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Constitutional Apportionment of Local Government in Montana

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COMMENTS**CONSTITUTIONAL APPORTIONMENT
OF LOCAL GOVERNMENT IN MONTANA****I. INTRODUCTION**

Midland County, Texas, has a population of about seventy thousand. The general governing body of the county is the Commissioner's Court, composed of five members. One, the County Judge, is elected at large and votes only to break a tie. The other four members are chosen from single member districts.¹ Virtually all of the county's only urban center, the city of Midland, is placed in one district.

Voter A, who lives in Midland, votes along with 67,905 others to elect one member of the Court. Voters B, C, and D who live in the country vote with only 851, 413, and 827 others, respectively, to elect their representatives to the Court.² The Court's powers embrace both the rural and urban areas. It appoints numerous minor county officials, lets contracts, builds roads and bridges, administers the county welfare plan, sets the county tax rate, and serves as a board of equalization.³

Is Voter A's situation with respect to his County Commissioner's Court any different than if his vote for a member of the State House of Representatives were similarly debased by unequal districts? The United States Supreme Court recently said "no."⁴ The Court held that "the Constitution imposes one ground rule for the development 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."⁵

The decision was not reached without some difficulty and leaves many questions unanswered. Its impact upon the structure of local government in Montana depends upon a number of factors. The governing bodies under Montana law are not perfectly analogous to the Commissioner's Court in Texas. To understand what difference this might make, we must start with a general review of apportionment law.

II. INTO THE THICKET

Few decisions of the Supreme Court dealing with the conduct of American politics have had as immediate an impact as *Baker v. Carr*, 369 U.S. 186 (1962), and the reapportionment cases which followed in

¹*Avery v. Midland County, Texas*, 88 S. Ct., 1114 (1968).

²*Id.* at 1116.

³Interpretive Commentary, Vernon's Annotated Texas Constitution, Art. V, Sec. 18 (1955).

⁴*Avery v. Midland County Texas*, *supra*, note 1.

⁵*Id.* at 1121.

1964.⁶ Few have so quickly reversed an accepted aspect of the American political structure.

Until the eve of *Baker v. Carr*, the Supreme Court had held, and the legal and political community accepted the fact that the imbalance of malapportionment was beyond the power of the Court to correct. It was generally felt that voters did not have proper standing to sue, that the courts were without power to afford a remedy, and that the whole matter was a political question which the Court had no business considering.

Most of these arguments stemmed from the case of *Colegrove v. Green*, 328 U.S. 549 (1946), in which Justice Frankfurter cautioned that "courts ought not to enter this political thicket," and that the best the Court could do would be to declare the existing system invalid.⁷ The Court in *Colegrove* was badly split on the issues of standing, political question, and the ability of the Court to grant equity, but Justice Frankfurter's warning was heeded for another sixteen years, though it was in fact not the holding of a majority of the Court.⁸

Whatever we may think of the advisability of "entering the thicket," the argument is now a matter of history. In 1960 the Court's self-imposed restraint began to break down. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), a unanimous Court gave Negro voters standing to challenge a legislative districting which created a racial gerrymander. The decision was based on the Fifteenth Amendment.

Baker v. Carr in 1962 disposed of the remaining restrictions on the Court's jurisdiction. The Court granted standing, and the six-man majority held that debasement of voting power was a justiciable question under the equal protection clause of the Fourteenth Amendment. The majority found a violation of the Fourteenth Amendment and remanded the case to a three-judge federal court to determine the remedy.⁹

Baker involved a state house of representatives.¹⁰ Later decisions extended the remedy to congressional districts,¹¹ state senates,¹² and state primary elections.¹² The constitutional basis and the emphasis of the decisions varied. The Court practiced some constitutional gymnastics as it was presented with various entrenched interests and political structures in the different states and at varying levels of our federal

⁶Waldon, Ellis L., "100 Years of Apportionment in Montana," 28 MONT. L. REV. 4 (1966).

⁷*Colegrove v. Green*, 328 U.S. 549, 556 (1946).

⁸Seven Justices participated. A four-three majority held that there was no basis for equity in that case, but a four-three alignment held that there would be in proper cases. The majority did not support Frankfurter in holding that it was a non-justiciable political question.

⁹*Baker v. Carr*, 369 U.S. 186, 237 (1962).

¹⁰The Tennessee General Assembly.

¹¹*Wesberry v. Sanders*, 376 U.S. 1 (1964).

