INDEX.

Subject Index.

INDEX—(Continued)

Table of Authorities.

Statutes and Constitutional Provisions.

Articles and Publications.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL.,
Appellants,

vs.

JOE C. CARR, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

COME NOW J. P. Harris, Peter Macdonald, John McCormally, and Ernest W. Johnson (Kansas Taxpayers and Qualified Voters) and respectfully move the Court for leave to file a brief in the above-entitled matter as amici curiae, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, and in support thereof allege and state as follows:

1. That the above-entitled case (the "Tennessee Case") was instituted by qualified voters and taxpayers in the State of Tennessee against state election and other officials under the Federal Civil Rights Act and the Federal Declaratory Judgment Act, to invalidate the existing state apportionment statute on grounds that it denies the equality in voting rights guaranteed by the Constitution of Tennessee and by the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

2. That as citizens of Kansas residing in Reno and Johnson counties, counties which are predominantly urban or metropolitan in population, the Kansas taxpayers are subject to many of the same forms of discrimination in representation and electoral influence as are complained of by the appellants in the Tennessee Case.

3. That the existing apportionment of the Kansas State Senate, duly enacted by the state legislature in 1947, and the existing apportionment of the Kansas State House of Representatives, duly enacted by the state legislature in 1961, did at the respective dates of their enactment and do now violate the provisions of the Kansas Constitution relative to equality of voting rights and of apportionment of districts, and were and are a denial of the Kansas Taxpayers' rights under the equal protection clause of the Fourteenth Amendment of the Federal Constitution, and under the Federal Civil Rights Act, and constitute an abridgment of their right to vote for members of the state legislature within the meaning and scope of Section 2 of the Fourteenth Amendment of the Federal Constitution.

4. That the Kansas Constitution, by providing that each county shall have one representative in the lower house of the legislature, regardless of population, and by further limiting the maximum number of seats in said lower house to such a number in comparison to the total number of counties as to make equal representation of citizens and control of the legislative lower house by a popular majority impossible, violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution and further violates Article IV, Section 4, of the Federal Constitution guaranteeing a republican form of government to each state in the union.

5. That as a result of the aforementioned provisions of the Kansas Constitution and the patently unequal apportionment statutes enacted by the state legislature, the Kansas legislature is manifestly unrepresentative of the state's population and becomes more so by legislative inaction due to the shift in population patterns and the passage of time.

6. That Kansas Taxpayers are in the process of preparing a case challenging the constitutionality of the Kansas apportionment statutes and relative provisions of the Kansas Constitution on the grounds above set forth, but that said action as yet has not been commenced.

7. That the state of voting rights and representation in Kansas involves many of the issues presented to this Court in the Tennessee Case, and the determination and ruling therein may affect the course and result of the efforts of Kansas Taxpayers and others to obtain judicial relief.

8. That Kansas Taxpayers fully support the position and arguments advanced by appellants in the Tennessee Case, and seek by a brief as amici curiae to present to this Court the factual situation and legal issues which will be presented to the Kansas court in the apportionment suit they propose to file, all to the end that the judgment of this Court in the Tennessee Case (a) will be based upon positions not prejudicial to Kansas Taxpayers if applied to similar issues existing in Kansas, (b) will not inferentially decide issues existing in Kansas and not before the Court in the Tennessee Case, and (c) will be decided upon issues of fact and law which will establish a ready basis for relief in securing equal representation and voting rights as guaranteed by the Kansas and Federal Constitutions.

9. That while both Tennessee and Kansas legislatures have failed to apportion either equitably or regularly as provided by constitutional mandate, and thus demonstrating a related interest in the subject matter, the Kansas Taxpayers believe that the facts and questions of law will not be adequately presented by the parties touching upon the reapportionment issues peculiar to the Kansas case, and in particular upon those provisions of the Kansas Constitution preventing equal representation in the state House of Representatives.

10. That the appellants have consented to the filing of a brief by the Kansas Taxpayers as amici curiae but that the appellees have refused consent.

11. That the brief which the Kansas Taxpayers request to file as amici curiae accompanies this motion.

Respectfully submitted,

H. R. Branine,
C. E. Chalfant,
W. Y. Chalfant,
Branine & Chalfant,
502 First Natl. Bank Bldg.,
Hutchinson, Kansas,

F. C. Littooy,
304 East 13th,
Hutchinson, Kansas,

Attorneys for Kansas Taxpayers,
By F. C. Littooy.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL.,
Appellants,

vs.

JOE C. CARR, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF OF FOUR KANSAS TAXPAYERS AND QUALIFIED VOTERS AS AMICI CURIAE

J. P. Harris, Peter Macdonald, John McCormally and Ernest W. Johnson (Kansas Taxpayers and Qualified Voters) file this brief contingent upon the Court's granting the Motion for Leave to File Brief as Amici Curiae in the above appeal from a judgment of the District Court of the United States for the Middle District of Tennessee entered on February 5, 1960, granting a motion to dismiss filed in said cause by appellees.

OPINIONS BELOW.

The opinion of Judge Miller of the District Court of the United States for the Middle District of Tennessee upon convening a three-judge District Court (R. 88) is reported at 175 F. Supp. 649. The opinion of the three-judge District Court (R. 214) is reported at 179 F. Supp. 824 (M.D. Tenn. 1959).

JURISDICTION.

The order of the three-judge District Court dismissing the complaint was entered on February 4, 1960, (R. 220-221). Notice of appeal to this Court was filed on March 29, 1960, (R. 310). Probable jurisdiction was noted on November 21, 1960, (R. 314). The jurisdiction of this Court to review the decision of the court below by direct appeal is conferred by 28 U.S.C. 1253 (62 Stat. 926).

INTEREST OF THE AMICI CURIAE.

