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## Supreme Court of the United States

OCTOBER TERM - 1968

Office-Supreme Court, U.S.  
FILED

JAN 21 1969

JOHN F. DAVIS, CLERK

In the Matter of:

DAVID I. WELLS,

Appellant;

vs.

NELSON A. ROCKEFELLER, as Governor  
of the State of New York, LOUIS J.  
LEFKOWITZ, As Attorney General of  
the State of New York, JOHN P. LOMENZO,  
as Secretary of State of the State of  
New York, MALCOLM WILSON, as Lieu-  
tenant Governor of the State of New York,  
and Presiding Officer of the Senate of  
the State of New York, and ANTHONY J.  
TRAVIA, as Speaker and Presiding Officer  
of the Assembly of the State of New York,

Appellees

Docket No. 238

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Place Washington, D. C.

Date January 13, 1969

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X  
4 DAVID I. WELLS,

5 Appellant;

6 versus

Case No. 238

7 NELSON A. ROCKEFELLER, as Governor  
8 of the State of New York, LOUIS J.  
9 LEFKOWITZ, as Attorney General of  
10 the State of New York, JOHN P. LOMENZO,  
11 as Secretary of State of the State of  
12 New York, MALCOLM WILSON, , as Lieu-  
tenant Governor of the State of New York,  
and Presiding Officer of the Senate of  
the State of New York, and ANTHONY J.  
TRAVIA, as Speaker and Presiding Officer  
of the Assembly of the State of New York.

13 Appellees.  
14 - - - - -X

15 Washington, D. C.

16 January 13, 1969

17 The above-entitled matter came on for argument at  
12:50 p.m.

18 BEFORE:

19 EARL WARREN, Chief Justice  
20 HUGO L. BLACK, Associate Justice  
21 WILLIAM O. DOUGLAS, Associate Justice  
22 JOHN M. HARLAN, Associate Justice  
23 WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
24 BYRON R. WHITE, Associate Justice  
25 ABE FORTAS, Associate Justice  
THURGOOD MARSHALL, Associate Justice

1 APPEARANCES:

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5 Counsel for appellant

6 GEORGE D. ZUCKERMAN, ESQ.  
7 Assistant Attorney General  
8 State of New York  
9 Counsel for appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: Case No. 238, David I. Wells, appellant, versus Nelson A. Rockefeller.

Mr. McKay?

ORAL ARGUMENT OF ROBERT B. MCKAY, ESQ.

ON BEHALF OF APPELLANT

MR. MCKAY: Mr. Chief Justice, may it please the Court: I should like to first introduce Mr. David Wells, the plaintiff, appellant in this case, who, through the generosity of the Clerk's office, has been allowed to participate with me as an adviser, even though he is not a member of this Bar or of any Bar, but he is a man of great knowledge in the field of Congressional districting, particularly in New York.

This is an appeal from a 3-judge Federal District Court in the Southern District of New York dismissing the suit that had been brought by Mr. Wells in 1966 in challenging the then 1961 Congressional districting statute in New York.

The present appeal is from the judgment and order of 1968 upholding and, therefore, dismissing the complaint in connection with the 1968 Congressional districting statute of New York.

In a sense, this case picks up where the Missouri case, on which we have just heard argument, leaves off. In many respects it is quite different because in this case, unlike the Missouri case, the legislative posture was totally

1 different. There was no debate in the Legislature of any  
2 consequence. There was only one plan presented, which had been  
3 prepared by a Joint Legislative Committee on Reapportionment  
4 en camera and it was presented and passed without essential  
5 debate.

6 Population disparities between the smallest and the  
7 largest districts are more than twice as great as in the Mis-  
8 souri case, and specifically in this case, the appellant has  
9 claimed throughout that there is a deviation that is so sub-  
10 stantial it requires justification, but the justifications  
11 given by the State are unsatisfactory and, further, that there  
12 is a lack of compactness and that the reasons for that are ex-  
13 plained by affirmative evidence in the record showing that there  
14 was a partisan objective leading to the particular district  
15 lines that were drawn.

16 This case, thus, raises two principal questions that  
17 are related but separable. The first is whether population  
18 deviations that are not de minimis, what is necessary for the  
19 State in order to satisfy the burden of justification.

20 Second, where the districts are not as compact as  
21 they could have been, and there is affirmative evidence of a  
22 gerrymander for partisan, or in this case perhaps bipartisan  
23 purposes, is the plan unconstitutional?

24 The suit was originally filed in 1966 in challenge  
25 to the last previous Congressional districting statute in New

1 York which dated from the year 1961. In May of 1967, the 3-  
2 judge court held that the statute was unconstitutional and that  
3 decision was affirmed by this Court in December of 1967.

4 The 3-judge court held that the population deviations  
5 were excessive, and they were, indeed, very substantial at that  
6 time. They suggested also that there was, and I quote, "a  
7 seemingly bizarre structure among the Congressional Districts,"  
8 and so the court advised that in redrawing the line, the Legis-  
9 lature should draw Congressional Districts that are, and I  
10 quote, "reasonably compact and contiguous."

11 The Legislature was warned not to allow, and I quote,  
12 "considerations of race, sex, economic status, or politics to  
13 cross their minds." How well the New York Legislature obeyed  
14 that injunction, we shall see.

15 The 1968 Act was prepared by a small group of legis-  
16 lators in a Joint Legislative Committee on Reapportionment and  
17 the drafting was largely in the hands of advisers to the lead-  
18 ing Republican and Democratic figures concerned with this par-  
19 ticular matter at the time in the State of New York.

20 The plan was introduced on February 20th, in response  
21 to a determination by the 3-judge District Court that a new  
22 plan must be drafted and presented by March 1st of 1968. It  
23 was discussed briefly, but not really debated, and both Houses  
24 of the New York Legislature on February 26th, passed after a  
25 10-minute debate in the Senate and a slightly longer but

1 perfunctory debate in the Assembly. It was signed by the  
2 Governor 90 minutes after it had been passed by the second  
3 House.

4 There were substantial majorities for the legislation  
5 in both Houses and by both parties in each House. There was no  
6 real doubt as to the decision made in advance that this was the  
7 legislation that would be accepted by the New York Legislature  
8 in 1968.

9 The principles of Congressional districting that have  
10 been outlined by this Court, or that are, we believe, in the  
11 prospect of being defined, are several. First, substantial  
12 population equality is required.

13 Second, to the extent that there is comparison with  
14 State legislative reapportionment, the deviations of Congress-  
15 sional Districts should be and ordinarily will be smaller than  
16 in State legislative redistricting.

17 Third, the deviations must be explained on rational  
18 and permissible grounds, and now it seems to us that there are  
19 emerging principles which will be tested in part by this case.  
20 The deviations from compactness also must be explained by the  
21 legislative body or those who support the legislation.

