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The achievement of satisfactory remedies for state legislative malapportionment has been impeded by uncertainty as to the roles of federal and state courts. Cooperation between these courts appears necessary if a plan is to be devised satisfying both federal and state constitutional requirements. This Note examines the recent reapportionment litigation in New York which culminated in a federally ordered election of legislators under a plan violating the state constitution. After exploring alternative actions which might have lessened the chance of a state-federal conflict, the author proposes a new approach to the problem. It is suggested that state courts be encouraged to assume a larger role in protecting both federal and state requirements.

I. THE NEW YORK LITIGATION

On November 9, 1965, voters in New York elected legislators in a federally ordered election pursuant to a state legislative reapportionment plan. This plan had been previously declared by the New York Court of Appeals to be in violation of the state constitution.

The first significant point in the New York reapportionment litigation was the 1964 decision of the United States Supreme Court in WMCA, Inc. v. Lomenzo.1 The Court, in deciding this and five other reapportionment cases,2 held that the constitu-

tional standard under the fourteenth amendment for both houses of a bicameral legislature was "one man, one vote." Noting that the last apportionment in New York had been in 1953, the Court held that, even using 1960 population statistics, reapportionment under the existing New York statutory and constitutional scheme was not constitutionally sustainable. The Court then remanded the case to the district court for determination of whether the 1964 election should be held under the existing apportionment.

On remand, in July 1964, the district court ordered that the 1964 election be held, but that the terms of those elected be one year rather than two years as provided in the New York Constitution. In addition, it was ordered that a special election be held in November 1965, under a federally acceptable reapportionment plan to be enacted by the state legislature and submitted to the district court for approval by April 11, 1965. The terms again

3. The phrase first appeared in Gray v. Sanders, 372 U.S. 368, 381 (1963): "The conception of political equality from the Declaration of Independence ... to the Fifteenth, Sixteenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

4. The number of assemblymen is set by the constitution at a maximum of 160 members. N.Y. Const. art. III, § 2. The ratio by which these seats are apportioned is obtained by dividing the number of assemblymen into the state population. N.Y. Const. art. III, § 5. Every county containing less than one and one-half "ratios" gets one seat; all other counties get two seats; and the remainder of the seats go to counties with over two "ratios." N.Y. Const. art. III, § 5. The senate "ratio" is obtained by dividing the population by fifty; one seat is apportioned for each full "ratio" to each county having six % or more of citizen population. Populous counties are restricted by three mandatory rules: (1) no county may have more than three seats unless it has a full "ratio" for each seat; (2) no county may have more than one-third of the seats; (3) no two adjacent counties may have more than one-half of all the seats. N.Y. Const. art. III, § 4. For a full description of the New York scheme, see Silva, The Population Base for Apportionment of the New York Legislature, 32 Fordham L. Rev. 1 (1963); Silva, Apportionment of the New York Assembly, 31 Fordham L. Rev. 1 (1962).

5. The Court was not specific as to which parts of the state scheme were unconstitutional. Its controlling principle was that "state constitutional provisions should be deemed violative of the federal constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated." Reynolds v. Sims, 377 U.S. 533, 584 (1964).

6. In a suit to enjoin enforcement of a state statute, the application must be heard by a district court of three judges, and a direct appeal lies to the Supreme Court. 28 U.S.C. §§ 1253, 2281 (1964).


8. At plaintiff's request, the court extended the deadline to May 5, 1965, after the state court had held the legislative plan to be unconstitutional. Brief for Appellees, p. 2, Travia v. Lomenzo, 382 U.S. 9 (1965).
were to be one year; the normal two year terms were to be resumed
with the regularly scheduled 1966 elections.9

The New York legislature convened in special session in Dec-
ember 196410 and passed four reapportionment plans11 in designated order for court consideration. The first plan to be found
constitutional by the district court was to become the apportion-
ment law for the state. The reapportionment plans were sub-
mitted to the court in January 1965.12 It rejected three of the
plans,13 but held that chapter 976 (Plan A) complied with the

9. Mr. Justice Harlan, concurring in the affirmance of this order, intimated
that the district court retained power to modify or vacate that portion of the
order calling for a 1965 election. Hughes v. WMCA, Inc., 379 U.S. 694, 695
(1965).

10. This was a "lame duck" Republican legislature called into special
session by the Republican governor. The legislature elected in November
1964, which would convene in January 1965, was controlled by Democrats.
For a discussion of political aspects of the New York reapportionment contro-
versy see VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, THE
SUPREME COURT OF THE UNITED STATES: A REVIEW OF THE 1964 TERM 15–24
(1965).

11. N.Y. Sess. Laws 1964, ch. 976 (Plan A), provided for a senate of 65
members and an assembly of 165 members, each with a single vote; counties
were combined and divided to achieve districts of substantially equal citizen
population. N.Y. Sess. Laws 1964, ch. 977–78 (Plan B), provided for a senate
of 65 members and an assembly of 180 members, each with a single vote;
counties were combined and divided to achieve districts of substantially equal
voter population. N.Y. Sess. Laws 1964, ch. 979 (Plan C), provided for a sen-
ate of 65 members with single votes and an assembly of 186 members with
fractional voting ranging from 1/6 of a vote to 1 full vote; assembly districts
were contained within counties, and districts were based on citizen population.
N.Y. Sess. Laws 1964, ch. 981 (Plan D), provided for a senate of 65 members
with whole votes and an assembly of 174 members, 127 of whom had whole
votes and 47 of whom had fractional votes ranging from 3/4 to 1/6; the dis-
tricts were based on voter population. Plans B, C, and D were declared un-
constitutional before the session laws were printed in a bound volume, there-
fore chapters 977–81 were not printed therein. For a discussion thereof, see
the case which held them to be unconstitutional, WMCA, Inc. v. Lomenzo,