The Kansas Taxpayers, who are qualified voters in the State of Kansas, are subjected to many of the same forms of discrimination relative to voting rights and equal representation in the Kansas legislature as are present in the Tennessee Case. Accordingly, the Kansas Taxpayers propose to institute an action in the state court system of Kansas, declaring invalid the existing apportionment acts for legislative districts as violative of state and Federal Constitutions and the Federal Civil Rights Act, declaring invalid those provisions of the Kansas Constitution which prevent equal representation and control by the popular majority in the state House of Representatives as violative of the Federal Constitution and enjoining and re-

straining the Secretary of State of Kansas and the county clerks of the several counties in Kansas from holding future elections to the Kansas legislature under the laws pertaining thereto. Reference is here made to the Motion for Leave to File Brief as Amici Curiae filed by Kansas Taxpayers for additional details with respect to their interest in the above-entitled case.

STATEMENT OF KANSAS CASE AND ARGUMENT.

I. The Kansas Constitutional Formula.

The Kansas Constitution provides that the legislature shall be comprised of a Senate and a House of Representatives, the former being authorized a maximum of 40 members and the latter being authorized a maximum of 125 members. While the Senate membership is proportioned to the total population alone, the House of Representatives is required to admit one member from each county in which at least 250 legal votes were cast at the next preceding general election. There have been 105 counties since 1886, leaving only 20 seats to be apportioned among the more heavily populated counties, and thus making it for practical purposes impossible for a popular majority to ever control the House.

The state Constitution in its Bill of Rights affirms that each citizen is possessed of equal and inalienable natural rights, and that all political power is inherent in the people, each free government being founded on their authority and instituted for their equal protection and benefit.[1] It is further provided therein that no special priv-

[1] **Constitution of Kansas, Bill of Rights, Sec. 1 and Sec. 2.**

ileges or immunities shall be granted by the legislature, which may not be altered, revoked and repealed by the same body.[2] Suffrage is extended to every citizen of the United States of the age of 21 years and upwards who has resided in Kansas six months next preceding any election, except those under disability, those convicted of a felony, and certain other limited categories.[3] Apportionment of the legislature is required at five-year intervals from and after 1866, based upon the state census of the preceding year.[4] This formula provides and guarantees equality of representation as nearly as is possible, although, as above mentioned, such equality does not and cannot extend to the House of Representatives due to constitutional provisions and restrictions.

II. The History of Apportionment in Kansas.

The history of apportionment in Kansas might better be referred to as the "history of malapportionment in Kansas," for an equally apportioned legislature has in truth never existed since the state's admission to the Union in 1861. While uttering the sounds of a democratic institution and of democratic theory, the legislature has in fact acted on the basis of special interests and special interest groups. Apportionment itself, during those rare occasions when it was noticed, has, in varying degrees at each stage of the state's growth, reflected the existing

---

[2] **Constitution of Kansas, Bill of Rights, Sec. 2.**

[3] **Ibid. Art. 5, Sec. 1 and Sec. 2.**

[4] **Ibid. Art. 10, Sec. 2.**

struggle between sectional interests, political parties, and the rural and urbanized population.

The Organic Act which created the Territory of Kansas in 1854 had provided a legislative assembly consisting of a 13-member Council and a 26-member House of Representatives, to be increased to a maximum of 39 in proportion to the increase of qualified voters. It further provided that an apportionment be made, based on the census of qualified voters of the several counties and districts, apportioning both branches of the assembly as nearly equal as practicable and giving to each section of the territory "representation in the ratio of its qualified voters as nearly as may be."[5] Notwithstanding this auspicious beginning as a fledgling republic, the cruel course of history did not fulfill the hopes for equality in representation. The early struggles that gave the name to "Bloody Kansas" are well known, and this struggle extended itself to the practical politics of writing a constitution and perpetuating the power of the winner. After three futile, fraud-filled attempts in which it seemed at first the forces of the South would prevail, the free-state sympathizers were at length successful in convening and dominating a constitutional convention in 1859; and in all candor it must be stated that their success was equally marked by all of the fraud and vicious politics of which they so vehemently accused their opponents.

The two political forces represented among the delegates to the Wyandotte Convention in 1859 were chosen from an electorate nearly evenly divided (54.6% Republican),

[5] Act of Congress, May 30, 1854, Sec. 22, 10 Stat. 284.

but the Republicans won 35, or 67%, of the 52 delegates. Those counties north of the Kaw river went Democratic by 319 votes and the Democrats won 16 of 25 delegates from those counties. The combined Republican majority for delegates from counties south of the Kaw, where the radical free-state Republicans were strongest, on the other hand, was a modest 1,538, but these counties had 26 Republican delegates of the 27 allowed.[6] It must appear to even the most casual observer that this result could only have been obtained by a "careful" apportionment of the variety which Kansans still enjoy.

The result was that the Wyandotte Convention was thoroughly partisan and systematically organized against any possible advantage to either Democrats or slavery. The committees in which partisan advantages were important were loaded decisively with Republicans; i. e., Elections, 5 to 2; Apportionment, 10 to 3; Amendment, 6 to 1; and Corporations and Banking, 10 to 3. Only routine committees were rather fairly balanced between the parties, and the Democrats held only 40 (29%) of the 140 committee posts.[7] With this well-oiled machine, the convention proceeded to adopt the singularly uninspired "Wyandotte Constitution," based largely upon the form of constitution then in use by the older Western states. Nothwithstanding its many shortcomings as a workable basis for a modern state government, however, the drafters did have the foresight to provide that each organized county be guaranteed one representative regardless of

[6] G. R. Gaeddert, The Birth of Kansas (Lawrence, 1940), p. 35.

[7] Ibid. p. 39

population, and to adopt a workable malapportionment of the first state legislature.

