

Final
STAFF SUMMARY OF MEETING

COMMITTEE ON JOINT SELECT COMMITTEE ON REDISTRICTING

Date:	02/02/2011	ATTENDANCE
Time:	04:05 PM to 05:31 PM	Brophy X
Place:	SCR 356	Carroll X
		Coram X
		Nikkel X
This Meeting was called to order by		Pabon X
<u>Senator Heath</u>		Scheffel X
		Schwartz X
This Report was prepared by		Vigil X
<u>Hillary Smith</u>		Balmer X
		Heath X

X = Present, E = Excused, A = Absent, * = Present after roll call

Bills Addressed:	Action Taken:
Discussion of Logistics	Witness Testimony and/or Committee Discussion Only
Congressional Redistricting Overview Continued	Witness Testimony and/or Committee Discussion Only

04:05 PM -- Discussion of Logistics

Senator Heath, Co-chair, called the meeting to order. He spoke about the committee's travel plans and various changes to the travel schedule. He said that the Boulder meeting will now be held on Tuesday, March 15, instead of on Monday, March 7. He stated that leadership had approved member travel expenses for the public hearings, and noted that staff had given each member a travel preference sheet for the overnight meetings for them to fill out. He then discussed the committee's schedule for the next two weeks.

04:11 PM

Senator Schwartz distributed a handout to the committee (Attachment A). She spoke about the town of Basalt, which is divided between two congressional districts. She noted the time it would take for residents from Basalt to travel to the public hearing in Boulder. She wondered if the committee would consider adding another public hearing in Eagle County. Senator Brophy shared additional remarks concerning the distance that certain residents from Congressional District 4 will need to travel in order to attend the hearing Fort Morgan. Discussion continued. Senator Schwartz asked whether individuals would be permitted to testify about any congressional district at any of the hearings. Senator Heath said that anyone can come from any district and testify at any hearing. He made further comments concerning Senator Schwartz's remarks.

04:16 PM

Representative Pabon spoke about the issue of input in the committee's travel decisions. He asked whether the committee as a whole should approve the various travel decisions, such as changes to locations and venues. Discussion ensued between Senator Heath and Representative Pabon. Senator Carroll asked whether a committee e-mail account could be created so that constituents could contact all of the committee members at once. Committee discussion on the subject of e-mail continued, with Hillary Smith of Legislative Council Staff noting that an e-mail account has already been set up at CongRedist2011@state.co.us. E-mail sent to this address will be forwarded to the members of the committee.

04:26 PM

Representative Pabon asked about the feasibility of allowing constituents to video conference during the public hearings. Senator Schwartz spoke about the possibility of having staff archive and organize e-mail that is sent to the CongRedist2011 e-mail account, prompting a committee discussion about the use of the e-mail account. In response to a question from Representative Vigil concerning comments that constituents may send via letter mail, staff directed the committee to the website www.colorado.gov/redistricting, which links to the CongRedist2011 e-mail account and also lists an address to which letter mail may be sent. Senator Heath indicated that he would find out whether video conferencing would be possible.

04:31 PM

Representative Balmer shared further remarks concerning the use of the CongRedist2011 e-mail account. Senator Carroll spoke about how the Colorado Open Records Act would pertain to e-mails sent to the e-mail account. Representative Balmer noted that all of the public hearings will take place at locations that comply with the Americans with Disabilities Act. He asked for further clarification concerning e-mail confidentiality.

04:35 PM

Senator Schwartz asked the committee to clarify when public comment would be taken via the e-mail account and letter mail. Discussion ensued, with Representative Balmer eventually asking the committee to approve a public comment period that runs from February 18 through March 25. No objection was offered, so the motion was informally adopted. Committee discussion continued and staff was directed to update the committee website to reflect the dates of the public comment period and to indicate that testimony on all of the congressional districts will be permitted at any public hearing.

04:39 PM -- Congressional Redistricting Overview Continued

Jerry Barry, Office of Legislative Legal Services, returned to the committee to continue his overview of congressional redistricting. Mr. Barry had previously spoken to the committee on January 26, 2011. Mr. Barry distributed a packet of information to the committee (Attachment B). He opened his presentation by noting that redistricting is one of the most partisan issues in which the General Assembly is involved. He provided some brief history of congressional redistricting in Colorado, stating that it is difficult to say whether Colorado is a "red" state or a "blue" state.

04:43 PM

Mr. Barry moved on to a discussion of the redistricting process in the 1980s. He indicated that much of his information comes from the district court opinion in *Carstens v. Lamm*, 543 F.Supp.68 (D.C. Colo. 1982), and that copies of the court opinions he will be discussing are included in the committee's packet. He said that the court, after analyzing five redistricting plans submitted to it, ultimately issued its own redistricting plan. He noted that of the five plans, the overall population deviation ranged from 7 to 15 people. He spoke about the various factors considered by the court when analyzing the plans, and remarked on the different weight given to county and municipal boundaries in urban and in rural areas.

04:52 PM

Mr. Barry moved on to a discussion of congressional redistricting in the 1990s. He said that during this time period, the lawsuit filed concerning redistricting was settled out of court, so there is no court opinion. Mr. Barry explained that the legislature enacted a redistricting plan during the 1992 legislative session, but noted that the timing of the precinct caucuses in 2012 makes it impossible to enact a redistricting plan during the 2012 legislative session.

04:55 PM

Mr. Barry next spoke about congressional redistricting in the 2000s. He discussed the lawsuits that were filed in both district and federal courts. He said that after no bill was passed during a second special session, a trial was scheduled. He explained the opinion reached in *Avalos v. Davidson*, 01 CV 2897 (Denver Dist. Ct. 2002). Mr. Barry quoted specific language from the court decision addressing political factors in the redistricting process.

05:06 PM

Mr. Barry noted that prior to the 1960s, the court did not get involved in redistricting matters. He expressed the opinion that no matter what the court decides in a redistricting case, it is viewed as a political decision. He then spoke about the case of *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002), in which the court found that a 3 percent drop in the Hispanic population in Congressional District 1 did not give rise to a finding of unconstitutional voter dilution. Mr. Barry then moved on to a discussion of *Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), in which the court found that Article V, Section 44, of the Colorado Constitution limited congressional redistricting to only once after a decennial census. He spoke about the election results since the 2002 redistricting plan.

05:09 PM

Representative Balmer asked Mr. Barry a follow-up question about the court's decision in *Beauprez v. Avalos*. He then asked Mr. Barry to comment on the extent to which other states have redistricting plans that come from outside the legislative process.

05:13 PM

Mr. Barry showed the committee several examples of the reports from the redistricting process in the 2000s. The reports are included in Attachment B. He then listed the various racial categories available on the U.S. Census Bureau form, and explained how individuals who check multiple races are tabulated in the redistricting process. Next, Mr. Barry showed the committee a report illustrating party registration information. He noted that the "unaffiliated" category on the report includes all voters who registered neither as Democrats nor as Republicans, even if they registered with a minor party. Mr. Barry remarked on the number of voters in the unaffiliated category, and spoke about several methods used to predict whether unaffiliated voters lean Republican or Democrat.

05:24 PM

Mr. Barry concluded his remarks by discussing the computer software's ability to show various types of information during the public hearings.

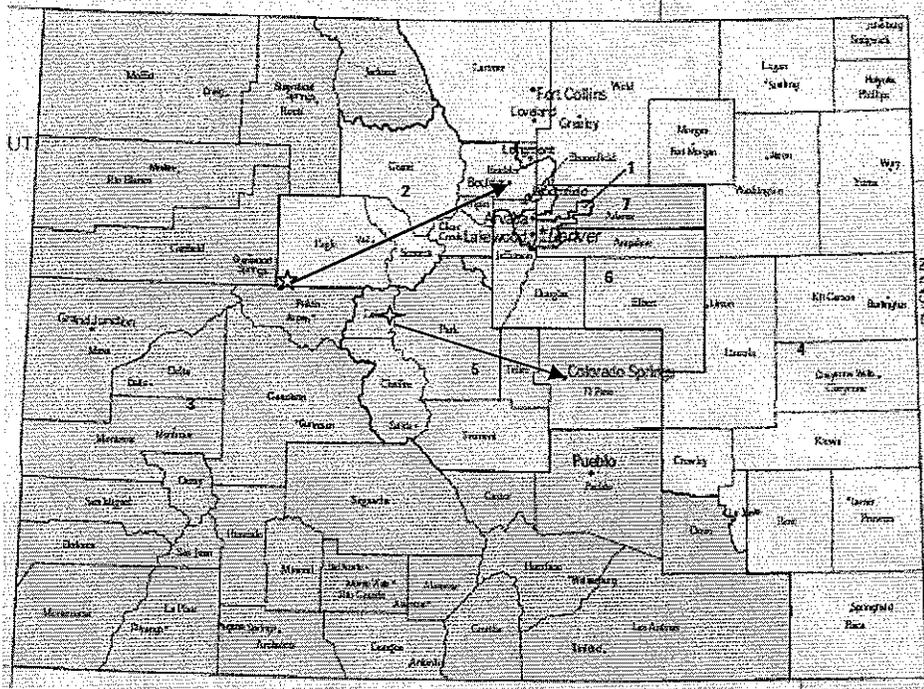
05:26 PM

Mr. Barry responded to a question from Senator Schwartz concerning when the 2010 census data will be available. Representative Balmer expressed his desire to have a map available at all of the public hearings indicating which congressional districts are over- or under-populated according to the 2010 census results. Mr. Barry suggested that having a map with the population of each of the counties would also be helpful. Discussion then continued between Senator Schwartz and Mr. Barry concerning the extent to which various maps will be able to be manipulated and displayed during the public hearings.

05:31 PM

Senator Heath made closing remarks. The committee adjourned.

Attachment A



CD2: 5,664 mi²

★ Basalt → Boulder: 3hrs, 44 min

CD5: 7,732 mi²

★ Leadville → Colorado Springs:
2hrs, 35 min

OVERVIEW OF REDISTRICTING IN COLORADO
JEREMIAH B. BARRY
SENIOR ATTORNEY
OFFICE OF LEGISLATIVE LEGAL SERVICES
FEBRUARY 2, 2011

I. HISTORY OF CONGRESSIONAL REDISTRICTING IN COLORADO

a. The 1980s

Carstens v. Lamm, 543 F.Supp. 68 (D.C. Colo. 1982)

The court has fashioned its own plan which attempts to satisfy the relevant legal criteria and incorporate the most desirable aspects of each plan presented to the court.

b. The 1990s

Senate Bill 92-198

c. The 2000s

Avalos v. Davidson, 01 CV 2897 (Denver Dist. Court 2002)

The court adopted a proposed plan submitted by the Plaintiffs which was an amendment to a plan originally submitted by the Republican Leadership.

Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002)

The district court properly applied the controlling law regarding the adoption of a congressional redistricting plan. A 3% drop in the Hispanic population in District 1 did not give rise to a finding of unconstitutional voter dilution

Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003)

Article V, Section 44 of the Colorado Constitution limited congressional redistricting to only once after a decennial census.

II. USE OF POLITICAL DATA IN DRAWING DISTRICTS

543 F. Supp. 68, *, 1982 U.S. Dist. LEXIS 14651, **

Judith F. **CARSTENS**, Kim M. Rue, W. R. Bray, J. Robert Schafer, and Sherill R. Rochford, Plaintiffs, v. Richard D. LAMM, as Governor of the State of Colorado; J. D. McFarlane, as Attorney General of the State of Colorado; and Mary Estill Buchanan, as Secretary of State of the State of Colorado, Defendants; David T. GOENS, Janet Roberts, Jennie Sanchez, George Rosenberg, and Jean Galloway, Plaintiffs, v. Richard D. LAMM, as Governor of the State of Colorado, and Mary Estill Buchanan, as Secretary of State of the State of Colorado, Defendants

Civ. A. Nos. 81-F-1713, 81-F-1870

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

543 F. Supp. 68; 1982 U.S. Dist. LEXIS 14651

January 28, 1982

CASE SUMMARY:

PROCEDURAL POSTURE: In these consolidated cases, plaintiff citizens brought suit against the defendants, governor and secretary of state, challenging Colorado's congressional redistricting plan.

OVERVIEW: Various citizens brought suit challenging Colorado's congressional redistricting plan. The court concluded that the redistricting plan set forth in Colo. Rev. Stat. § 2-1-101 was unconstitutional. Various plans were submitted to the court during the litigation and all of the plans were rejected by the court. The court noted that the primary goal of an acceptable congressional redistricting plan was fair and effective representation of all citizens. The court further noted that the constitutional required, as far as possible, population equality and protection of minority rights. However, the court also applied several non-constitutional criteria: 1) compactness and contiguity; 2) preservation of county and municipal boundaries, and 3) preservation of communities of interest. The court concluded that none of the plans submitted met these criteria. Accordingly, the court adopted its own plan, holding that no right was more precious in a free country than that of having a voice in the election of those who make the law.

OUTCOME: The secretary of state's motion to dismiss was denied and the court ordered that the secretary of state comply with the congressional redistricting plan appended to the opinion.

CORE TERMS: redistricting, congressional districts, split, deviation, slope, valleys, communities of interest, election, divide, general assembly, resident, municipality, municipal, state legislature, geographic, census, voting, front range, agricultural, reapportionment, region, apportionment, compactness, compact, preservation, largest, veto, consolidated, mountainous, voting strength

LEXISNEXIS(R) HEADNOTES

Constitutional Law > Equal Protection > Voting Districts & Representatives

HNI ⚡ Reapportionment is primarily a matter for legislative consideration and

determination and that judicial relief becomes appropriate only when a legislature fails to reapportion to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

Constitutional Law > Equal Protection > Voting Districts & Representatives
Governments > Federal Government > Elections

HN2 In its technical sense "reapportionment" refers to the redistribution of seats in established units of government, such as the United States House of Representatives. "Redistricting" signifies line-drawing to establish new districts within these units. Congress "apportions" the House of Representatives and the state "districts."

Constitutional Law > Equal Protection > Voting Districts & Representatives
Governments > Federal Government > Elections

HN3 Under the provisions of both federal and state law, the primary responsibility for drawing new congressional districts lies with the state legislature, subject to the approval of the governor. 2 U.S.C.S. § 2c and Colo. Const. art. V, § 44.

Constitutional Law > Equal Protection > Voting Districts & Representatives
Governments > Federal Government > Elections

HN4 2 U.S.C.S. § 2c (1967) states that in each state entitled to more than one representative under an apportionment made pursuant to 2 U.S.C.S. § 2a(b) of this title, there shall be established by law a number of districts equal to the number of representatives to which such state is so entitled.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN5 Colo. Const. art. V, § 44, states that the general assembly shall divide the state into as many congressional districts as there are representatives in Congress apportioned to this state by the Congress of the United States for the election of one representative to Congress from each district. When a new apportionment shall be made by Congress, the general assembly shall divide the state into congressional districts accordingly.

Civil Procedure > U.S. Supreme Court Review > Three-Judge Courts & Direct Appeals > Three-Judge Courts

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN6 28 U.S.C.S. § 2284(a) (1976) states that a district court of three judges shall be convened when an action is filed challenging the constitutionality of the apportionment of congressional districts.

Civil Procedure > Justiciability > Case or Controversy Requirements > Adverse Legal Interests

Civil Procedure > Justiciability > Case or Controversy Requirements > Immediacy

Civil Procedure > Justiciability > Ripeness > General Overview

HN7 Ripeness is an amorphous legal concept subject to many subtle pressures including the appropriateness of the issues for decision by the court and the actual hardship to the litigants of denying them the relief sought. The central concern of a ripeness inquiry is whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the attention of the court. As a general rule, the court will not review matters involving uncertain and contingent future events that may not occur as anticipated or may not occur at all.

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Federal Government > Elections

HN8 2 U.S.C.S. § 2a(c)(2) declares that until a state is redistricted in the manner provided by the law thereof after any apportionment, if there is an increase in the number of representatives, such additional representative or representatives shall be elected from the state at large and the other representatives from the districts then prescribed by the law of such state.

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Federal Government > Elections

Governments > Local Governments > Elections

HN9 2 U.S.C.S. § 2c states that in each state entitled to more than one representative under an apportionment, there shall be established by law a number of districts equal to the number of representatives to which such state is entitled, and representatives shall be elected only from districts so established, no district to elect more than one representative.

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Federal Government > U.S. Congress

HN10 Congressional redistricting is a law-making function subject to the state's constitutional procedures. The Colorado Constitution explicitly provides that every bill passed by the general assembly shall be signed by the governor before it becomes law. Colo. Const. art. IV, § 11. There is no authority conferred upon the general assembly to create congressional districts independently of the participation of the governor as required by the state constitution with respect to the enactment of laws.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN11 The primary goal of an acceptable congressional redistricting plan should be fair and effective representation of all citizens.

Constitutional Law > Congressional Duties & Powers > Census > General Overview

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN12 The second constitutional criteria used in analyzing redistricting plans developed out of the realization that sheer mathematical equality may not adequately protect minority rights. Plans which satisfy equal population requirements may still be vulnerable to attack on the issue of invidious racial discrimination.

Civil Rights Law > Voting Rights > Vote Dilution

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Local Governments > Elections

HN13 Unlike population equality which is capable of quantifiable verification, dilution of minority voting strength addresses the quality of representation and cannot be established through simple numerical tests. Instead, the court must determine whether there is sufficient evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did residents in the district to participate in the political processes and to elect legislators of their choice. The constitutionally protected right is one of equal access to the political process.

Constitutional Law > Congressional Duties & Powers > Census > Composition of the U.S. Congress

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Local Governments > Boundaries

HN14 ↓ The Colo. Const. art. V, § 47, states that: (1) Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap. (2) Except when necessary to meet the equal population requirements of Colo. Const. art. V, § 46, no part of one county shall be added to all or part of another county in forming districts. Within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible. When county, city or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law. (3) Consistent with the provisions of this section and § 46 of this article, communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible.

Civil Procedure > Justiciability > Political Questions > General Overview

HN15 ↓ When faced with potentially conflicting interests, courts generally attempt to achieve an equitable result by using a balancing test.

Civil Rights Law > Voting Rights > Vote Dilution

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN16 ↓ As a general rule, minority voting strength is impermissibly diluted when large concentrations of minority population are necessarily fragmented and disbursed.

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Local Governments > Elections

HN17 ↓ The compactness requirement specifies that the boundaries of each congressional district shall be as short as possible. Although there are several ways to measure compactness, one of the most accurate is to determine the smallest circle into which the district can be circumscribed and to compare the ratio of the area of the district inside the circle to the area of the circle itself.

Civil Procedure > Trials > Closing Arguments > General Overview

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN18 ↓ Communities of interest represent distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socioeconomic status or trade.

Constitutional Law > Congressional Duties & Powers > Census > General Overview

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > State & Territorial Governments > Legislatures

HN19 ↓ If a state can present legitimate justifications for small population variations in a congressional redistricting plan, the federal courts should not intervene merely to achieve an illusion of better equality.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN20 ↓ No right is more precious in a free country than that of having a voice in the election of those who make the law. Other rights, even the most basic, are illusory if the right to vote is undermined.

COUNSEL: **[**1]** Theodore S. Halaby, and Brian McConaty, Halaby & Bahr, Denver, Colo., for plaintiffs Judith F. Carstens, Kim M. Rue, W. R. Bray, J. Robert Schafer, and Sherill R.

Rochford.

Edwin S. Kahn, and Stephen H. Kaplan, Kelly, Haglund, Garnsey, Kahn & Donnell, Denver, Colo., for plaintiffs David T. Goens, Janet Roberts, Jennie Sanchez, George Rosenberg, and Jean Galloway.

Deanna E. Hickman, Asst. Atty. Gen., Denver, Colo., for defendants Richard D. Lamm and J. D. McFarlane.

John L. Holm, Holm & Christensen, Denver, Colo., for defendant Mary Estill Buchanan.

JUDGES: Before McWILLIAMS, Circuit Judge, and FINESILVER and KANE, District Judges.

OPINION BY: FINESILVER

OPINION

[*71] MEMORANDUM OPINION AND ORDER

In these consolidated cases, the Court is called upon to select a congressional redistricting plan for the State of Colorado. Following the tabulation of the 1980 decennial census, the Clerk of the United States House of Representatives informed the Governor of Colorado that the state, which currently has five representatives in Congress, was entitled to an additional congressional seat. Although the Governor and the General Assembly (sometimes referred to as the "State Legislature") **[**2]** made repeated attempts to develop an acceptable redistricting plan, both parties were unable to agree on the composition of the new districts. These suits were filed by several concerned citizens of Colorado in an effort to break the existing stalemate through judicial intervention.

After reviewing the testimony and evidence presented at trial, we conclude that the current congressional redistricting plan **[*72]** set forth in C.R.S. 1973 § 2-1-101 is unconstitutional. The Court is of the view, however, that none of the plans submitted to the Court during the course of this litigation fully comport with the objectives and criteria which we feel should be incorporated in a judicially approved redistricting plan. As a result, the Court has fashioned its own plan which satisfies the relevant legal criteria and incorporates the most desirable aspects of the plans presented to the Court.

I

OVERVIEW OF THE LITIGATION

At the outset, we emphasize that ^{HN1} reapportionment is primarily a matter for legislative consideration and determination and that judicial relief becomes appropriate only when a legislature fails to reapportion to federal constitutional requisites in a timely fashion **[**3]** after having had an adequate opportunity to do so." *White v. Weiser*, 412 U.S. 783, 794-95, 93 S. Ct. 2348, 2354, 37 L. Ed. 2d 335 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586, 84 S. Ct. 1362, 1394, 12 L. Ed. 2d 506 (1964)). The State Legislature fulfilled this responsibility ten years ago when the bill creating the current congressional districts was passed by both houses in the General Assembly and signed into law by the Governor. See C.R.S. 1973 § 2-1-101. At that time, there were 2,209,596 people residing within the borders of this state, and the ideal population ¹ of each district was 441,919.

FOOTNOTES

¹ The "ideal" district population is equal to the total state population divided by the total number of districts. See Wollock, ed., Reapportionment Law and Technology 6 (1980). (This pamphlet, prepared by the National Council of State Legislatures, in Denver, contains an excellent summary of the issues involved in congressional redistricting.)

Over the past ten years, however, the population of Colorado **[**4]** has grown at a rapid pace. According to the most current 1980 census figures, the population has increased by almost 700,000 people and now stands at 2,889,735. ² Since this growth rate was proportionally greater than the average overall growth of the nation, Colorado was assigned an additional congressional seat during the decennial reapportionment ³ of the House of Representatives.

FOOTNOTES

² Pursuant to an Order of the Panel dated January 7, 1982, the parties stipulated to the population of the State of Colorado based on the most recent revisions in the census data by the United States Census Bureau.

³ ^{HN2} In its technical sense "reapportionment" refers to the redistribution of seats in established units of government, such as the United States House of Representatives. "Redistricting" signifies line-drawing to establish new districts within these units. Congress "apportions" the House of Representatives and the state "districts". Kilgarlin v. Martin, 252 F. Supp. 404, 10 n.1 (S.D.Tex.1966) rev'd in part and remanded sub nom. Kilgarlin v. Hill, 386 U.S. 120, 87 S. Ct. 820, 17 L. Ed. 2d 771 (1967). See Bickerstaff, Reapportionment by State Legislatures: A Guide for the 1980's, 34 Sw.L.J. 607, 608 (1980).

[5]** ^{HN3}

Under the provisions of both federal and state law, the primary responsibility for drawing new congressional districts lies with the State Legislature, subject to the approval of the Governor. 2 U.S.C. § 2c (1979) ⁴; Colo.Const. art. V, § 44 (1973) ⁵. Shortly after the Clerk of the House of Representatives issued the reapportionment mandate, the Governor and the General Assembly began to consider various methods of approaching the task of redistricting. ⁶

[*73] By July 6, 1981, the first proposed plan, designated "H.B. 1615" ⁷, had passed both houses of the General Assembly. The Governor promptly vetoed the bill and sent the matter back to the Legislature for further study. His veto message urged the General Assembly to set aside partisan political considerations and develop a "fairer and more responsible plan for congressional redistricting." Exhibit 27a, Governor's Veto Message of H.B. 1615 dated June 12, 1981.

FOOTNOTES

⁴ 2. ^{HN4} U.S.C. § 2c (1967) states in pertinent part:

In each state entitled ... to more than one Representative under an apportionment made pursuant to section 2a(b) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such state is so entitled **[**6]**

⁵ ^{HN5} Colorado Constitution, Article V, § 44 (1974) states:

The general assembly shall divide the state into as many congressional districts as there are representatives in Congress apportioned to this state by the Congress of the United States for the election of one representative to Congress from each district. When a new apportionment shall be made by Congress, the general assembly shall divide the state into congressional districts accordingly.

As to the role of the Governor in the redistricting process, see Section III, *infra*.

⁶ One of the early suggestions was the formation of a citizens' committee with the "responsibility to formulate and recommend to the General Assembly a Congressional District Reapportionment Plan". Exhibit 28, Letter from Governor Richard D. Lamm to Fred E. Anderson and Carl B. "Bev" Bledsoe, dated January 28, 1981. This suggestion was never implemented.

⁷ H.B. 1615 is comprised of a "west slope" district which includes most of Boulder County (District 3), a consolidated city and county of Denver (District 1), an "east plains" district (District 4), and a divided Pueblo County (Districts 3 and 5). Its 2nd and 6th Districts include the areas immediately west and east of Denver, respectively, while the 5th District is located in central Colorado.

[7]** In response to the Governor's veto message, the Executive Committee of the State Legislative Council appointed an Interim Committee on Congressional Redistricting to review new proposals and make recommendations to the General Assembly ⁸. After several days of meetings in early July, the Committee referred five plans to the General Assembly. Although the Governor notified the Legislature in advance that none of these plans was acceptable, one plan, designated "H.B. 1618" ⁹, was subsequently passed by both the State House of Representatives and Senate. The Governor vetoed the bill immediately upon receipt. ~~He criticized the General Assembly for creating a highly partisan plan which would split the home counties of three incumbent Democratic representatives while giving "safe" districts to two incumbent Republicans. In addition to the political problems, the Governor noted that the plan "needlessly (split) select counties and fail(ed) to respect important communities of interest."~~ He urged the General Assembly to work together toward an acceptable compromise for the citizens of Colorado. Exhibit 27b, Governor's Veto Message of H.B. 1618 dated July 17, 1981.

FOOTNOTES

⁸ The Committee was comprised of seven Republicans and four Democrats, the latter appointed by the Republican majority in the Colorado Legislature. See Exhibit 25. **[**8]**

⁹ H.B. 1618 was the first legislatively passed plan to propose a north-south split in the City and County of Denver (District 1). This plan also split Boulder County and the City of Boulder (Districts 3 and 4), Pueblo and the City of Pueblo (Districts 2 and 5), and created two narrow winding districts in central Colorado (Districts 2 and 5). Like 1615, this plan also recognized to a large extent an incorporated "west slope" and an "east plains" district.

The matter was sent back to the Legislature's Interim Committee on Congressional Redistricting which met for several days in August. The Committee reviewed a large number of proposals and ultimately selected three plans for referral to the entire Legislature. Despite warnings from the Governor that he could not approve any of the plans recommended by the Committee, the Legislature reconvened and passed a third plan, designated "H.B. 1624" ¹⁰, on September 22, 1981. Rather than veto the bill immediately, the Governor announced his

intention to refrain from taking any action on the measure for ten days to allow for the possibility of a compromise. **[**9]**

FOOTNOTES

¹⁰ H.B. 1624 splits Denver into two separate congressional districts in much the same fashion as H.B. 1618. This division is made along an east-west line (starting at Yosemite Street and generally running west along Colfax Ave.) which effectively cuts the city in half. H.B. 1624 also splits Boulder County between a metropolitan District 2 and an agricultural District 4. The city and the county of Pueblo are similarly divided between a west slope District 3 and a central District 5. Additionally, southern Jefferson County and Douglas County are included in the "west slope" district.

Before any serious negotiations could begin, however, the first of these consolidated lawsuits, Civil Action No. 81-F-1713, was filed with the Court. The plaintiffs, Judith F. Carstens, Kim M. Rue, W. R. Bray, J. Robert Schafer and Sherill R. Rochford, are residents of each of the five current congressional **[*74]** districts. Their complaint seeks declaratory and injunctive relief against Governor Richard D. Lamm and **[**10]** Secretary of State Mary Estill Buchanan. ¹¹ Specifically, plaintiffs (hereinafter referred to as the "Carstens plaintiffs") make three requests of this Court:

FOOTNOTES

¹¹ Colorado State Attorney General J. D. McFarlane was initially named as defendant in the Carstens suit but was dismissed by stipulation of the parties prior to trial.

(1) to rule that C.R.S. 1973 § 2-1-101 is unconstitutional because it provides for only five congressional districts instead of the six districts mandated by the 1980 apportionment of the House of Representatives;

(2) to enjoin defendants from conducting either the primary or general congressional election for 1982 until Colorado is lawfully divided into six congressional districts; and

(3) to accept H.B. 1624, the most recent plan adopted by the Legislature, as the redistricting plan for Colorado in the event that the Governor and the Legislature could not agree on a compromise proposal in a timely manner.

Even the possibility of judicial intervention in **[**11]** the redistricting matter could not prompt the parties to reach an accord. On October 8, 1981, the Governor's ten-day grace period expired and he vetoed H.B. 1624. For the first time, however, the Governor's veto message not only included a critique of the rejected plan but also put forth a counter-proposal. ¹² Exhibit 27c, Governor's Veto Message of H.B. 1624 dated October 8, 1981. The Governor subsequently met with leaders of the State Legislature to discuss the merits of his plan and the prospects for resolving the matter without judicial assistance.

FOOTNOTES

¹² This plan, designated "Governor's Proposal A", more closely resembles Colorado's

current congressional scheme than any other. While it contains a "west slope" district (District 3), the east plains are divided in a north-south configuration (Districts 4 and 5). The 5th District extends from the Continental Divide east to the Colorado-Kansas border and south to the Colorado-New Mexico-Oklahoma border. Denver is kept intact (District 1), although Aurora is not.

[12]** In the meantime, several concerned citizens filed a second lawsuit on October 23, 1981. The new plaintiffs, David T. Goens, Janet Roberts, Jennie Sanchez, George Rosenberg and Jean Galloway (hereinafter referred to as the "Goens plaintiffs") are also residents of each of the five current congressional districts. Their complaint similarly requests this Court to enjoin the defendants, Governor Richard D. Lamm and Secretary of State Mary Estill Buchanan from conducting the primary or general congressional elections until a new redistricting plan has been adopted. In the absence of a compromise by the parties, the Goens plaintiffs asked the Court to adopt a plan which satisfied the following seven requirements: (1) population equality; (2) absence of racial discrimination and non-dilution of minority votes; (3) compactness; (4) contiguity; (5) preservation of county lines; (6) preservation of municipal boundaries; and (7) preservation of communities of interest. The Goens plaintiffs also urged the Court to adopt their proposed plan ¹³ which complied with the seven stated criteria or, in the alternative, to implement provisions of 2 U.S.C. § 2a(c)(2) (1979). Under this federal statute, **[**13]** the state would elect the "additional Representative ... from the state at large and the other Representatives from the districts then prescribed by the law of the state." 2 U.S.C. § 2a(c)(2) (1979).

FOOTNOTES

¹³ The plan submitted by the Goens Plaintiffs is comprised of a "west slope" (District 3) and an "east plains" district (District 4), a consolidated City and County of Denver (District 1), a 2nd District of Boulder, Adams County and South Weld County, a 6th district comprised of the suburban municipalities to the west, south and east of Denver, excluding a portion of Aurora, and a 5th district in largely mountainous central Colorado.

Negotiations between the Governor and the General Assembly continued throughout the month of October and culminated in a settlement conference at the federal courthouse on November 6, 1981. At the end of **[*75]** this conference, both the Governor and the leaders of the General Assembly conceded that there was no hope of reaching a compromise. ¹⁴ The two lawsuits were subsequently **[**14]** consolidated, and the case was set for trial on December 3rd and 4th. In the ensuing weeks, twenty-two plans ¹⁵ were submitted to the Court for consideration. At trial, however, testimony focused on five major plans: H.B. 1624, ¹⁶ submitted by Carstens plaintiffs; the Goens plan, ¹⁷ submitted by the Goens plaintiffs; Governor's Proposal A ¹⁸ and the GRC plan, ¹⁹ submitted by defendant Lamm; and the McPhee Plan # 2, ²⁰ submitted by a private citizen.

FOOTNOTES

¹⁴ The transcript of that conference includes the following colloquy:

THE COURT: Mr. Halaby (counsel for the Carstens plaintiffs), do you hold out any hope for a resolution or compromise? MR. HALABY: Through the legislative process?

THE COURT: Yes. MR. HALABY: I'm afraid I would have to say no.

THE COURT: (To Ms. Hickman, counsel for the defendant Lamm) Please. MS. HICKMAN:

No, your Honor, we don't.

THE COURT: Mr. Strahle (Majority Leader in the Colorado House of Representatives)

I take it this reflects your feelings and the feelings of the other legislative leadership as expressed by Mr. Halaby; is that correct?MR. STRAHLE: Unfortunately, yes.

THE COURT: ...I am satisfied that the legislative leadership, the Governor's office, the Attorney General and the amicus (later to become the Goens plaintiffs) have made every good effort to try to reach an agreement today, and apparently it is not forthcoming. **[**15]**

15 The Court has reviewed the following plans:

(1) H.B. 1615; (2) H.B. 1618; (3) H.B. 1624; (4) the Lillpop Plan No. 6E; (5) the A-2 Plan; (6) the B-2 Plan; (7) the K Plan; (8) the K Revised 3 Plan; (9) the Callaway Equal Districts Plan; (10) the Yost Plan 1A; (11) the P/S Plan; (12) the Governor's Proposal A; (13) the GCR Plan; (14) the Groff Plan; (15) the Pena-Groff Plan # 2; (16) the Goens Plan; (17) the McPhee Plan # 1; (18) the McPhee Plan # 2; (19) a plan submitted by Waldo Smith; (20) a plan submitted by Richard E. Wanek; and (21) a plan submitted by Herrick S. Roth.

16 See note 10, supra.

17 See note 13, supra.

18 See note 12, supra.

19 The GCR Plan, an acronym for Mssrs. Gilmore, Coddington and Ryan, the experts who prepared the plan for defendant Lamm, is similar to the plan submitted by the Goens plaintiffs. Denver is kept intact (District 1) although Boulder County is split (Districts 2 and 4). The west slope district (District 3) includes Pueblo and a bizarrely split Las Animas County. The 4th District contains most of the eastern agricultural counties and the 5th District is comprised of the central Colorado mountainous region plus El Paso County. District 6 includes all the suburban municipalities to the west, south and east of Denver, with the exception of northern Aurora. **[**16]**

20 The McPhee Plan No. 2 was devised by Professor William McPhee as a revision of an earlier plan submitted by him. This plan generally includes all of Colorado west of the foothills in a "west slope" district (District 3), incorporates the agricultural east plains in a single district (District 4), and forms the other four districts in a narrow strip along the front range, including a north-south division of Denver similar to H.B. 1624. District 2 includes the city of Boulder and the large municipalities to the west and northeast of Denver, and District 5 includes Colorado Springs and most of Pueblo.

II

JURISDICTION

The parties agree that this Court has jurisdiction over plaintiffs' claims for declaratory relief pursuant to 28 U.S.C. § 2201 and 2202 (1979). Jurisdiction over plaintiffs' equitable claims is based on 28 U.S.C. §§ 1343(3), 1343(4) (1979) and 42 U.S.C. §§ 1983 and 1988 (1979). Because this case challenges the constitutionality of the current apportionment of Colorado's congressional districts, a three-judge court was convened in accordance with the provisions of

28 U.S.C. **[**17]** § 2284(a) (1979). ²¹

FOOTNOTES

²¹ *HN6* 28 U.S.C. § 2284(a) (1976) states in pertinent part:

A district court of three judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts

On November 2, 1981, the Honorable Oliver Seth, Chief Judge of the United States Court of Appeals for the Tenth Circuit issued an order appointing Judges Robert H. McWilliams, Sherman G. Finesilver and John L. Kane, Jr. to the panel in the instant case.

[*76] A. Ripeness

Defendant Buchanan contends that the Legislature and the Governor have not had a full opportunity to act on redistricting Colorado, and therefore, the case before the Court is not ripe for adjudication. According to Buchanan, the Legislature and the Governor "may well" reach an accord on redistricting if they are given more time. Plaintiffs, however, point out that Colorado's congressional districts must be finalized prior to certain precinct and primary deadlines. ²² They argue that **[**18]** the Court cannot wait to take action on this matter until those deadlines expire.

FOOTNOTES

²² These deadlines include: (1) April 1, 1982-The last day for County Commissioners to alter precinct boundaries in conformance with congressional district lines (C.R.S.1973, § 1-6-101); (2) May 3, 1982-precinct caucus day (C.R.S.1973, § 1-3-102(1)); (3) May 13 to June 2, 1982-First and last day to hold county assembly (C.R.S.1973, § 1-4-602(1)); (4) July 1, 1982-Last day for the political party's congressional assembly to designate candidates for Congress (C.R.S.1973, § 1-4-601); (5) September 14, 1982-Congressional primary election; and (6) November 2, 1982-General election.

HN7 Ripeness is an amorphous legal concept subject to many "subtle pressures including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought." *Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L. Ed. 2d 989 (1961). See also, *Abbott Laboratories v. Gardner*, 387 **[**19]** U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *In re Grand Jury*, 604 F.2d 69 (10th Cir. 1979). The central concern of a ripeness inquiry is "whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" to warrant the attention of the Court. *Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498, 506, 92 S. Ct. 1749, 1755, 32 L. Ed. 2d 257 (1972) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941)). As a general rule, the Court will not review matters involving uncertain and contingent future events that may not occur as anticipated or may not occur at all. See *Wright & Miller*, 13 *Federal Practice & Procedure*, § 3532, p. 238 (1975).

In the instant case, the Governor and the State Legislature have had ample opportunity to redistrict Colorado to provide for an additional representative. The Legislature has passed three different redistricting proposals, all of which were subsequently vetoed by Governor Lamm. No attempt was made to override these vetoes. Despite months of deliberate study and negotiations, the people of Colorado still do not have an acceptable **[**20]**

congressional redistricting plan.

We are persuaded that the fate of redistricting in Colorado has reached an impasse which the parties are not capable of resolving. At the end of the November 6 negotiating session in the federal courthouse, the parties agreed that it "would do neither side any ... good to negotiate ... further". Transcript, Hearing of November 6, 1981, p. 3. Moreover, at trial Representative Ronald Strahle, Majority Leader of the Colorado House of Representatives testified that it was "highly remote" that the Governor and the Legislature would ever agree on an acceptable redistricting plan. This assessment was never challenged.

