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Reapportionment At The County Level - Moody v. Flowers

Reapportionment At The County Level

Moody v. Flowers[1]

The Supreme Court has recently considered four cases raising the question of whether the "one man–one vote" rule of the equal protection clause of the fourteenth amendment, as enunciated in *Reynolds v. Sims*,[2] applies to apportionment at the local level of government. The Court, by the process of exclusion, has narrowed the question but has allowed it to remain unanswered for the time being. In *Sailors v. Board of Education*,[3] the Court decided that even if *Reynolds* were to control at the county level, it would apply only to the election of legislative bodies and would not affect school boards, the functions of which are essentially administrative.[4] In *Dusch v. Davis*,[5] a Virginia Beach

1. 256 F. Supp. 195 (M.D. Ala. 1966), *vacated*, 387 U.S. 97 (1967).
2. 377 U.S. 533 (1964).
3. 387 U.S. 105 (1967), *aff'g* 254 F. Supp. 17 (W.D. Mich. 1966).
4. Involved was a Michigan plan under which the county board of education, which functions essentially as an administrative body rather than in a legislative capacity, was selected by delegates from local school boards. Each local board had one vote, irrespective of population. It was argued that this system of choosing county board members paralleled the county-unit system which was invalidated under the equal protection clause of the fourteenth amendment in Gray v. Sanders, 372 U.S. 368 (1963), and that it violated the constitutional precepts of Reynolds v. Sims, 377 U.S. 533 (1964). The Court found no constitutional reason why state or local officers of the non-legislative character involved could not be chosen by the governor, by the legislature, or by some other appointive means rather than by election. "At least as respects non-legislative officers," the Court said, "a State can appoint local officials or elect them or combine the elective and appointive systems. . . ." As to the application of the *Reynolds* doctrine, the Court concluded that "[s]ince the choice of members of the county school board did not involve an election and since none was required for these non-legislative offices, the principle of 'one man–one vote' has no relevancy."
5. 387 U.S. 112 (1967), *rev'g* Davis v. Dusch, 361 F.2d 495 (4th Cir. 1966).

plan calling for election of all of the city's eleven councilmen at large, but requiring that one of the councilmen reside in each of the city's seven boroughs, which varied widely in population, was held to be valid. The Court said that the plan satisfied the constitutional test under the equal protection clause, which proscribes invidious discrimination, because the councilmen represented the city at large and not merely the boroughs in which they resided.[6] The basic issue has now been delineated and may be expressed as follows: Must the election of members of local governmental bodies which function primarily as legislative rather than administrative bodies comply with the "one man–one vote" rule of the equal protection clause if those members are elected by the electors of their respective districts? The Court postponed confrontation of this issue until a later date when it vacated the decrees in *Moody v. Flowers*[7] and *Board of Supervisors v. Bianchi*[8] on jurisdictional grounds. Because the district court in *Moody v. Flowers* discusses this question with some degree of clarity, and because the problems of county reapportionment presented in *Moody* are fairly typical of those throughout the country, an attempt will be made to analyze the "one man–one vote" rule as it applies to local legislative bodies by a discussion of that case, the history which engendered it, and the decisions which are likely to determine its future.

In *Moody,* the plaintiff, a citizen of Alabama, contended that the act which divided Houston County, Alabama, into election districts and apportioned membership of the county board was unconstitutional when tested by the equal protection clause of the fourteenth amend-