The Republican apportionment plan as finally adopted was a crude double gerrymander. Some probably Democratic counties were isolated and under-represented, while others were submerged in multi-county districts with a dominant Republican section, all in contravention of the Constitution which the Convention had just adopted providing at least one representative seat for each county. For example, Democratic Wyandotte and Johnson counties were subordinated to free-state Douglas county, and Jefferson and Jackson counties were attached to Shawnee, containing Topeka, the free-state stronghold.[8] This plan was purportedly based on votes cast. Dissent to this assertion came in the form of a formal resolution of protest by the Democrats in which they stated that the plan met "no known rule of representation," that "population has never been consulted," that its purpose was merely "to meet the necessities of a political party," and that it amounted to "a practical disfranchisement of the small counties unworthy of the convention."[9] The practical result of its adoption, of course, was to extinguish any hope of the election of Democratic United States Senators, then done by the state legislature. On the admission of Kansas to the Union on January 29, 1861, at the peak of the secession movement of the southeastern states, the power to apportion the state legislature had a decisive bearing on national politics because control of

---

[8] Kansas Constitutional Convention, Proceedings, p. 359; Constitution of Kansas, Art. 10, Sec. 3.

[9] Kansas Constitutional Convention, Proceedings, p. 518.

the legislature carried with it control of the selection of the U. S. Senators and control, eventually, over districting for Congressional seats.

The succeeding history of apportionment in Kansas is largely in the splendid tradition established at the constitutional convention, one malapportionment following another. The only major Senate reapportionments, that is to say, reapportionments in which any substantial changes were made in the boundary lines of districts, occurred in 1862, 1871, 1876, 1881, 1886, 1891, 1933, and 1947. Major House reapportionments occurred in 1862, 1871, 1876, 1881, 1886, 1891, 1897, 1909, and 1959. In both cases those taking place during the nineteenth century were largely for the purpose of providing representation for the newly created western counties and reflected to some extent the sectional rivalries which developed during the westward migration of the peoples. This having been accomplished, the mandate of the state Constitution requiring apportionment every five years was subsequently conveniently ignored, and it is significant to note that neither house has had more than two major apportionments in the twentieth century, and in both cases these involved a relatively small change in the overall apportionment pattern.

A brief glimpse of the result of earlier apportionments suffices to bear out the assertion that even relative equality of representation has never been enjoyed in Kansas since its admission to the Union. In 1881 the State House of Representatives seated 137 members, 12 of them from newly organized counties, and making a total of 12 more

than allowed by the Constitution. Thus illegally constituted, the House passed an apportionment bill which decisively shifted the balance of power in both houses toward the rural and sparsely populated western part of the state. Significantly, the 12 new counties represented contained only 4.6% of the 1880 population. All eastern counties that had two senators either lost the second one entirely or had to share him with another and smaller county. Based on 1880 population data, the new act "equitably" represented in the House 63.7% of the population in 42 of the 80 counties. By "equitable" is meant a population per district between 80 and 120 per cent of the average House district's population. Only 7.7% were over-represented, but 28.6% in 20 of the 80 counties were seriously under-represented.[10] Thus, though not really equitable, this was the last remotely equitable apportionment in the state's history. Those counties containing large cities commenced an accelerated growth in the next decade, while the remaining unsettled lands eligible to become counties were organized rapidly. Inasmuch as the real growth of the cities occurred after the vested offices of the small counties were firmly established, subsequent history has shown that to challenge the distribution is merely to invite frustration.

---

[10] Page, Legislative Apportionment in Kansas, p. 62.

III. The Present State of Apportionment and Its Effect on Voting Rights.

The most recent reapportionment of the Kansas Senate, and the second such reapportionment during the twentieth century, was passed by the 1947 legislature (G. S. 1949, 4-102). Although a state census is made annually, and was available for use as provided by the constitutional mandate, this seems to have been ignored completely, with the result that the existing act as passed was immediately in violation of the law. The state by the 1947 census had a total population of 1,835,011 people, which would have given an average of 45,875 persons per district to an equally apportioned Senate of 40 seats. The largest county and senate district at that time, Sedgwick, had a population of 203,478, or approximately four and one-half times the average. Wyandotte County with 167,198 persons was more than 3.6 times the average, and Shawnee, with 106,244, was 2.3 times the average size. The smallest senatorial district at that time, the Thirty-first District containing Jewell and Mitchell counties, contained only 20,268 persons, or substantially less than half the average size and only one-tenth the size of Sedgwick County. In all, 19 of the 40 seats were more than 20% less than the average population figure, and three seats were more than 20% in excess of the average. When passed, then, the 1947 act apportioned only 18 of the 40 seats on a more or less equitable basis, if a generous 20% variation either above or below the average is used as the basis for defining "equitable."

The passage of time has seen a steady growth of population in Kansas, and to a marked degree this has represented a rapid growth of urban population, particularly in the present four metropolitan counties. Lacking regular reapportionment as provided by the state Constitution, the result has been a silent gerrymander by inaction, and the discrimination originally written into the act has been allowed to become worse. The 1960 Federal census now gives Kansas a total population of 2,178,611 people, of whom 1,328,741, or 61%, are classified as urban, the term "urban" being defined to include places of 2,500 inhabitants or more, whether incorporated or unincorporated, and the densely settled urban fringes of cities. An average-sized district, using this census, would contain a population of 54,465 persons in each of the 40 districts. However, the changing population pattern in Kansas has been such that only ten of the 40 districts are now within the "equity" range of variation of not more than 20% above or below the average. Six districts are above average and 24 districts are below. The Twenty-seventh District, containing Sedgwick County, for example, had a 1960 population of 343,231 persons, or approximately 6.3 times the average, which should entitle the county to six Senate seats instead of its one. Wyandotte County with a 1960 population of 185,495 is approximately 3.4 times as large as the average, Shawnee County with a 1960 population of 141,286 is 2.6 times larger than average, and Johnson County with a 1960 population of 143,792 people is 2.64 times as large. Each of these counties remains a single district, whereas each would have multiple districts

if apportioned on the basis of population as provided by the state Constitution.

