the responsibility of preparing ballots and conducting elections in said state, including the election of Congressmen to represent the electors of said State of Illinois in the lower house of the Congress of the

* (NOTE The foregoing Opinion was read in open Court by Judge Evan A Evans (and was presumably written by him) on Tuesday, January 29, 1946, and was concurred in by District Judges Michael L Igoe and Walter J LaBuy)

United States. Such election will occur in November, 1946, and petitioners are specifically concerned with the printing of ballots which are to contain the names of the candidates to be thus voted for at said election, and yet who must win the right to appear as candidates at said November election by first winning in a primary election which is soon to be held. It is through control of the printing of ballots to be used at the primary that plaintiffs hope to secure their legal rights.

Specifically the plaintiffs' grievance lies in the failure of the State of Illinois to so apportion the congressional districts as to give equality of voting power to the citizens of said state. It is alleged, and if not admitted, not denied, for example, that in one district a voter has the voting strength of eight voters in another district. Petitioners base their argument on the sound and elementary proposition that all the electors should have an equal voice and that none should be disfranchised. A failure to redistrict the State of Illinois after each census results in either disfranchisement or inequality of franchise strength. In short, the voice of one citizen carries more weight than that of another in another district, solely because the State of Illinois has refused and continues to refuse to reapportion the state in accordance with the population facts showing of the last census. Not only has the State of Illinois failed to redistrict the state according to population after the last census, but it has failed to do so for over forty years. Its action is apparently deliberate and defiant of both Federal and State Government and the principles upon which they are founded.

Defendants do not defend this action. Their defense is that this gross misrepresentation of Illinois citizens is due to certain legislators who, to retain political strength greater than they are entitled to, or would be entitled to,

if equality in representation occurred, refuse to act or to grant relief to this existing disgraceful situation in Illinois.

Defendants rely chiefly on their alleged unusual and unique immunity from legal process, both state and Federal. The citizens have sought relief in both tribunals. As representative of the legislative branch, the Legislature of Illinois has taken a defiant and arbitrary position quite at variance with the theory of a representative democracy.

Their refusal to grant relief is as obstinate as it is unpatriotic. It violates the spirit of citizen obligation to state and Federal Government which is as surprising as it is happily unusual. It is apparently modeled after the action of South Carolina in the days of President Jackson. Its continuance provokes, if it does not invite the resort to arms if appeals to reason or the patriotism of the individuals are too long ignored.

There can be no doubt that an elector, such as any one of the plaintiffs, has a right to vote for Federal representatives in the Illinois primary. His right to so do stems from the Federal Constitution. *U. S.* v. *Classic,* 313 U. S. 299.

The citizen's right in this respect is similar to other civil liberty rights expressly guaranteed by the Constitution. Quite as clearly, though by necessary implication instead of by express provision, is the right of the citizen to be equally represented in Congress. *U. S.* v. *Classic, supra.* In fact, equality of representation is such an essential of representative government that attempt to justify its violation has not been seriously attempted. 2 A. L. R. 1337.

It follows therefore that a denial or impairment of a citizen's right to choose a representative on terms of equality with other qualified voters in other districts is prohibited by the Constitution. It is violative of the basis of this Government. It is contrary to the theory of the

Constitution and its provision for a Congress which is to legislate for the people of the United States on Federal questions.

Plaintiffs' contention, not seriously disputed by the defendants, is that the Illinois Reapportionment Act is unconstitutional. It abridges plaintiffs' privileges and rights within the meaning of the Fourteenth Amendment. It denies to plaintiffs their right to liberty and property without due process of law.

Defendants' answer is expressed briefly and tersely, "Granted—What of it?" "The Legislature of the State of Illinois is not subject to Federal Court process or jurisdiction. Likewise, it can, with immunity, defy the Illinois state courts."

Defendants' dispute of Federal Court jurisdiction is predicated upon their contention (a) that there is no Federal statute in existence now which requires approximate equality in population of Congressional districts. (b) A Federal court of equity is without jurisdiction to interfere by injunction or otherwise with an election or other purely political question. (c) The Federal Court is without jurisdiction to proceed against the State of Illinois because prohibited by the doctrine of sovereign immunity. (d) Defendants are immune from coercion by process or adjudication in respect to Federal action. (e) It is further asserted that even though jurisdiction existed, this court should forbear to exercise it because of practical difficulties and moreover it would be an unwise exercise of discretion. (f) They also contend that the somewhat recently enacted Declaratory Judgment Statute, enacted by Congress (28 U. S. C. A. Sec. 400) did not extend the jurisdiction of a court of equity which is still confined to those equity suits of which a court of equity had jurisdiction before the enactment of the statute.

When this matter was argued, January 25th, this court, being desirous of eliminating all motions and objections to an early disposition of the questions which would permit of a final judgment and of a review of all questions by the United States Supreme Court, denied the defendants' motion to dismiss.

We did so without passing on the legal questions raised and ably argued by counsel for the defendants.

The pleading situation is now such that we can and should meet and dispose of the points upon which defendants rely.

Our study of the opinion of the Supreme Court in the case of *Wood* v. *Broom,* 287 U. S. 6, has resulted in our reaching a conclusion contrary to that which we would have reached but for that decision. We are an inferior court. We are bound by the decision of the Supreme Court, even though we do not agree with the decision or the reasons which support it. We have been unable to distinguish this case and as members of an inferior court, we must follow it. Only the Supreme Court can overrule that decision.

Although that decision was by a five to four vote of the members of the Supreme Court, the opinion of the four dissenters gives no comfort to the plaintiffs. While they would not dispose of the case on the ground that the Act of Congress there under consideration did not call for equality in population and therefore is not a necessary requisite to a valid apportionment, they are of the opinion that the appeal should be dismissed for want of equity. On the ground of lack of equity the four dissenting judges spoke before the enactment of the Declaratory Judgments Act. It in no way gave consideration to the Enforcement Act of 1870 or of the rights that arose thereunder. We might assume that the grounds for affirmance set forth in the dissenting opinion were rejected by the majority opinion,

but we can hardly assume that the law as announced by the majority is not the law governing us.

The majority view holds squarely that Sec. 3 of the Act of August 8, 1911, which required districts to be of contiguous and compact territory and contain as nearly as practical an equal number of inhabitants, is not effective today. Subsequent enactments by implication repealed Section 3 of the Act of 1911 and they do not contain any similar provision respecting equality in population of the districts.

In the absence of this decision we would assume that such requirement arose necessarily from the Constitution. Inequality in population of the districts is so contrary to the spirit of the Government and of the Constitution that we would assume it was a required condition to representation in the Congress of the United States. There is little or no difference between an unequal voice in election of members to Congress and a denial altogether of participation in the Election of Congressmen. It is at most a matter of degree. The right to vote, however, is not one of those boasted guarantees of the Constitution, if it appears that one voter has eight times as many votes as another.

If the district defined by the state legislature provides that a Congressman shall be elected in one district with eight times as many citizens as in another district, we fail to see how they could not provide that such district should not have representation at all. Such is the inevitable result of a doctrine which denies equality as a basis for congressional representation.

