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Constitutional Law -- Reapportionment -- One Man, One Vote Applied to Local Governing Bodies

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age into . . . an uncharted sea,"[33] preferring the comfortable predictibility of stare decisis to individualized justice. In this still inchoate area of law, however, a case-by-case development of rules without rigid adherence to any one theory is necessary in order to establish sound principles. "The objective is to achieve justice in a particular case and cases of like kind, avoiding ideology, on the one hand, and particularistic result-oriented determinations, on the other."[34] This rational approach would end ad hoc decisions. If a court, choosing between particular state laws, can identify the policies embodied in those laws and determine if a true conflict exists,[35] then it should use the facts or contacts to determine which state has a better claim, giving weight to the parties' expectations and other countervailing considerations. A few wide-sweeping rules could thus be avoided. This process would give hope that decisions founded upon discriminating assessments of policies and expectations will slowly build up a body of differentiated rules to which courts can adhere, bringing predictibility back into play. North Carolina for the present is content with lex loci. Perhaps a rule so well defined as the "greatest interest rule" will cause the court to reassess its status quo position and perceive the possible individualized justice for each case and a possible predictibility therein.

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Constitutional Law—Reapportionment—One Man, One Vote Applied to Local Governing Bodies

The one man, one vote rule of the United States Supreme Court has been described as "the symbol of an aspiration for fairness, for avoidance of complexity and for intelligibility in our representational processes in our mass democracy."[1] By *Avery v. Midland County*,[2] the Court has expanded the equal representation concept of *Reynolds v. Sims*[3] and its

[33] Shaw v. Lee, 258 N.C. 609, 616, 129 S.E.2d 288, 293 (1963).

[34] 22 N.Y.2d at —, 237 N.E.2d at 890, 290 N.Y.S.2d at 752. *See also* THE CHOICE-OF-LAW PROCESS 121-23.

[35] *See generally*, Traynor, *supra* note 15; Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967).

[1] Dixon, *Reapportionment Perspectives: What Is Fair Representation?*, 51 A.B.A.J. 319, 324 (1965).

[2] 390 U.S. 474 (1968).

[3] 377 U.S. 533 (1964). The Court said:

> [W]e conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.

companion cases[4] from the statehouses of the nation to thousands of county courthouses, city councils, school districts, and similar local governing bodies. Phrased simply, the decision means that many, if not most, representative bodies elected on the local level must be chosen under a scheme whereby the men who sit on them represent substantially equal numbers of people.[5] *Avery* itself did not commence the trend of applying the one man, one vote rule to local government; but it did settle the issue in favor of a line of state and lower federal court cases so extending the *Reynolds* principle.[6] The decision is significant[7] because the Court for a time declined any opportunity to apply the rule to local governments and governing boards after the *Reynolds* decision.[8]

The holding in *Avery* brings to a predictable conclusion the trend begun when the Court decided in *Baker v. Carr*[9] that apportionment and

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> Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment. . . .

Id. at 566.

[4] Lucas v. Forty-Fourth Gen. Ass., 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Rep. v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

[5] 390 U.S. at 478-79.

[6] The majority opinion in *Avery* mentioned several cases from state supreme courts and federal district courts extending *Reynolds* to local governments. 390 U.S. at 479 n.3. *But see* Bianchi v. Griffing, 271 F. Supp. 497 (E.D.N.Y.), *cert. denied*, 389 U.S. 901 (1967); Moody v. Flowers, 256 F. Supp. 195 (M.D. Ala. 1966), *vacated and remanded*, 387 U.S. 97 (1967); Johnson v. Genesee County, 232 F. Supp. 567 (E.D. Mich. 1964); Simon v. Lafayette Parish Police Jury, 226 F. Supp. 301 (W.D. La. 1964). As the only state supreme court holdings contrary to its decision in *Avery*, the Court cited Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98 (1966), where the Michigan court divided four to four on the issue; and the Texas Supreme Court decision in Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966), which was vacated and remanded to the Texas court.

