1973 S.C. Op. Atty. Gen. 241 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3584, 1973 WL 21041

Office of the Attorney General

State of South Carolina
Opinion No. 3584
August 1, 1973

1 Re:** ***House Apportionment

A system of weights or fractional voting in the South Carolina House of Representatives would be constitutionally suspect and would likely be declared invalid if challenged in the federal courts.

Member
House of Representatives
McCormick County

I apologize for not sooner replying to your letter of July 16, 1973, but I have been out of town for the past two weeks trying a federal case. In your July 16th letter you asked for an opinion as to the constitutionality of a House reapportionment plan in which the current number of representatives and the areas that they represent would remain unchanged, but weighted or fractionalized voting would be established to correspond with the population of the electoral district (i.e., the county).

Although a system of fractional voting was approved as a *temporary emergency* measure in one early reapportionment case [see *Thigpen v. Myers*, 231 F. Supp. 938, 941 (D. Wash. 1964)], systems of weighted or fractional voting must now be considered constitutionally suspect. The leading case on this question is *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965), affirmed per curiam, 382 U. S. 4, 86 S.Ct. 4, 15 L.Ed. 2d 2 (1965).

In the *Lomenzo* case a three-judge federal court declared a fractional and weighted voting system in the New York state legislature unconstitutional. The reasoning behind the decision was as follows:

If voting were the only important function of a legislator, the scheme of fractional voting in Plans D and C would probably not offend 'the basic standard of equality' among districts. But legislators have numerous important functions that have nothing directly to do with voting: participation in the work of legislative committees and party caucuses, debating on the floor of the legislature, discussing measures with other legislators and executive agencies, and the like. The Assemblyman who represents only one-sixth of a district can theoretically give each constituent six times as much representation in these respects as the Assemblyman who represents a full district. This disparity of representation persists even if the State is right in arguing that the Assemblyman with only one sixth of a vote will carry only one-sixth as much political weight when he engages in these activities.

Moreover, fractional districts are enjoyed mainly by the sparsely populated areas of the state. Of the forty-seven Assemblymen who would cast fractional votes under Plan D, thirty-seven are from counties to thinly inhabited to have any additional representation in the Assembly. Of the thirty-nine Assemblymen who would cast fractional votes under Plan C, thirty-four are from counties too thinly inhabitated to have any additional representation in the Assembly. None of the Assemblymen with fractional votes under either plan are from New York City or Nassau County. In view of the Supreme Court's concern for New York's traditional 'bias against voters living in the state's more populous counties,' *WMCA, Inc. v. Lomenzo*, supra, 377 U.S. at 654, 84 S.Ct. at 1428, this imbalance makes fractional voting particularly vulnerable.

***2** A more recent case involving the apportionment of the state senate in Hawaii likewise rejected fractional voting as constitutionally impermissible.

[A] legislator's vote (per se) is not the major value of legislative representation. It has been compared to the tip of the iceberg, and the evidence here makes it manifest that the major power of a legislator lies in his influence with and upon his fellow legislators, with his powers as a committee member, as a committee chairman, and as a party leader. This court can but conclude that the effect of fractional voting, as reflected in Hawaii's 1968 Constitution, would in fact dilute the value of the votes of those living outside the County of Kauai [whose two senators had ½ vote each].

Burns v. Gill, 316 F. Supp. 1285, 1301 (D. Hawaii 1970) (3-judge court). Other federal courts have struck fractional roting systems on similar grounds. See *Bannister v. Davis*, 263 F. Supp. 202, 209 (E.D. La. 1966); *Swann v. Adams*, 263 F. Supp. 225, (S.D. Fla. 1967).

On the basis of the foregoing it is my opinion that a system of weighted or fractional voting in the South Carolina House of Representatives would be constitutionally suspect and would likely be declared invalid if challenged in the federal courts.

Randall T. Bell
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