13. The court found fractional voting unsatisfactory as a permanent
solution under the "one man, one vote" standard. It reasoned that a repre-
sentative with one-sixth of a vote would be giving greater proportional repre-
sentation to his constituency than would a representative with a whole vote
because of the realities of the legislative process—debate, party caucuses,
committee assignments, etc. The court found voter population as a basis for
apportionment to violate equal protection because, at least in New York, it
would perpetuate discrimination against urban areas. It did say, however,
that voter population as a basis might not be found unsatisfactory in every
fourteenth amendment and its order of July 1964. The court refused to consider objections that Plan A violated the state constitution or to stay proceedings pending a state decision on these questions. Furthermore, it refused to enjoin the parties from proceeding in the state courts.

Shortly thereafter in *In the Matter of Orans*, Plan A was held to violate the state constitution by a lower state court. Reasoning that the constitutional provision limiting the number of assemblymen to 150 survived the Supreme Court decision in *Lomenzo*, the court declared Plan A invalid because it called for 165 members in the assembly. Since the state constitution required senate and assembly apportionment in the same law, the senate apportionment in Plan A could not stand alone. On April 14, 1965, the New York Court of Appeals affirmed the unconstitutionality of Plan A.

On May 10, a majority of the three-man district court, recognizing that Plan A was ineffective as a legislative act, nonetheless ordered that the districting scheme and procedures set forth in it be used as the basis for an election to be held in November 1965. The effect of the order was delayed until May 24 to give the legislature further time to act.

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15. In the Matter of Orans, 15 N.Y.2d 339, 206 N.E.2d 854, 258 N.Y.S.2d 825, appeal dismissed sub nom. Rockefeller v. Orans, 382 U.S. 10 (1965). The court also found prima facie violations of the "town and block" rule, but the court of appeals concluded its opinion by stating that it was "inappropriate to pass any comment on these statements."

16. Both the May 10 and May 24 orders by the district court were given orally. Judge Levet, dissenting, suggested weighted voting as an alternative. See WMCA, Inc. v. Lomenzo, 246 F. Supp. 953, 958 (S.D.N.Y.), motion to stay the order and to accelerate the appeal denied sub nom. Travia v. Lomenzo, 381 U.S. 431 (1965) (Harlan, J., dissenting).

17. The legislature attempted to redistrict in accordance with the state court ruling but no plan was completed and no bill was introduced. On May 24 the legislature passed three relevant bills. One bill adopted the weighted voting formula advocated by the dissenting district court judge on May 10. The second bill created a bipartisan committee to formulate a reapportionment plan to meet the requirements of both state and federal constitutions for 1966 elections. The third bill issued a call for a constitutional convention to devise a permanent plan for the 1968 and subsequent elections. See Travia v. Lomenzo, *supra* note 16, at 484.
On July 9, 1965, the New York Court of Appeals issued an injunction prohibiting the holding of the November 1965 election. Reasoning that the federal district court's order of May 24 was not "final and binding," the court held that it was obligated to prevent an election violating the state constitutional provisions fixing the number of assembly seats at 150 and requiring elections every two years. The majority opinion suggested weighted voting as an alternative; the concurring opinion suggested an election at large. The district court's immediate response was to make clear that its May 24 order had been "final and binding" and to enjoin anyone from interfering with the November election. The Supreme Court refused to stay this order pending appeal and later dismissed the appeal.

II. THE ROLE OF THE JUDICIARY IN REAPPORTIONMENT

Significant judicial involvement in reapportionment problems began with Baker v. Carr, in which the Court held apportionment was subject to judicial review and presented a federal question under the equal protection clause of the fourteenth amendment. Initially, the Court appeared committed to a standard of

19. The objection to the one year term had not been raised in the lower courts.
“invidious discrimination” for testing the constitutionality of an apportionment scheme. Although there was some indication of the Court’s ultimate position, it was not until the Court decided *Lomenzo* and the five other state apportionment cases that a clear standard appeared.

But application of the “one man, one vote” standard to both houses of a state legislature introduced a new problem in federal judicial handling of malapportionment. Heretofore courts had been dealing primarily with legislative apathy in following the obvious dictates of state constitutional provisions assumed to be valid under the federal constitution. In such situations, effective judicial relief can be provided without difficulty. Many state constitutions, however, have apportionment schemes which, taken as a whole, violate the new standard. In such situations the task of the court is complicated by the necessity of accommodating the relief ordered to requirements of parts of the scheme not inconsistent with the “one man, one vote” standard. This necessity is predicated upon the assumption that: “state constitutional pro-

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25. Members of the Court disagreed as to the meaning of this standard. See *Baker v. Carr*, 369 U.S. 186, 226 (1962) (opinion of the Court by Brennan, J.); id. at 242–50 (Douglas, J., concurring); id. at 253–58 (Clark, J., concurring); id. at 830–40 (Harlan, J., dissenting).


27. In *Gray v. Sanders*, 372 U.S. 368 (1963), the Georgia county unit system for primaries was held to violate the fourteenth amendment standard of one person, one vote, but the case was distinguished from legislative apportionment situations. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the existing congressional districting plan was declared unconstitutional because it diluted the voting strength of certain voters.


30. In New York the limitation of the assembly to 150 seats, together with the method of distributing seats to political subdivisions, see note 4 *supra*, caused the system as a whole to be unconstitutional. *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 650 (1964). Neither a limit of 150 members nor a requirement of one seat for each county alone would violate the federal constitution although in New York, if the smallest county were given a seat, the assembly would need over 1000 seats to afford equal representation on a system of whole votes.
visions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated."