[7] In the month after the announcement of *Avery*, for instance, both the Colorado and Iowa supreme courts cited and followed it in deciding cases challenging the constitutionality of local governing boards. Hartman v. City & County of Denver,—— Colo. ——, 440 P.2d 778 (1968) (city council); Mandicino v. Kelly, —— Iowa ——, 158 N.W.2d 754 (1968) (county board of supervisors). *Avery* should also be a strong argument for the plaintiffs in a North Carolina reapportionment case, *Jacobs v. Gaston County*, filed in Gaston County Superior Court, challenging the constitutionality of the Gaston County Board of Commissioners. A news report of the suit is contained in The Charlotte Observer, Sept. 24, 1968, § 2, at 1, col. 1.

[8] Bianchi v. Griffing, 389 U.S. 901, *denying cert. to* 271 F. Supp. 497 (E.D.N.Y. 1967); Dusch v. Davis, 387 U.S. 112 (1967); Sailors v. Board of Educ., 387 U.S. 105 (1967); Moody v. Flowers, 387 U.S. 97 (1967), *vacating and remanding* 256 F. Supp. 195 (M.D. Ala. 1966). As will be discussed at length, the Court had valid, practical reasons for not extending the application of one man, one vote to local governments in both *Sailors* and *Dusch*.

[9] 369 U.S. 186 (1962).

districting is a justiciable issue in federal courts and not merely a political question. But the Court in *Avery* also crossed the line that remained after its decision in *Reynolds*. Was the crossing of that line a mistake that constitutes a rigid, unwise approach with respect to the multitude of local governmental units of varying sizes and purposes, having general governmental powers? Or does application of the mathematically simple one man, one vote rule to local entities still retain sufficient flexibility to enable courts to reach desirable solutions in reapportionment cases involving local governments?

Midland County, Texas, was governed by a five-member board called the Midland County Commissioners Court, which performed various legislative, executive, and judicial functions. One member, the county judge, was elected at large by the voters of the county; however, he could vote only in case of a tie. The other four commissioners were chosen from four districts with an estimated population of 67,906 for the city of Midland, and 852, 828, and 414 for the three rural districts.[10] Thus, the urban area containing 95 per cent of the population could at most elect two representatives (one of them the county judge) to the commissioners court. The commissioners were responsible for such general governmental functions as letting contracts in the name of the county; appointing minor county administrative officials; setting the county tax rate, including that of property owners in the city, within limits controlled by the state; issuing bonds; and determining the county budget.[11]

On these facts, Justice White reasoned for the majority: "[I]nstitutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens."[12] Using this policy for extending the one man, one vote principle to local governments, the Court held: "[T]he Constitution 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."[13]

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[10] Avery v. Midland County, 390 U.S. 474, 476 (1968).

[11] *Id.*

[12] *Id.* at 481.

[13] *Id.* at 484-85. The Court thus vacated the judgment of the Texas Supreme Court, which had ruled that the equal protection clause was violated by the apportionment of districts in Midland County but that factors other than population might be taken into account in reapportioning the county. 406 S.W.2d 422 (Tex. 1966). The Texas Supreme Court had reversed the Texas Court of Civil Appeals. That court, in turn, had reversed the trial court. 397 S.W.2d 919 (Tex. App. 1965).

Justices Harlan, Fortas, and Stewart dissented.[14] Justice Harlan restated his general disapproval of *Reynolds*[15] and also reasoned that local governing bodies are so diverse in their functions that they need to be more flexible in their structure than do state legislatures.[16] Justice Stewart's rationale was the same as in his dissenting opinion in *Lucas v. Colorado General Assembly*,[17] where he protested that the principle of one man, one vote as applied to even state legislatures meant a simplistic, arithmetical approach.

While agreeing that the application of the equal protection clause in reapportionment situations should not stop at the state level, Justice Fortas also emphasized that equal protection of voters on the local level requires more than a simplistic and blanket one man, one vote approach.[18] He appeared particularly impressed by the fact that testimony at the trial level disclosed county roads to be the main concern of the county commissioners. He also stressed that the state had placed a ceiling on the tax rate set by the commissioners.

