

## Colorado Government – Fall 2008

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## A. History of the Colorado Constitution<sup>1</sup>

### 1. Geography

Parts of Colorado have been within the actual or claimed domains of several American Indian nations (notably Ute, Cheyenne and Arapahoe), Spain, France, Mexico, and the Texas Republic. Under U. S. sovereignty, parts of the future state were within Kansas, Nebraska, New Mexico, and Utah Territories. A north-south mountain boundary was common to all territorial boundaries before 1859.<sup>2</sup>

After the first major gold discovery in 1858, the Kansas Territory sector was swarmed with fortune hunters. In 1859, many of them organized mass meetings followed by a vote to hold a convention to establish a new territorial government. The convention adopted an extra-legal constitution and government for Jefferson Territory, with boundaries taking in all of present-day Colorado and parts of Utah, Wyoming, Nebraska and Kansas. It was the first boundary to bridge the mountains.<sup>3</sup>

Colorado's present boundaries were drawn by Congress for the Organic Act establishing Colorado Territory in 1861. The Organic Act's boundaries are two lines of north latitude (37° and 41°) crossed by two meridians measured from Washington (approximately 102° and 109° west of Greenwich) to form the State's nearly rectangular shape.<sup>4</sup> The boundaries have not changed since 1861.

A 1903 resurvey of the Colorado-New Mexico boundary on the 37<sup>th</sup> parallel placed the line north of the original survey by a considerable distance. In 1919, New Mexico sued Colorado to claim the territory between the two lines. This would have shifted most of a town, two villages, and five post offices to New Mexico and disrupted many other settled expectations. The U. S. Supreme Court rejected the claim, applying the standard rule that a resurvey cannot alter a boundary that has been substantially relied upon.<sup>5</sup>

### 2. Colorado Territory, 1861-76

In the summer of 1858 William Green Russell and his companions discovered gold at the confluence of Cherry Creek and the South Platte, and word spread rapidly and widely. People flooded into the area, soon known as the Pikes Peak gold region. By winter, two clusters of cabins and tents faced each other across Cherry Creek. Auraria, named for a place in Georgia, had residents mostly from Georgia and Nebraska and was "a moral place." Across the creek was the hamlet later named Denver, in honor of General James W. Denver, Governor of Kansas Territory. Denver's residents hailed primarily from Kansas and Missouri and indulged in more "drinking and humbugging."

During the winter of 1859, the newly arrived miners were cabin-bound and consumed with politics. The miners, in an election hotly contested between the "drinking element" and those who abstained, and with a cigar box for a polling booth, elected a representative to Congress, Hiram Graham. He had a mandate to lobby Congress for separate territorial status for the Pikes Peak

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<sup>1</sup> See generally Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution* 1-25 (2002).

<sup>2</sup> See Thomas J. Noel, Paul F. Mahoney & Richard E. Stevens, *Historical Atlas of Colorado* (1994), at parts II, VI.

<sup>3</sup> See 2 *Sources and Documents of U.S. Constitutions* (William F. Swindler, ed. 1973), at 16-22.

<sup>4</sup> See Frederic L. Paxson, "The Boundaries of Colorado," 2 *U. Colo. Studies* 87 (1904); *Historical Atlas of Colorado*, supra, part II.

<sup>5</sup> *New Mexico v. Colorado*, 267 U.S. 30 (1925).

area, but Congress did not respond. Impatient mining communities sent representatives in the spring of 1859 to convene at Uncle Dick Wootton's Tavern on Cherry Creek for the purpose of founding a new state. The group set grand boundaries, named the new State of Jefferson, and made preparations for a constitutional convention. There was no lengthy discussion because the delegates were all in haste to get through. Voters of the embryonic State of Jefferson rejected the constitution on September 5th, however, expressing a marked preference for territorial status. The trappings of statehood looked to be far too expensive and the stability of the mining camp economy far too unsteady.

Undeterred, the mining communities elected a delegate to Congress from the self-proclaimed Territory of Jefferson and chose delegates to found a provisional territorial government. The delegates met in a Denver saloon, the Apollo Hall, wrote a territorial constitution in a single day, modeled on the rejected State of Jefferson constitution, and submitted the new constitution and a full slate of territorial officers to local citizens on October 24. Many did not vote, but those who cast ballots overwhelmingly favored the territorial constitution. The general assembly of Jefferson Territory met in November and began passing laws, anticipating federal recognition.

In 1860 Denver citizens, dissatisfied with the illegitimate, provisional Jefferson Territory legislature, organized and created a constitution for an illegitimate, provisional "People's Government of Denver." The preamble professed loyalty to the federal Constitution and the laws of Kansas Territory but noted that, because no immediate protection was available from either, the law of self-preservation necessitated the creation of a temporary government "to protect our lives and . . . property from the lawless." Voters ratified the Denver constitution and elected officers on October 1. The last municipal election under it was held in April of 1861. In 1860 the Denver area, then, had three governments competing for jurisdiction, a county of Kansas Territory, a county of Jefferson Territory, and the People's Government of Denver.

Congress preempted the provisional governments by establishing Colorado Territory on February 28, 1861. The month before, Congress had admitted Kansas as a state with its present boundaries, and, compelled to cope with the Pikes Peak part of Kansas Territory and its maverick governments, passed the Organic Act creating Colorado Territory with the state's present boundaries.<sup>6</sup> At the time the Act passed, seven southern states had seceded, and most of their senators had left Washington. Their absence removed the major opposition to the creation of new western territories.

The ink had barely dried on the territorial act when proponents of statehood renewed their petitions to Congress. The struggle involved sharp conflicts both locally and nationally. The local conflict revolved around the costs and benefits to residents of statehood. The national conflict was one of partisan politics—the new state's single representative and two senators were likely to be Republicans. Statehood required that those who favored it have a majority in both local and national counsels at the same time.

The first formal step toward statehood at the national level occurred early in 1864, when Congress passed and President Lincoln signed an Enabling Act for the State of Colorado. It was a presidential election year, and Lincoln was looking for more Republican electoral votes to aid his re-election. Coloradans, if they could move quickly to form a state, were likely to send three

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<sup>6</sup> Act of Feb. 28, 1861, c.59, 12 Stat. 172.

Republicans to the Electoral College. The Enabling Act required, therefore, that Colorado have a constitution in place by September of that year.

Coloradans elected delegates to a constitutional convention, which produced a proposed state constitution. In the September 1864 election, the constitution failed by a wide margin, 1,520 for to 4,672 against. Those opposing statehood were concerned about tax increases (due to withdrawal of federal subsidies for officials' salaries), adding to the Republican majority in Congress, and the extension of federal conscription laws to Colorado's large community of draft-evaders.<sup>7</sup>

With conscription no longer at issue, sentiment in Colorado shifted towards statehood in 1865, and citizens elected delegates to yet another convention, which produced another proposed state constitution on August 12. Voters approved it in September 1865 by a thin margin of two hundred votes and in November elected state officers, all Republicans. In December the new state legislature met in Golden, elected Republican Senators, and adjourned to await a presidential declaration of statehood.

It never came. President Johnson was sympathetic to the Democrats and not eager to add more Republican representatives to an already hostile Congress. He refused to proclaim Colorado a state, asserting that the conditions of the Enabling Act of 1864 had not been met. According to Johnson, the 1865 Constitution lacked "legal authority" and had been "irregularly obtained." The Republican-controlled Congress rushed to recognize the new state regardless and twice, in 1865 and again in 1866, passed bills to admit Colorado to the Union. President Johnson vetoed both. The Senate failed to override the second veto by only three votes.<sup>8</sup> Agitation for statehood continued until the spring of 1868, when the last attempt was made to have Congress legitimize the 1865 Constitution.

President Grant visited Colorado in the summer of 1872, and his 1873 message to the 43<sup>rd</sup> Congress asked Congress to approve Colorado statehood. In its second session in 1875, Congress passed the Colorado Enabling Act.<sup>9</sup> The year 1876 would witness one of the closest presidential elections in history, and Republican leaders were worried about defeat. Reconstruction governments in the southern states were giving way to statehouses controlled by Democrats. And scandals in the Grant administration gave Democrats much to complain about in the campaign. Once again Republicans in Washington could use three Republican electors from Colorado.

The 1875 Enabling Act authorized the territorial governor to call an election for delegates to a constitutional convention. The Act specified 39 delegates, the same as the number of territorial legislators, and ordered the governor to hold a ratification election in July of 1876.

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<sup>7</sup> A large number of new Colorado residents had immigrated specifically to escape conscription in the Civil War.

<sup>8</sup> A disgruntled Henry Teller from Colorado, fighting statehood in Washington on behalf of the "Golden gang," created enough doubt in the minds of some senators to thwart the required two-thirds majority. The "Denver gang" of Republicans were the most persistent proponents of statehood. The fallout from the Sand Creek massacre on November 29, 1864 did not help either. The First Colorado Regiment, led by Colonel John Chivington, had slaughtered and mutilated more than 100 peaceful Cheyenne and Arapahoe people, including the aged, women and children. Congress condemned the massacre immediately after its occurrence. Finally, the Radical Republicans were not pleased with Colorado voters' rejection of black suffrage at the election ratifying the 1865 Constitution.

<sup>9</sup> Act of Mar. 2, 1875, c.139, 18 Stat. 474.

### 3. The 1875-76 Constitutional Convention

The Convention opened in Denver on December 20, 1875 in the Odd Fellows' Hall over the First National Bank. There were 24 Republicans and 15 Democrats, two-thirds of the Democrats from southern counties. After election of officers and employees, however, partisanship largely disappeared in the discussions and votes on controversial issues. At least three of the delegates were Hispanic and others spoke Spanish. Two delegates were from German-speaking communities. There were 15 lawyers and three bankers; other delegates came from mining, farming, stock raising, newspapers and railroads.

In floor debates, only four issues created substantial disagreement among delegates and residents who followed the proceedings. The hotly debated issues were regulation of railroads and other business corporations, mention of God in the Preamble, public funding of parochial schools, and women's suffrage.

The delegates stated in their letter to the people of Colorado introducing the draft Constitution that nothing caused them "more anxiety and concern than the troublesome and vexed question pertaining to corporations."<sup>10</sup> The territory had little internal capital with which to build the infrastructure necessary to support mining and farming, the territory's major industries. Outside capital would be necessary for railroads, irrigation projects, smelters, banks and the like. Yet the delegates were well informed of the scandals of the time, as large corporate concerns, particularly railroads, bribed and corrupted elected officials to obtain government favors.

The delegates attempted to chart a middle course. They struggled to write language that would not discourage investment in Colorado enterprise but would at the same time protect the government, and particularly the general assembly, from the corrupting power of big business. If the general assembly could not grant special dispensations, the delegates reasoned, businesses would not bribe public officials—there would be no point.

Heated debates over whether to allocate public school funds to private (mostly parochial) schools, whether to tax church property, and whether to mention God in the Preamble were linked. Debates over the three issues energized religious communities, who sent petitions to the Convention and wrote letters to the newspapers. Catholics wanted public money for their schools, a tax exemption for all church-owned property, and mention of God in the Preamble. Most Protestants wanted no public money for private schools, no tax on property used for religious purposes but taxes on church-owned investments, and God mentioned in the Preamble. Those wary of religion wanted no public money to go to private schools, all church property taxed at private property rates, and no mention of God in the Preamble. The Protestants prevailed on all three issues.

Another controversial issue was women's suffrage. Women's rights groups, local and national, deluged the delegates with petitions, imploring them to give Colorado the honor of becoming the first state to provide full political rights to women. In the end, the delegates gave a nod to women, allowing them to vote in local school district elections (as two other states had previously done). A majority of the delegates believed that the rough-and-tumble mining region was a man's country, and a women's suffrage provision would cause the Constitution to fail at the polls. However, the delegates did authorize the general assembly to enact a statute granting

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<sup>10</sup> Address to the People, Convention Proceedings at 728.

women's suffrage if ratified by popular vote. Two years later the general assembly placed the question before the state's (male) voters, and they rejected it.

The delegates wrote an "Address to the People" in an effort to sell their document at the polls. They emphasized that the governor's term of office was only two years so that the people would have the frequent opportunity to correct any inadequate administration. Second, the delegates addressed the corruption of legislatures of the time by railroads. Third, they trumpeted their system of numbering ballots to check voter fraud, which all knew to have occurred in territorial elections and in the 1864 and 1865 ratification votes on earlier proposed state constitutions. And they were proud of the provision for printing the Constitution and laws in Spanish and German until at least 1900, for the benefit of the state's non-English-speaking citizens. The Address also stressed the benefits of self-government. No longer would Colorado citizens be "beggars, asking pittance at the gate of the nation; poor wards dependent upon the charity of Congress, living in a sort of penal colony, the Botany Bay of political servitude."<sup>11</sup>

The size of the ratifying majority must have surprised the delegates, who in their deliberations were wary of passage, and must have caused some delegates to reevaluate whether all their compromises, many granted solely in order to secure approval but otherwise against their best wishes, were necessary.

#### **4. Amendments**

The original Colorado Constitution provided two methods of amendment. The legislature can propose amendments by two-thirds vote of both houses that are referred to the voters for popular ratification. Or a new constitutional convention can be called by a similar, two-thirds vote of both houses referring the proposal to voters. The latter method has never been used. On at least three occasions, the legislature has proposed a second convention, but voters turned down all of them. The Initiative Amendment of 1910, number 2 below, added a very important third way to amend the Constitution.

As the year 2007 ended, citizens had amended the Colorado Constitution 153 times, adopting about half the amendments proposed. Approximately two-thirds of the successful amendments were referred to voters by the general assembly, the remaining one-third initiated by Colorado citizens. The most important amendments are the following:

1. The 1893 adoption of Article VII Section 2, guaranteeing the vote to women.
2. The Denver Amendment of 1902, adding Article XX, gave Denver and other cities local autonomy, and the 1912 Home Rule Amendment broadened it. The City and County of Denver was declared a home rule city, and the residents of other cities were empowered to incorporate under their own charters. Charters must include citizens' powers of initiative and referendum.
3. The Initiative and Referendum Amendment of 1910 gave the people of Colorado a direct voice in the creation of statewide laws and in the amendment of the Constitution and extended these rights to all municipalities. The initiative empowers citizens to draft a proposed statute or constitutional amendment, gather a requisite number of voters' signatures on petitions, and have their proposal presented to the voters at the next biennial election.
4. The Recall Initiative of 1912 added Article XXI, giving citizens the right by petition to force a recall election of any elected official. In recall elections, replacement candidates, nominated

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<sup>11</sup> Address to the People, Convention Proceedings at 733.

by petition, are also included on the ballot. These rights are also guaranteed to citizens of local governments.

5. The Civil Service Amendment of 1918 added Section 13 to Article XII, creating the Civil Service Commission to govern most public employment. Appointments and promotions are to be made according to merit and fitness determined by competitive tests.
6. The Income Tax Amendment of 1936 added Section 17 to Article X, empowering the general assembly to levy a state income tax.
7. The 1966 amendment on the Selection and Tenure of Judges replaced selection of judges in contested, partisan elections with a merit system. It vested appointment power in judicial nominating commissions and the Governor, with voter approval after two years by retention elections.
8. A 1974 initiative added Article V, Section 48, establishing the Colorado Reapportionment Commission. The Commission is required to redraw general assembly districts after each federal census, greatly reducing the influence of self-interested politics.
9. The State Lottery Initiative of 1980 amended Section 2 of Article XVIII to authorize a state-supervised lottery. Great Outdoors Colorado was adopted in 1992 as Article XXVII to earmark lottery proceeds for wildlife, parks, and outdoor recreation
10. The Gaming Initiative of 1990, Section 9 of Article XVIII, legalized limited gambling in the cities of Black Hawk, Central City and Cripple Creek.
11. Term Limits initiatives for state officials and representatives to Congress passed in 1990, 1994 and 1996. The congressional limits were invalidated by the courts.
12. A 1992 initiative enacted Article II, Section 30b, prohibiting laws providing equality rights for gay people. It was held unconstitutional by the Colorado and United States Supreme Courts.
13. The Taxpayer's Bill of Rights Initiative in 1992 added Article X, Section 20, which provides that neither taxes, nor spending, nor government indebtedness can be increased by any state or local government over defined levels without voters' approval.
14. Voters in 2000 adopted Article IX, Section 17, which mandates significant, permanent increases in public school funding and exempts revenue for this purpose from the spending limits of the Taxpayer's Bill of Rights.

