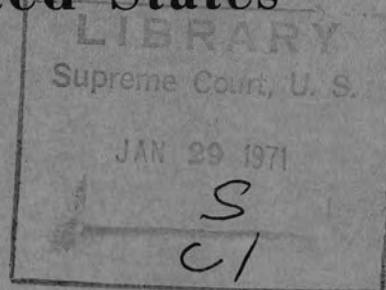


# Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

Docket No. 96

A. T. GORDON, ET AL.,

Petitioners

VS

GRANVILLE H. LANCE, ET AL.

Respondents.

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C O N T E N T S

ARGUMENT OF:

P A G E

George M. Scott. Esq., on behalf of Petitioners.	2
Charles C. Wise Jr. Esq., on behalf of Respondents.	21
George M. Scott, Esq., on behalf of Petitioners.	34

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## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

A. T. GORDON, ET AL.,

Petitioners

vs

No. 96

GRANVILLE H. LANCE, ET AL.,

Respondents

The above-entitled matter came on for argument at  
10:02 o'clock a.m., on Monday, January 18, 1971.

## BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

## APPEARANCES:

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On behalf of Petitioners

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On behalf of Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first today in Number 96: Gordon against Lance.

Mr. Scott, you may proceed whenever you are ready.

ORAL ARGUMENT BY GEORGE M. SCOTT, ESQ.

ON BEHALF OF PETITIONERS

MR. SCOTT: Mr. Chief Justice and may it please the Court:

I must apologize for my voice. I have had laryngitis the last few days and I hope the Court will indulge me in this.

MR. CHIEF JUSTICE BURGER: That's quite all right, counsel.

MR. SCOTT: This case is unique, I think, in the annals of jurisprudence. The question presented has never before been presented to this Court. The question: does equal protection of the laws and the 14th Amendment mean majority rule in special elections which determine questions of public policy.

To put it another way: does the 60 percent requirement, an extraordinary majority requirement of the constitution, and enabling(?) statutes in the State of West Virginia, violate the 14th Amendment of the Federal Constitution?

The facts of the case are not in dispute; they are simple and they are brief. In my home county, Roane County in



1 West Virginia, in April 1968 the Board of Education submitted  
2 to the people for decision, two issues. The first question  
3 was whether or not to issue \$1.8 million in general obligation  
4 bonds.

5 The second issue is whether or not to increase  
6 the rate of taxation for current expenditures beyond the  
7 constitutionally prescribed maximum for a period of five years.

8 On each of these issues, approximately 51 and a  
9 half percent of the persons voting, voted in the affirmative  
10 and, of course, the issues failed of passage at the canvass  
11 by the board of education because the requisite 60 percent  
12 of the voters did not approve the issues.

13 The Constitution of the State of West Virginia was  
14 adopted in 1872 and at that time the 60 percent requirement so  
15 far as bond indebtedness or any indebtedness extending beyond  
16 the current fiscal year, was a part of the constitution.

17 In 1932 the tax limitation amendment was adopted  
18 which set forth maximum tax rates for each political sub-  
19 division and this limitation provided that these rates could  
20 not be exceeded, except by vote of the people and 60 percent  
21 voting in the affirmative.

22 In 1966 an amendment was presented to the people  
23 of West Virginia, and the only question in that amendment was  
24 whether or not to amend and cancel the 60 percent requirement  
25 and substitute a simple majority requirement. And the people

1 voted by a majority to retain this 60 percent rule.

2 Despite this background and in light of this  
3 background, the Supreme Court of Appeals of the State of  
4 West Virginia, decided at the instance of five citizens of  
5 our county who allegedly voted in the affirmative on each of  
6 these issues, that the 60 percent requirement, the extra-  
7 ordinary majority requirement was inherently discriminatory  
8 in that it deleted or debased the vote of the persons who voted  
9 "yes," as compared to the vote of the persons who voted "no."

10 Q Can the constitution of West Virginia be  
11 changed by a simple majority vote?

12 A Yes, Mr. Chief Justice, when it is submitted.  
13 if it is submitted at the instance of a two-thirds vote in  
14 each house of the legislature. On the vote of the people it  
15 has a majority vote when submitted to the electorate at large.

16 Q Does this record by any chance show what the  
17 vote, in fact, was?

18 A I'm not sure, Your Honor. I think that the  
19 dissent of Judge Haymond does show that.

20 Q That is back in 1962, you mean?

21 A 1966.

22 Q 1966, when the amendment was submitted?

23 A Yes.

24 Q And this involved both a bond issue and a  
25 tax levy; is that it?

1 A Yes, Mr. Justice.

2 Q Each requiring 60 percent of the vote of  
3 those voting?

4 A That's right.

5 Q Does each of these provisions date back to  
6 1932?

7 A The tax limitation amendment dates back to  
8 1932; that's the levy.

9 Q Tax levy?

10 A Limited --

11 Q The tax remedy in excess of what the local  
12 government can do by itself?

13 A That's right, Mr. Justice. In 1932 --

14 Q And how about the bonding authority?

15 A Our political subdivisions have always been  
16 prohibited from borrowing money except by approval of two-  
17 thirds of the persons voting on the question of borrowing  
18 money.

19 Q Ever since the existence of West Virginia as  
20 a state?

21 A That's my understanding; at least from the  
22 1872 constitution, our constitution was --

23 Q So far as the bonding authority goes, it goes  
24 back to the original constitution of the State of West  
25 Virginia?