22 Q I am not sure I understood your second criterion.  
23 That is, as I heard you say it, smaller deviations are required  
24 in Congressional districting than might be permitted in State  
25 legislative reapportionment. Did I understand that correctly?



1           A     Yes, sir. In Reynolds versus Sims, the majority  
2 opinion stated that there might be a larger toleration for  
3 deviations in State legislative representation districts than  
4 in Congressional, because ordinarily there are a larger number  
5 of districts to be drawn in a State legislative chamber than in  
6 the Congressional Districts.

7           Q     I thought that worked the other way.

8           A     No, I think not, because of the necessity of the  
9 opportunity to draw so many different districts, there is more  
10 opportunity to play with the population figures, the point, in  
11 a sense, that Mr. Achtenberg made in connection with Missouri.

12          Q     Smaller building blocks.

13          A     Smaller building blocks, and more of them; yes,  
14 sir.

15          Q     So it follows, in your submission, that a lower  
16 magnitude of deviation is constitutionally permissible in Con-  
17 gressional Districts than might be constitutionally tolerable  
18 in State legislative apportionments.

19          A     Yes, sir.

20          Q     And you say there is something in Reynolds  
21 against Sims that says so?

22          A     Yes, there is. I can find the specific --

23          Q     Well, it is probably in your brief.

24          A     It is in the brief; yes, sir.

25          Q     Thank you.

1           A     The emerging principles, as we see them, are that  
2 when there are deviations from compactness, that this also must  
3 be explained by the State because it is impossible to have  
4 equality without being tested, in a sense at least, by the  
5 measure of compactness, a point I shall return to.

6                 Finally, we suggest that a gerrymander for racial,  
7 religious, socio-economic or partisan purposes is or should be  
8 forbidden by the Constitution.

9                 Let me speak first to the question of deviations in  
10 equality as it affects this case. It seems to us manifest that  
11 the deviations in this case are not de minimis by any standard  
12 whatsoever. The deviation from the smallest to the largest  
13 Congressional District in the State of New York under the 1968  
14 Act is more than 53,000 persons.

15                This is a difference in percentage point from the  
16 smallest, the least populous, to the most populous district, of  
17 over 14 percent. Even adjoining districts sometimes have popu-  
18 lation deviations as great as 50,000 where it would have been  
19 perfectly possible to reduce the figure, as I shall suggest  
20 later, to a very small figure, indeed.

21                Indeed, it would have been possible to change one of  
22 the substantial deviations between adjoining districts from  
23 40,000-plus to 5,000-plus by the shift of a single county, and  
24 now if you will refer, I can show you where this is, to Appendix  
25 B -- yes, I can do it on the map that is behind me, as well. It

1 is also in Appendix B in the appellant's brief.

2 Lewis County, which is now in the 31st District, could  
3 have been shifted to the 32nd District, thus also increasing or  
4 improving compactness of the 32nd District, with a difference  
5 in population instead of 40,000-plus, of 5,000-plus.

6 If a further shift had been made of Hamilton County,  
7 which is here, to the 32nd District, the population deviation  
8 would have been reduced to under 2,000. But in that particular  
9 case there would have been some sacrifice of compactness and we  
10 do not urge it but simply point out that this would have been  
11 possible without any other change in the State lines in that  
12 particular area.

13 On the deviation from equality point, it should be  
14 noted that there is no decision of this Court that has approved  
15 a population deviation as large as the one that exists in the  
16 State of New York now. As has been made clear from the Missouri  
17 case already discussed, the only two cases in which this Court  
18 has recently affirmed a decision with a population deviation of  
19 any substantial figure have been in the Mississippi and the  
20 Florida cases, and in neither of those was the population devia-  
21 tion as large as in the New York case.

22 Q What do you think the deviation was in the  
23 Florida case?

24 A The Legislature thought it was 8,000-plus. When  
25 the actual figures were made available, it turned out to be

1 48,000-plus. Now, I do not make any particular --

2 Q Wasn't that a court-made plan?

3 A Yes, that is correct, sir.

4 Q And the court thought it was only a deviation of  
5 a total of something like 2 percent, didn't it?

6 A That is correct.

7 Q And you say when the figures became available,  
8 it was --

9 A It turned out to be something like 48,000.

10 Q But the court, in affirming here, did it have the  
11 figures then, or not? Or did it have only what the District  
12 Court had?

13 A I think this Court at the time had the figures  
14 of 48,000, but I would have to verify that. If that is wrong,  
15 I will let you know.

16 Q Because that would have made a total variation  
17 of something like 12 percent.

18 A Yes, from the smallest to the largest.

19 Q Yes, and what is the total variation in this  
20 case -- 14?

21 A Over 14 percent.

22 Q What do you think is the right approach -- from  
23 the smallest to the largest, or deviation from the ideal, whether  
24 plus or minus?

25 A Both are available. If you want the deviations



1 from the ideal, the figure in this case would be 6.6 in one  
2 direction and 6.5 in the other direction. But the more dramatic  
3 figure, of course, is the deviation --

4 Q Well, naturally it is more dramatic, but I  
5 wonder which is the more helpful.

6 A I think they are both relevant and I would be  
7 glad to stand on either of them as showing a very substantial  
8 impermissible deviation in this case.

9 My present point is only that it is not de minimis  
10 and that, thus, under Swann versus Adams, and other decisions  
11 in this Court and elsewhere, it becomes necessary for the State  
12 to explain what the reasons for those deviations were. It is  
13 here that I believe the State has failed to give any satisfactory  
14 explanation. No explanation will hold up at all.

15 Let me talk then briefly to the explanations that the  
16 State has sought to give and suggest why I think each of them  
17 is inadequate and not sufficient constitutionally.

18 The State asserts in the first place that the plan  
19 took into account regional differences throughout the State of  
20 New York. This would obviously be of some significance. The  
21 difficulty is that the plan is not consistent in that standard.  
22 There are substantial unexplained departures from the notion of  
23 regionality or from the notion that they also assert of the  
24 desirability of preserving political subdivision lines, counties,  
25 cities, and towns, where possible. Let me give examples.

1           The State's plan, that is, the plan in New York at  
2 the present time, divides unnecessarily the cities of Yonkers  
3 in Westchester County just north of New York City, and Lackawanna,  
4 just south of Buffalo. It divides much more substantially than  
5 necessary the city of Rochester in upper central New York. It  
6 divides unnecessarily the town of Islip on Long Island, and it  
7 divides in ways that we think are undesirable but make no par-  
8 ticular point of part of the boroughs in the City of New York.

9           Q     Do you say that not dividing cities is a per-  
10 missible consideration?

11          A     Yes, sir.

12          Q     You just say that that really is just not true  
13 in this case because at least they inconsistently applied the  
14 principle.

