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Avery v. Midland County: Reapportionment and Local Government Revisited

R. Perry Sentell Jr.
University of Georgia School of Law

COMMENTARIES

AVERY V. MIDLAND COUNTY: REAPPORTIONMENT AND LOCAL GOVERNMENT REVISITED

*R. Perry Sentell, Jr.**

EARLIER in the pages of this *Review* the judicial application of the "one-man-one-vote" standard to local government is discussed in detail.[1] As noted, the United States Supreme Court did not completely evolve this standard for state legislatures until June, 1964.[2] Since that time, the state courts and the lower federal courts have been inundated with litigation raising the question of the basic applicability of the standard to local governments in this country, as well as a host of accompanying inquiries. This litigation and the courts' reactions to it were extensively traced.[3]

Also analyzed were the three instances in which the Supreme Court itself had spoken on the subject, as of the close of its 1966 term. Although the Court had been presented with the opportunity to declare the standard either applicable or not applicable to local government on each of these occasions, it had steadfastly refused to do so. Instead, in *Moody v. Flowers*[4] it completely passed up the question in order to hold the litigation presented not properly before it.[5] This, held the Court, resulted from the fact that the controversies in issue turned upon statutes of limited application,[6] and thus had not been appropriate for consideration by a three-judge court.[7] Accordingly, direct appeal to the Supreme Court was out of order.[8]

The other two decisions expressly reserved the question of basic applicability. In *Sailors v. Board of Education*,[9] the Court concluded that

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* Professor of Law, University of Georgia School of Law. A.B. 1956, LL.B. 1958, University of Georgia; LL.M. 1961, Harvard Law School. Member of the Georgia Bar.

1 Sentell, *Reapportionment and Local Government*, 1 GA. L. REV. 596 (1967).

2 Reynolds v. Sims, 377 U.S. 533 (1964).

3 *See* Sentell, *supra* note 1.

4 387 U.S. 97 (1967).

5 This litigation consisted of two cases, Bianchi v. Griffing, 256 F. Supp. 617 (E.D.N.Y. 1966), and Moody v. Flowers, 256 F. Supp. 195 (M.D. Ala. 1966).

6 In *Bianchi*, the challenged apportionment was provided for by a county charter; and in *Moody*, by local statute. Neither had statewide application.

7 *See* 28 U.S.C. § 2281 (1964).

8 *See* 28 U.S.C. § 1253 (1964).

9 387 U.S. 105 (1967).

even assuming the standard's applicability to local governments generally, the Michigan county board of education in question was not subject to its command.[10] This was true because the system for selecting members was "basically appointive rather than elective,"[11] which was permissible because the board performed functions "not legislative in the classical sense."[12] Finally, in *Dusch v. Davis*[13] the Court, again only assumed applicability arguendo, in order to approve a municipal plan of apportionment providing for the at-large election of councilmen required to be residents of seven unequally-populated municipal boroughs.[14] This plan was permissible, held the Court, because all the councilmen were elected by all the municipal voters; and each, therefore, was "the city's, not the boroughs' councilman."[15]

All three of the Court's opinions were written by Mr. Justice Douglas, and in both *Sailors* and *Dusch* his restraint and permissiveness were notable. To one attempting to read between the lines, the Court seemed acutely aware of the vast variations in American local governments, of the unique problems confronting them, and, perhaps, of the difficulties and confusion which might be caused by routinely applying the one-man-one-vote standard to them. Along this line, in *Sailors* the Court remarked that "[w]e see nothing in the Constitution to prevent experimentation."[16] In *Dusch*, it thought the plan there approved "to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside."[17]

This indicated awareness, combined with the Court's reservation of the question of basic applicability of the standard, appeared to foretell a decision to approach the problem deliberately, carefully, and

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10 *Id.* at 111.

11 *Id.* Members of the county board were selected by delegates from local boards who had been elected by popular vote.

12 *Id.* at 110. These functions included the powers over appointing school superintendents, preparing budgets, levying taxes, distributing delinquent taxes, employing teachers, establishing schools for children in juvenile homes, and transferring "areas" from one school district to another.

13 387 U.S. 112 (1967).

14 The Court held this plan not violative of the *Reynolds* test of "invidious discrimination." *Id.* at 117.

15 *Id.* at 115. The Court did warn that "[i]f a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow."

16 387 U.S. at 111.

17 387 U.S. at 117.

thoughtfully. The Court seemingly was awaiting a factual situation tailored to exact measurements before it would provide definitive treatment for reapportionment and local government.

