

# THE IMPLICATIONS OF LEGISLATIVE POWER: STATE CONSTITUTIONS, STATE LEGISLATURES, AND MID-DECADE REDISTRICTING

**Abstract:** In the wake of the U.S. Supreme Court's splintered decision in 2006 in *League of United Latin American Citizens v. Perry*, future federal constitutional challenges to mid-decade redistricting appear to be dead on arrival. Yet, experience demonstrates that state constitutions may provide a viable alternative source for meaningful limits on the ability of states to engage in mid-decade redistricting. Indeed, in combination with constitutional language indicating the time at which redistricting should occur, the plenary nature of state legislative power compels the conclusion that state legislatures generally lack the power to engage in mid-decade redistricting. Many state supreme courts, including those of South Dakota and Colorado, have already reached this conclusion. This Note contends that other state courts should similarly interpret their constitutions to require redistricting after the national census and before the ensuing general election, and to prohibit redistricting at any other time.

## INTRODUCTION

Apportionment<sup>1</sup> in the United States has never been a tidy affair.<sup>2</sup> Government officials have long used the process of drawing legislative districts and allocating legislative seats among those districts to entrench specific interests in power or to dilute the influence of others.<sup>3</sup>

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<sup>1</sup> Apportionment is the process of "[d]istribut[ing] . . . legislative seats among districts." BLACK'S LAW DICTIONARY 109 (8th ed. 2004). Reapportionment, or redistricting, is the process of "[r]ealign[ing] . . . a legislative district's boundaries to reflect changes in population." *Id.* at 1293. Throughout this Note, "districting," "redistricting," "apportionment," and "reapportionment" are used interchangeably to refer to the process of dividing a state into districts for the purpose of electing representatives to the state legislature, Congress, or other representative bodies. See BRUCE M. CLARKE & ROBERT TIMOTHY REAGAN, REDISTRICTING LITIGATION: AN OVERVIEW OF LEGAL, STATISTICAL, AND CASE-MANAGEMENT ISSUES 1 n.1, (2002), available at [http://www.fjc.gov/library/fjc\\_catalog.nsf/autoframepagelopenform&url=/library/fjc\\_catalog.nsf/Publication!openform&parent\\_unid=B172A2401C939FD085256CA30068F64E](http://www.fjc.gov/library/fjc_catalog.nsf/autoframepagelopenform&url=/library/fjc_catalog.nsf/Publication!openform&parent_unid=B172A2401C939FD085256CA30068F64E).

<sup>2</sup> See generally ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER (Reprint ed., Arno Press 1974) (1907).

<sup>3</sup> See *id.* at 120 ("The gerrymander is nearly as old as is the practice in America of popular election by districts."). This scholar traces the origins of gerrymandering to colo-

Since the U.S. Supreme Court's 1962 decision in *Baker v. Carr*,<sup>4</sup> redistricting litigation in the federal courts has been a common feature of American political life.<sup>5</sup> Between the 1980 and 1990 censuses, federal courts were involved in approximately one-third of all congressional and state legislative redistricting.<sup>6</sup> In the redistricting cycle that followed the 1990 census, forty-one states endured some form of redistricting litigation.<sup>7</sup> As the volume of redistricting cases has increased, so has the variety of causes of action.<sup>8</sup> Since *Baker*, redistricting cases have run the gamut, from allegations of malapportionment and vote dilution, to racial and political gerrymandering.<sup>9</sup>

When it comes to mid-decade redistricting, however, the volume of gerrymandering cases has done little to produce a coherent body of federal law.<sup>10</sup> As illustrated by the contentious congressional redistricting dispute in Texas in 2003, the Supreme Court has been unable to provide meaningful guidance to lower federal courts.<sup>11</sup> Accordingly, future plaintiffs challenging mid-decade redistricting are in-

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nial times, well before the coining of the term in 1812. See *id.* at 23–29. Although the term “gerrymander” initially had a very narrow meaning—“the formation of election districts, on another basis than that of single and homogeneous political units as they existed previous to the apportionment, with boundaries arranged for partisan advantage,” *id.* at 21—today it is used to refer to nearly any alleged unfairness that accompanies an apportionment. See, e.g., *Prison-Based Gerrymandering*, N.Y. TIMES, May 20, 2006, at A12 (labeling as “gerrymandering” the practice of including prisoners—who are ineligible to vote in forty-eight states—in the total number of residents of a legislative district).

<sup>4</sup> 369 U.S. 186, 237 (1962) (concluding that malapportionment claims presented justiciable cases and controversies under the Equal Protection Clause of the Fourteenth Amendment).

<sup>5</sup> See Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 879–80 (2001) [hereinafter *Federal Court Involvement*].

<sup>6</sup> See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1689–91 (1993).

<sup>7</sup> *Federal Court Involvement*, *supra* note 5, at 879.

<sup>8</sup> See, e.g., *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 642 (1993) (racial gerrymandering); *Grove v. Emison*, 507 U.S. 25, 37–42 (1993) (vote dilution); *Davis v. Bandemer*, 478 U.S. 109, 113 (1986) (plurality opinion) (political gerrymandering).

<sup>9</sup> See, e.g., *Shaw I*, 509 U.S. at 642 (appellants alleging that, because North Carolina's apportionment plan was “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting,” it violated the Equal Protection Clause); *Grove*, 507 U.S. at 37–42 (explaining that plaintiffs alleged that Minnesota's legislative redistricting plan violated Section 2 of the Voting Rights Act of 1965 by diluting the votes of the minority population in a portion of the city of Minneapolis); *Davis*, 478 U.S. at 113 (explaining that plaintiffs alleged that Indiana's state apportionment unconstitutionally diluted the votes of Indiana Democrats); *Baker*, 369 U.S. at 187–88 (appellants alleging that the malapportionment of Tennessee's legislative districts violated the Equal Protection Clause of the Fourteenth Amendment).

<sup>10</sup> See *infra* notes 23–28 and accompanying text.

<sup>11</sup> See *infra* notes 14–28 and accompanying text.

creasingly likely to try their luck in state courts using state constitutions.<sup>12</sup> Thus, the events in Texas provide a useful starting place to examine the increasingly nasty business of reapportionment, particularly the phenomenon of mid-decade redistricting.<sup>13</sup>

In a highly publicized case that reached the Supreme Court in 2006, *League of United Latin American Citizens v. Perry*, Republican legislators in Texas endeavored to re-redistrict the state's congressional districts after the 2002 elections had been held with districts drawn pursuant to the 2000 census figures, but before the next decennial census.<sup>14</sup> Because of the plan's obvious partisan design, the attempted redistricting, not surprisingly, led to litigation.<sup>15</sup>

Those who sued to block the use of the redrawn districts filed their lawsuit in federal court and alleged that the mid-decade redistricting was an unconstitutional partisan gerrymander.<sup>16</sup> Specifically, the plaintiffs alleged, inter alia, that the mid-decade redistricting violated the Equal Protection Clause of the Fourteenth Amendment and contravened the constitutional guarantee of one person, one vote.<sup>17</sup> The district court rejected the plaintiffs' claims, and the plaintiffs appealed to the Supreme Court.<sup>18</sup>

On the last day of the term, the deeply divided Court handed down its decision in *Perry*, producing a remarkable seven opinions totaling 132 pages.<sup>19</sup> Justice Kennedy announced the Court's judgment and delivered the lead opinion, but his reasoning failed to win the sup-

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<sup>12</sup> See *infra* notes 29–32 and accompanying text.

<sup>13</sup> See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2605–07 (2006) (plurality opinion).

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* at 2607; Patrick Marecki, Note, *Mid-Decade Congressional Redistricting in a Red and Blue Nation*, 57 VAND. L. REV. 1935, 1935–36 (2004). At nearly the same time, Republicans in Colorado endeavored to redistrict their state's congressional districts after a valid map had been used for the 2002 elections. See *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1226–27 (Colo. 2003) (en banc) (holding that the mid-decade displacement of a court-ordered congressional apportionment plan violated the Colorado constitution); *infra* notes 194–222 and accompanying text.

<sup>16</sup> *Perry*, 126 S. Ct. at 2609 (plurality opinion).

<sup>17</sup> See *id.* at 2609–12. The one person, one vote requirement obligates a state to redistrict following each census in order to equalize the size of its districts so that one individual's vote will not be worth more than another's. See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). For a discussion of the one person, one vote requirement, and the Equal Protection Clause's applicability to apportionment, see *infra* notes 52–80 and accompanying text.

<sup>18</sup> *Henderson v. Perry*, 399 F. Supp. 2d 756, 778 (E.D. Tex. 2005), *aff'd in part, vacated in part, rev'd in part sub nom.*, *Perry*, 126 S. Ct. at 2604 (plurality opinion).

<sup>19</sup> See generally 126 S. Ct. 2594 (2006).

port of a majority of the Court.<sup>20</sup> Although declining to reconsider the issue of justiciability, the severely fractured Court ruled that because the plaintiffs had not demonstrated a "legally impermissible use of political classifications" in the redrawing of Texas's congressional districts, the mid-decade redistricting did not violate the Equal Protection Clause.<sup>21</sup> Moreover, the Court rejected the plaintiffs' contention that a mid-decade redistricting, when solely motivated by partisan considerations, contravenes the one person, one vote requirement.<sup>22</sup>

The deep divisions among the Justices in the *Perry* decision do not bode well for a future federal constitutional challenge to mid-decade redistricting.<sup>23</sup> As many commentators have noted, the Supreme Court seems hopelessly lost in the "political thicket" of redistricting, providing little guidance for lower courts and even less hope for plaintiffs.<sup>24</sup> To begin with, the U.S. Constitution contains no explicit prohibition on

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<sup>20</sup> See *id.* at 2604 (plurality opinion). Justice Kennedy's discussion of the plaintiffs' Equal Protection Clause challenges controlled the result of the case, but did not gain the support of a majority of the Court. See *id.* at 2607–12. Chief Justice Roberts and Justice Alito joined in the disposition of the Equal Protection claims, but not in Justice Kennedy's reasoning. *Id.* at 2652 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I agree with the determination that appellants have not provided 'a reliable standard for identifying unconstitutional political gerrymanders.' . . . [Therefore,] I join the Court's disposition . . . without specifying whether appellants have failed to state a claim on which relief can be granted."). Justices Scalia and Thomas supported the disposition as well because, in their view, the plaintiffs' claims were nonjusticiable. *Id.* at 2663 (Scalia, J., concurring in the judgment in part and dissenting in part) ("As I have previously expressed, claims of unconstitutional partisan gerrymandering do not present a justiciable case or controversy."). In result, the *Perry* decision appears effectively to foreclose, at least for the time being, a federal constitutional challenge to mid-decade congressional redistricting. See David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 *RUTGERS L.J.* 1087, 1100 (2006).

<sup>21</sup> *Perry*, 126 S. Ct. at 2607–12 (plurality opinion).

<sup>22</sup> See *id.* at 2611–12.

<sup>23</sup> See Schultz, *supra* note 20, at 1100.

<sup>24</sup> See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 *U. PA. L. REV.* 503, 505 (2004). Professor Heather Gerken contends that the Court's inability to agree on a substantive standard is the result of its reliance on a conventional individual rights framework to confront a problem that is structural in nature. *Id.* at 504. Gerken argues that although an individual rights framework makes sense when there is concrete and personal harm such as when the state requires a poll tax in order to vote, such a framework makes no sense when an individual has not been denied the right to vote. See *id.* at 506. When a person claims that partisan considerations unconstitutionally dominated the redistricting process, "the claim is about who wins, not who votes." *Id.* See generally Daniel H. Lowenstein, *Vieth's Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?* 14 *CORNELL J.L. & PUB. POL'Y* 367 (2005); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 *HARV. J.L. & PUB. POL'Y* 103 (2000).

mid-decade redistricting.<sup>25</sup> Moreover, attempts to frame mid-decade redistricting as an unconstitutional political gerrymander will continue to be unsuccessful as long as a current majority of the Court is unable to agree on a substantive standard to govern such claims.<sup>26</sup> Yet, because at least five Justices continue to believe that claims of partisan gerrymandering are justiciable,<sup>27</sup> federal courts are usually in the awkward position of being unable to dismiss partisan gerrymandering cases but are nonetheless effectively unable to adjudicate them in the absence of any standard to determine whether a redistricting plan resulted from the impermissible use of partisan considerations.<sup>28</sup>

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<sup>25</sup> *Perry*, 126 S. Ct. at 2608 (plurality opinion).

<sup>26</sup> *See id.* at 2607–12.

<sup>27</sup> *See generally* *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer have all expressed the view that claims of unconstitutional partisan gerrymandering are justiciable. *See id.* at 317–42 (Stevens, J., dissenting); *id.* at 306–17 (Kennedy, J., concurring in judgment); *id.* at 343–55 (Souter, J., dissenting) (opinion joined by Justice Ginsburg); *id.* at 355–68 (Breyer, J., dissenting). Justices Scalia and Thomas have argued that such claims are nonjusticiable. *Perry*, 126 S. Ct. at 2663 (Scalia, J., concurring in the judgment in part and dissenting in part) (opinion joined by Justice Thomas). Since their appointment to the Court, Chief Justice Roberts and Justice Alito have not taken a position on the justiciability question. *See Perry*, 126 S. Ct. at 2652 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The question whether any . . . standard exists—that is, whether a challenge to a political gerrymander presents a justiciable case or controversy—has not been argued in these cases.”) (opinion joined by Justice Alito).

<sup>28</sup> *See Vieth*, 541 U.S. at 281 (plurality opinion) (concluding that partisan gerrymandering claims are nonjusticiable); *id.* at 306–17 (Kennedy, J., concurring in judgment) (reasoning that partisan gerrymandering claims are justiciable but declining to adopt a substantive standard to govern such cases). Justices Stevens, Souter, Ginsburg and Breyer have also concluded that partisan gerrymandering claims are justiciable but could not agree amongst themselves on a substantive standard. *See id.* at 317–42 (Stevens, J., dissenting); *id.* at 343–55 (Souter, J., dissenting) (opinion joined by Justice Ginsburg); *id.* at 355–68 (Breyer, J., dissenting). *But see* *Cox v. Larios*, 542 U.S. 947, 947 (2004) (affirming summarily the district court’s judgment that Georgia’s legislative reapportionment plan violated the one person, one vote requirement). The U.S. District Court for the Northern District of Georgia had concluded that the Georgia plan violated the one person, one vote requirement of the Equal Protection Clause because it deviated from population equality by 9.98% and there were no legitimate state policies that justified the deviation. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1322 (N.D. Ga. 2004), *summarily aff’d*, 542 U.S. 947. In particular, the district court found that the deviations were motivated by two impermissible policies: (1) “a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta,” and (2) “an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another.” *Id.* at 1327, 1329. The district court rejected the claim that the apportionment plan was an unconstitutional partisan gerrymander because the plaintiffs had not met a strict but undefined standard requiring plaintiffs to show they have “essentially been shut out of the political process.” *Id.* at 1351 (quoting *Davis*, 478 U.S. at 139). Never-

As a result of this doctrinal interregnum,<sup>29</sup> future challenges to mid-decade redistricting plans are unlikely to succeed in federal courts.<sup>30</sup> Accordingly, plaintiffs are increasingly likely to file such claims in state courts and to allege violations of state constitutions.<sup>31</sup> Indeed, although mid-decade redistricting cases may have only recently appeared in federal courts, state courts have been adjudicating similar cases for many years.<sup>32</sup>

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theless, concurring in the Supreme Court's judgment, Justice Stevens stressed the obviously partisan nature of the plan and opined that, "had the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case." *Id.*

<sup>29</sup> See generally Gerken, *supra* note 24.

