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Wyoming Legislative Reapprortionment in the Light of Baker v. Carr

Joseph E. Vlastos

WYOMING LEGISLATIVE REAPPORTIONMENT IN THE LIGHT (?) OF BAKER V. CARR

For over a century, the "political question" doctrine has presented a bar to any type of litigation involving a court's determination of what a constitutes a "Republican form of government." A doctrine of such longevity would naturally have a well defined and entrenched basis, which in this instance is well stated in Coleman v. Miller:

> In determining whether a question falls within that category (of political questions), the appropriateness under our system of government of attributing finality to action of political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.[1]

Recently, the Supreme Court of the United States seemed to ignore these criteria in the history making decision handed down in *Baker v. Carr*[2] dealing with reapportionment of the Tennessee legislature. "The political question doctrine, a tool for maintenance of government order, will not be applied as to promote only disorder."[3] So concluded the Supreme Court in a decision which will result in much litigation in the years to follow.

At the time of the writing of this note, only a few decisions, predominately federal, have been handed down subsequent to *Baker v. Carr* and bearing upon the Supreme Court's decision. With the aid of those decisions, it is the purpose of this note to examine the problem of apportionment in Wyoming in the light-if it is light-of *Baker v. Carr.* The first step is to analyze the case itself.

Baker et al. brought a civil action under 42 U.S.C. §§ 1983 and 1988[4] claiming that the 1901 Tennessee statute apportioning the State legislature, which was still in effect, had deprived them and other voters similarly situated of the equal protection of the rights accorded them by the Fourteenth Amendment of the United States Constitution, because the statute had resulted in the debasement of their votes. Plaintiffs requested a de-

1. Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 980, 83 L.Ed. 1385 (1939).
2. BAKER v. CARR, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d. 629 (1962). (Capital letters will be used to distinguish this decision from the subsequent federal court decision bearing the same title).
3. BAKER v. CARR, supra note 2 at 709.
4. § 1983: "Every person who, under color of any statute, . . . , of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
   § 1988: "The jurisdiction in civil and criminal matters conferred on the district courts, by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; . . . ."

claration that the Tennessee apportionment statute was an unconstitutional deprivation of equal protection of the laws; an injunction, and whatever other appropriate relief was necessary. A three-judge court in the Middle District of Tennessee dismissed the plaintiffs' complaint for lack of jurisdiction of the subject matter and a failure to state a justiciable cause of action.[5]

On direct appeal to the Supreme Court, three issues were presented: (1) jurisdiction of the subject matter, (2) the standing of the plaintiff-appellants to sue, and (3) nonjusticiability.

After enumerating the possible grounds of lack of jurisdiction,[6] the Court could find no justification for the district court's dismissal of the claim on the jurisdictional issue. In reaching its conclusion the Court held that the claim was within the "federal question" provisions of Art. III, § 2, of the Federal Constutition,[7] that the claim was not "so attenuated and unsubstantial as to be absolutely devoid of merit"[8] nor was it "frivolous"[9]; and that by precedent the Supreme Court has always realized that district courts have jurisdiction in this type of subject matter.[10]

The Court found that the appellants had standing to sue,[11] pointing out that they were asserting "a plain, direct, and adequate interest in maintaining the effectiveness of their votes," and not just a claim of the right possessed by every citizen "to require that the government be administered according to law."[12] However, the Court took great pains to point out that in disposing of the issue of standing "it would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief."[13]

The Court next defined justiciability[14] and then turned to the dis-

5. 179 F. Supp. 824 (1959).
6. ". . . the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute." BAKER v. CARR, supra note 2 at 700.
7. "The judicial Powers shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-. . . ."
8. Citing Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579, 202 S. Ct. 553, 557, 48 L.Ed. 795 (1904).
9. Citing Bell v. Hood, 327 U.S. 678, 683, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).
10. Citing Colegrove v. Green, 328 U.S. 547, 66 S.Ct. 1198, 90 L.Ed. 1932 (1946). (Court pointed out that at least four of the seven justices hearing the Colegrove case particularly emphasized that the courts had such jurisdiction.) MacDougall v. Green, 335 U.S. 281, 69 S.Ct. 1, 93 L.Ed. 3 (1948); South v. Peters, 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834 (1950); and others.
11. "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" BAKER v. CARR, supra note 2 at 703.
12. Citing Coleman v. Miller, supra note 1 at 438, and Fairchild v. Hughes, 258 U.S. 126, 129, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1921).
13. BAKER v. CARR, supra note 2 at 705.
14. ". . . , the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judically indentified and its breach judicially determined, and whether protection for the right asserted can be judically molded." BAKER v. CARR, supra note 2 at 700.

