Kentucky Law Journal

Volume 58 | Issue 3 Article 16

1970

Reapportionment--"One Man One Vote"--Local Government

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REAPPORTIONMENT-"ONE MAN ONE VOTE"-LOCAL GOVERNMENT—Reapportionment has come to Kentucky local government. In the early fall of 1968, James Wallace and others presented the Hardin County Judge with an application to reapportion Hardin County's six magisterial districts. When the judge failed to respond,[1] legal action was instituted in the Hardin Circuit Court against the judge and the six magistrates. Hardin County—population, 67,000[2]—at that time was divided into magisterial districts apportioned on the basis of county road mileage contained in each district. However, the people were not so neatly divided: one district was composed of only 3,600 voters, while another which included Elizabethtown, the county seat, represented 17,000 voters.[3]

In the first ruling of its kind in the state, the Hardin Circuit Court *held* that the Supreme Court's ruling in *Avery v. Midland County, Texas*[4] was controlling, and that reapportionment of Hardin County had to proceed at once.[5] *Wallace v. Tabb,* Civil No. 8441-C (Hardin Circuit Court, May 29, 1969).

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[1] The county judge refused to take any action on the ground that the county had been reapportioned in 1966 and 1967 and that KY. REV. STAT. [hereinafter KRS] 25.680 provides that a reapportionment cannot be had within four years of a prior one.

As the case progressed, it developed that the application filed with the county judge was not a part of the record of this action, nor was it recorded in the county clerk's office. Apparently the county judge retained the application and still had it in his possession or office. Furthermore, no notice of the application was posted or published prior to the presentation. The circuit court held that such failure of notice was fatal and that the application was therefore void.

In the meantime plaintiffs did give proper notice, both posted and published, of another application for reapportionment and same was presented to the county judge on January 20, 1969. Again the judge refused relief on the same grounds as before. Legal action was then instituted and the decision handed down a few days after the primary election.

[2] INDUSTRIAL RESOURCES—ELIZABETHTOWN, KENTUCKY (1968). (This was prepared by the Kentucky Department of Commerce, Division of Research and Planning).

[3] Brief in Support of Plaintiff's Motion For Summary Judgment at 14, Wallace v. Tabb, Civil No. 8441-C (Hardin Circuit Court May 29, 1969). In the last "reapportionment" of Hardin County, which was conducted in 1967, the commissioners reported the population in the various districts to be as follows:

District 1— 8,200
District 2— 4,500
District 3— 3,900
District 4— 3,600
District 5—13,100
District 6—17,000

[4] 390 U.S. 474 (1968).

[5] As to the county judge's justification for failing to act on the applications for reapportionment the Court stated:

> Further, and without regard to the validity of either the 1966 or 1967 reapportionments, plaintiffs are entitled to the relief sought if it is shown that the population of the various magisterial districts is so disproportionate that redistricting is demanded under the one man one vote

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In the *Avery* case, the Supreme Court held that units of local government with *general powers* over a particular geographic area must be apportioned on the basis of substantial equality of population.[6] In other words, the district must be aligned on the basis of the "one man - one vote" standard. *Avery* was the last apportionment case in a series which began in 1962 when it was held in *Baker v. Carr*[7] that the question of legislative district apportionment was not a "political" question and that it presented a justiciable issue. A leading case in the series was *Reynolds v. Sims*[8] which held that the equal protection clause required that both houses of a state legislature be apportioned on a population basis. However, in *Reynolds* the Court did seem to suggest that as long as population was the principal criterion, there might be some factors that could present a "rational justification" for deviation from the strict equal population standard.[9]

Soon after the *Reynolds* decision, speculation began as to whether or not the "one man - one vote" principle extended to the various 81,253 units of local government in the United States. Many of the lower courts held that it did apply to city councils,[10] county boards of supervision,[11] county commissions,[12] county boards of education[13] and revenue boards;[14] while other courts found it *not* applicable to an irrigation district,[15] a city council,[16] a county board of education,[17] a county board of revenue,[18] and a political party.[19] The lower courts

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doctrine . . . . Wallace v. Tabb, Civil No. 8441-C (Hardin Circuit Court, May 29, 1969) at p. 2.