<sup>30</sup> See, e.g., *Perry*, 126 S. Ct. at 2612.

<sup>31</sup> See *Salazar*, 79 P.3d at 1225 (holding that the mid-decade displacement of a court-ordered congressional apportionment plan violated the Colorado Constitution); *In re Below*, 855 A.2d 459, 470, 472 (N.H. 2004) (per curiam) (holding that mid-decade replacement of a court-ordered legislative apportionment plan violated the New Hampshire Constitution); *In re Certification of a Question of Law*, 615 N.W.2d 590, 593 (S.D. 2000) (holding that a mid-decade reapportionment of the state legislature violated the South Dakota Constitution); cf. James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 643 (2004) (suggesting that the Supreme Court's failure to agree on a standard to govern claims of partisan gerrymandering implicitly invites plaintiffs to pursue their claims in state courts). Professor James Gardner focuses on gerrymandering plans enacted for partisan advantage in the first instance, rather than mid-decade redistricting as a distinct form of gerrymandering. See *id.* In a subsequent article, Gardner takes the first step in addressing the viability of traditional partisan gerrymandering claims—as contrasted with mid-decade redistricting—in state courts. James A. Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 889 n.19 (2006) [hereinafter Gardner, *Representation Without Party*]. Gardner's preliminary conclusion is that traditional state constitutional constraints on gerrymandering "are not adequate to the task of restricting partisan gerrymandering because they do not speak to gerrymandering undertaken for partisan gain." *Id.* at 889–90.

<sup>32</sup> See generally *Opinion of the Justices*, 47 So. 2d 714 (Ala. 1950); *Legislature v. Deukmejian*, 669 P.2d 17 (Cal. 1983) (per curiam); *Wheeler v. Herbert*, 92 P. 353 (Cal. 1907); *Salazar*, 79 P.3d 1221; *People ex rel. Mooney v. Hutchinson*, 50 N.E. 599 (Ill. 1898); *Denney v. State ex rel. Basler*, 42 N.E. 929 (Ind. 1896); *Harris v. Shanahan*, 387 P.2d 771 (Kan. 1963); *In re Below*, 855 A.2d 459; *Jones v. Freeman*, 146 P.2d 564 (Okla. 1943), *overruled on other grounds by Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002); *In re Certification*, 615 N.W.2d 590; *Slauson v. City of Racine*, 13 Wis. 398 (1861); Justin Levitt & Michael P. McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247 (2007). Although it does not appear the Ohio courts ever adjudicated the particular dispute, between 1878 and 1892, the Ohio state legislature reapportioned the state's congressional districts at least seven times: "At one point during this period, six consecutive congressional elections were conducted with a new districting plan." See Richard Gladden, *The Federal Constitutional Prohibition Against "Mid-Decade" Congressional Redistricting: Its State Constitutional Origins, Subsequent Development, and Tenuous Future*, 37 RUTGERS L.J. 1133, 1139 (2006). See generally Schultz, *supra* note 20.

This Note examines the doctrinal approaches state courts have used to adjudicate cases involving mid-decade redistricting under their state constitutions.<sup>33</sup> It argues that challenges to mid-decade redistricting under state constitutions can be and have been successful when plaintiffs frame the issue as one of legislative power.<sup>34</sup> Whereas the Supreme Court in *Perry* used equal protection analysis to assess Texas's mid-decade redistricting,<sup>35</sup> state supreme courts adjudicating similar disputes have not relied on equivalent provisions in their state constitutions.<sup>36</sup> Rather, state courts have analyzed the question in terms of legislative power, and in those instances where state courts have invalidated mid-decade redistricting plans, they have done so by reasoning that the state legislature overstepped the implied (and occasionally explicit) limits on its authority.<sup>37</sup> This Note examines the theories and justifications state courts have used to assess the scope of a state's authority under a state constitution to replace a redistricting plan in the middle of the decade.<sup>38</sup> It argues in favor of a narrow interpretation of that authority.<sup>39</sup>

Part I outlines the federal constitutional and statutory framework within which all apportionment—federal, state, and local—takes place.<sup>40</sup> Part II highlights some of the most common state constitutional restrictions on apportionment.<sup>41</sup> Part III briefly examines the nature of state legislative power, its origins, limits, and the doctrinal approaches state courts have used to examine its scope.<sup>42</sup> It then analyzes three recent state court decisions from South Dakota, Colorado, and New Hampshire confronting the power of state legislatures to redistrict in the middle of a decade.<sup>43</sup> Finally, Part IV argues that future state courts should, when confronted with language similar to that contained in the South Dakota, Colorado, and New Hampshire constitu-

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<sup>33</sup> See *infra* notes 167–247 and accompanying text.

<sup>34</sup> See *infra* notes 167–338 and accompanying text; see also *Salazar*, 79 P.3d at 1231–40 (holding that the Colorado Constitution limited the power of the state legislature to redistrict once per decade).

<sup>35</sup> See *Perry*, 126 S. Ct. at 2607–12 (plurality opinion).

<sup>36</sup> See, e.g., *Salazar*, 79 P.3d at 1231–40; *In re Below*, 855 A.2d at 464–72; *In re Certification*, 615 N.W.2d at 593–97.

<sup>37</sup> See, e.g., *Deukmejian*, 669 P.2d at 22–31; *Wheeler*, 92 P. at 358–59; *Salazar*, 79 P.3d at 1231–40.

<sup>38</sup> See *infra* notes 167–247 and accompanying text.

<sup>39</sup> See *infra* notes 248–338 and accompanying text.

<sup>40</sup> See *infra* notes 45–116 and accompanying text.

<sup>41</sup> See *infra* notes 117–151 and accompanying text.

<sup>42</sup> See *infra* notes 152–166 and accompanying text.

<sup>43</sup> See *infra* notes 167–247 and accompanying text.

tions, favor the approach of the South Dakota and Colorado courts and reject the "continuing duty" theory of the New Hampshire court.<sup>44</sup>

## I. FEDERAL CONSTITUTIONAL AND STATUTORY BACKDROP

Redistricting plans, whether enacted following a census or some time during the middle of the decade, must comply with a host of federal constitutional and statutory requirements.<sup>45</sup> The federal constitutional mechanism for congressional apportionment is deceptively simple.<sup>46</sup> Article I, Section 2 of the U.S. Constitution provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States."<sup>47</sup> Section 4 provides: "The Times, Places and Manner of holding Elections for . . . 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."<sup>48</sup> Thus, although Congress has the power to make or alter regulations concerning the "manner" in which congressional elections take place—that is, the number of representatives per district,<sup>49</sup> or perhaps, as some have advocated, a statutory prohibition on mid-decade redistricting<sup>50</sup>—states retain the primary responsibility for redrawing their congressional districts every ten years following a national census.<sup>51</sup>

### A. *One Person, One Vote*

The most recognized—and occasionally controversial—constitutional condition is the "one person, one vote" requirement.<sup>52</sup> In 1964,

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<sup>44</sup> See *infra* notes 248–338 and accompanying text.

<sup>45</sup> See, e.g., U.S. CONST. art. I, §§ 2, 4; *id.* amend. XIV; Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (2000); see also *infra* notes 52–116 and accompanying text. The U.S. Constitution requires the taking of a national census every ten years. U.S. CONST. art. I, § 2.

<sup>46</sup> See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2607–09 (2006) (plurality opinion).

<sup>47</sup> U.S. CONST. art. I, § 2.

<sup>48</sup> *Id.* § 4.

<sup>49</sup> See 2 U.S.C. § 2c (2000) (requiring states, with certain exceptions, to use single-member districts when electing representatives to the House of Representatives).

<sup>50</sup> See *Marecki*, *supra* note 15, at 1966–72.

<sup>51</sup> See *Perry*, 126 S. Ct. at 2607–08 (plurality opinion) (explaining that Sections 2 and 4 of Article I of the U.S. Constitution "leave[] with the States primary responsibility for apportionment of their federal congressional . . . districts." (quoting *Grove v. Emison*, 507 U.S. 25, 34 (1993))); see also *White v. Weiser*, 412 U.S. 783, 795 (1973) ("We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment.").

<sup>52</sup> *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). For criticism of the one person, one vote requirement, see generally *McConnell*, *supra* note 24.



in *Wesberry v. Sanders*, the U.S. Supreme Court held that Article I, Section 2's requirement that the House of Representatives be composed of members elected "by the People of the several States" mandated that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>53</sup> In application, the one person, one vote requirement obligates states to make a good-faith effort to draw their districts so that they are equal in population.<sup>54</sup> A state must justify any variances in population by articulating legitimate state policies based upon nondiscriminatory criteria.<sup>55</sup> For instance, a state might legitimately have a policy of keeping districts compact, preserving local political boundaries, or avoiding incumbent-versus-incumbent races.<sup>56</sup>

The one person, one vote requirement is the fundamental federal control on states' power to redistrict because it compels every state to redistrict following a census.<sup>57</sup> Because dramatic population changes inevitably occur in the ten-year period between each census, a state would most likely run afoul of the one person, one vote requirement if it did not redistrict following a census.<sup>58</sup> Thus, if a state fails to redistrict in time for the mid-term elections, a lawsuit will often compel a court to impose its own districting plan to guarantee that the population changes from the previous ten years do not result in malapportioned districts.<sup>59</sup>

The Supreme Court has acknowledged, however, that because population shifts are continuous in the years between each census, states operate "under the legal fiction that even 10 years later" their plans comply with the one person, one vote requirement.<sup>60</sup> Moreover, a mid-decade redistricting plan that complies, as it must, with the one person, one vote requirement as measured by the preceding census

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<sup>53</sup> 376 U.S. at 7-8. Although the term is associated with the holdings of *Wesberry* and *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), the term was first used in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), in this context: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." See CLARKE & REAGAN, *supra* note 1, at 2 n.3.

<sup>54</sup> *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

<sup>55</sup> See *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Kirkpatrick*, 394 U.S. at 531 ("Unless population variances among congressional districts are shown to have resulted despite such [good-faith] effort, the State must justify each variance, no matter how small.").

<sup>56</sup> *Karcher*, 462 U.S. at 740.

<sup>57</sup> See *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003).

<sup>58</sup> See *id.*

<sup>59</sup> See *Perry*, 126 S. Ct. at 2606.

<sup>60</sup> See *Georgia*, 539 U.S. at 488 n.2.

figures, also benefits from this legal fiction.<sup>61</sup> Nevertheless, no matter when the redistricting takes place, a state must comply with the one person, one vote requirement by equalizing the population of their districts as measured by the immediately preceding census.<sup>62</sup>

### B. *The Equal Protection Clause*

In addition to the constitutional requirement of one person, one vote, redistricting plans must also comply with the Equal Protection Clause of the Fourteenth Amendment, particularly as it concerns racial gerrymandering.<sup>63</sup> Specifically, the Supreme Court has ruled that the Equal Protection Clause generally forbids redistricting plans that, although racially neutral on their face, are so irregular that they cannot be rationally understood as "anything other than an effort to separate voters into different districts on the basis of race."<sup>64</sup> Thus, a redistricting scheme that expressly classifies voters by race or that can be understood only as an effort to separate voters on racial lines is subject to strict scrutiny.<sup>65</sup> Such race based gerrymandering will only survive an Equal Protection Clause challenge if it is the result of a state's use of constitutionally permissible objectives such as compactness, contiguity, or respect for political subdivisions.<sup>66</sup>

For example, in 1993, the Supreme Court in *Shaw v. Reno* (*Shaw I*) concluded that plaintiffs challenging North Carolina's congressional redistricting plan had stated a claim for relief under the Equal Protection Clause by alleging that the state's plan included highly irregular

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<sup>61</sup> See *Perry*, 126 S. Ct. at 2611 (plurality opinion).

<sup>62</sup> See *id.*; *Georgia*, 539 U.S. at 488 n.2.

<sup>63</sup> See *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 649 (1993). The Court has ruled that partisan gerrymanders, as contrasted with racial gerrymanders, also implicate the Equal Protection Clause. *Davis v. Bandemer*, 478 U.S. 109, 113 (1986) (plurality opinion). In *Davis v. Bandemer* in 1986, the Court held that allegations of impermissible partisan gerrymandering presented justiciable claims under the Equal Protection Clause. *Id.* Nevertheless, the Court was unable to agree on the substantive standard applicable to such claims and merely held that to prevail on a claim of unconstitutional partisan gerrymandering a plaintiff would have to show that her "particular group has been unconstitutionally denied its chance to effectively influence the political process." *Id.* at 132-33.

<sup>64</sup> *Shaw I*, 509 U.S. at 649.

<sup>65</sup> See *id.* at 644-49.

<sup>66</sup> See *id.*; see also *Wright v. Rockefeller*, 376 U.S. 52, 56-58 (1964). In 1964 in *Wright v. Rockefeller*, the U.S. Supreme Court upheld a district court judgment dismissing a complaint that alleged four New York congressional districts unconstitutionally segregated the races. *Id.* at 54-57. The Supreme Court rejected the plaintiffs' contention that the districts were unconstitutionally segregative because the concentration of nonwhite voters would have made it difficult to draw districts that did not concentrate those voters. See *id.* at 56-58.

districts justifiable only on racial grounds.<sup>67</sup> In the wake of the 1990 census, North Carolina gained a twelfth seat in the House of Representatives.<sup>68</sup> After obtaining authorization for the plan from the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965,<sup>69</sup> North Carolina imposed an apportionment plan that included two majority-minority districts.<sup>70</sup> The first of these districts had a hook-shaped appearance resembling a "bug splattered on a windshield."<sup>71</sup> The second district was even more bizarrely shaped, 160 miles long and extremely narrow—at times no wider than the Route I-85 corridor.<sup>72</sup> As one state legislator observed, "If you drove down the interstate with both car doors open, you'd kill most of the people in the district."<sup>73</sup>

The Court concluded that the bizarrely shaped districts could not be justified by legitimate apportionment objectives.<sup>74</sup> Because racial considerations were the only rational justification for the shapes of the districts, the Court remanded the case for consideration of whether the design of the racially motivated districts was narrowly tailored to achieve a compelling governmental interest.<sup>75</sup>

On remand, the district court concluded that the plan was narrowly tailored to serve North Carolina's compelling government interest in complying with Section 2 of the Voting Rights Act.<sup>76</sup> The Supreme Court, however, once again reversed the district court's decision in 1996 in *Shaw v. Hunt* (*Shaw II*).<sup>77</sup> Even though the Court assumed without deciding that compliance with Section 2 of the Voting Rights

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<sup>67</sup> 509 U.S. at 642.

