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STATE COURTS AND DEMOCRACY: THE ROLE OF STATE COURTS IN THE BATTLE FOR INCLUSIVE PARTICIPATION IN THE ELECTORAL PROCESS

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As recently as 1962, the United States Supreme Court declined to rule on challenges to legislative apportionment schemes that created grossly disproportionate electoral districts. When, in the seminal decision Baker v. Carr, *the Supreme Court held such challenges to be justiciable, the federal courts in this country took on a new and important role. In this Brennan Lecture, Judge Smith explores the context in which this reapportionment "revolution" emerged and developed, in particular highlighting the symbiotic relationship between the reapportionment struggle and the struggle for African American civil rights.*

Smith turns his attention to the role state courts have played in these twin revolutions. He begins by noting that the federal reapportionment decisions had important state court antecedents. He then argues that contemporary judges—both state and federal—play two crucial roles in the struggle for inclusive participation in the electoral process. First, judges are required to maintain constant vigilance to ensure that the level playing field promised by Justice Brennan in Baker v. Carr *becomes and remains a reality. Second, judges must ensure that the Federal Constitution, state constitutions, and the Voting Rights Act are enforced to prevent discrimination against African Americans and other minorities. As Judge Smith concludes, successful performance of each of these two functions is necessary to ensure that African Americans and other historically oppressed minorities become a meaningful part of American democracy.*

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It is an honor for me to participate in this celebration and recognition of the life of one of the giants of American law, Justice William Brennan, Jr. His life was an inspiration to those who believe that the rule of law is the foundation on which our society rests and that it is up to the men and women in law to maintain and strengthen that foundation.

For a few minutes I will discuss the role of state courts in the battle for inclusive participation in the electoral process.

I
THE FEDERAL LAW BACKDROP

In 1946, in *Colegrove v. Green*,[1] the Supreme Court of the United States decided a case in which three Illinois voters had sued various officials seeking to prevent congressional elections from taking place under the then current procedures. Their claim was that different congressional representatives represented vastly different numbers of people, thus violating a federal apportionment act enacted in 1911, and Article I and the Equal Protection and Immunities Clauses of the Fourteenth Amendment of the Constitution of the United States.[2] In rejecting their claim, Justice Felix Frankfurter, writing for a four to three majority, stated:

> We are of the opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.[3]
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> . . . Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.[4]

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1 328 U.S. 549 (1946).

2 See Act of August 8, 1911, ch. 5, 62 Stat. 13 (1911) (superseded by Act of June 18, 1929, ch. 28, § 22, 71 Stat. 21, 26 (1929)); U.S. Const. art. I, § 2, cl. 3; id. amend. XIV, § 1.

3 *Colegrove*, 328 U.S. at 552.

4 Id. at 556. In disposing of the plaintiffs' claim that the state procedures violated the 1911 federal apportionment act, Justice Frankfurter relied on a similar case from Mississippi decided in 1932. See id. at 550-51. In that case, *Wood v. Broom*, a three judge federal panel had declared unconstitutional a Mississippi statute providing for the election of congressional representatives on the grounds that it violated the 1911 federal apportionment act which required congressional districts to be contiguous, compact, and, as nearly as possible, equal in population. See Wood v. Broom, 287 U.S. 1, 5 (1932). The panel had also

Colegrove was decided on June 10, 1946. A week earlier, on June 3, 1946, in *Morgan v. Virginia*,[5] the same Supreme Court, by a vote of seven to one, invalidated a Virginia statute requiring the separation of the races insofar as it applied to interstate travelers, finding that the Virginia statute was a burden on interstate commerce.[6] Justice Hugo Black concurred in the holding due to the constraint of prior Supreme Court cases but protested that invalidating the legislation made the Court a super-legislature.[7]

Justice Black's view in *Morgan* was that the Court should not use the Commerce Clause to outlaw racial discrimination in interstate commerce. Justice Frankfurter's view in *Colegrove* was that courts should not become involved in the political matter of reapportionment. The two struggles of reapportionment of legislative bodies and equality of rights, including voting rights for African Americans, were joined in the 1960s.[8] Those years would see a veritable revolution in the electoral process in this country.[9] At the beginning of the decade, across the country, legislators in the same legislative bodies represented vastly different numbers of people. One legislator might represent several hundred people while another legislator in the same legislature might represent several thousand.

By the 1960s, the reapportionment fight had been raging in state legislatures for many years. Some courts had ruled that the judiciary

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enjoined any election under that Mississippi statute. See id. at 2. In reversing, the Court noted that the requirement that congressional districts be substantially equal in population had not been carried forward in the 1929 apportionment act that replaced the 1911 statute, and that there was nothing else to make such equality a requirement. See id. at 6-8.

5 328 U.S. 373 (1946).

6 See id. at 386 (determining that need for national uniformity in interstate travel regulations outweighed local police power).

7 See id. at 387 (Black, J., concurring) (lamenting that, for period of years, Supreme Court had held some state legislation unconstitutional as undue burden on interstate commerce and stating his belief that only Congress, rather than courts, could regulate commerce).

8 The reapportionment revolution was based upon the demand by the majority of Americans that their votes be equal to that of any other person. It was a struggle fought largely in the courts and in state legislatures. The civil rights revolution grew from demands by African Americans for full citizenship, including the right to vote. The civil rights revolution was fought not only through lawsuits and lobbying in the courts and legislatures, but also with demonstrations in the streets of America.