cussion of the problems posed by the political question doctrine and the "Guarantee Clause" of the Federal Constitution.[15]

The district court in holding that the appellants' claim was nonjusticiable based its decision on *Colegrove v. Green*[16] and subsequent per curiam cases. After reviewing Guarantee Clause cases and other political question cases, the Supreme Court concluded that "it is the relationship between the judiciary and the coordinate branches of the Federal Government,[17] and not the federal judiciary's relationship to the States, which gives rise to the 'political question'."[18] The Court explained the criteria identifying a "political question" in the followng language:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a political department; or a lack of judically discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudical discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments of one question.[19]

The Court failed to find any one of the above formulations in appellants' claim and concluded that no "political question" was involved.[20]

The Court pointed out that Baker based his claim not on the Guarantee Clause, but on the equal protection clause. As to the former, the opinion observed:

> . . . that the nonjusticiability of claims resting on the Guarantee Clause which arises from their embodiment of questions that were thought 'political,' can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guarantee Clause claims of the elements thought to define 'political questions,' and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization.[21]

Thus the Court decided: (1) that the district court possessed jurisdiction of the subject matter; (2) that the appellants had standing; and (3)

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15. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."
16. Colegrove v. Green, supra note 7.
17. Such is the controversy in Colegrove v. Green.
18. BAKER v. CARR, supra note 2 at 706.
19. Ibid., p. 710.
20. "The doctrine of which we treat is one of 'political questions,' not one of 'political cases." BAKER v. CARR, supra note 2 at 710.
21. BAKER v. CARR, supra note 2 at 716.

that the claim presented a justiciable controversy. It did not pass judgment upon the merits, which were not before the Court. Thus the judgment of the district court was reversed and the cause remanded "for further proceedings consistent with this opinion."[22]

The dissenting opinions of Justice Frankfurther and Justice Harlan maintained that any case dealing with reapportionment of a state legislature involved the Guarantee Clause in that a determintion of a violation of the equal protection clause also involved a determination of the political basis of the state's government. Justice Frankfurter eloquently maintained that in order for the judiciary to be a separate and functioning branch of the government, it must not involve itself in politics, which he believed was done and would continue to be done because of this decision.[23]

Justice Clark, concurring, and Justice Harlan, dissenting, both criticized the Court for providing no "guidelines" for the lower courts to follow. However, the few cases decided since *Baker v. Carr* do provide several guidelines.

The issue or test may turn on the "rationality of the apportionment"[24] statute of the state and its not being "utterly arbitrary and lacking in rationality." The latter guideline was laid down in the district court decision of *Baker v. Carr* subsequent to the Supreme Court's decision.[25] Several other courts have expressed the issue or test in the term "invidious discrimination."[26] "Invidiousness" denotes discrimination arising out of a state legislative classificaton diffusing political strength[27] or "a disparity without rationality."[28] Upon examining the cases, one finds that the various judicial expressions boil down to this: That the apportionment statutes of a particular state, whether based upon population, area, or the like, must possess a reasonable and rational system of apportionment; if so, it is not irrational and arbitrary and does not demonstrate invidious discrimination.

Several factors or guidelines to consider when applying the "rationality test" are:

(1) Is there any rational standard or policy of the state or any rational standard which supports or justifies the apportionment?[29]

(2) "Numerical inequality of voting strength does not necessarily

22. Ibid., p. 720.
23. Ibid., pp. 737 and 738.
24. Moss v. Burkhart, 207 F. Supp. 885 (W.D. Okla. 1962).
25. Baker v. Carr, 206 F. Supp. 341 (M.D. Tenn. 1962).
26. W.M.C.A., Inc., et al. v. Simon, 370 U.S. 190, 82 S.Ct. 1234, 8 L.Ed.2d. 430 (1962); Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga., Atlantic Div. 1962); Sweeney v. Notte, 183 A.2d. 296 (R.I. 1962).
27. Toombs v. Fortson, supra note 26.
28. Moss v. Burkhart, supra note 24.
29. Baker v. Carr, supra note 25; Toombs v. Fortson, supra note 26; and Maryland Committee For Fair Representation v. Tawes, 228 Md. 412, 180 A.2d. 656 (1962).

