

IN THE SUPREME COURT OF MISSOURI

No. SC101412

MERRIE SUZANNE LUTHER, *et al.*,
Appellants,

v.

SECRETARY OF STATE DENNY HOSKINS, *et al.*,
Respondents.

Appeal from the Circuit Court of Cole County
The Honorable Christopher K. Limbaugh

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IN THE CIRCUIT COURT OF COLE COUNTY

STATE OF MISSOURI

MERRIE SUZANNE LUTHER, et. al.,)

Plaintiffs,)

Case No. 25AC-CC06964

v.)

DENNY HOSKINS,)

Defendant,)

and,)

MISSOURI STATE REPUBLICAN)
COMMITTEE,)

Intervenor.)

JUDGMENT

This matter came before the court for trial on November 12, 2025. At trial, all parties submitted stipulated facts and Exhibits A and B which were received by the court into evidence. No other evidence was submitted. Having considered the evidence and arguments at trial, as well as the substantive pleadings in this case, the court makes the following findings of fact and conclusions of law, and renders its judgment.

FACTUAL BACKGROUND

In 2020, a new 10-year United States Census was conducted which was certified to the Missouri governor in 2021. Generally, every ten years, this new census data is used to determine the relevant population for federal congressional apportionment within each state. In 2022, pursuant to Article III Section 45 of the Missouri Constitution, the Missouri

legislature used that census data and created a new redistricting map. In September, 2025, the legislature held an extraordinary session called by Governor Kehoe in order to conduct a second redistricting using the same 2020 census data. During that session, House Bill 1 (2025) was passed and titled “To repeal sections 128.345, 128.346, and 128.348, RSMo [which established the 2022 redistricting map] and to enact in lieu thereof twelve new sections relating to the composition of congressional districts.”

INTRODUCTION

Plaintiffs bring this cause of action challenging the constitutionality of the 2025 redistricting map under House Bill 1 because there was already a redistricting bill passed by the legislature in 2022 using the data from the 2020 census. They seek relief against the Missouri Secretary of State, Denny Hoskins (“Secretary”), asking this court to declare House Bill 1 unconstitutional pursuant to Article III Section 45, and to enjoin the Secretary and anyone acting in concert with him from utilizing the congressional districts from HB1 for any purpose.

DISCUSSION

In their one count petition, plaintiffs do not challenge the substance of the new congressional map under House Bill 1 (e.g. whether the 2025 map was gerrymandered, etc.), but rather the procedure in which House Bill 1 was passed. They claim that Article III Section 45 of the Missouri Constitution prohibits the legislature from passing a second redistricting bill and that this constitutional provision does not provide authority for the

legislature to do so. Of note, this provision is the sole provision within the Missouri Constitution that directly pertains to congressional redistricting.

The question is whether Article III Section 45 allows the legislature to create another redistricting map under House Bill 1. This court first looks to the language itself. In its entirety, Article III Section 45 provides,

When the number of representatives to which the state is entitled in the House of the Congress of the United States under the census of 1950 and each census thereafter is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.

Mo. Const. art. III, § 45.

On its face, this provision does not specifically *allow* the Missouri legislature to create a second congressional map using the same census. On the other hand, this provision does not specifically *prohibit* the Missouri legislature from creating a second congressional map using the same census. Moreover, this appears to be a unique issue that has never been definitively ruled on by Missouri courts. The following analysis applies under these circumstances.

“Words used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning.” *Faatz v. Ashcroft*, 685 S.W.3d 388, 400 (Mo. banc 2024) (citation omitted). “The Constitution is not a grant but a restriction upon the powers of the legislature.” *Liberty Oil Co. v Director of Revenue*, 813 S.W.2d 296, 297 (Mo. banc 1991). “Consequently, the General Assembly has the power to do whatever is necessary to

perform its functions except as expressly restrained by the Constitution.” *Id.* (quotations omitted) (emphasis in original); see also *Bohrer v. Toberman*, 227 S.W.2d 719, 723 (Mo. banc. 1950) (General Assembly has “all the powers and privileges which are necessary to enable it to exercise in all respects . . . its appropriate functions, except so far as it may be restrained by the express provisions of the Constitution”). Thus, “where the constitution is silent, the legislature may properly address the issue.” *State ex rel. Mathewson v. Bd. of Elec. Comm’rs of St. Louis Cnty.*, 841 S.W.2d 633, 636 (Mo. banc 1992).

Again, Article III Section 45 appears to be silent on the specific issue at hand, that is whether its language allows the legislature to conduct a second redistricting using the same census. In these situations, Missouri courts have consistently held that the legislature has the power to act unless expressly prohibited. *Id.* Given the fact that Section 45 contains no restrictive language, this court concludes that the legislature had the power to enact House Bill 1.¹

If more were somehow needed, the Framers of the 1945 Constitution knew how to impose “express[] prohibit[ions]” on the General Assembly’s exercise of legislative power. *State v. Clay*, 481 S.W.3d 531 at 532. The Constitution is replete with such prohibitions framed in declarations that the General Assembly “shall have no power to” or “shall not” have certain powers. See, e.g., Mo. Const. art. III, §§ 37 (“shall have no power.”); 38(a)

¹ Missouri adopted Section 45 after decades of the General Assembly failing to redraw its congressional map. See Erik J. Engstrom, *Stacking the States, Stacking the House: The Partisan Consequences of Congressional Redistricting in the 19th Century*, 100 AM. POL. SCI. REV. 419, 421 (Aug. 2006); Lloyd M. Short, *Congressional Redistricting in Missouri*, 25 AM. POL. SCI. REV. 634, 639 (1931).

(“shall have no power”); 39 (“shall not have power [to] ...”); 40 (“shall not pass ...”). Indeed, the terms “shall have no power” and “shall not” are “words of prohibition.” *Brooks v. State*, 128 S.W.3d 844, 847 (Mo. banc 2004). That the Framers did not include those terms in Section 45 only further underscores that the Constitution permits, rather than prohibits, mid-decade congressional redistricting by the General Assembly.

Plaintiffs rely heavily on *Pearson v. Koster* for the proposition that this exact issue has already been decided to the contrary. Plaintiffs argue that *Pearson* directs that congressional redistricting can only occur immediately following the certification of the census and cannot occur again until a subsequent census is certified. *Pearson v. Koster*, 359 S.W.3d 35, 37 (Mo. Banc 2012). Specifically, *Pearson* states, “[i]t is the responsibility of the Missouri General Assembly to renew congressional election districts. The new districts will take effect...and remain in place for the next decade or until a Census shows that the districts should change.” *Id.* However, it is clear that this language is dicta and should not have precedential value on the precise issue presented here.

To explain, the *Pearson* decision focused solely on the substance of the 2012 newly redistricted map itself, and had nothing to do with the authority of the Missouri legislature to enact a law providing for a second redistricting within the same census. In particular, *Pearson* only dealt with challenges to the compactness of congressional districts and unconstitutional gerrymandering in violation of Article III Section 45. In context, this dicta was wholly irrelevant and unnecessary to a resolution of the real issues *Pearson* raised.

Therefore, this court does not see *Pearson* as instructive, much less binding, on this case's very nuanced issue.

Plaintiffs next call attention to Article III Section 14 which, like Article III Section 45, was adopted in 1945. Section 14 provides for redistricting for state senate and house seats, and includes language that those "districts may be altered from time to time as public convenience may require." Mo. Const. art. III, § 14. Plaintiffs argue that the inclusion of this language with regard to state house and senate redistricting, and its absence with regard to congressional redistricting in Section 45, implies that an allowance for more than one redistricting was purposefully excluded from Section 45. Plaintiffs thus maintain that the intent of the 1945 constitutional framers was to only allow for one redistricting per a decennial census under Section 45. Again, however, there is no restrictive language in Section 45, and conceivably, the framers could have had a number of reasons to not specifically address multiple redistrictings in Section 45, or perhaps there was no reason at all. In any event, the implication raised by plaintiff is not enough to conclude that the inclusion of this language in Section 14 serves as a bar for the legislature to conduct a second redistricting pursuant to Section 45.

Ultimately, the legislature has the plenary authority to enact laws except as expressly prohibited. Therefore, in this case, in the absence of an express prohibition, the legislature had the plenary authority to enact House Bill 1, the second redistricting legislation.

The plaintiffs' claim and requested relief are hereby denied. All other pending motions and claims for relief are hereby denied.

SO ORDERED, ADJUDGED, AND DECREED.

12/09/2025
DATE

Ch. Limbaugh
Christopher K. Limbaugh
Circuit Judge, 19th Judicial Circuit
State of Missouri



Wor ▼

1st search term or section nr

An ▼

2nd search term



Constitution

Effective - 27 Feb 1945, see footnote ↓

III Section 45. Congressional apportionment. — When the number of representatives to which the state is entitled in the House of the Congress of the United States under the census of 1950 and each census thereafter is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.

Source: Const. of 1945.

(1962) Statute dividing state into 10 congressional districts, the least populous containing .087% and the most populous containing .117% of the state population and all but one of which were reasonably compact, was a constitutional apportionment. *Priesler v. Hearn* (Mo.), 362 S.W.2d 552.

---- end of effective 27 Feb 1945 ----

[use this link to bookmark section III Section 45](#)

Click here for the [Reorganization Act of 1974 - or - Concurrent Resolutions Having Force & Effect of Law](#)

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History and Fun Facts

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79 P.3d 1221

Supreme Court of Colorado,

En Banc.

PEOPLE of the State of Colorado, ex rel. Ken SALAZAR, in his official capacity as Attorney General for the State of Colorado, Petitioner,

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, Petitioner-in-intervention, v.

Donetta DAVIDSON, in her official capacity as Secretary of State for the State of Colorado, Respondent, Colorado General Assembly, Respondent-in-intervention.

Donetta Davidson, in her official capacity as Secretary of State for the State of Colorado, Petitioner,

v.

Ken Salazar, in his official capacity as Attorney General for the State of Colorado, Respondent.

Nos. 03SA133, 03SA147.

Dec. 1, 2003.

Synopsis

Attorney General brought original action challenging constitutionality of the General Assembly's congressional redistricting bill. Secretary of State brought separate original action challenging the Attorney General's authority to bring the first case. The Supreme Court, [Mullarkey](#), C.J., held that: (1) Supreme Court would exercise its discretion to decide cases; (2) Attorney General had authority to petition the Supreme Court to enjoin the Secretary of State from conducting elections under bill; and (3) General Assembly's congressional redistricting bill, which was second redistricting plan after 2000 census, violated provision of state

Constitution prohibiting congressional redistricting more than once per decade.

So ordered.

[Kourlis, J.](#), dissented in part and filed an opinion in which [Coats, J.](#), joined.

West Codenotes

Held Unconstitutional

[West's C.R.S.A. § 2-1-101](#)

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Chief Justice [MULLARKEY](#) delivered the Opinion of the Court.

I. Introduction

The cases before us are matters of great public importance involving the fundamental rights of Colorado citizens to vote for their representatives 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 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 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 “[w]hen 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 “[s]enatorial 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. 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 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, 84 S.Ct. 1459, 12 L.Ed.2d 632 (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, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

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 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 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

*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 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).

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: “The supreme court shall have power to issue writs of ... mandamus, ... injunction, and such other ... writs as may be provided by rule of court....” [Colo. Const. art. VI, § 3](#). Original proceedings are controlled by

*1228 [Colorado Appellate Rule 21\(a\)\(1\)](#), which states that: “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\(a\)\(1\)](#). 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.

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, “[n]o 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, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

The frequency of redistricting affects the stability of Colorado's congressional districts, and hence, the 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 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 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, 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 states have primary responsibility in congressional redistricting and that federal courts must defer to states. [Grove v. Emison](#), 507 U.S. 25, 34, 113 S.Ct. 1075, 122 L.Ed.2d 388 (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 state courts are the ultimate expositors of state law.” [Mullaney v. Wilbur](#), 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Consequently, even if the

Keller court were to address 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 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 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. 224 (1905). In *Tool*, we explicitly recognized the common law power of the Attorney General to bring an 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

*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. 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 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 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 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.

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.

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

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 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. We recognize and emphasize that the General Assembly has primary responsibility for drawing congressional districts. But we also hold that 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, 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, the states' redistricting authority is not “unfettered.” Rather, it is circumscribed by federal law. Each state must draw congressional districts immediately after each federal census and before the ensuing general election. There must be one district per 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, 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, 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 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: “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. 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. A state's lawmaking process may include citizen referenda and initiatives, mandatory gubernatorial approval, and any other procedures defined by the state. See [Smiley v. Holm](#), 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932) (gubernatorial approval); [Ohio ex rel. Davis v. Hildebrant](#), 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172 (1916) (referenda).

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, the word “legislature,” as used in Article I of the federal Constitution, encompasses court orders. 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. See generally [Grove](#), 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388; [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](#) 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, 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 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 inequality among districts, the Supreme Court and Congress stepped in to protect the voters' rights. In 1964, the United States Supreme Court established 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, 84 S.Ct. 526, 11 L.Ed.2d 481 (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, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983).

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, — n. 2, 123 S.Ct. 2498, 2516 n. 2, 156 L.Ed.2d 428 (2003). Consequently, according to this legal fiction, when states create same-size districts 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. 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, 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, 84 S.Ct. 526, 11 L.Ed.2d 481 (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 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.

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. *Id.* at 1439–40, 123 S.Ct. 1429. Congress disagreed, and in 1967

enacted 2 U.S.C. § 2c, which once again required single-member congressional districts. *Id.* at 1441, 123 S.Ct. 1429. 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.

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, 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, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)).

Section 5 of the Act 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 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 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, 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 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 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

assigned Colorado additional seats, the General Assembly was required to draw additional congressional districts.⁹

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

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 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.

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 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.2d 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 that “[t]he 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:

[I]t 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 Ridgely Park v. Bergen County Bd. of Taxation*, 31 N.J. 420, 157 A.2d 829, 832 (1960)). 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, 66 S.Ct. 1198, 90 L.Ed. 1432 (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, 82 S.Ct. 691, 7 L.Ed.2d 663 (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). 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, the term “General Assembly” in the first sentence of Article V, Section 44, broadly encompasses the legislative process, the voter initiative, and judicial redistricting. 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: “[w]hen 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, — n. 2, 123 S.Ct. 2498, 2516 n. 2, 156 L.Ed.2d 428 (2003). Thus, the second sentence requires that redistricting must take place “when” there is a census: *at least* once per decade.

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. 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 “[w]hen a new apportionment shall be made by Congress, the general assembly shall divide 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 after a census.

Furthermore, as other states have found, 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 (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 (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 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. 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 “[i]n 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) 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 “[s]enatorial 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.2d 757, 758 (1934). The contrast between these two sections clearly demonstrates that the framers intended to restrict the frequency of *congressional* redistricting 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.

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.

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:

[T]here 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) 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 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.

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 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 its prior holdings that the state constitution prohibits redistricting more than once per decade. [Legislature v. Deukmejian](#), 34 Cal.3d 658, 194 Cal.Rptr. 781, 669 P.2d 17 (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 (1907). *Wheeler* also cited and discussed similar holdings from several other

states, including New York, Massachusetts, Michigan, Ohio, Wisconsin, Virginia, and North Carolina. *Deukmejian*, 194 Cal.Rptr. 781, 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 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 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.

Before reaching its conclusion, the court acknowledged three federal 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, 96 S.Ct. 1814, 48 L.Ed.2d 295 (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, 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, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966). We have no similar issue here. In the other case, *Wise v. Lipscomb*, there is no majority opinion. 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978). The plurality opinion states that a federal court may “devise and *1242 impose a reapportionment plan pending later legislative action.” *Id.* at 540, 98 S.Ct. 2493 (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 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 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 (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 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 “[r]edistricting 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.

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 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 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.

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 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 enact¹ 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.

The only authority 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 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 “[t]he times, places and manner of holding elections for senators and representatives shall be prescribed in each state, *by the legislature 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, 52 S.Ct. 397, 76 L.Ed. 795 (1932), and that Colorado law supports such an inclusion.

In *Smiley*, the U.S. Supreme Court did hold that 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, 52 S.Ct. 397 (discussing [Davis v. Hildebrant](#), 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172 (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 *1245 1, Section 4, 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 (1931). The United States Supreme Court disagreed, concluding instead that the term referred to the lawmaking process applicable in Minnesota.

The Supreme Court stated:

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 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, s 4, of the

Federal Constitution, neither requires nor excludes such participation.

[Smiley](#), 285 U.S. at 367–68, 52 S.Ct. 397 (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, 52 S.Ct. 397.

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.²

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 (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 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.³ Similarly, [Article VI](#), which describes judicial powers in Colorado, makes no reference either to lawmaking in general or to redistricting in particular.