1                   A     Yes, Mr. Justice Stewart.

2                   Q     Now, we think that this -- of course this  
3 case doesn't present a situation where there was a discrimina-  
4 tion based upon race or religion or wealth or place of  
5 residence or the matter of status of any circumstance that  
6 prevailed in any of the so-called "one-man, one-vote" cases.  
7 There is, I think, no factual analogy between those cases and  
8 this case and yet our court felt obliged, by virtue of the  
9 language in the opinions of those cases, to hold that this  
10 60 percent requirement was inherently discriminatory; and we  
11 think -- it is our submission that this is a monstrous mis-  
12 application of the "one-man, one-vote" rule and to support  
13 this submission I have cited to the Court in my brief,  
14 articles which have appeared in the Virginia Law Review and  
15 the Georgetown Law Review.

16                   I have also stated articles which have appeared in  
17 the Harvard Law Review, the Columbia Law Review, Houston Law  
18 Review, Vanderbilt Law Review, and the West Virginia Law  
19 Review and there are others, and the commentators are severely  
20 critical of this decision, I think without exception.

21                   Q     The mathematical reasoning of the court is  
22 certainly impeccable; isn't it?

23                   A     Well, it's certainly beyond dispute, Mr.  
24 Justice Harlan, that 60 does not equal 40, and this is, I think,  
25 the basic error the court fell into. They treated this as a



1 problem of arithmetic rather than a problem of definition or  
2 one of philosophy. I think unless they reach this profound  
3 conclusion: the fact that 60 is to 40 as one-and-one-half is  
4 to one, that the rules of arithmetic, I think, must lead to  
5 an absurd result; because if you say, speaking mathematically,  
6 that this provision is inherently discriminatory then mathe-  
7 matically speaking you would have to say that a majority rule  
8 is likewise discriminatory. And a majority is, to my idea,  
9 as more is to less and inherently unequal.

10 But, it is a mathematical, I think, that can't be  
11 used.

12 Q Yet one can't escape the fact that arithmetic  
13 underlies the one-man, one-vote rule; doesn't it?

14 A Only on the basis of comparison, I think, in  
15 the geographical sense, and also a different context of whether  
16 so many more people have the right to elect only one delegate,  
17 whereas, as opposed to fewer people in another area. So,  
18 mathematics does have a part in it, but not in the sense that  
19 I would present here; that is the sense of equality. It  
20 doesn't have to -- one doesn't have to equal one before it can  
21 be constitutional equality, it seems to me.

22 Q What did the court do with the Federal Con-  
23 stitutional amending process?

24 A Ignored it.

25 Q Ignored it?

1           A     The court said that the Federal analogy was  
2 frivolous and wholly beside the point. I want to get to that  
3 a little later, too, that it was frivolous and wholly beside  
4 the point.

5           Q     Does the record show what percentage of  
6 eligible voters actually voted in this election?

7           A     The record does not show that. I can tell  
8 you, and I have the agreement of my counsel here, there were  
9 8,911 registered voters in Roane County at the time of this  
10 election. The record does show that how many persons voted  
11 was approximately 5,700 people voted, that approximately 60  
12 percent of the eligible voters voted.

13          Q     Do you know what your normal turnout is in  
14 a -- was this a general election here?

15          A     This was not a general election; this was a  
16 special election.

17          Q     Special election.

18          A     And this was a rather excellent turnout, I  
19 think --

20          Q     This is an excellent turnout for a bond  
21 election.

22          A     I think that the turnout was an excellent  
23 turnout.

24          Q     Yes.

25          A     For a rural area in the spring when the roads

1 were bad and these were generally scheduled, I might add, Mr.  
2 Justice White, so that there wouldn't be too heavy a turnout.

3 Q Well, that's not unusual.

4 A No; I'm certain of that.

5 Q Do you know what your turnout is in a  
6 general election year?

7 A It would be strictly a guess, but I would  
8 say roughly 75 percent. We have a politically-minded county.

9 So, as I have said in answer to the question by  
10 Mr. Justice Harlan, it's not a mathematical problem; it's a  
11 philosophical problem.

12 And of course --

13 Q Suppose, Counsel, if this were a mathematical  
14 problem, essentially, it could be reasonably argued that on  
15 the Respondents' theory, one-third of the registered voters,  
16 are committing the credit of all of the registered voters.  
17 There were about 28 or 2900 for the bond issue; were there  
18 not?

19 A Yes; 2800-odd; yes.

20 Q Now, that argument, if it's mathematics, a  
21 third -- normally a third of the people are committing 8900  
22 people, 2800 people --

23 A Yes, sir.

24 Q What would you say if, the position were the  
25 other way; if it only took a 30 percent vote in favor to pass

1 the bond issue?