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6. Since article VII, § 1 of the Maryland Constitution provides for an at-large election of county commissioners similar to the Virginia Beach plan approved, there is now little question of the constitutionality of Maryland county apportionment plans for election of the various county commissioners. Prior to the Supreme Court's decision in *Dusch,* the Maryland Court of Appeals heard three cases involving the constitutionality of county apportionment schemes. In Montgomery County Council v. Garrott, 243 Md. 634, 222 A.2d 164 (1966), the court held that a scheme which provided that each of five councilmen must come from the district of his residence, although elected by all the voters of the county, was unconstitutional because of the extreme variance in population in the five residency districts. The court, on little authority, said at 639, that "[t]here remains little doubt that the one man–one vote principle so fully articulated in Reynolds v. Sims, 377 U.S. 533 . . . is now applicable to political subdivisions of a state." The bases for holding a residence requirement unconstitutional where the residence districts greatly vary in population were the decisions of Fortson v. Dorsey, 379 U.S. 433 (1965) and Davis v. Dusch, 361 F.2d 495 (4th Cir. 1966), *rev'd,* 387 U.S. 112 (1967). Now that *Davis v. Dusch* has been reversed on the exact point for which it was cited in *Montgomery County Council v. Garrott,* the latter decision has been stripped of much of its vitality. Ironically, the Supreme Court relied on the language of *Fortson v. Dorsey* for its conclusion that at-large voting cures the defects which result from malapportioned residence districts. Relying on the precedent it set in *Garrott,* the court of appeals affirmed in a per curiam opinion in McGinnis v. Board of Supervisors, 244 Md. 65, 222 A.2d 391 (1966), that an election of county commissioners to be held in Harford County where residence districts were malapportioned as to population would be unconstitutional. In Gray v. Board of Supervisors, 243 Md. 657, 222 A.2d 176 (1966), the court applied the one man–one vote principle to a scheme for the election of county councilmen but found no invidious discrimination present in the Baltimore County apportionment plan because no significant population disparities were shown to exist between the residence districts.

7. 256 F. Supp. 195 (M.D. Ala. 1966), *vacated,* 387 U.S. 97 (1967).

8. 256 F. Supp. 617 (E.D.N.Y. 1966), *vacated,* 387 U.S. 97 (1967).

ment.[9] Houston County is divided into five election districts each of which is represented on the five-member County Board of Revenue and Control by a member elected by the qualified electors of the district of which he is a resident. The city of Dothan, which comprises District No. 5, has a population of 31,440, which is about sixty-one per cent of the total county population and accounts for sixty-nine per cent of the total assessed value of the property within the county.

Proscribed discrimination was argued by the plaintiff because sixty-one per cent of the population of the county, owning sixty-nine per cent of the assessed value of the property therein, were represented by only one of five Board members and, therefore, had only a twenty per cent voice in the levying of taxes and the expenditure of monies collected therefrom. The three-judge federal district court decided in a split decision that the complaint should be dismissed without prejudice because,

> . . . so long as the people of a state are afforded equal protection by true equality of representation in the state legislature the courts ought not to interfere with county governments of limited, as distinguished from general, power, and which have been created by the legislature as involuntary political subdivisions of the state.[10]

On appeal, the United States Supreme Court considered the threshold question of whether the three-judge district court had been properly convened. The Court, looking to the applicable jurisdictional statute, 28 U.S.C. § 2281, concluded that prior constructions of the section had established that a three-judge panel is not to be convened where matters of purely local concern are the subject matter of the suit. The Court pointed out that the Alabama statute which the plaintiff was seeking to enjoin related solely to the affairs of one county and also stated that the fact that state officials were named in the suit would in no way affect the result. The Court therefore held that since the three-judge court had been improperly convened, the appeal should have been taken in the court of appeals. Reasoning that the appeal period might have run by the date of its decision, the Court vacated the decree and remanded the cause to the court which had heard the case below. The lower court was directed to enter a fresh decree from which the appellant might perfect a timely appeal.

Plaintiff's action requesting reapportionment represents a recurring manifestation of the "one man–one vote" principle first enunciated

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9. "Apportionment and districting must be differentiated. Apportionment is the process by which legislative seats are distributed among units entitled to representation; districting is the establishment of the precise geographical boundaries of each such unit or constituency." NEW YORK CITIZEN'S COMMITTEE ON REAPPORTIONMENT, REPORT TO GOVERNOR ROCKEFELLER 25 (1964). Since most courts do not distinguish between problems of districting and apportionment and since constitutional requirements must be met whether apportionment or districting is the issue, Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965), the terms will be used interchangeably in this discussion.