The votes of African Americans had historically largely been suppressed by a variety of means. Since the reapportionment struggle was designed to make one person's vote equal to that of any other person, and the civil rights struggle was designed to assure the vote of African Americans, it follows that, if ultimately successful, the two struggles would lead to a substantial increase in the number and significance of African American votes.

9 See Samuel Issacharoff, Supreme Court Destabilization of Single-Member Districts, 1995 U. Chi. Legal F. 205, 211 (discussing Supreme Court's introduction of "one person, one vote" principle and subsequent treatment of right to vote).

had jurisdiction to entertain apportionment cases when the state legislature had failed to reapportion as required by state constitutions.[10] However, those same courts refused to require reapportionment. For example, in 1943, the Oklahoma Constitution required that legislative districts be equal in population.[11] Although the Oklahoma Supreme Court determined that it had jurisdiction to entertain a legal challenge to the failure to reapportion, it refused to order the legislature to reapportion.[12] That decision, *Jones v. Freeman*,[13] noted that twenty-two states, including New York,[14] either had exercised the power to review legislative apportionment acts or had stated that they possessed that power.[15]

It was a 1962 decision authored by Justice Brennan that sparked a comprehensive change in judicial involvement in legislative reapportionment. In *Baker v. Carr*,[16] the Supreme Court held that federal courts could entertain claims by voters that they were being denied equal protection of the laws by state legislatures to reapportion legislative districts so that one person's vote equaled that of the next.[17] In 1964, the Supreme Court made two further momentous decisions. The first, *Wesberry v. Sanders*,[18] held that congressional districts must be substantially equal in population.[19] The second, *Reynolds v. Sims*,[20] held that state legislative districts also must be substantially equal in population.[21] On the same day that it decided *Reynolds*, the

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10 See, e.g., Jones v. Freeman, 146 P.2d 564 (Okla. 1943).

11 See Okla. Const. art. V, §§ 9-10 (repealed 1964) (requiring population equality in apportioning senatorial districts and in determining number of representatives per county, but number of representatives per county limited to seven).

12 See *Jones*, 146 P.2d at 571-73.

13 146 P.2d 564 (Okla. 1943).

14 See In re Sherill, 81 N.E. 124, 126-27 (N.Y. 1907) (discussing judicial power to review legislative apportionment acts).

15 See *Jones*, 146 P.2d at 570.

16 369 U.S. 186 (1962).

17 See id. at 237. In *Baker*, Tennessee voters alleged that a 1901 state statute had apportioned seats in both houses of the legislature and that the legislature and others denied them equal protection of the laws by failing to reapportion those legislative districts in accordance with population shifts after 1901. The votes of persons in one district were thus not equal to those of persons in another district.

18 376 U.S. 1 (1964).

19 See id. at 18.

20 377 U.S. 533 (1964).

21 See id. at 568; id. at 577:

> 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.

Supreme Court ruled in *WMCA, Inc. v. Lomenzo*[22] that New York State's apportionment scheme was in violation of the "one person, one vote" standard.[23]

For decades prior to the passage of the Voting Rights Act of 1965, African Americans in the South had fought to secure the right to vote. It did not matter that the Fifteenth Amendment to the Constitution supposedly had secured the right to vote without regard to race. Literacy tests, the poll tax, qualifications for registering, property qualifications, grandfather clauses, good character findings, white primaries, and other obstacles had resulted in the wholesale denial of the vote to African Americans in some parts of the South.[24] During hearings on the Voting Rights Act of 1965, the Attorney General of the United States estimated that in Mississippi less than 7% of African Americans of voting age were registered to vote, in Alabama less than 20%, and in Louisiana less than 35%.[25]

During the 1960s, a civil rights struggle, which included the struggle for the right to vote, raged in America. Legislatures had been lax in assuring that vote. Some relatively ineffective legislation to protect voting rights had been passed with the Civil Rights Acts of 1957[26] and 1960.[27] Further efforts to deal with discrimination in voting had been undertaken with the Civil Rights Act of 1964.[28] But with the passage

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22 377 U.S. 633 (1964).

23 See id. at 653.

24 See South Carolina v. Katzenbach, 383 U.S. 301, 310-15 (1966) (rejecting challenges by six southern states to portions of Voting Rights Act of 1965 that required federal examination of states' voting practices, tests, and devices and holding those portions valid as proper means of effecting Fifteenth Amendment); see also Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disenfranchisement from the KKK to the Grandfather Clause, 82 Colum. L. Rev. 835, 842-47 (1982) (reviewing late 1800s and early 1900s state-sponsored attempts to obstruct African American vote).

25 See *Katzenbach*, 383 U.S. at 313 (reporting statistics).

26 Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified as amended at 28 U.S.C. §§ 1343, 1861 (1994); 42 U.S.C. §§ 1971, 1975-1975e, 1995 (1994)) (prohibiting any person, whether acting under color of law or otherwise, from intimidating, threatening, or coercing another for the purpose of interfering with right to vote, and authorizing Attorney General to seek injunctions against such actions).

