IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 804

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

Appellants,

vs.

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

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF BY BETTER GOVERNMENT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING.

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To: The Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

This brief is filed by the Better Government Association, an Illinois corporation, not for profit, as amicus curiae, in support of the petition for rehearing previously filed by

appellants in this cause. We also respectfully suggest that in addition this brief be considered by this Honorable Court as supporting appellants' motion for reargument before a full bench. The Association was given leave by this Honorable Court to file and did file amicus curiae briefs prior to the oral arguments in this cause On June 10, 1946 this court (66 Sup. Ct. 1198), rendered its judgment affirming the decision of the 3-judge District Court dismissing the complaint (64 Fed. Supp. 632). The Court divided sharply with 3 opinions being filed

The opinions reflect the existing sharp differences among the then members of the court. As amicus curiae we offer our brief in support of appellants' petition for rehearing and motion for reargument before a full bench only because after careful consideration of the three opinions we sincerely believe that in view of the striking national importance of the decision it is our duty to show this Honorable Court that its decision of affirmance and the reasons therefor are erroneous and should be set aside. [Cf *Macallen* v. *Massachusetts,* 280 U. S 513 (1929) granting leave to *amici curiae* to file their *first* briefs in support of petition for rehearing, but denying rehearing of 279 U. S. 620.]

In this brief, in the main, we shall treat the decision of this Court as being based on the opinion delivered by Mr. Justice Frankfurter, and concurred in by Justices Reed and Burton. Our reason for so doing is our belief that regardless of the desires of the Justices composing this Court the opinion and reasoning of Mr. Justice Frankfurter, in substance to the effect that the Court has no jurisdiction because the problem is political, *i. e*, non justiciable, will be accepted as the decision of the Court That is so even though logically that conclusion is erroneous because Mr. Justice Rutledge's opinion does indicate that in his opinion the issue is justiciable, *i. e.,* is non-political, but

that equitable relief should be denied in this case on the balancing of the conveniences between the parties to the particular suit.

Outline of Suggestions.

A summary of reasons why the Court should grant a rehearing or at least a reargument before the full bench in this cause is as follows:

1. The Decision Is Erroneous.

This Court has erroneously decided that a fundamental freedom guaranteed by the Federal Constitution, namely, substantial equality of voting power among the citizens of the United States, is *forever* outside the protection afforded by the equity branch of the Federal Judiciary.

2. The Reasoning in Support of the Decision Is Erroneous and Unsound.

At the outset, we admit that considerable difficulty attends upon the attempts of Counsel to analyze the opinions and judgment of this Court which hold, or tend to hold, that the problem involved is a political question. The reason for such difficulty was forcibly stated by Mr. Justice Frankfurter in his dissenting opinion, *Coleman* v. *Miller,* 307 U. S. 433, 461 (1939), to the effect that much of the reasoning "supporting" a decision that a problem before this Court is a "political question" is below the conscious level. But insofar as the reasons in the opinions in this case in support of the Court's judgment are explicit, we respectfully suggest that they are unsound and erroneous. In our humble opinion these errors in reasoning all lead to the error in the final statement to the effect that since this is a political question, the Federal Equity Court has no jurisdiction.

3. The Decision Is Contrary to the Applicable Precedents, and the Precedents Cited in Support of the Decision Are Not Applicable.

It is respectfully suggested that the opinion of Mr. Justice Frankfurter to the effect that the problem before this court is a political question does not contain a single precedent which can be said to be in point. As a matter of *stare decisis,* there is no decision to sustain the ruling of this Court. On the contrary we submit that the ruling is contrary to such decisions as exist.

4. The Decision and Reasoning Are a Departure From and Contrary to Decisions by This Court Upholding Other "Great Purposes of the Constitution."

The decision is a sharp departure from and inconsistent with the principles established by the cases decided by this Court within the past five years dealing with the "great purposes of the Constitution".

5. The Unusual Procedural Circumstances Surrounding the Delivery of Judgment and the Opinions Supporting the Same Warrant a Rehearing or a Reargument Before the Full Bench.

This case presents the following unusual "procedural" circumstances: A decision on an important Constitutional question rendered by only 7 justices, lacking the guiding hand of a Chief Justice of the United States, rendered by a divided court in divided opinion, where the majority of the 7 justices rule that the question is within the judicial power of the Federal judiciary.