However, we think it is our plain, clear duty to follow the decision of the Supreme Court in this case. The case is squarely in point. It seems to have been thoroughly considered. Only one of the nine judges, the Chief Justice, then sitting, is now a member of the Supreme Court. The

authority, however, is none the less controlling because of that fact.

If a Federal court of equity has no jurisdiction to correct a practice in the case of reduced suffrage, from whence would come its jurisdiction in case the state legislature denied some citizens the right of suffrage altogether? If there exists a right to partially disfranchise, where will the Illinois Legislature stop? If the right exists in the Illinois Legislature to give one elector the voting power of eight electors in another district, then it would be difficult to hold the Illinois legislature may not disfranchise some elector entirely.

This disposition of the pending suit does not end the plain obligations of the Illinois Legislature to perform its duty. Justice demands that it act. As one of the greatest of the 48 commonwealths that comprise the Union, she can not afford to become a leader in a new rebellion. A defiance based on the alleged right to discriminate between voters or between districts would not be a sound basis to start another rebellion.

A belated admission of error and desire to correct it are not an admission of weakness or incompetency. Rather it is a manifestation of bigness. Illinois will grow in the public opinion of other states and in her own esteem if she will frankly admit her past mistakes, perform her plain legislative duty and realign the Congressional districts on the basis of equality. She can not afford to await the coming of force to compel its action. We have had enough of the tramp, tramp of armed forces.

It follows from what has been said that plaintiffs' suit must be and is hereby dismissed.

EVAN A. EVANS,
MICHAEL L. IGOE,
WALTER J. LABUY.

January 29, 1946.

Exhibit B.

State Congressional Apportionments.

	State	Date of Last Reapportionment	Population of Largest District	Population of Smallest District	Percentage of Excess of Largest Over Smallest
1	Ill.	1901	914,053	112,116	715.3
2	Ohio	1913	698,650	163,561	327 1
3	Md	1902	534,568	195,427	174 1
4	Tex	1931	528,961	230,010	130 0
5	Mo	1933	503,738	214,757	134 6
6.	Ga	1931	487,552	235,420	107.1
7	Ark	1901	423,152	177,476	138 5
8	S D	1931	485,829	157,132	209 2
9	Miss	1932	470,781	201,316	133 8
10	Ind	1941	460,926	241,323	91.0
11	Penn	1943	441,518	212,979	107 4
12	Okla	1913	416,863	189,547	119 9
13	Ala	1931	459,930	251,757	82 3
14	Wash	1931	412,689	244,908	58 0
15	Fla	1943	439,895	186,831	136 0
16	Colo	1921	322,412	172,847	86 5
17	Calif.	1941	409,404	194,199	110 8
18	Mich	1931	419,007	200,265	109.2
19	Tenn	1941	388,938	225,918	72 2
20	Conn	1911	450,189	247,601	81 8
21	Ky	1934	413,690	225,426	84 0
22.	Ore	1941	355,099	210,991	68 3
23	Kans	1941	382,546	249,574	45 0
24	Wis	1932	391,467	263,088	48 8
25.	N J	1931	370,220	226,169	63 7
26	Ia	1941	392,052	268,900	45 8
27	La	1912	333,295	240,166	39 2
28	N Y	1942	365,918	235,913	55 1
29	Va	1934	360,679	243,165	43 9
30	S C	1932	361,933	251,137	44 1
31	N. C	1941	358,573	239,040	50 0
32	W Va	1934	378,630	281,333	34 6
33	Mont	1917	323,597	235,859	37 2
34	Idaho	1917	300,357	224,516	33 8
35	Mass	1941	346,623	278,459	25 2
36	Nebr	1941	369,190	305,961	20.7
37	Minn	1933	334,781	283,845	17.9
38	Utah	1913	293,922	256,388	14 6
39	R. I	1932	374,463	338,883	10 5
40	Maine	1931	290,335	276,695	4 9
41.	N H	1881	247,033	244,491	1 0

Exhibit C.

A Synopsis of Federal Apportionment Acts, 1792 to 1929.

NOTE: *Taken from Appellee's Brief (Appendix) in case of Moran* v. *Bowley, 347 Ill. 148, where the issue was the validity of the Illinois Act of 1931 concerning Congressional Appointment. The Illinois Court held the Illinois Statute was unconstitutional and void, because the Districts created were so grossly unequal in population.*

First Decennial Apportionment Act 1792, April 14th.

Found in 1 United States Statutes at Large, Page 253, Chapter 23. George Washington was President, and Samuel Adams, Vice President. This appointment was passed at the Second Congress. There were 15 States.

The bill provided that the House of Representatives should be composed of members elected agreeably to a ratio of one member for every thirty-three thousand persons in each State, computed according to the rule prescribed by the Constitution. (Here followed the names of each State and the number of Representatives to which each State was entitled.) *There were no Districts provided for.*

Second Decennial Reapportionment Act 1802, January 14th.

Found in 2 Statutes at Large, Page 128, Chapter 1. Thomas Jefferson, was President, and Aaron Burr, Vice-President.

The Act provides as follows: "The House of Representatives shall be composed of members elected agreeably to a ratio of one member for every thirty-three thousand (33,000) persons in each State computed according to the rule prescribed by the Constitution."

Then followed the names of 16 States then composing the Union, and opposite each State was the number of Representatives to which each State was entitled. *No Districts were provided for in this Act.*

Third Decennial Reapportionment Act
1811, December 21st.

Found in 2 Statutes at Large, Page 669, Chapter 9. James Madison was President, Henry Clay was Speaker of the House.

The Act provided as follows: "The House of Representatives shall be composed of members elected agreeably to a ratio of one Representative for every thirty-five thousand (35,000) persons in each State, computed according to the rule prescribed in the Constitution of the United States."

Then followed the names of the 17 States composing the Union, and opposite the name of each State was the number of Representatives to which it was entitled. *No Districts were mentioned in this Act.*

Fourth Decennial Reapportionment Act
1822, March 7th.

Found in 3 Statutes at Large, Page 651, Chapter 10. James Monroe was President.

The Act provided as follows: "The House of representatives shall be composed of members elected agreeably to a ratio of representation for each forty thousand (40,000)

persons in each State computed according to the rule prescribed by the Constitution of the United States."

Then followed the names of 24 States, and opposite the names of each State, the number of Representatives to which it was entitled. Illinois appears in this General Apportionment Act for the first time (the State having been admitted in 1818) and is given one Representative in Congress. *No Districts were provided for in this Act.*

Fifth Decennial Reapportionment Act
1832, May 22nd.

Found in 4 Statutes at Large, Page 516, Chapter 91. Andrew Jackson, President.

The Act provided as follows: "The House of Representatives shall be composed of members elected agreeably to a ratio of One Representative for every forty-seven thousand and seven hundred (47,700) persons in each State computed according to the rule prescribed by the Constitution of the United States."

Then each of the *24* States were named and the number of Representatives to which each was entitled, set opposite the name. Illinois was given 3 Representatives in Congress. *No Districts were provided for by this Act.*

Sixth Decennial Reapportionment Act
1842, June 25th.

Found in 5 Statutes at Large, Page 491, Chapter 47. John Tyler was President.

