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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 804

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

Appellants,

vs.

DWIGHT W. GREEN, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

URBAN A. LAVERY,
Counsel for Appellants.

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Appellees

JURISDICTIONAL STATEMENT OF APPELLANTS

The Appellants, Kenneth W. Colegrove, Peter J. Chamales, and Kenneth C. Sears, present this jurisdictional statement in accordance with the provisions of Rule 12 of the Rules of this Court.

Jurisdiction of the Supreme Court

Jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment here complained of is covered by Section 266 of the Judicial Code (Act of June 18, 1910, 36 Stat. 557, as amended by amendments

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culminating in the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Sec. 380) concerning the calling of a Special Three-Judge Court; and by Section 238, paragraph 3 of the Judicial Code (28 U. S. C. A. Sec. 345, sub. 3) specifically concerning direct appeal to the Supreme Court. More particularly in that respect, and using the language of Section 266 of the Judicial Code above cited, this case involves an application to suspend or restrain the "enforcement, operation or execution of any statute of a State" or involves an application for an order "restraining the action of any official of such state in the enforcement of execution of such statute" and such application is based "upon the ground of the unconstitutionality of such statute."

In a realistic sense, the jurisdiction of the Supreme Court in this case is closely similar to the jurisdiction grounds which existed in the case of *Broom* v. *Wood,* 287 U. S. 1. Jurisdiction was taken in that case under facts and circumstances strikingly similar to those found in this case. That case will be discussed, in detail, later on in this Statement as to Jurisdiction.

The Illinois Statute Here Involved

The Illinois Statute which Appellants claim is violative of the provisions of the Federal Constitution, and other basic Laws of the United States, is the Illinois Congressional Apportionment Act of May 13, 1901, which is still in force in that State. (Illinois Revised Statutes, 1945, Chapter 46, Sections 154-156; Laws of Illinois 1901, p. 3.)

In substance, that Act (enacted forty-five years ago) created twenty-five (25) Congressional Districts in Illinois. A new State Apportionment Act should have been passed in Illinois every ten years since 1901; but the General Assembly of the State has repeatedly and continuously refused to do its duty in that respect, for thirty-five years.

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Due to the great growth in population in Illinois, and particularly to the shifts in population during the last four decades, those 25 Districts, as fixed and established in 1901, are now violently unequal in population, varying (for example) from a population of 112,116 in the 5th District to a population of 914,053 in the 7th District. There are also wide and gross discriminations between different areas in the State.

Judgment to Be Reviewed

The judgment to be reviewed here was rendered February 1, 1946, by a specially constituted Three-Judge District Court convened in accordance with Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380). Application for appeal to the Supreme Court of the United States from the Judgment of February 1, 1946, was made and allowed on that day.

Nature of the Case and Rulings of the Trial Court

The Plaintiffs' Complaint charged that the Illinois Congressional Apportionment Act of 1901 denies and impairs and abridges the Civil Rights of the Plaintiffs in that it violates the following provisions of the Constitution and Laws of the United States:

1 The Preamble to the Federal Constitution.

2. Article I, Sections 2 and 4.

3. 14th Amendment, Sections 1 and 2.

4. Revised Statutes of the U. S., Section 23.

5. "Northwest Ordinance" of 1787, Section 14, Article II.

6 The Enabling Act of Congress admitting Illinois to the Union; Act of April 18, 1818.

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And also the following provisions of the Constitution of Illinois:

7. The Preamble of the Constitution of Illinois of 1818.

8. The Constitution of Illinois of 1870, Article II, Section 18.

The Civil Rights Act

The Complaint specifically claimed that the District Court had original jurisdiction in this case under Section 41, paragraph 14, of the Civil Rights Act. (Revised Statutes of the U. S., Sections 563 and 629, as amended; 28 U. S. C. A., Section 41, paragraph 14.)

Injunctive Relief Prayed

The Complaint, which was verified, prayed for an Injunction restraining the Defendants (Illinois State Election officials) from enforcing the provisions of the Illinois Congressional Apportionment Act of 1901, on the ground that it was unconstitutional and void, as violating the Constitutions and Laws above enumerated.

The Plaintiffs also filed a separate verified Petition asking for a Temporary Injunction for the same reasons.

Rulings of the Trial Court

The District Court, on Motion by Plaintiffs, convened a Special Three-Judge Court, as prayed in the Complaint, and in accordance with the provisions of Section 266 of the Judicial Code above cited.

The District Court on January 25, 1946, took jurisdiction of the cause, and after extended argument, over-ruled Defendants' Motion to Dismiss for want of Jurisdiction, which had been filed January 15, 1946.

