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State and Local Government

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STATE AND LOCAL GOVERNMENT

I. REAPPORTIONMENT OF THE SOUTH CAROLINA SENATE

Black voters brought suit against various state officials and the chairmen of the South Carolina Democratic and Republican Parties to challenge South Carolina's 1972 senate reapportionment plan in *Simkins v. Gressette*.[1] Alleging that the multimember senatorial districts, with numbered seats and a majority runoff requirement in primary elections, diluted their voting strength in violation of their rights under the first, thirteenth, fourteenth, and fifteenth amendments to the United States Constitution,[2] these voters sought to have a three-judge federal district court convened to consider the constitutionality of the plan.[3] The district court judge granted defendants' motion to dismiss the complaint,[4] and the Fourth Circuit Court of Appeals affirmed the decision.[5]

An action challenging the constitutionality of the apportionment of a statewide legislative body must be heard by a district court panel of three judges unless the judge to whom it is presented determines that three judges are not required.[6] When making this determination, the single judge is not permitted to rule on the merits of the claim.[7] In *Simkins*, the district court applied the test for determining appropriateness of a three-judge panel articulated by the Fourth Circuit Court of Appeals in *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*:[8] the single judge need not request the convening of a three-judge court if the complaint does not state

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1. 631 F.2d 287 (4th Cir. 1980).

2. Pursuant to 28 U.S.C. § 2284(a)(1976), "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of . . . any statewide legislative body."

3. 631 F.2d at 289-90.

4. Simkins v. Gressette, 495 F. Supp. 1075, 1084 (D.S.C. 1980). Defendant's motion was based on FED. R. CIV. P. 12(b)(6), which provides for a motion to dismiss a claim for failure to state a claim upon which relief can be granted.

5. 631 F.2d at 296.

6. 28 U.S.C. § 2284(b)(1)(1976). *See* note 2 *supra*.

7. 28 U.S.C. § 2284(b)(3)(1976).

8. 429 F.2d 606 (4th Cir. 1970).

a substantial claim for relief, and, further, a claim for relief is insubstantial if there is an "absence of federal jurisdiction, [a] lack of substantive merit in the constitutional claim, or [if] injunctive relief is otherwise unavailable."[9] Using this test, the district court in *Simkins* found that traditional equitable considerations such as the potentially disruptive effect of an injunction on the impending elections and the plaintiffs' "unreasonable delay" in commencing the suit[10] dictated the denial of injunctive relief. Nevertheless, the court went further to examine the complaint "to determine whether the factual allegations appear[ed] to be so compelling, if meritorious, that normal equitable principles governing the relief sought . . . should be totally disregarded"[11] and concluded that they were not.[12]

On appeal, the Fourth Circuit Court of Appeals affirmed the district court's denial of a three-judge panel. When the disposition of a request for convening a three-judge panel to hear an apportionment question is appealed, federal courts of appeals, like district courts, must refrain from reviewing the merits of the case and may determine only whether there is a substantial issue susceptible of litigation.[13] The United States Supreme Court, in *Goolsby v. Osser*,[14] stated that a claim is constitutionally insubstantial for the purpose of convening a three-judge panel when it is "essentially fictitious," "obviously frivolous," and "obviously without merit."[15] The Court further explained that "a claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."[16] The Fourth Circuit

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9. *Id.* at 611.

10. 495 F. Supp. at 1081-82, 1083.

11. *Id.* at 1083. In *Maryland Citizens*, as in *Simkins*, a suit to enjoin elections based on an allegedly unconstitutional apportionment plan was commenced only a short time before the election process began. The court of appeals concluded that maintenance of a suit at that time would disrupt the election process and that such a disruption was unjustified because the Maryland legislature had demonstrated its willingness to achieve a constitutional apportionment. 429 F.2d at 610.

12. The court evaluated the allegations of the complaint against a background of state and federal decisions. *See* City of Mobile v. Bolden, 467 U.S. 55 (1980); McCollum v. West, C.A. No. 71-1211 (D.S.C. April 7, 1972).

13. Edelberg v. Illinois Racing Bd., 540 F.2d 279 (7th Cir. 1976).

14. 409 U.S. 512 (1973).

15. *Id.* at 518.