*1246 Not only, then, does Colorado law not support an independent 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 (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.).

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 (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 re Interrogatories*, 536 P.2d at 316 (citing to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)).

Prior to 1964, courts played only an anecdotal role in the process, in part because redistricting was perceived to be a non-justiciable, political issue,⁴ and in part

because constitutional issues seldom arose.⁵ Further, many legislatures, like our own, chose not to redistrict for long periods of time.

In 1962, the U.S. Supreme Court issued *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (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, 82 S.Ct. 691.

The following year, the U.S. Supreme Court announced a decision in *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (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, 84 S.Ct. 526. 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, 84 S.Ct. 1362, 12 L.Ed.2d 506 (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 requisites in a timely fashion after having had an adequate opportunity to do so.” *Id.* at 586, 84 S.Ct. 1362.

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 holding, the Court determined that the reference in 2 U.S.C. § 2c 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, 98 S.Ct. 2493, 57 L.Ed.2d 411 (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, 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, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966)); see also *Connor v. Coleman*, 440 U.S. 612, 613, 99 S.Ct. 1523, 59 L.Ed.2d 619 (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, 113 S.Ct. 1075, 122 L.Ed.2d 388 (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, 113 S.Ct. 1075. 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, 113 S.Ct.

1075 (emphasis added). Again, the Court did not imply that either 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 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 “[t]o 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 plan pending later legislative action.” *Id.* (quoting *Wise*, 437 U.S. at 540, 98 S.Ct. 2493). The District Court also relied on *Burns*, 384 U.S. at 85, 86 S.Ct. 1286, where the Supreme Court stated: “[t]he 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 1545.⁶

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, 48 S.Ct. 480, 72 L.Ed. 845 (1928); *Speer v. People*, 52 Colo. 325, 122 P. 768, 771–72 (1912); Colo. Const. art. III.

In no other circumstance could 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 operated to divest the General Assembly of its authority. *Maj. op.* at 1226.

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, 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, 194 Cal.Rptr. 781, 669 P.2d 17, 22 (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, § 3.

In *State v. Weatherill*, 125 Minn. 336, 147 N.W. 105 (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 “[i]t 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 (1963) (holding that “the duty to properly apportion legislative districts is a continuing one”); see also *Selzer 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 (1960) (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.⁷

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 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 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.⁸

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 ample time to conduct an evidentiary hearing, await a trial court ruling, and appeal the *Keller* case.⁹ 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.

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 when it will supersede the functions of such appeal. See *Fitzgerald v. Dist. Court*, 177 Colo. 29, 493 P.2d 27, 29 (1972); *Weaver Constr. Co. v. Dist. Court*, 190 Colo. 227, 545 P.2d 1042, 1044 (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 (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 (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 (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 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 Commrs.*, 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 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 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 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—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.

All Citations

79 P.3d 1221

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.
- 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.
- 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).
- 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.

- 5 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. 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).
- 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](#), 277 Ga. 1, 586 S.E.2d 606 (2003); [State ex rel. Condon v. Hodges](#), 349 S.C. 232, 562 S.E.2d 623 (2002).
- 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, 84 S.Ct. 526.
- 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:

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).
- 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.
- 10 We neither examine nor decide whether federal law prohibits redistricting more than once per decade.
- 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).
- 13 The statistics cited above were compiled from the front of the Colorado Session Law books, which have listed party affiliations since 1915.

- 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....”).
- 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.
- 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.
- 1 See [Branch v. Smith](#), 538 U.S. 254, 123 S.Ct. 1429, 1437, 155 L.Ed.2d 407 (2003).
- 2 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 1226, 1231, 1232, and 1235. 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.
- 3 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 (1975).
- 4 See [Colegrove v. Green](#), 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).
- 5 See [Armstrong](#), 95 Colo. 425, 37 P.2d 757 (example of one of the early cases raising constitutional issues in redistricting).
- 6 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 “[s]uch 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”.
- 7 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](#), —U.S. —, — n. 2, 123 S.Ct. 2498, 2516 n. 2, 156 L.Ed.2d 428 (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, 84 S.Ct. 1362 (“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.”
- 8 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.

- 9 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.

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615 N.W.2d 590

Supreme Court of South Dakota.

Considered on Briefs July 13, 2000.

Decided July 26, 2000.

In the Matter of the CERTIFICATION OF A QUESTION OF LAW FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION, Pursuant to the Provisions of SDCL 15–24A–1, and Concerning Federal Actions Civ. 00–3008 and Civ. 00–3015 (D.S.D.), Titled as Follows:

Steven C. Emery, Rocky Le Compte,
and James Picotte, Plaintiffs,

v.

Roger Hunt, in his official capacity as
Speaker of the South Dakota House of
Representatives, South Dakota House of
Representatives, Carole Hillard, in her official
capacity as President of the South Dakota
Senate, South Dakota Senate, and Joyce
Hazeltine, in her official capacity as Secretary
of the State of South Dakota, Defendants.

United States of America, Plaintiff,

v.

State of South Dakota, William J. Janklow,
in his official capacity as Governor of the
State of South Dakota, Harold Halverson,
in his official capacity as the President Pro
Tempore of the Senate of the State of South
Dakota, Roger Hunt, in his official capacity as
the Speaker of the House of Representatives
of the State of South Dakota, Mark W.
Barnett, in his official capacity as Attorney
General of the State of South Dakota, and
County Auditors for Butte, Corson, Dewey,
Harding, Perkins and Ziebach Counties,
in their official capacities, Defendants.

No. 21504

Synopsis

Residents of state legislative district brought suit in federal court against state officials, alleging that statutory amendment, which modified system for election of state representatives from district from two single-member house districts consisting of specified geographic areas, to at-large voting for two representatives, violated State Constitution and federal Voting Rights Act. Separate federal action was brought by the United States, alleging a violation of Voting Rights Act, and matters were consolidated. The United States District Court for the District of South Dakota, [Charles B. Kornmann](#), J., certified question of state law. After accepting certification, the Supreme Court, [Amundson](#), J., held that amendment to statute constituted an impermissible reapportionment by Legislature other than after a decennial census, in violation of provision of State Constitution governing legislative reapportionment.

Question answered in the affirmative.

[Sabers](#), J., dissented and filed opinion.

[Gilbertson](#), J., dissented and filed opinion.

*592 Original Proceeding

Attorneys and Law Firms

[Laughlin McDonald](#) and [Bryan Sells](#) of American Civil Liberties Foundation, Atlanta, Georgia, [Patrick Duffy](#), Rapid City, South Dakota, Attorneys for plaintiffs Steven C. Emery, Rocky LeCompte and James Picotte.

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[Mark Barnett](#), Attorney General, [John P. Guhin](#), Deputy Attorney General, [Sherri Sundem Wald](#), Assistant Attorney General, Pierre, South Dakota, Attorneys for defendants.

Opinion

AMUNDSON, Justice.

[¶ 1.] Pursuant to [SDCL 15-24A-1](#), District Judge Charles B. Kornmann of the United States District Court, District of South Dakota, certified to this Court the following question:

Whether the South Dakota Legislature acted in violation of [Article III, Section 5 of the South Dakota Constitution](#), by the enactment of Chapter 21, Session laws of 1996, now codified as [SDCL 2-2-28](#).

In his certification, Judge Kornmann indicated that it appears there is no controlling precedent on this issue in the decisions of this Court. As set forth below, the question is controlled by our decision in *In re Opinion of Judges*, 61 S.D. 107, 246 N.W. 295 (1933) and is answered in the affirmative.

FACTS AND PROCEDURE

[¶ 2.] Plaintiffs in the District Court action are the United States and individual plaintiffs, Steven C. Emery, Rocky LeCompte, and James Picotte. The individual plaintiffs are voters and residents of Dewey County within legislative District No. 28 and are enrolled members of the Cheyenne River Sioux Tribe. They brought action in United States District Court against defendants who are Speaker of the South Dakota House of Representatives Roger Hunt, the South Dakota House of Representatives, President of the South Dakota Senate Carole Hillard, the South Dakota Senate, and Secretary of the State of South Dakota Joyce Hazeltine, all in *593 their official capacities. They claimed that the current at-large election plan in legislative District No. 28 violates Section 2 of the Voting Rights Act of 1965, [42 USC § 1973](#), as amended, and is unauthorized by [Article III, Section 5 of the South Dakota Constitution](#). The United States filed a similar action limited to a claim of violation of the federal statute. Defendants in that action are the State of South Dakota, Governor William Janklow, President Pro Tempore of the South Dakota Senate Harold Halverson, Speaker of the House of Representatives Roger Hunt, Attorney General of the State of South Dakota Mark Barnett, Secretary of the State of South Dakota Joyce Hazeltine, and the county auditors for Butte, Corson, Dewey, Harding, Perkins and Ziebach counties, all in their official capacities.

[¶ 3.] Following consolidation of these cases and upon motion by the State defendants, the District Court certified the above question of state law to this Court, which we accepted.

ANALYSIS AND DECISION

[¶ 4.] [Article III, Section 5 of the South Dakota Constitution](#) sets forth an affirmative mandate to the South Dakota Legislature for apportionment of its membership. It provides:

The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census. *An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required.* If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.

(emphasis added). In 1991, following the 1990 decennial census, the Legislature enacted [SDCL 2-2-28](#), which then provided:

Each representative district as provided for in § 2-2-26 is entitled to two representatives. However, in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts as follows:

- (1) District No. 28A—Dewey and Ziebach counties and that portion of Corson county consisting of Bullhead, Kenel, Liberty, Little Oak, Little Eagle, McLaughlin, Ridgeland and Wakpala precincts.
- (2) District No. 28B—Harding and Perkins counties and that portion of Corson county consisting of Delaney, Grand Valley, Lincoln, McIntosh, Morristown and Wautauga precincts, and the cities of McIntosh, McLaughlin and Morristown, and that portion of Butte county west of U.S. Highway 85, north of U.S. Highway 212 and east of S.D. Highway 79, excluding the cities of Belle Fourche and Nisland.

In 1996, the Legislature amended this statute as follows: “Each representative district as provided for in § 2–2–26 is entitled to two representatives.” We are asked to determine whether this 1996 amendment violates [Article III, Section 5 of our Constitution](#) which mandates apportionment in 1991 and every ten years thereafter. Clearly, the 1996 amendment reapportions legislative membership by eliminating Districts No. 28A and 28B.

[¶ 5.] “The Legislature is vested with authority to deal with any subject within the scope of civil government, except insofar as it is restrained by constitutional provisions, or by the valid treaties *594 and acts of Congress.” *Kane v. Kundert*, 371 N.W.2d 172, 174 (S.D.1985) (citations omitted). “If constitutional power does not exist, it cannot be acquired by legislative assertion.” *State ex rel. Oster v. Jorgenson*, 81 S.D. 447, 450, 136 N.W.2d 870, 871 (1965). “‘The Constitution is the mother law. It is not the baby. Statutes must conform to the Constitution, not vice versa.’” *Poppen v. Walker*, 520 N.W.2d 238, 242 (S.D.1994) (quoting *Cummings v. Mickelson*, 495 N.W.2d 493, 507 (S.D.1993) (Henderson, J., concurring in part; dissenting in part)).

[¶ 6.] In *In re Opinion of the Judges*, 61 S.D. 107, 246 N.W. 295 (1933), we answered an inquiry from the Governor regarding the authority of the Legislature to enact a reapportionment measure in the 1933 legislative session. The question required interpretation of [Article III, Section 5 of the South Dakota Constitution](#), which at that time read, in relevant part, that the legislature shall apportion its membership in 1895 and every ten years thereafter and at no other time.¹ When this question was raised, the first legislature meeting after the last federal census was the Twenty–Second Legislature, which met in 1931. It failed to make an apportionment as required by the Constitution. Having failed to perform this duty, the question then became whether the Twenty–Third Legislature had the authority to exercise this duty and make an apportionment. We answered in the affirmative, noting the duty continues until performed.

[¶ 7.] In arriving at this answer, the constitutions of several other states were examined and found to contain language similar to our own regarding apportionment. We noted: “It seems to be held by all the courts which have had occasion to pass upon the matter that an affirmative mandate for legislative action at a specified time is an implied prohibition of action at any other time.” *Opinion*, 61 S.D. at 111, 246 N.W. at 296 (emphasis added). The fact that the prohibition in our

constitutional provision was expressed rather than implied was not held to be a valid distinction. *Id.* We continued:

The framers of our Constitution did not, we think, have in mind the possibility that a Legislature might disobey the constitutional mandate, and might fail to make an apportionment at the time when that duty was affirmatively imposed upon them by the Constitution. It seems quite apparent that the framers of the Constitution in providing for apportionment ‘at its first regular session, after each enumeration ... but at no other time,’ meant to say only this and nothing more: That the Legislature should make an apportionment at the first session after an enumeration as affirmatively required by the Constitution, and having so done (as the Constitution makers assumed they would) they should not again exercise such power until after another enumeration.

In other words, when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration....

Id., 61 S.D. at 111–12, 246 N.W. at 296–97 (emphasis added).

[¶ 8.] Here we address not the Legislature's failure to act to perform its constitutional duty but whether the Legislature *595 had authority to act when it amended [SDCL 2–2–28](#) in 1996. The holding of *Opinion* instructs that because the Legislature did perform its constitutional duty when it enacted apportionment legislation in 1991 following the 1990 federal census, it lacked constitutional authority to make another apportionment until after the next federal census.

[¶ 9.] We reinforced this holding in 1985: “When there is an affirmative constitutional mandate for legislative action at a certain specified time, there is an implied prohibition of action at any other time.” *Kane*, 371 N.W.2d at 174 (citing *Opinion, supra*). *Kane* was decided after [Article III, Section 5](#) had been amended in 1982. As in *Opinion*, we determined in *Kane* that even without the express prohibition, the affirmative mandate for legislative action precludes action at any other time. The constitutional provision, as amended, reads, in part, that “[a]n apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991.” This language is mandatory and does not contemplate that the Legislature will fail to make an apportionment every ten years after 1991, nor does it provide, as interpreted in *Opinion* and reinforced in *Kane*, for an apportionment to be made at any other

time after that duty has been discharged. The Sixty-Sixth Legislature, sitting in 1991, apportioned its membership by enacting [SDCL 2-2-28](#). There is no constitutional authority for another legislative apportionment until 2001. Any other conclusion must reverse these two long-standing precedents.

[¶ 10.] Other jurisdictions, examining state constitutions with provisions similar to the 1982 amendment, that is, with no express prohibition of apportionment at a time other than that constitutionally prescribed, have reached the same conclusion. “It is the general rule that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period prescribed by the Constitution.” *Harris v. Shanahan*, 192 Kan. 183, 387 P.2d 771, 779–80 (1963); *Lamson v. Sec’y of Commonwealth*, 341 Mass. 264, 168 N.E.2d 480, 483 (1960); *Opinion of the Justices*, 254 Ala. 185, 47 So.2d 714, 716 (Al 1950); *Jones v. Freeman*, 193 Okla. 554, 146 P.2d 564, 573 (1943); *People ex rel. Mooney v. Hutchinson*, 172 Ill. 486, 50 N.E. 599, 601 (1898); *People ex rel. Carter v. Rice*, 135 N.Y. 473, 31 N.E. 921, 926 (1892); 25 Am.Jur.2d Elections §§ 7–9 (1999).

If legislative power is given in general terms, and is not regulated, it may be exercised in any manner chosen by the legislature; *but where the constitution fixes the time and mode of exercising a particular power it contains a necessary implication against anything contrary to it, and by setting a particular time for its exercise it also sets a boundary to the legislative power. If a power is given, and the mode of its exercise is prescribed, all other modes are excluded.*

Hutchinson, 50 N.E. at 601 (emphasis added).

[¶ 11.] In 1982, the voters of this State transferred the duty of apportionment, if not performed by the Legislature, to this Court. The relevant part of [Article III, Section 5](#), as amended, reads:

An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. *If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.*

(emphasis added). This amendment is “the latest expression of the will of the people with respect to matters embraced

therein and prevails over all preexisting inconsistent constitutional provisions.” *596 *State v. Sathre*, 113 N.W.2d 679, 683 (N.D.1962); 16 Am.Jur.2d Constitutional Law § 81 (1998). The plain language of this amendment by the people supports an interpretation that the Legislature may only act to apportion after a decennial census and at no other time.

[¶ 12.] “[A]ny Legislature whose duty it is to make an apportionment” will only be those legislatures meeting in 1983, 1991, and every ten years thereafter. The constitution provides for no other time for apportionment. The 1982 amendment requires this Court to apportion the Legislature should the Legislature fail to perform its duty.² The Court's duty is also mandated to be performed at a time certain. It may only be performed within ninety days after December first of 1991 and every ten years thereafter if the Legislature fails to apportion its membership by the December first deadline. If the Legislature were free to apportion at any time, why transfer this duty to the Court to be performed within a specific period of time in the event the Legislature fails to act?