The District Court on January 29, 1946, after further argument, filed a Memorandum Opinion making findings

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of fact and announcing conclusions of law, and ordering that the suit be dismissed. That Memorandum Opinion is appended to this Statement of Jurisdiction.

On February 1, 1946, the Defendants, after leave granted by the District Court, filed a further written Motion asking that the suit be dismissed on the general ground that the Complaint failed to state a cause of action. Thereafter and on the same day the District Court entered a final draft judgment order denying injunctive relief, denying a declaration of the rights of the Plaintiffs, and directing that the suit be dismissed at Plaintiffs' costs. On the same day the District Court entered a draft order granting leave to appeal to this Court, fixing and approving Appeal Bond, etc

Cases Believed to Sustain Jurisdiction

Under the foregoing statement of the nature of the case and the rulings of the District Court, it is submitted that the Supreme Court of the United States has jurisdiction in this cause. It is believed that the following cases sustain the jurisdiction of this Court:

Wood, Secy. of State, etc. v. *Broom,* 287 U. S. 1;
Mahan, Secy. of State v. *Bruce,* 287 U. S. 575;
Stratton v. *St. L. & S. W. Ry. Co.,* 282 U. S. 10, 14;
Ex parte, Northern Pacific Railway, 280 U S. 142, 144;
Sterling, Governor, etc. v. *Constantine,* 287 U. S. 378, 393

The cases of *Wood, Secy, of State* v. *Broom,* and *Mahan, Secy. of State,* v. *Bruce,* above cited, are both of them so closely similar on the major facts involved and on the issues of law raised that those two cases should have some short summary comment here.

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THE MISSISSIPPI CASE

The Act of Congress of June 18, 1929 apportioning the Members of the House of Representatives among the various States (55 Stat L. 761, 762; U. S. C. A. Title 2, Pocket Part, Secs. 2 (a) and 2 (b)) had reduced by one the number of Congressmen to which certain of the States were entitled, including Mississippi, Kentucky, Missouri, Virginia and Illinois. Thereafter, the Mississippi General Assembly, in the Spring of 1932, had adopted a new State Congressional Apportionment Act. That Act was challenged on the same ground that the Illinois Apportionment Act here in controversy is challenged, namely, that the Congressional Districts were grossly discriminatory as to population, the Mississippi Districts varying from a population of 184,000 to a population of 414,000. Thereupon certain citizens of Mississippi filed a Bill in Equity in the Federal Court for Mississippi asking that the new Apportionment Act in that State be held unconstitutional and void. The complaint in the *Mississippi* case, however, was based upon a narrow and restricted bottom, since it merely challenged the validity of the Mississippi Act on the ground that that Act was in conflict with the Federal Apportionment Act of August 8, 1911 (37 Stat. L 14; USCA, Title 2, Sec. 3). The 1911 Federal Statute had been passed after the Federal Census of 1910. That Statute contained a provision that the Congressional Districts in a State shall be

> "composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants."

Application was made in the Mississippi District Court for a Three-Judge Court (as in the case here at bar) under Section 266 of the Judicial Code and such a Court

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heard the cause. The District Court, after hearing and argument, entered a judgment and finding striking down the 1932 Mississippi Congressional Apportionment Act as unconstitutional and void, because it violated the provisions of the Federal Apportionment Act of 1911, above cited (*Broom* v. *Wood, Secy. of State,* 1 Fed Sup. 134). The judgment and opinion of the District Court was entered September 1, 1932. The result of that judgment meant the wiping out of the existing State Act in Mississippi providing for Congressional Districts and compelled all nine Congressmen in Mississippi to run "At Large" in the November, 1932 Election.

Thereafter, the Attorney General of Mississippi took an urgent appeal to the Supreme Court of the United States, where the printed Record was filed in that Court on October 2, 1932. By cooperation between Counsel, the Briefs of both sides were filed in the Supreme Court October 11, 1932. The Supreme Court granted emergency treatment and consideration to the cause and heard oral argument on October 13, 1932. The opinion in the case, written by Chief Justice Hughes, was filed October 18, 1932.

The significant point here to be stressed is that the Supreme Court took jurisdiction of the case and disposed of it on the merits.

It should also be stressed here that the plaintiffs in the *Mississippi* Case (as we have already suggested) bottomed their case almost exclusively on the Federal Apportionment Act of August 8, 1911. The provisions of Section 23 of the United States Revised Statutes, which were strongly relied on by the Plaintiffs in the case at bar, was never called to the attention of the Supreme Court or to the Trial Court, either in the pleadings or in the Briefs. It is also true that the provisions of the "Northwest Ordinance", concerning the right of equality of representation, which

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was strongly relied on by the Plaintiffs in the case at bar, did not and could not apply in the State of Mississippi. Finally, the rights of the plaintiffs, as claimed in the case at bar, arising under the various provisions of the Federal Constitution set out in the Complaint below, were not urged upon the Court and were only vaguely referred to by this Court in its opinion in the *Mississippi* Case.

