DePaul Law Review

Volume 22
Issue 4 *Summer 1973*

Article 11

Constitutional Law - Mahan v. Howell - Forward or Backward for the One Man-One Vote Rule

Clem Hyland

CONSTITUTIONAL LAW—MAHAN v. HOWELL—FORWARD OR BACKWARD FOR THE ONE MAN-ONE VOTE RULE

The Virginia General Assembly in 1971 enacted statutes reapportioning the state for the election of members of its House of Delegates and Senate. Two suits were brought challenging the constitutionality of the House redistricting statutes on the following grounds: population variances in the districts were impermissible; multimember districts diluted representation; and the use of multimember districts constituted racial gerrymandering. The Senate redistricting statute was challenged in a separate suit alleging that the City of Norfolk was unconstitutionally split into three districts.[1] The district court declared the reapportionment legislation unconstitutionally violative of the one man-one vote principle. The court created its own electoral districts reducing the allowable percentage variation from 16 percent under the state plan to approximately 10 percent.[2] In some instances, however, the court failed to follow city and county political subdivision lines.[3]

On appeal, the Supreme Court reversed, holding that the reapportionment of Virginia's House of Delegates electoral districts complied with the

1. Three three-judge district courts were convened to hear the three suits pursuant to 28 U.S.C. §§ 2281 and 2284. These suits were consolidated and heard by four of the judges who made up the three three-judge panels.

2. There are two basic mathematical tests used to measure deviations from equality in applying the one man-one vote rule. The first is the population variance ratio, which is the ratio between the most populous district and the least populous district. A perfectly districted state would have a population variance of one to one. The problem with this test is that it only gives a picture of the extremes. For example, if there are 98 districts each of 50 population, one of 130, and one of 10, the population variance of 13:1 shows gross inequality, but the overall disparity is not that bad. The other test measures deviations from the representative norm. Total population is divided by the total number of legislators to determine the ideal district. From this figure, one can determine for each district the percentage deviation from the ideal district. *See generally* Clem, *Problems Of Measuring And Achieving Equality Of Representation In State Legislatures*, 42 NEB. L. REV. 622 (1963); Note, *Reapportionment*, 79 HARV. L. REV. 1226, 1250-51 (1966).

3. Howell v. Mahan, 330 F. Supp. 1138 (E.D. Va. 1971). The district court based its decision on Reynolds v. Sims, 377 U.S. 533 (1964) and Swann v. Adams, 385 U.S. 440 (1967), holding that the state had not proved a governmental necessity for strict adherence to political subdivision lines and thus was unable to justify the population variances. The district court also established a multimember district from three single member districts.

equal protection clause of the fourteenth amendment, since the state had a rational objective in preserving the integrity of political subdivision lines. The Court concluded that more flexibility is permissible in state legislative reapportionment than in Congressional redistricting. The interim plan of the district court combining the three single member districts into one multimember district was also upheld.[4]

The decision gives courts greater flexibility in determining the constitutionality of a state apportionment plan rather than confining them to the old standard of strict mathematical equality required by the Warren Court. What follows is an analysis of *Mahan v. Howell* in light of relevant case law, evaluating the guidelines it establishes and how it represents a departure from a rigid and narrow interpretation of the one man-one vote principle.

Prior to 1962, the Supreme Court consistently refused to entertain constitutional complaints about legislative malapportionment. *Colegrove v. Green*[5] was long regarded as decisive precedent in litigation concerning districting practices and proved an effective barrier to reapportionment suits. *Colegrove* originated from a citizen voter complaint challenging the failure of the Illinois legislature to realign congressional districts to conform with population shifts over a number of years. The complaint contested the disparity of population among districts which allegedly operated to limit the effectiveness of individual votes. The Court dismissed the complaint as non-justiciable because the question was peculiarly political in nature.[6] Though many authors disagreed as to the proper interpretation of *Colegrove*, the case served as precedent for the dismissal of suits attacking the districting of state legislatures and Congress.[7]

---

4. Mahan v. Howell, 93 S. Ct. 979 (1973).

5. 328 U.S. 549 (1946).

