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**OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES**

**CAPTION:** ROBERT J. QUINN, JR., AND PATRICIA J. KAMPSEN,  
ETC., Appellants V. WAYNE L. MILLSAP, ET AL.

**CASE NO:** 88-1048

**PLACE:** WASHINGTON, D.C.

**DATE:** April 25, 1989

**PAGES:** 1 thru 59

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 ROBERT J. QUINN, JR., AND :

4 PATRICIA J. KAMPSEN, ETC., :

5 Appellants, :

6 v. :

No. 88-1048

7 WAYNE L. MILLSAP, ET AL., :  
8 -----x

9 Washington, D.C.

10 Tuesday, April 25, 1989

11 The above-entitled matter came on for oral argument  
12 before the Supreme Court of the United States at 1:58  
13 p.m.  
14

15 APPEARANCES:

16  
17 KEVIN M. O'KEEFE, St. Louis, Missouri; on behalf of  
18 Appellants.  
19

20 SIMON B. BUCKNER, Assistant Attorney General, Kansas  
21 City, Missouri; on behalf of Appellees.  
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P R O C E E D I N G S

1:58 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next  
in No. 88-1048, Robert J. Quinn v. Wayne L. Millsap,  
Mr. O'Keefe.

ORAL ARGUMENT OF KEVIN M. O'KEEFE

ON BEHALF OF APPELLANTS

MR. O'KEEFE: Mr. Chief Justice, and may it please  
the Court:

This case is before the Court on appeal from a  
final judgment of the Supreme Court of the State of  
Missouri. Appellants, as certified by the courts below,  
are a class comprising all registered voters of the  
State of Missouri who do not also own real property.

At issue is Section 30 of Article VI of the  
Constitution of the State of Missouri, a provision  
authorizing the creation and operation of a Board of  
Freeholders, which is an ad hoc, tax-supported, public  
governmental body authorized the exclusive authority to  
prepare and submit to the electorate of the St. Louis  
Metropolitan Area a plan for local government  
reorganization including the partial or complete  
government of all or any part of the City of St. Louis  
and St. Louis County.

The case was originally submitted on

1 cross-motions for summary judgment and stipulated  
2 facts. The challenge to the Section 30, both on its  
3 face and as applied, in the instance of the creation of  
4 the present Board of Freeholders in this area, was  
5 overruled by the Missouri Supreme Court on the grounds  
6 that the equal protection guarantees of the Fourteenth  
7 Amendment are irrelevant to the discrimination suffered  
8 by the appellant class because, in the court's words,  
9 the Board of Freeholders fails to exercise "general  
10 governmental power."

11           The question thus presented in the Court this  
12 afternoon is whether the State of Missouri may, by the  
13 operation of its State Constitution and the activities  
14 of appointing authorities operating under that  
15 provision, extend to one class of citizens -- to wit,  
16 property owners, the owners of real property -- the  
17 opportunity for public service and participation in a  
18 critical aspect of state and local governmental  
19 operation and, at the same time, withhold an equivalent  
20 opportunity for service and participation to the members  
21 of the appellant class solely because the appellants do  
22 not own an interest in real property.

23           QUESTION: Mr. O'Keefe, how far does your  
24 theory go? The Board does deal with things like  
25 recommendations on property taxes, I gather, and

1 formation of sewer districts, and property boundaries of  
2 one kind or another.

3 Do you suppose it would be possible, because  
4 property owners are particularly affected, to have a  
5 Board in which some of the members have to be property  
6 owners?

7 MR. J'KEEFE: Your Honor, the circumstances, of  
8 course, are not that there is a requirement for a  
9 representative array of Board members.

10 QUESTION: I understand that. That's not my  
11 question.

12 MR. J'KEEFE: I do not believe that property  
13 ownership would be a disqualification for service, as is  
14 the lack of property ownership.

15 QUESTION: Well, I'm asking whether it would be  
16 permissible under the Constitution, in your view, for a  
17 state to set it up with certain members having to be  
18 property owners -- maybe so many civil engineers, and so  
19 forth and so on. Can the state do that?

20 MR. J'KEEFE: Justice O'Connor, I don't believe  
21 that the ownership of property bears any rational  
22 relationship to the authority that a Board of  
23 Freeholders enjoys. As such, either its absence or its  
24 presence, --

25 QUESTION: (Inaudible) their duties impact

1 heavily on property ownership?

2 MR. O'KEEFE: Well, there is a reference in  
3 Section 30(b) of the Missouri Constitution to the  
4 levying of the property tax. That has been interpreted  
5 by the State Constitution, however, as to -- that it  
6 involves the levy of both personal and real property  
7 taxes. There are no exclusively real property issues.

8 The boundary lines of governmental entities are  
9 certainly not real property issues. The creation of a  
10 sewer district serves renters and property-owners alike,  
11 and similar proposals within the current plan,  
12 particularly the reduction of the property tax and the  
13 imposition of an earnings tax in lieu of it, are  
14 certainly not -- do not demonstrate that the absence of  
15 ownership of property should disqualify an individual.

16 QUESTION: Mr. O'Keefe, this Board, I take it,  
17 doesn't actually adopt anything itself, does it?

18 MR. O'KEEFE: It does adopt a plan.

19 QUESTION: But it -- but the plan it adopts  
20 doesn't have the force of law until it's ratified by the  
21 electors?

22 MR. O'KEEFE: That is correct. If it is  
23 ratified -- adopted by the electorate in the locality --  
24 that is, the City and County of St. Louis -- it becomes  
25 the organic law of the territory and supersedes all

1 conflicting state statutes.

2 QUESTION: What -- what case of ours comes  
3 closest, do you think, to supporting the proposition  
4 you're maintaining here?

5 MR. J'KEEFE: Your Honor, I believe Turner v.  
6 Fouche is the most clear statement of the law that the  
7 equal protection guarantees of the Fourteenth Amendment  
8 protect the right of each citizen to an equal  
9 opportunity for service. In -- when the state extends  
10 to one segment of the population an opportunity for  
11 service, that it is a violation of the equal protection  
12 guarantees to withhold a similar opportunity to another  
13 segment of the --

14 QUESTION: So, you -- you don't base your  
15 argument then on our -- the Kramer v. Union Free School  
16 District line of cases where we say that you can't  
17 discriminate among -- property qualifications for voters?

18 MR. J'KEEFE: To the contrary, your Honor. I  
19 believe that the voting rights questions in Kramer, and  
20 a variety of other cases including reapportionment  
21 cases, candidate ballot questions such as Bullock v.  
22 Carter and Lubin v. Panish, are all highly relevant to  
23 the consideration of this provision.

24 QUESTION: Well, but there are two quite  
25 different lines of reasoning I would have thought. One



1 is what you said earlier, the right to serve in a  
2 governmental capacity. And the other is the right to  
3 vote on matters that have a good deal of concern to you.

4 MR. D'KEEFE: Your Honor, first of all, the  
5 subsequent opportunity to vote does not overcome the  
6 discrimination which occurs when the Board is first put  
7 into place. That is the act of discrimination.

8 QUESTION: Well, it may not overcome the  
9 discrimination insofar as the opportunity to serve is  
10 concerned, but it very likely would overcome any  
11 discrimination insofar as the adoption of the plan is  
12 concerned. If all the voters have a right to vote, it's  
13 hard to see they are discriminated against as voters.

14 MR. D'KEEFE: well, Mr. Chief Justice, I  
15 believe that the reasoning articulated by this Court in  
16 Bullock and Lubin which concerned candidate  
17 restrictions, qualifications restricting candidates  
18 seeking an access to the ballot in a primary election,  
19 recognized that when an identifiable segment of the  
20 voting public has their perspective artificially barred  
21 from the ballot, that they suffer a diminution of the  
22 right of franchise and suffer an abridgement of their  
23 right to vote.

24 The concomitant effect of an exclusion of a  
25 segment of society from one level of participation has

1 an impact on the exercise of the right to vote, and that  
2 it is this exercise which in fact elevates the concern  
3 in the constitutional failure of Section 30, that those  
4 who do not own real property are allowed to participate  
5 only at the back end of the process.