In other words, KRS § 25.680 which provides that a reapportionment cannot be had within four years of a prior one, is unconstitutional and ineffective if the districts are malapportioned.

[6] 390 U.S. at 485.

[7] 369 U.S. 186 (1962).

[8] 377 U.S. 533 (1964).

[9] *Id.* at 579.

[10] Montano v. Lee, 384 F.2d 172 (2d Cir. 1967); Ellis v. Mayor of Baltimore, 234 F. Supp. 945 (D. Md. 1964), *aff'd and remanded,* 352 F.2d 123 (4th Cir. 1965).

[11] Miller v. Board of Sup. of Santa Clara, 63 Cal.2d 343, 405 P.2d 857, 46 Cal. Rptr. 617 (Sup. Ct. 1965); Mauk v. Hoffman, 87 N. J. Super. 276, 209 A.2d 150 (1965).

[12] Montgomery County Council v. Garrott, 243 Md. 634, 222 A.2d 164 (1966); Bailey v. Jones, 81 S.D. 617, 139 N.W.2d 385 (1966).

[13] Meyer v. Campbell, 152 N.W.2d 617 (Iowa 1967).

[14] Robertson v. Gallion, 282 F. Supp. 157 (M.D. Ala. 1968).

[15] Thompson v. Board of Dir. of Turlock Irrig., 247 Cal. App. 2d 587, 55 Cal. Rptr. 689 (1967).

[16] Blaikie v. Wagner, 258 F. Supp. 364 (S.D.N.Y. 1965).

[17] Sailors v. Board of Ed. of Kent County, 254 F. Supp. 17 (W. D. Mich. 1966), *aff'd,* 387 U.S. 105 (1967); New Jersey State AFL-CIO v. State Fed. Dist. Bds. of Ed., 93 N. J. Super. 31, 224 A.2d 519 (1966).

[18] Moody v. Flowers, 256 F. Supp. 195 (M.D. Ala. 1966), *remanded,* 387 U.S. 97 (1967).

[19] Lynch v. Torquato, 343 F.2d 370 (3rd Cir. 1965).

in reaching their decisions seemed to have used two major criteria: (1) whether the unit performed essentially legislative functions as opposed to administrative functions, and (2) whether there was a rational justification for deviating from the equal population standard.[20]

Until *Avery*, the Supreme Court had avoided ruling as to the limits of the "one man - one vote" doctrine. In 1967, *Sailors v. Board of Education*[21] held that an essentially administrative body chosen by a procedure essentially appointive was exempt. The Court again dodged the issue in *Dusch v. Davis*[22] when it assumed that the apportionment of local units was governed by *Reynolds* but held that the challenged local apportionment plan did not contain the elements necessary to invoke the "one man - one vote" principle.

But the Court met the issue head-on in the *Avery* case, using it as a "vehicle" to announce the application under the fourteenth amendment of the "one man - one vote" doctrine to local government.[23] However, one must take notice that *Avery* is limited to local government with "general governmental powers." The Court stated that a local government with "general governmental powers" included a county government having the power to make a large number of decisions having a broad range effect on all the citizens of the county.[24] Other than this statement the Court did not define the term "general governmental powers," but it seemed to be suggesting that the issue should turn on those legislative powers statutorily delegated to the county

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[20] *See* 35 BROOKLYN L. REV. 292, 294-95. *See also* Reynolds v. Sims, 377 U.S. 533, 579 (1963).

[21] 387 U.S. 105 (1967). In a footnote the Court attempted to explain its conclusion:

> The delegates from the local school boards, not the school electors, select the members of the county school board. While the school electors elect the members of the local school boards and the local school boards, in turn, select delegates to attend the meeting at which the county board is selected, the delegates need not cast their votes in accord with the expressed preferences of the school electors. . . . It is evident, therefore, that the membership of the county board is not determined, directly or indirectly, through an election in which the residents of the county participate. The "electorate" under the Michigan system is composed not of the people of the county, but the delegates from the local school boards. *Id.* at 109.