In sharp contrast to the under-representation of the four metropolitan counties and Senate districts in Kansas, is the gross over-representation of the rural districts. For example, of the 24 districts which are below the 20% equity range of variance from average, 12 are more than 50% below the average. The Thirty-first District containing Jewell and Mitchell counties remains the smallest district with a population of only 16,083, or less than one-third the size of the average. The vote of a resident of this district is worth approximately 21.3 times as much as a resident of the Twenty-seventh District (Sedgwick County), and his representation is accordingly an equal amount more influential on his behalf in state politics. In short, in a land of political equality, it would appear that a citizen of Jewell or Mitchell county is 21.3 times "more equal" than his fellow citizen in Sedgwick County in terms of influence in the Kansas Senate. It is interesting to note, also, that even the so-called "average" is not by any means representative, for only nine of the 40 districts equal or exceed the average. The harsh facts are that, based on the 1960 Federal census, 21 of the 40 Senate seats, being the majority necessary to constitute a quorum and to pass any bill or joint resolution, are controlled by 584,840 persons or .2684 of the 1960 population of 2,178,611. Twenty-seven Senate seats, being the two-thirds majority required for Senate approval of any Constitutional amendment or proposed Constitutional convention, are controlled by 842,238 persons or .3866 of the

1960 population. The four largest districts, being comprised of the four metropolitan counties of Johnson, Sedgwick, Shawnee and Wyandotte, have a combined 1960 population of 813,804 people, or .3735 of the total, and have only four votes. These four votes represent nearly the same number of people as do the 27 votes controlling the two-thirds majority of the Kansas Senate.

The Kansas House of Representatives presents a picture of gross discrimination in favor of rural areas which makes the upper chamber appear a model of equality by contrast. Far-sighted planning by the early fathers who guided the destinies of the Wyandotte Convention provided that every county would be assured one seat in the House regardless of population, if only it could muster 250 qualified voters, and at the same time limited the size of the House to 125 seats. With 105 counties, only 20 seats are left to be distributed among the metropolitan and urban counties where the larger proportion of the population is now located. The majority of the people of Kansas, therefore, can never control the House without either (a) a Constitutional revision or amendment which must first be approved by a two-thirds vote of both of the malapportioned houses before submission to the raw masses, or (b) an unforseen rush of the people from the cities back to the farms. If representative of anything at all, the lower house represents land and not people, and the Kansas Taxpayers therefore contend that the restrictive provisions of the state Constitution which guarantee this result are violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution,

and also of Article IV, Section 4, thereof, guaranteeing a republican form of government to each state.

The most recent major reapportionment of the House of Representatives was had in 1959, only fifty years after the last preceding. (G. S. 1959 Supp., 4-103) At that time the 20 extra seats were reshuffled among the more populous and deserving counties on the basis of one of those formulas only politicians can understand. From the dust of the battle 13 counties emerged with the prize, the four metropolitan counties of Johnson, Sedgwick, Shawnee and Wyandotte sharing a total of 11 of the extra seats, and the remainder one each. The relationship to population, however, is difficult to comprehend. Based upon the 1960 Federal census, if each of the 125 House seats were apportioned equitably on the sole basis of population, each would have an average of 18,155 people. On this standard alone and if apportioned equally, Sedgwick County would be entitled to 19 seats, Wyandotte to 10, and Johnson and Shawnee Counties to 8 each. Instead, Sedgwick has 5, Wyandotte 4, and Johnson and Shawnee have 3 each. If representation was on a more equalitarian basis proportioned upon the size of the smallest district, Wallace County with 2,068 people, Sedgwick County would merit 171 seats, Wyandotte 92 seats, Johnson 71 seats, and Shawnee 70 seats. As can be seen, the citizen of Wallace County has a vote which is approximately 35 times more influential than his city cousin residing in Sedgwick County. Such results as those above set forth can obviously not be obtained when only 20 seats are available for distribution; nevertheless, some relation to

numbers of people might be expected as between the fortunate districts sharing the bone. Instead, Barton County with a 1960 population of 32,368 had an average of only 16,184 people represented by its two House seats, while Sedgwick County with 343,231 people had an average of 68,646 persons for its five seats. The remaining multi-district counties showed like disparity in the average representation within the county.

In addition to a discriminatory distribution of the 20 extra seats among the 13 largest counties (all of which are indeed entitled to all the representation they have or more on an average population basis), the 1959 act also malapportioned the districts within each county. The Twenty-first District in Crawford County, for example, has a 1961 population of 11,354 as shown by the county assessor's figures, while the Twenty-second District in the same county has a 1961 population of 25,680, or more than twice the size of the Twenty-first. The Tenth District in Johnson County has an estimated 1961 population of 66,420, while the Eleventh District in the same county has 29,500, or less than one-half the size of the Tenth. The most flagrant of all is Reno County, a county which has enjoyed the control of two House seats since 1881, and the boundaries of whose two districts have remained virtually the same from then till now. When first created, one district had 6,125 people, and the other 6,701 people, or practical equality. But in the eighty years which have elapsed since then, the population has increased and shifted, largely due to the growth of the county's largest city, Hutchinson, so that today the Seventy-fourth

District contains 49,398 people and the Seventy-fifth only 9,718 people. The result is one of the prime examples of a rotten borough in the State of Kansas, and a dilution of the voting power of the urban citizen of the Seventy-fourth District to only one-fifth the value of the vote exercised by his rural neighbor in the Seventy-fifth. By this means the rural representative from the same county can cancel out the vote of the urban district if and when a rural-urban interest conflict might develop, and without causing so much as a ripple on the smooth waters of the constitutionally guaranteed rural dominance of the House.