At the close of its term, however, the Court granted certiorari[18] in the Texas case of *Avery v. Midland County*;[19] and on April Fool's day, 1968, it rendered a decision[20] on some of the previously unresolved questions. The *Avery* opinion serves to close out the lengthy chapter here traced, and the purpose now is to provide brief description and discussion of it.

The plan of apportionment challenged in *Avery* was that of the "Midland County Commissioners Court," composed of five members, four of whom were elected from separate county districts.[21] The population of these districts ranged from a high of 67,906 to a low of 414, with the result that at least 95 percent of the county's total population resided in one district.[22] Although the trial court held for the challenger and ordered the commissioners to redistrict the county along the lines of substantially equal population, the Texas Court of Civil Appeals reversed.[23] The case was then carried to the Texas Supreme Court.[24]

In initiating its search for a conclusion, a majority of the Texas Supreme Court held the challenger, a county voter, to possess sufficient standing,[25] and expressly agreed with the trial court that the apportionment of the commissioners "is not supportable under the requirements of the Texas and United States Constitutions. . . ."[26] The problem, however, was the determination of a proper basis for the redistricting.[27]

Probing this problem, the Texas court first conceded that the commissioners court was the "governmental body" of the county,[28] and

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18 Avery v. Midland County, 388 U.S. 905 (1967).

19 406 S.W.2d 422 (Tex. 1966).

20 390 U.S. 474 (1968).

21 Avery v. Midland County, 406 S.W.2d 422, 424-25 (Tex. 1966). The fifth member was the County Judge, who was elected from the entire county.

22 Avery v. Midland County, 390 U.S. 474, 476 (1968).

23 397 S.W.2d 919 (Tex. Civ. App. 1965).

24 406 S.W.2d 422 (Tex. 1966).

25 *Id.* at 425. In a dissenting opinion Justice Smith argued that the petitioner did not have standing to sue and also that the commissioners had not abused their discretion in apportioning the county districts. *Id.* at 429.

26 *Id.* at 425.

27 *I.e.*, had the trial court erred in ordering redistricting on the sole basis of equality of population?

28 *Id.* at 426. Furthermore, "[t]he county is a subordinate and derivative branch of state government." *Id.*

that its "primary function" was "the administration of the business affairs of the county."[29] Still, hedged the court,

> [i]ts legislative functions are negligible and county government is not otherwise comparable to the legislature of a state or to the federal Congress where the "one man, one vote" principle is asserted in its most exacting and compelling sense.[30]

Moreover, observed the court, the core issue here was "the extent of political power which the metropolitan areas should have in relation to the rural areas."[31] On this issue, a number of factors in Midland County dictated the need for assuring the residents of sparsely-populated areas a substantial voice in electing the commissioners. First, some of the county's business affairs were delegated to officials who were selected in countywide elections, which the urban voters naturally controlled.[32] Second, the governmental interests of the urban voters were largely provided for by municipal governments, with the rural residents having only the commissioners to whom they might turn.[33] Further, "important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas —disproportionately [concerned] the rural areas."[34] Finally, said the court, although the commissioners theoretically represented all county residents, "developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county."[35]

Taking these factors into account, the Texas court feared that "[t]he voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis. . . ."[36] Indeed, it did not believe, at least in the circumstances here, that either the state or the federal constitution required such apportionment.[37] Accordingly, it instructed the redistricting body, *i.e.*,

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29 *Id.* "The appellation 'court' is a misnomer in the accepted meaning of the designation." *Id.*

30 *Id.*

31 *Id.* at 427-28.

32 "The very fact of population concentration enables the city voters to elect the county-wide officers." *Id.* at 428.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 The Texas court freely conceded that "there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights." *Id.*

the commissioners themselves,[38] to consider "additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads, and taxable values."[39] To this extent, therefore, the trial court's order was reversed.[40]

Against the background here sketched, the United States Supreme Court's grant of certiorari[41] in the *Avery* case was somewhat puzzling. If, as it had given every indication of doing, the Court was awaiting the perfect context in which to expound upon reapportionment and local government, *Avery* hardly seemed a likely possibility. After all, the Texas court itself had invalidated the apportionment there challenged and had delineated the boundaries within which those with the responsibility of redistricting were to operate. The Supreme Court's disagreement with these boundaries would have to be sharp indeed for it to step into the Midland County picture at this point. In a subject area as uncertain as this one, that possibility appeared remote. Indeed, the one lesson to be gathered from the Court's three previous decisions was its extreme reluctance to project itself into such situations. About the most that could reasonably be expected from the Court's consideration of *Avery*, therefore, was another postponement of the main event.