¹²*Reynolds v. Sims*, 377 U.S. 533 (1964).

system. These will be discussed in detail later, for they bear directly on the extension of this constitutional right into the area of local government. The important point, however, is that the Court has steadfastly adhered to the principle that one man-one vote means what it says.

III. DOES IT REALLY MATTER?

The Supreme made a major reversal of its own policy when it entered the thicket of legislative apportionment. An activist Court, already under fire in other areas, opened itself to further criticism which led to official state protests¹³ and an attempt in Congress to overrule the decisions.¹⁴

Was the debasement of voting rights so serious a problem that it merited such an all-out effort by the Court? The question may now be somewhat moot. Frankfurter's dissent in *Baker*¹⁵ repeated his majority opinion in *Cologrove*.¹⁶ He warned again against judicial entanglement by granting illusory relief for a hypothetical claim which rests on abstract assumptions.

These arguments will not reverse the course of judicial action. However, the concept of American politics which led to judicial intervention still shapes the future extension of the doctrine of the one man-one vote.

Is there a real harm from the debasement of voting rights? The answer involves questions of political theory, economics, racial discrimination, and practical politics.

Even in pure theory, the answer is difficult. The proposition that a state senator "represents" his constituency suggests that equal votes are important. However, American political theory has never really decided whether a senator exercises his own best judgment or merely reflects the collective feelings of his constituency. In practice it is probably something of both—the kind of ambiguity which lends credence to Frankfurter's dissent in *Baker*.

However, in a very practical sense, there are four conflicts in American politics which are often reflected in the geography of a districting plan. In general terms, the four are urban v. rural, white v. black, property v. consumer interests, and republican v. democrat. Where a districting plan gives relatively more votes to one area than another, and to whatever extent a representative identifies directly with his con-

¹³Montana's reaction is typical. Senate Joint Resolution No. 5, *Laws of Montana 1965*, 999, called for an amendment to provide that one house of a state legislature could be based on factors other than population.

¹⁴The Dirksen Amendment in Congress is discussed in Hanson, *The Political Thicket*, Prentice-Hall, 1966, P.92-101.

¹⁵*Supra*.

¹⁶*Supra*.

stituency, one of these opposing interests is given more political power than the other.

The geographical relationship between urban and rural is obvious. The association of the others is not so obvious or universal, but is consistent enough to cause problems in many states. Negroes, democrats and consumers tend to be concentrated in urban areas. Whites, republicans and property interests tend to group together in the suburbs or less populous areas. A districting plan which improperly emphasizes population in particular areas may reflect the imbalance in the governing body which the districts constitute.

Reapportionment is working. The most apparent example is Negro representation. The other interests are not as clearly identifiable, but there is little doubt that they will be felt in the long run. The future of reapportionment may prove Frankfurter to be wrong. The courts have been effective in shaping remedies. The result is that governing bodies, when apportioned properly, will better reflect the interests they represent.

IV. CONSTITUTIONAL REQUIREMENTS

The geographical association of conflicting interests which led the Supreme Court into the area of legislative apportionment can be just as real for local governing bodies as state legislatures. However, blanket extension of the doctrine into the area is not necessarily justified by the geographical imbalance. The constitutional or statutory structure of a particular governing body may be such that the geographical separation of interests is not reflected in the board itself. Further, the extension of the apportionment doctrine requires some re-examination of the established constitutional requirements for legislative apportionment.

What are these requirements? Exact mathematical equality of districts is not required.¹⁷ Certain other criteria, if adhered to, make mathematical exactness impossible. Among these are respect for existing county lines, compactness and contiguity. The Court has said that these criteria will not be permitted to excuse substantial departures from equality of population,¹⁸ but they can often be considered without creating substantial disparities.

How much difference in the population of districts will be permitted? The Court has never established an exact standard, but it has relied on two measurements of the disparity. One is the ration between the population of largest and smallest district.¹⁹ The second is the percentage of the population which could elect a majority of the assembly.²⁰ The

¹⁷Reynolds, *supra* at 583.

¹⁸Lucas v. Colorado General Assembly, 377 U.S. 713 (1964).

¹⁹Reynolds, *supra*.

²⁰*Id.*

apportionment schemes which have been upheld suggest that a ratio of 1.20 to one and a percentage close to fifty percent will be sufficient for state legislative apportionment. The allowable departures will depend on local circumstances.²¹

It must be noted that the imbalances of representation, at which reapportionment has been aimed, do not arise where the governing body is elected at large. In such a case, any particular representative does not have an obligation to a specific geographical group.