## **5. Constitutional Events**

At times in Colorado's history significant elements of its state government were in serious disarray. Often the Colorado Supreme Court had to invoke the Constitution to sort out the mess.

*The Presidential Election of 1876.* Colorado played a pivotal role in the notorious presidential election of 1876. When the Colorado enabling bill was before Congress in 1875, members were looking ahead to the presidential election of 1876, which appeared to be a horse race.

The Enabling Act passed, the Convention met, and the Constitution included Section 19 in the transition Schedule. It empowered the first general assembly to appoint electors for the 1876 election without a popular vote on presidential candidates. The Enabling Act did not expressly authorize this section, but after approval of the state Constitution, only President Grant, with power to proclaim statehood, could object. He did not. Election of the new state's officers was held on October 3, 1876, and Republicans won. The general assembly convened on November

1, and, after seating state officers, elected three Republican presidential electors. Rutherford B. Hayes, the Republican candidate, needed the three votes to win the Electoral College by a single vote over his opponent, Samuel J. Tilden, even though Tilden had won the popular vote nationally. To obtain the electoral votes of disputed delegations from four other states, Hayes cut a deal to pull the army out of southern states, returning control to Southern Democrats. Although the Democrats promised to honor the citizenship of blacks in the South, they did not. As students of American history know, it was not until the 1960s that the national government reasserted the civil rights of black Americans.<sup>12</sup>

*Alferd Packer's 1883 Trial for Cannibalism.* Alferd Packer misrepresented himself as an able guide to five gold miners and led them into the San Juan Mountains in the winter of 1873-74.<sup>13</sup> Trapped in blizzard conditions and without provisions, only Packer survived. In an early statement, he confessed to murdering and eating his companions. Later, he asserted that he had killed only one and in self-defense, but continued to admit dining on the remains. Packer's alleged offenses were in Colorado Territory, but he was tried in 1883 under the criminal laws of the new state. Convicted and sentenced to hang, the Supreme Court, with some regret, threw out the conviction on the ground that the general assembly had not saved the territorial murder law. There followed an extraordinary series of moves by a clever defense lawyer, intent on freeing Packer, and countermoves by a determined Supreme Court, intent on keeping Packer in prison. After quashing the murder conviction, the Court concluded that the indictment survived, despite several irregularities, and that Packer could be tried on the lesser-included offense of manslaughter. On retrial Packer was convicted of five counts of manslaughter and sentenced to 40 years in prison. In two subsequent proceedings, the Court rejected an assortment of attacks on the judgment. But in 1901 Packer was pardoned by Governor Thomas at the request of the editors of the *Denver Post* and one of its high profile, muckraking reporters, Polly Pry, who were convinced he was innocent. Recently unearthed scientific evidence lends some support to Packer's later statement that he killed only in self-defense.<sup>14</sup>

*The State Treasury Ring (1876-1890).* The Constitution provided for a state treasurer to take control of and account for state funds. From the beginning, state treasurers took advantage of their power by putting state funds under their control in private banks. The banks and the state treasurer split the interest on the accounts. For a short time the office of state treasurer was the most vigorously contested state position, with private banks funding candidates who had promised to deposit state money in their vaults. Three successive governors, Alva Adams (1886), Job Cooper (1888), and John Routt (1891), attempted to stop the practice. The Constitution forbids any public officer from making a profit on public funds; the practice is declared a felony to be punished by law.<sup>15</sup> The Supreme Court held that the constitutional provision was not self-executing and required a statute. When the general assembly made it criminal for a state treasurer to convert the interest, the Court invalidated it on the technical ground that its title did not adequately describe it.<sup>16</sup> The attorney general tried another tack; he sued an outgoing state treasurer to recover interest on the state accounts. The Court held that since there was no statute de-

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<sup>12</sup> See Keith Polakoff, *The Politics of Inertia: The Election of 1876 and the End of Reconstruction* (1973); C. van Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951).

<sup>13</sup> See Ervan F. Kushner, *Alferd G. Packer: Cannibal! Victim?* (Frederick, CO: Platte 'N Press, 1980); *In re Packer*, 33 P. 578 (Colo. 1893).

<sup>14</sup> See *Denver Post*, Feb. 13, 2001, at 1B.

<sup>15</sup> Art. X, § 13.

<sup>16</sup> See *In re Breene*, 24 P. 3 (Colo. 1890) (applying Art. V, § 21).

claring that the interest on the accounts belonged to the state, it was the treasurer's to keep.<sup>17</sup> Not until 1892 did the general assembly pass a statute that claimed the interest for the state and that survived judicial review. State treasurers pocketed the interest on state money for 16 years!

*"The Royal Gorge War": Two Railroads Fight Pitched Battles over Rights of Way (1878-79).* In 1878 two railroad lines, the Denver & Rio Grande and the Atchison, Topeka & Santa Fe, were racing to lay lines through Royal Gorge. Both were anxious to reach the lucrative mines of Leadville in the upper Arkansas Valley. The Rio Grande was locally owned (by General W. J. Palmer), the Santa Fe had Boston owners.

The lines went into state and federal courts to adjudicate the right of way. However, while the dispute was on appeal to the U.S. Supreme Court, the parties settled. The Rio Grande leased its line to the Santa Fe, and the Santa Fe stopped building in the Arkansas canyon. The Supreme Court later ruled that the roads were entitled to joint occupancy of the gorge.<sup>18</sup>

Trouble resumed when the Santa Fe began to favor traffic to Kansas City over traffic to Denver. Palmer prevailed on the attorney general to secure an order from a district judge that the Santa Fe, a foreign corporation, had no power to operate in the state. The judge directed sheriffs of several counties to take possession of Rio Grande property operated by the Santa Fe and return the property to Palmer. Santa Fe employees resisted, and the sheriffs responded by forming posses. After bloodshed, a federal district judge quashed the state court injunctions, for which he was pilloried in the press. The court held that the state could not confiscate the property of a foreign corporation once it had been admitted to do business in the state.

Santa Fe forces continued to resist, erecting timber forts around depots and garrisoning them with armed men. Armed gangs attacked and beat Santa Fe employees wherever found. The federal courts put control of the Rio Grande in the hands of a receiver to stop the trouble and later voided the Royal Gorge lease, turning the road back to Palmer. The U.S. Supreme Court affirmed.<sup>19</sup> Palmer, however, lost control of the Rio Grande to Jay Gould, from whom he had sought funds to finance the litigation. The Rio Grande became a small part of the Gould railroad monopoly.

*Women's Suffrage.* The Populist Party swept the 1892 elections, putting Davis Waite in the governor's mansion.<sup>20</sup> Its platform promised to promote the vote for women, and the issue was duly placed on the general election ballot in 1893 and passed. But when Waite lost his bid for reelection in 1894, he blamed ungrateful women voters.

*The Governor's 1894 "War with City Hall."* Early in 1893, Populist Governor Waite decided that two members of the Denver Police and Fire Board, Jackson Orr and D. J. Martin, had schemed to use police and firemen to provide protection to illegal gambling establishments. The Governor fired them and made new appointments. The men did not go quietly. Claiming there was no lawful cause for removal, they turned City Hall into an armed fortress. Gathering Denver policemen and sympathetic workers from the Public Works department, Orr and Martin were guarded by over three hundred Winchester rifles trained from the doors and windows of City Hall and from adjacent rooftops.

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<sup>17</sup> State v. Walsen, 28 P. 1119 (Colo. 1892).

<sup>18</sup> Railway Co. v. Alling, 99 U.S. 463 (1878).

<sup>19</sup> Atchison, T. & S.F. R. Co. v. Denver & N.O.R. Co., 110 U.S. 667 (1884).

<sup>20</sup> The Populists were a reformist party, originating with the Farmers' Alliance and the Greenbackers.

The Governor called out the National Guard, still popularly called the militia, who surrounded City Hall. One of the units called up was the Chaffee Light Artillery that sported two Gatling guns and two Napoleon cannons, which were trained on City Hall. He also convinced the Commandant of Fort Logan to send three hundred federal troops, who were stationed at the Union Passenger Depot with orders to “preserve the peace.”

A committee of prominent citizens appointed by the Denver Chamber of Commerce convinced the Governor and his opponents to submit the issue to the Supreme Court. The Court held that although the Governor had power to remove members of the Police and Fire Board, he could not employ the militia to execute his removal order. The Governor, the Court held, should seek to remove the officials by court proceeding.<sup>21</sup> The Governor did not yield; he threatened to declare martial law for what he called an “insurrection.” He directed his Adjutant General to recruit two infantry regiments and put them at “full war-strength” in preparation for an active assault on City Hall. The following day, however, he obtained a restraining order from the District Court that put him in full control of the board. Several months later, the Supreme Court also sided with the Governor.<sup>22</sup>

*Violence at the Mines (1903-14).* Miners’ unions were formed in the late 1870s, and the first important strike hit Leadville in 1880, suppressed with aid of the militia but without significant violence. The Western Federation of Miners struck in the Cripple Creek District in 1894. Strikers and deputies shot at one another, killing a few on both sides, and strikers set off an explosion that trapped several men. But Populist Governor Waite sent the militia to restore peace and successfully mediated the dispute. Strikes at Leadville in 1896 and Telluride in 1901 also involved shooting, a few deaths, and suppression by the militia.

One of labor’s major aims was an eight-hour limit on miners’ workdays. It was a principal issue at Cripple Creek in 1894, and the following year saw attempts to have the legislature enact a statutory limit. These were struck out by a series of activist decisions of the Colorado Supreme Court. In response, the 1901 general assembly proposed a constitutional amendment to require an eight-hour limit in the mines and authorize it for other occupations.<sup>23</sup> Voters approved in 1902, but control of the legislature changed in the same election, and no statute passed. This was one cause of dramatic and widespread strikes and violence in the mines in 1903-04. A sobered general assembly passed the required statute in 1905.<sup>24</sup>

The years 1903 and 1904 brought strikes in mines and smelters all over the state, and the militia was repeatedly called out to quell them. The most violent were in the Cripple Creek District. Governor Peabody called out the militia in September 1903. Union members were arrested and sympathetic newspapers closed. An explosion killed two mine officers, and the Governor proclaimed a state of insurrection and rebellion. In March, Western Federation President Charles Moyer was arrested in Ouray on nominal charges of desecrating the American flag. Moyer and

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<sup>21</sup> In re Fire and Excise Comm’rs, 36 P. 234, 240 (Colo. 1894).

<sup>22</sup> People ex rel. Engley v. Martin, 36 P. 543 (Colo. 1894). The Court had been waiting for the case. The government filed on a Saturday and the Court handed down its decision the following Monday, petulantly noting that the petition was the “first regular appeal” to the Court although many days had passed since the struggle began.

The Governor also attempted to remedy the Silver Panic of 1893 by having the state buy the entire output of the state’s silver mines, ship it to Mexico where it would be coined into dollars, and return the dollars to Colorado to be put into circulation. The general assembly rejected the “Fandango Dollars” scheme

<sup>23</sup> See Art. V, § 25a, reviewing the Supreme Court decisions..

<sup>24</sup> 1905 Colo. Laws 284.

other union members were detained by the militia, and their release on bail or habeas corpus refused. On Moyer's appeal, the Supreme Court denied both requests, holding that the Governor's acts in suppressing insurrection were not subject to judicial review.<sup>25</sup>

On June 6, 1904, a massive explosion under the railway platform in Independence killed thirteen non-union miners and badly wounded six others. Although the crime was never solved, the Western Federation was blamed. President Moyer was released on the flag charge and rearrested for insurrection and conspiracy, though never formally charged. Governor Peabody ordered the militia to deport union men accused of being "dangerous characters."<sup>26</sup> Dozens of men were rounded up and confined in infamous "bullpens," loaded into railway cars and hauled to the border of Kansas or New Mexico. They were unloaded in desolate areas without provisions and ordered to move away afoot and not to return to the mines. The militia fired a volley over the heads of detaining miners "to accelerate their movements." The few who did return were arrested and deported a second time. However, the following November, Moyer called off a 15-month strike in Telluride because it had achieved most of the union's goals.

The United Mine Workers of America organized Colorado's coalfields. The first coal miners' strikes were part of the turmoil in 1903-04. A second round began in 1910 in Boulder County and spread to Las Animas and Huerfano Counties in 1913. Striking miners erected tent colonies to house over 12,000 miners and their families who had been evicted from company-owned houses. Mine owners brought in non-union miners and assembled a small army of armed guards. Rumors that owners were securing machine guns for the guards led the miners to dig cellars beneath their tents for protection from gunfire.

In October, Governor Ammons sent the militia to occupy the southern fields. Miners welcomed the soldiers, believing that they would keep the peace, but the militia sided with the owners. As the militia ran short of funds, soldiers left for home and were replaced by mine guards.<sup>27</sup> Eventually many of the militia were paid and outfitted by John D. Rockefeller, Jr., owner of one of the mines. The Rockefellers owned the Colorado Fuel & Iron Company, which operated a steel mill in Pueblo and controlled local railroads and stores; it also owned the miners' houses and schools. The company may have controlled local sheriffs.<sup>28</sup>

Events escalated into a gun battle between strikers in the tent city of Ludlow, north of Trinidad, and a company of the militia, on April 20, 1914. Four strikers and a boy were killed by militia fire, and the strike leader, Louis Tikas, was captured and shot. A fire raged through the tent community and suffocated eleven children and two women who had retreated to one of the tent cellars. As word of the massacre spread, striking miners in other camps erupted, and the entire area became a battleground. The eventual death toll was 46. At the Governor's request, President Wilson sent in federal troops to restore order.

*"Three Governors in One Day"—March 17, 1905.* The 1904 gubernatorial election featured incumbent Republican James Peabody running against twice-elected ex-Governor Democrat Alva

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<sup>25</sup> Ex parte Moyer, 91 P. 738 (Colo. 1905); In re Moyer, 85 P. 190 (Colo. 1904).

<sup>26</sup> General Sherman Bell of the Colorado National Guard is said to have shouted, "Habeas corpus? Hell, we'll give 'em post mortems."

<sup>27</sup> People v. Kennehan, 136 P. 1033 (Colo. 1913) (discussing the state's difficulties in paying the National Guard's expenses during the deployment).

<sup>28</sup> See Neeley v. Farr, 158 P. 458 (Colo. 1916) (Court invalidated an election for the Huerfano County sheriff on the grounds that the mining company effectively limited access to the ballot box).

Adams (1887-89, 1897-99). Peabody was awash in controversy for having called out the militia to quell labor strikes in the mines.

The parties traded claims of fraud and ballot box stuffing. Republican leaders successfully petitioned the Supreme Court for an unprecedented injunction to force Denver officials, who were Democrats, to obey and enforce election statutes. The Court stationed two poll watchers nominated by the Republican Party at every Denver polling place. A Democratic petition to stop voting fraud in four southern mining counties was less successful. The Court delayed its decision granting an injunction until the night of the election and then only for Huerfano County, the farthest away. The Court's orders did not arrive in time to take effect.

When the votes were counted, Adams appeared to have won by just under 10,000 votes. Allegations of fraud continued after the election, and the Court, using contempt trials based on its injunction, annulled votes in Denver and allowed the all-Republican State Board of Canvassers to annul votes in two other counties. All had favored Democrats. The effect was to undo the election of four senators, six representatives, and numerous Denver officials, all Democrats.<sup>29</sup> Control of the Senate passed to the Republicans, and they already held the House. The two parties brokered a back-room compromise on the governorship: Adams would take the oath of office as Governor, Republicans would drop their challenge to the Denver vote and Adams' election, and lame-duck incumbent Peabody would appoint two new judges to the Supreme Court and call the new Senate into session to confirm the appointments.<sup>30</sup> After the Peabody appointments (both partisan Republicans<sup>31</sup>) and after a Republican Lieutenant Governor was sworn in, the Republicans reneged and formally protested Adams' election by renewing challenges to the Denver vote.

The Lieutenant Governor appointed a joint committee of the general assembly to hear the election challenge; 18 of 27 members were Republicans. Six weeks later the committee concluded; it found "brazen, shameless, and far-reaching frauds," but could not reach agreement on what to do. The committee filed three separate reports, one supporting Peabody (with 14 Republican votes) by rejecting all Denver votes, one for Adams (all nine Democrats), and one for Peabody by rejecting one-half the Denver votes (the Chair and three other Republicans). A lone Republican recommended that the office be declared vacant and the Lieutenant Governor take over.

