

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

CAPTION: UNITED STATES DEPARTMENT OF COMMERCE,  
ET AL., Appellants v. MONTANA, ET AL.

CASE NO: 91-860

PLACE: Washington, D.C.

DATE: March 4, 1992

PAGES: 1 - 37

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITED STATES DEPARTMENT OF                   :

4       COMMERCE, ET AL.,                         :

5                   Appellants                         :

6               v.   :   No. 91-860

7   MONTANA, ET AL.                                 :

8   - - - - - X

9   Washington, D.C.

10    Wednesday, March 4, 1992

11               The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 10:02 a.m.

14   APPEARANCES:

15   KENNETH W. STARR, ESQ., Solicitor General, Department of  
16       Justice, Washington, D.C.; on behalf of the  
17       Appellants.

18   MARC RACICOT, ESQ., Attorney General of Montana, Helena,  
19       Montana; on behalf of the Appellees.

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C O N T E N T S

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	PAGE
ORAL ARGUMENT OF KENNETH W. STARR, ESQ. On behalf of the Appellants	3
MARC RACICOT, ESQ. On behalf of the Appellees	17
REBUTTAL ARGUMENT OF KENNETH W. STARR, ESQ. On behalf of the Appellants	35



1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 91-860, the United States Department of  
5 Commerce v. Montana.

6 General Starr.

7 ORAL ARGUMENT OF KENNETH W. STARR

8 ON BEHALF OF THE APPELLANTS

9 GENERAL STARR: Mr. Chief Justice, and may it  
10 please the Court:

11 Article I, Section 2, Clause 3 of the  
12 Constitution provides that representatives shall be  
13 apportioned among the several states according to their  
14 respective numbers. This case brings before the Court the  
15 judgment of a three judge district court holding  
16 unconstitutional the act of Congress that since 1941 has  
17 governed the apportionment of representatives among the  
18 several states. As the Court has been informed, a three  
19 judge district court in Massachusetts has very recently  
20 come to the opposite conclusion, rebuffing a  
21 constitutional challenge mounted by the Commonwealth of  
22 Massachusetts.

23 The Montana case and the Massachusetts case in  
24 its wake have resurrected a controversy as old as the  
25 Constitution itself, how to deal with the problem of

1 fractional remainders in the apportionment of  
2 representatives to the states. The fractional remainder  
3 problem arises because of two things. First, the  
4 Constitution by its terms requires that no matter how  
5 sparsely populated the state, each state shall have at  
6 least one representative in the House. And secondly, the  
7 implicit Constitutional requirement, that no district  
8 shall transgress or cross a state line.

9 QUESTION: Strangely enough, we haven't been  
10 consistent over the century, have we?

11 GENERAL STARR: The Congress has not been  
12 consistent in terms of the specific method that has been  
13 employed, but what Congress has done, Justice Blackmun, is  
14 to examine what it believes to be the most appropriate  
15 method, including, as the Court is aware, at the founding  
16 that Congress in 1792 in response to the debate in those  
17 early years determined in the wake of President  
18 Washington's veto to disregard fractional remainders  
19 entirely. And that was the history of apportionment for  
20 the first 5 decades. It was only in the 1840 census that  
21 the method was changed, and indeed over the decades  
22 Congress has used no fewer than four methods of  
23 apportionment.

24 QUESTION: Well, there's another factor that  
25 enters in, isn't there, the fact that the House of

1 Representatives has a limited number of members?

2 GENERAL STARR: That's exactly right.

3 QUESTION: And that is not in the Constitution,  
4 is it?

5 GENERAL STARR: That is not. It has always been  
6 thought, as has this question, to be a matter entrusted to  
7 the judgment of the Congress of the United States. In  
8 fact in federalist '55 Madison said quite plainly that no  
9 political problem admits of a less precise solution than  
10 the size of the House of Representatives. And the issue  
11 before the Court today flows quite naturally from that,  
12 because until 1911 Congress always had the option, which  
13 it exercised from time to time, of increasing the size of  
14 the House of Representatives. But again, that is not a  
15 textually committed power. Nonetheless it is one that  
16 has, from the founding of the republic been one that is  
17 viewed as falling to Congress and not admitting the --

18 QUESTION: Well, this problem in Massachusetts  
19 and Montana certainly could be cured by increasing the  
20 size.

21 GENERAL STARR: Yes, it could. The problem of  
22 fractional remainders would not, there would still have to  
23 be a method for dealing with fractional remainders. But  
24 Montana could eventually get an additional representative  
25 were Congress willing to increase the size of the House.

1 But Madison wisely advised at the founding that a  
2 representative body should not be so numerous that it  
3 becomes similar to an Athenian assembly, and yet it should  
4 be large enough to be representative of the people as a  
5 whole.

6 And since 1911 the Congress has fixed the size  
7 of the House of Representatives at 435, and neither court  
8 now to address this issue has suggested that it would be  
9 appropriate for the judiciary to mandate to override  
10 Congress' judgment as to the size of its own House.

11 QUESTION: Has any calculation been done to show  
12 how large the House would have to be in order to have  
13 precise apportionment?

