large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import.

This conclusion disposes of all the questions properly before the Court. Questions in relation to the application of the standards defined in section 3 of the Act of 1911 to a redistricting statute, if such a statute should hereafter be enacted, are wholly abstract. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

KOENIG ET AL. *v.* FLYNN, SECRETARY OF STATE, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 731. Argued March 24, 1932.—Decided April 11, 1932.

Decided upon the authority of *Smiley* v. *Holm, ante,* p. 355. 258 N. Y. 292; 179 N. E. 705, affirmed.

CERTIORARI* to review a judgment affirming the refusal of a writ of mandamus.

Messrs. Abraham S. Gilbert and *Benjamin L. Fairchild* for petitioners.

The word " legislature " in § 4 of Art. I means the same representative body referred to in Art. II, § 1, of the Constitution. It must have the same meaning wherever used in the Constitution.

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* See table of cases reported in this volume.

When the Constitution was under discussion and adopted, the delegates knew that in Massachusetts the governor had a veto over all legislative activity and that in New York a Council of Revision had a veto power; and that in the remaining States the legislature, (a bicameral body in every State except Pennsylvania), was supreme. *Hawke* v. *Smith,* 253 U. S. at p. 227.

That care was used in the selection of terms is evident from the language of Art. I, § 8, cl. 17, which, as to property owned by the State, requires state action, but as to private property requires only the consent of the legislature.

Section 3 of Art. I confers upon the "legislature" the power to choose Senators; § 4 the power to prescribe the times, places and manner of electing Senators. In the same sentence the "legislature" is given power to prescribe the times, places and manner of electing Representatives in Congress. The word could not have been used in two different senses in the same sentence. It is inconceivable that the framers intended to exclude the Executive when they authorized the "legislature" to choose Senators, and at the same time to include him when they gave that same body power to determine the times, places and manner of their election. Unless the Constitution gave him a voice in those matters, how can it be said that he was given any voice in fixing the time, place and manner of electing Representatives?

The framers of the Constitution made use of the Congress, the Legislature, the Executive, the State, and did not fail to refer to "appropriate legislation by the State." The delegates would not have voted for a proposition to give the executive of each State a veto over federal legislation. The proposal to give even the President a veto was strenuously combated before final adoption.

In *Hawke* v. *Smith,* 253 U. S. 221, this Court held that the word "legislature" in Art. V, dealing with Amend-

ments, refers to the bicameral body; in *Davis* v. *Hildebrant,* 241 U. S. 565, that the Act of August 8, 1911, required the States to be re-districted according to state laws rather than—as in previous apportionment Acts—by the state legislatures, and that the Act was valid under § 4, Art. I. The same fundamental question seems to have been inherent in that as in the instant case, viz.: in the absence of authorization by Congress, acting under Art. I, § 4, may the discretion of a legislature in prescribing the times, places and manner of holding elections for Representatives be circumscribed by those provisions of a state constitution which regulate enactment of the laws for state governmental purposes. Unless this provision of § 4 was intended to limit the state agency to the "legislature," it was surplusage.

If the framers intended that the State rather than the legislature, should have the power conferred upon the legislature by § 4 of Art. I, but that Congress should always have the right by law to control the election of Senators and Representatives, except as to the places of choosing Senators, the first phrase of clause 1 is entirely unnecessary.

In all of the seventeen subdivisions of § 8, Art. I, conferring jurisdiction on Congress, not one unnecessary word is used. It is impossible to believe that the first phrase of the first clause of § 4 was inserted unnecessarily. Nor is it conceivable that the word "legislature" would have been used in § 4 of Art. I if the framers meant the "State," or anything other than the bicameral body referred to in Art. V, and described by this Court in *Hawke* v. *Smith.*

The power conferred on the "legislature" by the Federal Constitution may not be circumscribed by a State constitution. If the constitution of a State may provide that to re-district a State into congressional districts, pursuant to § 4, Art. I, the legislature must do so by a

bill approved by the governor or passed over his veto by a two-thirds vote, it may require a four-fifths vote, or a unanimous vote, or may provide that no apportionment shall be valid unless approved by the governor. Some of the best minds of the country in the legislative halls and constitutional conventions have spoken against any such power in the State. Election, West Virginia, Forty-third Congress, I Hind's Prec., 653, 654; Massachusetts Constitutional Convention of 1820, per Story, J. (see Journal in Cong. Library); per Webster, I Hind's Prec., 653; Election case of *Baldwin* v. *Trowbridge,* 2 Bartlett Contested Election Cases 46, 38th Cong., Rep. No. 13; *Schrader* v. *Polley,* 26 S. D. 5; *Shiel* v. *Thayer,* 2 Bartlett 349, Cong. Globe, 1st Sess., 39th Cong., pp. 815–823; *Sapp* and *Carpenter Cases,* H. Rep. No. 19, 3d Sess., 46th Cong., I Hind's Prec., 672, I Ellsworth, p. 322; *Davidson* v. *Gilbert,* 56th Cong., I Hind's Prec., 180; *Perkins* v. *Morrison,* Rep. No. 3, 31st Cong., 2d Sess. See also Cong. Rec., vol. 47, 67th Cong., 3436–7, 3507.

Resort to the doctrine of practical construction, if proper at all in the case at bar, does not support the contention that "legislature" in § 4 of Art. I means State. A practice that was wrong should be rejected, *Wendell* v. *Lavan,* 246 N. Y. 115; *People* v. *Tremaine,* 252 N. Y. 27; *Louisville & N. R. Co.* v. *Kentucky,* 161 U. S. 677, 690; Cooley, Const. Lim., 6th ed., p. 85.

The Act of August 8, 1911, c. 5, 37 Stat. 13, was limited to the apportionment therein made and expired with the apportionment under the Act of June 18, 1929.

Mr. Henry Epstein, First Assistant Attorney General of New York, with whom *Mr. John J. Bennett, Jr.,* Attorney General, was on the brief, for Flynn, Secretary of State, respondent.

Messrs. John Godfrey Saxe, Robert F. Wagner, and *John J. O'Connor* were on the brief for Farley, respondent.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The petitioners, 'citizens and voters' of the State, sought a writ of mandamus to compel the Secretary of State of New York, in issuing certificates for the election of representatives in Congress, to certify that they are to be elected in the congressional districts defined in the concurrent resolution of the Senate and Assembly of the State, adopted April 10, 1931. The Secretary of State, invoking the provisions of Article I, section 4, of the Constitution of the United States, and those of the Act of Congress of August 8, 1911, c. 5, 37 Stat. 13, and also the requirements of the constitution of the State in relation to the enactment of laws, alleged that the concurrent resolution in question was ineffective, as it had not been submitted to the Governor for approval and had not been approved by him. The Court of Appeals of the State, construing the Federal constitutional provision as contemplating the exercise of the lawmaking power, sustained the respondent's defense and affirmed the decision of the lower courts refusing the writ. 258 N. Y. 292; 179 N. E. 705. This Court granted a writ of certiorari.

The State of New York, under the reapportionment pursuant to the Act of Congress of June 18, 1929, c. 28, 46 Stat. 21, 26, is entitled to forty-five representatives in Congress in place of forty-three, the number allotted under the previous apportionment. The Court of Appeals decided that, in the absence of a new districting statute dividing the State into forty-five congressional districts, forty-three representatives are to be elected in the existing districts as defined by the state law, and the two additional representatives by the State at large.

For the reasons stated in the opinion in *Smiley* v. *Holm,* decided this day, *ante,* p. 355, the judgment is affirmed.

Judgment affirmed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.