The same problem of accommodating state constitutional provisions must be faced by a legislature when ordered to submit a new apportionment plan complying with a federal court order. Determining which provisions remain operative, despite the invalidity of the scheme as a whole, requires an interpretation of the state constitution. Such interpretation should consider the language of the plan, the framers' intent, and the political history of the state, in light of the federal decree. This responsibility is shared by the state courts, who have been urged by federal courts to interpret and enforce their own constitutions.

Cooperation among these three bodies in remedying malapportionment is dictated by two fundamental positions of the federal judiciary: A federal court should defer to state decisions on state problems; the political nature of apportionment questions favor achieving a solution through the legislative process. However, since an asserted deprivation of voting rights presents a federal claim for relief, the federal court has primary responsibility for fashioning a solution within a relatively short period of time.

32. The Citizen's Committee on Reapportionment reported to the state legislature: "There is no clear-cut method of determining which sentences or parts of sentences contained in sections 3, 4, and 5 of Article III of the State Constitution have withstood the decision of the Supreme Court in the WMCA case." McKinney's Session Law News, Feb. 25, 1965, 187th Sess., 2d Extraordinary Sess. 1964, p. A-13. Significantly, the section which contained the maximum number of seats (art. I, § 2) was not mentioned and apparently was assumed by both the Citizen's Committee and the legislature to have fallen. Id. at 8-A.
33. It was argued in New York that all of the provisions relating to reapportionment were so intertwined and interrelated that if one fell they all must fall. See WMCA, Inc. v. Lomenzo, 298 F. Supp. 916, 921 (S.D.N.Y. 1965).
35. See Forty-Fourth Gen. Assembly v. Lucas, 379 U.S. 693 (1964), where it was said that the district court could abstain on the question of severability of the reapportionment amendment to the state constitution pending a reasonably prompt settlement of the issue in the state court.
37. "If a State's legislative apportionment scheme has been found unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan . . . ." Reynolds v. Sims, supra note 36, at 586.
Although standards for effecting the right to an equal vote remain unsettled, it is clear that neither legislative inertia nor state decisions can stand in the way of effective relief. If a state fails to fashion a satisfactory solution within the time fixed by the federal court, some less ideal but federally acceptable relief must be devised.

III. PROPRIETY OF THE DISTRICT COURT ORDER

The federal district court clearly had the power to adopt a federally acceptable plan. Hence, the propriety of its ordering an election under Plan A must be judged by its rationale and by available alternatives.

A. RATIONALE

First, it could have eliminated any objection to its reliance upon invalid legislation by holding that the state constitutional provisions were no longer viable as a matter of federal law. Such a holding would apply most clearly to the biennial election provision since an immediate election is a discretionary remedy under Supreme Court decisions. With respect to the limitation of the

38. In Roman v. Sincock, 377 U.S. 695, 711 (1964), the Court stated that despite the fact that legislative apportionment has traditionally been treated as a state constitutional matter, the Court will not delay and deprive plaintiff an adequate representative voice. The determination of an appropriate remedy will be made on equitable grounds. The statement indicates that the remedy is dependant on equitable considerations rather than any set and observable standards. The Court further warned in Reynolds v. Sims, 377 U.S. 533, 578 (1964), that "what is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case."

39. Federal courts are bound by a state court decision only if no federal question is involved and the state decision does not conflict with the federal constitution. See Valenti v. Dempsey, 211 F. Supp. 911 (D. Conn. 1962); Jordan v. Green, 173 So. 2d 448 (Fla. 1965); Hutchinson v. Cooley, 214 A.2d 828 (Vt. 1965); 35A C.J.S., Federal Civil Procedure § 271 (1960).


41. See Davis v. Mann, 379 U.S. 696 (1965); Hughes v. WMCA, Inc., 379 U.S. 694 (1965). Both of these cases approved cutting short legislative terms in order to accelerate reapportionment. Further, the state court had not expressed a binding opinion on the length of legislative terms if Plan A were to be used. N.Y. Const. art. III, § 2 provides both for two year terms and elections in even numbered years. Under the state court solution of weighted voting the state court did not have to choose between one year terms or switching to odd number years. Thus in using Plan A the district court's disre-
assembly to 150 seats, it could be argued that the dominant element of the New York constitutional scheme was the preservation of counties as political subdivisions of the state.\textsuperscript{42} Since this feature—not in itself unconstitutional—survived the \textit{WMCA} decision, the federal right to equal representation demanded more than 150 seats in the assembly. However, the converse of this argument could be asserted by regarding the 150 member limit as more central to the state constitutional scheme than representation of each county in the assembly. Although it was clear that one requirement or the other must have fallen as a matter of federal law, the district court thought the question of which was more central to the state scheme was better left to the state courts.\textsuperscript{43} Thus it consistently maintained that the 150 member limitation could remain operative as a matter of federal law.