[¶ 13.] The State argues the 1996 amendment is not an apportionment, but merely changes one voting district from two single-member districts into a dual-member district. Apportionment is defined as the “process by which legislative seats are distributed among units entitled to representation.” Black's Law Dictionary at 99 (6th ed. 1990). There is no question the 1996 amendment to [SDCL 2-2-28](#) effects an apportionment. The amended statute abolished distribution of a legislative seat in Districts No. 28A and 28B, and distributed two seats to District No. 28.

[¶ 14.] Further, the State claims the 1982 amendment to the Constitution, deleting the words “at no other time” from [Article III, Section 5](#) permits redistricting at times other than following a decennial census. This argument has already been addressed above. “We think no valid distinction can be based upon the point that in our Constitution the prohibition against action at any other time is express rather than implied.” *Opinion*, 61 S.D. at 111, 246 N.W. at 296. The affirmative constitutional mandate for legislative action at a specified time remains in the present version of [Article III, Section 5](#), thereby providing an implied prohibition of action at any other time. *Kane*, 371 N.W.2d at 174.

[¶ 15.] Moreover, this argument disregards the language added by the voters in 1982, transferring the duty to apportion to this Court to perform within ninety days after the Legislature's deadline for performance has expired. We are not at liberty to ignore any part of the provision.

“ ‘A Constitutional provision, like a statute, must be read giving full effect to all of its parts.’ The court, in construing a constitutional provision, must have regard to the whole instrument, and must seek to harmonize the various provisions, and if possible, give effect to all of them.” *Assoc. Gen. Contractors v. Schreiner*, 492 N.W.2d 916, 922–23 (S.D.1992) (citations omitted). The provision is self-executing and, once the duty to apportion has transferred to this Court, prohibits the Legislature from taking further action until after the next federal census.

[¶ 16.] Finally, the State claims the South Dakota Legislature enacted the 1996 amendment in response to the United States Supreme Court decision in *Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) to “correct” what it perceived to be an unconstitutional act it enacted in 1991. *Miller* addressed a redistricting plan in Georgia involving congressional *597 seats which was held to be violative of the Fourteenth Amendment's equal protection clause because it was drawn on the basis of race without sufficient showing that it was narrowly tailored to achieve a compelling state interest, thus satisfying strict scrutiny.

[¶ 17.] *Miller* and its progeny must be read in conjunction with South Dakota's compliance with the Voting Rights Act of 1965, 42 USC § 1973, as amended. See *Sanchez v. State of Colorado*, 97 F.3d 1303, 1327 (10th Cir.1996) (“*Miller* left open the question of whether compliance with the VRA, ‘standing alone, can provide a compelling interest independent of any interest in remedying past discrimination.’” (quoting *Miller*, 515 U.S. at 921, 115 S.Ct. at 2490–91, 132 L.Ed.2d at 783)).³ This argument by State begs the federal question left pending before the United States District Court and we are without jurisdiction to address this issue. The specific state law question certified to this Court has been answered.

CONCLUSION

[¶ 18.] Constitutional provisions are not grants of power to the Legislature, but are instead limitations on legislative authority. *Poppen*, 520 N.W.2d at 241 (citing *Wyatt v. Kundert*, 375 N.W.2d 186, 191 (S.D.1985)). Here, the Legislature acted beyond its constitutional limits. The certified question is answered in the affirmative. The South Dakota Legislature violated [Article III, Section 5 of the South Dakota Constitution](#) when it amended [SDCL 2–2–28](#) in 1996. As this amended form is declared unconstitutional, the 1991

version of [SDCL 2–2–28](#) remains in full force and effect. *In re Certification of Questions of Law*, 1996 SD 10, ¶ 87, 544 N.W.2d 183, 204; *Weegar v. Bakeberg*, 527 N.W.2d 676, 678 (S.D.1995).

[¶ 19.] [MILLER](#), Chief Justice, and [KONENKAMP](#), Justice, concur.

[¶ 20.] [SABERS](#) and [GILBERTSON](#), Justices, dissent.

[¶ 21.] [SABERS](#), Justice (dissenting).

[¶ 22.] I disagree with the majority opinion's conclusion that the South Dakota Legislature exceeded its constitutional authority in enacting [SDCL 2–2–28](#). Because the 1991 version of [SDCL 2–2–28](#) violated the Equal Protection Clause within the Fourteenth Amendment (amend.XIV, § 1) and the corresponding provision of the South Dakota Constitution (art. VI, § 2), the 1996 amendment was corrective and, therefore, constitutional.

[¶ 23.] The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” The purpose is to promote “racial neutrality in governmental decisionmaking.” *Miller v. Johnson*, 515 U.S. 900, 904, 115 S.Ct. 2475, 2482, 132 L.Ed.2d 762, 771 (1995) (citations omitted). Thus, any legislation which makes distinctions on the basis of race or ethnicity is inherently suspect and, thus, subject to a strict scrutiny analysis. *Id.* (citations omitted). This includes redistricting legislation. See *Shaw v. Reno*, 509 U.S. 630, 644, 113 S.Ct. 2816, 2825, 125 L.Ed.2d 511, 526–27 (1993) (providing that “redistricting legislation that is so bizarre on its face that it is ‘unexplainable on grounds other than race,’ ... demands the same close scrutiny that we give other state laws that classify citizens by race.” (quotation omitted)).

[¶ 24.] In 1991, the South Dakota Legislature enacted [SDCL 2–2–28](#):

Each representative district as provided for in § 2–2–26 is entitled to two representatives. However, *in order to protect minority voting rights*, District No. 28 shall consist of two single-member house districts as follows:

*598 (1) District No. 28A—Dewey and Ziebach counties and that portion of Corson county consisting

of Bullhead, Kenel, Liberty, Little Oak, Little Eagle, McLaughlin, Ridgeland and Wakpala precincts.

- (2) District No. 28B—Harding and Perkins counties and that portion of Corson county consisting of Delaney, Grand Valley, Lincoln, McIntosh, Morristown and Wautauga precincts, and the cities of McIntosh, McLaughlin and Morristown and that portion of Butte county west of U.S. Highway 85, north of U.S. Highway 212 and east of SD Highway 79, excluding the cities of Belle Fourche and Nisland.

(emphasis added). In application, District 28A was carved out to include the Cheyenne River Sioux Reservation and portion of the Standing Rock Reservation, thereby creating a majority Native American Indian district. The plain statutory language unequivocally provides that the purpose of the re-districting was to “protect minority voting rights.” This results in racial gerrymandering—plain and simple—and, therefore, violates the Fourteenth Amendment. The President of the Senate in 1991 corroborated this purpose:

[District 28A] was configured as a single-member district primarily on the basis of race. In other words, [it] was configured as a single-member district to gather within it as many persons as possible who were [Native American] Indian so as to maximize their chance of electing a [Native American] Indian to the legislature.

Race was the predominant factor in drawing two single-member districts in District 28 in 1991 and the other traditional districting principles were subordinated to racial objectives.

Additionally, the minutes from the Redistricting Preparation Committee continually discuss a desire to maximize the “likelihood ... for the Lakota to elect legislative representatives.” Obviously, race was the predominant, overriding factor explaining the legislature's redistricting of District 28.

[¶ 25.] In 1993 and 1995, the United States Supreme Court held that redistricting legislation, even if it is neutral on its face, is unconstitutional if the effect is to separate citizens “into different voting districts on the basis of race.” *Miller*, 515 U.S. at 911, 115 S.Ct. at 2486, 132 L.Ed.2d at 776. See also *Shaw*, 509 U.S. at 657, 113 S.Ct. at 2832, 125 L.Ed.2d at 535 (stating that “race-based districting by our state legislatures demands close judicial scrutiny.”). In its analysis, the Court determined that districting on the basis of race “assumes from a group of voters' race that they ‘think alike, share the same political interests, and will prefer the

same candidates at the polls,’ it engages in racial stereotyping at odds with equal protection mandates.” *Miller*, 515 U.S. at 920, 115 S.Ct. at 2490, 132 L.Ed.2d at 782 (quoting *Shaw*, 509 U.S. at 647, 113 S.Ct. at 2826, 125 L.Ed.2d at 529) (citing *Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411, 424 (1991) (stating “We may not accept as a defense to racial discrimination the very stereotype the law condemns.”)).⁴ The Court also clarified that *599 its holding in *Shaw* extended to prohibit racial gerrymandering regardless of how compact or contiguous the new district was:

Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

Id. at 913, 115 S.Ct. at 2486, 132 L.Ed.2d at 777.

[¶ 26.] After the *Miller* decision was issued, Senator Lee Schoenbeck testified that he believed “that the creation of Districts 28A and 28B by the 1991 South Dakota Legislature violated the Equal Protection Clause of the ... Fourteenth Amendment.” To remedy this constitutional violation, he introduced legislation, in 1996, to amend SDCL 2–2–28 by returning District 28 to a multi-member district. The amendment passed and SDCL 2–2–28 currently provides: “Each representative district as provided for in § 2–2–26 is entitled to two representatives.”

[¶ 27.] The plaintiffs argue that this amendment violates Article III, Section 5 of the South Dakota Constitution: “[a]n apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991.” Regardless of whether the legislature was prohibited from reapportioning the district in 1996, it was required to abide by the federal constitution and when there is an unavoidable conflict between the application of state and federal constitutions, the clear language of the Supremacy Clause controls:

This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2. After evaluating and balancing the competing constitutional values at stake, one must logically

conclude that the substantive provisions of the United States Constitution control over the procedural provision within the South Dakota Constitution.

[¶ 28.] It is rudimentary black-letter law that a statute may not be enacted in derogation of the state or federal constitutions. See *Kane v. Kundert*, 371 N.W.2d 172, 175 (S.D.1985) (stating that “[i]t is rudimentary that a statute must serve and cannot abrogate the Constitution.”). When a legislative enactment does conflict with the federal Constitution, it “must be disregarded – treated as if [it was] never enacted – by all courts recognizing the Constitution as the paramount law of the land.” *Wolff v. New Orleans*, 103 U.S. 358, 365, 26 L.Ed. 395, 398 (1880). After considering these rules, we must declare that the 1991 version of SDCL 2–2–28 was invalid because it conflicted with the Due Process Clause of the Fourteenth Amendment. Furthermore, the 1996 amendment is valid because the legislature has a continuing duty of reapportionment and that duty continues until it is performed within the ambits of the state and federal constitutions. See *In re Opinion of the Judges*, 61 S.D. 107, 246 N.W. 295, 297 (1933).

[¶ 29.] In summary:

- (1) It is clear that the condition “at no other time” has been deleted.
- (2) Even if the condition remained in effect, it would not prohibit a mere correction to a reapportionment plan *600 in contrast to the creation of a new reapportionment.
- (3) Even if the above condition remained in effect, it would not prevent a mere correction to an illegal provision in a reapportionment plan, as here.
- (4) Therefore, the legislative enactment of SDCL 2–2–28 was not only constitutional, it would, in effect, be required by the Constitutions of the State of South Dakota and the United States.

GILBERTSON, Justice (dissenting).

[¶ 30.] I agree that the 1996 amendment to SDCL 2–2–28 deals with apportionment. However, I disagree that it violates Article III, § 5 of the South Dakota Constitution. While that provision makes it the duty of the legislature to apportion itself every ten years, as the article is currently enacted it does not restrict the legislature from exercising its right to

apportion on other occasions. Not only is this supported by the express language of the Constitution, but also by the history of this provision and its predecessor. Therefore I respectfully dissent.

[¶ 31.] In ascertaining the intent of the adopters of the current constitutional text we look first to its predecessor. *S.D. Automobile Club v. Volk*, 305 N.W.2d 693, 697 (SD 1981). The original version of Article III, § 5 enacted in 1889 stated as follows:

The legislature shall provide by law for the enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five and every ten years thereafter; and at its first regular session, after each enumeration and also after each enumeration made by authority of the United States, *but at no other time*, the legislature shall apportion the senators and representatives according to the number of inhabitants, excluding Indians not taxed and soldiers and officers of the United States army and navy. Provided, that the legislature may make an apportionment at its first session after the admission of South Dakota as a state. (emphasis added).

This article traces its roots back to the Constitutional Convention of 1883 where a similar provision passed without recorded debate. See *Journal of the Constitutional Convention of 1883*, South Dakota Historical Collections Vol. 21, p. 350, 358 (1942).

[¶ 32.] However, when the same draft was presented to the 1885 Constitutional Convention, a vigorous debate ensued. One faction argued that the rapid growth of the proposed new State of South Dakota justified the legislative flexibility to authorize a more frequent apportionment. An amendment was offered to strike the words “but at no other time.”⁵ South Dakota Constitutional Convention Debates of 1885, Vol. 1 pp. 207–09. This disputed language⁶ was crucial to this debate as it *601 was recognized that the constitution was but a limit on the power of the legislature rather than a grant of power to it. *Id.* at 207. See also *Territory v. Scott*, 3 Dak. 357, 20 N.W. 401, 404 (1884). Ultimately the forces in favor of the restrictive “at no other time” position were to prevail and Article III, § 5 was so enacted in 1889. “First and foremost, the object of construing a constitution[al provision] is to give effect to the intent of the framers of the organic law and of the people adopting it.” *In re Janklow*, 1999 SD 27, ¶ 5, 589 N.W.2d 624, 626 (citing *Schomer v. Scott*, 65 S.D. 353, 274 N.W. 556, 559 (1937); *State v. Jorgenson*, 81 S.D. 447, 136 N.W.2d 870, 875 (1965)).

[¶ 33.] This Court was called upon to interpret this provision in *Opinion of the Judges*, 61 S.D. 107, 246 N.W. 295 (1933). The issue before the Court was whether the 1933 legislature had the authority to apportion itself in light of the fact that the 1931 legislature had failed to act although required to do so by *Article III, § 5*. We found that such authority existed.

[¶ 34.] In dictum this Court cited cases from other jurisdictions that implied a restriction “at no other time” if one was not expressly drafted into the constitution. In so doing the Court failed to cite to our own constitutional debates as to the actual reason this express language was specifically used. It is very clear from these debates that if the legislature was to be precluded from authorizing an apportionment more often than every ten years, the limitation had to be an express one. No delegate in the Constitutional Convention of 1885 attempted to argue that the proposed text of this article contained an implied limitation on more frequent apportionments than were specifically enumerated. Further, the Court failed to consider the constitutional doctrine that was recognized by the Constitutional Convention of 1885 during this debate, that the constitution is but a limit on legislative authority and not a grant of authority to that body. See *State Census*, 62 N.W. at 130.

[¶ 35.] In 1982 an amended version of *Article III, § 5* was proposed to the voters. It passed and is the current provision in effect.⁷ It states:

The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census. An apportionment shall be made by the Legislature in 1983 and 1991 and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.

Gone were the words “but at no other time.” “Usually amendments are adopted for the express purpose of making

a *602 change in the existing system.” *Volk*, 305 N.W.2d at 697.

[¶ 36.] This Court presumes that the people adopted this amended constitutional provision in view of and with the understanding of the prior existing provision. *Kneip v. Herseeth*, 87 S.D. 642, 214 N.W.2d 93, 102 (1974). An examination of the explanation of the ballot questions drafted by the South Dakota Secretary of State at the 1982 election sets out verbatim both the old text and the proposed text upon which the voters were to pass. (See attached copy). The deletion of the “but at no other time” language was obvious to the voters. “The courts are under the duty to consider the old law, the mischief, and the remedy, and to interpret the constitution broadly to accomplish the manifest purpose of the amendment.” *Volk*, 305 N.W.2d at 697 (citing 16 Am.Jur.2d *Constitutional Law* § 88 (1979) (footnotes omitted)).⁸

[¶ 37.] Thus it is clear that the advocates of legislative flexibility who lost their argument at the 1885 Constitutional Convention were ultimately vindicated by the voters in 1982. The express constitutional prohibition against the now challenged legislative apportionment that was to occur in 1996, was removed in 1982. As such, I would hold the 1996 amendment to *SDCL 2-2-28* to be constitutional.

[¶ 38.] For the above reasons I respectfully dissent.

*603 EXHIBIT A

EXHIBIT A

*604

1982 BALLOT QUESTIONS
STATE OF SOUTH DAKOTA
JULY 30, 1982

(MISS) ALICE KUNDERT
SECRETARY OF STATE
PIERRE, SD 57501

Amendment A

South Dakota Constitution be repealed and a new Section 5, Article III be submitted to the electorate of the State of South Dakota for their approval or rejection.