The hardship to the parties and to the people of Colorado is evident. There is no dispute that the current posture of Colorado's congressional districts is unconstitutional. If an acceptable redistricting plan is not adopted, the only alternative would be to hold the 1982 congressional elections pursuant to district lines which are patently offensive to the long-established principle of "one person-one vote". Thus, this Court is presented with a controversy of immediate concern. There is no indication that absent judicial intervention, **[**21]** a viable solution will be forthcoming. Considering the nature of the issues presented for decision and the hardship to the parties, we find that the redistricting question is ripe for adjudication.

[*77] B. Applicability of 2 U.S.C. § 2a(c)(2)

One possible short term solution to the redistricting dilemma is contained in ^{HN8} 2 U.S.C. § 2a(c)(2) (1979). This federal statute declares, "until a state is redistricted in the manner provided by the law thereof after any apportionment, ... if there is an increase in the number of representatives, such additional representative or representatives shall be elected from the state at large and the other representatives from the districts then prescribed by the law of such State." Defendant Buchanan maintains that even if this matter is ripe for review, this Court must defer to the directives of this statute and dismiss the case.

The Carstens plaintiffs claim that this Court is not constrained by the provisions of 2 U.S.C. § 2a(c)(2) because the measure was impliedly repealed when Congress passed ^{HN9} 2 U.S.C. § 2c in 1967. Section 2c provides, "In each state entitled ... to more than one representative under an apportionment, ... there shall **[**22]** be established by law a number of districts equal to the number of representatives to which such state is entitled, and Representatives shall be elected only from districts so established, no district to elect more than one representative ..." On its face, Section 2c appears to prohibit at-large elections under any circumstances since the number of districts and the number of representatives must always be equal.

We are of the view that these two statutes are not necessarily inconsistent and do not preclude this Court from considering the redistricting dilemma. Section 2c prohibits a legislature or court from deliberately designing a redistricting plan which would elect at-large representatives. Arguably, Congress did not repeal Section 2a(c)(2) because they did not want to leave a state without a remedy in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan. ²³ In this very limited circumstance, we believe that Section 2a(c)(2) **[*78]** provides emergency statutory relief from an otherwise unconstitutional situation. There is nothing **[**23]** in the language of Section 2a(c)(2) which indicates that Congress intended to bar the federal courts from providing timely assistance to the state in resolving a redistricting dispute. Since the posture of this case does not require the use of such a drastic emergency remedy, we find that Section 2a(c)(2) is not applicable here.

FOOTNOTES

23 But see *Shayer, et al. v. Kirkpatrick, et al.*, 541 F. Supp. 922, No. 81-4144-CV-C (W.D.Mo. Jan. 7, 1982). In *Shayer*, a three-judge court considered the applicability of 2 U.S.C. § 2a(c)(5) in a suit challenging the constitutionality of Missouri's existing congressional districts. Section 2a(c)(5) provides:

(c) Until a State is redistricted in the manner provided by the law thereof after any reapportionment, the Representatives to which such state is entitled under such apportionment shall be elected in the following manner:

(5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives they shall be elected from the State at large.

The Missouri court concluded that § 2a(c)(5) was not applicable inasmuch as it was inconsistent with the § 2c prohibition of at-large elections and, thus, repealed by implication. The Court relied in part on the following colloquy between Senator Howard Baker of Tennessee and Senator Birch Bayh of Indiana during the floor debate on § 2c:

Mr. Baker: (2 U.S.C. § 2c) strictly provides in a straightforward manner that when there is more than one member of the House of Representatives from a state, the state must be redistricted, and the members may not run at large.

Mr. Bayh: Suppose a state legislature does not do it (redistrict). Does the Senator not think that, to be consistent, we should say that the Federal Court should not be permitted to reapportion a state and let all the legislators run at large?

Mr. Baker: With respectful deference to my colleague, I think not; because I believe that you are then running afoul of the very problem that is created by occasional failure of state legislatures to adhere to the provisions of Article I of the Constitution.

Mr. Bayh: ... I just wish to make one brief comment in summary, in light of the colloquy.

This will make it mandatory for all Congressmen to be elected by single-member districts, whether the reapportionment is done by the state legislatures or by a Federal Court.

Mr. Baker: That is my understanding.

Shayer, supra, slip opinion at pp. 7-8, at pp. 926-27. We do not feel that these comments, or any of the congressional debate on § 2c necessarily indicate a desire on the part of Congress to repeal § 2a(c)(2). A persuasive argument can be made that the statute is a stop-gap measure to be utilized in the limited circumstances discussed above.

【**24】 III

ISSUES

The issues in this case can be divided into two broad categories. The first category defines the scope of the Court's authority to act while the second category delineates the criteria which form the basis of the Court's decision.

A. The Scope of the Court's Authority to Act

Although we have established that this Court has jurisdiction to rule on the redistricting dispute, it is also important to determine the scope of the Court's authority in this matter.

According to the Carstens plaintiffs, our authority is somewhat limited. Since redistricting is primarily the responsibility of the State Legislature, they argue that H.B. 1624, the last legislative pronouncement, represents current state policy on redistricting and should receive priority during the Court's deliberations.

Carstens plaintiffs claim that courts in general have paid great deference to the "studied and thoughtful approach" to redistricting provided by the legislative process. As examples of instances in which a court has deferred to the legislature, they cite *White v. Weiser*, 412 U.S. 783, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973) and *Donnelly v. Meskill*, 345 F. Supp. 962 (D.Conn.1972). These cases **[**25]** fail to support Carstens' position.

In *White v. Weiser*, 412 U.S. 783, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973), the Supreme Court reversed a three-judge district panel's selection of a redistricting plan because that plan "broadly brush(ed) aside state apportionment policy without solid constitutional or equitable grounds for doing so." *Id.* at 796, 93 S. Ct. at 2355. The case is not controlling, however, because the "state apportionment policy" referred to by the Court was embodied in a plan which not only had been passed by the State Legislature but also had been signed into law by the Governor. *Id.* at 784, 93 S. Ct. at 2349. In the instant case, H.B. 1624 was approved by the General Assembly but vetoed by the Governor. ²⁴

FOOTNOTES

²⁴ Carsten's reference to *Graves v. Barnes*, 446 F. Supp. 560 (W.D.Tex.1977) can be dismissed on similar grounds.

Although *Donnelly v. Meskill*, 345 F. Supp. 962 (D.Conn.1972), another case cited by the Carstens plaintiffs, is factually similar to the situation before this Court, *Donnelly* **[**26]** is also distinguishable. In that case, the Court was required to select one of three plans submitted after the Legislature's redistricting bill had been vetoed by the Governor. The plan chosen by the Court contained districts "essentially as outlined by the legislature, with adjustments necessary to bring about virtually complete population equality." *Id.* at 965. While the Court felt that this essentially legislative plan was constitutionally sound and workable, it concluded, "if time permitted extended hearings before the court or extended consideration by a court-appointed master, a better plan might be devised, weighing all possible factors." *Id.* at 965. In the instant case, the Court has solicited extensive submissions from the parties and does not face the same severe time constraints ²⁵ which confronted the *Donnelly* court. Thus, we do not feel that the holding in either *White* or *Donnelly* compels us to give priority to H.B. 1624, particularly if a better plan is available.

FOOTNOTES

²⁵ *Donnelly* was decided in mid-July with the November election less than four months away. The instant case, however, was filed well over a year before the 1982 Colorado congressional election, allowing the Court sufficient time to fashion appropriate relief.

[27]** HN107

[*79] Congressional redistricting is a law-making function subject to the state's constitutional procedures. *Koenig v. Flynn*, 285 U.S. 375, 52 S. Ct. 403, 76 L. Ed. 805 (1932). See also *Smiley v. Holm*, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932). The Colorado Constitution explicitly provides that every bill passed by the General Assembly shall be signed by the Governor before it becomes law. ²⁶ Colo.Const. art. IV, § 11. There is no

authority conferred upon the General Assembly "to create congressional districts independently of the participation of the Governor as required by the state constitution with respect to the enactment of laws." Smiley, 285 U.S. at 373, 52 S. Ct. at 401. Accord, State ex rel. Reynolds v. Zimmerman, 22 Wis.2d 544, 126 N.W.2d 551 (1964).

FOOTNOTES

²⁶ The legislature, by a two-thirds majority, can override the Governor's veto. Colo.Const., art. IV, § 11.

As a result, H.B. 1624, which certainly is entitled to careful consideration by this Court, cannot represent current state **[**28]** policy any more than the Governor's proposal. Both the Governor and the General Assembly are integral and indispensable parts of the legislative process. ²⁷ To take the Carstens' position to its logical conclusion, a partisan state legislature could simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the Court defer to their proposal. This Court will not override the Governor's veto when the General Assembly did not do so. ²⁸ Instead, we regard the plans submitted by both the Legislature and the Governor as "proffered current policy" ²⁹ rather than clear expressions of state policy and will review them in that light.

FOOTNOTES

²⁷ "The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measure which itself on mature reflection would condemn." A. Hamilton, *The Federalist* 495 (Jacob Cooke, ed. 1961). **[**29]**

²⁸ Cf. *Legislature of California v. Reinecke*, 6 Cal.3d 595, 99 Cal.Rptr. 481, 492 P.2d 385 (1972).

²⁹ *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 197, 92 S. Ct. 1477, 1484, 32 L. Ed. 2d 1 (1972).

B. The Criteria

HN11 The primary goal of an acceptable congressional redistricting plan should be "fair and effective representation of all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S. Ct. 1362, 1383, 12 L. Ed. 2d 506 (1964). Prior to the early 1960's, the Supreme Court refused to get involved in the predominantly political cases which challenged the composition of legislative or congressional districts. See e.g., *Colegrove v. Green*, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946). ³⁰ The disparities in the composition of districts in some states became so great, however, that the Court was forced to intervene in order to protect the integrity of the legislative system. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). ³¹ Development of the criteria which currently govern congressional redistricting began shortly thereafter with *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964).

FOOTNOTES

³⁰ In *Colegrove*, a sharply divided Court refused to consider claims that Illinois congressional districts were unconstitutional due to the state's failure to reapportion. Justice Frankfurter, writing for the majority, warned that it would be "hostile to a democratic system to involve the judiciary in the politics of the people". *Colegrove*, 328 U.S. at 553-54, 66 S. Ct. at 1200.

³¹ In *Baker*, the Court held that the federal courts had jurisdiction to hear a suit filed by a citizen of Tennessee alleging that the state's failure to update the 1901 apportionment of the state legislature "debased" his constitutional right to vote. At the time Baker's suit was filed, Tennessee's three million residents were divided into legislative districts ranging in size from 42,298 to 2,340. Tennessee was not unique in this regard. Population disparities of 10 to 1 or higher were common in the legislative and congressional districts of most states. Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, 9 *Policy Studies Journal* 839, 843 (Special Issue # 3, 1980-81).

[31] [*80]** In *Wesberry*, several citizens challenged the gross population disparities in Georgia's congressional districts which ranged in size from 823,680 residents in the largest district to 272,154 residents in the smallest district. These individuals claimed that their right to vote had been diluted by the failure of the Georgia Legislature to realign each district to equalize the population. The Supreme Court agreed and established population equality as the first relevant constitutional standard for congressional redistricting. The Court held, "the command of Article I, Section 2 that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8.

Over the next few years, the Court attempted to define the acceptable parameters of population deviation under the "one person, one vote" principle. Although the Court seemed to assume that equal representation was synonymous with equal population, it steadfastly refused to quantify the criteria announced in *Wesberry* as a fixed or numerical percentage. In *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 **[**32]** S. Ct. 1225, 22 L. Ed. 2d 519 (1969), the Court invalidated a Missouri congressional redistricting plan with an overall population deviation of 5.97%. ³² Justice Brennan declared that *Wesberry*'s "as nearly as practical" standard required "the State (to) make a good faith effort to achieve precise mathematical equality" and "(to) justify each variance, no matter how small." *Id.* at 530-31, 89 S. Ct. at 1228. The Court concluded that the population variances among the Missouri congressional districts were unacceptable and could not be justified by the state's attempt to avoid fragmenting political subdivisions or areas with distinct economic and social interests, to recognize projected population shifts, to ensure geographically compact districts, or to achieve a reasonable legislative compromise. *Id.* at 533-36, 89 S. Ct. at 1230.

FOOTNOTES

³² Throughout this opinion, we will refer to the "overall population deviation" or "total population deviation" in a specific case or plan as the term has been used by the Supreme Court. To arrive at this figure, we first calculated the difference in population between the largest and smallest districts and divided the result by the ideal population. See note 1, *supra*.

In *Kirkpatrick*, for example, the largest district drawn by the Missouri legislature had a population of 445,523, while the smallest contained 419,721. The difference between the two districts is 25,802. When this figure is divided by the ideal population (431,981), the result is .0597. Converted to a percentage, the "total population deviation" of the Missouri legislature's plan is 5.97%.

[33]** Similarly, in *Wells v. Rockefeller*, 394 U.S. 542, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969), the Court invalidated a New York congressional redistricting plan with a total population deviation of 13.095% ³³. In that case, New York did not claim that the Legislature had made a good faith effort to achieve mathematical equality. Instead, the state attempted to justify existing deviations by creating districts with specific interest orientations. The Court rejected this argument as "antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." *Id.* at 546, 89 S. Ct. at 1237.

FOOTNOTES

³³ In *Wells*, the largest district drawn by the New York legislature contained 435,880 people, while the smallest numbered 382,277. The difference between these two districts (53,603) divided by the ideal population (409,324) yields a quotient of 0.13095. Converted into a percentage, the total population deviation in the New York legislature's plan is 13.095%.

Although **[**34]** the Court has accepted greater population deviations for state legislative districts ³⁴, it seems preoccupied with the notion of precise mathematical equality for congressional districts. The most recent decision **[*81]** on this issue not only affirmed the strict standard enunciated in *Kirkpatrick and Wells*, but also tightened the range of acceptable variances. In *White v. Weiser*, 412 U.S. 783, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973), the Court rejected a Texas redistricting plan with an overall population variance of 4.13% in favor of a plan with a total deviation of 0.149%. ³⁵

FOOTNOTES

³⁴ See *Chapman v. Meier*, 420 U.S. 1, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975) (the Court sustained an overall relative deviation of 20.14% in the North Dakota State House districts); *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973) (the Court sustained an overall relative deviation of 9.9% in the Texas state House districts); *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973) (the Court sustained an overall relative deviation of 7.83% in the Connecticut state House districts); *Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979, 35 L. Ed. 2d 320 (1973) (the Court sustained an overall relative deviation of 16.4% in the Virginia state House districts). **[**35]**

³⁵ In *White*, the population of the largest and smallest districts in the plan accepted by the Court were 400 and 296, respectively. The difference of 696 divided by the ideal population of 466,530 is .00149. Converted into a percentage, the total population deviation of the *White* plan is 0.149%.

The current status of the population equality standard is perhaps best described as entrenched ambiguity. No one will deny that it is the "pre-eminent, if not the sole, criterion on which to adjudge (the) constitutionality" of congressional redistricting plans. *Chapman v. Meier*, 420 U.S. 1, 23, 95 S. Ct. 751, 764, 42 L. Ed. 2d 766 (1975). The precise point at which a plan passes into the range of acceptable population deviation remains undefined and presumably varies with the plan. In applying this standard, however, the district courts tend to invalidate deviations which are greater than those found in *Kirkpatrick and Wells*. See e.g., *David v. Cahill*, 342 F. Supp. 463 (D.C.N.J.1972) (total population deviation of 12.41%); *Skolnick v. Illinois State Electoral Board*, 307 F. Supp. 698 (N.D.Ill.1969) **[**36]** (total population deviation of approximately 13.6%). Conversely, plans with lower population

variances have been approved. See e.g., *Dunnell v. Austin*, 344 F. Supp. 210 (E.D.Mich.1972) (total population deviation of .01005%); *Drum v. Scott*, 337 F. Supp. 588 (M.D.N.C.1972) (total population deviation of 3.79%); *West Virginia Civil Liberties Union v. Rockefeller*, 336 F. Supp. 395 (S.D.W.Va.1972) (total population deviation of 0.07865%); *Skolnick v. State Electoral Board of Illinois*, 336 F. Supp. 839 (N.D.Ill.1971) (total population deviation of 1.144%).

HN12 The second constitutional criteria used in analyzing redistricting plans developed out of the realization that sheer mathematical equality may not adequately protect minority rights. Although no group has a constitutional right to be represented in a legislative body in direct proportion to its numerical voting strength ³⁶, the Court began to recognize that district lines could be drawn in a manner which would "minimize or cancel out the voting strength of racial or political elements of the ... population." *Fortson v. Dorsey*, 379 U.S. 433, 439, 85 S. Ct. 498, 501, 13 L. Ed. 2d 401 (1965). See also *Whitcomb v. Chavis*, 403 U.S. 124, **[**37]** 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971). Thus, plans which satisfy equal population requirements may still be vulnerable to attack on the issue of invidious racial discrimination.

FOOTNOTES

³⁶ See *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980); *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971).

HN13 Unlike population equality which is capable of quantifiable verification, dilution of minority voting strength addresses the quality of representation and cannot be established through simple numerical tests. *Whitcomb*, 403 U.S. at 142, 91 S. Ct. at 1868 (1971). Instead, the court must determine whether there is sufficient "evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did residents in the district to participate in the political processes and **[**38]** to elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 765-66, 93 S. Ct. 2332, 2339, 37 L. Ed. 2d 314 (1973). The constitutionally protected right is one of equal access to the political process.

In the instant case, the parties have not challenged an existing redistricting plan on the basis of invidious racial discrimination. Therefore, we find it unnecessary to explore the nuances of proof needed to support such a claim. We are, however, acutely aware of the potential for minimizing the voice of minority populations in the development of redistricting plans and have carefully reviewed all of the proposals submitted **[*82]** to the court with this issue in mind. ^{36a} In our view, a redistricting plan which satisfies this criteria should not fracture a natural racial or ethnic community or otherwise dilute minority voting strength.

FOOTNOTES

^{36a} An additional factor which should be mentioned in our analysis of minority representation is the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. (1979). This legislation "designed by Congress to banish the blight of racial discrimination in voting," requires covered jurisdictions to seek the approval of the United States Attorney General or of a three-judge court in the District of Columbia before implementing new voting procedures. *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803, 808, 15 L. Ed. 2d 769 (1966). A county becomes subject to these "preclearance" requirements whenever the Justice Department determines that certain conditions, indicative of racial discrimination in voting, are present in the area.

El Paso County is the only jurisdiction in the state of Colorado which is currently subject to preclearance procedures under the Act. Defendant Buchanan explained that these requirements were imposed on El Paso several years ago because (1) more than 5% of the residents of voting age were members of a single language minority and (2) less than 50% of the residents of voting age cast ballots in the 1970 Presidential election. Buchanan claims that since these conditions have now been remedied, this Court should "exercise its equitable powers to declare that the State of Colorado is no longer subject to preclearance" requirements. Buchanan's Closing Arguments, p. 3-4.

We decline to rule on the current status of El Paso County under the Voting Rights Act. Because the Court has fashioned its own plan rather than implementing a legislative proposal, the preclearance requirements of the Act are not applicable in the instant case. *McDaniel v. Sanchez*, 452 U.S. 130, 101 S. Ct. 2224, 68 L. Ed. 2d 724 (1981).

[39]** These two constitutional criteria, population equality and absence of racial discrimination, have formed the foundation of judicial analysis on this issue for almost two decades. While the integrity of these standards has never been seriously challenged, the lower courts have frequently been forced to resort to additional non-constitutional criteria in their comparisons of proposed congressional plans. The degree of sophistication in redistricting technology has reached a point where it can match the courts' increasing demands for mathematical precision. As a result, courts are often faced with situations in which several different redistricting plans achieve virtually identical levels of population equality without substantially diluting minority rights. ^{36b} In these cases, no reasoned decision can be based solely on these two constitutional criteria. The court must accommodate other relevant criteria in determining whether to accept a proposed plan or to adopt a new one.

FOOTNOTES

^{36b} For example, a three-judge district panel in Illinois was recently presented with four plans which ranged in total population deviation from .02851% to .14797%. See *In Re Illinois Congressional Districts Reapportionment Cases*, No. 81-C-3915 (N.D.Ill. December 3, 1981), judgment aff'd, sub. nom. *Ryan v. Otto and McClory v. Otto*, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

[40]** Therefore, we decided to evaluate the plans submitted to the Court on the basis of several additional non-constitutional criteria. These criteria can be grouped into three categories: 1) compactness and contiguity; 2) preservation of county and municipal boundaries, and 3) preservation of communities of interest. Selection of these criteria was based primarily upon their successful use in other redistricting cases. See e.g., *David v. Cahill*, 342 F. Supp. 463 (D.C.N.J.1972); *Preisler v. Secretary of State of Missouri*, 341 F. Supp. 1158 (W.D.Mo.1972); *Skolnick v. State Electoral Board of Illinois*, 336 F. Supp. 839 (N.D.Ill.1971). We note, as well, that both the Governor and the State Legislature's Interim Committee on Congressional Redistricting considered these factors important enough to include them on lists of guidelines to be used in developing proposed plans. ³⁷ In addition, **[*83]** the people of Colorado have adopted an amendment to the state constitution which endorses the use of similar criteria in state reapportionment cases. ³⁸

FOOTNOTES

³⁷ In his July 17, 1981, veto message of H.B. 1618, Governor Lamm suggested these guidelines:

The primary factor in any redistricting plan is obviously that of population equality. In realizing this numerical equality, city and county boundaries should be followed to the maximum extent possible. Districts should be compact to the maximum possible extent. The voting effectiveness of minority groups must not be diminished or diluted. Incumbents should not be granted special favorable treatment, but neither should they be subject to punitive treatment.

Exhibit 27c.

The Interim Committee on Congressional Redistricting of the Colorado State Legislature adopted the following criteria on August 19, 1981:

In consideration of congressional redistricting plans, the committee shall observe the following two requirements:

- (a) population equality in each district; and
- (b) avoidance of overt dilution of minority voting strength.

In consideration of congressional redistricting plans, the committee may recognize as desirable but not binding, the following elements of a plan:

- (a) an attempt, insofar as practical, to avoid splitting county boundaries;
- (b) an endeavor, insofar as practical, to draw compact districts;
- (c) an attempt should not be made to draw plans for the specific purpose of rewarding or penalizing incumbents;
- (d) to the extent practical, the plan should respect communities of interest and
- (e) other desirable elements which may be brought to the attention of the committee.

Exhibit 25a. [**41]

³⁸ HN147 Colorado Constitution, Article V, § 47 states:

Composition of districts. (1) Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap.

(2) Except when necessary to meet the equal population requirements of section 46, no part of one county shall be added to all or part of another county in forming districts. Within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible. When county, city or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law.

(3) Consistent with the provisions of this section and section 46 of this article, communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible.

[42]** Throughout this litigation, Carstens plaintiffs have criticized the use of non-constitutional criteria in analyzing redistricting plans. They argue that there are internal conflicts inherent in such criteria which make their use subjective and impractical. We do not find these arguments persuasive. ^{HN15}When faced with potentially conflicting interests, courts generally attempt to achieve an equitable result by using a balancing test. See *David v. Cahill*, 342 F. Supp. 463 (D.C.N.J.1972); *Skolnick v. State Electoral Board of Illinois*, 336 F. Supp. 839 (N.D.Ill.1971). If conflicts do, in fact, occur when these criteria are applied to redistricting plans, we are convinced that balancing the competing interests represents a realistic and practical means for resolving any potential problems.

IV

GEOGRAPHIC AND DEMOGRAPHIC PROFILE OF COLORADO

Before proceeding to critique the plans submitted to the Court under the criteria outlined above, it is important to review the topography and population distribution of the state. An understanding of geography and demographics is important to the development of a rational state policy for redistricting Colorado.

Geographically speaking, the state **[**43]** is divided into three principal regions: (1) eastern plains, (2) western slope and (3) Rocky Mountains and Continental Divide. The eastern portion of Colorado (generally referred to as the eastern plains) covers more than one-third of the state's land area. This region has flat plains and broad rolling prairies which gradually rise to the foothills and the mountain ranges (on the west) that divide the state. A combination of physical and economic geography influences the eastern portion of the state. These high plains are bisected by two prominent river valleys, the Arkansas and South Platte, which have been dominant forces in the development of this region. The people in the area are dependent on these two rivers for their water supply which is their economic base.

The western third of Colorado (commonly referred to as the western slope) consists of **[*84]** alpine terrain interspersed with wide valleys, rugged canyons, high plateaus and deep basins. Like the eastern plains, the west slope contains two prominent river systems, the Colorado and the Gunnison, which converge at the city of Grand Junction, the major population center of the western slope.

The Rocky Mountains **[**44]** cut through the middle third of Colorado from north to south and also rise in the northwestern corner of the state. Fifty-five peaks which tower 14,000 feet or more above sea level are found in this mountainous area. The Continental Divide, a line of mountain summits which separates streams flowing toward the Pacific Ocean and the Gulf of California from those flowing toward the Gulf of Mexico, traverses the west central part of the state. This world famous Divide is crossed by a limited number of highways which are open year round. As a result, the Divide has a substantial effect on the distribution of Colorado's population. The geographic location and physical characteristics of the Divide must therefore be a realistic consideration in any redistricting plan.

The distribution of the state's population over Colorado's broad and varied geographic spectrum is truly unique. Nine of the state's 63 counties contain approximately 80 percent of the state's total population. These nine counties (Adams, Arapahoe, Boulder, Denver, El Paso, Jefferson, Larimer, Pueblo and Weld) are located along the narrow strip of the eastern front range of the Rocky Mountains. The other 20 percent of **[**45]** the state's population is distributed over a vast geographic area. The retail trade centers, educational institutions, and recreational facilities of the front range counties, however, act as the lifeblood for a major portion of the state.

With these facts in mind, we will now examine the plans submitted to the Court under the criteria we outlined above.

V

CRITIQUE OF THE PLANS UNDER COURT-ADOPTED CRITERIA

A. The Constitutional Criteria

The first constitutional criteria, population equality, has not been a topic of dispute during the course of this litigation. All of the plans submitted to the Court made a "good faith effort" to comply with this requirement. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969); *Wells v. Rockefeller*, 394 U.S. 542, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969). If the 0.149% total deviation figure accepted by the Supreme Court in *White v. Weiser*, 412 U.S. 783, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973), is used as a benchmark, each of the plans fall well within constitutional limits.

The overall population deviation figures range from a low of 7 people or .0015% on H.B. 1624 to a high of 15 people or .0031% on the Governor's **[**46]** Plan.³⁹ In simple terms, these figures mean that the drafters of H.B. 1624, the most exacting plan in population terms, came within fifteen one-thousandths of a percent of being able to split the state into six equal congressional districts. **[*85]** The least successful plan, however, was off by only thirty-one one-thousandths of a percent.

FOOTNOTES

³⁹ The following table summarizes the overall population deviation figures for the five major plans discussed at trial:

Plan	Population of Largest District	Population of Smallest District	Difference	Total Population Deviation (percentage)
H.B. 1624	481,625	481,618	7	.0015%
Goens	481,628	481,616	12	.0025%
Governor's				
Proposal A	481,629	481,614	15	.0031%
GCR	481,628	481,617	11	.0023%
McPhee #2	481,629	481,616	13	.0027%

To select one plan over another on the basis of population equality when only sixteen one-thousandths of a percent separates the five major plans presented to the Court **[**47]** ignores the realities of "fair and effective representation." We refuse to relegate congressional redistricting to a hair splitting game in which the citizens of the state emerge as the only real losers. We must therefore rely on the other criteria to draw some important distinctions between these plans.

Each of the plans submitted to the Court was carefully analyzed on the basis of the second constitutional criteria, the absence of racial discrimination and the non-dilution of minority votes. The State of Colorado has a combined minority population of 16.9% which is concentrated in three major areas. Exhibit 33(a). The City and County of Denver supports both a substantial Black and Hispanic population. Large groups of Hispanics also reside in the City of Pueblo, elsewhere in Pueblo County and in the San Luis Valley located in the south central portion of the state. Exhibits 13, 14 and 32(a). The manner in which each of the

proposed plans deals with these centers of minority population is an important factor in determining their constitutionality and credibility.

None of the plans shows any evidence of invidious racial discrimination. At least one, however, raises questions **[**48]** regarding the dilution of minority votes. H.B. 1624, submitted by the Carstens plaintiffs, includes a significant split of the minority populations in both Denver and Pueblo. This plan divides the Denver community in half and likewise splits Pueblo along an irregular configuration.

Although Carstens plaintiffs admit that the Denver metropolitan area represents the only concentration of minority strength sufficient to create a relatively strong minority district, they claim that H.B. 1624 splits Denver in order to "enhance" minority votes. This alleged enhancement is accomplished by adding the growing minority population in western Adams county ⁴⁰ to the large minority population residing in northeast Denver. ⁴¹ Thus, Carstens plaintiffs claim that District 1 of H.B. 1624 encompasses substantially all of the expected minority population growth in the Denver metro area in the coming decade. They strongly suggest that "the affirmative goal of having a district that will be one in which a Black-Hispanic minority finally achieves such strength as to guarantee representation of their choice is plainly obtainable under H.B. 1624." Carstens Closing Argument at p. 5.

FOOTNOTES

⁴⁰ David Prince, former Colorado state demographer, testified at trial on the growth of minorities in Adams County. According to Prince, the Hispanic population grew from 26,277 in 1970 to 38,470 in 1980 for a total of 46.4% over the ten year period. The Black population rose from 1355 in 1970 to 6307 in 1980 for a total ten year growth rate of 365%. Minorities currently represent 20% of the total population of Adams County. **[**49]**

⁴¹ Prince also testified as to changes in Denver's minority population. From 1970 to 1980, the Black population increased from 47,011 to 59,252 or a total of 26%. The Hispanic population over the same ten year period rose only 6.5% from 86,345 to 91,937. Minorities currently comprise 32.98% of the total population of the City and County of Denver.

We have thoroughly examined the minority population statistics for the Denver area and have carefully reviewed the testimony at trial. On the basis of this evidence, we are not persuaded by the arguments of the Carstens plaintiffs. No one will deny that the enhancement of minority voting strength is a worthy goal. The experts at trial agreed, however, that the benefit obtained through a 3 to 5% increase in the minority population in H.B. 1624's first congressional district was far outweighed by the detrimental impact of splitting the City and County of Denver into several districts. ⁴²

FOOTNOTES

⁴² See discussion of testimony at p. 89, *infra*.

[50]** *HN16* 

As a general rule, minority voting strength is impermissibly diluted when **[*86]** large concentrations of minority population are necessarily fragmented and disbursed. *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1363, 47 L. Ed. 2d 629 (1976); *Mississippi*

v. United States, 490 F. Supp. 569, 581 (D.C.D.C.1979). H.B. 1624 severs traditional Hispanic communities in west Denver, placing part of them in the first district and part of them in the sixth district. The split is made to achieve a 3 to 4% increase in the minority population in H.B. 1624's first congressional district relative to the other plans. ⁴³ If this increase made a meaningful impact on minority voting strength, we might be more receptive to the position of the Carstens plaintiffs. But the fact remains that a minority population must have a majority of 60 to 65% of the voters in a district in order to exercise political control over that district. *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S. Ct. 996, 51 L. Ed. 2d 229 (1977); *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976). Unfortunately, it is mathematically impossible to design a district in Colorado in which **[**51]** minorities are "guaranteed representation of their choice." Cf. Carstens' Closing Argument at p. 5. Even allowing for substantial growth in the minority population during the next decade, it is unlikely that the minority population in this district will even begin to approach the 60-65% goal. Drawing district lines to enhance minority representation thus becomes a hollow concept, particularly when the 3-4% enhancement in one district is accomplished at the cost of 5-6% reduction in another. ⁴⁴

FOOTNOTES

⁴³ The total minority population (Black, Hispanic, Asian, American Indian, Aleut or other) in the first congressional district of each major plan is as follows:

H.B. 1624	36.6%	(Exhibit 33c)
Goens	32.5%	(Exhibit 33e)
GCR	33.4%	(Exhibit 33b)
Governor's Proposal A	31.8%	(Exhibit 33d)
McPhee #2	37.1%	(Exhibit 33f)
See also Exhibits 18a-d.		

⁴⁴ The total minority population in the second congressional district of each major plan is as follows:

H.B. 1624	7.19%	(Exhibit 33c)
Goens	16.2%	(Exhibit 33e)
GCR	13.9%	(Exhibit 33b)
Governor's Proposal A	15.0%	(Exhibit 33d)
McPhee #2	7.5%	(Exhibit 33f)
See also Exhibits 18a-d.		

[52]** Carstens plaintiffs contend that the split through the city and county of Pueblo similarly enhances minority voting strength in the third district. ⁴⁵ The evidence submitted at trial, however, belies this claim. ⁴⁶ The district lines which wind and twist through southern Colorado succeed in consolidating **[*87]** the Hispanic population of western Pueblo County and the San Luis Valley in District 3 while placing the Hispanics in Las Animas County in District 4 and the Hispanics in the eastern half of Pueblo County in District 5. As a result, H.B. 1624 fractures the southern Hispanic community more than any other plan before this Court.

FOOTNOTES

⁴⁵ H.B. 1624's Fifth District is comprised of El Paso, Teller, Elbert Counties, and portions

of Pueblo, Fremont and Arapahoe Counties. Carstens plaintiffs argue that "taking the GCR Plan as a basis of comparison, (the Fifth District in) H.B. 1624 contains 45% more minorities, Goens contains no greater minority representation and the Governor's Plan contains only 27% more minorities. Thus, H.B. 1624 set up a second major concentration of minority population in that district which included El Paso County-the only county in Colorado which is covered by the Voting Rights Act". Carstens Closing Argument p. 7 (emphasis in original). **[**53]**

46 First, Carstens' argument that H.B. 1624 demonstrates "sensitivity to the Voting Rights Act's concern for racial representation by combining Black voting strength in El Paso County with minorities in other immediately contiguous areas" is not persuasive. See Carstens Closing Argument p. 7-8. The determination that a county is subject to preclearance requirements under the Voting Rights Act is made on the basis of minority population and voter registration in that specific county. The placement of a preclearance county in a particular congressional district has absolutely no bearing on the county's status under the Voting Rights Act. See note 36a, supra.

Second, Exhibit 33, prepared by the Carstens plaintiffs, demonstrates that their enhancement of minority population in the Fifth District will not have a meaningful impact on minority strength and was accomplished at the expense of minorities in the Third District.

Plan	Minority Population District 3	Minority Population District 5
H.B. 1624	16.9%	17.1%
Goens	19.4%	12.5%
GCR	20.0%	13.1%
Governor's Proposal A	19.2%	16%
McPhee #2	13.3%	19.7%

As we explained when a similar situation arose in H.B. 1624's First Congressional District, a meaningless enhancement of minority strength in the district is not sufficient to justify a major division of a substantial minority population.

[54]** Thus, after examining the second constitutional criteria, we are no closer to selecting a plan which provides fair and effective representation for the people of Colorado than we were before. While H.B. 1624 has the lowest population deviation, it is the least desirable in terms of minority representation. At least two of the other plans, the Governor's Plan and Goens Plan, also make minor splits in Denver which affect traditional minority communities. 47 While these splits are probably not sufficient to dilute minority voting strength, they detract from the overall acceptability of these plans. Since we are unable to make meaningful distinctions between the five major plans on the basis of constitutional standards, we will examine them in light of our non-constitutional criteria.

FOOTNOTES

47 The minority effect of the Denver split in the Governor's Plan is illustrated in Exhibits 17b and 16f and g. The minority effect of the Denver split in the Goens Plan is illustrated in Exhibits 17d and 16f and g.

B. The **[**55]** Non-Constitutional Criteria

Compactness and contiguity represent the first and probably the least significant of the three non-constitutional criteria which we have adopted. Since both of these concepts focus primarily on the geographic shape of the proposed districts rather than on substantive aspects of representation, there is more flexibility in their application. Both were originally designed to represent a restraint on partisan gerrymandering and should be used with this thought in mind.

HN17 The compactness requirement specifies that the boundaries of each congressional district shall be as short as possible. ⁴⁸ Although there are several ways to measure compactness, one of the most accurate is "to determine the smallest circle into which the district can be circumscribed and to compare the ratio of the area of the district inside the circle to the area of the circle itself." American Bar Association Special Committee on Election Law and Voter Participation, *Congressional Redistricting* 13 (1981) (hereinafter referred to as "*Congressional Redistricting*"). The closer these figures come to a 1 to 1 ratio, the more compact the district will be. ⁴⁹

FOOTNOTES

⁴⁸ Although there is no federal constitutional standard requiring compact districts, more than half of the states include compactness as a constitutional or statutory criteria for state legislative districting. See Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation"*, 14 *Harvard Journal on Legislation* 825, 848 (June, 1977) (hereinafter referred to as "*Reapportionment Process*"). Some of those state provisions also apply to congressional redistricting. See e.g., *Shayer et al. v. Kirkpatrick, et al.*, 541 F. Supp. 922 (W.D.Mo.1982) and Mo.Const. art. 3, § 45. **[**56]**

⁴⁹ A second method of measuring compactness is to compare the aggregate linear distance of the boundaries of each district. See Colo.Const. art. V, § 47.

In a practical sense, the compactness of a congressional district will be directly affected by the density and distribution of a state's population. Since population requirements have priority, compactness must often be sacrificed in order to achieve an acceptable range of population deviation. Compact districts do, however, reduce electoral costs (in both time and money) and increase the opportunities for more effective representation by concentrating a congressperson's constituency in an easily accessible area. *Congressional Redistricting* at 13.
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FOOTNOTES

⁵⁰ See also *Shayer, et al. v. Kirkpatrick, et al.*, 541 F. Supp. 922 at 933, No. 81-4144-CV-C, Slip Opinion at 22 (W.D.Mo. Jan. 7, 1982).

The courts which have utilized the compactness criteria have almost always **[**57]** considered contiguity as well. See e.g., *Dunnell v. Austin*, 344 F. Supp. 210 (E.D.Mich.1972); *Preisler v. Secretary of State of Missouri*, 341 F. Supp. 1158 (W.D.Mo.1972). **[*88]** This factor specifies that "no part of one district be completely separated from any other part of the same district." Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, 9 *Policy Studies Journal* 839, 847 (Special Issue # 3, 1980-81) (hereinafter referred to as "*Criteria and Procedures*"). The universal acceptance of the need for contiguous

congressional districts indicates the pragmatic character of this requirement. ⁵¹

FOOTNOTES

⁵¹ Almost two-thirds of the states have constitutional or statutory provisions which specify continuity as a criteria in state legislative redistricting. See Reapportionment Process at 848.