The Kentucky Case

The Federal Apportionment Act of 1929, above cited, also reduced by one (as we have indicated) the number of Congressmen in the State of Kentucky. The General Assembly of the State of Kentucky, in the Spring of 1932, passed a State Congressional Apportionment Act setting up new Congressional Districts in that State. That State Statute was also challenged in the Federal District Court for Kentucky on the same grounds as above described for the *Mississippi* Case. The *Kentucky* Case likewise was heard by a Special Three-Judge Court. That Court also struck down the Kentucky State Apportionment Act for the reason that it also was grossly discriminatory and inequitable as far as the population of the Districts was concerned (*Hume* v. *Mahan,* 1 Fed. Sup. 142). The judgment in that case was entered September 3, 1932, almost concurrently with the judgment in the *Mississippi* Case, although the two cases were entirely separate and distinct. The effect of the Kentucky District Court judgment was similar to that of the Mississippi Court, in that it compelled all Congressmen in Kentucky in the November, 1932 Election to run "At Large."

The Attorney General of Kentucky also took an urgent appeal to the Supreme Court of the United States. That appeal, however, was not perfected as rapidly as was true of the *Mississippi* Case, the appeal coming before the Su-

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preme Court of the United States sometime during the month of November, 1932. The Supreme Court in the *Kentucky* Case merely reversed the judgment of the District Court in a memorandum *per curiam* opinion (referring to *Wood* v. *Broom,* 287 U S. 1) and indicating that the ruling in that case was controlling in the Kentucky situation. The opinion in the Supreme Court in the *Kentucky* Case is reported in 287 U. S. 575.

It will thus be seen that in two separate and distinct cases coming before the Supreme Court of the United States a number of years ago, where the factual situations were closely similar to those in the case at bar, and where the legal issues raised were substantially analogous to those in the case at bar, the Supreme Court took jurisdiction of the appeals in both of those cases.

Wood v. Broom Not Controlling Here

A comparison of the case of *Wood* v. *Broom, supra,* with the case at bar shows clearly that the *Mississippi* Case is not controlling here. We will not stress this point in this Statement as to jurisdiction. But we respectfully suggest that the opinion of the District Court in the case at bar clearly indicates that this case should be taken and reviewed by the Supreme Court.

A Showing That Substantial Federal Questions Are Involved

I

The question whether the Illinois Congressional Apportionment Act of 1901 is unconstitutional and void because it violates the civil rights of these Plaintiffs as guaranteed by the Constitution and Laws of the United States (because of the gross inequalities in the population of the Illinois Congressional Districts) is a substantial Federal question.

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The right of the Plaintiffs to vote for Representatives in Congress is a right established and protected by the Federal Constitution. This question has been so often determined by the Supreme Court of the United States that we will cite merely the two latest cases on the point, *United States* v. *Classic,* 313 U. S. 299, 314, and *Smith* v. *Allwright,* 321 U. S. 649, 661.

It is strongly urged that gross inequality in voting power is the equivalent of actual disfranchisement of voters. This point has been well stated by the District Court in its opinion in the case at bar (attached as an appendix to this Statement) where the Court said: *"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 the election of members to Congress and a denial altogether of participation in the election of Congressmen."*

II

The Illinois Statute of 1901 violates the Guarantees of several provisions of the Constitution of the United States.

A. *The Preamble. The Preamble to the Constitution of the United States has not in itself been sufficiently relied upon by the courts as a guaranty of the civil rights of the citizens. The Constitution in the Preamble expressly recites that one of the major purposes of that great charter is to "secure the blessings of liberty to ourselves and our posterity."*

How can it be said that the blessings of liberty are secured for the citizens of Illinois when one voter in one Congressional District of that state has only one-eighth the voting power which a citizen of another District in that

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state has—and all by virtue of the antiquated statute of Illinois of 1901?

B. *Congressional elections. The right to vote for Representatives in Congress is expressly created and guaranteed by Sections 2 and 4 of Article I, of the Constitution By implication and by its very essence that right to vote contemplates a substantial equality between the electors.* In *United States* v. *Classic,* 313 U S. 299, the Supreme Court held that the right to vote for Representatives in Congress included the right to have the vote honestly counted by Election Judges. In *Smith* v. *Allwright,* the Supreme Court held that the denial by a state of the right to vote through some procedural device seeking to eliminate negroes from voting in a State Primary, constituted a denial of the right to vote guaranteed by the Federal Constitution. In *Truax* v. *Corrigan,* 257 U. S. 312, 331, the Supreme Court of the United States spoke of the "basic principle of equality" as if it were an accepted principle of the fundamental law of the United States. The right to vote for members of Congress therefore is fully and liberally guaranteed by the Federal Constitution; and that guaranty is violated by the Illinois statute here in question.