A

The following amendment to the Constitution is submitted to a vote of the people by initiative of the voters pursuant to the Constitution:

AN INITIATED PROPOSAL to repeal Section 5 of Article III of the South Dakota Constitution and adopt a new Section 5, Article III, relating to apportionment and the establishment of single member senate districts.

This proposed Constitutional Amendment would:

- (1) repeal existing § 5 of Article III of the Constitution which requires the Legislature to apportion its membership every ten years according to the federal census, and at no other time, commencing in 1951, and in the event the Legislature fails to so apportion, mandates the Governor, superintendent of public instruction, presiding judge of the Supreme Court, attorney general and secretary of state to apportion within thirty days after the Legislature adjourns and requires the Governor to proclaim such apportionment; and
- (2) place in the Constitution a new section requiring the Legislature to apportion its membership by dividing the state into single member senate districts and by establishing either single member or dual member house districts each wholly within a senate district. Each district shall consist of compact, contiguous territory containing, as nearly as practicable, equal population. Apportionment would be required in 1983, 1991, and each ten years thereafter. Upon failure of the legislature to so apportion, the Supreme Court would do so within ninety days.

A vote "Yes" by a majority will change the Constitution as explained above.

A vote "No" by a majority will leave the Constitution as it exists.

Shall the proposed change of the Constitution be approved?

Following is the full text of the petition filed in the office of the Secretary of State:

WE, THE UNDERSIGNED, duly qualified voters of the State of South Dakota, hereby petition that Section 5 of Article III of the

The new Section 5, Article III shall be as follows:

The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census. An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.

All Citations

615 N.W.2d 590, 2000 S.D. 97

Footnotes

1 In its entirety, this provision read:

The legislature shall provide by law for the enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five and every ten years thereafter; and at its first regular session, after each enumeration and also after each enumeration made by authority of the United States, but at no other time, the legislature shall apportion the senators and representatives according to the number of inhabitants, excluding Indians not taxed and soldiers and officers of the United States army and navy. Provided, that the legislature may make an apportionment at its first session after the admission of South Dakota as a state.

2 As this Court observed in *Opinion*, 61 S.D. at 113, 246 N.W. at 297, "[t]he failure to perform the duty cannot cancel the legislative obligation." (quoting *Botti v. McGovern*, 97 N.J.L. 353, 118 A. 107, 108 (N.J.1922)). Observing the doctrine of separation of powers, this Court cannot compel the Legislature to perform its constitutional duties. *In re State Census*, 6 S.D. 540, 542, 62 N.W. 129, 130 (1895) (interpreting SDConst. Art. III, § 5). The voters merely transferred this obligation to the Court to perform should the Legislature fail to do so.

3 In a separate concurrence in *Bush v. Vera*, 517 U.S. 952, 990, 116 S.Ct. 1941, 1968, 135 L.Ed.2d 248, 278 (1996), Justice O'Connor announced that "compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest."

4 Plaintiffs argue:

This Court can take judicial notice of the facts that Native Americans in South Dakota have a common and distinct history, a special quasi-sovereign tribal status, and a unique political status under the treaties, laws, and executive orders of the United States and under the laws of South Dakota. It is clear that placing tribal members from the Cheyenne River Sioux Reservation and the Standing Rock Sioux Reservation in the same district is not to indulge in

racial stereotyping but simply to recognize communities that have a 'common thread of relevant interests.' (quoting *Miller*, 515 U.S. at 920, 115 S.Ct. at 2490, 132 L.Ed.2d at 782).

I disagree that we can take judicial notice that all Native American Indians within District 28A have the same perspective as the plaintiffs do in this case. To comply with plaintiff's request is the equivalent of engaging in racial stereotyping because we would be assuming that the affected Native Americans "think alike, share the same political interests, and will prefer the same candidates at the polls [.]'" *Miller*, 515 U.S. at 920, 115 S.Ct. at 2490, 132 L.Ed.2d at 782 (quotation omitted). In short, plaintiffs request that we impose "the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 928, 115 S.Ct. at 2494, 132 L.Ed.2d at 787.

- 5 Advocates of allowing legislative discretion in this matter argued that the rapid growth of the new state may require apportionment after every legislative session. Opponents countered that this would create "danger" that such a decision may rest on "the interest of the political party dominant[.]" South Dakota Constitutional Convention Debates of 1885, Vol. 1 p. 207. Participating in this debate were many of the existing and future leaders of the judiciary. Delegate Dighton Corson who in 1889 was to become the first Presiding Judge of the South Dakota Supreme Court, opposed the deletion of the words "but at no other time" for the following reason:

We have a census taken every ten years by United States officials. It is provided here that in the year 1895 a census shall also be taken. There are two provided for in ten years, and certainly that is enough, and I do not think it wise to subject the state to any unnecessary expense, and I am opposed to striking out any portion of it. *Id.* 205–206.

Also participating in the debate were Alphonso Kellam who also became a Judge of the South Dakota Supreme Court in 1889 and Judge Wilmot Brookings who had previously served on the Dakota Territorial Supreme Court. The Chair of the debate was the Honorable A.J. Edgerton who at that time was the Chief Justice of the Dakota Territorial Supreme Court. See generally 1999–2000 South Dakota Legislative Manual, pp. 490–91.

- 6 A dispute also arose over the words "shall" or "may" in regards to the duty of the legislature to conduct the census at the stated time. The "shall" faction successfully carried its position. However, this Court subsequently in *In re State Census*, 6 S.D. 540, 62 N.W. 129 (1895) held that when the 1895 legislature refused to conduct the census on the claim that it was not needed and was a waste of money, even though required by the Constitution, the legislature could not be forced by this Court to do so and the existing apportionment law would remain in effect until it did act.
- 7 Chapter 1 of the 1982 Session Laws indicates that this amendment was proposed by direct initiative of the voters rather than by the legislature. Thus, unlike the 1889 provision of this article, there exists no secondary material to be of assistance in interpreting the intent of the "framers ... and the people adopting it." *Janklow*, 1999 SD 27, ¶ 5, 589 N.W.2d at 626.
- 8 The Court today reasons that under the current version of *Article III, § 5*, "if the Legislature were free to apportion at any time, why transfer this duty to the Court to be performed within a specific period of time in the event the Legislature fails to act?" The answer is that under cases such as *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) it was held that malapportioned state legislatures constitute a violation of the Fourteenth Amendment Equal Protection Clause and as such must be promptly corrected when found to exist. The 1982 amendment to *Article III, § 5 of the South Dakota Constitution* recognized this requirement and if it were not timely done by the Legislature every ten years following the U.S. Census, it would be done by the South Dakota Supreme Court to avoid violation of the United States Constitution. Given the fact that the Legislature in 1895 and 1931, despite the express mandate of *Article III, § 5*, had refused to perform the required apportionment, the 1982 authorization for apportionment by the South Dakota Supreme Court in the face of legislative inaction cured any future threat of this prior problem and a *Baker v. Carr* violation. This is an entirely separate matter from the question now before us as to whether the legislature has the authority to exercise its prerogative to conduct an apportionment more often than the minimum that is expressly mandated by *Article III, § 5*.

34 Cal.3d 658

Supreme Court of California, In Bank.

LEGISLATURE OF the STATE OF

CALIFORNIA et al., Petitioners,

v.

George DEUKMEJIAN, as

Governor, etc., et al., Respondents;

Don SEBASTIANI et al.,

Real Parties in Interest.

Glenn M. ANDERSON et al., Petitioners,

v.

George DEUKMEJIAN, as

Governor, etc., et al., Respondents;

Don SEBASTIANI et al.,

Real Parties in Interest.

S.F. 24589, S.F. 24596

|

Sept. 15, 1983.

Synopsis

Mandamus proceeding was brought seeking to restrain respondents from expending any public funds or otherwise acting to carry out a special election proclaimed by respondent Governor for purpose of submitting voters an initiative measure which, if adopted, would realign legislative and congressional districts and repeal redistricting statutes. The Supreme Court held that state constitutional provision specifying that redistricting may occur only once within ten-year period following a federal census precluded a further change in district boundaries through statutory initiative process; furthermore, redistricting statutes were "effective" for purposes of the constitutional provision notwithstanding fact that no election had been held pursuant to their provisions.

Issued.

Richardson, J., filed dissenting opinion.

Attorneys and Law Firms

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J. Albert Woll, Laurence Gold, Washington, D.C., Marsha S. Berzon, Fred H. Altshuler, Stephen P. Berzon, Michael Rubin, Altshuler & Berzon, Charles P. Scully, Donald C. Carroll, Charles P. Scully II, San Francisco, John B. Clausen, County Counsel, Arthur W. Walenta, Asst. County Counsel, Martinez, Donald Clark, County Counsel, Robert Meniffee, Deputy County Counsel, San Jose, Joaquin G. Avila, Morris J. Baller, John E. Huerta, San Francisco, Douglas E. Mirell, Susan Lerner, Los Angeles, Barbara S. Bryant, Berkeley, Farnsworth, Saperstein & Brand, Oakland, Burton S. Levinson, Beverly Hills, Nathaniel S. Colley, Sacramento, Ephraim Margolin and Sandra Coliver, San Francisco, as amici curiae on behalf of petitioners.

John K. Van de Kamp, Atty. Gen., Richard D. Martland, Chief Asst. Atty. Gen., N. Eugene Hill and Paul H. Dobson, Deputy Attys. Gen., and Vance W. Raye, Sacramento, for respondents.

Pillsbury, Madison & Sutro, Walter R. Allan, Vaughn R. Walker, Frederick K. Lowell and Kevin M. Fong, San Francisco, for real parties in interest.

OpinionBY ***663** THE COURT:*

In this case we are called upon to determine the constitutionality of an attempt—novel in the history of this state—to readjust state legislative and congressional district boundaries through the statutory initiative process after the Legislature has already done so. We are asked by the proponents of the initiative to create an exception to the constitutionally mandated and long-established rule that redistricting may occur only once within the 10-year period following a federal census. We conclude, based upon the principle that in the enactment of statutes the constitutional limitations that bind the Legislature apply with equal force to the people's reserved power of initiative, that such an exception cannot be justified. Therefore, the proposed

initiative is constitutionally impermissible ***783 and may not be submitted to the voters.

****19** Petitioners in these consolidated proceedings are the Legislature of the State of California; Willie L. Brown, Jr., a taxpayer and Speaker of the California Assembly; David Roberti, a taxpayer and President Pro Tempore of the California Senate; three qualified electors; and twenty-eight California members of the House of Representatives. Respondents are the Governor; the Secretary of State; and the Clerk of the City and County of San Francisco and its Registrar of Voters, the latter two officials being sued individually and as representatives of all county clerks and registrars of voters of the state.¹ Real parties in interest are Don Sebastiani, Parker Montgomery, and Quentin Kopp, the proponents of the initiative measure which is the subject of this petition.²

Petitioners seek mandamus to restrain respondents, all of whom have official duties in the conduct and/or certification of elections in California, *664 from expending any public funds or otherwise acting to carry out a special election proclaimed by respondent Governor on July 18, 1983, to be conducted on December 13, 1983,³ for the purpose of submitting to the voters the initiative⁴ measure of which the real parties in interest are proponents. The initiative, if adopted, would realign the Assembly, Senate and congressional districts of California and repeal statutes enacted by the Legislature during the 1983–1984 First Extraordinary Session.⁵

****20 ***784** The principal claim of both the legislative and congressional petitioners is that the initiative measure is invalid because it represents an attempt to redistrict more than once in a decennial period—an attempt which both sets of petitioners say is barred by article XXI of the California Constitution, and which congressional petitioners also oppose on the basis that it would *665 violate article I, section 2, of the United States Constitution,⁶ and the Permanent Reapportionment Act (2 U.S.C. § 2a).⁷

Legislative and congressional petitioners join also in challenging the initiative on the ground that the districts it seeks to create violate, in the case of the congressional districts, the “equal representation” standard (*Karcher v. Daggett* (1983) 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133), and as to both types of districts the equal protection clauses of both the state and federal Constitutions. (U.S.

Const., 14th Amend.; art. I, § 7; *Reynolds v. Sims* (1964) 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; *Baker v. Carr* (1962) 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939.) The legislative petitioners argue also that the initiative unnecessarily disenfranchises certain voters, thus denying them due process and equal protection of the laws; that it fails to provide for redistricting by the Legislature in 1991 as mandated by article XXI; and that it cannot be understood by the voters because it is not accompanied by maps or other descriptive material adequate to permit them to visualize and comprehend the new districts.

Finally, amici curiae who have filed briefs in support of petitioners assert that article XXI permits adjustment of district boundaries only by the Legislature, and that the initiative violates the proscription contained in article II, section 8, subdivision (d), of the California Constitution against initiative measures “embracing more than one subject.”

We issued an alternative writ of mandate to consider the issues thus raised. Mandamus is an appropriate remedy. (*Assembly v. Deukmejian*, *supra*, 30 Cal.3d 638, 646, 180 Cal.Rptr. 297, 639 P.2d 939.)

PROPRIETY OF PREELECTION REVIEW

“As we have frequently observed, it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity. [Citations.]” (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4, 181 Cal.Rptr. 100, 641 P.2d 200.) That principle is a salutary one, and where appropriate we adhere to it. However, where the requisite *666 showing of invalidity has been made, departure from the general rule is compelled.

The general rule favoring postelection review contemplates that no serious consequences will result if consideration of the validity of a measure is delayed until after an election. Under those circumstances, the normal arguments in favor of the “passive virtues” suggest that a court not adjudicate an issue until it is clearly required to do so. If the measure passes, there will be ***785 ample time to rule on its validity. If it fails, judicial action will not be required.

****21** In this case both state and local election officials—while not taking any position on the substantive resolution of the case—have urged the court to decide the matter before the election because of what they consider to be the dire consequences of delay. They point, in part, to the high costs—estimated at \$15 million—which both state and local governments will be required to absorb if this special election is allowed to proceed, and suggest that if the initiative is in fact invalid this expenditure will be for naught. And they point—most significantly, in our view—to the very substantial problems for election officials, candidates, and supporters that would exist if our consideration of this matter were deferred beyond December. Indeed, the Secretary of State advises us that implementation of changes in district boundaries so close to the time at which procedures preliminary to the conduct of the June 1984 primary election must be undertaken would make the orderly conduct of that election impossible.⁸ Similar considerations underlay this court's decision to intervene prior to the election on the challenged reapportionment referenda in *Assembly v. Deukmejian*, *supra*, 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939.

Another and most formidable argument advanced by petitioners against the validity of the initiative is that the Legislature has already completed the constitutional duty of establishing district boundaries for this decennial period. This argument, if correct, would constitute an absolute bar to a further redistricting prior to the 1990 decennial census, whether by initiative or legislative action. As Justice Mosk observed in his separate opinion in *Brosnahan v. Eu*, *supra*, 31 Cal.3d 1, 6, 181 Cal.Rptr. 100, 641 P.2d 200: “[E]lection officials have been ordered not to place initiative and referendum proposals on the ballot on the ground that the electorate did not have the power to enact them since they were not legislative in character [citations], the subject matter was not *667 a municipal affair [citations], or the proposal amounted to a revision of the Constitution rather than an amendment thereto. [Citation.]” Here, as in those cases, the challenge goes to the power of the electorate to adopt the proposal in the first instance. This challenge does not require even a cursory examination of the substance of the initiative itself. The question raised is, in a sense, jurisdictional.

Moreover, and unlike the situation in *Brosnahan*, preelection review is here essential to further the purposes underlying the principle which is being invoked. As we shall explain, one of the primary purposes of the one-apportionment-per-decade rule upon which petitioners rely is to avoid subjecting the body politic unnecessarily to a repetition of the turmoil and

disruption which inevitably surround reapportionment and redistricting. Were we to defer judicial review until after the election, and then hold the initiative invalid on that ground, our ruling would come too late; part of the reason for the existence of the rule would already have been frustrated by default.

Finally, having issued the alternative writ and carefully considered the briefs and oral argument, we have concluded that a “clear showing of invalidity” has been made. There seems little reason in law or in policy for keeping that conclusion a secret. We turn, then, to the events which precipitated the instant dispute.

FACTUAL BACKGROUND

In September 1981 the Legislature passed, and the Governor signed, three statutes redefining the state's congressional, Senate and Assembly districts. Referenda petitions subjecting the statutes to voter approval were accepted by the Secretary of State in December 1981. In *Assembly v. Deukmejian*, *supra*, 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939, filed January 28, ***786 1982, this court upheld the validity of the referenda, ruled that they stayed operation of the statutes pending the referenda election, ****22** and judicially adopted the statutes' districts temporarily for the legislative and congressional elections of June and November 1982.