14 GENERAL STARR: In order to have precise  
15 apportionment, I am not sure that that calculation has  
16 been done. At least I am certainly not aware of any  
17 calculation.

18 QUESTION: Mr. Starr, what is the status of the  
19 Massachusetts case?

20 GENERAL STARR: The status is that a final  
21 judgment has been rendered, and the United States is  
22 presently considering precisely what to do. And there are  
23 several alternatives that we are presently actively  
24 considering and we will come to closure on that within a  
25 matter of a very few days. As the Court is aware, the



1 Massachusetts court directs action to be taken by March  
2 31. That again is a decision, as the Court is aware, that  
3 rejected the constitutional challenge but overturned the  
4 apportionment on non constitutional grounds.

5 QUESTION: I'm not sure that you would ever  
6 solve the fractional remainder problem by any reasonable  
7 increase in the size of the House of Representatives. If  
8 you increased it to a point where Montana was clearly  
9 entitled to two, you'd probably have a situation where  
10 Washington was almost entitled to a couple more, but not  
11 exactly. I mean, I don't think reasonable increases in  
12 the size of the House would ever solve the fractional  
13 remainder problem.

14 GENERAL STARR: I think the point is well taken.  
15 It would not ultimately solve it. I meant to suggest that  
16 Montana's concern about maintaining its two  
17 representatives would be solved under the existing method  
18 if the size of the House were increased by approximately  
19 six or seven representatives, then under this  
20 apportionment method it would eventually be entitled to  
21 that additional representative.

22 But I think the Chief Justice is making the  
23 critical point here. Someone is going to be a winner and  
24 someone is going to be a loser, inevitably. And in 1980,  
25 in the wake of that apportionment, Montana was quite

1 pleased because it was comparatively over represented, and  
2 the two representatives who are parties to this action  
3 trumpeted the virtues of the equal proportions method.  
4 Which again suggests that ultimately this is a debate that  
5 should go on among the states as represented in the  
6 Congress of the United States, and thus we do believe that  
7 this is a matter that is entrusted to the discretion of  
8 the Congress.

9 QUESTION: Of course there's no express  
10 delegation to the Congress in the Constitution to do this,  
11 is there?

12 GENERAL STARR: There is none, but it has been  
13 viewed, as Justice Story stated in the 1830's in Prigg  
14 against Pennsylvania, as flowing ineluctably from the very  
15 nature of the plan of power.

16 QUESTION: Did the present method of  
17 apportionment, did that, that was an act of Congress, was  
18 it?

19 GENERAL STARR: Yes.

20 QUESTION: Did it have to be signed by the  
21 President?

22 GENERAL STARR: Yes. It was an act of Congress  
23 that was --

24 QUESTION: Well, it's not just delegated to the  
25 Congress alone then.

1           GENERAL STARR: Oh, I am sorry, in terms of the  
2 presentation. Congress has done this by an act of  
3 Congress, by statute, and presenting it, and no one has  
4 questioned that that is a matter that is entrusted to the  
5 political branches, that that is --

6           QUESTION: Well, but not to the Congress.

7           GENERAL STARR: Not to the Congress entirely,  
8 but to the political branches, but Congress' discretion is  
9 quite broad. But to answer your question specifically,  
10 Justice White, the statute was enacted in 1941 with the  
11 expectation that this would bring stability and finality  
12 to the process. This is obviously, since elections are  
13 effected in the House of Representatives every two years,  
14 a matter that cries out for a quick and speedy resolution,  
15 and that's why Congress has imposed very precise and  
16 demanding statutory duties in terms of the time table for  
17 completing the census, for doing the calculations and then  
18 making the report from the President to the Congress.

19           QUESTION: General Starr, what if Congress  
20 decided to apportion it roughly, for the most part  
21 according to population, but put an upper limit? Congress  
22 says, you know, California is getting awfully big, and we  
23 think just as there's a minimum limit there ought to be a  
24 maximum limit too. What if it did that? Could we review  
25 that?

1 GENERAL STARR: I think not.

2 QUESTION: We could not review it?

3 GENERAL STARR: I think that would be a matter  
4 entrusted to the political process --

5 QUESTION: Really? Congress could --

6 GENERAL STARR: -- as long as it is according to  
7 their respective numbers, and it seems to me that as long  
8 as the --

9 QUESTION: I'm saying it's not according to  
10 their numbers. They're saying California, once California  
11 has more than a certain number, we don't care how big  
12 California gets, that's too big. We're not going to allow  
13 any more.

14 GENERAL STARR: But as long as it is tying it to  
15 respective -- and I think it is. You're suggesting that  
16 it's not, but I think although we are at the outer  
17 perimeter of Congress' discretion, it seems to me that  
18 Congress does have that discretion if it so chooses. But  
19 may I supplement that by this? History illuminates the  
20 meaning of the text, and it certainly is clear that what  
21 Congress has been struggling to do over these many decades  
22 is to come as close to quota as possible, and there's no  
23 question that equal proportions advances that.