[22] 387 U.S. 112 (1967). The plan, called the "Virginia Beach type plan," divides the unit into smaller units of substantially equal populations each electing a councilman and in addition combining these units to elect another smaller group of councilmen. These councilmen would be required to reside in specified areas of the combined unit, not as representatives but as persons familiar with particular needs and desires. Therefore, this was held not to be an evasive scheme, but a rational variance.

[23] *See* Dixon, *Local Representation: Constitutional Mandates and Apportionment Options*, 36 GEO. WASH. L. REV. 693, 701 (1968).

[24] 390 U.S. at 483.

[25] 390 U.S. at 480. In a discussion of which governmental bodies should be governed by the doctrine, the Court said:

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governing body and not the day-to-day functions which it performs.[25] In other words, the Court was indicating that the test would be what the government was authorized to do and not what it had actually been doing.

Due to the lack of a clear definition of the term "general governmental powers" and the Court's reaffirmation of the *Sailors* and *Dusch* cases, some authorities think that *Avery* is ambiguous and that the Court will have to further define its rule in a future case.[26] However, it seems very clear that the Court was trying to limit the "one man - one vote" principle to local legislative units which have their membership elected from single member districts.

> The Court is aware of the immense pressures facing units of local government and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform strait jacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems . . . . The *Sailors* and *Dusch* cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. Our 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.* (Emphasis added)[27]

Therefore, it would seem that the *Avery* principle should clearly apply to Kentucky counties with the fiscal court[28] as it governing body and to cities of the fourth class which have their councilmen selected from wards.[29] Although the determination as to "general governmental

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> When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking 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 qualified to vote have the right to an equally effective voice in the election process. *Id.* at 480.

See also 21 S.C. L. REV. 102, 105-06 (1968).

[26] *See* 21 S.C. L. REV. 102, 105-06 (1968).

[27] 390 U.S. at 485.

[28] KY. CONST. art. 4, § 144 provides that the fiscal court consists of the county judge and the justices of the peace or a county may have three commissioners elected from the county at large. KY. CONST. art. 4, § 142 provides that each county shall be divided into no less than three nor more than eight districts in each of which a justice of the peace shall be elected.

[29] KRS § 86.220 provides that ". . . member[s] of the city council shall be elected by the qualified voters of the ward for which he stands, or if the city is not divided into wards, by the qualified voters of the city."

See KY. CONST. ch. 156. Since Kentucky chose the classified charter method, there are several alternatives available to the different municipalities. The authors

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powers" was not apparent in the *Wallace* case, it seems that the fiscal courts are delegated such powers under section 67.080 of the Kentucky Revised Statutes.[30] The authorizations seem to be very similar to those delegated to Midland County by the Texas legislature[31] and there would appear to be no alternative for the Kentucky courts except to apply the *Avery* rule as was done in the *Wallace* case.

Assuming that the courts will require some Kentucky counties to reapportion, what will be the effect? A few counties would not be directly affected because the members of their governing bodies are elected at large.[32] The impact would be felt in some rural counties which are presently malapportioned. Although no exhaustive study has been conducted, a good estimate would be that some fifty counties in Kentucky will be affected.[33]

The major impact could be a change in county policies brought about by the new urban interests, which have previously played no major role in county politics. Furthermore, we would probably see more public confidence in the government resulting from the "representativeness" of the counties. This increasing confidence could bring more support for expanded county services and the taxes needed to support them.[34] The result could be a consolidation of functions which the city and county have previously been performing separately, thus leading to more economy and efficiency in government.[35]

However, there could be weaknesses in this theory. In his dissent

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of the 1891 Constitution believed that the problems and needs of small towns were quite different from those of larger cities, and they accordingly established six classes of municipalities on the basis of population.