27 Pub. L. No. 86-449, 74 Stat. 86 (1960) (codified as amended at 18 U.S.C. §§ 837, 1074, 1509 (1994); 20 U.S.C. §§ 241, 640 (1994); 42 U.S.C. §§ 1971, 1974-1974e, 1975d (1994)) (authorizing states to be joined as parties to lawsuits brought by Attorney General, giving Attorney General access to voting records in local areas, and authorizing courts to register voters in areas where there was systematic discrimination). Both the 1957 and 1960 Acts proved ineffective. Lawsuits were onerous to prepare and required substantial time. In spite of tremendous efforts, the ultimate objective of registering African American voters lagged appreciably. See *Katzenbach*, 383 U.S. at 313-14.

28 Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 28 U.S.C. § 1447 (1994); 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1994 & Supp. III 1997)).

of the Voting Rights Act of 1965,[29] the United States Congress made a comprehensive effort to ensure to African Americans the right to vote.

Until *Baker*, Justice Frankfurter's statement in *Colegrove* epitomized the traditional view of the role of judges in the election of political officeholders—judges should not get involved. With the exception of the aforementioned legislation,[30] until the Voting Rights Act, the sole means by which African Americans could try to secure the vote was a case-by-case approach in the courts.

Since the reapportionment decisions of the 1960s and passage of the Voting Rights Act of 1965, the struggle for equality of the vote, both numerically and racially, has continued and, as a result, a revolution has occurred in the exercise of the vote in America. In many instances, the struggle has been in the federal courts, but a parallel effort has proceeded in the state courts. The role of both state and federal courts in this struggle for inclusive participation in the electoral process has been—and remains—crucial.

What, then, is the role of the courts today in the field of reapportionment and in the equality of the vote? Despite efforts to remain out of politics, have courts now entered the political thicket that Justice Frankfurter feared so much? Is the role of state courts different than the role of federal courts in the continuing battle for reapportionment?

Judges have assumed two essential roles in the fight for reapportionment and for the assurance of the vote to African Americans. Justice Brennan's opinion in *Baker* and the subsequent decisions in *Wesberry* and *Reynolds* represented a sea change in the traditional view of courts in the apportionment process. The Supreme Court was suddenly acknowledging that the field on which the political game was played was unfair and that it had to be made level for all who voted. Thus, one role of a court is to ensure that a level playing field exists. This is done by ensuring that the requirement of *Wesberry* and *Reynolds* that one person's vote equals another's is met: Representatives ought to have districts substantially equal in size.

The second role of a court is to uphold the Federal Constitution, the constitutions of many states, and the Voting Rights Act, which assure the right to vote to African Americans and other minorities. In this role, it is often necessary for a court to determine, when asked, the rules by which the game should be played. While the role of the

[29] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

[30] See supra notes 26-28 and accompanying text.

courts has changed, the effort emphasized by Justice Frankfurter to keep courts out of the political thicket continues. Clearly, it is not the role of the courts to determine who wins an election or what politics should govern. But it is the courts' role to see that the playing field is the same for all of those who play a part in determining the electoral winner. In the face of a long American history of opposition to African American enfranchisement, what rules will ensure that African Americans become a meaningful part of the American democracy, to the extent that their vote counts as much as that of any other person? How can it be determined which particular voting procedures have the effect of eliminating or diluting the vote of African Americans or other minorities?

To some extent, due to the general acceptance of the *Wesberry* and *Reynolds* decisions, the first role—ensuring the same playing field for all Americans—has become almost routine. It is the second role—adherence to the Federal and State Constitutions and laws that assure African Americans and others the right to vote—that, at times, proves difficult to accomplish. The formulation of the rules of the game has not been easy and is, at times, extremely controversial.

II
THE STRUGGLE IN THE STATE COURTS

A. State Courts and Reapportionment

The states bear the primary responsibility for reapportionment. Although the *Reynolds* Court upheld the lower court's judgment that neither the Alabama apportionment scheme then in effect, nor two proposed plans, passed constitutional muster, the Court also emphasized "that legislative reapportionment is primarily a matter for legislative consideration and determination."[31] The Supreme Court has reiterated this view on several occasions.[32] Federal courts intervene in

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31 Reynolds v. Sims, 377 U.S. 533, 586 (1964).

32 See Voinovich v. Quilter, 507 U.S. 146, 156 (1993) (reiterating that reapportionment is primarily matter for states); Connor v. Finch, 431 U.S. 407, 414-15 (1977) ("We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination,' . . . for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." (quoting *Reynolds*, 377 U.S. at 586)); Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 676 (1964):

> Since primary responsibility for legislative apportionment rests with the legislature itself, and since adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further af-

state legislative reapportionment actions only if federal law is alleged to be violated. As the Supreme Court stated in *Voinovich v. Quilter*,[33] "[f]ederal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place."[34] Moreover, federal courts must defer to the timely efforts of a state legislature or a state court to deal with the problem of reapportionment.[35]

The Supremacy Clause of the Constitution of the United States[36] requires judges of state courts to uphold the Constitution and federal laws such as the Voting Rights Act of 1965. Thus, one of the roles of state courts following *Reynolds* was to bring state law and state constitutional interpretation into line with federal requirements. In fact, the Court, on the same day it decided *Reynolds*, in *Maryland Committee for Fair Representation v. Tawes*,[37] reversed a Maryland Court of Appeals decision which had upheld an apportionment scheme that did not conform to the principles announced in *Reynolds*.[38]

Following the *Reynolds* decision, the highest courts in some states declared unconstitutional state constitutional and statutory provisions that were inconsistent with the Supreme Court's "one person, one vote" decision.[39] For example, the New Jersey Supreme Court declared unconstitutional provisions of the state constitution and gave

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firmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so.