The 1981 statutes were rejected by the voters at the June 1982 referenda election. At the First Extraordinary Session of 1982–1983, convened in December 1982, the Legislature enacted chapter 6, establishing new boundaries for congressional districts, and chapter 8, doing the same for Senate and Assembly districts. Both chapters were signed by then Governor Brown on January 2, 1983. Chapter 8 (legislative districts) became effective immediately ***668** as an urgency statute,⁹ and chapter 6 (congressional districts) will go into effect on October 17, 1983, the 91st day after the July 19, 1983, adjournment of the extraordinary session. (*Art. IV, § 8*, subd. (c).)

As an urgency statute, chapter 8 was not subject to a referendum. (*Art. II, § 9*, subd. (a).) Chapter 6 would have been subject to a referendum under a petition filed by April 1 (“90 days after the enactment date”), but none was filed. (See *art. II, § 9*, subd. (b).)

The legislative and the congressional petitioners argue that because both chapter 6 and chapter 8 will be effective prior to December 14, 1983, the date upon which the initiative would become effective, if adopted by the voters (art. II, § 10, subd. (a)), it may not be adopted because only one valid reapportionment plan for these districts between each decennial federal census is permitted by article XXI. For reasons that we shall explain, we agree.

ONE REAPPORTIONMENT PER DECADE: THE HISTORICAL UNDERSTANDING

As adopted in 1879, article IV, section 6 of the California Constitution provided: “[t]he census taken under the direction of the Congress of the United States, in the year one thousand eight hundred and eighty, and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first session after each census, adjust such districts and re-apportion the representation so as to preserve them as near equal in population as may be.” To the extent that constitutional history offers any basis for ascertaining the intent of the framers of the Constitution of 1879, it supports our conclusion that the drafters intended thereby that the state be redistricted immediately after each decennial census and not again thereafter until the next census. This court has so held repeatedly.

*669 More than 75 years ago this court first considered whether a second change in the boundary of a legislative district was permitted by former article IV, section 6, and held that it was not. In *Wheeler v. Herbert* (1907) 152 Cal. 224, 92 P. 353, the question was presented in the context of a statute that permitted a change in the boundary between Fresno and Kings Counties which shifted territory from the southernmost part of the former to the latter. A resident of the territory challenged the statute on a ***787 variety of grounds. It was claimed that article IV, section 6, did not permit the Legislature to change a legislative district.

**23 That would occur, it was argued, if the county lines by which existing districts were defined should change. The court agreed that article IV, section 6, limited the Legislature's power to redistricting only once after each decennial census. Because the statute did not purport to change the legislative districts, we concluded the existing legislative districts would continue and upheld the statute.

Considering the power to change the boundaries of legislative districts, we said: “The provisions of section 6 of article

IV being construed as limitations, and being mandatory and prohibitory, it follows from their terms, and from the application of the maxim, *expressio unius est exclusio alterius*, that the legislative power to form legislative districts can be exercised but once during the period between one United States census and the succeeding one, and that, having been thus exercised in 1901, the districts cannot be again adjusted until the season of 1911. The general rule in regard to constitutional limitations of this character is that that which cannot be done directly cannot be done by indirection. This is a case to which the rule should be applied, since great abuses might follow a too frequent exercise of the power.” (152 Cal. at p. 237, 92 P. 353.)

In *Wheeler v. Herbert* the court supported its decision by reference to decisions of the courts of several other states which had reached similar conclusions in attempting to harmonize constitutional limitations on redistricting with the power to create or modify boundaries of political subdivisions. (See *People v. Board of Sup'rs.* (1895) 147 N.Y. 1 [41 N.E. 563]; *Lanning v. Carpenter* (1859) 20 N.Y. 447; *Stone v. Charlestown* (1873) 114 Mass. 214, 226–227; *Warren v. Mayor* (1854) 68 Mass. (2 Gray) 84, 101; *Opinion of Justices* (1839) 60 Mass. (6 Cush.) 578;¹⁰ *Smith v. Saginaw* (1890) 81 Mich. (23 & 24 Fuller) 123, 45 N.W. 964; *Bay County v. Bullock* (1883) 51 Mich. (15 & 16 Chaney) 544, 16 N.W. 896; *People ex rel. Attorney General v. Holihan* (1874) 29 Mich. (7 & 8 Post) 116; *State ex rel. Evans v. Dudley* (1853) 1 Ohio St. 437; *670 *State v. Stevens* (1901) 112 Wis. 170, 88 N.W. 48; *Wade v. Richmond* (1868) 18 Grat. (Va.) 583, 608–620; *Commissioners v. Ballard* (1873) 69 N.C. 18.)

The Michigan Constitution provided that “each apportionment and the division into representative districts by any board of supervisors shall remain unaltered until the return of another enumeration.” The Michigan Supreme Court held that although that limitation on the boards of supervisors did not mention the legislature, the language of the section mandating legislative reapportionment after each state or federal census “was so clear and the design so plain” that it must be read to prohibit additional changes in districts, whether by the legislature or a board of supervisors. As to the express limitation, the court remarked: “The provision noticed was not casually inserted, and without attention to its possible scope. It falls in with others which help to show a settled purpose to organize electoral districts in a way most likely to secure unity of interest and convenience, and to shield them for fixed periods against change.” (29 Mich. at p. 118.)

The North Carolina Constitution then provided that the senatorial districts established after each census “shall remain unaltered until after another census.”

The New York Constitution provided that legislative and local districts “shall remain unaltered until another enumeration shall be made” (147 N.Y. at p. 13, 41 N.E. 563.) The limitation was in the New York Constitution of 1846 (*Lanning v. Carpenter*, supra, 20 N.Y. 447, 451), and the Constitution of 1822 had required a decennial census followed by a new apportionment of members of the Legislature. (*Id.*, at p. 453.)

In *Dowell v. McLees* (1926) 199 Cal. 144, 248 P. 511, this court reconfirmed the once-a-decade principle as a matter of constitutional interpretation. There, pursuant to ***788 the Consolidation Act of 1913 (Stats.1913, ch. 311, § 1, p. 577), San Diego and East San Diego had been consolidated in 1923.

**24 Thereafter, in 1925, additional territory was annexed to San Diego pursuant to the Annexation Act (Stats.1913, ch. 312, § 9, p. 594). The 79th and 80th Assembly Districts then encompassed respectively the City of San Diego and the remainder of the county. This court rejected a claim that the consolidation and annexation had altered the boundaries of the 79th Assembly District. The court held, “following the reasoning and conclusions in *Wheeler v. Herbert*” (199 Cal. at p. 147, 248 P. 511): “In fixing and readjusting the boundaries of assembly districts the legislature acts pursuant to the provisions of section 6 of article IV of the constitution. Under that section, which is mandatory and prohibitory, the power to form legislative districts can be exercised but once during the period between one United States *671 census and the succeeding one (*Wheeler v. Herbert*, 152 Cal. 224, 92 P. 353), and by the terms of the section, until the legislative power is exercised as therein provided, assemblymen shall be elected by the districts as theretofore established.” (*Id.*, at p. 146, 92 P. 353, emphasis added.)

More recently, in *Yorty v. Anderson* (1963) 60 Cal.2d 312, 33 Cal.Rptr. 97, 384 P.2d 417, this court again recognized the prohibition, announced in *Wheeler* and *Dowell*, against successive district changes in the same inter-census period. Without questioning the continued validity of the general once-a-decade constitutional principle, we went on to explain that that rule did not preclude the Legislature from enacting a second statute if the first one had been invalidated by judicial decision or nullified by referendum. (60 Cal.2d at pp. 316–317, 33 Cal.Rptr. 97, 384 P.2d 417.)¹¹ And in our later decisions, we have uniformly assumed that only one

valid plan for legislative and congressional districts may be implemented in a decennial census period. (See *Legislature v. Reinecke* (1972) 6 Cal.3d 595, 604, 99 Cal.Rptr. 481, 492 P.2d 385, 7 Cal.3d 92, 93, 101 Cal.Rptr. 552, 496 P.2d 464; *Assembly v. Deukmejian*, supra, 30 Cal.3d 638, 671, 676, 180 Cal.Rptr. 297, 639 P.2d 939; *id.*, p. 692, 180 Cal.Rptr. 297, 639 P.2d 939 (dis. opn. of Richardson, J.).)¹²

INTERPRETATION AND APPLICATION OF ARTICLE XXI

Although former article IV, section 6, by its terms applied only to legislative districts, it was assumed that the once-a-decade rule of *Wheeler* and *Dowell* applied to congressional districts as well.¹³

On June 3, 1980, article XXI replaced former article IV, section 6. It provides:

*672 “SECTION 1. In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board ***789 of Equalization districts in conformance with the following standards:

“(a) Each member of the Senate, Assembly, Congress, and the Board of Equalization **25 shall be elected from a single-member district.

“(b) The population of all districts of a particular type shall be reasonably equal.

“(c) Every district shall be contiguous.

“(d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the state and ending at the southern boundary.

“(e) The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section.”

Article XXI thus expressly includes congressional districts among those subject to the requirement of adjustment following each decennial federal census. Although rephrased, article XXI perpetuates the command of article IV, section 6,

by providing that the Legislature “shall adjust the boundary lines” of the affected districts in the year following each federal census. Therefore, absent evidence that the people intended a different interpretation, it must be inferred that in the drafting and adopting of article XXI, the prior judicial interpretation of that language was considered and a similar interpretation of that article was intended. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 216, 168 Cal.Rptr. 455, 617 P.2d 1087; *Perry v. Jordan* (1949) 34 Cal.2d 87, 93, 207 P.2d 47.)

The Legislative Analyst's explanation of the measure and the arguments for and against it, set forth in the California Ballot Pamphlet for the Primary Election on June 3, 1980, at which time article XXI was ***673** adopted, reveal no such contrary intent or understanding.¹⁴ “It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts.” (*City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191, 44 P.2d 305.) The presumption is equally applicable to measures adopted by popular vote. (*Perry v. Jordan*, *supra*, 34 Cal.2d 87, 93, 207 P.2d 47.)

REAL PARTIES' CHALLENGE TO THE APPLICATION OF THE ESTABLISHED ONCE-A-DECADE RULE

Real parties in interest do not question the long line of California decisions which hold that the constitutional limitation to a single, valid decennial redistricting precludes a further change in district boundaries by the Legislature. Instead, they offer a novel theory—that the limitation of article XXI applies only to the Legislature and is inapplicable to the people's reserved initiative *****790** power. Alternatively, they argue that because the districts established by the Legislature in chapters 6 and 8 have not yet ****26** been “used,” these statutes have not become effective.

Assuming, but not deciding, that redistricting by initiative is permissible, we find the first proposition puzzling inasmuch as the reserved power to enact statutes by initiative is a legislative power, one that would otherwise reside in the Legislature. It has heretofore been considered to be no greater with respect to the nature and attributes of the statutes that may be enacted than that of the Legislature. Any doubt in this regard was conclusively ***674** dispelled by *Wallace v. Zinman* (1927) 200 Cal. 585, 254 P.2d 946, in which it

was claimed that an initiative statute was not invalid for failure to conform to the “single-subject rule” applicable to legislative enactments. Noting that the Constitution provided, as it does now in article I, section 26, that “[t]he provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise,” this court said: “It has been urged, however, that an initiative measure in its effect is a constitutional amendment, and as constitutional amendments need not conform to the provision of the constitution quoted above, this statute need not so conform to it. We are unable to accord any weight whatsoever to this contention. We do not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation. Throughout [section 1 of article IV of the constitution](#) a distinct line of demarcation is kept between a law or an act and a constitutional amendment. It is only another system added to our plan of state government by a permissive amendment to the constitution, but it was at no time intended that such permissive legislation by direct vote should override the other safeguards of the constitution. If an amendment of the constitution were intended, the provision requires steps to be taken that will apprise the voters thereof so that they may intelligently judge of the fitness of such measure as a constituent part of the organic law.” (200 Cal. at p. 593, 254 P.2d 946.)

That elementary principle is dispositive of any claim that because this redistricting is to be accomplished by initiative it is exempted from the prohibition of article XXI. A statutory initiative is subject to the same state and federal constitutional limitations as are the Legislature and the statutes which it enacts. (*Hays v. Wood* (1979) 25 Cal.3d 772, 786, fn. 3, 160 Cal.Rptr. 102, 603 P.2d 19; *Fair Political Practices Com. v. State Personnel Bd.* (1978) 77 Cal.App.3d 52, 56, 143 Cal.Rptr. 393, disapproved on another point in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 172 Cal.Rptr. 487, 624 P.2d 1215; see also, *Weaver v. Jordan* (1966) 64 Cal.2d 235, 241, 49 Cal.Rptr. 537, 411 P.2d 289, cert. den., 385 U.S. 844, 87 S.Ct. 49, 17 L.Ed.2d 75; *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533, 50 Cal.Rptr. 881, 413 P.2d 825, affd. *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830; *Blotter v. Farrell* (1954) 42 Cal.2d 804, 810, 270 P.2d 481; *Lucas v. Colorado Gen. Assembly* (1964) 377 U.S. 713, 737, 84 S.Ct. 1459, 1474, 12 L.Ed.2d 632.)

Real parties' reliance on *Associated Home Builders, etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473, is misplaced. That case did not hold, as

they suggest, that the power of initiative is not subject to the same limitations as is legislative ***675** action. Rather, in overruling *Hurst v. City of Burlingame* (1929) 207 Cal. 134, 140–141, 277 P. 308, the court reaffirmed the understanding that the power of the people through the statutory initiative is coextensive with the power of the Legislature. *Associated Home Builders* held only that notice and hearing requirements of zoning laws were not intended to apply to zoning ordinances enacted by initiative. The court warned that a statute which made compliance with *procedural* requirements a prerequisite to enactment of local ordinances would be constitutionally suspect if applied to preclude enactment by initiative of an ordinance on a subject on which the city council could legislate. That *****791** decision does not, therefore, support the argument that the people may enact a statute which the Legislature has no power to ****27** enact. Although the initiative power must be construed liberally to promote the democratic process (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, supra, 22 Cal.3d 208, 219, 149 Cal.Rptr. 239, 583 P.2d 1281) when utilized to enact statutes, those statutes are subject to the same constitutional limitations and rules of construction as are other statutes. Indeed, real parties do not question the fact that the proposed initiative measure is subject to general constitutional limitations and, in particular, to the other requirements of article XXI.¹⁵ Given the applicability of article XXI in these respects, we see no basis on which to conclude that the once-a-decade limitation does not apply.

This is particularly so since a number of the purposes underlying the once-a-decade limitation—as reflected both in the California decisions and the decisions in other states with comparable constitutional provisions—apply equally to a second redistricting by initiative. The value of repose—which promotes stability in districts and minimizes political battles—was thought to be worth the “cost” of not permitting subsequent legislative attempts to alter existing districts. The instability that would arise from not applying the once-a-decade limitation to initiatives would reintroduce some of the very evils against which the limitation was directed.

Moreover, while there are no judicial decisions in this state precisely on point,¹⁶ more than 30 years ago the California Attorney General, in an ***676** opinion addressing numerous legal questions posed by a proposed congressional reapportionment initiative, concluded: “*after a districting statute has become effective, the lawmaking power of the state may not make a second revision, whether by means of a legislative enactment or an initiative statute.*” (18

Ops.Cal.Atty.Gen. (1951) 11, 16.) That opinion, which was written by Leonard M. Friedman, then a deputy attorney general and later a distinguished and highly respected jurist, clearly reflects the prevailing understanding that the initiative is not exempt from the once-a-decade rule.

Traditional rules of constitutional and statutory interpretation yield the same conclusion. Article XXI, like its predecessor, is absolute in its prohibitory aspect. By 1911, when the California constitutional provision providing for the exercise of the initiative power was first adopted (former art. IV, § 1), the once-a-decade rule had already been clearly established. Nothing on the face of the initiative provision reflects either consideration of the use of the initiative to redistrict, or, if such use is permissible, an intent to exclude initiatives from the operation of the once-a-decade rule. Neither respondents nor real parties in interest have called to our attention anything in the adoption of that provision or in its subsequent readoption as [article II, section 8](#), to suggest such an intent. Well-established principles, applicable both to statutes and constitutional provisions, including constitutional provisions added by initiative, as was former section 1 of article IV (*****792** *Galvin v. Bd. of Supervisors* (1925) 195 Cal. 686, 689–690, 235 P. 450), require that in the absence of irreconcilable conflict among their various ****28** parts, they must be harmonized and construed to give effect to all parts. (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 813–814, 114 Cal.Rptr. 577, 523 P.2d 617; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596, 96 Cal.Rptr. 601, 487 P.2d 1241, cert. den., 432 U.S. 907, 97 S.Ct. 2951, 53 L.Ed.2d 1079; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645, 335 P.2d 672.) There being no contrary intent apparent and no repugnancy between former article IV, section 6, the predecessor of article XXI as heretofore interpreted, and [article II, section 8](#), we conclude that the initiative process may not be used to do that which the Legislature may not do, to redraw legislative and congressional districts during the decade following a federal decennial census at a time when the Legislature has enacted a valid and effective statute or statutes defining those districts.