<sup>68</sup> *Id.* at 633.

<sup>69</sup> 42 U.S.C. § 1973c (2000) (amended 2006). Under Section 5 of the Voting Rights Act, a covered jurisdiction must obtain authorization from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia before instituting any change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." *Id.*

<sup>70</sup> *Shaw I*, 509 U.S. at 634–36. A majority-minority district is a "voting district in which a racial or ethnic minority group makes up a majority of the voting citizens." BLACK'S LAW DICTIONARY 510 (8th ed. 2004).

<sup>71</sup> *Shaw I*, 509 U.S. at 635.

<sup>72</sup> *Id.* at 635–36.

<sup>73</sup> *Id.* at 636 (internal quotation marks omitted).

<sup>74</sup> *Id.* at 649.

<sup>75</sup> *See id.* at 653–58. In the Court's view, the plan was not narrowly tailored because it would not remedy a potential Section 2 violation. *See id.*

<sup>76</sup> *Shaw v. Hunt*, 861 F. Supp. 408, 436–39 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996). For more on the requirements of the Voting Rights Act see *infra* notes 81–102 and accompanying text.

<sup>77</sup> 517 U.S. 899, 902 (1996).

Act constituted a compelling government interest,<sup>78</sup> it invalidated the districting scheme as unconstitutional because it was not narrowly tailored to serve that interest.<sup>79</sup> In the Court's view, the plan would not have provided a remedy for a hypothetical Section 2 violation principally because the district along the I-85 corridor did not contain a geographically-compact racial minority group, which is a prerequisite for Section 2 liability.<sup>80</sup>

### C. *The Voting Rights Act of 1965*

In tension with commands of the Equal Protection Clause as it concerns racial gerrymandering is the principal statutory constraint on redistricting, Section 2 of the Voting Rights Act of 1965.<sup>81</sup> Under Section 2(a) of the Voting Rights Act, a state may not enact any "standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."<sup>82</sup> The Supreme Court has recognized that an apportionment plan constitutes such a "standard, practice, or procedure" for the purposes of Section 2.<sup>83</sup> Thus, a state apportionment plan violates the Act's prohibition if:

[B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>84</sup>

In this way, the Voting Rights Act prohibits all forms of voting discrimination, although minority groups have used Section 2 principally as a means of asserting claims of illegal vote dilution.<sup>85</sup>

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<sup>78</sup> *Id.* at 915.

<sup>79</sup> *Id.* at 915-18.

<sup>80</sup> *Id.* at 916-18; see *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *infra* notes 81-102 and accompanying text.

<sup>81</sup> See 42 U.S.C. § 1973 (2000); see also CLARKE & REAGAN, *supra* note 1, at 28-36 (discussing the tension between the Court's racial gerrymandering Equal Protection jurisprudence and the requirements of Section 2 of the Voting Rights Act).

<sup>82</sup> 42 U.S.C. § 1973(a).

<sup>83</sup> See *Johnson v. De Grandy*, 512 U.S. 997, 1006-24 (1994).

<sup>84</sup> 42 U.S.C. § 1973(b).

<sup>85</sup> *Gingles*, 478 U.S. at 45 n.10; see *Perry*, 126 S. Ct. at 2612-26 (holding that Texas's mid-decade congressional redistricting plan illegally diluted the votes of Latinos in west Texas

To state a claim for relief under Section 2 for illegal vote dilution, a plaintiff must establish three threshold conditions—known as the “*Gingles* factors” from the 1986 decision of the Supreme Court in *Thornburg v. Gingles*—before the court will examine the totality of the circumstances test embodied within the statute.<sup>86</sup> First, a plaintiff must prove that her racial group “is sufficiently large and geographically compact to constitute a majority in a single-member district.”<sup>87</sup> Second, a plaintiff must establish that her racial group is “politically cohesive.”<sup>88</sup> Finally, a plaintiff must show that the white majority votes cohesively enough to prevent the minority bloc from electing its desired candidate.<sup>89</sup> A plaintiff need not prove intentional discrimination; she need only show that the apportionment plan results in a denial or abridgment of the right to vote.<sup>90</sup>

To guarantee minorities an equal opportunity “to elect representatives of their choice,” states often choose to create majority-minority districts that permit minority groups to control more effectively who wins the election.<sup>91</sup> Indeed, in areas where racially polarized voting exists, Section 2 prohibits a state from redistricting in a manner that dilutes the voting strength of minority groups relative to other members of the electorate.<sup>92</sup> This prohibition may obligate a state to create a majority-minority district if the three *Gingles* factors exist.<sup>93</sup> Thus, although the creation of majority-minority districts is not required in every instance, states commonly employ the technique to avoid Section 2 liability.<sup>94</sup>

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and African-Americans in Dallas); *Abrams v. Johnson*, 521 U.S. 74, 90–95 (1997) (holding that a court-imposed apportionment plan for Georgia’s congressional districts illegally diluted the votes of African-Americans).

<sup>86</sup> 478 U.S. at 50–51.

<sup>87</sup> *Id.* at 50.

<sup>88</sup> *Id.* at 51.

<sup>89</sup> *Id.*

<sup>90</sup> 42 U.S.C. § 1973(a) (2000); see *Gingles*, 478 U.S. at 35. In 1980, the Supreme Court held in *City of Mobile v. Bolden* that claims of vote dilution under Section 2 required proof of an intent to discriminate. 446 U.S. 55, 60–65 (1980) (plurality opinion) (reasoning that Section 2 proscribed no more conduct than prohibited by the Fifteenth Amendment, which prohibits only purposeful discrimination). In 1982, Congress amended Section 2 to clarify that vote dilution claims did not require proof of an intent to discriminate. See *Gingles*, 478 U.S. at 35–36.

<sup>91</sup> See, e.g., *Shaw I*, 509 U.S. at 633–39 (describing North Carolina’s creation of two majority-minority districts as an attempt to avoid perceived Section 2 liability).

<sup>92</sup> *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O’Connor, J., concurring); see also CLARKE & REAGAN, *supra* note 1, at 16–18.

<sup>93</sup> *Vera*, 517 U.S. at 993 (O’Connor, J., concurring).

<sup>94</sup> See CLARKE & REAGAN, *supra* note 1, at 15–18.

It is occasionally difficult to satisfy the demands of both the Equal Protection Clause and Section 2 of the Voting Rights Act.<sup>95</sup> On the one hand is the Equal Protection Clause's prohibition on districts that are motivated predominantly by race to the exclusion of traditional districting criteria, such as compactness and contiguity;<sup>96</sup> on the other is the state's obligation under Section 2 to ensure that minorities have an equal opportunity "to elect representatives of their choice,"<sup>97</sup> an obligation that always necessitates consideration of race and occasionally requires the creation of a district explicitly on racial lines.<sup>98</sup>

This tension, though obvious, is not inherently unmanageable.<sup>99</sup> While the Supreme Court has held that districts drawn predominately along racial lines—to the exclusion of legitimate criteria—are subject to strict scrutiny,<sup>100</sup> the Court has also ruled that an apportionment plan can survive strict scrutiny if it is narrowly tailored to comply with Section 2 of the Voting Rights Act.<sup>101</sup> Thus, if a state creates a majority-minority district around a minority group that is sufficiently large, geographically compact, and politically cohesive, that district will survive strict scrutiny so long as it is narrowly tailored to comply with Section 2.<sup>102</sup>

Whether a state enacts an apportionment plan immediately after a census or it replaces a lawful plan in the middle of the decade, the fore-

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<sup>95</sup> *Id.* at 46.

<sup>96</sup> See *Shaw I*, 509 U.S. at 649.

<sup>97</sup> 42 U.S.C. § 1973(b) (2000).

<sup>98</sup> See *Vera*, 517 U.S. at 993 (O'Connor, J., concurring).

<sup>99</sup> See *id.*

<sup>100</sup> *Shaw I*, 509 U.S. at 653–58.

<sup>101</sup> See *Vera*, 517 U.S. at 977–81; *Shaw II*, 517 U.S. at 915–16; *Shaw I*, 509 U.S. at 653–58.

In her concurring opinion in the 1996 case of *Bush v. Vera*, Justice O'Connor outlined a framework for states to comply with both the Equal Protection Clause and Section 2: (1) a state redistricting plan will only be subject to strict scrutiny if it neglects traditional districting criteria and such neglect is due primarily to the misuse of racial considerations; (2) if there is racially polarized voting, Section 2 prohibits states from using redistricting plans that dilute votes on the basis of race and may require the creation of majority-minority districts in order to avoid Section 2 liability; (3) a state has a compelling interest in avoiding liability under Section 2, and it can create a majority-minority district if it concludes, based on strong evidence, that the three *Gingles* factors are present; (4) if the state creates a majority-minority district that directly addresses the potential Section 2 liability, a court will deem its plan narrowly tailored if it does not "deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons"; and (5) a court will find a plan unconstitutional if it includes districts that, for predominantly racial reasons, deviate substantially from a court-drawn Section 2 plan. *Vera*, 517 U.S. at 993–94 (O'Connor, J., concurring).

<sup>102</sup> See *Vera*, 517 U.S. at 977–81; *Shaw II*, 517 U.S. at 915–16; *Shaw I*, 509 U.S. at 653–58; see also CLARKE & REAGAN, *supra* note 1, at 44–46.

going requirements apply to all congressional apportionment plans.<sup>103</sup> The following section briefly examines the distinct federal constitutional considerations that apply to state and local apportionment plans.<sup>104</sup>

#### D. *Special Treatment of State and Local Apportionment Plans*

Like congressional apportionment plans, state and local apportionment plans are subject to the requirements of the Voting Rights Act, as outlined above.<sup>105</sup> Moreover, such plans must also comply with the Constitution, particularly as it concerns racial gerrymandering.<sup>106</sup> When it comes to the one person, one vote requirement, however, there are some subtleties in the requirement's application to state and local apportionment.<sup>107</sup> Whereas Article I, Section 2 of the Constitution obligates states to make a good-faith effort to achieve population equality in the context of congressional apportionment, the Equal Protection Clause imposes the same requirement in the context of state and local apportionment.<sup>108</sup>

In assessing the applicability of the one person, one vote requirement to state and local apportionment plans, the Supreme Court held in 1973 in *Mahan v. Howell* that states have more latitude to vary the population of their legislative and local districts than they have with their congressional districts.<sup>109</sup> Additional deference to states is appro-

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<sup>103</sup> See U.S. CONST. art. I, §§ 2, 4; *id.* amend. XIV; 42 U.S.C. § 1973 (2000); *supra* notes 52–102 and accompanying text.

<sup>104</sup> See *infra* notes 105–116 and accompanying text.

<sup>105</sup> 42 U.S.C. § 1973(a); see *Grove*, 507 U.S. at 37–42 (analyzing Minnesota's legislative reapportionment plan and its compliance with Section 2 of the Voting Rights Act); see also *supra* notes 81–102 and accompanying text.

<sup>106</sup> See *Chen v. City of Houston*, 206 F.3d 502, 505–22 (5th Cir. 2000) (analyzing the Houston City Council's districting scheme for compliance with the Equal Protection Clause).

<sup>107</sup> See *Reynolds*, 377 U.S. at 568 (holding that the Equal Protection Clause “requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis”).

<sup>108</sup> Compare *Reynolds*, 377 U.S. at 538 (one person, one vote required for state and local redistricting by virtue of the Equal Protection Clause of the Fourteenth Amendment), with *Wesberry*, 376 U.S. at 7–8 (one person, one vote required for congressional redistricting by virtue of Article I, Section 2). The one person, one vote requirement applies when “drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.” *Avery v. Midland County*, 390 U.S. 474, 485 (1968).

<sup>109</sup> See 410 U.S. 315, 323–35 (1973) (holding that Article I, Section 2 of the U.S. Constitution imposed a more stringent requirement of population equality on congressional redistricting than did the Equal Protection Clause in the context of state and local redistricting).

priate in the apportionment of state or local districts because of states' legitimate interest in preserving traditional political boundaries.<sup>110</sup>

In practice, the dual standard for the one person, one vote requirement has had some interesting effects.<sup>111</sup> In 1969, in *Kirkpatrick v. Preisler*, the Supreme Court ruled that states had to make a good-faith effort to equalize the populations of their congressional districts and to justify any variance, "no matter how small."<sup>112</sup> Thus, in 1983, the Supreme Court in *Karcher v. Daggett* invalidated a federal congressional apportionment plan that had a maximum deviation of only 0.7%, and it rejected outright the notion that Article I, Section 2 tolerated even de minimis variances in population between districts.<sup>113</sup> Conversely, in *Mahan*, the Court ruled that state and local entities must also make a good-faith effort to comply with one person, one vote, but that deviations from strict population equality are permissible when justified by "legitimate considerations incident to the effectuation of a rational state policy."<sup>114</sup> That same year, the Court concluded in *White v. Regester* that, even absent special justification, a state redistricting plan with a maximum deviation of 9.9% was *prima facie* constitutional.<sup>115</sup> In sum, the Court permits greater population deviations for state and local apportionment plans than for congressional plans.<sup>116</sup>

## II. COMMON LIMITATIONS PRESENT IN STATE CONSTITUTIONS

In addition to the federal constitutional and statutory constraints on congressional and legislative redistricting, states may impose further limitations on reapportionment.<sup>117</sup> Indeed, many state constitutions contain a thorough set of constraints on the power to redistrict.<sup>118</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> See McConnell, *supra* note 24, at 109 n.33 ("For reasons that make no doctrinal sense, the Court tolerates larger deviations (up to 10%) for state legislative districts, while requiring precise mathematical equality for congressional districts.").

<sup>112</sup> 394 U.S. at 530-31.

<sup>113</sup> 462 U.S. at 731-34.

<sup>114</sup> 410 U.S. at 325.

<sup>115</sup> 412 U.S. 755, 761-64 (1973).

<sup>116</sup> Compare *Karcher*, 462 U.S. at 731-34 (invalidating a congressional apportionment plan with a maximum deviation of only 0.7%), with *White*, 412 U.S. at 761-64 (declining to invalidate a legislative apportionment plan with a maximum deviation of 9.9%).