Splitting five to three, however, a majority of the Supreme Court selected *Avery v. Midland County*[42] as the occasion for rendering its basic decision. The one-man-one-vote standard was finally held applicable to local governments: "We hold that petitioner, as a resident of Midland County, has the right to a vote for the Commissioners Court of substantially equal weight to the vote of every other resident."[43]

The opinion for the majority of the Court was written by Mr. Justice White, who apparently had little patience with the argument that no question for decision yet existed. In a mere footnote reference, he demolished this point by characterizing the Texas Supreme Court's opinion as contemplating "no further proceedings in the lower Texas courts. . . ."[44] Thus, he concluded, "a 'final judgment' that population

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38 The court declared itself without power to redistrict the county. *Id.*

39 *Id.* "This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate." *Id.* at 428-29.

40 *I.e.*, the redistricting was not to be based solely upon population.

41 Avery v. Midland County, 388 U.S. 905 (1967).

42 390 U.S. 474 (1968). Mr. Justice Marshall abstained.

43 *Id.* at 476.

44 *Id.* at 478 n.2.

does not govern the apportionment of the Commissioners Court is before us."[45]

The jurisdictional barrier having been so easily hurdled, the Court then turned to the merits of the problem. Beginning with basics, it first established the applicability of the Equal Protection Clause of the fourteenth amendment to local government. This clause applied, it said, whenever state power was exercised; and "[t]he actions of local government *are* the actions of the State."[46] If the clause commanded the election of state legislators according to population, therefore, it made the same command of the election of local government officials.[47]

> We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties.[48]

Had it actually been this simple all the time?

From the earlier analysis, it will be recalled that one of the most persistently-advanced arguments against applicability was that the one-man-one-vote requirement should be satisfied once the legislature of a state was properly apportioned.[49] When this had been accomplished, the contention ran, the requirement did not extend further down to the creatures of that legislature.[50] In *Avery*, the Court expressly rejected this argument on the ground that "the States universally leave much policy and decision making to their governmental subdivisions."[51] Were these subdivisions not held accountable to the requirement, the Court apparently feared that its purposes could be defeated.[52] At any rate, this popular argument was laid to rest.

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45 *Id.* The Court was also unable to find an independent state ground for the Texas court's decision.

46 *Id.* at 480 (emphasis by the Court).

47 The Court appeared to talk interchangeably of "the members of a city council, school board, or county governing board . . . ." *Id.* at 480.

48 *Id.* at 481.

49 Sentell, *supra* note 1, at 645.

50 *Id.*

51 390 U.S. at 481. Indeed, "not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference." *Id.*

52 "In a word, institutions 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." *Id.*

One of the most amusing portions of the Court's opinion was the point at which it noted that "[t]he parties have devoted much effort to urging that alternative labels—'administrative' versus 'legislative'—be applied to the Commissioners Court."[53] Much effort, indeed! In light of the Court's own utilization of these "alternative labels" just one year earlier in *Sailors*, counsel in the case would have been derelict had they *not* emphasized this argument.[54] Indeed the Texas court itself had found the body's legislative functions to be "negligible,"[55] and thus not strictly within the confines of the one-man-one-vote requirement. Nevertheless, as though the argument was the last it would ever have expected, the Supreme Court reminded counsel that "this unit of local government cannot easily be classified in the neat categories favored by civics texts."[56] Like most governing bodies, the Court patiently explained, the commissioners performed tasks which were a mixture of the "legislative," "executive," "administrative," and "judicial."[57]

Apparently, therefore, the necessity of discovering the performance of "legislative" functions before applying the one-man-one-vote standard was being rejected by the Court, at least in respect to elected bodies.[58] What, then, did the Court offer as a replacement? Did it intend to indicate that any elected local official, no matter what functions he performed, was subject to the requirement? Apparently it did not, for the Court immediately set about isolating the characteristics of the commissioners court which worked the necessary magic. The commissioners were "a unit of local government with general responsibility and power for local affairs."[59] Further, offered the Court, they "have power to make a large number of decisions having a broad range of impacts on all the citizens of the county."[60] Was it easier to discover these characteristics than to balance "alternative labels"? More importantly, when counsel in future litigation attempted to make this discovery, would the Court be able to imagine why he was doing so?