Real parties offer an alternative argument: they suggest that even if the once-a-decade rule applies to initiatives, it applies only where statutes ***677** defining the districts have become “effective,” and they argue that chapters 6 and 8 have not yet become effective because no election has been held pursuant to their provisions.

Acceptance of this proposition, however, would require that we depart from the constitutional provisions and established rules governing the effective date of statutes. The effective date of statutes is governed by [article IV, section 8](#). Pursuant to that provision chapter 8, reapportioning legislative districts, became effective as an urgency measure when signed by the Governor on January 2, 1983. No referendum petition having been filed, chapter 6, reapportioning congressional districts, will become effective on October 17, 1983.

Real parties offer no persuasive authority to support their argument that these statutes have not or will not become effective prior to the date on which this initiative measure could be enacted.¹⁷ They suggest that because the statutes have not been “implemented,” and because actions contesting their validity have been filed, we should not consider their adoption as constituting the single, valid decennial districting permitted by article XXI.

The Wisconsin Supreme Court rejected a similar argument in *State v. Zimmerman*, *supra*, 266 Wis. 307, 63 N.W.2d 52. There, the question was whether a 1953 redistricting statute violated that state's Constitution which permitted no more than one legislative districting between two federal enumerations. It was argued that the Legislature was free to modify the districts up to January 1, 1954, the date on which the 1951 redistricting statute became operative by its terms. In rejecting that argument, the court stated: “[T]he passage of the [earlier] Act exercised and exhausted the power of the legislature to redistrict during the present interval In the absence of a successful attack upon its constitutionality it was a reapportionment, directed by the constitution to be done once and only once following each federal *678 census, which passed beyond the legislature's power of ***793 revision at the date of the referendum at the very latest.” (63 N.W.2d at p. 56.)

****29** Thus, implementation is irrelevant to the effectiveness of the legislation. The Legislature has fulfilled its obligation to adjust the legislative and congressional districts and, unless invalidated, they may not be changed again until the 1990 census has been completed.

Incumbent and would-be office holders, party organizations, and residents of the districts established thereby, are entitled to rely on the districts delineated in chapters 6 and 8 in formulating plans to stand for election or to organize to support those who do. In that sense, the statutes may have been “implemented” already. Only unacceptable

and unjustified uncertainty could follow a departure from recognition of the constitutionally mandated effective date of legislation establishing legislative and congressional districts as the date on which the mandatory aspect of article XXI is fulfilled and the prohibitory function activated.

The pendency of actions challenging the validity of chapters 6 and 8 is also irrelevant. This is not an action brought for the purpose of determining the validity of chapters 6 and 8. Therefore, the usual rule that the legislation bears a strong presumption of validity is applicable (*In re Ricky H.* (1970) 2 Cal.3d 513, 519, 86 Cal.Rptr. 76, 468 P.2d 204; *Martin v. Riley* (1942) 20 Cal.2d 28, 39, 123 P.2d 488), and unless and until judicially declared invalid, chapters 6 and 8 are effective statutes for purposes of determining whether article XXI bars the adoption of a new and different statutory plan, whether by the Legislature or the people through their reserved initiative power.

Real parties argue that the districts established by chapters 6 and 8 are constitutionally impermissible, asserting that they unnecessarily dilute the strength of minority voters, are not contiguous and compact, have excessive deviations from population equality, and are not “essentially different” from the district plans rejected in the 1982 referenda. They acknowledge that these claims are based on factual allegations which, if controverted, would require a reference (*Holt v. Kelly* (1978) 20 Cal.3d 560, 562, 143 Cal.Rptr. 625, 574 P.2d 441), but ask that we nonetheless consider their challenge to the validity of the statutes in this proceeding. We decline the invitation.

As real parties have acknowledged, other actions in which the validity of the statutes is challenged are already pending. The question before this court is whether at the time the initiative petition was presented for filing with the *679 Secretary of State pursuant to [Elections Code section 3520 et seq.](#), a presumptively valid districting statute or statutes had been enacted which would become effective prior to the date on which the initiative could be submitted to the voters. Inasmuch as the Secretary of State has no discretion to refuse to submit a properly qualified initiative measure to the voters (*Farley v. Healey* (1967) 67 Cal.2d 325, 327, 62 Cal.Rptr. 26, 431 P.2d 650), any challenge based on a claim that the measure is one that may not be presented to the voters must be promptly made and determined by petition for writ of mandate. (See *McFadden v. Jordan* (1948) 32 Cal.2d 330, 196 P.2d 787.) Where, as here, the object of the petition is to prevent submission of the measure to the voters at all,

the time constraints within which a judicial determination of the challenge must be made preclude expanding the scope of the proceeding beyond the limited question of whether the once-a-decade rule applies to the people's reserved power of initiative. The proponents of the initiative were not without opportunity to challenge the validity of sections 6 and 8 prior to their qualification of the initiative. Both mandate and declaratory relief actions were available to them. (See *Yorty v. Anderson*, supra, 60 Cal.2d 312, 317, 33 Cal.Rptr. 97, 384 P.2d 417.) Having bypassed these remedies, their request that we undertake an examination of the districts created by those statutes at a time when the initiative has qualified and an election has been scheduled, comes too late.

Finally, real parties argue that application of these established constitutional limitations ***794 will exclude the people from the reapportionment process and give legislators ***30 uncontrolled power in an area in which they may have a conflict of interest. Real parties' contention is that it is difficult for those seeking to redistrict through the initiative process to qualify an initiative for the ballot before the Legislature acts, and that the Legislature—through use of an “urgency” clause—may be able to foreclose use of the referendum. There are several answers to these arguments.

First, assuming that the initiative is generally available in the redistricting process notwithstanding the command of article XXI that “[t]he Legislature shall adjust the boundary lines” (emphasis added), it is by no means clear that the Legislature will always be in a position to preempt use of the initiative. Indeed, there have been recent occasions in California in which the Legislature was slow or failed to act, or the Governor vetoed its enactments, and ample time for qualification of an initiative was available.

Second, redistricting is not the only context in which the use of the initiative may be preempted by legislative action. There are a number of legislative actions—including, for example, immediate and irrevocable expenditures of funds—that cannot effectively be undone by a subsequent initiative *680 measure and that can be prevented, if at all, only by referendum. That is an inherent feature of the balance between popular control and representative government reflected in this state's Constitution.

Third, constitutional standards embodied in both the state and federal Constitutions impose significant restraints on potential legislative abuse or discrimination in the reapportionment process. (E.g., art. XXI; U.S. Const., art. 1,

§ 7, 14th Amend.; *Baker v. Carr*, supra; *Karcher v. Daggett*, supra.) Thus, real parties' fears of unrestrained legislative action are without substance.

Finally, the possibility that the Legislature may on rare occasions foreclose use of the referendum through a declaration of urgency adopted by two-thirds vote¹⁸ is an inherent feature of our constitutional system. The framers of the initiative and referendum provisions and the people in adopting those provisions deliberately accepted this limitation upon the reserved power of the electorate. The existence of this limitation upon the referendum is not a justifiable basis for extending use of the initiative into areas not permitted by the Constitution.

Real parties argue that we should exempt initiatives from the once-a-decade principle, suggesting at the same time that we might “create” a new rule which would allow two opportunities to redistrict each decade, once by the Legislature and once by initiative, provided the Legislature acts first. This we decline to do. The people of this state, as the ultimate source of legitimate political power, are of course free through constitutional amendment to adopt whatever changes in the existing system they consider appropriate, subject only to limitations contained in the Constitution of the United States. Whatever the merits of possible alternative constitutional mechanisms, it is manifest that our role is simply to apply the applicable constitutional provisions as they currently exist. Under the well-established constitutional principles that we have reviewed, it is clear that because one presumptively valid redistricting plan based on the 1980 census has already been adopted, article XXI prohibits the adoption of a second redistricting plan either by the Legislature or by initiative.¹⁹

*681 ***31 ***795 Let a writ of mandate issue restraining respondents from expending any public funds or otherwise acting to carry out the special election proclaimed by respondent Governor to be conducted on December 13, 1983.

*692 APPENDIX A

July 20, 1983

ELECTION CALENDAR

JUNE 1984

PRIMARY ELECTION

The following is a list of the earliest statutory deadlines for which compliance requires a knowledge of district boundaries:

- a. December 30, 1983, (E-158): First day for candidates to obtain, clerks to issue, and voters to sign petitions in lieu of filing fees. [Elections Code sections 6494.1; 6555](#). Petition signers must be registered in the district from which the candidate seeks nomination in the primary election. [Elections Code section 6555\(b\)\(1\)](#). Candidates must reside in the district in which they seek election. [Cal. Const. Art. IV, sec. 2\(a\)](#); [Elections Code section 75](#). County clerks and registrars must mark the petition at the time of issuance with the name and district number of the office sought. [Elections Code section 6551](#).

Peace and Freedom, American Independent, and Libertarian Party candidates calculate the number of signatures necessary for their petitions in lieu of filing fees based on a percentage of the total number of voters registered in the district from which they seek nomination. [Elections Code section 6555\(a\)\(6\)](#).

- b. January 3, 1984, (E-154): As of this date, county clerks must prepare indexes of registered voters and reports of registration by political subdivision. This information must be compiled and made available to the Secretary of State and to candidates by January 23, 1984, (E-135). [Elections Code sections 607\(g\), 608-611, 6460\(a\)](#).

Candidates use the indexes in directing their campaigns towards voters residing in the district.

- c. January 31, 1984, (Fixed by Law): Deadline for county clerk to compute the number of members of American Independent Party County Central Committee allotted to each Assembly district or supervisorial district, as the case may be. [Elections Code section 9721](#). See [Elections Code sections 9700, 9701](#).
- d. January 31, 1984, (E-127): First day on which county clerks and registrars of voters must issue and candidates for state legislative office may file declarations of intention. [Elections Code section 25500\(a\)](#). The declarations state the office sought.

- e. February 1, 1984, (E-125): Deadline for the Secretary of State to compute for each county the number of members of Party Central Committees for the Peace and Freedom and Libertarian parties, and transmit that number to the county clerks and party officials. [Elections Code section 9770](#). The number of members in each county depends on the number of Assembly districts located in the county. See [Elections Code sections 9700, 9701](#).

- f. February 8, 1984, (E-118): Last day to file Declarations of Intention for legislative office. [Elections Code section 25500](#).

- g. February 13, 1984, Adjusted from Saturday, (E-115): Deadline for county clerks to compute the number of Libertarian and Peace and Freedom Party Central Committee members to be elected in each supervisorial or Assembly ***796 district. [Elections Code section 9771](#).

- h. February 13, 1984, (E-113): End of extension period for persons other than **32 the incumbent to file declaration of intention. [Elections Code section 25500](#).

- i. February 13, 1984, (E-113): Deadline for county clerks to forward declarations of intention for legislative candidates to the Secretary of State. [Elections Code section 25500](#).

- j. February 13, 1984, (E-113): First day for county clerks to issue, candidates to obtain, and voters to sign nomination papers and declarations of candidacy. [Elections Code section 6490](#).

- k. February 21, 1984, (E-105): Deadline for Secretary of State to compile a statewide report of registration, broken out by legislative districts, among other divisions. [Elections Code section 6460](#).

- l. February 22, 1984, (E-104): Deadline for Secretary of State to prepare and transmit *693 to the county clerks and registrars of voters a notice designating all state offices for which candidates are to be nominated in the Primary Election. [Elections Code section 6462](#).

- m. February 23, 1984, (E-103): Deadline for candidates to file petitions in lieu of filing fees. [Elections Code sections 6494.1, 6555\(b\)\(3\)](#).

- n. March 5, through 12, 1984, (Fixed by Law): Period in which county clerks are required to compute the number of members of each Democratic and Republican Central Committee allotted to each Assembly district

- or supervisorial district, as the case may be. [Elections Code sections 8871, 9371](#). See [Elections Code sections 8820–8823, 9320–9323](#).
- o. March 7, 1984, (E–90): Deadline for county central committees to nominate persons for appointment as precinct board members. Nominees must be registered voters residing in the precinct for which they are nominated. [Elections Code sections 75, 1639](#). State legislative and congressional boundary lines must be known before this date in order to observe this deadline, because precinct lines are based on those district boundary lines. See [Elections Code section 1513](#).
- p. March 9, 1984, (E–88): Deadline for circulation and filing of candidates nomination papers, and supplemental petitions in lieu of filing fees. [Elections Code sections 6490, 6555\(b\)\(3\)](#).
- q. March 14, 1984, (E–83): Deadline for candidates to file nomination papers for state Senate and Assembly, in cases where incumbent state legislator files a declaration of intention but fails to qualify for the nomination by March 9. [Elections Code section 25500\(b\)](#).
- r. March 14, 1984, (E–83): Last day on which it will be known if candidates will be authorized to file nomination papers up through March 23, 1984, (E–74). This applies only in cases where only one candidate files nomination papers for a partisan nomination and the candidate dies on or before March 14, 1984. [Elections Code section 6490.2](#).
- s. March 14, 1984, (E–83): Last day on which county clerks and registrars of voters may certify and file nomination documents for state office with the Secretary of State. [Elections Code section 6507](#).
- t. March 15, 1984, (E–82): The Secretary of State shall conduct a drawing of the letters of the alphabet, for the purpose of determining the order in which candidates appear on the Primary Election ballot. [Elections Code section 10217](#). The statute generally contemplates that the order of candidates be known after the last day on which voters may qualify to become candidates.
- u. March 23, 1984, (E–74): See entry “r” for March 14, 1984.
- v. March 26, 1984, Adjusted from Saturday, (E–73): Deadline for county clerks and registrars of voters to determine whether the number of American Independent, Democratic and Republican County Central Committee candidates who have filed for each Assembly or supervisorial district exceeds the number *****797** to be elected. If not the clerk shall not include the office or the candidates on the ballot, unless a petition signed by 25 registered voters indicating that a ****33** write-in campaign will be conducted for the office has been filed no later than March 29, 1984, (E–68). [Elections Code sections 8873, 9373, 9723](#).
- w. March 26, 1984, Adjusted from Saturday, (E–73): Deadline for the Secretary of State to notify each candidate for partisan office, including candidates for state Legislature and for congress, of names, addresses, offices, occupations and party affiliations of all other persons who have filed for the same office. [Elections Code section 6580.5](#).
- x. March 29, 1984, (E–68): Deadline for Secretary of State to prepare and transmit to county clerks and registrars of voters a certified list identifying candidates entitled to receive votes at the Primary Election. [Elections Code sections 6580–6584](#).
- y. April 2, 1984, (Approximately E–64): Clerk to publish the certified list of candidates together with office sought. [Elections Code sections 6585–6588](#).
- z. April 12, 1984, (E–54): If on this date, there are 100 or fewer persons registered to vote in any precinct, the clerk may mail each voter an absentee ballot along with a statement that there will be no polling place for the election. Ballots shall be sent as ***694** soon as they are available. [Elections Code section 1005](#).
- aa. April 16, 1984, (E–50): Deadline for clerk to publish notice of the primary election, including list of offices to be filled. [Elections Code section 2554](#).
- bb. April 26, 1984, (E–40): First day clerk to commence mailing polling place notice and appropriate party or nonpartisan sample ballot to each registered voter. [Elections Code section 10007](#).
- cc. May 7, 1984, (Adjustment for Sunday), (E–30): Last day precincts may be created, united, divided, or combined where voting machines are used. [Elections Code section 1509](#).
- dd. May 7, 1984, (E–29): Last day to appoint precinct board members and designate polling places. [Elections Code section 1638](#).
- ee. May 7, 1984, (E–29): First day that absentee voters may cast ballots. [Elections Code section 1002](#).

- ff. May 11, 1984, (E-25): Last day for clerk to prepare separate sample ballots for each political party and a separate non-partisan sample ballot. [Elections Code section 10007](#).
- gg. May 22, 1984, (E-14): Last day for write in candidates to file declaration of write in candidacy, and nomination papers, if any. [Elections Code section 7301](#).
- hh. May 22, 1984, (E-14): Last day for clerk to prepare a list of precincts to which bilingual precinct officials were appointed. [Elections Code section 1635](#).
- ii. May 29, 1984, Adjustment for Saturday, (E-10): Last day for clerk to transmit to the Secretary of State a statement, as of May 7, showing the county registration by party and district. [Elections Code section 6460](#).
- jj. May 29, 1984, (E-7): Last day for submitting standard absentee voting applications. [Elections Code section 1002](#).
- kk. May 31, 1984, (E-5): Last day for clerk to complete mailing of sample ballots for all voters. [Elections Code section 10007](#).
- ll. June 5, 1984, Election Day. Elections Code section 2521.