It must be noted that this writing will primarily involve a discussion of reapportionment at the county level.

[30] The fiscal courts may appropriate county funds, sell and convey real estate belonging to the county, regulate and control fiscal affairs and property of the county, provide for good condition of the highways in the county, and execute all order relating to the levying of taxes as is conferred on the Court by law.

[31] See 390 U.S. at 483, where the Court states that the county commissioner's court has power to set the tax rate, issue bonds, prepare a budget and make long-range judgments about the way the county should develop.

[32] KRS § 67.050 provides that any county may have a fiscal court consisting of a county judge and three commisioners elected from the county at large. However, this commission form of government must be approved by the voters. KRS § 67.065 provided that all counties having a population of 75,000 or over shall have the commissioner form of county government. This section was determined to be unconstitutional by the Kentucky Court of Appeals in *Billiter v. Nelson*, 300 S.W.2d 790 (Ky. 1957), and was repealed in 1966.

[33] Interview with A. Wallace Grafton, Jr., Attorney for the Plaintiff, in Louisville, Ky., August 6, 1969.

[34] *See* Grant & McArthur, *"One Man–One Vote" and County Government: Rural, Urban and Metropolitan Implications*, 36 GEO. WASH. L. REV. 760, 767-68 (1968).

[35] *Id.* at 774-75.

in *Avery*, Justice Fortas demonstrated a concern for the rural resident. He objected to subjecting local government to the inflexible and simplistic approach of the "one man - one vote" standard.[36] Fortas stated that the equal protection clause did not demand a strict application of the "one man - one vote" principle, because its inflexibility ignored the fact that many local functions which are limited and specialized have an unequal effect on the county's residents.[37] To him, the *Avery* decision meant that the county residents would be denied meaningful representation because only in an artificial sense did the commissioners have general governmental powers, their primary interest being rural roads. Fortas concluded, therefore, that the rural person's vote would become substantially unequal with the urban voter's since the rural interests have a greater stake than the non-rural interests. However, it has been pointed out that Justice Fortas might have overlooked "one potentially critical factor."[38] "It may be that one way to make county government 'general purpose' and effective is to require a 'one man - one vote' reformation within reasonable limits."[39]

It is apparent that there are more questions to be answered in the apportionment cases, namely, questions involving the nature of the representative process. In *Sailors* the Court pointed out that it saw

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[36] 390 U.S. 474, 499 (1968) (dissenting opinion).

[37] For an exhaustive study of the *Avery* case, *see* 21 VAND. L. REV. 1104 (1968).

> Determining that the commissioners court in the instant case was a special-purpose unit with limited powers and functions which were oriented toward the rural population in Midland County and not toward the urban population which had another governing body to manage its governmental affairs, Justice Fortas concluded that it would debase the substantive equality of the rural person's vote if it were mechanically equalized with that of the urban voter since the rural person had the greater interest in the court.
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> Two dissenters persuasively pointed out that irrespective of the scope of the authority granted to a local unit, the "general power" standard ignored the reality of the functioning process of special-purpose units. *Id.* at 1107-08.

See also Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 32-33 (1965). Criteria are established for determing whether the unit is special-functioning rather than general: (1) how many functions the unit has; (2) whether the unit is reasonably designed to achieve an end appropriate for a special-function unit, *i.e.*, water supply, sewage disposal, or other special services; and (3) how well the representational formula for selecting members of the unit reflects population. Weinstein feels that a rough estimate would be valid for special purpose districts. Id. This article contains an excellent discussion of the various forms of local governmental units and the effect that extension of the "one man–one vote" doctrine would have on them.

[38] *See Dixon, supra* note 23, at 704.

[39] *Id.* at 704.

nothing in the Constitution which prevented experimentation,[40] and in *Dusch*, Douglas stated that the particular form of at-large election seemed *"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."* (Emphasis added)[41]

Avery reaffirmed these decisions and stated ". . . the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government."[42] With these statements in mind, one can see that the Court is concerned both with rural residents and with local government being representative.