Second, the district court could have held that the limitation had fallen by reasoning that a state legislature has inherent power to interpret the state constitution, coextensive with a state court.\textsuperscript{44} Plan A could have been deemed a valid legislative act despite the decision of the court of appeals. Appealing as this notion may be, however, it seems clear that the division of power between a state's legislature and judiciary must be determined under state law.\textsuperscript{45} Thus, the federal district court would be justified in accepting the legislature's interpretation of the state constitution only if the state court conceded that the legislature

\begin{quote}
\textsuperscript{44} See Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 675-76 (1964):
\begin{quote}
With the Maryland Constitutional provisions relating to legislative reapportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements.
\end{quote}
\textsuperscript{45} Despite its statement in Maryland Comm. for Fair Representation v. Tawes, supra note 44, when presented with an appeal from the New York state court decision which found no such inherent power in the legislature, the Supreme Court dismissed the appeal for lack of a federal question. Rockefeller v. Orans, 382 U.S. 10 (1965). The Court apparently left the question of the legislature's power to interpret the state constitution to the state courts.
had this power. To adopt this rationale in the face of the court of appeals decision holding Plan A invalid would have been a clear affront and an unwarranted intrusion into state affairs. The district court, however, conceded that Plan A was not a valid legislative act since the court of appeals had held that it violated the state constitution.\footnote{46}

B. ALTERNATIVES

In adopting Plan A as its own judicial solution, the district court was faced with at least five alternatives. Since no districting plan satisfying both federal and state constitutions had been submitted to it, the alternatives were to postpone any action until 1966, allow the existing legislature to return with weighted votes, order an election at large, order an election under Plan A, or devise its own districting plan.

Weighted voting or postponement of the election until 1966 would prejudice the federal right of New York residents to an equal vote.\footnote{47} Hence, neither was a realistic alternative because they were not federally acceptable. Moreover, the state courts had never settled the doubts of the district court concerning the validity of an election at large under the New York Constitution. An election at large could have denied minority groups and small state subdivisions a voice in the legislature,\footnote{48} and a ballot with

\footnote{46. See note 72 infra.}

\footnote{47. The system of weighted voting suggested by Judge Levet in dissenting from the May 10 district court decision [excerpts may be found in WMCA, Inc. v. Lomenzo, 246 F. Supp. 953, 956 (S.D.N.Y. 1966)] would have produced much greater inequities than the system of fractional voting held unconstitutional by the district court in WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 921 (S.D.N.Y. 1965). The disparity in voting power under the fractional voting plans was from .17 to 1. Under the suggested plan of weighted voting the range would have been from .13 to 2.9 with only 28 of the 150 members having votes in the normal range from .9 to 1.1. Brief for Appellee, p. 11, Travia v. Lomenzo, 382 U.S. 9 (1965). Computation of votes and determination of committee action would have involved difficult problems. Moreover, the apparent inequities in the system favored the sparsely populated regions of the state whose dominance in the legislature was the main target of the WMCA decision.}

\footnote{48. See notes 90-92 infra and accompanying text. However, the Citizen's Committee on Reapportionment noted that an enlarged house might aid the efficiency of its undertakings. McKinney's Session Law News (N.Y.) Feb. 25, 1965, 187th Session — 2d Extraordinary Session 1964, p. 8-A.
over 400 candidates would have been confusing. Faced with such doubts as to the validity of an at large election, it was not unreasonable for the district court to prefer a traditional election under Plan A.

Perhaps the most attractive alternative in such a situation would be a judicially drawn plan accommodating both federal and state constitutional requirements. However, the pressure of time and the complexity of the New York requirements for districting made it improbable that such a plan could have been prepared in time for November elections. Moreover, since the state courts left a number of constitutional issues unsettled, the district court could not be certain its plan would satisfy all requirements of the state constitution which might subsequently be held still operative by the state courts. If unsuccessful, a court-devised plan would have nothing but the effort to recommend itself over Plan A. It would have the undesirable effect of shaping a state's political future through judicial rather than legislative means.

IV. THE CONFLICT BETWEEN FEDERAL AND STATE COURTS

The only regrettable effect of the district court's decision to use Plan A was that it led to a confrontation between federal and state judicial power. This conflict raises questions as to the propriety of actions taken by both the federal district court and the New York courts during the course of the protracted litigation.

A. ACTIONS OF THE DISTRICT COURT

Several suggestions were made to the district court, before the March 15 state court decision declaring Plan A unconstitutional, which might have avoided a conflict with the state courts. Presumably the district courts' measures for remedying malapportionment are circumscribed only by the following guidelines established by the Supreme Court: The district court should set a reasonable period of time within which the state legislature may reapportion itself; state courts should settle state questions so long as their decisions do not conflict with the protection and effectuation of

federal rights; and the district court should determine whether a solution is federally acceptable on the circumstances in each case.

The first and most obvious alternative would have been for the district court to grant a longer time for compliance. There seems to be no constitutionally established period of time in which reapportionment must be accomplished. The courts’ formal obligation is to balance the interests of the state against the right of the deprived voter to be equally represented. In practice, however, the objective of a period of grace would seem to be the achievement of a legislative plan which complies with both the state and federal constitutions. To achieve this, the time period must be long enough to allow for enactment of a legislative plan, litigation in the state courts, and correction of an unsatisfactory plan by the legislature.

When the district court rendered its decision in January 1965, it was clear that the legislative plans were going to be considered in the state courts. The time required for such litigation was difficult to estimate. However, as long as it was possible that

55. The tone of the Supreme Court decisions has been that once the state scheme has been declared unconstitutional the right to an immediate decree is established. The Court, however, usually remands the case to the district court to establish an acceptable time period for compliance. See, e.g., Reynolds v. Sims, supra note 54, at 585. In Scott v. Germano, supra note 54, the Supreme Court deferred to state court attempts to reapportion, in part on the ground that the state court’s jurisdiction was invoked first. However, the Court held that the period of time within which the state court could reapportion was limited. Thus, the period of compliance would seem to be a question for federal determination rather than a prerogative of jurisdiction.
56. One of the better time saving devices, interrogatories by the legislature to the highest state court seeking a decision as to the constitutionality of its plan or plans, would not seem to have been available in New York. This approach was suggested by the majority in White v. Anderson, 394 P.2d 333, 338 (Colo. 1964), and used by the Alabama Legislature. Opinion of the Justices, 178 So. 2d 641 (Ala. 1965).