15          A     Again, from Reynolds and Sims, and through the  
16 more recent cases, it has been perfectly clear that one of the  
17 factors that could be taken into account in justifying popu-  
18 lation deviations of small amounts, is the desirability of  
19 protecting against the gerrymander, and one way of protecting  
20 against the gerrymander is to use whole political subdivision  
21 units, so that there can be no charge that the lines are drawn  
22 in ways that cannot be checked out.

23                But in the State of New York, the State legislative  
24 Act here in question has unquestionably divided towns and cities  
25 in ways that were not necessary. I suggest "not necessary"

1 because the appellant himself has devised a plan which has been  
2 before the Court throughout, which he does not assert is the  
3 best plan, does not suggest is one that should be approved by  
4 this Court or by the Legislature, but simply to show that on the  
5 basis of an entire plan for the State of New York, it is possible  
6 to draw a plan that is more compact, more equal, and does not  
7 divide any town or city that is not required to be divided be-  
8 cause of the substantiality of the population of that town,  
9 county, or city.

10 So all these things have to be explained by the State  
11 and they have not done so, certainly, on the basis of regionalism.  
12 Take for example the 35th Congressional District, which stretches  
13 from virtually the outskirts of Rochester all the way over  
14 virtually to Schenectady, a stretch of about 200 miles, more  
15 than two-thirds of the whole State.

16 Now, we have some reason to know what the basis for  
17 this district drawing was when it was first drawn in 1951. It  
18 was designed, according to the popular legend in New York, which  
19 I have no reason to doubt, to make impossible the election of a  
20 Democratic Congressman. In fact, a Democratic Congressman has  
21 been elected every time since then, so the purpose failed, but  
22 there still remains no logic to that district except now as a  
23 means of protecting the incumbent in that particular office.

24 It is not a region. It is not the Mohawk Valley, as  
25 was asserted by witnesses before the hearing below. It is not

1 land or area within the State of New York that makes any par-  
2 ticular sense except for the political reasons for which it was  
3 originally drawn and has now been continued.

4 The State has suggested that it is appropriate to  
5 consider the so-called "blue line" counties together. The blue  
6 line is essentially the line drawn around the Adirondack Pre-  
7 serve in upper northeastern New York, and that is the justifica-  
8 tion, they say, for not drawing the district lines somewhat  
9 more consistently with compactness and population, as appellant  
10 has suggested.

11 But, in fact, the very counties that are at issue  
12 here -- Lewis County, to which reference has been made before --  
13 is in the State legislative districts joined with a non-  
14 Adirondack county, Oneida, which is a Mohawk Valley county.

15 So there is, again, no consistency of approach in the  
16 State and there is, we believe, no justification for the lines  
17 which have drawn that the State has satisfactorily advanced in  
18 any of these points.

19 The State also argues that there is a factor of  
20 legislative convenience. Perhaps this is the legislative func-  
21 tion consideration that was discussed in the Missouri case.  
22 They say the time was too short to devise a better plan. But  
23 the time, I call to their attention, was from May of 1967 when  
24 the 1961 plan was held unconstitutional, until March 1 of 1968,  
25 the deadline imposed by the Court. There was, indeed, time to



1 draw a more comprehensive, a more equality serving plan.

2 They suggest the necessity of preserving the election  
3 districts whole, and this, of course, is a valid consideration  
4 to minimize the dislocation of a new plan.

5 Appellant, in drawing his plan, did not use election  
6 districts because he did not have, unlike the State, the popu-  
7 lation of the election districts, but it could have been done  
8 just as well with election districts as with census tracts with  
9 which he largely worked.

10 So, again, it is a factor that could have been satis-  
11 fied perfectly well and a plan that would have met the equality  
12 and the compactness standards which we believe are appropriate.

13 It is asserted also that this is the best plan that  
14 could have been secured, but note that unlike Missouri, there  
15 was no legislative compromise factor involved here. The plan  
16 was produced and was presented to the legislators on a take-it-  
17 or-leave-it basis and it was perfectly clear that they were  
18 expected to take it; both parties had agreed in advance that  
19 this was the plan that would best satisfy the give and take  
20 of the political and the legislative process, and so it was  
21 passed without any substantial dissent in both Houses.

22 Q This was done when one House had a majority  
23 of Democrats and the other House had a majority of Republicans,  
24 wasn't it?

25 A Yes, sir. Thus distinguishing it from what had

1 been the previous situation in New York, and in most States,  
2 where both Houses are of a single party, where the plan is  
3 worked out by that party and presented to the Legislature and  
4 then that seems to have been the case in Missouri, but the dis-  
5 sent dispute is unavailable in those cases.

6 But here it was necessary to give something to both  
7 parties in order to make the plan acceptable legislatively.

8 Further I call to your attention, and here you will  
9 have to look at Appendix B, the map of Queens in New York City,  
10 which is on that map.

11 The Sixth and the Eighth Congressional Districts, if  
12 they were to be added together, could be a reasonably compact,  
13 almost circular area. But as you will notice, they have been  
14 drawn as the interlocking wedges as though of two wrenches  
15 working together. The question is why they were drawn in that  
16 fashion?

17 The perfectly clear answer is that the Sixth District  
18 is a Republican District and was intended to be so. The Eighth  
19 District is a Democratic District and was intended to be so.

20 I shall advert later, in connection with my argument  
21 on gerrymander, to the exact evidence which shows that that  
22 was not only the result but, as well, the intent.

23 Let me turn now to the question of gerrymander to  
24 which these arguments are, I believe, inextricably linked.  
25 Here the question is deviation from equality and deviation from

1 compactness and the burden being, I believe, on the State to  
2 explain both in the rather extreme circumstances here presented.

3 Q I don't see Richmond here. Where is that?

4 A It shows only in the extreme left-hand corner,  
5 just the very tiniest touch of the lower left-hand map.

6 You see that little line going from the 2 there.  
7 That is the Verrazanno Bridge. To the left of that is Richmond,  
8 but it doesn't appear here. Richmond, intact, is a part of the  
9 16th Congressional District. It is not large enough by itself  
10 to justify a whole district, so it is linked through the Verra-  
11 zanno Bridge to part of Brooklyn.

12 Q Over there in Kings County.

13 A Yes, sir.

14 Q Thank you.

15 A The gerrymander, as is well known, is that de-  
16 vice by which a Legislature seeks to add to or diminish the  
17 power of a political group, a racial group, a socio-economic  
18 group, a religious group, or any other kind of group interest.  
19 It is this that we believe is demonstrated in this case and it  
20 is this that we believe must be prohibited in terms of the con-  
21 stitutional philosophy that is here involved.