33 507 U.S. 146.

34 Id. at 156.

35 See Growe v. Emison, 507 U.S. 25, 34 (1993) (emphasizing that federal courts must defer not only to state legislatures, but also to state courts).

36 Article VI of the Constitution reads in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

37 377 U.S. 656 (1964).

38 See id. at 663, 675 (rejecting argument that, similar to U.S. Senate, one of Maryland's legislative bodies could allocate representatives on basis of geography rather than population).

39 See, e.g., Wade v. Nolan, 414 P.2d 689, 701 (Alaska 1966) (finding apportionment provisions of Alaska Constitution violated Federal Constitution); Hughes v. Maryland Comm. for Fair Representation, 217 A.2d 273, 279 (Md. 1966) (holding Senate reapportionment bill which permitted nearly six to one ratio in "weight" of votes unconstitutional); Jackman v. Bodine, 205 A.2d 713, 724 (N.J. 1964) (holding legislative article of New Jersey Constitution invalid); Butcher v. Bloom, 203 A.2d 556, 567 (Pa. 1964) (holding state reapportionment act unconstitutional).

the state legislature the opportunity to call a constitutional convention to address the problem of reapportionment.[40] Even as it did so, the New Jersey court emphasized the historical reluctance of courts to become involved in a political controversy. The court stated:

> We think it clear that the judiciary should not itself devise a plan except as a last resort. The reasons, simply stated, are that the prescription of a plan of apportionment is laden with political controversy from which the judiciary cannot be too distant, and further, that if the judiciary should devise an interim plan, that plan will likely seem so attractive to some as to impede the search for common agreement.[41]

Thus, the role of the New Jersey Supreme Court became one of ensuring compliance with federal law and determining the playing field on which the political game could be played.

Because a new census is required at the turn of the century, state legislatures will again be called upon to redistrict their states. The role of state courts and of federal courts may determine the final makeup of legislative bodies. To the extent that the constitutional requirement of equal protection means representation of substantially equal numbers of people, it can be argued that the playing field has been largely determined. Any deviation by a state of under ten percent in its electoral districts will not normally engender equal protection problems.[42] Deviations are permissible for a variety of reasons including "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."[43] Moreover, where a state legislature seeks to maintain existing political boundaries, a deviation greater than ten percent has been permitted. In *Mahan v. Howell*,[44] the Supreme Court permitted a deviation of sixteen percent in the popu-

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40 See *Jackman*, 205 A.2d at 726 (striking Article IV, Sections 2 and 3 of New Jersey Constitution). Article IV, Section 2 provided for the election of one senator from each county for a four year period, while Article IV, Section 3 provided for up to 60 members apportioned among the several counties according to population, providing each county with at least one member. See N.J. Const. art. IV, §§ 2-3 (amended 1966).

41 *Jackman*, 205 A.2d at 724.

42 See Voinovich v. Quilter, 507 U.S. 146, 161 (1993) (noting that deviations of more than 10% could be justified by desire to maintain political boundaries); Brown v. Thomson, 462 U.S. 835, 842 (1983) (upholding reapportionment plan in which Niobrara County, Wyoming's least populous county, was permitted to have representative in Wyoming House of Representatives even though its population was smaller than average population of other Wyoming districts, reasoning that Wyoming had historical, consistent, nondiscriminatory effort to ensure representation from each county).

43 Karcher v. Daggett, 462 U.S. 725, 740 (1983).

44 410 U.S. 315 (1973).

lation of various House of Delegates districts in the State of Virginia.[45]

B. State Courts and State Constitutions

At the same time that state courts exercise their authority in requiring compliance with federal law, they must also ensure compliance with their own state's constitution. For example, shortly after the 1964 Supreme Court cases of *Wesberry* and *Reynolds*, the Wisconsin Supreme Court relied on both the Equal Protection Clause of the Federal Constitution and the equivalent provision of the Wisconsin Constitution to hold that the "one person, one vote" rule should be applied to county boards of supervisors in certain counties.[46] A state may also require a lesser deviation among the populations of its several electoral districts than does the federal government. However, Maryland's highest court, the Maryland Court of Appeals, has ruled that its Constitution does not require a different deviation than that required by the federal government.[47]

New York State's constitution, at the time of the *Reynolds* decision, provided that each county, no matter how small, should be represented by one member in the State Assembly.[48] It was clear that this provision did not comply with *Reynolds* because of the small population of some counties.[49] Shortly after the decisions in *Reynolds*

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[45] See id. at 328-29.

[46] See State ex rel. Sonneborn v. Sylvester, 132 N.W.2d 249 (Wisc. 1965). The Wisconsin Supreme Court relied in part on Article I, Section 1 of the Wisconsin Constitution: "Equality; inherent rights. Section 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Wisc. Const. art. I, § 1 (amended 1982 and 1986). In its opinion, the Wisconsin court stated that this provision "has been held to be substantially equivalent of the due-process and the equal-protection clauses of the 14th Amendment to the U.S. Constitution." *Sonneborn*, 132 N.W.2d at 252.