The New York Constitution requires that an action to review apportionment legislation be brought by a citizen in a lower state court; it can be heard by the highest state court on appeal only. N.Y. CONST. art. III, § 5;
state court proceedings would be completed in time to allow reconsideration by the legislature, the district court's position would seem to be justifiable. Since the objective is to achieve apportionment in the shortest time possible, the district court should begin with a realistic but optimistic time estimate. It was always within its power to extend the time period if necessary.

It was also suggested to the district court that it stay proceedings pending a decision of the state court on whether the plans complied with the state constitution. The court refused to wait because it felt the state was entitled to know immediately whether the legislative plan satisfied the federal constitution, and because no state proceeding had been started before federal jurisdiction was invoked.

Since the state and federal courts were to decide different questions, the only purpose of abstention would have been to avoid an unnecessary decision by the federal court if the state courts found all plans to be unsatisfactory. Even in that situation, however, a federal court decision would give direction to the legislature. Moreover, there was no basis for assuming that a rejection of all plans by the state courts would preclude a decision by the federal court. The subsequent action of the district court demonstrated its power to order an election under a plan violating the state

art. VI, § 3(a). A decision by the highest state court is necessary both to settle the issue for the legislature and to bind the federal courts. See White v. Anderson, supra; 36 C.J.S., Federal Civil Procedure § 171, at 393 (1960). In any event, the district court had the assurance that the New York courts would proceed with all due speed. See N.Y. Const. art. III, § 5.

57. It would appear that the state legislature did have enough time to enact a new plan. The legislature was put on notice by the March decision of the lower New York court that Plan A was unconstitutional. The legislature could have authorized the Citizen's Commission to devise alternative plans in anticipation of the court of appeals decision or could have done so itself. The federal district court extended the time period after the lower court decision until May 5, and ultimately extended the period for compliance until May 24. Thus even if the legislature had waited until the court of appeals decision on April 15, it still had enough time to devise a new plan. The task of revising the enrollment books listing of registered voters did not have to be completed until June 29. N.Y. Election Law § 186, subd. 5. June 1 was the last day for county chairmen to notify the election board of party positions to be filled. N.Y. Election Law § 18.


59. Abstention of the federal court on a state question should be distinguished from equitable abstention which is the postponement of any exercise of federal jurisdiction and remand of both the federal and state questions to the state court. It would not seem inconsistent with the former to decide the federal question prior to the state court determination.
constitution; hence there was no basis for objecting to a decision merely declaring that one or more of the plans was in conformity with its previous order. Finally, the district court’s failure to abstain did not damage state-federal relations. A federal decision after the state court had held all plans unconstitutional would be no less an affront to the state court than not waiting for its decision.

The federal district court also rejected the request to enjoin the state court action.\textsuperscript{60} The denial was consistent with the federal court’s position that the state courts were free to decide state constitutional issues. A decision on such issues, insofar as it did not impinge on federal rights, would jeopardize neither the jurisdiction nor the judgment of the district court.\textsuperscript{61} Although an injunction would have avoided the ultimate conflict between courts, more damage would have been done to state-federal relations by prohibiting state court action on a state question.

Another possible alternative for the district court, when it recognized a potential state-federal conflict, would have been to grant an immediate decree without looking to legislative action.\textsuperscript{62} Although a direct decree would probably have the effect of eliminating technical state-federal conflict, it would have necessitated more federal involvement in state political and legislative affairs than actually occurred in New York. To accommodate the state constitution, the federal court would have had to interpret it.\textsuperscript{63} Furthermore, a direct federal decree would have discouraged the settlement of many of the issues by the state legislature and courts. Self-determination on state questions should not be sacrificed to avoid potential judicial clashes.

B. Actions of the State Courts

Since the federal district court declined to pass on claims under the state constitution, the task of protecting the remaining requirements of the state constitutional scheme fell to the New York courts. To perform this task effectively, the New York

\textsuperscript{60} WMCA, Inc. v. Lomenzo, 298 F. Supp. 916, 917 (S.D.N.Y. 1966).
\textsuperscript{62} See Note, 72 YALE L.J. 968, 1035 (1963).
\textsuperscript{63} If the state courts did not agree with the interpretation given the state constitution by the federal courts, a state-federal conflict could still result. In an analogous situation in Colorado, the state court did not hesitate to correct the federal court’s interpretation. White v. Anderson, 394 P.2d 383 (Colo. 1964). However, the effect of the decision was stayed until after the federally-ordered election, with two justices dissenting.
courts had to decide state questions in a manner which would not compromise federal rights. A state decision standing in the way of effectuating a declared federal right can be disregarded by the federal court.64

The first decision by the New York Court of Appeals held all four legislative plans unconstitutional.65 Plan A was declared unconstitutional because it provided for more than 150 assembly members. The court must have assumed its decision would protect the state constitution. However, it was unreasonable to expect the district court to abide by this decision without an alternative plan complying with both federal and state constitutions. Unless the legislature were to enact a new plan, or the district court were informed whether election at large or weighted voting would comply with the state constitution,66 there would be no alternative to Plan A, and no assurance that the remaining state constitutional requirements would be met.67

64. Under Baker v. Carr . . . [plaintiff] is pressing a federal constitutional right; and if he is correct in his federal constitutional claim, the state constitutional limitation need not be construed as a bar, for no state limitation on legislative action can prevent relief which the Federal Constitution, as construed by the Supreme Court, requires. Valenti v. Dempsey, 211 F. Supp. 911, 913 (D. Conn. 1962).