The Fortas dissent cited both *Dusch v. Davis*[19] and *Sailors v. Board of Education*[20] to illustrate that the Court had not in the past insisted on a rigid application of one man, one vote to local government. Although the majority in *Avery* specifically pointed with favor to both of these cases,[21] the cases can be distinguished from *Avery* on their facts. *Sailors* involved what the Court characterized as an appointment of a county-wide school board by various local school boards representing variously populated districts; and *Dusch* involved an at large election of city council members, some of whom were required to reside in districts containing substantially unequal numbers of people.

Insofar as Justice Fortas relied on the legislative limitations on the county commissioners' powers, his dissent may be rebutted.

> If it is contended that unlimited discretion is necessary for the exercise of true legislative power, then no legislative body in the American system of government would qualify since each body receives its grants of power from constitutions and/or legislation which limits the scope of the power granted. . . . The current trend at the county

[14] All of the dissenters thought that the writ of certiorari had been improvidently granted.
[15] 390 U.S. at 487 (dissenting opinion).
[16] *Id.* at 490-92.
[17] 377 U.S. 713, 750 (1964) (dissenting opinion).
[18] 390 U.S. at 498-99 (dissenting opinion).
[19] 387 U.S. 112 (1967).
[20] 387 U.S. 105 (1967).
[21] 390 U.S. at 485.

> governing level is toward more exercise of this legislative power since the modern urban county has been forced into exercising its legislative authority more and more in choosing which of a broad array of programs available to it will be effectuated in a county.[22]

Avery applies the one man, one vote formula to certain local governing bodies, but does not attempt to precisely define what local bodies may be included among those having "general governmental powers." Clearly the decision encompasses such entities as county governing boards and city councils with at least as much legislative power as was held by the county commissioners court in *Avery*. But there are myriad bodies exercising governmental power at the local level, many of them having only one function such as sanitation or education. The Court noted in *Avery* that in 1967 there were an estimated 81,304 units of government of "staggering diversity" throughout the nation.[23] One analyst of the Court's reapportionment decisions suggests three criteria for deciding whether the local body has "general governmental powers" over a geographic area: (1) What functions does the entity have? If few, the courts have justification for not applying the one man, one vote principle. (2) Is the organization a special purpose unit, such as a port authority? If so, a general local government is probably not involved. (3) To what extent is the selection of members of the unit based on equal representation? The more limited the unit's functions, the greater the variance that courts should allow from the one man, one vote formula.[24]

A lawyer attempting to predict whether a certain local governing body will come under *Avery* must apply the above criteria cautiously and critically. For instance, school boards generally have one basic function designed to fulfill a specific purpose; but where their members are elected, several courts have specifically held that they fall under the one man, one vote test;[25] and language in *Avery* itself indicates that the Supreme Court considered school boards to be among the type of local governmental entities it had in mind.[26] In fact, under the rationale of *Gray v.*

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[22] Oden & Meek, *County Reapportionment: A Rebuttal*, 18 BAYLOR L. REV. 15, 16-17 (1966).

[23] 390 U.S. at 483.

[24] Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 32-33 (1965). This article contains an excellent discussion of the various types of local governmental units and the effect that extension of the one man, one vote rule would have on them.

[25] *E.g.*, Strickland v. Burns, 256 F. Supp. 824 (M.D. Tenn. 1966); Delozier v. Tyrone Area School Bd., 247 F. Supp. 30 (W.D. Pa. 1965).

[26] 390 U.S. at 480.

Sanders[27] all locally-elected officials—including those with strictly administrative duties—might be held to come under the one man, one vote principle. Until more case law develops in this area, predictions concerning specific categories of local governing bodies and officials may be difficult in close situations. Perhaps the only entities that will eventually escape application of the rule are those whose members sit as the result of a scheme more in the nature of appointment than of election.[28]

Avery probably has carried not only the *Reynolds* rule itself into the area of local government, but also the holdings of cases answering certain problems raised by *Reynolds*.[29] However, *Avery* did leave unsettled the population standard on which local representation is to be based. Is it sheer population figures? Or registered voters? Or the number of people who voted in the last election? Perhaps *Hartman v. City & County of Denver*,[30] a decision by the Colorado Supreme Court based primarily on *Avery*, provides the answer to these questions. The court said that reliance on the number of registered voters is not per se unconstitutional, but in applying such figures a local government cannot "depart significantly from population-oriented standards."[31]

