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Emil W. Wald

CONSTITUTIONAL LAW

I. Legislative Apportionment

In *O'Shields v. McNair*[1] a three-judge federal panel stuck closely to the trail recently blazed by the United States Supreme Court in *Reynolds v. Sims*.[2] The court in *O'Shields* held that the South Carolina House was constitutionally constituted but that the Senate, apportioned in accordance with the fifty Senator plan,[3] would be of doubtful federal and state constitutionality and would be acceptable only on an interim basis. The court also suggested that more justification would be required to support the negative residence provision, which assures a senator to some of the smaller counties.[4]

The Supreme Court's historic pronouncement in *Reynolds* is having the predicted "jarring" effect by requiring hastily conceived legislative reapportionment, patchwork constitutional amendment,[5] political maneuvering and general turmoil among the states. Typical was the recent litigation finally upholding Georgia's constitutional scheme of gubernatorial selection. Undoubtedly, other predicted and unpredicted results will follow.

The holding of *Reynolds*, applied in *O'Shields*, was that the equal protection clause requires both legislative houses to be apportioned on a population basis in order not to impair, unconstitutionally, an individual's right to vote. Not unreasonable deviations from the strict population basis are permissible only by substantial justification such as "that of insuring some voice to political subdivisions, as political subdivisions."[6] The Court cautioned, however, that "permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population."[7] Nevertheless, in *O'Shields* the court upheld South Carolina's constitutional requirement for House apportionment which does just that.[8]

1. 254 F. Supp. 708 (D.S.C. 1966).
2. 377 U.S. 533 (1964).
3. S.C. Acts & J. Res. 1966, p. 2016.
4. O'Shields v. McNair, 254 F. Supp. 708 (D.S.C. 1966).
5. In the November 8, 1966 general election, approval was sought and obtained for constitutional changes required by *O'Shields*. The requirement for senatorial county residency will be amended to require residency in the new senatorial election districts. S.C. Const. art. 3, § 7. The requirement for staggered senatorial terms will be eliminated. S.C. Const. art. 3, § 8.
6. Reynolds v. Sims, 377 U.S. 533, 580 (1964).
7. *Id.* at 581.
8. S.C. Const. art. 3, § 4.

McCormick County benefits most from this provision in receiving one representative for its 8,629 people compared with the statewide average of 19,214. This results in a percentage deviation of 55.1 percent compared with the presumptive maximum, supplied by the court, of 15 percent. In overlooking this disparity the *O'Shields* court may have been exercising the "judicial restraint" recommended in *Reynolds* as well as following the Court's disclaimer of "rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause."[9]

In investigating the consequences of the Senate reapportionment plan,[10] the *O'Shields* court found "grave questions" raised because of the deviation of four counties by more than the 15 percent presumptive maximum. These counties ranged from 15.20 to 19.84 percent deviation. Thus, one county deviating by 55 percent may be acceptible while four deviating by an average of 17 percent may not. Then the court, even more surprisingly, concluded, as to the four counties, that "there may be some amelioration in the fact that [the four counties'] ... variations from the norm are in the form of *over-representation*, not *under-representation*."[11] This would appear to apply a rule of equal protection, where some are more equal than others.

It is evident that the courts rely heavily on the use of statistical concepts in examining apportionment schemes though, invariably, there is a denial of the requirement of mathematical precision.[12] Some of the frequently used concepts are "percent population deviation,"[13] "maximum population variance,"[14] and "minimum controlling percentage."[15] The first two deal with the districts representing the extremes of deviation, while the

9. Roman v. Sincock, 377 U.S. 695 (1964).

10. S.C. Acts & J. Res. 1966, p. 2016. Only § 1 (50-Senator Plan) of the act was considered, the presumption being that it had legislative preference over its alternate § 2 (59-Senator Plan). O'Shields v. McNair, 254 F. Supp. 708, 710 (D.S.C. 1966).

11. O'Shields v. McNair, 254 F. Supp. 708, 712 (D.S.C. 1966). (Emphasis added.)

12. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Westberry v. Sanders, 376 U.S. 1 (1964); O'Shields v. McNair, 254 F. Supp. 708 (D.S.C. 1966).

13. This term equals the difference between the actual population represented by a legislator and the statewide average, divided by the statewide average, times 100.

14. This term represents the ratio of the population of the most under-represented county to that of the most over-represented one.