None of the plans submitted to the Court can be seriously challenged on either of these criteria. The demographics of the State of Colorado are such that the Denver metropolitan districts will be **[**58]** extremely compact while the west slope and eastern plains districts will be quite large. The geographic size of these larger districts cannot be significantly reduced due to the sparse population of these areas. Since each of the plans contained six properly contiguous districts, the first category of non-constitutional criteria has not been helpful in distinguishing among the proposed plans. ⁵²

FOOTNOTES

⁵² We do note, however, that the geographic configuration of the districts in H.B. 1624 would permit all six congressional representatives to reside within sixty miles of the Denver Metropolitan area. The possibility of such concentrated representation is not a desirable feature of this plan. See trial testimony of Representative Ronald Strahle.

The next category focuses on the preservation of county and municipal boundaries. These political subdivisions should remain undivided whenever possible because the sense of community derived from established governmental units tends to foster effective representation. **[**59]** ⁵³ See *Dunnell v. Austin*, 344 F. Supp. 210 (E.D.Mich.1972); *Skolnick v. State Electoral Board of Illinois*, 336 F. Supp. 839 (1971); *Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, aff'd. sub nom., *Alton v. Tawes*, 384 U.S. 315, 86 S. Ct. 1590, 16 L. Ed. 2d 586 (1966). Unnecessary fragmentation of these units not only "undermines the ability of constituencies to organize effectively but also ... increases the likelihood of voter confusion regarding other elections based on political subdivision geographics." *Congressional Redistricting at 12.*

FOOTNOTES

⁵³ "The village or township is the only association which is so perfectly natural that, wherever a number of men are collected, it seems to constitute itself.

(Municipalities) form a complete and regular whole; they are old; they have the support of the laws and the still stronger support of the members of the community, over which they exercise a prodigious influence."

A. De Tocqueville, *I Democracy in America* 60-61 (1945).

[60]** The priority given to population equality makes the division of some county and municipal lines unavoidable. It is less certain, however, when faced with the choice of preserving county or municipal boundaries, which of these boundaries should prevail. As a general rule, county lines are more meaningful in sparsely populated areas because the residents rely on the county government to provide all necessary services. Municipal boundaries, on the other hand, take precedence in densely populated areas. These local units

of government represent logical centers of community interest for urban residents who identify more closely with municipal rather than county services. See *David v. Cahill*, 342 F. Supp. 463, 469 (D.C.N.J.1972).

The State of Colorado is divided into 63 counties which range in population from 408 to almost 500,000. Exhibits 21 and 21A. It is inevitable that some county and municipal boundaries will be split when congressional districting lines are drawn. We believe, however, that any splits in city and county boundaries should be made in a rational manner which attempts to minimize divisions in these local governmental units. The two areas of prime concern in **[**61]** this regard are Denver and Pueblo.

[*89] The current population of the City and County of Denver is 492,365. Exhibit 21A. Since the ideal population of a new congressional district is 481,622.5, approximately 3%⁵⁴ of Denver's population must be severed from the city in order to achieve population equality. We are of the view that few, if any, of the plans submitted to the court split Denver in a desirable location.

FOOTNOTES

⁵⁴ Within the geographic perimeters of the City and County of Denver are several islands of population which are under the jurisdiction of Arapahoe County. In order to insure contiguous congressional districts, the 5759 residents of these Arapahoe enclaves must be included in a district with Denver. As a result, Denver's population for districting purposes becomes 498,124 or 16,501.5 more than is necessary for a single congressional district. See Exhibit A and Appendix II, *infra*.

The Goens Plan makes this "required" split in the northwest corner of the city, while the Governor's **[**62]** Plan removes an area from the north central section of Denver. Evidence at trial indicated that both of these splits were undesirable because they separated a significant minority population within Denver.⁵⁵ For this reason, we conclude that neither plan embodies the most rational division of the City and County of Denver.

FOOTNOTES

⁵⁵ See Exhibits 16f, 16g, 17b and 17d.

H.B. 1624 and the McPhee Plan # 2 split Denver for the alleged purpose of enhancing minority votes in the first congressional district. As we noted earlier, the 3 to 4% increase in minority population is not enough to have a significant impact on the election. In addition, there was substantial evidence presented at trial which indicated that bisecting the City and County of Denver was not conducive to fair and effective representation. State Senator Ted Strickland, Chairman of the Legislature's Interim Committee on Congressional Redistricting, testified that the unique nature of Denver's problems presented a "compelling reason" for maintaining **[**63]** the city as one congressional district. Denver City Council President William Roberts elaborated on these problems when he explained the very different philosophies held by Denver and its suburbs with regard to housing, schools, employment and social services. This point was also reiterated in the affidavit of Cathy Reynolds, Denver City Councilwoman-at-large and representative of the National League of Cities. She emphasized that the division of loyalties which would result from splitting Denver into two districts would only "help perpetuate an already existing urban-suburban split and ... weaken Denver's strength.... (The city's) governmental structure, ... taxing ability, ... location and ... services not only provide internal bonds within (its) citizenry, but (also) make it practical and

logical for (Denver) to have one strong voice in the U. S. House of Representatives." Exhibit 38B. ⁵⁶ As a result, we believe that the division of Denver which appears in H.B. 1624 and McPhee Plan # 2 lacks vision and an understanding of the objectives of effective and accountable congressional redistricting.

FOOTNOTES

⁵⁶ A division of Denver would also weaken important neighborhood community groups. Kathy Cheever, an active member of Inter-Neighborhood Cooperation, testified at trial that there are currently 80 registered neighborhood organizations in the City and County of Denver. See Exhibit 36. H.B. 1624 would place twenty-seven of these organizations in one congressional district, forty-two in another district and split the remaining eleven in some manner. This division would be extremely harmful to the effectiveness of these groups.

[64]** One of the most controversial issues at trial involved the status of Pueblo County in the new redistricting plan. Considerable evidence was presented on the importance of keeping both the city and the county of Pueblo intact. See Exhibits 38d and 42. ⁵⁷ The only two plans which split this area are H.B. 1624 and McPhee Plan # 2. H.B. 1624 divides the city and the county in half along a "subterranean geological formation" known as the hogback. The McPhee Plan, on the other hand, splits Pueblo in the southwest corner of the county. Carstens plaintiffs maintain that these "sacrifices" were necessary to prevent Pueblo from dominating the western slope district.

FOOTNOTES

⁵⁷ See text and accompanying notes at pp. 91-92.

[*90] We do not believe that a reasonably fair and effective congressional redistricting plan should "sacrifice" any county in the state. Pueblo's 125,972 citizens represent approximately one-fourth of the population needed to create a congressional district. If the county is kept intact, **[**65]** Pueblo will account for only 26% of the population in any district in which it is located. The remaining counties would therefore have a 3 to 1 advantage over Pueblo in population and could effectively counter any concerted effort by Pueblo to unduly influence representation of the area.

Every major plan submitted to the Court splits at least five counties. ⁵⁸ Although most of these splits are necessary to achieve population equality, they are frequently made without regard to the impact such a split would have on the representation of the divided communities. For example, the GCR plan splits Boulder County by placing the northeast corner in a predominantly agricultural district. The City of Boulder, however, is playing a central role in the development of this entire area. As a result, we feel that the needs of these people are better served by a united Boulder County.

FOOTNOTES

⁵⁸ The following table compiled from Exhibits 30 and 34a-d contains a listing of each plan and the counties split:

Plan	No. of Counties Split	Counties Split

H.B. 1624	6	Arapahoe, Boulder, Denver, Fremont, Jefferson and Pueblo
Goens Plan	5	Arapahoe, Custer, Denver, Jefferson and Weld
GCR Plan	6	Adams, Arapahoe, Boulder, Denver, Jefferson and Las Animas
Governor's Plan A	5	Adams, Arapahoe, Denver, Jefferson, Las Animas
McPhee Plan #2	8	Adams, Arapahoe, Boulder, Denver, El Paso, Jefferson, Larimer, Pueblo

[66]** Similarly, the GCR Plan makes an obscure split in Las Animas County (located in Southern Colorado). This split does not appear to reflect any particular geographic, demographic or economic consideration. In such a sparsely populated, predominantly rural community where the citizens depend upon the county for important services, an unexplained split of even a minimal number of citizens does not represent desirable redistricting strategy.

Each of the major plans submitted to the Court also split several municipalities.⁵⁹ While many of these divisions were made along county lines, we feel that consideration should have been given to the significance of the county lines within those communities. Dividing a congressional district along these lines is logical only for the sake of convenience. When the divided municipality is located in a densely populated area, we believe that the citizens identify more strongly with the services provided by the municipality. As a result, the principle of fair and effective representation would be better served in these circumstances by maintaining the integrity of municipal boundaries.

FOOTNOTES

⁵⁹ The following table compiled from Exhibit 30 contains a listing of each plan and the municipalities split:

Plan	No. of Municipalities Split	Municipalities
H.B. 1624	8	Arvada (along county lines), Aurora, Bow Mar (along county lines), Broomfield (along county lines), Denver, Greenwood Village, Pueblo, Westminster (along county lines)
Goens	5	Arvada (along county lines, Aurora, Denver, Broomfield (along county lines); West- minster (along county lines)
GCR	2	Aurora (along county lines), Denver

Governor's Pro- posal A	2	Aurora, Denver
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Comparable information on McPhee Plan # 2 is not contained in Exhibit 30.

[67]** After carefully examining all of the proposed plans under our second non-constitutional category, no plan can claim any particular advantage over the others. For every desirable element in a proposed plan, there is an equal number of undesirable features. We therefore turn to our third non-constitutional category for additional direction.

[*91] "No one denies that a concept of 'community of interest' can and does apply to congressional redistricting, since formulating a plan without any such consideration would constitute a wholly arbitrary and capricious exercise." Carstens Closing Argument, p. 3. Disputes about this third category center, instead, on the definition of the term "communities of interest" and its relevance to the State of Colorado. For our ^{HN18} purposes, communities of interest represent distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socioeconomic status or trade. We are convinced that a plan which provides fair and effective representation for the people of Colorado must identify and respect the most important communities of interest within the state.

There is **[**68]** substantial agreement among the parties that Colorado should have a consolidated eastern agricultural district. Thus, the Governor's Plan, which divides the state's eastern counties into two separate districts ⁶⁰ is immediately placed at a considerable disadvantage. While the remaining plans essentially unite all of the eastern counties, there are a few additions and exclusions which detract from the concept of a consolidated agricultural district. H.B. 1624, for example, fails to include the two prominent southeastern agricultural counties of Crowley and Otero in its eastern plains district. The plan similarly ignores the agricultural concerns of eastern Arapahoe and Adams Counties. The Goens Plan, on the other hand, places Jackson County in its eastern plains district when this mountainous area has few, if any, common interests with rural farming communities.

FOOTNOTES

⁶⁰ Although every expert questioned on the viability of an agricultural district felt that it made sense and should be incorporated into a plan, the Governor's Proposal A splits the eastern counties in half along the South Platte drainage pattern. The resulting fourth district is predominantly rural farming areas but the fifth district combines the mountainous Chaffee, Park and Teller Counties with the growing metropolitan El Paso County and heavily agricultural areas to the east and southeast.

[69]** The parties also agree that the predominantly mountainous counties in the western portion of the state should be consolidated, if at all possible. Ideally, this western slope district would include only counties west of the Continental Divide. Unfortunately, population standards require that some front range counties be placed in this district. ⁶¹ The choices made by the drafters of each plan submitted to the Court in this regard reflect policy decisions which often conflict with court-adopted criteria.

FOOTNOTES

⁶¹ The combined population of the 22 counties west of the Continental Divide is 287,595 or 194,026.5 short of the ideal population for a congressional district.

The McPhee Plan # 2 was presented to the Court as a plan which truly respected geographic communities of interest within the state. See Exhibit 41. McPhee's theory mirrors the ideal in that it attempts to group all mountainous areas west of the front range into one district. As a result, the McPhee Plan places a small portion of every major **[**70]** front range county into a western slope district. ⁶² Testimony at trial demonstrated, however, that mountains are only important as they affect people. The people east of the Continental Divide have some very different concerns which frequently conflict with those of the people who reside on the western slope. ⁶³ Moreover, in its attempt to respect geographic communities of interest, the McPhee Plan divides more counties than any other plan submitted to the Court and also achieves **[*92]** the largest population deviation. ⁶⁴ While we believe that communities of interest are an important factor in drawing fair and effective congressional districts, we are not prepared to recognize this criterion to the exclusion of all others.

FOOTNOTES

⁶² The following table illustrates the fragmentation of five major front range counties under the McPhee Plan # 2:

County	Total Population	Persons Placed In West Slope District	Percentage
Larimer	149,184	9577	6.5%
Boulder	189,625	8074	4.25%
Jefferson	371,741	24403	6.5%
Pueblo	125,972	11799	9.33%
El Paso	309,424	2534	.8%

[71]**

⁶³ The greatest potential for conflict arises over the transmountain diversion of water from the western slope to the eastern front range.

⁶⁴ See notes 39 and 58, supra.

H.B. 1624 also reaches well into the front range to achieve the population necessary for a western slope district. ⁶⁵ The most objectionable feature of this plan is the manner in which it splits Pueblo. Carstens plaintiffs contend that Pueblo, or a portion of it, should be placed with El Paso County, its northern neighbor. We are not convinced, however, that this arrangement is in the best interests of the people of either county. These two areas share no strong communities of interest with the exception of the transportation concerns generated by a common highway and rail system. Pueblo is the only heavily industrial region in the state, while El Paso County supports a predominantly technical community. The current statistics relating to housing start-ups demonstrate that Pueblo is a low or negative growth county. El Paso, on the other hand, is a high growth area. ⁶⁶ Historically, these counties are commercial **[**72]** rivals and were characterized by the drafter of one plan as "hereditary enemies." See Exhibit 41, p. 5. The competitive atmosphere between these two counties is contrary to the concept of communities of interest. We are persuaded that Pueblo and El Paso do not belong in the same congressional district.

FOOTNOTES

65 Southern Jefferson County, Douglas County and Park County are all included in H.B. 1624's western slope.

66 According to the testimony of Dr. Alan Love, the 1980 census data indicates housing start-ups in Pueblo and the San Luis Valley range from 10.4% to 30.4% while El Paso County starts ranged from 50% to 230%.

The Governor's Plan leaves Pueblo intact and places it in a western slope district with the San Luis Valley. Testimony at trial indicated that Pueblo had considerably more amicable ties to the western slope than any other front range population center. ⁶⁷ The county's large Hispanic population has strong traditional ethnic and cultural bonds with the San Luis Valley to the southwest. **[**73]** Pueblo is the primary trade, religious and educational center for the Valley which supplies much of Pueblo's labor force. Because Pueblo is not experiencing rapid growth, its water requirements are stable, and conflict with the western slope over transmountain diversion of water would be kept to a minimum.

FOOTNOTES

67 Dr. Alan Love, Professor of Political Science and Dean of Liberal Arts at the University of Southern Colorado, testified at trial as an expert on communities of interest in Pueblo and the surrounding areas. He reviewed statistics focusing on the income and education of the residents in this area, the concentration of minority groups and general changes in population. From this data, he concluded that Pueblo has a "stronger community of interest with the San Luis Valley" than with El Paso County, its northern neighbor.

Similarly, Jennie Sanchez, a plaintiff in this lawsuit and a long time resident of the San Luis Valley identified seven separate communities of interest shared by Pueblo and the Valley. These include: employment (Valley residents seek work in Pueblo); religion (the Valley, which is included in the Diocese of Pueblo is approximately 40% Catholic); education (University of Southern Colorado and Pueblo Vocational Community College are located in Pueblo and used by Valley residents;) and, health (Pueblo and the Valley share several hospitals and medical facilities).

[74]** The western slope district of the Governor's Plan has at least one major disadvantage, however, in that it includes the front range counties of Gilpin and Clear Creek. While both of these counties are mountainous, their primary ties are with Boulder, Jefferson and Denver in the east. For example, both counties are included in a judicial district with their eastern neighbors. We are of the view that an acceptable redistricting plan should respect the front range orientation of Gilpin and Clear Creek Counties.

After examining each of the plans with respect to our criteria, we have not been able to select one plan which substantially complies with all of our objectives. Each of the proposed plans appears to satisfy constitutional requirements. On balance, no one **[*93]** plan represents the best effort at providing fair and effective representation for the people of Colorado because each plan has several undesirable elements which tend to outweigh any advantages. Therefore, the Court has fashioned its own plan which attempts to satisfy the relevant legal criteria and incorporate the most desirable aspects of each plan presented to the Court.

VI

THE 1982 COLORADO CONGRESSIONAL **[**75]** REDISTRICTING PLAN

We adopt the 1982 Colorado Congressional Redistricting Plan appended to this opinion and

marked as "Exhibit A." This plan creates the following districts:

DISTRICT 1 incorporates the City and County of Denver with the exception of approximately 16,500 persons in the extreme southwest corner of the city. It also includes the Arapahoe County enclaves found within the Denver city limits. ⁶⁸

FOOTNOTES

⁶⁸ See note 54, supra. The Arapahoe County enclaves, including Glendale, have a total population of 5,759. Exhibit A and Appendix II, infra.

DISTRICT 2 includes Boulder, Gilpin and Clear Creek Counties, northeast Jefferson County, and western Adams County. The cities of Arvada, Broomfield, Federal Heights, Northglenn, Thornton and Westminster are all left intact.

DISTRICT 3 is the largest district in the 1982 Plan. In addition to every county west of the Continental Divide, ⁶⁹ it contains Jackson, Pueblo and southern Fremont Counties along with those southern counties which comprise the San Luis Valley. ⁷⁰ It does not include Las Animas County.

FOOTNOTES

⁶⁹ The following counties or portions thereof are located west of the continental divide: La Plata, Montezuma, Dolores, San Miguel, Ouray, Montrose, Gunnison, Mesa, Delta, Garfield, Pitkin, Eagle, Summit, Rio Blanco, Moffat, Routt, Grand, Archuleta, Mineral, Hinsdale, San Juan, and Saguache. [****76**]

⁷⁰ The San Luis Valley generally includes the following counties: Huerfano, Alamosa, Conejos, Rio Grande, Archuleta, and Mineral.

DISTRICT 4 is comprised of all major agricultural counties in eastern Colorado, including the greater parts of Adams and Arapahoe Counties. The district extends from Larimer County in the north to Las Animas County in the south. ⁷¹

FOOTNOTES

⁷¹ In addition to Larimer County and Las Animas County, District 4 includes the following counties: Weld, Morgan, Logan, Sedgwick, Phillips, eastern Adams, eastern Arapahoe, Washington, Yuma, Lincoln, Kit Carson, Cheyenne, Crowley, Otero, Kiowa, Bent, Prowers, and Baca.

DISTRICT 5 contains the following counties located in the mountainous front range region of central Colorado: El Paso, Chaffee, Lake, Park, Teller, northern

Fremont, Elbert, Douglas, central and south Jefferson, and a small portion of southwest Arapahoe.

DISTRICT 6 is comprised of those suburban municipalities found in Jefferson, Arapahoe and Adams Counties **[**77]** which surround Denver on the west, south, and east. Included in their entirety are the cities of Aurora, Bow Mar, Cherry Hills, Columbine Valley, Edgewater, Englewood, Lakewood, Lakeside, Littleton, Sheridan, and Wheat Ridge. A small portion of southwest Denver is also found in this district.

Appendix I illustrates in map form all of the districts delineated by the 1982 Congressional Plan. Appendix II highlights the Denver Metropolitan Area and Vicinity, and Appendix III defines the division of Fremont County.

Taken as a whole, the 1982 Plan satisfies the criteria adopted by this Court for redistricting Colorado. First, the Plan falls easily within the constitutional requirement of equal population in all the districts. Second, the Plan does not discriminate against minority voters and attempts, wherever practicable, to preserve traditional minority communities. Third, all of the districts within the Plan are reasonably compact and contiguous. Fourth, recognition was given to the importance of municipal boundaries in highly populated areas. To **[*94]** this end, rapidly growing communities such as Westminster and Aurora in the Denver area are kept intact. Fifth, **[**78]** the 1982 Plan achieves a balance among the many communities of interest affected by congressional redistricting. Most important among these are an "east plains" and a "west slope" district, the inclusion of a consolidated Pueblo with the San Luis Valley, and a consolidated City and County of Denver. ⁷²

FOOTNOTES

⁷² An additional advantage of the 1982 Plan is that it enhances prospects for a strong geographic spread in congressional representation. In other words, because many of the major population centers are not in close proximity to each other (e.g. Grand Junction, Pueblo, Fort Collins, Denver), all six congressional Representatives cannot reside in the Denver metropolitan area. See note 52, supra.

A. Population Equality

The 1982 Plan contains a total deviation from the ideal district population of 12 persons, or approximately .0025%. This deviation is clearly within the constitutional parameter set by the Supreme Court. See Section V, supra.

Only one plan submitted to this Court achieved a more equal **[**79]** balance between the six districts. H.B. 1624 had a total deviation of 7 persons, or approximately .0015%. This figure, however, is merely ten one-thousandths of a percent lower than the total deviation achieved by the 1982 Plan. Given the natural margin of error in the actual census figures, ⁷³ there is no appreciable difference between the two plans in terms of population equality.

FOOTNOTES

⁷³ See Kirkpatrick v. Preisler, 394 U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969); Wells v. Rockefeller, 394 U.S. 542, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969); and note 85, infra.

B. Non-Dilution of Minority Votes

While several of the plans urged upon this court raised the spectre of diluting traditional minority communities, the 1982 Plan attempts wherever practicable to preserve those communities. The congressional districts in the 1982 Plan contain minority populations which range from 9.76% to 33.4%. ⁷⁴ Due to the large concentrations of minorities in Denver and Pueblo, it is impossible to match the state average **[**80]** of 16.9% minority population in every district, but the 1982 Plan compares favorably with the other plans submitted to the Court. ⁷⁵

FOOTNOTES

⁷⁴ The six districts under the 1982 Plan contain the following minority populations:

District 1: Black-59,326 (12.32%); Indian, Eskimo and Aleut-3,834 (.80%); Asian and Pacific Islanders-7,009 (1.45%); and Hispanic-90,888 (18.87%); Total Minority Population-161,057 (33.4%).

District 2 : Black-3,919 (.81%); Indian, Eskimo and Aleut-2,488 (.52%); Asian and Pacific Islanders-5,230 (1.08%); Hispanic-41,944 (8.71%); Total Minority Population-53,581 (11.12%).

District 3 : Black-3,192 (.66%); Indian, Eskimo and Aleut-5,004 (1.04%); Asian and Pacific Islanders-1,558 (.32%); Hispanic-82,238 (17.07%); Total Minority Population-91,992 (19.1%).

District 4 : Black-2,363 (.50%); Indian, Eskimo and Aleut-2,060 (.43%); Asian and Pacific Islanders-3,373 (.70%); Hispanic-65,850 (13.67%); Total Minority Population-73,646 (15.30%).

District 5 : Black-19,806 (4.11%); Indian, Eskimo and Aleut-2,442 (.51%); Asian and Pacific Islanders-5,960 (1.24%); Hispanic-32,291 (6.70%); Total Minority Population-60,499 (12.56%).

District 6 : Black-13,057 (2.71%); Indian, Eskimo and Aleut-2,124 (.44%); Asian and Pacific Islanders-6,635 (1.38%); Hispanic-25,184 (5.23%); Total Minority Population-47,000 (9.76%).

Compiled from Exhibit 22. **[**81]**

⁷⁵ The state average of 16.9% minority population is based on the approximate numbers of Blacks (3.5%); American Indian, Eskimo and Aleuts (0.6%); Asian and Pacific Islanders (1.0%); and persons of Spanish origin (11.8%) in Colorado following the 1980 decennial census. Exhibit 33(a), also Exhibit 18(a)-(d).

H.B. 1624 had minority populations ranging from 7.19% to 36.6%; McPhee Plan # 2 from 7.5% to 37.1%; Governor's Proposal A from 7.4% to 31.8%; GCR Plan from 8.7% to 33.4%; and the Goens Plan from 8.9% to 32.5%. Exhibit 33(b)-(f).

We felt that it was particularly important to avoid diluting the concentration of minority strength in the City and County of Denver. As noted earlier, the principle of population equality requires a split of at least 16,500 persons from this area. The 1982 Plan makes this minimal division in **[*95]** southwest Denver and thus, to the greatest extent possible, avoids disturbing traditional minority communities. As a result, the congressional district

which encompasses the City and County of Denver (District 1) contains slightly over thirty-three percent Black **[**82]** and Hispanic residents.

We also paid close attention to the minority population in Pueblo County for two reasons. First, a very large Hispanic population is spread throughout the City of Pueblo. Any attempt to concentrate this Hispanic population into one congressional district results in a winding, twisting district line which unnecessarily fragments the remainder of the city. Second, there was extensive testimony at trial indicating an historical and practical link between the minority population in Pueblo and the San Luis Valley. See Sec. VI, supra. A division of Pueblo County between two congressional districts invalidates that historic connection and potentially dilutes minority votes in both districts. For these reasons, we followed a pattern used by many of the proposed plans and included all of Pueblo County with the San Luis Valley in the western slope. This district achieves approximately a nineteen percent minority population, second only to District 1.

C. Compactness and Contiguity

Like all the plans submitted to the Court, the 1982 Plan includes very compact districts in the Denver metropolitan area and very large eastern and western districts. These differences **[**83]** reflect the demographic reality that eighty percent of the population of Colorado is centered in the front range counties. Thus, the districts range in size from one county (District 1) to thirty-one counties (District 3). All of the districts in the 1982 Plan are contiguous.

D. Preservation of County and Municipal Boundaries

The 1982 Plan attempts to recognize the importance of both county and municipal boundaries by respecting their integrity to the greatest extent possible given population requirements. The City and County of Denver is the clearest example of this principle. As the capital of Colorado, Denver has the largest population of any county in the state. It is one of the leading economic, cultural, and transportation centers in the western United States. It is also a center of administrative activity for the federal government. The boundaries of the City and County of Denver are co-extensive and are explicitly defined in the Colorado Constitution. See Colo.Const. art. XX, § 1 (1973). Moreover, the geographic growth of Denver is severely limited by a constitutional amendment.⁷⁶ These practical considerations coupled with persuasive testimony at trial underscore **[**84]** the need to keep Denver as a single congressional district. The 1982 Plan respects Denver's city and county boundaries to the maximum extent possible.

FOOTNOTES

⁷⁶ The so-called "Poundstone Amendment", adopted in 1974, sets out a limitation on the initiation of annexation and consolidation proceedings with the City and County of Denver. Among other things, the amendment requires a majority vote approval of a six-member "boundary control commission".

While not constitutionally designated, the boundaries of the rapidly growing municipalities surrounding Denver are no less important. Although several of these densely populated cities are fortuitously split by county lines, those lines should not take precedence over municipal boundaries in this area. By respecting municipal rather than county boundaries in the second congressional district, for example, we prevented the fragmentation of more than 130,000 people in the rapidly growing cities of Arvada, Broomfield and Westminster.

Similarly, almost every plan relied **[**85]** upon the convenience of the Adams-Arapahoe

County line to needlessly divide Aurora, the second largest city in the state. The 1982 Plan places a consolidated Aurora in District 6 with the other suburban municipalities surrounding Denver. This is a significant feature of the Plan. Aurora will most likely play a key role in the growth of Colorado over the coming decade and should [*96] be unified for congressional districting purposes.

Unfortunately, our desire to recognize the important municipal boundaries in the Denver metropolitan area results in a three-way split of Jefferson, Adams and Arapahoe counties. We feel these multiple divisions are justified given the stark contrast between the concerns of the expanding municipalities and the outlying rural areas in these counties. Where municipalities serve as the most logical boundaries, that logic should not be sacrificed at the cost of preserving county lines.

The 1982 Plan also geographically divides Fremont County along an east-west line through Canon City for no other reason than to achieve ideal district population in the 3rd and 5th congressional districts. We would have preferred not to split Canon City, but, because [**86] the population of the county is centered in Canon City, that result is unavoidable. Every effort was made to split the city along existing geographic landmarks and impartial census enumerator lines to minimize the confusion inherent in dividing any municipality. ⁷⁷

FOOTNOTES

⁷⁷ Fremont County was divided utilizing the Arkansas River on the west and State Highways 50 and 115 on the east. Within Canon City the division, as far as practicable, follows Highway 50 and "BNA" census divisions.

E. Preservation of Communities of Interest

Each district in the 1982 Plan was designed to recognize those communities of interest which emerged during trial as most important to effective congressional representation for the citizens of this state. Where necessary, competing interests were balanced in favor of articulated advantages. The result is six congressional districts which reflect well-defined communities of interest.

District 1 is the City and County of Denver. As a much older core urban area, Denver faces problems [**87] not shared by its suburban counterparts. Primary among these are the maintenance, and often replacement, of out-dated facilities such as sewers, streets and viaducts. Additionally, Denver bears the brunt of providing social services, including housing, unemployment, and medical care for much of the metropolitan area. As a single school district, Denver must also confront some aspects of public education which are unique to a core city.

Any split of Denver necessarily divides some existing neighborhood communities. The impact on those communities can be lessened somewhat by the location of that division. Testimony indicated, and we are convinced, that the most logical division is in the Grant Park area of southwest Denver. This split leaves Denver more compact as a congressional district and, more importantly, has a minimal impact on the voting strength of both minority and neighborhood communities.

Just as Denver must deal with the problems inherent in a core city, the surrounding suburban municipalities share common problems incident to young, rapidly growing municipalities. Whereas Denver seeks state and federal assistance to repair and replace services and facilities, the [**88] suburbs compete for the same funds to develop and implement

relatively new services. The same concerns that place the suburbs in a conflicting posture with Denver form a natural community of interest among all the suburban municipalities. For this reason, District 2 and District 6 of the 1982 Plan seek to consolidate those municipalities.

District 2 combines Gilpin, Clear Creek and Boulder County with the cities in northeast Jefferson and extreme western Adams County. These areas are linked naturally by Highway 36, also known as the Boulder Turnpike. The result is a rapidly growing commercial, technological, and light industrial region with extensive business exchanges between the cities.

District 6 incorporates the remaining cities immediately to the west, south and east of Denver. As noted earlier, the primary advantage of such a district lies in its preservation of municipal boundaries. This [*97] district contains two of Colorado's largest and fastest growing cities, Lakewood and Aurora. Consolidation of these cities in the 1982 Plan recognizes the vitality and needs of this region.

There was little, if any, argument at trial that "west slope" and an "east plains" [**89] districts should be included in any redistricting plan. Nearly every plan submitted embodied similar configurations for these two large districts.

The "west slope" district under the 1982 Plan (District 3) contains every county west of the Continental Divide. These counties share common concerns of water management, energy production, and environmental conservation. Vast portions of this region are federally owned and controlled which creates a unique relationship with the federal government. See Exhibit 8. In addition, Pueblo County and the San Luis Valley are included in District 3. Extensive testimony at trial was directed at demonstrating a natural affinity between Pueblo and the San Luis Valley. See Section V, supra. No one has contended that those counties have any close connection with agricultural eastern Colorado. Thus, the inclusion of the San Luis Valley in the western slope logically compels the inclusion of Pueblo as well. All of those plans given primary consideration at trial included at least a portion of Pueblo in this region.

District 4 of the 1982 Plan is the so-called "east plains agricultural" district. It is comprised of the major agricultural counties [**90] of northern, eastern and southern Colorado. Testimony indicated that eastern Adams and Arapahoe Counties, being dedicated to an agricultural economy, should be included in an east plains district. All of these counties share common concerns over farm production and subsidies, water management, and soil conservation.

District 5 of the 1982 Plan includes those counties in the predominantly mountainous front range region of central Colorado. The focal point of this district is El Paso County and specifically Colorado Springs. The other counties in District 5 rely heavily on Colorado Springs as a trade, communication and cultural center of the region. In return, Colorado Springs is dependent on the mountainous region for its water and recreation.

VII

CONCLUSION

In formulating the 1982 congressional redistricting plan, we have endeavored to form six districts that, as nearly as possible, have exactly equal populations. This result is dictated by the Supreme Court's opinions in *White v. Weiser*, 412 U.S. 783, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969); *Wells v. Rockefeller*, 394 U.S. 542, 89 S. Ct. 1234, [**91] 22 L. Ed. 2d 535 (1969); and *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). See Section V supra. We have discovered, however, that mathematical precision does not necessarily guarantee fair and effective representation for the people of the state.

The City and County of Denver is an apt illustration of this problem. It is constitutionally defined to be a separate city and county. Colo.Const. art. XX, § 1. The Colorado Constitution also declares it to be a separate school district. Colo.Const. art. XX § 7. According to the 1980 census, Denver's population was approximately two percent greater than one-sixth of the state population. Since Colorado is now entitled to six congressional districts, the City and County of Denver without any additions or deletions, is a logical district.

Yet, according to Wesberry and its progeny, we must remove an area of approximately sixteen thousand Denver residents to make the rest of Denver a congressional district. Although this division is supposedly necessary to prevent underrepresentation of Denver residents in the House of Representatives, the result almost certainly will be overrepresentation of Denver residents [****92**] during the coming decade. From 1970 to 1980 Denver's population declined 4.5% while Colorado's as a whole grew over 30%. Even if this trend has continued at only half of that rate, the population of Denver [***98**] is already less than one-sixth of Colorado's. While we realize that the census must be taken on a certain date, it is to be observed that the present attempt to achieve exact population equality is actually leading to less equality than would the now impermissible approach of placing the entire City and County of Denver in one district. ⁷⁸

FOOTNOTES

⁷⁸ An additional advantage to keeping Denver whole is voter identity. Most voters know what city and county they live in, but fewer are likely to know what congressional district they live in if the districts split counties and cities. If a voter knows his congressional district, he is more likely to know who his representative is. This presumably would lead to more informed voting.

No one will deny that gross population deviations between congressional [****93**] districts should not be permitted, but we believe that the degree of mathematical precision which requires a minimal split of Denver is neither necessary nor desirable. Almost twenty years ago, Chief Justice Earl Warren noted that "mathematical exactness or precision (was) hardly a workable constitutional requirement. What is marginally permissible in one state may be unsatisfactory in another, depending on the particular circumstances of the case." Reynolds v. Sims, 377 U.S. 533, 578, 84 S. Ct. 1362, 1390, 12 L. Ed. 2d 506 (1964). In subsequent cases, however, the Court steadfastly refused to set a permissible range of population deviation and at the same time proceeded to reject plans with ever decreasing deviations in favor of plans which demonstrated an even greater degree of mathematical perfection. District courts, floundering in the absence of any definable deviation standards, began to adopt plans which fell below the lowest deviation accepted by the Supreme Court and reject those which were greater regardless of the actual impact of the plan on representation. Litigants, seeking court approval of their plans, strove to achieve a greater degree of mathematical precision, [****94**] again without regard to the impact on the quality of representation. Thus, the current overriding and at times illogical dominance of population equality in congressional redistricting is more the result of inadvertent evolution and blind adherence to prior court decisions than of reasoned decision making.

We believe that population equality should be prominent, but only if the variations are over some chosen maximum, which probably should be in the 5-15% range. Below that maximum, population equality should be one factor considered equally with others such as the absence of racial discrimination, compactness and contiguity, preservation of county and municipal boundaries, and preservation of communities of interest in determining the constitutionality of any given redistricting plan. Due to differences in population growth rates and inaccuracies in the census figures, exact population equality is almost certain to be

illusory. ⁷⁹ **HN19** ¶ If a state can present **[*99]** legitimate justifications for small population variations in a congressional redistricting plan, the federal courts should not intervene merely to achieve an illusion of better equality. See *White v. Weiser*, 412 U.S. **[**95]** at 798, 93 S. Ct. at 2356. (Powell, J., Burger, C. J. and Rehnquist, J. concurring). Instead, we would adopt the same approach that the Supreme Court has used in state legislative redistricting cases, allowing some population variations, if they can be justified by legitimate state interests. See generally *Chapman v. Meier*, 420 U.S. 1, 21-26, 95 S. Ct. 751, 763, 42 L. Ed. 2d 766 (1975).

FOOTNOTES

⁷⁹ The Supreme Court has recognized the inherent inaccuracies in census figures on several occasions. In *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969), Justice Fortas wrote:

Whatever might be the merits of insistence on absolute equality if it could be attained, the majority's pursuit of precision is a search for a will-o'-the-wisp. The fact is that any solution to the apportionment and districting problem is at best an approximation because it is based upon figures which are always to some degree obsolete. No purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based.

Kirkpatrick v. Preisler, 394 U.S. 526, 538-39, 89 S. Ct. 1225, 1232, 22 L. Ed. 2d 519 (1969) (Fortas, J., concurring).

Similarly, in *Wells v. Rockefeller*, 394 U.S. 542, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969), Justice Byron White noted:

Today's decision on the one hand requires precise adherence to admittedly inexact census figures, and on the other downgrades a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect. I see little merit in such a confusion of priorities.

Wells v. Rockefeller, 394 U.S. 542, 89 S. Ct. 1234, 1242, 22 L. Ed. 2d 535 (1969) (White, J. dissenting).

[96]** ⁸⁰ **HN20** ¶ No right is more precious in a free country than that of having a voice in the election of those who make the law under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 534, 11 L. Ed. 2d 481 (1964). In developing the 1982 Congressional Plan, we carefully considered the numerous plans submitted to the Court and endeavored to incorporate the most beneficial aspects of each proposal against the backdrop of constitutional and other recognized criteria. The sum total of our efforts reflects a rational state policy for redistricting Colorado and attempts to provide fair and effective representation for its citizens. ⁸⁰

FOOTNOTES

⁸⁰ Those persons assisting in the preparation of base maps of the 1982 Colorado Congressional Redistricting Plan were: Mr. John McLaurin, Center Chief; Mr. George M.

Barker, Chief, Branch of Geometronics; Mr. William Alexander, Chief, Office of Technology; and, Mr. Neil C. Colin, Branch of Cartometric Operations, Rocky Mountain Mapping Center, National Mapping Division, United States Department of Interior, Geological Survey, Denver.

We are indebted to these gentlemen, their colleagues, and the federal agency they represent for their assistance and splendid cooperation.

We also acknowledge, with appreciation, the technical assistance and cooperation of Mr. Richard P. Gebhart in the verification of the accuracy of the population figures, the Tract/Block description of the 1982 Plan, and of the district boundary lines drawn by the Court.

Mr. Gebhart is an economist/planner, with substantial experience in population-based data and statistical indices. He is employed by the Denver Regional Council of Governments. However, he was appointed as a technical expert, pursuant to our Order Regarding the Appointment of Technical Expert or Experts entered on December 21, 1981, in his individual capacity. He performed his services for the Court on Sunday, January 17; Monday, January 18; Friday, January 22; and Monday, January 25, 1982.