6. *Id.* at 552. Mr. Justice Frankfurter wrote for only three of the justices in dismissing for want of justiciability. Mr. Justice Rutledge concurred in the result, dismissing for want of equity, holding that Smiley v. Holm, 285 U.S. 355 (1932), had established malapportionment as a justiciable issue. For a discussion of *Colegrove see* Bickel, *The Durability Of Colegrove v. Green*, 72 YALE L.J. 39 (1962).

7. In a series of per curiam decisions, the Court refused to render a judicial remedy for malapportionment. *See* Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Cox v. Peters, 342 U.S. 936 (1952); Remmey v. Smith, 342 U.S. 916 (1952); South v. Peters, 339 U.S. 276 (1950). In MacDougal v. Green, 335 U.S. 281 (1941), overruled by Moore v. Ogilvie, 394 U.S. 814 (1969), the Court dismissed the complaint on the merits rather than for a lack of justiciability. For a discussion of pre-*Baker* cases *see* Lewis, *Legislative Apportionment And The Federal Courts*, 71 HARV. L. REV. 1057 (1958); Caruso,

In 1962, however, apparently because of the number of malapportioned state legislatures,[8] the Supreme Court decided in *Baker v. Carr*[9] that the issue of state apportionment was within its jurisdiction.[10] The *Baker* plaintiffs challenged Tennessee's legislative apportionment arguing that inequality (population variances) in voting districts resulted in a denial of plaintiff's rights as guaranteed by the fourteenth amendment. The Court found claims of population inequality among electoral districts justiciable and within the jurisdiction of the Court, but failed to establish a standard to determine the constitutionality of population variances among districts in state legislative apportionment plans.[11]

Having resolved the issue of justiciability, the Court began developing a standard to be applied in reapportionment cases. Although *Gray v. Sanders*[12] was not concerned with legislative or congressional apportionment, the Court, in striking down the Georgia unit system used in statewide primaries, established the basic principle of equality among voters within a state: a "conception of political equality . . . can mean only

---

The Rocky Road From Colegrove To Wesberry: Or, You Can't Get There From Here, 36 TENN. L. REV. 621 (1969).

8. In 1962, there were great disparities among legislative districts which produced unequal legislative voting strength in almost all states. For example, 8 per cent of the population could control the Nevada Senate, while only 11.6 per cent could control Vermont's House of Representatives. In Connecticut 33.4 per cent of the population was sufficient to control the Senate, while only 12 per cent could rule the House. *See* Goldberg, *The Statistics Of Malapportionment*, 72 YALE L.J. 90 (1962).

9. 369 U.S. 186 (1962). Many people forsaw the decision in light of the Court's action in Gomillion v. Lightfoot, 364 U.S. 339 (1960). Though that case was decided on the basis of the fifteenth amendment, one author saw *Gomillion* as an indication of a possible change in the Court's attitude toward the justiciability of apportionment cases. *See* Lucas, *Dragon In The Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUPREME COURT REV. 194.

10. 369 U.S. at 209. In *Baker*, the Court pointed out that a majority of the Justices in *Colegrove* actually sustained the justiciability of the question presented and that the complaint was dismissed for want of equity, not justiciability.

11. For a general discussion of *Baker v. Carr see* McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); McKay, *Political Thickets And Crazy Quilts: Reapportionment And Equal Protection*, 61 MICH. L. REV. 645 (1963); Neal, *Baker v. Carr: Politics In Search Of Law*, 1962 SUPREME COURT REV. 252; Lancaster, *What's Wrong With Baker v. Carr?*, 15 VAND. L. REV. 1247 (1962).

12. 372 U.S. 368 (1963). Every qualified voter was entitled to one vote, but in tallying the votes the use of the county unit system gave rural votes more weight than urban votes. Population variance ratio between the largest and smallest districts was 99:1. *See generally* Bondurant, *A Stream Polluted at its Source: The Georgia County Unit System*, 12 J. PUB. L. 86 (1963); Note, *Constitutional Law—County Unit System Per Se Unconstitutional-Fourteenth Amendment Requires Precise Equality In Statewide Election*, 26 GA. B. J. 339 (1964).