6 They may be naysayers, they may be able to vote  
7 down a plan. And if they do, and if they, along with  
8 the rest of society, still seek to improve the  
9 operations of their government, they can only do so if  
10 another Board of Freeholders would propose a plan.

11 And if that plan is not satisfactory, they may  
12 attempt to participate in turning it down. But they  
13 have no opportunity to --

14 QUESTION: What if --

15 MR. O'KEEFE: -- see their public policy  
16 perspective --

17 QUESTION: What if the legislature, the state  
18 legislature -- or, for that matter, the governor, had  
19 authority to propose the plan. And let's say the  
20 legislature were, you know, 70 percent Democratic --

21 MR. O'KEEFE: Well --

22 QUESTION: -- and it proposes the plan and the  
23 people either take it or leave it. Now, could a voter  
24 come in and say, well, you know, I'm a Republican, it's  
25 a Democratic-dominated legislature, I haven't had a good

1 shot at this?

2 MR. O'KEEFE: Both Republicans and Democrats  
3 have an equal opportunity to participate in the state  
4 legislature.

5 The appellant class does not. The appellant  
6 class is barred from the opportunity to participate in  
7 the critical decision-making process which precedes the  
8 submission of the issue on the ballot.

9 QUESTION: You have two challenges here, Mr.  
10 O'Keefe. One facial and one as applied.

11 MR. O'KEEFE: Yes, your Honor.

12 QUESTION: Now, why is it bad for the  
13 appointing officials to make as one of the  
14 qualifications that they want for their appointees that  
15 the appointee own real property?

16 MR. O'KEEFE: Well, your Honor, the appointing  
17 authorities, the respondents, mayor, governor and county  
18 executive, did not in fact of their own volition apply a  
19 property ownership requirement.

20 Counsel for the city and the county advised the  
21 executive authorities that property ownership was a  
22 requirement.

23 QUESTION: Well, that gets you back to your  
24 facial challenge then. I mean, if you're saying it's a  
25 requirement of the law or it's not a requirement of the

1 law but it's now the law has been applied in this case  
2 -- you're saying you have nothing but a facial  
3 challenge. Even your "as applied" challenge hinges on  
4 the fact that the law requires this.

5 MR. O'KEEFE: Well, because the law required  
6 it, in fact, a nominee such as Father Reiner, the  
7 President Emeritus of St. Louis University, was  
8 withdrawn from service by application of the principle.

9 QUESTION: But you're saying it just boils down  
10 to your facial challenge, because the law requires it.  
11 And if the law doesn't require it, it's okay that each  
12 of the appointing officials should voluntarily -- or,  
13 perhaps, even on the basis of bad advice from his  
14 counsel, have selected a freeholder. Is there anything  
15 wrong with that?

16 MR. O'KEEFE: Your Honor, if -- if the  
17 appointing authorities -- which, of course, are not the  
18 facts situations -- but, if the appointing authorities  
19 under some circumstance were to believe that among other  
20 factors it was advantageous that some of the appointees  
21 also own property, that may or may not, given their  
22 perspective, be a rational basis for them to use as a  
23 factor.

24 But, when, as here, they cannot utilize that,  
25 that factor is used as a bar to one segment for service

1 --

2 QUESTION: But that's your --

3 MR. O'KEEFE: -- not as a --

4 QUESTION: -- your racial challenge. When you  
5 say they cannot, that -- that requires that we find that  
6 that's what the Constitution of Missouri requires.

7 MR. O'KEEFE: Well, your Honor --

8 QUESTION: But your "as applied" challenge, I  
9 thought, did not hinge on our determining what the  
10 Constitution of Missouri requires.

11 MR. O'KEEFE: You are correct, Justice Scalia.  
12 What the "as applied" argument is, is that if the  
13 appointing authorities got bad advice, as you indicated  
14 -- if they made a mistake as to what the law required,  
15 nonetheless, they did apply the standard --

16 QUESTION: Right.

17 MR. O'KEEFE: -- that all nominees were  
18 measured against that criteria --

19 QUESTION: And that's no good?

20 MR. O'KEEFE: Yes, sir.

21 QUESTION: Well, I -- you -- what if the  
22 governor and all the other appointing officials happen  
23 to be Republicans and they say, as frequently happens in  
24 this town when appointment are made, "I'm going to  
25 appoint Republicans." Is that all right?

1 MR. O'KEEFE: Your Honor, I don't believe that

2 --

3 QUESTION: You have a whole Board of  
4 Freeholders with nothing but Republicans on it. Is  
5 there anything wrong with that?

6 MR. O'KEEFE: Well, that would violate the  
7 facial terms of Section 30 which require bipartisan  
8 representation.

9 QUESTION: Yeah, I'm --

10 MR. O'KEEFE: Aside from --

11 QUESTION: This is a hypothetical, Mr. O'Keefe.

12 MR. O'KEEFE: Aside from the minor detail, the  
13 exercise of discretion based on political affiliation I  
14 believe this Court has endorsed in policy-making  
15 positions.

16 I don't believe that this Board would be any --  
17 would be outside the scope of policy-making bodies.

18 QUESTION: Would not be outside the scope?

19 MR. O'KEEFE: Would not be.

20 QUESTION: It's a policy-making body?

21 MR. O'KEEFE: I believe it is. And, as such,  
22 that would be one criteria which may, with others,  
23 reasonably be applied.

24 QUESTION: I'm saying with others. That was  
25 criterion one, and then we'll look at other ones. But,

1 number one, you have to be a Republican. And, don't  
2 bother me, I'll look at your other qualifications when  
3 -- that's done sometimes, you know.

4 MR. O'KEEFE: I believe it is done. I think  
5 there may be a significant problem with proof to  
6 establish that fact.

7 But I don't believe that given the nature of  
8 this body -- that it is autonomous and independent and  
9 has a significant broad-based impact on policy -- that  
10 it would necessarily fall outside the purview where this  
11 Court has previously authorized political considerations  
12 at policy level.

13 QUESTION: Mr. O'Keefe, how long does this  
14 Board last? It's -- It's not a self-perpetuating Board,  
15 certainly, is it?

16 MR. O'KEEFE: It is not self-perpetuating. It  
17 is authorized to be created for a period of one year.  
18 It is an ad hoc body, tax-supported, and operates only  
19 until it files a plan, which is a maximum time period of  
20 one year.

21 QUESTION: It's pretty hard to get a plan out  
22 in one year, isn't it?

23 MR. O'KEEFE: They -- they have achieved it.

24 QUESTION: It's been going on for some time,  
25 and the county and the city like to stay apart.

1 MR. D'KEEFE: In fact, the history is that the  
2 city and county were so-called divorced in 1876, and  
3 this provision was entered in the Missouri Constitution  
4 by an Initiative in 1924 primarily for the purpose of  
5 allowing for that remarriage, if you will, between the  
6 City and the County of St. Louis.

7 QUESTION: Of course, the very name of it  
8 implies land ownership. At least, the term freeholder  
9 has always been that way for me.

10 MR. D'KEEFE: Well, Your Honor, I believe that  
11 would be consistent with about 700 years of common law,  
12 as to the meaning of the term freeholder, which has, to  
13 my knowledge, no appellate decision has found it to be  
14 independent of the ownership interest in real property.

15 In fact, the Missouri Supreme Court also has  
16 defined the constitutional use of the word freeholder in  
17 the case of Shively v. Langford, cited in our reply  
18 brief, to specifically require the ownership of a  
19 fee-interest in real property. Lands, tenements, or --

20 QUESTION: (Inaudible) for this requirement?

21 MR. D'KEEFE: It is.

22 QUESTION: Yes.

23 MR. D'KEEFE: The definition of the word  
24 freeholder, Your Honor?

25 QUESTION: Well, the -- the -- the provision



1 providing for this Board doesn't say property ownership,  
2 does it? It just --

3 MR. O'KEEFE: No.

4 QUESTION: -- says freeholder?

5 MR. O'KEEFE: It says freeholder, Your Honor.

6 QUESTION: Do you seek to invalidate the plan  
7 that was proposed by the Board, or just a declaratory  
8 judgment that all voters are entitled to membership on  
9 the Board? Or both?