Finally, what were the functions of the Midland County commis-

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53 *Id.* at 482.

54 *See* Sentell, *supra* note 1.

55 406 S.W.2d 422, 426 (Tex. 1966).

56 390 U.S. at 482.

57 *Id.*

58 In *Sailors*, it will be recalled, the county board of education was held basically appointive in nature. 387 U.S. at 109.

59 390 U.S. at 483. "[V]irtually every American," said the Court, "lives within what he and his neighbors regard as" such a unit. *Id.*

60 *Id.*

sioners which encompassed these newly-evolved characteristics? Those specifically focused upon by the Court included budgeting, making long-range judgments about the development of the county, and—especially significant—exercising the power of taxation.[61] Thus, the taxation function, held "not legislative in the classical sense" in *Sailors*,[62] leaped into the forefront under this new approach.

Still another point raised by the Texas court was the disproportionate concern of the rural residents with the work of the commissioners, the idea being that these residents were entitled to a larger voice in selection because they had more at stake. To this, the Supreme Court responded that

> while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits of Midland.[63]

The decision was to turn, therefore, upon theory rather than practice.

The Court was careful to note, however, that if it were presented with "a special-purpose unit of government,"[64] with functions affecting some citizens more than others, it "would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions."[65] The commissioners court was not such a unit,[66] and the question was left for future decision.

In concluding its opinion, the Court had a word of sympathy for the local governments of this country. It was aware, it assured, of "the immense pressures" and "the greatly varying problems" facing these governments; and it did not intend to devise "a uniform straitjacket" or "roadblocks" for them.[67] Then pointing to its decisions in both *Sailors* and *Dusch* as evidence of its good faith, the Court explained that

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61 The Court specified setting the tax rate, equalizing assessments, and issuing bonds. *Id.*

62 387 U.S. at 110.

63 390 U.S. at 484. These decisions concerned maintaining buildings, administering welfare services, determining school districts, and, again most significantly, imposing taxes.

64 *Id.* at 483.

65 *Id.* at 484.

66 This is based upon the noted rationale. *See* notes 63-65 and accompanying text *supra*.

67 390 U.S. at 485.

> [o]ur decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.[68]

The great difference between "a uniform straitjacket" and "one ground rule" was not elaborated. But on this concluding note, the Texas Supreme Court's judgment was vacated, and the case was remanded.

Each of the three dissenting Justices wrote an opinion. Mr. Justice Harlan's objection was a two-pronged one.[69] First, he believed the Court lacking in jurisdiction over the case because "the Texas judgment must be seen either to rest on an adequate state ground or to be wanting in 'finality'."[70] On the merits of the case, he thought no necessity had been shown for the Court's entrance into this sensitive area of government.[71] Even assuming the desirability of the one-man-one-vote standard at the state level, it should not be extended to impede the flexibility so necessary to local governments.[72]

Mr. Justice Stewart too would deny jurisdiction in the case.[73] On the problem presented, he emphasized his disagreement with the equal population requirement itself, whether applied to the state or to local government.[74]

The most thorough opinion in the case was that written by Mr. Justice Fortas.[75] Essentially, his plea was for the analysis of specifics.

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68 *Id.* at 485-86.

69 *Id.* at 486.

70 *Id.*

71 Necessity had been the general justification, he said, for the entrance by the federal courts into the field of state legislative apportionment. Here no claim was even made that other avenues of correction were not open. "I continue to think that these adventures of the Court in the realm of political science are beyond its constitutional powers. . . ." *Id.* at 487.

72 This need for flexibility was demonstrated here, he said, by the lower court's finding that in practice the rural residents were more affected by the county commissioners than were the urban residents. *Id.* at 491. Applying the one-man-one-vote standard here, then "discriminates against the county's rural inhabitants." *Id.* One of the specific undesirable results of this application, he predicted, would be the hindrance of the development of metropolitan area governments. *Id.* at 493.

73 *Id.* at 509 (dissenting opinion).

74 *Id.* at 510. The apportionment of government, he said, "is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic." *Id.*

75 *Id.* at 495 (dissenting opinion).

Like the other dissenters, he saw no need for beating a dead horse—for condemning a plan of apportionment which the Texas court itself had invalidated.[76] The Court's prior decisions in *Sailors* and *Dusch*, he said, "reflect a reasoned, conservative, empirical approach to the intricate problem of applying constitutional principle to the complexities of local government."[77] He viewed the majority as now abandoning that approach.