one thing—one person, one vote."[13] During the same term, the Court in *Wesberry v. Sanders*[14] stated that one man's vote in a congressional election must equal as nearly as is practicable the vote of another.[15] The Court avoided the equal protection clause and based its decision on article I section 2 of the Constitution, possibly to leave the field open for application of some other standard to state legislative apportionment.[16]

In *Reynolds v. Sims*,[17] the Court applied the standard formulated in *Gray* and *Wesberry*, modifying it to require state legislative bodies to apportion their districts as nearly as is practicable on an equal population basis. The plaintiffs, qualified voters of Jefferson County, Alabama, had challenged the apportionment laws of that state on the issue of whether there are any constitutional principles which would allow a departure from the basic standard of equality among voters in the apportioning of seats of state legislatures.[18] The Court stated:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable . . . . Mathematical exactness or precision is hardly a workable constitutional requirement.[19]

Chief Justice Warren explained that more flexibility may be permissible in state legislative apportionment than in congressional districting. A state may maintain the integrity of various political subdivisions and

---

13. 372 U.S. at 381.

14. 376 U.S. 1 (1964).

15. *Id.* at 7-8.

16. For a general discussion of *Wesberry see* Carpenter, *Wesberry v. Sanders: A Case Of Oversimplification*, 9 VILL. L. REV. 415 (1964); Weiss, *An Analysis Of Wesberry v. Sanders*, 38 So. CAL. L. REV. 67 (1965).

17. 377 U.S. 533 (1964). Following its decision in *Reynolds*, the Court overturned the apportionment plans of five other states: Colorado: Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964); Delaware: Roman v. Sincock, 377 U.S. 695 (1964); Virginia: Davis v. Mann, 377 U.S. 678 (1964); Maryland: Maryland Comm. For Fair Representation v. Tawes, 377 U.S. 656 (1964); New York: WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964). On June 22, 1964 the Supreme Court handed down a number of memorandum decisions concerning state legislative apportionment plans based on its ruling in *Reynolds*; Iowa: Hill v. Davis, 378 U.S. 565 (1964); Connecticut: Pinney v. Butterworth, 378 U.S. 564 (1964); Idaho: Hearne v. Smylie, 378 U.S. 563 (1964); Michigan: Marshall v. Hare, 378 U.S. 561 (1964); Illinois: Germano v. Kerner, 378 U.S. 560 (1964); Oklahoma: Williams v. Moss, 378 U.S. 558 (1964); Ohio: Nolan v. Rhodes, 378 U.S. 556 (1964); Washington: Meyers v. Thigpen, 378 U.S. 554 (1964); Florida: Swann v. Adams, 378 U.S. 553 (1964).

18. 377 U.S. at 561.

19. *Id.* at 577.

provide for compact districts of contiguous territory in designing a state legislative apportionment plan, but one vote must equal another. The Court would permit a divergence from a strict population standard when based on "legitimate considerations incident to the effectuation of rational state policy"[20] such as insuring some voice to political subdivisions as political subdivisions. The Court must also consider the character as well as the degree of deviation from a strict population basis.

The companion cases decided with *Reynolds* did little to clarify the standards set forth in that case.[21] *Roman v. Sincock*[22] held that it was not practicable to establish strict mathematical standards for determining the constitutionality of a state legislative apportionment plan under the equal protection clause. Chief Justice Warren suggested that the proper approach for the Court was to examine the particular circumstances in each case to determine whether or not the state had adhered faithfully to a plan of population-based representation.

The 1964 apportionment cases left many questions unanswered. The Court did not clearly establish the constitutionality of multimember districts and failed to determine whether the principles set forth in these cases should be applied to local governments. The Court also failed to answer the question of what constituted substantial equality among districts and how much population deviation would be allowed.[23]

These decisions stirred up a storm of criticism in Congress with many members contending that, within reasonable limits, states had the right

20. *Id.* at 579. The Court further stated that "the overriding objective must be substantial equality of population among the various districts." *Id.* For a discussion of reasons which would be insufficient to justify a divergence *see* Auerbach, *The Reapportionment Cases: One Person, One Vote-One Vote, One Value*, 1964 SUP. CT. REV. 1.