10 MR. O'KEEFE: I would seek both, Your Honor.  
11 That --

12 QUESTION: What -- what was sought in the  
13 complaint below?

14 MR. O'KEEFE: What was sought in the complaint  
15 below is a declaration of invalidity and injunctive  
16 relief against its enforcement, including as to the  
17 present Board.

18 QUESTION: And who -- who is the Plaintiff?

19 MR. O'KEEFE: The Plaintiff in this case is the  
20 State of Missouri, the appointing authorities, and the  
21 members of the Board of Freeholders.

22 QUESTION: You -- you seek injunction against  
23 enforcement of what?

24 MR. O'KEEFE: Section 30's provisions.

25 QUESTION: Well, does that involve an

1 abrogation of the plan that was proposed?

2 MR. D'KEEFE: Yes, Your Honor. We sought the  
3 -- we sought relief before a plan was proposed and  
4 sought injunction against the further operations of the  
5 Board. And that would include the product of an  
6 illegally-constituted body in this instance.

7 QUESTION: Has there -- has there been a vote  
8 on the plan?

9 MR. D'KEEFE: There has not been a vote on the  
10 plan. It was scheduled for June 20th of this year. A  
11 lower court in St. Louis County has delayed the  
12 election, pending the resolution of this appeal.

13 QUESTION: In -- In the state court, did you  
14 rely on the Lubin and the Bullock cases in the -- in  
15 your argument that the right to vote is burdened?

16 MR. D'KEEFE: In the pleadings filed with the  
17 state court in our cross-petition for relief, we pointed  
18 out that the exclusion of non-property owners from  
19 participation in the Board can result in a biased plan  
20 and infringe on the rights of voters.

21 That's located in the Joint Appendix, if I can  
22 find it. The --

23 QUESTION: Is that in your argument before the  
24 Missouri Supreme Court?

25 MR. D'KEEFE: There was no specific discussion

1 of the voter impact --

2 QUESTION: Or --

3 MR. O'KEEFE: -- issue in the Missouri Supreme  
4 Court.

5 QUESTION: Mr. O'Keefe, your opponent refers to  
6 the Board of Freeholders in the New Jersey counties,  
7 which he says there is no evidence that any of the  
8 persons elected to those posts have to be freeholders.  
9 And I assume you could call something a Board of  
10 Freeholders without requiring that they own land, if you  
11 want to.

12 Do we have a clear holding here by Missouri  
13 courts that because the name of this is Board of  
14 Freeholders you cannot be elected to it unless you --  
15 unless you are a freeholder?

16 MR. O'KEEFE: We have, Your Honor. We have,  
17 first of all, the definition of the term as used in the  
18 Missouri Constitution, from which there has been no  
19 withdrawal or retreat by the Missouri Supreme Court.

20 We have, secondly, a Missouri Supreme Court  
21 decision which discusses only issues of federal  
22 constitutional law. Under the rule of necessity, it did  
23 not determine that this matter could be resolved by any  
24 ambiguity or uncertainty in state law issues.

25 QUESTION: Well, I can see that freeholders

1 means what everybody thinks freeholders means.

2 MR. D'KEEFE: Yes, sir.

3 QUESTION: But there's -- there's no provision  
4 in the Missouri Constitution that says the members of  
5 the Board of Freeholders shall be freeholders. It just  
6 calls them the Board of Freeholders.

7 MR. D'KEEFE: It calls them the Board of --

8 QUESTION: Now, couldn't it be possible for the  
9 Missouri Supreme Court to say, yeah, they're called  
10 that, and maybe once upon a time they were that, but  
11 there's no constitutional requirement that they all own  
12 real property. Couldn't it -- wouldn't that be within  
13 the realm of the power of the Missouri Supreme Court?

14 MR. D'KEEFE: Well, of course, the Missouri  
15 Supreme Court is bound to interpret its Constitution and  
16 construe it consistent with the past opinions and  
17 principles --

18 QUESTION: Sure.

19 MR. D'KEEFE: -- of construction. The use of  
20 the word freeholder is also found in Article VI, Section  
21 18(g) concerning county Boards of Freeholders to prepare  
22 local charters for counties, including St. Louis County,  
23 and in Section 32(b) of Article VI concerning a  
24 freeholder board for the City of St. Louis to prepare a  
25 charter.

1           And in those uses, the number of members  
2 precedes the use of the term freeholders so that it  
3 reads, "there shall be a board consisting of 14  
4 freeholders," and thlrteen freeholders.

5           QUESTION: Right.

6           MR. O'KEEFE: In this instance, by --

7           QUESTION: There Isn't.

8           MR. O'KEEFE: Pardon me?

9           QUESTION: In this instance there isn't.

10          MR. O'KEEFE: In this instance, by reason of  
11 the fact that the number is stated after the word as  
12 opposed to before it, I don't think amounts to a  
13 constitutional distinction between the two perspectives.

14          In addition, of course, the language utilizes  
15 -- the section refers to the fact that the freeholders  
16 of the city and county will establish compensation rate  
17 for the freeholder from -- the 19th freeholder -- and  
18 that the election is to be set on the date set by the  
19 "freeholders."

20          So, the section uses the term "members" in some  
21 instances, and "freeholders" in others.

22          QUESTION: See, I'm -- I'm a little reluctant  
23 to set aside a -- a -- a proposal in Missouri on the  
24 basis of a meaning of the Missouri Constitution unless  
25 It's unavoidable that the Constitution requires an

1 interpretation that makes this thing invalid. And -- do  
2 you --

3 MR. D'KEEFE: Well, Justice Scalia, I could --  
4 I could suggest to you that, as was mentioned in the  
5 prior argument, the trial court in this case took a  
6 position such as that you are discussing here, that the  
7 name is titular only and not a requirement for office.

8 QUESTION: Uh-huh.

9 MR. D'KEEFE: That opinion went to the Missouri  
10 Supreme Court. As is in the case in other opinions of  
11 law, by trial courts, particularly those on stipulated  
12 facts, the Missouri Supreme Court gave no deference to  
13 that opinion and did not articulate it, preserve it,  
14 reflect it in any manner.

15 QUESTION: They didn't say no, but they didn't  
16 say yes, either. There -- it's hard to point to a line  
17 in their opinion where they say, of course, the meaning  
18 of our State Constitution is that these members must be  
19 freeholders.

20 MR. D'KEEFE: I think there is such a line,  
21 Your Honor.

22 QUESTION: They say that -- well, all right.  
23 Go on. I know the --

24 MR. D'KEEFE: Membership on the Board is  
25 restricted to owners of real property.

1 QUESTION: Was restricted.

2 MR. O'KEEFE: Was restricted to --

3 QUESTION: Was restricted is what they said.

4 MR. O'KEEFE: Yes, sir.

5 QUESTION: And that could be just a description  
6 of -- not the facial challenge, but of the "as applied"  
7 challenge. That maybe as a matter of fact the governor  
8 and all the people who -- who selected people did  
9 restrict it to freeholders.

10 But that would be an "as applied" challenge.  
11 And then we get back to my Republican question.

12 MR. O'KEEFE: Well, Your Honor, they did not  
13 separate the "as applied" and facial challenges or  
14 concerns about the section in their decision.

15 The Missouri Supreme Court also, I think it is  
16 fair to recognize, addressed this case because there was  
17 an abstention order by the Eighth Circuit Court of  
18 Appeals.

19 So, Missouri was fully aware of the fact, the  
20 Missouri Supreme Court, as referenced in its opinion,  
21 that it was being given an opportunity to address --  
22 identify, address, and resolve any state law issues  
23 which might obviate the challenge, and did not do so.

24 QUESTION: They were, at least, making our job  
25 harder. I've got to agree with you there.

1 (Laughter.)

2 MR. D'KEEFE: It is the position of the  
3 appellants that in essence the rights which the  
4 appellant class seeks to preserve are the identical  
5 rights recognized and articulated by this Court in the  
6 Turner decision, that it is the right to equal  
7 treatment, the equal opportunity for service which the  
8 Turner decision so jealously guarded.