[47] Legislative Redistricting Cases, 629 A.2d 646, 659 (Md. 1993) (upholding governor's redistricting plan that permitted less than 10% deviation and rejecting arguments that Maryland Constitution sets a more stringent standard).

[48] N.Y. Const. art. III, § 5.

[49] In *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), the Supreme Court noted the population disparity in legislative districts for both houses of the New York State Legislature. According to 1960 census figures, assemblypersons representing 34.7% of New York State citizens would constitute a majority of the 150-person Assembly. See id. at 647. According to the same figures, the least populated Assembly district, Schuyler County, had a population of 14,974, while a Nassau County Assembly district had 314,721 persons. See id. at 650-51. The average population for an Assembly district in four of the five counties in New York City (Bronx, Brooklyn or Kings, Manhattan or New York, and Queens) was over 132,000; in Nassau County, 212,634; and in Suffolk County, 216,704. See id. The least populous senatorial district, consisting of Saratoga, Warren, and Essex Counties, had a total 1960 census population of 166,715 people. See id. at 649. The average population of

and *Lomenzo*, the New York State Court of Appeals struck down four reapportionment plans which had passed the New York State Legislature.[50] While recognizing that the constitutional provision of one assemblyperson per county could not continue to be enforced, the Court of Appeals held that each proposed plan violated the New York Constitution by providing for more than 150 persons in the Assembly,[51] 150 being the number which the New York State Constitution required.[52] Thus, the New York State Court of Appeals was called upon to adhere to the Federal Constitution and to so much of the State Constitution as did not violate federal law. The role of the state courts in these instances, like the role of the federal courts, is to ensure a level playing field for the participants in the electoral process.

C. State Courts and the Voting Rights Act of 1965

The Voting Rights Act of 1965 was designed to enforce the guarantee of the Fifteenth Amendment that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[53] First, the Voting

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the three senatorial districts from Nassau County was 425,267, while the average population of New York City's 20 senatorial districts was 360,193 and of the 15 upstate districts was 207,528. See id. at 649-50.

[50] See In re Orans, 206 N.E.2d 854 (N.Y. 1965).

[51] See id. at 857 (holding "150 assemblymen" provision of state constitution valid absent showing that it violated federal constitutional rights).

[52] See N.Y. Const. art. III, § 2.

[53] U.S. Const. amend. XV; see also H.R. Rep. No. 89-439 (1965), reprinted in 1965 U.S.C.C.A.N. 2437. The beginning of the House Report stated the purpose of the legislation:

> The bill, as amended, is designed primarily to enforce the 15th amendment to the Constitution of the United States and is also designed to enforce the 14th amendment and article I, section 4. To accomplish this objective the bill (1) suspends the use of literacy and other tests and devices in areas where there is reason to believe that such tests and devices have been and are being used to deny the right to vote on account of race or color; (2) authorizes the appointment of Federal examiners in such areas to register persons who are qualified under State law, except insofar as such law is suspended by this act, to vote in State, local, and Federal elections; (3) empowers the Federal courts, in any action instituted by the Attorney General, to enforce the guarantees of the 15th amendment, to authorize the appointment of Federal examiners, pending final determination of the suit or after a final judgment in which the court finds that violations of the 15th amendment have occurred; (4) provides criminal penalties for intimidating, threatening, or coercing any person for voting or attempting to vote, or for urging or aiding any person to vote or to attempt to vote. In addition, civil and criminal remedies are provided for the enforcement of the act.
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> Upon the basis of findings that poll taxes as a prerequisite to voting violate the 14th and 15th amendments to the Constitution, the bill abolishes the poll tax in any State or subdivision where it still exists.

Id. at 1, reprinted in 1965 U.S.C.C.A.N. 2437, 2437.

Rights Act provided for "a general prohibition of discriminatory practices nationwide."[54] Thus, Section 2 of the Act prevented a state or its subdivisions from imposing any practice or procedure which denied a person the right to vote on account of race or color.[55] Second, in specified areas, particularly in the South, the Act provided for a number of remedies, including the suspension of certain tests used to prevent the registration of African Americans, the use of federal examiners where necessary to protect the right to vote, and a requirement that certain "covered" jurisdictions preclear—that is, submit for approval—any change in election laws to the Attorney General of the United States or to the United States District Court for the District of Columbia.[56] In 1965, these "covered" jurisdictions included Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, twenty-six counties in North Carolina, three counties in Arizona, one county in Hawaii, and one county in Idaho.[57]

The results of the Voting Rights Act of 1965 were dramatic. Between 1965 and 1972 over one million African Americans were newly registered to vote.[58] Yet it was clear that problems remained. Efforts were made in many areas to dilute the vote of African Americans by concentrating them in one or two districts or by placing them in multimember districts—that is, districts which could elect more than one representative—such that the African American vote was being swallowed. A 1982 Senate Report detailed some of the problems:

> Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act.[59]

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[54] S. Rep. No. 97-417, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 183.

[55] Section 2 of the Voting Rights Act of 1965 reads: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973f(2) (1994).

[56] See id. at § 1973c (providing for remedies including appointment of federal examiners, suspension of voting tests and devices, and preclearance by Attorney General).