The Act provided as follows: "The House of Representatives shall be composed of members elected agreeably to a ratio of One Representative for every seventy thousand six hundred eighty (70,680) persons in each State, and one additional Representative for each State

having a fraction greater than one moiety of said ratio computed according to the rule prescribed by the Constitution of the United States."

Then follows the names of each of the 26 States of the Union, and opposite each State was the number of Representatives to which it was entitled. Illinois was given 7 Representatives in Congress.

Note: In this Act, of 1942 Congressional Districts Are Required for the First Time.

The language used with reference thereto was as follows:—"Section 2. And be it further enacted that in every State where a State is entitled to more than one Representative, the number to which each State shall be entitled under this Apportionment shall be elected by Districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one District electing more than one Representative."

Seventh Decennial Reapportionment Act
1850, May 23rd.

Found in 9 Statutes at Large, Pages 432-433, Sections 23 and 24. Zachary Taylor, President.

This Act was an elaborate Act, and provided as follows: "The House of Representatives shall have 233 members apportioned by determining the aggregate representative population of the United States by adding the whole number of free persons in all the States, including those bound to service for a number of years, and excluding Indians not taxed, three-fifths of all other persons; which aggregate population shall be divided by 233, and the product of such division, rejecting any fraction of a unit, if any such happens to remain, shall be the ratio or

rule of apportionment of Representatives among the several States under such enumeration, (and the proper Officer) shall proceed in the same manner to ascertain the representative population of each State and to divide the whole number of the representative population of each State by the ratio already determined as above directed, and the product of this last division shall be the number of Representatives apportioned to each State under the then last enumeration; provided the loss in the number of members caused by the fractions remaining in the several States on the division of the population thereof shall be compensated for by assigning to so many States having the largest fractions, one additional member each for its fraction, as may be necessary to make the whole number of Representatives, 233." *No Districts were provided for by this Act.*

Eighth Decennial Apportionment Act
1862, March 4th.

Found in 12 Statutes at Large, Page 353, Chapter 36. Abraham Lincoln was President.

The Act to which reference was here made was not in fact a general apportionment act. It apparently took an arbitrary number of States, to-wit, Pennsylvania, Ohio, Kentucky, Illinois, Iowa, Minnesota, Vermont and Rhode Island, and provided that the members of the House shall be increased by eight (8) members, and each of the States above named should have one of said Representatives.

Additional Act:
1862, July 14th

Found in 12 Statutes at Large, Page 572, Chapter CLXX. Abraham Lincoln was President.

The title to this Act is,—"An Act in relation to the elec-

tion of Representatives in Congress by single Districts." It contains but one Section, as follows:—

"That in each State entitled in the next and any succeeding Congress to more than one Representative, the number to which such State is or may be hereafter entitled shall be *elected by Districts composed of contiguous territory,* equal in number to the number of Representatives to which said State shall be entitled in Congress, for which said election is held, no District electing more than One Representative, * * * provided that the additional representative given to Illinois by the Act of March 4, 1862, shall be elected at Large, and the other thirteen (13) by the Districts as now prescribed by law in said State unless the Legislature of said State should otherwise provide before the time fixed by law for the election of Representatives."

Ninth Decennial Reapportionment Act
1872, February 2nd.

Found in 17 Statutes at Large, Page 28, Chapter 11. U. S. Grant was President. James G. Blaine, Speaker of the House.

This fixes the number of Representatives at 283, and names the 36 States then members of the Union, and opposite each State was the number of Representatives to which the State was entitled. Illinois had 19.

Section 2, of the Act was as follows: "That in each State entitled under this law to more than one Representative, the number to which said State shall be entitled in the 43rd and each subsequent Congress, shall be elected by Districts *composed of contiguous territory and containing as nearly as practicable, an equal number of inhabitants,* and equal in number to the number of Represen-

tatives to which said State may be entitled in Congress, no one District electing more than one Representative."

Additional Act:
1872, May 30th.

Found in 17 Statutes at Large, Page 192, Chapter 239.

This was an amendment to the Apportionment Act of February 2, 1872, and gave one additional Representative to the States of New Hampshire, Vermont, New York, Pennsylvania, Indiana, Tennessee, Louisiana, Alabama and Florida, "to be elected by separate Districts as in said Act directed; provided, that in the election of Representatives to the 43rd Congress *only,* in any State given the above increase, the additional Representative may be elected at large, unless the legislature of said State shall otherwise provide before the time fixed by law for the election of Representatives therein.

Revised Statutes of the United States, 1874.

The first Revised Statutes of the United States were compiled under an Act entitled, "An Act providing for the publication of the Revised Statutes of the United States." It was approved June 20, 1874. The act provided that the Secretary of State should cause to be completed headnotes to the several Titles and Chapters and marginal notes referring to the Statutes from which each Section was compiled and repealed by said revision * * * and certify the same; and when printed and promulgated as aforesaid, the printed Volume shall be legal evidence of the law in all courts of the United States and the several States. The volume of 1874 was certified by Hamilton Fish, Secretary of State, June 28, 1875.

Revised Statutes, 1878.

These Statutes were compiled under "An Act to provide for the preparation of publication of a new edition of the Revised Statutes of the United States". It was approved March 2, 1877 and was amended by an Act, approved March 9, 1878. This Act required the Commissioner to be selected, to complete the work in manuscript form by Jan. 1, 1878, and required the Secretary of State to examine and compare the same as amended, with all amendatory Acts, and to certify the same. It provided that the printed volume shall be legal evidence of all laws therein contained in all courts of the United States and of the several States. This was certified to by Wm. M. Evarts, Secretary of State, February 18, 1878.

This Volume states that it contains all Statutes of the United States, "general and permanent" in their nature, in force December 1, 1873, as revised and consolidated by a Commissioner appointed under an Act of Congress and as reprinted with amendments under authority of an Act of Congress, approved March 2, 1877.

The Volume states that it was edited, printed and published under the authority of an Act of Congress and under the direction of the Secretary of State. It was published at the Government Printing Office in 1878.

In Volume 1, Revised Statutes of 1878, appears Title 2, Chapter 2, Section 23 on page 5, which is as follows: "In each State entitled under this apportionment to more than one Representative, the number to which each State may be entitled in the 43rd and each Subsequent Congress, *shall be elected by Districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants*, and equal to the number of Representatives to which such State may be entitled in Congress, no one District electing more than one Representative; but in the elec-

tion of Representatives to the 43rd Congress in any State to which an increased number of Representatives is given by this apportionment, the additional Representative or Representatives may be elected by the State at Large, and the other Representatives by the Districts as now prescribed by law, unless the Legislature of the State shall otherwise provide before the time fixed by law for the election of Representatives therein."

The marginal notes opposite this Section states that it is from the Act of February 2, 1872, and from the Act of May 30, 1872.

Tenth Decennial Reapportionment Act
1882, February 25th.

Found in 22 Statutes at Large, Page 5, Chapter 20, Chester A. Arthur, President, and David Davis, President of the Senate.

This act fixed the number of Representatives at 325, and gave the names of the States and the number of Representatives to which each State was entitled. Illinois had 20.