SUGGESTIONS.

1. The Decision Is Erroneous.

Theories of jurisprudence, or policies concerning the proper function of the judiciary in our Nation cannot change the grim realities of this Court's judgment denying relief. The injustice of the denial by the Illinois Legislature of appellants' fundamental Constitutional rights has not been and cannot be denied by the Appellees. No moral justification exists for wilful disfranchisement. It is intrinsically shocking to our sense of justice. As stated by Justice White, dissenting in *Pollock* v. *Farmers' Loan Co.*, 158 U. S. 706, 712 (1895) "The injustice of the conclusion points to the error of adopting it" The result of the decision by this Court is to render the Federal Judiciary permanently incapable of substantially protecting a fundamental right guaranteed to the citizens of the United States by the organic law of the land.

In 35 Nat. Mun. Rev. 336 (July 1946), an editorial commenting on this Court's decision points out that our nation should concern itself about the domination by minorities and the disfranchisement of voters "in our own bailiwick" before we worry about such evils existing in foreign countries.

A national evil—disfranchisement of voters—is ruled as being beyond the remedial powers of the equity branch of the Federal Judiciary The shocking injustice of a *brazen* disregard of the Constitution may not be remedied by the Federal Judiciary—that *is this Court's decision.*

2. The Reasoning in Support of the Decision Is Erroneous and Unsound.

There are several possible analytical approaches to the 3 opinions filed in this cause. But in the last analysis the differences among the Justices of this Court with regard to the national policies governing the exercise of judicial power are the reasons for the differences among the three opinions and the justices concurring in two of the opinions. The three basic concepts upon which the three opinions are founded are as follows:

1. The opinion of Mr. Justice Frankfurter, joined by Justices Reed and Burton, is based upon the policy that the possible invasion by the Federal Judiciary of the Legislative Department of our Government outweighs all other considerations of policy.

2. The opinion of Mr. Justice Rutledge is that since as a practical matter the relief given by the Equity Court would not be valuable this Court will refuse to grant an injunction in this particular case.

3. The opinion of Mr. Justice Black, joined by Justices Douglas and Murphy, is based upon the policy that the great Constitutional purpose of insuring substantial equality of voting power outweighs opposing policies, and that such clear Constitutional right will be enforced by equity injunction.

Though there are no absolute tests or standards for determining when a question is "political" or "justiciable", yet some tests do exist.

We respectfully call the Court's attention to the analysis and the standard set up in *Coleman* v. *Miller*, 307 U. S. 433 (1939). At page 454 Chief Justice Hughes points out the

difficulty of determining when a question is political and when a question is justiciable:

> "In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations" 307 U. S. at 454-5.

It is not suggested in the opinion of Mr. Justice Frankfurter that there is a "lack of satisfactory criteria" in the case at bar. No "test" or "standard" is set up. The result in this case depends purely upon concepts of "policy" not expressed in opinion.

But even more illuminating is the dissenting opinion of Mr. Justice Frankfurter in *Coleman* v. *Miller* where after pointing out the historical fact that "It was not for courts to meddle with matters that require no subtlety to be identified as political issues" (307 U. S. at 460) he went on to say:

> "As abstractions, these generalities represent common ground among judges. Since, however, considerations governing the exercise of judicial power are *not mechanical criteria* but derive from conceptions regarding the distribution of governmental powers in their manifold changing guises, *differences* in the application of canon of jurisdiction *have arisen* from the beginning of the Court's history. (Citing cases.) *Conscious* or *unconscious leanings* toward the serviceability of a judicial process in the adjustment of public controversies clothed in the form of private litigation inevitably affect decisions For they influence *awareness* in recognizing the relevance of conceded doctrines of judicial self-limitation and rigor in enforcing them." 307 U. S. at 461 (Italics ours.)

Another facet of the problem of exercise of judicial power was before this Honorable Court in *West Va. Bd.*

of Education v. *Barnette,* 319 U. S. 624 (1943). In that case Mr. Justice Frankfurter dissented from the majority of the Court and pointed out that the question of "passing upon political power" was involved (319 U. S. at 650 and 666) as well as the question of "ultimate questions of judicial power and its relation to our scheme of Government (319 U. S. at 667)." Yet notwithstanding the persuasiveness of this dissenting opinion this Court in opinion by Mr. Justice Jackson, ruled that not only was the matter not one of passing on political power but that the very purpose of establishing fundamental rights such as provided by the Bill of Rights "and other fundamental rights" was to withdraw certain subjects from the "vicissitudes of political controversy," 319 U. S. at 638.