The specific restraint involved in this situation was the state's interpretation of the constitutional requirement that the legislature reapportion at the first session after the federal census. It was held that if the legislature did not reapportion at that time it could not reapportion for ten more years.


66. The federal district court in its May decision based its rejection of weighted voting at least in part on its suspicions that it would be held unconstitutional by the New York courts. Brief for Appellees, pp. 10-11, Travia v. Lomenzo, 382 U.S. 9 (1965). If either the weighted voting or election at large were constitutional the state court should have so declared at that time.

The New York Constitution has a number of provisions which appear to be inconsistent with weighted voting. N.Y. Constr. art. III, § 9 provides: "a majority of each house shall constitute a quorum to do business"; § 14 provides: "nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature . . . ."; § 20 provides: "the assent of 2/3 of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." (Emphasis added.)

67. The federal court's reluctance to become involved in state problems such as gerrymandering is based on the premise that "when a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review." Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

It would appear that the state court understood the Supreme Court directive that the reapportionment must be accomplished under a valid plan to
Furthermore, if the state court sought to protect the state constitution it should have given guidance to the legislature by deciding specifically what were the remaining requirements of the state constitution. In its April 15 decision, the court of appeals failed to consider the town and block rule and the biennial election provision. Considering the federal time limit, such determination should have been made to facilitate achievement of a satisfactory plan.

The next court of appeals decision, on July 9, enjoined the holding of an election under Plan A as ordered by the district courts. The decision was based on findings that Plan A violated the state constitution in providing for 165 members and one year terms. An injunction was considered proper since the district court order was not final and binding. The majority argued that whether Plan A complied with the state constitution was a state question to be determined by the New York courts, and that all federal decisions were based on the assumption that the 1965 election would be held under a valid legislative plan. The district court, however, had acknowledged on May 10 that Plan A was no longer a valid statute. The majority's reference to previous

mean that the plan must comply with both state and federal constitutions. Glinski v. Lomenzo, 16 N.Y.2d 27, 209 N.E.2d 277, 261 N.Y.S.2d 281 (1965).

68. The court decided generally which provisions had survived the Supreme Court decision, but it did not interpret these provisions. Such a decision was particularly necessary with relation to the issue of gerrymandering. Since the basic unit previously had been the county, there was little precedent to give the legislature knowledge of the extent of their discretion in forming new districts.

69. The objection to the one year terms provided for in Plan A was not raised until the July 9 court of appeals decision enjoining the holding of an election under Plan A. Glinski v. Lomenzo, 16 N.Y.2d 27, 209 N.E.2d 277, 261 N.Y.S.2d 281 (1965).

70. Ibid.

71. The court stated that it would be obligated to permit the November election if a federal court order

had made final and binding orders therefor. To repeat, I have seen no such order. All the previous Federal decisions were based on the assumption that the 1964 or the 1965 Legislature would — neither did — pass a valid legislative districting statute. The May 24, 1965 decision of the Federal three-man District Court did no more than decline to change its previous orders. Obviously and under settled principles, the subsequent denial of a stay by the United States Supreme Court decided nothing. The appeal to that court still pendes.

Id. at 29-30, 209 N.E.2d at 278, 261 N.Y.S.2d at 282.

72. See WMCA, Inc. v. Lomenzo, 246 F. Supp. 953 (S.D.N.Y. 1965), for a printed statement of the oral May 24 order which stated that Plan A was itself invalid as a New York law.
federal decisions must have meant, therefore, that no Supreme Court ruling required New York to hold an election under an invalid plan. Although it was true that the Supreme Court had never made such a ruling, it had refused to stay the district court order to hold an election under Plan A.73

There is little doubt that the method of electing state officials is solely a state question if the method does not impinge on federal rights. However, it was questionable whether weighted voting—the court of appeals’ solution—satisfied the federal constitution.74 On May 10, the district court had said that weighted voting did not fully satisfy the federal constitution.75 The court of appeals may have been contending, however, that the district court determination on weighted voting was not binding on the state courts until affirmed by the Supreme Court. Generally, the provisions of a state constitution can be disregarded only in effectuating federal constitutional rights as construed by the Supreme Court.76 In light of this, the Supreme Court’s refusal to stay the effect of the May 24 district court order or accelerate the appeal was much more significant than the majority admitted. Under the circumstances, it was tantamount to approval of the district court order.77