2 A I would say the same thing; I think it's  
3 valid.

4 Q That there is no majority rule either way.

5 A I think not. I think with a situation of a  
6 minority veto -- of course our constitution and our history is  
7 full of instances of minority vetos, and not necessarily  
8 minority rule --

9 Q And full of constitutional provisions to  
10 protect the minority?

11 A I'm sorry, Mr. Justice.

12 Q And full of constitutional provisions to  
13 protect minorities?

14 A Yes. Before this decision I thought that was  
15 what the 14th Amendment was all about.

16 There is one thing that I think is pivotal(?) here  
17 -- the essence of the 14th Amendment in a voting situation is  
18 that every voter should have equality of voting power.  
19 And I believe that the court below more or less conceded it.  
20 The California court, in its scholarly decision, a 62-page  
21 decision, I think, did concede, and I believe that my adver-  
22 sary here, and I think we would all have to admit that when-  
23 ever the -- and in a situation like this, when any man enters  
24 the voting booth, when all the voters first go to the polls,  
25 before the election is held, each has exactly the same



1 opportunity; each has exactly the same power to affect the  
2 ultimate decision, as every other voter, regardless of how he  
3 votes. He's got the same power to affect the outcome of the  
4 election when he goes in.

5 Now, this wasn't the case in any of the one-man,  
6 one-vote cases and in those cases it seems to me the state had  
7 told its people: regardless of how you vote, your vote as a  
8 resident of this populous county can't have as much effect  
9 on the ultimate decision-making process as a vote of the man  
10 who lives in the less populous, rural areas.

11 But, surely the state has told that: you each have  
12 votes; each has the equal power to affect the outcome. There-  
13 fore the majority requirement is merely a rule of decision;  
14 it prescribes how many votes it takes to win. No plurality;  
15 not a majority, but 60 percent of the votes to win.

16 Q What if West Virginia should say that in order  
17 to elect a Republican candidate it took 60 percent of the  
18 votes; but in order to elect a Democratic candidate it only  
19 took 50 percent.

20 A That would be monstrous. I think that would  
21 be monstrous, and of course in violation of equal protection  
22 of the law. The candidates are individuals; they are people  
23 and subject to discrimination. They could be treated un-  
24 equally in such a measure.

25 Q But here you say that in order to impose a

1 tax levy or to impose bond indebtedness, it takes 60 percent  
2 of the vote, but on other issues it takes 50 percent.

3 A Well, the affirmative of a bond issue, or a  
4 negative of a bond issue is not a person subject to dis-  
5 crimination.

6 Q No, but I simply -- aren't there other  
7 issues in which it only takes a majority?

8 Q Like a constitutional amendment?

9 A A constitutional amendment is one; certainly.  
10 I don't know that there is any constitutional distinction be-  
11 tween those two. I think that's a question of public policy  
12 which the people of the state have spoken to.

13 Q Well, what if the law, the West Virginia law  
14 was that negative votes be counted twice and affirmative votes  
15 be counted once on bond issues?

16 A Well, if such a provision were addressed to  
17 the voters, I think that would be bad.

18 Q Well, it would get just exactly the same  
19 result; wouldn't it?

20 A Possibly, on a mathematical basis; yes, I  
21 think it would, except it would give you a --

22 Q Well it would --

23 A Yes.

24 Q Well, I mean you --

25 A But, this is addressed to a political

1 subdivision, Mr. Justice White. This restricts the power of  
2 a political subdivision. It cannot borrow money unless you  
3 have this consensus.

4 Q Well, the law could say that in all political  
5 subdivisions passing bond issues or submitting bond issues,  
6 negative votes would be counted once-and-a-half and affirmative  
7 votes counted once and you would have precisely the same  
8 result.

9 A Well, it's possible; yes, you are going to  
10 have precisely the same result on a mathematical basis, but it  
11 is not a question of --

12 Q Well, wouldn't you make the same argument,  
13 though, there, that --

14 A No, I couldn't make that argument --

15 Q Why?

16 A Because the voters would be treated un-  
17 equally. Here the voter -- every man stands equally before  
18 this -- Mr. Justice White. Every man has the same burden;  
19 that is to carry his side of the issue. And if he has the  
20 same power when he goes into the polls I don't think he loses  
21 that power, that equality of power by casting his ballot.

22 Q Well, on my example he has the same power  
23 when he goes in, too, because he doesn't know which side he's  
24 going to be on until the vote is counted.

25 A But the way that example was put, I think,

1 of course, is not this case, but it wouldn't be a question of  
2 voting. I think it would be discriminating between people.

3 Q Well, Mr. Scott, overriding a Presidential  
4 veto, in the Houses of Congress, under the Federal Constitu-  
5 tion, negative votes have twice the voting value as affirma-  
6 tive votes; don't they?

7 A Well, they certainly have --

8 Q -- to take Justice White's illustration.

9 A Well, they certainly have twice the effect.  
10 I'm not sure that the -- that specific context is justification  
11 for a state to treat its citizens unequally and that the  
12 Federal analogy hasn't met with very much favor at the hands  
13 of this Court, although I do want to employ it later on, and  
14 I think it is a valid argument.

15 Q Well, in each case the parallel to the veto  
16 power overriding the veto of the President in each case: West  
17 Virginia's constitution and the Federal constitution, it's a  
18 matter of the organic law which the people have adopted; is  
19 it not?

20 A It certainly is, Your Honor, Mr. Chief  
21 Justice. And in our case, there is an expression to it(?) on  
22 three separate occasions by a majority vote, and have volun-  
23 tarily, by a majority vote, restricted the powers of the  
24 majority, designed to protect the rights of the minority in  
25 situations like this.



1                   Q     What was the term of the bond issue? When  
2 were they due?

3                   A     Twenty years at five-and-one-half percent  
4 amortized annually over a period of 20 years; \$1.8 million.

5                   Q     There are many people who couldn't vote in  
6 this bond issue who are going to have to pay off the bonded  
7 indebtedness; aren't they?