It is respectfully suggested that in the case at bar the arguments of policy favoring adjudication and protection of appellants' rights as citizens of the United States outweigh the necessities of "judicial humility" and "judicial self-restraint."

There is no mechanical formula or jurisprudential touchstone or legal alchemy that would enable a member of the Bar of this Court to exhaustively dissect and reconcile the conflicting policies in the three opinions. All of these policies have their roots in the concepts of the Justices of this Court concerning our national existence and our national welfare. At this point in the history of the unfolding and development of our nation, the demands of the national welfare tip the scales of justice in favor of the great purposes sought by the Constitution and put to one side the judicial fears that the granting of relief by this Court would be impertinently intermeddling in the national affairs reserved for the National Congress or the Illinois Legislature. To say that the question is political merely states the result. All great Constitutional cases

touch upon political issues. [Wright, "The Growth of American Constitutional Power," p. 245 (1942).] By the very nature of knowledge all cases are linked. There is no sharp line of demarkation between the field of economics or sociology or law or politics. Cf. *Knauer* v. *United States,* 90 Law Ed. (adv. opinions) 1195, 1198 (1946).

Conversely, the decision of this Court in saying that it will not interfere because the matter is political and not justiciable is *necessarily* a political decision. By its refusal to grant relief this Court necessarily supports political parties or other organs of our National or State governments.

Historically, the principle of judicial abnegation adopted by the decision of this Court is unsound. If there never had been a Chief Justice Marshall nor a decision in *Marbury* v. *Madison,* then the decision in the instant case might be consonant with American Judicial history. If there had not been the decisions in *United States* v. *Classic* and *Smith* v. *Allwright* then the suit in the instant case would never have been filed. If the views of the Southern colonies had prevailed at the Constitutional Convention there never would have been the great Constitutional purpose of substantial equality in voting insofar as the National Government is concerned. But history has shaped our national goal toward substantial equality of voting power among citizens just as history has molded our jurisprudence to include this court as one of protectors of the Constitutional Guarantees.

3. The Decision Is Contrary to the Applicable Precedents, and the Precedents Cited in Support of the Decision Are Not Applicable.

As a matter of *stare decisis,* this Court by its judgment has decided that a Federal Court which may give damages for violation of an admitted Constitutional legal right, is powerless to grant specific relief for the protection of that admitted Constitutional legal right by way of an injunction because specific protection by injunction is entry of the Court into the domain of political questions. This decision is contrary to specific precedents, is contrary to our entire inherited concept of equity jurisprudence, and is contrary to the decisions of this Court on the subject of fundamental Civil liberties.

It is respectfully suggested that as a matter of *stare decisis* the precedents do not support the opinion and reasoning of Mr. Justice Frankfurter. *Coleman* v. *Miller* 307 U. S. 433 (1939) is an authority against the judgment of this Court because this Court in that case affirmed the ruling of the Kansas Supreme Court instead of dismissing the Writ of Certiorari for want of jurisdiction as sought by Mr. Justice Frankfurter. (39 Colum. L. R 1232, 1237 (1939). The exact decision in *Coleman* v. *Miller* is difficult of ascertainment The comments on that decision in 48 Yale Law Journal 1455 (June 1939), in an amusing note entitled, "Sawing a Justice in half" may well be applied to the judgment and the three opinions filed in the instant case.

But the dissenting opinion of Mr Justice Frankfurter in *Coleman* v. *Miller* recognized that voting cases, *i. e.,* cases where voters claim injury to their political rights, did *not* present the kind of "*non*-justiciable" question that the learned Justice sought to reject.

In *Coleman* v. *Miller,* Mr. Justice Frankfurter says: The majority is wrong in holding that Kansas senators had standing in Court, *i. e.,* that issue is "justiciable" because, he says, majority relies on cases upholding "a voter's right to protect his franchise", and he says those cases go back to *Ashby* v. *White.*

The arguments by Mr. Justice Frankfurter in his opinion in the instant case about not interfering with Congress are in substance the same arguments advanced in *Ashby* v. *White,* 2 Ld. Ray 938, against deciding that an action on the case would lie at law. The flexibility of our Anglo-American system of law which permits growth and change in our jurisprudence is uniquely illustrated in comparing the reasons advanced by the opinions of this Court denying an injunction with the reasons advanced by several Justices in *Ashby* v. *White* for denying an action at law for damages.