A reapportionment act passed by the 1961 session of the legislature, and which could have corrected these inequities, did nothing but make minor alterations in the boundaries of the three Shawnee County districts (L. 1961, Ch. 7, Secs. 32, 33, 34). Rendered almost meaningless at best by these constitutional provisions, apportionment of the 20 extra seats in the House has thus nevertheless received its fair share of malapportionment by both intentional action and intentional inaction. Newspaper criticism of this undemocratic state of affairs recently drew forth the statement of one of the representatives, who also holds the position of Speaker of the House, that "most of the excitement over apportionment has been in the newspapers"![11]

Taken as a whole, the Kansas legislature as presently constituted presents a picture of gross mathematical under-representation of the four large Metropolitan counties, that is to say, those counties with an urban population of

[11] **The Hutchinson News (Hutchinson, Kansas), June 9, 1961.**

over 50,000 and containing over 70% urban population. Among the 25 Urban counties with an urban population between 10,000 and 49,999 and tending to contain less than 40% rural-farm population, there is serious under-representation; while the 8 Mixed counties, or those with an urban population between 5,000 and 9,999 and tending to contain over 30% rural-farm population are slightly over-represented. The remaining 68 Rural counties, those with an urban population under 5,000 and tending to contain less than 50% urban population, are, of course, grossly over-represented. A 1952 study of apportionment in Kansas made by the University of Kansas Bureau of Government Research indicated that only 9 of the 105 counties were at that time within the "equity" limits for their share of seats in both houses, while four counties enjoyed the ambivalent position of being under-represented in the House and over-represented in the Senate. Over-representation was predominantly rural, and in the House to a significant extent western in flavor.[12] This state of affairs has since grown worse, and in the House today, based upon the 1960 Federal census figures, 63 seats, being the majority necessary to enact legislation, are controlled by 402,687 people, or .1815 of the 1960 population, while 84 seats, being the two-thirds majority required for approval of constitutional amendments, are controlled by 745,959 people, or .342 of the 1960 population.

[12] **Page, Legislative Apportionment in Kansas, p. 88.**

IV. The Practical Effects of Inequality.

It has sometimes been said that if a popular basis lies behind the scheme of representation in American states, it lies behind it by as much as fifty years! The truth of the matter is that control of the political institution of apportionment has become the lever or device whereby to resist change in the composition of legislatures which would adjust them in accordance with the obvious change in the composition of the electorate. Changes in the political sentiments of the people are arrested, the vested rule of the status quo maintained, and a capitalized value is placed on inaction. The continued maintenance of this malapportionment in favor of the rural minority has also carried with it more tangible advantages. Principally, these are of two types: partisan political advantage and discriminatory tax benefits. From the political standpoint it has enabled full use of that renowned political tool, gerrymander, and, indeed, one has perpetuated the other from the days of the Wyandotte Convention to the present. What it has done on the state level is set forth above, but equal advantage has been obtained in the redistricting of Congressional seats.

Aside from the obvious partisan advantages of the prevailing political party, gerrymanders of the Kansas Congressional districts have also tended to be influenced by sectional rivalries and the rural-urban conflict of interest. Two of the practical unwritten rules governing such apportionment have been (a) keep the three largest population centers in separate Congressional districts, and (b) calculate the effect of the apportionment on the

incumbent so as to save the right one.[13] Nevertheless, some Democratic Congressmen have been elected from time to time, probably on individual appeal. In 1941, reduction of the Kansas delegation to six members necessitated a new redistricting. As stated by the February 9, 1941, "Topeka Daily Capital," U. S. Senator Capper's paper, there were "six good Republican Congressmen . . ., it would be a pity to lose any of them." So the lone Democrat, who was able to win in the Wichita district, was redistricted out of his seat by adding his normally Democratic and urban Fifth District to the strongly Republican and rural Fourth District.

Again, in 1961, faced with a further reduction of the delegation to five members, the Kansas legislature chose to add the southwest Kansas District of Democratic Congressman, J. Floyd Breeding, to the predominantly Republican northwest Kansas District, after detaching Breeding's strongest county and giving it to the Fourth District. (Kansas Session Laws, 1961, Ch. 8, Sec. 2) This resulted in a district of over one-half million people (and one-fourth of the people in Kansas), making it one of the largest in the country, all of which it is hoped, will put an end to Mr. Breeding's political career. The incumbent in the former Sixth District, which merged with the former southwest Kansas district, stated to the press with refreshing candor that "we should draw political lines, not just lines on a map."[14] The disparity of population between

[13] **Page, Legislative Apportionment in Kansas, p. 51.**

[14] **The Hutchinson News (Hutchinson, Kansas), March 29, 1961.**

the new First (western Kansas) District, with approximately 540,000 people, and the new Fifth District, with approximately 373,000 people, indicates that this divine revelation has been adhered to with religious fervor.

In view of the studied manner in which the malapportioned and unrepresentative state legislature has consistently malapportioned the Congressional district to serve the interests of both partisan and rural needs, there appears to be a question as to whether or not Section 2 of the Fourteenth Amendment to the Federal Constitution has not also been violated. This section provides that representatives shall be apportioned among the several states according to population, but that when the right to vote at any election for "President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged," the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state. Presumably, the limitation to males would now be eliminated by virtue of the Nineteenth Amendment. The Kansas Taxpayers submit that the present state of apportionment in both the Congressional districts in Kansas and the state legislature *is* such an abridgment of their right to vote in any election for representatives and for members of the legislature, and thus a violation of Section 2 of the Fourteenth Amendment to the

Federal Constitution. The remedy provided suggests another possible form of relief available for purposes of judicial enforcement.