The American political system works through a composite of elected governing bodies. They can be arranged roughly in a hierarchy which arises out of the federal system; some were created by the federal Constitution, some by state constitutions, others by state statute or local ordinance or city charter. There is an equal variety in the scope of their powers, types of apportionment and responsibility for apportionment.

The United States House of Representatives is malapportioned. However, the situation arises out of the Constitution itself.²² The Supreme Court has brushed aside arguments that state legislatures under state constitutional provisions could have a similar malapportionment on analogy to the federal government.²³ This seems to indicate that the Court will have little sympathy for any apportionment of any body below the federal level, regardless of the source of the unit's power, where it results in substantial malapportionment. One man-one vote seems to be required across the spectrum of American politics, without regard to history.

V. IS LOCAL GOVERNMENT DIFFERENT?

The United States Supreme Court faced the issue of the apportionment of local government for the first time in *Avery v. Midland County, Texas*, 88 S. Ct., 1114 (1968).²⁴ A five-to-three majority held "that the Constitution permits no substantial variation from equal population in drawing districts for units of local government."²⁵ The holding was again based on the equal protection clause of the Fourteenth Amendment.

The majority reasoned that the Fourteenth Amendment applies to "the exercise of state power however manifested."²⁶ Thus, even where the malapportionment is created by local ordinances or the action of the local board itself, as an agent of the state, it is state action subject to the Fourteenth Amendment.

²¹WALDRON, ELLIS L., *The Constitutional Obligation to Reapportion*, MONTANA BUSINESS QUARTERLY, 96-105 (1965).

²²U.S. CONST., Art. I, § 2.

²³Reynolds, *supra* at 573.

²⁴For holdings of state and federal courts applying the principles of *Reynolds v. Simms* to local government, see *Avery, supra* at 1117.

²⁵*Avery, supra* at 1120.

²⁶*Id.* at 1117.

The Court noted that the powers exercised by the board were relevant to the requirement that it be apportioned according to population.²⁷ It had been argued that the Commissioner's Court had few legislative functions, and that it was really more executive or judicial.²⁸ Such arguments, if accepted, could substantially reduce the impact of the population requirement on local government. Units of local government play a unique but often not strictly legislative role. In a very real sense, one body may exercise all three powers in about equal proportions. The Court rejected this argument, however, stating that equal population of districts was required wherever the governing board has "general governmental powers over the entire geographical area served by the body."²⁹

It was further urged that the work of the Commission's Court related more to the rural areas than the urban areas, and as a result the emphasis on rural representation was justified.³⁰ The Court held that while the Commissioner's Court may in fact deal more extensively with rural areas, their powers related extensively to both groups.³⁰ The Court did not rule on the situation where the powers as well as what is actually done relate more to the rural than the urban area. The majority placed heavy emphasis on the power of the Commissioners to determine the county tax rate.³¹

Finally, the majority pointed out that the decision was not intended to prescribe one form for local government. They suggested that cities and counties were free to devise particular bodies to meet special circumstances, as long as their districts properly reflect population.³²

There were three dissents. Justice Harlan reiterated his dissent in *Reynolds*,³³ asserting that apportionment was a political question beyond the cognizance of the Court. Justice Fortas adhered to the principles of the *Reynolds* decision, but felt that the Court should have waited to see the results of the redistricting ordered by the Texas Supreme Court.³⁴ Justice Stewart, like Justice Harlan, felt that the complexity of state and local apportionment was beyond the powers of the Court.³⁵

On the merits, the dissenting Justices disagreed with the majority reasoning in several respects. They saw a distinction between the case

²⁷*Id.* at 1120.

²⁸*Id.* at 1119.

²⁹*Id.* at 1120.

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Reynolds*, *supra* at 1395.

³⁴The Texas Supreme Court had held that the present scheme was unconstitutional and had remanded, saying that population, number of qualified voters, land areas, miles of county roads and taxable values could be considered in the new plan. *Avery v. Midland County, Texas*, 406 S. W. 2d, 919 (1965).