10. 256 F. Supp. at 200.

in *Baker v. Carr.*[11] *Baker,* in holding that a court might properly consider the extent to which state legislative apportionment schemes conform to constitutional requirements,[12] reversed the ruling enunciated in *Colegrove v. Green,*[13] that such matters were political questions. *The 1964 Reapportionment Decisions, Reynolds v. Sims*[14] and its five companion cases,[15] "held that seats in both houses of a bicameral state legislature are required, under the Equal Protection Clause, to be apportioned substantially on a population basis."[16] A week after *Reynolds,* the Court handed down ten memorandum decisions in which it found state apportionment schemes unacceptable.[17] The impact of having fifteen state legislatures declared unconstitutionally apportioned in one week's time was felt throughout the country, and as a result, a comprehensive reevaluation of state apportionment was commenced with vigor.[18]

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11. 369 U.S. 186 (1962).

12. An extensive list of cases responding to *Baker* appears in McCloskey, *Foreword: The Reapportionment Cases,* 76 HARV. L. REV. 54, 56 n.14 (1962).

13. 328 U.S. 549 (1946). The Supreme Court dismissed an appeal requesting that Illinois officials be enjoined from proceeding with an election of Congressmen because the Congressional districts were malapportioned. Justice Frankfurter, in the majority opinion, in which he was joined by only two other Justices, stated: "[E]ffective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination. . . . Courts ought not to enter this political thicket." *Id.* at 552, 556. *See also* South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948). *Cf.* Gomillion v. Lightfoot, 364 U.S. 339 (1960), where the Court found the political question doctrine to be no barrier in ruling that an Alabama statute redefining the boundaries of Tuskegee, Alabama, was violative of the fifteenth amendment because of the resulting discrimination against Negro voters.

Prior to *Colegrove v. Green,* "in the few instances before 1946 where the court had occasion to pass directly upon alleged apportionment and districting abuses, the court acted without hesitation, both in taking jurisdiction and in providing effective relief." R. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 65 (1965). *But see* Carroll v. Becker, 285 U.S. 380 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Smiley v. Holm, 285 U.S. 355 (1932).

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

15. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964) (Colorado); Roman v. Sincock, 377 U.S. 695 (1964) (Delaware); Davis v. Mann, 377 U.S. 678 (1964) (Virginia); Maryland Comm. v. Tawes, 377 U.S. 656 (1964), which reversed the decision of the Maryland Court of Appeals and held that neither house of the Maryland Legislature, even after the 1962 legislation apportioning the House of Delegates, was apportioned sufficiently on a population basis to be constitutionally sustainable; WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) (New York). *See* Michener, *The History of Legislative Apportionment in Maryland,* 25 MD. L. REV. 1 (1965).

16. Maryland Comm. v. Tawes, 377 U.S. 656, 674 (1964).

17. *See* Beadle v. Scholle, 377 U.S. 990 (1964) (Michigan). The Supreme Court by denying certiorari left standing the decision of the Michigan Supreme Court in Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962) which held Michigan's 1952 apportionment amendment to be discriminatory. Hill v. Davis, 378 U.S. 565 (1964) (Iowa); Pinney v. Butterworth, 378 U.S. 564 (1964) (Connecticut); Hearne v. Smylie, 378 U.S. 563 (1964) (Idaho); Marshall v. Hare, 378 U.S. 561 (1964) (Michigan); Germano v. Kerner, 378 U.S. 560 (1964) (Illinois); Williams v. Moss, 378 U.S. 558 (1964) (Oklahoma); Nolan v. Rhodes, 378 U.S. 556 (1964) (Ohio); Meyers v. Thigpen, 378 U.S. 554 (1964) (Washington); Swann v. Adams, 378 U.S. 553 (1964) (Florida).

18. Cases are cited in R. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 274–75 (1965) (appendix). *See also* Annot., 12 L. Ed. 2d 1282, 1289–1304 (1964).

The "pregnant"[19] case of *Baker v. Carr* now claims among its progeny cases calling for the application of the "one man–one vote" principle to local governmental bodies. However, because these decisions were born without the aid of the eminent legal obstetricians that delivered the *Reapportionment Cases of 1964,* their vitality remains uncertain. Bound by no compelling precedents,[20] courts must resolve two major issues in each case raising this question. First, do the Supreme Court's rulings on the apportionment of state legislatures apply to the states' political subdivisions? Second, if the principles expressed in those decisions do apply, is the case at bar an appropriate one for their application?