8                   A     That's quite so, Mr. Chief Justice, and I  
9 think it's analogous to a mortgage of real estate; it is,  
10 in effect, a mortgage of property even to persons not born at  
11 the time of the election. There might be some people not yet  
12 born who will own property and will have to pay taxes on it  
13 as minors, before the bonds retire.

14                   There are many reasons and many justifications for  
15 such a public policy of the state, but I don't think we have to  
16 get to a justification of this, though, because I don't think  
17 it is discriminatory. I think that the three-judge district  
18 court of Missouri, and the Supreme Court of Idaho, reached the  
19 correct conclusion: this is nondiscriminatory; this is that  
20 every person --

21                   Q     So you are saying it wouldn't make any dif-  
22 ference what issue the provision applied to; just across-the-  
23 board the state could require a simple majority to pass any-  
24 thing and it's not a question of the state justifying it at  
25 all; there just isn't any discrimination?

1           A     I think that's true there, as here, that  
2 people have reserved for themselves certain legislative powers  
3 which they refuse to delegate to the public -- I think that's  
4 true. And whether it's a ten percent vote or a nine percent  
5 vote it can be prohibited entirely. The state could prohibit  
6 -- we could, if we wanted to, in our constitution say: under  
7 no conditions shall a political subdivision borrow money. If  
8 we can prohibit entirely, why can't we qualify it? I think  
9 we can so long as we treat everybody alike, and I think this  
10 does. Every man stands equally in the face of this type of  
11 requirement.

12           Q     Mr. Scott, let me ask a question which may  
13 not be in your case. You said this was a special election;  
14 suppose the bond issue were voted on in a general election;  
15 does West Virginia have a provision as to what happens if a  
16 voter just doesn't vote on the bond issue controversy?

17           A     I'm not sure I follow you, Mr. Justice  
18 Blackmun; there would be a separate ballot submitted to the  
19 voter and if he accepted the ballot and turned it back in to  
20 the poll clerk after -- and folding it --

21           Q     Suppose he --

22           A     If he doesn't mark it it's just not counted.

23           Q     It's just not counted; in other states I know  
24 this is the case.

25           A     There is no quorum(?) requirement in our

1 state.

2 Q There are provisions that a failure to vote  
3 equals a negative vote?

4 A That is not the case in our state, sir.

5 Q Do you think that has any constitutional  
6 deficiency?

7 A I think that it must have in light of Clay  
8 versus Turner which this Court -- it came up from South  
9 Carolina this past summer and was dismissed for lack of a  
10 substantial Federal question and when that argument was raised  
11 -- the cases which is cited in my reply brief, I think it has  
12 substantial constitutional deficiencies.

13 I don't think that when a person enters the poll  
14 booth that he loses, regardless of how he marks his ballot,  
15 that he loses any of the equality that he had before he went  
16 in. And I think this is the basic error made in the Califor-  
17 nia case where they held and their entire 62-page opinion  
18 rested on one thin thread and when it said that if you  
19 classified voters that it was sufficient for the class to come  
20 into being at or after the election. It was not necessary for  
21 there to be prospective discrimination; it was sufficient if it  
22 came into being retrospectively.

23 And I think that there is no such thing as a  
24 class here. There isn't even an identifiable group if secrecy  
25 of the ballot is to be preserved. I don't think that the --

1 you could come in, I suppose, and say: I voted yea or nay  
2 but if -- how could it be established that you voted yes or  
3 no?

4 And I think this is the way the law, the law is  
5 based on a neutral principle; it's addressed not to the voters  
6 and not to discriminate against people but against specific  
7 errors of government action. It's addressed to specific  
8 questions of public policy: shall we become indebted or not?  
9 It isn't just a vote as to whether we have any schools in the  
10 county; it is a question of whether we are going to go ahead  
11 with the program we have or are we going to increase the  
12 expenditures to a certain level. And every person had a  
13 different reason for voting either yes or no. There were as  
14 many reasons for voting one way as there were voters.

15 Q Let's assume just for the moment that the  
16 Court disagreed with you on whether or not there was a dis-  
17 crimination and the issue got down to whether there were cir-  
18 cumstances in which the state may discriminate, given a good  
19 enough reason. Are those reasons in your brief?

20 A I hope that they --

21 Q I know you don't want us to get that far.

22 A I don't think you should --

23 Q Well, I know you don't.

24 A But if you did I think certainly there are  
25 good reasons.



1 Q Are those in your brief, the ones that the  
2 state claims?

3 A I didn't brief that point thoroughly; no,  
4 because I didn't think it was essential.

5 Q Well, you don't think you have lost the case,  
6 do you, just -- if the Court thought there was a discrimina-  
7 tion?

8 A I should certainly hope not, Mr. Justice  
9 White, and there is in our brief, the arguments of the three-  
10 judge District Court in Missouri and there is in our brief the  
11 arguments advanced in the Georgetown Law Journal, which does  
12 set out reasons that could exist here to justify such a state  
13 provision.