[97] ORDER**

The foregoing memorandum opinion is hereby adopted as this Court's findings of fact and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Secretary of State Mary Estill Buchanan's Motion to Dismiss filed on November 18, 1981 is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the current congressional districting plan set forth in C.R.S. 1973 § 2-1-101 is unconstitutional.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the 1982 Congressional Redistricting Plan set forth in Exhibit A meets all federal constitutional requirements.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the congressional election processes and congressional primary and general elections for the State of Colorado in 1982 and thereafter be conducted in and from the congressional districts established in this opinion and by Exhibit A.

The composition of the 1982 congressional redistricting plan in terms of population is as follows:

1982 COLORADO CONGRESSIONAL REDISTRICTING PLAN			
DISTRICT	POPULATION	ABSOLUTE DEVIATION	RELATIVE DEVIATION
1.	481,628	+5.5	.00114%
2.	481,617	-5.5	.00114%
3.	481,625	+2.5	.00052%
4.	481,616	-6.5	.00134%
5.	481,627	+4.5	.00093%
6.	481,622	-0.5	.00010%

TOTAL POPULATION: 2,889,735
IDEAL DISTRICT POPULATION: 481,622.5
ABSOLUTE MEAN DEVIATION: 4.17
RELATIVE MEAN DEVIATION: .00087%

[98] [*100]** In the event that there is a conflict between county and census tract descriptions, on the one hand, and boundary lines as shown on the appended maps, the county and census tract descriptions will control.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant Secretary of State Mary Estill Buchanan, in performance of her duties and functions under Colorado election laws, be governed by and comply with said redistricting plan.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court retains jurisdiction to implement, enforce and amend this order as shall be necessary and just. *

FOOTNOTES

* Exhibit A to this Memorandum Opinion and Order, setting out in words and figures the 1982 Colorado Congressional Redistricting Plan, is on file in the Office of the Clerk, United States District Court for the District of Colorado.

Source: [Legal > / ... / > CO Federal & State Cases, Combined](#) 

Terms: **NAME(carstens)**

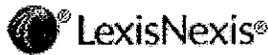
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Date/Time: Friday, July 25, 2008 - 4:47 PM EDT

* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

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DISTRICT COURT

CITY AND COUNTY OF DENVER, COLORADO

Plaintiffs:

**RITA AVALOS, LORI FOX, DAN FRIESEN,
ANN KNOLLMAN, RICK SWAIN and TONY
YOUNG**

Plaintiffs-in-Intervention:

**BOB BEAUPREZ, STEVE MILLER, SUE
MITCHELL, CHERI OFNER, PAUL SCHAUER
and SCOTT TIPTON; DAN GROSSMAN; CITY
AND COUNTY OF DENVER and MAYOR
WELLINGTON WEBB; MICHAEL HANCOCK,
MARGARET ATENCIO and MONICA BAUER;
DOUG DEAN, LOLA SPRADLEY, KEITH
KING, ROB FAIRBANK, WILLIAM
SINCLAIR, JOHN ANDREWS, MARK
HILLMAN and MARILYN MUSGRAVE;
JERALD GROSWOLD; DENIS
BERCKEFELDT; WILLIAM C. VELASQUEZ
INSTITUTE; ROBERT SCHAFFER; JOSEPH
STENGEL; MARK UDALL; LATIN
AMERICAN RESEARCH AND SERVICE
AGENCY, RUFINA HERNANDEZ-PREWITT,
ARNOLD SALAZAR; GOVERNOR BILL
OWENS; SCOTT McINNIS; WILLIAM TEMBY
and JEFFREY CRANK**

Defendants:

DONETTA DAVIDSON, et al.

▲ COURT USE ONLY ▲

Case Number:

01 CV 2897

Courtroom 8

D E C I S I O N

THIS MATTER comes before the Court on the Amended Complaint of Plaintiffs. In the Amended Complaint the Plaintiffs have two claims for relief. First, Plaintiffs request that pursuant to C.R.S. §13-51-101 et seq. and C.R.C.P. 57 the Court declare the present congressional districts of the state of Colorado as set forth in C.R.S. §2-1-101 be declared unconstitutional as a

violation of the one-man one-vote principle. Plaintiffs also in the first claim for relief request an injunction against the Secretary of State enjoining the Secretary of State from conducting the congressional election of November 2002 pursuant to the present congressional districts in Colorado.

Second, Plaintiffs request that if the Colorado General Assembly fails to pass a redistricting plan which is approved by the Governor of Colorado, that this Court on January 25, 2002 adopt a redistricting plan which complies with the United States Constitution as applied in the case of Grove v. Emison, 507 U.S. 25 (1993).

Numerous parties have intervened, including the Governor of the state of Colorado, Bill Owens; Mayor Wellington Webb, Mayor of the City and County of Denver; the house minority leader, Dan Grossman; various United States congressional representatives from the state of Colorado; and numerous other parties. The hearing was conducted starting December 17, 2001 and lasted for seven days. Written closing arguments were received from all the parties on or before January 4, 2002.

This Court is very much aware that redistricting after a census is the responsibility of the state legislature with the approval of the governor of Colorado. 2 U.S.C. §2(c) (1979); Colo. Const. Art. V, §44 (1973). The legislature failed to approve a redistricting plan and submit the plan for approval to Governor Owens in the general session that began in January 2001. Again, in the fall of 2001 at a special legislative session, the legislature failed to approve a redistricting plan and submit it for the Governor's approval.

This Court has waited until this date to announce this decision with the hope that the General Assembly in the general legislative session of January 2002 would have adopted a plan for redistricting and have that plan approved by Governor Owens. But once again, the legislature has failed to adopt a redistricting plan and submit that plan for approval to Governor Owens. Since there has been a failure of the legislative branch and the Governor to adopt a constitutionally acceptable redistricting plan for the state of Colorado in a timely fashion, this Court must now act and establish a constitutional redistricting plan for Colorado. White v. Weiser, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973).

Redistricting is necessary because the 2000 census showed the population of Colorado from 1990 to 2000 has grown slightly over 1,000,000. Because of the unparalleled growth, Colorado is now entitled to a seventh seat in the U.S. House of Representatives.

In adopting a redistricting plan for the congressional districts in the state of Colorado this Court was fortunate to have the guidance of the decision by United States District Court Judge Sherman Finesilver in the case of Carstens v. Lamm, 543 F.Supp. 68 (Colo. 1982). In Carstens, *id.*, Judge Finesilver set forth both the constitutional and non-constitutional criteria that this Court must follow in adopting a redistricting plan.

The constitutional criteria that this Court is bound to apply is population equity which provides that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another." Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

The second constitutional criteria that this Court must apply is avoiding diluting minority voting strength. As stated in Carstens, this means "in our view, a redistricting plan which satisfies this criteria should not fracture a natural racial or ethnic community or otherwise dilute minority voting strength." Carstens at p. 82.

In addition to the constitutional criteria, the Carstens court adopted non-constitutional criteria to be followed. These non-constitutional criteria are compactness and contiguity, preservation of county and municipal boundaries whenever possible, and preservation of community of interest. These constitutional and non-constitutional criteria, and only these criteria, are what this Court is bound to follow in selecting a constitutional redistricting plan for the state of Colorado.

The constitutional criteria are, for the most part, self-explanatory. The Court, therefore, will spend some time discussing the non-constitutional criteria. The first and least significant of the non-constitutional criteria are compactness and continuity. Contiguity means "no part of one district should be completely separated from any other part of the district." Carstens, p. 88. In Colorado with a large land mass in sparsely populated areas, it is next to impossible to have each district compact.

The next non-constitutional criteria is the preservation of political subdivisions when possible. Carstens, supra, goes on to establish the principle that in sparsely populated areas county government is the provider of services and, therefore, in those areas county government lines should be respected if possible. In urban areas that are densely populated, municipal boundaries are of more importance than county lines and should be respected because people look to their city for services. In selecting a redistricting plan the Court has attempted, where possible, to apply this criteria.

The last non-constitutional criteria is more difficult to define and apply. The last non-constitutional requirement is protection of community of interest. Carstens defines "community of interest" as follows:

For our purposes, community of interest represents distinct units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, social economic status or trade.

Carstens, p. 91.

In discussing the seven congressional districts adopted by this Decision the Court will attempt to identify the community of interest in each district. However, it must be kept in mind when a congressional district must consist of 614,000 people, approximately, it is impossible to draw a district in which every person in the district shares all the same community of interest with every other person in the district. The Court may only use its best judgment in drawing a district where the people in the district, for the most part, share common concerns.

In drawing the redistricting plan as set forth in Exhibit 1, which is attached and made part of this Order, the Court only applied the criteria set forth in Carstens. It is not appropriate for this Court in redistricting the congressional districts in the state of Colorado and adding a seventh congressional district to consider whether a particular political party will prevail in any one of the seven districts. Nor should the issue of protecting an incumbent representative be a factor in the Court's decision.

In addition to Exhibit 1, the Court has attached and made part of this Order Exhibit 2, the population and ethnic breakdown of each district as required by this Order. Also attached and made part of this Order is Exhibit 3, the Plan Components Report of the redistributing plan accepted by the Court.

With these principles in mind, the Court has adopted the redistricting map submitted by the Plaintiffs and labeled "Amendment to Republican Leadership." At trial this redistricting plan was Plaintiffs' Exhibit 22. The Court will discuss the seven congressional districts as set forth in the map labeled "Amendment to Republican Leadership."

Below the Court will explain the seven districts and why the Court concluded that the districts, as drawn in the map "Amendment to Republican Leadership" meets the constitutional and non-constitutional criteria stated in Carstens.

Congressional District One

District One as contained in the Amendment to Republican Leadership map consists of all of the City and County of Denver, approximately 60,000 from Arapahoe County and an insignificant amount from Jefferson County. The total population of the district, as it is now constituted, is 614,465 people, which meets the constitutional requirement of equal population for each district.

District One is made up of 29.99% Hispanics, 10.44% African-Americans for a total minority population of 40.43%. District One as presently constituted has a Hispanic percentage of 33.38% voting age population. District One as set forth by the Court has a slightly less Hispanic population, but not sufficiently decreased to be considered a dilution of Hispanic voting strength.

The decrease of 3.39% in Hispanic voting strength may not be considered a dilution of minority voting block. An increase or decrease of 3% or 4% was not considered significant in Carstens (see Carstens, p. 86).¹

District One meets all the criteria of Carstens: (1) The population will be equal to other districts, or approximately so; (2) the voting blocks of minorities will not be diluted; (3) the district is extremely compact and contiguous; (4) the political boundaries of the City and County of Denver are kept intact; and (5) a significant and identifiable community interest of the people of the City and County of Denver and a portion of its suburbs are kept intact.

There is a recognizable community of interest consisting of the City and County of Denver. First, it is the capitol of the state of Colorado and the seat of the state government. Second, the City and County of Denver is a unified school district. Certainly not all of the residents of the City and County of Denver send their children to the Denver public schools. However, every property owner in the City and County of Denver pays property tax which supports Denver public schools.

The City and County of Denver is unique from its suburbs in the Denver metropolitan area. The taxpayers of the City and County of Denver support medical care for the indigent. Denver owns DIA, the largest transportation hub west of the Mississippi and the main airport for the entire state of Colorado and the western United States. Taking together all the factors, it is imperative that the City and County of Denver have one representative that will speak for the interests of the City and County of Denver in a clear, undivided voice.

Congressional District Two

Congressional District Two consists of part of Adams County, part of Boulder County, Clear Creek County, Eagle County, Gilpin County, Grand County, Jefferson County, Summit County, and part of Weld County. The total number of people in District Two is 614,465, which certainly meets the constitutional requirement of equal population for each district.

Hispanics make up 14.74% of the voting age population of District Two. This is more than the 13.67% of the present District Two, and therefore, there is no dilution of minority voting strength.

¹ If it is determined that reducing the Hispanic population in Congressional District One from 33.38% to 29.99% is significant, the situation may be easily changed. A revision could consist of putting Cherry Hills with a 2000 census population of 5,998 in Congressional District Six and add approximately 6,000 in District Six to Congressional District One.

These 6,000 people from Congressional District Six would come from the area described as follows: the north boundary being the Denver City limits; the west boundary being Lowell Boulevard; the east boundary would be Federal Boulevard; and proceed south to Belleview.

District Two as shown in the map labeled Plaintiffs' Amendment to Republican Leadership is a compact and contiguous district. Unfortunately, some municipal and county boundaries are necessarily violated. However, it is clear to see that there is a strong community of interest among the voters of Congressional District Two.

A very significant issue in District Two is the federal facility at Rocky Flats. This facility was involved in United States' effort in building nuclear weapons and, unfortunately, a great deal of radioactive waste still remains at Rocky Flats. To deal with this situation the towns of Superior, Boulder, Broomfield, Westminster, Arvada, and Boulder County have joined in what is called the Rocky Flats Coalition of Local Governments. All the members of the Coalition, to some degree, are contained in District Two as set forth by the order. In addition, those communities involved in the Northwest Parkway Project and the Improvements to US 36 contained in congressional District Two – all these things show there is an extremely strong community of interest that the people of Congressional District Two share.

Congressional District Three

Congressional District Three consists of the following 30 counties: Alamosa, Archuleta, Conejos, Costilla, Custer, Delta, Dolores, Garfield, Gunnison, Hinsdale, Huerfano, Jackson, La Plata, Las Animas, Mesa, Mineral, Moffat, Montezuma, Montrose, Ontario, Otero, Ouray, Pitkin, Pueblo, Rio Blanco, Rio Grande, Routt, Saguasche, San Juan, and San Miguel. The population of District Three is 614,467 and therefore meets the equal population criteria.

Unfortunately, because District Three is sparsely populated, it is a very spread-out and non-compact district. However, of the 30 counties in District Three, there is only one county that is split, that being Otero County. In following the Carstens criteria in rural areas it is extremely important to keep intact, if possible, the boundaries of rural counties since people look to counties for their governmental services.

District Three consists of 21.47% Hispanic as compared to 18.94% Hispanic of the present Congressional District Three. There is no dilution of Hispanic voting strength. In Carstens it was extremely important that the San Luis Valley be in the same district as the City of Pueblo and the County of Pueblo. There is a great ethnic and cultural connection between the San Luis Valley and all of Pueblo.

District Three contains an extremely large portion of land owned by the federal government. For this reason it is imperative that District Three have congressional representatives who can interact with the federal government on behalf of the people of District Three as it relates to their use of these federal lands. In addition, the western portions of District Three contain extremely important water sheds. As testified at trial, for the western portions of District Three, and the San Luis Valley, water is a "religion". In keeping District Three as

constituted in the Amendment to Republican Leadership map, the community interest of water protection is recognized.

District Three, in addition to putting the San Luis Valley in the same district as all of Pueblo County, also puts the county of Las Animas and a portion of Otero County with Pueblo County. This permits the strong Hispanic community of interest to be united. There is much that connects the town of Trinidad in Las Animas County, the town of La Junta in Otero County, and the City of Pueblo. All of this community of interest is recognized in Congressional District Three.

In the past Eagle, Summit and Grand Counties have been part of the Western Mountain District. These three counties are placed with Congressional District Two. There is a logical connection with these counties and Congressional District Two. These three counties contain a great deal of ski areas that are visited by the people in the front range cities. In addition, I-70 is the connection between the Denver suburbs and the ski areas in Eagle, Summit, and to a lesser degree Grand County. I-70 through Clear Creek, Summit, and Eagle Counties is extremely congested. Any improvements of this necessary highway in large part come from federal aid. For this reason, among others, it appears wise to have the counties burdened by the heavy I-70 traffic to be in the same congressional district.

Congressional District Four

Congressional District Four is a district which recognizes the agricultural community of interest of the eastern plains. This community of interest was recognized in Carstens. The population of Congressional District Four is 614,466. The equal population criteria is met.

District Four consists of the following 18 counties: Baca, Bent, Boulder (part), Cheyenne, Crowley, Kiowa, Kit Carson, Larimer, Lincoln, Logan, Morgan, Otero (part), Phillips, Prowers, Sedgwick, Washington, Weld (part), and Yuma. County political boundaries, for the most part, are respected in District Four. Both Larimer and Weld Counties are included in Congressional District Four. Colorado State University is located at Fort Collins in Larimer County. This university serves the agricultural interests of the eastern plains in various ways.

The town of Greeley in Weld County has, historically, had an agricultural bent. Con-Ag, formerly known as Monfort, is an extremely large cattle processing company that has a large presence in Greeley. In addition, Greeley contains various markets for agricultural products.

Testimony has established that Larimer County and Weld County have much in common. A number of people work in Larimer County and live in Weld County and vice versa. For the last 20 years Larimer and Weld Counties have been joined in the same congressional district. It is extremely important in recognizing community of interest to put the people of Weld and Larimer Counties together in the Fourth Congressional District.

Congressional District Five

Congressional District Five consists of 614,467 people. The counties comprising the District Five are: Chaffee, El Paso, Fremont, Lake, Park (part), and Teller. It is important to note that all of El Paso County is in Congressional District Five. El Paso County has five military facilities. Those facilities are the Air Force Academy, the NORAD facility at Cheyenne Mountain, Peterson Air Force Base, Schriever Air Force Base, and Fort Carson. Fort Carson is the largest employer in El Paso County.

In addition to the five military facilities found in El Paso County, military retirees make up a large segment of the El Paso population. There are over 23,000 military retirees in El Paso County.

It is clear when you take into consideration the military and their dependents at these five military facilities along with the large number of military retirees in El Paso County, that there exists a large segment of the people of El Paso County with community interest revolving around the military. For this reason it is imperative that El Paso County not be split.

In addition, El Paso County is the second-largest county in the state of Colorado and, like the City and County of Denver, should not be divided. The City of Colorado Springs is the second largest city in the state of Colorado and should not be divided. Congressional District Five as established by the Court does not dilute any minority voting strength. The present Congressional District Five has 9.27% Hispanic and the new Congressional District Five would be 11.13% Hispanic.

Except for Park County, all county boundaries are kept intact. Likewise, the major cities in Congressional District Five are intact.

Congressional District Six

Congressional District Six contains 614,466 people and therefore meets the equal population criteria. The district is made up of a large portion of Arapahoe County, all of Douglas County, all of Elbert County, a large portion of Jefferson County, and a portion of Park County.

Congressional District Six is, in large part, a suburban bedroom district. It can be argued that Elbert County is largely rural and agricultural. However, Elbert County was at one time the fastest growing county in Colorado and is quickly changing from rural and agricultural to suburban. Congressional District Six is very compact and, for the most part, respects county and city boundaries.

The Court was very interested in keeping the City of Aurora, the third largest city in Colorado, in one congressional district. Unfortunately, this was not possible. That portion of Aurora which is contained in Arapahoe County is in District Six, and that portion of Aurora which lies within Adams County is in District Seven. Presently the City of Aurora is in three or more congressional districts. The plan adopted by the Court keeps Aurora as intact as possible.

Congressional District Seven

Congressional District Seven consists of parts of Adams County, Arapahoe County, and Jefferson County. The population is 614,465 and meets the equal population criteria. The Court admits that District Seven is an extremely cut-up district. The reason District Seven is so cut up is that it surrounds the City and County of Denver on the west, the north and the east. When Denver annexed a part of Adams County for the purpose of building DIA, the boundaries of the City and County of Denver became very irregular. Since District Seven goes around the City its boundaries are also very irregular.

District Seven is the new congressional district in Colorado. It is therefore impossible to compare the minority population in District Seven to any existing District Seven. Hispanics make up 19.62% of the new District Seven and African-Americans make up 6.18% of the new congressional district. Minorities will therefore comprise better than 25% of the new congressional district and be a substantial voice in the new district.

Congressional district seven should be a "competitive" district. Such a prediction, however, is risky because the district has 121,500 independent voters who have the strength to elect a candidate by a large margin.

The Court has concluded the new district would benefit from what should be a competitive race. The foreseen closeness of the race will hopefully generate much interest of the voters of the new district. No candidate will enjoy the advantages of incumbency.

General Comments Regarding Adoption of Plaintiffs' Amendment to Republican Leadership Map

As stated in the beginning, this Court has attempted to follow the criteria set out in Carstens. Whether a particular political party or candidate will prevail in a district was not a factor utilized by the Court. However, the Court may not ignore political consequences of adopting a redistricting plan. The final product, no matter what criteria is used, results in a map that profoundly affects Colorado politics for the next ten years.

The case of Balderas v. Texas (E.D. Tex. November 14, 2001), speaks to this political reality.

Finally, we check our plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races. This is a traditional last check upon the rationality of any congressional redistricting plan, widely relied-upon by political scientists to test plans, if only in an approximating manner.

See also Good v. Austin, 800 F. Supp. 557 (E.D. Mich. and W.D. Mich. 1992).

As of November 14, 2001, Colorado had 1,007,249 registered Republicans (36%); 932,058 unaffiliated voters (34%); and 838,629 registered Democrats (30%). The redistricting plan chosen by the Court will most likely result in four Republicans being elected to Congress, two Democrats being elected, and the congressional district being a toss-up.

This result mirrors, to some degree, the voter registration in Colorado.

Because of the somewhat rigid requirement of equal population, no redistricting plan can be perfect. The Court acknowledges flaws in the redistricting plan adopted by this Court. Some have already been mentioned. Overall it would be better if Congressional District Three was more compact. However, to recognize the strong community interest among the Hispanic population of Pueblo, Huerfano and Las Animas Counties and the City of La Junta, Congressional District Three extends a considerable distance east. In balancing compactness with community interest of the large Hispanic population, the Court chose to recognize the community interest of the Hispanic population in southern Colorado.

Jefferson County is one of the largest counties in Colorado. Four people from Jefferson County are included in Congressional District One; 53,882 people from Jefferson County are included in District Two; and 327,744 people from Jefferson County are included in District Seven. The small number of people in District One is not significant. Preferably it would be best for all of Jefferson County to be one congressional district. To recognize the strong community interest of the people around Rocky Flats it was necessary for a portion of Jefferson County to be included in Congressional District Two.

There certainly can be an argument that the eastern portions of Adams and Arapahoe Counties are rural. These areas, however, are part of a tremendous growth in the Denver metropolitan area and are in the process of changing to urban areas. In addition, it would not be wise to put the City of Aurora, which is growing at the rate of 2% per year and spreading out in all directions, in the congressional district which includes the Arkansas River. The water needs of those in the Arkansas Valley and the City of Aurora are certainly in conflict, and it is necessary that each community have its own congressional representation.

The Court will now briefly discuss the various maps submitted by the Plaintiffs and various Intervenors. Some of the Court's comments about a particular map should be considered as comments about other maps which have the same characteristic. Space does not permit the Court to discuss every proposal made at trial. The comments below hopefully discuss many of the points raised at trial.

Plaintiffs' Map

The Court rejects the map advocated by Plaintiffs for many reasons. The first reason is that Plaintiffs have chosen to split the City and County of Denver. Plaintiffs argue that since the Carstens, supra decision in 1982, the community of interest of the City and County of Denver as being one congressional district has changed. The Court disagrees.

Today as in 1982 Denver has a large Hispanic population. That fact has not changed. But there are other facts which make it even more imperative that Denver not be split. Since 1982 Denver has built and is now operating Denver International Airport. Because of the operation of DIA there are natural conflicts between Denver and communities surrounding DIA and communities that are affected by flights in and out of DIA. Denver must have a strong and unified voice speaking in behalf of the City and its airport.

Recently Broomfield became a city and county. Before that time Denver was the only city and county in the state of Colorado. Denver has one school district. Denver School District No. 1 is more unified now than it was in 1982, when the city was divided on the issue of busing. Now the entire city is behind the school district, and even if a property owner does not send his or her children to the Denver public schools, every property owner supports the school district through payment of property taxes.

Denver is even more of a cultural center now than in 1982. The Denver Center for the Performing Arts is an award-winning arts center. In addition to the arts, Denver is a major league sports city. Since 1982 a new major league baseball stadium has been built, a revised arena for professional basketball has been completed, and most recently a new stadium for Denver's beloved Broncos was built. All these factors and others dictate that Denver remain whole and have a single, unified voice in Congress that has no other divided interest.

Plaintiffs' avocation to split Denver is for partisan reasons. As mentioned above, this Court cannot consider partisan criteria in deciding how to redistrict the state of Colorado. Denver, Boulder and the city of Pueblo are the three Democratic strongholds. Certainly Plaintiffs would like to "mine" as many Democratic votes from the City and County of Denver. That is not this Court's responsibility.

Plaintiffs argue it is necessary to split Denver so a Hispanic has a chance to be elected to the U.S. Congress. The political history of Denver establishes that Plaintiffs are in error.

Numerous minorities have been elected to office in city-wide races. Some examples are Mayor Webb, Mayor Pena, and City Auditor Don Mares. In partisan races minorities have fared well. Norm Early was elected District Attorney in a partisan D.A. race. Joe Rogers won a contested primary for the position of Lieutenant Governor.

If one is interested in electing a minority to office, it would be a mistake to separate Denver and divide the Hispanic minority from the Afro-American minority. Together these two minorities have been extremely successful in electing a minority to office in Denver.

In addition to splitting Denver, Plaintiffs' map has numerous other problems. Plaintiffs have approximately 140,000 people from Jefferson County in the mountainous District Three. Jefferson County would be the largest county in Plaintiffs' proposed District Three. It is true that the present District Three has a very small population from Jefferson and Douglas County, but not anywhere near 140,000 people. The 140,000 people in Jefferson County, including the city of Golden, have no community of interest with the people on the western slope. The 140,000 people in Jefferson County are water users. The people in the rest of District Three live in areas that produce water. Very little connects people in Jefferson County to the rest of District Three.

Another flaw in the Plaintiffs' proposed map is the dividing of El Paso County and dividing the second largest city in the state of Colorado, Colorado Springs. Plaintiffs ignore the mandate of Carstens to honor city and county boundaries when at all possible.

In dividing El Paso County Plaintiffs have divided the five military bases in El Paso County. Plaintiffs argue the Court should look to the interests of people and not military bases. The military personnel, their dependents, and the military retirees living in El Paso County are people who have an interest in protecting their livelihood.

In general, Plaintiffs have cleverly proposed a map which gets as many votes as possible from the three Democratic strongholds and in doing so ignores the criteria of Carstens.

Congressman McInnis' Map

Congressman Scott McInnis has submitted a proposed map for Congressional District Three only. Congressman McInnis does not propose a map that would divide the entire state of Colorado into seven congressional districts as the Court must do. This Court cannot draw a map for one congressional district in a vacuum, but must consider the necessary seven congressional districts for the entire state.

One obvious flaw in Congressman McInnis' proposed District Three is the dividing of the City of Pueblo from the San Luis Valley. Carstens, and testimony before this Court, have established that there is a clear, strong ethnic and cultural tie between the San Luis Valley and the city of Pueblo.

Representative Fairbank's Map and Amendment Thereto

Representative Fairbank of the Colorado State House of Representatives has submitted a proposal which has been marked at trial as Beauprez Exhibit 1. Representative King amended the map of Representative Fairbank. The map as amended was not marked as an exhibit. The Court first will address Beauprez Exhibit 1.

Beauprez Exhibit 1 proposes a Congressional District Five consisting of all of Pueblo County and a portion of El Paso County. This district does not include Teller County, which from all testimony has a great deal of community interest and ties to the city of Colorado Springs.

Beauprez Exhibit 1 puts all of Pueblo County with a good portion of El Paso County. This Court has strong views that there does not exist a community of interest between El Paso County and Pueblo County. It is true that the city of Pueblo and the city of Colorado Springs are close together and are bound together by I-25. It is also true that certain media markets are shared by Colorado Springs and Pueblo. That ends all community of interest between Pueblo and Colorado Springs. They are two unique and very different cities.

Colorado Springs and all of El Paso County is well known for its conservative leaning. Christian-based organizations find their home in Colorado Springs or El Paso County. El Paso County always votes in a very conservative way. El Paso County, in addition to the military interest that has already been discussed, enjoys a high tech industry.

The city of Pueblo, and all of Pueblo County, has a strong and vital ethnic diversity. Perhaps the strongest ethnic community is the Hispanic community. However, other ethnic communities are strong in the city of Pueblo. It is true that the city of Pueblo is no longer the industrial giant it was 20 years ago. The economy has become more diverse and is striving to become stronger. But in general the people of Pueblo County and the city of Pueblo have very little in common with their neighbors to the north in Colorado Springs and El Paso County.

Beauprez Exhibit 1 also puts Boulder County with Larimer County. This divides Larimer County and Weld County. Testimony has clearly established there is a strong community of interests between Larimer County and Weld County. Representative King's amendment to the Fairbanks' map does put Larimer County and Weld County together, but other than that it has no redeeming value.

Tate and Denver Map

The map proposed by Senator Tate and supported by Mayor Webb has the flaw of splitting El Paso County and Colorado Springs. Another flaw is placing a portion of El Paso County with all of Pueblo County.

Berckefeldt No. 1

Certainly Berckefeldt No. 1 has some redeeming value. The problems are that Berckefeldt No. 1 divides the community interests of the eastern plains and also divides the community of interests of the western slope and the mountainous western region. Berckefeldt No. 1 in District Three has 34 counties. Certainly Colorado has had in the past large congressional districts because of sparse population. But there does not seem to be a valid reason for the large third congressional district in the configuration as proposed.

District Five as proposed in Berckefeldt No. 1 puts Aurora and Colorado Springs with the rural areas of Cheyenne County, Kit Carson County, Yuma County, Phillips County, Sedgewick County, Washington County and Morgan County. The second and third largest city should not be tied together with a rural community.

Republican Leadership Map and Republican Leadership Map as Amended by the Republicans

The Republican Leadership Map has much to recommend the Court's acceptance of the map. The Republican Leadership Map correctly follows the dictates of Carstens. For various reasons the Court has selected the amendment by the Plaintiffs to the Republican Leadership Map instead of the Republican Leadership Map.

First of all, the Republican Leadership Map does put the city of Pueblo with the San Luis Valley. However, the Republican Leadership Map does not put all of Pueblo County with the San Luis Valley. The counties of Huerfano and Las Animas, with the city of Trinidad, are separated from Pueblo. The Court finds there has been a long-standing community of interests between all of Pueblo County, Huerfano County, Trinidad and Las Animas County.

The Republican Leadership map has the advantage of keeping Aurora all in one congressional district. However, the Court is of the view that it makes more sense to put in one congressional district, Congressional District Six, most of Jefferson County, all of Douglas County, all of Elbert County and Arapahoe County. These three counties, Jefferson, Douglas and Arapahoe, all share a great deal of community interest. Douglas County is the fastest growing county in the state of Colorado and therefore suffers from numerous problems. For this reason it is best to keep Douglas County in one congressional district.

A big difference between the Republican Leadership Map and the Amendment to the Republican Leadership Map is having Summit, Eagle, and Grand Counties in Congressional District Two in the Amendment to the Republican District Map. At first glance it seems that Summit, Eagle and Grand Counties should be with the rest of western Colorado. However, on closer consideration there is much to merit having those three counties together with Boulder and the area around metropolitan Denver. One of the enormous problems facing these three mountain counties is the tremendous traffic on I-70. Because of the ski areas, that portion of I-70 that serves the three mountain counties has a tremendous amount of traffic and faces numerous challenges. It is a traffic pattern far different than the rest of western Colorado. Any improvements that are needed to I-70 will have to come, in large part, through federal funds. For that reason it is advisable that these three mountain counties have one congressional voice, different than the voice of the remaining portions of western Colorado.

The growth in Summit, Eagle, and Grand Counties mirrors the Denver metro area more than the Western Slope. This growth will continue. Growth is another reason to have these three mountain counties in Congressional District Two.

The Republican Leadership Map and the map as amended by the Republican Leadership (Dean Exhibit 13), not surprisingly, favors electing Republicans to congress. The two maps do not reflect the party registration in Colorado. As mentioned above, registered Republicans outnumber Democrats, but not to the degree as would be suggested by the Republican's proposed maps. Balderas v. Texas, 610 CV 158, slip op. at 8 (E.D. Tex., November 14, 2001)

The amended or alternate House Leadership Map (Dean Exhibit 13) also contains the problem of splitting El Paso County. The second largest county should not be divided when such a division is unnecessary.

Hernandez Map

The Hernandez Map has the fatal flaw of splitting the City and County of Denver. In addition, it has what the Court considers to be the flaw of splitting El Paso County and putting portions of El Paso County with Pueblo. Lastly, the eastern plains are divided unnecessarily.

Conclusion

The Court is aware that there was one objection to the Court admitting Plaintiffs' Amendment to the Republican Leadership Map and Amendment to the Republican Leadership Map prepared by the Republican party. Both maps were introduced and evidence presented on both maps. All parties had their opportunity to comment on the Plaintiffs' Amendment to the Republican Leadership Map and the Amendment that was prepared by the Republican party. It

should be noted that in Carstens the court prepared its own map and no party in that case had an opportunity for comment on the final map accepted by the court.

The above findings of fact and conclusions of law shall be the written judgment required by C.R.C.P. 58.

ORDER

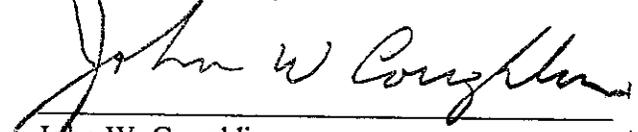
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the current congressional district plan set forth in C.R.S. §2-1-101 is unconstitutional.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of State of the State of Colorado, Donetta Davidson, is enjoined from conducting the November 2002 congressional district election pursuant to the present C.R.S. §202-1-101.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the congressional election process and the congressional primary and general election for the state of Colorado in 2002 and thereafter be conducted in and from the congressional district established in this opinion as set forth in Exhibit 1.

Dated this 25 day of January, 2002.

BY THE COURT:



John W. Coughlin
District Court Judge

42 P.3d 642, *; 2002 Colo. LEXIS 224, **

Petitioners: BOB BEAUPREZ, STEVE MILLER, SUE MITCHELL, CHERI OFNER, PAUL SCHAUER, SCOTT TIPTON, and GERALD GROSWOLD, v. Respondents: RITA AVALOS, LORI FOX, DAN FRIESEN, ANN KNOLLMAN, RICK SWAIN, and TONY YOUNG, and Intervenors: THE CITY AND COUNTY OF DENVER and MAYOR WELLINGTON WEBB.

Case No. 02SC87

SUPREME COURT OF COLORADO

42 P.3d 642; 2002 Colo. LEXIS 224

March 13, 2002, Decided

SUBSEQUENT HISTORY: [**1] As Modified April 26, 2002.

PRIOR HISTORY: Certiorari to the Colorado Court of Appeals Pursuant to C.A.R. 50, Case No. 02CA253. District Court, City & County of Denver, Case No. 01CV2897.

DISPOSITION: JUDGMENT AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, members of the State Democratic Party, petitioned for certiorari review of the decision of the Colorado Court of Appeals, affirming adoption of the state **redistricting** plan.

OVERVIEW: With the results of the 2000 census, Colorado became entitled to a new seat in the United States House of Representatives. The State Democratic Party filed an action in the district court to begin the court process of **redistricting**. The district court allowed seventeen parties to intervene. The district court issued its ruling adopting a map created by Republican leaders. Members of the Democratic Party appealed, alleging the Republican map violated equal protection rights. On review, the state supreme court considered whether the **redistricting** map in effect diluted minority voting strength contrary to the Voting Rights Act, 42 U.S.C.S. § 1971 (1988). Upon determining the case was ripe for adjudication, the state supreme court determined that the process utilized by the district court in adopting a **redistricting** plan was thorough, inclusive, and non-partisan. The approximately 3 percent drop in the Hispanic population of District 1 did not give rise to a finding of unconstitutional voter dilution.

OUTCOME: The judgment was affirmed.

CORE TERMS: redistricting, map, general assembly, governor, congressional districts, dilution, constitutional requirements, voting strength, slope, election, communities of interest, split, non-constitutional, ripe, consisting, reapportionment, intervenors, secretary of state, census, voting, voter, session, Voting Rights Act, state policy, political processes, district boundaries, unconstitutionally, non-dilution, municipalities, contravened

LEXISNEXIS(R) HEADNOTES

Civil Rights Law > Voting Rights > Vote Dilution

Constitutional Law > Congressional Duties & Powers > Census > General Overview

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

HN1 A **redistricting** plan must satisfy two constitutional requirements: (1) equal population in each district; and (2) an absence of racial discrimination in the form of the dilution of minority voting strength. When the two constitutional requirements are met by several proposed plans, a court may consider the following non-constitutional factors in adopting a plan: (1) compactness and contiguity; (2) preservation of municipal boundaries; and (3) preservation of communities of interest.

Governments > State & Territorial Governments > Elections

HN2 The secretary of state is required by law to administer Colorado's congressional elections. Colo. Rev. Stat. tit. 1, § 1-1-107 (2001).

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN3 The secretary of state is required to implement a court-ordered **redistricting** plan.

Constitutional Law > The Judiciary > General Overview

HN4 The judiciary does not have the power to order the general assembly to convene, consider issues, or enact specific legislation. Furthermore, the judiciary cannot compel the governor to sign legislation.

Civil Procedure > Justiciability > Case or Controversy Requirements > General Overview

Civil Procedure > Justiciability > Ripeness > General Overview

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

HN5 Ripeness requires that there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication. Thus, courts generally do not consider cases involving uncertain or contingent future matters.

Civil Procedure > Justiciability > Ripeness > General Overview

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN6 In the context of court-ordered **redistricting**, although **redistricting** is primarily the task of the legislature, a controversy is ripe for judicial action when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. A **redistricting** controversy is ripe when a court lacks assurance that reapportionment plans will be validly enacted in time for the upcoming election.

Civil Procedure > Appeals > Reviewability > Preservation for Review

Civil Rights Law > Voting Rights > Vote Dilution

Governments > Federal Government > Elections

HN7 An issue not presented to or raised at the trial court will not be considered on appeal.

Civil Rights Law > Voting Rights > Vote Dilution

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

HN8 There are two constitutional requirements that a **redistricting** plan must meet: population equality and non-dilution of minority voting strength.

Civil Procedure > Justiciability > Standing > General Overview

Civil Rights Law > Voting Rights > Vote Dilution

Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview

HN9 To assert a vote dilution claim in the context of **redistricting** dispute, a plaintiff must have standing. Standing in this context requires that the plaintiff: (1) be a resident of the district in which the alleged dilution occurred; and (2) have been individually harmed by the alleged racial classification utilized in the **redistricting** plan.