[57] See Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897, 14,505 (1965).

[58] See S. Rep. No. 97-417, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 183.

[59] Id., reprinted in 1982 U.S.C.C.A.N. 177, 183.

When Section 2 of the Voting Rights Act was passed, preventing any practice or procedure that denied the right to vote, it was thought that a violation of the section could be proven by a law's effect, that is, by whether or not a minority's choice of a candidate could be elected. This view, however, was rejected by the Supreme Court in *Mobile v. Bolden*.[60] In that case, the structure of the three-person City Commission which governed Mobile, Alabama, was challenged as violating both the Fifteenth Amendment to the Constitution and Section 2 of the Voting Rights Act of 1965. Since all three members of the Commission were elected at-large rather than from specific districts, the claim was that the votes of African Americans were diluted and that they were unable to elect a candidate of their choice. This effect, the plaintiffs argued, demonstrated that the law had been violated.[61] While a district court and the court of appeals agreed with the contentions, the Supreme Court of the United States reversed. The Court concluded that Section 2 was intended to have the same effect as that of the Fifteenth Amendment.[62] Citing *Gomillion v. Lightfoot*[63] and *Wright v. Rockefeller*,[64] the Supreme Court concluded that in order to show a violation of the Fifteenth Amendment or of Section 2 of the Voting Rights Act, plaintiffs must demonstrate "purposeful discrimination."[65] In other words, to prevail on a claim that the Fifteenth Amendment or Section 2 of the Voting Rights Act was being violated, a claimant had to show that there was a discriminatory intent on the part of the person or persons responsible for the practice.

Because of this narrow interpretation of the Voting Rights Act and because barriers such as multi-member districts continued to prevent an effective vote by African Americans and others, the need to amend the Voting Rights Act became apparent. In 1982, Section 2 was amended to substitute a "results test" for the intent requirement.[66] Specifically, Section 2 of the Voting Rights Act was amended to require that no voting qualification, prerequisite, standard, practice,

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60 446 U.S. 55 (1980).

61 See id. at 58.

62 See id. at 60, 61.

63 364 U.S. 339 (1960) (holding that African Americans stated valid claim when alleging that they were denied due process and equal protection by state law that excluded all but four or five African Americans from City of Tuskegee, Alabama, while excluding no white persons).

64 376 U.S. 52 (1964) (accepting finding of three-judge United States district court that plaintiffs had not shown that congressional districts in New York County, one of five counties within City of New York, were drawn based on racial considerations or were drawn along racial lines).

65 *Bolden*, 446 U.S. at 63, 66-67.

66 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973 (1994)).

or procedure could be imposed by a state or subdivision of a state which resulted in the denial of the right to vote on account of race or color.[67] Thus, plaintiffs no longer needed to show an intent to discriminate. Section 2(b) indicated that the denial of the right to vote would be established if, based on the totality of circumstances, the qualification, prerequisite, standard, practice, or procedure was deemed to have caused the members of a class, such as African Americans, to have less of an opportunity to elect candidates of their choice than did other members of the electorate.[68]

The Supreme Court, in an opinion written by Justice Brennan, confirmed in *Thornburg v. Gingles*[69] that a showing of intentional discrimination was no longer necessary.[70] *Thornburg* was a North Carolina case which involved claims by African Americans that their votes were being diluted in order to prevent them from electing candidates of their choice. The *Thornburg* decision and other decisions which reiterate its holding and reasoning are crucial to an understanding of the rules which must be applied by state and federal courts across the country in assuring that the votes of African Americans count as much as that of any other voters. Because of its discussion of what is needed to prove racial discrimination in the formation of multi-member districts, the decision may assume more importance as challenges are made to reapportionment statutes following the next census.[71]

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[67] See id.

[68] See id. Specifically, section 2 of the Voting Rights Act was amended to say:

> (a) . . . No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.

[69] 478 U.S. 30 (1986).

[70] See id. at 74; see also Voinovich v. Quilter, 507 U.S. 146, 155, 157-58 (1993) (applying *Gingles*, but holding that even under *Gingles*, appellees' claim for relief must be rejected).

[71] The Supreme Court noted with approval the district court's consideration of the totality of the circumstances including an analysis of several elections, racially polarized voting, historical discrimination in several areas such as voting, appeals to racial prejudice, and the use of multi-member districts. See *Thornburg*, 478 U.S. at 80.

The *Thornburg* decision dealt with the 1982 amendment to the Voting Rights Act. African American voters from North Carolina challenged a redistricting plan, and specifically, one single-member State Senate district and six multi-member Senate and Assembly districts, on the ground that they violated Section 2 of the Voting Rights Act.[72] In challenging multi-member districts in North Carolina, plaintiffs were echoing a contention, made by African Americans and others across the country,[73] that multi-member district elections dilute African American votes. In sustaining the challenge to the multi-member district elections and concluding that African Americans were not given a fair chance to elect candidates of their choice, the Supreme Court upheld the lower court's consideration of the totality of circumstances. The factors relied on for the conclusion that African Americans could not elect candidates of their choice included racially polarized voting; historical discrimination in a number of areas involving African Americans, including voting matters, education, housing, employment, and health services; and political campaign appeals to racial prejudice.[74]

Since the *Thornburg* decision, a number of voting rights cases have been decided by the highest state courts. The Maryland Court of Appeals relied on *Thornburg* to reject a challenge to the redistricting effort in that State.[75] Similar challenges have been rejected by the highest courts in Colorado,[76] Connecticut,[77] Kansas,[78] and Pennsylvania.[79]

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[72] See id. at 35.