Advanced by Justice Gould (2 Ld. Ray. 941-942) is the argument that Parliament is to decide He found that the "Matter which relates to public and is a kind of popular offence." (2d Ld. Ray. 942.)

Justice Powys also contended that the matter was for Parliament. (2 Ld. Ray 944). At p 946—Powys says that ruling in favor of Plaintiff would decide the election and is not simply a "particular injury". And Powys in substance agrees that "it will be in consequence of a determination of the election." Also, he stated

> "* * * the Courts at Westminister must not enlarge their jurisdiction in these matters farther than the Statute gives them; and indeed it is a happiness to us, that we are so far disengaged from the heats which attend elections. Our business is to determine of meum and teum, where the heats do not run so high, as in things belonging to the Legislature."

Justice Powell—at 947, says—Plaintiff should go to Parliament first; if they support him, then he will have an action on the case.

We respectfully suggest that these reasons for "judicial restraint" in the decision of *Ashby* v. *White* be compared with the reasons advanced by the opinions of this Court in affirming the judgment.

But Holt, Chief Justice, at 950—disagrees with all these reasons.

In referring to the argument that the matter was one for Parliament (p. 956) he says in substance, to allow the action will make more public officers—

> "more careful to observe the Constitution of Cities and boroughs and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief and tends to the prejudice of the place of the nation. But they say, that this is a matter of our jurisdiction, and we ought not to enlarge it I agree we ought not to enlarge our jurisdiction; by so doing we usurp both on the right of the Queen and the people; but sure we may determine on a charter granted by the King, or on a matter of custom or prescription when it comes before us without encroaching on the Parliament And if it be a matter within our jurisdiction we are bound by our oaths to judge of it. This is a matter of property determinable by us."

The Judges voted 3 to 1 against the Plaintiff. But on Jan. 14, 1703, the Judgment was reversed in the *House of Lords* by a vote of *Fifty Lords* v. *16* and the reasoning of Chief Justice Holt finally prevailed

The comments upon the argument in The House of Lords (2 Ld. Ray. 959) by Lord Chief Justice Holt were that:

> "The plaintiff has a particular right vested in him to vote * * *. This action is brought by plaintiff

> for the infringement of his franchise. You would have nothing to be a damage, but what is pecuniary and a damage to property * * *. Although this matter relates to the Parliament yet it is an injury precedaneous to the Parliament as my Lord Hale said in case of *Bernardeston* v. *Soame,* 2 Lev. 114, 116. The Parliament cannot judge of this injury, nor give damage to the plaintiff for it; they cannot make him a recompense. Let all people come in and vote fairly; it is to support one or the other party, to deny any man's vote. By my consent if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right, and if this action be not allowed, a man may be forever deprived of it. It is a great privilege to chuse such persons, as are to bind a man's life and property by the laws they make."

On the precedents of the voting cases previously decided by this Court the judgment of this Court in the case at bar apparently boils down to this: In a suit for money damages the problem of substantial equality of voting rights is not a political question and the issue is justiciable, whereas the same right in a suit for injunctive or declaratory relief presents a political question and the issue is not justiciable.

In *Wood* v. *Broom,* 287 U. S. 1 (1932), the four justices who urged that the complaint should be dismissed for "want of equity" necessarily decided that the issue *was* justiciable and was not a "political question". Otherwise the complaint would have been dismissed for want of "jurisdiction".

The cases cited by Mr. Justice Frankfurter as precedents indicating the kind of "political question" which will not be adjudicated by the judicial power are different on their facts from the case at bar. An able analysis which classifies 7 categories of political questions which does not include the facts of the instant case is found in 8

Minn. L. Rev. 485 (1924) entitled "Doctrine of Political Questions in the Federal Courts". To same effect see 19 N. Y. U. L. Q. R. 123 note 12 (1939), and Weston: "Political Questions," 38 Harv. L. R. 296 at 327-8 (1925).

4. The Decision and Reasoning Are a Departure From and Contrary to Decisions by This Court Upholding Other "Great Purposes of the Constitution."