In dismissing the complaint, the *Moody*[21] court answered both of the above questions in the negative. It discovered no Supreme Court decisions suggesting "a basis for judicial intervention in a state's geographical distribution of electoral strength among its political subdivisions"[22] and found no facts in the instant case "to justify penetration of the 'political thicket.' "[23]

Prior to *Moody,* other courts had answered both questions in the affirmative. In *State ex rel. Sonneborn v. Sylvester,*[24] the Wisconsin Supreme Court considered the constitutionality of a state statute specifying the scheme for the composition of a county board of supervisors. In declaring the statute unconstitutional, the court rejected a number of arguments in support of the proposition that "one man–one vote" does not apply to local bodies of the nature of the county board in question. It was argued that because the composition and powers of such boards are statutory rather than constitutional in origin, the equal protection clause does not apply. It was also contended that the question was reserved to the state under the dictates of the tenth amendment so long as the United States Supreme Court does not expressly declare that the fourteenth amendment applies to county board membership. The state also raised the argument that "one man–one vote" only applies to independent governmental entities deriving their power directly from the people, which, of course, is not the nature of counties. In reply to this concluding argument, which essentially states that counties are "arms of the state" and therefore immune from the commands of the equal protection clause, the court stated:

> Characterizing counties as "political subdivisions created to perform functions of the state locally and existing as a result of the superimposed will of the state" or as "pure auxiliaries of the state" or as "an arm of the state" or "local organizations" which

19. Dixon, *Legislative Apportionment and the Federal Constitution,* 27 LAW & CONTEMP. PROB. 329, 330 (1962).

20. The highest authority on the issue of local apportionment, left unchanged by the Supreme Court rulings, is a Fourth Circuit Court of Appeals decision which relied on *Reynolds* in holding that local governmental bodies must comply with the equal representation formula enunciated by the Supreme Court. Ellis v. Mayor and City Council, 352 F.2d 123 (4th Cir. 1965).

21. 256 F. Supp. 195 (M.D. Ala. 1966), *vacated,* 387 U.S. 97 (1967).

22. *Id.* at 199.

23. *Id.*

24. 26 Wis. 2d 43, 132 N.W.2d 249 (1964).

> "rank low down in the scale or grade of corporate existence," or *quasi* municipal corporations . . . is not determinative of whether the 14th Amendment applies to their composition when the members of a county board are determined by the elective process.[25]

In *Seaman v. Fedourich*[26] the New York Court of Appeals utilized the characterization of the county as an "arm of the state" as a positive principle from which it reasoned that since the state "may exercise its legislative powers only in a body constituted on a population basis, any general elective municipal organ to which it delegates certain of its powers must, by a parity of reasoning, be subjected to the same constitutional requirement."[27] The judicial support for this position is impressive. With few exceptions,[28] most state[29] and federal[30] cases which have tested the constitutionality of the apportionment plans of local governmental units have applied the principle of equal representation.

Another consideration relating to the issue of whether the *Reynolds* principles are to be applied to counties may be described as the "make haste slowly" doctrine. The majority in the instant case felt it not within their province

> . . . to forecast the likelihood that the Supreme Court will ultimately extend the principles of Reynolds v. Sims . . . to the tens of thousands of subordinate political units of the states[31] to which have been delegated some power to which the label "legislative" may be attached.[32]