***681** RICHARDSON, Justice, dissenting.
I respectfully dissent.

For the first time in 35 years this court has removed from the ballot a qualified initiative measure, thereby preventing the people of California from voting on a subject of great importance to them—the reapportionment of their legislative boundaries, federal and state. (See [McFadden v. Jordan \(1948\) 32 Cal.2d 330, 196 P.2d 787](#).) I regret this defeat of the people's right to vote.

*****798** In blocking this election, the majority disregards the well established threshold rule of deference to the people's franchise. Only last year we reaffirmed the principle ****34** that we will seldom interfere with the people's exercise of their cherished vote: “[I]t is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures *after* an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, *in the absence of some clear showing of invalidity*. [Citations.]” ([Brosnahan v. Eu \(1982\) 31 Cal.3d 1, 4, 181 Cal.Rptr. 100, 641 P.2d 200](#), italics added.) An

appellate court recently expressed the same rule in this way: “*Even grave doubts* as to the constitutionality of an initiative measure do not compel a court to determine its validity prior to its submission to the electorate, [Citations.]” ([Gayle v. Hamm \(1972\) 25 Cal.App.3d 250, 256, 101 Cal.Rptr. 628](#), italics added.)

Neither the “clear invalidity” nor “grave doubts” as to the initiative has been demonstrated. To the contrary, the measure is plainly constitutional and valid. I am not alone in this view. After a thorough analysis and on March 21, 1983, the Legislature's own attorney, the Legislative Counsel of California, concluded that “The people may enact an initiative statute which adjusts the boundary lines of congressional or legislative districts ... provided the statute adjusting the boundary lines takes effect in time for the orderly conduct of the 1984 Direct Primary elections.” The legislative leadership has rejected this advice and now seeks from this court a second opinion. However, even if my colleagues entertained “grave doubts,” we should not prohibit the people themselves from expressing their own will regarding the boundaries which the Legislature has again sought to impose upon them.

***682** The majority, conceding that the foregoing rule of deference “... is a salutary one, and where appropriate we adhere to it” (*ante*, p. 784 of 194 Cal.Rptr., p. 20 of 669 P.2d) nonetheless rejects it assertedly because of the “high cost” of the election and problems relating to the timing of the administrative deadlines for the 1984 elections. (*Ante*, pp. 784 – 785 of 194 Cal.Rptr., pp. 20–21 of 669 P.2d). As a matter of principle, the financial cost of the election should be entirely irrelevant to the legal issue before us—such costs are incurred whenever a special election is called, yet no exception exists for pre-election review in such cases. (In passing, it perhaps bears noting that the legislative leadership reportedly has vigorously resisted any effort to *reduce* these costs by combining the special election with a general election in November 1983.) As for the election process and deadlines, we have previously and consistently recognized a reasonable flexibility in these matters and, in the exercise of our equitable powers, have waived or extended these deadlines in order to assure the orderly conduct of the election. (E.g., [Assembly v. Deukmejian \(1982\) 30 Cal.3d 638, 678–679, 180 Cal.Rptr. 297, 639 P.2d 939](#); [Legislature v. Reinecke \(1973\) 10 Cal.3d 396, 406–407, 110 Cal.Rptr. 718, 516 P.2d 6](#).)

Having expressed my strong objection to the *premature* disposition of this case, I turn to the merits of the controversy and, ultimately, to the majority's principal assertion that reapportionment can occur only once every 10 years. While

the political impact of this dispute may well rise to Olympian heights, the legal and constitutional issues, in my view, are very much at ground level.

1. The Constitutional Origin and Nature of the Initiative

Our state Constitution contains some very fundamental principles relevant to this case. First and foremost, “*All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.*” (Cal.Const., art. II, § 1, italics added.) A corollary to this is that “The legislative power of this State is vested in the California Legislature ..., *but the people reserve to themselves the powers of initiative and referendum.*” (*Id.*, art. IV, § 1, italics added.) Finally, “The initiative ***799 is the power of the electors to propose statutes and amendments to the Constitution **35 and to adopt or reject them.” (*Id.*, art. II, § 8, subd. (a).)

Thus, the Constitution forcefully teaches us that the source of ultimate legislative and political power in this state, and all of it, is found not in Sacramento or Washington D.C. but in the *people*, who may exercise this power both indirectly (through their chosen representatives) or directly (through a referendum or, as here, an initiative).

*683 What is the nature of the initiative? In 1976, Justice Tobriner described it in glowing terms: “The amendment of the California Constitution in 1911 to provide for the *initiative and referendum* signifies one of the *outstanding* achievements of the progressive movement of the early 1900’s. Drafted in light of the theory that *all power of government ultimately resides in the people*, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it ‘the *duty of the courts to jealously guard* this right of the people’ (*Martin v. Smith* (1959) 176 Cal.App.2d 115, 117 [1 Cal.Rptr. 307]), the courts have described the initiative and referendum as articulating ‘*one of the most precious rights of our democratic process*’ (*Mervynne v. Acker* [1961] 189 Cal.App.2d 558, 563 [11 Cal.Rptr. 340]). ‘[I]t has long been our judicial policy to *apply a liberal construction* to this power wherever it is challenged in order that the right be not improperly annulled. *If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.*’ (*Mervynne v. Acker*, *supra*, 189 Cal.App.2d 558, 563–564 [11 Cal.Rptr. 340]; *Gayle v. Hamm*, *supra*, 25 Cal.App.3d 250, 258 [101

Cal.Rptr. 628].)” (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, 135 Cal.Rptr. 41, 557 P.2d 473, italics added, fns. omitted.) In short, we have traditionally insisted that an initiative is entitled to *very special and very favored treatment*.

Since *Associated Home Builders* and until today, we have faithfully followed these admonitions regarding this constitutional right. (See, e.g., *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241, 186 Cal.Rptr. 30, 651 P.2d 274 [upholding the “Victims’ Bill of Rights” initiative]; *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 41, 157 Cal.Rptr. 855, 599 P.2d 46 [upholding, in most respects, the Political Reform Act of 1974]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219–220, 248, 149 Cal.Rptr. 239, 583 P.2d 1281 [upholding the Jarvis-Gann Property Tax initiative].)

2. The Reapportionment Struggle

A brief review of the current reapportionment struggle reveals why from a policy standpoint it is so *essential* that the people retain, in its pure form, their constitutional initiative power over reapportionment, even if both a legislative and an initiative plan have been adopted in the same census period.

In 1981, following the 1980 census, the Legislature purported to reapportion the legislative and congressional districts, pursuant to a constitutional grant of such power. (Cal. Const., art. XXI.) After charges that this *684 plan (Plan I) was greatly and unfairly gerrymandered, referendum petitions challenging Plan I were promptly circulated and the referendum qualified for the June 1982 Primary Election ballot. At this point, responding to litigation challenging the referendum, and despite clear and applicable precedent calling for a stay of the 1981 reapportionment legislation as to legislative districts (*Legislature v. Reinecke* (1972) 6 Cal.3d 595, 99 Cal.Rptr. 481, 492 P.2d 385), a bare majority of this court, while permitting the referendum to proceed, ordered that the new, challenged and subsequently invalidated voting boundaries applied to the 1982 legislative and congressional elections. (*Assembly v. Deukmejian*, *supra*, 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939.) Our action thereby assured that, ***800 though the legislative plans might change, the authors would not.

At the June 1982 referendum election, the people of California overwhelmingly rejected **36 Plan I. However, because of our ruling, the present Legislature was elected pursuant to the invalid 1981 district boundaries. Those same

legislators drafted a new plan (Plan II) and, in January of this year, effectuated it. The challenged initiative before us is intended to replace Plan II.

The Legislature, in adopting Plan II, denominated it an “urgency” measure as to legislative districts. By this device the Legislature effectively prevented the people from once again exercising in 1983 their referendum right to invalidate Plan II. (See *Cal. Const.*, art. II, § 9, subd. (a).)

The full import of today's opinion thus becomes manifest. The Legislature precluded the people from another *referendum* similar to that which last year threw out Plan I. Now the majority of this court not only wrenches from the people their only remaining legal tool, the *initiative* power, but slams the door to the polling place in the face of the people's attempt to exercise their additional power, also constitutionally protected, to “alter or reform” their government when the public good requires it. (*Id.*, art. II, § 1.) Together, marching in lockstep, the Legislature as to the referendum and now this court as to the initiative, have effectively and completely prevented the people from *any* exercise of their popular will. The unfortunate consequence of today's ruling is that on this matter of great public moment, the people are thereby blocked from expressing through their ballots their own wishes as to the boundaries of the districts from which their legislative representatives are elected. This decision no longer can be made by the people. The Legislature and this court have made it for them. This dubious result is reached notwithstanding the following: constitutional mandates that the people have reserved to themselves *all political power*; our repeated assurances that the people's initiative is a “most precious” right, and the *685 absence of any constitutional prohibition whatever against reapportionment by initiative. As a consequence, the ultimate sovereign, the people, find themselves imprisoned within the walls erected by their own servants, the Legislature and this court.

This is but the latest chapter in a very unhappy period in California political history. Realignment of voting boundaries, congressional and legislative, has become so volatile, so heavily laced with partisan wrangling and self-interest, that the periodic process has become something painfully to be endured. This has been going on for years. Doubtless there must be a better way. However, it is not for a court to fashion one, but rather for the people, groping for some equitable resolution, to choose the appropriate alternative.

In sum, the events of the past few years afford a vivid, precise, and concrete demonstration of the danger of depriving the people of their powers of initiative and referendum. The majority's very unfortunate holding is compelled by neither sound analysis nor precedent.

3. Reapportionment by Initiative

While counsel for petitioners have readily conceded that a legislative or congressional reapportionment may be accomplished by use of the initiative process, my colleagues may have withdrawn from even that concession and their position remains cloudy and vague. (*Ante*, pp. 790, 793 – 794 of 194 Cal.Rptr., pp. 29–30 of 669 P.2d.) If, in truth, they really do not accept the right of the people themselves to reapportion by initiative, the distance of the majority's retreat from precedent can be precisely measured. Eighteen years ago Chief Justice Traynor, referring to a people's initiative within the reapportionment context, said for a unanimous court: “The makeup and apportionment of the Legislature involve peculiarly political questions that are not appropriate for this court to decide. They are far better entrusted to the collective political wisdom of the Legislature *subject to the power of initiative and referendum reserved to the people.*” (*Silver v. Brown* (1965) 63 Cal.2d 270, 280, 46 Cal.Rptr. 308, 405 P.2d 132; ***801 see *Blotter v. Farrell* (1954) 42 Cal.2d 804, 811–813, 270 P.2d 481 [local redistricting by initiative]; **37 18 Ops.Cal.Atty.Gen. 11, 14 (1951) [congressional reapportionment by initiative].)

This court's doubts about the people's reapportionment power through initiative are of very recent origin. Indeed, our sister states have uniformly acknowledged that the people may reapportion by exercising their initiative power. (*Armstrong v. Mitten* (1934) 95 Colo. 425, 37 P.2d 757, 759–760 [legislative reapportionment]; *686 *In re Initiative Petition No. 317, etc.* (Okla.1982) 648 P.2d 1207, 1212–1213 [congressional reapportionment]; *State v. Hinkle* (1930) 156 Wash. 289, 286 P. 839, 840–841 [legislative reapportionment].)

As our Constitution itself provides, “The initiative is the power of the electors *to propose statutes* and amendments to the Constitution and to adopt or reject them.” (*Cal. Const.*, art. II, § 8, subd. (a), italics added.) The qualified initiative before us, consistent with standard legislative procedure, *proposes statutes* (amendments to the Elections Code) which would reapportion the state's legislative and congressional districts. No “liberal construction” is needed to conclude that the initiative power includes the power to reapportion the state's

voting districts, resting as it does on the plain language of the Constitution.

4. Reapportionment Once Every Decade

Initially, it should be noted that my colleagues obviously err in claiming that, in some way, California has a “constitutionally mandated” rule “that redistricting may occur only once” within the decade. (*Ante*, p. 782 of 194 Cal.Rptr., p. 18 of 669 P.2d.) One can read the California Constitution from beginning to end without finding a trace or hint of an expression mandating any such limitation on the people's initiative power. The majority cites no provision of the Constitution, no article, no section. There is none. The Constitutional provisions vesting in the people “all political power” and “the right to alter or reform” their government (*art. II, § 1*, italics added), are entirely inconsistent with the majority's restriction upon initiative reapportionment. Former article IV, section 6, on which the majority relies for an “historical understanding” did not deny the people the right to adopt their own reapportionment. Indeed, the article was adopted more than 30 years before the people placed their initiative right in their Constitution.

Lacking any express inhibition on the people's initiative power, the majority bases its technical argument upon an expanded interpretation of article XXI of the state Constitution, a very shaky platform. That provision directs the Legislature “In the year following the year in which the national census is taken ...” to adjust the voting boundaries. It refers to the Legislature, not the people. This article may, as discussed below, limit the power of the Legislature to adopt multiple reapportionment plans during a single census period, but it contains no language placing a similar restriction upon the people's initiative power. Undaunted, my colleagues reason that because the people in enacting new political boundaries are exercising “legislative” power, and because the Legislature also exercises “legislative” power, therefore the limitation constitutionally imposed upon the Legislature must *687 restrict the people as well. By interpretation, my colleagues insert the language “or the people through the initiative” after the words “the Legislature” in article XXI. But this judicial redrafting of the article will not do, for the majority misconceives the true constitutional origin of the people's power to reapportion. The right to redistrict the state by initiative derives not from any grant of power originating in article XXI, but rather from the broad reservation to the people of all political and legislative power contained in

article II, sections 1 and 8, and article IV, section 1, as previously discussed.

It is also interesting to note that although the majority relies on article XXI to uphold Plan II, the plan itself does not comply with the article which requires that the boundaries be adjusted “in the year ***802 following” the census. Plan II was enacted in the *third* year following the census. Indeed, in the 1970's the plan formulated by **38 this court was adopted in the *fourth* year after the census.

The cases relied upon by the majority do not suggest such a restriction as my colleagues wish to engraft upon reapportionment by initiative. Two older cases (*Wheeler v. Herbert* (1907) 152 Cal. 224, 237, 92 P. 353; *Dowell v. McLees* (1926) 199 Cal. 144, 146, 248 P. 511) involved statutory changes in county boundary lines, changes which also would have altered the preexisting legislative districts, accomplishing an unintended de facto reapportionment. We held that the Legislature's power to form legislative districts may be exercised only once during the period between one national census and the succeeding one. *Wheeler*, of course, could not have contemplated any once-a-decade limitation upon initiatives because it was decided before the initiative existed in California. *Dowell* concerned the Legislature's power and, as the majority acknowledges, relied wholly on former article IV, section 6, which is confined exclusively to the Legislature's authority.

A subsequent case (*Yorty v. Anderson* (1963) 60 Cal.2d 312, 316–317, 33 Cal.Rptr. 97, 384 P.2d 417) does not help the majority at all. *Yorty* made it abundantly clear that the “once-every-decade” principle is not absolute even as to the Legislature, and that the Legislature has the power to adopt a second reapportionment plan within a single census period if the courts, or the people by referendum (p. 317, 33 Cal.Rptr. 97, 384 P.2d 417), have nullified the initial plan. Thus, even the Legislature is free from the restraints which the majority without constitutional authority has now imposed upon the people themselves.

At this point, I put these simple but relevant questions to my esteemed colleagues: If the people can, as here, indirectly through referendum, mandate *688 the Legislature to adopt a second reapportionment plan within the same decennial census period, why may not the same people, directly through the initiative achieve the same result? How is it that the public's servants, the Legislature, may place a reapportionment plan beyond the reach of their masters, the

people? Put another way, in constitutional analysis how is it that the servants of the people are elevated above the sovereign people who are vested with “all political power”? If the people wanted to impose upon themselves a once-a-decade limitation, why have they not expressly done so, having had ample opportunity as recently as 1980 when article XXI was substituted for former article IV, section 6? Why, contrary to the rules which direct us to interpret the initiative favorably, do my colleagues (1) read into a constitutional section language which the people omitted, and (2) decline to resolve any reasonable doubts in support of the initiative?

As we stated in *Fair Political Practices Com. v. Superior Court*, *supra*, 25 Cal.3d 33 at p. 42, 157 Cal.Rptr. 855, 599 P.2d 46, “The people having reserved the legislative power to themselves as well as having granted it to the Legislature, there is no reason to hold that the people’s power is more limited than that of the Legislature” Surely, if contrary to article II, section 1, the constitutional power of the people is not paramount, it cannot be *less* than that of their own creation, the Legislature.