Section 3, was as follows:—"That in each State entitled under this Apportionment, the number to which said State may be entitled in the 48th and each subsequent Congress shall be elected by Districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants, and equal in number to the Representatives to which such State may be entitled in Congress. No one District electing more than one Representative; provided where no change is made in the number of Representatives to the 48th Congress, shall be elected from Districts now provided by law unless the Legislature of such State shall otherwise provide before the election shall take place. And if the number is increased, the additional Rep-

resentatives may be elected at large and the others by Districts now prescribed by law; if the number is decreased, then the whole number from said State *shall be* elected at large, unless the Legislature of said State has provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein."

This is the first Act where there is a repealing clause. Said clause was as follows:—All Acts and parts of Acts inconsistent herewith are hereby repealed."

Eleventh Decennial Reapportionment Act
1891, February 7th.

Found in 26 Statutes at Large, Page 735, Chapter 116. Benjamin Harrison, was President, and Thomas B. Reed, Speaker of the House.

The Act fixed the number of Representatives at 356, gave the names of the States and stated the number of Representatives to which each State was entitled. Illinois was entitled to 22.

Section 3 of the Act was as follows:—"That in each State entitled under this Apportionment, the number to which such State may be entitled in the 53rd and each subsequent Congress shall be *elected by Districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants.* The said Districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no one District electing more than one Representative."

This Act also contained a repealing clause: "All Acts and parts of Acts inconsistent with this Act are hereby repealed."

Twelfth Decennial Reapportionment Act
1901, January 16th.

Found in 31 Statutes at Large, Page 733, Chapter 93. William McKinley, President, and David B. Henderson, Speaker.

This Act fixed the number of Representatives at 386. Illinois had 25.

Section 3 was as follows:—"That in each State entitled under this apportionment, the number to which each State may be entitled in the 58th and each subsequent Congress shall be elected by Districts *composed of contiguous and compact territory, containing as nearly as practicable an equal number of inhabitants.*" The said District shall be equal to the number of Representatives to which each State may be entitled in Congress, no District electing more than one Representative.

This Act also contained a repealing clause as follows:—"All Acts and parts of Acts inconsistent with this Act are hereby repealed."

Thirteenth Decennial Reapportionment Act
1911, August 8th.

Found in 37 Statutes at Large, Page 13, Chapter 5. William Howard Taft, President. Champ Clark, Speaker.

This Act fixed the number of Representatives at 433. Gave the names of the States and the number to which each was entitled. Illinois had 27. (Arizona and New Mexico were admitted in 1912, and made the total 435.)

Section 3 of the Act provided: "That in each of the States entitled under this apportionment to more than one Representative, the Representatives to Congress in the 63rd and *each subsequent Congress,* shall be *elected by Dis-*

tricts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said Districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no District electing more than one Representative.''

''United States Code'' of 1925

The Code was published under an Act of Congress which provides ''That the 50 titles hereinafter set forth are intended to embrace the laws of the United States, *general and permanent in their nature* in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress and designated 'the code of the Laws of the United States of America' ''.

The Act provides that the Code shall be *prima facie* evidence of the laws of the United States, general and permanent in their nature in force December 7, 1925.

In the Code title of Chapter 1, Section 3, is as follows: ''In each state entitled under the apportionment to more than one representative, the representatives to Congress shall be elected by Districts composed of a contiguous and compact territory, and containing as nearly as practicable, an equal number of inhabitants. The said Districts shall be according to the number of representatives to which such State may be entitled in Congress, no Districts electing more than one Representative''. Section 4 provides if the number of Representatives is increased, those additional shall be elected at large and the others in the Districts ''*until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated* in Section 3.''

The above sections are taken from the Act of August 8, 1911.

1929 Conditional Automatic Apportionment Act
1929, June 18th.

This Act is known as Public,—No. 13, 71st Congress. It was Senate Bill No. 312. The Title is, "An Act to provide for the 15th and subsequent Decennial censuses, and to provide for apportionment of Representatives in Congress."

Sections 1 to 21 inclusive, relate to the census and Section 22 relates to apportionment.

The repealing clause is Section 21 and reads as follows: "That the Act establishing the permanent census as approved March 8, 1902, and Acts amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. *That the Act entitled 'An Act to provide for the 14th and subsequent Decennial Censuses' approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.*"

(Note: The Act of 1911 Above Is Specifically Not Repealed.)

Exhibit D.

Portions Of The Congressional Record Giving Debates (In Part) At Time Of Passage Of Federal Congressional Apportionment Act Of 1929.

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1. The Senate.

With reference to a Bill entitled, "An Act to provide for the 15th and subsequent decennial censuses and to provide for apportionment of Representatives in Congress." There is found in the Congressional Record;

Page 1325.

Mr. Black,—I understand that the Constitution, according to the Senator's contention requires that there shall be a reapportionment every ten years. That is correct is it not?

Mr. Vandenberg,—That is correct.

Mr. Black,—Does the Senator claim that the bill to which he has reference reapportions under the next census?

Mr. Vandenberg: The Senator claims nothing of the sort.

Mr. Black,—This bill then, is not a reapportionment bill?

Mr. Vandenberg: This bill is described in its title as a bill to provide for apportionment, and it furnishes a basis for authenticating the Constitution for the first time in the history of the Government.

Mr. Black: I understand it is a bill to provide for reapportionment, and I understand the Senator to say

the Constitution provides for reapportionment. Is that right?

Mr. Vandenberg: My statement is that the theory of the Constitution and its spirit, if not its actual letter, requires reapportionment.

Mr. Black: Then the Constitution provides for reapportionment does it not?

Mr. Vandenberg: That is correct.

Mr. Black: The Senator says it is a bill which provides for reapportionment in the future.

Mr. Vandenberg: I said nothing of the sort.

Mr. Black: That is what it does. It does not provide for reapportionment today, does it?

Mr. Vandenberg: I said it provides a system under which the Constitution can be no longer flaunted indefinitely.

Mr. Barkley: The bill does presuppose a failure on the part of the 72nd Congress to reapportion according to do its duty, then there shall be an automatic rule President to proceed to reapportion under those circumstances.

Mr. Vandenberg: It presupposes nothing of the sort. It provides that in case the Congress does refuse to do its duty, then there shall be an automatic rule which shall defeat congressional inertia, which has the effect of disfranchising millions of people.

Mr. Barkley: Why not wait for the 72nd Congress to perform its duty without presupposing the failure on its part?

Mr. Vandenberg: Because the experience of the past decade indicates that Congress is perfectly willing to ignore the Constitution and that the Senate itself is a major offender in this respect.

Mr. Vandenberg: The bill undertakes to provide a just method so that in the event of failure on the part of the Senate to perform its constitutional duty an automatic rule shall have the power to justify and validate the Constitution.

May 21, 1929. Pages 1610-1611.

Mr. Vandenberg speaking: Mr. President, from 1790 to 1910, there never was a decade when the acknowledgement of these theories of representative and constitutional Government was not prompt, precise, honest and adequate. Until the ugly default which the country has suffered since the census of 1920, until that particular trespass, Congress theretofore never permitted more than two years to intervene between the completion of enumeration of the people and the reflection of that enumeration in a new apportionment. From 1790 to 1920 there was a continuous, unbroken record of faithful reflection of census figures in apportionment arithmetic, and yet, since 1920, it has been absolutely impossible to procure the consent of the Congress to the recognition of this fundamental responsibility. Congress has spurned its duty with contempt. * * *

In the first place, Mr. President, there are today according to available estimates, thirty-two million Americans robbed of their legitimate spokesmenship in the House of Representatives. This is Exhibit A. That is a rather formidable sector of the American people to be without the spokesmenship that the Constitution solemnly promises them and intends they shall have.