21. In Maryland Comm. For Fair Representation v. Tawes, 377 U.S. 656, 675 (1964), the Court found that "considerations of history and tradition, relied upon by appellees, do not, and could not, provide a sufficient justification for the substantial deviations from population-based representation in both houses of the Maryland Legislature." In Davis v. Mann, 377 U.S. 678, 692 (1964), the Court held: "The fact that the maximum variances in the populations of various state legislative districts are less than the extreme deviations from a population basis in the composition of the Federal Electoral College fails to provide a constitutionally cognizable basis for sustaining a state apportionment scheme under the Equal Protection Clause." The *Lucas* case may be the most interesting of all because the Court rejected a state apportionment plan that had been approved by the voters.

22. 377 U.S. 695 (1964).

23. For a general discussion of *Reynolds* and its companion cases *see* Baldwin and Laughlin, *The Reapportionment Cases: A Study In The Constitutional Adjudication Process*, 17 U. FLA. L. REV. 301 (1964); Carroll, *The Legislative Apportionment Case*, 16 SYRACUSE L. REV. 55 (1964); Swindler, *Reapportionment: Revisionism Or Revolution?*, 43 N.C.L. REV. 55 (1964).

to apportion their legislatures as they wished. Opponents of the decisions proposed various constitutional amendments, attempting to curb the effect of *Reynolds* and its companion cases, but none of the amendments passed both the House and the Senate.[24]

In 1965, the Court considered the first question left open by *Reynolds,* that of multimember districting. In *Fortson v. Dorsey,*[25] the Court held that equal protection does not necessarily require that state legislatures must be composed of single member districts. However, at the same time, the Court did not hold multimember districts per se constitutional.[26] This concept was again advanced in *Burns v. Richardson*[27] where multimember districts were found permissible, subject to constitutional challenges when such districts were designed to or would minimize the voting strength of various elements of the voting population.[28] The Court implied that multimember districts would be valid in some instances, but left the door open to further litigation on that issue.

Beginning in 1967, the Supreme Court began to significantly tighten the substantial equality of population requirement established by *Reynolds.* The Court in *Swann v. Adams*[29] invalidated a Florida legislative reapportionment plan because the state failed to present acceptable reasons for variations of population among legislative districts. The decision stated that de minimis deviations are unavoidable but variations of 30 per cent and 40 per cent can hardly be considered de minimis.[30] *Swann*

---

24. *See* R. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 203-13 (1970); McKay, *Court, Congress, and Reapportionment,* 63 MICH. L. REV. 255 (1964); Note, *The Equal-Population Standard: A New Concept of Equal Protection In State Apportionment Cases,* 33 U. CIN. L. REV. 483, 502-03 (1964).

25. 379 U.S. 433 (1965). The *Fortson* plaintiffs argued that county wide voting requirements in seven multi-district counties violated the equal protection clause of the fourteenth amendment. For general discussion of *Fortson see* Note, *Representative Government—Use of County-Wide Voting To Elect State Senators Does Not Deprive Voters of Multi-District Counties of Equal Protection of the Laws (United States),* 1965 U. ILL. L. F. 596, 599.

26. For a general discussion of multimember districts *see* Banzhaf, *Multi-Member Electoral Districts—Do They Violate The "One Man, One Vote" Principle,* 75 YALE L. J. 1309 (1966); Carpeneti, *Legislative Apportionment: Multimember Districts And Fair Representation,* 120 U. PA. L. REV. 666 (1972).

27. 384 U.S. 73 (1966).

28. *Id.* at 89.

29. 385 U.S. 440 (1967). The variances in this contested plan ranged from 18.28 per cent over-representation to 15.27 per cent under-representation in the House to 15.09 per cent over-representation and 10.56 per cent under-representation in the Senate.