24 QUESTION: I think you've given, you've given  
25 Wyoming the solution, or Montana. I mean, that's the way



1 to do it, just take some representatives away from  
2 California and parcel them out. This is not really a big  
3 problem for the Congress. I thought it was a really big  
4 problem.

5 (Laughter.)

6 GENERAL STARR: Well, that is a matter that  
7 Congress could consider, but the fact that it has not done  
8 so, Justice Scalia, suggests the wisdom and the efficacy  
9 of the political process.

10 QUESTION: Or it may suggest that the  
11 representatives from California can outvote the  
12 representative from Montana.

13 (Laughter.)

14 GENERAL STARR: And perhaps are not so  
15 eleemosynary-minded as might be suggested.

16 QUESTION: If you were a member of the Congress  
17 and that somewhat startling proposal were made, would you  
18 think you were violating your duties under the  
19 Constitution as a congressman if you voted for that  
20 bizarre solution?

21 GENERAL STARR: In my own view, as opposed to  
22 what is appropriate for judicial review, I would be  
23 informed by history. I would be guided by that. And the  
24 point I was making, Justice Kennedy, in response to  
25 Justice Scalia is this, that Congress has always sought to

1 employ a method that gets at quota, as close as possible  
2 in round numbers to the precise numerical titlement.

3 QUESTION: Well, but suppose you were met with  
4 that proposal. Would you consider it consistent with your  
5 constitutional duty to support that, if you supported that  
6 proposal after you reviewed history, et cetera?

7 GENERAL STARR: In terms of my own perception I  
8 would be more guided by history, frankly, and I would view  
9 it as difficult to depart from history. I think history  
10 illumines the meaning of the text. Nonetheless, I do  
11 think in terms as a matter of raw power that Congress  
12 could see fit to engage in, and my colleagues therefore  
13 who might not share my perspective as to the illumination  
14 that history provides, might very well say we do have a  
15 political problem in this country that we want to solve,  
16 namely the largest states have become a little bit too  
17 large and we need to in fact give a little bit of bias in  
18 favor of the smaller states.

19 But there is still a rational relationship to  
20 population. That's what can't be done, quite clearly. It  
21 would be not only anticonstitutional, it would be clearly  
22 unconstitutional to simply ignore the numbers or ignore  
23 the population of the respective states.

24 QUESTION: There has to be some rational  
25 relation?

1           GENERAL STARR: Correct. And I do think that is  
2 subject to judicial review. That's why we have said that  
3 the political question doctrine does not shield all  
4 aspects of Congress' action, and certainly if there were a  
5 violation of a specific textual requirement, then the  
6 courts can in fact call Congress to account for that. But  
7 as long as there's a rational relationship to population,  
8 then it seems to us that that is a matter that the  
9 political process should in fact handle.

10           QUESTION: Well, General Starr, you're using the  
11 political question idea then not as meaning barring  
12 adjudication, but as a very heightened form of deference.

13           GENERAL STARR: Well, that's one way of  
14 formulating it. I think what I am suggesting is that the  
15 precise issue of which of competing apportionment methods  
16 that are indisputably related to population, once we reach  
17 that stage then it seems to us that that issue is shielded  
18 from -- and why is that, because under, for a variety of  
19 reasons, but under Baker v. Carr what Congress is making  
20 in choosing one apportionment method over another is a  
21 basic policy choice about equity and fairness among the  
22 states.

23           QUESTION: Well, sir, I'm not sure if that  
24 qualifies as the traditional political question which, you  
25 know, at one time was said a thicket that courts should

1 just stay out of, or simply saying that given the  
2 constitutional standard of according to their respective  
3 numbers, it leaves all sorts of reasonable alternatives  
4 open to Congress that would be reviewed only if the  
5 alternative weren't reasonable.

6 GENERAL STARR: I think the Court could come at  
7 it from that method of analysis as well by virtue of the  
8 broad powers that Congress enjoys under the necessary and  
9 proper clause, and that was the method that the  
10 Massachusetts three judge court engaged in or used in  
11 rejecting the constitutional claim.

12 But our basic submission is this, that it is  
13 quite wrong to believe, as the three judge court in  
14 Montana did, the majority did, that this Court's  
15 articulation of the one person, one vote standard, which  
16 of course was articulated and applied in the in-state  
17 setting that was at issue in Wesberry and in Karcher  
18 against Daggett, is applicable in this setting when that  
19 standard or ideal of absolute equality cannot in fact be  
20 achieved.

21 I should hasten to add that these methods are  
22 extremely similar in terms of their results. Each uses  
23 the population of the state as the numerator. The divisor  
24 varies from method to method, and there are certain  
25 variations. But all of the, the three principle, I should



1 say, competing methods are extremely close in terms of the  
2 results. We're therefore quite far removed from what this  
3 Court was concerned about in Wesberry, the problem of  
4 rotten boroughs, as it were, which was of concern at the  
5 founding in terms of the gross disparity in district  
6 sizes.