What is the next Exhibit? The next result is that there are, as a result of that disfranchisement, based upon prospective 1930 census figures, 23 misplaced seats in the House of Representatives. * * * What is the third Exhibit which reflects the net result of this default and lapse? Mr. President, it is not only 23 seats misplaced in the House of Representatives, but looking forward to the Presidential election of 1932, it involves also 23 misplaced votes in the next Presidential Electoral College. * * *

Now in what manner does the proposed legislation undertake to meet this situation? Mr. President, the pending bill undertakes to propose not only a cure for 1930, but a cure for 1940 and 1950, and so long there-

after as the Congress is willing to permit this enabling act to stand. It is not a mere temporary expedient revolving around a dispute over a few seats in the lower House of Congress. It is far more than that; it lifts itself to a greater and higher vision. It undertakes for the first time since 1850 to parallel and authenticate the Constitution of the United States with an enabling act which declares that the Constitution shall mean what its spirit intends and which proposes that Congress shall not retain an option to nullify it at will.

How would the bill work? * * * Probably the easiest way to understand it is to personify it; so we will apply it specifically to 1930 and thereafter. We will apply it as it would apply in that particular decennium; and this is the net result:

The census would be taken in November 1929. On the first day of the second regular session of the 71st Congress, which is December 1930, the President of the United States would report to Congress the mathematical results obtained, *first,* in the census figures previously completed; *second,* in the mathematical calculation showing how that census would apportion a House of Representatives of the existing size by the method of apportionment obtaining in the last previous apportionment.

Now, mark you, the President is making a ministerial report. He is making it in December 1930. He is reporting the arithmetic of a census plus the application of a mathematical formula to this census arithmetic. That is all he is doing. He sends these findings to the Congress and he is through. Now what happens?

Congress has that entire session in which to pass its own apportionment law on any basis it wants to, with any size House it wants to erect, by any method it wants to embrace, in any fashion it seeks to indicate. It is a free agent. * * *

If it does not see fit, or,—as the Senator from Mississippi indicates, and I freely concede it could be possible,—if it is unable to act, then, as soon as that Con-

gress is done, and adjourned, the arithmetic which had been previously reported to the Congress, indicating the count of the country and its proper mathematical apportionment under prior standards, and specifications, automatically becomes the new apportionment.

The net result, as I see it, is nothing more nor less than the provision of life insurance for the Constitution. It is a warrant for the basic formula upon which the entire genius of our democracy depends.

So much for the proposed answer. I have presented very briefly the need for legislation of this character; I have presented briefly the theme of the proposed answer; and now I desire to advert briefly to the necessity for this particular automatic type of apportionment legislation.

Page 1613. May 21, 1929.

Mr. Harrison: Will not the Senator admit that this bill carries with it the major fractions method?

Mr. Vandenberg: And the Senator will admit that this bill provides for major fractions.

Mr. Harrison: That is all right then.

Mr. Vandenberg: Just a moment; in the event that Congress shall fail to enact its own independent apportionment law in 1930-1931, and not otherwise.

Mr. Vandenberg speaking: I submit that it takes from Congress absolutely nothing but its right of inertia. I will concede that it takes that from Congress. It does make it possible for Congress to do what it has done during the past eight years by way of default, and contempt and trespass. If that is a right that belongs to Congress then there is some ground for protest. But that is not a right, unless the Congress assumes to be greater than the Constitution itself. We are not masters of the Constitution; we are its servants. Otherwise we live in an elective despotism. * * *

I have had the vain hope that those changes might end the war of quotients; but whether it does or not, they at least take out of the pending measure any specific identification and leave to the serial judgment of

Congress, if Congress wants to exercise that judgment, the method by which these results shall be obtained. (Page 1614.) If Congress again refuses or fails to act in 1930, then it is quite obvious that since the bill preserves the *status quo* as related to method and size of the House; it also retains the so-called method of major fractions as the basis of the formula, but if Congress does what it is supposed to do, if Congress does what Senators upon the other side of the aisle have protested their eagerness that it shall do if Congress does pass its own independent apportionment act in 1930, it can assess equal proportions or minimum range or any other method for handling remainders and thereafter this measure will recognize it as an authentic system. In other words, this bill undertakes in this manner of detail to accommodate this permanent enabling act to the serial decisions of Congress.

Mr. Vandenberg: The Senator might also read the other portions of the bill which gives that particular method no validity and no authority whatever except in the event that Congress fails or refuses to do its independent duty in 1930.

(Page 1615)

Mr. President: I think that covers perhaps superficially and yet, I hope, with sufficient explanation, the general philosophy and purpose which the authors of this bill, the members of the House of Representatives, who previously have approved it, and the Commerce Committee of the Senate, which has approved it, have had in mind in urging once more that the Senate confront its constitutional duty.

So this issue, a fundamental issue, again knocks for admission to the Senate's conscience. I hope that the improved and pending proposal speedily may arm the Government with this needed power to face emergencies. Its failure could involve portentious consequences. Its success will encourage a sadly needed renaissance in constitutional fidelity. We cannot ignore the power of our own example. When those in high places

spurn one part of the Constitution, it cannot be a matter of surprise if their example encourages men in other places to spurn other parts of the same Constitution.

2. The House.

The following appears in the Congressional record under date of June 3, 1929, beginning at Page 2279.

Mr. Reed of New York * * * I have a question here that is of the utmost importance to some of the larger states which should receive your attention. "I am going to have the amendment read for the information of the House; then it will appear in the Record and Members can give careful thought and study to it in the morning. When we are under the 5-minute rule I propose to offer this amendment. It would be much more pleasant for me to stand here and talk without reference to any prepared manuscript, but in order that I may not be misunderstood and so that I shall not in any way fail to quote correctly the Constitution and authorities bearing out the argument which I shall make, I shall ask the indulgence of the committee and the close attention of the members of the committee while I read a brief which I have prepared touching the reason for the amendment which I propose to offer and the constitutional authority for its adoption."

Mr. Reed still speaking. "At the end of the bill, if the bill should not be emasculated by removing some of the other sections, I shall introduce this as section No. 23.

"Nothing in this act contained shall be construed to prevent the legislature of any State (subject, however, to the initiative and referendum law in any State wherein such a law exists), at any time after the approval of this act in order to secure contiguous and compact territory and equalization of population in accordance with the rules enumerated in section 3 of the apportionment act, approved August 8, 1911, by concurrent resolution, redistricting the State for the

purpose of electing Representatives to Congress, and upon each and every such redistricting the Representatives to Congress shall in any such State be elected from the new districts so formed."

I just want to call your attention to the fact that there is nothing there that disturbs the free action of the legislatures as they now function—nothing whatever.

The purpose of an apportionment act is to apportion or allocate among the several States the entire representative power of all people in the Union according to their respective numbers. The bill (S. 312) provides for the whole number of which the House of Representatives is to be composed, viz., 435 Members, and a method is then provided to ascertain how much of this representative power each State is entitled to, based upon its population.