<sup>117</sup> See *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1235 (Colo. 2003) (en banc) ("The Colorado Constitution can only further restrict the General Assembly's authority to draw congressional districts; it cannot expand it."). The Federal Constitution presents a grant of power; a state's constitution presents a limitation on it. *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1208 (Colo. 1994).

<sup>118</sup> See Gardner, *Representation Without Party*, *supra* note 31, at 899-925.



There are at least five general methods by which state constitutions further control apportionment.<sup>119</sup> First, state constitutions regulate the unit of representation such as a county, town, or individual;<sup>120</sup> second, they prescribe a method for allocating representatives among that unit;<sup>121</sup> third, they control the total number of representatives within an elected body;<sup>122</sup> fourth, they stipulate whether representatives will be elected from single-member or multi-member districts;<sup>123</sup> and fifth, they provide specific restrictions on the manner in which districts are drawn by requiring, for example, compactness or contiguity.<sup>124</sup> Although the use of these types of constitutional provisions and their degree of specificity vary by state, they all aim to rein in reapportionment discretion and thus the opportunistic redistricting that frequently undermines the stability and accountability of representative government.<sup>125</sup>

Throughout the country, at many levels of representative government, the common unit of representation is the electoral district.<sup>126</sup> In the nascent United States, most state constitutions defined legislative electoral districts along county lines,<sup>127</sup> but over the course of the nineteenth century states across the country moved toward the use of electoral districts distinct from county boundaries.<sup>128</sup> This move resulted, at least in part, from a desire to ensure population equality across electoral districts as population changes throughout the country resulted in counties with highly variable populations.<sup>129</sup> For example, Massachusetts added a constitutional provision for the selection of senators "by the inhabitants of the districts into which the commonwealth may, from time to time, be divided."<sup>130</sup>

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<sup>119</sup> *Id.* at 900.

<sup>120</sup> *Id.* at 900–04.

<sup>121</sup> *Id.* at 904–08.

<sup>122</sup> *Id.* at 908–11.

<sup>123</sup> Gardner, *Representation Without Party*, *supra* note 31, at 911–15.

<sup>124</sup> *Id.* at 915–24.

<sup>125</sup> See *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d 1237, 1244–45 (Colo. 2002); *People ex rel. Woodyatt v. Thompson*, 40 N.E. 307, 315 (Ill. 1895).

<sup>126</sup> Gardner, *Representation Without Party*, *supra* note 31, at 900.

<sup>127</sup> *Id.* For example, the 1777 New York Constitution provided that members of the legislature would "be annually chosen in the several counties." *Id.* (quoting N.Y. CONST. of 1777, art. IV).

<sup>128</sup> *Id.* at 900–01.

<sup>129</sup> *Id.* at 901–02. Although these changes aimed to ensure accountability and control apportionment abuse, Professor Gardner argues that they were largely unsuccessful. *Id.* at 903–04.

<sup>130</sup> MASS. CONST. of 1780, pt. II, ch. I, § 2, art. I.

In addition to regulating the unit of representation, state constitutions frequently specify the method by which representatives are allocated to electoral units.<sup>131</sup> Whereas early constitutions often specified the exact number of representatives to which each unit was entitled,<sup>132</sup> modern constitutions allocate representatives based on population.<sup>133</sup> For example, the New Hampshire constitution provides: "[T]hat the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population . . . ."<sup>134</sup> This method is in line with the Supreme Court's holding in 1964 in *Reynolds v. Sims* that the Equal Protection Clause "requires that the seats in both houses of a bicameral state legislature . . . be apportioned on a population basis."<sup>135</sup>

A third method of apportionment control that states employ is a constitutional cap on the number of seats in the state legislature.<sup>136</sup> Such a cap prevents politicians from increasing or decreasing the size of the legislature for purely partisan gain.<sup>137</sup> The Colorado Constitution, for example, provides: "The general assembly shall consist of not more than thirty-five members of the senate and of not more than sixty-five members of the house of representatives . . . ."<sup>138</sup> Other constitutions contain similar language.<sup>139</sup>

A fourth method by which state constitutions frequently regulate apportionment is by specifying the number of representatives to be elected from each electoral district.<sup>140</sup> This helps to prevent opportunistic changes from single-member districts to at-large voting, which

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<sup>131</sup> Gardner, *Representation Without Party*, *supra* note 31, at 904-08.

<sup>132</sup> See, e.g., DEL. CONST. of 1776, art. 3. The Delaware constitution, for example, once allotted seven representatives to each county. *Id.*

<sup>133</sup> Gardner, *Representation Without Party*, *supra* note 31, at 905-06 (citing constitutions).

<sup>134</sup> N.H. CONST. pt. II, art. XXVI.

<sup>135</sup> 377 U.S. 533, 568 (1964).

<sup>136</sup> Gardner, *Representation Without Party*, *supra* note 31, at 908-11.

<sup>137</sup> *Id.* at 910-11.

<sup>138</sup> COLO. CONST. art. V, § 45.

<sup>139</sup> See, e.g., CAL. CONST. art. IV, § 6 (setting the size of the state senate at forty members and the state house of representatives at eighty members); DEL. CONST. art. II, § 2 (setting the size of the state senate at twenty-one members and the size of the state house of representatives at twenty-five members); N.H. CONST. pt. II, art. XXV (setting the size of the state senate at twenty-four members).

<sup>140</sup> Gardner, *Representation Without Party*, *supra* note 31, at 911-15, 914 n.115 (citing CAL. CONST. of 1879, art. IV, § 6; KAN. DRAFT [LEAVENWORTH] CONST. of 1858, art. IV, § 3; MICH. CONST. of 1850, pt. IV, §§ 2, 3; MO. CONST. of 1875, art. IV, §§ 3, 5, 6; N.Y. CONST. of 1846, art. III, §§ 3, 5; WIS. CONST. of 1848, art. IV, §§ 4, 5).

would upset the stability of state government.<sup>141</sup> As James Gardner has explained, a party in power may prefer at-large elections because such elections tend to overrepresent the majority.<sup>142</sup> Because of the attractiveness of manipulating the number of representatives to which each district is entitled, state constitutions today routinely specify whether state elections will use single-member districts or at-large voting.<sup>143</sup>

Finally, state constitutions frequently contain restrictions on the manner in which districts are physically drawn to prevent the most recognizable type of gerrymandering—drawing a crazy quilt of districts to secure the greatest partisan advantage.<sup>144</sup> Many state constitutions require contiguity, such that counties in a multi-county electoral district must be adjacent.<sup>145</sup> Moreover, many constitutions require electoral districts to be “convenient”<sup>146</sup> and “compact.”<sup>147</sup> Some states have gone even further in constraining redistricting discretion by including ultra-specific requirements.<sup>148</sup> The 1974 amendment to the Colorado Constitution, for example, added the requirement that “the aggregate linear distance of all district boundaries shall be as short as possible.”<sup>149</sup>

Although these provisions vary from state to state, all are meant to prevent gerrymandering and to ensure stability and accountability.<sup>150</sup> The more specificity in the state constitution, the less discretion legislators have to alter opportunistically the shape and composition of the

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<sup>141</sup> *Id.* at 911–13. New Hampshire, for example, changed the method it used to elect congressmen twice within the span of seven months. *Id.* at 912.

<sup>142</sup> *Id.* at 911–15. At the same time, the party in power must be careful because a small change in public opinion can result in a wholesale transfer of legislative control. *Id.*

<sup>143</sup> *See id.* at 911–15. California’s constitution, for example, specifies: “Each Senatorial district shall choose one Senator and each Assembly district shall choose one member of the Assembly.” CAL. CONST. art. IV, § 6. Likewise, the Colorado Constitution provides that one senator and one representative are “to be elected from each senatorial and each representative district, respectively.” COLO. CONST. art. V, § 45.

<sup>144</sup> Gardner, *Representation Without Party*, *supra* note 31, at 911–24.

<sup>145</sup> *Id.* at 918–20.

<sup>146</sup> *See id.* at 923 n.159 (citing ARK. CONST. of 1836, art. IV, § 31; MINN. CONST. of 1857, art. IV, § 24; MO. CONST. of 1820, art. III, § 6; N.Y. CONST. of 1846, art. III, § 5; PA. CONST. of 1838, art. I, § 4 (1857) (limited to representative districts created by subdivision of cities); WASH. CONST. art. II, § 6; WIS. CONST. of 1848, art. IV, §§ 4, 5).

<sup>147</sup> *See id.* at 923 n.161 (citing COLO. CONST. of 1876, art. V, § 47; ILL. CONST. of 1870, art. IV, § 6; MO. CONST. of 1865, art. IV, § 2; PA. CONST. of 1873, art. II, § 17; W. VA. CONST. of 1862, art. IV, § 4).

<sup>148</sup> *Id.* at 923–24.

<sup>149</sup> Gardner, *Representation Without Party*, *supra* note 31, at 923 (quoting COLO. CONST. art. VI, § 47(1)).

<sup>150</sup> *Id.* at 894–98.

state's legislative districts, the number of representatives to which each district is entitled, and the size of the state legislature itself.<sup>151</sup>

### III. IMPLIED LIMITS IN STATE CONSTITUTIONS

In addition to express limitations on a state's authority to apportion, there are also implied limits on a state's legislative power to reapportion.<sup>152</sup> Unlike Congress, which possesses only those powers expressly provided by the Constitution, state legislatures have plenary legislative power.<sup>153</sup> Every state constitution includes one large, unqualified grant of power to its state legislature.<sup>154</sup> The Colorado Constitution, for example, provides, "The legislative power of the state shall be vested in the general assembly consisting of a senate and a house of representatives, both to be elected by the people . . ."<sup>155</sup> State supreme courts have generally interpreted these grants to be broad, limited only by the Federal Constitution and other relevant provisions embodied in state constitutions.<sup>156</sup> As a result, supreme courts interpret state consti-

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<sup>151</sup> See *id.* at 925. For example, in 1895 in *People ex rel. Woodyatt v. Thompson*, the Illinois Supreme Court commented that the purpose of the compactness requirement in its state constitution was "to guard as far as practicable . . . against a legislative evil commonly known as the 'Gerrymander.'" 40 N.E. at 315.

<sup>152</sup> See *infra* notes 153-247 and accompanying text.

<sup>153</sup> See JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 154-58 (2005). When the Framers drafted the U.S. Constitution, states were considered the primary repository of legislative power over internal affairs. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936). As Justice Sutherland explained, the legislative power of states antedated the Constitution because the states existed well before the Framers drafted it. *Id.* In drafting the Constitution, the Framers carved out certain powers from the mass of powers then possessed by the states and gave those enumerated powers to the national government. *Id.* And by enumerating specific powers given to the national government, the Framers reserved the remainder for the states. *Id.*

<sup>154</sup> See GARDNER, *supra* note 153, at 155-56.

<sup>155</sup> COLO. CONST. art. V, § 1.

<sup>156</sup> See, e.g., *City of Pawtucket v. Sundlun*, 662 A.2d 40, 44 (R.I. 1995). In 1995 in *City of Pawtucket v. Sundlun*, the Rhode Island Supreme Court confronted a challenge to the state's scheme of financing public education. *Id.* at 42. The plaintiffs argued that the state's financing system violated the Education Clause as well as the Equal Protection and Due Process Clauses of the Rhode Island Constitution. *Id.* Before turning to the scope of those clauses, the court reviewed and emphasized the presumption of constitutionality that accompanied any legislation enacted by the state general assembly. *Id.* at 44-45. In highlighting this deference to the legislature, the court explained that the plenary power of the general assembly provided this presumption. *Id.* at 44. The court reasoned that after the adoption of the state constitution the state legislature retained the powers of both the English Crown and Parliament. *Id.* Accordingly, the general assembly had exclusive legislative power, limited only by relevant provisions of the U.S. or Rhode Island Constitutions. *Id.* And given the plenary nature of the legislature's power, the court opted for an extremely deferential review of the general assembly's actions, reasoning that a law should

tutional provisions appearing to confer a power on the legislature as limits on state power.<sup>157</sup> Otherwise, such provisions would be superfluous because state legislatures would already have a particular power even without a specific grant of it.<sup>158</sup>

For example, in 1900 in *Scott v. Flowers*, the Nebraska Supreme Court examined a state constitutional provision that provided: "The legislature may provide by law for the establishment of a school or schools for the safe-keeping, education, employment, and reformation of all children under the age of sixteen years, who, for want of parental care, or other cause, are growing up in mendicancy or crime."<sup>159</sup> Because the legislature would have had the power to commit troubled children in the absence of this constitutional provision, the court interpreted the clause to limit the legislature's power to provide such schools only for those children under the age of sixteen.<sup>160</sup> As the court bluntly explained, "To construe the provisions in question as a grant of authority is to impute to the framers the doing of a useless and idle thing."<sup>161</sup> Accordingly, the court invalidated a state law to the extent it provided for the commitment of children beyond their sixteenth birthday.<sup>162</sup>

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only be invalid if a plaintiff proves its unconstitutionality beyond a reasonable doubt. *Id.* at 44-45.

<sup>157</sup> W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 157-58 (1919); see, e.g., *Scott v. Flowers*, 84 N.W. 81, 81 (Neb. 1900); see also *infra* notes 159-162 and accompanying text.

<sup>158</sup> Dodd, *supra* note 157, at 158.

<sup>159</sup> NEB. CONST. of 1875, art. VIII, § 12.

<sup>160</sup> *Scott*, 84 N.W. at 83.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 81. Likewise, clauses dealing with redistricting have generally been interpreted as limits on the legislature's plenary power, even if they are written in the form of an affirmative grant. See *Wheeler v. Herbert*, 92 P. 353, 358-59 (Cal. 1907). Thus, a state constitutional provision that provides, for example, "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, is interpreted not as a grant of power to the state legislature—as the legislature would have had the power even in the absence of this provision—but rather as a limit. See *Salazar*, 79 P.3d at 1235, 1237-40.