7 QUESTION: Mr. Starr, can I ask you a question  
8 about the methods as a group? Is it true that for all of  
9 them, focusing on the fractional remainder point that you  
10 say, like California has, what is it, 52 and 1/8 is --

11 GENERAL STARR: Yes.

12 QUESTION: -- then all of those would require  
13 that California get either 52 or 53?

14 GENERAL STARR: Three of the methods would, two  
15 would not. The Adams method, which our colleagues also  
16 urged upon the district court, would result in what we  
17 call a quota violation. It would actually give California  
18 only 50 seats. The Jefferson method, which ignores  
19 fractional remainders, also resulted in quota violations  
20 in the 1830 apportionment, and that was one of the primary  
21 reasons that Webster --

22 QUESTION: I thought that always took the next  
23 higher number, didn't it? Jefferson?

24 GENERAL STARR: Well, it did, and yet for  
25 mathematical reasons that I don't pretend to understand,

1 the Jefferson method had a particular methodology to it  
2 that resulted in a quota violation in the 1830 census in  
3 reapportionment. And that prompted both Webster on the  
4 one hand and Adams on the other to come forward with their  
5 method. Webster's was employed.

6 Again the Congress employed the Vinton or  
7 Hamilton method in the 1850 methods, and what Congress was  
8 seeking to do in this area is find the best possible  
9 choice that maximized various indicia of equity, of  
10 fairness. And they thought that equal proportions did  
11 that, and it clearly does not violate quota. It could not  
12 have violated quota. When we have gone back and taken the  
13 numbers back to 1792, equal proportions would never have  
14 done what Jefferson and Adams could do and in fact did do  
15 in 1830.

16 It seems to us, in short, that the basic error  
17 of the three judge court was to transplant to alien soil a  
18 standard that does not apply, and in the process grossly  
19 intruded into the province of Congress which quite clearly  
20 has carefully, elaborately considered which method is best  
21 and chose that method, and sought to achieve something  
22 that Joseph Story in his commentaries in the 1830's  
23 suggested was very important, and that was stability and  
24 predictability.

25 Congress thought it achieved that in 1941, with

1 the irony that Senator Hugo Black urged the adoption of  
2 equal proportions, the author of Wesberry against Sanders.  
3 This was viewed as a fair method that created a balance  
4 between the interests of large and small states, as well  
5 as being emphatically, enthusiastically recommended by  
6 distinguished panels of mathematicians.

7 I'd like to reserve the remainder of my time, if  
8 I may.

9 QUESTION: Very well, General Starr.

10 General Racicot, we'll hear from you.

11 ORAL ARGUMENT OF MARC RACICOT

12 ON BEHALF OF THE APPELLEES

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

15 If I could first of all answer a couple of  
16 questions that were posited during the Solicitor's  
17 argument. First of all with Justice Kennedy, how large  
18 would the House have to be to accommodate if the standard  
19 proposed by the State of Montana were adopted, namely the  
20 Dean method, the accommodation would occur in terms of  
21 adding two members, and then all three states, Washington,  
22 Massachusetts, and Montana, would then at that point in  
23 time have the representatives that they have currently  
24 been notified that they would secure.

25 In terms of your question, Mr. Chief Justice,

1 concerning fractional remainders, that will always be a  
2 problem until such time as the constitutional maximum is  
3 reached, which would be 1 for every 30,000, and of course  
4 that would approach 8,600 representatives which is quite  
5 obviously not a palatable solution, I would suspect.

6 And in reference to the Adams method, Justice  
7 Stevens, you requested why is it that it can in fact  
8 create something known as the Alabama paradox, and that is  
9 because it ignores all the fractional remainders, and as a  
10 consequence it ends up providing fewer seats. You run out  
11 of seats before in fact all of them are ultimately  
12 presented.

13 The question in Montana's view is does the  
14 standard for population equality enunciated in Wesberry  
15 and Kirkpatrick and Karcher apply to Congress? Does it  
16 apply to their congressional reapportionment duties? Or  
17 put another way, should the same standard of fairness  
18 required of all other governmental bodies, including local  
19 government bodies, apply to Congress when they apportion?

20 Contrary to the suggestions of the United States  
21 in their brief, this Court is not being asked to second  
22 guess experts in the field of mathematics or to direct and  
23 any way dissect the statistical underpinnings of the five  
24 historically recognized apportionment methods, nor be able  
25 to distinguish between all the very complicated



1 mathematical concepts that are involved in all five of  
2 these various formulas. The Court in our judgment need  
3 only determine which of the methods, which all have a  
4 different measure of equity, and which one of those  
5 methods is designed to meet the constitutional goal that  
6 has been articulated by this Court in the intrastate  
7 setting concerning apportionment.

8 QUESTION: General Racicot, would you indicate  
9 whether you think that in your view Congress has ever  
10 apportioned the fractions in a way that meets the  
11 Constitution? It has used four different methods. I have  
12 the impression from reading your brief that none of them  
13 would have met your test.

14 MR. RACICOT: Justice O'Connor, in view of the  
15 decisions of this Court, that is precisely what we mean to  
16 indicate. Although there has never been a case --

17 QUESTION: I think that's sort of an extreme  
18 position to take when we're trying to interpret what the  
19 Constitution requires and when the practice has gone back  
20 so far in the Nation's history of permitting Congress to  
21 make this sort of a determination.