16. *Id.*

appears to have gone beyond a determination of substantiality based on the allegations of the complaint by considering the merits of the claims in *Simkins.*

In *Simkins,* the Fourth Circuit Court of Appeals relied heavily on *McCollum v. West,*[17] an action before a three-judge panel in which black South Carolina voters sought an injunction against enforcement of the 1971 senate reapportionment plan.[18] The panel in *McCollum* found that the 1971 plan violated the "one man, one vote" principle established by the United States Supreme Court in 1964 in *Reynolds v. Sims.*[19] After the decision in *McCollum,* the South Carolina General Assembly enacted a multimember district plan[20] that received the panel's approval.[21] The panel subsequently denied a request by the plaintiffs in *McCollum* to modify the second plan but ruled that any party might later challenge the plan upon presentation of additional facts to prove its unconstitutionality.[22]

To meet the requirement of additional facts showing the 1971 plan's unconstitutionality, plaintiffs in *Simkins* sought to establish a historical pattern of racial discrimination by showing that, since the time of Reconstruction, no blacks have been elected to the state senate—either before or after *McCollum.*[23] The Fourth Circuit, rejecting this evidence, reasoned that because multimember districts have been in existence only since 1966 and because no blacks had been elected under the previous system of single member districts,[24] there was no showing of discriminatory intent.[25] The court further concluded that the fact that no black senators have been elected since 1972 did not add substantially to the claim.[26] Consequently, citing decisions by

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17. C.A. No. 71-1211 (D.S.C. April 11, 1972).

18. Brief of Appellant at 9-16. *McCollum* was heard with two companion cases: Twiggs v. West, C.A. No. 71-1106 (D.S.C. 1971) and McLeod v. West, C.A. No. 71-1123 (D.S.C. 1971). *Twiggs* and *McLeod* challenged the 1971 plans only as failing to conform with the one man, one vote principle. The cases were argued and decided together but not formally consolidated. Simkins v. Gressette, 631 F.2d 289 n.4 (1980).

19. 377 U.S. 533 (1964).

20. 1972 S.C. Acts 2384, No. 1205 (codified at S.C. CODE ANN. § 2-1-60 (1976)).

21. McCollum v. West, No. 71-1211, order at 2-3 (D.S.C. June 9, 1972).

22. *Id.* at 2.

23. 631 F.2d at 293.

24. *Id.*

25. *Id.*

26. *Id.* Similarly, the court summarily dismissed, as having nothing to do with race, the claim that lack of access to financial resources reduced black voters' opportunities to

the United States Supreme Court in *Whitcomb v. Chavis*[27] and *City of Mobile v. Bolden*,[28] the court ruled that plaintiff's allegations, even if proven, were insufficient to support a claim for relief.

In *Whitcomb*, the Supreme Court determined that disproportionate minority representation alone was not sufficient to prove invidious discrimination. Although the Court gave little guidance concerning a test for purposeful discrimination, it did suggest the need for evidence that minority voters had less opportunity than other voters to participate in the political process.[29] *Whitcomb* made reference to *White v. Register*[30] in which the Court, basing its decision upon a showing of a history of racial discrimination,[31] unanimously held the use of multimember districts unconstitutional.[32] In *Bolden*, a plurality of the Court, ignoring the holding in *White*, stated that a showing that "the group allegedly discriminated against has not elected representatives in proportion to its numbers" is not enough to prove invidious discrimination.[33] In *Simkins*, the Fourth Circuit Court of Appeals concluded that "*Bolden* and *Whitcomb* inescapably render[ed] the [voters'] claim frivolous."[34]

The conclusion of the Fourth Circuit in *Simkins* arguably is overbroad. The United States Supreme Court has neither overruled *White*'s precept that multimember districts are unconstitutional nor has it established a clear standard for proof of invidious discrimination. In any event, whether the complaint in *Simkins* met the burden of proof within the meaning of *Whitcomb* and *Bolden* arguably is a question going to the merits of the case, a question reserved for evaluation by a three-judge panel rather than one upon which determination of insubstantiality may be predicated for the purpose of denying a voters' request to convene a three-judge panel.

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participate in the political process.

27. 403 U.S. 124 (1971).
28. 446 U.S. 55 (1980).
29. 403 U.S. at 149.
30. 412 U.S. 755 (1973).
31. *Id.* at 769.
32. *Id.* at 765-67.
33. 444 U.S. at 66.
34. 631 F.2d at 295.

II. Absolute Immunity for Local Legislators in Actions Brought Under Section 1983

In *Bruce v. Riddle*,[35] the Fourth Circuit Court of Appeals held that county legislators have absolute immunity from liability under 42 U.S.C. section 1983[36] for acts performed in a legislative capacity.[37] Although the United States Supreme Court has not ruled directly on the issue,[38] the Fourth Circuit found the basis for its holding in past Supreme Court decisions.

In *Bruce*, plaintiff alleged that the Greenville County Council unconstitutionally rezoned his property in response to pressure by influential property owners. Before rezoning, plaintiff's land had been designated for multifamily residences, and plaintiff had planned to build a 150-unit public housing complex on the site.[39] Claiming that the zoning amendment was an arbitrary, bad faith reclassification that substantially reduced the value of his property, plaintiff brought suit under section 1983 against Greenville, South Carolina and the members of the county council in their official and individual capacities.[40]

The district court granted the council members' motion to dismiss the cause of action against them individually on the ground that they were entitled to absolute legislative immunity from personal liability.[41] On appeal, plaintiff argued that local

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35. 631 F.2d 273 (4th Cir. 1980).

36. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976) provides a federal cause of action against:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.

Id. Plaintiff claimed that the County Council deprived him of property under color of state law in violation of the fifth amendment and the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. He also alleged violations of the due process and equal protection clauses in article I, § 3 of the South Carolina Constitution and the taking of property without just compensation in violation of article I, § 13. Record at 9.

37. 631 F.2d at 273.

38. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 404 n.26 (1979). See notes 58-61 and accompanying text *infra*.

39. 631 F.2d at 274.

40. *Id.* at 273.

41. Bruce v. Riddle, 464 F. Supp. 745, 748 (D.S.C. 1979).

legislators were entitled only to qualified immunity[42] and, alternatively, that private meetings between council members and interested parties, from which the rezoning decision allegedly resulted, took the council members outside the scope of legislative immunity.[43] The Fourth Circuit Court of Appeals rejected both arguments, holding that county legislators have absolute immunity for acts performed in a legislative capacity[44] and that private meetings with interested parties do not remove council members from the scope of this immunity.[45]

Governmental immunity has its origins in the common law[46] and is guaranteed to federal legislators by the speech and debate clause of the United States Constitution.[47] Quoting from *Owen v. City of Independence*,[48] the Fourth Circuit presented a summary of the United States Supreme Court's development of governmental immunity.[49] The Court first extended absolute immunity in section 1983 actions to state legislators in *Tenney v. Brandhove*[50] "to enable and encourage a representative of the public to discharge his public trust with firmness and success . . . ."[51] In *Tenney*, the Court examined the origins of the im-

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42. 631 F.2d at 274. Good faith immunity constitutes a defense based on good faith performance of official duties. See Scheuer v. Rhodes, 416 U.S. 232 (1974) for the qualification of "good faith" immunity for state legislators. For the application of a good faith test for local legislators, see *e.g.* Bennett v. Gravelle, 323 F. Supp. 203 (D. Md. 1971), *aff'd*, 451 F.2d 1011 (4th Cir. 1971); Smetanka v. Borough of Ambridge, 378 F. Supp. 1366 (W.D. Pa. 1974); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958).

43. 631 F.2d at 274.

44. *Id.* at 278-79.

45. *Id.* The court explained that unless there was illegal conduct, it would not consider the motives of the city council members, whether good or bad.

46. For a discussion of common-law immunity for legislators, see Tenney v. Brandhove, 341 U.S. 367, 372 (1951).

47. U.S. CONST. art. I, § 6 provides that "any Speech or Debate in either House shall not be questioned in any other place."

48. 445 U.S. 622 (1980).

49. 631 F.2d at 275.

50. 341 U.S. 367 (1951).

51. *Id.* at 373 (quoting 2 *Works of James Wilson* 38 (Andrews ed. 1896)(quoting James Wilson, member of the Committee of Detail which was responsible for the speech or debate clause)). Similarly, in Pierson v. Ray, 386 U.S. 547 (1967), the Supreme Court ruled that the common-law immunity traditionally available to judges also applied in § 1983 damage suits. In *Pierson*, a group of white and black clergymen sought damages against a municipal police justice who convicted them of violating a Mississippi statute that was later declared unconstitutional. The statute prohibited congregating in public places. As in *Tenney*, the Court reasoned that the doctrine of judicial immunity was not created "for the benefit of a malicious or corrupt judge, but for the benefit of the public,

munity granted to federal legislators by the speech and debate clause and concluded that, even though section 1983 is silent on the issue of immunity, Congress did not intend to abrogate this long-standing common-law privilege.[52]

The Supreme Court has been willing to extend immunity to other public officials when the policy underlying judicial and legislative immunity is applicable. In *Butz v. Economou,*[53] the Court extended absolute immunity to an administrative judicial hearing officer for the Department of Agriculture by comparing the nature of his responsibilities with those of a judge.[54] The Court used this functional approach again in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,*[55] in which it compared the function of government appointed members of the planning agency to that of legislators.[56] The Court in *Lake Country Estates* concluded that, because the reasoning behind the common-law immunity doctrine applies equally to federal, state, and regional legislators,[57] planning agency members were entitled to immunity from federal damage liability when "acting in a capacity comparable to that of members of a state legislature."[58]

The Fourth Circuit Court of Appeals in *Bruce* found this historical common-law and functional approach persuasive. Because the South Carolina Supreme Court has declared that the adoption of zoning ordinances is a legislative activity[59] and because the policy reasons for extending absolute immunity to legislators were found to apply equally to county council members, the court of appeals found that the council members were entitled to protection from personal liability.[60]

The Fourth Circuit did not discuss the unwillingness of many lower federal courts to extend absolute immunity to local

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whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. at 544 (quoting Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868)).