The Supreme Court of California explained this approach in the 1907 case of *Wheeler v. Herbert*, the first California case to limit the redistricting power of the California legislature to once a decade. 92 P. at 358. In *Wheeler*, the plaintiffs challenged an act that changed the boundary line between Fresno and Kings Counties in the middle of the decade. *Id.* at 354. The plaintiffs contended that because the state's legislative districts corresponded to the state's county lines, the law unconstitutionally changed the composition of the state's legislative districts. *Id.* at 358. The court ultimately disagreed that the law changed the boundaries of the state's legislative districts in addition to those of Fresno and Kings Counties but concluded that it would have been beyond the legislature's power had the legislature intended such a reapportionment. *Id.*

Using reasoning like the Nebraska court in *Scott*, other state supreme courts have examined the implied limits on the power of state legislatures to redistrict in the middle of the decade.<sup>163</sup> Indeed, although Texas's redistricting fight described in this Note's Introduction was perhaps the first to make national headlines, Texas has not been alone in experiencing mid-decade redistricting controversies.<sup>164</sup> South Dakota, Colorado, and New Hampshire did as well.<sup>165</sup> These redistricting cases are examined below.<sup>166</sup>

#### A. Mid-Decade Redistricting in South Dakota

In 2000 in *In re Certification of a Question of Law*, the South Dakota Supreme Court struck down the state legislature's attempt to alter a portion of the districting plan the legislature had enacted in 1991.<sup>167</sup> The court ruled that having performed its constitutional obligation to redistrict in the year following the census, the legislature was without the power to alter or replace that plan until the subsequent census.<sup>168</sup> In relevant part, article III, section 5, of the South Dakota Constitution provides:

An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991 . . . . 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

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In reaching this conclusion, the court proceeded from the familiar premise that the state legislature has plenary power. *Id.* Accordingly, the court reasoned that other provisions of the constitution, written as affirmative grants of power, necessarily contained an implied limit on the exercise of that power at any other time than provided for by the specific provision. *Id.* Thus, the court interpreted article 4, section 6 of the state constitution—which provided, “[T]he Legislature shall, at its first session after each census, adjust such districts and reapportion the representation”—to limit the legislature's power to reapportion at any time other than in the first session following each national census. *Id.* As the court explained, “The power to adjust the legislative districts and the power to form new counties and change county lines are all vested in the Legislature by the general grant of legislative power . . . . The special provisions relating to these powers, found in other parts of the Constitution, must therefore be considered as limitations upon the general grant.” *Id.* (citation omitted).

<sup>163</sup> See *Salazar*, 79 P.3d at 1224–25; *In re Below*, 855 A.2d 459, 470–72 (N.H. 2004) (per curiam); *In re Certification of a Question of Law*, 615 N.W.2d 590, 593–96 (S.D. 2000).

<sup>164</sup> *In re Certification*, 615 N.W.2d at 593.

<sup>165</sup> See *Salazar*, 79 P.3d at 1224–25; *In re Below*, 855 A.2d at 470–72; *In re Certification*, 615 N.W.2d at 593–96.

<sup>166</sup> See *infra* notes 167–247 and accompanying text.

<sup>167</sup> *In re Certification*, 615 N.W.2d at 595.

<sup>168</sup> *Id.* at 594–95.

Supreme Court within ninety days to make such apportionment.<sup>169</sup>

In 1991, the South Dakota legislature enacted an apportionment plan that, in part, aimed to protect minority voting rights.<sup>170</sup> Accordingly, it created two single-member districts around minority populations.<sup>171</sup> In 1996, however, the legislature enacted a plan that combined the two single-member districts into a single district that would, in turn, use at-large voting to elect two representatives.<sup>172</sup> Using the implied limitation interpretive framework outlined above, the South Dakota Supreme Court reasoned that article III, section 5's mandate to redistrict in 1991 and every ten years thereafter impliedly prohibited the legislature from redistricting at any other time and thus from changing the 1991 plan in 1996.<sup>173</sup>

The court first noted that the state legislature has plenary legislative power and could legislate "on any subject within the scope of civil government," limited only by the Federal Constitution or other relevant provisions of the state constitution.<sup>174</sup> According to the court, the language of article III, section 5—"[a]n apportionment *shall* be made"—is mandatory and thus imposed an affirmative duty on the state legislature to reapportion in 1991 and every ten years thereafter.<sup>175</sup> In this case, the legislature had discharged its duty by enacting the 1991 plan and thus was impliedly barred from reapportioning until the following census.<sup>176</sup>

In reaching its decision, the court relied on its 1933 decision in *In re Opinion of the Judges*, which also concerned an attempt by the legislature to redistrict in the middle of the decade.<sup>177</sup> There, unlike in the 1996 case, however, the legislature had failed to reapportion in 1931 based on the 1930 census.<sup>178</sup> The question before the court was

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<sup>169</sup> S.D. CONST. art. III, § 5.

<sup>170</sup> *In re Certification*, 615 N.W.2d at 593.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 593–96. The state contended that the 1996 enactment was not an apportionment. *Id.* at 596. Pointing to *Black's Law Dictionary*, the court ruled that "[a]ppportionment is the 'process by which legislative seats are distributed among units entitled to representation.'" *Id.* (quoting BLACK'S LAW DICTIONARY 99 (6th ed. 1990)). Because the 1996 enactment combined the two districts and distributed two representatives to the new single district, it constituted an apportionment, or in this case, a reapportionment. *Id.*

<sup>174</sup> *Id.* at 593–94 (quoting *Kane v. Kundert*, 371 N.W.2d 172, 174 (S.D. 1985)).

<sup>175</sup> *In re Certification*, 615 N.W.2d at 594–95 (emphasis added).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (discussing *In re Opinion of the Judges*, 246 N.W. 295 (S.D. 1933)).

<sup>178</sup> *In re Opinion*, 246 N.W. at 296.

whether, given the legislature's failure to perform its affirmative duty in 1931, it was without the power to redistrict in 1933.<sup>179</sup> The court reasoned that the affirmative constitutional duty to redistrict in 1931 impliedly prohibited the legislature from apportioning at any other time.<sup>180</sup> But that duty continued until performed, and only then was the legislature prohibited from acting again until the following census.<sup>181</sup> Thus, having failed to act in 1931, the legislature was not prohibited from redistricting in 1933—in fact, it had a duty to do so.<sup>182</sup> Having reapportioned in 1933, however, the legislature was then barred from redistricting again until 1941.<sup>183</sup> The 1996 court viewed its 1933 decision as controlling.<sup>184</sup> Because the legislature had discharged its duty by enacting the 1991 plan, it could not act again until 2001.<sup>185</sup>

Moreover, article III, section 5 of the state constitution had been amended in 1982 in a manner that further supported the court's implied limitation analysis.<sup>186</sup> The amendment transferred the duty to apportion, should the legislature fail to act in the year following the census, to the state supreme court.<sup>187</sup> The amendment supported the court's analysis because, as the court put it, 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?"<sup>188</sup> If the legislature had failed to act in 1991, the

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<sup>179</sup> *Id.* At the time, the text of article III, section 5 provided:

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.

*Id.* (quoting S.D. CONST. of 1889, art. III, § 5).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 296-97.

<sup>182</sup> *Id.* at 297.

<sup>183</sup> *In re Opinion*, 246 N.W. at 297.

<sup>184</sup> *In re Certification*, 615 N.W.2d at 595.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 595-96.

<sup>187</sup> *Id.* at 595. In relevant part, the amendment provided: "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." S.D. CONST. art. III, § 5.

<sup>188</sup> *In re Certification*, 615 N.W.2d at 596.



court would have been forced to impose its own apportionment plan.<sup>189</sup> And because the text of article III, section 5 impliedly limits the power to redistrict at any time other than in the year immediately following the census, had the court been forced to impose its own plan, the legislature would still have lacked the power to replace or alter that plan in 1996.<sup>190</sup>

In sum, the South Dakota Supreme Court ruled that the state constitution requires the legislature to redistrict in the year immediately following the census.<sup>191</sup> Should the legislature fail to act, the reapportionment duty transfers to the court.<sup>192</sup> But regardless of which body ultimately redistricts in the year following the census, the legislature is prohibited from reapportioning again until the following census.<sup>193</sup>

### B. Mid-Decade Redistricting in Colorado

In 2002 and 2003, nearly contemporaneous with the congressional redistricting fracas in Texas described in the Introduction, Colorado also experienced a mid-decade reapportionment battle.<sup>194</sup> In contrast to the U.S. Supreme Court's interpretation of federal law in the Texas dispute, the Colorado Supreme Court ruled that the state legislature lacked the power to redistrict in the middle of the decade because the

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<sup>189</sup> See *id.* at 595–96.

<sup>190</sup> *Id.* at 596. In 2005 in *Bone Shirt v. Hazeltine* (*Bone Shirt II*), the court reaffirmed its conclusion that a court-imposed plan in the year following a census, necessitated by the legislature's failure to act, cannot be replaced in the middle of the decade. 700 N.W.2d 746, 752 (S.D. 2005). In *Bone Shirt II*, the state legislature had reapportioned in 2001 pursuant to its constitutional obligation. *Id.* at 748. In 2004, however, a federal court concluded that the 2001 plan violated Section 5 of the Voting Rights Act. *Bone Shirt v. Hazeltine* (*Bone Shirt I*), 336 F. Supp. 2d 976, 980 (D.S.D. 2004). Given the holding in *In re Certification*, it was unclear whether the legislature had the power to replace the 2001 plan in the middle of the decade. *Bone Shirt II*, 700 N.W.2d at 748. The South Dakota Supreme Court reaffirmed the holding of *In re Certification* that once the legislature discharges its duty to reapportion, it is without the power to redistrict again until the following census. *Id.* at 752. The court reasoned, however, that this holding assumed the legislature's discharge of its duty resulted in a valid apportionment plan. *Id.* at 753. Given the continuing duty logic endorsed by the court in *In re Opinion*, the court in *Bone Shirt II* reasoned that if the legislature's apportionment plan is deemed invalid, the legislature is under a continuing duty to enact a valid districting scheme. *Id.* Thus, because the 2001 plan ran afoul of the Voting Rights Act, the legislature retained the power to alter that plan so that it conformed to federal law. *Id.*

<sup>191</sup> *In re Certification*, 615 N.W.2d at 594–95.

<sup>192</sup> *Id.* at 595–96.

<sup>193</sup> *Id.* at 596.

<sup>194</sup> See Julia C. Martinez, *Colo. Justices Set to Consider GOP's Remap*, DENVER POST, Sept. 8, 2003, at A1.

state constitution limits congressional redistricting to once every ten years.<sup>195</sup>

The drama began in the aftermath of the 2000 census when the state legislature, composed of a Republican-controlled House of Representatives and a Democratic-controlled Senate, failed to pass a reapportionment plan despite meeting in one regular and two special sessions.<sup>196</sup> Because Colorado had been awarded a seventh seat in the House of Representatives, the plan based on the 1990 census could not govern the 2002 congressional elections, and a group of voters filed a lawsuit in state court to compel the imposition of a court-drawn plan.<sup>197</sup> The court settled on a plan that essentially preserved the status quo in the six old districts and created a new seventh district intended to be highly competitive.<sup>198</sup> The court delayed imposing its plan to give the state legislature another opportunity to create a valid apportionment scheme.<sup>199</sup> When the general assembly again failed to enact a plan, the district court imposed its own and the Colorado Supreme Court unanimously upheld the plan in 2002.<sup>200</sup>

Shortly thereafter, in the 2002 state legislative elections, the Republican Party regained control of the state Senate, giving them unified control of the state legislature and the governorship.<sup>201</sup> Taking a cue from the Texas Republicans, in the final seventy-two hours of the 2003 legislative session the Republican majority pushed through a new apportionment plan to replace the court-ordered plan of 2002.<sup>202</sup>

Less than a week later, state Attorney General Ken Salazar, a Democrat, filed *People ex rel. Salazar v. Davidson*, an original proceeding before the state supreme court.<sup>203</sup> Salazar alleged that the general assembly lacked the power to replace a lawfully imposed redistricting plan in the middle of the decade.<sup>204</sup> On December 1, 2003, the Colo-

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<sup>195</sup> *Salazar*, 79 P.3d at 1231.

<sup>196</sup> *Id.* at 1226-27.

<sup>197</sup> *Id.* at 1227.

<sup>198</sup> *See id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Beuprez v. Avalos*, 42 P.3d 642, 645 (Colo. 2002).

<sup>201</sup> Ryan Morgan, *Andrews Selected as Senate President*, DENVER POST, Nov. 11, 2002, at A8.

<sup>202</sup> *Salazar*, 79 P.3d at 1227.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1225. The Secretary of State, Donnetta Davidson, a Republican who under normal circumstances would be represented by the Attorney General in lawsuits challenging her official actions, defended not only the legislature's authority to redistrict at any time but also challenged the Attorney General's authority to bring the original proceeding in the first instance. *Id.* In the only portion of the opinion that was unanimous, the court rejected Davidson's argument that the Attorney General lacked the power to initiate an

rado Supreme Court ruled 5–2 in favor of Salazar and concluded that the Colorado constitution limited redistricting to once a decade, regardless of whether the apportionment plan was enacted by the legislature or imposed by a court as a result of a lawsuit.<sup>205</sup>

The court began its opinion by construing Article I, Section 4, Clause 1, of the U.S. Constitution, which provides: "The Times, Places and Manner of holding Elections for . . . 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."<sup>206</sup> The court first reasoned that a narrow reading of the provision appears to reserve the redistricting power to the *legislatures* of the various states, but noted that the U.S. Supreme Court has long interpreted the clause to refer to a state's lawmaking process generally, which includes not only court decisions but also initiatives and redistricting commissions.<sup>207</sup> Thus, Article I, Section 4, Clause 1, of the U.S. Constitution gives state legislatures the primary responsibility for redistricting, but it also places the redistricting power in the states generally rather than the state legislatures exclusively.<sup>208</sup> Indeed, as the court noted, the constitutional requirement of one person, one vote frequently obligates courts to impose a congressional apportionment plan if the legisla-

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original proceeding in the Colorado Supreme Court challenging an official action of the state legislature. *Id.* at 1229–31.

<sup>205</sup> *Id.* at 1231.

<sup>206</sup> U.S. CONST. art. I, § 4 (emphasis added).

<sup>207</sup> *Salazar*, 79 P.3d at 1232 (citing *Smiley v. Holm*, 285 U.S. 355 (1932); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916)). This particular aspect of the holding, based as it was on federal constitutional law, was appealed to the U.S. Supreme Court, which denied certiorari on June 7, 2004. *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1093 (2004). Chief Justice Rehnquist, and Justices Scalia and Thomas dissented from the denial and strongly intimated that, because the effect of the Colorado ruling was to exclude the Colorado legislature absolutely from any participation in the redistricting process, it ran afoul of Article I, Section 4, Clause 1. *Id.* at 1095 (Rehnquist, C.J., dissenting). On this point, the dissenting justices at the Colorado Supreme Court agreed. See *Salazar*, 79 P.3d at 1244–46 (Kourlis, J., dissenting).

Shortly after the Colorado court decided *Salazar*, four Colorado citizens who had not participated in the case filed an action in federal district court arguing that the Colorado court's interpretation of the state's constitution contravened the Elections Clause in Article I, Section 4 of the U.S. Constitution. *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007) (per curiam). After two trips to the U.S. Supreme Court, the first of which concerned the district court's initial dismissal of the federal case under the Rooker-Feldman doctrine, see *Lance v. Dennis*, 546 U.S. 459, 459 (2006) (per curiam), the Court dismissed the plaintiffs' Elections Clause claim because they lacked standing. *Lance*, 127 S. Ct. at 1198.