22 MR. RACICOT: Justice O'Connor, I think a close  
23 examination of the apportionment history of this country  
24 would find that there has been more accommodation than  
25 there has been any process sustained in principle. And

1 that in fact if one takes a look at the cases that have  
2 been put forth by this Court with the intrastate  
3 reapportionment processes that occur, one will find a very  
4 simple thread throughout all of them, and that is, number  
5 one, you determine an ideal population district, the  
6 district size, by taking the total amount of the  
7 population and dividing the number of seats that are  
8 available. That determines an ideal district size, and  
9 then all the deviations are measured from that ideal  
10 district size.

11 The only formula that is agreed by all of the  
12 parties that does that is the Dean method, which has never  
13 been used. So in our judgment, although there have  
14 certainly been accommodations throughout our history, the  
15 Dean method has never been used, and as a consequence does  
16 not come to the point where it meets this Court's demands  
17 within the intrastate setting. And the question then  
18 becomes, in our judgment, whether or not we are going to  
19 require of Congress the same expectations that we require  
20 of states and other local government entities.

21 QUESTION: But don't you agree that the  
22 situation of the intrastate redistricting even for  
23 Congress is quite dramatically different than the  
24 situation of assigning representatives to 50 different  
25 states?

1 MR. RACICOT: Mr. Chief Justice, that is true  
2 because of the obvious constitutional requirements that  
3 there be no more than 1 for every 30,000, and also that  
4 state boundaries be respected. We cannot reach as much  
5 mathematical precision as we can within the intrastate  
6 setting, but applying the same rules that have been used  
7 in those cases to Congress will allow us to get much  
8 closer.

9 QUESTION: Well, why, why would we apply those  
10 same rules?

11 MR. RACICOT: Because that's how population  
12 equality or district equality is achieved.

13 QUESTION: But the directive to Congress doesn't  
14 say achieve population equality. It says according to  
15 their respective numbers.

16 MR. RACICOT: Yes. According to the respective  
17 numbers of people within those states. And quite  
18 obviously if one takes a real close look at the  
19 constitutional convention debates, I think that that was a  
20 question that was paramount in their minds as well, was  
21 continually how are we going to reach population equality,  
22 how are people going to be equally represented.

23 QUESTION: The directive to the states says even  
24 less than that, doesn't it?

25 MR. RACICOT: It does, Justice Scalia.

1 QUESTION: In fact it says nothing at all,  
2 except republican form of government.

3 MR. RACICOT: That's right. There is much more  
4 of a textural reference to this particular process than  
5 there is the one that this Court has found --

6 QUESTION: We didn't discover that until 1964,  
7 which is, I suppose, your answer for why for almost 200  
8 years we have never had the right solution, because this  
9 Court didn't give the answer until 1964. Wesberry, I'm  
10 talking about.

11 MR. RACICOT: That's precisely correct. It is  
12 also agreed without any question between the parties,  
13 between the experts, between those states who have  
14 appeared as amicus, between all concerned, that the ideal  
15 district size pursuant to the 1990 census is 572,466  
16 people. With the Hill method, with the method of equal  
17 proportions as presently codified in statute, Montana is  
18 by far the largest district in the Nation with a  
19 population of 803,655. It exceeds the ideal district size  
20 by 231,000 people, or by 40.4 percent. So it takes in  
21 Montana 800 people to have the same voting strength as 500  
22 have in Idaho or Rhode Island.

23 Now, under that method that's presently codified  
24 in the statute --

25 QUESTION: May I ask just at this point, is it



1 part of your submission that the Hill method is always  
2 distorted against a smaller state?

3 MR. RACICOT: I believe, Your Honor, that you  
4 can always determine bias from a number of different  
5 perspectives, and that there's no consistent way to  
6 measure bias.

7 QUESTION: But the bias under that method will  
8 not necessarily be against a smaller state, or do you  
9 contend it is?

10 MR. RACICOT: No, sir, we do not.

11 QUESTION: It could have been against  
12 Massachusetts or New York or any one of the other states?

13 MR. RACICOT: Yes, sir.

14 QUESTION: The larger the state -- you cannot  
15 have the proportion of swing with a state that is very  
16 numerous in population, has a lot of districts. One more  
17 or less district is not going to make the difference  
18 between 500 and 800 per representative. Isn't the swing  
19 going to be a lot more with a small state?

20 MR. RACICOT: It may well be, Justice Scalia,  
21 but the --

22 QUESTION: I think it has to be.

23 MR. RACICOT: -- historical perspective  
24 indicates that bias is not necessarily something that can  
25 be established under those circumstances over the long

1 course.

2 QUESTION: The bias, there may be bias just as  
3 likely with respect to big states as small states, but the  
4 degree of it will always be much less.

5 MR. RACICOT: Yes.

6 QUESTION: Okay.

7 MR. RACICOT: Under the method presently used by  
8 Congress there is a total range, from the largest district  
9 of Montana, at 803,000 to the smallest district, Wyoming,  
10 at 455,000 people. There is a range, then, of 347,000  
11 people, which is a 61 percent deviation from the ideal.  
12 Under the method proposed by Montana, the method of  
13 harmonic means, the most populous district would be South  
14 Dakota, with 699,000 people, and the smallest would be  
15 Montana, with 401,000, which produces a range of 298,000  
16 people, rounded off.