15. This is the percentage of the state's voters residing in the most over-represented counties, who could theoretically elect a bare legislative majority.

latter goes to the cumulative effects. What may be an acceptable figure for these formulas has not yet been spelled out by the Supreme Court but the *O'Shields* court makes some suggestions. It found a minimum controlling percentage of 47.99 percent in the Senate plan to be "probably within the range of acceptability."[16] It found a maximum population variance of 1.42/1 in the plan to be "not so extreme as to suggest per se invalidity. . . ."[17] The court also presumes 15 percent to be the maximum population deviation. The difficulty of manipulating these concepts becomes apparent when it is observed that these guidelines are mutually contradictory. The highest maximum population variance achievable within the 15 percent population deviation is 1.35/1, yet the court approves 1.42/1. If 1.42/1 is acceptable then the percent population deviation *must* be higher than the presumed 15 percent maximum. (The lowest it can be, corresponding with 1.42/1, is 18 percent.) The irrelevance of the minimum controlling percentage can be shown by noting the irrationality of the assumption that the people would vote precisely in the required manner. Also, by making a no more irrational assumption, it can be shown that even in the *ideally* apportioned state, 26 percent of the voters could elect a majority of the representatives (a bare majority of the voters in a bare majority of the districts).[18]

But the problem is a deeper one than the inconsistent application of statistical concepts or the difficulty of the use of numbers to measure intangible rights. The question goes to the very roots of the objective of representative government. The depth of the problem can be suggested by considering the following question: Would state representation *at large* be satisfactory? The practical result, of course, would be complete representation for the popular majority with no voice for the minority on a state or local level. But the Court has labeled as "undesirable" a plan under which, in multi-seat counties, the representatives represented the whole county and "the residents of those areas had no single member of the Senate or House elected specifically to represent them."[19] On the other hand, the Court disclaims any intimation that this system would be constitutionally

16. O'Shields v. McNair, 254 F. Supp. 708, 712 (D.S.C. 1966).
17. *Ibid.*
18. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 750 n.12 (1964) (dissenting opinion).
19. *Id.* at 731.

defective.[20] It should be recalled, too, that election at large, ordered by district courts, is the usual incentive assuring rapid compliance with reapportionment orders. The balancing of majority and minority interests is even more interesting in the light of the result in *Lucas v. Forty-Fourth Gen. Assembly*.[21] In that case a clear statewide majority, as well as a majority of the voters in every county, rejected population apportionment and selected traditional apportionment for their Senate. In invalidating the plan, the Supreme Court said "a citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."[22] They did not say, however, that the majority, in effect, had chosen to dilute its own vote in order to provide what it felt was adequate minority representation. Could the majority, then, remove *all* minority representation by election at large? Is the answer so simple as one man—one vote? Is it just that "legislators represent people, not trees or acres"[23] and that "citizens, not history or economic interests cast votes"?[24]

The Court might well have felt this extension of emphasis on individual rights was the logical approach to cure the blight of many of our under represented cities. But, hopefully, the way to cure the city blight is not to plow under the counties and states. "In the last analysis, what lies at the core of this controversy is a difference of opinion as to the function of representative government."[25] If the controversy is "the function of representative government," at least there is no longer a question as to the judiciary's role in determining it on the state level.

II. VOTING RIGHTS

South Carolina, one of the nine states initially affected by the Voting Rights Act of 1965,[26] challenged the constitutionality of all or parts of seven sections of the act.[27] In *South Carolina v. Katzenbach*,[28] the Court upheld the validity of the

20. *Id.* at 731 n.21.
21. 377 U.S. 713 (1964).
22. *Id.* at 736-37.
23. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
24. *Id.* at 580.
25. Baker v. Carr, 369 U.S. 186, 333 (1962) (dissenting opinion).
26. 42 U.S.C. § 1973 (Supp. 1966).
27. 42 U.S.C. §§ 1973 b (a-d), 1973 c, 1973 d (b), 1973 e, 1973 g, 1973 k (a), 1973 l (Supp. 1966).
28. 383 U.S. 301 (1966). For a more complete discussion of this case, see generally 18 S.C.L. REV. 535 (1966).

challenged sections as "appropriate means for carrying out Congress' constitutional responsibilities . . . consonant with all other provisions of the Constitution."[29] In finding the act a legitimate means for carrying out the mandate of the fifteenth amendment, the Court was substantially unanimous. Mr. Justice Black, dissenting in part, disagreed as to the validity of section 5 of the act which suspends future state legislation concerning elections.[30] "If this dispute between the Federal Government and the States amounts to a case or controversy it is a far cry from the traditional constitutional notion of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied."[31] In addition to "case or controversy," the dissent found a more basic ground to be a distortion of the distinction between state and federal power. "I cannot agree with the Court that Congress—denied the power in itself to veto a state law—can delegate the same power to the Attorney General or to the District Court for the District of Columbia."[32]

In other litigation on voting rights, the Supreme Court in *Cardona v. Power*[33] declined the opportunity to rule on the constitutionality of literacy tests in states not within the coverage formula of the Voting Rights Act. In remanding, the Court concluded the case might have become moot by section 4(e) of the act[34] which excepts Puerto Rican graduates of the sixth grade from the requirement of literacy in English. However, two Justices would have reached the merits and would have declared New York's requirement of literacy in English a denial of equal protection of the law to citizens literate only in Spanish.[35] There is also the suggestion that literacy itself is not a "wise prerequisite for exercise of the franchise."[36] Congress has taken the giant step in the area of voting rights. Will the Court for long be contented merely to interpret that law?

29. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).
30. *Id.* at 833 (dissenting in part).
31. *Ibid.*
32. *Id.* at 834-35 (dissenting in part).
33. 384 U.S. 672 (1966).
34. The constitutionality of § 4(e) was upheld in Katzenbach v. Morgan, 384 U.S. 641 (1966).
35. Cardona v. Power, 384 U.S. 672, 675 (1966) (dissenting opinion).
36. *Ibid.*

III. RIGHTS OF THE ACCUSED

In *Wheeler v. State*[37] the South Carolina Supreme Court, following the majority rule,[38] held that the right to a speedy trial would be considered waived in the absence of a timely demand. The source of this right, said the court, is the South Carolina Constitution[39] and the fourteenth amendment. Following the "fundamental fairness" approach to fourteenth amendment due process, the court concluded that the sixth amendment is not applicable to the states unless "the trial of the accused has been so unreasonably delayed as to deprive him of his right to due process under the Fourteenth Amendment."[40] In any event where, as here, the accused failed to make timely demand, requested and was granted a continuance, and entered a guilty plea without reservation of the right, any one of which would be sufficient to constitute waiver, he was not denied due process of law.

The United States Supreme Court's most significant recent pronouncement in the area of the rights of the accused was in *Miranda v. Arizona*.[41] In *Miranda* the Court sought to clarify its holding in *Escobedo v. Illinois*[42] and to reaffirm the principles laid down in *Escobedo*.

The Court very generously summarized the holding from the rather lengthy *Miranda* opinion which actually considered four different cases:

> Our holding . . . briefly stated . . . is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation[43] of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . As for the procedural safeguards to be employed, unless other fully effective means are devised to

37. 247 S.C. 393, 147 S.E.2d 627 (1966).

38. *E.g.*, Pietch v. United States, 110 F.2d 817 (10th Cir. 1940); McCandless v. District Court, 245 Iowa 599, 61 N.W.2d 674 (1953); State v. McTague, 173 Minn. 153, 216 N.W. 787 (1927). *Contra, e.g.*, State v. Carrillo, 41 Ariz. 170, 16 P.2d 965 (1932); Flannary v. Commonwealth, 184 Va. 204, 35 S.E.2d 135 (1945).

39. S.C. CONST. art. 1, § 5.

40. Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966).

41. 384 U.S. 436 (1966).

42. 378 U.S. 478 (1964).

43. Custodial interrogation is the term the Court now uses for an investigation which has focused on the accused.

> inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he had a right to the presence of an attorney, either retained or appointed. . . .[44]

The Court places on the state the affirmative duty for providing the safeguards and the burden of showing that they have been provided. "[W]e will not presume that a defendant has been effectively appraised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any effective warnings have been given. . . ."[45] The state also has the burden of showing a waiver voluntarily, knowingly and intelligently made.[46] No amount of circumstantial evidence will be admissible to show that the accused was already aware of his rights.[47]

The South Carolina Supreme Court decided the case of *Bostick v. State*[48] before the *Miranda* ruling was handed down; nevertheless, it appears that the correct result was reached with the possible exception of a sufficient showing of waiver. Bostick was apprehended late on the day the Sheriff of Jasper County was killed. He was turned over to the personal custody of the Chief of the South Carolina Law Enforcement Division. Before Bostick made any statement, the Chief "repeatedly advised him of his right to counsel and of his right to remain silent."[49] Yet, while still in the Chief's car and within thirty minutes after his apprehension, Bostick made his first verbal admission of the shooting. Later, before other statements were made, the accused received further warnings as to his rights. Also, offers of assistance in obtaining counsel were made, along with advice to take advantage of the offers.[50]

While it is clear that the court considered the claim of the denial of rights in the light of the "narrow" *Escobedo* hold-

44. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
45. *Id.* at 498.
46. *Id.* at 475.
47. *Id.* at 469.
48. 247 S.C. 22, 145 S.E.2d 439 (1965).
49. Bostick v. State, 247 S.C. 22, 30, 145 S.E.2d 439, 443 (1965).
50. *Id.* at 31, 145 S.E.2d at 443.