14 Just a couple things about the -- I know that in  
15 the allocation of Senators and the use of the Electoral  
16 College, of course, there are necessary concessions made at the  
17 time of the original compact, but we're dealing here with the  
18 14th Amendment. And I think, if we recall, that Section 1 of  
19 the 14th Amendment contains the Equal Protection Clause, our  
20 court says that the Equal Protection Clause forbids an extra-  
21 ordinary requirement. And yet Section 3 of the 14th Amendment  
22 dealing with this qualification of officers, specifically says  
23 that Congress can, by a two-thirds vote, remove those dis-  
24 qualifications. It seems highly irregular to me to suggest  
25 that one section of this amendment forbids an extraordinary

1 majority requirement and the next section, or the third  
2 section, requires it.

3 And in 1968 the 25th Amendment, which came down  
4 more recently, provides that by an extraordinary majority  
5 vote of Congress, in determining whether or not the President  
6 can discontinue as disabled; he is not able to perform the  
7 duties of his office.

8 So I think that, to summarize my presentation,  
9 that there is no specific language in the constitution which  
10 requires this result. There is no specific holding of this  
11 Court which requires this result. There is no natural law  
12 or rule of reason which requires this result.

13 The framework of our government is based upon a  
14 delicate balancing of instances of minority vetoes, such as  
15 we have here by -- legislatures.

16 The doctrine of separation of powers, the  
17 doctrine of judicial supremacy, executive veto, all instances  
18 of a minority veto and it seems to me that if majority rules  
19 strict majoritarianism is to become the only acceptable way  
20 of political life in the states and local affairs of this  
21 nation, we must recognize that we have embarked upon a new  
22 journey of uncertainty down a new avenue of judicial activity.

23 This unique combination that I spoke of has been  
24 the very source of strength and stability of this great nation  
25 and I would dread to see it destroyed.

1 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Scott.  
2 Mr. Wise.

3 ORAL ARGUMENT BY CHARLES C. WISE, JR., ESQ.

4 ON BEHALF OF RESPONDENTS

5 MR. WISE: Mr. Chief Justice and may it please  
6 the Court:

7 In our view we are dealing here with a voting, an  
8 election case that of course does determine questions of  
9 whether or not bonds may be issued or excess levies applied,  
10 but it also equally determines whether or not a school will  
11 be built for the use of students 20 years in the future as  
12 well as the issue of paying for it.

13 There is certainly no requirement, to our know-  
14 ledge, that the West Virginia Constitution was required to  
15 submit to the voter an issue such as this, but it is refresh-  
16 ing that it does do so on such an important matter: education;  
17 and having done so, it seems to us that as all roads once led  
18 to Rome, the well-established powers of the decisions of this  
19 Court in the denial of the vote cases, and in the waiting and  
20 debasement of dilution cases, as well as discrimination of  
21 subject matter, found in Hunter versus Erickson, are appli-  
22 cable here. Because, there is an effect, no doubt but that  
23 the person who, because of his conviction on the issue of  
24 whether or not bonds shall be issued, determines whether or  
25 not his vote is to be counted 50 percent more than that of

1 another of opposite conviction.

2 Q Is the sum total of your argument that the  
3 14th Amendment forbids the state to have any election unless  
4 it provides for a result that will abide by the majority  
5 vote?

6 A Mr. Justice Black, I think that the line  
7 will have to be drawn somewhere and we certainly wouldn't  
8 contend that elections in very restricted areas or dealing  
9 with restricted acres or dealing with the internal procedures  
10 of a legislature or something of that kind would require a  
11 majority. But, we think that when we have --

12 Q Who decides where that line is drawn?

13 A This Honorable Court, sir, and we think that  
14 within the framework of these decisions it is almost in  
15 escapable that when we are dealing with an election on an  
16 important issue on a county-wide basis when a citizen has so  
17 little opportunity now of direct participation in an important  
18 result, that there may be better reasons for applying the 14th  
19 Amendment to this than in the election of a representative  
20 where the citizen's interest is certainly not quite as direct  
21 a --

22 Q Well, there is no question of whether or not  
23 the 14th Amendment applies to West Virginia; of course it  
24 applies to West Virginia. There is no question about whether  
25 or not we can apply the 14th Amendment of the Constitution, by

1 its own force as it applies to the 14th Amendment to each of  
2 the 50 States. The question is: what does the 14th Amendment  
3 require, if anything, in this area.

4 A In this particular area; right.

5 Q Yes.

6 Q And as I now understand you in connection  
7 with your second answer, you say the 14th Amendment forbids  
8 the states to permit an election on a particular issue it  
9 chooses to submit to the people to permit that to be decided  
10 by less than 50 percent -- by more than 50 percent, unless  
11 this Court somehow decides that it would be wiser and better  
12 to let that election stand?

13 A Well, Mr. Justice Black, what I meant was  
14 that where the line is drawn, I think ultimately will rest  
15 with --

16 Q What line? What line?

17 A There are certain areas where we certainly  
18 would not contend that the majority would be necessary to  
19 arrive at a decision. I think that the organization of the  
20 legislature, for example, or in connection with submitting the  
21 constitutional amendments certainly would not come within  
22 what we understand to be the decisions of this Court.

23 Q You would say the approval of constitutional  
24 amendments could require 60 percent?

25 A I think it would be wrong, but I --



1 Q Well, I know, but it wouldn't be unconstitu-  
2 tional to require 60 percent?

3 A The line could be drawn whereby it would not  
4 be unconstitutional.

5 Q Who would draw that line?

6 A I think ultimately it would rest with this  
7 Court, sir.

8 Q The line for the West Virginia Constitution?

9 A It would determine whether or not the 14th  
10 Amendment would apply to this.

11 Q What about a requirement in the West Virginia  
12 Constitution that 50 percent plus 1, a majority of all the  
13 registered voters would be required to contract bonded in-  
14 debtedness. Would you think that would be unconstitutional?