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25. *Id.* at 255.
26. 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965).
27. *Id.* at 782.
28. *See, e.g.*, Reed v. Mann, 237 F. Supp. 22 (N.D. Ga. 1964); Johnson v. Genesee County, 232 F. Supp. 567 (E.D. Mich. 1964).
29. Miller v. Board of Supervisors, 63 Cal. 2d 343, 405 P.2d 857, 46 Cal. Rptr. 617 (1965) (applying state statute requiring redistricting of California counties); Henderson v. Superior Court, 61 Cal. 2d 883, 390 P.2d 206, 37 Cal. Rptr. 438 (1964); Griffin v. Board of Supervisors, 60 Cal. 2d 318, 384 P.2d 421, 33 Cal. Rptr. 101 (1963); Knudsen v. Klevering, 377 Mich. 666, 141 N.W.2d 120 (1966); Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98 (1966); Hanlon v. Towey, 274 Minn. 187, 142 N.W.2d 741 (1966); Mauk v. Hoffman, 87 N.J. Super. 276, 209 A.2d 150 (Ch. Div. 1965); Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965). *Cf.* Avery v. Midland County, 406 S.W.2d 422 (Tex. Sup. Ct. 1966), *review granted*, 35 U.S.L.W. 3429 (U.S. June 13, 1967), holding that although counties need not be redistricted into commissioner districts solely on the basis of population, a population disparity cannot be sustained against a showing of discrimination, fraud, arbitrariness, or abuse of discretion.
30. Davis v. Dusch, 361 F.2d 495 (4th Cir. 1966), *rev'd*, 387 U.S. 112 (1967); Ellis v. Mayor and City Council, 352 F.2d 123 (4th Cir. 1965); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965) (dictum); Sailors v. Board of Education, 254 F. Supp. 17 (W.D. Mich. 1966), *aff'd*, 387 U.S. 105 (1967); Delozier v. School Bd., 247 F. Supp. 30 (W.D. Pa. 1965).
31. The 1962 census of governments found that 91,186 governmental units exercise state delegated powers in the United States. BUREAU OF CENSUS, 1965 STATISTICAL ABSTRACT OF THE UNITED STATES 419. Even if reapportionment were to be limited to general function units with legislative powers, 3,043 counties, 18,000 cities, towns and villages, and 17,142 townships would probably be affected.
32. 256 F. Supp. at 200. *Accord*, Knudsen v. Klevering, 377 Mich. 666, 141 N.W.2d 120 (1966). Concurring in part with a holding that the Muskegon County Board of Supervisors was unconstitutionally apportioned, Black, J., said: "In today's specific circumstances, it is better judgment on the part of an inferior court to refrain from determination of an unprecedented Federal question pending formal declaration

It therefore read a warning to "make haste slowly" into the Supreme Court's refusal to hear a case raising the issue of whether the federal constitution requires local governmental bodies below the state level to be apportioned on a population basis. In *Glass v. Hancock County Election Commission*,[33] the Mississippi Supreme Court refused to enjoin the holding of an election for supervisors in a malapportioned[34] county on the ground that there was available an adequate remedy at law, namely, statutory procedures for effecting redistricting. The Supreme Court's dismissal of the *Glass* appeal was presumably based on the existence of adequate state grounds. It would seem, therefore, that the dissent in *Moody* was correct in finding the Supreme Court's disposition of *Glass* neither "controlling [n]or indicative" of the course which the *Moody* court should follow.[35]

After concluding that the principles of *Reynolds* do not apply at the county level, the *Moody* court directed its attention to the issue of whether the present fact situation would call for judicial action if the Supreme Court's decisions did in fact apply to the apportionment of a state's political subdivisions. According to the majority in *Moody*, there must exist one of three types of serious wrongs to justify judicial penetration of the "political thicket:"

> [1] the long continued failure of a legislature through inertia, apathy or wilful refusal to reapportion itself in obedience to the mandate of the state law, [2] the whimsical relocation of the boundary lines of a local government for the obvious purpose of depriving Negroes of their right to vote, or [3] the absence of a political remedy resulting from the "stranglehold" of a minority on the legislative processes.[36]

While the Supreme Court has sustained judicial action when these wrongs were found to exist, the court in the instant case overlooked the fact that the Court has never refused to act because of their absence when a case of malapportionment was otherwise made out. In *Davis v. Mann*,[37] the Court made it clear that the failure of a legislature to reapportion itself is not a prerequisite to judicial intervention. In *Davis*, the Court reviewed the apportionment scheme of the Virginia legislature, notwithstanding the fact that in accordance with a Virginia

