Wyoming Law Journal

Volume 11 | Number 2 Article 19

December 2019

Possible Action to Force the Wyoming Legislature to Reappportion

Ross Merlin Beyer

Follow this and additional works at: https://scholarship.law.uwyo.edu/wlj

Recommended Citation
Ross M. Beyer, *Possible Action to Force the Wyoming Legislature to Reappportion*, 11 WYO. L.J. 136 (1957)
Available at: https://scholarship.law.uwyo.edu/wlj/vol11/iss2/19

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

state plus the extent of its activity therein are the tests used by the courts to determine whether it would offend the notion of fair play and substantial justice to subject the corporation to the jurisdiction therein.

The courts by using this criterion and looking at the activities realistically are able to extend their jurisdiction over corporations in a manner which would not have been permissible under the solicitation doctrine.

VERNON K. SESSIONS

POSSIBLE ACTION TO FORCE THE WYOMING LEGISLATURE TO REAPPORTION

The Wyoming legislature during the past 22 years has failed to pass any statute apportioning representation in the House and Senate of the state legislature among the various counties of the state according to county population or otherwise. This is directly contra to the command of the Wyoming Constitution which states:

> "The legislature shall provide by law for an enumeration of the inhabitants of the state in the year 1895, and every tenth year thereafter, and at the session next following such enumeration, and also at the session next following an enumeration made by the authority of the United States, shall revise and adjust apportionment for senators and representatives, on a basis of such enumeration according to ratios to be fixed by law."[1]

The present apportionment of the legislature in Wyoming is based upon a statute enacted in 1933. Using the federal census of 1930 as a basis, the 1933 Act provides that each county shall have one senator for every 11,000 inhabitants or major portion thereof,[2] and one representative for every 4,150 inhabitants or major portion thereof.[3] Each organized county is entitled to be represented by at least one senator and one representative regardless of the number of inhabitants in the county.[4] The statute then specifies the exact number of senators and representatives from each of the 23 counties.

If these same ratios, namely one senator for every 11,000 inhabitants and one representative for every 4,150 inhabitants, were used today in accordance with the 1950 census to apportion the legislature, Albany, Fremont and Natrona counties would each gain one senator; Laramie county would gain two senators, and none of the present counties in the state would lose any senators. Each of the following counties would gain the number of representatives following their enumeration: Albany (2), Carbon (1), Fremont (2), Laramie (5), Natrona (2), Park (2), Sheri-

1. Wyo. Const., Art. 3 § 48.
2. Wyo. Comp. Stat. § 17-102 (1945).
3. Wyo. Comp. Stat. § 17-103 (1945).
4. Wyo. Comp. Stat. § 17-105 (1945).

dan (1), Sweetwater (1), Washakie (1) and Weston (1). Campbell, Converse and Lincoln counties would each lose one representative.[5]

An examination of the legislative journals reveals that apportionment bills have been introduced in almost every session since 1941. The counties which would either lose representatives or lose representation in comparison proportionately with the other counties have apparently been able to muster enough votes to defeat all such bills.

This failure to reapportion in accordance with the state constitution is not peculiar to Wyoming.[6] In some states the question has led to bitter controversy, especially between rural and urban factions. A recent Hawaiian case[7] has held that the legislature's failure to reapportion during the preceding 55 years in accordance with a directive of the Hawaiian Organic Act of 1900[8] denied a voter, who became under-represented by reason of population shifts, of his rights to due process and equal protection of the laws granted by the Fifth[9] and Fourteenth[10] Amendments to the United States Constitution. The court held that the Federal Civil Rights Act[11] and its parallel jurisdictional provision[12] give a federal district court the power to grant equitable relief for the deprivation of these fundamental rights by ordering the legislature to reapportion or requiring an at-large election.