The second major tangible result of rural over-representation is the control over the power to tax. One of the most serious and pressing of the problems of urban government is the growing inadequacy of the property tax base to support local services. Neither rural nor urban peoples desire to have heavier burdens placed upon their land, but the more elastic of tax sources are monopolized by the state government and there is a reluctance to share these sources with local governmental units. The fiscal problems of the cities compound themselves, and they are finally forced to turn to the state for assistance. It is at this point that rural area legislators are able to exploit their numerical advantage, for they can grant or deny relief in accordance with the solution from which they stand most to gain. They may curtail city expenditures to prevent urban areas from obtaining better treatment than rural areas in the several programs of grants-in-aid or shared taxes going to local governments; or they may enact special legislation to treat a problem, a practice which facilitates rural dominance in tax control. Although forbidden by the state Constitution, special legislation is regularly enacted in Kansas by merely imposing geographical and population limitations under which only one city in the state can qualify. If the legislature does offer a program of general fiscal aid, the rural majority is in a position to exact its own price in the form of a sharing

formula generous to themselves without a need equivalent to that of the cities.

One of the principal examples of the results of rural control over grants-in-aid, has been the efforts of their legislative majority to protect low property tax levies in rural areas and to prevent disorganization of the generally high-cost, low-standard, small rural school districts. Portions of the aid appropriation which subsidize these schools are paid out of the proceeds of beer and general retail sales taxes that bear most heavily on urban areas, and then are inefficiently applied to rural education. In some cases rural counties have systematically under-assessed their property, so that it is still possible to comply with a required minimum mill levy to qualify for state school aid.[15]

The retail sales tax itself is the model for the discrimination regularly practiced. First enacted in 1937 to finance the state's share of the cost of public assistance programs authorized by the Federal Social Security Act of 1935, it was contemplated that direct appropriations of fixed amounts would be made to the welfare program. The uncertainty of yield and the need for help by the counties in meeting welfare costs, prompted a decision to share the residue, after deduction of amounts appropriated, with the counties on an annual basis. Ignoring the question of need, the legislature adopted a formula of distribution for the residue whereby it went to the counties, fifty per cent on the basis of population and fifty per cent on the

[15] **Page, Legislative Apportionment in Kansas, p. 140.**

basis of "equalized tangible assessed valuation."[16] After the welfare budget is met, the remainder is distributed to the taxing units in the county, including itself, in proportion to their respective total budgeted revenues from the application of the tangible tax rate of each unit to the total tangible assessed valuation for that unit. This tax sharing formula has become a characteristic one in Kansas. The University of Kansas study of the problem indicated that, based on 1950 population and 1948 tangible assessed valuation, metropolitan counties with a then 25.8% of the population and 14.2% of assessed valuation received 20.9% of the 1950 residue; urban counties with a then 30.4% of population and 23.7% of the valuation, received 26.4%; mixed counties with 15.1% of the population and 18.7% of value received 16.7%; and rural counties with a 28.7% of the population and 43.4% of the value, received 36% of the residue—all from an excise tax derived largely from the urban areas and intended to aid with welfare costs experienced largely in the same urban area.[17]

From the foregoing it can be seen that the state sales tax is used, in part, to reduce local taxes on an entirely different tax base—property. There is no logical relationship to relative needs of local governmental units, and the sharing formula is supported by a legislative majority from areas that in no sense bear their relative share of the tax fund so distributed. Economically an inner area transfer payment, politically it amounts to a partial sub-

[16] G. S. 1959 Supp., 79-3621.

[17] Page, Legislative Apportionment in Kansas, p. 141.

sidization of rural local government that approaches an exaction.

A similar formula has been applied to the two and one-half per cent gross receipts tax which Kansas levies on liquor sales. Ninety-seven per cent of the proceeds of this tax are shared with local governments through the so-called "County and City Enforcement Fund," but which is in reality an unrestricted shared tax, not a grant-in-aid for liquor enforcement. This fund is shared quarterly with the counties, fifty per cent on a population basis and fifty per cent on the basis of "equalized tangible assessed taxable valuation." Each county keeps half and distributes the balance to the cities in proportion to population. (G. S. 1959 Supp., 79-4101 and 4108) Many of the counties sharing in this fund have enacted prohibition in accordance with the local-option provisions of the Kansas liquor law, and thus have no liquor stores against whom to "enforce" anything, and little or no liquor-control problem. In sharing liquor revenues, then, the limits placed on distribution of the sales tax residue are by-passed by calling the liquor sales tax a gross receipts tax and by making a shared tax sound like a grant-in-aid for enforcement. Cigarette taxes collected by the state are also split with the counties in a similar manner. Small and usually solvent local government units are thus able to shift their operating costs in part from local property taxes to state collected grants.

Another example of tax discrimination is to be found in the gasoline excise tax. The revenues from this tax, from a ton-mile tax on motor carriers, and from automobiles,

trucks, and drivers' license fees, are constitutionally dedicated for the construction and maintenance of Kansas highways.[18] From the proceeds of this fund $900,000.00 per quarter is distributed to the counties on the basis of 40% to the 105 counties equally, and 60% on the basis of assessed valuation, for construction and maintenance of county roads and bridges. (G. S. 1959 Supp., 68-416) Although earmarked for the one purpose, aid to county road systems makes the counties able to lighten the property tax load and to meet other demands for public funds, and is thus clearly a concealed subsidy or transfer payment of the same nature as the shared sales tax residue. This is all the more apparent when it is realized that some 38% of the vehicle miles traveled for which gasoline taxes are presumably paid are driven on city streets that make up only 5% of the total road mileage in the state. County roads, on the other hand, carry only 19% of the mileage traveled but make up 88% of the road miles.[19]

One further, and perhaps ultimately tragic, example will suffice to indicate the practical import of rural over representation in relation to taxes. In 1951 the Kansas legislature appropriated one million dollars from the sales tax fund to be shared with the counties, fifty per cent on a population basis and fifty per cent on "equalized tangible assessed taxable valuation," and to be used for Civil Defense. The counties were to keep one-half and share the other half with the cities in the county in proportion to each city's population in the total city population in the

[18] Constitution of Kansas, Art. 11, Sec. 10.