Civil Rights Law > Voting Rights > Vote Dilution
Governments > Federal Government > Elections
Governments > Local Governments > Elections

HN10 In order to prevail on a claim under § 2 of the Voting Rights Act, 42 U.S.C.S. § 1971 (1988), a plaintiff must satisfy three conditions. First, a plaintiff must show that a minority is sufficiently large and geographically compact so as to constitute a numerical majority in a district. Second, a plaintiff must show that the minority group is politically cohesive. Finally, a plaintiff must show that the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. The ultimate finding of vote dilution is a question of fact subject to appellate review under the clearly erroneous standard.

Civil Rights Law > Voting Rights > Vote Dilution
Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Abuse of Public Office > Illegal Gratuities > Elements

HN11 To prevail on a claim that a **redistricting** plan unconstitutionally dilutes minority voting strength, a claimant must show that the plan unconstitutionally denies the minority group's chance to effectively influence the political process. This inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate. An equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context such a finding must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN12 See Colo. Const. art. V, § 47.

Constitutional Law > Congressional Duties & Powers > Census > General Overview
Constitutional Law > Equal Protection > Voting Districts & Representatives

HN13 Colo. Const. art. V, § 46, expressly referred to in Colo. Const. art. V, § 47, is entitled "senatorial and representative districts," and addresses only districts of the state general assembly. The creation of districts for the United States House of Representatives, in contrast, is addressed by Colo. Const. art. V, § 44, which is entitled "representatives in congress," and directs that the general assembly shall redistrict the state into congressional districts when a new apportionment of seats is determined by the census. Colo. Const. art. V, § 44. Thus, satisfaction of the factors enumerated in Colo. Const. art. V, § 47 is not required in the adoption of a congressional **redistricting** plan.

Civil Rights Law > Voting Rights > Vote Dilution
Constitutional Law > Congressional Duties & Powers > Census > General Overview
Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

HN14 A court engaged in the task of adopting a **redistricting** plan must initially ensure that the two constitutional requirements of equal population and non-dilution of minority voting strength are satisfied. Once these constitutional requirements are satisfied, a court may consider non-constitutional criteria that have been articulated by the state as important state policy. Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, a district court should similarly honor state policies in the context of congressional reapportionment.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN15 A court abuses its discretion only if it can be said with fair assurance that, based on the particular circumstances confronting the court, its decision was manifestly arbitrary, unreasonable, or unfair.

COUNSEL: Friedlob, Sanderson, Paulson & Tourtillott, LLC, Christopher R. Paulson, Richard C. Kaufman, Denver, Colorado, Attorneys for Petitioners.

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Isaacson, Rosenbaum, Woods & Levy, Mark G. Grueskin, Timothy P. Daly, T. Barton French, Jr., Denver, Colorado, City Attorney's Office, J. Wallace Wortham, Jr., David W. Broadwell, Denver, Colorado, Attorneys for The City and County of Denver and Mayor Wellington Webb.

Denis Berckefeldt, Denver, Colorado, Pro se.

JUDGES: JUSTICE MARTINEZ delivered the Opinion of the Court.

OPINION BY: MARTINEZ

OPINION

[*645] EN BANC

JUSTICE MARTINEZ delivered the Opinion of the Court. This case involves the **redistricting** of the **[**2]** Colorado congressional districts pursuant to the results of the 2000 census, which determined that Colorado is entitled to a seventh representative in the United States House of Representatives. On January 25, 2002, the Denver District Court ("the district court") issued an order decreeing that the current congressional districts as set forth in section 2-1-101, 1 C.R.S. (2001), are unconstitutional and that the Secretary of State of Colorado, Donetta Davidson ("Davidson") is enjoined from conducting the November 2002 congressional district elections pursuant to the current congressional districts. The district court also adopted a **redistricting** map originally proposed by the Republican leadership, but as modified by the plaintiffs below ("the Avalos plaintiffs"), known as the Amendment to Republican Leadership map ("ARL map").

Petitioners here, intervenors below ("Beauprez"),¹ appealed to the court of appeals, but asked us to issue a writ of certiorari before argument and judgment in that court. On February 7, 2002, we granted certiorari. We now address the following issues: (1) whether the district court properly found that it had jurisdiction in this **[**3]** matter; (2) whether the district court diluted minority voting strength contrary to the Voting Rights Act, 42 U.S.C. § 1973 (1988), and the United States Constitution; (3) whether the district court contravened the requirements of section 47 of the Colorado Constitution; and (4) whether the district court contravened the constitutional mandate regarding the enactment of legislation found in Articles III, IV, and V of the Colorado Constitution. On February 26, 2002, we issued an order and mandate affirming the district court's adoption of the ARL map. We did so before issuing an opinion to expedite the process of determining the new congressional districts and to give the appropriate officials adequate time to prepare for the upcoming elections. In that order, we stated that a written opinion would follow in the near future. This is our opinion explaining the order and mandate of February 26, 2002.

FOOTNOTES

¹ The set of six intervenors that constitute the Beauprez petitioners are six individuals, each of whom lives in one of the six congressional districts as previously configured. In their motion to intervene, the six individuals described themselves as necessary intervenors because "all of the Plaintiffs are Democrats. All of the [intervenors] are Republicans. As such, [intervenors] are certain that their interests cannot be adequately represented by the Plaintiffs."

[4]** *Facts and Procedure*

With the results of the 2000 census, Colorado became entitled to a new seat in the United States House of Representatives. See U.S. Const. art. I, §§ 2, 3. The task of drawing congressional district boundaries is **[*646]** the province of the general assembly, pursuant to Article V, section 44 of the Colorado Constitution.² As with any legislation passed by the general assembly, the governor must sign such bill into law. Colo. Const. art. IV, § 11. The new congressional districts must be in place by March 11, 2002, to allow the November 2002 general elections to proceed.

FOOTNOTES

² Section 44 states:

The general assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district. When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly.

[5]** Since being notified of Colorado's entitlement to a seventh congressional district on or about April 1, 2001, the general assembly has failed to complete the **redistricting** process on several occasions. It failed to promulgate a **redistricting** plan and present it to Governor Owens for his signature at the end of the regular session in 2001. It again failed to promulgate a plan during two special legislative sessions, the second of which ended on

October 9, 2001.

Based on this legislative inaction, the Avalos plaintiffs, representing the interests of the State Democratic Party, filed the present action in the district court against Davidson, the Colorado Secretary of State, on May 31, 2001, after the general assembly concluded its regular session. The Avalos plaintiffs sought a declaration that the current congressional districts are unconstitutional and to begin the court process of **redistricting** if the legislature and governor failed to agree on a plan. Davidson filed a motion to dismiss, arguing that the Avalos plaintiffs lacked standing because the issue of congressional **redistricting** was not yet ripe, which the district court denied. The district court held a status conference [**6] on October 25, 2001, at which it ordered any parties that wished to intervene to do so by November 2, 2001. Seventeen sets of parties intervened. A trial to the court was held from December 17 to December 21, 2001, and again on December 27 and 28, 2001. At the close of trial, the district court announced that it would not issue its decision until January 25, 2002, in order to allow the general assembly another chance to agree on a plan when it convened for its regular session in January 2002. When the general assembly failed to act by the January 25 deadline, the district court issued its ruling adopting the ARL map.

A. The District Court's Decision

The district court issued its decision in this case with both reluctance and certitude. Although the district court recognized that **redistricting** is the task of the general assembly, it also noted that "there has been a failure of the legislative branch and the Governor to adopt a constitutionally acceptable **redistricting** plan for the state of Colorado in a timely fashion, [so] this Court must now act and establish a constitutional **redistricting** plan for Colorado." *Avalos v. Davidson*, No. 01CV2897, slip. op. at 2 (Denver Dist. [**7] Ct. Jan. 25, 2002). It thus set about the task of establishing Colorado's congressional districts.

The district court considered over a dozen plans submitted by many of the parties. The district court heard testimony, including expert testimony, regarding Colorado's geography, ethnic communities, trade and political history, and theories of voter performance. After hearing this testimony, the court notified all parties that it was inclined to work from a map submitted by the representatives of the Republican party, the Republican Leadership Map ("RLM"). The court invited the parties to propose any amendments to the RLM for its consideration. As previously noted, the district court adopted the ARL map, which was an amended RLM and was submitted by the Avalos plaintiffs.

In reaching its decision to adopt the ARL map, the district court relied heavily on *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982). *Carstens*, which involved the congressional **redistricting** of Colorado following the 1980 census, articulated the relevant constitutional and non-constitutional criteria that a court must employ when determining a **redistricting** plan. Specifically, *Carstens* held [**8] that ^{HNI} a **redistricting** plan must satisfy two constitutional requirements: (1) equal population in [*647] each district, and (2) an absence of racial discrimination in the form of the dilution of minority voting strength. *Carstens*, 543 F. Supp. at 81-82. *Carstens* then went on to hold that, when the two constitutional requirements are met by several proposed plans, a court may consider the following non-constitutional factors in adopting a plan: (1) compactness and contiguity, (2) preservation of municipal boundaries, and (3) preservation of communities of interest. *Id.* at 82.

The district court discussed in detail each of the seven congressional districts of the ARL map that it adopted in the context of the *Carstens* criteria. Initially, the district court noted that, given the census numbers, the ideal population of each of the seven congressional districts would be approximately 614,000. The district court recognized that each of the seven districts in the ARL map met the constitutional requirement of equal population. ³ The district court also found that none of the districts in the ARL map unconstitutionally diluted minority

voting strength. ⁴ **[**9]** After finding the two constitutional requirements satisfied, the district court considered the non-constitutional factors. When the district court determined that it needed to depart from one of these factors, it explained its reasoning. For example, the district court determined that it was necessary to violate some municipal and county boundaries in District 2. The district court explained, however, that such violation was necessary because a strong community of interest exists for the voters in District 2 around the Rocky Flats facility as well as the development of the area around highway US 36. The district court considered this community of interest as necessitating a single voice in congress. The district court was careful to explain its reasoning regarding the non-constitutional factors for each of the seven districts in the plan it adopted.

FOOTNOTES

³ The district court stated that District 1, consisting of the City and County of Denver, approximately 60,000 people from Arapahoe County, and an "insignificant" number of people from Jefferson County, contains 614,465 people; District 2, consisting of part of Adams County, part of Boulder County, Clear Creek County, Eagle County, Gilpin County, Grand County, Jefferson County, Summit County, and part of Weld County, contains 614,465 people; District 3, consisting of the following counties: Alamosa, Archuleta, Conejos, Costilla, Custer, Delta, Delores, Garfield, Gunnison, Hinsdale, Huerfano, Jackson, La Plata, Las Animas, Mesa, Mineral, Moffat, Montezuma, Montrose, Ontario, Otero (part), Ouray, Pitkin, Pueblo, Rio Blanco, Rio Grande, Routt, Saguasche, San Juan, and San Miguel, contains 614,467 people; District 4, consisting of the counties of Baca, Bent, Boulder (part), Cheyenne, Crowley, Kiowa, Kit Carson, Larimer, Logan, Morgan, Ortero (part), Phillips, Prowers, Sedgwick, Washington, Weld (part), and Yuma, contains 614,466 people; District 5, consisting of the counties of Chaffee, El Paso, Fremont, Lake, Park (part), and Teller, contains 614,467 people; District 6, consisting of most of Arapahoe County, Douglas County, Elbert County, a large portion of Jefferson County, and part of Park County, contains 614,466 people; and District 7, consisting of parts of Adams County, Arapahoe County, and Jefferson County, contains 614,465 people. **[**10]**

⁴ The district court recognized that the new District 1 would decrease the Hispanic population approximately 3.39% from the prior District 1, but found that such a decrease did not represent an unconstitutional dilution of minority voting strength.

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9,301,241

We determine that the process utilized by the district court in adopting a **redistricting** plan was thorough, inclusive, and non-partisan. The district court engaged in an even-handed approach to the complex and detailed process of congressional **redistricting**. It encouraged all parties and intervenors to submit proposed plans in order for it to adopt a plan that would reflect, as much as possible, the input of the general assembly and the governor, while satisfying the relevant constitutional and non-constitutional criteria.

II. Jurisdiction

Beauprez first contends that the district court did not have jurisdiction over this matter. Specifically, Beauprez argues that Davidson, as secretary of state, was not the proper defendant because she does not have any role in drawing Colorado's congressional districts and that the case was not ripe for adjudication. **[**11]** Because Beauprez believes that subject-matter jurisdiction was lacking, he argues that the case should have been dismissed.

A. The Secretary of State was the Proper Defendant

Beauprez's contention that Davidson is not the proper defendant is not persuasive. ^{HN2}

¶ **[*648]** The secretary of state is required by law to administer Colorado's congressional elections, and is thus a proper defendant. See § 1-1-107, 1 C.R.S. (2001). Further, ^{HN3}¶ the secretary of state is required to implement a court-ordered **redistricting** plan. See *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 209, 213 (Colo. 1982). In addition, ^{HN4}¶ the judiciary does not have the power to order the general assembly to convene, consider issues, or enact specific legislation, rendering the general assembly an improper defendant for the relief requested by the Avalos plaintiffs. See, e.g., *Lucchesi v. State*, 807 P.2d 1185, 1190 (Colo. Ct. App. 1990). Furthermore, the judiciary cannot compel the governor to sign legislation, rendering Governor Owens an improper defendant for the relief sought by the Avalos plaintiffs. See, e.g., *Romer v. Colo. Gen. Assembly*, 840 P.2d 1081, 1084-85 (Colo. 1992). **[**12]** Finally, all interested parties intervened, including representatives of the Republican and Democratic parties and Governor Owens.

Case law further supports our conclusion that Davidson was the proper defendant in this case. We have found numerous cases, all of them adjudicated on the merits, in which the secretary of state was named as the defendant in a congressional **redistricting** action. See, e.g., *Grove v. Emison*, 507 U.S. 25, 27, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993); *White v. Weiser*, 412 U.S. 783, 786, 37 L. Ed. 2d 335, 93 S. Ct. 2348 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 528, 22 L. Ed. 2d 519, 89 S. Ct. 1225 (1969).

We conclude that Davidson, in her official capacity as secretary of state, was properly named as the defendant in this action.

B. The Case was Ripe for Adjudication

Beauprez asserts that there was no case or controversy when this action was filed in May 2001, because the general assembly still had ample time and opportunity to enact a **redistricting** plan. We disagree.

^{HN5}¶ Ripeness requires that there be an actual case or controversy between the parties that is sufficiently immediate and real **[**13]** so as to warrant adjudication. *Carstens*, 543 F. Supp. at 76 (citing *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506, 32 L. Ed. 2d 257, 92 S. Ct. 1749 (1972)). Thus, courts generally do not consider cases involving uncertain or contingent future matters. *Id.* (citing Charles Wright & Arthur Miller, *Federal Practice & Procedure*, § 3532, at 238 (1975)).

^{HN6}¶ In the context of court-ordered **redistricting**, it has been recognized that, although **redistricting** is primarily the task of the legislature, a controversy is ripe for judicial action when "a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Weiser*, 412 U.S. at 794-95 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964)); see also *O'Sullivan v. Carlin*, 540 F. Supp. 1200, 1202 (D. Kan. 1982). It has also been articulated that a **redistricting** controversy is ripe when a court "lacks assurance that reapportionment plans [will] be validly enacted" in time for the upcoming election. *Wilson v. Eu*, 1 Cal. 4th 707, 823 P.2d 545, 547 (Cal. 1992). **[**14]** Finally, an argument similar to the one presented by the petitioners here was presented to the *Carstens* court, which rejected the ripeness argument:

In the instant case, the Governor and the State Legislature have had ample opportunity to redistrict Colorado and to provide for an additional representative. . . . Despite months of deliberate study and negotiation, the people of Colorado still do not have an acceptable congressional **redistricting** plan. We are persuaded that the fate of **redistricting** in Colorado has reached an impasse which the parties are not capable of resolving. . . . Thus, this Court is presented with a controversy of immediate concern. There is no indication that absent

judicial intervention, a viable solution will be forthcoming.

Carstens, 543 F. Supp. at 76.

Given these principles of ripeness in the context of a **redistricting** dispute, we conclude that the district court properly determined that the present action was ripe for adjudication. Our review of the record reveals that the district court abstained from ruling on this matter until it was convinced that no legislatively crafted plan would be [*649] forthcoming. That court deferred [**15] ruling on the initial motions filed in this case until November 2001, after the general assembly adjourned without adopting a plan. Even after conducting the trial in this case in December 2001, the district court abstained from issuing its decision until January 25, 2002, in order to give the general assembly another chance to promulgate a **redistricting** plan. ⁵ In its eventual ruling, the district court explicitly states that it "has waited until this date to announce this decision with the hope that the General Assembly in the general legislative session of January 2002 would have adopted a plan for **redistricting** and have that plan approved by Governor Owens." *Avalos*, No. 01CV2897, slip op. at 2. The record also indicates that the general assembly had an adequate opportunity to enact a **redistricting** plan, but failed to do so. Accordingly, we find that the case was ripe for adjudication on its merits. *Carstens*, 543 F. Supp. at 67.

FOOTNOTES

⁵ None of the adopted plans was enacted.

III. Voting [**16] Rights Act

Beauprez did not raise an objection below to the plan adopted by the district court based on section 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973 (1988). On appeal, Beauprez asserts for the first time that the ARL map adopted by the district court violates section 2 of the VRA. ⁶ As a general rule, ^{HN7*} an issue not presented to or raised at the trial court will not be considered on appeal. *See, e.g., Stevenson v. The Hollywood Bar and Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992). Thus, Beauprez has failed to preserve his claim that the ARL map adopted by the district court dilutes minority voting strength. Notwithstanding this failure to preserve the claim, we choose to consider whether the ARL map adopted by the district court dilutes minority voting strength in order to make our review of the actions taken by the district court as thorough and complete as the record allows.

FOOTNOTES

⁶ Section 2 states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than

other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[17]** As stated previously, ^{HNS} there are two constitutional requirements that a **redistricting** plan must meet: population equality and non-dilution of minority voting strength. *Cartsens*, 543 F. Supp. at 81-82. Congress enacted the VRA to provide a statutory mechanism for redress of constitutional harms in voting and election procedures against minorities. See generally *Chisom v. Roemer*, 501 U.S. 380, 115 L. Ed. 2d 348, 111 S. Ct. 2354 (1991); *Thornburg v. Gingles*, 478 U.S. 30, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). Thus, both the constitutional requirement and the statute are based on the same principles and goals. ^{HNS} To assert a vote dilution claim in the context of **redistricting** dispute, a plaintiff must have standing. **[*650]** Standing in this context requires that the plaintiff (1) be a resident of the district in which the alleged dilution occurred, and (2) have been individually harmed by the alleged racial classification utilized in the **redistricting** plan. *United States v. Hays*, 515 U.S. 737, 745-46, 132 L. Ed. 2d 635, 115 S. Ct. 2431 (1995). Because a vote dilution claim was not raised at trial, the record does not reveal **[**18]** any facts that would confer standing on Beauprez to enable him to assert a section 2 claim.

FOOTNOTES

⁷ Although it is unclear from prior precedent whether compliance with the VRA is an additional inquiry that a court must complete before adopting a **redistricting** plan or whether a VRA inquiry takes the place of a court's inquiry regarding the non-dilution of minority voting strength when determining whether the two constitutional requirements have been met, we need not determine the interplay between the two because the VRA and the constitutional requirement share the same goals and principles. Compare *Abrams v. Johnson*, 521 U.S. 74, 90, 138 L. Ed. 2d 285, 117 S. Ct. 1925 (1997), and *Carstens*, 543 F. Supp. at 81-82 with *Upham v. Seamon*, 456 U.S. 37, 43, 71 L. Ed. 2d 725, 102 S. Ct. 1518 (1982), and *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 687 (D. Ariz. 1992).

Despite our conclusion that Beauprez lacks standing to raise a VRA **[**19]** claim, we choose to address this issue in order to engage in the most thorough review of this case possible.

^{HN10} In order to prevail on a claim under section 2, a plaintiff must satisfy three conditions. First, a plaintiff must show that a minority is "sufficiently large and geographically compact" so as to constitute a numerical majority in a district. Second, a plaintiff must show that the minority group is "politically cohesive." Finally, a plaintiff must show that the "white majority votes sufficiently as a bloc to enable . . . it to defeat the minority's preferred candidate." *Growe*, 507 U.S. at 40 (quoting *Gingles*, 478 U.S. at 51). The ultimate finding of vote dilution is a question of fact subject to appellate review under the clearly erroneous standard. *Gingles*, 478 U.S. at 78-79.

Beauprez argues that the ARL map adopted by the district court retrogressed and diluted the minority voting strength of District 1, which consists of the City and County of Denver. Again, because a vote dilution claim was not raised below, the record is inadequate for us to determine whether the three *Gingles* conditions were satisfied. The record **[**20]** does

demonstrate, however, that the first *Gingles* condition cannot be satisfied because there is not a large enough Hispanic population in the Denver area to constitute a "majority-minority" district in District 1, regardless of how that district is drawn. With regard to the second and third *Gingles* conditions, the record is inadequate for any conclusion to be reached. We thus find that Beauprez cannot prevail on his VRA claim. *See generally In re Reapportionment of the Colo. Gen. Assembly*, 828 P.2d at 193 ("We conclude that resolution of the section 2 claim . . . would involve the finding of material facts that are in genuine dispute. Our examination of the record discloses that the Commission attempted to apply the proper legal standards to the Voting Rights Act claims . . . and made a good-faith effort to comply with section 2 of the Act.").

Although our review of the record leads us to conclude that Beauprez's VRA claim fails because he cannot satisfy the specific requirements of the that statute, we are able to assess his more general constitutional claim of vote dilution, which is separate and apart from his statutory claim. ^{HN117}To prevail on a claim that **[**21]** a **redistricting plan** unconstitutionally dilutes minority voting strength, a claimant must show that the plan unconstitutionally denies the minority group's

chance to effectively influence the political process. . . . This inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate. . . . An equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context such a finding must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Davis v. Bandemer, 478 U.S. 109, 133, 92 L. Ed. 2d 85, 106 S. Ct. 2797 (1986). Because the district court addressed the issue of dilution of minority voting strength repeatedly throughout its order, we can determine from the record **[**22]** that the ARL plan adopted by the district court, particularly with regard to District 1, but also with regard to the entire map, did not result in an unconstitutional dilution of minority voting strength. We review the district court's findings regarding minority vote dilution under the clearly erroneous **[*651]** standard of review. *Id.* at 127; *Karcher v. Daggett*, 462 U.S. 725, 743-44, 77 L. Ed. 2d 133, 103 S. Ct. 2653 (1983). As noted, the district court addressed the constitutional requirement of an absence of vote dilution on nearly every page of its discussion of the ARL map that it adopted. *Avalos*, No. 01CV2897, slip op. at 3-6, 8-9. It increased the percentage of the Hispanic population in three districts, namely Districts 2, 3, and 5. *Id.* at 5, 6, 8. The plan adopted by the district court also comes close to creating a minority "influence district" in the new district, District 7, which contains a 20% Hispanic population. *Id.* at 9. Given these facts, the approximately 3% drop in the Hispanic population of District 1, which the district court acknowledges in its decision, does not give rise to a finding of unconstitutional vote dilution. **[**23]** *Carstens*, 543 F. Supp. at 86 (a 3-4% decrease in Hispanic population was not constitutionally significant in Colorado given the fact that Hispanics cannot reach the 60 to 65% population in a given district necessary to exercise political control of that district). After reviewing the record, we conclude that the finding of the district court that no minority vote dilution occurs in the adopted plan was not clearly erroneous.

IV. Section 47 of the Colorado Constitution

Beauprez contends that the district court contravened the legal requirements of Article V, section 47 of the Colorado Constitution when it failed to consider the number of municipalities that are split in its adopted plan and by failing to maintain the western slope

community of interest. ⁸

FOOTNOTES

⁸ Beauprez makes no argument that the district court failed to minimize the number of county boundary splits and we do not specifically address this issue. We recently addressed the issue of county boundary splits in the context of state legislative reapportionment in *In re Reapportionment of the Colorado General Assembly*, No. 01 SA386, 2002 Colo. LEXIS 115 (Colo. Jan. 28, 2002).

[**24] Section 47 states:

HN12 **Composition of districts** (1) Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap. (2) Except when necessary to meet the equal population requirements of section 46, no part of one county shall be added to all or part of another county in forming districts. Within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible. When county, city, or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law. (3) Consistent with the provisions of this section and section 46 of this article, communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible.

Colo. Const. art. V, § 47. **HN13** Section 46, expressly referred to in section 47, is [****25**] entitled "senatorial and representative districts," and addresses only districts of the state general assembly. Colo. Const. art. V, § 46. The creation of districts for the United States House of Representatives, in contrast, is addressed by section 44 of Article V, which is entitled "representatives in congress," and directs that the general assembly shall redistrict the state into congressional districts when a new apportionment of seats is determined by the census. Colo. Const. art. V, § 44. Thus, satisfaction of the factors enumerated in section 47 is not *required* in the adoption of a *congressional redistricting* plan.

HN14 A court engaged in the task of adopting a **redistricting** plan must initially ensure that the two constitutional requirements of equal population and non-dilution of minority voting strength are satisfied. *Carstens*, 543 F. Supp. at 81-82. Once these constitutional requirements are satisfied, a court may consider non-constitutional criteria that have been articulated by the state as important state policy. *Id.* 82-83. In *Upham v. Seamon*, the United States Supreme Court also expressed this principle:

[****652**] Just as a federal [****26**] district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment.

Upham v. Seamon, 456 U.S. 37, 41, 71 L. Ed. 2d 725, 102 S. Ct. 1518 (1982). In considering whether the district court properly adopted the ARL map consistent with the non-

constitutional criteria reflected in section 47, we employ an abuse of discretion standard. See *Connor v. Finch*, 431 U.S. 407, 414, 52 L. Ed. 2d 465, 97 S. Ct. 1828 (1977); *Mahan v. Howell*, 410 U.S. 315, 332, 35 L. Ed. 2d 320, 93 S. Ct. 979 (1973); *Williams v. Rhodes*, 393 U.S. 23, 64-65, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968) (Warren, J., dissenting). ^{HN15} A court abuses its discretion "only if it can be said with fair assurance that, 'based on the particular circumstances confronting the court, **[**27]** its decision was manifestly arbitrary, unreasonable, or unfair.'" *State ex rel. Dep't of Corrections v. Pena*, 788 P.2d 143, 148 (Colo. 1990) (Quinn, J., dissenting) (quoting *King v. People*, 785 P.2d 596, 603 (Colo. 1990)). Our review of the record leads us to conclude that the district court did not abuse its discretion in applying the non-constitutional criteria.

Beauprez specifically contends that the district court did not consider municipalities that were split in its adoption of the ARL map. In contrast, the district court gave ample attention to this issue, stating that it "was very interested in keeping the City of Aurora, the third largest city in Colorado, in one congressional district," but determined that Aurora must be split between District 6 and District 7. *Avalos*, No. 01CV2897, slip op. at 9. The district court also noted that the plan it adopted only split Aurora into two districts, whereas the prior districting plan split it into "three or more" districts. *Id.* Additionally, the district court explained that the City of Arvada should be split into two districts to maintain the community of interest in District 2 that is the **[**28]** Rocky Flats Coalition of Local Governments. *Id.* at 6, 10. The district court's decision to split these municipalities is thus supported by the record.

Beauprez also asserts that the district court improperly failed to preserve the western slope community of interest. There is little dispute that the western slope constitutes a community of interest. *Carstens*, 543 F. Supp. at 91. It is also undisputed that the ARL map adopted by the district court places almost all of the western slope counties into District 3. However, some counties of the western slope are not included in District 3, but are instead included in District 2. This result is supported by the record: The court determined that the San Luis Valley and Huerfano, Pueblo, and Las Animas Counties, as well as a part of Otero County, should be included in a single district, District 3, along with most of the western slope counties in order to preserve the historical Hispanic community of interest in that part of the state. *Avalos*, No. 01CV2897, slip op. at 10. In determining that these counties should be in District 3, the court, pursuant to the constitutional requirement of equal population, necessarily **[**29]** had to remove some counties of the western slope and place them in another district. The district court noted that the counties of the western slope that it placed in District 2, namely Summit, Eagle, and Grand Junction counties, make up a ski corridor from Denver's suburbs and that the growth in these counties "mirrors the Denver metro area more than the Western Slope." *Id.* at 15. The district court thus concluded that these three counties were properly included in District 2. The district court's determination regarding the western slope is thus supported by the record and will not be disturbed by this court on appeal.

V. The District Court did not Contravene the Constitutional Mandate Regarding the Enactment of Legislation Found in Articles III, IV, and V of the Colorado Constitution.

Finally, Beauprez argues that the district court abused its discretion by disregarding testimony given by Governor Owens. **[*653]** Specifically, Beauprez contends that the district court should have implemented a plan consistent with Governor Owens's testimony that he would veto any plan that (1) did not keep the City and County of Denver together, (2) did not keep the western slope and the San Luis **[**30]** Valley together, and (3) did not change existing district boundaries as little as possible. Beauprez relies on *Carstens*, which stated that the input of the general assembly and the governor are "integral and indispensable parts of the legislative process," *Carstens*, 543 F. Supp. at 79, to support his contention that the district court should have adopted a plan consistent with Governor Owens's testimony. However, Beauprez misconstrues *Carstens*' holding. A full reading of *Carstens* reveals that that court determined that when no **redistricting** plan has been

enacted through the legislative process, the court "will regard the plans submitted by both the Legislature and the Governor as 'proffered current policy' rather than clear expressions of state policy and will review them in that light." *Carstens*, 543 F. Supp. at 79 (citation omitted). The district court was thus free to accord whatever evidentiary weight it saw fit to the testimony of Governor Owens. The record reveals that the district court considered all of the testimony that it heard, including that of Governor Owens, as well as all of the proposed plans that were submitted for its **[**31]** review. We thus find no abuse of discretion in the district court's consideration of Governor Owens's testimony.

VI. Conclusion

We find that the district court properly applied the controlling law regarding the adoption of a congressional **redistricting** plan and thus affirm its adoption of the ARL map. Not only did the district court explain and fairly apply pertinent legal standards, it did so in a highly politically charged atmosphere.

For the reasons explained herein, we issued our order and mandate affirming the decision of the district court on February 26, 2002.

Source: [Legal > / . . . / > CO State Cases, Combined](#) 

Terms: **redistricting**

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79 P.3d 1221, *; 2003 Colo. LEXIS 941, **

Petitioner: PEOPLE OF THE STATE OF COLORADO, EX REL. KEN SALAZAR, in his official capacity as Attorney General for the State of Colorado, Petitioner-in-intervention: MARK UDALL, individually as a citizen of Colorado, and in his capacity as the elected representative to the United States House of Representatives for the Second Congressional District of the State of Colorado, v. Respondent: DONETTA DAVIDSON, in her official capacity as Secretary of State for the State of Colorado, Respondent-in-intervention: COLORADO GENERAL ASSEMBLY. Petitioner: DONETTA DAVIDSON, in her official capacity as Secretary of State for the State of Colorado, v. Respondent: KEN SALAZAR, in his official capacity as Attorney General for the State of Colorado.

Case No. 03SA133, Case No. 03SA147, Consolidated Cases

SUPREME COURT OF COLORADO

79 P.3d 1221; 2003 Colo. LEXIS 941

December 1, 2003, Decided

SUBSEQUENT HISTORY: Related proceeding at Keller v. Davidson, 299 F. Supp. 2d 1171, 2004 U.S. Dist. LEXIS 838 (D. Colo., 2004)
US Supreme Court certiorari denied by COLORADO GENERAL ASSEMBLY v. KEN SALAZAR, ATTORNEY GENERAL OF COLORADO, ET AL., 2004 U.S. LEXIS 4029 (U.S., June 7, 2004)

PRIOR HISTORY: [**1] Original Proceeding Pursuant to Colo. Constitution Art. VI, § 3.

DISPOSITION: In Case No. 03SA133; rule to show cause made absolute. In Case No. 03SA147; rule to show cause discharged.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner state attorney general filed an original action pursuant to the Colo. Const. art. VI, § 3, asking for an injunction preventing respondent secretary of state from implementing the general assembly's 2003 **redistricting** plan and requesting a writ of mandamus requiring the secretary to return to the 2002 **redistricting** plan. The secretary filed her own original action, requesting dismissal of the attorney general's petition.

OVERVIEW: When the general assembly failed to redraw congressional districts after the latest census and before the upcoming election, the court settled on a new seven-district plan. After the election, the general assembly enacted 2003 Colo. Sess. Laws 1645, 1645-58, a new **redistricting** plan. The attorney general filed the instant action requesting an injunction to prevent implementation of the new plan. In response, the secretary of state requested dismissal of the attorney general's petition, claiming that he could not bring an original proceeding of that type. The court issued a rule to show cause in both cases and made the rule absolute in the attorney general's case. The court first held that the attorney general had authority to sue the secretary, because the resolution of the **redistricting** plan dispute was a matter of great public importance. The court further held that U.S. Const. art. I, § 4, granted only limited authority to the state for congressional **redistricting** and that Colo. Const. art. V, § 44 further limited that power to **redistricting** only after a decennial census, before the ensuing election, and at no other time.

OUTCOME: The court made the rule absolute in the case brought by the attorney general

and discharged the rule in the secretary's case.

CORE TERMS: redistricting, general assembly, congressional districts, election, redistrict, census, secretary, apportionment, state constitution, voter, reapportionment, sentence, original proceeding, session, times, elected, framers, seat, state law, original jurisdiction, state legislatures, initiative, federal district, federal law, federal census, lawmaking, general election, voting, single-member, decennial

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Remedies > Writs > General Overview

HN1 See Colo. Const. art. VI, § 3.

Civil Procedure > Remedies > Writs > General Overview

HN2 Original proceedings are controlled by Colo. R. App. P. 21(a)(1).

Civil Procedure > Remedies > Writs > General Overview

HN3 See Colo. R. App. P. 21(a)(1).

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN4 Although the Supreme Court of Colorado has discretion regarding the cases it chooses to hear, the Court has established two basic requirements for original proceedings that are not the equivalent of an interlocutory appeal or the result of an alleged abuse of discretion in a lower court proceeding that cannot be cured on appeal. First, the case must involve an extraordinary matter of public importance. Second, there must be no adequate "conventional appellate remedies."

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Remedies > Writs > General Overview

HN5 Regarding the requirement for an original proceeding that the parties have an adequate alternative remedy, the remedy may be an action in a trial court or an appeal in an ongoing proceeding. Colo. R. App. P. 21(a)(1).

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN6 States have primary responsibility in congressional **redistricting** and federal courts must defer to states.

Governments > State & Territorial Governments > Relations With Governments

HN7 State courts are the ultimate expositors of state law.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Courts > Authority to Adjudicate

HN8 The Attorney General and other public officials have the ability to request original jurisdiction in matters of great public importance.

Governments > State & Territorial Governments > Elections

Governments > State & Territorial Governments > Employees & Officials

HN9 The state attorney general has common law power to bring an original proceeding in order to protect the integrity of the election process. The attorney general is the

appropriate person to institute such an action, because it is the function of the attorney general to protect the rights of the public.

Civil Procedure > Jurisdiction > Jurisdictional Sources > Constitutional Sources
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN10 ↓ The Colorado Constitution vests original jurisdiction in the Supreme Court. Colo. Const. art. VI, § 3.

Governments > Courts > Common Law
Governments > State & Territorial Governments > Employees & Officials

HN11 ↓ The state attorney general has common law powers unless they are specifically repealed by statute.

Governments > Courts > Common Law

HN12 ↓ As Colo. Rev. Stat. § 2-4-211 (2002) states, Colorado adopts the common law of 1607 insofar as it is applicable and of a general nature.

Governments > State & Territorial Governments > Employees & Officials
Legal Ethics > Client Relations > General Overview

HN13 ↓ The Colorado Rules of Professional Conduct explicitly recognize that government lawyers may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. Colo. R. Prof. Conduct pmb1. The Rules say that a government lawyer's client may in some circumstances be a specific agency, but it is generally the government as a whole. Therefore, the state attorney general must consider the broader institutional concerns of the state even though these concerns are not shared by an individual agency or officer.

Constitutional Law > Congressional Duties & Powers > Census > General Overview
Constitutional Law > Equal Protection > Voting Districts & Representatives

HN14 ↓ Colo. Const. art. V, § 44, prohibits congressional **redistricting** more than once per decade. More specifically, Colo. Const. art. V, § 44: (1) requires congressional **redistricting** after a national census and before the ensuing general election; and (2) prohibits **redistricting** outside of this window.

Constitutional Law > Equal Protection > Voting Districts & Representatives
Governments > State & Territorial Governments > Legislatures

HN15 ↓ In Colorado the general assembly has primary responsibility for drawing congressional districts.

Constitutional Law > Equal Protection > Voting Districts & Representatives
Governments > State & Territorial Governments > Elections

HN16 ↓ In Colorado, when the general assembly fails to provide a constitutional **redistricting** plan in the face of an upcoming election and courts are forced to step in, these judicially-created districts are just as binding and permanent as districts created by the general assembly.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN17 ↓ The U.S. Constitution does not grant **redistricting** power to the state legislatures exclusively, but instead, to the states generally. The state may draw congressional districts via any process that it deems appropriate.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN18 ⚡ The states' **redistricting** authority is not "unfettered." Rather, it is circumscribed by federal law.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN19 ⚡ Each state must draw congressional districts immediately after each federal census and before the ensuing general election.

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Legislation > Initiative & Referendum

HN20 ⚡ The Colorado Constitution does not grant the general assembly exclusive authority to draw congressional districts. **Redistricting** can be accomplished by enacting a bill subject to gubernatorial approval, by voter initiative, and through litigation.

Constitutional Law > Congressional Duties & Powers > Census > General Overview

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN21 ⚡ The Colorado Constitution cannot relax the federal laws pertaining to **redistricting**; the Colorado Constitution can only impose more stringent restrictions.

Constitutional Law > Congressional Duties & Powers > Elections > Time, Place & Manner

HN22 ⚡ See U.S. Const. art. I, § 4, cl. 1.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview

HN23 ⚡ The United States Supreme Court has interpreted the word "legislature" in U.S. Const. art. I to broadly encompass any means permitted by state law, and not to refer exclusively to the state legislature.

Governments > Legislation > General Overview

HN24 ⚡ A state's lawmaking process may include citizen referenda and initiatives, mandatory gubernatorial approval, and any other procedures defined by the state.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Legislation > General Overview

HN25 ⚡ As contemplated in U.S. Const. art. I the word "legislature" extends to special **redistricting** commissions.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview

HN26 ⚡ The word "legislature," as used in U.S. Const. art. I, encompasses court orders.