52. 341 U.S. at 376.
53. 438 U.S. 478 (1978).
54. *Id.* at 511-12.
55. 440 U.S. 391 (1979).
56. *Id.* at 406.
57. *Id.*
58. *Id.*
59. Conway v. City of Greenville, 254 S.C. 96, 173 S.E.2d 648 (1970).
60. 631 F.2d at 278-79.

legislators. These courts have extended only qualified immunity from liability under section 1983. A possible explanation may be the Supreme Court's ruling in *Monroe v. Pape*[61] that municipalities are not "persons" within the meaning of section 1983 and that, consequently, section 1983 afforded no cause of action against a municipality.[62] Under *Monroe*, a plaintiff injured by a municipality through the action of its legislators had no cause of action against the municipality or against the legislators if they were accorded absolute immunity from liability. As a result, many federal courts concluded that official immunity should be used sparingly in order not to frustrate the intent of section 1983 to provide a federal remedy for the deprivation of federally guaranteed rights and extend only a qualified immunity to local legislators.[63] Recently, however, in *Monell v. Dept. of Social Services of the City of New York*[64] and *Owen v. City of Independence*,[65] the Supeme Court dispelled the notion that municipalities are absolutely immune from liability under section 1983. Because these decisions allow the recovery of damages from municipalities, the need for imposing personal liability on local legislators no longer exists. The Fourth Circuit, therefore, was reasonable in its perception that the next logical step in the progression of the Supreme Court's analysis from *Tenney* to *Lake Country Estates* is the extension of absolute immunity to local legislators.

III. Home Rule and the "One-Shot" Doctrine

Frustrated by four years of litigation in both federal[66] and state courts,[67] the voters of Horry County finally achieved a transition to home rule through *Horry County v. Cooke*.[68] The

61. 365 U.S. 167 (1961).

62. *Id.* at 187.

63. *See, e.g.*, Bennett v. Gravelle, 323 F. Supp. 203 (D. Md. 1971) and Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966). The good faith defense available in those jurisdictions protects local legislators from civil liability if they reasonably rely on the legality of their actions and have no improper purpose. See note 42 *supra*.

64. 436 U.S. 658 (1978).

65. 445 U.S. 622 (1980).

66. See Horry County v. United States, 449 F. Supp. 990 (D.S.C. 1978); McCray v. Hucks, C.A. No. 76-2476 (D.S.C. 1976).

67. See Van Fore v. Cooke, 273 S.C. 136, 255 S.E.2d 339 (1979).

68. ___ S.C. ___, 267 S.E.2d 82 (1980).

county initiated suit in the South Carolina Supreme Court pursuant to the Uniform Declaratory Judgment Act[69] claiming that two acts[70] passed by the General Assembly in 1980 violated articles III and VIII of the South Carolina Constitution. One of the acts at issue amended the Home Rule Act[71] to allow the General Assembly to make subsequent enactments providing for the transition to home rule government,[72] and the other established a form of government for Horry County.[73] Article III, section 34 of the constitution prohibits special legislation where general laws can be made applicable,[74] and article VIII[75] provides for the management of local government by the respective counties and

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69. S.C. CODE ANN. §§ 15-53-10 to -140 (1976).

70. 1980 S.C. Acts 1111, No. 300 (codified at S.C. CODE ANN. § 4-9-10(c) (Supp. 1980)); 1980 S.C. Acts 2374, No. 609.

71. S.C. CODE ANN. §§ 4-9-10 to -1230 (Supp. 1980) is the enabling legislation commonly referred to as the Home Rule Act.

72. Act 300 amended § 4-9-10(c) by adding the following paragraph:

> If the governing body of the county as initially or subsequently established pursuant to a referendum or otherwise shall be declared to be illegal and not in compliance with State and Federal law by a court of competent jurisdiction, the General Assembly shall have the right to prescribe the form of government, the method of election, and the number and terms of council members but may submit to the qualified electors by referendum a question as to their wishes with respect to any element thereof which question shall include as an option the method of election in effect at the time of the referendum.

73. Act 609 provided for the establishment of the council-administrator form of government with eleven members elected from single member districts and a chairman elected at-large from the county for a term of two years. The act also repealed the 1976 legislation originally enacted to establish home rule in the county.

74. ___ S.C. at ___, 267 S.E.2d at 85.