The theory of the Hawaiian court was that the Organic Act's directive to the legislature to reapportion "from time to time" indisputably required affirmative action within a span of 55 years, the last time they had apportioned being in 1900. This lapse of time, said the court, was sufficient to make the original apportionment act contrary in fact and law to the Organic Act. The legislature's failure to obey the fundamental law of Hawaii was equivalent to affirmative electoral legislation which operated to discriminate against a class of persons.[13] The ultimate effect of this failure was intentionally to discriminate against a class, in that a voter in one electoral district was being given a decided preference over a voter in another electoral district, although all were entitled to equal treatment. For example, in one district a vote had 6.8 times as

5. The World Almanac, pp. 298, 299 (1956).
6. Note, States That Have Not Met Their Constitutional Requirements, 17 Law and Contemporary Problems 377 (1952). The author makes the observation that, "State constitutional provisions with respect to legislative reapportionment are more honored in their breach than in their observance."
7. Dyer v. Kazuhisa Abe, 138 F.Supp. 220 (D. Hawaii 1956).
8. Act of April 30, 1900, c. 399, § 55, 31 Stat. 150, as amended 48 U.S.C. § 562 (1952 ed.).
9. "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."
10. "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
11. Act of April 20, 1871, c. 22, 17 Stat. 13, as amended 42 U.S.C. § 1983 (1952 ed.).
12. Act of June 25, 1948, c. 646, 62 Stat. 932, as amended 28 U.S.C. § 1343 (3) (1952 ed.).
13. Lane v. Wilson, 307 U.S. 268, 274, 59 S.Ct. 872, 83 L.Ed. 497 (1939).

much weight as in another. This was held to be a denial of the equal protection of the laws.[14]

The Hawaiian court pointed out that the denial of equal protection of the laws and due process can overlap,[15] and that discriminatory legislation may amount to a denial both of due process and of equal protection.[16] The reasoning here was that the Hawaiian legislature arbitrarily discriminated against persons having equal rights by failing to reapportion in accordance with population shifts, thus in effect the legislature pointedly favored one regional class of persons over another regional class. This, said the court, is a denial of due process.[17]

The biggest hurdle encountered by the Hawaiian court in reaching its decision was whether a federal district court had jurisdiction over this type of question, and if so, whether it should exercise its jurisdiction. The court resolved this question on the basis of *Colegrove v. Green*.[18] Three of the seven justices sitting in the *Colegrove* case held that jurisdiction did not exist or should not be exercised. Three justices felt that jurisdiction did exist and should be exercised. The deciding vote was cast by Mr. Justice Rutledge, who held that jurisdiction was present but should not be exercised as this was purely a political question.

Defendant's contention that a federal court should refrain from interfering with a matter construing purely local law was rejected on the ground that this action did not involve a mere interpretation of local law, but was a question of violation of due process and equal protection of the laws under the Federal Civil Rights Act, and in such a situation a federal district court may grant relief without prior pursuit of redress in a local forum.[19]

As to plaintiff's remedy, the holding was that a federal court may mandate an inferior legislative body to take proper action,[20] and in doing so may use an order "equivalent to mandamus" in aid of its original jurisdiction to accomplish the desired end. The judge felt that this is no more than is done in the typical civil rights case.[21]

The decision in this *Dyer* case appears to be clearly in the minority.[22]

14. Compare Turman v. Duckworth, 68 F.Supp. 744 (N.D.Ga. 1946), appeal dismissed; Cook v. Fortson, 320 U.S. 675, 67 S.Ct. 21, 91 L.Ed. 596 (1946), rehearing denied, 329 U.S. 829 (1946).
15. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).
16. Bolling v. Sharpe, supra note 15; Kiyoshi Hirabayaski v. U.S., 230 U.S. 81, 100, 63 S.Ct. 1376, 87 L.Ed. 1774 (1943).
17. Bolling v. Sharpe, supra note 15; Wallace v. Currin, 95 F.2d 856, 867 (4th Cir. 1938), affirmed, 306 U.S. 1 (1939); Southern Bell Tel. & Tel. Co. v. Town of Calhoun, 287 Fed. 381 (W.D.S.C. 1923); U.S. v. Yount, 267 Fed. 861, 863 (W.D.Pa. 1920).
18. 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).
19. Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 497 (1939); Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955).
20. Connett v. City of Jerseyville, 125 F.2d 121 (7th Cir. 1941).
21. E.g., Brown v. Board of Education of Topkea, Shawnee County, Kan., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); Id., 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).
22. Cases illustrating the majority rule are: Waid v. Pool, 255 Ala. 441, 51 So.2d 869 (1951); Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943); South v. Peters, 339