Governments > Federal Government > General Overview

Governments > Federal Government > U.S. Congress

Governments > State & Territorial Governments > Legislatures

HN27 ⚡ State courts have the authority to evaluate the constitutionality of **redistricting** laws and to enact their own **redistricting** plans when a state legislature fails to replace unconstitutional districts with valid ones. In fact, courts are constitutionally required to draw constitutional congressional districts when the legislature fails to do so. In such a case, a court cannot be characterized as "usurping" the legislature's authority; rather, the court order fulfills the state's obligation to provide constitutional districts for congressional elections in the absence of legislative action.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview
 Constitutional Law > Equal Protection > Voting Districts & Representatives
 Governments > State & Territorial Governments > Legislatures

HN28 ⚡ U.S. Const. art. I, § 4, cl. 1, delegates congressional **redistricting** power to the states to carry out as they see fit, and not exclusively to the state legislatures.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN29 ⚡ There is a one-person, one-vote doctrine, requiring that every state make a good-faith effort to elect all representatives from districts of equal populations. Under this doctrine, states now have a constitutional obligation to draw congressional districts with equal numbers of constituents, or else justify any differences, no matter how small, with a legitimate reason.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN30 ⚡ When evaluating constitutionality under the one-person, one-vote doctrine, a court uses the national decennial census figures.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

Constitutional Law > Congressional Duties & Powers > Elections > Time, Place & Manner
 Governments > Federal Government > U.S. Congress

HN31 ⚡ The states' authority to regulate the "times, places and manner" of congressional elections is not absolute. Instead, the United States Constitution gives Congress the power to make or alter election regulations at any time. U.S. Const. art. I, § 4, cl. 1.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN32 ⚡ See 2 U.S.C.S. § 2c.

Civil Rights Law > Voting Rights > Racial Discrimination

Civil Rights Law > Voting Rights > Vote Dilution

Governments > Local Governments > Elections

HN33 ⚡ The Voting Rights Act, 42 U.S.C.S. §§ 1973 to 1973bb-1, forbids diluting the voting strength of a minority group sufficiently large and geographically compact to constitute a majority in a single-member district.

Civil Rights Law > Voting Rights > Preclearance

Governments > Federal Government > Elections

HN34 ⚡ Section 5 of the Voting Rights Act found generally at 42 U.S.C.S. §§ 1973 to 1973bb-1 requires jurisdictions with a history of discrimination to obtain federal approval before making any changes to voting laws or procedures. 42 U.S.C.S. § 1973c. The process of obtaining approval is known as "preclearance."

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN35 ⚡ The federal Constitution, not the state constitution, is the source of the states' authority to redistrict, and the federal Constitution and federal statutes restrict the states' authority to redistrict.

Constitutional Law > State Constitutional Operation

HN36 ⚡ The Colorado Constitution is not a grant of power, but an additional limitation upon all forms of state power, including the authority of the general assembly.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN37 ⚡ See Colo. Const. art. V, § 44.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN38 ↓ As contemplated in Colo. Const. art. V, § 44, the term "general assembly" does not simply refer to the lawmakers who must pass a bill. Instead, it is a shorthand method of referring to the entire standard lawmaking procedure set forth in the Colorado Constitution.

Constitutional Law > Equal Protection > Voting Districts & Representatives

Governments > Legislation > Initiative & Referendum

HN39 ↓ The term "general assembly" in the first sentence of Colo. Const. art. V, § 44, broadly encompasses the legislative process, the voter initiative, and judicial **redistricting**.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN40 ↓ Regardless of which body creates the congressional districts in Colorado, these districts are equally valid. Hence, judicially created districts are no less effective than those created by the general assembly.

Constitutional Law > State Constitutional Operation

HN41 ↓ In construing the Colorado Constitution, a court's primary task is to give effect to the framers' intent. To ascertain this intent, the court begins with the plain meaning of the constitutional provision. Then, by way of confirmation, the court proceeds to examine the provision in light of its context within the state constitution.

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN42 ↓ When the state constitution specifies a timeframe for **redistricting**, then, by implication, it forbids performing that task at other times.

Governments > Legislation > Interpretation

HN43 ↓ In construing a statute, interpretations that render statutory provisions superfluous should be avoided.

Constitutional Law > Congressional Duties & Powers > Census > General Overview

Constitutional Law > Equal Protection > Voting Districts & Representatives

HN44 ↓ Colo. Rev. Stat. § 2-2-901(1)(a) (2002) says that congressional **redistricting** occurs after each federal decennial census. Colo. Rev. Stat. § 2-2-901(1)(b) (2002), regarding legislative **redistricting**, similarly states that legislative **redistricting** occurs after each federal census.

HEADNOTES

No. 03SA133 -- Salazar v. Davidson: Constitutional Law, Legislative Branch, Election Law, **Redistricting**, No. 03SA147 -- Davidson v. Salazar: Constitutional Law, Executive Branch, Attorney General, Original Proceeding

SYLLABUS

In two original proceedings, consolidated for opinion, the Supreme Court holds:

(1) The Attorney General may bring an original proceeding pursuant to C.A.R. 21 to challenge the constitutionality of Senate Bill 03-352, a congressional **redistricting** law enacted by the General Assembly to replace the court-ordered congressional districts applied in the 2002 general election.

(2) Senate Bill 03-352 is unconstitutional because the Colorado Constitution requires the General Assembly to redistrict after each census and before the ensuing general election, and does not allow **redistricting** at any other time. Because the General Assembly failed to redistrict during this constitutional window, it relinquished its authority to redistrict until after the 2010 census.

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Ballard Spahr Andrews & Ingersoll, LLP, A. Thomas Downey, Denver, Colorado, Attorneys for Amicus Curiae, Colorado House Minority in Support of Attorney General Salazar's Original Petition.

Kenneth L. Smith, Pro se, Golden, Colorado.

JUDGES: CHIEF JUSTICE MULLARKEY delivered the Opinion of the Court. JUSTICE KOURLIS and JUSTICE COATS join as to Part IV, and dissent as to the remainder of the Opinion.

OPINION BY: MULLARKEY

OPINION

[*1224] EN BANC

I. Introduction

The cases before us are matters of great public importance involving the fundamental rights of Colorado citizens to vote for their representatives **[**5]** in the United States Congress. In the closing days of the 2003 legislative session, the General Assembly enacted a bill to redraw the boundaries of Colorado's seven congressional districts. With this new law, the General Assembly intended to supplant the court-ordered 2002 **redistricting** plan, which governed the 2002 general election. **[*1225]** Pitted against each other in this dispute are two strongly opposed views of the Colorado Constitution.

The Secretary of State and the General Assembly interpret the state constitution as an unlimited grant of power from the People of Colorado to the General Assembly to draw and redraw congressional district boundaries. Under this view, the General Assembly may change the congressional districts as frequently as it likes, even if an earlier General Assembly or the courts have already redrawn congressional districts since the most recent census. At the same time, these parties contend that the Attorney General has no power to ask this court to exercise its original jurisdiction to review the constitutionality of the General Assembly's districts.

The Attorney General presents a very different understanding of Colorado law. He argues that although our constitution **[**6]** directs the General Assembly to draw congressional boundaries, it limits the timeframe and frequency within which the General Assembly may do so. Specifically, the General Assembly may redistrict only once every ten years, and this must occur immediately after each federal census. Accordingly, the General Assembly loses its power to redistrict if it does not act within the window of time beginning after each federal

census when Congress apportions seats for the U.S. House of Representatives and ending with the next general election. The Attorney General also maintains that he may petition this court to exercise its original jurisdiction to decide state constitutional issues of public importance. Similarly, the Attorney General does not oppose the Secretary of State's ability to petition this court for relief in an appropriate case.

Because of the importance of the issues raised, we exercise our discretion to decide two cases. The first is the Attorney General's constitutional challenge to the General Assembly's congressional **redistricting** bill. The second is the Secretary of State's separate challenge to the Attorney General's authority to bring the first case. We decide both issues **[**7]** as a matter of state law.

Since our constitution was ratified in 1876, the congressional **redistricting** provision found in Article V, Section 44, has always provided, as it does today, that the General Assembly shall redistrict the congressional seats "when a new apportionment shall be made by Congress." There is no language empowering the General Assembly to redistrict more frequently or at any other time. To reach the result that the Secretary of State and the General Assembly would have us reach, we would have to read words into Section 44 and find that the General Assembly has implied power to redistrict more than once per census period.

We cannot do that, however, because another section of the original Colorado Constitution makes it clear that the framers carefully chose the congressional **redistricting** language and that this language gives no implied power to the General Assembly. Article V, Section 47, of the original 1876 Constitution addressed legislative **redistricting**, and originally stated that "senatorial and representative districts may be altered from time to time, as public convenience may require." The phrase "from time to time" means that an act may be done occasionally. **[**8]** Had the framers wished to have congressional district boundaries redrawn more than once per census period, they would have included the "from time to time" language contained in the legislative **redistricting** provision. They did not.

In addition to the plain language of our constitution, Colorado has had 127 years of experience in applying the congressional **redistricting** provision. It has never been given the interpretation advanced by the Secretary of State and General Assembly.

Congressional **redistricting**, like legislative **redistricting**, has had a checkered history in Colorado, marked by long periods of time when the General Assembly failed to redistrict even though the state population grew dramatically and Colorado received more congressional seats. The federal government has conducted thirteen federal censuses since Colorado became a state, but the General Assembly has redrawn congressional districts only six times. The legislature's failure to redistrict meant that urban areas were systematically underrepresented, and **[*1226]** congressional districts were grossly disproportionate. For example, in 1964, when the General Assembly had not drawn new districts for over forty years, the four **[**9]** congressional districts ranged in population from 195,551 to 653,954; one person's vote in the smallest district was equivalent to the votes of 3.3 people in the largest district.

This era of inaction came to an abrupt end when the United States Supreme Court announced its "one-person, one-vote" principle and ordered Colorado to comply. See generally *Lucas v. Forty-Fourth Gen. Ass'y*, 377 U.S. 713, 12 L. Ed. 2d 632, 84 S. Ct. 1459 (1964). In the cases leading up to *Lucas*, this court, as well as a federal district court in Colorado, held that the legislature's inaction violated both the Colorado and the U.S. Constitutions. See generally *In re Legislative Reapportionment*, 150 Colo. 380, 374 P.2d 66 (1962); *Lisco v. McNichols*, 208 F. Supp. 471 (D. Colo. 1962). These and other better-known cases ushered in a new era in which there can be no doubt that the state must redistrict both its legislative and congressional seats after every new census. See generally, e.g., *Wesberry*

v. Sanders, 376 U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526 (1964); Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). **[**10]**

Within ten years of the Lucas decision, the voters of Colorado passed an initiative putting the power to redistrict the legislature into the hands of a constitutionally created reapportionment commission. See Colo. Const. art. V, § 48. The constitutional provision governing congressional **redistricting**, however, was not substantially changed. Colorado's congressional seats have been redistricted four times since the Lucas decision: twice, following the 1970 and 1990 censuses, by the General Assembly; twice, in 1982 and 2002, by the courts after the legislature failed to act. After the 1980 census, the federal court did the congressional **redistricting**. Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982). After the 2000 census, the task of congressional **redistricting** fell to the state court. Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002).

In this opinion, we conclude that the General Assembly does not have the unprecedented power it claims. Federal law grants the states the authority to redistrict, and federal law defines and limits this power. Our state constitution cannot change these federal requirements. Instead, it can only place additional **[**11]** restrictions on the **redistricting** process. Therefore, even though the first sentence of Article V, Section 44, of our constitution appears to grant **redistricting** power to the state "general assembly" acting alone, this language has been interpreted broadly to include the Governor's power to approve or disapprove the legislature's **redistricting** plan, and the voters' power to redistrict by initiative or by resort to the courts if the legislature fails to timely act. Finally, the second sentence of Article V, Section 44, of the Colorado Constitution says "when" Colorado may redistrict. The plain language of this constitutional provision not only requires **redistricting** after a federal census and before the ensuing general election, but also restricts the legislature from **redistricting** at any other time.

In short, the state constitution limits **redistricting** to once per census, and nothing in state or federal law negates this limitation. Having failed to redistrict when it should have, the General Assembly has lost its chance to redistrict until after the 2010 federal census.

II. Background

In 2000, the United States census reflected Colorado's rapid growth of the 1990s and prompted **[**12]** Congress to assign Colorado one additional seat in the United States House of Representatives, bringing our total seats to seven. Because federal law requires each state to have the same number of congressional districts as it does representatives, the old **redistricting** plan, which contained only six districts, became illegal. See 2 U.S.C. § 2c (2000); Beauprez, 42 P.3d at 646. Consequently, when the federal government released detailed, block-by-block **redistricting** data in March 2001, the state General Assembly began the task of drawing new congressional districts. ¹

FOOTNOTES

¹ The terms "**redistricting**" and "reapportionment" are often used interchangeably. To reduce confusion, we avoid the term "reapportionment," and use "**redistricting**" to refer to the process of drawing the districts from which representatives will be elected. Black's Law Dictionary 1283 (7th ed. 1999). We use the term "apportionment" to mean "allocation of congressional representatives among the states based on population" Id. at 97.

[13]** **[*1227]** The General Assembly was unable to pass a new plan despite meeting in its regular session and two special sessions. Therefore, the voters turned to the courts for

relief, asking the Denver District Court to hold the existing six-district plan unconstitutional and to replace it with a valid seven-district plan. *Avalos v. Davidson*, No. 01CV2897, 2002 WL 1895406, at *1 (Denv. Dist. Ct. Jan. 25, 2002), *aff'd sub nom. Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002).

The district court considered more than a dozen competing maps during a seven-day trial, and ultimately settled upon a new seven-district plan. See *Beauprez*, 42 P.3d at 645-46. The court, however, delayed issuing its decision in order to give the legislature yet another chance to pass its own plan during the 2002 session. Finally, after the General Assembly again was unable to act, the court announced its **redistricting** plan in time for the precincts to be set before the November election.

This court unanimously affirmed the district court decision, saying that the plan was "thorough, inclusive, and non-partisan." *Id.* at 647, 653. The plan did indeed end up **[**14]** being non-partisan. From six districts, the voters reelected the incumbent or a replacement from the incumbent's party, and the new seventh district was highly competitive. In fact, in 2002, the seventh district voters elected their congressional representative by only 121 votes out of 170,000 voters--the narrowest margin in the nation.

In the closing days of the 2003 regular session, the newly elected General Assembly enacted a new **redistricting** plan, Senate Bill 03-352 ("SB 03-352"). See Ch. 247, sec. 1, § 2-1-101, 2003 Colo. Sess. Laws 1645, 1645-58. The bill was introduced on May 5, 2003, passed by both houses on May 7, the final day of the session, and was signed into law on May 9.

On the same day that the Governor signed SB 03-352 into law, a group of citizens filed suit in Denver District Court, asking the court to enjoin implementation of the plan. ² *Keller v. Davidson*, No. 03CV3452 (Denv. Dist. Ct. filed May 9, 2003). That case has since been removed to federal court, and is now on hold by order of the federal district court pending this decision. *Keller v. Davidson*, No. 03-Z-1482(CBS) (D. Colo. filed Sept. 25, 2003).

FOOTNOTES

² Plaintiffs in that case allege that the General Assembly violated a variety of state laws regarding the procedure by which the lawmakers must introduce, read, debate and pass bills. Those issues were not raised in this case, and so we do not consider them in today's decision.

[15]** On May 14, shortly after the District Court case was filed, the Attorney General filed an original action in this court pursuant to the Colorado Constitution, Article VI, Section 3, asking us to issue an injunction preventing the Secretary of State from implementing the General Assembly's 2003 **redistricting** plan and requesting a writ of mandamus requiring the Secretary of State to return to the 2002 **redistricting** plan. Subsequently, the Secretary of State filed her own original action with this court, asking us to dismiss the Attorney General's petition. She claims that the Attorney General cannot bring an original proceeding in this type of case and cannot name the Secretary of State as a respondent because he is ethically obligated to represent her. We issued a rule to show cause in both cases. We now make the rule absolute in the case brought by the Attorney General and we discharge the rule in the Secretary of State's case.

III. Jurisdiction

Both the Attorney General's case and Secretary of State's case are original proceedings pursuant to Article VI, Section 3, of the Colorado Constitution. Article VI, Section 3, states in relevant part: ^{HN1} "The supreme court shall have **[**16]** power to issue writs of . . .

mandamus, . . . injunction, and such other . . . writs as may be provided by rule of court . . .
 ." Colo. Const. art. VI, § 3. ^{HN2}Original proceedings are controlled by Colorado Appellate Rule 21(a)(1), **[*1228]** which states that: ^{HN3}"Relief under this rule is extraordinary in nature and is a matter wholly within the discretion of the Supreme Court. Such relief shall be granted only when no other adequate remedy . . . is available." C.A.R. 21(a)(1). ^{HN4}
[¶]Although we have discretion regarding the cases we choose to hear, we have established two basic requirements for original proceedings such as these. ³ First, the case must involve an extraordinary matter of public importance. *Leaffer v. Zarlengo*, 44 P.3d 1072, 1077 (Colo. 2002). Second, there must be no adequate "conventional appellate remedies." *Id.*; see also William H. ReMine, Anne Whalen Gill & Gregory J. Hobbs, Jr., *Appeals to the Supreme Court*, *Supreme Court Original Proceedings* § 15.3, in Leonard P. Plank & Anne Whalen Gill, *Colorado Appellate Law and Practice* 217 (1999). Both of the cases we decide today satisfy both requirements. We examine the Attorney General's case first. **[**17]**

FOOTNOTES

³ The criteria are different if the case is the equivalent of an interlocutory appeal, or the result of an alleged abuse of discretion in a lower court proceeding that cannot be cured on appeal. See *People v. Braunthal*, 31 P.3d 167, 172 (Colo. 2001).

There can be no question that the Attorney General's case involves an extraordinary matter of public importance. Congressional **redistricting** implicates citizens' right to vote for United States Representatives. This right to vote is fundamental to our democracy. According to the United States Supreme Court, "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 11 L. Ed. 2d 481, 84 S. Ct. 526 (1964).

The frequency of **redistricting** affects the stability of Colorado's congressional districts, and hence, the **[**18]** effectiveness of our state's representation in the United States Congress. When the boundaries of a district are stable, the district's representative or any hopeful contenders can build relationships with the constituents in that district. Furthermore, the constituents within a district can form communities of interest with one another, and these groups can lobby the representative regarding their interests. These relationships improve representation and ultimately, the effectiveness of the district's voice in Congress.

Furthermore, the specific outcome of the Attorney General's case resolves the debate over the shapes of the congressional districts for the 2004 elections. Until this dispute is settled, Colorado citizens and their representatives in Congress will not know whether the 2004 elections will take place under the same districts as the 2002 elections or according to SB 03-352's new districts. The uncertainty surrounding the 2004 congressional districts has forced some voters, local officials, and interest groups to act as if they could be in either one of two districts, and, thus, to expend unnecessary money and effort building relationships with both of their potential **[**19]** representatives and districts. Moreover, this uncertainty carries over to other elected and appointed officials, such as the University of Colorado Board of Regents, whose districts follow the congressional map. In sum, congressional **redistricting** is a crucial issue, which warrants a decisive and expedient resolution from this court.

The second factor in considering whether to exercise our original jurisdiction is ^{HN5}whether the parties have an adequate alternative remedy. The remedy may be an action in a trial court or an appeal in an ongoing proceeding. C.A.R. 21(a)(1). As noted above, there is now a case in the federal district court that also challenges SB 03-352. *Keller*, No. 03-Z-1482(CBS). The Secretary of State urges that this federal case is an adequate remedy to the Attorney General's claims. We disagree.

The federal case is not an adequate form of relief for several reasons. An appellate court will often defer to a trial court when a case can be resolved on a ground that makes it possible to avoid reaching a constitutional issue. Here, however, the constitutional question cannot be avoided. In *Keller*, the plaintiffs did not raise the question of whether Article V, **[**20]** Section 44, of the Colorado Constitution restricts congressional **redistricting** **[*1229]** to once per decade. If the trial court were to hold that SB 03-352 is invalid because of a procedural error in its enactment, as alleged, the question would remain whether the General Assembly could redistrict more than once in a census period.

Also, the federal court is not the appropriate forum to decide the frequency of **redistricting**. The United States Supreme Court has made it clear that ^{HN6} states have primary responsibility in congressional **redistricting** and that federal courts must defer to states. *Grove v. Emison*, 507 U.S. 25, 34, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993) (saying "reapportionment is primarily the duty and responsibility of the State"); see also *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 1435, 155 L. Ed. 2d 407 (2003).

Most importantly, this case turns on the Colorado Constitution. The United States Supreme Court "repeatedly has held that ^{HN7} state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975). Consequently, even if the *Keller* court were to address **[**21]** the issue of how frequently the General Assembly may draw congressional districts, the federal court would have to turn to this court to answer that question. See *S.C. State Conference of Branches of NAACP v. Riley*, 533 F. Supp. 1178, 1180 (D.S.C. 1982) (**redistricting** case in which a federal district court said that only the South Carolina Supreme Court could interpret the state constitution's **redistricting** provision). Hence, it is illogical for this court to defer to the federal court. In sum, the Attorney General's petition presents an issue uniquely suited for resolution in an original proceeding.

In the second case that we decide today, the Secretary of State raises an issue that is also appropriately resolved in an original proceeding. The Secretary is the named respondent in the Attorney General's petition, and she challenges the Attorney General's authority to file such an original proceeding. The Attorney General's authority to sue the Secretary of State is a matter of public importance. Both are constitutional officers of the executive branch, and this is the proper vehicle to resolve their dispute. Thus, we exercise our discretion to decide both original **[**22]** proceedings.

IV. The Attorney General's Authority to Sue the Secretary of State

Before turning to the question of whether the General Assembly had the authority to redistrict in 2003, we first address the question of whether the Attorney General has the authority to petition this court to enjoin the Secretary of State from conducting the elections under SB 03-352. The Secretary of State contends that the Attorney General has no constitutional, statutory, or common law power to petition this court for the relief requested and that, by filing the petition, the Attorney General violates his ethical duty to represent the Secretary. We reject both arguments. We see no reason to depart from our long-established practice allowing the Attorney General to petition this court in an appropriate case.

We have always recognized ^{HN8} the ability of the Attorney General and other public officials to request original jurisdiction in matters of great public importance. The case closest to the one before us today is *People v. Tool*, 35 Colo. 225, 86 P. 231, 86 P. 224, 86 P. 229 (1905). In *Tool*, we explicitly recognized ^{HN9} the common law power of the Attorney General to bring an **[**23]** original proceeding in order to protect the integrity of the election process. The Attorney General was the appropriate person to institute such an action, because "it is the function of the Attorney General . . . to protect the rights of the public . . ." *Id.* at 236,

86 P. at 227; see also *People ex rel. Graves v. Dist. Court*, 37 Colo. 443, 461, 86 P. 87, 92 (1906).⁴

FOOTNOTES

⁴ The Attorney General's authority to bring an original proceeding in matters involving the public good is also consistent with Colorado's broad conception of taxpayer standing, which is grounded in this court's recognition of taxpayers' interest in living under a constitutional government. See *Howard v. City of Boulder*, 132 Colo. 401, 404, 290 P.2d 237, 238 (1955); *Colo. State Civil Servs. Employees Assoc. v. Love*, 167 Colo. 436, 444, 448 P.2d 624, 627 (1968). Under this court's jurisprudence, ordinary taxpayers would have standing to challenge the constitutionality of the 2003 **redistricting** statute in an original proceeding. The Attorney General, as an ordinary taxpayer, could raise this case; therefore, he should also be able to petition this court in his capacity as chief legal officer of the state of Colorado.

[24] [*1230]** In an even earlier case, *Wheeler v. Northern Colorado Irrigation Co.*, we similarly held that it was "eminently fitting" that original proceedings be initiated by the Attorney General in the name of the people. 9 Colo. 248, 256, 11 P. 103, 107 (1886). Likewise, in *State Railroad Commission v. People ex rel. Denver & R.G.R. Co.*, we affirmed the Attorney General's authority to bring an original writ, underscoring the principle that "the Attorney General himself, as the chief legal officer of the state, is here in the interests of the people to promote the public welfare . . ." 44 Colo. 345, 354, 98 P. 7, 11 (1908).

Despite this precedent, the Secretary of State argues that the Attorney General is limited to his express statutory powers. We reject this argument. ^{HN10} The Colorado Constitution vests original jurisdiction in the Supreme Court. Colo. Const. art. VI, § 3. The constitutional separation of powers prevents the General Assembly from enacting any statutes that restrict this court's exercise of its original jurisdiction. Hence, it is irrelevant that no statute authorizes the Attorney General to file his petition.

The Secretary of State also reads **[**25]** our decision in *People ex rel. Tooley v. District Court* to stand for the principle that the Attorney General has no common law powers. 190 Colo. 486, 549 P.2d 774 (1976). We reject such a sweeping interpretation. *Tooley* is consistent with the well-settled principle that ^{HN11} the Attorney General has common law powers unless they are specifically repealed by statute. *Colo. State Bd. of Pharmacy v. Hallett*, 88 Colo. 331, 335, 296 P. 540, 542 (1931); see also *Kane v. Town of Estes Park*, 786 P.2d 412, 415 (Colo. 1990). In *Tooley*, the legislature expressly abrogated the Attorney General's common law power to institute criminal actions in a trial court in favor of other constitutional officers, the district attorneys. *Id.*

The Secretary of State misses the true significance of *Tooley*, which in fact supports the Attorney General's ability to file an original proceeding in this court. In *Tooley*, the district court ruled that the Attorney General and not the District Attorney could prosecute certain criminal actions. The Denver District Attorney subsequently sought this court's review of that ruling by filing an original **[**26]** proceeding. 190 Colo. at 488, 549 P.2d at 776. Although we decided that the Attorney General did not have that power, the outcome is not relevant. What is important here is that we accepted jurisdiction and heard the District Attorney's case. Had the district court ruled the other way, we would have heard the Attorney General's petition instead because this was a matter of public importance--a conflict between two officers of the state. ⁵ Therefore, *Tooley* actually supports the Attorney General's position in this case.

FOOTNOTES

s The Secretary of State also makes an historical argument to support her position, placing great emphasis upon the fact that Colorado adopted the English common law of 1607 into its body of laws. § 2-4-211, 1 C.R.S. (2002); *Bieber v People*, 856 P.2d 811, 815 (Colo. 1993). In 1607, England's Attorney General was subject to the wishes of the crown, and could not independently institute actions against it. 6 W. Holdsworth, *History of English Law*, 457-61 (2d ed. 1971). The Secretary of State posits that the Attorney General is similarly subject to the wishes of the executive branch. This argument does not persuade us. Although Colorado has incorporated the common law of 1607, we find its transposition to Colorado, where executive power is intentionally diffused among several officers, is necessarily approximate. The Attorney General acts as the chief legal representative, not of a king, but of the state. Therefore, the common law applies only to the extent that it is consistent with the Colorado Constitution. ^{HN12}¶ As section 2-4-211 states, Colorado adopts the common law of 1607 insofar as it is "applicable and of a general nature." See also *Lovato v. Dist. Court*, 198 Colo. 419, 425, 601 P.2d 1072, 1075 (1979); *Vogts v. Guerrette*, 142 Colo. 527, 533, 351 P.2d 851, 855 (1960); *Crippen v. White*, 28 Colo. 298, 302, 64 P. 184, 185 (1901).

[27]** The Secretary of State also asserts that the Attorney General has violated the Colorado Rules of Professional Conduct by naming her as the respondent. We find no ethical violation. The Secretary of State is named as a party in her official capacity because she administers the election laws. **[*1231]** § 1-1-107(1)(a), 1 C.R.S. (2003). In this case, no client confidences are involved.

^{HN13}¶ The Colorado Rules of Professional Conduct explicitly recognize that government lawyers may "have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so." Colo. R.P.C., Scope. The Rules say that a government lawyer's client may in some circumstances be a specific agency, but "it is generally the government as a whole." Colo. R.P.C. 1.13 cmt. Therefore, the Attorney General must consider the broader institutional concerns of the state even though these concerns are not shared by an individual agency or officer. ⁶

FOOTNOTES

⁶ Other states have considered the Attorney General's ethical obligations in inter-executive disputes, and their decisions accord with ours today. See *Perdue v. Baker*, 586 S.E.2d 606 277, Ga. 1 (Ga. 2003); *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (S.C. 2002).

[28]** In his role as legal advisor to the Secretary of State, the Attorney General must advise the Secretary of State on the implementation of the election laws. Consistent with his ethical duties and his oath of office, if the Attorney General has grave doubts about the constitutionality of the impending 2004 general election, he must seek to resolve these doubts as soon as possible. A prompt resolution of the case will aid both the Secretary of State and the Attorney General in fulfilling their oaths to uphold the Colorado Constitution. For these reasons, we find that the Attorney General has the authority to file this original action challenging the constitutionality of SB 03-352.

V. The General Assembly's Power to Redistrict

We now turn to the question of whether SB 03-352 violates the Colorado Constitution. We

hold that it does. We base our holding on Article V, Section 44, of the Colorado Constitution, which ^{HN14} prohibits congressional **redistricting** more than once per decade. More specifically, Article V, Section 44: (1) requires congressional **redistricting** after a national census and before the ensuing general election; and (2) prohibits **redistricting** outside of this window. **[**29]** We recognize and emphasize that ^{HN15} the General Assembly has primary responsibility for drawing congressional districts. But we also hold that ^{HN16} when the General Assembly fails to provide a constitutional **redistricting** plan in the face of an upcoming election and courts are forced to step in, these judicially-created districts are just as binding and permanent as districts created by the General Assembly. We further hold that regardless of the method by which the districts are created, the state constitution prohibits redrawing the districts until after the next decennial census.

We base our decision on the Colorado Constitution, but to put state law in context, we begin with a discussion of federal law. First, ^{HN17} the U.S. Constitution does not grant **redistricting** power to the state legislatures exclusively, but instead, to the states generally. The state may draw congressional districts via any process that it deems appropriate. Second, ^{HN18} the states' **redistricting** authority is not "unfettered." Rather, it is circumscribed by federal law. ^{HN19} Each state must draw congressional districts immediately after each federal census and before the ensuing general election. There must be one district per **[**30]** representative, and the resulting districts in any given state must be equal in size and comply with the Voting Rights Act.

Third, like the U.S. Constitution, ^{HN20} the Colorado Constitution does not grant the General Assembly exclusive authority to draw congressional districts. **Redistricting** can be accomplished by enacting a bill subject to gubernatorial approval, by voter initiative, and through litigation.

Finally, ^{HN21} the Colorado Constitution cannot relax the federal laws pertaining to **redistricting**; our constitution can only impose more stringent restrictions. Article V, Section 44, of the Colorado Constitution does just that. It restricts the timeframe in which Colorado may redistrict. The plain language of this constitutional provision not only requires **redistricting** after a federal census and before the ensuing general election, but also prohibits the legislature from **redistricting** at any other time.

In conclusion, the state constitution limits **redistricting** to once per census, no matter **[*1232]** which body creates the districts. Nothing in state or federal law contradicts this limitation. In fact this interpretation is supported by public policy, history, and the law of other states. The **[**31]** following subsections discuss these concepts in greater detail.

A. The U.S. Constitution's Grant of Power to the States

The Secretary of State and General Assembly argue that both the United States and Colorado Constitutions grant the General Assembly the exclusive authority to draw congressional districts. In support of this argument, they point to Article I, Section 4, Clause 1, of the U.S. Constitution, which says: ^{HN22} "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state, by the legislature thereof" U.S. Const. art. I, § 4, cl. 1 (emphasis added). The Secretary of State and General Assembly assert that the word "legislature" in this clause means that the General Assembly is the only body with authority to draw permanent congressional districts, and that the court may not "usurp" this absolute power.

This argument is flawed. ^{HN23} The United States Supreme Court has interpreted the word "legislature" in Article I to broadly encompass any means permitted by state law, and not to refer exclusively to the state legislature. ^{HN24} A state's lawmaking process may include citizen referenda and initiatives, mandatory **[**32]** gubernatorial approval, and any other

procedures defined by the state. See *Smiley v. Holm*, 285 U.S. 355, 76 L. Ed. 795, 52 S. Ct. 397 (1932) (gubernatorial approval); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 60 L. Ed. 1172, 36 S. Ct. 708 (1916) (referenda).

^{HN25}¶ The word "legislature" also extends to special **redistricting** commissions. Arizona, for instance, has a special commission that draws congressional districts and then submits the plan directly to the Secretary of State, thus bypassing the Arizona legislature entirely. See *Ariz. Const. art. IV, part 2, § 1*; Rhonda L. Barnes, **Redistricting** in Arizona Under the Proposition 106 Provisions: Retrogression, Representation, and Regret, 35 *Ariz. St. L.J.* 575, 578-81 (2003). Other states with **redistricting** commissions include Hawaii, Idaho, Montana, New Jersey, and Washington. Tim Storey, **Redistricting** Spats Unlikely to Spread, *Denver Post*, Sept. 28, 2003, at 1E, 8E.

Most importantly for our purposes, ^{HN26}¶ the word "legislature," as used in Article I of the federal Constitution, encompasses court orders. ^{HN27}¶ State courts have the authority to evaluate the constitutionality of **redistricting** **[**33]** laws and to enact their own **redistricting** plans when a state legislature fails to replace unconstitutional districts with valid ones. See generally *Grove*, 507 U.S. 25, 122 L. Ed. 2d 388, 113 S. Ct. 1075; *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982). In fact, courts are constitutionally required to draw constitutional congressional districts when the legislature fails to do so. *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 1441, 155 L. Ed. 2d 407 (2003). In such a case, a court cannot be characterized as "usurping" the legislature's authority; rather, the court order fulfills the state's obligation to provide constitutional districts for congressional elections in the absence of legislative action.

As these examples reveal, Article I, Section 4, Clause 1, of the U.S. Constitution ^{HN28}¶ delegates congressional **redistricting** power to the states to carry out as they see fit, and not exclusively to the state legislatures. Hence, the U.S. Constitution does not grant absolute **redistricting** authority to the General Assembly as the Secretary of State and the General Assembly claim, and when courts are forced to draw congressional districts, **[**34]** they are not usurping the state legislature's power.

B. The U.S. Constitution's Restrictions on the General Assembly's Authority to Redistrict

Next, the Secretary of State and General Assembly argue that the U.S. Constitution grants the General Assembly absolute, "unfettered" **redistricting** authority that the states cannot curtail. This is not so. Instead, this authority is limited by both federal and state law. Before turning to state law, we first describe the federal case law and statutes that control **redistricting** to illustrate **[*1233]** that the General Assembly's **redistricting** authority is not "unfettered" as it claims.

Although the U.S. Constitution grants the power to draw congressional districts to the states, the states have often abused their broad **redistricting** authority. Historically, some state legislatures have used **redistricting** to enhance the power of the majority (racial and/or political), and to suppress minorities. See generally Andrew Hacker, *Congressional Districting: The Issue of Equal Representation 30-70* (1963) [hereinafter Hacker, *Congressional Districting*]. The legislatures primarily disenfranchised voters either by gerrymandering or by neglecting **[**35]** **redistricting** duties altogether, thus allowing the sizes of the districts to become more and more unbalanced as populations shifted over time. The resulting size disparities were unfair because the representatives from larger population districts represented more citizens than representatives from smaller districts.

This disparity among districts meant that the citizens in the smaller population districts had a relatively more powerful voice in Congress. As an example, in 1962, Colorado's largest

congressional district had 3.3 times the population of the smallest district. Thus, one vote in the smallest district was the same as 3.3 votes in the largest district. Hacker, *Congressional Districting at 3*. Even though the population of Colorado was shifting from rural to urban and suburban areas, the rural counties still elected more than their proportional share of representatives. *Lisco v. McNichols*, 208 F. Supp. 471, 478 (D. Colo. 1962); see also Hacker, *Congressional Districting at 22-26*. Yet the Colorado legislature neglected its duty to draw new congressional districts for more than forty years between 1921 and 1964. *Id.* at 3.

Because of this growing **[**36]** inequality among districts, the Supreme Court and Congress stepped in to protect the voters' rights. In 1964, the United States Supreme Court established ^{HN29} the one-person, one-vote doctrine, requiring that every state make a good-faith effort to elect all representatives from districts of equal populations. *Wesberry v. Sanders*, 376 U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526 (1964) (interpreting U.S. Const. art. I, § 2, cl. 1). Under this doctrine, states now have a constitutional obligation to draw congressional districts with equal numbers of constituents, or else justify any differences, no matter how small, with a legitimate reason. *Karcher v. Daggett*, 462 U.S. 725, 734, 77 L. Ed. 2d 133, 103 S. Ct. 2653 (1983).

^{HN30} When evaluating constitutionality under the one-person, one-vote doctrine, a court uses the national decennial census figures. The United States Supreme Court has recognized the legal fiction that these figures remain accurate for the entire ten years between censuses. *Georgia v. Ashcroft*, 539 U.S. 461, 156 L. Ed. 2d 428, 123 S. Ct. 2498, 2516 n.2 (2003). Consequently, according to this legal fiction, when states create same-size districts **[**37]** that adhere to one-person, one-vote standards at the beginning of the decade, these districts remain constitutionally valid on equal population grounds until the next census, even though the states' populations actually shift and change in the intervening years. *Id.* Conversely, new decennial census figures generally render the old districts unconstitutional, and states must redistrict prior to a subsequent election. *Id.* In sum, under federal constitutional law, each state must draw new congressional districts after a decennial census or risk having its districts declared unconstitutional prior to the next congressional election.

C. Federal Statutory Restrictions on the General Assembly's Authority to Redistrict

Federal statutes also restrict how the states may redistrict. ^{HN31} The states' authority to regulate the "times, places and manner" of congressional elections is not absolute. Instead, the United States Constitution gives Congress the power to "make or alter" election regulations "at any time." U.S. Const. art. I, § 4, cl. 1 ("The times, places and manner of holding elections for senators and representatives shall be prescribed in each State, by the legislature thereof, **[**38]** but the Congress may at any time, by law, make or alter such regulations . . .").

[*1234] The "times, places and manner" clause was a very controversial provision in the U.S. Constitution. During the debates preceding ratification, the public expressed fear that Congress would usurp the states' powers to conduct elections. See I *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification* 429 (Bernard Bailyn ed., 1993). But the framers strongly believed that Congress must be empowered to step in and regulate elections if necessary to ensure that they are conducted fairly. *Wesberry v. Sanders*, 376 U.S. 1, 6, 11 L. Ed. 2d 481, 84 S. Ct. 526 (1964); Hacker, *Congressional Districting at 9, 12-14*.