22 Whether speaking in terms of Article I, Section 2, of  
23 the Constitution, as in Wesberry versus Sanders, or in terms  
24 of the equal protection of the laws clause of the Fourteenth  
25 Amendment, we believe that a gerrymander designed to favor or

1 to disfavor some identifiable group is constitutionally imper-  
2 missible.

3         The State has argued -- I think not very strongly,  
4 but it should be mentioned -- that there is a doubt as to the  
5 justiciability of the gerrymander issue. The reliance there is  
6 on bits and pieces of lower Federal Court decisions and State  
7 Courts with one exception: that is the affirmance by this Court  
8 of the decision in WMCA versus Lomenzo, in which there was a  
9 pro curiam affirmance of a decision of a 3-judge District Court  
10 below in which, among various points, the Court had suggested  
11 that the gerrymander was not a justiciable issue.

12         But the affirmance pro curiam seems equally susceptible  
13 to the point that this Court was not satisfied that there was  
14 sufficient proof of a gerrymander in that case to warrant taking  
15 it up on that particular issue. It becomes particularly un-  
16 likely that the Court has determined that the issue is not  
17 justiciable in view of the fact that WMCA was bracketed in time  
18 by Fortson versus Dorsey from Georgia, and Burns versus Richard-  
19 son from Hawaii, in each of which the Court explicitly recog-  
20 nized the possibility that, in proper circumstances, there might  
21 be racial or political gerrymandering taken into account as a  
22 basis for a holding of unconstitutionality.

23         This, we believe, is a case in which those factors  
24 are sufficiently evident, both affirmatively, and negatively  
25 by inference, to justify the imposition of that rule in this



1 particular case.

2           The proof of the gerrymander in the circumstance of  
3 this case, I think, deserves some mention at this point. The  
4 circumstances of the development of the 1968 legislative plan,  
5 and of its passage through the Legislature, suggest that there  
6 was a bipartisan agreement to protect incumbents and to trade  
7 off to make sure that individuals favored by the legislative  
8 leaders in both parties would be assured as nearly as may be of  
9 a continuance of their seat or of the giving of a new seat in  
10 the Congress to be elected in 1968.

11           There was unwavering bipartisan support for the bill  
12 by substantial majorities in both Houses. The principal Repub-  
13 lican and Democratic architects of the plan both testified in  
14 its favor in the hearing before the 3-judge District Court below  
15 and the evidence as to the Sixth and Eighth Congressional Dis-  
16 tricts indicates very clearly that they were drawn so as to in-  
17 sure a Republican preponderance in the Sixth and a Democratic  
18 preponderance in the Eighth.

19           Now, that is a point that I would like to return to  
20 in the time that I have reserved, if I may leave it at that  
21 juncture.

22           Q     Were there any findings made on that?

23           A     No, sir; there were not.

24           MR. CHIEF JUSTICE WARREN:   Mr. Zuckerman.

1 ORAL ARGUMENT OF GEORGE D. ZUCKERMAN, ESQ.

2 ON BEHALF OF APPELLEES

3 MR. ZUCKERMAN: Mr. Chief Justice, may it please the  
4 Court: Before discussing New York's 1968 Congressional Dis-  
5 tricting Act, I believe it would be advisable if we briefly con-  
6 sidered the background of this litigation.

7 As a result of the 1960 census, which reduced New  
8 York's Congressional Delegation from 43 to 41 seats, it was  
9 necessary to draw new lines in 1961. Now, although at that time  
10 this Court had not yet come down with the decisions in Reynolds  
11 versus Sims, Baker versus Carr, or Wesberry versus Sanders, the  
12 New York Legislature in its report of the Joint Legislative  
13 Committee on Reapportionment determined that the most important  
14 criterion to follow is substantial equality of population.

15 At that time, the standard that was being recommended  
16 by the American Academy of Political Science, by former Presi-  
17 dent Truman, and by various Congressional leaders such as Con-  
18 gressman Celler, was that no district should exceed the State  
19 mean by more than 15 percent, and that is what the New York  
20 Legislature did in 1961.

21 The present suit was instituted in 1966, and when the  
22 3-judge court reached its conclusion in 1967, they concluded  
23 that whatever standard the Legislature may have followed in  
24 1961 had become outmoded as a result of the recent decisions of  
25 this Court.

1           They also particularly criticized the Congressional  
2 Districts in Brooklyn under the 1961 Act, where disparities of  
3 up to 29-1/2 percent existed among contiguous districts.

4           But when it came to determining an appropriate remedy,  
5 the District Court, in its opinion, acknowledged that it might  
6 be perferable to wait until the 1970 census figures were avail-  
7 able, rather than having the Legislature draw new lines in 1968  
8 based on figures that were eight years old. However, the Court  
9 felt that the decisions of this Court in Swann versus Adams  
10 precluded such an extension.

11           Accordingly, to resolve this dilemma, the court below  
12 suggested a compromise which I would just like to quote from  
13 because this was very important when the Legislature drew the  
14 lines. The court said:

15           "Acting upon the assumption that accurate Congres-  
16 sional representation must await the 1970 census, and  
17 upon the Supreme Court's understandable objection to pro-  
18 tracted delay, a compromise may be in order. The 1968 and  
19 1970 Congressional Districts ought to be held in districts  
20 far more equalized than they are at present. There are  
21 enough changes which can be superimposed on the present  
22 districts to cure the most flagrant inequalities."

23           When the Legislature drew new lines in 1968, they  
24 followed this admonition from the District Court; whereas, be-  
25 fore six of the Congressional Districts were above 10 percent

1 from the State mean, and seven districts were below 10 percent  
2 from the State mean, there is no district in the 1968 Act which  
3 is more than 10 percent. The largest deviation, -6.6 percent,  
4 rests upon rational State policies which I will come to in a  
5 minute.

6 As for appellant's argument that the Legislature  
7 didn't have time to consider this thing, first let me point out  
8 that the Joint Legislative Committee on Reapportionment issued  
9 a 20-page report which outlined its policies, and these were  
10 in the hands of the Legislature several weeks before the Act  
11 was actually passed.

12 The bill was introduced on February 20th, and it was  
13 six days later when the Legislature enacted the statute. After  
14 considering the policies set forth in the report of the Joint  
15 Legislative Committee on Reapportionment, and after hearing  
16 witnesses for the State, and after giving any party -- or any  
17 person, I might add -- in the State an opportunity to criticize  
18 these districts at a hearing in March of last year, the District  
19 Court concluded that the Legislature had, indeed, cured the de-  
20 fects under the prior 1961 statute.

21 In Brooklyn, where the greatest disparities occurred,  
22 as I mentioned, up to 29-1/2 percent under the 1961 lines, the  
23 seven districts in this area are now all within one-tenth of  
24 one percent of each other, and they are all less than two per-  
25 cent from the State mean.