[19] Kansas State Highway Fact-Finding Report (Topeka, 1948).

county. If, after July 1, 1952, the county commissioners or city councils had not found some Civil Defense use for this handout, it was to be added to their general funds for expenditure in calendar years 1952 and 1953 in addition to budgeted funds.[20] Needless to say, nearly all of this money went for ordinary domestic uses, and Civil Defense was ignored. No relation to need is apparent in the formula for distribution, but the act does demonstrate the importance to the rural majority in the legislature of measures that reduce tax burdens in rural areas with money not collected there.

V. The Impossibility of Obtaining State Legislative Relief.

Perhaps nothing attests more eloquently to the impossibility and to the futility of expecting relief from the legislature itself, than to contemplate the make-up of its component parts and the studied way it has avoided obeying the constitutional mandate to reapportion either regularly or equitably and in accordance with population. While the changes in House membership would be slight by reason of the constitutional guarantee of one representative per county, a radical change in Senate membership would undoubtedly occur. Rural dominance would be lost or severely curtailed in this chamber, depending upon what imaginative forms of gerrymandered districts were developed, and the threat to partisan interests would be not inconsiderable. It cannot be doubted that the existing districts and their incumbents would for the most part be singularly unenthusiastic about voting themselves

[20] **1951 Session Laws, Ch. 498, Sec. 1.**

out of office and out of existence! This truth gives reality to the maxim that no constitutional mandate to the legislature is any better than the legislature itself, and this is particularly true where judicial enforcement is denied.

The Kansas legislature has followed the pattern of its own history, and has steadfastly refused to consider any major reapportionment of the Senate in recent years. When pressed on grounds of democratic principles by the newpapers, the present Speaker pro tem of the Kansas Senate refused to reply or comment, and the Speaker of the House offered only the statement that the newpapers were the only parties excited about apportionment.[21] Democracy is apparently the concern of a limited segment of our population, not including legislators! Generally, the central theme among the legislators is not how to deal with the problem, but how to avoid dealing with it. We thus have gerrymanders by inaction, and a mighty effort to lock away the family skeleton from public view by ignoring it.

There were, indeed, early efforts to obtain constitutional reform, principally in the nineteenth century. The only serious attempt in the twentieth century was an intellectual-political movement that flowered and faded from 1911 to 1920. S. A. Kingman, a surviving member of the Wyandotte Convention and an early justice of the Kansas Supreme Court, had urged in 1900 that a new constitutional convention was the only way to correct the serious defects that existed in the systems of taxation and representation. His remark, "This is a government of men, not

[21] The Hutchinson News (Hutchinson Kansas), June 9, 1961.

acres," became the battle cry for the reform movement among liberals of both the Wilson and Bull Moose stripe. Unfortunately, World War I intervened and energies were applied elsewhere. The movement died without accomplishing any tangible result.[22]

More recently, an interesting and fairly conclusive experiment tested the climate of legislative opinion on reapportionment in Kansas. In 1949, a resolution was introduced which called for a comprehensive constitutional amendment to deal with apportionment problems (1949 HCR 8). This proposal dropped the guarantee of one representative per county and the obsolete provisions for counties failing to tally 250 votes. It proposed limits for the variation from average population of all legislative districts: Congressional districts would not vary more than 12%, and state legislative districts could vary between 50% and 200% of their averages. It provided for apportionment by an ex officio commission if the legislature should fail to apportion at required times or by required methods, with the commission subject to injunction and mandamus action. The House Committee on State Affairs requested an explanation from the author of the bill and its legislative sponsor. The proposal was coolly received, and the committee recommended that it not pass.[23] Since then, no further reform has been seriously considered by the legislature.

True constitutional reform by legislative initiative is not, for practical purposes, a possibility in Kansas, be-

[22] **Page, Legislative Apportionment in Kansas, p. 67.**

[23] **Page, Legislative Apportionment in Kansas, p. 68.**

cause any constitutional amendment or any constitutional convention must first be approved by a two-thirds majority of each house in the malapportioned legislature.[24] All such efforts have failed in the past, but even if a convention were authorized, it would be chosen in an unrepresentative manner based upon the existing apportionment laws. The Governor has no authority to convene a constitutional convention, and there is no provision in the state Constitution authorizing the people to do so by initiative or referendum.

VI. The Necessity of Federal Judicial Assistance.

It is not our purpose in submitting this brief to undertake a lengthy examination of the legal authorities bearing upon these questions. This has already been done in a most thorough and complete manner by the appellants and other amici curiae, and further additions could only bring repetition. What is hoped is that by presenting the factual basis demanding relief in Kansas, this Court will more clearly understand the far-reaching and vitally important implications of its decision, and will be better prepared to render a judgment which will serve the purposes of human rights and democracy in all of the varying situations to which it will apply. Kansas suffers neither more nor less than its sister states, and although each may vary in terms of the constitutional provision and laws involved, all are identical in the need for reform and realization of equal suffrage and representation.