9 The right to be free, in the Turner language,  
10 from the burden of an invidiously discriminatory  
11 disqualification by which one segment of society is  
12 offered either a privilege, a right, or an opportunity  
13 by the state. And, for irrational and illogical  
14 reasons, the class consisting of the appellants was  
15 excluded from an equal opportunity for that right.

16 QUESTION: Mr. D'Keefe, do we apply just a  
17 rationality standard?

18 MR. D'KEEFE: Your Honor, I believe that even  
19 under the minimum rational basis test, as articulated in  
20 Turner, that the freeholder qualification of Section 30  
21 falls.

22 QUESTION: You think Turner was a typical  
23 application of a rationality test? Or, did it look like  
24 something else?

25 MR. D'KEEFE: I believe it appeared to be a



1 logically consistent and appropriate application of a  
2 rational basis test.

3 I believe, however that there are -- there is  
4 one set of factors which make the appellant  
5 circumstances in this case even more compelling than the  
6 issues in Turner. And that is, as was discussed  
7 previously. The concomitant impact which the exclusion  
8 of the appellant class from service on the Board has on  
9 that class' rights as voters.

10 And when -- as in the cases of Bullock v.  
11 Carter and Lubin v. Parish -- candidates seeking nearly  
12 access to the ballot for a primary election, never to  
13 exercise any "general governmental power" or any power  
14 whatsoever, other than the opportunity to stand again  
15 for election, when this Court has considered  
16 restrictions which impede the opportunity of citizens to  
17 seek access to the ballot, you have found -- and I think  
18 quite appropriately -- that no such standard can survive  
19 constitutional scrutiny absent it being reasonably  
20 necessary, and, therefore, surviving a heightened level  
21 of constitutional scrutiny.

22 There is no difference between the opportunity  
23 for service on the Board of Freeholders so that you can  
24 dictate access to the ballot for the proposition, and  
25 the opportunity for service -- opportunity to stand for

1 election in the primary election.

2 I think that that factor also would indicate  
3 that the standard to be applied should be heightened.  
4 But that under either standard, that the constitutional  
5 equal protection deprivations of Section 30 must be  
6 declared invalid.

7 Unless there are additional questions, I'd like  
8 to reserve the balance of my time.

9 QUESTION: Than you, Mr. O'Keefe.

10 Mr. Buckner.

11 ORAL ARGUMENT OF SIMON B. BUCKNER

12 ON BEHALF OF APPELLEES

13 MR. BUCKNER: Mr. Chief Justice, and may it  
14 please the Court:

15 The state, perhaps not surprisingly, has a  
16 slightly different perspective on this case than that  
17 enunciated by the appellants.

18 what's important to remember is that 65 years  
19 ago the people of the state, that is, the whole State of  
20 Missouri, decided that there might come a time when the  
21 people of St. Louis City and County would want to  
22 reorganize the metropolitan government. To that end,  
23 the people of the state invoked the state initiative  
24 process.

25 They passed petitions throughout the state,

1 gathered signatures from every congressional district in  
2 the state, and voted to adopt a process. This was the  
3 only thing on the ballot -- or, pardon me -- it wasn't  
4 like adopting a constitution. It was one issue and the  
5 people of the state voted to do this.

6           They voted to adopt a process whereby the Mayor  
7 of St. Louis City, the County Executive of St. Louis  
8 County, and the Governor, each appointed a number of  
9 people to a board, a committee, whatever. In this case  
10 it was called the Board of Freeholders, and this group  
11 of people have exactly one function, and that is to  
12 propose a plan for the reorganization of Metropolitan  
13 St. Louis government.

14           QUESTION: When they did that, they didn't know  
15 that the Constitution prohibited your having a -- a  
16 governmental unit like this composed only of property  
17 owners. Because we hadn't told them that yet, had we?

18           MR. BUCKNER: If the reference is to Turner v.  
19 Fouche, you're right. That case is later than that.

20           On the other hand, it is my position -- it is  
21 the state's position, as you suggested earlier -- that  
22 it is not clear that the Missouri Constitution limits  
23 membership on this Board to owners of real property.

24           The appeal is essentially based on one sentence  
25 that you've heard. We recognize membership on the Board

1 of Freeholders was restricted --

2 QUESTION: Is there anything in the lore --  
3 l-o-r-e -- of Missouri that says that freeholders do not  
4 mean holders of property?

5 MR. BUCKNER: There is nothing in the Missouri  
6 Constitution that speaks to that point. There is, I  
7 believe, a statute that refers to a freeholder as one  
8 who owns a certain number of chickens. But we have a  
9 number of cases in Missouri, and in particular, the ones  
10 in this line of cases that form the basis of the appeal  
11 today.

12 And, in addition, there was another trial court  
13 opinion which, of course, was not --

14 QUESTION: Which says that freeholders don't  
15 mean freeholders?

16 MR. BUCKNER: That says that when the word  
17 freeholder is used in this context, it should be  
18 understood in a public law context, as opposed to a  
19 property law context. And in the public law context,  
20 the word freeholder does not impose any limitation of  
21 the sort urged by the appellants today.

22 QUESTION: What does it mean?

23 MR. BUCKNER: In this case the trial court held  
24 that it was -- it imposed no limitation over and above  
25 the word "elector."

1 QUESTION: Or it doesn't mean anything?

2 MR. BUCKNER: That is what the trial court --

3 QUESTION: It's just a --

4 MR. BUCKNER: -- said.

5 QUESTION: -- a wasted word.

6 MR. BUCKNER: Well, it is a wasted word in the  
7 sense that it is a word that is being used to name the  
8 Board.

9 In a property law context, it means owner of  
10 real property. In a public law context, in this  
11 particular case, it is just a descriptive word that is  
12 used to name the Board.

13 QUESTION: Then what does it mean to the people  
14 in Missouri? Or anyplace else?

15 MR. BUCKNER: To the lawyers who study real  
16 property law, it means--

17 QUESTION: Well, now --

18 MR. BUCKNER: -- owner of real property.

19 QUESTION: -- lawyers will make any word mean  
20 anything they want to make.

21 (Laughter.)

22 QUESTION: I'm talking about common people.

23 MR. BUCKNER: Well, I would draw an analogy to  
24 the use of the word "judge," which is used in all sorts  
25 of varieties and means different things in different

1 contexts.

2 Here today, we would say that the judge -- the  
3 judge refers to somebody who tries cases or hears  
4 appeals. In another context, as I pointed out in the  
5 brief, judge, referring to a member of the County Court  
6 of Jackson County -- we referred to Harry Truman as the  
7 presiding judge of that county, but Harry Truman wasn't  
8 a lawyer. He didn't exercise any judicial power. It  
9 was merely the name we applied to a member of this group.

10 QUESTION: Well, what does freeholder apply to?

11 MR. BUCKNER: In this case, the word freeholder  
12 is not a word of limitation that applies to the --

13 QUESTION: Does it mean --

14 MR. BUCKNER: -- members of this Board.

15 QUESTION: -- a person? Does it mean a  
16 person? I mean, could it be a dog or a cat?

17 (Laughter.)

18 MR. BUCKNER: No, Your Honor. In this case  
19 Section 30(a) refers to members of a board and talks  
20 about appointees. Section 30(b) speaks of freeholders.  
21 That is, people who are members of this Board.

22 QUESTION: Mr. Buckner, did you make this  
23 argument to the Supreme Court?

24 MR. BUCKNER: I personally did not make the  
25 argument.

1 QUESTION: Was the argument made on behalf --

2 MR. BUCKNER: That the word --

3 QUESTION: -- of the state to the board?

4 MR. BUCKNER: That the word freenolder did not  
5 act as a limitation --

6 QUESTION: Right.

7 MR. BUCKNER: -- to membership? Yes, Your  
8 Honor.

9 QUESTION: And yet the court's opinion appears,  
10 at least to me, to assume that it means property owner.

11 MR. BUCKNER: There are a variety --

12 QUESTION: The court simply decided it on that  
13 assumption, the Supreme Court did.

14 MR. BUCKNER: Well --

15 QUESTION: The district court didn't.

16 MR. BUCKNER: I think --

17 QUESTION: But when it got to the Supreme  
18 Court, one has the impression that that court assumed it  
19 meant there is a property ownership requirement. And it  
20 decided the federal issue on that assumption.

