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One Man - One Vote: Is It Applicable to Local Government?

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RECENT DECISION

One Man-One Vote: Is It Applicable To Local Government? In *Avery v. Midland County, Texas*,[1] the United States Supreme Court applied its "one man-one vote" reapportionment principle to the Midland County Commissioners Court, a local government unit of the State of Texas having general control over 70,000 inhabitants of Midland County. Justice White, who delivered the majority opinion, adequately described the fact situation with which the Court was faced:

> The Commissioners Court is composed of five members. One, the County Judge, is elected at large from the entire county, and in practice casts a vote to break a tie. The other four are Commissioners chosen from districts. The population of those districts, according to the 1963 estimates . . . was respectively 67,906; 852; 414; and 828. This vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides.[2]

Having standing as a resident, taxpayer, and voter of the largest district, the Mayor of Midland sued the Commissioners Court in the Midland County District Court charging that the population deviation for the four districts was clearly extreme and that this disproportionate district size violated the Fourteenth Amendment. Although making no reference to the Fourteenth Amendment, the trial court ruled for the petitioner ordering the defendant commissioners to adopt a new plan in which each district would have substantially an equal amount of people.[3] The Court of Civil Appeals of Texas reversed expressing the view that both the Texas and United States Constitutions merely required "a Republican Form of Government. . . ."[4]

The Texas Supreme Court reversed the Court of Civil Appeals but also disagreed with the trial court's conclusion that the districts must be of substantially the same population.[5] The Texas Court thought other factors should be taken into account. These factors included: (1) that the primary function of the Commissioners Court was administrative;[6] (2) that there should be a "balance" between the voices of rural voters and the voices of urban voters;[7] (3) that the city of Midland could elect the county-wide officers due to population concentration,[8] and concluded:

> As we have said, equal rights and equal protection of laws require equality in political rights and there may be circum-

[1] 390 U.S. 474 (1968).
[2] *Id.* at 476.
[3] *Id.* at 477.
[4] Avery v. Midland County, 397 S.W.2d 919, 921 (Tex. Civ. App. 1965).
[5] Avery v. Midland County, 406 S.W.2d 422 (Tex. Sup. Ct. 1966).
[6] *Id.* at 426.
[7] *Id.* at 428.
[8] *Id.* at 428.

> stances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights. On the other hand, the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads and taxable values.[9]

The Texas Supreme Court then ordered the Commissioners Court to redistrict itself in accordance with the constitutional guidelines it had defined and it was at this point that the United States Supreme Court intervened and took jurisdiction over the case by certiorari.[10]

Justice White proclaimed the majority's extension of the "one man-one vote" principle to a state's political subdivisions and thereby unequivocally maintained that they must comply with the Fourteenth Amendment:

> The actions of local government are the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of the law.[11]

With numerous state and federal precedents in his favor,[12] he went on to draw an analogy between apportionment of state legislatures and proper representation in local governmental units:

> When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates law-making power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those

[9] *Id.* at 428.

[10] The question of jurisdiction and of the finality of the Texas Supreme Court decision was one of the key issues of the case, but it is not within the scope of this article.

[11] 390 U.S. at 480.

[12] State cases invoking the doctrine of Reynolds v. Sims, 377 U.S. 533 (1964) to local governmental units include: Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (1965); Brouwer v. Bronkema, No. 1855, Cir. Ct., Kent County, Mich., Sept. 11, 1964, (although the Supreme Court of Michigan divided evenly on the same question in 277 Mich. 616, 141 N.W.2d 98, (1966)); Miller v. Board of Supervisors, 63 Cal. 2d 343, 405 P.2d 857 (1965); Montgomery County Council v. Garrot, 243 Md. 634, 222 A.2d 164 (1966); Armentrout v. Schooler, 409 S.W.2d 138 (Mo. App. 1966); Seaman v. Fedourich, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778 (1965); Bailey v. Jones, 81 S.D. 617, 139 N.W.2d 385 (1966); and Newbold v. Osser, 425 Pa. 478, 230 A.2d 54 (1967). Cases generally holding that state political subdivisions must comply with the Fourteenth Amendment include: Cooper v. Aaron, 358 U.S. 1 (1958); Thompson v. City of Louisville, 362 U.S. 199 (1960); and Terminello v. Chicago, 337 U.S. 1 (1949). Federal cases applying Reynolds v. Sims are many and include: Ellis v. Mayor of Baltimore, 234 F. Supp. 945 (D. Md. 1964), *aff'd and remanded,* 352 F.2d 123 (4th Cir. 1965); Martinolich v. Dean, 256 F. Supp. 612 (D. S.D. Miss. 1966); Strickland v. Burns, 256 F. Supp. 824 (D. M.D. Tenn. 1966).