<sup>208</sup> *Salazar*, 79 P.3d at 1232.

ture fails to act.<sup>209</sup> Against this backdrop, the court turned to the relevant provisions of the Colorado constitution.<sup>210</sup>

Using the implied limitation interpretive framework described above, the court began from the premise that the Colorado Constitution is a limit on the power of the state, not an affirmative grant.<sup>211</sup> Article V, section 44 of the Colorado constitution provides:

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.<sup>212</sup>

Beginning with the first sentence, the court again stressed the state constitution's clear preference for redistricting by the general assembly.<sup>213</sup> The court noted, however, that like the term "legislature" in Article I, Section 4, Clause 1, of the U.S. Constitution, the term "general assembly" had been broadly interpreted to encompass all of the state's lawmaking processes, including judicial decisions.<sup>214</sup> Moreover, in the modern context of one person, one vote, the term "general assembly" necessarily had to include court orders because courts routinely have to impose their own redistricting plans—as the district court did in this case—to comply with the requirement of population equality.<sup>215</sup> In sum, the court-ordered plan of 2002, just like any other court-drawn plan compelled by a lawsuit, was just as valid as any legislatively-enacted plan.<sup>216</sup>

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<sup>209</sup> *Id.* (citing *Branch v. Smith*, 538 U.S. 254 (2003)).

<sup>210</sup> *See id.* at 1235–40.

<sup>211</sup> *Id.* at 1235.

<sup>212</sup> COLO. CONST. art. V, § 44.

<sup>213</sup> *Salazar*, 79 P.3d at 1236.

<sup>214</sup> *Id.* at 1236–37; *see also* *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) ("Congressional redistricting is a law-making function subject to the state's constitutional procedures."); *In re Legislative Apportionment*, 374 P.2d 66, 68 (Colo. 1962) (en banc). The Colorado Supreme Court explained:

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.

*Id.* (quoting *Asbury Park Press, Inc. v. Woolley*, 161 A.2d 705, 711 (N.J. 1960)).

<sup>215</sup> *Salazar*, 79 P.3d at 1237.

<sup>216</sup> *Id.*

Turning to the second sentence of article V, section 44, the court relied on an implied limit interpretation to conclude that the provision, by requiring redistricting "when" a new census occurs, also prohibited the general assembly from redistricting at any other time.<sup>217</sup> Looking to the provision's plain language, the court reasoned that the term "when" meant "just after the moment that," "at any and every time that," or "on condition that."<sup>218</sup> And because the general assembly would have had the power to redistrict "just after the moment that" a new apportionment occurs regardless of the inclusion of article V, section 44 in the state constitution, it had no authority to redistrict at any other time.<sup>219</sup> Accordingly, the general assembly's 2003 redistricting, occurring as it did *after* the imposition of a valid plan based upon the 2000 census, was unconstitutional.<sup>220</sup>

In sum, the Colorado court ruled that the state constitution limited the general assembly's power to redistrict to once a decade, after the federal census and before the next general election.<sup>221</sup> Should the legislature's failure to act force the courts to impose a plan of their own, the legislature forfeits its opportunity to redistrict until after the following census.<sup>222</sup>

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<sup>217</sup> See *id.* at 1237–39.

<sup>218</sup> *Id.* at 1238 (quoting WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2602 (Philip Babcock Gove ed. 1993)).

<sup>219</sup> See *id.* at 1238–39. In support of its reading of an implied limit contained within the second sentence of article V, section 44, the court compared the provision to a prior version of the state constitutional provision governing legislative redistricting. *Id.* at 1239. The provision governing legislative redistricting originally provided that "[s]enatorial and representative districts may be altered *from time to time, as public convenience may require.*" COLO. CONST. of 1876 art. V, § 47 (amended 1974) (emphasis added). Because this provision quite clearly contemplated mid-decade redistricting of legislative districts, the court reasoned that its contrast with article V, section 44 provided further support for its implied limitation interpretation. *Salazar*, 79 P.3d at 1239.

<sup>220</sup> See *Salazar*, 79 P.3d at 1235–40. The court also stressed the public policy considerations that weighed in favor of narrowly interpreting the power of the legislature to redistrict—that is, limiting that power to once a decade. *Id.* at 1242–43. The court noted that the House of Representatives is, and was intended to be, the house of Congress most directly tied to the people. *Id.* at 1242. The court emphasized that unlimited redistricting, undertaken whenever the political winds change directions, would directly threaten this connection to the people. *Id.* Closely connected to the threat that mid-decade redistricting posed to any sense of accountability—after all, if your representative is constantly changing, how will you be able to reward or punish her with your vote?—the court underscored the instability that could result if the legislature's ability to redistrict were unlimited. See *id.* Quoting James Madison, who said that "[i]nstability is one of the great vices of our republics, to be remedied," the court reasoned that its rule best promoted the needed stability. *Id.* at 1242; see also *infra* notes 325–338 and accompanying text.

<sup>221</sup> See *Salazar*, 79 P.3d at 1231.

<sup>222</sup> *Id.*

### C. Mid-Decade Redistricting in New Hampshire

As in Colorado, a mid-decade redistricting case also arose in New Hampshire when the legislature attempted to replace a lawfully imposed, court-drawn apportionment scheme in the middle of the decade.<sup>223</sup> Like the Colorado Supreme Court, the New Hampshire Supreme Court in 2004 in *In re Below* construed the New Hampshire Constitution's legislative redistricting provision to limit impliedly the legislature's authority to impose more than one apportionment plan every ten years.<sup>224</sup> Unlike the Colorado Supreme Court, however, the New Hampshire Supreme Court held that because redistricting was a legislative task, the prohibition only applied to the mid-decade replacement of a prior legislative plan and not to the replacement of a court-drawn plan.<sup>225</sup>

In the wake of the 2000 census, the New Hampshire legislature failed to reapportion the state legislative districts.<sup>226</sup> Accordingly, because the existing plan concededly contravened the one person, one vote requirement, the New Hampshire Supreme Court imposed a plan to govern the 2002 general election.<sup>227</sup> After the 2002 election, but before the ensuing election in 2004, the state legislature enacted an apportionment plan intended to replace the 2002 court plan.<sup>228</sup>

Three constitutional provisions concerning the apportionment of the state legislature were at issue in the case.<sup>229</sup> The court first re-

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<sup>223</sup> See *In re Below*, 855 A.2d at 461–62.

<sup>224</sup> *Id.* at 469.

<sup>225</sup> *Id.* at 470–72.

<sup>226</sup> *Id.* at 461.

<sup>227</sup> *Id.* at 462.

<sup>228</sup> *In re Below*, 855 A.2d at 462.

<sup>229</sup> *Id.* at 464. Part II, article 9 of the New Hampshire Constitution provides in relevant part:

As soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state.

N.H. CONST. pt. II, art. IX. At the time, part II, article 11, also relating to the apportionment of the house, provided in relevant part, "The legislature shall form the representative districts at its next session after approval of this article by the voters of the state, and thereafter at the regular session following every decennial federal census." N.H. CONST. pt. II, art. XI (amended 2006). Finally, part II, article 26, concerning the state senate, provides in pertinent part, "The legislature shall form the single-member districts at its next session after approval of this article by the voters of the state and thereafter at the regular session following each decennial federal census." N.H. CONST. pt. II, art. XXVI.

viewed the history of all three, drawing two broad conclusions.<sup>230</sup> First, the court concluded that the tradition in New Hampshire was to redistrict once every ten years following the national census.<sup>231</sup> Second, the court held that this tradition became a constitutional mandate in 1942 with an amendment that required once-a-decade redistricting.<sup>232</sup> Thus, the court held that the constitution prohibited the legislature from redistricting more than once a decade.<sup>233</sup> Nevertheless, the court rejected the plaintiff's arguments that the text of the relevant provisions authorized the legislature to redistrict only in the session immediately following the national census and that failing to act by the 2002 elections precluded the legislature from replacing the court-imposed plan because the "court [had] acted in its stead by redistricting in 2002."<sup>234</sup>

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<sup>230</sup> See *In re Below*, 855 A.2d at 465–69. Prior to 1876, population was not the basis of representation in the New Hampshire House of Representatives. *Id.* at 465–66. The 1876 amendments making population the basis of representation did not, however, dictate when the legislature was to reapportion the legislative districts. *Id.* at 466. Nevertheless, the practice of the legislature was to reapportion the house each decade following the national census. *Id.* During a 1941 constitutional convention, the apportionment procedure was amended once again, this time constitutionalizing the legislature's practice of reapportioning every ten years. *Id.* at 466–67. At a subsequent constitutional convention in 1964, the constitution was amended again, this time to provide full-time representation in the state senate to citizens of small towns and wards. *Id.* at 467. Believing, however, that the U.S. Constitution only required one house of a bicameral state legislature to be apportioned by population, the delegates did not amend the provision in the constitution that required "towns and wards to have twice as many people for each additional representative [in the state house of representatives] as they needed for the first representative." *Id.* Five days after the convention adjourned, the U.S. Supreme Court handed down its decision in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), announcing the one person, one vote requirement. *In re Below*, 855 A.2d at 468. Accordingly, the delegates reconvened and removed the provision. *Id.*

The history of the constitutional provision governing apportionment of the state senate is similar. See *id.* 468–69. Prior to 1964, taxes, and not population, served as the basis of representation in the senate. *Id.* at 468. Before the 1964 convention, part II, article 26 required the state legislature to redistrict the state senate "from time to time." *Id.* The legislature did not, however, obey the constitutional command, as it failed to reapportion the state senate at any time between 1915 and 1961. *Id.* Believing that representation based on taxes was likely unconstitutional, the delegates to the 1964 convention amended the constitution to make population the basis of representation in the senate and to provide that the senate districts would be reapportioned every ten years following the census. *Id.*

<sup>231</sup> *In re Below*, 855 A.2d at 469.

<sup>232</sup> *Id.* At the time, the amendment changed the text of part II, article 9 to include the following: "At the next session of the legislature, and at the session in 1951, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by the authority of the United States or of this state." *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 470.

First, the court acknowledged that a literal reading of the relevant provisions supported the petitioners' contention that the legislature was restricted to redistricting at "the session" or "at the regular session" following the 2000 census.<sup>235</sup> The provision therefore impliedly prohibited the legislature from redistricting at any other time.<sup>236</sup> The court reasoned, however, that such a rigid reading would subvert the purpose of the provisions, which was to secure equal representation for the people in the state legislature.<sup>237</sup>

Even though the provisions are written in obligatory language—the legislature "shall" redistrict every ten years following the census—the court relied on the South Dakota Supreme Court's 2000 decision in *In re Certification of a Question of Law* and concluded that the provision imposed a "continuing duty" on the legislature to complete the reapportionment.<sup>238</sup> That is, the constitution obligated the legislature to redistrict in the session following the census, and presumed the legislature would so do, but did not strip the legislature of that power should it not act during the first session.<sup>239</sup> Rather, the duty to redistrict continued until discharged, and only then prohibited the legislature from acting again until after the following census.<sup>240</sup> But even so, the court asserted in dictum that "[h]ad the legislature not enacted its own redistricting plan during [the 2004] session, it might well have been precluded from doing so at a future session."<sup>241</sup>

Second, taking a strict view of the separation of powers doctrine, the court rejected the *Salazar*-like notion that its imposition of a plan

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<sup>235</sup> *Id.*

<sup>236</sup> *In re Below*, 855 A.2d at 470.

<sup>237</sup> *Id.* As discussed below, it is not at all clear how such a reading ignores the goal of providing equal representation, considering that the court itself had secured that equal representation in 2002 by imposing a plan that complied with the one person, one vote requirement. See *infra* notes 279–285 and accompanying text. In other words, had the court ruled that the legislature was without the power to redistrict in 2004, the people of New Hampshire would still have been represented on an equal basis because the court-imposed plan of 2002 provided that protection. See *In re Below*, 855 A.2d at 461–63.

<sup>238</sup> *In re Below*, 855 A.2d at 471–72 (citing and quoting approvingly from *In re Certification*, 615 N.W.2d at 595 (holding that the state legislature lacked the power to replace a lawfully enacted apportionment plan in the middle of the decade)).

<sup>239</sup> *Id.* at 472.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* (citing *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 841 (N.D. Cal. 1992)). As discussed below, this dictum contradicts the very premise of a "continuing duty." See *infra* notes 290–309 and accompanying text. In asserting this dictum, the court provided no analysis and relied exclusively on one case that it significantly misread, *Cardona v. Oakland Unified School District*. See *infra* notes 290–309 and accompanying text.



in 2002 stripped the legislature of the authority to reapportion.<sup>242</sup> Rather, the court stated that it imposed its 2002 plan "reluctantly" and only because the legislature had failed to act.<sup>243</sup> Because redistricting is a legislative function, and because the state constitution vests the power to redistrict in the state legislature, the court declined to hold that its decisions were part of the lawmaking process.<sup>244</sup> Accordingly, though noting that the court had the power to impose a plan should the legislature fail to act, such an imposition did not thereby relieve the legislature of its obligation to reapportion.<sup>245</sup>

In sum, the New Hampshire court relied on the history of the relevant constitutional provisions and an implied limitation interpretative framework to conclude that the legislature had a duty to redistrict in the first session following the census, and once that duty was discharged, the legislature lacked the power to reapportion again until the following census.<sup>246</sup> Because the legislature's duty to redistrict was a "continuing" one, however, the court-drawn plan in 2002 did not deprive the legislature of the authority to discharge its duty in 2004, late as it was.<sup>247</sup>

#### IV. CONTROLLING A STATE'S POWER TO REDISTRICT IN THE MIDDLE OF A DECADE

The decisions of the supreme courts of South Dakota, Colorado, and New Hampshire present three subtly different approaches to the problem of mid-decade redistricting.<sup>248</sup> All three courts endorsed some form of implied limitation analysis, each concluding that a legislature's enactment of a valid apportionment plan precludes it from redistricting until the following census.<sup>249</sup> The courts split, however,

<sup>242</sup> *In re Below*, 855 A.2d at 472-73.

<sup>243</sup> *Id.* at 462, 472.

<sup>244</sup> *Id.* at 472.

<sup>245</sup> *Id.* at 472-73.

<sup>246</sup> *See id.* at 470-72.

<sup>247</sup> *In re Below*, 855 A.2d at 471-73.

<sup>248</sup> *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1237-40 (Colo. 2003) (en banc); *In re Below*, 855 A.2d 459, 470-72 (N.H. 2004) (per curiam); *In re Certification of a Question of Law*, 615 N.W.2d 590, 593-96 (S.D. 2000).