The adoption of the principle of judicial self-restraint in the enforcement of the fundamental right of substantial equality of voting guaranteed by the Constitution is directly contrary to the recent Constitutional development evidenced by the decisions of this Court Even in the last five war years this Court has breathed new life into Constitutional guarantees. [32 Va. L. Rev. 461, 475, 476, 483, (April, 1946)] [55 Yale L. J 715, 717, 733 (June, 1946).]

The fundamental right of freedom of speech was protected by this Court in situations including industrial competition and dispute [*Thomas* v. *Collins,* 323 U. S. 516 (1944)], criticisms of the judicial organ of Government [*Pennekamp* v. *Florida,* 90 Law Ed. (adv. opinions) 1001, 1009, 1014, 1021, 1022, (1946)] and proselytizing in "Company Towns" [*Marsh* v. *Alabama,* 90 Law Ed. (Adv. opinions) 227, 230, 232, (1946)].

Freedom of political thought was given content and protection by this Court in *Baumgartner* v. *United States,* 322 U. S. 665, and *Schneiderman* v. *United States,* 320 U. S. 118.

Freedom of religious worship became a reality by virtue of *West Va. Board of Education* v. *Barnette,* 319 U. S. 624 (1943) and *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943).

Due process of law in trial court procedure as established by this Court assures fairness and decency in the

protection of the fundamental rights of an accused defendant. *Ashcroft* v. *Tennessee,* 322 U. S. 143 (1944).

In the identical field of the fundamental right to vote as guaranteed by the Federal Constitution this Court has already established the principle that a State may not "illegally" discriminate against the citizens of the United States in the exercise of their right to vote under the Federal Constitution, *Smith* v. *Allwright,* 321 U. S. 649 (1944).

These cases show and mark out the stream of history upon which our ship, the nation, is moving. The fundamental guarantees of the Constitution are at the same time the compass by which the ship is guided and a stream which carries it toward, though never reaching, the goal of perfection. The decision of this Court is a sharp reversal of the trend and in square conflict with the reasoning of such cases.

We respectfully suggest that one of the basic principles implicit in Mr. Justice Frankfurter's opinion is the fear that the Supreme Court of the United States will imperil its national dignity and prejudice the potentiality of its contribution to the national welfare by the entry of an empty or sterile decree, *i. e.*, a decree which it could not enforce. But so to reason might have precluded *Marbury* v. *Madison,* 1 Cranch. 137 (1803). Our national experience does not support this reasoning. In fact, it contradicts this reasoning. The strength of our American Judicial System, of which this Court is the Supreme head, depends more upon the intrinsic rightness of the decision than it does upon the mailed fist ready to enforce the decree by exercise of power or force. The experience of our people within the last five years under the decisions previously grouped illustrate the principle that a mere pronouncement by this Court does not *ipso facto* work revolu-

tionary changes. Yet the pronouncement of this Court in the voting cases that substantial equality of voting power should not be denied to people because of the color of their skin did sweep away mountains of historical and political enslavement, and did open the road leading in the future to a substantial equality voting power. See the result in *Mitchell* v. *Wright,* 154 Fed. 2d 924 (C. C. A. 5, 1946), [pending in this Court on petition for certiorari, No. 399, Oct. Term, 1946].

In *Ex Parte Merryman,* Fed. Cas. No. 9,487 (C. C. Md. 1861), Chief Justice Taney protested against the suspension of the rights of habeas corpus. Can it be said that the intrinsic value of such decision was an empty gesture in view of *Ex Parte Milligan,* 4 Wall. 2 (1866) decided some five years later?

Can the decisions of this Court during the war time hysteria of the first world war stand up in view of subsequent history? [55 Yale Law J. 717-817 (1946)] Cf. *Girouard* v. *United States,* 66 Sup. Ct. 826 (1946). Does not the decision in *Duncan* v. *Kahamamoko* 90 Law Ed. (Adv. Opinions) 469, 480 (1946), conform to the manifest destiny of this Court?

5. The Unusual Procedural Circumstances Surrounding the Delivery of Judgment and the Opinions Supporting the Same Warrant a Rehearing or a Reargument Before the Full Bench.