prove a case for the deprivation of voting rights,"[30] and "an apportionment formula need not be ideal if it is reasonably equitable."[31]

(3) Whether the present method of apportionment has a historical basis in our political institutions, either state or federal. Of great influence here is how long the legislature has been inactive on apportionment, and the change that time has brought not only to the shift of population but also in the living habits and social conditions and needs of the population.[32]

(4) Whether the electorate has any possible remedy such as initiative or referendum for the gross inequalities.[33]

(5) Compliance with the principle that an alleged violation of a constitutional right by a state must be clear before a federal court will disrupt a state's action.[34]

Assuming the court finds a state's legislative apportionment to be irrational and arbitrary and thus a case of invidious discrimination, the Supreme Court said a federal court should provide "appropriate relief" but at no time even suggested what would constitute appropriate relief.[35] Here again, the subsequent decisions have furnished some help where the Supreme Court did not.

In the subsequent decisions, the plantiffs have consistently sought both a declaratory judgment stating that the state's legislative apportionment works a deprivation of their vote, thus a violation of the equal protection clause, and in injunction against any further elections under such statutes. No court has granted an injunction. The various courts have granted the declaratory judgment to the extent of finding a violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution. However, only in one case has the court held such statute to be unconstitutional and void.[36] Even after declaring the statute unconstitutional and void, the court in *Moss v. Burkhart* followed the other courts in allowing the approaching election (Fall of 1962) to be conducted upon the "invalid" statute. Thus the various decisions all hold that the plaintiffs are entitled to relief, but all allow the legislatures in the respective states one more opportunity to reapportion themselves. If they should fail, or if the new reapportionment is not sufficient within the equal protection clause, then the courts which retained jurisdiction until deadlines set in 1963 will take whatever measures are necessary to constitute appropriate

30. Moss v. Burkhart, supra note 24 at 891.
31. Sweeney v. Notte, supra note 26 at 303.
32. Toombs v. Fortson, supra note 26.
33. Ibid.
34. Ibid.
35. BAKER v. CARR, supra note 2 at 720.
36. Moss v. Burkhart, supra note 24. (Other courts refused because: (1) to declare the present apportionment statute void would be to fall back upon an older and even more inequitable statute; and (2) preparations for the 1962 elections according to the apportionment statute now under attack have already been made.)

relief.[37] The reasoning in the decision of the courts to apply this "lever" effect is that "there should be a minimum of judicial intrusion by federal courts into the governmental affairs of the state consistent with an effective enforcement of the plaintiffs' rights to equal protection of the law under the Fourteenth Amendment."[38]

A variation of this "if you don't do it soon, we will" attitude employed by the federal courts, is the attitude taken by two state court decisions.[39] Both the Maryland and Rhode Island Supreme Courts concluded that the legislature should and has the duty to reapportion itself. The Rhode Island court frankly stated that the state judiciary would not itself work out a reapportionment. However, both courts, particularly the Rhode Island Court, did emphasize that if the legislature did not reapportion itself, a federal court would "probably" reapportion for them.

The Wyoming legislature has failed to pass a statute apportioning representation in Wyoming since the act of 1933.[40] However, the Wyoming Constitution provides:

> 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 the apportionment for senators and representatives, on a basis of such enumeration according to ratios to be fixed by law.[41]

Thus the legislature's failure to reapportion itself during the last 29 years is contrary to the Wyoming Constitution.