<sup>249</sup> *See Salazar*, 79 P.3d at 1240; *In re Below*, 855 A.2d at 471; *In re Certification*, 615 N.W.2d at 595; *see also supra* notes 152-247 and accompanying text. Many other state supreme courts have employed similar logic. *See Opinion of the Justices*, 47 So. 2d 714, 716 (Ala. 1950); *Wheeler v. Herbert*, 92 P. 353, 358-59 (Cal. 1907); *People ex rel. Mooney v. Hutchinson*, 50 N.E. 599, 601 (Ill. 1898); *Denney v. State ex rel. Basler*, 42 N.E. 929, 932 (Ind. 1896); *Harris v. Shanahan*, 387 P.2d 771, 779-80 (Kan. 1963); *Jones v. Freeman*, 146 P.2d 564, 573 (Okla. 1943), *overruled on other grounds by Alexander v. Taylor*, 51 P.3d 1204,

on the authority of a legislature to use its redistricting power in the first instance to replace a previously imposed court-drawn plan.<sup>250</sup> Both the South Dakota and Colorado courts used what might be termed a "pure implied limitation analysis" whereby the legislature may not replace, in the middle of the decade, a court-imposed plan necessitated by the legislature's own failure to act.<sup>251</sup> By contrast, the New Hampshire Supreme Court endorsed a modified implied limitation analysis whereby the legislature has a continuing duty to reapportion that permits and even obligates it to replace a court-imposed plan in the middle of the decade.<sup>252</sup> Thus, in essence, the dispute boils down to the appropriateness of the "continuing duty" theory in the context of redistricting.<sup>253</sup>

Although there is no doubt validity to the notion of a continuing duty in a situation where legislative inaction will result in no action at all, in the context of redistricting, the continuing duty theory undermines the very stability and accountability fostered by a prohibition on mid-decade redistricting.<sup>254</sup> Future state courts should follow the lead of the South Dakota and Colorado courts and require redistricting after the national census and before the ensuing general election, and—

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1208-09 (Okla. 2002); *Slauson v. City of Racine*, 13 Wis. 398, 401 (1861). *But see* *Blum v. Schrader*, 637 S.E.2d 396, 399 (Ga. 2006) (distinguishing *Salazar* on the ground that the Georgia constitution contained no similar temporal limitation).

<sup>250</sup> See *Salazar*, 79 P.3d at 1231; *In re Below*, 855 A.2d at 470-71; *In re Certification*, 615 N.W.2d at 595-96.

<sup>251</sup> See *Salazar*, 79 P.3d at 1231; *In re Certification*, 615 N.W.2d at 596.

<sup>252</sup> *In re Below*, 855 A.2d at 470-71.

<sup>253</sup> See *Salazar*, 79 P.3d at 1231; *In re Below*, 855 A.2d at 470-71; *In re Certification*, 615 N.W.2d at 596.

<sup>254</sup> See *Salazar*, 79 P.3d at 1242-43.

absent a later declaration of unlawfulness<sup>255</sup>—prohibit redistricting at any other time.<sup>256</sup>

### A. The Text of the Redistricting Provisions

All three courts interpreted their state constitutions to set out affirmative duties the legislature was required to perform at a certain time, and to impliedly limit the legislature's authority to act at any other point.<sup>257</sup> Such a limit makes sense as a textual matter because the very fact that a state constitution contains a provision specifying the time for redistricting necessarily implies that it is not to take place at any other time.<sup>258</sup> Otherwise, the provision would be superfluous, given that the legislature would have had the power to redistrict even absent the provision.<sup>259</sup>

Future courts confronting similar mid-decade redistricting disputes should employ a pure implied limitation analysis because it is more faithful to the text than the continuing duty approach.<sup>260</sup> The pure implied limitation analysis imposes a true limit on the power of

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<sup>255</sup> See *Bone Shirt v. Hazeltine (Bone Shirt II)*, 700 N.W.2d 746, 752 (S.D. 2005); see also *Harris*, 387 P.2d at 780; *supra* note 190. In 2005, in *Bone Shirt II*, the South Dakota court ruled that, even though the legislature had reapportioned in 2001 pursuant to its constitutional obligation, the state constitution did not preclude the legislature from enacting a remedial plan in 2005 to correct legal deficiencies identified by a federal court. 700 N.W.2d at 753. The court reasoned that the state constitution assumed the legislature would discharge its redistricting duty by enacting a valid apportionment plan. *Id.* Assuming the legislature enacts a valid plan, the court noted, the legislature is without the power to change or replace that plan until the following census. *Id.* If, however, a court concludes the plan is unlawful, as happened in *Bone Shirt v. Hazeltine (Bone Shirt I)*, 336 F. Supp. 2d 976, 980 (D.S.D. 2005), the legislature has not only the power but also the duty to remedy the unlawful plan. *Bone Shirt II*, 700 N.W.2d at 753. Because a judicial declaration of invalidity necessitates a change to the existing apportionment plan, the state legislature is the proper institution to make the change, should time permit. See *id.*

<sup>256</sup> See *Salazar*, 79 P.3d at 1231; *In re Certification*, 615 N.W.2d at 596. The Colorado court ruled that the general assembly must redistrict after the national census and before the ensuing general election. *Salazar*, 79 P.3d at 1231. The South Dakota constitution is more specific and requires the legislature to redistrict "by December first of the year in which the apportionment is required." S.D. CONST. art. III, § 5.

<sup>257</sup> See *Salazar*, 79 P.3d at 1240; *In re Below*, 855 A.2d at 471; *In re Certification*, 615 N.W.2d at 595.

<sup>258</sup> E.g. *Opinion of the Justices*, 47 So. 2d at 716; *Wheeler*, 92 P. at 358–59; *Salazar*, 79 P.3d at 1240; *Mooney*, 50 N.E. at 601; *Denney*, 42 N.E. at 932; *Harris*, 387 P.2d at 779–80; *In re Below*, 855 A.2d at 471; *Jones*, 146 P.2d at 573; *In re Certification*, 615 N.W.2d at 595; *Slauson*, 13 Wis. at 401.

<sup>259</sup> See *Scott v. Flowers*, 84 N.W. 81, 83 (Neb. 1900) ("To construe the provisions in question as a grant of authority is to impute to the framers the doing of a useless and idle thing.").

<sup>260</sup> *Salazar*, 79 P.3d at 1231; *In re Certification*, 615 N.W.2d at 596.

the state to redistrict because it prevents the *state* from redistricting more than once a decade.<sup>261</sup> This limit fully effectuates the text of the constitution because it forces the state to redistrict when, and only when, the constitution commands—that is, after a census and before the ensuing general election.<sup>262</sup> By contrast, the continuing duty approach limits the legislature to one redistricting per decade but does not also limit the time at which the legislature may redistrict, despite explicit language in the constitution specifying the *exact* time at which reapportionment should occur.<sup>263</sup> In the modern era of one person, one vote, the legislature's failure to reapportion after a census will necessitate a court-imposed plan.<sup>264</sup> If the legislature then replaces the court-imposed plan in the middle of the decade, it engages in the very mid-decade redistricting that the relevant constitutional provisions seek to avoid by explicitly indicating when redistricting should occur.<sup>265</sup> Thus, the continuing duty approach is not faithful to the text of the state constitution.<sup>266</sup>

Indeed, the New Hampshire court acknowledged that the plain text of the provisions supported a rule prohibiting the legislature from replacing the court-drawn plan.<sup>267</sup> Nonetheless, the New Hampshire court adopted a severely countercontextual reading of its constitution.<sup>268</sup> The constitution literally provided, "The legislature shall form the representative districts at its next session after approval of this article by the voters of the state, and thereafter at the regular session following every decennial federal census," seemingly obligating the legislature to redistrict at the first session following the census and prohibiting it from redistricting at any other time.<sup>269</sup> Now, because the continuing duty theory permits the legislature to discharge its duty at a time of its choosing, the constitution effectively reads, "The legislature shall form the representative districts once every enumeration."<sup>270</sup> In essence, the New Hampshire court said to the legislature:

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<sup>261</sup> *Salazar*, 79 P.3d at 1237–39; *In re Certification*, 615 N.W.2d at 594–96.

<sup>262</sup> *Salazar*, 79 P.3d at 1231; *In re Certification*, 615 N.W.2d at 594–96.

<sup>263</sup> *In re Below*, 855 A.2d at 470.

<sup>264</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Salazar*, 79 P.3d at 1237; *In re Below*, 855 A.2d at 461.

<sup>265</sup> See *Salazar*, 79 P.3d at 1236, 1237–40; *In re Below*, 855 A.2d at 470–72; *In re Certification*, 615 N.W.2d at 594–96.

<sup>266</sup> See *Salazar*, 79 P.3d at 1237–40; *In re Below*, 855 A.2d at 470–72.

<sup>267</sup> See *In re Below*, 855 A.2d at 470.

<sup>268</sup> See *id.* at 470–71.

<sup>269</sup> N.H. CONST. pt. II, art. XI (amended 2006); see *In re Below*, 855 A.2d at 470–72.

<sup>270</sup> See *In re Below*, 855 A.2d at 470–72.

You must, and can only, redistrict at the first session following each census; but not if you do not want to.<sup>271</sup>

### B. *The Purpose of the Redistricting Provisions*

The pure implied limitation analysis of the South Dakota and Colorado courts not only has better textual support than the New Hampshire continuing duty approach, but it also best fulfills the purpose of the specific redistricting provision because it adheres closely to the temporal limit embodied in the text.<sup>272</sup> As explained above, because a legislature would have the power to redistrict even in the absence of the redistricting provisions, an interpretation that requires redistricting at a certain time but does not also limit the legislature's ability to redistrict at any other renders the provision effectively meaningless.<sup>273</sup> Because the framers of a constitution are presumed not to draft superfluous provisions, the purpose of including the provisions must have been to obligate the legislature to redistrict at a particular time and no other.<sup>274</sup> Thus, a pure implied limitation approach fully realizes the purpose of the provisions because it prevents the state from redistricting outside the window specified in the constitutional text.<sup>275</sup>

The continuing duty approach, by contrast, undercuts the purpose of the redistricting provisions because it ignores the temporal restriction contained therein.<sup>276</sup> Despite language specifying when the legislature must redistrict, the continuing duty theory permits the legislature to redistrict at a time of its choosing, eliminating the main constraint imposed by the provisions.<sup>277</sup> And, by eliminating that constraint and rendering the provisions effectively meaningless, the continuing duty reasoning subverts the purpose of the provisions by "imput[ing] to the framers the doing of a useless and idle thing."<sup>278</sup>

It may be true that the purpose of the constitutional provisions is also to "ensure substantially equal representation based upon population."<sup>279</sup> The New Hampshire court stressed this point in support of its

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<sup>271</sup> See *id.*

<sup>272</sup> See *Salazar*, 79 P.3d at 1238; *In re Certification*, 615 N.W.2d at 593–95.

<sup>273</sup> See *Salazar*, 79 P.3d at 1239; *Scott*, 84 N.W. at 83.

<sup>274</sup> See *Scott*, 84 N.W. at 83.

<sup>275</sup> See *Salazar*, 79 P.3d at 1231; *In re Certification*, 615 N.W.2d at 594–96.

<sup>276</sup> See *In re Below*, 855 A.2d at 470–72.

<sup>277</sup> See *id.*

<sup>278</sup> *Scott*, 84 N.W. at 83; see *In re Below*, 855 A.2d at 470–72.

<sup>279</sup> *In re Below*, 855 A.2d at 470.

continuing duty approach.<sup>280</sup> Yet, in the context of one person, one vote, this provides no support for permitting the legislature to redistrict in the middle of the decade because a court will already have ensured "substantially equal representation" through the imposition of a court-drawn plan.<sup>281</sup> If, as was the case in New Hampshire, a legislature fails to redistrict following a census, the one person, one vote requirement will compel a court to impose a plan.<sup>282</sup> Indeed, in the New Hampshire case, a court-imposed plan was necessary precisely because the legislature failed to act in its first regular session to correct districts that had become unequal since the last census.<sup>283</sup> Thus, assuming the purpose of the provisions is to guarantee equal representation, it was the New Hampshire court's own plan of 2002 that fulfilled the intent of the framers; allowing the legislature to replace that plan in 2004 furthered the framer's intent no more than the court's plan already had.<sup>284</sup> Accordingly, even conceding that the redistricting provisions might also serve to guarantee equal representation on a population basis, in the modern context of one person, one vote, the continuing duty approach makes little sense.<sup>285</sup>

### C. *The Effect of a Continuing Duty Approach to Redistricting*

Another reason courts should reject the continuing duty approach is that it encourages mid-decade redistricting rather than constrains it.<sup>286</sup> If a legislature knows that, after failing to act in the first session following the census, it will be free to replace a court-drawn plan, those in control of the legislature may choose not to redistrict at the first session and hope the court-drawn plan favors their interests.<sup>287</sup> If the court plan does, they will have accomplished their goal; if not, or if some time later the party in control of the legislature

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<sup>280</sup> See *id.*

<sup>281</sup> See *id.* at 461-63, 470-72.

<sup>282</sup> See *Reynolds*, 377 U.S. at 568 (holding that the Equal Protection Clause "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis"); *In re Below*, 855 A.2d at 461-62.

<sup>283</sup> See *In re Below*, 855 A.2d at 461-62.

<sup>284</sup> See *id.* at 461-63.

<sup>285</sup> See *Salazar*, 79 P.3d at 1237 ("Although courts continue to defer to the legislatures, the courts must sometimes act in order to enforce the one-person, one-vote doctrine."); *In re Below*, 855 A.2d at 470-72.

<sup>286</sup> See *In re Below*, 855 A.2d at 470-72.

<sup>287</sup> Cf. *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2611 (2006) (plurality opinion).

changes, the legislature is still free to replace the court-drawn plan.<sup>288</sup> The effect of this displacement on the continuity and stability of a state's districts is just as pernicious as a mid-decade legislative displacement of a previously enacted legislative plan.<sup>289</sup>

Indeed, the New Hampshire court seemed to recognize the irony of adopting a rule intended in part to preserve stability that in fact promotes instability.<sup>290</sup> In dictum the court wrote that had the state legislature not enacted its plan before the 2004 elections, "it might well have been precluded from doing so at a future session."<sup>291</sup> This proposition, of course, completely contradicts the fundamental premise of the continuing duty theory.<sup>292</sup> If the legislature's obligation and authority to redistrict following a census continues until it is discharged, why would the legislature have forfeited its right to redistrict if it had waited until after the 2004 election? Or the 2006 election for that matter? Or even the 2008 election?<sup>293</sup>

The court provided no analysis for this dictum and relied exclusively on one 1992 case from the U.S. District Court for the Northern District of California, *Cardona v. Oakland Unified School District*.<sup>294</sup> Although the New Hampshire Court did not articulate how *Cardona* might have precluded the legislature from redistricting at a later session had it not enacted its plan before the 2004 elections, the court appeared to assume that such a failure would result in the use of legislative districts that violated the one person, one vote requirement of the Equal Protection Clause of the Fourteenth Amendment.<sup>295</sup>

*Cardona*, however, is inapposite because it concerned a school system's failure to reapportion districts that admittedly *prima facie* violated the Equal Protection Clause.<sup>296</sup> Conversely, in the New Hampshire case, the legislature's failure to redistrict by 2004 would not have resulted in the use of districts that violated the Equal Protection Clause because the state supreme court had already imposed an apportionment plan that assured one person, one vote.<sup>297</sup>

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<sup>288</sup> See *In re Below*, 855 A.2d at 470–72.