21 MR. BUCKNER: As was pointed out a short while  
22 ago, there were two arguments brought to the trial court  
23 and to the Supreme Court.

24 Number one, is this provision unconstitutional  
25 on its face? Number two, is it unconstitutional as

1 applied?

2 I would submit that on its face we have the  
3 statement at the outset of the Supreme Court opinion  
4 that says In so many words, Section 30 required both the  
5 Mayor of St. Louis and the County Supervisor of St.  
6 Louis County to appoint nine electors to the Board. In  
7 addition, the Governor of Missouri was required to  
8 appoint one elector to the Board. That appears in the  
9 Jurisdictional Statement at Appendix page two.

10 The court needed to go on and discuss the "as  
11 applied" problem. We needed to do something. And the  
12 court went on and it felt that the cases discussing --

13 QUESTION: Wait a minute. You think they  
14 decided the question that a freeholder does not have to  
15 be a land owner by using the word elector instead of  
16 freeholder, and that they made that significant  
17 constitutional decision in the statement of facts?

18 MR. BUCKNER: I am submitting that we have  
19 looked at the text of the Constitution which says that  
20 the Board shall consist of 19 members, as you noted,  
21 without reference to the word freeholder or to ownership  
22 of real property.

23 The trial court looked at that and said  
24 specifically -- and this is at page A-17 of the  
25 Jurisdictional statement -- it quoted the constitutional



1 language of the Missouri Constitution and said the only  
2 qualification for members is that they be electors.

3 The Missouri Supreme Court went on and found,  
4 and said, that Section 30 required these people to be  
5 electors and then, in what I will admit is a highly  
6 ambiguous statement at the end, said, "We recognize  
7 membership on the Board of Freeholders was restricted to  
8 owners of --

9 QUESTION: Well, why then --

10 MR. BUCKNER: -- real property."

11 QUESTION: -- would they need to have -- go any  
12 further? If they didn't mean that, why would they then  
13 go on and give a reason, say this doesn't raise an equal  
14 protection problem because this is not a governmental  
15 body?

16 MR. BUCKNER: We --

17 QUESTION: That doesn't make -- they didn't  
18 need to say that unless they -- they said that against  
19 the background of property ownership, it seems to me.

20 MR. BUCKNER: We have the fact that both sides  
21 have stipulated to, that all the members of the Board  
22 were in fact owners of real property.

23 Thus, we have a problem with the Constitution  
24 as applied, if it were, and we need to come up with some  
25 sort of reason. And the court came up with an analysis

1 that --

2 QUESTION: But you -- so -- on the "as applied"  
3 basis, you agree that -- that -- that as applied they --  
4 somebody thinks the property ownership was necessary?

5 MR. BUCKNER: I know that the counsel for both  
6 St. Louis City and St. Louis County so advised the  
7 appointing authorities.

8 QUESTION: And so must you defend this "as  
9 applied" case here?

10 MR. BUCKNER: I think not.

11 QUESTION: Why not?

12 MR. BUCKNER: Number one, because, as I have  
13 suggested, we've moved from state to federal court now,  
14 and these particular appellants were not discriminated  
15 against in any way. Because we have stipulated that it  
16 would have to be the County Executive to appoint them,  
17 and the County Executive made his determination, we have  
18 stipulated, without considering whether these people  
19 owned real property.

20 So, these people would not have been injured on  
21 an "as applied" basis. In addition --

22 QUESTION: But the County Executive received  
23 legal advise that you didn't have to be a freeholder.  
24 But, what? The Mayor of St. Louis received contrary  
25 advise?

1 MR. BUCKNER: No, Your Honor. In each case,  
2 the executive came up with a list of nine names. After  
3 coming up with the list of names, each of these  
4 executives received legal advice.

5 In the case of the county, the legal advice was  
6 these people need to be owners of real property. They  
7 looked at the list of names. All these people, as it  
8 happened, did own real property. So, there was no  
9 change made.

10 In St. Louis City, the Mayor came up with a  
11 list of nine people. He received the same legal advice  
12 and went down the list and determined that one of the  
13 persons did not own real property, and he was excluded  
14 from the -- another person was appointed in his place.

15 QUESTION: And that person was -- the person  
16 who was excluded in St. Louis City is not a party to  
17 this case?

18 MR. BUCKNER: That is correct.

19 QUESTION: Well, then, if that's true, why is  
20 the "as applied" challenge really any different from the  
21 facial challenge? Because, as it's applied, even if it  
22 doesn't mean that, apparently all the lawyers who  
23 advised the governmental officials in your community  
24 tell them that this is what it means.

25 And maybe they're wrong, but then they all act

1 on incorrect advice. So, the application of this  
2 ambiguous provision is exactly the same as if it meant  
3 what I thought it meant when I read it.

4 MR. BUCKNER: As Mr. -- as Brother O'Keefe  
5 pointed out in his brief, the law of Missouri is  
6 determined not by the appointing officials, but by the  
7 court, the Missouri Supreme Court.

8 QUESTION: No. But it's applied by people who  
9 listen to their lawyers. And their lawyers tell them  
10 that -- erroneously perhaps -- that it requires  
11 freeholders.

12 So, as applied in this -- it just doesn't mean  
13 they happened to appoint them. They appointed them  
14 because they were told by the people from whom they get  
15 legal advice that this is what it means.

16 MR. BUCKNER: I have several responses to the  
17 problem "as applied." As I observed in my brief, my  
18 reading of this tends to lead me to the conclusion that  
19 "as applied" really wasn't raised in that we have the  
20 statement in --

21 QUESTION: Well, if it wasn't raised, your  
22 explanation for the Missouri Supreme Court's opinion  
23 goes up in smoke.

24 MR. BUCKNER: It was not raised when brought to  
25 this Court. Raised below, but not in this Court.

1 QUESTION: But certainly the Missouri Supreme  
2 Court doesn't differentiate between two kinds of  
3 challenges.

4 MR. BUCKNER: No, it does not.

5 QUESTION: They don't even mention the "as  
6 applied."

7 MR. BUCKNER: I -- I agree that the Missouri  
8 Supreme Court --

9 QUESTION: So your explanation of that opinion  
10 rests on the assumption they carefully categorized these  
11 two different legal theories and disposed of one of them  
12 in the statement of facts, and then disposed of the  
13 other one by -- by making this governmental powers  
14 argument.

15 MR. BUCKNER: As Justice Scalia observed, the  
16 court could have made my job easier too.

17 (Laughter.)

18 QUESTION: And I also would point out that this  
19 -- the federal district Judge who read this just thought  
20 that this interpretation was really off-the-wall. He  
21 thought it was -- there was absolutely no merit to it.

22 MR. BUCKNER: That's correct. That is --

23 QUESTION: And that's the one unambiguous  
24 description of what -- what this provision means by a  
25 judge here.

1 MR. BUCKNER: But we have a -- In this case, a  
2 federal Judge interpreting the --

3 QUESTION: Right.

4 MR. BUCKNER: -- Missouri Constitution. And,  
5 fortunately, in my case --

6 QUESTION: Presumably it was a Missouri lawyer.

7 MR. BUCKNER: Yes, he is.

8 QUESTION: Well, what should we do? Just give  
9 it the best reading we can and interpret that opinion as  
10 we best understand it?

11 MR. BUCKNER: I think not. That is certainly --

12 QUESTION: Are we permitted to do that?

13 MR. BUCKNER: That is certainly one thing that  
14 you may do, is look at that question.

15 As I suggested in the brief, this is really a  
16 legislative process and this Court does not have the --  
17 well, this Court may review two things in connection  
18 with the legislative processes.

19 First, the result. What comes out. When a  
20 plan is adopted and -- voted on by the people and  
21 adopted by the people, this Court may review the way  
22 that that plan meshes with the Federal Constitution.  
23 That's not a controversial issue of law.

24 QUESTION: You're not suggesting that -- you're  
25 not suggesting that a referendum cures every equal

1 protection violation just because the people want to  
2 violate somebody's rights?

3 MR. BUCKNER: well, as Justice Stewart  
4 suggested in the Town of Lockport decision, there are  
5 different considerations that apply to legislative acts  
6 -- or, pardon me -- one class of votes and referenda.