[73] See, e.g., Katherine I. Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, 42 La. L. Rev. 851, 876-90 (1982); Pamela S. Karlan, Undoing the Right Thing: Single Member Offices and the Voting Rights Act, 77 Va. L. Rev. 1, 6-9 (1991).

[74] See *Thornburg,* 478 U.S. at 80.

[75] See Legislative Redistricting Cases, 629 A.2d 646, 661-62 (Md. 1993).

[76] See In re Reapportionment of the Colo. Gen. Assembly, 828 P.2d 185, 192 (Colo. 1992) (noting that one key lesson of *Thornburg* was that finding of vote dilution was one fact reviewable only if clearly erroneous, and upholding majority of reapportionment plan against challenge that it discriminated against minorities).

[77] See Fonfara v. Reapportionment Comm., 610 A.2d 153, 159 (Conn. 1992) (rejecting challenge that redistricting plan impermissibly sought to create minority districts while ignoring traditional integrity of town lines).

[78] See In re Stephan, 836 P.2d 574, 584 (Kan. 1992) (upholding legislative reapportionment, and concluding that plan did not improperly fracture or pack minority districts).

[79] See In re 1991 Pa. Legislative Reapportionment Comm., 609 A.2d 132, 142, 147 (Pa. 1992) (rejecting challenges to third reapportionment plan since 1968 amendment to state constitution created Legislative Reapportionment Commission, and denying alleged violations of the Fourteenth Amendment and the Voting Rights Act for lack of contiguity and lack of equal population between districts).

The racial gerrymander is another means of taking away an effective vote.[80] Racial gerrymanders have been challenged in a number of cases, both federal and state.[81] When the effect of multi-member districting or racial gerrymandering is to prevent the selection of a candidate of choice, it is up to the courts, state or federal, to recognize the effect and to deal with it in accordance with the Voting Rights Act.

D. Reapportionment and Judicial Elections

The effort to guarantee that African Americans have the same vote as any other person extends to judicial elections. While it is true that judicial elections are not subject to the "one person, one vote" rule,[82] the Voting Rights Act protects the right of African Americans and others to vote in judicial elections. In *Chisom v. Roemer*,[83] a Louisiana judicial election case, the 1982 amendment to Section 2 of the Voting Rights Act of 1965 was again at issue. The case involved the election of the seven judges of the Louisiana Supreme Court. Five of the seven judges were elected from five single-member districts. The other two were elected from one multi-member district. The multi-member district consisted of the parishes of Orleans, St. Bernard, Plaquemines, and Jefferson. The allegation of the petitioners, who repre-

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[80] The gerrymander may be used to dilute or eliminate the African American vote as described in *Gomillion v. Lightfoot*, 364 U.S. 339, (1960), in which the Court rejected an attempt to change the shape of the City of Tuskegee from a square to a "twenty-eight-sided shape." See id. at 341. It may also be used to try to ensure the reelection of incumbents. See generally Sally Dworak-Fisher, Drawing the Line on Incumbency Protection, 2 Mich. J. Race & L. 131, 148 (1996).

[81] African American plaintiffs successfully challenged a law which excluded all but a small number of them from the City of Tuskegee, Alabama, while excluding no white voters when the motion of the defendants to dismiss the action was denied in *Gomillion*. See *Gomillion*, 364 U.S. at 341, 348. White voters in North Carolina successfully challenged a district designed to create a second minority district in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Shaw v. Hunt*, 517 U.S. 899 (1995).

[82] See Wells v. Edwards, 409 U.S. 1095 (1973) (affirming, without opinion, decision of lower court). Justice White, joined by Justices Douglas and Marshall, dissented. In his dissent, Justice White noted that Louisiana elected five of its seven justices from five separate districts ranging in population from 369,485 to 682,072 persons. Two justices were elected from the sixth district. See id. at 1095 (White, J., dissenting). He noted further that, in *Gray v. Sanders*, 372 U.S. 368 (1963), the Supreme Court invalidated Georgia's county unit system which had been used in Democratic primary elections for United States Senator, governor, statehouse officers, justices of the supreme court, and judges of the court of appeals. See *Wells*, 409 U.S. at 1097 (White, J., dissenting). He concluded:

> What I had thought the apportionment decisions at least established is the simple constitutional principle that, subject to narrow exceptions, once a State chooses to select officials by popular vote, each qualified voter must be treated with an equal hand and not be subjected to irrational discrimination based on his residence.

Id. at 1097-98 (White, J., dissenting).