<sup>289</sup> See *id.* at 471.

<sup>290</sup> See *id.* at 472.

<sup>291</sup> *Id.*

<sup>292</sup> See *id.* at 470–71.

<sup>293</sup> See *In re Below*, 855 A.2d at 470–72.

<sup>294</sup> See *id.* at 472 (citing *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 841 (N.D. Cal. 1992)).

<sup>295</sup> See *id.* at 470–72.

<sup>296</sup> See 785 F. Supp. at 838, 841.

<sup>297</sup> *In re Below*, 855 A.2d at 461–62.

In *Cardona*, the Oakland Unified School District planned to redraw its districts in 1993 based upon the 1990 census figures.<sup>298</sup> The last time the districts had been redrawn was in 1984 based on the 1980 census data.<sup>299</sup> The case arose, however, because the school district was planning to hold an election in 1992 using the 1984 districts.<sup>300</sup> The plaintiffs argued that the use of districts drawn according to the 1980 census rather than new districts drawn according to the 1990 census would violate the constitutional guarantee of one person, one vote.<sup>301</sup> Indeed, the court acknowledged that there was a 17.8% population disparity between the most populated and the least populated district, a *prima facie* violation of the Equal Protection Clause.<sup>302</sup>

Although the *Cardona* court ultimately permitted the election to go forward with districts drawn from the outdated 1980 census, it was careful to note that the situation would be much different if the city had attempted to delay its redistricting for nine or even ten years.<sup>303</sup> Although a short delay in this instance was justified, the court noted that it would be "constitutionally suspect" for the school district to delay much longer given the malapportionment.<sup>304</sup> The court's admonition that the school district could not justifiably delay redistricting for nine or ten years assumed the 1984 plan would govern the elections in the interim, a scenario that would clearly run afoul of the one person, one vote requirement.<sup>305</sup>

By contrast, in the New Hampshire case a court-drawn plan based upon the 2000 census figures was already in place and would continue to govern elections until the legislature acted.<sup>306</sup> Thus, if the legislature had waited nine years to redistrict, the intervening elections would have been held using districts that satisfied, rather than contravened, the one person, one vote requirement, unlike the situation in *Cardona*.<sup>307</sup> For this reason, the *In re Below* Court's reliance on *Cardona* for the proposition that the state legislature might have lost its power to redistrict had it not

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<sup>298</sup> 785 F. Supp. at 838.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 841.

<sup>303</sup> 785 F. Supp. at 841 n.9. For reasons peculiar to federal law, the court denied the requests and dismissed the case on the merits because the state had offered a legitimate rationale for delaying the redrawing of the districts. *Id.* at 842.

<sup>304</sup> *Id.* at 841 (quoting *Reynolds*, 377 U.S. at 583-84).

<sup>305</sup> See *id.* at 841 n.9.

<sup>306</sup> *In re Below*, 855 A.2d at 461-62.

<sup>307</sup> See *Cardona*, 785 F. Supp. at 840-42; *In re Below*, 855 A.2d at 461-62.



acted before 2004 is misplaced.<sup>308</sup> This further reflects the inappropriateness of the continuing duty approach to redistricting.<sup>309</sup>

#### D. Separation of Powers Concerns

A separation of powers argument further supports the pure implied limitation analysis.<sup>310</sup> There is no doubt that redistricting is an intensely political undertaking<sup>311</sup> and courts are understandably reluctant to wade into redistricting fights out of respect for separation of powers.<sup>312</sup> Indeed, because the purpose of redistricting is to protect the ability of citizens to participate in the democratic process, courts rightly express a preference for the democratic branches of government to control reapportionment.<sup>313</sup> The New Hampshire court was particularly emphatic on this point, commenting that its involvement was “unwelcome” and “reluctant.”<sup>314</sup> It does not automatically follow, however, that the proper separation of powers is undermined by a ruling that prohibits a state legislature from replacing a court-drawn plan in the middle of the decade—especially where the court-drawn plan was necessitated in the first instance by the legislature’s own failure to act.<sup>315</sup>

To begin with, the South Dakota and Colorado courts’ approach does not, by itself, prevent the state legislature from participating in the redistricting process.<sup>316</sup> On the contrary, it actually encourages the political branches to undertake redistricting following a census and to enact a lawful apportionment.<sup>317</sup> In South Dakota, the legislature had enacted the initial apportionment plan it later sought to alter; in Colorado, had the legislature agreed on a valid plan before the 2002

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<sup>308</sup> See *In re Below*, 855 A.2d at 461–62.

<sup>309</sup> See *Cardona*, 785 F. Supp. at 840–42; *In re Below*, 855 A.2d at 472.

<sup>310</sup> See *infra* notes 311–324 and accompanying text.

<sup>311</sup> See *Perry*, 126 S. Ct. at 2607–08 (plurality opinion); *Salazar*, 79 P.3d at 1231, 1237; *In re Below*, 855 A.2d at 461–63, 472–73.

<sup>312</sup> See *In re Below*, 855 A.2d at 461–63. On the national level, federalism concerns, in addition to separation of powers issues, animate courts’ reluctance to intrude too heavily into the process of reapportionment. See *Perry*, 126 S. Ct. at 2607–08 (plurality opinion) (commenting that the U.S. Constitution “leaves with the States primary responsibility for apportionment of their federal congressional . . . districts” (quoting *Grove v. Emison*, 507 U.S. 25, 34 (1993))); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (“[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body.”).

<sup>313</sup> *Perry*, 126 S. Ct. at 2608 (plurality opinion).

<sup>314</sup> *In re Below*, 855 A.2d at 462–63.

<sup>315</sup> See *Salazar*, 79 P.3d at 1231, 1237; *In re Certification*, 615 N.W.2d at 593–97.

<sup>316</sup> See *Salazar*, 79 P.3d at 1227, 1231, 1236–37; *In re Certification*, 615 N.W.2d at 593.

<sup>317</sup> See *Salazar*, 79 P.3d at 1227, 1231, 1236–37; *In re Certification*, 615 N.W.2d at 593.

elections, a court would not have displaced it.<sup>318</sup> To the extent the Colorado decision excluded the state legislature from the redistricting process, it was only *after* the legislature failed to enact a plan.<sup>319</sup>

Far from intruding on the province of the legislatures, the approach of the South Dakota and Colorado courts actually encourages legislatures to discharge their constitutional duty.<sup>320</sup> After these decisions, a legislature is on notice that it must agree upon a plan or risk losing an opportunity to participate in the redistricting process until the next census.<sup>321</sup> This merely creates an incentive for state legislatures to redistrict, a task, it should be remembered, that they already have a duty to accomplish.<sup>322</sup> Moreover, if the houses of a legislature are divided between two parties, or if one party controls a legislature and another the governorship, there is an incentive to reach a bipartisan consensus.<sup>323</sup> Thus, not only does a pure implied limitation analysis encourage legislatures to discharge their duty, but it also encourages them to discharge that duty in a bipartisan fashion.<sup>324</sup>

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<sup>318</sup> See *Salazar*, 79 P.3d at 1226-27, 1237; *In re Certification*, 615 N.W.2d at 593.

<sup>319</sup> See *Salazar*, 79 P.3d at 1227.

<sup>320</sup> See *id.* at 1231; *In re Certification*, 615 N.W.2d at 595-96.

<sup>321</sup> See *Salazar*, 79 P.3d at 1231; *In re Certification*, 615 N.W.2d at 595-96.

<sup>322</sup> See *Salazar*, 79 P.3d at 1236-37; *In re Below*, 855 A.2d at 469-71; *In re Certification*, 615 N.W.2d at 594-95.

<sup>323</sup> See *Salazar*, 79 P.3d at 1231, 1242-43; *In re Certification*, 615 N.W.2d at 595-96. One might argue that, armed with the knowledge that it only gets one shot at redistricting, a legislature under the control of a single party will go for broke and enact a highly partisan map, whereas a legislature divided between two parties will reflexively enact a plan highly protective of incumbents. See *Perry*, 126 S. Ct. at 2611 (plurality opinion) ("If mid-decade redistricting were barred or at least subject to close judicial oversight, opposition legislators would also have every incentive to prevent passage of a legislative plan and try their luck with a court that might give them a better deal than negotiation with their political rivals."). Either of the two outcomes, however, is no reason for rejecting the pure implied limitation analysis because both situations are already the reality of redistricting in America. See *Davis v. Bandemer*, 478 U.S. 109, 113-15 (1986) (plurality opinion); JULIET EILPERIN, *FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES* 92-93 (2006). For example, in 1986 in *Davis v. Bandemer*—the case in which the U.S. Supreme Court first concluded that claims of partisan gerrymandering were justiciable—it was obvious that the Indiana legislature, under the unified control of Republicans, enacted a highly partisan redistricting plan aimed at diluting the strength of their Democratic rivals. 478 U.S. at 113-15. In much the same way, incumbency protection is already an all-too-common feature of reapportionment life. See G. Alan Tarr & Robert F. Williams, *Introduction*, 37 *RUTGERS L.J.* 877, 878 (2006) (citing EILPERIN, *supra*, at 89-125). Accordingly, opposition to the South Dakota and Colorado approach because it might encourage partisan gerrymandering is unpersuasive when partisan gerrymandering is already the reality of redistricting life. See *Perry*, 126 S. Ct. at 2611; *Davis*, 478 U.S. at 113-15; Tarr & Williams, *supra*, at 878.

<sup>324</sup> See *Salazar*, 79 P.3d at 1231, 1242-43; *In re Certification*, 615 N.W.2d at 595-96. One might also object to the Colorado decision on federal constitutional grounds. See *Colo.*

### E. Policy Concerns

Unlike the continuing duty approach, a pure implied limitation analysis appropriately balances important public policy considerations such as the need for accountability and stability in representative government and the necessity of equal representation.<sup>325</sup> Representative government depends upon these objectives.<sup>326</sup> Because elected representatives by definition represent their constituents, the contours of electoral districts must be appropriately stable so that a voter is aware of who represents her and can vote to hold that representative accountable.<sup>327</sup> At the same time, given the population changes that inevitably occur in a country as mobile as the United States, electoral districts cannot be so fixed that they become malapportioned.<sup>328</sup>

The best way to balance these competing goals is through a prohibition on mid-decade redistricting.<sup>329</sup> A voter can hold her representative accountable only if she has the opportunity to vote her representative out of office.<sup>330</sup> Limiting redistricting to once a decade ensures this opportunity because it guarantees a voter the opportunity to reject a candidate in 2004 that she voted into office in 2002.<sup>331</sup> Furthermore, a prohibition on mid-decade redistricting promotes stability in political representation by preventing opportunistic changes to the district map as the political winds shift.<sup>332</sup> In terms of equal repre-

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Gen. Assembly v. Salazar, 541 U.S. 1093, 1093 (2004) (denying certiorari); see also Michael A. Carvin & Louis K. Fisher, "A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts, 4 ELECTION L.J. 2, 37-50 (2005). Article I, Section 4, of the U.S. Constitution provides: "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4 (emphasis added). Because the Colorado decision prevented the state legislature from having any role in the redistricting, there is a colorable argument that it conflicts with Article I, Section 4. See *Colo. Gen. Assembly*, 541 U.S. at 1095 (Rehnquist, C.J., dissenting); *Salazar*, 79 P.3d at 1244-46 (Kourlis, J., dissenting). The U.S. Supreme Court, however, declined to address this issue in 2004. See *Colo. Gen. Assembly*, 541 U.S. at 1093 (denying certiorari). Moreover, the objection would seem to be equally applicable to independent redistricting commissions, like the one in use in Arizona. See ARIZ. CONST. art. IV, pt. 2, § 1 (establishing the Arizona Independent Redistricting Commission to redistrict the state's congressional and legislative districts).

<sup>325</sup> See *Salazar*, 79 P.3d at 1231, 1242-43.

<sup>326</sup> See *id.*

<sup>327</sup> See *id.*

<sup>328</sup> See generally *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>329</sup> See *Salazar*, 79 P.3d at 1242-43.

<sup>330</sup> See *id.*

<sup>331</sup> See *id.*

<sup>332</sup> See *Reynolds*, 377 U.S. at 583 ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system . . .").

sensation, an implied limitation analysis bolsters what the U.S. Supreme Court already requires—redistricting after each census.<sup>333</sup>

By contrast, the continuing duty approach undermines the stability and accountability that is essential to representative government and does little to promote equal representation.<sup>334</sup> The mid-decade replacement of a court-drawn plan, as permitted under the continuing duty approach, is just as destabilizing as the mid-decade replacement of a previously enacted legislative plan.<sup>335</sup> This destabilization undermines accountability<sup>336</sup> and does little to further equal representation because a court-imposed plan will already have ensured "substantially equal representation."<sup>337</sup> Therefore, the pure implied limitation analysis best balances accountability, stability, and equal representation.<sup>338</sup>

### CONCLUSION

In American political life, few things are more controversial or complicated than redistricting. From at least the time the term "gerrymander" was coined in the early nineteenth century, redistricting disputes have been an all-too-frequent reminder of just how nasty politics can be. In recent years, however, the phenomenon of mid-decade redistricting has made the situation qualitatively worse. Nevertheless, the decisions of the South Dakota and Colorado Supreme Courts provide hope that, in the future, more courts will interpret their constitutions to embody meaningful limits on the ability of state legislatures to engage in mid-decade redistricting. An implied limitation analysis that adheres closely to the text of the relevant provisions, which also recognizes the unique threats posed by mid-decade redistricting, is best approach to the problem of mid-decade redistricting in the modern context of one person, one vote. When confronting similar language, future state courts should follow the lead of the South Dakota and Colorado courts and interpret their constitutions to require redistricting after the national census and before the ensuing general, and to prohibit redistricting at any other time.

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<sup>333</sup> See *id.* at 568; *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

<sup>334</sup> See *In re Below*, 855 A.2d at 470-72.

<sup>335</sup> See *Salazar*, 79 P.3d at 1227, 1237; *In re Below*, 855 A.2d at 461-63.

<sup>336</sup> See *Davis*, 478 U.S. at 177 (Powell, J., concurring in part and dissenting in part) ("Intelligent voters, regardless of party affiliation, resent . . . political manipulation of the electorate for no public purpose.").

<sup>337</sup> See *In re Below*, 855 A.2d at 470.

<sup>338</sup> See *supra* notes 325-337 and accompanying text.