---

[24] **Constitution of Kansas, Art. 14, Sec. 1 and Sec. 2.**

Today, reapportionment in many of these states, including Kansas, appears to be at an impasse: No reapportionment until parties act responsibly; no hope for responsible parties until an equitable apportionment. Both of our major political parties are equally responsible for this situation, the accident of history having made the Democrats the offender in Tennessee and the Republicans guilty in Kansas. Had the Democrats initially captured control of the Wyandotte Convention in Kansas, it cannot be doubted that they would have as readily used the control over apportionment to their own advantage. The temptation for any partisan, economic, geographic, or other group of our citizens to utilize this powerful lever to their own advantage is a compelling one, and selfish interests are thereby placed above the interests of the people and of democracy. Failure to reapportion regularly must needs raise the question as to whether the consent of the governed is now linked with public policy in state government, and whether government institutions not truly representative of the majority can qualify as a democracy. It has often been said that to frustrate the majority is to invite disorder, and that the only political force more dangerous than an extremist minority is a long-frustrated majority. It is patently obvious that the present condition of apportionment in Kansas and other states is undemocratic and contrary to both the spirit and letter of Federal and state Constitutions guaranteeing a republican form of government and free and equal elections. While there seems little liklihood of physical violence or revolt against the constitutionally established authorities,

there can be no question that the prestige of our country suffers greatly in the eyes of the world and that there is a loss of respect among our own citizenry.

Apportionment itself was designed by the early fathers to insure the equal access of all of our citizens to the processes of a representative democracy, for without the equal participation of all of the people, there is no democracy. There are those who assert that this republic was not intended by its founders to be a popular democracy, and that certain segments of the population are not responsible enough to have an equal say with others. Yet Thomas Jefferson, author of the Declaration of Independence, said that "the will of the people is the only legitimate foundation of any government" and "no government can continue good, but under the control of the people." A republican government is a government of the people and chosen by the people by its very definition. Of it, Thomas Jefferson made the following statement:

> "Every man and every body of men on earth possesses the right of self-government. They receive it with their being from the hand of nature. Individuals exercise it by their single will; collections of men by that of their majority; for the law of the majority is the natural law of every society of men." [Letter to Washington, 1790]

> "[What is a republic?] Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its composition, more or less of this ingredient of the direct action of the citizens." [Letter to J. Taylor, 1816]

> "My most earnest wish is to see the republican element of popular control pushed to the maximum of its practicable exercise. I shall then believe that our government may be pure and perpetual." [Letter to I. H. Tiffany, 1816]
>
> "The first principle of republicanism is, that the lex-majoris partis is the fundamental law of every society of individuals of equal rights; to consider the will of the majority enounced by the majority of a single vote as sacred as if unanimous, is the first of all lessons in importance, yet the last which is thoroughly learnt. This law once disregarded, no other remains but that of force, which ends necessarily in military despotism." [Letter to Baron V. Humboldt, 1817]

If, then, we are to realize the promise that our forefathers made to the world, that here was a place where all men lived in freedom and with equal opportunity, we must make the will of the majority the foundation of all our governmental units.

Beyond the failure of the legislature to apportion itself as required by constitutional mandate and democratic theory, there lie a host of practical implications, some of which have been examined previously. Among other things the steady shift of electoral power to urban and suburban areas, and the progressive industrialization of even rural-oriented states such as Kansas, has resulted in urban needs and problems arising which have been too often ignored or neglected by the rural-dominated state legislatures. The result has been an increased tendency of the cities to by-pass state governments and seek assistance directly from the national government. Continuation of this trend

will result in the roles of the states in our Federal system being further subordinated, with serious consequences to our tradition of local self-government. Unquestionably, the failure to reapportion regularly has greatly contributed to the atrophy of state governments as policy making bodies. Moreover, at a time when our nation faces dark and powerful forces, which threaten our very existence, a nation devoted to democratic theory is failing its own test.

If we are to reverse the process now stagnating our state legislatures, and by providing for rule of the popular majority insure a responsible and responsive legislative majority, we must take such steps as are necessary to prevent legislative discrimination between citizens in apportionment, and the legislative ability to allow the discrimination to worsen by inaction. The remedies suggest themselves: Narrow the range of discrimination as nearly as practicable, and make it necessary that the legislatures keep apportionment on a current basis as required by the state constitutions. The legislatures themselves, as has been demonstrated, neither observe the mandates nor permit remedial action, for they are the creatures of the malapportionment.

While the Kansas Supreme Court has not as yet been called upon to decide the question, certain of the American jurisdictions have refused judicial relief, passing the problem off as a legislative responsibility which can apparently not be enforced, no matter how grave the wrong. Democracy cannot exist in such a state of affairs, and we submit that the responsibility to guarantee those civil

rights and give credence to constitutional provisions for a republican form of government and equal protection of individual voting rights, is one that this Court rightfully can and should assume. The right of equal suffrage and, thereby, equal representation in the making of our laws is absolute, and deprivation of this right by either deliberate action or by deliberate inaction surely offends not only state constitutional provisions but constitutes a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Federal Constitution, if this clause is held to mean anything at all. The validity of all laws, including apportionment acts, are justiciable issues, and this is particularly so where the boundaries of constitutional authority are exceeded and the sacred rights guaranteed the citizens are denied. The Kansas Taxpayers submit that the right to review both legislative acts and state constitutional provisions, where they appear violative of any provision of the Federal Constitution and abridge the rights of the citizenry, is not only within the authority of the Federal Courts, but constitutes a solemn duty as well.

CONCLUSION.

The Kansas Taxpayers, in conclusion, respectfully request this Court to assume jurisdiction of the issues herein presented, to reverse the court below, and to exercise its equitable discretion and consider the manifest violations of the sacred rights guaranteed by the Federal Constitution.

Respectfully submitted,

H. R. BRANINE,
C. E. CHALFANT,
W. Y. CHALFANT,
BRANINE & CHALFANT,
502 First National Bank Building,
Hutchinson, Kansas,

F. C. LITTOOY,
304 East 13th,
Hutchinson, Kansas,

Attorneys for Kansas Taxpayers,

By F. C. Littooy.