15 A No, sir; I don't think so.

16 Q That would require 4500 votes, in round  
17 figures here; wouldn't it?

18 A I believe that would be a proper restriction.

19 Q It would be far more difficult to obtain that  
20 kind of a majority than 60 percent of the voters actually  
21 voting; wouldn't it?

22 A Yes. It is certainly true that it is  
23 difficult to get a voter turnout under these conditions in a  
24 special election. But, I would guess that if the law were  
25 fixed on that basis it would be much easier to get a greater

1 turnout and perhaps these special issues would be submitted  
2 in a general election where normally there are more voters  
3 participating.

4 Q But you would -- so I understand it, if the  
5 law said 51 percent of all eligible voters, you would think  
6 that would be constitutional?

7 A I think that might be reasonable.

8 Q But that if the state purports to go on just  
9 the actual votes you say it must be a majority and no more?

10 A I think it would be a great error of policy  
11 to make that type of requirement because we have had a con-  
12 stitution for 98 years with practically no change, and efforts  
13 to amend it have met with a very frustrating experience  
14 ultimately, and nothing happened -- it was rather typical.

15 Q Well, how do you -- did I understand that  
16 the legislature did, by a two-thirds vote, adopt a constitu-  
17 tional amendment, and that the people rejected it?

18 A That is correct.

19 Q Well, then how were they legislatively  
20 frustrated?

21 A They weren't legislatively frustrated.

22 Q They just frustrated themselves.

23 A That is correct, and of course this Court  
24 pointed out in the Lucas case against the \_\_\_\_\_ Assembly of  
25 Colorado, the mere fact that there has been approval by the

1 voters of an apportionment plan does not in anywise take the  
2 proposal away from the requirements of the 14th Amendment.  
3 And we think also that the Hunter against Erickson case where  
4 there was a very sophisticated method employed in depriving  
5 certain interested groups of an opportunity to get equal  
6 protection of the laws of Akron, Ohio, dealing with local  
7 housing, that that is equally applicable here, because those  
8 who are in favor of a proposal of the kind voted on in this  
9 case, are certainly disadvantaged by reason of the 60 percent  
10 requirement.

11 And that is the effect of the well-reasoned  
12 opinion as we see it in California and also the West Virginia  
13 Supreme Court, which was -- took the invitation of this Court  
14 in the Maryland case: Pauls(?) against Maryland, of attempting  
15 to apply what it understood to be the rules of this Court in  
16 that situation.

17 Q Well, a majority of the voters in West  
18 Virginia could change the constitution of West Virginia to  
19 say that all bond issues shall be approved if they are approved  
20 by a majority of the voters actually voting?

21 A Yes, sir.

22 Q Is there initiative in West Virginia?

23 A No, sir; we have no initiative and it requires  
24 a two-thirds conferring vote of both houses of the legislature.

25 Q But you don't challenge?

1           A     No, sir. We do have a provision for calling  
2 a constitutional convention, which has not been done for 98  
3 years when the '72 constitution was involved.

4           But, basically, Your Honors, it is our position  
5 and we think it goes back even beyond Gray. Mr. Justice  
6 Black in Colgrive against Green in '46 in a dissenting opinion  
7 pointed out that no one would argue that if you gave to one  
8 voter one-half of the weight given to another voter you would  
9 have an invalid situation. Gray certainly makes that clear  
10 and as we see it, all of the equality cases go to the point  
11 that the same weight, substantially, must be given to the  
12 views of each one. The most invidious discrimination of all,  
13 as we conceive it, is a discrimination based upon the views  
14 of the outcome of an issue that a voter may have.

15          Q     I understood you to concede that constitu-  
16 tionally West Virginia could require a majority of all  
17 registered voters, in response to questions by Justice White  
18 and myself now. If you had that, what is the mathematical  
19 impact of the people who stay home?

20          A     It's substantial.

21          Q     Well, is it more than that? Isn't it dis-  
22 criminatory if we follow your thesis of rigid mathematics?

23          A     Well, it seems to us, Mr. Chief Justice, that  
24 the most a state could do is give the opportunity to vote.  
25 And if it gives that opportunity it ought not to load the dice;

1 it ought to be fair. It should not weigh one man's vote  
2 greater than another. Now, it's true that many factors may  
3 keep a voter away which would influence the outcome. We, of  
4 course, don't know how the absent voter would vote on a  
5 particular issue did he come to the polls and participate.

6 Q Why isn't the Federal Constitutional pro-  
7 vision requiring two-thirds vote to override a Presidential  
8 veto "unconstitutional discrimination?" I would put that in  
9 quotation marks.

10 Q Well, the 14th Amendment doesn't apply to the  
11 Federal Government; does it?

12 A Not to my knowledge, but philosophically I  
13 would suppose, Mr. Chief Justice, that that goes back to a  
14 part of the great compromise, a part of the traditions of our  
15 form of government and in the final analysis there seems to be  
16 exceptions to most rules somewhere along the line.

17 Q Well, I had understood all of your argument,  
18 the main thrust of your argument was philosophical here.

19 A Yes, sir; I think it's philosophical. I --

20 Q Well, there is a difference between the 14th  
21 Amendment being binding on the states and not the Federal  
22 Government; doesn't help you very much?