75. The relevant portions of the article are as follows:

> § 1. Powers of political subdivisions continued. The powers possessed by all counties, cities, towns, and other political subdivisions at the effective date of this Constitution shall continue until changed in a manner provided by law.
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> § 7. Organization, powers, duties, etc., of counties; special laws prohibited. The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.
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> § 17. Construction of Constitution and laws. The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

S.C. CONST. art. VIII.

prohibits the General Assembly from enacting special legislation for any county.[76] The court held that the two acts did not violate the prohibition against special legislation and were constitutionally permissible under the "one-shot" doctrine of *Duncan v. York County*.[77]

In *Duncan*, the supreme court recognized that the General Assembly has a duty to provide for the structure, organization, power, duties, functions, and responsibilities of the counties.[78] Plaintiff in *Duncan* brought suit against York County to attack the constitutionality of two acts passed by the General Assembly providing first for a referendum to select the form of government for York County and later for the establishment of that government. Although the legislation applied to a specific county, the court ruled that it was constitutionally permissible as a "one-shot" proposition to bring about the orderly transition to home rule.[79] The court concluded that the Home Rule Act complies with the constitutional mandate of article VIII to establish home rule government and that special legislation by the General Assembly was necessary in order to provide for the transition.[80] The authority to enact legislation for a specific county, however, was to be "temporary in nature and extend[ing] only to the point necessary to place Article VIII fully into operation."[81]

In August, 1975, the voters of Horry County selected a council-administrator form of government and expressed their preference for at-large elections.[82] Then in 1976, the General Assembly passed legislation to establish the chosen form of government and to provide for the county election.[83] Under the "one-shot" doctrine of *Duncan*, this legislation was permissible in order to provide for the transition to home rule.

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76. *See id.*

77. 267 S.C. 327, 228 S.E.2d 92 (1976).

78. *Id.* at 337, 228 S.E.2d at 96.

79. *Id.* at 345, 228 S.E.2d at 100.

80. *Id.* at 346, 228 S.E.2d at 101.

81. *Id.* at 345, 228 S.E.2d at 100.

82. ___ S.C. at___, 267 S.E.2d at 83. The Home Rule Act permitted referendums to be held before July 1, 1976 for the purpose of allowing county voters to select their preference for one of the alternative forms of government. S.C. CODE ANN. §§ 4-9-10,-20 (1976).

83. 1976 S.C. Acts 2415, No. 845 provided for eight members and a chairman.

The federal Voting Rights Act of 1965[84] requires submission of any voting procedure for the approval of the United States Attorney General to ensure compliance with the prohibition against racial discrimination in voting.[85] The Attorney General must approve the plan before it can be enforced.[86] The General Assembly submitted the Horry County home rule plan to the Attorney General, and elections were held.[87] Ten days later and within the statutory sixty-day period, the Attorney General interposed an objection and brought suit in federal court to enjoin the seating of the county council members elected pursuant to the plan.[88] The district court determined that the Horry County home rule plan was subject to the requirements of the Voting Rights Act but permitted the incumbents to remain as a de facto government pending the outcome of the suit.[89]

Prior to a determination on the merits of the plan contained in the 1976 act, the General Assembly passed legislation in 1978 providing for the election of Horry County Council members from single member districts and for the repeal of the 1976 plan. The Justice Department made no objection to the 1978 plan, the suit in district court was dismissed, and elections took place in Horry County pursuant to the 1978 plan.[90]

Once again, however, the validity of the home rule plan was

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84. 42 U.S.C. § 1973 (1970). Section 5 of the Voting Rights Act requires that before any change in a voting practice or procedure different from that in force in 1964 may be enforced, the district court must determine that it does not have the effect of denying or abridging the right to vote on the basis of race. Alternatively, the proposed change may be submitted to the United States Attorney General for preclearance. If no objection to the proposed change is interposed within sixty days after its submission, the plan may go into effect without a judicial proceeding. 42 U.S.C. § 1973(c).

85. U.S. CONST. amend. XV.

86. *See* note 85 *supra.*

87. The General Assembly submitted Act 845, *supra* note 83, to the United States Attorney General on March 16, 1976. The Attorney General requested additional information on May 17, 1976, but it was not received until September 13, 1976. Elections were held in Horry County on November 2, 1976 and the Attorney General interposed his objections on November 12, 1976, within the sixty-day period. Horry County v. Cooke, 449 F. Supp. at 994.

88. McCray v. Hucks, C.A. No. 76-2476. The three judge court entered an order allowing the members elected in the 1976 election to remain seated until the constitutionality of the 1976 legislation was determined. Order (March 22, 1977). Plaintiffs later abandoned this action. See Horry County v. Cooke, 449 F. Supp. at 996.

89. 449 F. Supp. at 997. Horry County brought suit before a three judge court seeking to enjoin the 1978 elections under the yet untested 1976 legislative plan.