ing,[51] it is equally clear that the state had demonstrated "the use of procedural safeguards effective to secure the privilege against self-incrimination."[52]

In dismissing further claims, the court held the appearance before a magistrate to hear the reading of the warrant was not an arraignment, that no plea was or could have been entered and that, therefore, the petitioner's rights were not denied where he was later provided counsel before indictment and arraignment.[53] The court also found the petitioner had not been denied the right to have the charges against him heard by an impartial jury, selected by neither inclusion nor exclusion based on race or color.[54]

IV. Police Power

In *Hall v. Bates*[55] the appellant contended a deprivation of liberty without due process of law from the action of the city in fluoridating the only practical source of water available to him. While on the facts the issue was novel before this court, the test had been well established.

> In passing upon such regulations and proceedings, the courts consider, first, whether interference with personal liberty or property was reasonably necessary to the public health and, second, if the means used and the extent of the interference were reasonably necessary for the accomplishment of the purpose to be attained.[56]

In an attempt to show the test's requirements were not met, the appellant contended that he was denied the freedom to drink non-fluoridated water and the liberty to decide whether the effects of fluoridated water would be beneficial or detrimental to his health; that, concededly, the claimed benefits only extend to the class of young children; and that, where the health prob-

51. The court interpreted *Escobedo* to require a request to see counsel. Bostick v. State, 247 S.C. 22, 32-33, 147 S.E.2d 439, 444 (1965). "[F]ailure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the required warnings . . . have been given." Miranda v. Arizona, 384 U.S. 436, 470 (1966).

52. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

53. Bostick v. State, 247 S.C. 22, 33, 147 S.E.2d 439, 445 (1965).

54. *Id.* at 29, 147 S.E.2d at 442. The United States Supreme Court recently reversed this ruling. See Survey of Criminal Law and Procedure in this issue.

55. 247 S.C. 511, 148 S.E.2d 345 (1966).

56. Kirk v. Board of Health, 83 S.C. 372, 380, 65 S.E. 387, 390 (1909).

lem is not one of contagion, the deprivation taken cannot be justified.

Pointing to the great weight of authority,[57] the court found city water fluoridation to be a reasonable health measure from which the entire community will benefit with the passage of time and, therefore, a valid exercise of police power.

V. STATUTORY AND CONSTITUTIONAL CONSTRUCTION

The case of *Mungo v. Shedd*[58] involved the construction of the constitutional amendments raising the bonded debt limitation of school districts within Lexington and Richland Counties as to a school district lying partly within both counties. The amendments in question set the debt limitation at fifteen percent in Richland County and twenty percent in Lexington County. The plaintiff-appellant contended that neither amendment alone could apply to the district since it did not fit the requirement of being within the affected county. Thus, the argument ran, neither amendment being applicable, the general constitutional eight percent bonded indebtedness limitation applied. The court, however, found this separate construction too rigid and held rather that the entire constitution with amendments must be construed together. Upon doing this, the district was found to be limited by the lowest of any limitation imposed on any of its parts, in this case, fifteen per cent.[59]

A similar but more complex question was involved in the case of *Boatwright v. McElmurray*.[60] In that case, the question was whether a consolidated school district consisting of parts of three counties had been created by the legislature. If it had, then the debt limitation would be the lowest imposed on any segment, *i.e.*, eight percent, and the challenged bond issue would be invalid, being in excess of that figure. In examining the act setting up the "district,"[61] an amending act,[62] and an act[63] repealing and replacing the first two, the court concluded

57. *E.g.*, Chapman v. City of Shreveport, 225 La. 859, 74 So. 2d 142 (1954), *cert. denied*, 348 U.S. 892 (1954); Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.2d 609 (1955), *cert. denied*, 351 U.S. 935 (1956).

58. 247 S.C. 195, 146 S.E.2d 617 (1966).

59. Mungo v. Shedd, 247 S.C. 195, 197, 146 S.E.2d 617, 618 (1966).

60. 247 S.C. 199, 146 S.E.2d 716 (1966).