The Apportionment Act of 1933 using the federal census of 1930 as a basis provided that each county "shall have one senator for every 11,000 inhabitants, or major portion thereof"[42] and each county "shall have one representative for every 4,150 inhabitants, or major portion thereof;"[43] however, each county "shall be represented in the legislature by at least one senator and one representative regardless of the population of such county."[44]

Applying the above ratio and the 1960 census to the Wyoming Senate and House of Representatives, an apportionment in the legislature today would result as follows; Albany, Fremont, and Park Counties would gain

37. Baker v. Carr, supra note 25; Moss v. Burhart, supra note 24; Toombs v. Fortson, supra note 26. (In Baker v. Carr and Moss v. Burkhart the courts retained the cases on their dockets.)
38. Baker v. Carr, supra note 25 at 348.
39. Sweeney v. Notte, supra note 26; and Maryland Committee For Fair Representation v. Tawes, supra note 30.
40. "Possible Action to Force the Wyoming Legislature to Reapportion," 11 Wyo. L.J. 136, is a very revealing discussion of the problem of reapportionment in Wyoming before the present decision by the United States Supreme Court.
41. Wyo. Const., Art. 3, § 48.
42. Wyo. Stat. § 28-9 (1957).
43. Wyo. Stat. § 28-10 (1957).
44. Wyo. Stat. § 28-12 (1957); This is also found in Wyo. Const., Art. 3, § 3.

one additional senator, and Laramie and Natrona Counties would gain three senators each; in the House of Representatives, Campbell, Carbon, Hot Springs, Sheridan, Washakie, and Weston Counties would gain one seat, Park and Albany Counties would gain two seats, Fremont County three seats, and Natrona and Laramie Counties would gain six and nine seats respectively.[45]

As a result of the above apportionment, Wyoming would have 36 senators and 82 representatives as compared to the present 27 and 56.[46]

Taking into consideration the population shift, today Laramie and Natrona Counties have a combined population of 109,772, which is roughly 33⅓% of the state's entire population of 330,066.[47] At present, these two counties combined have 14.4% of the representation in the Senate and 21.4% of the representation in the House. On the other hand, Teton and Niobrara, Wyoming's least populous counties, have a combined population of 6,812, which is 2.7% of Wyoming's population, but these two counties now have 8% of the representation in the Senate and 4% in the House. Putting it in another way, in the two most populous counties in Wyoming 27,443 votes elect one senator and 8,147 votes elect one represenative, while in the two least populous counties 3,406 votes elect one senator and one representative. This is roughly making one vote in the least populous counties equivalent to nine votes in the former, for a senator, and three votes for a representative. A greater difference in voting power is evident when a comparison is made between Teton and Laramie Counties. Here the difference is ten to one in the Senate and three to one in the House.

Of course, comparing the largest to the smallest county in population gives the extreme; however, another method of demonstrating the unfairness of the present apportionment is to take the combined population of Laramie, Natrona, Fremont, Albany, and Sheridan Counties, aggregaing 176,219, which is 54% of Wyoming's population has 30% of the representation within the Senate and 39% within the House.

If we try to apply *Baker v. Carr* and the subsequent decisions to the situation existing in Wyoming, the first question presented is whether the legislative apportionment in Wyoming is arbitrary and irrational, i.e., an example of "invidious discrimination." In the determination of this question, use must be made of at least several guidelines mentioned earlier in this note.

First, can it be said that there is a rational standard or policy of Wyoming which supports or justifies the 1933 apportionment today? The securing of representation to each county as a minimum requirement of repre-

45. The World Almanac, p. 296 (1962).
46. Such is not contra to Wyo. Const., Art. 3, § 3, which provides, ". . . ; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of member of the senate. . . ."
47. The World Almanac, p. 296 (1962).

sentation is not in itself arbitrary or irrational; however, when the result is a denial of equal protection within the Fourteenth Amendment of the Federal Constitution, the apportionment is subject to an attack and possibly a judicial decision against such act.[48] Of course, there are numerous arguments based on Wyoming's economy and large area in favor of each county having at least minimum representation; however, it must be recognized that the Constitution of Wyoming provides for representation according to population in both houses of the legislature[49] and that a representative district may be composed of two or more counties when so required by "public convenience."[50] It must also be recognized and will be discussed below that should the Wyoming legislature be forced to reapportion, this would by no means compel the legislature to abandon the granting of representation to each county.[51] The court must decide whether the policy of one representative per county in each house is irrational to the degree of invidious discrimination when it limits numerical equality, which the Wyoming Constitution provides as the basis of representation and apportionment.

Second, may it be argued that the present apportionment is "reasonably equitable" and therefore does not result in a "deprivation of voting rights?" It has been held that a disparity of ten to one in the voting strength between electoral districts makes a prima facie case for invidious discrimination.[52] Also where 24% of the population elects 66% of the senate and 51% of the House.[53] The Wyoming figures as to representation, population, and voting strength have been noted earlier.