Even so, the Constitution was silent regarding whether states were required to draw single-member districts, or whether they were allowed to elect their representatives in at-large, statewide elections. ⁷ Hacker, *Congressional Districting at 40*. After the states ratified the United States Constitution, many elected all of their members of Congress at large. *Id.* But in 1842, Congress exercised **[**39]** its authority to regulate elections and passed the

Apportionment Act, which prohibited the "winner-take-all," at-large elections, and required that states elect members of Congress from contiguous, single-member districts. *Id.* Congress allowed this requirement to lapse, however, and by 1962, many representatives were once again elected at large. *Id.* at 41.

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⁷ The at-large scheme does not violate the one-person, one-vote doctrine because all representatives are elected from the state as a whole, and hence, represent equal numbers of voters. *Wesberry*, 376 U.S. at 8.

Shortly after the United States Supreme Court announced the one-person, one-vote doctrine in 1964, many lower courts began to implement that decision by replacing unconstitutional, disproportionate districts with at-large elections. *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 1439, 155 L. Ed. 2d 407 (2003). These courts did so because they found they had no authority to draw new districts. **[**40]** *Id.* at 1439-40. Congress disagreed, and in 1967 enacted 2 U.S.C. § 2c, which once again required single-member congressional districts. *Id.* at 1441. With this statute, Congress eliminated the option of at-large elections for states with more than one representative. ⁸ 2 U.S.C. § 2c (2002). Thus, states must draw same-size, single-member districts.

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⁸ Section 2c exempted states that had always elected all of their representatives at large. These states could continue the at-large elections. Section 2c states in full:

HN32 ¶ In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. § 2c (2002).

[41]** Another limitation on the General Assembly's freedom to redistrict is the Voting Rights Act. See 42 U.S.C. §§ 1973 to 1973bb-1 (2002); *Carstens v. Lamm*, 543 F. Supp. 68, 82 n.36a (D. Colo. 1982). Even while complying with Section 2c and the one-person, one-vote doctrine by drawing same-size, single-member districts, some state legislatures were able to discriminate against racial minorities by drawing their districts in such a way as to render minority votes ineffective. In an attempt to combat discrimination against minority voters, Congress passed the Voting Rights Act. Specifically, *HN33* ¶ the Act forbids diluting the voting strength of a minority group "sufficiently large and geographically compact to constitute a majority in a single-member district." *Sanchez v. State*, 97 F.3d 1303, 1310 (10th Cir. 1996) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986)).

Section 5 of the Act *HN34* ¶ requires jurisdictions with a history of discrimination to obtain

federal approval before making any changes to voting laws or procedures. 42 U.S.C. § 1973c (2002). The process **[**42]** of obtaining approval is known as "preclearance." See Branch, 123 S. Ct. at 1446-47. In Colorado, **[*1235]** El Paso County was once a covered jurisdiction, requiring preclearance. Thus, prior to implementing any voting change in El Paso County, including **redistricting**, the General Assembly was first required to obtain approval from either the United States Attorney General or a three-judge panel from the United States District Court for the District of Columbia. Carstens, 543 F. Supp. at 82 n.36a.

As these examples demonstrate, the General Assembly has never had "unfettered" authority to create congressional districts. Under federal law, Colorado must redistrict after each federal census and before the ensuing election, must create single-member districts, must create racially neutral districts, and at certain times in the past, was required to obtain federal preclearance for its plan. Moreover, because the United States Constitution grants **redistricting** authority to the states, and not exclusively to the legislatures of the states, Colorado has the authority to further limit the power of its General Assembly through its laws or constitution. As we illustrate **[**43]** below, Colorado has done just that.

D. Colorado's Constitutional Restrictions on the General Assembly's Authority to Redistrict

The Secretary of State and General Assembly argue that the Colorado Constitution grants the General Assembly unfettered power to redistrict. We are not persuaded. As discussed above, **HN35** the federal Constitution, not the state constitution, is the source of the states' authority to redistrict, and the federal Constitution and federal statutes restrict the states' authority to redistrict.

The Colorado Constitution can only further restrict the General Assembly's authority to draw congressional districts; it cannot expand it. We know this is true because **HN36** the Colorado Constitution is not a grant of power, but an additional limitation upon all forms of state power, including the authority of the General Assembly. *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1208 (Colo. 1994) ("The Colorado Constitution, unlike the federal Constitution, does not comprise a grant of but rather, a limitation on power."). Indeed, when our state constitution was ratified in 1876, there was a deep public distrust of the legislature due to Colorado's territorial **[**44]** history of scandal and corruption. Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 1-2, 20 n.7 (2002). As a result, the delegates created a very detailed document specifically for the purpose of severely restricting the legislature's discretionary powers. *Id.* Given that the state constitution adds to the federal limitations on congressional **redistricting**, the crucial question is: "Exactly how does Article V, Section 44, limit Colorado's authority to redistrict?" We now turn to this question.

Article V, Section 44, has always been in the Colorado Constitution. It originally said, in full:

One Representative in the Congress of the United States shall be elected from the State at large at the first election under this constitution, and thereafter at such times and places and in such manner as may be prescribed by law. When a new apportionment shall be made by Congress, the general assembly shall divide the State into congressional districts accordingly.

Colo. Const. art. V, § 44. This original language meant that the state's single representative was to be elected from a state-wide district, but as the United States Congress **[**45]** assigned Colorado additional seats, the General Assembly was required to draw additional congressional districts. ⁹

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9 In fact, as Colorado grew, the legislature did redistrict six times: 1891, 1913, 1921, 1964 (after the one-person, one-vote Supreme Court decision), 1972, and 1992. 1891 Colo. Sess. Laws 89 § 1; 1913 Colo. Sess. Laws 517 § 1; 1921 Colo. Sess. Laws 170 § 1; 1964 Colo. Sess. Laws 11 § 1 (First Extraordinary Session); 1972 Colo. Sess. Laws 184 § 1; 1974 Colo. Sess. Laws 40 § 19; 1992 Colo. Sess. Laws 593 § 2. In 1900, Congress gave Colorado a third seat, and in 1910 a fourth, but the legislature did not redistrict between 1891 and 1913. Thus, the third and fourth members of Congress were elected at large from 1902 to 1912. Kenneth C. Martis, *The Historical Atlas of United States Congressional Districts: 1789-1983* (1982). The General Assembly did not redistrict in the more than forty years between 1921 and 1964 either. After the federal censuses in 1980 and 2000, the General Assembly was unable to pass a **redistricting** bill, and the courts were forced to redistrict instead. See Carstens, 543 F. Supp. at 71-72; *Beauprez v. Avalos*, 42 P.3d 642, 645-46 (Colo. 2002). Thus, since Colorado became a state, there have been thirteen federal censuses, and the General Assembly has redistricted only six times.

[**46] [*1236] In 1974, the General Assembly recommended and the people approved a change to Section 44. It now states, in full:

HN37 The General Assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district. When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly.

Colo. Const. art. V, § 44. The first sentence states who must redistrict--the "General Assembly"--and what the General Assembly must do--create single-member congressional districts. The second sentence of Section 44 establishes when this **redistricting** shall take place--after a new congressional apportionment. Because the Attorney General's case turns upon the interpretation of Section 44, we will examine each of Section 44's sentences in turn.

1. Who May Redistrict

The Secretary of State and the General Assembly argue that three words in the state constitution grant the General Assembly exclusive power to draw Colorado's congressional districts: "General [****47**] Assembly shall." At first blush, this logic seems persuasive; however, this argument is not consistent with existing Colorado law. Although the first sentence of Section 44 says that the "General Assembly shall" draw congressional districts, the term "General Assembly," like the term "legislature" in Article I of the U.S. Constitution, has been interpreted broadly. The term "General Assembly" encompasses the entire legislative process, as well as voter initiatives and **redistricting** by court order.

HN38 The term General Assembly does not simply refer to the lawmakers who must pass a bill. Instead, it is a shorthand method of referring to the entire standard lawmaking procedure set forth in the Colorado Constitution. Carstens, 543 F. Supp. at 79 ("Congressional **redistricting** is a law-making function subject to the state's constitutional procedures."). These procedures require a majority quorum, approval by a committee, and reading of the bill at length on two different days in each house. See, e.g., Colo. Const. art. V, §§ 11, 20 & 22. The standard lawmaking procedure includes passage by both houses of the legislature as well as the governor's signature or approval [****48**] by inaction. Carstens, 543 F. Supp. at 79. With a two-thirds vote, the General Assembly may pass a **redistricting** bill over the governor's veto. Colo. Const. art. V, § 39.

Standard lawmaking procedure in Colorado also includes voter initiative. In 1934, this court upheld a legislative **redistricting** plan that was created by voter initiative and also rejected a subsequent plan adopted by the General Assembly. *Armstrong v. Mitten*, 95 Colo. 425, 430, 37 P.2d 757, 759 (1934). *Armstrong* involved state legislative **redistricting**, which now is performed by a special commission. At that time, however, the relevant section of the state constitution called for the General Assembly to "revise and adjust the apportionment for senators and representatives" during the "session next following" a census. *Id.* at 426-27, 37 P. at 758. The legislature failed to enact a **redistricting** plan in the session following the 1930 census. As a result, the voters initiated and passed a plan in 1932. Then, in 1933, the General Assembly enacted its own plan. In *Armstrong*, we held that the initiated plan was valid and enforceable. In so holding, we reasoned **[**49]** that "the people are sovereign" and they created the General Assembly as "their agent." *Id.* Consequently, we rejected a literal interpretation of the term "General Assembly," and instead held that "General Assembly" broadly encompassed all legislative processes, including voter initiative. *Armstrong's* holding applies to congressional **redistricting** as well.

The term "General Assembly" in Section 44 also encompasses the courts, but only in the special instance when the General Assembly fails to provide constitutional districts **[*1237]** for an impending election. In an early case, *In re Legislative Reapportionment*, this court said:

It is manifest that the triunity of our government is not invaded by acceptance of this litigation for decision. If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him.

150 Colo. 380, 384-85, 374 P.2d 66, 68-69 (1962) (quoting *Village of Ridgefield Park v. Bergen County Bd. of Taxation*, 31 N.J. 420, 157 A.2d 829, 832 (N.J. 1960)). **[**50]** Prior to the 1960s, the United States Supreme Court refused to interfere with **redistricting** issues. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 90 L. Ed. 1432, 66 S. Ct. 1198 (1946). Instead, the Court deemed **redistricting** a political issue that was nonjusticiable. *Id.* In 1962, in *Baker v. Carr*, the United States Supreme Court reversed *Colegrove* and held that **redistricting** was a justiciable issue. 369 U.S. 186, 208-09, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). Accordingly, in *In re Legislative Reapportionment*, the Colorado Supreme Court said that it would draw districts, but only if the legislature failed to act. 150 Colo. at 385, 374 P.2d at 69.

In the forty years since *Baker v. Carr*, court involvement in **redistricting** has become more common. Although courts continue to defer to the legislatures, the courts must sometimes act in order to enforce the one-person, one-vote doctrine. Indeed, Congress enacted 2 U.S.C. § 2c specifically for the purpose of forcing courts to draw valid **redistricting** plans rather than resorting to at-large districts. *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 1439, 1445, 155 L. Ed. 2d 407 (2003). **[**51]** Hence, courts are heavily involved in ensuring that all federal, state, and local districts satisfy the one-person, one-vote criteria.

When a court is forced to draw congressional districts because the legislature has failed to do so, the court carries out the same duty the legislature would have. **Redistricting** involves prospective rules for elections, rather than a retrospective decision based on past events. Thus, when **redistricting**, the court's task closely resembles legislation. See Saul Zipkin, *Judicial Redistricting and the Article I State Legislature*, 103 Colum. L. Rev. 350, 379-80 (2003). In so doing, the court gathers information regarding alternative plans, hears expert advice, weighs alternatives, and ultimately adopts the plan it deems the best for the state. See generally, e.g., *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). In the end, the court's

plan is just as effective as a law passed by the legislature: it supercedes the prior districts, and remains in effect until legally replaced at a later date.

In sum, ^{HN39} the term "General Assembly" in the first sentence of Article V, Section 44, broadly encompasses the legislative process, **[**52]** the voter initiative, and judicial **redistricting**. ^{HN40} Regardless of which body creates the congressional districts, these districts are equally valid. Hence, judicially created districts are no less effective than those created by the General Assembly.

2. When Colorado May Redistrict

The second sentence of Article V, Section 44, says when **redistricting** may take place: "when a new apportionment shall be made by congress." ¹⁰ a Colorado statute, enacted in 1999, defines "new apportionment." § 2-2-901(1)(a), 1 C.R.S. (2002). It says that "a new apportionment occurs after each federal decennial census." *Id.* Moreover, the one-person, one-vote doctrine firmly requires **redistricting** after each national census. *Georgia v. Ashcroft*, 539 U.S. 461, 156 L. Ed. 2d 428, 123 S. Ct. 2498, 2516 n.2 (2003). Thus, the second sentence requires that **redistricting** must take place "when" there is a census: at least once per decade.

FOOTNOTES

¹⁰ We neither examine nor decide whether federal law prohibits **redistricting** more than once per decade.

[53]** The crucial question for us, however, is whether **redistricting** may occur more often **[*1238]** than once per decade. The Secretary of State and General Assembly argue that the General Assembly may redistrict at any time, even more than once per decade. They do not interpret the second sentence to constrain the General Assembly in any way. We reject this construction.

Our decision turns upon the interpretation of the second sentence in Article V, Section 44. ^{HN41} In construing our constitution, our primary task is to give effect to the framers' intent. *Grant v. People*, 48 P.3d 543, 546-47 (Colo. 2002). To ascertain this intent, we begin with the plain meaning of Section 44. *Id.* at 546. Then, by way of confirmation, we proceed to examine Section 44 in light of its context within the state constitution. Next, we review similar cases from other states, and find that they comport with our holding. Finally, we demonstrate that custom, history, and policy support our holding as well.

The second sentence of Section 44 places a temporal restriction on **redistricting**. In the sentence "when a new apportionment shall be made by Congress, the general assembly shall divide **[**54]** the state into congressional districts accordingly," the word "when" is used as a subordinating conjunction. It indicates the relationship of **redistricting** and apportionment--**redistricting** "shall" take place "when" apportionment occurs. "When," in this context, means "just after the moment that," "at any and every time that," or "on condition that." Webster's Third New World International Dictionary of the English Language 2602 (Philip Babcock Gove ed., 1993) [hereinafter Webster's Dictionary]. All of these definitions indicate that in Section 44, the word "when" means that **redistricting** may only occur after a new apportionment. Applying this language in the instant case: a new apportionment is a "condition" for **redistricting**; **redistricting** must take place "any and every time" a new apportionment occurs; and, **redistricting** must take place "just after" a new apportionment. Conversely, **redistricting** may not happen spontaneously or at the inducement of some other unspecified event; it must happen after and only after a new apportionment. Because section 2-2-901(1)(a) defines "new apportionment" to be

synonymous with a federal census, **redistricting** must take place after and only **[**55]** after a census.

Furthermore, as other states have found, ^{HN42} when the constitution specifies a timeframe for **redistricting**, then, by implication, it forbids performing that task at other times. People ex rel. Mooney v. Hutchinson, 172 Ill. 486, 50 N.E. 599, 601 (Ill. 1898) ("Where there are provisions inserted by the people as to the time when a power shall be exercised, there is at least a strong presumption that it should be exercised at that time, and in the designated mode only; and such provisions must be regarded as limitations upon the power"); Denney v. State ex rel. Basler, 144 Ind. 503, 42 N.E. 929, 931-32 (Ind. 1896) ("The fixing, too, by the constitution, of a time or a mode for the doing of an act, is, by necessary implication, a forbidding of any other time or mode for the doing of such act."). Here, Section 44 specifies the time for **redistricting**--just after a new apportionment--and the logical conclusion is that **redistricting** is forbidden at other times.

We also look to the text of Section 44 as it was originally written to confirm our interpretation of the current language. When ratified in 1876, Section 44 said that although there **[**56]** was then only one United States Representative from Colorado, the General Assembly should create more districts "when" the state received more seats. This clear mandate did not give the General Assembly unfettered authority to create new districts. It is absurd to imagine the General Assembly drawing districts before Congress gave a second seat in the House of Representatives. Instead, the second sentence requires that congressional apportionment be a necessary and logical trigger for the General Assembly to perform its task. Unfettered authority is especially unlikely in light of the limited authority the Colorado Constitution originally gave to Colorado's General Assembly.

In its brief and during oral argument, the General Assembly strongly asserted that the 1974 changes in Section 44 were technical changes intended to eliminate obsolete language. They assure us that no substantive changes were made in Section 44. Thus, the second sentence of Section 44, as it was **[*1239]** originally written, placed a temporal restriction on **redistricting**, and the temporal limitation remains in the most recent version of Section 44.

To read the second sentence to mean otherwise would render it superfluous. **[**57]** The first sentence of Section 44 says: "The General Assembly shall divide the state into as many congressional districts as there are representatives in congress . . . for the election of one representative to congress from each district." The second sentence says: "When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly." If the second sentence did not place a time constraint upon **redistricting**, then all that would remain of this sentence would be a directive for the General Assembly to divide the state into single-member districts--exactly what the first sentence in Section 44 already requires.

We will not assume that the 1974 technical changes to Section 44 rendered the second sentence superfluous. See, e.g., Welby Gardens v. Adams County Bd. of Equalization, 71 P.3d 992, 995 (Colo. 2003) (saying that ^{HN43} "in construing a statute, interpretations that render statutory provisions superfluous should be avoided"); Grant v. People, 48 P.3d 543, 547 (Colo. 2002). Instead, we interpret Section 44 to mean that the General Assembly (or voters by initiative, or the courts) **[**58]** must create as many congressional districts as there are congressional representatives, and it must do so at a specific time--after a census.

The framers' intent to limit the frequency of congressional **redistricting** is evident when the congressional **redistricting** language in the original 1876 Constitution is compared with the legislative **redistricting** language from 1876. Section 44 originally limited the timeframe for congressional **redistricting**, as it still does, to "when a new apportionment shall be made by Congress." Section 47, however, originally said that "senatorial and representative districts may be altered from time to time, as public convenience may require." Colo. Const. art. V., §

47 (amended 1974) (emphasis added). "From time to time" means "occasionally" or "once in a while." Webster's Dictionary at 2395. In *Armstrong v. Mitten*, this court assumed without deciding that this language allowed legislative **redistricting** more than once per census period. 95 Colo. 425, 428, 37 P. 757, 758 (1934). The contrast between these two sections clearly demonstrates that the framers intended to restrict the frequency of congressional **redistricting** **[**59]** to once per census. If the framers had intended to allow the General Assembly to draw the congressional districts at will, without temporal limitation, they would have used the "from time to time" language that they used in Section 47.

Our interpretation is supported by history and custom. We have never been called upon to interpret Section 44 in the past because the General Assembly has never before drawn congressional districts more than once per decade. Just the opposite is true. As we discussed earlier in this opinion, the legislature has only redistricted six times when it should have done so thirteen times. ¹¹ The legislature has been so reluctant to draw new districts that it allowed at-large elections for newly created seats in 1902-1912. ¹² And it did not act at all during the four decades between 1921 and 1964.

FOOTNOTES

¹¹ Until SB 03-352, the General Assembly had redrawn congressional districts only in 1891, 1913, 1921, 1964, 1971, and 1992.

¹² In 1900, Congress allocated a third seat to Colorado, and in 1910 a fourth. The legislature did not redistrict, however, between 1891 and 1913. Kenneth C. Martis, *The Historical Atlas of United States Congressional Districts: 1789-1983* (1982).

[60]** This reluctance to redistrict is even more significant in light of the fact that state political control has changed hands many times over the years. Since 1915, when the Colorado session laws began listing the party affiliation for the state legislators, ¹³ political control of the General Assembly and governorship has been in the hands of a single political party quite often. The state was entirely in Republican hands in 1915-16, **[*1240]** 1921-22, 1925-26, 1943-46, 1951-54, 1963-64, 1967-74, 1999-2000, and 2003. And Colorado was controlled by Democrats in 1917-18, 1933-38, and 1957-62. Yet since 1915, the General Assembly only redistricted four times: 1921, 1964, 1971, and 1992. If the General Assembly has always understood the state constitution to allow **redistricting** more than once per decade, there should be some evidence that it exercised that power. Yet there is none. Even when the party in control changed, there was no new **redistricting** of congressional seats.

FOOTNOTES

¹³ The statistics cited above were compiled from the front of the Colorado Session Law books, which have listed party affiliations since 1915.

[61]** This is the tradition in many other states as well. As one author put it, politicians understand that a census is a necessary prerequisite for **redistricting**:

There is no denying that when a new party gains a legislative majority in mid-decade it does not redistrict the state's congressional delegation right away but waits until the next Census. This is another of the "rules of the game" in legislative life, for everyone wants to avoid violent seesaws in policy.

Hacker, *Congressional Districting* at 66.

The 1999 General Assembly also interpreted the state constitution to limit congressional **redistricting** to once per decade when it enacted section 2-2-901. See Ch. 170, sec. 1, § 2-2-901, 1999 Colo. Sess. Laws 559, 559-60. Subsection 2-2-901(1)(a) ^{HN44} says that congressional **redistricting** "occurs after each federal decennial census." Subsection 2-2-901(1)(b), regarding legislative **redistricting**, similarly states that legislative **redistricting** occurs "after each federal census." It is undisputed that the state constitution now limits legislative **redistricting** to once every ten years, so we find it significant that the Colorado General Assembly used the same language to **[**62]** describe the timeframe for both legislative and congressional **redistricting**. ¹⁴ This statute is yet another indication that the Colorado Constitution requires congressional **redistricting** once and only once per decade.

FOOTNOTES

¹⁴ See Colo. Const. art. V, § 48 (as amended by voter initiative in 1974) (requiring that a bipartisan reapportionment commission draw state legislative districts, and specifying in detail that the **redistricting** take place after the federal census results and before the precinct caucuses of the following election year); Legislative Council of the Colo. Gen. Assembly, An Analysis of 1974 Ballot Proposals 29 (Research Publication No. 206, 1974) ("Adoption of the proposal would mean that reapportionment of legislative districts would occur only once every 10 years . . .").

In sum, the plain language of Section 44, the General Assembly's past **redistricting** customs, and the General Assembly's own interpretation of Section 44 all demonstrate that the framers of the Colorado Constitution **[**63]** intended that congressional districts must only be drawn once per decade.

E. Other Jurisdictions

Although certainly not binding authority, we have looked to other states for guidance. The constitutions of our sister states vary. Some set forth detailed schedules for **redistricting** immediately following each decennial census. See, e.g., Ariz. Const. art. IV, part 2, § 1. Other states simply require **redistricting** in the legislative session immediately following a decennial census. See, e.g., Utah Const. art. IX, § 1. Still others allow congressional **redistricting** "at any time" or "from time to time." See, e.g., S.C. Const. art. VII, § 13; Wyo. Const. art. III, § 49. Finally, some state constitutions do not address congressional **redistricting** at all. See generally, e.g., Tex. Const. Despite the differences in state approaches to congressional **redistricting**, we have found no decision by any state's highest court that has interpreted its constitution to allow **redistricting** more than once per decade. To the contrary, many have concluded that congressional **redistricting** may only occur once per census period.

For example, in 1983, California emphatically reinforced **[**64]** its prior holdings that the state constitution prohibits **redistricting** more than once per decade. *Legislature v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (Cal. 1983). Article 21, Section 1, of the California Constitution provided: "In the year following the year in which the national census is taken . . . the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts . . ." In *Deukmejian*, the California Supreme Court recounted over seventy-five years of cases consistently upholding **[*1241]** the "once-a-decade rule." *Id.* at 22-24. The first California case so holding was *Wheeler v. Herbert*. 152 Cal. 224, 92 P. 353 (Cal. 1907). *Wheeler* also cited and discussed similar holdings from several other states, including New York, Massachusetts, Michigan, Ohio, Wisconsin, Virginia, and North Carolina. *Deukmejian*, 669 P.2d at 23. Since *Wheeler*, California courts have been consistently emphatic in holding that congressional **redistricting**

can only occur once per decade.

There are only two authorities to the contrary that we have found or that were noted [**65] in the numerous briefs filed in this **redistricting** case. The first case was from South Carolina, which has a constitutional provision very different from Colorado's. In 2002, the South Carolina General Assembly was unable to pass a congressional **redistricting** bill. *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002). Because the **redistricting** plan in effect in 2002 had been enacted prior to the 2000 census, the Federal District Court for South Carolina declared the existing plan unconstitutional and drew its own districts. *Id.* The federal court, however, was careful to say that its plan was only effective until and unless the state General Assembly enacted a plan. *Id.* at 670-71. This reasoning was in light of the specific language in the South Carolina Constitution saying that the "General Assembly may at any time arrange the various Counties . . . into Congressional Districts . . ." S.C. Const. art. VII, § 13. This "at any time" language allows the South Carolina General Assembly much greater freedom to draw congressional districts than the Colorado Constitution allows the Colorado General Assembly. The Colorado Constitution [**66] only allows **redistricting** "when" there is a census.

The second authority was from a federal district court in Florida. *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995). Prior to *Johnson*, the Florida legislature had failed to pass a congressional **redistricting** plan for the 1992 election, so a federal three-judge panel created a plan instead. *Id.* at 1533; *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992). Subsequently, the *Johnson* court held that the three-judge panel had no authority to create a permanent **redistricting** plan,¹⁵ and that the state legislature had authority to replace the judicial plan with its own plan at any time. 915 F. Supp. at 1544.

FOOTNOTES

¹⁵ The *Johnson* court clarifies: "It is clear that 'permanent,' in the context of reapportionment and **redistricting**, means until the next decennial census." *Johnson*, 915 F. Supp. at 1544.

Before reaching its conclusion, the court acknowledged three federal [**67] cases that have adopted "permanent" **redistricting** plans. *Id.* In the first, *Connor v. Coleman*, the United States Supreme Court ordered a district court to adopt a permanent reapportionment plan for the Mississippi Legislature. 425 U.S. 675, 48 L. Ed. 2d 295, 96 S. Ct. 1814 (1976). Then, in *Garza v. County of Los Angeles*, the Ninth Circuit upheld a lower court's adoption of a permanent plan for county supervisor districts. 918 F.2d 763 (9th Cir. 1990). Finally, in *Kimble v. County of Niagara*, a federal court in New York adopted a permanent plan for elections to the county legislature. 826 F. Supp. 664 (W.D.N.Y. 1993).

Notwithstanding these cases, the *Johnson* court held that two opposing cases constituted the "clear weight of authority" that courts cannot create permanent districts. Neither of these two cases is relevant to the case at hand, however. Neither involved the question of whether a legislature could redistrict in the same census period after a prior court-imposed plan; neither is factually similar to the instant case; neither examined a state constitution; and certainly neither interpreted constitutional provisions similar to Colorado's.

Instead, [**68] both cases involved legislatively adopted plans. In *Burns v. Richardson*, the Hawaii senate **redistricting** plan was expressly adopted to bridge the time gap until a constitutional convention could be convened to amend state constitutional provisions regarding **redistricting**. 384 U.S. 73, 80, 16 L. Ed. 2d 376, 86 S. Ct. 1286 (1966). We have no similar issue here. In the other case, *Wise v. Lipscomb*, there is no majority opinion. 437 U.S. 535, 57 L. Ed. 2d 411, 98 S. Ct. 2493 (1978). The plurality opinion states that a federal

court may "devise and [*1242] impose a reapportionment plan pending later legislative action." *Id.* at 540 (opinion of White, J., with Stewart, J., concurring). However, the statement is dicta because the plan involved in that case was found to be a legislative plan, not a court-imposed plan.

Our decision today is based upon Article V, Section 44, of the Colorado Constitution. Because Wise and Burns do not interpret any state constitution or statute involving **redistricting**, we do not find these cases persuasive or even relevant to our analysis. Even if we assume without deciding that the federal Constitution does not prohibit mid-decade congressional **redistricting**, our state constitution [**69] does not allow it and this is a question of state law.

F. Public Policy Considerations

Our holding today not only is consistent with custom, precedent, and other states' laws, but also rests upon solid policy foundations. The framers of the United States Constitution intended the House of Representatives to "have an immediate dependence upon, and sympathy with the people." Joseph Story, *Story's Commentaries on the Constitution* § 291 (1833) [hereinafter *Story's Commentaries*]. Unlike the Senate, the House should "emanate directly from" the American people and "guard their interests, support their rights, express their opinions, make known their wants, redress their grievances, and introduce a pervading popular influence throughout all the operations of the government." *Id.* For this to be true, according to Justice Story, the representatives' power, influence, and responsibility must be directly tied to the constituents. *Id.* at § 292. A "fundamental axiom of republican governments," he said, is that there must be "a dependence on, and a responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts [**70] and opinions, and produce a sympathy between him and his constituents." *Id.* at § 300.

The framers knew that to achieve accountability, there must be stability in representation. During the debates over the frequency of congressional elections, James Madison said: "Instability is one of the great vices of our republics, to be remedied." I 1787: *Drafting the U.S. Constitution* 212 (Wilbourn E. Benton ed., 1986) (notes of Mr. Madison). At the same time, the framers recognized that as the new union evolved, the population of the states would shift and grow and require changes in the distribution of congressional seats. *Id.* at 376. This fundamental tension between stability and equal representation led the framers to require ten years between apportionments. *Armstrong v. Mitten*, 95 Colo. 425, 433-34, 37 P.2d 757, 761 (1934) (citing with approval *People ex rel. Snowball v. Pendegast*, 96 Cal. 289, 31 P. 103, 105 (Cal. 1892), which says the framers of the state constitution must have consciously balanced the upheaval associated with **redistricting** with the need for equal representation). This ten-year interval was short enough to achieve fair [**71] representation yet long enough to provide some stability.

Our interpretation of Article V, Section 44, of the Colorado Constitution supports these notions of accountability and fairness. Limiting **redistricting** to once every ten years maximizes stability. In its brief, the General Assembly, however, argues that it should be allowed to redistrict two, or even ten times in a single decade. If the districts were to change at the whim of the state legislature, members of Congress could frequently find their current constituents voting in a different district in subsequent elections. In that situation, a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents.

Moreover, the time and effort that the constituents and the representative expend getting to know one another would be wasted if the districts continually change. See James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. Rev. 1237, 1242 (saying that "[a] boundary that is continually moving is one that is unlikely to serve as any

kind of imaginative focal point for communal identity . . ." and **[**72]** "redistricting thus flattens identity within a jurisdiction by preventing subcommunities from enjoying the kind of stability and sense of permanence that are necessary **[*1243]** ingredients for communal self-identification and, ultimately, differentiation"). Instead, we find that the framers of the Colorado Constitution intended to balance stability and fairness by both requiring and limiting **redistricting** to once per decade. ¹⁶ Had they wished to have more frequent **redistricting**, the framers would have said so. They did not.

FOOTNOTES

¹⁶ Of course, additional **redistricting** may become necessary if existing districts are declared unconstitutional on grounds such as racial discrimination. In that case, the legislature or ultimately the courts must create constitutional districts no matter when it occurs.

VI. The Holding in This Redistricting Case

Having held that the Colorado Constitution limits **redistricting** to once per decade, we now turn to the facts of the **redistricting** case at hand. Here, the Colorado General Assembly **[**73]** failed to create new congressional districts before the 2002 general elections, despite one regular session and two special sessions. In lieu of a legislative plan, the state district court was obligated to set forth its own carefully considered plan. This court upheld the district court's plan in *Beauprez v. Avalos*. 42 P.3d 642 (2002). Then, in 2002, seven U.S. Representatives were elected under this new plan. In May of 2003, however, the General Assembly passed a new congressional **redistricting** plan of its own.

Under our holding today, the General Assembly may only create a **redistricting** plan after the federal census (and the resulting congressional apportionment to the states) and before the ensuing general election. In this case, that would have been between April 1, 2001, when the U.S. Congress notified Colorado that it would gain an additional representative, and March 11, 2002, when the election process began. As we know, the General Assembly failed to act within this time frame. The fact that the courts were forced to create the 2002 **redistricting** plan in the absence of a valid legislative plan makes no difference. Congressional districts created by a court **[**74]** are equally effective as those created by the General Assembly and disruption of those districts triggers the same policy concerns. Consequently, the General Assembly's 2003 **redistricting** plan is not permitted by Article V, Section 44, of the Colorado Constitution because it is the second **redistricting** plan after the 2000 census. Hence, Senate Bill 03-352 is unconstitutional and void.

VII. Conclusion

We make our rule to show cause absolute in case number 03SA133, and discharge our rule to show cause in case number 03SA147. Until Congress apportions seats to Colorado after the next federal census, the Secretary of State is ordered to conduct congressional elections according to the plan approved in *Beauprez v. Avalos*.

JUSTICE KOURLIS and JUSTICE COATS join as to Part IV, and dissent as to the remainder of the Opinion.

DISSENT BY: KOURLIS

DISSENT

JUSTICE KOURLIS dissenting:

Although I join in part IV of the majority opinion in its conclusion that the Attorney General may initiate an original proceeding to contest the constitutionality of legislative action, I respectfully dissent from all other portions of the opinion.

The majority concludes that the delegation of **redistricting** **[**75]** power in Article V, Section 44, of the Colorado Constitution to the "General Assembly" includes the courts and specifically imbues the courts with independent authority to undertake such **redistricting**. Further, the majority reads the word "when" in Article V, Section 44, of the Colorado Constitution to limit the exercise of all **redistricting** authority, by the General Assembly or the courts, to a window of time between a new apportionment by Congress and the next general election.

I fundamentally disagree. Courts cannot be lawmakers under Article V of the Colorado Constitution. Courts do not enact ¹⁷ or create laws; courts declare what the law is **[*1244]** and what it requires. To hold otherwise violates the clear language of Article V and also the mandates of Article III of the Colorado Constitution, which delineates the separation of powers among the three coordinate branches of Colorado government.

FOOTNOTES

¹⁷ See *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 1437, 155 L. Ed. 2d 407 (2003).

The only authority **[**76]** that courts have to intervene in this purely political, legislative process is to review the constitutionality of existing districts, as we would review the constitutionality of any law, in order to protect the voting rights of aggrieved claimants. Within that limited framework, courts may enter emergency or remedial orders for the purpose of allowing elections to go forward. Such court orders are interstitial, and cannot then serve to preempt the legislature from reclaiming its authority to redistrict.

The majority also determines that **redistricting** must occur within the narrow window of time between Congressional approval of a reapportionment and preparation of precinct information for the next general election. According to the majority, if the General Assembly fails to act within that time, it abdicates the responsibility to the courts for a decade. I find nothing in our Constitution that so provides. To the contrary, I would read the Colorado Constitution, as a whole, as abhorring such a transfer of legislative power to the judicial branch.

Therefore, since, in my view, the authority remains vested in the Colorado General Assembly, to be exercised after a reapportionment by **[**77]** Congress, but within no specific time limits, I would discharge the Rule to Show Cause issued in this case. In that regard, I also note that I do not believe that this court should ever have chosen to accept original jurisdiction in this case. At the time this court did so, there was a case pending in the Denver District Court that raised all of the issues before us now, plus a variety of other legal and factual issues. If that case had been allowed to proceed, the trial court would not only have addressed all disputed issues of fact but would also have ruled on all legal theories presented by the plaintiffs. In that situation, we would be in a position to resolve the issues with a full factual record. By taking this case when we did, we unnecessarily circumvented the normal process of case resolution, and limited ourselves to addressing the constitutional issues first rather than as a last resort.

I. Article V Does Not Grant the Courts Authority to Redistrict the State

Article I, Section 4, of the United States Constitution provides that "the times, places and manner of holding elections for senators and representatives shall be prescribed in each state, by the legislature **[**78]** thereof, but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators". (emphasis added).

Article V, Section 44, of the Colorado Constitution implements that responsibility as follows:

The general assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district. When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly.

(emphasis added).

The majority determines that the reference to "General Assembly" in Article V includes the courts. For that unusual proposition, the majority argues that the United States Supreme Court has assigned to the states the right to define "legislature" under Article I, Section 4, of the U.S. Constitution by operation of state law, citing *Smiley v. Holm*, 285 U.S. 355, 76 L. Ed. 795, 52 S. Ct. 397 (1932), and that Colorado law supports such an inclusion.

In *Smiley*, the U.S. Supreme Court did hold that **[**79]** the term legislature in the U.S. Constitution refers to a state's lawmaking process, which is then defined by state law. *Id.* at 372 (discussing *Davis v. Hildebrant*, 241 U.S. 565, 60 L. Ed. 1172, 36 S. Ct. 708 (1916)). In *Smiley*, the Minnesota legislature attempted to implement a **redistricting** bill without gubernatorial approval or overturn of gubernatorial veto. The Supreme Court of Minnesota interpreted Article 1, Section 4, **[*1245]** as vesting the power to redistrict solely in the legislative body of Minnesota, without the need for gubernatorial approval. See *State ex rel. Smiley v. Holm*, 184 Minn. 228, 238 N.W. 494, 497-98 (Minn. 1931). The United States Supreme Court disagreed, concluding instead that the term referred to the lawmaking process applicable in Minnesota.

The Supreme Court stated:H

As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments. We find no suggestion in the federal constitutional provision **[**80]** of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted. Whether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity. Article 1, § 4, of the Federal Constitution, neither requires nor excludes such participation.

Smiley, 285 U.S. at 367-68 (emphasis added). The Supreme Court then analyzed Minnesota's Constitution and concluded that the lawmaking process, as defined by that state, included the participation of the governor. *Id.* at 372-73.

Thus, *Smiley* does stand for the proposition that the term "legislature" in the U.S. Constitution encompasses more than just the General Assembly acting alone, and refers instead to the general process of lawmaking in a given state. Furthermore, *Smiley* clarifies that it is a matter of Colorado law to determine what constitutes that process of lawmaking.

FOOTNOTES

¹⁸ Although the majority indicates that it relies only upon state law to define the power to redistrict, it nonetheless acknowledges the importance of federal law in shaping the court's role in that process. Maj. op. at 11, 26, 28, and 37. That acknowledgement, from my perspective, is a telltale indication of the premise that court authority does truly stem from federal law and is not here independently created by operation of the state constitution.

[81]** That circuitous process avails the majority little. Colorado law could not be clearer with respect to the meaning of the term "General Assembly." Article V itself defines the General Assembly as "the senate and house of representatives, both to be elected by the people." The term neither needs nor permits any further semantic gymnastics.

Under the mandate of Smiley, however, "General Assembly" cannot just mean that the two houses may independently exercise the **redistricting** authority. In Colorado, we reached that same conclusion shortly after the Smiley decision was announced. See *Armstrong v. Mitten*, 95 Colo. 425, 37 P.2d 757, 758 (Colo. 1934) (a case in which this court approved **redistricting** by initiative). Together, then, *Armstrong* and *Smiley* dictate that the narrow reference in Article V, Section 44, to the "General Assembly" must be read more broadly to include the process of initiative on the one hand, and gubernatorial approval on the other.