23 A No, sir. No, sir; I would certainly concede  
24 that on a philosophical ground.

25 Q It is discriminatory, in effect, and



1 philosophically discriminatory to require a two-thirds veto  
2 to override the President. Mathematics is intentionally dis-  
3 criminatory; isn't it?

4 A Yes, sir, Mr. Chief Justice. I think that's  
5 true.

6 Q Well, let's get down to something a little  
7 less theoretical. Doesn't West Virginia have a provision  
8 about overriding the Governor's veto?

9 A Yes, sir; the constitution --

10 Q What is that: two-thirds?

11 A I believe it's four-fifths. Two-thirds or  
12 four-fifths.

13 Q Does your argument mean that that provision  
14 of the West Virginia Constitution must fall?

15 A No, sir. It seems to me that the arm properly  
16 doesn't extent to matters involving this balance between the  
17 -- type functions of government.

18 Q Even in the face of the 14th Amendment --

19 Q The Fifth Amendment Due Process Clause sub-  
20 sumes equal protection; doesn't it? So the -- how does the --  
21 how can the Fifth Amendment with an equal protection clause  
22 implied into it, be squared with the provisions of the main  
23 bbody of the constitution that requires simple majorities in  
24 some instances?

25 A I don't think there is complete consistency

1 in --

2 Q Well, does the Fifth Amendment then modify  
3 the main provisions? It's never been held to.

4 A It's never been held to.

5 Q So that it is consistent.

6 A That is correct.

7 Q So there is no denial of equal protection in  
8 the constitution's equal majority requirements. I mean, just  
9 on a constitutional principle --

10 A -- the basis of law of giving effect to all.

11 Q Mr. Wise, I assume that if the state legis-  
12 lature passed an appropriation for schools, a pretty high one,  
13 which would include this county and the government vetoed it,  
14 and you couldn't muster a four-fifths vote to override the  
15 veto; that would be it?

16 A That would be true for that particular  
17 session; yes, Mr. --

18 Q And you wouldn't have any complaint?

19 A We couldn't.

20 Q Why not? It's the same subject matter:  
21 schools --

22 A It's the same subject --

23 Q -- and money.

24 A But it comes about, it seems to me, because  
25 of the provisions of the constitution dealing with the effect

1 of legislative appropriation and the fact that in our check  
2 and balance system of government we give to the executive an  
3 opportunity to veto. Now, whether it's wise; I don't know,  
4 but as far as we're aware, that has not been the subject  
5 matter of a decision here and a determination that --

6 Q So that we are dealing with two provisions  
7 of your constitution.

8 A Yes, sir.

9 Q One is good and one is bad; that's your  
10 position.

11 A We think sir, that both are bad, but we  
12 aren't sure that the other one is subject to the application  
13 of the 14th Amendment.

14 Certainly the Court will not be called upon at  
15 any time to go 100 percent by saying that majority rule shall  
16 control every aspect of life. We don't believe that majority  
17 rule as a rule is really involved here, except in the sense  
18 that the result of applying to each voter equal weight in his  
19 vote does result, of course, in that there must be a majority  
20 to carry a proposition; a majority of those voting.

21 But that, as we understand it, doesn't involve  
22 the application on even theoretical grounds, of going to the  
23 point of destroying the traditional balance of power between  
24 the three branches of the government. And that would be the  
25 last thing that we would urge here.

1 But we do say that under the Ray against Sanders  
2 and all of the cases that follow it, those that deal with  
3 local issues, has been subject to the application of the  
4 14th Amendment like Avery against Midland; the cases that  
5 have recently been decided in 1969 and 1970, such as Kramer  
6 and Cipriano, and Phoenix, which go to the question of issuance  
7 of bond and the requirements for example, in Cipriano, that it  
8 is impermissible for Louisiana to require by legislation a  
9 50 percent vote and a 50 percent -- resolve to uphold.

10 And in the case of Phoenix, as well as Cipriano,  
11 of course, the Court very properly pointed out that you cannot  
12 make the voting classification on the basis of whether or not  
13 you are a real property taxpayer.

14 But in our view, Carrington against Rash, the  
15 Erickson decision, make it even more invidious if the dis-  
16 crimination is based upon the views that a man holds at to  
17 the outcome of an election. Having granted him a right to  
18 come in to participate in an important issue he should have  
19 the right to have his vote counted equally with that of the  
20 man who is convinced that an opposite result should come about.

21 Q I find that difficult to follow, Mr. Wise, in  
22 light of the proposition that we -- that you and I seem to  
23 agree on with reference to 50 percent, a majority of all  
24 registered voters be required because then the man who stays  
25 home might have a non-vote which would carry more weight than

1 the man who took the trouble to go down to the polls and vote.

2 A That's perfectly true, but I think we are  
3 going to have risk and encourage them to get out and vote  
4 their convictions. Philosophically there is an inconsistency  
5 there, Mr. Chief Justice, that we recognize, of course. We  
6 also submit that there, if it is applicable here, Mr. Justice  
7 White, that there is no compelling state interest that would  
8 preclude or make it proper to permit this provision to stand.

9 Section 8 of Article 10 of our constitution,  
10 another section of the very article that's involved here, has  
11 an absolute limit on bonded indebtedness and on excess levy.  
12 In lieu of that, even with the 60 percent vote in successive  
13 elections and for a period of time can you go beyond five  
14 percent of the assessed valuation. Of course that constitutes  
15 the best way to prevent extravagant government.