17 QUESTION: May I ask you one other question when  
18 you're talking about these big percentages? Supposing we  
19 took in a new state, like Guam, which is very much smaller  
20 than all the other states. Inevitably the percentage  
21 distortion would be much greater. Say there were only  
22 100,000 people in the state, so they would get one  
23 representative when the ideal is 572,000. So isn't there  
24 always a potential for even more dramatic distortion than  
25 you describe?

1 MR. RACICOT: Your Honor, because there is a  
2 requirement that each state be provided at least one,  
3 there is some built in inequity, but in our judgment that  
4 doesn't justify allowing the process to become more  
5 unequal by the application of a formula that simply  
6 doesn't produce the most equitable results.

7 We have then with the method of harmonic means,  
8 the method advocated by the State of Montana, a deviation  
9 of 52 percent from the ideal. So quite obviously there  
10 will always be some opportunity for deviation. So under  
11 the Hill method or the method of equal proportions, the  
12 statutory method presently there, there's a 61 percent  
13 deviation from the ideal, which is reduced to a 52 percent  
14 deviation from the ideal under the method of harmonic  
15 means.

16 And under Karcher and in the context of the  
17 intrastate reapportionment cases, this Court has held that  
18 a deviation of less than 1 percent from the ideal was not  
19 constitutionally acceptable. Quite obviously those are  
20 different cases in different settings, but nonetheless  
21 this Court has been very, very precise in its examinations  
22 of intrastate redistricting.

23 And although not precisely described in  
24 Wesberry, the way this Court has determined whether one  
25 person's vote is worth as much as another's is described

1 with particularity in the Kirkpatrick case in 1969. What  
2 happens in that case and in every subsequent case is this,  
3 the ideal population equality is determined by taking the  
4 total population, and in that case Missouri, dividing by  
5 the number of congressional seats that were allocated to  
6 give an ideal district size.

7 Then the range of variation is examined from the  
8 ideal to determine if in fact the range is acceptable. In  
9 that case it was 25,000 people. There were 2,260 below  
10 the ideal district size, and 13,542 above the ideal  
11 district size. So the total range of deviation was 5.97  
12 percent. More important, however, is the fact that in  
13 Kirkpatrick that is when this Court first with precision  
14 and particularity described a method that was going to be  
15 utilized in determining whether or not in fact the  
16 apportionment was capable of being accepted  
17 constitutionally.

18 The Court then went on in 1973 to White v.  
19 Weiser, as I am certain you are all aware, and in that  
20 case disapproved plans that provided for a deviation in  
21 the range of 4.13 percent and one that also provided for a  
22 deviation, a total range of deviation of 0.284 percent in  
23 favor of one that provided a total deviation of 696  
24 people, or a deviation, a total range of deviation of  
25 0.149 percent. And then of course in Karcher we know



1 precisely what occurred, that there was in fact an ideal  
2 district size determined, then the range was determined,  
3 and the Court affirmed the district court's order striking  
4 down that districting plan which had less than 1 percent  
5 in total deviation.

6 Now lest anyone question whether or not in fact  
7 this has remained the principle and the method employed by  
8 this Court, I would refer the Court to the Board of  
9 Estimate of the City of New York v. Morris in 1989. And  
10 in that particular case the Court once again pointed out  
11 that the guarantee of 1 person, one vote extended to local  
12 government apportionment as well as to congressional and  
13 state districting plans. And quoting Daniel Webster the  
14 Court pointed out that the right to choose a  
15 representative is every man's portion of sovereign power,  
16 and that the electoral system should strive to make each  
17 citizen equal.

18 QUESTION: How can you possibly ascribe that  
19 overriding objective? You're saying this pushes aside  
20 everything else, all other considerations which some of  
21 these other methods take into account. You say this is a  
22 categorical consideration. How can you attribute that to  
23 a system which says no matter what, if we figure it all  
24 out and you don't even get one representative, we're still  
25 going to give you one? I mean, isn't this a system that

1 has not adopted that principle? It has not adopted the  
2 one man, one vote principle as an overriding  
3 consideration.

4 MR. RACICOT: I think, Justice Scalia, that that  
5 is precisely the question before the Court.

6 QUESTION: No, but I'm asking you how do you  
7 explain, how you reconcile with your position the fact  
8 that the Constitution itself provides for one  
9 representative even if you're not entitled to one on the  
10 basis of one person, one vote?

11 MR. RACICOT: There certainly is, Justice  
12 Scalia, inequity built into the system because of those  
13 provisions that require at least one to be provided every  
14 state, and one, and not having the possibility of crossing  
15 state boundaries. But just because there is a basic level  
16 of inequity, in our judgment does not allow us to proceed  
17 further with producing further inequities. And I think  
18 that's precisely what we're talking about here before the  
19 Court today, is what method is it that's going to be  
20 utilized? What is the one that not only reflects the  
21 constitutional mandate, but also makes common sense and is  
22 easily understood and is the only one that measures the  
23 number of people per representative?