> qualified to vote have the right to an equally effective voice in the election process. If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population.[13]

The majority, also placing emphasis upon the role of the local governmental unit in the United States today, stated that it was impressed by the amount of policy and decision making left to the local units and noted the immunity that many local bodies enjoyed from legislative interference. Indeed, it was with relative ease that the Court made the transition from the principles of *Reynolds v. Sims*[14] to the instant case.[15]

Next, the Court ventured into the arena of political science, citing works from that discipline and apparently attempting to document its conclusion that the County Commissioners Court was a legislative as opposed to an administrative unit of the Texas government. And, although the Court found no difficulty in so concluding, its alegal journey into political science foreshadowed the use of many treatises on that subject by the minority opinions[16] and was also prophetic of the problems inherently present in any adjudication of a like fact situation.

Finally, after speaking in terms of substantial equality of voting power through an elimination of disparate representation on the local level, after a seemingly unequivocal introduction of "one man-one vote," and after a multitude of logically pure comparisons of voting rights with freedom of speech, freedom of religion, and so on, the Court apparently qualified *Avery's* import, from a constitutional standpoint, and distinguished it from *Reynolds v. Sims*. In what appears as an afterthought or cautionary postscript the decision explains:

> The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious. The conclusion of *Reynolds v. Sims* was that bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect members of state legislatures. We hold today only that the Con-

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[13] 390 U.S. at 480.

[14] 377 U.S. 533 (1964).

[15] The reasoning indulged in being unsurprisingly similar to the Supreme Court's language in applying its original Baker ruling (Baker v. Carr, 369 U.S. 186 (1962)) to the Reynolds situation.

[16] The following texts were among those cited: ANDERSON & WEIDNER, STATE AND LOCAL GOVERNMENT (1951); ADRIAN, STATE AND LOCAL GOVERNMENTS (1960); INTERNATIONAL UNION OF LOCAL AUTHORITIES, LOCAL GOVERNMENT IN THE UNITED STATES OF AMERICA (1961); NATIONAL MUNICIPAL LEAGUE, MODEL COUNTY CHARTER, (1956); DUNCOMBE, COUNTY GOVERNMENT IN AMERICA (1966); BENTON, TEXAS, ITS GOVERNMENT AND POLITICS (1966); MACCORKLE AND SMITH, TEXAS GOVERNMENT.

> stitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.[17]

As in so many of its decisions, the Court failed to define key phrases in the formula which was put forth to resolve the difficulties in the specified area. What are "general governmental powers"? What is an "entire geographic area"? The majority inferred that a unit as "minute and miniscule" as a school board would come under the purview of this decision.[18] It is hard to conceive of the practicality and enforceability of such a ruling.[19]

Justices Harlan, Fortas, and Stewart dissented in *Avery* with almost identical expressions of doubt as to the Court's jurisdiction over what they considered a non-final judgment by the Texas high court.[20] Harlan hinged his remaining argument on the impossibility and impractability of the majority decision explaining:

> . . . I consider this decision, which extends the state apportionment rule of *Reynolds v. Sims* . . . to an estimated 80,000 units of local government throughout the land, both unjustifiable and ill-advised.
>
> I continue to think that these adventures of the Court in the realm of political science are beyond its constitutional powers.[21]

Harlan accurately pointed to certain administrative difficulties that had not been resolved under the *Reynolds* ruling. Whereas the majority made the theoretical transition from state governments to localities, Harlan made the practical transition. The mysteries present in the Court's attempt at solving the reapportionment problem for the fifty states would only be multiplied by the "bewildering variety"[22] of local governments that are covered by *Avery*. The result, claimed Harlan, would deprive units "of the desirable option of establishing slightly specialized, elective units of government such as Texas' county commissioners court."[23]

The remainder of Fortas' dissent, although recognizing the intricacies involved in the Court's entrance upon the local scene, suggested that if the Court were going to enter this field of local govern-

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[17] The majority opinion closes with two examples put forth where the Court has allowed experimentation: Sailors v. Board of Education, 387 U.S. 105 (1967); and Dusch v. Davis, 387 U.S. 112 (1967).

[18] 390 U.S. at 480: "If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population."

[19] By sheer reason of numbers this would be difficult to envision.

[20] 390 U.S. at 486, 495, and 509.

[21] 390 U.S. at 487.

[22] 390 U.S. at 490.