30. *Id.* at 444.

indicated that population deviations could be justified by two considerations: de minimis deviations or the effectuation of an acceptable state policy.[31] On the same day as the *Swann* decision, the Court handed down two per curiam decisions, *Duddleston v. Grills*[32] and *Kirkpatrick v. Preisler.*[33] In *Grills,* the Court vacated a district court's holding that a 1965 Indiana reapportionment act was constitutional. The population variances under this plan ranged from an over-representation of 7.2 per cent to an under-representation of 12.8 per cent from an ideal plan.[34] In *Preisler,* the 1965 Missouri Constitutional Redistricting Act was held unconstitutional because it provided for a 9.9 per cent maximum deviation.[35] Late in 1967, the Court invalidated a Texas reapportionment plan that allowed a variance ranging from approximately an over-representation of 15 per cent to an under-representation of 11 per cent. The Court felt that the announced policy of the State of Texas, to respect county lines, did not necessitate this range of deviation.[36] These decisions placed a burden on the state to show acceptable reasons for population variances. Precise mathematical equality was not required, nor was the exact amount of permissible deviation determined.

In one of the most important decisions since *Reynolds,* the Court significantly extended the one man-one vote principle in *Avery v. Midland County*[37] holding that units of local government with general powers over a particular area must be apportioned on the basis of population equality. The petitioner alleged that the four districts represented in the Midland County Commissioners were grossly disproportionate in population distribution.[38] This decision further established the population standard as

31. Note, *Constitutional Law—Congressional Districting—"One Man-One Vote" Demands Near Mathematical Precision,* 19 DEPAUL L. REV. 152, 159 (1969).

32. 385 U.S. 455 (1967).

33. 385 U.S. 450 (1967).

34. Grills v. Branigin, 255 F. Supp. 155, 158 (S.D. Ind. 1966).

35. Preisler v. Missouri, 257 F. Supp. 953 (W.D. Mo. 1966).

36. Kilgarlin v. Hill, 386 U.S. 120 (1967).

37. 390 U.S. 474 (1968). For a general discussion of the apportionment issue in local governments *see* Martin, *Local Reapportionment,* 47 J. URBAN L. 345 (1969); Martin, *The Constitutional Status Of Local Government Reapportionment,* 6 VAL. U.L. REV. 237 (1972). For a discussion of *Avery see* Comment, *Avery v. Midland County: Reapportionment And Local Government Revisited,* 3 GA. L. REV. 110 (1968).

38. According to the 1968 estimates, one district had a population of 67,906 while "[t]he others, all rural areas, had populations, respectively, of about 852; 414; 828." 390 U.S. at 474. The Midland County Commissioners consisted of five members including a county judge, elected at large from the county and four commissioners, one elected from each district.

the dominant consideration in apportionment by holding that the Constitution does not permit a "substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body."[39] As in *Reynolds* and *Wesberry* the Court did not require precise mathematical equality, but stated only that the equal protection clause may allow the state to sometimes distinguish between citizens as long as these distinctions are never arbitrary or invidious.[40] As in all previous decisions the Court failed to determine how much deviation would be allowed and thus set the stage for still further litigation.

In two 1969 decisions the Court continued its move toward an absolute population equality standard. *Kirkpatrick v. Preisler*[41] struck down Missouri's congressional districting plan which resulted in the most populous district being 3.13 per cent above the mathematical ideal and the least populous being 2.84 per cent below, for a maximum variance of only 5.97 per cent. The Court rejected Missouri's contention that these variations were acceptable because they were de minimis, holding that there were no fixed percentage population variances small enough to be considered de minimis.[42] The majority opinion emphasized that

> the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve *precise mathematical equality* . . . . Unless population variances

39. 390 U.S. at 485. Previousy in Dusch v. Davis, 387 U.S. 112 (1967), the Court refused to extend the one man-one vote principle to city and legislative bodies because no invidious discrimination was shown. In Sailors v. Board of Education, 387 U.S. 105 (1967), the Court held that the equal population principle was inapplicable to a board of education because the board fulfilled non-legal functions and positions were appointive, not elective. The Court distinguished these cases from *Avery*, holding that the Commissioners Court in *Avery* had broad policy making power that affected many people. The equal protection clause reaches the exercise of state power, whether directly or through subdivisions of the state or local governments.

40. 390 U.S. at 484. In Hadley v. Junior College District, 397 U.S. 50 (1970), the Court further extended the one man-one vote principle to the election of junior college district trustees. For a discussion of *Hadley see* Note, *Uncertain Voice In The Representation Thicket: Hadley v. Junior College District*, 39 U.M.K.C. L. REV. 78 (1970).