The most difficult issue raised by *Avery* is the problem of applying the one man, one vote principle to obtain truly meaningful representation for the local electorate. To Mr. Justice Fortas, the decision in *Avery* meant that the county residents would be denied meaningful representation because only in the "most superficial sense" did the commissioners have general governmental powers,[32] their primary concern being the construction of county roads. Even if he were correct in his analysis of the facts, his well-reasoned dissent may be answered by the *Sailors* and *Dusch* cases along with the majority opinion in *Avery*. Together the

[27] 372 U.S. 368 (1963). The Court held that the Georgia system of voting for senators and other statewide elected officials, including the governor and other administrative officials, was violative of the fourteenth amendment since it resulted in a substantial dilution of the electors' votes.

[28] Sailors v. Board of Educ., 387 U.S. 105 (1967).

[29] For instance, it would appear that local governmental entities may establish multi-member districts so long as their use is not designed to discriminate against or cancel out some minority racial or political element. *See* Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965); Mann v. Davis, 245 F. Supp. 241 (E.D. Va.), *aff'd mem. sub. nom.* Burnette v. Davis, 382 U.S. 42 (1965). *But cf.* Drew v. Scranton, 229 F. Supp. 310 (M.D. Pa.), *vacated and remanded*, 379 U.S. 40 (1964); Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (1964). It also appears that a local government must be reapportioned at least once every decennial based upon the census to satisfy the Constitutional requirement. *See* Reynolds v. Sims, 377 U.S. 533, 583-84 (1964).

[30] —— Colo. ——, 440 P.2d 778 (1968).

[31] *Id.* at ——, 440 P.2d at 783.

[32] 390 U.S. at 507 (dissenting opinion).

opinions in the three cases indicate that local governments do have some justification for experimentation and flexibility *if* they also recognize the equal protection principle. For instance, if it were conceded that the county commissioners' most important function in Midland County is maintaining county roads, a scheme whereby all commissioners were voted on at large but one or two of them were required to reside in a rural geographical area might well be satisfactory.[33] Such a scheme would approach the facts approved in *Dusch* and would recognize the one man, one vote principle since every citizen would have an equal vote in determining the makeup of the county commissioners. However, some flexibility would be preserved so that rural areas would have a voice on a matter of vital importance to them. In *Dusch*, the scheme, while giving rural areas a significant voice, nevertheless gave majority representation to the urban areas that contained most of the population. The Court will almost certainly demand that a majority of the population in any system keep a majority voice even if the minority is given representation greater than its mere numbers call for.

Thus, one solution to an inflexible and unjust application of the one man, one vote rule in a fact situation involving local districts is the use of residency requirements for political candidates. *Avery* leaves unanswered the problem of exactly what type of residency requirements will satisfy the equal protection principle. The facts of *Dusch* perhaps give the best indication of what the Court may be willing to accept if a valid and non-discriminatory reason underpins the scheme. In *Mandicino v. Kelly*,[34] the Supreme Court of Iowa, in the month following *Avery*, struck down a residency scheme under which a city with eighty per cent of a county's population could elect only two of the resident supervisors on the five-member county board. However, the Iowa court was careful to distinguish this fact situation from that in *Dusch*.[35]

The Iowa decision, as does *Avery*, has strong implications for a North Carolina local reapportionment case pending in Gaston County.[36]

[33] *See* Fortson v. Dorsey, 379 U.S. 433 (1965), which held that the Georgia Senate was properly apportioned. In that case, senators in certain large counties entitled to more than one senator could be nominated and elected by the county at large; but they were required to live within districts in the county. The Court deemed senators elected by an entire county to be representatives of the entire county.

[34] —— Iowa ——, 158 N.W.2d 754 (1968). *Cf.* Secretary of State v. Bryson, 244 Md. 418, 224 A.2d 277 (1966).

[35] —— Iowa at ——, 158 N.W.2d at 763.

[36] See the newspaper article, cited note 7 *supra*, for more details and background on the suit.