The representative power of all the people in the Union and its proper allocation to the several States, as directed by the Constitution, *goes to the very root of free government.* It was sought by those who framed the Constitution to distribute this power of all the States on the basis of the population of the several States, and to that end they directed an enumeration be made every 10 years.

Article 1, section 2, clause 3, of the United States Constitution provides that:

The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of 10 years, in such manner as they shall direct.

Mr. Reed still speaking. "In obedience to this constitutional mandate the Congress has provided by legislation for a decennial census and a reapportionment of congressional representation from 1790 to 1910. It is now nine years since the 1920 census was taken, and although the House has performed its constitutional duty by passing a reapportionment act, the Senate has failed to act until the first session of the Seventy-First Congress. This deadlock has broken

a precedent of legislative regularity and obedience to a constitutional mandate covering a period of 120 years.

The present bill, S. 213, seeks to anticipate a similar legislative situation on the subject of apportionment and by its provisions prevent a future legislative deadlock on this subject, the provisions to become operative, however, only in the event that the Congress fails to act. The remedial provision to which I refer is section 22 of S. 312, as follows:

"Sec. 22. That on the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census, of the population, and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives made in the following manner: By apportioning the existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census by the method used in the last preceding apportionment and also by the method of equal proportions, no State to receive less than One Member.

If the Congress to which the statement required by this Section is transmitted fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until such apportioning law shall be enacted or a subsequent statement shall be submitted as herein provided, to the number of Representatives shown in the statement based upon the method used at the last preceding apportionment; and it shall be the duty of the Clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State

is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under section 32 or 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives elect.

This section shall have no force and effect, in respect of the apportionment to be made under any decennial census unless the statement required by this section in respect of such census is transmitted to the Congress within the time prescribed in this section."

The whole principle of representative government as disclosed by the debates of the framers of the Constitution, was to make it possible for the various interests, such as agriculture, industry, finance, commerce, navigation, to have a voice in the national councils. Congress recognized the fact in 1842 that this could best be accomplished by providing for congressional districts composed of contiguous territory which would enable a Representative to be known to his constituents, and he in turn to be familiar with the conditions in that district, so that he could legislate intelligently and effectively. The selection and election of the 42 Representatives at large, without due regard to the agricultural, industrial, financial, and other interests of the State, would deprive a large portion of the State of any voice in the national councils. It is to avoid any such calamity as this that I am urging this amendment.

This situation I wish to meet by offering the following amendment: (The amendment above noted.)

June 4, 1929, Page 2363.

Mr. Reed of New York offered an amendment to senate Bill No. 312 being the census and apportionment Act which added a Section to the Act, which Section was as follows: "Section 23. Nothing in this Act contained shall be construed to prevent the Legislatures of any States (subject, however, to the initiative and referendum law in any State wherein such a

law exists), at any time after the approval of this Act, in order to secure contiguous and compact territory and equalization of population in accordance with the rules enumerated in Section 3 of the Apportionment Act approved August 8, 1911, by concurrent resolution, redistricting the State for the purpose of electing Representatives to Congress, and upon each and every such redistricting the Representatives to Congress shall in any such State be elected from the new districts so formed."

Mr. O'Connor of New York: Mr. Chairman, I make the point of order against the amendment. It is not germane to the bill.

The Chairman: The Chair had his attention called to this amendment by the gentleman from New York who placed it in the record yesterday and it will be found on Page 2279. The Chair will ask the gentleman from New York who offered the amendment *whether he can point to any portions in the pending bill which refer to the matter of the redistricting of the States by the Legislatures of the States?*

Mr. Reed of New York: Mr. Chairman, we are dealing with a Reapportionment Act, and under Article 1, Section 4, of the Constitution it is provided as follows:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators."

That gives us authority and makes it germane to this bill.

The Chairman: The gentleman's citation of the Constitution of the United States, the Chair thinks, would have no bearing on the pending bill. We are not considering any amendment to the Constitution. We are considering the present bill and amendments thereto. The Chair desires to give the gentleman an opportunity to show how the pending bill in any way relates to the redistricting of the States by the legisla-

tures, if he can. The Chair has not been able to find anything in the bill which would relate to that subject.

Mr. Reed of New York: But I submit that this Article 1, Section 4, of the Constitution gives us authority to enact legislation in this respect. *We are now dealing with a reapportionment bill.*

The Chairman: *The pending bill does not relate to that subject, the Chair thinks.*

The Chairman: The Chair had that in mind. Unless the gentleman wishes to argue the matter further the Chair is prepared to decide the point of order. The Chair is of opinion that the point of order is well taken and sustains the point of order.

Mr. Reed again offered the amendment by adding the same matter at the close of another Section.

Mr. O'Connor of New York: "Mr. Chairman, I make a point of order on the amendment. This is the identical amendment, word for word, which was ruled out by the committee and prevented from being added to the bill. Now an attempt is made to insert it in section 22 of the bill. I make the point of order on the same ground—that it is not germane to the bill. It pertains to something that the legislature is going to do after being notified as to how many Members will come from certain States. This bill only provides for the taking of the census and notifying the executive of each State how many Members that State is entitled to."

June 6, 1929 the following proceedings were had in Congress relating to the same amendment as shown by the Record, Page 2443.

Mr. Reed of New York: "Mr. Chairman, prior to August 8, 1911, the apportionment act of that year, it was always provided in the matter of redistricting that this should be done by the legislature of the State in accordance with Article 1, section 4, of the Constitution of the United States, which gives the legislature the power to fix the time and places, but reserves to the Congress the right at any time to make, alter, or

amend such regulations. In 1911, in order to take care of a situation in Ohio and in some other States where they had the referendum, they changed this language that had been used for more than half a century to the language that it should be by the laws of the State.

Now, here is the practical situation under the law as it now stands. Unless my amendment is passed you would have this situation: After the enumeration is made it will probably develop in my State that instead of 43 Members of Congress we will have 42, and this means that if there is a deadlock between our legislature and our governor 42 Members of the Congress would have to be elected at large. Every one of them could be nominated in the city of New York, and I am casting no reflection, but these men would not accurately reflect the sentiment of the rural section of the great State touching prohibition, immigration, and other important public questions.

Mr. Crowther: Does the gentleman from New York think that sections 3 and 4 in the 1911 act are really inconsistent with the present act?

Mr. Reed of New York: They are now the law *and what I am pointing out to the House is that under section 21 of this bill there is a possible construction by which they may be repealed, and we will go out to the country with an apportionment act that leaves it absolutely free to the Legislature to put in shoestring districts, saddleback districts, and achieve all the vicious things of the gerrymanders in the days of old.*

Mr. Crowther: Does not the language in the present bill call attention to the sections that are inconsistent, and *I ask the gentleman again whether he considers sections 3 and 4 inconsistent?*

Mr. Reed of New York: *I say there is that possible construction.*

Mr. Crowther: Oh, possible construction!

Mr. Reed of New York: I will say this, that when

we pass an act we should make it as clear as possible, and not leave anything to conjecture.

Mr. Bankhead: Mr. Chairman, a point of order. I do not desire to cut the gentleman from New York off, but he has conceded the point of order made by the gentleman from New York.