41. 394 U.S. 526 (1969).

42. *Id.* at 530. The Court rejected Missouri's other arguments "that variances were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress," and ". . . that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." 394 U.S. at 533-34. The Court also felt that the state had failed "to ascertain the number of eligible voters in each district and to apportion accordingly." 394 U.S. at 534-35.

among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.[43]

The decision follows the implication developed in *Swann* that a burden of proof is placed on the state to justify *any* variations among populations of various districts. In *Kirkpatrick,* the Court felt that Missouri had not made a good faith effort to achieve precise mathematical equality, because a more equal apportionment plan was available and thus variances were not unavoidable.[44]

In the companion case of *Wells v. Rockefeller,*[45] the Court invalidated New York's congressional districting statute which provided that the smallest district would be 6.6 per cent below the mean population while the most populous district would be 6.5 per cent above the mean. The Court rejected the state's justification for accepting the population variances —creating districts with specific interest orientations—and based its decision on its holding in *Kirkpatrick.*[46]

The decision in *Kirkpatrick* and *Wells* implied that it would be very difficult for a state to justify deviations from exact numerical equality among its various districts. These cases indicated that the Court would require precise mathematical equality in population and that justification for population variances such as the preservation of political subdivisions and other non-population factors would be insufficient. It must be remembered that these cases concerned congressional redistricting statutes. The effect of a strict equality standard on a state legislative apportionment plan in light of the equal protection test proposed by *Reynolds* remained unclear at this point.[47]

In *Whitcomb v. Chavis*[48] the Court again turned its attention to the issue of multimember districting. In *Chavis* the petitioner challenged state statutes establishing Marion County as a multimember district for the election of state senators and representatives. Plaintiffs argued that the multimember districts discriminated against them. The district court

43. 394 U.S. at 530-31 (emphasis added). *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964).

44. 394 U.S. at 531.

45. 394 U.S. 542 (1969).

46. *Id.* at 546. The Court emphasized its findings in *Kirkpatrick* that population variances must be unavoidable or shown to be justifiable.

47. One author suggested that: "The new standard appears to be a simple arithmetic approach based solely on gross population which assumes that 'equal numbers' means 'equal representation.'" *See* Note, *Congressional Redistricting: Missouri Again Fails To Meet Constitutional Requirements,* 35 MO. L. REV. 246, 251 (1970).

48. 403 U.S. 124 (1971).

agreed and held this scheme unconstitutional because of the minimization of black voting power.[49] The Supreme Court reversed, finding that multimember districts are not inherently violative of the fourteenth amendment, but suggesting a preference for single member districts.[50]

Late in 1971, the Court indicated for the first time a possible loosening of a strict application of the one man-one vote principle in apportionment cases. In *Abate v. Mundt*[51] the Court sustained a reapportionment plan for the Rockland County New York Board of Supervisors, even though this plan produced a total deviation of 11.9 per cent from population equality. The majority view stated that "the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality."[52] Again the Court emphasized that the state must justify population variances. In this particular case, the justification was Rockland County's long history of and need for close cooperation between the county and its constituent towns.

From 1962 to 1971 the Supreme Court opened up the area of reapportionment to litigation, but left many questions unanswered. In two short years, the Court established reapportionment as a justiciable issue in *Baker,* the one man-one vote principle in *Gray,* and the nearly equal as practicable standard for congressional districting in *Wesberry.* The 1964 reapportionment cases of *Reynolds* and its companion cases applied the standards adopted in *Gray* and *Wesberry* to the apportionment of state legislatures. *Fortson, Burns* and *Chavis* did little to clarify the problems involved in multimember districting, while *Avery* extended the one man-one vote principle to local governments. The Court applied a strict mathematical equality test in a congressional context in *Kirkpatrick* and *Wells,* yet *Abate* suggested a deviation in the future from a narrow interpre-

49. Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969).

50. 403 U.S. at 159-60. The Court also felt that "affirmance of the District Court would spawn endless litigation concerning the multimember district systems now widely employed in this country." *Id.* at 157. For a general discussion of *Chavis see* Note, *Chavis v. Whitcomb: Apportionment, Gerrymandering, And Black Voting Rights,* 24 RUTGERS L. REV. 521 (1970); Note, *Constitutional Law—Multimember Districting As A Violation Of Equal Protection,* 1970 WIS. L. REV. 552.