Third, has the present legislature a historical basis in our political institutions, either federal or state? The present legislature is basically the same method of representation as it was when Wyoming became a state. This fact in itself tends to negative "invidious discrimination." However, it has been 29 years since Wyoming reapportioned. There has been a population shift, the economy of Wyoming has expanded to include several new industries, and the living habits and social conditions and needs of the population have naturally been influenced and changed somewhat in the past three decades. Of course, Wyoming has not changed as rapidly or drastically as several of her sister states; however, all these

48. Sweeney v. Notte, supra note 26.

49. Wyo. Const., Art. 3, § 48.

50. Wyo. Const., Art. 3, § 49. (A contradiction appears immediately in regard to each county being entitled to one senator and one representative as stated in the 1933 apportionment act. The Wyoming Constitution, Art. 3, § 3, provides a senator and representative district may be composed of two or more counties. This conflict is settled upon reading the first sentence of Art. 3, § 49, which provides for a representative district of two or more counties when the "public convenience may require" it.)

51. Sweeney v. Notte, supra note 26.

52. Moss v. Burkhart, supra note 24.

53. Maryland Committee For Fair Representation v. Tawes, supra note 30. (One can not determine at this time whether Moss v. Burkhart and Maryland Committee for Fair Representation v. Tawes demonstrate the minimum or maximum degree of invidious discrimination.)

factors and the degree to which each exists must be taken into consideration by the court.

Fourth, do the people of Wyoming have any possible remedy for the inequities? We have no referendum or initiative procedures that are effective in this context. The Wyoming method of initiating Constitutional amendment is primarily in the hands of the legislature itself.[54] The unlikelihood of a Constitutional Convention is made ever more improbable because that too is in the hands of the legislature.[55] Practically speaking, the electorate's only remedy lies in its representatives; the very representatives who have refused to reapportion for 29 years!

Fifth, is the violation of the constitutional right (assuming the plaintiff claims a violation of the equal protection clause) sufficiently clear to enable a federal court to intervene? Of course, this is assuming that the controversy is presented to a federal court, although federal jurisdiction is not exclusive.

> The (United States) Supreme Court's remand subsequently of Scholle v. Hare[56] to the Michigan court suggests that the question is reviewable in the state courts as well. Indeed there is a strong implication that recourse to the state judiciary by an elector complaining that his vote has been so debased as to be the subject of invidious discrimination will, unless the state courts fail to respond, forestall federal intervention.[57]

The determination as to whether the present apportionment produces an invidious discrimination would depend upon the conclusions reached by a court on the basis of the above guidelines.

In the process of enumerating factors or guidelines, other circumstances peculiar to each state should not be overlooked. This would naturally include limitations imposed by the state's constitution itself, such as Art. 3, § 48.

In the light of the decisions subsequent to *Baker v. Carr,* an aggrieved voter would do well to seek the remedies sought in those cases, namely, a declaratory judgement and an injunction.[58] Wyoming has enacted the Uniform Declaratory Judgment Act,[59] which would allow such a procedure. The above remedies would be much more appropriate than mandamus, which in the light of *State ex rel. Sullivan v. Schnitger*[60] and the very recent decision of *State ex rel. Whitehead v. Gage,*[61] would involve

54. Wyo. Const., Art. 20, § 1.
55. Wyo. Const., Art. 20, § 3.
56. Scholle v. Hare, 369 U.S. 429, 82 S.Ct. 910, 8 L.Ed.2d 1 (1962).
57. Sweeney v. Notte, supra note 26 at 300.
58. Those which included a declaratory judgment: W.M.C.A., In., et al v. Simon, supra note 26; Baker v. Carr, supra note 25; Toombs v. Fortson, supra note 26; Sweeney v. Notte, supra 26; and Maryland Committee For Fair Representation v. Tawes, supra note 30. Those which included an injunction: all of the above plus, Moss v. Burkhart, supra note 24.
59. Wyo. Stat. §§ 1-1049 to 1064 (1957) and R.C.P. 57.
60. 16 Wyo. 479, 95 Pac. 698 (1908).
61. 377 P.2d 299, (Wyo. 1962).

not only the petitioner's right to such, but the jurisdiction of the court to coerce the appropriate officials and the type of duty reapportionment would impose upon such proper officials. Further there is the very significant aspect, that no court has yet outlined a judicial reapportionment or directly coerced reapportionment. Thus a petitioner must be careful not to demand too much or too drastic a remedy at this early stage in the development of remedies for malapportionment.