The Senate asked the Supreme Court if the latter option were valid. The Court ruled that the general assembly could not declare a vacancy; the legislature would have to choose between the two candidates.<sup>32</sup> Republicans in the general assembly were not united behind Peabody, however, and many refused to seat him for another term. To unite the party, Republican leaders settled on a scheme to circumvent the Court's holding. After a Republican-controlled vote for Peabody, he would resign, and Lieutenant Governor Jesse McDonald would be sworn in. Peabody signed a pledge to execute no business and make no appointments during his brief tenure. Thus, in the 24-hour period on March 16-17, 1905, Colorado had three governors.

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<sup>29</sup> There were three decisions titled *People ex rel. Miller v. Tool*, 86 P. 224 (Colo. 1904), 86 P. 229 (Colo. 1905), 86 P. 231 (Colo. 1905). The Court's one Democrat vigorously dissented.

<sup>30</sup> A 1904 amendment to the Constitution expanded the Court from three to seven members by adding two from the Court of Appeals and two appointed by the Governor.

<sup>31</sup> One of the appointees appeared actively in front of the Board of Canvassers, arguing against the election of Democratic Senators who, if seated, would vote against his appointment.

<sup>32</sup> *In re Sen. Res.*, 79 P. 1009 (Colo. 1905).

*The Supreme Court Convicts a United States Senator and Publisher of the Rocky Mountain News of Criminal Contempt (1905)*. The Supreme Court's heavy partisan role in deciding the 1904 state and local elections drew stinging public criticism from the editor of the *Rocky Mountain News*, Thomas Patterson, who was also a United States Senator.<sup>33</sup> Editorials charged that the Court's extraordinary injunction in the 1904 election had allowed and endorsed widespread election rigging to secure the appointment and confirmation of two Republicans as members of the Court. His paper published a very unflattering cartoon of the five Republican Justices. The Court was furious; after unsuccessful attempts to have Patterson disbarred, it convinced the attorney general to bring before it an information against Patterson for contempt. The Court found Patterson in contempt and fined him.<sup>34</sup> Neither Justice Goddard nor Justice Bailey, whose appointments allegedly were secured through the claimed election rigging, recused themselves. They and the three other Justices whom Patterson had lambasted provided five of the six votes to convict their accuser. The Court refused to permit Patterson to prove the allegations in his answer. It found that truth was irrelevant when a contempt defendant is charged with out-of-court comments tending to influence the outcome of pending matters (one of the election contests was pending on a petition for rehearing).

In 1907, the U.S. Supreme Court, in an opinion by Justice Holmes, dismissed Patterson's writ of error for want of a federal constitutional question; neither the First Amendment nor the Fourteenth Amendment spoke to the issues in the case.<sup>35</sup> Holmes wrote that the First Amendment applied only to protect the press from prior restraints on publication and did not apply to post-publication proceedings. Although never expressly overruled, the decision is no longer good law.<sup>36</sup>

The public took the Colorado Supreme Court's disposition of the case, avoiding a trial on the merits, as the Court's confession to the Senator's charges. The Senator gained and the Court lost significant popularity. The effect was to give Patterson the power to unseat delegates from the Denver democratic political machine at the 1906 state Democratic convention. Voters also replaced the Republican majority on the Court in the 1908 election.

*A One-Senator State (1911-13)*. In the 1910 election Democrats swept all but two statewide offices and controlled the general assembly. In January 1911, Senator Charles J. Hughes died, and the general assembly met to appoint a successor. Four Democrats vied for the position (as did four Republicans who had no chance), but the general assembly deadlocked for 102 ballots over 123 days. Reformers in the Democratic Party locked heads with the Denver political machine. In the end, the general assembly gave up and left the matter until its next session in 1913. Colorado's problems were not unique. Between 1891 and 1905 there were 46 deadlocks across 20

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<sup>33</sup> He held the seat from January of 1901 to March of 1907. He represented Colorado in the House of Representatives from 1877 to 1879.

<sup>34</sup> *People ex rel. Attorney General v. News-Times Publ. Co.*, 84 P. 912 (Colo. 1906). Patterson's editorials and cartoon were published in reaction to a June 1905 decision. For Patterson it was the last straw. See 84 P. at 937-41 (Patterson's affidavit).

<sup>35</sup> *Patterson v. Colorado*, 205 U.S. 454 (1907).

<sup>36</sup> See *Bridges v. California*, 314 U.S. 252 (1941) (reversing contempt convictions of the personnel of two newspapers for comments made about judges). See also *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (first amendment applies to post-publication cases).

states in appointments for the Senate.<sup>37</sup> The deadlocks contributed to adoption of the Seventeenth Amendment, providing for direct election of senators.

*Populism Threatens the Courts (1912-21).* Right after achieving the power to amend the Constitution by citizens' initiative, Colorado voters used it to go after the courts. An initiative adopted in 1912 forbade any but the Supreme Court to declare a state statute or local ordinance invalid under the state or federal Constitution. More dramatically, it provided that any decision of the Supreme Court holding a law unconstitutional could be put on the ballot by citizens' petition and overturned by popular vote. When the Supreme Court got its hands on this product of the rabble, the only issue properly before it was validity of the ban on lower courts' review under the federal Constitution. The Court held that it violated the Fourteenth Amendment and managed to extend its rulings to throw out the rest of the initiative.<sup>38</sup>

*Battling the Depression.* In 1933 Governor Johnson called a special session of the general assembly to deal with civil unrest attributed to the large numbers of desperate, unemployed people in the state.<sup>39</sup> The general assembly, known as the "Twiddling Twenty-Ninth," had done nothing in its regular session. In special session, it belatedly passed a special motor vehicle tax to fund a relief program, and a highway construction program, funded by bonds, to put people to work. The Colorado Supreme Court, in a pair of immensely unpopular decisions, declared both tax and bonds unconstitutional.<sup>40</sup> With no state funds for relief, the Governor privately asked Harry Hopkins, head of the Federal Emergency Relief Administration, to withdraw federal matching funds from the state. Hopkins, who had been funneling money to Colorado on promises of future matching state appropriations, complied in December 1933. The result was a riot in the State Capitol in which irate depression victims, pushing a herd of frightened legislators out of the Capitol and into the streets, occupied the senate chamber. The mob took over the seats and podium and proceeded to pass relief bills.<sup>41</sup> The official legislators regrouped (some armed) once order was restored and responded by hastily diverting highway funds to match the FERA grants and by imposing an excise tax on gasoline with some of the proceeds earmarked for relief payments. Thereafter the legislators offered an amendment to Article XI earmarking the excise tax on gasoline for highway construction and thus the repayment of highway bonds. This time the Court meekly acceded to both tax and bonds.<sup>42</sup>

In 1936 Governor Johnson stationed the militia at the New Mexico border to turn away desperate immigrants. After months of criticism and protests from New Mexico authorities, they were withdrawn.<sup>43</sup>

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<sup>37</sup> See Todd J. Zywicki, "Beyond the Shell and Hush of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals," 45 *Cleve. St. L. Rev.* 165, 198-200 (1997). Utah had four years of only one Senator, 1897 to 1901; Delaware had no Senators from 1901 to 1903.

<sup>38</sup> See Art. VI, § 1.

<sup>39</sup> See Stephen J. Leonard, *Trials and Triumphs: A Colorado Portrait of the Great Depression with FSA Photographs* 54 (Univ. of Colo. Press 1993). By mid-1934 one of every four Coloradans was receiving welfare payments from the Federal Emergency Relief Administration (FERA). In some counties, over 60 percent of the population was on relief. In Denver an army of 60,000 unemployed people lived in the railyards and on the banks of the South Platte.

<sup>40</sup> *Walker v. Bedford*, 26 P.2d 1051 (Colo. 1933); *In re Sen. Res. No. 2*, 31 P.2d 325 (Colo. 1933).

<sup>41</sup> A reporter observed that it was the first Communist meeting to be held under the dome of any state capitol in the United States. Frank Cross, "Revolution in Colorado," *The Nation*, Feb. 7, 1934.

<sup>42</sup> *Johnson v. McDonald*, 49 P.2d 1017 (Colo. 1935). See also *In re Hunter's Estate*, 49 P.2d 1009 (Colo. 1935).

<sup>43</sup> See *Historian* (Fruita, Colo., Feb. 2001) at 1.

*Incumbents at the Barricades—the Reapportionment Struggle (1920-74).* The original Constitution required a state census in 1885 and every ten years thereafter. Seats in the general assembly were to be reapportioned after every state and federal census. The Constitution based apportionment first on representation of every county, then on population, a system that favored rural areas. A census was held in 1885 and a reapportionment bill passed, but it was vetoed and the state census died a quiet death. The general assembly reapportioned after each federal census until 1921, when it ceased to bother. The 1931 legislative session ignored the next census, and citizens were fed up. An initiated statute imposed reapportionment, coming closer to equality of districts, but the general assembly promptly replaced it with its own product. The Supreme Court did the right thing and invalidated the legislature’s work.<sup>44</sup>

Round two came in the 1960s, after the U.S. Supreme Court held that the Fourteenth Amendment requires equal population in state legislative districts. One of the Court’s leading decisions threw out Colorado’s apportionment in June 1964,<sup>45</sup> requiring a special session of the general assembly to allow an election that fall. In 1974, citizens stepped in again and adopted an initiative measure that took the apportionment decision away from the general assembly and committed it to a Reapportionment Commission under strict guidelines. This provision has largely depoliticized legislative reapportionment.<sup>46</sup>

*The Taxpayer’s Bill of Rights (1992).* The Taxpayer’s Bill of Rights (TABOR) initiative signaled a new era. Citizens who are discontented with legislative inaction and distrustful of legislators have proposed and passed complex, statute-like systems of regulation as constitutional amendments. TABOR is the archetypical example, but there are many others, such as Article XVIII, Section 12b, a detailed regulation of trapping wild animals. The initiative process has produced poorly worded amendments that conflict with other provisions of the document. The courts have struggled to sort out and rationalize constantly evolving constitutional language.

TABOR was followed by Amendment 23 in 2000, mandating spending for public schools. The combination of TABOR’s spending limits and Amendment 23’s spending requirements hobbled state government severely. The General Assembly was unable to agree on a resolution until it successfully proposed Referendum C in 2005, although it provides only a temporary fix.

## **B. The Bill of Rights and Voting Rights—Articles II and VII**

The 1876 Constitution included a bill of rights of 28 provisions, to which one amendment and five additions have been made.<sup>47</sup> Most provisions are cousins of federal counterparts. Like other state bills of rights, Colorado’s is dwarfed in importance by federal provisions. Our brief look at Article II will focus on a few provisions that have practical importance. This can arise where a Colorado provision has no federal counterpart, but the important provisions are common to both.

Because most federal rights limit state government under the “incorporation” doctrine, state governmental actions must satisfy both federal and state limits to be valid. For several reasons, federal provisions dominate discourse about rights limits common to both Constitutions. First, the U.S. Supreme Court adopted an activist stance toward rights enforcement before the Colorado

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<sup>44</sup> *Armstrong v. Mitten*, 37 P.2d 757 (Colo. 1934).

<sup>45</sup> *Lucas v. 44th General Assembly*, 377 U.S. 713 (1964).

<sup>46</sup> See Art. V, §§ 45-48.

<sup>47</sup> A 1992 addition, known popularly as Amendment 2, forbade equality rights for gays. Colo. Const. Art. II § 30b. As you know from your Con Law course, it was held invalid by state and federal supreme courts. See *Romer v. Evans*, 517 U.S. 620 (1996).

courts. Second, the federal provisions have acquired a much larger body of precedent than have the rights laws of any state, particularly states of modest size like Colorado. Third, state courts have both the power and the obligation to entertain rights claims under the U. S. Constitution. Fourth, rights claims against state officials are often made in federal district court in situations where only federal claims are made. Fifth, some litigants in state courts assert only federal rights claims. As a result, Colorado limits are important only when they are more stringent than federal, and this is true of but few rights.

Therefore many decisions of Colorado courts adjudicating rights claims either rest the decision only on federal rights, or discussion of federal rights predominates, or state and federal rights are treated alike in scope. Even when a Colorado provision is distinctly addressed, the decision will often give it no greater scope than its federal counterpart. On some issues the Colorado provision might be less protective, but this possibility is obscured by the dominance of federal law in rights discourse.

Federal civil rights laws, including the Bill of Rights, are enforced against state and local governments in criminal cases and federal civil lawsuits filed under 42 USC § 1983, which provides a federal cause of action against state and local officials, and sometimes against local governments, for deprivations of federal rights. Lawyers representing state and local governments must be conversant with the complexities of 1983 cases, but they are beyond the scope of this course and are addressed in courses on civil rights statutes.

## **1. Religion**

**Art. II § 4. Religious freedom.** The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

**Art. IX § 7. Aid to private schools, churches, sectarian purpose, forbidden.** Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

**Art. IX § 8. Religious test and race discrimination forbidden—sectarian tenets.** No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race

or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

See also Art. V § 34, banning legislative appropriations to “any denominational or sectarian institution.”

**People ex rel. Vollmar v. Stanley**

255 P. 610 (Colo. 1927)

**Mr. Justice Denison** delivered the opinion of the court.

Mandamus was prayed, on the relation of Vollmar, to compel the respondents to "revoke their said rule requiring the reading of the Bible as a portion of the morning exercises in the schools in which petitioners' children are in attendance and prohibit such religious exercises in the public schools of said school district."

The writ recites that the respondents, who constituted the board of education of school district 118, Weld county, had promulgated and enforced a rule which required, as a part of the morning exercises in each class room, the reading by the teacher of portions of King James' version of the Bible without comment; that relators' children withdrew during such reading, and thereupon the respondents ruled that no pupil might leave the room during the reading.

The writ further states that the said version was a sectarian religious book and was proscribed by the Roman Catholic Church, to which relator and his children belong; that the relator and his children conscientiously believe in the doctrines and worship of the Roman Catholic Church which teaches that the King James translation is in part incorrect; is incomplete, . . . It is further alleged that such reading is sectarian instruction.

The claim is made that the action of the respondents is contrary to section 1 of the Fourteenth Amendment to the national Constitution, and to article II, section 4, and article IX, sections 7 and 8 of the Colorado Constitution.

The right of parents to have their children taught where, when, how, what and by whom they may judge best, are among the liberties guaranteed by section 1 of the Fourteenth Amendment of the United States Constitution. *Pierce v. Society of Sisters*, 268 U.S. 510, 534, *Meyer v. Nebraska*, 262 U.S. 390.

The conclusion must be, therefore, that children cannot be required, against the will of their parents or guardians, to attend its reading. It follows that the relator was entitled to relief to the extent of revocation of the order of compulsory attendance of which he complains, and the demurrer to the alternative writ should have been overruled.

But there remains the question whether the reading of the Bible in the public schools must be prohibited altogether, which must be answered by another and different course of reasoning. The first objection of plaintiff in error to the use of the Bible is that it constitutes a preference to a religious denomination or mode of worship contrary to the clause of article II, section 4. . .

The fourth point is that reading the Bible in the public schools constitutes (1) Expenditure of public money in aid of a sectarian purpose, and (2) the use of public funds to sustain a school controlled by a sectarian denomination, contrary to article 9, section 7. The first is logically impossible if only those parts which are not sectarian are read without comment. It is not the Bible itself that is sectarian. If any part of it is so, it is a small part. It therefore cannot be said that Bible reading in the public schools causes the taxpayers to pay for aid to a sectarian purpose. . .

The seventh point is that the reading is teaching sectarian tenets and doctrines, contrary to said section 8. That cannot be true unless those parts of it which teach some sectarian doctrines are read; and the record does not show that such is the case. The case of plaintiff in error is based on the claim that the whole King James Bible is sectarian, and whether that is true must be determined before we can decide this point.

The weight of authority is heavily in the negative, and was so when our Constitution was enacted. Sectarian means pertaining to a sect, and, when put into the Constitution in 1875-6, was commonly used to describe things pertaining to the various sects of Christianity and was not extended beyond the various religious sects. A sectarian doctrine or tenet, then, would be one peculiar to one or more of these sects, as, for example, the doctrine held by Baptists that immersion is necessary to valid baptism, a practice which many other sects tolerate but do not require. . . .