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of controlling law by Federal authority." 141 N.W.2d at 121. *Contra*, State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249, 256 (1964):

> We find no merit in the argument that unless the United States supreme court expressly first determines the equal-protection clause of the 14th Amendment applies to county-board membership, the 10th Amendment reserving powers to the state not delegated to the United States is applicable. This argument overlooks the fact that it is the duty of this court to decide questions properly presented to it whether they have been expressly decided by the United States supreme court or not and further since Art. 1, Sec. 1, of our constitution is the equivalent of the 14th Amendment of the United States constitution, the effect of that amendment is necessarily involved in construing our state constitution.

33. 250 Miss. 40, 156 So. 2d 825 (1963), *appeal dismissed*, 378 U.S. 558 (1964) (per curiam).

34. A clear case of malapportionment was made out where one district in the county had a larger population than the other four combined.

35. 256 F. Supp. at 202.

36. *Id.* at 199.

37. 377 U.S. 678 (1964).

constitutional requirement, the state legislature had reapportioned itself in 1932, 1942, 1952 and 1962.

As to the second type of serious wrong, Mr. Justice Stewart, in characterizing the *1964 Reapportionment Cases,* made it clear that those cases were unlike *Gomillion v. Lightfoot*[38] where the relocation of boundaries was for the obvious purpose of depriving Negroes of their right to vote. *Reynolds* and its kin "have nothing to do with denial or impairment of any person's right to vote. Nobody's right to vote has been denied. . . . [or] restricted. Nobody has been deprived of the right to have his vote counted. . . ."[39]

The recognition of the third classification has led to the contention in many of these cases that there exists a political remedy for effectuating reapportionment and that therefore courts should not intervene. The argument has usually been rejected by the courts.[40] In *Lucas v. Forty-Fourth General Assembly,*[41] the Court held that departure from population-based representation may not be justified by the fact that a non-judicial political remedy, such as initiative or referendum, either caused the adoption of a legislative apportionment plan or was available to change it.[42] That a plan was approved by the majority of the voters is without federal constitutional significance, if the plan fails to satisfy the basic requirements of the equal protection clause.

The available political remedy to which the instant court referred the plaintiff is far less effective and immediate than the referendum procedures deemed insufficient in *Lucas.* The *Moody* majority said that since sixty-one per cent of the qualified voters of Houston County resided in the under-represented city of Dothan, they "[had] the power at the ballot box to elect representatives to the state legislature and through them, under the prevailing rule of local courtesy, obtain the desired redistricting."[43] Unfortunately the logic of idyllic justice rarely finds its correlative in reality; the revered "power at the ballot box" upon which the majority relies has often been undermined by general apathy and self-serving political structures.

In determining whether there exists such malapportionment as would call for judicial remedy, some standard must be selected by

38. 364 U.S. 339 (1960).

39. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 744 (1964) (dissent).

40. *See* Ellis v. Mayor and City Council, 234 F. Supp. 945 (D. Md. 1964), *aff'd,* 352 F.2d 123 (4th Cir. 1964). The district court held that approval by voters of a city council apportionment plan could not by itself validate the plan under the equal protection clause. But since there was ample time before the next election, the court permitted the city council to propose a valid scheme to the voters while the court retained jurisdiction. Such a plan was recently approved under the name of the Bard Plan in the Maryland gubernatorial election of November, 1966. *But see* Bianchi v. Griffing, 238 F. Supp. 997 (E.D.N.Y. 1965), *appeal dismissed,* 382 U.S. 15 (1965), where the district court refused to require equal population reapportionment of the County Board of Supervisors before an attempt was made to reach the same result through the county political process or a reapportioned state legislature, although it retained jurisdiction on the merits.

41. 377 U.S. 713 (1964).

42. "Except as an interim remedial procedure justifying a court in staying its hand temporarily, we find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of assorted rights to equal representation. . . ." *Id.* at 736.