Article V embodies just such breadth. Section 1 of Article V reserves to the people the power of initiative and referendum. Section 39 sets out the condition that before a law may take effect, it shall **[**82]** be approved by the Governor, or re-passed by two-thirds of both houses. Article V is, therefore, a self-contained and complete description of the lawmaking processes and legislative powers in Colorado.

Redistricting is a lawmaking function, and is to be, in my view, accomplished within the rubric of Article V -which, of course, contains no reference to the courts.¹⁹ Similarly, Article VI, which describes judicial powers in Colorado, makes no reference either to lawmaking in general or to **redistricting** in particular.

FOOTNOTES

¹⁹ We have held that the constitutional assignment in Article V, Section 48, to the Chief Justice of the Colorado Supreme Court of the duty of appointing four members to the state legislative reapportionment commission is not a violation of separation of powers because it is specifically required by the constitution. In *re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 189 Colo. 1, 536 P.2d 308, 315 (Colo. 1975).

[*1246] Not only, then, does Colorado law not support an independent **[**83]** assignment of the right to redistrict to the courts, but rather, it precludes it. Article III of the Colorado Constitution, which spells out separation of powers among and between the three branches of government, prohibits the judiciary from undertaking a function assigned by the constitution to another branch of government. *People v. Zapotocky*, 869 P.2d 1234, 1243-44 (Colo. 1994). Article III directs that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." This precept imposes on the judiciary both a proscription against interfering with the executive or legislative branches, and a duty to perform its constitutional and statutory

obligations with complete independence. Zapotocky, 869 P.2d at 1243-44; see also *People v. Herrera*, 183 Colo. 155, 516 P.2d 626, 627 (Colo. 1973) (The statute that gave courts the power of sentence commutation was an unconstitutional violation of separation of powers because such power rests with the executive. [**84]).

The separation of powers concept is fundamental to our free system of government, and accordingly, this court is "unalterably opposed to any attempt by one branch of the government to assume the power of another." *In re Interrogatories*, 536 P.2d at 318.

Because the constitution assigns **redistricting** to the legislative branch of government under Article V, Section 44, Article III mandates that the judiciary may only exercise that power if expressly so directed or permitted by the constitution. Implied exceptions are not sanctioned; this is the plain meaning of Article III. *Denver Bar Ass'n v. Public Util. Comm'n*, 154 Colo. 273, 391 P.2d 467, 470 (Colo. 1964). Simply stated, under Colorado law, courts may not usurp the legislative function of **redistricting**.

II. The Limited Role of the Courts in Redistricting

The courts do have the ultimate responsibility of reviewing **redistricting** plans, just as we may review all other laws, to determine whether they comport with the constitution. In *Interrogatories*, 536 P.2d at 316 (citing to *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803)).

Prior to 1964, courts [**85] played only an anecdotal role in the process, in part because **redistricting** was perceived to be a non-justiciable, political issue,²⁰ and in part because constitutional issues seldom arose.²¹ Further, many legislatures, like our own, chose not to redistrict for long periods of time.

FOOTNOTES

²⁰ See *Colegrove v. Green*, 328 U.S. 549, 90 L. Ed. 1432, 66 S. Ct. 1198 (1946).

²¹ See *Armstrong*, 95 Colo. 425, 37 P.2d 757 (example of one of the early cases raising constitutional issues in **redistricting**).

In 1962, the U.S. Supreme Court issued *Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). In that case, the Court confirmed that voters in Tennessee, who claimed that the congressional districts in effect in that state deprived them of equal protection of law under the Fourteenth Amendment to the U.S. Constitution by debasing their vote in comparison to other voters, had presented a justiciable claim over which the court had jurisdiction. *Id.* at 209. [**86]

The following year, the U.S. Supreme Court announced a decision in *Wesberry v. Sanders*, 376 U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526 (1964). There, the Court held that the mandate of Article I, Section 2, of the U.S. Constitution, which said that Representatives to Congress be chosen by the people, meant that "one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8. Stated differently, for the first time, the Court declared that congressional districts were to be divided as nearly equally as possible by population.

The third case in this trilogy was announced in 1964. In *Reynolds v. Sims*, 377 U.S. 533, 568-69, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964), the Supreme Court held an Alabama legislative **redistricting** plan unconstitutional under the Equal Protection Clause because the apportionment was not made on [**1247] population and lacked a rational basis. *Reynolds*

emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional **[**87]** requisites in a timely fashion after having had an adequate opportunity to do so." Id. at 586.

Lastly, in 1965, Congress passed the Voting Rights Act, 42 U.S.C. § 1973 (2003), which recognized the need in **redistricting** to protect minority voters. Under that Act, courts have been called upon to undertake additional supervisory authority. Hence, since the mid-1960's, there have been numerous cases around the nation where courts have become involved in **redistricting** issues.

Most recently, in *Branch*, 538 U.S. 254, 123 S. Ct. 1429, 155 L. Ed. 2d 407, the U.S. Supreme Court dealt with the interrelationship between federal and state courts, specifically in connection with a **redistricting** plan covered by the Voting Rights Act of 1965. The Court held that the Federal District Court in that case properly enjoined enforcement of the state court plan because the state court plan had not been pre-cleared under the Voting Rights Act. Id. at 1437. The Court further held that the Federal District Court plan was required to comply with the statutory requirement to draw single-member districts whenever possible. Id. at 1441. By so **[**88]** holding, the Court determined that the reference in 2 U.S.C. § 2 of the Apportionment Act to districts "established by law" affirmatively applied to judicial **redistricting** as well as to legislative **redistricting**. Id. The Court did not address the question before us today of whether such court order would preempt the state legislature from reclaiming the right to redistrict.

Indeed, the Supreme Court has previously stated that courts should make every effort to avoid preempting the exercise of legislative authority. And, in *Wise v. Lipscomb*, 437 U.S. 535, 540, 57 L. Ed. 2d 411, 98 S. Ct. 2493 (1978), it specifically held that even when a federal district court had declared an existing **redistricting** scheme unconstitutional, the court must then give the legislative body a reasonable opportunity to adopt a substitute plan rather than for the court to devise its own plan. The Supreme Court stated:

The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. '[A] state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, **[**89]** either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.'

Id. (quoting *Burns v. Richardson*, 384 U.S. 73, 85, 16 L. Ed. 2d 376, 86 S. Ct. 1286 (1966)); see also *Connor v. Coleman*, 440 U.S. 612, 613, 59 L. Ed. 2d 619, 99 S. Ct. 1523 (1979) (ordering a federal district court in Mississippi to file a court-ordered **redistricting** plan, but expressing the clear expectation that if the legislature acted in time, the legislative plan would supercede the court plan).

In *Grove v. Emison*, 507 U.S. 25, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993), the Supreme Court reviewed a congressional **redistricting** debacle in Minnesota. Ultimately, the Supreme Court concluded that the "[Federal] District Court erred in not deferring to the state court's timely consideration of congressional reapportionment." Id. at 37. Justice Scalia, writing for the majority, called the state court's intervention "precisely the sort of state judicial supervision of **redistricting** we have encouraged." Id. at 34 (emphasis added). Again, the Court did not imply that either **[**90]** the federal or state court could preempt the legislative prerogative.

Other courts around the nation have similarly recognized the supervisory, temporary and interstitial character of court-ordered **redistricting** plans. In *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995), the Federal District Court for the Northern District of Florida

faced a controversy similar to the one before our court today. As a result of the 1990 census, Florida was entitled to four additional members in the House of Representatives. On the first day of the 1992 Florida legislative session, members of the State House of Representatives and other voters filed suit in federal court challenging the constitutionality of Florida's congressional **[*1248]** and state legislative districts. This suit resulted in an order from a three-judge panel that adopted a plan and ordered the state of Florida to conduct the 1992 congressional elections "and congressional elections thereafter" in conformity with the plan. *Id.* at 1533-34 (quoting *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1090 (N.D. Fla 1992)).

The plaintiffs argued that the "DeGrandy" order was a temporary solution **[**91]** interposed at a time when the state legislature had insufficient time to enact a new plan before the elections, which did not deprive the legislature of the authority to act after the elections. The District Court recognized that the language "and congressional elections thereafter" had one of two results: either that the court had intended its plan to be permanent, or that the legislature had interpreted it in that fashion and had thereby been dissuaded from enacting its own plan. *Id.* at 1543-44. The District Court then held that "to the extent that the first result occurred, the DeGrandy plan is unconstitutional. To the extent the second result occurred, the law is clear that a state legislature always has the authority to redistrict or reapportion, subject to constitutional restraints." *Id.* at 1544. While recognizing that some authority would permit federal court plans to serve as permanent **redistricting** plans, the court found that the "clear weight of authority" was to the contrary. *Id.* Specifically, the District Court emphasized that the U.S. Supreme Court in *Wise* went to great lengths to point out that federal courts must "devise and impose a reapportionment **[**92]** plan pending later legislative action." *Id.* (quoting *Wise*, 437 U.S. at 540). The District Court also relied on *Burns*, 384 U.S. at 85, where the Supreme Court stated: "the State remains free to adopt other plans for apportionment, and the present interim plan will remain in effect no longer than is necessary to adopt a permanent plan." *Mortham*, 915 F. Supp. at 1544. The court felt constrained by the twin principles of federalism and separation of powers from usurping the state legislature's authority to adopt a constitutional **redistricting** plan, and concluded that it would violate both principles to enshrine the DeGrandy plan as permanent. *Id.* at 1545. ²²

FOOTNOTES

²² See also *Ramos v. Koebig*, 638 F.2d 838, 843-44 (5th Cir. 1981) in which the court held that it was error for the Federal District Court to pass upon the constitutionality of a proposed **redistricting** plan before the city council had the opportunity to enact a valid plan. The court stated that "such a court-ordered plan will be a temporary measure, however, and will not preclude the legislative body from devising a plan that reflects its legislative judgment. Once validly enacted, and approved by the district court on constitutional grounds, the legislative plan will become effective, and will supersede the temporary court-ordered plan."; and *Colleton County v. McConnell*, 201 F. Supp. 2d 618, 670-71 (D.S.C. 2002) holding that a court order would govern elections "unless and until the South Carolina General Assembly, with the approval of the Governor and in accordance with § 5 of the Voting Rights Act, ends its current impasse and enacts an alternative **redistricting** plan for the legislative body at issue".

[93]** Thus, in my view, the U.S. Supreme Court ushered in the era of court involvement in **redistricting** by clarifying that the Fourteenth Amendment protects voters' rights and the courts are charged with enforcing that protection. When districts are not constitutionally adequate, courts may fashion a remedy to protect aggrieved voters in an upcoming election. However, never has the U.S. Supreme Court held that a court-ordered plan preempts a legislature from attempting to correct a deficiency by passing its own **redistricting** plan.

Courts act in the first instance only because an existing apportionment of districts is constitutionally deficient. In order to have the capacity to remedy that deficiency, we must be able to issue remedial orders. Yet, neither the federal nor the state constitution supports a conclusion that such emergency relief can supplant the later exercise of legislative authority. Quite simply, the judiciary cannot legislate. See *Springer v. Gov't of Phil. Islands*, 277 U.S. 189, 201, 72 L. Ed. 845, 48 S. Ct. 480 (1928); *Speer v. People*, 52 Colo. 325, 122 P. 768, 771-72 (Colo. 1912); Colo. Const. art. III.

In no other circumstance could [**94] it be debated that a court order should be published in the Colorado Revised Statutes as an enforceable statute. The court order is interstitial - a temporary remedy in place to satisfy the needs of the electoral system until the General [**1249] Assembly can exercise its rightful legislative function. In other situations, if a court declares a statute unconstitutional, the court would never presume to replace the statute with a constitutional version. That is not our function. In the electoral setting, we act on an emergency basis, to enable the pending election to go forward. However, the fundamental nature of what we do is not altered. We act only in the breach; once the legislature takes up its rightful mantle, our involvement is no longer necessary.

III. Redistricting Is Not Time-Limited

The majority also concludes that Article V, Section 44's use of the term "when" is an independent basis under Colorado law upon which to delimit the authority to redistrict - whether exercised by the General Assembly or by the court. Thereby, the majority concludes that the brief window of time within which **redistricting** could occur came and went, with only the court-ordered plan in place, which [**95] operated to divest the General Assembly of its authority. Maj. op. at 11.

In response to this argument, I first take issue with the majority's assignment of this issue to state law. Indeed, the U.S. Supreme Court has afforded broad discretion to the states to define the process whereby districts are created. However, in my view, the involvement of the courts - absent some express provision in a state constitution delegating a role to the courts (which Colorado does not have) - continues to be predicated, in large part, upon the duty to enforce federal constitutional rights. Hence, the duration of a court order protecting those rights, or the jurisdiction of a court to review existing districts when constitutional infirmities exist, must be governed by an intermixed application of state and federal law.

Colorado's Constitution neither assigns a specific function in **redistricting** to the courts, nor a specific time within which to complete that role. I find no support in Article V for the majority's definition of "when," which restricts not only legislative authority but also court supervisory authority. The Article does contain time frames for action in great detail in some sections, [**96] such as those imposed upon the Reapportionment Commission in Section 48. The absence of such time limits in Section 44 is telling. If the framers of Section 44 had intended to start the ticking of a time clock that would govern the **redistricting** process, they had language at their command with which to accomplish such an end.

Various other state constitutions do mandate the time within which reapportionment must occur. For example, the California Constitution provided that the reapportionment must take place at the "first session after each census," which the California Supreme Court construed to mean immediately after the new census figures are available, and not again thereafter until the next census. See *Leg. of the State of Cal. v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 22, 194 Cal. Rptr. 781 (Cal. 1983) (interpreting Cal. Const. art. IV, § 6, and applying that interpretation to art. XXI, § 1). Similarly, the Oklahoma Constitution requires **redistricting** to occur within 90 days after the convening of the first regular session after the census. Okla. Const. art. V, § 11A); see also Utah Const. art. IX, § 1; Va. Const. art II, § 6; Wis. Const. art. IV, [**97] § 3.

In *State v. Weatherill*, 125 Minn. 336, 147 N.W. 105 (Minn. 1914), the Minnesota Supreme Court interpreted a reference to the "first session after each (census)" in the predecessor to its current constitutional provision as a duty to reapportion in the first session, but not a prohibition to reapportionment at a later time. The court noted that "it seems clear that, had there been any intention to restrict or limit the time when a reapportionment might be made, those framing the Constitution had language at their command which, if employed, would not have left that intention shrouded in doubt or uncertainty." *Id.* at 106. Thus, that court held "the Constitution should be construed as imposing a duty of reapportionment, and that the duty so imposed continues until performed." *Id.* at 107.

Other courts agree that the legislature's duty to reapportion continues until performed. See *Harris v. Shanahan*, 192 Kan. 183, 387 P.2d 771, 795 (Kan. 1963) (holding that "the duty to properly apportion legislative districts is a continuing one"); see also *Selzer* [*1250] v. *Synhorst*, 253 Iowa 936, 113 N.W.2d 724, 733 (Iowa 1962) (same); *Lamson v. Sec'y of the Commonwealth*, 341 Mass. 264, 168 N.E.2d 480, 483 (Mass. 1960) [**98] (same).

This court has a duty to interpret constitutional and statutory provisions as written. Constitutional provisions should be given their plain and ordinary meaning. *Bolt v. Arapahoe County Sch. Dist.*, 898 P.2d 525, 532 (Colo. 1995). The plain and ordinary meaning of "when" is that it must follow the condition precedent, which in this instance is the new apportionment by Congress. Although "when" might well be read as imposing a duty upon the legislature to act as soon as possible after the predicate event, it does not in any way imply the imposition of a back-end limitation upon that duty. In my view, burdening the word "when" in the Colorado Constitution with the implied intention that the right to redistrict is abrogated if not exercised within a narrow time frame seems heavy freight indeed.²³

FOOTNOTES

²³ The majority goes even further in concluding that **redistricting** can only occur once each decade. In my view, we need not reach that question because it is not before us. From my perspective, **redistricting** by the General Assembly has only taken place once - in Senate Bill 03-352 -and I would not opine further. To the extent, however, that the majority relies upon federal law for the conclusion that **redistricting** is limited to once per decade, I read the cases differently. *Georgia v. Ashcroft*, 539 U.S. 461, 156 L. Ed. 2d 428, 123 S. Ct. 2498, 2516 n.2 (2003), holds merely that districts must meet federal constitutional mandates and "if [a] State has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election." See also *Reynolds*, 377 U.S. at 583-84 ("While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable.") (emphasis added). In fact, in *Armstrong*, 37 P.2d at 758, this court previously "assumed, without deciding, that under section 47, a general **redistricting** of the state may occur more frequently than once after each census."

[**99] IV. 2002 Redistricting

In *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002), we affirmed the decision of the Denver District Court declaring the then current congressional districts as set out in section 2-1-100.5, et seq., 1 C.R.S. (2002), unconstitutional for failure to satisfy the one-person, one-vote principle. The congressional districts that appear in section 2-1-100.5 do not comport with current population realities in the state of Colorado as reflected in the 2000 census. See

also section 2-2-901, 1 C.R.S. (2002), regarding the import of that census.

The Denver District Court acted only after the General Assembly failed to act in sufficient time to allow the November, 2002 election to proceed. There is no question but that the court-ordered **redistricting** governed that election by virtue of the legislative abdication.

In my view, that court order was a temporary, emergency order -to be honored until such time as the legislature acted to create districts that are constitutionally sufficient.

V. Original Jurisdiction Is Improper

Lastly, I suggest that this court should not have accepted original jurisdiction over this **[**100]** case, but should have allowed the Denver District Court action to proceed to completion.

On May 9, 2003, the same day on which Governor Owens signed Senate Bill 03-352 into law, two plaintiffs brought an action in Denver District Court challenging its constitutionality. Keller v. Davidson, No. 03 CV 3452 (Denver District Court, May 9, 2003). The plaintiffs in that case contend that the General Assembly's 2003 **redistricting** plan violates: Colorado's GAVEL amendment (Colo. Const. art. V, § 20; Colorado's Sunshine Law (§ 24-6-101, et seq., 7B C.R.S. (2002)); the Colorado State Senate Rules; plaintiffs' equal protection rights; and the Colorado Constitution art. V, § 22, and art. II, § 10. In short, that case includes, but is not limited to, the constitutional issues raised in this case.

Because of the additional claims, there were numerous issues of disputed fact, and an evidentiary hearing would have been necessary to resolve those disputes. The disputed facts relate to certain claims, such as the **[*1251]** claim that SB 03-352 does not comport with the GAVEL amendment, with the Sunshine Law or with the Colorado rules.

In taking this case as an original proceeding, our court has violated **[**101]** two bedrock rules. First, this court does not interfere in the normal process of a case when the issues can be properly resolved below and the rights of all parties preserved. Second, this court does not resolve cases on constitutional grounds when non-constitutional grounds are raised and may be dispositive.²⁴

FOOTNOTES

²⁴ I also note that if we were addressing the appeal of the district court case, we would not need to resolve the issue concerning the Attorney General's authority, because he is not a party to the lower court case. Hence, in addition to joining issues of constitutional magnitude in the first instance, rather than only as a last resort, we are inviting still another constitutional issue which we would never have needed to reach.

In order to satisfy the electoral time frame of this case, precincts must be established by March 15, 2004, which is 29 days prior to the precinct caucus day in 2004. (Affidavit of Secretary of State Davidson). Thus, at the time the case was filed in district court, there was **[**102]** ample time to conduct an evidentiary hearing, await a trial court ruling, and appeal the Keller case.²⁵ These proceedings could have been completed on an expedited basis well in advance of the March 14, 2004 deadline, and would have resulted in a full resolution of the issues.

FOOTNOTES

²⁵ The case was later removed to federal court, where it has been stayed awaiting this

opinion. See *Keller v. Davidson*, No. 03-Z-1482 (CBS) (D. Colo. Sept. 25, 2003). It is speculation at this point to try to unravel the process and guess what might have occurred had we not taken the original proceeding.

A. Other Relief Was Clearly Available

Under C.A.R. 21, the exercise of original jurisdiction is "extraordinary in nature and is a matter wholly within the discretion of the Supreme Court. Such relief shall be granted only when no other adequate remedy, including relief available by appeal or under C.R.C.P. 106, is available." This relief is not a substitute for appeal from a lower court proceeding and is not to be granted **[**103]** when it will supersede the functions of such appeal. See *Fitzgerald v. Dist. Court*, 177 Colo. 29, 493 P.2d 27, 29 (Colo. 1972); *Weaver Constr. Co. v. Dist. Court*, 190 Colo. 227, 545 P.2d 1042, 1044 (Colo. 1976) (There exists a general policy which disfavors the use of an original writ where an appeal would be an appropriate remedy.); *People v. Montez*, 48 Colo. 436, 110 P. 639, 640 (Colo. 1910) (This court exercises original jurisdiction only in case of emergency, or where the questions involved are clearly of public interest, and then only when satisfied that the rights of the parties will not be protected and enforced in lower courts.); *Clark v. Denver & I.R. Co.*, 78 Colo. 48, 239 P. 20, 21 (Colo. 1925) (This court declines original jurisdiction in cases where the issues can be fully determined and the rights of all parties preserved and enforced in the district court.).

In *People v. McClees*, 20 Colo. 403, 38 P. 468 (Colo. 1894), various plaintiffs sought an injunction against the secretary of state and others preventing certain claimants from taking judicial office. The plaintiffs asked this court **[**104]** to assume original jurisdiction for purposes of resolving the controversy, and this court declined, stating:

We are urged to entertain the present proceeding for the purpose of reaching an early decision of the controversy between the rival claimants to judicial positions, and thus prevent confusion in the administration of justice. This proceeding is commended as a 'short cut' to a determination of the controversy. But short cuts in legal controversies are seldom satisfactory

Id. at 472. I suggest that the original proceeding here is a short cut, which reaches out to address the seminal issue without allowing the case to proceed in due course.

B. Resolution of Cases on Non-Constitutional Grounds Preferred

Furthermore, when a constitutional question is not essential to the resolution of the issue before us, we will not address it. *Town of Orchard City v. Bd. of Delta County Comm'rs*, 751 P.2d 1003, 1006 (Colo. 1988); *Ricci v. Davis*, 627 P.2d 1111, 1121 (Colo. 1981) ("It is well settled that a court will not rule on a constitutional question which is not essential to the resolution of the controversy **[*1252]** before **[**105]** it."). Here, there were a number of non-constitutional issues which might have been dispositive. We will never know, because this court made a decision to accept the constitutional issue alone -uncoupled from the factual and non-constitutional underpinnings.

Our system of government relies upon courts as the final arbiters of disputes -sometimes even disputes that have a distinctly political character. I suspect that many courts charged with the duty of resolving a divisive political issue would prefer not to be in that position, but our tri-partite system of government contemplates the exercise of that duty as part of the necessary judicial power.

However, being pressed into service is quite a different matter from volunteering. In this case, I view our court as having volunteered for the task of resolving the question at issue -

on the grounds that we would ultimately have to resolve it in any event and time is of the essence. The same could be true in many litigated matters, in which we decline to exercise original jurisdiction for all of the reasons appearing in the legions of cases. Furthermore, the time constraints could have been satisfied in the normal course of events, if **[**106]** each of the involved courts had proceeded expeditiously.

Thus, I suggest that this case is a particularly inappropriate one in which to accept jurisdiction on an original basis, and that by proceeding in this fashion, we have inserted ourselves further than necessary into the political process.

VI. Conclusion

By exercising original jurisdiction in this case, the court has foreclosed any inquiry into the propriety of the General Assembly's **redistricting** process or the constitutional validity of the congressional district boundaries themselves.

Instead, the court has seized upon the underlying constitutional issue, and has reached a conclusion predicated upon two alternate, but, in my view, equally flawed, theories. First, the majority quite remarkably equates the judiciary with the legislature, thereby concluding somehow that the General Assembly has already redistricted once since the last census and may not do so again. Second, the majority imputes to the word "when" an absolute time limitation, thereby transforming a constitutional requirement for the General Assembly to account for changes in the state's federal representation by **redistricting** into a prohibition against **[**107]** its doing so during nine out of every ten years. For both of those propositions, the majority states that it relies upon state law in an effort to insulate this case from federal review, when, in fact, the whole analysis is and must be permeated by a reliance upon federal, as well as state, law.

Whether or not the parties to this controversy were motivated in part or in whole by partisan advantage, the court's resolution of this issue has implications that transcend partisanship and are far-reaching. With its holding today, the court significantly alters our form of government. For the first time in the state's history, the court restricts the **redistricting** authority of the General Assembly to a narrow window, and mandates that if the General Assembly fails to act within that time frame, the court will exercise that power for it.

While eliminating political considerations from **redistricting** may or may not be a laudable goal, **redistricting** is an inherently political activity, and rests with the democratically elected branch of government for good reason. Absent express constitutional authority granting a role to the judiciary -which I suggest is wholly absent from our constitution **[**108]** -the courts should serve only to protect constitutional interests in **redistricting**: not to commandeer the process.

Accordingly, I construe the Denver District Court's and this court's prior involvement in the **redistricting** matter as judicial supervision, holding then-existing congressional districts illegal and imposing a temporary plan in order to allow the 2002 election to go forward. That violation has potentially been remedied by Senate Bill 03-352 -assuming that no other infirmities as alleged by the Keller plaintiffs exist in the legislation. Thus, I would discharge the rule issued in this case and allow the Keller case to go **[*1253]** forward in order to resolve the other issues raised.

I am authorized to state that JUSTICE COATS joins in this dissent.

Source: [Legal > / . . . / > CO State Cases, Combined](#) 

Terms: **redistricting**

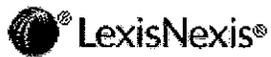
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District Summary
Ethnic Breakdown of Districts plus Voting Age
Population

Plan Name: Court Approved Date: January 28, 200
Plan Type: Congressional Time: 8:58 am
Page: 1

DISTRICT	POPULATION	WH	HISPANIC	NH	DOJ	BLKNH	DOJ	INDNH	DOJ	ASNH	DOJ	HWN	NH		18 POP
													DOJ	Other	
1	614,465	333,829	184,254	64,167	6,229	18,728	676	6,582	0.11%	3.05%	0.11%	1.07%	1.07%	480,045	78.12%
2	614,465	484,899	90,581	7,044	5,449	22,020	596	3,876	0.10%	3.58%	0.10%	0.63%	0.63%	462,167	75.21%
3	614,467	458,432	131,941	4,768	11,964	3,872	517	2,973	0.08%	0.63%	0.08%	0.48%	0.48%	460,376	74.92%
4	614,466	487,837	104,246	5,106	5,734	8,459	568	2,516	0.09%	1.38%	0.09%	0.41%	0.41%	454,306	73.94%
5	614,467	475,601	68,400	38,384	8,155	16,530	1,541	5,856	0.25%	2.69%	0.25%	0.95%	0.95%	450,464	73.31%
6	614,466	538,749	35,624	13,035	4,395	18,889	638	3,136	0.10%	3.07%	0.10%	0.51%	0.51%	433,689	70.58%
7	614,465	423,533	120,555	37,955	6,509	19,814	855	5,244	0.14%	3.22%	0.14%	0.85%	0.85%	459,419	74.77%
		4,301,261	3,202,880	735,601	170,459	48,435	5,391	30,183							3,200,466

District Summary
 COMBINED 2000 PARTY REGISTRATION AND
 REGENTS/BdEd

Date: January 28, 200

Plan Name: Court Approved

Time: 8:58 am
 Page: 1

Plan Type:Congressional	DISIRCTI	60REPS	00DEMS	00UNAFF	REG	LRG	RREG	LRG	D	BDED	LRG	RBDED	LRG	DREG	LRG	F98REG	LRG	D98
1	86,649.4	156,454.6	120,735.7	69,283.2	104,565.9	64,081.4	127,347.0	57,274.1	83,565.3									
	23.82%	43.00%	33.18%	39.85%	60.15%	33.48%	66.52%	40.67%	59.33%									
2	121,563.9	133,408.9	162,468.5	102,745.9	101,544.2	91,835.0	133,236.7	82,496.6	68,581.4									
	29.12%	31.96%	38.92%	50.29%	49.71%	40.80%	59.20%	54.61%	45.39%									
3	149,765.2	144,563.5	137,944.8	120,277.3	90,484.0	118,089.2	117,589.3	95,722.1	71,124.4									
	34.65%	33.44%	31.91%	57.07%	42.93%	50.11%	49.89%	57.37%	42.63%									
4	154,347.1	99,469.6	134,110.6	128,998.3	74,601.8	124,629.6	100,196.3	101,032.1	54,686.8									
	39.79%	25.64%	34.57%	63.36%	36.64%	55.43%	44.57%	64.88%	35.12%									
5	169,701.1	84,938.9	122,097.7	135,126.4	61,198.3	129,531.2	83,665.5	103,468.2	43,430.5									
	45.04%	22.55%	32.41%	68.83%	31.17%	60.76%	39.24%	70.44%	29.56%									
6	192,115.4	93,883.2	136,386.0	155,564.1	75,698.0	150,218.1	103,673.8	118,957.5	53,132.3									
	45.48%	22.23%	32.29%	67.27%	32.73%	59.17%	40.83%	69.13%	30.87%									
7	115,525.9	115,689.4	121,501.7	93,566.8	80,408.6	90,056.4	103,813.3	80,587.5	63,348.4									
	32.75%	32.80%	34.45%	53.78%	46.22%	46.45%	53.55%	55.99%	44.01%									
<hr/>																		
	989,668,00828,407.99	935,244.99	805,561.97	588,500.75	768,440.96	769,521.91	639,538.05	437,869.10										

Plan: Court Approved Map 1_25_02
 Plan Type: Congressional
 Administrator:
 User:

Population Summary Report

Monday January 28, 2002

8:57 AM

DISTRICT	POPULATION	DEVIATION	%	PRES_R_BUSH	PRES_D_GORE
		DEVN.			
1	614,465	-1	0.00	72,460	134,192
2	614,465	-1	0.00	103,540	126,578
3	614,467	1	0.00	140,198	102,108
4	614,466	0	0.00	145,053	92,679
5	614,467	1	0.00	151,735	74,963
6	614,466	0	0.00	169,150	104,125
7	614,465	-1	0.00	101,609	103,583

Total 4,301,261
 Population:
 Ideal District 614,466
 Population:
Summary
Statistics
 Population Range: 614,465 to 614,467
 Ratio Range: 1.00
 Absolute Range: - to
 Absolute Overall 2.00
 Range:
 Relative Range: 0.0% to 0.0%
 Relative Overall 0.0%
 Range:
 Absolute Mean 0.71
 Deviation:
 Relative Mean 0.0%
 Deviation:
 Standard 0.90
 Deviation:

Plan: Court Approved Map 1_25_02
 Plan Type: Congressional
 Administrator:
 User:
Population Summary Report

Monday January 28, 2002

8:57 AM

**DISTRICT POPULATION DEVIATION % GOV_R_OWEN GOV_D_SCH
 DEVN.**

District	Population	Deviation	% Devn	Gov R Owen	Gov D Sch
1	614,465	-1	0.00	60,727	113,179
2	614,465	-1	0.00	78,110	107,509
3	614,467	1	0.00	97,958	96,855
4	614,466	0	0.00	104,812	83,124
5	614,467	1	0.00	102,753	62,693
6	614,466	0	0.00	119,820	86,152
7	614,465	-1	0.00	81,988	88,263

Total 4,301,261

Population:

Ideal District 614,466

Population:

Summary

Statistics

Population Range: 614,465 to 614,467

Ratio Range: 1.00

Absolute Range: - to

Absolute Overall 2.00

Range:

Relative Range: 0.0% to 0.0%

Relative Overall 0.0%

Range:

Absolute Mean 0.71

Deviation:

Relative Mean 0.0%

Deviation:

Standard 0.90

Deviation:

District Summary

Ethnic Breakdown of Districts plus Voting Age Population

Plan Name 2003map6

Date: April 25, 2003

Plan Type: Congressional

Time: 12:00 pm

Page: 1

DISTRICT	POPULATION	NH	WHT	HISPANIC	DOJ	BLK	NH	INDDOJ	NH	ASNDJOJ	NH	HWNDJOJ	Other	18 POP
01	614,466	319,242	51.95%	191,892	31.23%	70,080	11.41%	6,057	1.0%	19,470	3.17%	724	7,001	478,381
02	614,466	478,701	77.91%	98,175	15.98%	6,929	1.13%	5,531	0.9%	20,651	3.36%	598	3,881	465,168
03	614,466	471,054	76.66%	118,279	19.25%	5,907	0.96%	12,205	2.0%	3,744	0.61%	494	2,783	461,496
04	614,466	487,213	79.29%	105,288	17.13%	4,743	0.77%	5,605	0.9%	8,490	1.38%	571	2,555	453,513
05	614,466	461,493	75.10%	83,138	13.53%	37,606	6.12%	8,084	1.3%	16,582	2.70%	1,563	6,000	448,270
06	614,466	531,754	86.54%	50,709	8.25%	6,938	1.13%	5,428	0.9%	16,073	2.62%	583	2,981	450,167
07	614,466	453,423	73.79%	88,120	14.34%	38,256	6.23%	5,525	0.9%	23,302	3.79%	858	4,982	443,471

4,301,261 3,202,880 735,601 170,459 48,435 108,312 5,391 30,183 3,200,466

District Summary

Plan Name Political Summary Date: April 25, 2003
 Date: April 25, 2003
 Time: 1:44 pm
 Page: 1

COMBINED 2000 PARTY REGISTRATION AND REGENTS/BdED

DISTRICT	00REPS	00DEMS	00UNAFF	REG LRG R	REG LRG D	BDED LRG R	BDED LRG D	REG LRG R98REG	LRG D98
01	82,020.1	155,746.6	118,328.8	65,692.1	103,337.7	60,766.7	125,176.0	54,150.2	82,413.1
	23.03%	43.74%	33.23%	38.86%	61.14%	32.68%	67.37%	39.65%	60.35%
02	119,624.6	137,138.8	164,481.7	98,186.1	101,837.0	88,280.1	132,792.1	79,216.9	68,882.9
	28.40%	32.56%	39.05%	49.09%	50.91%	39.53%	60.07%	53.49%	46.51%
03	155,836.9	135,268.1	137,605.9	123,462.4	85,754.2	121,039.4	112,567.7	97,770.7	67,054.7
	36.35%	31.55%	32.10%	59.01%	40.99%	51.81%	48.19%	59.32%	40.68%
04	153,566.3	98,986.7	135,534.5	128,640.4	74,903.5	124,323.0	109,273.3	100,077.9	54,537.1
	39.57%	25.51%	34.92%	63.20%	36.80%	55.35%	44.65%	64.72%	35.28%
05	164,552.4	92,978.5	118,244.2	133,485.5	64,507.1	127,652.9	87,290.3	102,609.8	46,696.5
	43.79%	24.74%	31.47%	67.42%	32.58%	59.39%	40.61%	68.72%	31.28%
06	171,533.8	99,786.2	135,720.4	145,390.9	80,808.3	140,635.2	109,561.0	112,620.1	58,164.9
	42.98%	24.16%	32.86%	64.28%	35.72%	56.21%	43.75%	65.94%	34.06%
07	136,533.9	108,503.1	125,329.6	110,704.5	77,353.0	105,743.6	101,861.6	93,142.3	60,120.0
	36.86%	29.30%	33.84%	58.87%	41.13%	50.93%	49.07%	60.77%	39.23%

989,667.99 828,408.00 935,245.00 805,562.00 588,500.76 768,440.97 769,521.90 639,538.04 437,869.11

Plan: 2003map6
 Plan Type: Congressional
 Administrator:
 User:

Population Summary Report

Friday April 25, 2003

1:46 PM

DISTRICT	POPULATION	DEVIATION	% DEVN.	PRES_R_BUSH	PRES_D_GORE
01	614,466	0	0.00	\$68,665	\$132,230
02	614,466	0	0.00	\$99,537	\$127,090
03	614,466	0	0.00	\$143,212	\$97,258
04	614,465	-1	0.00	\$144,069	\$93,012
05	614,466	0	0.00	\$150,427	\$77,492
06	614,466	0	0.00	\$158,972	\$110,393
07	614,466	0	0.00	\$118,862	\$100,753

Total Population: 4,301,261

Ideal District Population: 614,466

Summary Statistics

Population Range: 614,465 to 614,466

Ratio Range: 1.00

Absolute Range: -1 to 0

Absolute Overall Range: 1.00

Relative Range: 0.00% to 0.00%

Relative Overall Range: 0.00%

Absolute Mean Deviation: 0.14

Relative Mean Deviation: 0.00%

Standard Deviation: 0.38

Plan: 2003map6
 Plan Type: Congressional
 Administrator:
 User:

Population Summary Report

Friday April 25, 2003

1:46 PM

DISTRICT	POPULATION	DEVIATION	% DEVN.	GOV_R_OWEN	GOV_D_SCH
01	614,466	0	0.00	\$57,723	\$110,925
02	614,466	0	0.00	\$74,941	\$107,747
03	614,466	0	0.00	\$99,731	\$93,191
04	614,465	-1	0.00	\$103,613	\$83,005
05	614,466	0	0.00	\$102,598	\$64,642
06	614,466	0	0.00	\$112,944	\$92,174
07	614,466	0	0.00	\$94,618	\$86,092

Total Population: 4,301,261

Ideal District Population: 614,466

Summary Statistics

Population Range: 614,465 to 614,466

Ratio Range: 1.00

Absolute Range: -1 to 0

Absolute Overall Range: 1.00

Relative Range: 0.00% to 0.00%

Relative Overall Range: 0.00%

Absolute Mean Deviation: 0.14

Relative Mean Deviation: 0.00%

Standard Deviation: 0.38

**Comparison of Election Results Between
Court Approved Plan in 2002 and the
Plan Enacted by the General Assembly in 2003**

Results of Election for President in 2000				
	Court Approved		2003	
District	Bush	Gore	Bush	Gore
1	35.06	64.94	34.18	65.82
2	44.99	55.01	43.92	56.08
3	57.86	42.14	59.56	40.44
4	61.02	38.98	60.77	39.23
5	66.93	33.07	66.00	34.00
6	61.90	38.10	59.02	40.98
7	49.52	50.48	54.12	45.88

Results of Election for Governor in 1998				
	Court Approved		2003	
District	Owens	Schoettler	Owens	Schoettler
1	34.92	65.08	34.23	65.77
2	42.08	57.92	41.02	58.98
3	50.28	49.72	51.69	48.31
4	55.77	44.23	55.52	44.48
5	62.11	37.89	61.35	38.65
6	58.17	41.83	55.06	44.94
7	48.16	51.84	52.36	47.64