7 In particular, I think that what saves this  
8 process is that we have a vote by the people of the  
9 State of Missouri to establish this process, and we have  
10 a vote of the affected people at the back end.

11 It's not as was suggested a while ago, we have  
12 the people backing in and approving or disapproving. We  
13 have the approval of the people at the outset as well.

14 I suggested that this Court may review the  
15 result. We also know from cases like Baker v. Carr and  
16 Reynolds v. Sims that this Court is very jealous of and  
17 protects the right to vote.

18 As was suggested earlier today, this really is  
19 not a right to vote case. Nobody questions that any  
20 person is being disenfranchised. Nobody questions that  
21 any vote has been diluted.

22 QUESTION: I somehow thought we were being  
23 asked to review the judgment of the Missouri Supreme  
24 Court on an issue of federal constitutional law. I  
25 thought that's why we were here.

1 MR. BUCKNER: But whether that -- Justice  
2 O'Connor, you're correct, and that is why the appellants  
3 appealed this case here.

4 But in order to exercise that jurisdiction,  
5 there has to be a live controversy. And if the Missouri  
6 Supreme Court and the lower court have determined and  
7 can construe the constitution in such a way that that  
8 federal issue does not arise --

9 QUESTION: Well, what if we disagree with your  
10 reading of it and we read their opinion as being based  
11 on the assumption that the Missouri Constitution  
12 requires the Board to be comprised of property owners?  
13 Suppose that's how we read it?

14 MR. BUCKNER: Then there are two questions that  
15 arise. First, as to whether this is a justiciable  
16 controversy. Second, as to whether there is a rational  
17 basis for such a requirement.

18 We have suggested -- well, there's several  
19 potentially rational bases for this, and the trial court  
20 suggested, for example, that this Board considers land  
21 use issues and that real property owners may be better  
22 equipped to consider questions of land use than people  
23 who do not hold real --

24 QUESTION: Any real property owner or just a  
25 real property owner in St. Louis?



1 MR. BUCKNER: The trial court did not make any  
2 such distinction.

3 QUESTION: Well, you're representing the  
4 Attorney General. What do you think it means? Any  
5 property owner?

6 MR. BUCKNER: I think that from looking at the  
7 text of the Missouri Constitution that since nine  
8 persons are required to be electors of St. Louis County  
9 and nine of St. Louis City, and one of some other county  
10 in the state, that presumably they would be real  
11 property holders in those counties.

12 QUESTION: Except you don't think they have to  
13 be real property owners at all?

14 MR. BUCKNER: You're right.

15 QUESTION: All right.

16 MR. BUCKNER: Yes, sir.

17 QUESTION: But do you have to own the real  
18 property in that county? Or do you have to be a person  
19 in that county who owns real property someplace?

20 QUESTION: The Missouri Constitution does not  
21 draw that distinction.

22 QUESTION: Well, again, if I may impose, what  
23 is your position?

24 MR. BUCKNER: I think that it is rational to  
25 assume that when the people of the State of Missouri

1 voted to adopt this provision that they intended this  
2 language to mean persons who reside in and own real  
3 property -- in fact, were homeowners, since that is the  
4 most common form of real property ownership.

5 QUESTION: In St. Louis?

6 MR. BUCKNER: In the --

7 QUESTION: Or one of the affected counties?

8 MR. BUCKNER: Yes, Your Honor. In addition, I  
9 have suggested in my brief that the process of  
10 purchasing a home, since home ownership is probably what  
11 the people presumed, is an educational process in that  
12 the person who purchases a home learns about real  
13 property values and the value of various amenities in  
14 the area, and the costs of these services.

15 This is an experience that somebody who has not  
16 gone through -- an experience that someone who has not  
17 gone through this process will not have and not be able  
18 to bring to bear.

19 QUESTION: Well, what about this Court's cases  
20 in Turner and Chappelle?

21 MR. BUCKNER: We have -- In the case of Turner  
22 and in the case of Chappelle, we have persons who are  
23 being asked to exercise administrative authority rather  
24 than, as in this case, legislative authority.

25 And for that reason, I maintain that this

1 process under the Pacific States Telephone and Telegraph  
2 case does not --

3 QUESTION: Could the state allow or provide  
4 that bills in the legislature could only be introduced  
5 by property owners?

6 MR. BUCKNER: I think that in such a case we  
7 would run afoul of the -- the Congress or the Executive,  
8 perhaps, on a guaranty clause question. But, no, that  
9 would not be a reviewable controversy in this Court.

10 QUESTION: May I go back a moment to the  
11 interpretation of the Missouri Supreme Court's opinion.

12 In essence, you're arguing there was an  
13 adequate and independent state ground for the decision?  
14 Isn't that your --

15 MR. BUCKNER: Yes, Your Honor.

16 QUESTION: Does that court ever cite Michigan  
17 against Long and recognize the force of that opinion  
18 suggesting that when it intends to rely on an  
19 independent and adequate state ground, it has to make a  
20 clear statement to that effect?

21 MR. BUCKNER: The court does not, of course,  
22 cite to Michigan v. Long in this particular case.

23 QUESTION: That's right.

24 MR. BUCKNER: The state --

25 QUESTION: But they are aware of that doctrine,

1 I hope.

2 MR. BUCKNER: I am -- I am aware of that  
3 doctrine. Yes, Your Honor.

4 QUESTION: No. I mean, the court is aware of  
5 that?

6 MR. BUCKNER: Yes, it is.

7 QUESTION: They cite it in other cases?

8 MR. BUCKNER: Yes, Your Honor. The question,  
9 though, is, given this record, what does the Missouri  
10 Supreme Court opinion mean?

11 The appellants have been able to point to one  
12 ambiguous statement. And, on the other hand, I can  
13 point to several clear statements throughout the record  
14 that say that it consists of members, it consists of  
15 electors.

16 QUESTION: The clear statement that the  
17 Missouri Supreme Court intended to rest its decision on  
18 an adequate state ground rather than on the ground that  
19 it argued -- that it discussed about not exercising  
20 governmental powers, which I gather was an argument that  
21 you -- hadn't even been made in that court before.

22 MR. BUCKNER: That is correct, Your Honor.

23 QUESTION: It's a rather strange way to clearly  
24 rely on an independent and adequate state ground.

25 MR. BUCKNER: I cannot point to a statement of

1 the Missouri Supreme Court that says we are relying on  
2 this to the exclusion of all else. I --

3 QUESTION: Of course, even if they didn't state  
4 clearly that they were relying on an independent state  
5 ground, we -- we still are confronted, before we can  
6 decide the federal ground, with the -- with the  
7 difficulty of interpreting the Missouri Constitution,  
8 without any interpretation by the Missouri Supreme Court  
9 that's clear one way or the other.

10 MR. BUCKNER: Yes --

11 QUESTION: I suppose. Although you think it's  
12 clear one way and your opponent thinks it's clear the  
13 other. I don't think it's clear, myself.

14 MR. BUCKNER: Yes, Your Honor. You're  
15 absolutely right.

16 QUESTION: Counselor, just as a matter of  
17 curiosity. The Missouri Supreme Court -- was written by  
18 Justice Donnelly, wasn't it?

19 MR. BUCKNER: Yes, Your Honor.

20 QUESTION: Did the entire court sit on this  
21 case?

22 MR. BUCKNER: Yes, Your Honor.

23 QUESTION: The full court?

24 MR. BUCKNER: Yes, it did.

25 QUESTION: Unanimous opinion?

1 MR. BUCKNER: Yes, Your Honor.

2 QUESTION: Even Justice Blackmar?

3 MR. BUCKNER: Even Justice Blackmar? For what  
4 it's worth, this was Justice Donnelly's last opinion on  
5 the Missouri Supreme Court. He retired immediately  
6 after writing this opinion.

7 As a -- we were discussing a short while ago,  
8 the rational basis for a land owner requirement -- and  
9 that is, in addition to the findings of the trial court  
10 and the -- the rational reason to have a homeowner and  
11 the educational experience of owning a home, in  
12 addition, somebody who owns real property within the  
13 district is, quite frankly, likely to stay there because  
14 there are certain transactional costs involved with  
15 selling the home and moving elsewhere.