The majority view is that the legislature's duty to reapportion is exclusively a legislative duty,[23] and that the legislature is not responsible to the court for its failure to comply with the constitution, but to the people alone.[24] Thus the remedy for a citizen deprived of his rights would have to be by seeing that public servants were elected who are willing to comply with the constitution.[25] In *Fergus v. Marks*,[26] the Illinois Supreme Court expressly held that mandamus will not lie to compel the legislature to reapportion in conformance with state law. The use of mandamus to compel the legislative body or its officers to perform duties purely legislative in character and pertaining to legislative functions over which they have exclusive control would be a usurpation of power by the court.[27] The old apportionment act will remain in effect until a valid new apportionment is made under this view.[28]

Although it is a minority decision on the question of whether the legislature can be forced to reapportion, the Hawaiian court in *Dyer v. Kazuhisa Abe* correctly recites the general consensus of American courts that population shifts, whether large or small, causing a voter in one area to be under-represented, is a denial of due process and equal protection of the laws guaranteed by the Federal Constitution. Procedurally, however, the majority view expressed in *Fergus v. Marks*[29] illustrates the present status of the law in the United States to the effect that there is no remedy in the hands of the court to compel the legislature to reapportion without directly usurping a power conferred solely upon state legislatures.

The Supreme Court of the United States has held either that the peculiarly political nature of cases of this type makes them inappropriate for judicial determination, or has explained refusal to grant relief as a matter of equitable discretion. Lower federal courts have generally felt bound to follow these Supreme Court pronouncements.[30]

Another question which arises in consideration of this problem is whether the present Wyoming apportionment act, passed in 1933 has become unconstitutional. The Minnesota Supreme Court in *Smith v. Holm*,[31] one of the leading cases on this question, took the view that a

---

U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834, rehearing denied 339 U.S. 959 (1950); Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946); Blackman v. Stone, 101 F.2d 500 (7th Cir. 1939); Fergus v. Marks, 321 Ill. 510, 152 N.E. 557, 46 A.L.R. 964 (1926); Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932).

23. Fergus v. Marks, supra note 22; Smiley v. Holm, supra note 22; Fergus v. Kinney, 333 Ill. 437, 164 N.E. 665 (1928), cert. denied, 279 U.S. 854 (1929); State ex rel. Gordon v. Becker, 329 Mo. 1053, 49 S.W.2d 146 (1932).
24. Fergus v. Marks, supra note 22.
25. Person v. Doughton, 186 N.C. 723, 120 S.E. 481 (1923).
26. 321 Ill. 510, 152 N.E. 557, 46 A.L.R. 964 (1926).
27. Ex Parte Echols, 39 Ala. 698, 88 Am.Dec. 749 (1866); Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 Pac. 1125, 81 A.L.R. 284, 15 L.R.A. 369 (1892).
28. Opinion of the Justices, 157 Mass. 595, 35 N.C. 111 (1893); Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610 (1946); Attorney General v. Springwells Tp., 143 Mich. 523, 104 N.W. 87 (1906).
29. 321 Ill. 510, 152 N.E. 557, 46 A.L.R. 964 (1926).
30. Note, Federal Court Takes Jurisdiction To Compel Reapportionment of Hawaiian Legislature, 56 Col. Law Rev. 949, 950 (1956).
31. 220 Minn. 486, 19 N.W.2d 914 (1945).

reapportionment act, valid when enacted, cannot be held unconstitutional by reason of subsequent changes in relative population of districts, resulting in inequality of representation, and that an old apportionment act continues in force until superseded by a valid new act. Even though changes have been so great as to make the inequalities exceedingly gross, the validity of an existing legislative apportionment is not affected.[32] A dictum in *Jones v. Freeman*[33] indicates that Oklahoma does not fully concur with the decision in the *Smith* case. The Oklahoma Supreme Court stated that, where justice requires it, the Supreme Court of Oklahoma may declare invalid apportionment acts enacted by the legislature which have become contrary to constitutional requirements, and may enforce this decree by proper writs running to election officials. The court then held that the Supreme Court was not compelled to declare all apportionment acts contrary to the Oklahoma Constitution invalid, where the resulting apportionment, which would be that originally set up in the Constitution, would be more inequitable than the apportionment act now in effect.

The Supreme Court of Wyoming considered several aspects of the reapportionment problem in *State ex rel Sullivan v. Schnitger*,[34] which was decided in 1908. On the relation of Sullivan and another, the State instituted an original proceeding in mandamus in the Supreme Court, to compel an election of members of the legislature under the apportionment contained in the constitution of Wyoming in disregard of reapportionment acts subsequently passed in 1893, 1901 and 1907, all of which were alleged to be invalid. The court sustained a demurrer to the petition and alternative writ, upon the ground that the relators had not shown themselves to be entitled to mandamus, and without ruling upon the validity of the past and existing reapportionment acts.