90. ___ S.C. at ___, 267 S.E.2d at 83.

challenged. In *Van Fore v. Cooke*,[91] the South Carolina Supreme Court held that the 1978 legislation establishing the form of government for Horry County was legislation for a specific county in violation of article VIII, section 7 of the South Carolina Constitution.[92] The court concluded that the Home Rule Act enables the General Assembly to act by special legislation only to a limited extent in establishing the initial home rule government.[93] Although the court recognized the necessity for compliance with the requirements of the Voting Rights Act, it would not allow the legislature to accomplish that goal through the use of repeated special legislation.[94] Because the 1978 legislation was found unconstitutional as special legislation, the results of the 1978 election were rendered void and the members of the 1976 de facto government resumed office.[95]

The decision in *Van Fore* created a serious dilemma for the government of Horry County. Because the district court had not had the opportunity to rule on the constitutionality of the 1976 plan, Horry County was faced with the options of refiling suit in federal court or devising a new plan and securing its approval by the voters in the county. An expeditious solution appeared unavailable.[96] Then, in 1980, the General Assembly amended the Home Rule Act to permit special legislation in order to establish a form of government should the county's governing body be declared illegal by a court.[97] Pursuant to this enabling legislation, the legislature passed an act providing for the establishment of a form of government and elections for Horry County identical to the 1978 legislation which had been declared unconstitutional by the supreme court in *Van Fore*.[98]

Horry County brought suit challenging the constitutionality of the 1980 legislation in light of the prohibition against specific

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91. 273 S.C. 136, 255 S.E.2d 339 (1979).

92. *Id.* at 139, 255 S.E.2d at 341.

93. *Id.* at 139, 255 S.E.2d at 340.

94. *Id.* at 139, 255 S.E.2d at 340.

95. *Id.* at 139, 255 S.E.2d at 341.

96. This problem was faced by other counties in which solution by referendum was not possible. See United States v. Colleton County, C.A. No. 78-903 (D.S.C. 1978), where, in two separate elections, the voters failed to adopt a plan that would comply with federal standards. *See also* United States v. Sumter County, C.A. No. 78-883 (D.S.C. 1978).

97. 1980 S.C. Acts 1111, No. 300 (codified at S.C. CODE ANN. § 4-9-10(c) (Supp. 1980)).

98. 1980 S.C. Acts 2374, No. 609.

legislation in article VIII, section 7 of the South Carolina Constitution.[99] The supreme court, in rejecting the county's claim, recognized that while article VIII contemplates an orderly transition to home rule by means of specific legislation, such legislation is limited to the establishment of the initial, fully operational government.[100] The court concluded, however, that the amendment to the Home Rule Act is a general law applicable to all counties.[101] Furthermore, the court interpreted the amendment to apply only during transition to the initial county government.[102] Because it is the general law that permits the legislature to establish the initial government for the county, the court concluded that the legislation merely amended the general law to encompasss those situations in which more than one attempt is necessary to effectuate the transition.[103] Providing a general law for subsequent attempts to establish the initial government is consistent with the "one-shot" doctrine of *Duncan* that contemplates legislation only to the point necessary to place home rule fully into operation.[104]

The constitutionality of the 1980 legislation also was attacked on the ground that it violated article III, section 34 of the South Carolina Constitution, which prohibits special laws where general laws can be made applicable.[105] Even though legislation may be expressed in general terms, it violates the constitutional provision if it is special in its operation.[106] The issue must be decided not by the letter but by the spirit and practical operation of the act.[107] The fact that a law affects only one county,

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99. ___ S.C. at ___, 267 S.E.2d at 83-84.
100. *Id.* at ___, 267 S.E.2d at 83-84.
101. *Id.* at ___, 267 S.E.2d at 83-84.
102. *Id.* at ___, 267 S.E.2d at 83-84.
103. *Id.* at ___, 267 S.E.2d at 85.
104. *Id.* at ___, 267 S.E.2d at 85.
105. Article VIII, § 34 provides, *inter alia:*

> The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit:
>
> . . . .
>
> IX. In all other cases, where a general law can be made applicable, no special law shall be enacted . . . .

S.C. CONST. art. III, § 34.
106. Elliott v. Sligh, 233 S.C. 161, 165, 103 S.E.2d 923, 926 (1958).
107. *Id.* at 165, 103 S.E.2d at 926.

however, does not render it special legislation.[108] If the legislative language is unambiguous and general in its application, the court will not inquire into the legislative intent.[109] Here, the court concluded that the 1980 legislation created a general classification applicable to all counties, and it made no further inquiry into the legislative history or intent.[110]

Having found the amendment to the Home Rule Act constitutional, the court examined the act that established the form of government for Horry County. Although the 1980 act was identical to the 1978 legislation struck down in *Van Fore,*[111] the court upheld its constitutionality in light of the amendment to the Home Rule Act. The statute permitted specific legislation "[i]f the governing body of the county as initially or subsequently established" were declared illegal by a court.[112] This amendment brought Horry County within the provision of the statute and made it permissible for the General Assembly to pass specific legislation establishing the County's form of government. In *Cooke,* the court made a constitutionally sound decision to uphold a statute that recognizes the practical difficulties of implementing a home rule government in compliance with both federal and state constitutional requirements while limiting the General Assembly's ability to interfere with the affairs of local government.