[83] 501 U.S. 380 (1991).

sented a class of approximately 135,000 African American voters in Orleans Parish, was that their voting strength was impermissibly diluted because, although African Americans were over one-half the voters in Orleans Parish, more than three-fourths of the voters in the other three parishes were white.[84]

The case did not involve the State or Federal Constitution—only the interpretation of Section 2 of the Voting Rights Act of 1965. The 1982 amendment to Section 2, as previously stated, prohibits any voting practice or procedure that results in discrimination.[85] Reversing the lower court, the Supreme Court held that Section 2 of the Voting Rights Act did apply to judicial elections and remanded the case for further proceedings.[86] On remand, the case was settled.[87]

III
TAKING STOCK

What can we conclude about the role of state courts and inclusive democracy? Certainly, state judges are required to follow both federal and state law. This means adherence to both the reapportionment cases like *Reynolds v. Sims* and to the Voting Rights Act. Any redistricting following a decennial census must adhere to those cases and law. At the same time, neither state nor federal courts can substitute their views for the state legislatures which bear the primary responsibility for reapportionment. Adhering to the tradition that courts stay out of the political thicket, the New Jersey Supreme Court refused to devise its own plan of reapportionment in 1964 after the Supreme Court's decision in *Reynolds v. Sims*.[88] The determination to stay out of the political thicket may also explain the refusal of the New York State Court of Appeals to uphold a challenge to the New York State Legislature's reapportionment act following the 1990 census, even though another plan might more closely have followed the

[84] See id. at 384, 385 (remanding case and holding that plaintiffs could state claim for alleged impermissible dilution of minority voting strength in judicial elections).

[85] See 42 U.S.C. § 1973 (1994); supra notes 66-68 and accompanying text.

[86] See *Chisom*, 501 U.S. at 404.

[87] On remand, the United States Court of Appeals for the Fifth Circuit granted a Joint Motion to Remand to the United States District Court for the Eastern District of Louisiana to Effectuate Settlement. See Chisom v. Edwards, 970 F.2d 1408 (5th Cir. 1992). Once a consent judgment was entered by the district court, the appeal before the Fifth Circuit was dismissed. See id.

[88] See Jackman v. Bodine, 205 A.2d 713 (N.J. 1964).

command of the New York State Constitution that county boundaries be respected as much as possible.[89]

The command of the Voting Rights Act—that an effects test be used to determine whether or not a given group such as African Americans is able to select a candidate of its choice—is not always easily applicable.

The court decisions on reapportionment and the Voting Rights Act of 1965 represent a view of democracy that is inclusive, a view of democracy that does not exclude on the basis of arbitrary distinctions such as race, and in which one person's vote counts as much as that of any other person—a view that has, in America, not always been accepted universally. Nevertheless, it was Congress which in 1872 passed legislation requiring that congressional districts be substantially equal in population. That requirement endured until its omission in the 1929 Reapportionment Act passed by Congress. Inclusive democracy represents the ideal for which all America can strive and which the Constitution guarantees. In this effort, the role of state judges and the role of all judges is to uphold the guarantees of the Constitution.

In 1901, an African American Congressman from North Carolina, George White, the last remaining African American in Congress at that time, made a parting speech to that body. Following his departure from the House of Representatives, no other African American would serve in that House for more than a quarter of a century.[90] George White decried the hostility to African Americans which existed throughout the country and emphasized the progress which African Americans had made since the end of slavery. He asserted that his exit represented only a "temporary farewell" of African Americans to the American Congress, and that phoenix-like they would rise and return.[91] In the new House of Representatives that took office in

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[89] See Wolpoff v. Cuomo, 600 N.E.2d 191, 195 (N.Y. 1992) (holding that "technical deficiencies" of redistricting plan resulted only in "minimized" violations, and that legislature acted in good faith when approving redistricting plan).

[90] See Congressional Quarterly, Inc., Congressional Quarterly's Guide to Congress 702 (4th ed. 1991).

[91] George White's farewell speech can be found at 34 Cong. Rec. 1634-38 (1901). White proclaimed:

> This, Mr. Chairman, is perhaps the negroes' temporary farewell to the American Congress; but let me say, Phoenix-like he will rise up someday and come again. These parting words are in behalf of an outraged, heart-broken, bruised, and bleeding, but God-fearing people, faithful, industrious, loyal people—rising people, full of potential force.
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> . . . .
>
> The only apology that I have to make for the earnestness with which I have spoken is that I am pleading for the life, the liberty, the future happiness,

January 1999, there are 39 African Americans, 19 Latino-Americans, and 5 Asian Americans.[92] In the Senate there are 2 Asian Americans and 1 Native American.[93] The reapportionment revolution and the Voting Rights Act have made possible this increase of minority membership in the Congress of the United States and in public offices across America.

We return to the philosophy of Justice Brennan, a giant legal thinker and scholar and a molder, through his decisions, of the ideal of inclusive democracy. He and many others are responsible for building the long road towards inclusive democracy that this country has traveled. That destination has not yet been reached. Inclusive democracy cannot mean, to paraphrase Justice William Douglas in his dissent in *Wright v. Rockefeller*,[94] that one district must be represented by an African American, another by a White, and still another by a member of a particular religious or ethnic group.[95] Inclusive democracy does mean that one individual's vote will count as much as the next person's and that no arbitrary barriers will be used to thwart that vote. Until the goal is achieved, state courts and federal courts, the guarantors of the rights given by the United States Constitution, must play a role in seeing that inclusive democracy becomes a reality.

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and manhood suffrage for one-eighth of the entire population of the United States.

Id. at 1638.

92 See Minorities in Congress, Cong. Q. Wkly., Jan. 9, 1999, at 62 tbl.

93 See id.

94 376 U.S. 52 (1964).

95 See id. at 66 (Douglas, J., dissenting).