1           The minor population disparities that exist among  
2 New York's districts rest upon rational State policies which  
3 were undertaken by the Legislature to first, of course, create  
4 districts that are substantially equal in population, but at  
5 the same time to respect the integrity of county lines where  
6 possible, and to afford recognition to the natural geographical  
7 and economic regions within the State of New York.

8           Now, in New York State the problems and the aspira-  
9 tions of the people of New York City are far different from  
10 those in Long Island or Westchester; or similarly, the problems  
11 of the people in the Mohawk Valley and what they expect of  
12 their Representatives in Congress are far different from the  
13 people in the Adirondacks or in the Niagara frontier.

14           The State wanted to afford some recognition to these  
15 regional considerations. For example, the City of New York,  
16 in light of its independent charter and its special political  
17 and economic problems, was treated as a separate entity, and  
18 nobody, including appellant, has criticized this.

19           Dividing the population of New York City into the  
20 population of the State entitled the city to 19 Congressional  
21 seats, and 19 is what is received. In fact, no one has been  
22 able to point to any metropolitan area within the State of New  
23 York that has been discriminated against in drawing the 1968  
24 lines.

25           The City of New York itself divides within sub-regions.



1 Manhattan and the Bronx are separated from Brooklyn and the  
2 other boroughs by water and, as some New Yorkers will tell you,  
3 there is more than just a body of water which separates Man-  
4 hattan from Brooklyn.

5 When it came to drawing these lines, the Bronx pre-  
6 sented a problem because its population was too large for just  
7 three districts, but not large enough for four full districts.  
8 Therefore, a small segment of the Bronx, being the southwest  
9 portion, was attached to a district in Manhattan which it is  
10 connected to by four bridges.

11 Altogether, the eight districts given to Manhattan  
12 and the Bronx do not vary from each other by more than one-  
13 quarter of one percent.

14 Queens presented a problem because its population of  
15 1,800,000 was too large for just four districts, but not large  
16 enough for five full districts. To overcome this problem, the  
17 Rockaway Peninsula, which lies to the south of Queens, and which  
18 is connected by toll bridges to Brooklyn, was joined in the  
19 Brooklyn District. Therefore, the other four districts, all  
20 within the County of Queens, were joined to produce districts  
21 which do not vary from each other by more than about 200 persons.

22 Preserving the integrity of the New York City lines  
23 left Nassau and Suffolk Counties separated from the rest of the  
24 State, and this was treated as a separate region in the drawing  
25 of five Congressional Districts which are approximately equal to

1 each other.

2 When we move north of the New York City line, the  
3 Legislature followed the county lines wherever possible. The  
4 counties of Westchester, Monroe and Erie, which were too large  
5 for just one district, of course, had to be divided, but every  
6 other county of the State has not been divided in the creation  
7 of the Congressional Districts.

8 Now, in the extreme western portion of the State, the  
9 1961 districts were left alone in the drawing of the 1968  
10 statute. The reason for this is, first, nobody had criticized  
11 these lines in the arguments prior to the issuance of the prior  
12 opinion, nor had the District Court pointed out these lines as  
13 being particularly large in disparities.

14 But another reason was that these districts rest upon  
15 rational State considerations as well. For instance, the  
16 largest deviation among the present districts is the 38th Con-  
17 gressional District, and that is the area just south of Erie,  
18 south of Buffalo. This is composed of five small, agrarian  
19 counties which are all similar both as to their nature and as  
20 to their economy.

21 The only way to make this district a little bit  
22 closer to the State mean would have been to take a portion of  
23 Erie County and join this into the 38th District. However,  
24 Niagara and Erie Counties form an area which is known in the  
25 State as the "Niagara Frontier." They are treated alike when

1 it comes to receiving Federal and State grants and various  
2 State projects. They have practically nothing at all in com-  
3 mon with the agrarian counties in the southwest tier.

4 Q Where is Jamestown? Is that in the Niagara  
5 Frontier, or is it south of it?

6 A I believe Jamestown is in the 38th District.

7 Q Down in the 38th.

8 A Yes, Your Honor. That, I think, might be about  
9 the largest city in --

10 Q Where is Rochester?

11 A Rochester is in Monroe County. That is the 37th  
12 and the 36th Districts.

13 In that particular area, as long as you bring it up,  
14 it should be pointed out that that area was divided, as it has  
15 been for the past prior two Congressional districting statutes,  
16 right along the Genesee River.

17 Now, it is interesting that nobody from Upstate or  
18 the western portion of the State, came into the District Court  
19 to challenge these lines. In fact, we have no one from any of  
20 the political parties here before this Court to challenge these  
21 lines. We have just one private citizen from Queens who is  
22 taking up the supposed argument for the people Upstate or in  
23 the western portions of the State.

24 He argues that he could come up with a plan which  
25 would somewhat reduce the disparities in New York's present

1 Congressional Districts. However, he does it by ignoring many  
2 of the considerations which were felt to be very vital by the  
3 New York Legislature.

4 As an example, he would move Lewis County from the  
5 present 31st District, where it is joined with the other  
6 Adirondack Counties, and move it into the 32nd District, which  
7 would, true, bring the disparity down a little bit. However,  
8 in that event, Lewis County, which strongly believes in con-  
9 servation, since it is part of the Adirondack Preserve, would  
10 then be under the domination of the metropolitan area of Utica.

11 Appellant claims that a similar district was drawn in  
12 the State Assembly or State Senate, but those districts are  
13 much smaller in population. They are only about one-half in  
14 size of the population of Congressional Districts, so it was not  
15 possible to create one district just to encompass the Adiron-  
16 dacks.

17 As for the examples that appellant has given toward  
18 the division of cities, there were a few cities where it was  
19 impossible to keep that intact. I should say really only two  
20 cities, I believe, in the whole State. One, the City of Yonkers,  
21 a little portion, I believe one ward, was taken out of Yonkers  
22 in the creation of the 25th and 26th Districts. However, the  
23 only way appellant gets around this in his supposed plan is to  
24 take Putnam County and move it northward into the 28th District.

25 Now, this is an example of how a private citizen does

not understand the aspirations and the problems that are felt by other people in the State.

Q If you are right that it is constitutionally irrelevant to consider the economic or conservation interests or whatever you referred to, in terms of the justification of population disparities among districts, let's suppose you have a case where there is a very large population disparity between District A and District B, and let us suppose that that population disparity is a result of the Legislature's judgment that it is appropriate to consider the border counties in District A rather than District B because those border counties have interests that are harmonious with the rest of District A, but not harmonious with District B.

Are you arguing to us that that is a relevant constitutional fact?

A To a limited extent, Mr. Justice. What I am arguing is that the most important criterion is, of course, equality of population.

Q Is what?