IV. POSTCITATION DISCOVERY RULES FOR ADMINISTRATIVE HEARINGS

Pursuant to section 41-15-310 of the South Carolina Code,[113] the South Carolina Commissioner of Labor promul-

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108. Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970).

109. *Id.* at 401, 175 S.E.2d at 817.

110. ___ S.C. at ___, 267 S.E.2d at 85.

111. *Compare* Act 609, *supra* note 98, *with* 1978 S.C. Acts 2447, Nos. 776-77. These acts provided alternative plans for the election of eleven council members from single member districts and for a chairman elected at-large. They also established eleven election districts and repealed the 1976 legislation.

112. S.C. CODE ANN. § 4-9-10(c) (Supp. 1980).

113. S.C. CODE ANN. § 41-15-130 (1976) provides, in pertinent part, as follows:

> The Commissioner of Labor shall promulgate such rules and regulations as may be necessary to establish a procedure for administrative review before the Commissioner or his authorized representative or representative for any employer or employee or employee's representative affected or aggrieved by (1)

gated rules[114] authorizing the use of certain discovery procedures by the Department of Labor after issuance of citations for the violation of health and safety regulations.[115] In *Milliken v. South Carolina Department of Labor*,[116] the South Carolina Supreme Court invalidated those rules as violative of due process.[117]

In 1970, the United States Congress enacted an occupational safety and health program (administered by OSHA) to ensure safe and healthful working conditions in businesses affecting interstate commerce.[118] The legislation authorized the Secretary of Labor of the United States to carry out the purposes and policy of the program by setting mandatory occupational safety and health standards, and it established an effective enforcement program.[119] In addition, the legislation encouraged states to assume responsibility for the administration and enforcement of federal standards by submitting to the Secretary of Labor suitable plans setting forth standards and means to enforce those standards.[120] In 1971, the South Carolina General Assembly enacted such a plan,[121] and it was approved and implemented in 1973.[122] Shortly thereafter, however, the South Carolina Labor Council (AFL-CIO) sought to enjoin administration of the plan, charging that it failed to meet the required standards.[123] To assure the plan's continuation, the General Assembly amended the initial legislation,[124] and the union withdrew its suit.[125]

One of the amendments to the plan both broadened review of the State Commissioner of Labor's actions by providing ag-

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any act of the Commissioner, (2) any citation issued by the Commission, (3) any penalty assessed by the Commissioner, or (4) any period of abatement set by the Commissioner.

114. See notes 128-31 and accompanying text *infra*.

115. *Id.*

116. ___ S.C. ___, 269 S.E.2d 763 (1980).

117. *Id.* at ___, 269 S.E.2d 764.

118. 29 U.S.C. §§ 651-78 (1970).

119. *Id.* §§ 651, 659.

120. *Id.* § 667(b), (c).

121. 1971 S.C. Acts 505, No. 379.

122. S.C. DEPT. OF LABOR ANN. REP., No. 38, at 15 (1973).

123. *Id.*

124. 1973 S.C. Acts 370, Nos. 305-12.

125. S.C. DEPT. OF LABOR ANN. REP., No. 38, at 15.

grieved employers the right to seek an administrative hearing[126] and expanded the Commissioner's authority "to promulgate such rules and regulations as may be necessary to establish a procedure for administrative review."[127] Pursuant to his expanded authority, the Commissioner promulgated two rules providing for postcitation discovery. The first was South Carolina Labor Regulation 71-4.10(A)(2),[128] which made the Rules of Practice for the Circuit Courts of South Carolina applicable to Department of Labor Proceedings and which the Commissioner interpreted to permit repeated inspections of premises pursuant to Circuit Court Rule 88.[129] The second was South Carolina Labor Regulation 71-4.10(Y),[130] which provided for service of interrogatories on any party to a Department of Labor proceeding after notice of protest to a Department citation.[131]

Pursuant to the South Carolina Occupational Safety and Health Act,[132] the South Carolina Department of Labor inspected four of Milliken's textile mills and, following the inspections, cited the mills for exposing employees to excessive levels of cotton dust in violation of OSHA standards. Milliken con-

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126. ___ S.C. at ___, 269 S.E.2d at 764.

127. 1973 S.C. Acts 370, No. 310 (codified at S.C. CODE ANN. § 41-50-310 (1976)). Before this amendment, an aggrieved employer could appeal only to the circuit court. There was no express provision for administrative hearings until the amendment was passed.

128. S.C. LABOR REG. 71-4.10(A)(2)(Supp. 1979) provides, in pertinent part, that "[e]xcept as specifically set forth to the contrary in this section (4.10), procedures shall be in accordance with the Code of Laws of South Carolina and the Rules of Practice for the Circuit Courts of South Carolina, insofar as such Rules can be made applicable to proceedings hereunder."

