South Carolina House of Representatives

Legislative Update

Robert J. Sheheen, Speaker of the House

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House Week in Review

One of the most significant bills of the 1991 legislative session, S.388, the Solid Waste Management Act, was given third reading by the House of Representatives last week. This statewide bill now returns to Senate for the consideration of the House amendments to the bill.

On Tuesday, the House amended S.388 to the House version of the bill. Lengthy debate on the legislation prompted the House to give S.388 special order consideration Wednesday. After debating a number of amendments, the House voted 100-0 to give the Solid Waste legislation second reading approval. Third reading was given on Thursday.

A summary of the House version of the Solid Waste legislation (originally H.3096) appeared in the March 26 issue of the *Legislative Update.*

Ratified last week was S.654, the English Fluency in Higher Education Act. The legislation now goes to the governor for his signature.

An Overview of Reapportionment

The following article on the reapportionment issue is reprinted with permission from *State Legislatures*, a monthly magazine published by the National Conference of State Legislatures. This article appeared under the title "Maps That Will Stand Up in Court" in the September 1990 issue of *State Legislatures*. The author, Peter S. Wattson, is counsel for the Minnesota Senate and staff chairman of the NCSL's Reapportionment Task Force. Thanks to the NCSL for permission to reprint this background article on the reapportionment issue.

Legislators undertake the painful process of redistricting every 10 years, driven not only by a sense of duty, but also by a desire to control their own destiny. For they have learned that if they do not draw new boundaries for their legislative districts following each decennial census, the federal courts will do it for them.

It was a 1962 U.S. Supreme Court case involving the Tennessee General Assembly, *Baker vs. Carr*, that opened the floodgates of redistricting litigation by holding that legislative districts with unequal populations are subject to challenge in federal court.

The basic rule that all votes in a state election must have equal weight was laid down in the 1963 case of *Gray vs. Sanders*, where Justice Douglas made the now familiar assertion: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the 15th, 17th and 19th Amendments can mean only one thing: one person, one vote."

In order to give each vote an equal weight, how equal do the district populations have to be? The federal courts use two different standards for judging the population equality of redistricting plans -- one for congressional plans and a different one for legislative plans.

Source: NCSL *State Legislatures* Magazine, Sept. 1990

The standard for congressional plans is strict indeed. In the 1964 case of *Wesberry vs. Sanders*, the U.S. Supreme Court articulated that standard as "as nearly equal in population as practicable."

Notice the choice of words. The Court did not say "as nearly equal as practical." The *American Heritage Dictionary* defines "practicable" as "capable of being done." It notes that something "practical" is not only capable of being done, but "also sensible and worthwhile." It illustrates the difference between the two by pointing out that "It might be *practicable* to transport children to school by balloon, but it would not be practical."

In 1983, in *Karcher vs. Daggett*, the U.S. Supreme Court struck down a congressional redistricting plan drawn by the New Jersey Legislature that had an overall range -- the difference between the largest and the smallest district -- of less than 1 percent. To be precise, 0.6984 percent, or 3,674 people, where the ideal population of a district was about 526,000. The plaintiffs showed that at least one other plan before the Legislature had an overall range less than the plan enacted by the Legislature, thus proving that the population differences could have been reduced or eliminated by a good faith effort to draw districts of equal populations.

If you can't draw congressional districts that are mathematically equal in population, don't assume that others can't. Assume that you risk having your plan challenged in court and replaced by another with a lower overall range.

Even if a challenger is able to draw a congressional plan with a lower overall range than yours, you may still be able to save your plan if you can show that each significant deviation from the ideal was necessary to achieve "some legitimate state objective." Writing for the 5-4 majority in *Karcher vs. Daggett*, Justice Brennan said: "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving cores of prior districts and avoiding contest between incumbent representatives... The state must, however, show with come specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions.... By necessity, whether deviations are justified requires case-by-case attention to these factors."

So, if you intend to rely on these "legitimate state objectives" to justify *any* degree of population inequality in a congressional plan, you would be well-advised to articulate those objectives in advance, follow them consistently and be prepared to show that you could not have achieved

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Source: NCSL *State Legislatures* Magazine, Sept. 1990

those objectives *in each district* with districts that had a smaller deviation from the ideal.

Fortunately for those who will be drawing redistricting plans after the 1990 census, the Supreme Court has adopted a less exacting standard for legislative plans. As Chief Justice Earl Warren observed in the 1964 case of *Reynolds vs. Sims*, "mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that they achieve "substantial equality of population among the various districts."

"Substantial equality of population" has come to mean that a legislative plan will not be thrown out for inequality of population if its overall range is less than 10 percent.