74. The district court had held fractional voting unconstitutional. WMCA, Inc. v. Lomenzo, 233 F. Supp. 916 (S.D.N.Y. 1965). Since fractional voting is the least offensive form of weighted voting (largest vote is one, disparities are equalized by fractions under one), all other forms of weighted voting should be unconstitutional.
76. See Valenti v. Dempsey, 211 F. Supp. 911, 913 (D. Conn. 1962); Maryland Comm. for Fair Representation v. Tawes, 229 Md. 406, 184 A.2d 715 (1962). In Delaware, in a situation similar to the one in New York, the federal district court entered a decree declaring the Delaware constitutional amendment on apportionment to be unconstitutional. It then gave the general assembly a specified period of time to devise a valid plan. The Supreme Court of Delaware advised the Governor that, notwithstanding the district court decision, he should proclaim a redistricting plan in compliance with the amendment. It would seem that the only basis for asserting that the Governor was not bound by the district court order was that the decision involved a novel federal question which was being appealed to the Supreme Court. The district court enjoined the action of the Governor, but on appeal Mr. Justice Brennan stayed the injunction pending the outcome of the substantive issues in the Supreme Court. Roman v. Sincock, 377 U.S. 695, 701-03 (1964). See also Kruidenier v. McCulloch, 136 N.W.2d 546 (Iowa 1965) (federal questions finally determined are binding on state courts).
77. Mr. Justice Harlan, in denying a stay of the district court’s injunction, commented that the state court’s injunction could have been prevented had the Supreme Court explained its reasons for denying a stay of the district
Furthermore, absence of an affirmance by the Supreme Court was irrelevant if the state court did not have jurisdiction to make a final determination. Although the respective jurisdiction of state and federal courts in reapportionment is ambiguous, it is clear that initially there is concurrent jurisdiction. The relevant question, however, is whether the federal courts, in assuming jurisdiction to implement a Supreme Court reapportionment decision, do so to the exclusion of the state courts. Generally, in litigation involving both state and federal questions, in personam jurisdiction remains concurrent until a final decision is reached by one of the courts. Reapportionment may be an exception to this rule. In Oklahoma, the federal district court, having first acquired jurisdiction, enjoined the state court when it assumed jurisdiction on issues which would have affected the final outcome. The federal court maintained that the court which first acquires jurisdiction should proceed to a final determination of the issues involved. Because of the limited time and the necessity to settle on a particular reapportionment plan, circumstances might prohibit

court's May 24 order, Travia v. Lomenzo, 386 Sup. Ct. 7, 9 (1965). In the Delaware situation the state court action preceded the Supreme Court action on the stay.

78. Compare Scantoon v. Drew, 379 U.S. 40 (1964), where a district court order was vacated upon a decision by the state court even though the jurisdiction of the federal court had been invoked first, with Moss v. Burkhart, 230 F. Supp. 149 (W.D. Okla. 1963), aff'd sub nom. Williams v. Moss, 378 U.S. 558 (1964), where the district court successfully enjoined the state court from deciding reapportionment issues similar to those before the district court. See also Kruidenier v. McCulloch, 136 N.W.2d 546 (Iowa 1966). The majority in Glinski assumed the jurisdiction was concurrent. Glinski v. Lomenzo, 16 N.Y.2d 27, 209 N.E.2d 277, 261 N.Y.S.2d 281 (1966). But the dissenting judges expressed doubts as to the extent of their jurisdiction. Id. at 31, 209 N.E.2d at 279, 261 N.Y.S.2d at 284.

79. Mr. Justice Harlan, in refusing to stay the district court's injunction stated that "whether the federal court will . . . defer to the state court depends not on the Supremacy Clause, but on the exercise of discretion by the federal court pursuant to considerations of comity inherent in federalism." Travia v. Lomenzo, 386 Sup. Ct. 7, 9 (1965). This statement seems to indicate that the jurisdiction of the federal court is exclusive unless it chooses to defer to the state court.


state court action on a state question because the action could jeopardize the holding of any election.\textsuperscript{82} If this is the law, the New York courts, while perhaps having jurisdiction to decide state questions, would not have had jurisdiction to make a final determination. Their role would have been limited to advising the federal courts on state law.

It is unclear whether the solution suggested by the concurring opinion,\textsuperscript{83} an election at large, would comply with the New York Constitution.\textsuperscript{84} However, sanction thereof by the majority of the court of appeals would have made it difficult for the district court to ignore this solution. If an election at large does not violate “one man, one vote,” and if the federal court’s only objection to it was lack of knowledge of its state constitutionality, the choice of this remedy over Plan A would have been solely a state question. However, the question of the state court’s jurisdiction would have remained.

V. PROPOSALS TO FACILITATE STATE-FEDERAL COOPERATION IN REAPPORTIONMENT

Under the circumstances of the New York situation, the district court decision to order an election under a federally acceptable plan which violated the state constitution seems justifiable. However, the method which has been chosen by the federal courts to achieve reapportionment is objectionable. In essence, the method is to permit the states to reapportion with the federal courts maintaining a check on the remedies. The form of the check is a federal court decision at the end of the stipulated time period, based on equitable considerations. However, the absence of explicit federal standards places a burden on the states in propping up remedies. The state can not afford to leave reapportionment entirely to the federal courts since there is no guarantee they will implement state constitutional requirements.\textsuperscript{85} The combination of necessary state action and no federal standards often leads to state-federal conflict rather than cooperation.

\textsuperscript{82} Although there is no reapportionment case directly in point, it would seem that there are some limits to the federal court power. In Anderson v. Kentucky, 288 F.2d 383 (6th Cir. 1961), it was held that federal courts do not have jurisdiction to restrain judges of state courts from performing a discretionary duty which does not violate federal constitutional rights.


\textsuperscript{84} See, e.g., N.Y. CONST. art. III, §§ 3, 5.

The failure of the federal courts to set guidelines is particularly detrimental when the state legislature arrives at a solution which is likely to be invalid under the state constitution. Since the state courts may be unwilling to reapportion, they turn to weighted voting or an election at large as temporary remedies. To avoid the use of these alternatives, federal courts have resorted to the invalid legislative plan if they found that state interests would not be seriously infringed.

One alternative to the method used in New York would facilitate state-federal cooperation—a holding that weighted voting and election at large are not federally acceptable. There have been indications that such is the case. In January the district court held fractional voting unconstitutional as a permanent solution. On May 24, the court considered weighted voting as a temporary solution and stated that it did not fully satisfy the federal constitution. There has been less intimation that elections at large are federally objectionable, but the argument can be made. The


87. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 924 (S.D.N.Y. 1966). Actually all four plans were temporary measures. No permanent solution could have been achieved until the 1968 elections. Delegates for a constitutional convention are to be elected in 1966. The legislature and the people will vote on any proposed amendment in 1967, and it will be put into effect in 1968.