The one-man-one-vote rule was appropriate for state legislatures because each citizen is similarly affected by their actions, "[b]ut the same cannot be said of all local governmental units, and certainly not of the unit involved in this case."[78] To enforce the rule in cases such as this "completely ignores the complexities of local government in the United States. . . ."[79]

Flatly disagreeing with the majority, Mr. Justice Fortas saw the problems here presented as "precisely the same as those arising from special purpose units."[80] For the fact was, he declared, that "[t]he functions of many county governing boards . . . affect different citizens residing within their geographical jurisdictions in drastically different ways."[81] In Midland County, for instance, the urban area which contained most of the county's population had its own municipal government to deal with urban problems.[82] The county government, therefore, was "primarily concerned with rural affairs, and more particularly with rural roads."[83] This reality should govern the decision in the case.[84] Moreover, many of the subjects of county government itself were actually under the control of officials who were elected countywide; and these officials were generally residents of the urban

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76 *Id.* And the Court could not yet know, he argued, what the results of the standards laid down by the Texas Court for redistricting would be. *Id.*

77 *Id.* at 496. "[W]e should be careful and conservative in our application of constitutional imperatives, for they are powerful." *Id.* at 497.

78 *Id.* at 498. "Residents of Midland County do not by any means have the same rights and interests at stake in the election of the Commissioners." *Id.* at 499.

79 *Id.*

80 *Id.* at 500. He noted the majority's implication that the one-man-one-vote rule may not apply in the special purpose unit cases. *Id.*

81 *Id.*

82 This urban government, he said, possessed relative autonomy and authority to deal with such problems. *Id.* at 502.

83 *Id.* at 504. Furthermore, county governments, generally, act "primarily as an administrative arm of the State." *Id.* at 502.

84 "Substance not shibboleth should govern in this admittedly complex and subtle area. . . ." *Id.* at 508.

area.[85] Thus, the majority's characterization of the commissioners court as a unit with "general governmental powers," Justice Fortas thought, "simply is not so except in the most superficial sense."[86]

To apply strictly the one-man-one-vote requirement in the context of these specifics was to err in the opposite direction from the present apportionment.[87]

> Only the city population will be represented, and the rural areas will be eliminated from a voice in the county government to which they must look for essential services. With all respect, I submit that this is a destructive result. It kills the very value which it purports to serve.[88]

This, then, was *Avery v. Midland County*, the most recent step by the Supreme Court along the lengthy route here traced. It was a major step, because it finally evoked a basic decision that the one-man-one-vote standard is applicable in the sphere of local government. As important as it was, however, it was not taken in the best of style or under the most fortunate of conditions.

In terms of judicial statesmanship, the decision was a disappointing one. Running through all three of its 1967 opinions on the subject was a consistent thread evidencing the Court's awareness of the magnitude of the problem presented and an appreciation of its complexity. The *Avery* opinion completely snipped that thread. Indeed, it was ironic that after awaiting so patiently exactly the right context in which to speak on applicability, the Court should blunder into selecting what was in many ways the most inappropriate one. The contrast between the delicate treatment of 1967 and the heavy-handed approach of 1968 was almost breathtaking. It was as though the Court had carefully tiptoed throughout the silent house and then knocked over the lamp while closing the door.

In terms of long-range results, of course, prediction at this point is difficult. But if the Court still possessed any of that tender 1967 concern for "a detente between urban and rural communities,"[89] *Avery* constituted an odd manner of expressing it.

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85 "It is apparent that the city people have much more control over the county government than the election of the Commissioner Court would indicate." *Id.* at 506.

86 *Id.* at 507.

87 "It denies—it does not implement—substantive equality of voting rights. It is like insisting that each stockholder of a corporation have only one vote even though the stake of some may be $1 and the stake of others $1,000." *Id.*

88 *Id.* at 509.

89 Dusch v. Davis, 387 U.S. 112, 117 (1967).

Even with basic applicability declared, however, the possibility of hope remains for a more sensitive treatment of the still-unanswered questions. These include, of course, the limits, if any, upon the at-large election, as discussed in *Dusch;* and the availability of the appointive-office approach, as reserved in *Sailors.* Even *Avery,* with its reservation of the special purpose unit question and its declaration against the imposition of a "straitjacket" upon local government, offers faint promise for the future. In the realm of the elective local office, one cannot help believing that practical necessity will dictate more attention to the Court's replacement for the "legislative function" test than it has thus far afforded.

In short, a lengthy chapter has been closed; but the book is not yet finished.