61. S.C. Acts & J. Res. 1953, p. 342.

62. S.C. Acts & J. Res. 1958, p. 1964.

63. S.C. CODE ANN. § 21-131 (1962).

the plain meaning and intention of the legislature had been "to unite the designated areas of Saluda and Edgefield Counties with the School District of Aiken County into a consolidated school district."[64] But the problem arose when the legislature, in an act authorizing the issuance of the bonds, stated that "it was never intended that any portion of either Edgefield or Saluda Counties be added to the School District of Aiken County, but that a relation contractual in nature and terminable at the will of the General Assembly . . . be arranged. . . ."[65] In holding that, while the legislature may repeal or amend prior acts, it cannot construe them, the court said "a legislative interpretation of [an act] . . . previously enacted may not prevail over the clear meaning of the statutory language."[66] "The construction of a statute is a judicial function and responsibility."[67]

VI. Constitutional Amendment Procedure

Two cases this year turned on the validity of constitutional amendments—the contention being that the adoption procedure was not in conformance with provisions of the constitution. Article 16, Section 1 of the South Carolina Constitution sets forth this procedure. It requires approval of a proposed amendment by a two-thirds majority of each house, along with the entry of the proposal and the vote in the respective house journals. Next the proposal is submitted to the people. If the people vote favorably, the amendment, to become effective, must be ratified by a majority vote of each house, provided the amendment be read in each house on three several days.

In *Watts v. Oliphant*[68] it was contended that, (1) failure to record the Senate proposed amendment in its amended form in the House Journal, (2) failure of the Senate to recomply with the constitutional provisions upon the proposal's return after House amendment, and (3) a defect in the title of the ratifying act following popular approval, were all fatal defects to the validity of the amendment. In upholding the amendment, the court adopted the rule: "The question is not whether it is pos-

64. Boatwright v. McElmurray, 247 S.C. 199, 206, 146 S.E.2d 716, 719 (1966).

65. S.C. Acts & J. Res. 1965, p. 701.

66. Boatwright v. McElmurray, 247 S.C. 199, 207, 146 S.E.2d 716, 720 (1966).

67. *Ibid.*

68. 246 S.C. 402, 143 S.E.2d 813 (1965).

sible to condemn the amendment but whether it is possible to uphold it, and we shall not condemn it unless in our judgment its nullity is manifest beyond a reasonable doubt."[69]

The amendment proposed in the Senate was to raise the debt limit of *both* a county and the county's school district. The House deleted the provision as to the county, leaving intact the provision as to the school district. Thus the fact that the House Journal entry contained the original proposal was not fatally defective as to the school district debt limitation, since that part was accurately entered in full. In addition, the "enrolled act rule" precluded the court's inquiry into whether or not the proposal received the required three readings, and that included reading in its amended form. If the reading had been of the amended proposal, the House members could not have been misled and the constitutional safeguards would have been substantially met.[70]

Similarly, since the amendment was only a deletion, the Senate had already met the constitutional requirements as to the school district provision in the original proposal, and recompliance was not necessary. "The greater included the lesser and as to it the respective Houses were in substantial agreement."[71]

In the ratifying act, the title stated that the debt limitation increase would be to twenty percent instead of the twelve percent provided in the body. In declaring the defect not fatal, the court restated the rule:[72] "[I]n instances where the Title to the Act is broader than the body, the operation of the Act would be limited to matters embraced both in the Title and the body of the Act, provided always that the Title is not so deceptive or misleading to render the entire statute void."[73] Applying that rule the court found that no members of the General Assembly could have been misled into agreeing to an increase to twelve percent by the title's broader reference to an increase to twenty percent.[74]

In *Moffett v. Traxler*,[75] the amendment at issue had been ratified, following popular approval, in an act of the legislature

69. State *ex rel* Corry v. Cooney, 70 Mont. 355, 225 Pac. 1007 (1924).
70. Watts v. Oliphant, 246 S.C. 402, 409, 143 S.E.2d 813, 817 (1965).
71. *Id.* at 411, 143 S.E.2d at 818.
72. Doyle v. King, 211 S.C. 247, 252, 44 S.E.2d 608, 610 (1947).
73. Watts v. Oliphant, 246 S.C. 402, 414, 143 S.E.2d 813, 819 (1965).
74. *Ibid.*
75. 247 S.C. 298, 147 S.E.2d 255 (1966).

which included two amendments to different parts of the constitution. Its validity was contested on the ground that this procedure violated Article III, Section 17 of the South Carolina Constitution which provides in part, "every Act or resolution having the force of law shall relate to but one subject. . . ." The court held that the part of the constitution dealing with constitutional amendment procedure is separate unto itself and is unaffected by other constitutional provisions as to procedure. This rule had been applied previously in holding that the Governor's signature was not required for a ratifying act,[76] and in the instant case, it was applied to exclude ratifying acts from the rule requiring that each act relate to but one subject.[77]

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76. Kalber v. Redfearn, 215 S.C. 224, 54 S.E.2d 791 (1949).
77. Moffett v. Traxler, 247 S.C. 298, 306, 147 S.E.2d 255, 259 (1966).