51. 403 U.S. 182 (1971). Rockland County was governed by a board of supervisors consisting of supervisors of the county's five towns. The members of the county legislature held their county offices by virtue of their election as town supervisors, which produced close co-operation between the towns and the county. Increased population caused severe malapportionment and the 1969 plan provided for a county legislature composed of eighteen members chosen from five legislative districts. These districts corresponded to the five towns.

52. 403 U.S. at 185.

tion of the one man-one vote principle. On the basis of these developments the next logical question would be whether to apply the absolute mathematical equality test of *Kirkpatrick* and *Wells* or the general equal protection test suggested by *Reynolds* in determining the constitutionality of population variances in state legislative reapportionment. In *Mahan v. Howell*,[53] the Court adopted the latter approach and decided that states can deviate from nearly absolute mathematical equality in apportioning their own legislatures.

The *Howell* petitioners challenged a state reapportionment act that produced an over-representation of 6.8 per cent in one district and 9.6 per cent under-representation in another district for a maximum deviation of 16.4 per cent.[54] Whether or not the equal protection clause of the fourteenth amendment permits only unavoidable population variances in state legislative apportionment, despite a good faith effort to achieve absolute equality, was the issue in this action.[55] Virginia attempted to justify its plan in this case on the grounds of maintaining political subdivision lines.[56] It wanted districts to conform to local boundaries in order to allow subdivisions a unified voice in the lower house. The district court held that since the state had not proved a governmental necessity for strictly adhering to political subdivision lines, the plan was constitutionally invalid.[57] The Supreme Court reversed, holding that the proper equal protection test is based on a state's rational considerations, not a showing of necessity.[58]

Mr. Justice Rehnquist, speaking for the majority, found that the state policy of preserving political subdivisions urged by Virginia to justify the divergences was furthered by the plan adopted by the legislature, allow-

53. 93 S. Ct. 979 (1973).

54. The deviations in the Virginia plan were not as large as some previously struck down by the Court in *Reynolds, Swann*, and *Kilgarlin* but larger than others in *Kirkpatrick* and *Wells*. Appellee DuVal argued that another method of computation would result in a deviation of 23.6 per cent.

55. 93 S. Ct. at 983. The Court had reserved decision on this issue in Connor v. Williams, 404 U.S. 549 (1972).

56. The issue of a state's policy of maintaining the integrity of political subdivision lines was presented in Davis v. Mann, 377 U.S. 678, 686 (1964) where the Court noted: "Because cities and counties have consistently not been split or divided for purposes of legislative representation, multimember districts have been utilized for cities and counties whose population entitle them to more than a single representative. . . . And, because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them."

57. 330 F. Supp. at 1140.

58. 93 S. Ct. at 986.

ing the 16.4 per cent population variance, and that it was a rational one. The next question was whether the divergences were tolerable. Again, the Court emphasized that there is no previously established range of percentage deviations that is permissible, but the divergences in these circumstances were tolerable. The Court implied that this allowable range may be tightened in other circumstances and strengthened this implication by failing to establish a definite percentage of deviation that would be considered allowable.[59]

The district court also created a multimember senatorial district made up of three single member districts in order to correct population variances due to 36,700 naval personnel being stationed at the U.S. naval station in Norfolk. The Supreme Court upheld the district court's action to the extent that it was proper under the circumstances—the imminency of the 1971 fall elections.[60] Again the Court failed to fully discuss the issue of multimember districting and apparently has left this area open to further litigation.