24 QUESTION: But it makes it harder for you to  
25 argue that the only consideration to be taken into account

1 is numerical parity, because that was not the only thing  
2 that Congress took into account when it set up this  
3 system. So maybe there are other values that Congress can  
4 reasonably take account of, so long as it's basically  
5 proceeding on a numerical system.

6 MR. RACICOT: I think, Justice Scalia, that is  
7 the question in this case. And quite obviously if this  
8 Court determines that to be the case, then I think that we  
9 have to take another look at state districting  
10 responsibilities as well because we certainly have not  
11 allowed them to do that in that context.

12 QUESTION: Well, I don't think you're, that  
13 there's any question here but what the Constitution does  
14 require that every state have one representative and by  
15 implication requires that districts not cross state  
16 boundaries. Those are not inequities. I mean, those are  
17 constitutional provisions that are not subject to  
18 challenge here. And so however that rubs off on state  
19 districting, I think that you've got to deal with those  
20 things not as producing inequity, as you call it, but  
21 that's what the Constitution provides for. It suggests  
22 that equality, numerical equality is not an overriding  
23 thing, as Justice Scalia has suggested to you, I think.

24 MR. RACICOT: I think your point is well taken,  
25 Mr. Chief Justice. In fact they are not inequities. They

1 provide a basic level of equality, and then there is of  
2 course that discretionary area beyond 50 and up to a  
3 maximum wherein Congress is allowed to achieve equality by  
4 a method that is consistent with the Constitution, with  
5 common sense, and with this Court's rulings.

6 And what we are alleging is that in fact that  
7 the method that is presently being used, because it  
8 measures relative equality, it measures a relative share  
9 in a representative. Where in the Constitution, where in  
10 this Court's decision does one find the provision that  
11 people are entitled only to relative equality or to a  
12 relative share in a representative? We haven't measured  
13 shares in representatives throughout our history.

14 QUESTION: I presume that under this  
15 Constitution the House could provide for only 50 members.  
16 I mean, suppose the House says we want to become more  
17 prestigious than the Senate.

18 (Laughter.)

19 QUESTION: We will have only 50 members. Each  
20 state would have one representative, wouldn't it?

21 MR. RACICOT: Yes, sir.

22 QUESTION: And that would comport with the  
23 Constitution.

24 MR. RACICOT: It would. And that is why,  
25 although Montana certainly is presented in this instance



1 as being somewhat selfish or interested only in its own  
2 developments, and quite obviously that is one of the  
3 things that we're concerned about, but we're also deeply  
4 concerned about what it is that sustains us in principle  
5 in this particular area that the jurisprudence of this  
6 Court began developing in 1964, as Justice Scalia pointed  
7 out, and it has become more refined over the course of  
8 time. And there were certainly those who wondered whether  
9 in fact it was the proper course to pursue at every  
10 junction. But it has produced, I think over the long  
11 haul, equality within our voting systems across the United  
12 States of America.

13 And as Justice White noted in Morris in 1989,  
14 and I quote, the formula for measuring constitutionality,  
15 in other words he said calculating deviation from the  
16 ideal has been utilized without exception since 1971. The  
17 method presently being used does not calculate from the  
18 ideal population. It measures in terms of relative  
19 equality. So I --

20 QUESTION: May I be sure I understand your  
21 submission? Are you contending the Dean method is  
22 constitutionally compelled?

23 MR. RACICOT: Your Honor, I believe what I'm  
24 suggesting is that the Dean method complies with the  
25 Constitution. Whether or not another one could be

1 developed, quite obviously I do not know.

2 QUESTION: That was going to be my next  
3 question, because the Dean method was I guess the last one  
4 to be developed of the five that are before us. If  
5 another one should be, someone should think up one that's  
6 even more equitable according to your submission, would  
7 that then become constitutionally compelled?

8 MR. RACICOT: I believe so, yes, sir, even if it  
9 disenfranchises --

10 QUESTION: Okay. And what about your reference  
11 to a system that's easily understood? Is there any virtue  
12 in the most easily understood method?

13 MR. RACICOT: I don't think there's any question  
14 but that the most easily understood -- yes, there is, sir.  
15 And I don't think there's any question but that the most  
16 easily understood is the Dean method, the method of  
17 harmonic means, because it deals --

18 QUESTION: Is it really? I've had the most  
19 difficulty understanding that one myself.

20 (Laughter.)

21 QUESTION: The others I can understand without  
22 much difficulty, but that one I really have trouble with.

23 MR. RACICOT: Perhaps it would be best if I  
24 phrased it that the result is most easily understood,  
25 because what it seeks to do is measure absolute equality,

1 not relative equality. And that, I guess in my judgment,  
2 is the most easily understood result. I think it's also  
3 consistent with the Constitution and with this Court's  
4 rulings.

5 QUESTION: Let me ask you to comment on one  
6 other thing that runs through my mind. It may be entirely  
7 irrelevant, but to the extent we're talking about overall  
8 national fairness and so forth, is it at all relevant to  
9 consider the fact that Montana has two senators?