43. 256 F. Supp. at 200.

which the population disparities can be compared. The majority in the instant case found that the test of *Reynolds* is not one of mathematical precision and concluded that "[t]he numerical imbalance demonstrated by simply statistics falls far short of proving invidious discrimination."[44]

Prior to *Reynolds v. Sims,* courts were divided on the issue of granting relief under a claim of county malapportionment.[45] The trend today is to apply the principle of equal representation to political subdivisions that (1) exercise general governmental functions and (2) are designed to be controlled by the voters of the geographic area over which the municipality has jurisdiction.[46] Even prior to the recent Supreme Court decisions, there was general agreement as to what types of governmental bodies should fall within the purview of the "one man–one vote" precept; disagreement persists as to the legal basis for such a conclusion.

One line of cases, which includes *State ex rel. Sonneborn v. Sylvester*[47] and *Seaman v. Fedourich,*[48] has drawn a parallel between the state legislature and the county board of supervisors as law-making bodies and has concluded that no qualitative distinction exists between their functions sufficient to justify applying the principle of equal representation to one but not the other. The logic of this position is at once both expansive and limiting. It is expansive in that it represents an extension of the doctrine of *Reynolds v. Sims* to an entirely new level of political bodies. However, this line of cases has been decided on the basis of the functional similarities of state legislatures and county boards upon which legislative functions have been conferred. This basis for decision therefore confines the scope of *Reynolds* to law-making bodies and in this respect is restrictive.[49]

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44. *Id.* at 199. The Supreme Court said in *Dusch* that if *"Reynolds v. Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination." 387 U.S. at 116.

45. *Compare* Tedesco v. Board of Supervisors, 43 So. 2d 514 (La. Ct. App. 1949), *appeal dismissed,* 339 U.S. 940 (1950) (per curiam) *and* Glass v. Hancock County Election Comm'n, 250 Miss. 40, 156 So. 2d 825 (1963), *appeal dismissed,* 378 U.S. 558 (1964) (per curiam), *with* Griffin v. Board of Supervisors, 60 Cal. 2d 318, 384 P.2d 421, 33 Cal. Rptr. 101 (1963) *and* State *ex rel.* Scott v. Masterson, 173 Ohio St. 402, 183 N.E.2d 376 (1962).

46. *See* notes 2–6 *supra* and accompanying text. *See also* Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965); State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (1965). *Cf.* Delozier v. Tyrone Area School Bd., 247 F. Supp. 30 (W.D. 1965), where a non-elective school board was held unconstitutionally apportioned; Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98, 117 (1966).

47. 26 Wis. 2d 43, 132 N.W.2d 249 (1965).

48. 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965).

49. *See* Sailors v. Board of Education, 387 U.S. 105 (1967), *aff'g* 254 F. Supp. 17 (W.D. Mich. 1966); Brouwer v. Bronkema, (Mich. Civ. Ct. Sept. 11, 1964), reprinted in 13 *National Municipal League Court Decisions on Legislative Reapportionment* 81 (1956), *aff'd,* 377 Mich. 616, 141 N.W.2d 98 (1966). There the court based its decision on the following chain of arguments:

> 1. The fourteenth amendment applies to the State and to every governmental agency or instrumentality of the State which exercises powers delegated to it by the State.
>
> 2. The County is a governmental instrumentality or division of the State and the board of supervisors is the legislative body of the County. The board exercises legislative powers delegated to it by the State.
>
> 3. The State may exercise its legislative powers only in a legislative body apportioned on a population basis and if it delegates a part of those powers, it

Disagreeing with the foundation of the above decisions, the Supreme Court of Michigan said that more is required "than simple reference to *Reynolds*"[50] to declare a county unconstitutionally districted. In *Brouwer v. Bronkema*,[51] the Michigan court found the equal protection clause itself to be the only sufficiently broad base for the extension of "one man–one vote" to the local level. Mere reliance on the *Reapportionment Cases* was deemed inappropriate because those cases involved a citizen's right at a level of government, which no one could dispute was required to be representative in character, whereas there is no similar federally protected right to vote for legislative officers of subordinate political divisions. Hence, the court relied on the equal protection clause because it extended its protection to all rights granted from any state or federal source and was not limited to the protection of only fundamental constitutional rights.