³⁵*Avery*, *supra* at 1133.

of state legislatures and local governments in the nature of the powers that they exercise. *Reynolds* was based on the proposition that every citizen stands in the same relation to the state legislature. Justice Fortas points out that the same is not true of all units of local governments.³⁶ Their powers are limited and often strike one group of citizens more than others. The dissents would require equal population districts only where the powers of the body in question affect the districts equally. The action of a particular board may "have only slight impact on some of [its] constituents and a vast and direct impact on others."³⁷ The dissents contend that the majority's extension of the *Reynolds* doctrine to "units of local government with general responsibility and power for local affairs" grossly oversimplifies the problem.³⁸ Justice Fortas contends that such blanket extension of the *Reynolds* doctrine "denies, does not implement—substantive equality of voting rights."³⁹

Even taking the reasoning of the majority only, it is obvious that the requirement of population equity cannot be applied flatly to all units of local government. The question of the powers exercised was of concern to the majority, and could be such that a population standard is inappropriate.

VI. APPORTIONMENT OF LOCAL GOVERNMENT IN MONTANA

From the preceding discussion, we can state the following general rules about the apportionment of local government. The equal protection clause of the Fourteenth Amendment requires that members of elective bodies of state and local government be chosen from districts of equal population. Exact mathematical equality will not be required. Factors other than population may be considered only to the extent that the resulting apportionment conforms to the equal population requirement. The equal population rule is inapplicable where members are elected at-large. It may be modified where the powers which the body can exercise affect one area more than another.

Under Montana law, there are two elective bodies in local government which exercise sufficient powers to fall within the purview of the apportionment requirements. They are the boards of county commissioners and city councils. Each is structured differently, and thus each is differently affected by the requirements of apportionment. Each will be considered separately, with emphasis on the situation in Missoula County and the City of Missoula for purposes of illustration. Most of what is said will apply equally to the other Montana counties.

³⁶*Id.* at 1127.

³⁷*Id.* at 1128.

³⁸*Id.* at 1124.

³⁹*Id.* at 1132.

The Board of County Commissioners

In Montana, county commissioners are elected at large.⁴⁰ This, standing alone, would make the apportionment requirements inapplicable. However, the Montana Constitution also provides that each county is to be divided into three districts, and, though elected at large, one member must reside in each of the three districts.⁴¹ This partial use of districts opens the question of apportionment. The *Avery* case does not control, however, because it dealt with election districts, not residence districts.

It could be argued that this residence requirement is part of an individual voter's rights to equal representation and is protected by the Fourteenth Amendment from debasement by unequal districts. The United States Supreme Court has not spoken directly on this question, but it has sustained a similar plan in the case of a city council with both at-large and district-elected members.⁴² It would appear that absent clarification by the Supreme Court, the residence provision in the Montana Constitution does not raise a federal question, even if the populations of the districts are not equal.

If necessary, unequal districts might be defended on the grounds that the inequality of population reflects an inequality in the powers which the county commissioners may exercise. The *Avery* case, as discussed above, left this question unsettled, but indicated that it might prevail under proper circumstances. The decision would require an exhaustive classification of the powers of the board. It is the powers which can be exercised, not those which are exercised in practice, which are controlling.

Even though the apportionment of boards of county commissioners may not be subject to question under the Fourteenth Amendment, it would appear that the Montana Constitution requires that the three districts be of equal population. Article XVI, Section 4, provides that the board may change the boundaries of the districts "to equalize population and area." The mandate for districts of equal population seems clear.

The apportionment of the districts in Missoula County seems to satisfy even the Montana requirement. The three districts are roughly pie-shaped so that each district includes a portion of the urban area in the City of Missoula. Any county which includes all its urban center in one district is probably violating the Montana Constitution, but their plan would not seem to violate federal requirements.

The City Council

City councils under Montana law would be subject to the apportionment requirements for local government stated in *Avery*. The aldermen

⁴⁰MONT. CONST., Art. XVI, § 4.

⁴¹*Id.*

⁴²*Dusoh v. Davis*, 87 S. Ct. 1554 (1967).

are elected from wards which are determined by the city council.⁴³ Though provision for two aldermen from each ward complicates the theories of representation, the district identity which characterizes the equal apportionment requirements is still present.

In some ways, a city council would be more readily subject to equal population requirements than the Commissioner's Court in *Avery*. The city council serves a more homogeneous area than does a body like the county commissioners. A city council is more analogous to a state legislature and the *Reynolds* standard, in that each resident stands in the same relation to a city council, much as they do to a state legislature.