[23] 390 U.S. at 492.

ment, then equal protection of the laws could only be achieved "by a system which takes into account a complex of values and factors, and not merely the arithmetic simplicity of one equals one."[24] (Harlan had specifically singled out this section of Fortas' dissent arguing that it was as equally unsatisfactory from a practical point of view as the majority's position. "For it would bid fair to plunge this Court into an avalanche of local reapportionment cases with no firmer constitutional anchors than its own notions of what constitutes 'equal protection' in any given instance."[25] The only way to avoid the pitfalls in the solutions of both the majority and Fortas, is the totally unsatisfactory "hands off" policy of Harlan.) Fortas also pointed to the inherent practical difficulties connected with any future attempt by the Court to adjudicate the question of whether a citizen on the local level had a vote substantially equal to his fellow citizens when he was "usually subject to several local governments with overlapping jurisdiction,"[26] but, unfortunately, suggested nothing to fill the present void of substantial voter inequality. Fortas ended his dissent with the argument, much like the Texas Supreme Court's argument, that other factors, such as tax impact, would have to be taken into account if the Court were going to enter this field.

Stewart essentially agreed with the dissent of Fortas expressing his well-known feelings as to the one man-one vote rule and reapportionment.[27] Speaking specifically of the invasion of the local political arena, Stewart warned much like Fortas that local apportionment was "far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic."[28]

Upon reviewing the decisions of the courts of Texas, the majority decision of the United States Supreme Court, and the strongly-worded dissenting views of Harlan, Fortas, and Stewart, it would seem that the applicability of the one man-one vote rule to local governments is a path through a maze of practicalities, side effects, and inherent problems.

Among these practicalities are factors as simple and basic as the intricate structuring and intertwinement of units of government. Certainly malapportionment should not be allowed the sanctuary of "safety in numbers," but it is obvious that the Supreme Court might find baby-sitting for 80,000 units of local government a perplexing task.

The side effects of one man-one vote upon the local units themselves are at best predictable. Fortas' dissent pessimistically predicted an ill effect on the city-suburban relationship.[29] Professor Robert G. Dixon,

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[24] 390 U.S. at 496.
[25] 390 U.S. at 494.
[26] 390 U.S. at 500.
[27] Stewart's views on this subject can be found in Lucas v. Colorado General Assembly, 377 U.S. 713, at 744 (dissenting opinion) (1963).
[28] 390 U.S. at 510.
[29] 390 U.S. at 497: "And while I have no doubt that, with the growth of suburbia

Jr., on the other hand, thoroughly discussed the implications of reapportionment upon county governments and took a very different stand on such side effects.[30] He spoke of malapportionment as the most crucial obstacle to the development of "urban counties" which in turn might be a chosen instrument for "metropolitan salvation."[31] Speaking before *Avery*, Dixon's following prediction optimistically cited the side effects of a decision like *Avery:*

> In short, by judicial fiat, and as a totally unexpected by-product of the original state legislative reapportionment suit from Tennessee in 1962, we may soon have on hand a ready-made political instrument for 'metro' development, in the form of reinvigorated county government, that probably could not have developed in a generation of popular referenda. A county board on which all sections of the county—city, suburban, rural—are represented approximately in proportion to their population, could be a ready-made 'metro' instrument. The traditional character of the county should ease the path to acceptability.[32]

Dixon also saw the more difficult challenge that local reapportionment poses warning that "particularly in those states with a tradition of township organization, [it] is a more complex, more challenging, and potentially more revolutionary process than state legislative reapportionment."[33]

There are also inherent problems. For example, what does the Court mean by its conveniently vague "arbitrary and invidious" test? What is "an allowable population disparity"?[34] It was a simple matter, almost a constitutional reflex, to declare that districts of 67,906; 852; 414; and 828 were grossly disproportionate, but it will be in the gray fact situations that the idea of "the substantially equal vote" will provide the Court with its most challenging realities. As is the case with so many "breakthrough" decisions, only time and cautious but perceptive decisions by the Supreme Court in this vast new area will allow a true evaluation as to whether or not one man-one vote is applicable to local governmental units.

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Federal Courts and Procedure: Abstention: Under the Civil Rights Act of 1964, "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any state law, . . .

and exurbia, the problem of allocating local government functions and benefits urgently requires attention, I am persuaded that it does not call for the hatchet of one man, one vote."

[30] 30 LAW AND CONTEMPORARY PROBLEMS 57 (1965).

[31] *Id.* at 70.

[32] *Id.* at 73.

[33] *Id.* at 74.

[34] For example of the problems present when the Court deals with population disparities *see* Lucas v. Colorado General Assembly, 377 U.S. 713 (1963).