He is not discussing the point of order He is not addressing the Chair. If he desires to be heard further, I think it should be by unanimous consent, because it is not in accordance with the provisions of the rules of the House.

The Chairman: The Chair thinks the point of order is well taken with this excepton, that notwithstanding the concession of the point of order by the gentleman from New York that it may be well taken, he then proceeded to claim that the repeal of certain provisions of the prior law might make his amendment in order. The Chair is prepared to rule.

Mr. Reed of New York: I want to say that inasmuch as this bill may be passed repealing the provisions to which I have referred, my amendment proposes to save the situation by making it possible to prevent a deadlock in the legislature. I will yield to the gentleman from Idaho.

The Chairman: The Chair will be glad to hear from the gentleman from Idaho.

Mr. French: Mr. Chairman, I wish to address myself for a moment to the point of order. I have in mind the provision to which the gentleman from New York has referred, namely, the language of Section 21, but I take a different point of view as to the effect of the pending bill upon Sections 3, 4 and 5 of the act of 1911.

What does the pending bill provide? It provides, *first,* for taking the census; and, *second,* it provides for an apportionment of Representatives in Congress. The measure carries language, to which the gentleman from New York has referred in Section 21, providing for the repeal of certain specific laws and any other law inconsistent with the pending bill. Evi-

dently the pending bill provides for the repeal of Section 1 of the act of August 8, 1911. It unquestionably provides for such repeal. I do not think that it provides directly or indirectly for the repeal of other sections of the act.

Now, if that is true, it would seem that the remaining provisions of the act of 1911 ought to be subject to amendment. That is precisely what is proposed by the amendment offered by the gentleman from New York.

The Act of August 8, 1911, provides for two contingencies in the districting of the different States. One is that in event the representation in the different States should not be disturbed by the census of 1910 and the State legislatures do not undertake to redistrict, then the act itself would provide that the districting in existence at the time of the passage of the Act shall continue. The other contingency provided for was in States that would receive additional representation in Congress. The act provides that in such contingency if the States fail to redistrict, the number of Representatives gained by the States over that which they already had would be elected at large.

In the pending bill you are providing a third contingency not referred to in the act of 1911, namely, the situation that would arise should some States suffer reduced representation. Should any State, as a result of the census and apportionment we are providing for, suffer a reduction in representation, then in the absence of laws in the States providing for new arrangements of districts there would be no provision whatever for election of Representatives in Congress from such States.

So, then, it would seem reasonable that the amendment offered by the gentleman from New York is in point and that it is germane to a portion of an act that we are not repealing, though we are repealing part of such act. So, bringing the matter to a head, I submit that the pending bill provides for the repeal of Section 1 of the act of August 8, 1911, as this sec-

tion is in conflict with definite provisions of the pending bill, but it does not provide for the repeal of Sections 2, 3, 4, and 5. If that is true, it seems to me that the amendment of the gentleman from New York is germane.

The Chairman: The Chair is ready to rule * * * On Tuesday last the Chair ruled upon this same amendment when offered at another point, and *stated that there is nothing in the present bill which relates to the subject matter of the amendment, which subject matter is the action of State Legislatures and of State authorities in redistricting a State upon the basis of a reapportionment of members of the House made by Congress.* No argument has been made today which controverts the position which the Chair took at that time. The Chair takes it that no one now is prepared to claim that there is anything in the bill pending before us—S. 312—which directly relates to the matter of the redistricting of the States.

However, the gentleman from New York (Mr. Reed) now claims that the provision in Section 21 is applicable, which reads as follows:

That the act entitled "An act to provide for the Fourteenth and subsequent decennial censuses," approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed.

The gentleman from New York calls attention to that provision and claims that it relates to certain sections of the act of August 8, 1911, which bore on the subject of redistricting by the States, but it seems to the Chair that the gentleman overlooked the effect of the words—"all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed."

If there is nothing in this bill relating to redistricting, then there can be nothing in it which is inconsistent with the act of 1911 on that subject. There can be no repeal by this bill of any law or parts of laws

which are not inconsistent with that act on the subject of redistricting by State legislatures.

Furthermore, the gentleman from Idaho (Mr. French) stated that in his opinion Section 1 of the Act of August 8, 1911, is repealed by the words which the Chair has just quoted in Section 21 of the pending bill; but he said that Sections 2, 3, and 4 are not so repealed. If they are not repealed, of course, they are not affected by S. 312, now before us; and if Section 1 is the only one that is affected, the only one that is repealed, it seems to the Chair that the gentleman's argument is without avail.

Exhibit E.

Modern Law of Federal Elections.

In this Brief we have referred to what we have called "The Modern Law of Federal Elections" and have strongly urged that the decisions of the Supreme Court in Election Cases in recent decades have been moving like a tide toward greater and wider protection of the elective franchise. This point is vigorously indicated and suggested in a recent and well-received Text entitled, **"Chief Justice Stone and the Supreme Court"** by Samuel J. Konefsky, published in 1945 The author devotes one entire Chapter (VI) to what he calls "SAFEGUARDING CIVIL LIBERTIES." One of the principal topics discussed in that Chapter is "PROTECTING THE POLITICAL PROCESS."

After discussing at considerable length the case of *Hague* v. *C. I. O.*, 307 U. S. 496, and its bearing on the subject of "free public discussion", the author then turns to the question of the importance of the elective franchise. He there says, p. 204:

> "But if free public discussion is a prerequisite to group action and political pressure, the integrity of the ballot box touches even more directly the democratic base of government. Pernicious practices at the polls raise a more significant issue than that of honesty in government. In the final analysis, what is really at stake is the extent of the popular basis of our political institutions. However, when called upon to deal with corrupt administration of elections, courts have more often recognized the corruption than its ultimate import for the democratic process.
>
> "Even less frequently has the Supreme Court

grappled squarely with the deeper implications of a restricted suffrage. One can question, for example, the soundness of the Court's erstwhile classification of the political party as a private organization. To sanction, as the Court did in *Grovey* v. *Townsend,* the right of a political party to exclude a substantial section of the population from participating in the primary, in circumstances where nomination is for all practical purposes equivalent to election, is certainly to slide over the real situation. And yet the result reached in that case had the support of such stalwart champions of democratic rights as Justices Cardozo, Brandeis and Stone.

"Since then Mr. Justice Stone has had occasion to speak more frankly. In the opinion he delivered in the CLASSIC case, his last before assuming the duties of Chief Justice, he dealt forthrightly with an old and touchy question. * * * The fundamental question the Court was asked to decide was whether the right of voters to participate in a congressional primary and to have their ballots duly counted was a right assured them by the Constitution."

In indicating the growth and development of the idea of Federal control over Federal Elections, the author says, p. 206, 207:

"It had been settled in the YARBROUGH case that the privilege of voting for national officers was secured by the Constitution to all persons who were otherwise qualified to vote under state law. Asserting that it was essential that elective officials of the federal government should be the 'free choice of the people,' the Court in that case upheld the power of Congress to protect those eligible to vote for members of Congress against fraud and violence. But for the decision in the NEWBERRY case, therefore, the CLASSIC case could have been disposed of by a citation of the Yarbrough ruling.