The difficulty in the *Schnitger* case arose out of the fact that several new counties had been formed out of portions of pre-existing counties, and senators and representatives had been elected from these new counties in addition to those elected by the inhabitants of the territory remaining in the old counties. Moreover, there were "holdover" senators who had been elected before the new counties had come into being. Whom would the holdovers represent in a legislative session then held? The relators contended that because of the organization of new counties the existing apportionment acts were invalid, and that the only solution was for the court to mandamus the Secretary of State to frame his notice of a forthcoming state election in terms of the apportionment set out in the constitution adopted in 1890. The number of legislators had been increased by statute passed subsequent to 1890.

The Supreme Court held that an election under the original con-

32. State ex rel. Warson v. Howell, 92 Wash. 540, 159 Pac. 177 (1916).
33. 193 Okla. 554, 146 P.2d 564 (1943).
34. 16 Wyo. 479, 95 Pac. 698 (1908).

stitutional apportionment would be illegal because it would (1) violate the constitutional provision for the existence of two classes of senators as nearly equal as may be, and (2) would result in the representation of the new counties by holdover senators not residents thereof nor elected therefrom. Thus, said the court, the relators had not shown a clear legal right to the writ, and the court should in its discretion deny it.

It will be noted that the court refused to consider the validity of the existing apportionment acts because relators could not show a valid apportionment to fall back to in the event that past and existing acts should be held invalid. It will also be noted that the line-up of parties was not such as would raise the issue of whether the legislature can be mandamused to perform a legislative duty.

The *Schnitger* case would appear to stand as a bar, in Wyoming, to an attack on the validity of the 1933 apportionment act. It is unlikely that any prior apportionment act would more fairly reflect the present population incidence, and under the *Schnitger* case the 1933 act could be attacked only if the attackers could show something else to fall back to. The court did not, however, consider the possibility of an "at-large" election. This would call for an election of members of the legislature on the basis of a state-wide ticket. Mr. Justice Frankfurter, in *Colgrove v. Green*[35] aptly points out the possible evils of such an election in that it would defeat the vital political principle which led Congress to require districting. This principle was to give the local subdivisions of people of each state a due influence in the choice of representatives, so as not to allow an aggregate minority of the people of a state to be overpowered by the combined action of the numerical majority. This problem was averted in the *Dyer* case by holding that the territory of Hawaii was an inferior administrative body of the Federal government and as such the court could properly order a redistricting. The prevailing view is that a court cannot re-map the districting within a state, and thus if a court desired to give affirmative relief by invalidating an apportionment act it would either have to mandamus the legislature or consider the "at-large" election problem.[36]

It is also unlikely that a Wyoming state court would entertain jurisdiction over a suit brought by a citizen of Wyoming on the same basis as plaintiff's action in the *Dyer* case. Plaintiff's cause of action in the *Dyer* case was conferred on him by the Federal Civil Rights Act. At the present writing, Wyoming has no statute comparable to the Civil Rights Act on which a state court could base its jurisdiction. If a Wyoming plaintiff relied instead upon the grounds usually selected by plaintiffs in state reapportionment cases, he would be met with the almost solid wall of adverse holdings which we have hereinabove discussed. These usual grounds are that the writ of mandamus is available to compel action by

35. 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).
36. Ibid.

an officer, tribunal or body charged by law with the duty of performing a certain act.

If, recognizing these obstacles, a Wyoming plaintiff filed suit in the federal district court and relied upon the Civil Rights theory, he would be met by the fact that the *Dyer* case stands alone in granting recovery upon that theory and in addition he would run up against the reluctance of federal courts to order state legislatures around, exemplified by such cases as *Colegrove v. Green.* The federal district court in the *Dyer* case assumed this burden with a lighter heart, because of the federal territorial status of Hawaii.

To summarize, the substantive law would be definitely favorable to a Wyoming plaintiff seeking a court order forcing reapportionment, whether he sued in state or federal court, but the procedural holdings are as definitely against him. The chances for success should be rated as minimal.

ROSS MERLIN BEYER