The Bible is a compilation of many books. Even an atheist could find nothing sectarian in the book of Esther. Is it not as practicable to say that that book is not sectarian as to say that the whole Bible is? Can we not separate the sectarian teachings of the Bible as practically as those of any other book? What right have we to say that the whole is when we know that part is not?

It is argued that, because some sects regard the whole Bible as sacred and inspired and others not, that it is therefore sectarian. Non sequitur. Sectarian or not cannot be determined of a book by how sects regard it. The decisive question is whether it teaches some doctrine peculiar to a sect. That part which does not is not sectarian. The eloquence of Amos and Isaiah and the wisdom of the parables is sectarian or not whether read from King James' version, the English Revised, the American Revised, the Douai or any of the many other translations, or from any other book.

It is said that King James' Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so. Neither can the fact that it is authorized by a sect make it sectarian.

We conclude that the reading of the Bible without comment is not sectarian. When portions are read which are claimed to be sectarian the courts will consider them.

The conclusion is that the Bible may be read without comment in the public schools and that children whose parents or guardians so desire may absent themselves from such reading. When comment or the reading of a given part is claimed to be teaching sectarian doctrines or tenet, the courts will consider that point, but it cannot be said that the whole Bible is so.

Justices Adams and Whitford dissent from the allowance of optional attendance upon the reading of the Bible.

## Notes

1. *Vollmar* is inconsistent with modern decisions of the U. S. Supreme Court enforcing the federal Establishment Clause, and it was expressly overruled by *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982), discussed in the next case below.

2. In 1982, the Court sustained the Colorado Student Incentive Grant Program for needy students in higher education, available to students in both private and public schools, including some schools with religious affiliation. *Americans United for Separation of Church & State*

Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982). See CRS § 23-3.5-101 et seq.<sup>48</sup> The Court held that, as funds were directed to students, aid to the institutions was incidental. The program excludes institutions that are “pervasively sectarian” or “theological.” Thus the general assembly had not intended to and did not enhance the ideological ends of sectarian institutions. CRS §§ 23-3.5-102(3)(b), -105.

Other aid programs for higher education are similarly open to students at institutions with religious affiliation that are not “pervasively sectarian” or “theological.” Most important is the 2004 general tuition voucher program for higher education, the College Opportunity Fund. CRS § 23-18-101 et seq. See also CRS §§ 23-3.3-401; 23-3.3-501; 23-3.7-101 et seq.

In 2003, Colorado Christian University (CCU) applied to participate in these programs. In 2004, the Colorado Commission on Higher Education decided that CCU is pervasively sectarian and rejected its application. CCU sued in federal district court claiming that its exclusion violates both religion clauses of the First Amendment. A theology student’s challenge to a similar Washington statute failed in *Locke v. Davey*, 540 U.S. 712 (2004). The Tenth Circuit distinguished that case and ruled in favor of CCU. *Colorado Christian Univ. v. Weaver*, 2008 U.S. App. LEXIS 16189 . Naropa University has not applied to participate in these programs, but the decision should allow it to do so.

3. The 2003 General Assembly passed a pilot program for publicly funded vouchers that parents can apply to private school tuition. CRS § 22-56-101 et seq. (repealed 2006). Religious schools are eligible to participate. Opponents sued to overturn the statute under Colorado’s constitutional provision for local control of schools, and they won. *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004). We’ll look at this local government issue later. Their complaint also attacked the statute insofar as it allowed vouchers to be used at religious schools. The outcome of the case mooted that claim.

4. In 1944 the Colorado Supreme Court relied on Section 8 to order reinstatement of students who were expelled from public schools in Fremont County for refusing to recite the pledge of allegiance to the flag. *Zavilla v. Masse*, 147 P.2d 823 (Colo. 1944). The students, members of the Jehovah’s Witnesses, believed that the pledge violated one of God’s commandments. The Court held that the students had been expelled for holding a particular religious view, which violated Section 8.

5. The question of distinct anti-establishment protection under Article II Section 4 arose in litigation challenging Denver’s annual Christmas display on the steps of the City and County Building. Denver eventually won the cases. The Colorado Supreme Court’s two opinions in the Christmas case are discussed in the decision below.

### **State v. Freedom From Religion Foundation**

898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996).

**Justice Scott** delivered the Opinion of the Court.

We must determine whether the content and context of a monument containing a message of both religious and secular value, displayed among other monuments and tributes on the grounds

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<sup>48</sup> As all of you probably know, CRS abbreviates Colorado Revised Statutes, which are republished annually. If no date is given, a cite is to the current set.

of the State Capitol, violate the constitutional provisions prohibiting the establishment of or any preference to religion. We conclude that under the facts of this case they do not.

I. The Freedom From Religion Foundation, Inc., a Wisconsin non-profit corporation, sought removal of a monument of the Ten Commandments located on state property. The trial court found that the monument did not violate the applicable constitutional provisions and the court of appeals reversed. The trial court applied the legal standard we set forth in *Conrad v. City and County of Denver*, 656 P.2d 662, 672 (Colo. 1983) (Conrad I),<sup>49</sup> and ruled the monument does not offend the [federal] Establishment or [state] Preference Clauses. On review we now apply that standard and reverse.

IIA. Directly west of the State Capitol Building is a one-square-block park owned by the State, known as Lincoln Park. The State Capitol grounds and Lincoln Park make up a three-block area called the Capitol Complex Grounds. Within it are several monuments. On the east side of the Capitol there is a large statue of a Native American and a buffalo. In front of the Capitol's west entrance is a monument to soldiers who served and died in the Civil War, including a statue of a Union Soldier and two cannons. Other commemorative areas include a bench dedicated as a Pearl Harbor monument and an Aspen grove, comprised of seven trees, that was planted in memory of the Challenger Astronauts who perished in the tragic space shuttle disaster several years ago. There are also numerous arboreal tributes in honor of non-military activities and events ranging from Arbor Day to soil conservation efforts.

Near the center of Lincoln Park, there has been erected the Veterans War Memorial. Dedicated to the veterans of all of our nation's wars, that memorial rises to a height of approximately forty-five feet, making it much taller than all of the other monuments and the most prominent structure in the park, with all pathways leading to its base.

Throughout Lincoln Park there are several other monuments of various sizes. A statue more than twenty-feet tall stands in the park's northeast quadrant in tribute to a World War II Hispanic Congressional Medal of Honor recipient, J.P. Martinez, and commemorates the participation of Coloradans of Hispanic descent in that and other wars.

In the southeast quadrant of the park stands a replica of the Liberty Bell. Like the original, the replica contains a phrase in raised letters taken from Leviticus in the Bible, which reads: "Proclaim liberty throughout the land and unto all the inhabitants thereof." [King James Version, Lev. 25:10.] In the northwest quadrant is a drinking fountain dedicated to the memory of Sadie M. Likens, who aided war survivors in the early part of this century. Also near the center of the park is a flagpole honoring those who served in the military campaign known as the Spanish-American War.

The monument that has spurred this litigation is the Ten Commandments monument, which is located in the northwest quadrant of Lincoln Park. It is made of stone and is three to four feet high and about two and one-half feet wide and sculpted in the form of two tablets. Between the two tablets is an eye within a triangle -- an "all-seeing eye" similar to that depicted on the dollar bill. Expert testimony indicates that this Egyptian symbol is generally considered to be secular in nature, although some people view it as representing the eye of God. Immediately below this symbol is an American eagle grasping an American flag.

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<sup>49</sup> The Court's decision in Conrad I was issued in December 1982 and modified in January 1983. Westlaw and Lexis use the 1982 date for the decision, but the Colorado Supreme Court uses 1983.

A unique version of the text of the Ten Commandments is immediately below the American flag. Below this text there are two stars of David. Between the two stars of David are two Greek letters, Chi and Rho, which is a symbol for the first two letters in the name Jesus Christ developed by the early Christian church and still found in many Catholic churches. At the very bottom of the monument appears a scroll with these words: PRESENTED BY MEMBERS OF FRATERNAL ORDER OF EAGLES OF COLORADO.

B. In 1943, a Minnesota juvenile court judge decided to post a copy of the Ten Commandments in state juvenile courts across the country as part of a nationwide youth guidance program. As chair of the Youth Guidance Committee of the Fraternal Order of Eagles, the judge presented his ideas to the Eagles for financial support. After representatives of the Jewish, Protestant, and Catholic faiths were able to develop a version of the Ten Commandments which was not identified with any particular religious group, the Eagles agreed to support such a program.

At the same time, the juvenile judge received a telephone call from motion picture producer Cecil B. DeMille, who was then producing the movie *The Ten Commandments*. As a promotion of his movie, no doubt, Mr. DeMille suggested that bronze plaques be produced with the Ten Commandments imprinted for distribution throughout the country. The judge suggested and DeMille agreed that stone or granite tablets would be suitable. Various local chapters or "aeries" of the Eagles paid for the stone monuments and donated them as part of the youth guidance program to several local and state governments, including Colorado.

Since the monument was placed at Lincoln Park, maintenance costs have been minimal; however, the State has used its employees at least once in the past thirty-five years to remove graffiti and to clean it on occasion.

III. In March of 1989, after Governor Romer refused a written request that the monument be removed from Lincoln Park, respondents filed this civil action in the Denver District Court seeking removal of the monument.

A trial was held which included the testimony of several lay and expert witnesses as well as documentary evidence. The trial court concluded that the monument is one of "a number of monuments," which overall contain symbols of various historic events or concepts associated with American history. Further, the trial court ruled that the monument itself was "a melange of civil, political, cultural, and religious meanings." The trial court concluded that because the monument did not have the overall effect of fostering, preferring, or establishing any religion, its continued existence on state property would not violate the federal Establishment Clause or the state Preference Clause. The court of appeals reversed, finding that the "overriding significance" of the text of the monument in its entirety conveys an "essential religious message."

On review, we must determine whether the presence of the Ten Commandments monument on state property communicates a prohibited endorsement or disapproval of religion. We hold that the monument's content and its setting among several much more prominent monuments in Lincoln Park and throughout the Capitol Complex Grounds sufficiently neutralize its religious character resulting in neither an endorsement nor a disapproval of religion. Accordingly, we reverse.

IV. [The Court quoted Art. II, § 4.] The last sentence of this provision is referred to as the Preference Clause. In interpreting our Preference Clause we have looked to the Establishment Clause of the First Amendment and the body of federal cases that have construed it. See, e.g., *Conrad v. City and County of Denver*, 724 P.2d 1309, 1313, 1315 (Colo. 1986) (Conrad II) (holding that

the main intent or purpose of including a nativity scene in a holiday display on the steps of the Denver City and County building is to "promote a feeling of good will, to depict what is commonly thought to be the historical origins of a national holiday, and to contribute to Denver's reputation as a city of lights"). Consistent with *Conrad II*, for purposes of review under our Preference Clause we see no need to depart from the path cut by the United States Supreme Court for Establishment Clause cases.

A. As the Supreme Court has set forth, "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 605 (1989). Nor can government favor religion over non-religion. The natural analog also requires then that we not prefer non-religion over religion.

In *Zorach v. Clauson*, 343 U.S. 306 (1952), Justice Douglas suggested:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

The Constitution does not require complete separation of church and state: "It affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "Our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Id.* at 683.<sup>50</sup>

In *Lynch*, the Court upheld the display of a creche as part of an overall holiday display. The Court discussed the historical role of religion in American society and concluded that "there is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. at 674. The Court set forth several illustrations of the government's acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage, including religious exhibits in art galleries and the depiction of Moses and the Ten Commandments in the U.S. Courthouse.

The test for determining whether a governmental act violates the Establishment Clause of the First Amendment was first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court announced a tripartite test for determining whether government action violates the Establishment Clause: "first, the statute must have a secular legislative purpose; second, its principal or primary

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<sup>50</sup> Justice O'Connor spoke of this tension between the language of the clause and our past conduct, recognizing other governmental "acknowledgements" of religion such as government declaration of Thanksgiving as a public holiday and the printing of "In God We Trust" on coins. 465 U.S. at 692-93.

effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13.

Although the tripartite test established in *Lemon* has never been overruled, the Supreme Court has since elaborated upon the second prong of the *Lemon* test -- that the principal or primary effect of the government action must not be either to advance or inhibit religion. This elaboration had its beginnings in the concurrence of Justice O'Connor in *Lynch*.

Five years later, in *Allegheny County*, the Court embraced Justice O'Connor's refinement of the second prong of the tripartite *Lemon* test. As modified, the appropriate inquiry requires a determination as to whether the suspect government act has "the purpose or effect of endorsing religion." *Allegheny County*, 492 U.S. at 572.

The primary way in which courts have determined the effect of the government action is by focusing on the content of the display and the context in which the questioned object appears. For example, in *Allegheny County*, the Court examined two displays on public property in downtown Pittsburgh, one of a creche standing alone in a courthouse staircase and one of a menorah displayed as part of a larger winter holiday exhibit in front of the City-County building which included a sign with the words "Salute to Liberty" placed below a Christmas tree. The Court found that the creche display violated the Establishment Clause and the menorah display did not.

In evaluating both the content and the context of the creche display, the Supreme Court noted that the creche sends an unmistakable religious message, praising God in Christian terms. The Court concluded that "nothing in the content of the display detracts from the creche's religious message." *Id.* at 598. The Court also noted the physical setting and location of the creche, concluding that it "stands alone; it is the single element of the display on the Grand Staircase." *Id.* The Court then pointed out that the Grand Staircase is "the 'main' and 'most beautiful part' of the building that is the seat of county government." *Id.* at 599. The Court concluded that "no viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599-600.

The menorah display, on the other hand, was part of a holiday season display which saluted liberty; the Court found that the context of the entire display neutralized the religious dimension of the display. The Court conceded that the menorah is a religious symbol: it serves to commemorate the miracle of oil as described in the Talmud. The Court also noted, however, that the menorah is a symbol of a holiday that, like Christmas, has both religious and secular dimensions. The Court held that since the menorah stood next to a Christmas tree and a sign saluting liberty, it created an "overall holiday setting." *Id.* at 614.

B. Several courts have examined the content and context of Ten Commandments displays in evaluating their constitutionality. For example, in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), under circumstances similar to those present here, the Court of Appeals allowed a gift of the Order of Eagles to be displayed on the courthouse grounds. This gift was a granite monument inscribed with the Ten Commandments and other religious and nonreligious symbols much like the monument in the case at bar.

It has been where the display or publication of the Ten Commandments concerns public schools -- where young and impressionable minds are in need of greater protection -- that courts have been less tolerant of the potential to inappropriately persuade or coerce students by religious views. In *Stone v. Graham*, 449 U.S. 39 (1980), for example, the Court invalidated a state statute

requiring the posting of a copy of the Ten Commandments on public classroom walls. The Court concluded the statute served no secular legislative purpose and was therefore unconstitutional.

The differences between the Anderson monument and the Stone display are significant and make reliance on cases involving the publication of the Ten Commandments in classrooms misplaced. School religion cases require a more stringent analysis because of the age of the minds affected, and because students are captive audiences, especially susceptible to influence. Thus, the analysis applied by the Anderson court is more relevant to this case.

V. Following the principles set forth in the Conrad cases, and the legal standard set forth in Lemon as modified by Allegheny County, the constitutionality of the Ten Commandments monument in this case will depend upon whether the display has the purpose or effect of endorsing or disapproving of religion.

A. Upon consideration of the content of the monument itself, we conclude that it was not erected with the purpose of endorsing religion. The monument was donated as part of the National Youth Guidance Program, whose purpose was secular in nature. Such secular intent of the donation is logical in light of the historical fact that the Ten Commandments has served over time as a basis for our national law.

B. Although displayed on public property, unlike the school setting cases, the monument is not located so as to have a coercive effect. The monument occupies an inconspicuous place where citizens may be found by choice and are not necessarily present for purposes related to government. While the text of the Ten Commandments affixed to a monument would not be appropriately placed on state property standing alone, here the monument and its countervailing secular text fits within the melange of historical commemorative accounts found in Lincoln Park.

C. Accordingly, we find that the content and context of the monument negate any suggestion that the government is endorsing religion.

VI. We believe it would result in the very callous indifference suggested by Justice Douglas in *Zorach* to exaggerate the effect of benign religious messages by suggesting they automatically inculcate religion. The flaw of such a result would be to assume improper motive and to credit inappropriate religious involvement by the State in every message of historical or solemn significance in which religious precepts may also be attributed to the words and symbols used. While we are to be vigilant to bar state conduct that results in the establishment of religion, we are not to engage in an exercise intended to require government to prefer non-believers over believers.