The Legislature, acting pursuant to article XXI, may reapportion the state once every 10 years. The people, acting pursuant to article II, section 1, may *reject* the Legislature’s effort as they may other legislative acts or indeed rulings of this court through referendum (*Yorty*, *supra*, 60 Cal.2d 312, 316–317, 33 Cal.Rptr. 97, 384 P.2d 417) and may *replace* that effort with the people’s own plan. The Legislature’s role in reapportionment cannot rise to a higher level than that of its source, the people, nor can it, a creation of the people, constitutionally preempt the people. This is a fundamental, constitutional principle with which my colleagues do not choose to grapple.

The Oklahoma Supreme Court last year in *In re Initiative Petition No. 317, etc.*, *supra*, 648 P.2d at page 1212, applied supportive ***803 analysis in squarely upholding the people’s exercise of their initiative power to adopt a reapportionment plan despite the ***39 Oklahoma Legislature’s prior adoption of a plan within the same decennial census period. In Oklahoma, as in California, the “Constitution in no way restricts the initiative against a legislative congressional enactment.” (*Ibid.*) Moreover, in Oklahoma, as in California, “There is no express prohibition contained in the constitutional [reapportionment] provision, nor in the statute, which would prohibit a second valid congressional redistricting within the ten-year period

following a *689 decennial census.” (*Ibid.*; see *Exon v. Tiemann* (D.C.Neb.1967) 279 F.Supp. 603, 608.)

The Oklahoma Supreme Court concluded that “We hold that the electorate of Oklahoma are entitled to invoke the initiative against a legislative congressional redistricting act even though the initiative and the legislative enactment occur during the same ten (10) year period and are based upon the same federal census.” (648 P.2d at p. 1213.) The people of California retain no lesser political authority than the people of Oklahoma. (See also *Lucas v. Colorado Gen. Assembly* (1964) 377 U.S. 713, 732, 84 S.Ct. 1459, 1471, 12 L.Ed.2d 632 [in Colorado, “the initiative device provides a practicable political remedy to obtain relief against alleged legislative malapportionment ...”].)

As noted, petitioners herein concede that, following the people’s invalidation of Plan I, if a qualified reapportionment initiative had been approved by the people it might have been valid. But, petitioners reason (with the apparent concurrence of the majority) that the Legislature beat the people to it. The lawmakers acted first and thereby instantly and for the balance of the decade preempted for themselves the whole reapportionment power. This rationale contemplates that the people and the Legislature engage in a foot race to the reapportionment drawing board to draft the first plan after the invalidation by a successful referendum within a current decennial census period. Given the procedural and financial hurdles inevitably placed in the path of all initiative proponents in the circulation, qualification and election process, can there be any reasonable doubt that the Legislature will win the race? When the people have been denied their right to vote, they will gain small comfort from being told, in effect, “come back again in 10 years and maybe we’ll talk about it,” for in 1990 the same unending cycle will be repeated, continuing in perpetuity. What kind of a responsive democracy is that? Such an implied surrender of their political power cannot have been within the reasonable contemplation of the voters when they adopted the Constitution or its initiative or reapportionment provisions.

Warning against a “premature interposition of the judiciary” in cases of this kind, one appellate court made these cogent observations: “We take judicial notice of the fact that a large cross-section of the citizenry entertains an opinion that the government is no longer representative of the people. It takes outlandish financial resources to mount a campaign for office, lobbyists play no small part in controlling the destiny of legislative measures, and in election years our elected

representatives procrastinate taking action even on urgent matters. *One counter-balance to this trend is to give vitality to *690 the initiative power.*" (*Gayle v. Hamm*, supra, 25 Cal.App.3d 250, 257–258, 101 Cal.Rptr. 628, italics added.)

Regrettably, my colleagues vote today for less democracy in California. This is doubly sad for it occurs at a time when there is a growing feeling of detachment and separation of the citizen-voters from the handles, controls and direction of their affairs. The people's representatives often seem quite distant from the voter separated by a large, faceless bureaucracy. There are numerous signs these days of voter apathy and the decline in voter participation and interest in public policy matters. The surest way to promote this decline is to cut off the opportunities for citizen participation. The most effective way to increase public interest in political issues is to assure that the people have the widest practical opportunity to share in making the public decisions which ***804 directly affect them. In the New England town meeting the people's voice was heard in its purest form. The use of this method **40 is not feasible in a large state with 23 million people. It is all the more important to preserve for our citizens those few remaining alternatives by which the people's voice may be heard and their will expressed and implemented. This, to my mind, is the very essence of democracy.

The majority insists that invalidation of the initiative is required in order to insure "repose—which promotes stability in districts and minimizes political battles" (*Ante*, p. 791 of 194 Cal.Rptr., p. 27 of 669 P.2d.) Tranquility has its place, but, with respect, I suggest that, purchased at the cost of the people's power to decide the boundaries of their own legislative districts, the price is far too high. The greater danger of "instability" lies in muffling the people's voice.

In my view, the initiative process and the ballot constitute the people's only weapons to dislodge entrenched political dynasties created and sustained primarily by virtue of their own use and misuse of the reapportionment device. Using the referendum in 1982, the people spoke to the Legislature very loudly in rejecting Plan I. In 1983 the people might have shouted if they had been given the opportunity to vote on Plan II. In a democratic society so heavily dependent upon a system of interlocking governmental checks and balances, surely we cannot sacrifice the salutary protection of the initiative.

If the people are denied any right to approve or disapprove a blatantly gerrymandered reapportionment plan, then there is absolutely no check on the Legislature's abuse of power. The

concept of a Legislature perpetuating its tenure by devising a reapportionment plan wholly immune from review or revision by the people themselves is dangerous and repugnant to constitutional principles.

*691 Several years ago, one observer of the California political scene made these pertinent observations regarding the initiative and referendum: "As the periodic assaults on the initiative and referendum arise and fade, it is hoped that the courts will resist urgings to use judicial powers to circumscribe these institutions. While the initiative and referendum may not fit into a given philosopher's democratic model, and while these powers may, like any others, be misused from time to time, one would hope the courts will not fall prey to the elitist argument that the people do not know what is best for them and therefore need someone else to tell them. Pragmatically, the institutions work; like their representatives, the people may sometimes approve mischievous or unconstitutional measures, but by and large, as studies show, they are good legislators. In a society where government moves further and further from the people, these institutions can help keep it near. If an occasional 'bad' measure is passed, let those who urge less democracy instead use the tools of democracy to convince the people of the 'rightness' of their view. While the courts have the duty to maintain these institutions within their proper boundaries, they should not be the vehicle for any constriction of those boundaries." (Greenberg, *The Scope of the Initiative and Referendum in California* (1966) 54 Cal.L.Rev. 1717, 1747–1748, fn. omitted.)

The people can make mistakes, so can legislatures, and so can courts, but mistakes can be corrected. History has demonstrated repeatedly that in the long run, the people's judgment is ultimately to be trusted. If not, then whose? I do not know whether the particular initiative measure before us is good, bad or indifferent, or whether the people would have voted it up or down if permitted to do so. What I do know is that the reapportionment initiative, signed by over half a million voters, has legally qualified for the ballot. The initiative involves a matter of compelling public interest. I see no legal or constitutional impediment to a public vote. The people should be heard on this issue.

I would deny the peremptory writ.

All Citations

34 Cal.3d 658, 669 P.2d 17, 194 Cal.Rptr. 781

Footnotes

- * Before BIRD, C.J., MOSK, RICHARDSON, KAUS, BROUSSARD, REYNOSO, and GRODIN, JJ.
- 1 The legislative petitioners have named the county clerk and registrar of voters as respondents individually and as representatives of a class consisting of all clerks and registrars in the state. Because the election cannot be held or the results certified without the participation of the Secretary of State, and issuance of a peremptory writ of mandate directed to her alone would be sufficient to accord petitioners substantially all of the relief they seek, it is not necessary that we determine whether this proceeding may be prosecuted as a defendant class action pursuant to [Code of Civil Procedure section 382](#). We have not, therefore, certified a class or directed petitioners to serve notice on the county clerks and registrars of the state.
- 2 Quentin Kopp, named as a real party in interest, has not appeared in these proceedings.
- 3 Special elections are ordered by the Governor pursuant to [Elections Code section 2651](#):
 “The Governor shall call all statewide special elections by issuing a proclamation pursuant to Section 2553. In the case of a vacancy in a congressional or legislative office the Governor shall issue a proclamation, within 14 calendar days of the occurrence of the vacancy, calling a special election in accordance with Section 7200.5.
 “A copy of the proclamation shall be sent to the board of supervisors of every affected county and a notice of election published in accordance with the provisions of Section 2554.”
 Section 2553 provides: “For each statewide election the Governor shall issue a proclamation calling the election. The proclamation shall be issued by the Governor under his or her hand and the Great Seal of the state no later than the 148th day prior to the election and shall state the time of the election and the offices, if any, to be filled. Copies of the proclamation shall be transmitted by the Governor to the boards of supervisors of the counties.”
- 4 The initiative power is now reserved and defined in [article II, section 8 of the California Constitution](#):
 “(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.
 “(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.
 “(c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.
 “(d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”
 All footnote and parenthetical references to constitutional provisions hereinafter are to the California Constitution unless otherwise indicated.
- 5 Statutes 1982, First Extraordinary Session 1983–1984, chapter 6, section 2, chapter 8, section 2 (No. 1 West’s Cal.Legis. Service, pp. 34 and 120). The initiative would repeal and replace chapters 1 through 4 of division 18 of the Elections Code, which divisions encompass sections 30000 through 30030, and establish the boundaries respectively of the Assembly, Senate, and congressional districts.
- 6 Subdivision 3, of article I, section 2, provides in pertinent part: “Representatives ... shall be apportioned among the several States which may be included within this Union, according to their respective numbers, ... The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct....”

- 7 That act provides in subdivision (a): "On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State ... as ascertained under ... each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member."
- 8 While not taking an adversary position in the proceeding, the Secretary of State has provided a calendar of statutory deadlines with which election officials and candidates cannot comply unless they have knowledge of district boundaries. That calendar appears as Appendix A to this opinion.
- 9 Article IV, section 8, subdivisions (c)(1) and (2) and (d) provide that legislation may become effective immediately upon signing if the Legislature so directs:
- "(c)(1) Except as provided in paragraph (2) of this subdivision, a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed.
- "(2) Statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the State, and urgency statutes shall go into effect immediately upon their enactment.
- "(d) Urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. In each house the section and the bill shall be passed separately, each by rollcall vote entered in the journal, two thirds of the membership concurring. An urgency statute may not create or abolish any office or change the salary, term, or duties of any office, or grant any franchise or special privilege, or create any vested right or interest."
- 10 See also, *Opinion of Justices* (1839) 60 Mass. (6 Cush.) 575, to the same effect.
- 11 We stated: "The views expressed herein are not inconsistent with the position taken by this court in *Dowell v. McLees*, 199 Cal. 144, 146, 248 P. 511, and *Wheeler v. Herbert*, 152 Cal. 224, 237, 92 P. 353, that the power to form legislative districts under section 6 (as it read prior to the 1926 amendment) could be exercised but once during the period between one federal census and the succeeding one. It is apparent that the statements in the opinions related to the effect of a *valid* reapportionment, not one which is inoperative because of a violation of the Constitution, and there is nothing in those decisions which would preclude the Legislature from making a second reapportionment after nullification of its first effort by the courts or by referendum." (60 Cal.2d at pp. 316–317, 33 Cal.Rptr. 97, 384 P.2d 417, emphasis in original.)
- 12 As the out-of-state authorities cited in *Wheeler* demonstrate, the once-in-a-decade rule is by no means peculiar to California. As the Supreme Court of Kansas has observed: "It is the general rule that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period prescribed by the Constitution [citations]." (*Harris v. Shanahan* (1963) 192 Kan. 183, 387 P.2d 771, 779–780; see also, *State v. Zimmerman* (1954) 266 Wis. 307, 63 N.W.2d 52.)
- 13 See Opinion of Legislative Counsel of California No. 5177 (Mar. 9, 1951) Reapportionment, 1 Assem. J. (1951 Reg.Sess.) page 1796; 18 Ops.Cal.Atty.Gen. 11, 15.
- 14 The ballot pamphlet prepared for the voters prior to the adoption of article XXI supports the conclusion that no change was intended in the limitation of reapportionment to once each decade. The Official Title and Summary Prepared by the Attorney General stated that the measure "[s]ets forth in a new article the standards to which the Legislature is required to conform in adjusting the boundaries of these districts *each decade*." (Emphasis added.) The Legislative Analyst's analysis stated in the introductory sentence of the "Background" summary of the measure: "State Senate, Assembly, congressional and Board of Equalization *districts are reapportioned every ten years*" (Emphasis added.) Neither the Attorney General's summary nor the Legislative Analyst's explanation of the measure suggested that any change was intended in this regard. None of the arguments for or against the measure suggested any change, and the one argument that mentioned the subject, that of Assemblyman Naylor and Mr. Hofeller, stated that the proposition "would establish

reasonable rules for redrawing boundaries for legislative and congressional districts *after each census*.” (Emphasis added.) (Ballot Pamp., Proposed Amends. to Cal.Const. with arguments to voters, Primary Elec. (June 3, 1980) pp. 20, 22.) Ballot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 246, 149 Cal.Rptr. 239, 583 P.2d 1281.)

15 Article XXI, quoted in full at pages 788 – 789, of 194 Cal.Rptr., at pages 24–25 of 669 P.2d, *ante*, requires the establishment of (1) single-member districts, (2) of “reasonably equal” population, (3) which are contiguous, (4) are numbered in a specified manner, and (5) which respect the geographical integrity of cities, counties and geographical regions “to the extent possible without violating the other requirements” of the provision.

16 In *In re Initiative Petition No. 317, Etc.* (Okla.1982) 648 P.2d 1207, 1212, the Oklahoma Supreme Court recently held that an initiative measure—which had been filed after a congressional redistricting plan had been adopted—could be put to the voters. In that case, however, the Oklahoma court did not address the question of the effect of a state constitutional once-a-decade limitation on districting by initiative, and thus the decision provides no authority or guidance on this point.

An article on the use of the initiative in this area reports various instances in which the initiative has been used to establish or restructure ground rules for reapportionment, but none in which it has been used to redistrict. (Goldberg, *The People Legislate* (1966) 55 National Civic Rev. 82.)

17 *Sloan v. Donoghue* (1942) 20 Cal.2d 607, 127 P.2d 922, on which real parties rely, held that a reapportionment was not “effective” at the time the Governor proclaimed a special election to fill a vacancy in a congressional seat occasioned by the death of the incumbent prior to the expiration of his term. The reapportionment statute enacted before his death would govern the next primary and general election. This court held that the district from which the decedent had been elected continued intact inasmuch as nothing in the reapportionment legislation reflected an intent that it apply to vacancies occurring before the next election, and to so interpret it would lead to arbitrary and capricious results. (20 Cal.2d at pp. 611–612, 127 P.2d 922.) The court considered neither the question of whether former section 6 of article IV would permit earlier application of a reapportionment statute, nor the question of when the prohibitory aspect of the section operated to preclude a second reapportionment. *Sloan* was reaffirmed in *Legislature v. Reinecke* (1973) 10 Cal.3d 396, 404, 110 Cal.Rptr. 718, 516 P.2d 6, in which we recognized stability and continuity of representation and orderly operation as desirable goals in the redistricting process. (*Id.*, at pp. 405–406, 110 Cal.Rptr. 718, 516 P.2d 6.)

18 As applied in this case, the argument is more theoretical than real. The congressional redistricting statute (ch. 6) was not adopted on an “urgency” basis, yet apparently there was no attempt to qualify a referendum as to that statute. Nor has there been any cognizable challenge to the declaration of urgency with respect to the state legislative redistricting statute (ch. 8) (see *Stockburger v. Jordan* (1938) 10 Cal.2d 636, 642, 76 P.2d 671).

19 Some members of the court are of the opinion that the initiative also violates the one-subject rule. (Art II, § 8, subd. (d).) In their view, legislative reapportionment and congressional reapportionment are separate subjects, as determined by origin (i.e., the number of legislators is prescribed by the state Constitution, the number of representatives by federal law), by legislative practice (i.e., redistricting has always been undertaken by separate bills for the Assembly, the Senate and for congressional representatives), and by voter consideration (e.g., Proposition 10 [congressional districts], Proposition 11 [Senate districts], Proposition 12 [Assembly districts], Primary Election, June 8, 1982.)

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