Gaston's Board of County Commissioners presently consists of six members elected at large, but each one must reside in a different township.[37] The townships allegedly vary substantially in population, with the largest—the city of Gastonia—containing 45 per cent of the total county population and the smallest having only six per cent.[38] While each township doubtless can point out valid policy reasons for being individually represented on the county board, the facts listed above appear much closer to *Mandicino v. Kelly* than to *Dusch*. Were Gaston County in some way to insure majority representation to the two townships having the large majority of the population, the North Carolina Supreme Court might decide that there would be no constitutional objection to the plan;[39] but Gaston County's present scheme is almost certain to be held violative of the equal protection clause of the fourteenth amendment.[40]

The broad language of *Avery* can clearly be misapplied to vitiate its policy of meaningful representation for citizens on the local level. Later in the month in which *Avery* was handed down, a federal court in *Gordon v. Meeks* applied it to uphold an Alabama law against "single shot" voting.[41] The plaintiff contended that the law denied him equal protection, since it in effect forced him to vote for certain candidates for Birmingham's city council whom he found unacceptable, or find his ballot for one or two candidates invalidated. The Fifth Circuit Court of Appeals turned the reasoning of *Avery* against the plaintiff and held that it would not permit "single shot" voting since the plaintiff's vote for one council position would count more than another's who voted to

[37] N.C. GEN. STAT. § 153-5 (Supp. 1967).

[38] Complaint at 3, Jacobs v. Gaston County, Gaston County Super. Ct. (1968).

[39] *See generally* Hobbs v. County of Moore, 267 N.C. 665, 149 S.E.2d 1 (1966), where the North Carolina Supreme Court approved residency requirements for five of seven members of the county board of education that were to be elected by the county at large. Because two members could reside anywhere in the county, and because two more had to live in the two cities in the county, the urban areas could elect four of the seven board members. Because all members were elected at large, the urban areas also had a voice in the selection of the other three. The suit in Gaston County is based upon Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967). The North Carolina Supreme Court there said the issue of whether the one man, one vote principle is applicable to county commissioners is justiciable in the North Carolina courts.

[40] See generally Sanders, *Equal Representation and the Board of County Commissioners*, POPULAR GOVERNMENT, April, 1965, at 1, for a discussion of the effect the one man, one vote rule is likely to have on various counties in North Carolina. The author predicts that the United States Supreme Court may eventually go so far as to hold that residency requirements on the local governmental level must be predicated on districts of substantially equal population. This, of course, might well destroy the flexibility the Court approved in *Dusch* and *Sailors*.

[41] 394 F.2d 3 (5th Cir. 1968) (per curiam).

fill every seat.[42] There was little doubt that the Alabama law was on the books to keep Negroes from "single shot" voting one of their race onto the city council. The court's application of *Avery* probably denied a significant racial minority a chance to gain at least one voice on Birmingham's city council. However, *Avery* dealt with a completely different circumstance than "single shot" voting, and it need not have been applied in such an inflexible manner to the set of facts found in *Gordon*. The court in *Gordon* actually took a portion of the language in *Avery* out of context to support its decision.[43]

Even in a situation where it is applied too rigidly, such as in *Gordon*, the one man, one vote rule has a saving feature. In American life there is really no such thing as a monolithic majority with one or a few overriding interests. "[T]he majority is but a coalition of minorities which must act in a moderate, broadly representative fashion to preserve itself."[44] In other words, the political majority cannot long ignore various minority interests in governing without offending all or some of the many minorities of which it itself is composed. Thus, there is a strong argument that the one man, one vote concept—while not perfect—nevertheless is the best rule in a representative democracy, even on the local level of government with its many complex governing bodies. But it should not be applied in inappropriate situations, as was done in *Gordon*, and the courts should apply it flexibly, using the rationale of *Dusch* where apposite.

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Criminal Law—*United States v. Jackson* and Its Impact Upon State Capital Punishment Legislation

INTRODUCTION

The provisions of the Federal Kidnapping Act[1] subject a defendant to the risk of death if he is tried by a jury, but to no more than life imprison-

[42] *Id.* at 4.

[43] Compare the paragraph in which the court in *Gordon* quotes *Avery*, 394 F.2d at 4, with the actual context of that language in *Avery* itself, 390 U.S. at 480-81.

[44] Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 52.

[1] 18 U.S.C. § 1201(a) (1964) provides that:
Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, ab-