10 MR. RACICOT: No, sir, I don't believe so,  
11 because the system was set up that that was obviously the  
12 product of a great compromise, and the system was set up  
13 so that states, the corporate entities, would be  
14 represented, and then in the House where people would be  
15 represented. And that's why this is so incredibly  
16 important. I don't think that one can fairly and  
17 completely understand what it is like to be disadvantaged  
18 in this particular arena until such time as you personally  
19 experience it.

20 And quite frankly, that at that point in time,  
21 as I believe Mr. Wilson pointed out at the convention,  
22 indicated that waters of bitterness flow from unequal  
23 representation. And quite honestly in this case what we  
24 have is a river of equality that has been demanded by this  
25 Court, and the tributaries are the states and local

1 government, but it is Congress that sits at the  
2 headwaters. And unless we require of Congress the same  
3 standard that we require of the states, how is it that we  
4 can expect the system to be equal?

5 So if we're going to allow for the method  
6 presently there, and whatever happens in this courtroom  
7 and ultimately the decision of this Court is going to say  
8 something to Congress and to the members of this Union.  
9 And if Montana's position is upheld and the district court  
10 judgment is affirmed it will say, I believe, that the same  
11 rules apply to Congress, they go from the school house to  
12 the court house to the state house to Congress. And if it  
13 is reversed it will say that Congress can play by a  
14 different set of rules, that it does in fact, as the  
15 Solicitor has recommended, have unfettered discretion in  
16 spite of what's demanded of the states.

17 So I believe painstaking precision in the  
18 drawing of congressional district boundaries by the states  
19 is going to be hollow indeed if apportionment at the  
20 national level is poisoned. The Court has not tolerated  
21 of the states that they simply provide relatively equal  
22 amount of equality. They require that they do that with  
23 precision.

24 Thank you.

25 QUESTION: Thank you, General Racicot.



1           General Starr, do you have rebuttal? You have  
2 11 minutes remaining.

3           REBUTTAL ARGUMENT OF KENNETH W. STARR

4                   ON BEHALF OF THE APPELLANTS

5           GENERAL STARR: Very briefly, Mr. Chief Justice.

6           QUESTION: Well, you have a lot of time, maybe  
7 you could explain the five, the five different  
8 mathematical systems to us.

9                   (Laughter.)

10          GENERAL STARR: I would like to submit that  
11 point on the briefs.

12                   (Laughter.)

13          GENERAL STARR: But with respect to the  
14 suggestion that equal proportions rides roughshod over  
15 concerns about absolute differences, I refer the Court to  
16 Footnote 38 in our brief, which I think goes a long way to  
17 suggesting that there is, with all respect to our  
18 colleagues from Montana, a certain artificiality about  
19 their argument, even accepting, as we urge the Court not  
20 to do, their basic proposition that Congress is bound by  
21 the Constitution to embrace a particular measure of  
22 equality.

23                   But once we move beyond that area where we can  
24 achieve absolute equality in crossing state lines, we see  
25 in these rivers of inequality that have been referred to

1 that under the Dean method there are very considerable  
2 inequalities. Essentially what Montana wants, and it's  
3 quite understandable, is to go to the smallest state. It  
4 doesn't like being the largest single district. It wants,  
5 as it would be under its proposed method, the state that  
6 enjoys the smallest by far of the congressional districts.

7 And when we look to those absolute deviations in  
8 population, I shouldn't use the term deviation, but  
9 absolute differences, what we see is that it is not at all  
10 curious that an equal proportions method designed to  
11 achieve goals of equity and fairness results in a state  
12 that has been over represented for some time, now being  
13 relatively under represented for a period of time. And  
14 that it is curious in the extreme that the Constitution of  
15 the United States would require Washington, with a higher  
16 fractional remainder than that of Montana, to lose that  
17 representative and give it to Montana with its 1.404 in  
18 comparison to Washington state's 8.538.

19 With respect to the articulation of the  
20 standard, yes, it's quite true that the Constitution does  
21 not speak in words of equality. This Court has inferred  
22 that, but it has inferred it from section 1, using the  
23 term the people. And this Court in its decisions in  
24 Yarborough and Classic over the years has viewed that as  
25 endowing a personal interest on the part of each of our

1 citizens in participating in the political process.

2 Clause 3 speaks in terms of the states, a  
3 process in which Congress or the states are represented,  
4 are given their apportionment. It is a process that  
5 speaks in terms of that which history tells us, that it  
6 has been a process entrusted to the political branches,  
7 but political branches that have been quite sensitive to  
8 the needs for basic fairness and equity. And it is beyond  
9 dispute that the equal proportions method, among others,  
10 achieves those goals.

11 I thank the Court.

12 CHIEF JUSTICE REHNQUIST: Thank you, General  
13 Starr.

14 The case is submitted.

15 (Whereupon, at 10:46 a.m., the case in the  
16 above-entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 91-860 - UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
Appellants v. MONTANA, ET AL.

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BY Michelle Sanders

(REPORTER)