16 Thus, the -- a home owner requirement is  
17 analogous, anyway, to a prospective residency  
18 requirement in that somebody who is likely to stay in a  
19 particular jurisdiction is more likely to be careful  
20 about structuring the government that he is going to  
21 live under, than somebody who is free to pick up and  
22 move in the near future.

23 QUESTION: Mr. Buckner, does Missouri have a  
24 certification procedure barring federal courts to ask  
25 the State Supreme Court what it means by something?

1 MR. BUCKNER: No, Your Honor. This would --  
2 this would have to be remanded. Alternatively -- rather  
3 than remanding it -- bear in mind that what the state  
4 and the governments would like in this case is to have  
5 the appeal dismissed.

6 But what we are after in this case is an  
7 election. We want to let the people of Metropolitan St.  
8 Louis vote and determine the kind of government under  
9 which they will live. Alternatively --

10 QUESTION: (Inaudible) election?

11 MR. BUCKNER: Pardon me.

12 QUESTION: Can't they have the election? Is  
13 there an injunction against the election?

14 MR. BUCKNER: Yes. After this opinion -- or,  
15 this appeal -- was taken to this Court, one of the  
16 members of the Board of Freeholders obtained an order  
17 precluding the election in the City and County --

18 QUESTION: Oh, I thought it was just  
19 voluntarily postponed. No?

20 MR. BUCKNER: No. There is a court order  
21 enjoining the election.

22 QUESTION: But it's the --

23 QUESTION: Is that from the district court or  
24 the --

25 MR. BUCKNER: From the -- I believe it's the --

1 QUESTION: From a state court?

2 MR. BUCKNER: -- St. Louis -- it's a state  
3 court. A trial court in St. Louis.

4 QUESTION: A state court in St. Louis.

5 QUESTION: So, as I understand it, it's the  
6 official position of the State of Missouri that  
7 homeowners are better qualified than all other electors  
8 to participate on certain governmental units?

9 MR. BUCKNER: I am proposing this as an idea  
10 that might have occurred to the electorate at the time  
11 it adopted this.

12 QUESTION: Well, is it your position that that  
13 comports with the equal protection clause?

14 MR. BUCKNER: I'm saying that there is a  
15 rational basis for believing that. Yes, Your Honor.

16 QUESTION: And, therefore, it comports with the  
17 equal protection clause?

18 MR. BUCKNER: Yes, Your Honor.

19 QUESTION: It's also the position of the  
20 Attorney General of Missouri, I gather, that the  
21 Missouri Constitution doesn't require that?

22 MR. BUCKNER: Yes, Your Honor.

23 QUESTION: May I just clear up one thing? When  
24 this -- when Article 30, or whatever it is, was adopted  
25 -- how long ago was this constitutional provision



1 adopted?

2 MR. BUCKNER: In 1924. Sixty-five years.

3 QUESTION: There was not then a freeholder  
4 requirement for state electors, was there?

5 MR. BUCKNER: For electors?

6 QUESTION: No, just for voters in the State of  
7 Missouri?

8 MR. BUCKNER: No, Your Honor.

9 QUESTION: Okay. Well, has the Missouri  
10 Supreme Court defined what a freeholder is for the  
11 purposes of some other provisions to the Constitution?

12 MR. BUCKNER: As the appellants have cited, for  
13 other provisions of the Constitution, and notably the  
14 one in Article I, it has been defined to be an owner of  
15 real property.

16 QUESTION: But Article I is a provision that  
17 requires somebody to be a freeholder.

18 MR. BUCKNER: Yes, Your Honor.

19 QUESTION: Your point is that this provision  
20 doesn't necessarily require somebody to be a  
21 freeholder. He just calls the Board a Board of  
22 Freeholders?

23 MR. BUCKNER: Yes, Your Honor. As I had --

24 QUESTION: A plain obvious reading of the  
25 language?

1 MR. BUCKNER: It's a plain obvious reading of  
2 the Constitution that these people are required to be  
3 electors of various districts.

4 QUESTION: Yeah, all right.

5 MR. BUCKNER: The -- we were discussing quite a  
6 while ago the meaning of the word "judge." Sometimes it  
7 means one who sits on a case. On election day, it means  
8 someone who supervises a polling place.

9 QUESTION: Well, that's different than saying  
10 that the Board of Freeholders doesn't mean a -- that  
11 they have to be freeholders.

12 MR. BUCKNER: But a board of judges at a  
13 racetrack refers to people who supervise stewards rather  
14 than --

15 QUESTION: Well, sure, but --

16 MR. BUCKNER: -- people who --

17 QUESTION: -- they're judges for that purpose.

18 MR. BUCKNER: But, the point is we use judge --  
19 the word "judge" to mean different things in different  
20 contexts. And in the context of Section --

21 QUESTION: So freeholder means -- might mean --  
22 might mean four or five different things, depending on  
23 where in the Constitution it is.

24 MR. BUCKNER: It is -- in this particular  
25 section it is only a name given to a group of people who

1 serve on a particular board. These people, when we talk  
2 about appointment and qualifications in Section 30(a) --

3 QUESTION: And even if they happen to be  
4 freeholders, so-called, that doesn't mean they have to  
5 own real property?

6 MR. BUCKNER: So the trial court found. Yes,  
7 Your Honor.

8 QUESTION: Is that your position too?

9 MR. BUCKNER: When using this word in a public  
10 law context, as found by the trial court, yes, that is,  
11 at this point, the law of Missouri. When --

12 QUESTION: Has the Attorney General's office  
13 ever taken a position on this?

14 MR. BUCKNER: I am not aware that our office  
15 has --

16 QUESTION: Have you ever taken the public  
17 position?

18 MR. BUCKNER: In the trial court and in the  
19 Supreme Court, yes, Your Honor.

20 QUESTION: In the public -- did you ever tell  
21 the public that freeholders don't mean freeholders?

22 MR. BUCKNER: We have not issued any --

23 QUESTION: Did you ever? In a speech or  
24 anything? Did you do this anyplace other than in this  
25 case? Did you ever say that freeholders didn't mean

1 freeholder?

2 MR. BUCKNER: There is a second case that was  
3 pending at about the same time in St. Louis County where  
4 we did take that position. Yes, Your Honor.

5 QUESTION: Well, I take it you must have taken  
6 it in the trial court here.

7 MR. BUCKNER: That is true.

8 QUESTION: You didn't take it when you advised  
9 the Governor, though.

10 MR. BUCKNER: The Governor is the former  
11 Attorney General and did not ask for our advice on this  
12 question.

13 (Laughter.)

14 QUESTION: Touche. Touche.

15 MR. BUCKNER: If there are no further  
16 questions, I would ask this Court to dismiss the  
17 appeal. Thank you very much.

18 QUESTION: Thank you, Mr. Buckner.

19 Mr. O'Keefe, do you have rebuttal?

20 REBUTTAL ARGUMENT OF KEVIN M. O'KEEFE  
21 ON BEHALF OF APPELLANTS

22 MR. O'KEEFE: I do, Your Honor. The shotgun  
23 arguments from the other side leave a lot of stray  
24 pellets that I'd like to try to pick up very briefly.

25 First of all, there is no question as to the

1 meaning of the word freeholder in the English language  
2 or in the common law.

3 I think the state's assertion that it has  
4 suddenly become mere surplusage, contrary to the rules  
5 of constitutional construction in the Missouri  
6 Constitution, that it has become devoid of meaning.  
7 Were there a single appellate decision of any court in  
8 the English-speaking world in the 700 years since the  
9 foundations of common law to support that position, it  
10 might have more merit.

11 QUESTION: Well, what about the -- what about  
12 the district court?

13 QUESTION: Circuit court.

14 QUESTION: I mean circuit court.

15 MR. O'KEEFE: The -- the St. Louis County  
16 Circuit Court, trial bench, as a conclusion of law,  
17 ruled that a freeholder qualification was not necessary,  
18 and as a matter of dicta, suggested that the term may  
19 have no meaning. That's as far as --

20 QUESTION: So there has been a court who says  
21 that the term is meaningless.

22 MR. O'KEEFE: Well, as a matter of dictum, the  
23 trial court in this case postulated that that was a  
24 potential. The Missouri Supreme Court, of course, did  
25 not adopt that finding, or that conclusion.