A Equality of population. But I believe disparities, minor disparities, should be permissible when the State feels that rational State policies require such disparity.

Q I know, but are you saying here if the disparity is gross --

A No, Your Honor. If the disparity were, say, 50



1 percent or 30 percent, I would not say that --

2 Q Well, what are the factors that are relevant,  
3 constitutionally relevant, assuming that a gross disparity  
4 exists? Any factors?

5 A Well, if the disparity is gross enough, I suppose  
6 no explanation by the State would satisfy this Court.

7 Q Suppose it is not quite so gross. Suppose it is  
8 just a little gross.

9 A Well, I think what this Court is really interested  
10 in is fair and effective representation.

11 Q No, I understand it to be the constitutional  
12 standard.

13 A Yes. What I am saying is that the Legislature  
14 might feel, for instance, that nobody in Congress is speaking  
15 for the conservationist interests of the State. There are 41  
16 Congressmen from New York. They might feel that it was neces-  
17 sary to have at least one Congressman who represented the  
18 Adirondack area.

19 Q I thought you just said that is constitutionally  
20 irrelevant, where you have a gross population disparity. Now  
21 let me change that wording.

22 I don't suppose that numerically there is a disparity  
23 just on the basis of numbers which is constitutionally objec-  
24 tionable. Is it permissible, is it mandatory or is it permis-  
25 sible for this Court to take into account a conservation

1 interest in the terms that you have just stated?

2 A I believe it is permissible.

3 Q Well, does that affect the literal constitutional  
4 standard? The constitutional objective, if I may speak very  
5 roughly and broadly, is to see that one man's vote has equal  
6 effect with the vote of another man; is that right?

7 A Yes, Your Honor.

8 Q In lay parlance? Now, what does the conservation  
9 factor in the example you have put to us have to do with that?

10 A Well, what I was referring to, the language of  
11 "fair and effective representation", I believe, can be found in  
12 the Reynolds versus Sims opinion. I believe this was the overall  
13 goal. One man-one vote was felt to be the guiding principle  
14 which would lead toward the effectuation of this goal.

15 But this is not just solely a question of numbers.  
16 Basically, people want to be adequately represented in Congress  
17 and the question then becomes who is being injured? If the  
18 result of creating a Congressional District representing con-  
19 servationist interests is such that the district is six or  
20 seven percent from the State mean, is anyone else in the State  
21 really being injured to any great extent?

22 Perhaps in a very abstract sense they are. But if  
23 one vote is 94/100ths of another vote, I would say the injury  
24 really only lies in the abstract.

25 Q Well, in the Midland County case I wrote an

1 opinion in connection with the local government problem and  
2 arguments of that sort were made. I regret to remind you that  
3 that was a dissenting opinion. I don't believe it should have  
4 been, but that is the way it turned out.

5 A Yes, Your Honor.

6 Q But you are arguing, then, that these qualitative  
7 factors are constitutionally relevant.

8 A I am.

9 Q Do you see a difference between that kind of an  
10 interest, say representation of conservation interests on the  
11 one hand, and gerrymandering on the other, in terms of consti-  
12 tutional relevance?

13 A Well, let me get to the issue of gerrymandering,  
14 because I think that presents rather complicated factors.

15 Q And I hope you will say something about Six and  
16 Eight, Districts 6 and 8.

17 A Yes, I will.

18 First let me say, at the outset, that this Court has  
19 never held that partisan gerrymandering presents a cognizable  
20 issue under the Fourteenth Amendment. I would say on the facts  
21 of this case, it would be hard to imagine a weaker test case  
22 than the present one to bring forth this issue.

23 There is a great deal of confusion, first of all,  
24 about what gerrymandering means. The evil of the original  
25 gerrymandered districts in Massachusetts was not that they

1 took the shape of a salamander or a dragon. The evil there was  
2 that the result was expected to produce a completely dispropor-  
3 tionate share of seats to one party, and when I say "dispropor-  
4 tionate" I mean because the lines were drawn in such a way that  
5 one party was expected to get many more seats than their gen-  
6 eral voting patterns in the State would entitle them to.

7 I think we often lose sight of this in looking at  
8 district lines in the abstract. Compactness certainly is  
9 esthetically pleasing, but it is not the sole answer. You  
10 could have perfectly compact districts and you could still have  
11 partisan abuses, depending upon where various groups lie within  
12 the State.

13 Now, assuming that gerrymandering presented a justic-  
14 iable issue, I believe it should be evident that appellant has  
15 failed to present any evidence which would justify this Court  
16 overturning the districts on that basis.

17 First of all, in any districting plan there is always  
18 going to be certain districts which are going to favor one party  
19 and districts which will favor another party. Professor McKay  
20 in one of his articles entitled "Reapportionment Reappraised"  
21 has himself said that legislative representation lines are never  
22 neutral. If you look at any one district, you can always argue  
23 that if the lines were drawn to the left two blocks or to the  
24 right three blocks, Party A or Party B might have won the  
25 election.

1           What I think of in terms of gerrymandering is the  
2 definition which is found in the Encyclopedia of Social Sciences  
3 which I have set forth in my brief. This speaks of the abuse  
4 of power by a party that is dominant at the time in the legis-  
5 lature, so as to maximize its political strength throughout the  
6 State.

7           Now, no one has shown that there was any abuse under  
8 New York's present lines. In terms of political realities, there  
9 couldn't have been an abuse, because the Democratic Party con-  
10 trolled the State Assembly, and the Republican Party controlled  
11 the State Senate.

12           The only two examples that appellant has been able to  
13 point to are the 35th District and the 6th District. The 35th  
14 District is located in the lower central valley of New York,  
15 this district right here. It is rather an elongated district  
16 and I admit it is not esthetically pleasing if the lines are  
17 viewed in the abstract, but it is a perfectly logical district.  
18 It consists of eight agrarian counties. They are all small in  
19 population.

20           The boundaries of the district exactly follow the  
21 boundaries of these counties. As for the argument that this  
22 was drawn with some partisan intent in view, as appellant's  
23 counsel has conceded, although it was expected to produce a  
24 Republican Congressman, in each of the four elections that have  
25 taken since this district was created, the Democratic candidate



1 has won the election.

2 Turning to Queens, we have the example of the 6th  
3 Congressional District. What appellant is basically arguing  
4 is that if the 6th District was drawn somewhat differently, a  
5 Republican candidate might not have won that district.

6 Again, in terms of realities, I doubt this very much,  
7 because in the last election the Republican Congressman carried  
8 the district by a margin of more than two to one. In fact, it  
9 is misleading when you come to New York City just to talk in  
10 terms of Republican as against Democrat. The people of New York  
11 City are quite sophisticated in who they vote for. That par-  
12 ticular candidate is a Republican, but he happens to have a  
13 very liberal persuasion and he happens to draw large numbers of  
14 votes from Democrats and Independents.