VII. For the foregoing reasons, we reverse the judgment of the court of appeals.

**Justice Erickson** dissenting. [omitted]

**Justice Lohr**, dissenting. [omitted]

**Justice Kirshbaum** dissenting.

IIA. Assuming, arguendo, that Allegheny County and Lynch control this case, I conclude that the state's conduct in this case in permanently displaying in a public park a religious symbol associated with two religions violates the Establishment Clause. I also find such conduct violative of the Preference Clause of Colorado's Constitution.

B. The majority finds that the Ten Commandments monument does not "stand alone"; is located among a veritable cornucopia of other non-religious monuments, tributes and memorials, and in

effect is one of many displays arranged al fresco in a "natural museum." No witness testified that Lincoln Park was designed as, or perceived by, the state to be a museum. The Ten Commandments monument was placed in the park in the mid-1950's. At that time the only other commemorative objects in Lincoln Park were a flagpole, constructed in 1898, and a drinking fountain, constructed in 1923. Lincoln Park is not comparable to a museum housing many religious paintings.

III. The evidence unequivocally establishes that the text of the Ten Commandments occupies almost the entire surface of the monument and is the dominant feature thereof. The witnesses agreed that the complete text of the Ten Commandments is itself a religious symbol associated with the Jewish and Christian religions.

IVB. I conclude that the display of the Ten Commandments in Lincoln Park conveys the impression to any reasonable, objective observer that the State of Colorado endorses the Jewish and Christian religions or endorses religion in general. The Establishment Clause prohibits such governmental conduct.

V. The Ten Commandments monument prefers Christianity and Judaism over all other religions and also signifies government preference of religion over non-religion. The language and purpose of the Preference Clause compels application of strict scrutiny analysis to such governmental conduct.

Several other states have adopted constitutional provisions containing language comparable to the provisions of this state's Preference Clause. Few decisions exploring the meaning of such provisions have been reported. However, in *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978), the California Supreme Court did examine the distinctive language of California's constitution in holding that a display of a single-barred cross on the Los Angeles city hall during the Christmas holiday season and during both Latin and Eastern Orthodox Easter Sundays violated provisions of that constitution.

## Notes

1. As the court said, the monument in question was one of hundreds donated by the Fraternal Order of Eagles in the 1950s, in part to publicize Cecil B. DeMille's film. *Christian v. City of Grand Junction*, 2001 U.S. Dist. LEXIS 25349, was an unsuccessful suit seeking to force the city to remove another copy of the monument. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the U. S. Supreme Court held that another copy of the monument, located on the grounds of the Texas State Capitol, did not violate the federal First Amendment. A companion case, *McCreary County v. A.C.L.U.*, 545 U.S. 844 (2005), held that posting the Ten Commandments in court-houses was invalid. Both were 5-4 decisions; Justice Breyer was the swing vote.
2. The Western Colorado Atheists recently threatened to sue Grand Junction, seeking to forbid opening its city council meetings with prayers. See *Grand Junction Daily Sentinel*, 9 June 2008.
3. A federal statute, the Religious Land Use and Institutionalized Persons Act, 42 USC § 2000cc to 2000cc-5, provides a federal cause of action to challenge land use, prison, and asylum regulations that allegedly overburden religious freedom. The statute is extensively used to attack local land use regulations. A prominent local case involves Rocky Mountain Christian Church, located on 54.4 acres near Niwot. The Church is challenging County regulations in a federal lawsuit. See *Rocky Mountain Christian Church v. Board of County Comm'rs of Boulder County*, 2008 U.S. Dist. Lexis 28942.

## 2. Search and Seizure

The Colorado Constitution's search and seizure clause is essentially identical to the federal clause.

**Art. II § 7. Security of person and property—searches—seizures—warrants.** The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

### **People v. Haley**

41 P.3d 666 (Colo. 2001)

**Justice Hobbs** delivered the Opinion of the Court.

In these appeals, the prosecution challenges the trial court's suppression of evidence obtained as a result of a dog sniff search of a car after the reason for the traffic stop had been completed. In accordance with our prior case law interpreting Article II, Section 7 of the Colorado Constitution, a dog sniff search of an object can constitute a search requiring reasonable suspicion to justify the governmental intrusion. We agree with the trial court that the drug investigation in this case lacked reasonable suspicion and the dog sniff search of the automobile contravened protections of the Colorado Constitution.

I. Officer Mike Miller was performing highway drug interdiction on Interstate 70 in Mesa County on December 16, 2000, when he saw the defendants' automobile heading eastbound. Officer Miller thought that the vehicle was following the truck in front of it too closely, so he conducted a traffic stop. In the automobile were three African-Americans, Dedrick Haley, Gene Dunlap, and Larry Daniels. Officer Miller approached the vehicle and asked the driver, Haley, for his license and registration. Haley produced his Kansas driver's license and a rental agreement for the car. Officer Miller told Haley he thought he was following the truck in front of him too closely. He asked Haley to come with him to the patrol car; Haley complied.

In response to Officer Miller's questioning, Haley explained that he was coming from Sacramento, California, where he had visited friends for a few days, and was now heading home to Kansas. Officer Miller noticed that the cost of the rental car was approximately \$600 a week, and the car had been rented the previous day at the Sacramento airport for a week. Throughout this conversation, Officer Miller observed several nervous behaviorisms: Haley's hands were shaking, he was licking his lips indicating that his mouth was dry, he was stuttering, and he was shuffling his feet.

Because Haley had not provided him with the vehicle registration, Officer Miller returned to the vehicle and asked Dunlap to find it in the glove compartment. In response to Officer Miller asking Dunlap where he was going, Dunlap did not answer and exhibited shaking hands and a facial twitch. Daniels also did not answer the question until Officer Miller suggested the answer Haley had given, that they were going home. Daniels agreed with the officer's suggestion.

After Dunlap handed him the registration document, Officer Miller returned to Haley to give him back his paperwork. According to Officer Miller, Haley was walking in circles and appeared nervous. Officer Miller decided not to issue him a citation for the traffic offense and told Haley he was free to go, but immediately asked Haley whether he "had any drugs or anything illegal in the vehicle." Haley said no. Next, according to Officer Miller, Haley consented to a dog sniff

search of the luggage, saying, "Do you want to check it out?" Officer Miller asked for consent to have the dog sniff the car also, Haley said no. Haley removed three bags from the trunk of the car, and placed them about five feet away from the rental car.

The dog did not alert to the luggage. Officer Miller then proceeded with the dog towards the vehicle, despite Haley's vehement protests. The dog alerted to several places around the car. Haley yelled, "What are you doing searching my car?" The dog stopped sniffing the car and moved to protect Officer Miller, the dog's handler. Officer Miller then placed the dog inside the police vehicle and called for assistance. Officer Daley responded to the call. Officer Miller also called Detective Norcross via a police network system.

Haley and Officer Miller talked for about ten minutes until the other two officers arrived. Officer Miller requested identification from the other men in the car to establish their age. They supplied the identification.

Upon the other officers' arrival, Officer Miller asked Haley if he had any weapons. Haley said no; one of the officers patted him down, finding no weapon. The police asked Daniels to get out of the vehicle; they found no weapons on him. The police then asked Dunlap to get out of the vehicle. Officer Miller noticed that Dunlap was trembling and had a large bulge in his waistband. Patting down Dunlap, the police found a package in his waistband that appeared to contain drugs.

Officer Miller attempted to place Dunlap under arrest; Dunlap resisted. A struggle ensued involving Dunlap, Haley, and the police. Daniels was not involved. Dunlap fled the scene on foot. Officer Daley chased after Dunlap on foot. Dunlap threw Christmas stockings into the brush. Officer Daley apprehended Dunlap. The police recovered the stockings, which contained kilo-sized bricks of cocaine. Daniels made a statement after signing a Miranda waiver.

The police placed the three men under arrest. The prosecution charged them with several offenses. The trial court judge ordered the evidence suppressed on grounds of an illegal search. The trial court ruled that a dog sniff of an automobile from its exterior to detect substances therein constitutes a search under Article II, Section 7, and that reasonable suspicion, rather than probable cause, must support it. The trial court determined that the police did not have reasonable suspicion for the drug investigation after the reason for the traffic stop had been concluded; consequently, it suppressed the evidence.

II. We hold under Article II, Section 7, of the Colorado Constitution that the prolonged police detention and investigation of the persons and automobile for illegal substances, after the consensual dog sniff of the luggage proved to be negative, was a search and seizure not supported by reasonable suspicion. Consequently, the trial court properly suppressed the evidence the police obtained after the reason for the traffic stop had concluded.

B. Dog Sniff Searches. The Fourth Amendment and Article II, Section 7 protect a person's reasonable expectation of privacy from governmental intrusion. The prosecution argues that *United States v. Place*, 462 U.S. 696 (1983), should apply here. In *Place*, the court held that exposing an individual's luggage located in a public place to a dog sniff did not constitute a "search" under the Fourth Amendment.

In applying Article II, Section 7, we have ruled that Colorado law affords broader protections in some instances than the Fourth Amendment. In some instances, we have determined certain investigative activities to be searches, even though the United States Supreme Court determined

that they were not. See *People v. Oates*, 698 P.2d 811, 815-16 (Colo. 1985) (government-installed beeper in a 110-lb. drum of phenyl-acetic acid purchased from a chemical company was a search); *People v. Sporleder*, 666 P.2d 135, 139-40 (Colo. 1983) (governmental installation of a pen register is a search); *Charnes v. DiGiacomo*, 612 P.2d 1117, 1120-21 (1980) (governmental seizure of bank records violated the Colorado Constitution).

Based upon our precedent, we conclude that a dog sniff search of a person's automobile in connection with a traffic stop that is prolonged beyond its purpose to conduct a drug investigation intrudes upon a reasonable expectation of privacy and constitutes a search and seizure requiring reasonable suspicion of criminal activity. Our holding here accords with cases we decided after *Place*. See *People v. May*, 886 P.2d 280, 282 (Colo. 1994) (dog sniff of express mail package was a search); *People v. Boylan*, 854 P.2d 807, 812 (Colo. 1993) (dog sniff of federal express package was a search); *People v. Unruh*, 713 P.2d 370, 377-78 (Colo. 1986) (dog sniff search of a safe taken by a burglar from the defendant's home was a search).

An individual must have a reasonable expectation of privacy in order to succeed in a challenge based on illegal search or seizure. In evaluating the legitimacy of the defendant's constitutional privacy interest, the proper inquiry involves two parts: whether the defendant expected that his or her privacy interest would be free from governmental intrusion, and if so, "whether that expectation is one that society is prepared to recognize as reasonable." *Sporleder*, 666 P.2d at 140. We have previously held that "whether an expectation of privacy is reasonable may be tested against the customs, values, and common understandings that confer a sense of privacy upon many of our basic social activities." *Oates*, 698 P.2d at 816.

The prosecution argues that a dog merely enhances the olfactory senses of an officer, does not involve physical intrusion into a private area, and is minimally intrusive because all that the dog detects is in the air surrounding the object. We do not find this argument persuasive. Here, in the absence of reasonable suspicion that illegal activity was occurring other than the traffic infraction, Officer Miller's sole purpose was to conduct a drug investigation and to detect whether evidence hidden from view was within the car. In *May*, we reasoned that such use of a drug dog amounted to a search because the defendant had a constitutional interest in a sealed package and the dog sniff of the package with its contents hidden from view amounted to a search.

While we acknowledge that automobiles enjoy a lesser expectation of privacy in our society than private homes, citizens have a reasonable expectation of privacy from search and seizure in their cars and in their persons as they travel the state's roads. Even though police may search an automobile without a warrant following an arrest, pursuant to a police inventory, when they observe something in plain view, or to secure the officer's safety, these exceptions do not establish precedent for unconstrained police searches of automobiles.

Travelers on the roads of Colorado may reasonably expect that law enforcement officers may stop them for violating traffic laws; they do not expect that persons will be detained and their automobiles searched because of traffic stops once the reason for those stops has been accomplished. The intrusion is limited to the reason for the stop unless other circumstances or acts permit the intrusion to continue.

During a valid traffic stop an officer may request a driver's license, vehicle registration and proof of insurance. An officer may also run a computer check for outstanding warrants so long as this procedure does not unreasonably extend the duration of the temporary detention. These intrusions are brief and minimal. Once a driver produces a valid license and proof that he is entitled to

operate the vehicle, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.

C. The Dog Sniff Search In This Case. The prosecution argues that the use of a dog is not a search when the dog and its handler are lawfully in a public area. We disagree that this assertion applies here. The only reason the automobile stopped was because of Officer Miller's traffic stop. The police detained this automobile for a drug search.

1. Reasonable Expectation of Privacy. In *Unruh*, we rejected the prosecution's argument that a dog sniff search is always a reasonable intrusion. *713 P.2d at 379*. Recognizing that the United States Supreme Court has held differently under the Fourth Amendment, we nevertheless established that the balance between governmental and individual interests is best struck by requiring reasonable suspicion as a prerequisite to the dog sniff search of an object to which the defendant has a reasonable expectation of privacy. We have adopted this Colorado Constitutional standard in cases that are analogous to stops of vehicles, namely, circumstances in which the possessor of the object searched had a reasonable expectation of privacy. In *Unruh*, we did not reach, but differentiated, dog sniff searches of luggage at airports or objects in public places from cases in which a reasonable expectation of privacy in the object triggers the requirement of reasonable suspicion for the dog sniff search. *Unruh*, *713 P.2d at 378* (analogizing to cases involving a Terry stop); see *Terry v. Ohio*, *392 U.S. 1 (1968)*.

We ascertain no compelling reason for departing from our prior precedent. Our reasoning in prior cases involving dog sniff searches and prolonged traffic stops applies to the case before us. Accordingly, we determine that Haley, Dunlap, and Daniels possessed a privacy interest in their persons and vehicle being free from unreasonable governmental intrusion, and the drug investigation following the traffic stop in this case required reasonable suspicion for the dog sniff search to proceed. See *Boylan*, *854 P.2d at 811* ("[A] dog sniff search need not be justified by probable cause sufficient to obtain a search warrant, but instead only requires reasonable suspicion, similar to that required to stop and frisk a person suspected of involvement in imminent criminal activity.").

2. No Reasonable Suspicion. [Analysis omitted.] We determine that the facts in this case, when taken together, did not justify the police finding reasonable suspicion of criminal activity other than the reason for the initial traffic stop.

III. Accordingly, we affirm the trial court's suppression orders, and return these cases to the trial court for further proceedings consistent with this opinion.

**Justice Kourlis** dissenting:

In my view, a dog sniff of the exterior of a car in a public place does not constitute a search within the meaning of Article II, Section 7 of the Colorado Constitution. Further, even if it were a search, I would find it here supported by the requisite reasonable suspicion and would therefore admit the evidence obtained from the search. I respectfully dissent.

I. The purpose of both the Fourth Amendment and Article II, Section 7 is to protect a person's legitimate expectation of privacy from unreasonable governmental intrusion. Courts must determine whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable.

In 1983, the United States Supreme Court concluded that a defendant did not have a reasonable expectation of privacy in the odors emanating from his luggage and that, therefore, a dog sniff of

that luggage was not a search. *United States v. Place*, 462 U.S. 696, 707 (1983). While the Court acknowledged that a person possesses a privacy interest in the contents of personal luggage, it held that a canine sniff is "an investigative procedure that is so limited in both the manner in which the information is obtained and in the content of the information revealed by the procedure" that it does not constitute a search. The Court specifically noted that a canine sniff is much less intrusive than a typical search because it does not require opening the luggage to reveal information about personal non-contraband items, but rather only discloses the presence or absence of an illegal substance. Most recently in *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), the Court held that the dog sniff of a car is not a search.

Most courts around the nation, both state and federal, have similarly held that the use of trained dogs to sniff for illegal drugs is not a search. See Brian L. Porto, Annotation, Use of Trained Dog To Detect Narcotics Or Drugs As Unreasonable Search In Violation Of Fourth Amendment, 150 A.L.R. Fed. 399 (2001). Those courts reason that dog sniffs are not searches because they are only minimally intrusive and because they occur in places where individuals do not have heightened expectations of privacy.