1           And, In fact, one of the things which concerns  
2 the appellants is the very issue which Justice Scalia  
3 raised. The red herring approach of the state's wishing  
4 that there was an ambiguity in the Missouri Supreme  
5 Court's decision doesn't make it so.

6           The fact that they focused a lot of attention  
7 to debate a hypothetical ambiguity doesn't make an  
8 ambiguity. What the other side seeks to do is to read  
9 into the Missouri Supreme Court what they did not say,  
10 and to read out of the Missouri Supreme Court's opinion  
11 what they did say.

12           And that is, first of all, inconsistent with  
13 the authority and jurisdiction of the Missouri Supreme  
14 Court to interpret the state statutes and Constitution  
15 of that state as it sees fit.

16           And it is also inconsistent with the findings  
17 of the Missouri Supreme Court when it specifically  
18 defined the constitutional use of the term freeholder.

19 There is --

20           QUESTION: Mr. --

21           MR. O'KEEFE: -- no ambiguity.

22           QUESTION: Mr. O'Keefe, can I ask this? I can  
23 understand how your clients have standing, if the  
24 Missouri Constitution requires these people to be -- to  
25 be freeholders.

1           But, let's assume that I don't know what the  
2 Missouri Constitution requires and let's assume I'm just  
3 looking at your "as applied" challenge. why do -- why  
4 do your clients have standing on the "as applied"  
5 challenge If it appears that the only people on the list  
6 of names submitted -- only one person was bumped off  
7 after this advice was given and that person is not among  
8 your clients?

9           MR. D'KEEFE: To the contrary, Your Honor.  
10 Father Reiner is a member of the class. The class in  
11 this case is every person who could be subjected to  
12 discrimination on the property ownership requirement.  
13 The class consists of every registered voter in the  
14 State of Missouri who does not own real property.

15           QUESTION: Well, that may be the class, but  
16 what about the named plaintiff?

17           MR. D'KEEFE: Your Honor, we are before the  
18 Court as the defendants in a case put out by the state.  
19 They designated the named parties; they defined the  
20 class.

21           QUESTION: Well --

22           MR. D'KEEFE: For them to come now and suggest  
23 that we are not appropriate parties raises some  
24 substantial questions as to what sort of a judgment we  
25 are appealing from. Excuse me.

1 QUESTION: Well, I guess you have to get him in  
2 there. I guess if he's in the class, it's all right.  
3 But everybody else in the class hasn't been harmed. So,  
4 it really turns, then, on whether he's in the class.

5 MR. J'KEEFE: Your Honor, I don't believe  
6 that's necessary. Both in Turner where the -- at  
7 footnote 23 in the Turner decision where this Court  
8 discussed the fact that the local authorities can be  
9 relied upon or expected to obey the state law, and also  
10 in Carter v. Green County Jury Commissioners decided the  
11 same day, where the Court recognized --

12 QUESTION: That goes to the facial challenge.  
13 I agree that if -- if the Constitution says that,  
14 there's no standing problem.

15 I'm only worried about the situation if the  
16 Constitution doesn't say that but everybody believed it  
17 says that and everybody acted on that basis. Then I  
18 wonder why anybody, except Father Reiner, was it --

19 MR. J'KEEFE: Well, first of all, Governor  
20 Ashcroft, one of the appellees, and the person  
21 responsible for selecting the 19th member of the Board,  
22 did specify that he did not consider and would not  
23 consider anyone who did not own real property. It was  
24 an applied criterion in the Governor's choice from among  
25 all the registered voters in the state who do not reside



1 In the City or County of St. Louis.

2 So, certainly, all of them are clearly  
3 specifically, and factually, within the class.

4 The -- the questions also suggest the state's  
5 position that there is a rational basis for this  
6 criteria. Of course, first of all, the Missouri Supreme  
7 Court has not identified any legitimate state objective  
8 which it claims is served by the exclusion of  
9 non-property owners, non-freeholders from service on  
10 this body.

11 Secondly, even the trial court --

12 QUESTION: Well, in rational basis cases  
13 doesn't the -- don't our cases sometimes suggest that if  
14 a court can dream up one --

15 MR. D'KEEFE: Generally, Your Honor, they're  
16 required to at least dream it up before they finish the  
17 case.

18 QUESTION: Uh-huh.

19 (Laughter.)

20 MR. D'KEEFE: As opposed to relying on this  
21 Court to --

22 QUESTION: Yeah, but nevertheless --

23 MR. D'KEEFE: -- dream up a justification for  
24 them.

25 QUESTION: Well, I know, but judges might think

1 that -- that they -- even if one isn't suggested, the  
2 judges might think there is one.

3 MR. O'KEEFE: Well, Your Honor, unless they  
4 articulate what that might be, it's very difficult for  
5 this Court to hypothesize what reasoning may have gone  
6 into a decision which does not support that.

7 QUESTION: Well, what if we thought -- what if  
8 we thought there was a perfectly good reason for that?

9 MR. O'KEEFE: Your Honor --

10 QUESTION: Are we forbidden to affirm?

11 MR. O'KEEFE: If you believed that was  
12 consistent with constitutional -- equal protection  
13 analysis --

14 QUESTION: Well, how about -- how about -- Is  
15 it consistent with our cases?

16 MR. O'KEEFE: I believe it is not in -- it is  
17 not consistent with your cases to make such a conclusion.

18 QUESTION: Well, there certainly are cases from  
19 this Court that say that we may speculate as to what a  
20 rational basis would have been. Williams v. Lee Optical  
21 Company.

22 MR. O'KEEFE: Your Honor, I'm not going to  
23 confess -- I'm not going to assert that I'm familiar  
24 with that particular decision. In general, I --

25 QUESTION: In any event, we do speculate --

1 MR. O'KEEFE: Pardon me?

2 QUESTION: And, in any event, we do speculate.

3 (Laughter.)

4 MR. O'KEEFE: Well, certainly, in this case you  
5 wouldn't speculate.

6 QUESTION: Believe it, Mr. O'Keefe. No.

7 MR. O'KEEFE: Pardon me?

8 QUESTION: After all, it's just a wasted word.

9 MR. O'KEEFE: Well, Your Honor, that -- it is  
10 the state's contention that it's a wasted word. But, of  
11 course, there -- every use of the words in the  
12 Constitution are presumed intentional and meaningful and  
13 not surplusage.

14 I'd also like to just point out that the state  
15 has conceded that it believes that this Board of  
16 Freeholders -- first of all, it abandoned the reasoning  
17 of the Missouri Supreme Court to justify the relief they  
18 seek now, but also that they have contended that the  
19 Board of Freeholders process is equivalent to the state  
20 legislature and the right of initiative, and have even  
21 suggested to this Court that it would be an appropriate  
22 application of a rational standard to limit -- in  
23 response to the question asked previously -- to limit  
24 the opportunity to introduce bills in the Missouri  
25 legislature to only property owners.

1 Presumably they also suggest it would be  
2 rational to limit the right of initiative to property  
3 owners. Essentially what they are suggesting is that  
4 Missouri is to be a two-tiered class -- a two-class  
5 society. One class, the landed gentry allowed to  
6 participate at the front and back end of the  
7 governmental process, while those who do not enjoy the  
8 privilege, are allowed to participate only at the back  
9 end of the process.

10 A hundred and forty-seven years ago this month,  
11 the citizens of the State of Rhode Island went into  
12 rebellion. Armed rebellion in the streets for the  
13 purpose of protecting the right of the participation in  
14 government, free of a property ownership qualification.  
15 The doors rebellion was a sad chapter in that state's  
16 history and in this country's history.

17 But the appellants in this case seek no more  
18 greater right than that. Thank you, Your Honor.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
20 O'Keefe.

21 The case is submitted.

22 (Whereupon, at 2:57 p.m., the case in the  
23 above-entitled matter was submitted.)  
24  
25

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V. WAYNE L. MILLSAP, ET AL.

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