C. *The "privileges and immunities" guaranty.* The right to vote for Representatives in Congress is one of the "privileges and immunities" guaranteed to citizens by the language of that particular clause of Section 1 of the 14th Amendment. Under the *Slaughter House* cases, 16 Wall. 36, it was decided that the privileges and immunities clause of the 14th Amendment enlarged and protected the privileges and immunities growing out of Federal citizenship as distinguished from the privileges and immunities which grew out of state citizenship.

The decisions of this court in *United States* v. *Classic,* 313 U. S. 299 and *Smith* vs. *Allwright,* 321 U. S. 649, make

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it clear that the right of a voter to vote for Representatives in Congress is one of the privileges of United States citizenship. We think this point will hardly be disputed and we will not labor it further.

D. *The "equal protection" clause. The Illinois Statute also violates the "equal protection" clause of Section 1 of the 14th Amendment.*

We will not discuss this point here. However, we believe it is sound and is important. See as to this point:

> *Nixon* v. *Condon,* 286 U. S 73, *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.

E. *Revised Statutes of the United States, Section 23. In 1878 Congress passed the Revised Statutes of the United States (2nd Edition), in which it provided that Congressional Districts in the state "at each subsequent Congress" are required to contain "as nearly as practicable an equal number of inhabitants." That provision of law is still in full force and effect and is violated by the Illinois Act of 1901.*

The provisions of the Revised Statutes above referred to should have been called to the attention of the Supreme Court by counsel in the cases of *Wood* v. *Broom,* 287 U. S. 1 and *Mahan* v. *Bruce,* 287 U. S. 575 (the "*Mississippi*" case and the "Kentucky" case above discussed in this Statement) but that was not done; and that provision of the Revised Statutes was not before the Supreme Court when those two cases were decided. That provision of law as found in the Revised Statutes has never been repealed and we strongly urge has never been superseded. It is, therefore, directly violated by the Illinois Statute of 1901 here in issue.

F. *Northwest Ordinance of 1787. The Northwest Ordinance of 1787, which is still a part of the organic law appli-*

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cable to the State of Illinois, guarantees citizens of that state forever "a proportionate representation of the people in the Legislature." The Illinois Act of 1901 directly violates that provision of the Northwest Ordinance.

The provisions of the Northwest Ordinance above mentioned have never been considered by the Supreme Court in connection with the issues raised in this case; since they were not cited and could not have been cited as applicable in the states of Mississippi and Kentucky, from which states the cases of *Wood* v. *Broom, supra,* and *Mahan* v. *Bruce, supra,* arose. The Illinois Act here in controversy clearly violates the above provision of the Northwest Ordinance.

G. *Illinois Enabling Act of 1818 and Illinois First Constitution of 1818.* The Enabling Act of Congress admitting Illinois to the Union (Act of April 18, 1818; 3 Stat. L 428) required that the State of Illinois should never adopt or maintain any laws "repugnant to the Ordinance of the 13th of July, 1787." The Preamble to the First Constitution of Illinois of 1818 specifically adopted the "Ordinance of Congress of 1787" as a part of the organic law of Illinois. Both the Enabling Act of 1818 and the Preamble of the Constitution of 1818 are violated by the Illinois Statute of 1901 here considered.

H. *Illinois Constitutional Provision.* The Constitution of Illinois of 1870 now in force in that state contains in Article II, Section 18 in its Bill of Rights the following provision:

> *"All elections shall be free and equal".*

That provision is a guaranty applicable to the rights of the Plaintiffs in the case at bar and was urged by them and relied upon by them in their Complaint. The Act of Illinois of 1901 is a clear violation of the foregoing provi-

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sion of the Illinois Constitution and it, therefore, constitutes a denial of the constitutional rights of these Plaintiffs.

Conclusion

For the reasons urged in these Suggestions it is submitted that this Court has jurisdiction of this cause upon this appeal and that substantial Federal questions are here presented.

Respectfully submitted,

URBAN A. LAVERY,
Attorney for Appellants.

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APPENDIX "I"

Note: The following 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.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 46 C 46

Before Special Three-Judge Court

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

v.

DWIGHT W. 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

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 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

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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 that 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 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.

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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

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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

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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 mattter 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 Surpeme 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

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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 obligation 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.

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