II. In my view, [Colorado case law] supports a conclusion that the nature of the item or place being subjected to the dog sniff is the focal factor. If the sniff is of a home safe, a personal storage locker or a package, whether sent through the mail or through a private courier, it is a search. On the other hand, if the sniff is of luggage at a bus station, it is not a search.

This court has specifically acknowledged that there is a reduced expectation of privacy in vehicles. I, therefore, analogize the automobile to the luggage at the bus station -and not to an item in someone's home, and would conclude that an individual has no reasonable expectation of privacy in the illegal contents of a vehicle that are detected by means of odors emanating from that vehicle.

III. The majority reads the Colorado Constitution as providing protection that would not be available under the Fourth Amendment. I disagree that there is a basis for that expansion. In my view, such a divergence is only warranted when the language of the state constitution differs from its federal counterpart, or when the historical or legal context in which the state constitution was framed or has existed over time differs from its federal counterpart. I find neither to be present here.

The language addressing searches and seizures and our interpretation of that language is nearly identical for both the United States Constitution and the Colorado Constitution. Furthermore, neither this case nor any of our prior cases suggest a history unique to Colorado. In fact, our own court has been inconsistent in its application of the state constitution to afford more protection in cases involving dog sniffs.

In my view, it is not enough that a state supreme court differs with the United States Supreme Court. See, e.g., *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 283, 127 Cal. Rptr. 360 (Cal. 1976) (Richardson, J., dissenting) (noting that "something more than personal disagreement by a majority of members of a state court with the decision of the United States high tribunal on search and seizure is required if the persuasion of that court is not to be followed." Further observing that "the shifting winds of judicial policy and personal predilection, is not calculated to produce that kind of uniformity or harmony conducive to the logical and uniform development of constitutional law").

IV. If it were a search, I suggest that it is here supported by ample reasonable suspicion of criminal activity. [Analysis omitted.]

I am authorized to state that **Justice Rice** and **Justice Coats** join in this dissent.

## Notes

1. The exchange between majority and dissent in *Haley* is the Court’s most extensive discussion of whether Colorado should adopt a tougher constitutional standard than the federal rule when constitutional texts are essentially the same. Do you think the decision was influenced by controversies about racial profiling?

2. As you know, the key to search and seizure law is the Exclusionary Rule, which forbids use against an accused of most evidence obtained by police searches that violate privacy rights under either the federal or state provision. The U. S. Supreme Court decided in 1914 that the Fourth Amendment bars use of such evidence in federal trials, but at that time it had not “incorporated” the Fourth Amendment against state governments.<sup>51</sup> In 1925, the Colorado Supreme Court refused to adopt an exclusionary rule to enforce Section 7.<sup>52</sup> But in 1961 the U.S. Supreme Court imposed its Fourth Amendment rule on states.<sup>53</sup> Later the same year, the Colorado Supreme Court adopted an exclusionary rule as part of Colorado Rule of Criminal Procedure 41, governing police searches.<sup>54</sup> Since then, the Court’s judgments have assumed that Section 7, like the Fourth, forbids use of illegal evidence.

Since 1961, defense lawyers in Colorado criminal cases have routinely invoked both Section 7 and the Fourth Amendment, seeking exclusion of evidence under either provision. On many occasions, they have urged the Colorado Supreme Court to interpret Section 7 to protect privacy more strictly than its federal counterpart. The Court has rejected most such claims. The exceptions are discussed in *Haley*.

3. The Colorado Supreme Court also overturned a search warrant issued to gain access to the book-buying records of a suspected criminal at Denver’s celebrated Tattered Cover Bookstore.<sup>55</sup> The Court based the decision on constitutional rights to freedom of speech and freedom from unwarranted searches, and it discussed the relevant rights provisions of the federal and state constitutions.<sup>56</sup> For both, the Court stated that state rights were broader than federal, although it did not cite any conflicting federal decision—indeed, the federal decision most nearly on point, involving the book purchases of Monica Lewinsky, was consistent with the Court’s ruling.<sup>57</sup> In any case, the Court rested the decision on the state provisions and adopted a balancing test and procedural rule to govern attempts to search for expressive materials that have free speech protections. Under the test, which was not met in the Tattered Cover case, the government must demonstrate a compelling need for specific information, and the third-party bookstore must be afforded a hearing prior to execution of the warrant.<sup>58</sup>

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<sup>51</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>52</sup> *Massantonio v. People*, 236 P. 1019, 1020-21 (Colo. 1925).

<sup>53</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>54</sup> See *Hernandez v. People*, 385 P.2d 996, 998 (Colo. 1963).

<sup>55</sup> *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002).

<sup>56</sup> *Id.* at 1051-56.

<sup>57</sup> *Id.* at 1054-57.

<sup>58</sup> *Id.* at 1058-61.

### 3. Due Process, Constitutional Equality, and Special Legislation

**Art. II § 25. Due process of law.** No person shall be deprived of life, liberty or property, without due process of law.

**Art. II § 29 (1972). Equality of the sexes.** Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex.

**Art. V § 25. Special legislation prohibited.** The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say; for [23 specific purposes]. In all other cases, where a general law can be made applicable no special law shall be enacted.

**Art. XIV § 13. Classification of cities and towns.** The general assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.

#### Notes

1. The Colorado Constitution's due process clause is essentially identical to the federal clauses. Colorado has no equal protection clause, and the framers did not record their reasons for the omission. Voters in 1972 approved an equal rights amendment guaranteeing equality between the sexes, and in 1980, the Colorado Supreme Court found equal protection to be implicit in the state due process clause. Other provisions are based on particular concepts of equality.<sup>59</sup>

The Colorado Supreme Court first interpreted the state's due process clause to impose an implied equal protection standard in three 1980 decisions. The most notable was *R. McG. v. J. W.*<sup>60</sup> The case involved an attack on CRS § 19-6-101, a section of the Uniform Parentage Act, which did not allow a natural father to bring an action for determination of his paternity of a child born during the marriage of the natural mother to another. The Court held that the claiming natural father was constitutionally entitled to bring the action. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the U. S. Supreme Court sustained a California statute similar to that struck down in *R. McG. v. J. W.* against a 14<sup>th</sup> Amendment attack.

2. All three 1980 Colorado decisions adopted the equal protection interpretation without discussion and cited earlier decisions in support, but none of the earlier decisions even hinted at the interpretation. Apparently the justices did not want to acknowledge the novelty. The interpretation was similar to the U. S. Supreme Court's holdings implying an equal protection limit on the federal government into the Fifth Amendment's due process clause. See *Bolling v. Sharpe*, 347

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<sup>59</sup> We previously looked at the provisions relating to religious and public school equality standards. We also noted that Colo. Const. Art. II § 30b forbids equality laws for gays but was struck down by the courts. See *Romer v. Evans*, 517 U.S. 620 (1996). Other provisions with some relation to equality are Art. V § 25, discussed *infra*; Art. II § 6 (access to courts); id. § 11 (forbids special privileges, franchises, or immunities); id. § 27 (equal property rights of aliens); Art. VI § 19 (uniform laws relating to state courts); Art. X § 3 (uniform taxation); Art. XIV § 13 (mandates general laws for organizing cities and towns); Art. XV § 6 (equal rights to transportation); id. § 8 (equal rights against corporations).

<sup>60</sup> The others were *Heninger v. Charnes*, 613 P.2d 884, 886 n.3 (Colo. 1980) and *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

U.S. 497 (1954). The Colorado Court has consistently followed the interpretation since 1980. The Court also applies the “three tiered” equal protection system invented by the U. S. Supreme Court.

3. The 1980 interpretation may have been influenced by the state’s 1972 equal rights amendment. It must have seemed anomalous to have an equality standard only for sex discrimination. A major question about the latter provision is whether it adds anything to the general equal protection right under § 25 and the Fourteenth Amendment. Another way to pose the question is whether § 29 subjects sex classifications to the strict judicial scrutiny standard applied to racial classifications, which in turn raises the question whether there is a meaningful difference between the two standards.

The Colorado Supreme Court has not answered these questions. No decision has squarely relied on § 29 to invalidate any statute. In *R. McG. v. J. W.*, the Court said in dictum, “A fortiori” the statute violated “the stricter judicial scrutiny standard applicable to” § 29. Other decisions are inconclusive.<sup>61</sup>

4. Prior to 1980, equality issues were raised by invoking the federal equal protection clause and the state prohibition on “local or special laws” in Art. V § 25. Many other state constitutions have similar clauses. Their dominant purpose was to restrict the power of state legislatures to discriminate among cities and towns, a purpose also shown in Art. XIV § 13. Indeed, Colorado’s provision was used several times to overturn statutes imposing only on Denver.<sup>62</sup> In re Sen. Bill 95, 361 P.2d 350, (Colo. 1961), involved a proposed law intended to help Denver. The Court held that a bill allowing Denver to annex Glendale unilaterally would violate § 25.

Since 1980, litigants continue to invoke the section. A 1991 decision stated that the section is “more than a redundant Equal Protection Clause.” The Court distinguished between cases involving the 23 enumerated categories in § 25, stating that when “an enumerated prohibition is implicated, the class cannot be limited to one.”<sup>63</sup> Where instead a case involves only the general provision at the end of § 25, the Court applies a rational basis test indistinguishable from equal protection doctrine.<sup>64</sup>

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<sup>61</sup> In *Colorado Civil Rights Comm’n v. Travelers Ins. Co.*, 759 P.2d 1358 (Colo. 1988), the Court held that a statute required coverage of pregnancy under a health insurance policy. The defendant was a private company not subject to the bill of rights, and the Court invoked § 29 only to aid in interpreting the statute. It remarked that § 29 requires “closest judicial scrutiny.” *Id.* at 1363. But two other opinions stated in dictum that § 29 imposes the intermediate scrutiny standard. *Austin v. Litvak*, 682 P.2d 41, 49 (Colo. 1984); *Lujan v. Colorado St. Bd. of Educ.*, 649 P.2d 1005, 1015 (Colo. 1982). See also *Estate of Musso*, 932 P.2d 853, 855 (Colo. App. 1997) (intermediate scrutiny standard applied). And the Supreme Court sustained sex discrimination in the state’s statutory rape law. *People v. Salinas*, 551 P.2d 703, 705 (Colo. 1976). See also *In re Marriage of Franks*, 542 P.2d 845 (Colo. 1975) (alleged discrimination against men in awarding child custody did not violate § 29).

<sup>62</sup> *Reed v. Blakley*, 176 P.2d 681 (Colo. 1946) (liquor licenses); *In re Sen. Bill 9*, 56 P. 173 (Colo. 1899) (school consolidation); *In re Constitutionality of Sen. Bill 293*, 39 P. 522 (Colo. 1895) (annexation); *In re Extension of Boundaries of City of Denver*, 32 P. 615 (Colo. 1893) (same).

<sup>63</sup> *In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005*, 814 P.2d 875, 885-86 (Colo. 1991). Two dissenting justices would have held that the bill violated § 25. The case involved Colorado’s failed attempt to lure a United Airlines maintenance facility to locate in the state by means of subsidies. The facility instead went to Indianapolis, but it later closed.

<sup>64</sup> In *City of Greenwood Village v. Petitioners for the Proposed City Centennial*, 3 P.3d 427, 440-44 (Colo. 2000), the Court discussed § 25 extensively but sustained the statute at issue. The last invalidation that expressly relied on Art. V, § 25 appears to be *People v. Sprengel*, 490 P.2d 65, 67 (Colo. 1971).

Although Art. V § 25 mentions only the general assembly, the Colorado Supreme Court applied it to municipal laws on the reasoning that municipal powers are devolved by the general assembly, which cannot grant authority to violate § 25.<sup>65</sup> That was before home-rule cities were created under Article XX, but the Court has applied the section to home-rule ordinances as well.<sup>66</sup> Of course, the due process clause limits all levels and branches of government.

5. Repeated equal protection attacks on state statutes limiting tort recoveries in medical malpractice cases have failed.<sup>67</sup>

6. A 2006 statute forbade indoor smoking in all places of employment except for cigar-tobacco bars, airport smoking concessions, and licensed casinos. CRS tit. 25 art. 14. (The ban was preceded by numerous municipal anti-smoking ordinances.) The 2006 law was attacked in a federal lawsuit that asserted various violations of the federal and state constitutions, including denial of equal protection because of the exceptions. The federal courts rejected the attacks, applying rational basis equal protection doctrine and opining that the state and federal standards are identical.<sup>68</sup> In *Curious Theater Co. v. Colorado Dept. of Public Health & Environment*, 2008 Colo. App. LEXIS 442, the court rejected a claim that the smoking ban violated theaters' free speech rights. A 2007 amendment subjected casinos to the statewide ban. Casinos and other establishments are now trying to avoid the ban by claiming to be cigar bars.

#### **4. Retrospective Legislation, Gun Rights, Eminent Domain, and Juries**

Article II § 11 forbids any law "retrospective in its operation or making any irrevocable grant of special privileges, franchises, or immunities." Its frequent invocations are seldom successful. A 2006 decision that relied on § 11 to overturn a municipal law is noted later in these readings.

Article II § 13 establishes a personal right to have weapons for defense of self and property. Its application is considered in home rule cases later in the course.

Article II §§ 14 and 15 and Article XVI § 7 govern the power of eminent domain generally. Article XX § 1 defines the power for home-rule municipalities. Many statutes define and regulate the power. The subject is addressed later in the course.

Article II § 23 guarantees a jury of twelve in criminal cases except for "courts not of record." However, the relevant state statute and court rule provide for juries of six in misdemeanor cases.<sup>69</sup> In *People v. Rodriguez*, 112 P.3d 693 (Colo. 2005), a misdemeanor defendant demanded a jury of twelve for his county court prosecution because county courts are courts of record. The Supreme Court rejected his claim. In a complex opinion analyzing the history of Colorado juries and courts, the Court interpreted § 23's guarantee to apply only to felonies, allowing the Legislature to authorize juries of six for misdemeanors in courts of record.

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<sup>65</sup> *City of Denver v. Bach*, 58 P. 1089 (Colo. 1899) (ordinance invalid).

<sup>66</sup> See, e.g., *Mergen v. City & County of Denver*, 104 P. 399 (Colo. 1909) (following *Bach*, *supra*, without noticing the change to constitutional home rule).

<sup>67</sup> *Garhart v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571, 583-84 (Colo. 2004); *HealthONE v. Rodriguez*, 50 P.3d 879, 892-96 (Colo. 2002); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993).

<sup>68</sup> *Coalition For Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 n.3 (10<sup>th</sup> Cir. 2008).

<sup>69</sup> CRS § 18-1-406(1); R. Crim. P. 23(a)(2).

## 5. Voting Rights.

**Art. VII § 10. Disfranchisement during imprisonment.** No person while confined in any public prison shall be entitled to vote; but every such person who was a qualified elector prior to such imprisonment, and who is released therefrom by virtue of a pardon, or by virtue of having served out his full term of imprisonment, shall without further action, be invested with all the rights of citizenship, except as otherwise provided in this constitution.

### **Danielson v. Dennis**

139 P.3d 688 (Colo. 2006)

**Justice Hobbs** delivered the Opinion of the Court.

We accepted jurisdiction in this appeal to determine whether section 1-2-103(4), C.R.S. (2005), unconstitutionally conflicts with article VII, section 10 of the Colorado Constitution. Section 1-2-103(4) prohibits Colorado parolees from registering to vote and voting. Article VII, section 10 provides that persons who were qualified electors prior to their imprisonment and who have served their full term of imprisonment, shall have their rights of citizenship restored to them.

In dismissing the petition and complaint in this case, the District Court ruled in favor of the Colorado Secretary of State that the statute is not unconstitutional because it does not conflict with the constitutional provision. We agree. A person who is serving a sentence of parole has not served his or her full term of imprisonment within the meaning of this constitutional provision.

I. Danielson was sentenced to the Colorado Department of Corrections for a felony conviction and is now on parole. Except for his status as a parolee, he is an eligible elector who wants to register to vote and cast his ballot in local, state, and national elections. The Colorado Secretary of State, however, will not allow him to do this because section 1-2-103(4) provides that "no person serving a sentence of parole shall be eligible to register to vote or to vote in any election."

II.B. Danielson contends that the words of the constitutional provision require restoration of the franchise when the person convicted of the crime is no longer in confinement within prison walls. Dennis responds that the words must be read as a whole; that the phrase "having served out his full term of imprisonment" includes that part of a person's punishment involving the constraints of parole outside of prison walls.