16 And it was pointed out earlier in connection with  
17 our provision of the constitution involved here, the hope was  
18 expressed that this would have something to do with preventing  
19 that profligacy. As a matter of fact, the 30-odd states that  
20 have you such provisions in their constitutions or laws, seem  
21 to be able to be just as economical and handle these matters  
22 just as effective as the 16 or 17 which clearly do contain  
23 provisions of this kind, either in their organic law or in  
24 their statutes.

25 As a matter of fact, there has been a great body



1 sophisticated knowledge respecting bond issues and taxes that  
2 has blown up in recent years, the rating services and matters  
3 of that kind which do a much better job than restrictive  
4 legislative or constitutional provisions do in attempting to  
5 prevent the local governmental bodies from going overboard  
6 and making extravagant expenditures.

7 On that basis we respectfully suggest that the  
8 West Virginia Supreme Court correctly decided this issue as  
9 did California.

10 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wise.

11 Mr. Scott, you have about five minutes left.

12 REBUTTAL ARGUMENT BY GEORGE M. SCOTT, ESQ.

13 ON BEHALF OF PETITIONERS

14 MR. SCOTT: If it please the Court, Mr. Chief  
15 Justice:

16 By way of rebuttal I would like to respond to two  
17 or three things. Mr. Wise just made the point that the 30-odd  
18 states which don't have this rule, don't seem to be spend-  
19 thrifts and are getting along all right. But, I think it's  
20 also well to remember that the 20-odd states which do have,  
21 at least a great percentage of them, as far as we know, are  
22 getting along all right in the fields of education. This  
23 doesn't seem to have been a great hindrance to them in that  
24 area.

25 The question of Mr. Justice Black was very

1 intriguing: who decides where the lines ought to be drawn in  
2 this case, and of course I would love to argue that this is  
3 a political question, nonjusticiable and if there is anything  
4 left of that political, nonjusticiable political question here  
5 I think this would be a classic example for its application.

6 I would like to remind again also that we're  
7 dealing here not with the question of minority rule, but the  
8 question of minority veto. And it seems to me that minority  
9 rule would be much more constitutionally impermissible than  
10 minority veto. And yet we elect officers every day. I under-  
11 stand the last election was at the center(?) and the lawyer  
12 states that 39 percent or something like that of the votes  
13 cast, will elect governors, will elect members of the legis-  
14 lature, will elect, as I recall, and of course this is not a  
15 matter of record, but the last man elected to the board of  
16 education in Roane County received less than 30 percent of the  
17 total vote cast in the election.

18 So, we have many instances of minority rule, which  
19 I think are much worse than this. And this is, of course, the  
20 minority veto. I don't see anything wrong with protecting  
21 minorities. As I said earlier, I think that's what the 14th  
22 Amendment is all about.

23 Then the use of this word "weight," I think might  
24 have caused some of the, what I consider to be confusion on the  
25 part of the lower court. I am not suggesting that I could have

1 used a better word, but I'm not sure that I understand what  
2 it means. It does have a mathematical connotation when we  
3 should, I think, we dealing with philosophical definitions of  
4 this word "veto."

5 And I recall that the lower court quoted an  
6 opinion of Mr. Justice Douglas in Gray versus Sanders in which  
7 he stated that the only instance, I believe is the word: the  
8 only instance of weighting the votes sanctioned by the con-  
9 stitution is in the makeup of the senate and the electoral  
10 college. But, to emphasize the word "only," that if the only  
11 instance of weighting the votes sanctioned by the constitution  
12 are those two, then of course, an extraordinary majority  
13 would be in the instance of weighting the votes, because there  
14 are several constitutional areas where extraordinary majority  
15 votes are required.

16 Q Could your constitution compel your legis-  
17 lature to submit this to the people?

18 A No, Mr. Justice Black; there is no provision  
19 for initiative, that we cannot compel.

20 Q If it was an act submitted to the people by  
21 a legislature to try to find out for themselves --

22 A Yes, sir.

23 Q -- whether enough of the people wanted it to --

24 A Exactly. And they expressed it there there,  
25 to. That was the only question submitted, as Judge Haymond

1 points out in his dissent, in 1966, when the majority of our  
2 people voted to retain it.

3 Q Was that true, with respect both to the tax-  
4 levy and the bond issue provisions in 1966?

5 A I don't think so, Mr. Justice Stewart, but I  
6 couldn't answer with certainty.

7 Q It was with respect just to one of them, you  
8 think?

9 A I think it had to do with bond issues only,  
10 if I'm not mistaken. At any rate it was a question of policy  
11 and --

12 Q And that was a proposed amendment to the  
13 state constitution submitted to popular vote in 1966.

14 A At least a 60 percent requirement and it was  
15 substituted -- a simple majority.

16 Q And on that question, a majority vote carried,  
17 I assume.

18 A The majority vote carried and the majority  
19 vote was to attain the 60 percent --

20 Q Right; right. I understand that.

21 A We would urge that the judgment of the Supreme  
22 Court of Appeals of the State of West Virginia be reversed.

23 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Scott.  
24 Thank you, Mr. Wise. The case is submitted.

25 (Whereupon, at 10:56 o'clock a.m., the argument in  
the above-entitled matter was concluded)