129. S.C. CIR. CT. R. 88 (1976). The rule provides, *inter alia*, as follows:

> Upon motion of any party showing good cause therefor and upon written notice of ten days to all other parties, the Court in which an action is pending may . . . (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting . . . the property or any designated object or operation thereon within the scope of the examination permitted by the rule relating to depositions.

130. S.C. LABOR REG. 71-4.10(Y)(Supp. 1979).

131. *Id.* § (1) provides in pertinent part as follows:

> Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent who shall furnish such information as is available to the party.

132. S.C. CODE ANN. § 41-15-260 (1976) permits the Commissioner or any agency official to inspect "all places . . . where employment comes under the jurisdiction of the Commissioner for compliance" with OSHA standards.

tested the citations and requested a review hearing before the Commissioner. Before the hearing, the Department served interrogatories on the mills and sought entry for the purpose of further investigation.[133] Milliken refused to answer the interrogatories or permit reentry. The Department's administrative hearing officer ordered Milliken to comply with the request, and the Commissioner affirmed the order. On appeal, the circuit court reversed the order and held that the Commissioner lacked statutory authority to promulgate postcitation discovery rules for its administrative review hearings.[134]

The Department appealed to the South Carolina Supreme Court and argued that the postcitation discovery procedures were necessary to make the state plan as effective as the federal program and that the federal regulatory agency employs similar devices in connection with its administrative hearings.[135] The court rejected these arguments and affirmed the circuit court's determination,[136] focusing on the nature of a citation. Section 41-15-280 of the South Carolina Code authorizes the Commissioner or his agent to issue a citation if, upon inspection or investigation, he ascertains that an employer has violated an OSHA standard. The language in this provision suggests that such action by the Commissioner constitutes a final determination or judgment: once a citation issues, the employer has the right to an administrative hearing to review this judgment.[137] The court concluded that this hearing is appellate in nature, intended to be based only on information discovered by the investigating officer responsible for issuing the citation, and that additional investigation through postcitation discovery procedures would violate due process.[138] The court reinforced its decision by referring to the South Carolina Administrative Procedure Act,[139] which provides for judicial review of final agency actions: "[T]hat Act clearly contemplates a straight-line agency process

133. ___ S.C. at ___, 269 S.E.2d at 763. Numerous questions were posed requesting information concerning manufacturing process stages such as fiber composition, methods of ventilation, cotton dust sampling, and other technical data. See Record at 3-23.

134. Record at 24-48, 67.

135. Brief of Appellant at 16.

136. ___ S.C. at ___, 269 S.E.2d at 763.

137. S.C. CODE ANN. § 41-15-310 (1976).

138. ___ S.C. at ___, 269 S.E.2d at 764.

139. S.C. CODE ANN. § 1-23-10 to -400 (Supp. 1980).

beginning with fact-finding and ending with judicial review; it does not contemplate an agency's continuous re-initiation of investigation throughout the process."[140]

To suggest that the Administrative Procedure Act is appellate in nature and provides only for an agency's review of its factfinding process is erroneous. The Act provides the opportunity for a hearing for all parties in contested cases.[141] These hearings encompass rate-making, price-fixing, and licensing decisions.[142] The nature of contested cases indicates that the agency action is a preliminary decision subject to additional fact-finding procedures before a review hearing. Only after the review hearing are the rights of the parties finally determined.[143] Furthermore, nothing in the Act suggests that agency hearings should be limited to appellate review. Its purpose is not to deprive either the agency or litigants of previously established rights and procedures but to provide procedures that augment expeditious and fair resolution of contested agency actions.[144]

Denominating the Department's administrative hearing an appellate proceeding is unlikely to hinder seriously the Labor Commission's enforcement effectiveness because the Commissioner's investigatory powers can be used to issue any necessary rule or regulation to enhance fact-finding procedures before the issuance of a citation.[145] Nevertheless, the ruling in *Milliken* that administrative proceedings are appellate in nature should be limited to administrative hearings concerning occupational safety and health where a conclusion that issuance of citations constitutes final agency action is justified by statutory language. Extending *Milliken* to all administrative hearings held pursuant to the Administrative Procedures Act would be a misinterpretation of the Act.

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140. ___ S.C. at ___, 269 S.E.2d at 764.

141. S.C. CODE ANN. § 1-23-320 (Supp. 1980).

142. S.C. CODE ANN. § 1-23-310(2)(Supp. 1980)(definition of contested cases).

143. *Id.*

144. For a discussion of administrative adjudications under the Act, *see Administrative Law, Annual Survey of South Carolina Law,* 30 S.C.L. REV. 1, 12-22 (1979).

145. S.C. CODE ANN. § 41-15-210 (1976). The statute authorizes the Commissioner to promulgate rules and regulations for the purpose of attaining the highest degree of health and safety protection for employees. Additionally, §§ 41-15-260, -270 grant extensive investigatory power to the Commissioner before the issuance of a citation.