Danielson argues for a strict version of the constitutional word "imprisonment" to mean only confinement within a prison. But the power under the constitution to criminalize conduct and set the punishment for a crime resides within the legislative branch; absent a constitutional infirmity, we have no basis to interfere with the exercise of that power. Of course we agree with Danielson that parole did not exist at the time Colorado adopted its constitution, but this does not mean that the General Assembly was constrained from punishing crimes with sentences that include custody while the convicted person is being transitioned to community and before restoration of his or her full rights.

At the time our constitution was adopted, the then-current penal practice was for set terms of confinement within prison; the executive had pardoning authority for early release. The advent of indeterminate sentencing in the late 1800s changed this; a maximum sentence was imposed with the possibility of earlier release. A shift in penal philosophy accompanied indeterminate sentencing. Criminal sentencing included rehabilitating offenders for re-introduction into society. Sen-

tencing to parole commenced in New York in 1876. Colorado first adopted parole sentencing in 1899. Under this provision, the Governor had authority to parole convicts serving other than a life sentence. But the General Assembly clearly stated that paroled convicts remained in the legal custody of the penitentiary in which they were imprisoned. The legislature's mandate that prisoners remain in legal custody during parole, and that parole is not a discharge from imprisonment, reflects the long-prevailing view of parole.

A parolee is given certain privileges to assist in returning to community while testing his or her capability to adhere to restrictions imposed. The convicted person can be re-incarcerated for a parole violation and does not enjoy the full panoply of legal rights a person not serving a sentence enjoys.

In our first case to construe article VII, section 10, we held in a disbarment context that an attorney convicted of a crime was not invested with all the rights of citizenship under this provision when he was placed on parole. Because he was on parole, he was still serving out his "full term of imprisonment." *People ex rel. Colo. Bar Ass'n v. Monroe*, 57 P. 696, 696 (Colo. 1899).

Despite Danielson's argument to the contrary, our probation decision recognizing rights of persons in such circumstances is distinguishable. *Sterling v. Archambault*, 332 P.2d 994 (1958). Probation is an alternative to a prison sentence. If the person violates probation, he or she is subject to being sentenced as though the probation had not been granted. Unlike incarceration and parole, probation is not available to those convicted of serious crimes or certain multiple convictions.

Also distinguishable is our decision in *Moore v. MacFarlane*, 642 P.2d 496 (Colo. 1982). There we were asked to determine whether article VII, section 10 applied to pre-trial detainees who had not been convicted of a crime or otherwise found to be in violation of the terms of a probation sentence they were serving as the result of a prior conviction.

Accordingly, in-prison confinement and the type of conditional release from confinement outside of prison walls that mandatory parole entails are separate components of the penalty the General Assembly has prescribed for certain crimes. Revocation of mandatory parole is an administrative procedure, is not accompanied by the full rights attendant to a criminal prosecution, and results in prison confinement.

Therefore, we do not agree with Danielson's contention that the General Assembly contravened article VII, section 10 when it adopted section 1-2-103(4). The General Assembly has authority to include parole as part of the "full term of imprisonment" within the meaning of this constitutional provision.

#### **Note**

As the History relates, voting by women was a prominent and colorful issue at the Convention and when the Constitution was amended to guarantee it in 1893.

### **C. The General Assembly and the Governor's Veto Powers**

The Colorado Legislature, formally known as the General Assembly, is established by article V of the Constitution. In the original Constitution, section 1 of article V simply and grandly stated, "The legislative power shall be vested in the general assembly, which shall consist of a senate and house of representatives, both to be elected by the people." This is similar to the wording of

U. S. Constitution Art. I § 1, vesting the legislative power of the United States in a Congress of two houses.

Both constitutions also limit legislative powers in various ways, but the limits in the Colorado Constitution are much greater than in the federal and have grown more severe over time, to the point that scholars who study state constitutions rank our legislature as one of the nation's weakest.<sup>70</sup> In today's class, we take an overview of these limits and look at the particulars of a few of them that are central to the state's legislative process.

Article V was and is the Constitution's longest. The original had 49 sections; it now has 48. Most of these are attempts to restrict what the Legislature can do. Important limits appear in other articles as well. Here is a list of limits other than the bill of rights, which we have already considered, and omitting such obvious and routine rules as terms of office, sessions, and quorums.

### **1. Original Art. V Limits**

§ 9 – Forbade salary increases for legislators during their terms. Moved to Art. XII § 11 in 1974.

§ 17 – Forbids amending a bill to alter its purpose. Full text below.

§ 19 – Forbade introduction of bills late in a session—limit removed by 1950 amendment.

§ 20 – Bills must be referred to and considered by a committee.

§ 21 – Limits bills other than general appropriations bills to a single subject “clearly expressed in its title.” Full text below.

§ 25 – Prohibits “local or special laws.” See previous assignment.

§ 28 – Forbids extra compensation to public employees or contractors after services rendered. Gutted by the Supreme Court when the issue was pensions for former judges of the Court.<sup>71</sup>

§ 32 – Limits general appropriations bills (the “long bill” in popular usage) to appropriations only, thus barring substantive riders. Full text below.

§ 34 – Prohibits appropriations “for charitable, industrial, educational or benevolent purposes” to any private party, and in particular to “any denominational or sectarian institution or association.” In other words, the Legislature can't make gifts to private parties. Overlaps Art. XI § 2.

§ 35 – Forbids delegation of power over municipal corporations to any “special commission, private corporation or association.” In other words, protects cities and towns from being subjected to authority of a special public body or of a private organization.

§ 36 – Forbade laws authorizing fiduciaries to invest in “the bonds or stock of any private corporation.” Replaced with prudent investment standard by 1950 amendment.

§ 38 – Provides that liabilities or obligations owned by the state or a municipality shall not be extinguished other than by payment. A 1974 amendment made an exception for “uncollectible accounts.”

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<sup>70</sup> See Denver Post, April 16, 2001, quoting Professor Alan Rosenthal, Eagleton Institute of Politics, Rutgers University.

<sup>71</sup> Bedford v. White, 106 P.2d 469 (Colo. 1940).

§ 39 – Protects the governor’s veto power by requiring presentment for governor’s signature or veto of anything that can become a law, regardless of its label.

§ 40 – Declares that the practice of vote trading or “log rolling” by legislators constitutes bribery for which guilty parties should be expelled and subjected to prosecution. Never enforced.

§§ 41-42 – Mandated laws making bribery or corrupt solicitation of legislators a crime. Moved to Art. XII § 7 in 1974.

§ 43 – Requires that legislators who have “a personal or private interest” in any measure before the legislature disclose the interest and not vote on it. Never enforced.

§ 44 – Requires the legislature to draw new congressional district boundaries after each federal census. To be discussed in an assigned case.

§ 45 – Required a state census in 1885 and every tenth year thereafter and reapportionment of state legislative districts after every federal and state census. The state census provisions were never enforced and repealed in 1966. Reapportionment after each federal census is still required but under § 48.

§ 47 – Original § 47 requires legislative districts to be compact and contiguous and forbids dividing a county in forming a legislative district—an attempt to curb gerrymandering. Current § 47 (adopted in 1974) continues these requirements except when dividing a county is necessary to achieve equal population (that is, to comply with the federal constitutional rule mandating equal population of legislative districts, also known as one person one vote).

## **2. Other Original Limits**

Art. IX § 2 – Requires the legislature to establish and maintain “a thorough and uniform system of free public schools.”

Art. IX § 3 – Declares that the school lands fund “shall forever remain inviolate and intact.” This refers to funds derived from federal land granted to the new state in trust for public schools. Indirectly altered by a 1996 amendment to other parts of Art. IX.

Art. X § 3 – Required taxes to be “uniform on the same class of subjects”, levied under “general laws,” and that property valuations for taxation be “just” and “equalized.” Made much longer and more complex by 1982 amendment.

Art. X § 6 – Forbids private property tax exemptions except for religious property. In 1992, § 20 (TABOR) authorized tax exemptions for business personal property but not for real property.

Art. X § 7 – Forbids state-level taxes for local government purposes.

Art. X § 8 – Forbids release or discharge of municipal taxes.

Art. X § 9 – Forbids relinquishing power to tax corporations or corporate property.

Art. X § 11 – Severely limits property taxes to support state government without a vote of the people. (The original TABOR?)

Art. X § 16 – Forbids deficit spending.

Art. XI §§ 1-2 – Forbids pledging public credit or making public grants to private interests or public purchases of shares in private ventures. The Legislature and Supreme Court eventually found ways around this provision, which we’ll look at later.

Art. XI §§ 3-5 – Prohibits public debt above modest levels. Ignored and evaded, as we’ll see later.

### 3. Amendments

Art. V § 1 – Amendment added powers of initiative and referendum to overturn or bypass the Legislature. The important part of it authorizes the initiative, which we’ll study later. A less important part will be in the next class materials.

Art. V § 20 – Amendment requires that legislative committees consider bills on their merits and that bills reported to a full house appear on its calendar in the order reported. Thus restricts power of committee chairs and legislative leaders to “kill” bills.

Art. V § 22a – Prohibits binding party caucus positions on bills.

Art. V § 48 – Establishes and empowers Colorado Reapportionment Commission to redraw state legislative districts after each federal census, removing this power from the Legislature.

Art. V § 50 – Forbids public funding of most abortions.

Art. IX § 17 – Mandates increasing levels of funding for public schools. We’ll study it later.

Art. X § 3 (Gallagher Amendment) – Limits residential property taxes to 47% of property taxes collected in the state each year, although residential property now constitutes over 75% of assessed valuation. We’ll study it later.

Art. X § 20 – The Taxpayer’s Bill of Rights, or TABOR, forbids increases in state or local taxes, spending, or debt without a vote of the people. We’ll study it later.

Art. XIII § 9 – Authorizes limited gambling in Central City, Blackhawk and Cripple Creek, regulated by a special commission largely free of legislative control. Allocates (only) half the net proceeds of taxes and fees to control of the Legislature.

Art. XX – Establishes municipal home rule. We’ll study it later.

Art. XXVII – Restricts proceeds from the state lottery to wildlife, parks, and outdoor recreation.

Art. XXVIII – Limits campaign contributions.

Art. XXIX – Limits gifts to public officials and employees, their families, and contractors. We’ll consider it later.

### 4. Applications

**Article III. Distribution of Powers.** The powers of the government of this state are divided into three distinct departments,— the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

**Art. IV § 11. Bills presented to governor—veto—return.** Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it, with his objections, to the house in which it originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill. If then two-thirds of the members elected agree to pass the same, it shall be sent, together with the objections, to the

other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members elected to that house, it shall become a law, notwithstanding the objections of the governor. In all such cases the vote of each house shall be determined by ayes and noes, to be entered upon the journal. If any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the general assembly shall by their adjournment prevent its return, in which case it shall be filed with his objections in the office of the secretary of state, within thirty days after such adjournment, or else become a law.

**Art. IV § 12. Governor may veto items in appropriation bills—reconsideration.** The governor shall have power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be law, and the item or items disapproved shall be void, unless enacted in manner following: If the general assembly be in session, he shall transmit to the house in which the bill originated a copy of the item or items thereof disapproved, together with his objections thereto, and the items objected to shall be separately reconsidered, and each item shall then take the same course as is prescribed for the passage of bills over the executive veto.

**Art. V § 17. No law passed but by bill—amendments.** No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose.

**Art. V § 21. Bill to contain but one subject—expressed in title.** No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

**Art. V § 32. Appropriation bills.** The general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments of the state, state institutions, interest on the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

### **Colorado General Assembly v. Owens**

136 P.3d 262 (Colo. 2006)

**Chief Justice Mullarkey** delivered the Opinion of the Court.

I. This case concerns the Governor's line item vetoes of definitional headnotes in two General Appropriations Bills, also known as the "long" bills, and the Governor's line item veto of an appropriation in a separate substantive bill.

II. This case involves three bills passed by the General Assembly during its 2002 and 2003 sessions and submitted to the Governor for his approval. Two of the bills were the General Appropriations Bills or "long bills" for fiscal years 2002-03 (House Bill 02-1420), and 2003-04 (Senate Bill 03-258). The third bill, House Bill 02-1246, created an Eligible Facilities Education Task Force and made an appropriation to fund it. The Governor signed the legislation into law after he vetoed a \$10,000 appropriation made in the bill.

The first section in each of the long bills sets forth headnotes defining terms such as "capital outlay," "lease space," "operating expenses," and several others. The Governor vetoed fifteen of the definitional headnotes, thirteen of which are at issue here.

The General Assembly brought an action for declaratory judgment and injunctive relief in the trial court, rather than attempting to override the Governor's veto by a two-thirds majority vote.<sup>72</sup> The General Assembly's suit sought a determination that the Governor exceeded his constitutional authority to veto distinct "items" within appropriations bills when he vetoed the thirteen definitional headnotes.

The Governor claimed that the headnotes constituted "distinct items" pursuant to the state constitution and intruded upon the powers of the executive branch, or alternatively, that they constituted substantive legislation. The Governor also claimed the power to veto an appropriation in either a general appropriations bill or any other bill such as House Bill 02-1246.

Relying on *Colorado General Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985) (Lamm II), the trial court held that the headnotes were "items" that could appropriately be vetoed by the Governor because the headnote vetoes did not affect the enactment's other purposes. The court held, alternatively, that the headnotes invaded the administrative authority of the executive branch in contravention of the separation of powers doctrine as stated in *Anderson v. Lamm*, 579 P.2d 620 (Colo. 1978). The trial court did not address the Governor's contention that the headnotes were constitutionally invalid as a legislative attempt to enact substantive legislation in the long bills.

With regard to the Governor's line item veto of the \$10,000 appropriation in House Bill 02-1246, the trial court invalidated the veto under Lamm II, where we held that "All bills other than general appropriation bills must encompass only a single subject. With the exception of appropriation bills, therefore, the governor must approve or disapprove a bill in its entirety." 704 P.2d at 1383.

A. For the past fifty years, the preparation of the budget has been performed by the Joint Budget Committee (JBC). The six member JBC has two majority members and one minority member from each house of the General Assembly. § 2-3-201, C.R.S. (2005). The position of JBC chair alternates between the Senate and House members on a yearly basis. The JBC employs a professional staff including budget analysts who are assigned to one or more executive agencies and meet with department personnel to review the proposed executive budget. The analysts prepare recommendations for the members of the JBC, and ultimately the committee crafts the budget that is presented to the full legislature and enacted as the long bill. While the executive submits a proposed budget, it is not binding on the legislature.

The JBC employs a technique described as "line item budgeting" to appropriate specific sums of money for specific purposes. Over the years, the state budget has grown in size and complexity. Whereas the budget consisted of thirty typewritten pages in 1955, the long bill for the current fiscal year is 379 pages in length.

While the General Assembly has great discretion in formulating the budget, it is subject to various constitutional limitations. Relevant to this case are three such restrictions: (1) the Governor's powers to veto items in appropriations bills under article IV, section 12; (2) the prohibition against enacting substantive legislation in the general appropriations bill framed in article V, section 32; and (3) the separation of powers guaranteed by article III.

B. The legislature's power over appropriations is plenary, subject only to constitutional limits, and includes the power to attach conditions on expenditures. A general appropriations bill may

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<sup>72</sup> [Instructor's note] Legislative sessions are limited to 120 days by Art. V § . Many vetoes are made after the legislative session is over, so there is no opportunity for an override vote.

only contain appropriations for the expenses of the departments of the state, state institutions, interest on the public debt, and public schools. Colo. Const. art. V, § 32. The legislature is prohibited from including substantive legislation in a general appropriations bill.

Upon passage of the appropriations bill, the executive's duty to administer the funds begins, subject to the limitations imposed by the legislature. However, the legislature may not attach conditions to a general appropriation bill which purport to reserve to the legislature powers of close supervision that are essentially executive in character.

The Governor is constitutionally authorized to "disapprove of any item or items of any bill making appropriations of money, embracing distinct items." Colo. Const. art. IV, § 12. This provision allows a veto of any item in its entirety, but does not allow a partial veto. The item veto is a negative power of limited scope. The Governor may use it to eliminate funding for an item. The veto cannot create funding and it cannot partially reduce funding for an item.

III. The General Assembly and the Governor dispute whether headnotes constitute "items" for purposes of the item veto power, and alternatively, whether the headnotes violate the separation of powers or constitute substantive legislation. We begin with the former assertion, whether the definitional headnotes in the long bills constitute "items" properly vetoed according to article IV, section 12. We hold that they do not.