The decision of this Court was rendered by a bench lacking one Justice and a Chief Justice of the United States. The court divided, 4 Justices voting for affirmance, and 3 Justices voting for reversal. Of the 4 Justices voting for affirmance 3 Justices so voted because the question was beyond the judicial power, *i. e.,* the question was political. But Mr. Justice Rutledge, in his concurring opinion,

shows that feeling himself bound by precedents he was voting that the issue was justiciable and was not a political question.

With such a division of the Court, what is *the* decision of the Court?

Cf.

Hague v. *C. I. O.*, 307 U. S. 496 (1939)
Coleman v. *Miller*, 307 U. S. 433 (1939)
48 Yale L. J. 1455 "Sawing a Justice in Half".

The appellants' petition for rehearing has already discussed the problems of the decision of a constitutional question during a vacancy on the Court.

Briscoe v. *Commonwealth Bk.*, 8 Pet. 118 (1834).
New York v. *Miln*, 9 Pet. 85 (1835).

So we have an unusual division of this Court where the vote was four to three on the "justiciability" issue basis, with four Justices saying that the issue was justiciable, *i. e.*, that the Court had power, and three Justices saying that it was not justiciable, *i. e.*, that the Court did not have power. But the result of this division is to have the conception of the three prevail against the four.

By the tragic and inevitable reason of human destiny and by the pressure of international affairs, only seven out of a possible full bench of nine participated in a ruling which formulates and molds our national destiny and which controls the interplay of state and federal governments and the several departments thereof.

And a decision which acknowledges a judicial abdication and refuses to follow the spirit of *Marbury* v. *Madison* was made without the guiding hand of a Chief Justice of the United States.

Precedents for Rehearing or Reargument.

There are precedents for the granting of a rehearing in this case, or at the very least, a reargument of this cause before the full bench. The Docket of this Court for the October 1946 Term contains at least thirty-three cases that originally came before this Court at the 1945 Term where reargument has been ordered. Some of these cases had been decided by this Court in *per curiam* opinions. Others had not been decided. It is respectfully suggested that the importance of the issues in the case at bar is no less than, and is probably considerably greater than the issues presented in the thirty-three cases so docketed for reargument before a full bench.

In *Green* v. *Biddle,* 8 Wheaton 1 (1823), after argument at February Term, 1821, the Court decided the case on March 5, 1821. On March 12, 1821, Henry Clay as *amicus curiae* moved for a rehearing, and on the same day the motion was granted (8 Wheaton 17). The case was reargued on March 8-11, 1822 (8 Wheaton 17), and the decision was rendered on February 27, 1823 (8 Wheaton 69).

This Court has on its own motion ordered reargument where "differences of opinion" existed concerning questions of the "highest importance", decided when the Court was much pressed by "the ordinary business of the term". *Dred Scott* v. *Sanford,* 19 Howard 393, 399 (1856).

Where a case has been decided by a divided court if an "important constitutional question" is raised on petition for rehearing there is greater chance of granting a rehearing, *Home Ins. Co.* v. *New York,* 119 U. S. 129 (1886); rehearing granted in 1224 U. S 636 (1887); affirmed in 134 U. S. 594 (1890). See the discussion of this rehearing in *City of Shreveport* v. *Holmes,* 125 U. S. 694 (1888).

In 119 U S. 129, Justice Woods was ill and absent during the whole term and did not participate in the first decision and judgment, 119 U. S. 129. When the petition for rehearing was granted he did not participate (122 U. S. 636). When the petition for rehearing was presented to the Court it was based upon the argument that the principle announced by Chief Justice Marshall in *Briscoe* v. *Commonwealth Bk.*, 8 Pet. 118 (1834) and *City of New York* v. *Miln,* 8 Pet. 120, 122 (1835) should be followed, and on the further ground that the Constitutional question involved was sufficiently important to demand a decision concurred in by a majority of the whole court. The petition was granted, 122 U. S 636, but the case was not reargued until the bench was full, Justice Woods having died on May 15, 1887, 134 U. S 594, 597. This practice was recognized as established. Phillip's Practice at p. 380. See the discussion of this rehearing in *Pollock* v. *Farmer's Loan,* 158 U. S 601, 602, 603 (1895).

A closely analogous situation was presented in the first "Income Tax" case, *Pollock* v. *Farmer's Loan,* 157 U. S. 429 (decided April 8, 1895), with Justice Jackson not participating because of illness, and with the court dividing equally on certain propositions.