One desirable innovation might be to gerrymander (*i.e.* to divide an area into political units in an unnatural way with the purpose of giving special advantages to one group), applying the "one man - one vote" standard while promoting true representative equality, thus "reflect[ing] a detente between urban and rural communities." The rural community's fear of the "one man - one vote" principle is justified on the grounds that its voice in government would be diluted. Although the Court has been critical of gerrymandering,[43] it has never stated that the *practice* was unconstitutional per se.[44] It is highly possible that reapportionment of districts to serve a partisan interest would not be ruled unconstitutional.[45]

Dr. Malcolm E. Jewell,[46] in a recent law review article, while not openly advocating gerrymandering as a solution to the problem of applying the inflexible "one man - one vote" doctrine to local government, does discuss gerrymandering and appears to suggest it might be a solution to the urban-rural problem.[47] Jewell states that ". . . as long as the Court receives the apportionment issue to be fundamentally a question of voting rights, it is not likely to declare that partisan gerrymandering violates the Fourteenth Amendment."[48] Moreover, he

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[40] 387 U.S. at 111.
[41] 387 U.S. at 117.
[42] 390 U.S. at 485.
[43] The Supreme Court has clearly stated that racial gerrymandering is in violation of the Fourteenth Amendment. Gomillion v. Lightfoot, 364 U.S. 339 (1960).
[44] *See* Jewell, *Local Systems of Representation: Political Consequences and Judicial Choices*, 36 GEO. WASH. L. REV. 790, 796 (1968).
[45] *See generally* Comment, *Political Gerrymandering: The Law and Politics of Partisan Districting*, 35 GEO. WASH. L. REV. 143 (1967). *See also* Sinock v. Gately, 262 F. Supp. 739 (D. Del. 1967). Two viewpoints as to the constitutionality of partisan gerrymandering are discussed in the majority and dissenting opinions.
[46] Professor of Political Science, University of Kentucky.
[47] *See generally* Jewell, *supra* note 44 at 790.
[48] *Id.* at 797.

feels that this form of gerrymandering meets one of the criteria for a political question as defined in *Baker v. Carr*: "a lack of judicially discoverable and manageable standards for resolving it."[49]

Since its 1960 decision in *Gomillion v. Lightfoot*,[50] in which gerrymandering for purposes of racial discrimination was held unconstitutional, the Supreme Court has decided only one case pertinent to this discussion.

In *Wright v. Rockefeller*,[51] the use of racial factors in establishing district boundaries in order to assure that a racial minority had representation was declared not violative of the Constitution. Therefore, it seems logical to assume that the Court would not rule unconstitutional a districting plan in which the "one man - one vote" principle was applied, and yet, in *Wright*, the district boundaries were so drawn (gerrymandered) as to further the representation of a minority (either urban or rural).

The *Wallace* case has signalled the arrival of reapportionment in Kentucky. But it has not necessarily signalled the stifling of the rural minority voice in local government. The door is still open for local legislative units to innovate within constitutional limits some method of redistricting which would promote true representation for both rural and urban interests. It is submitted that this innovation could best be carried out by combining the principle of "one man - one vote" with the technique of gerrymandering as described above.

Joseph H. Terry

REAL PROPERTY—IMPLIED WARRANTY IN SALE OF NEW HOUSE BY VENDOR.—A husband and wife purchased a new house from the builder-owner. Several months after moving in, the purchasers discovered that water seeped through the basement walls every time it rained and would not drain out. Suit was brought alleging breach of an implied warranty. The jury found for the plaintiffs. *Held*: Affirmed. In selling a new house, builder was bound by an implied warranty

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[49] Professor Jewell states:
There is no ideal standard against which to measure an allegedly gerrymandered districting plan . . . . The factors that have discouraged judicial attack on partisan gerrymandering in state legislative districts would seem to be equally applicable to cases of gerrymandering that occur in local units of government. *Id.* at 797.

[50] 364 U.S. 339 (1960).

[51] 376 U.S. 52 (1964).