Mr. Justice Brennan concurred with the majority regarding the multimember districting issue, but agreed with the district court in rejecting the state's justification for the population variances. He framed the equal protection test in terms of governmental necessity, rather than relying on the rational basis test. His opinion acknowledged that legislative apportionment may be allowed to have small variances in some instances, but proposed the same constitutional standard for state legislative reapportionment and congressional districting.[61] He noted that the district court's plan would achieve a higher degree of equality in district population and thus was more feasible. This analysis coincided with that of the second *Kirkpatrick* case where a plan was struck down due to the existence of another more equal plan.[62]

Some people may interpret the *Mahan* decision as a threat to the one man-one vote principle established by the Warren Court. It does indicate

59. *Id.* at 987. The Court previously noted in Swann v. Adams, 385 U.S. 440, 445 (1967) that "the fact that a 10% or a 15% variation from the norm as approved in one State has little bearing on the validity of a similar variation in another State."

60. *Id.* at 989. The Court relied on its rule handed down in *Chavis* that multimember districts were not per se violative of the equal protection clause.

61. *Id.* at 993. Mr. Justice Brennan further stated that: "While the State may have a broader range of interests to which it can point in attempting to justify a failure to achieve precise equality in the context of legislative apportionment, it by no means follows that the State is subject to a lighter burden of proof or that the controlling constitutional standard is in any sense distinguishable." *Id.*

62. *Id.* at 997. Mr. Justice Brennan delivered the majority opinions in *Kirkpatrick* and *Wells.*

a departure from a single standard of mathematical equality, at least in state legislative reapportioning. The Court noted that "latitude afforded to States in legislative redistricting is somewhat broader than that afforded to them in congressional redistricting."[63] The Court itself described the test of *Kirkpatrick* and *Wells* as one of absolute equality and that the application of this strict test to state legislative redistricting may impair the normal functioning of state and local governments.[64]

Mahan v. Howell does not overturn the one man-one vote principle, but simply allows the Court more flexibility in looking at factors other than population in determining the constitutionality of an apportionment plan. As in other reapportionment decisions, the Court looked at the particular facts in this case and refused to establish a single standard to be applied uniformly in all cases dealing with reapportionment.

The Court seemed to understand and reach a very important issue in this case—whether or not equal population necessarily means equal representation. During the 1960's, the Court became preoccupied with mathematical standards and failed to look beyond population statistics to determine whether there was actual inequality among voting districts. The Court did not realize that there was more to fair representation than eliminating malapportioned legislatures under an equal population basis. Basic local governmental units such as cities and counties perform important functions for the state and therefore it is reasonable to maintain the integrity of these units in formulating legislative districts. The preservation of these political subdivisions appears rational when one remembers that these city and county units have similar interests and needs that must be represented in the state legislature. It becomes a test of balancing interests between the rights of an individual to have his vote count as much as that of another and the obligation of the state to be receptive to the needs and interests of local governmental bodies.

Another interesting aspect of the case is the apparent reliance of the Court on the "old" equal protection test. The Court referred to the proper test in this case as one based on a state's rational considerations (rational basis test), rather than one of governmental necessity (compelling state interest). Application of this test reduces the burden on the state in justifying population variances among various districts.[65]

63. *Id.* at 986.

64. *Id.* at 985.

65. Some authors feel that the Court is going to apply the old equal protection test in all circumstances in the future. For a general discussion of equal protection *see Developments In The Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969);

The case does not answer all the questions presented in reapportionment cases, but it does give the Court needed flexibility. The question remains as to how much deviation will be permitted in future cases. Will the Court redefine the test established by *Kirkpatrick* and *Wells* to allow flexibility in congressional districting plans? Will the Court consider reasons other than the preservation of political subdivisions as a basis for a state's reapportionment plan to deviate from mathematical equality? Will the Court look beyond the mathematics of the situation and see whether gerrymandering has taken place among the districts?[66]

The Warren Court of the 1960's saved many states from malapportionment, but it will be the task of the Burger Court in the 1970's to clarify the uncertainties in reapportionment litigation. This Court has taken the important first step—a re-evaluation of whether equal population means equal representation.

Clem Hyland

Note, *The Decline And Fall of The New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972).

66. Gerrymandering is the practice of districting along unnatural lines to achieve partisan advantage or some other unfair objective. It is actually a manipulation of boundary lines among districts of equal population. *See generally* Edwards, *The Gerrymander And 'One Man, One Vote,'* 46 N.Y.U.L. REV. 879 (1971); Gottlieb, *Identifying Gerrymanders*, 15 ST. LOUIS U.L.J. 540 (1971).