The Supreme Court in *Reynolds vs. Sims* anticipated that some deviations from population equality in legislative plans might be justified if they were "based on legitimate considerations incident to the effectuation of a rational state policy." So far, the only "rational state policy" that has served to justify an overall range of more than 10 percent in a legislative plan has been respect for the boundaries of political subdivisions. And that has happened in only two cases: *Mahan vs. Howell* (1973) and *Brown vs. Thomson* (1983).

There may not be any other "rational state policies" that will justify a legislature's exceeding the 10 percent standard. But with the multitude of plans that are likely to be submitted for your consideration, you may wish to adopt other policies to govern plans that are within the 10-percent overall range.

Three-judge courts, called upon to draw redistricting plans where legislatures do not, often have adopted criteria for the parties to follow in submitting proposed plans to the court. These criteria are not constitutionally required, and have not been used to justify exceeding the 10-percent standard, but they have helped the three-judge courts to show the Supreme Court that they were fair in adopting their plans. These criteria often have included requirements that districts must be composed of contiguous territory, that they must be compact and that they should preserve "communities of interest."

In a democracy, "power to the people" means the power to vote. Section 2 of the Voting Rights Act of 1965 attempts to secure this political power for racial and language minorities by prohibiting states and political subdivisions from imposing qualifications for voting, prerequisites to voting or standards, practices or procedures to deny or abridge the right to vote on account of race or color or because a person is a member of a language minority group. Section 2 has been used to

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Source: NCSL *State Legislatures* Magazine, Sept. 1990

attack reapportionment and redistricting plans on the ground that they discriminated against blacks of Hispanics and abridged the right to vote by diluting the voting strength of those particular populations in the state.

In the 1986 case of *Thornburg vs. Gingles*, the Supreme Court held that a minority group challenging a redistricting plan must prove at least three things:

-- That the minority is sufficiently large and geographically compact to constitute a majority in a single member district;
-- That it is politically cohesive;
-- That, in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate.

If you have a minority population that could elect a representative if given an ideal district, but bloc voting by whites has prevented members of the minority from being elected in the past, you will have to create a district that the minority has a fair chance to win. To do that, the minority will need an effective voting majority in the district.

How much of a majority is that? Under Section 2, that depends on "the totality of circumstances." In other words, there is no fixed rule that applies to all cases.

The Court of Appeals for the Seventh Circuit, in the case of *Ketchum vs. Byrne* (1984), endorsed the use of a 65 percent black population majority to achieve an effective voting majority in the absence of empirical evidence that some other figure was more appropriate. The Court noted, "Judicial experience can provide a reliable guide to action where empirical data is ambiguous or not determinative and...a guideline of 65 percent of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence.... This figure is derived by augmenting a simple majority with an additional 5 percent for young population, 5 percent for low voter registration and 5 percent for low voter turnout..."

But the Court of Appeals in *Ketchum* also noted, "The 65 percent figure should be reconsidered regularly to reflect new information and new statistical data," and "provision of majorities exceeding 65 percent to 70 percent may result in packing."

So, if you face a charge of a Section 2 violation, you had better be prepared with empirical data to show what is "reasonable and fair" under the "totality of the circumstances," because your plan may be invalidated for putting either too few or too many members of a minority group into a given district.

Source: NCSL *State Legislatures* Magazine, Sept. 1990

While Section 2 of the Voting Rights Act applies throughout the United States, Section 5 applies only to certain covered jurisdictions. If you're covered, you know it, because all your election law changes since 1965 -- and not just your districting plans -- have had to be cleared before they take effect by either the U.S. Department of Justice or the U.S. District Court for the District of Columbia.

Section 5 preclearance of a redistricting plan will be denied if it makes the members of a racial or language minority worse off than they were before. One measure of that is whether they are likely to be able to elect fewer minority representatives than before. To defend against a charge that your plan will make members of a racial or language minority group worse off than they were before, you will want to have at least a 10-year history of the success of the minority at electing representatives.

The Voting Rights Act does not apply to conduct that has the effect of diluting the voting strength of partisan minorities, such as Republicans in the South and Democrats in the West. Partisan minorities must look for protection to the Equal Protection Clause of the 14th Amendment.

While the federal courts have not yet developed criteria for judging whether a redistricting plan is so unfair as to deny a partisan minority the equal protection of the laws, the Supreme Court has held in *Davis vs. Bandemer* (1986) that partisan gerrymandering is now a justiciable issue. This means that you must be prepared to defend an action in federal court challenging your redistricting plans on the ground that they unconstitutionally discriminate against the partisan minority.