15 What appellant tries to seize upon is the fact that  
16 at the hearing below, a witness representing the Majority  
17 Leader of the State Senate said that he saw nothing wrong with  
18 a district, the 6th District, electing a Republican Congressman.  
19 What he was saying, if his remarks are read in their full con-  
20 text, was that the Republican Party generally captures about 43  
21 percent of the vote in the Borough of Queens. Therefore, he  
22 couldn't see anything wrong in having them elect one candidate  
23 in the four districts that are allotted to Queens. In fact, if  
24 the Democrats won all four districts, the argument could have  
25 been made that this was not fair and effective representation.

1           Finally, I would like to bring to the Court's atten-  
2       tion the fact that regardless of the outcome of this appeal,  
3       New York will have to draw new Congressional districting lines  
4       after the 1970 census, because according to all projections of  
5       the United States Census Bureau, the State of New York will  
6       lose at least one Congressional seat.

7           We feel the present act is constitutional. We agree  
8       with the District Court. If this Court should feel, however,  
9       that there is any defect in any of these lines, we would ask  
10      that under equitable considerations, the drawing of new lines  
11      be deferred until the 1970 census figures are available.

12           Q     When would that be?

13           A     I imagine that would be in 1971.

14           Q     Which would mean you would probably have the  
15      same lines in '70 and '72?

16           A     No, I would say that the 1972 election will be  
17      held under new lines. Certainly I think the Legislature should  
18      have the figures by the end of 1971, even if we have to pay  
19      more money to get them.

20           Q     The 1970 election would have to be under this  
21      statute.

22           A     One more election.

23                 If there are no further questions --

24           Q     Well, I take it the gerrymander argument really  
25      doesn't depend on any disparities in numbers, does it.

1           A     No.

2           Q     The districts could be absolutely equal in  
3 population and if the gerrymander argument is good here, it would  
4 be good there.

5           A     Right. That argument does not -- well, of course,  
6 disparities might be one example.

7                 Since you bring that up, let me make reference to the  
8 example in the Adirondacks where we said that Lewis County was  
9 kept in the 31st District, not in the 32nd.

10           Now, this entire area here is Republican. The Repub-  
11 lican candidates for Congress captured both the 31st and the 30th  
12 Districts by very large margins. So the reason that Lewis  
13 County was kept in the 31st certainly was not for partisan  
14 reasons.

15           Q     Do you concede that -- the Adirondack area is  
16 the 31st, is it?

17           A     The 31st.

18           Q     Do you concede that there was deliberate intent  
19 to put the Adirondack counties in one district?

20           A     Yes.

21           Q     In order to lump together the so-called conser-  
22 vationist interests?

23           A     Basically, yes. In fact, Lewis County --

24           Q     Well, is that any different than deliberately  
25 putting in the 31st District either all Democrats or all

1   Republicans?

2           A     Well, as I said, the idea was to get a Congress-  
3   man who would represent the dominant position in this area.

4           Q     And you said that the 35th was a deliberate  
5   attempt to lump together all rural interests.

6           A     What we were looking for were logical districts.

7           Q     Well, you say it is perfectly justifiable to  
8   deliberately put together --

9           A     No, Your Honor; not if it created large dispari-  
10   ties in population.

11          Q     No, no; not at all. But it was done to put to-  
12   gether all the people of one interest or of one persuasion.

13          A     This area is agrarian.

14          Q     Yes.

15          A     And they had been together for many years in one  
16   particular district. This is what the people wanted of their  
17   Representatives. This is the pressure that --

18          Q     You suggested that it is wholly proper for the  
19   Legislature, not questionable constitutionally, for the Legis-  
20   lature to draw the district lines based upon the character of  
21   the interest groups who are defined by the district.

22          A     I am not saying that the Legislature was required  
23   to do that in this case, but at the same --

24          Q     But let's assume that it does do that. You say  
25   it may do that.

1           A     Where there are not disparities in population of  
2 any appreciable extent, and where this is an area of the State  
3 where the people want this, where this is the pressure they  
4 bring to bear on the Legislature. Otherwise, if the Legislature --

5           Q     So in the 31st, the Legislature could say, "We  
6 are going to put all the conservation interests in that dis-  
7 trict, give them a Representative, and in the 35th we are going  
8 to give the rural interests who are in that county a Represen-  
9 tative, and then down in the city we are going to draw a district  
10 so that the Negroes have a Representative, and another one in  
11 which the Roman Catholics will have a Representative."

12          Q     How about those who are opposed to freeways?  
13 Do you want to get a district for them, too?

14          A     That will be rather difficult if we keep to the  
15 principle of contiguity.

16                What I am saying is that I believe to try to get fair  
17 and effective representation, it may not be impermissible in  
18 States like New York to give recognition to some of these in-  
19 terests.

20          Q     Do you have to be right in what you have just  
21 said to win this gerrymander argument?

22          A     No, this is just a viewpoint, but I think the  
23 argument that has been thrown in this case is so weak that I  
24 am just throwing this in --

25          Q     Well, apparently they haven't seized on the



1 strong gerrymander argument, about the 31st District.

2 A Well, certainly when you talk about partisan  
3 gerrymandering, one political party as opposed to another, there  
4 really is no argument that can be made with regard to the 31st  
5 District.

6 Q Mr. Zuckerman, in your argument on gerrymandering  
7 you stressed the fact that there was no partisan districting;  
8 that it was agreed by both sides that it was all right. Would  
9 you think that if we consider that there has been gerrymandering  
10 that it would be any less wrong had it been accomplished just  
11 because the members of the Legislature or the members of Con-  
12 gress wanted to have their own districts protected and did it  
13 for that reason, rather than for partisan reasons?

14 A Well, that only played an element in this re-  
15 gard, Your Honor: that since they felt there would be new dis-  
16 trict lines after the 1970 census, they thought it would be  
17 foolish to completely wipe all the old districts off the map  
18 and start in a vacuum. They felt it would be desirable to make  
19 as few changes as possible, rather than have three completely  
20 different changes in Congressional constituencies within about  
21 a six-year period.

22 Thank you.

23 MR. CHIEF JUSTICE WARREN: Mr. McKay?  
24  
25

1 REBUTTAL ORAL ARGUMENT OF ROBERT B. MCKAY, ESQ.

2 ON BEHALF OF APPELLANT

3 MR. MCKAY: May it please the Court, two brief,  
4 specific points, one in response to Mr. Justice White's earlier  
5 question about Gong versus Kirk.