89. Two federal district courts have held multiple districts requiring a number of representatives to be elected at large to violate the federal constitution. Drew v. Scranton, 229 F. Supp. 310 (M.D. Pa. 1964); Dorsey v. Fortson, 228 F. Supp. 259 (N.D. Ga. 1964). However in Fortson v. Dorsey, 379 U.S. 433 (1965), the Supreme Court rejected the contention that multiple districts were per se violations of the federal constitution. But the Court left open the question of constitutionality of multiple districts when actual mini-
Supreme Court has indicated that "one man, one vote" as applied to state legislatures means each voter should belong to a district which is substantially equal in population to all other districts.\(^9^0\) Since an election at large results in each legislator representing the whole, it may be inconsistent with the Supreme Court decision. The method ignores the need of voters to be represented as citizens of towns and counties as well as citizens of the state.\(^9^1\) An election at large would deny such representation to all voters except those in the more populous areas. Secondly, an election at large could easily deny minority interests a voice.\(^9^2\) It would not seem unreasonable to conclude that the right of a person to an equal vote in a legislative election is only satisfied if he has both an equal vote and an equal district — at least in those states with extreme variations in population density and a number of minority interests.

Holding elections at large and weighted voting to be unacceptable would delineate the boundaries within which state courts must operate. When the state legislature fails to reapportion, the


\(^9^1\) Counties and towns, as subdivisions of the state, depend on the legislature for authorization to do many acts. N.Y. Const. art. IX, §§ 1, 2. The inequality of an election at large is particularly acute when special legislation is prevalent.

\(^9^2\) This could be mitigated to some extent by allowing some form of cumulative voting. But such a technique would compound the confusion of an election at large, and might run afoul of the "one man, one vote" standard itself.


\(^9^3\) See also, 734 MINNESOTA LAW REVIEW [Vol. 50:714
state court would either have to do the redistricting itself or leave
the matter to the federal courts. The possibility of a direct con-
frontation between state and federal courts would be minimized.

A second alternative which would lessen the probability of
conflict would be for the federal court to apply the doctrine of
eQUITABLE abstention. After setting a time period, the court
would postpone the exercise of federal jurisdiction and remit the
issue to the state courts for a determination of both state and
federal questions. This would eliminate the confused and time-
consuming process of a dual trial of the issues. The state courts
would be encouraged to assume a role of active supervision be-
cause their role as enforcer of federal rights would take them out
of their co-equal status with the state legislature. An extension
of this method which might further facilitate achievement of a
plan satisfactory to both the state and federal courts would be a
joint effort between the two courts to devise a districting plan if
the legislature fails to produce a valid plan.

In abstaining, the federal courts would retain jurisdiction

93. See Friedelbaum, Baker v. Carr: The New Doctrine of Judicial Inter-
vention and Its Implications for American Federalism, 29 U. CHI. L. REV. 673
(1962); Kurland, Toward a Co-operative Judicial Federalism: The Federal

94. The federal courts have abstained in a few cases, see Scott v. Germano,
381 U.S. 407 (1965); Scranton v. Drew, 379 U.S. 40 (1964), but they have
left the initiative to intervene on the state courts. A more consistent policy of
remission to the state courts would encourage even the most reluctant state
court to assume responsibility.

95. Decisions of the New York Court of Appeals indicate that state courts
will do little more than determine whether the legislature has properly com-
plied with state constitutional provisions. See In re Fay, 291 N.Y. 198, 52
N.E.2d 97 (1943); In re Dowling, 219 N.Y. 44, 113 N.E. 546 (1916); In re
Sherill, 188 N.Y. 185, 81 N.E. 124 (1907). The state court as a co-equal branch
with the state legislature does not believe it has the power to become involved
in reapportionment since the constitution gave this duty exclusively to the
Sweeney v. Nolte, 183 A.2d 296 (R.I. 1962), in which the court doubted its
authority as a co-equal with the legislature to supervise reapportionment
because supervision could be "in the nature of a mandamus by duress." Id. at
303. This attitude places the fate of the state constitution in the hands of a
reluctant legislature. If the legislature fails to act and the state courts also
refuse to act, the likelihood that state constitutional provisions will not be
effectuated is great.

96. People ex rel. Scott v. Kerner, 33 Ill. 2d 460, 211 N.E.2d 736 (1965)
(federal district court joined in action to devise congressional districts); People
ex rel. Engle v. Kerner, 33 Ill. 2d 11, 211 N.E.2d 185 (1965) (federal court
joined in action to devise state senate districts).
pending the outcome of the state court decision. The federal courts would thus retain a supervisory position while being relieved of much of the direct involvement in state affairs. Equitable abstention would be particularly advantageous if weighted voting and election at large were eliminated as alternatives. The solution would be state derived and there could be considerable confidence that the districting plan would satisfy both state and federal constitutions.

There may be situations, however, in which abstention on federal issues would not be desirable. If it is necessary that the federal courts decide the federal issues, they should assume exclusive jurisdiction. The uncertainty of concurrent jurisdiction might jeopardize effective pre-election procedures in addition to jeopardizing the election. Assuming the federal court obtains jurisdiction first, necessity is a sufficient basis for exclusive jurisdiction.


98. If there had already been substantial delay, or if there were important issues of fact which the federal court thought were essential to the federal question, or if it were unlikely that the state court would be able to deal with the reapportionment issue, the federal courts might not want to abstain. See ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 67–80 (Tentative Draft No. 3, April 1965).