Whatever malapportionment exists, it results not from the state statutes, but from the action of the city councils, which determine the boundaries of the wards.⁴⁴ However, they are acting as agents under the authority of the state, and there is clearly state action within the Fourteenth Amendment.

The city councils under Montana law are also under a statutory duty to provide for wards of equal population. R.C.M. 1947, 11-707, provides that the city council "must divide the city or town into wards, having regard to population so as to make them as nearly equal as possible."

The apportionment of Missoula's city council is probably unconstitutional under the Fourteenth Amendment and seems to violate the provisions of state statute. It cannot be stated positively because of a problem in measurement. The United States Bureau of Census does not collect population figures by precincts or wards. Thus, we have no authoritative population figures for the districts in question. For the purposes of this paper, estimates of population by precinct in the City of Missoula have been prepared by analogy to the registered vote. The total registered vote in Missoula County for the primary election of June 4, 1968,⁴⁵ was compared to a 1966 estimate of the population for Missoula County.⁴⁶ The ratio obtained was applied to the registered vote in each precinct to obtain a population estimate for each precinct. This requires the assumption that the population in each precinct bears the same relation to that precinct's registered vote as the population of the county bears to the total registered vote. The assumption is obviously not totally accurate. What it amounts to is apportionments of registered voters, not population. The figures are, however, a useful tool and, indeed, the only ones available.

The figures show the total population of Ward 1 as 3,867, the smallest of the six wards. Ward 4, the largest, has a population of

⁴³R.C.M., § 11-701 (1947).

⁴⁴R.C.M., § 11-707 (1947).

⁴⁵Official report to Secretary of State, dated May 15, 1968.

⁴⁶56 Bureau of Business and Economic Research, University of Montana, *Montana Planning Design Study* (1968).

5,341. This gives a ratio of 1.53 : 1, well above that permitted by the Supreme Court for state legislatures. Since there are two members from each ward, it will take more than fifty percent of the population to control the council, which is the other test applied by the Supreme Court.

There is reason to expect that something close to a 1 : 1 ratio would be required in local apportionments. Since there is nothing sacred about precincts, small changes can be made to shift any number of voters necessary. Wards are groups of precincts, and the distribution can be easily controlled. There is not the same degree of ease in districting a state legislature. If county lines are observed, it may be impossible to reach mathematical exactness, so some latitude has been allowed.

There will be some difficulty in Montana, even at the local level, because the precinct lines are determined by the county commissioners and the city council groups these precincts into wards. The city council is limited in equalizing its wards by the precincts which the county commissioners determine.

Even within the precincts set by the county commissioners, Missoula's city council could draw wards much more closely equal in population. Absent more authoritative projection of population, the city council could redistrict on the basis of registered vote to comply with constitutional and statutory requirements.

The "evils" of malapportionment of a city council are not as evident as those of state government. The important urban-rural conflict is not present. However, the various geographical areas of a city do have some differing identifiable interests. The balance of political parties and the strength of a particular type of property holding may be affected by disproportionate districts. To whatever extent particular aldermen identify strongly with their wards, their constituents have a stronger or weaker voice in city government. It is likely that there are still ward heelers on the American scene.

It seems unlikely that these apportionments will be challenged in court. The lack of population figures would be a stumbling block in any litigation. There is no reason, however, why the city councils could not accomplish the task without being forced to. The benefits may be ill-defined, but they will be felt in the long run.

VII. CONCLUSION

The extension of the doctrine of one man-one vote to the area of local government may not be as shattering and disruptive as many people fear. Only about 25 percent of local government governing boards are

elected from districts, including those with residence requirements.⁴⁷ Thus, fewer than 25 percent are subject to the federal requirement. Under Montana law, the federal ruling adds nothing to present constitutional and statutory requirements, and, in fact, appears less demanding than the Montana law.

County commissioners in Montana seem to be under no federal obligation to equalize their residence districts, but they should do so to comply with the Montana Constitution. City councils have a federal and state obligation to provide wards of equal population. Absent proper population figures, they should apportion on the basis of registered vote or a projection of registered vote.

It is difficult to assess the ultimate effect of reapportionment on any particular city. Party representation will depend on the present distribution of votes and the particular manner in which the new apportionment shifts certain votes. How the newly apportioned body will vote on given issues will still depend on the particular men elected, what interests they identify with, and the complex association of interests and issues. Though it may be some time before the result will be known, the law has dictated a change.

LEE SIMMONS

⁴⁷*Avery, supra*, Footnote 7, 1119.