* * * * *

"Mr. Justice Stone began his opinion for the majority in the CLASSIC case by emphasizing that although

the right to vote for members of Congress could only be claimed by those eligible to vote under state law, that right, since it was secured by the Constitution, could be protected by Congress against fraud and violence. And so far as choosing members of the House of Representatives was concerned, the power to safeguard that right was given Congress by section 4 of the legislative article of the Constitution authorizing it to regulate the times, places and manner of holding elections for Representative."

The author then discusses (pp. 208, 209) the reasoning and philosophy back of the opinion of the Court as written by Chief Justice Stone and reaches the conclusion that the *Classic* case stands for the proposition that

> "The right to vote for members of Congress includes the right to have one's ballot duly counted in Congressional Elections."

Here, of course, we have language that is very close to the particular issue before the Court in the case at bar. As the learned Judge who wrote the opinion below in this case said, there is little difference between having one's vote entirely excluded from the ballotbox and having a situation where one's vote is only one-eighth as effective as the vote of another person in the State.

The author then (p. 210) discusses a contention which we have urged in this Brief; namely, that "one of the great purposes" of the Constitution is to guarantee equality of the citizen at the ballotbox. The author says on this point (p. 210):

> "The free choice by the people of their representatives in Congress is 'one of the great purposes' of our system of government. That 'constitutional purpose' remains, even though the procedure for choosing Representatives may have come to consist of two steps—the preliminary selection of the candidate in a primary and his subsequent election—instead of the single step in the form of a general election such as was

known at the time the Constitution was established. Election methods may be new, but the power of Congress to assure a free choice by the people is undiminished. Article I, Section 4, which is the source of Congress' power to protect the electoral process against corruption, extends therefore to congressional primaries."

The author makes particular reference to the dissenting opinion of Mr. Justice Douglas and the dissenting views of Mr. Justice Black and Mr. Justice Murphy. The author points out that these dissenting Justices really go oven further in their views as to the "fundamental rights" guaranteed by the Constitution with respect to voting. He quotes from the dissenting opinion of Justice Douglas:

> "Free and honest elections are the very foundations of our republican form of Government."

In his concluding comment about the division in the Court in the *Classic* case, this author says (p. 213):

> "Minority and majority were thus motivated by a common desire to safeguard important democratic values."

The author gives his final appraisal of the *Classic* case in these words:

> "From the point of view of its vindication of the Congressional authority to protect the integrity of the procedures by which members of Congress are chosen, the opinions in the CLASSIC case are probably among the most important since the adoption of the Civil War amendments."

Here, we say, in the above quotations there is found strong and vigorous language with which we fully agree. The words of the author are merely another way of pointing out the tidal swing which is still going on in the decisions of this Honorable Court toward the protection of the right to vote, a development which started with what the Court calls the "Civil War amendments."

Primary Election Certificate

Seventh Senatorial District

UNITED STATES OF AMERICA,
STATE OF ILLINOIS } SS. OFFICE OF THE SECRETARY OF STATE.

To the County Clerk of Cook County:

We, the undersigned, Members of the Primary Certifying Board, pursuant to law in such case made and provided, do hereby certify that the following is a true and correct list, as shown by petitions now on file in the office of Edward J Barrett, Secretary of State of the State of Illinois, of the names and political affiliations of all candidates for nomination and election for the following offices, to be voted for at the Primary Election to be held on the 9th day of April, A D 1946, in the Seventh Senatorial District, in the County of Cook

DEMOCRATIC PARTY	REPUBLICAN PARTY
FOR STATE TREASURER:	**FOR STATE TREASURER:**
SAM KEYS	I JAY BROWN STEPHEN A DAY RICHARD YATES ROWE
FOR SUPERINTENDENT OF PUBLIC INSTRUCTION:	**FOR SUPERINTENDENT OF PUBLIC INSTRUCTION:**
C H ENGLE	VERNON L NICKELL
FOR REPRESENTATIVE IN CONGRESS: State at Large.	**FOR REPRESENTATIVE IN CONGRESS:** State at Large.
EMILY TAFT DOUGLAS	MAURICE C SIMPSON WILLIAM G STRATTON DANIEL D FRAZIN DAVID L KYLER
FOR REPRESENTATIVE IN CONGRESS:	**FOR REPRESENTATIVE IN CONGRESS:**
THIRD DISTRICT	THIRD DISTRICT
EDWARD A KELLY E T (JERRY) HORN	FRED I BUSBY JAMES OAKLY KOONTZ HERBERT BLBB THEODORE R KATZMANN
SIXTH DISTRICT	SIXTH DISTRICT
THOMAS J O BRIEN	HAROLD C WOODWARD WALFORD ANDERSON IVA I HENDERSON CHARLES J ANDERSON JR
SEVENTH DISTRICT	SEVENTH DISTRICT
WILLIAM W LINK	THOMAS L OWENS HAROLD J DALE MICHAEL HECHT
TENTH DISTRICT	TENTH DISTRICT
HAROLD H KOLBE	RALPH E CHURCH FLORENCE HOBAN GRIESEL HUGH RIDDLE
FOR STATE CENTRAL COMMITTEEMAN:	**FOR STATE CENTRAL COMMITTEEMAN:**
THIRD DISTRICT	THIRD DISTRICT
WILLIAM A MARSHALL JAMES A KIVICK THOMAS E GILMORE JR	CLARENCE N BERGSTROM LAWRENCE RICHARD BLAIR JAMES OAKEY KOONTZ THOMAS A. GREEN
SIXTH DISTRICT	SIXTH DISTRICT
EDWARD SULLIVAN	JOHN F TYRRELL FRANCES S CONLON ~~RALPH E CHURCH~~
SEVENTH DISTRICT	SEVENTH DISTRICT
GEORGE D KILLS	DLANE F REED WILLIAM H ATZEL MANS HANSEN CHARLES L HEINEMANN ARTHUR W MUELLER ERNEST F KAPS GEORGE W ANDERSON ARTHUR SCHMIDT
TENTH DISTRICT	TENTH DISTRICT
ROBERT C QUIRK	WILLIAM M MARKS OSCAR LINDSTRAND
FOR STATE SENATOR:	**FOR STATE SENATOR:**
SEVENTH DISTRICT	SEVENTH DISTRICT
WILLIAM F DONAHUE	ARTHUR J BIDWILL
FOR REPRESENTATIVE IN THE GENERAL ASSEMBLY:	**FOR REPRESENTATIVE IN THE GENERAL ASSEMBLY:**
SEVENTH DISTRICT	SEVENTH DISTRICT
EMMETT McGRATH WILBERT F SAUERBIER ERWIN A GAFDI	BERNICE T VAN DER VRIES VERNON W REICH ARTHUR W SPRAGUE GUSTAVE C ANDERSON ANTHONY J MAIER

Exhibit E

IN WITNESS WHEREOF, We hereto set our hands and cause to be affixed the Great Seal of State Done at the City of Springfield this 4th day of February, A D 1946 and of the Independence of the United States the one hundred and seventieth

Dwight H Green
Governor

Edward J Barrett
Secretary of State

Arthur C Lueder
Auditor of Public Accounts.

Attest.

Edward J Barrett
Secretary of State.

(11966)