Petition for rehearing filed by appellants was limited to the propositions upon which the Court was equally divided, whereupon the Attorney General suggested that if any rehearing were granted it should embrace the whole case. The Court treated the suggestion as application for rehearing, and Justice Jackson returning to the bench for the particular case the full bench heard the reargument. (158 U. S at 606, 607) The Court again divided but a 5 to 4 decision of the full bench disposed of the entire cause.

In *James* v. *Clements,* 217 Fed. 51 (C. C. A. 5, 1914), a rehearing before a full bench was granted because a

Justice died after argument, and the remaining Justices were not fully agreed.

This Court has been influenced in its consideration of petitions for rehearing by the inexorable march of events subsequent to the filing of an original opinion. Since the decision of this Court was made on June 11, 1946, our prediction that unconstitutional conduct by public officials leads to violence has been borne out by the march of events Election procedure in Tennessee was marked by the efforts of veterans to obtain their constitutional rights by guns because they could not do so by ballots. Grumblings of dissent by similarly defrauded war veterans were heard in the State of Arkansas. In the State of Georgia claims are now made that the voting rights guaranteed by the Federal Constitution had been abrogated by provisions of Georgia Statutes.

In the case of *Jones* v *Opelika* and related cases, judgment of affirmance was entered in 316 U. S. 584 by a Court voting five to four on June 8, 1942. On February 15, 1943 a rehearing was granted, 318 U. S. 796. Upon such rehearing there was a reargument on March 10-11, 1943. On May 3, 1943 the decision, by a divided Court, was that the judgments of affirmance were vacated and the judgments of the State Court were reversed on the authority of *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943) See 319 U. S. 103. In that case the petition for rehearing and *amicus curiae* briefs filed in support disclosed the supervening events that played a material part in persuading this Court to grant a rehearing.

Conclusion.

This Court has decided that it is forever incapable of considering an appeal by citizens of the United States to the Federal Equity Judiciary for protection of one of the fundamental freedoms. This is a principle of self-restraint on the part of the Federal Judiciary equivalent to sharply marking off judicial boundaries in such fashion that citizens of the United States will be forever doomed to the revolting spectacle of having their sacred rights as free men and citizens to choose their representatives throttled by the wilful, brazen disregard by Legislators of their oath to support the Constitution of the United States.

From the point of view of American jurisprudence the ethical and moral implication of a decision by this Court which unwittingly lends support to this wilful, brazen disregard by public officials of their oath to support the Constitution of the United States is to be regretted. Pound has stated: "In general law cannot depart far from ethical custom nor lag far behind it", "Law and Morals," p. 122 (1924). The decision will be used to lend an evil gloss in order to conceal the "slick business" of denying to American citizens the fundamental rights concerning substantial equality of voting power guaranteed to them by the Constitution.

The decision advocating judicial restraint and self-denial measured against the titanic national and international events which seem to put a premium on the disregard of law, dams the current of national history begun with *Marbury* v. *Madison,* ignores the basic essence of Anglo-American law that this Government is a Government by law, and is inconsistent with the principle that the rights of citizens are governed by law and not by individuals making up any particular department of Government

or any political party in control of any particular department.

The suggested remedies offered in the opinion of Mr. Justice Frankfurter of applying to the Illinois State Legislature or the Federal Congress are unrealistic. The record eloquently shows that practically speaking, the "Constitution violating Legislators" are not judges who will eliminate the system consciously designed to perpetrate the evils sought to be eliminated by such application to the Legislature. Such relief has been sought in vain over twenty-five years. To suggest that petitioners apply to the Illinois Legislature for relief is to give them barren stones. And the same reasoning applies to the possibility of obtaining relief from our National Congress.

It has been recently stated that, "It is impossible, as Lincoln declared, for the country to remain half slave and half free. It is equally impossible for the country to remain a country in which in some parts large populations are reduced to second class citizenship by law".

Radin: 25 Oregon L. R. 83, 101 (1946); "The Function of the States".

Yet the "Balkanization" of Illinois will remain unchanged unless the Federal Judiciary exercise their powers of equitable jurisdiction.

Amicus curiae ends as it began: One of the great purposes of the Federal Constitution is being violated. Unless the Federal Judiciary lends its protection there is no relief.

WHEREFORE, Better Government Association, *amicus curiae,* respectfully submits this brief in support of appellants' petition for rehearing and motion for reargument.

Respectfully submitted,

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