Davis vs. Bandemer involved a legislative redistricting plan adopted by the Indiana General Assembly in 1981. Republicans controlled both houses. Before the 1982 election, several Indiana Democrats attacked the plan in federal court for denying them, as Democrats, equal protection of the laws.

The House plan included nine double-member districts and seven triple-member districts. The lower court found the multimember districts were "suspect in terms of compactness." Many of the districts were "unwieldy shapes." County and city lines were not consistently followed. Various House districts combined urban and suburban or rural voters with dissimilar interests. Democrats were packed into districts that already had large Democratic majorities, and fractured into districts where Republicans had a safe but not excessive majority. The speaker of the House candidly testified that the purpose of the multimember districts was "to save as many incumbent Republicans as possible."

Source: NCSL *State Legislatures* Magazine, Sept. 1990

The Supreme Court, in an opinion by Justice White, held that the issue of fair representation for Indiana Democrats was justiciable, but that the Democrats had failed to prove that the plan denied them fair representation. The Court denied that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," since, if the vote in all districts were proportional to the vote statewide, the minority would win no seats at all. Further, if districts were drawn to give each party its proportional share of safe seats, the minority in each district would go unrepresented. Justice White concluded that a "group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. Rather, unconstitutional discrimination occurs only when *the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."* (Emphasis added.)

But merely showing that the minority is likely to lose elections held under the plan is not enough. The Court pointed out: "The power to influence the political process is not limited to winning elections.... We cannot presume..., without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters [who did not vote for him]."

How do members of a major political party prove they do not have "a fair chance to influence the political process?"

When California Republicans attacked the partisan gerrymander enacted by the Democratic Legislature to govern congressional redistricting, the Supreme Court in *Badham vs. March Fong Eu* (1989) summarily affirmed the decision of a three-judge court dismissing the suit on the ground that the Republicans has failed to show that they had been denied a fair chance to influence the political process. The lower court said: "Specifically, there are no factual allegations regarding California Republicans' role in 'the political process as a whole.' There are no allegations that California Republicans have been 'shut out' of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fundraising or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or ever have been, any impediments to their full participation in the 'uninhibited, robust and wide open' public debate on which our political system relies."

Source: NCSL *State Legislatures* Magazine, Sept. 1990

But just because unconstitutional partisan discrimination may be difficult to prove doesn't mean that major political parties won't challenge redistricting plans that appear to put them at a disadvantage. Rather, it more likely means that there will be a multitude of challenges before the standards of proof are clearly established.

Thus, state legislatures are now in about the same position with regard to partisan gerrymandering as they were in 1962 with regard to equal population requirements. The federal courts have clear authority to hear claims that redistricting plans violate the rights of a partisan minority, but it may take another decade or two of challenges to virtually every redistricting plan drawn by a legislature for the courts to settle the arguments over what that means.

Major Court Cases on Redistricting

Eleven major court cases have dealt with redistricting. They are:

Baker vs. Carr, 1962

The Supreme Court holds that legislative districts with unequal populations may be challenged in federal court.

Gray vs. Sanders, 1963

Justice Douglas says that the basic rule for voting in state elections is "one person, one vote."

Wesberry vs. Sanders, 1964

The Supreme Court says that congressional districts must be "as nearly equal in population as practicable."

Reynolds vs. Sims, 1964

The Supreme Court holds that seats in both houses of a legislature must be apportioned on the basis of population, but "mathematical nicety is not a constitutional requisite" in drawing a legislative plan. It is necessary only to achieve "substantial equality of population among the various districts."

Source: NCSL *State Legislatures* Magazine, Sept. 1990

Mahan vs. Howell, 1973

The Supreme Court holds that respecting the boundaries of political subdivisions is a "rational state policy" that permits a legislature to deviate from population equality.

Gaffney vs. Cummings, 1973

Justice Brennan in dissent accuses the majority of establishing an overall range of 10 percent as the standard for legislative plans, with states not required to justify an overall range less than that.

City of Mobile vs. Bolden, 1980

The Supreme Court holds that Section 2 of the Voting Rights Act of 1965 applies only to election laws intended to discriminate against racial or language minorities, regardless of their effect.

Karcher vs. Daggett, 1983

The Supreme Court strikes down a congressional redistricting plans with an overall range of less than 1 percent, since plaintiffs showed that at least one other plan before the legislature had an overall range of less than that.

Brown vs. Thomson, 1983

The Supreme Court upholds a legislative reapportionment plan with an overall range of 89 percent.

Thornburg vs. Gingles, 1986

The Supreme Court upholds the 1982 amendments to the Voting Rights Act of 1965, designed to reverse *City of Mobile vs. Bolden*, and holds that a legislative redistricting plan must provide representation for racial and language minorities if they have previously been discriminated against and districts could be drawn where the minority has a fair chance to win.