6 As I see the District Court opinion in that case,  
7 which is 278 Fed. Supp. 133, which is the one that I believe  
8 was affirmed by this Court, the reference there is to the dis-  
9 parity in population of only 8,000. Whether something else  
10 was developed between the time of the --

11 Q There was. There was a motion for reconsidera-  
12 tion in the District Court, which brought the other figures to  
13 the District Court's attention and the figures were discussed  
14 in the jurisdictional statement in response here, to some ex-  
15 tent.

16 Now, could I ask you if you would make the same argu-  
17 ment on gerrymander here, whether there was any population  
18 disparity or not?

19 A Yes, sir; I would. It was emphasized and exag-  
20 gerated by the two facts of substantial population deviations,  
21 otherwise unexplained, and the lack of compactness, which makes  
22 the district suspect, and then there is also affirmative evi-  
23 dence in this case that --

24 Q Is it also your claim here that the population  
25 disparities themselves were energized by a gerrymandering motive?

1           A     Yes, sir; at least in part. Let me give you some  
2 examples of that, if I may.

3           I will first make reference to my own writing, the  
4 fact that the drawing of political lines is never neutral. Of  
5 course, that is true. But the objective of the Constitution,  
6 and of the earlier decisions of this Court, as I understand it,  
7 is to make sure that it be as neutral as possible and it be as  
8 free of erroneous, nonpermissible considerations as possible.

9           We go, then, right to the question of whether it is  
10 permissible to have a conservationist viewpoint represented,  
11 or a religious viewpoint represented, or a Congressman who  
12 represents a racial, a socio-economic, or political --

13          Q     Or an urban district.

14          A     Or an urban district. Now, the urban districts  
15 pretty well will be represented where you have a substantial  
16 city and, indeed, it would be my own belief that as far as pos-  
17 sible to protect against gerrymandering, the city should be  
18 kept intact. The district lines, whether they be cities,  
19 counties, townships, or whatever the case may be, should be  
20 adhered to where possible, and that is what has not been done  
21 in the State of New York.

22          They should be adhered to, to the extent possible,  
23 to protect against the gerrymander.

24          Now, the question was raised by Mr. Justice Fortas --

25          Q     Is one independent ground of yours that they

1 are gerrymandering?

2 A Yes, sir.

3 Q It does not depend at all upon the disparity  
4 of the voters, one man-one vote?

5 A We make both arguments, Your Honor: that there  
6 are substantial population inequalities that are not explained  
7 by any rational and permissible ground; and that there is a  
8 gerrymander.

9 Q Which constitutional provision do you rely on  
10 as to the gerrymandering?

11 A On both the equal protection clause of the  
12 Fourteenth Amendment and Article I, Section 2. Fair represen-  
13 tation, the vote by the people, is within Article I, Section 2,  
14 and that to us means equality and fairness, and the equal pro-  
15 tection clause, of course, means that there shall not be arbi-  
16 trarily drawn districts.

17 Q With reference to constitutional principles,  
18 do you say that in addition to actual population equality, con-  
19 stitutionally there is also required compactness?

20 A Yes, sir.

21 Q And that is the way you handle it, or express  
22 it, that gerrymandering can't be done, whether it is for con-  
23 servationist, religious, political, or other grounds, because  
24 you would introduce the element of compactness, the consti-  
25 tutional principle?

1           A     Yes, sir.

2           Q     I have forgotten, it is some while now, but  
3 didn't the old 1912 statute, the Federal Statute, as I recall  
4 it, used to have the criteria of compactness, contiguity --

5           A     And contiguity.

6           Q     Was there also population? I have forgotten.

7           A     No, there was not.

8           Q     Now that, of course, was repealed. In the old  
9 Groom case, wasn't there some consideration of compactness as  
10 a constitutional criterion, or not?

11          A     No decision on that point.

12          Q     Was it raised or suggested or discussed?

13          A     Whether it was raised, I am not sure; but there  
14 was no decision on that point.

15          Q     But in any event, you would ask us to add to  
16 substantial population equality, a constitutional requirement  
17 of compactness.

18          A     That is correct.

19          Q     Now what about contiguity?

20          A     And contiguity, I think, quite clearly.

21          Q     Well then what you would have us do then, ulti-  
22 mately, I take it, is to convert those statutory criteria, add-  
23 ing the population equality, as we have now defined it, into  
24 constitutional criteria.

25          A     Yes, sir.



1           Q     May I ask you, along the same lines that my  
2 brother Brennan has been asking questions, do you really mean  
3 that, or do you mean that where there is gerrymandering, the  
4 likelihood is very great that the result of it will be to dilute  
5 or arbitrarily to manipulate the effect of the individual's  
6 vote so that, in short, are you talking about two constitutional  
7 principles here, or one?

8           One constitutional principle has been popularly called  
9 the one man-one vote principle. Now, is gerrymandering under  
10 that heading, or is it something different in constitutional  
11 terms?

12          A     I believe it is a function of the equality  
13 argument. Our proposition, I think, would run this way: that  
14 substantial equality is required. In this case, that alone  
15 would be enough to justify reversal.

16          But in addition, in order to make the equality aspect  
17 work, as someone suggested, it is only one part of a pair of  
18 pliers -- equality. In order to make it work, there must also  
19 be protection against use of the districting process for imper-  
20 missible purposes or else equality serves no real function of  
21 itself.

22          So our second argument is that equality and compactness  
23 must be satisfied in reasonable ways and where it is not satis-  
24 fied, the State must explain. Some explanations can be given.  
25 But in this case there are no satisfactory explanations and,

1 indeed, there is affirmative evidence of a conscious intent to  
2 gerrymander for partisan reasons.

3 Q Well, if I live in the northeast section of a  
4 State and the Legislature gerrymanders the State -- to take an  
5 extreme and, therefore, absurd example to illustrate the point --  
6 so as to put my area in with the extreme southwest portion of  
7 the State so that they will put together a Democratic district,  
8 then it seems to me that what has happened is that my vote as  
9 a resident of one of these extreme areas is being manipulated.

10 A Yes, sir.

11 Q And that does bear upon the principle of equal  
12 effect of my vote.

13 A Right.

14 Q And it is from that principle, I take it, that  
15 you would derive a constitutional basis for your insistence upon  
16 an absence of gerrymandering.

17 A Quite clearly so. In this case there is, in  
18 addition, the affirmative evidence of conscious purpose for  
19 partisan or bipartisan results and, in addition, as Mr. Zucker-  
20 man has just conceded, there was an effort to secure a conser-  
21 vationist district, which seems to me to pervert the old rural-  
22 urban dichotomy that was the thrust of Reynolds versus Sims.

23 Q We don't have to reach this gerrymandering ques-  
24 tion if we agree with you that the substantial population prin-  
25 ciples have been met.

1           A     That is right, sir.

2           Thank you.

3           (Whereupon, at 1:50 p.m. the argument in the above-  
4 entitled matter was concluded.)  
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