The next problem is the character and extent of the declaratory judgment to be requested from the court. Here again it is advisable to investigate not only the decisions subsequent to *Baker v. Carr,* but also the past decisions of the individual state.

An investigation of the subsequent decisions reveals that in only one case did the court hold the apportionment act in question unconstitutional.[62] In addition, the Wyoming court in *State ex rel. Sullivan v. Schnitger* refused to even consider the validity of the existing apportionment statute because there was no valid apportionment to fall back upon if the former was declared unconstitutional.[63] Considering the two circumstances above, the declaratory judgment sought should be limited to stating that the petitioner under the present apportionment act is deprived of the effect of his vote in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and Art. 3, §§ 4 and 48 of the Wyoming Constitution.[64]

In the decisions subsequent to *Baker v. Carr,* the litigants have sought various relief by injunction, based upon the different situations and circumstances in each state. However, the injunctions have not been granted for the simple reason that the courts did not wish or possess the jurisdiction to call a special session of the legislature,[65] or coerce the governor to call such,[66] or formulate a judicial apportionment.[67] The courts have chosen to use the threat of their judicial weapons as a "lever" and to indirectly secure from the legislatures a reapportionment. The federal courts have retained jurisdiction of the subject-matter until after the next session of the various legislatures. They have declared that if the legislature should fail to reapportion or the enacted reapportionment does not erase the "invidious discrimination," then the courts will grant appropriate judicial relief. The Supreme Court of Rhode Island which held that it could

62. Moss v. Burkhart, supra note 24.
63. State ex rel. Sullivan v. Schnitger, supra note 60. The same was noted in Baker v. Carr, supra note 25.
64. Art. 3, § 4: ". . . shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. . . ." Art. 3, § 48: "The legislature shall provide by law for an enumeration of the inhabitants of the state . . . every tenth year . . ., shall revise and adjust the apportionment for senators and representatives, on a basis of such enumeration according to rations to be fixed by law."
65. Sweeney v. Notte, supra note 26; and Maryland Committee For Fair Representation v. Tawes, supra note 30.
66. Id.
67. Baker v. Carr, supra note 25; Moss v. Burkhart, supra note 24; and Toombs v. Fortson, supra note 26.

not coerce reapportionment[68] threatened that if the legislature failed to reapportion, a federal court would grant the appropriate relief.

Since the courts at the writing of this note have chosen and found it desirable to allow the state legislatures another opportunity to reapportion, this writer believes that an attempt to persuade a Wyoming court to reach a different conclusion would be unsuccessful.

The Wyoming Supreme Court in the recent decision of *State ex rel. Whitehead v. Gage*[69] has suggested the necessity of legislative reapportionment. In so doing, the court has made it clear that it will "provide an alternative remedy, in order to secure to the people their constitutional rights, if there is continued failure on the part of the legislature to reach agreement."[70] Thus there is no doubt that Wyoming voters will find their remedy in the Wyoming courts and not in the federal courts.

While denying the relators' petition for the writ of mandamus, the "lever" effect of the court's decision was effective. As of the writing of this note, the Wyoming legislature has enacted and the governor has signed into law a new apportionment for the 1965 legislature. However, this writer is certain that the newly enacted legislative apportionment will be vigorously contested in the Wyoming courts as being an insufficient measure to alleviate invidious discrimination.

Baker v. Carr has held that apportionment may present a justiciable controversy, and intimated that if relief is necessary it may be granted. As of this writing, the courts have chosen to attempt reapportionment indirectly. What further relief a court will grant will only be known when the situation arises. The few state courts that have handed down decisions have followed the lead of the federal courts in the type of remedy offered. However, the granting of relief of any type depends upon the petitioner proving that the legislative apportionment in his state and under circumstances particular to his state is not only a violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution, but also an "invidious discrimination."

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68. Sweeney v. Notte, supra note 26.
69. State ex rel. Whitehead v. Gage, supra at note 61.
70. Ibid., at 301.