In New York, the initial issues of county apportionment are no longer debated. With the law settled by *Seaman v. Fedourich*[52] that counties must abide by the commands of equal representation, the lower state courts need only determine the amount of deviation from the "one man–one vote" standard which is constitutionally permissible. To date, ten New York counties have been declared malapportioned by state courts;[53] one, by a federal district court.[54]

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must do so to a legislative body apportioned to the same "basic constitutional standard."

The cogency of the above syllogism has been approved in Weinstein, *Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 27 (1965), and questioned in Note, *Reapportionment*, 79 HARV. L. REV. 1226, 1270 (1966).

50. In Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98, 107 (1966), the court stated:

> It is not quite accurate to conclude, as did the trial judge in Seaman v. Fedourich (1965), 45 Misc. 2d 940, 258 N.Y.S.2d 152, that Reynolds v. Sims and its companion cases stand for the proposition that the Equality Clause requires apportionment on an equal population basis of all elected legislative bodies, even those of subordinate political subdivisions of a state [cites cases]. . . . More is required than simple reference to Reynolds.

51. 377 Mich. 616, 141 N.W.2d 98 (1966). The oft-cited decision of the Circuit Court for Kent County which declared the apportionment of seats on the Kent County Board of Supervisors violative of the fourteenth amendment was affirmed by a divided court. It is interesting that in Sailors v. Board of Education, 254 F. Supp. 17 (W.D. Mich. 1966), *aff'd*, 387 U.S. 105 (1967), a Michigan federal district court refused to entertain a suit challenging on fourteenth amendment grounds the apportionment of the local school board in Kent County, because the Supreme Court had not yet ruled on malapportionment of boards and agencies of states and their subdivisions, while the state court found this no barrier.

52. 16 N.Y.2d 94, 209 N.E. 778, 262 N.Y.S.2d 444 (1965).

53. Michl v. Shanklin, 50 Misc. 2d 460, 270 N.Y.S.2d 778 (Sup. Ct. 1966), *aff'd*, 270 N.Y.S.2d 405; Grove v. Chemung County Bd. of Supervisors, 50 Misc. 2d 418, 270 N.Y.S.2d 465 (Sup. Ct. 1966); Graham v. Board of Supervisors, 49 Misc. 2d 459, 267 N.Y.S.2d 383 (Sup. Ct. 1966); Town of Greenburgh v. Board of Supervisors, 49 Misc. 2d 116, 266 N.Y.S.2d 998 (Sup. Ct. 1966); Dona v. Board of Supervisors, 48 Misc. 2d 876, 266 N.Y.S.2d 229 (Sup. Ct. 1966); Treiber v. Lanigan, 48 Misc. 2d 434, 264 N.Y.S.2d 797 (Sup. Ct. 1965); Barzelay v. Board of Supervisors, 47 Misc. 2d 1013, 263 N.Y.S.2d 854 (Sup. Ct. 1965); Augostini v. Lasky, 46 Misc. 2d 1058, 262 N.Y.S.2d 594 (Sup. Ct. 1965); Shilbury v. Board of Supervisors, 46 Misc. 2d 837, 260 N.Y.S.2d 931 (Sup. Ct. 1965).

54. Bianchi v. Griffing, 256 F. Supp. 617 (E.D.N.Y. 1966), *vacated*, 387 U.S. 97 (1967).

When *Moody v. Flowers* returns to the Supreme Court properly presented, the Court may settle the fate of the multitudinous varieties of local governmental units. The fact that these units vary greatly in size and function prohibits the enunciation of a principle equally applicable to all of these bodies. However, the Supreme Court has been shown a clear path to decision by the almost unanimous holdings of the state courts applying the "one man–one vote" principle to those bodies which exercise general governmental functions, perform legislative duties, and are elected by citizens of the area they serve. A decision holding that *Reynolds* applies in such circumstances would reach over 38,000 counties, cities, towns, and townships and would secure for citizens in those areas equal representation on the boards and councils which make the day-to-day decisions which have a great impact on the lives of the vast majority of citizens throughout the country.