Davis vs. Bandemer, 1986

The Supreme Court holds that legislative districts that result from partisan gerrymandering may be challenged in federal court.

Source: NCSL *State Legislatures* Magazine, Sept. 1990

Bills Introduced

The following bills were introduced in the House of Representatives last week. Not all the bills introduced in the House are featured here. The bill summaries are arranged according to the standing committee to which the legislation was referred.

Agriculture, Natural Resources and Environmental Affairs

Public Hearing Before Landfill Opening (H.3924, Rep. Cromer). This legislation would require the Department of Health and Environmental Control to hold a public hearing in the community where a landfill is proposed. This public hearing requirement would apply to any type of proposed landfill. The legislation specifies how and when the public hearings would be publicized.

Education and Public Works

Benefits for Permanent, Part-time Employees (H.3920, Rep. J.C. Johnson). Permanent, part-time state employees (PPTs) would be allowed to accumulate and be paid for to 45 days of accumulated annual leave at retirement, under this legislation. These provisions would not apply, however, to school teachers regardless of their classification. The legislation also notes that some PPTs may accumulate a higher annual leave total if authorized by law.

Public School Enrollment Requirements (S.295, Sen. Setzler). This legislation seeks to ease the problems encountered when children, who reside with someone other their parents, seek to enroll in the public schools. This legislation sets forth the criteria a child must meet to be enrolled in the public schools when they live somewhere other than with their parents, and the standards and responsibilities required of the adult with whom the child resides.

This legislation would allow a child to be enrolled in the public schools in the district where the adult they live with resides if:

-- The adult has been awarded custody of the child;
-- The adult is a foster parent licensed by the Department of Social Services or the Department of Youth Services;
-- The child resides with the person because of the death, serious illness or imprisonment of the parent; or if the parent has relinquished complete control of the child by failure to provide financial support or parental guidance; or if the parents are homeless; or if the parents have abused or neglected the child; or if the physical or mental condition of the parent prevents him or her from providing for the child.

A homeless child or school age juvenile who has married also may be enrolled in public school.

The school district may require the adult with whom the child lives to accept responsibility for the child's educational needs. This may include receiving disciplinary notices, granting permission for activities and other responsibilities. The district may require the adult to sign an affidavit attesting to the residency of the child and agreeing to accept the educational responsibilities. If the information proves to be false the child could be removed from school and the adult could be charged with a misdemeanor carrying a fine of up to $200 or 30 days in jail.

Encouraging Post-Secondary Education (S.361, Sen. Setzler). The purpose of this legislation is to encourage more high school students in South Carolina to go on to college by making sure parents and students receive information on the courses required for college entrance and the financial aid available. Under the provisions of this bill, which would be added as part of the Education Improvement Act, the state Commission on Higher Education would work with state and private higher education institutions to develop an information package on college opportunities in South Carolina, the course requirements for college admission and the financial aid available. The information would be developed for distribution to 8th grade students and their parents. The information packages would be pilot tested during the 1991-92 school year in a number of school districts, with the Higher Education Commission reporting back the results to the House and Senate Education committees.

In addition, the commission would work with the public and private higher education institutions to provide yearly small group and one-to-one counseling sessions to explain to 8th grade students and their parents the educational opportunities open to them at the post secondary level. These would be held at each public school that has an 8th grade. These counseling sessions would be available during a time promoted as "Education Options Week."

Public schools and public school districts would work with the commission on coordinating the information packages and sessions for their 8th graders and parents. And businesses would be encouraged to allow their employees to participate in these session with their 8th grade children.

Judiciary

Increasing the Civil Jurisdiction of Magistrates (S.434, Sen. Passailaigue). Under this legislation, the civil jurisdiction of magistrates would be expanded to involve cases up to $5,000. The current limit is $2,500.

Labor, Commerce and Industry

Dealer License Tags (S.282, Sen. Mullinax). This legislation would prohibit dealer plates from being issued to any dealer unless he could furnish proof of a retail license and had sold at least 10 vehicles at retail or wholesale during the past 12 months. With this proof, the state Highway Department would issue at least three dealer tags to the dealer.

Ways and Means

Bond Issue Bids (H.3934, Rep. Ross). Under this legislation, counties, municipalities, school districts, and special purpose districts, authorized to issue general obligation bonds, would be allowed to receive bids on more than one bond issue at a time. Further these local governments would be allowed to require bidders to submit proposals on multiple bonds offered as though they were a single issue. This would allow better overall interest costs to the local government issuing the bonds.