This court first considered the meaning of "item" in *Stong v. People*, 292, 220 P. 999, 1003 (Colo. 1923). In that case, the Governor approved a long bill, but vetoed \$1750 from a \$7000 salary appropriation for the Industrial Commission secretary. We held that the appropriation for the secretary was a separate, distinct, and indivisible item and that the Governor's veto was invalid because it attempted to strike a portion of the appropriation.

In *Lamm II*, we examined the validity of the Governor's veto of specific source designations for appropriations. We held that the veto was invalid because funding source restrictions were not separate "items" subject to the Governor's item veto power. In that case, we held that an "item" in an appropriations bill must be legally independent, and if removed, it must not affect the bill's purpose or other provisions. We concluded that the source of funding is as much a part of an item of appropriation as the amount of money appropriated and the purpose to which it is to be devoted, and so it could not be removed through the item veto power.

The Governor contends that the headnotes are "items" subject to the item veto power because they can be removed from the bill without affecting the other purposes or provisions of the general appropriations. The General Assembly argues that the headnotes are not items because eliminating the headnotes removes a portion of the legislature's statement of purpose; thus, the alteration is beyond the constitutional scope of the item veto power. The General Assembly relies on a construction of the term "item" from *Lamm II*, namely that items are indivisible sums of money dedicated to a stated purpose, to support their contention that headnotes cannot be items subject to the Governor's veto power.

We hold that the definitional headnotes in this case are not "items" for purposes of the item veto power. Headnotes defining the terms used throughout the long bills cannot be "items" because they are not sums of money, and they cannot be eliminated without affecting the other purposes or provisions of the long bill. Rather, headnotes are indivisible parts of the items to which they relate, and are integral to and legally interdependent with other portions of the items of which they are a part. By striking out the headnotes, the appropriations made throughout the long bills

for "operating expenses," "health, life, and dental," and the other line items are necessarily affected.

In the Governor's veto message, he informed the legislature that his agencies will comply with the headnotes to the extent feasible while allowing them to spend outside the parameters set forth in the line item. He also purported to preserve the dollar amount appropriated for each item despite the stricken headnote. The Governor's assumption that the dollar amounts are preserved without condition after his veto is contrary to our analysis in Lamm II. The headnotes function as legislative conditions and so removal of that condition is beyond the Governor's item veto power, especially removal with the expectation that the dollar amount could remain intact.

IV. We now turn to the Governor's argument that the headnotes violate the separation of powers. The Governor contends that the vetoes were necessary to allow flexibility in administering the funds within each department. The Governor also claims that the General Assembly's use of headnotes unconstitutionally prevents him from using money from other line items within the same department to meet shortfalls in areas like legal services and utilities. The General Assembly counters that the headnotes enable the legislature to honor its own constitutional obligation to determine and specify the purposes for which it appropriates public funds throughout the state government, while leaving daily administration of the appropriated funds to the executive departments and agencies that receive them. We hold that all thirteen headnotes at issue here, including the full time equivalent; health, life and dental; personal services; short-term disability; lease purchase; leased space; vehicle lease payments; legal services; operating expenses; utilities; purchase of services from computer center; capital outlay; and multiuse network payments headnotes, unconstitutionally intrude on the authority of the executive branch.

We have held that article III permits the General Assembly to limit the cash-fund sources from which appropriated moneys are derived. Lamm II, 704 P.2d at 1384-85. However, an appropriations bill cannot interfere with the executive authority to allocate staff and resources, make contracts, enter into agreements, or limit the general administration of the federal funds it receives. The power to appropriate does not give the General Assembly the power of close supervision that is essentially executive in character. Anderson, 579 P.2d at 623-24.

In carefully striking a balance between the General Assembly's power to appropriate funds and the Governor's power to manage and administer various departments of the executive branch, we have held in prior cases that the following legislative provisions were constitutionally impermissible: conditions on the number of full-time employees in each county; the requirement that the Joint Budget Committee approve rate increases in certain contracts; a provision that made appropriations contingent upon presentation of cost-benefit reports and five year plans to the General Assembly; the funding of full-time employees contingent on case-load; and, the requirement of monthly reports to the budget committee. We have also held that it would be a legislative infringement on executive power to mandate diversion of limited executive resources to a particular revenue-producing activity. And, similarly, it is not within the General Assembly's power to require that federal or cash funds received by any agency in excess of the appropriation be expended without additional legislative appropriation, because such funds are custodial in nature and not subject to the appropriative power of the legislature.

Further, we have distinguished between circumstances in which the General Assembly limits the cash fund sources from which the moneys are to be derived and those in which the provisions interfered with the administrative utilization of the appropriated funds limiting or directing the

executive in putting the moneys to use. In sum, the legislature may not limit the executive branch in its staffing, resource allocation, or general administration of the federal funds it receives.

With these principles in mind, we now turn to the headnotes vetoed by the Governor and asserted to be a violation of the separation of powers. We first address the "full time equivalent" or "FTE" headnote applicable to executive branch employees that defines an FTE. The FTE definition, in combination with the numerical limits on FTE in individual appropriations, is designed to limit the actual number of FTE that an agency may hire.

Under our holding in *Anderson*, the General Assembly may not designate the number of full-time employees as such a condition interferes with the executive authority to allocate staff and resources in administering the funds. 579 P.2d at 626. *Anderson* stands for the proposition that a limit on the number of FTEs constitutes interference with the inherent prerogatives of the executive branch.

According to the Governor, the headnotes for health, life, and dental; personal services; and short-term disability violate the separation of powers due to the prohibition on interference with the executive authority to allocate staff and resources in administering funds. The Governor argues that these three headnotes are inextricably related to the remuneration packages to which each employee is entitled. By dividing the payment of salaries and benefits into three parts, the Governor contends that the General Assembly effectively limits the number of employees that can be hired, especially by utilizing language preventing the expenditure of these funds for any other purpose. This mechanism for limiting the number of employees an agency may hire is similar to the FTE headnote at issue in *Anderson* that directly limited the number of full-time employees hired in each department, interfering with the authority of the executive to allocate staff and resources, and is likewise invalid.

The Governor contends that the headnotes defining capital outlay; operating expenses; lease purchase; leased space; legal services; purchase of services from the computer center; utilities; vehicle lease payments; and multiuse network payments all intrude on the authority of the executive. The Governor seeks approval of these vetoes to allow flexibility for the use of funds appropriated within the individual departments. The "flexibility" sought by the Governor is integral to his argument that the use of headnotes prevents the executive from moving funds between accounts within departments, violating the separation of powers.

The General Assembly counters that permitting the Governor the flexibility he seeks weakens the legislature's plenary authority and its ability to meet its constitutional responsibility to consider and balance competing interests and needs across the entire state government. The General Assembly also emphasizes the existence of a variety of mechanisms to address unforeseen circumstances and budget shortfalls.

The precise extent to which an appropriation may be itemized is not prescribed by the constitution, and it has not been explored in great detail by this court. While the legislature certainly maintains the power to appropriate and attach various purposes and conditions to an appropriation, it cannot interfere with the administration of the funds either explicitly or implicitly by using creative language and mechanisms in the long bill that would thwart the exercise of legitimate executive authority. An overview of each headnote and its practical effect on the day-to-day operations of the executive branch is necessary to determine whether each headnote intrudes on the executive power, or falls within the ambit of the legislature.

The trial testimony best illustrates the function of the headnotes in relation to the administration of the budget. Nancy McCallin, then director of the Office of State Planning and Budgeting, testified that the executive branch requires the ability to manage its budget to meet regularly occurring shortfalls within a single department for items like utilities and legal services. McCallin further testified that budgeting flexibility is allowed under the General Accounting Standards Board (GASB) definitions for items like operating expenses and personal services that include vehicle lease payments and legal services as subcategories. The GASB standards were adopted by statute, currently codified at section 24-30-202(12), C.R.S. (2005), and provide that the controller must install a unified and integrated system of accounts based on those standards.

Another witness, Leslie Shenefelt, the Colorado State Controller, described how the headnote definitions are in conflict with generally accepted accounting principles, with which he is statutorily mandated to comply. He stated that the Governor's vetoes neutralized the conflicts between the headnotes and the GASB standards.

The testimony shows that the primary difficulty with some of the headnotes is restrictive language preventing the executive from spending excess funds from these line items to meet shortfalls elsewhere within an individual department's budget. The language states that "no funds appropriated for health, life, and dental shall be expended for any other purpose."

By dividing the executive's ability to pool resources already appropriated to it, the General Assembly is supervising the executive's allocation and administration of those resources in contravention of our decision in *Anderson* where we prohibited the General Assembly's condition of appropriations on the presentation of periodic expense reports. The headnotes deprive the executive of the ability to allocate resources to pay for outstanding expenditures without first obtaining approval from the legislature to use funds from lines already appropriated. The headnotes thus violate the separation of powers.

What the executive seeks to do is not the same as an intradepartmental transfer or increase in appropriation for any department. The Governor seeks to balance the budget by paying for outstanding debts using moneys from items already appropriated to each department, albeit the items as defined by the GASB standards, not the narrow definitions contained in the headnotes. The line items and headnotes at issue here require that the executive make a showing to the legislative branch to determine when the executive's departmental needs are critical enough to authorize the use of funds already appropriated. Requiring such a showing violates the separation of powers.

The remaining headnotes at issue in this case--utilities, capital outlay, and purchase of services from computer center--do not contain the prohibitive language found in the other headnotes that we find unconstitutional. However, the legislature is managing the day-to-day operations of the departments which need these services to remain operational. While the legislature interprets these headnotes as conditions and expressions of legislative purpose, it fails to explain why it is the appropriate branch to oversee the minutiae of state government, including whether such departments can pay their monthly utility bills in a dramatically fluctuating energy market. These headnotes operate to exercise unconstitutionally close supervision over every department. Based upon the foregoing analysis, the headnotes for utilities and purchase of services from computer center are unconstitutional.

The headnote for capital outlay not only defines purchases that qualify as "capital outlay," but also places specific monetary caps on the purchase of equipment, building repairs, renovations,

and improvements to property. This monetary restriction is in addition to the actual amount of money appropriated for this item in the long bill for each department. Once again, the trial testimony helps illuminate the ramifications of adding a monetary cap to various purchases in the headnote. McCallin testified that the headnote is much more restrictive than the GASB definition, and prevents executive agencies from purchasing equipment or making repairs that facilitate productivity and essential departmental operations.

The net effect of the monetary caps is that no matter how much money is appropriated for the capital outlay line, every department is prevented from purchasing equipment or making repairs that exceed an artificially designated amount of money, even through utilization of the transfer power or the supplementary appropriation process. The General Assembly does not have the power to force the executive to halt its various departmental operations because of an inability to repair heating and ventilation, or to purchase necessary equipment by placing monetary caps in the headnote. The headnote impermissibly encroaches on the Governor's ability to allocate resources to operate statutorily authorized programs, and violates the separation of powers.

For these reasons, the headnotes defining full time equivalent; health, life and dental; personal services; short-term disability; lease purchase; leased space; vehicle lease payments; legal services; operating expenses; utilities; capital outlay; purchase of services from computer center; and multiuse network payments unconstitutionally infringe on the Governor's resource allocation and general administrative powers.<sup>73</sup>

V. We finally turn to the issue of the Governor's item veto power over bills other than the general appropriations bills. The legislature enacted House Bill 02-1246. The Governor vetoed a \$10,000 appropriation to compensate members of the legislature who served on the task force. The Governor contends he has the power to disapprove of any appropriations provision of any bill, including a substantive bill. The General Assembly submits the item veto power extends only to general appropriations bills rendering the Governor's attempted veto of the appropriation in House Bill 02-1246 invalid because it is a substantive bill subject only to the full veto power of article IV, section 11. We agree with the legislature that an appropriation in a substantive bill does not make that bill an appropriations bill subject to the item veto power.

All bills other than general appropriations bills must encompass only a single subject. Colo. Const. art. V, § 21. The bifurcation of single subject requirements for substantive bills and multi-subject allowance for long bills is properly reflected in the two types of veto power maintained by the Governor. Article IV, section 11 requires the Governor to veto a bill in its entirety. The item veto power enables the Governor to veto "distinct items" of any bill making appropriations. Colo. Const. art. IV, § 12.

To interpret the presence of an appropriation clause in a substantive bill as an "appropriations bill" subject to the item veto power would render the distinction between the two veto powers nugatory. The item veto power does not apply to any appropriation in any bill; rather, it applies only to those bills that have the "primary purpose" of making appropriations. See Colo. Const. art. V, § 32 ("The general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial department."). The long bills are the only type of legislation with that purpose. This interpretation is consistent with the plain language of the item

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<sup>73</sup> Because we address all of the headnotes under our separation of powers analysis, we do not reach the question of whether the headnotes violate the prohibition against substantive legislation in a long bill.

veto provision because that power may only touch upon bills containing several "distinct items," rather than single subject bills like House Bill 02-1246.

We hold that House Bill 02-1246 is a single subject substantive bill that creates and partially funds a new program, the Education Task Force, and is not a bill funding programs that have been separately authorized by other legislation. As such, the Governor's item veto of the appropriation made therein is invalid.

## Notes

1. Article III explicitly entrenches the doctrine of separation of powers into three departments, legislative, executive and judicial, which is implicit in the U.S. Constitution. As the Court's opinion mentions, for some years, the General Assembly and the governor have sparred over control of federal funds allocated to the State. The Legislature insisted that it had appropriations authority over these funds, but the Supreme Court held that control of custodial and trust funds is constitutionally subject to executive control and beyond the legislature's power of appropriation.<sup>74</sup>

A 2004 bill sought to limit the definition of custodial funds to those granted "for a particular purpose" and to claim legislative control over funds granted "for the support of general or essential state government services."<sup>75</sup> While the bill was pending, the General Assembly submitted two interrogatories to the Supreme Court seeking to determine the bill's constitutional validity. The first sought an opinion on the bill's definition of custodial money in general; the second sought an opinion on the definition as applied to a particular federal grant program.<sup>76</sup> The Court approved legislative control over the latter but refused to answer the general question, stating that each application must be evaluated on particular facts. As the dissent pointed out, this gives the courts detailed supervisory power over federal and other outside funds received by the State.<sup>77</sup> However, the Court's decision went far toward approving the statute's definition.

2. Separation of powers in local governments presents distinct issues that we consider later.

3. The veto and Article V provisions quoted and discussed above, plus the attempt to ban log-rolling in Art. V § 40, were the Convention's attempt to restrict the legislative practice of combining unrelated provisions in a single bill to gain passage of measures that could not succeed alone. Critics refer to this practice as "bundling." These provisions depart significantly from the U. S. Constitution, which lacks any limit on bundling. Comparing federal and state statutes suggests that the most important of these provisions are § 32's ban on substantive provisions in appropriations bills and the line-item veto because the most egregious bundling in federal statutes occurs in appropriations acts, which are routinely filled with substantive riders and special interest appropriations often derided as "earmarks." This reflects the necessity to pass appropriations bills. Others can be killed, but appropriations must be enacted to operate the government.

4. Section 21's single subject and title requirements are usually discussed separately in judicial opinions, but they are logically related. Challenges under the title requirement often attack provisions of bills alleged to be beyond the scope of the title. The General Assembly can avoid

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<sup>74</sup> See Oesterle & Collins, *supra* note 1, at 93, 137-38, 435.

<sup>75</sup> H.B. 04-1098, enacted as CRS § 24-75-201.

<sup>76</sup> In re Interrogatories Submitted by the General Assembly on House Bill 04-1098, 88 P.3d 1196, 1196-99 (Colo. 2004).

<sup>77</sup> *Id.* at 1205-07 (Coats, J., dissenting).

these claims by writing a broad title that takes in all parts of a bill. But a broader title is more likely to encompass more than one subject. The title requirement was often and drastically enforced in the past, and some decisions overturned statutes long relied upon as valid.<sup>78</sup> However, there has been no invalidation on this ground since 1952.

Modern legislative procedures guard against violations of § 21. By rule, no bill can be introduced into the General Assembly unless it has been first submitted to the Office of Legislative Legal Services for approval as to form, and this procedure enforces § 21's requirements.<sup>79</sup> However, the single-subject and clear title concepts have assumed greater importance since 1995, when provisions were added applying the same requirements to citizens' initiatives and to constitutional amendments referred by the General Assembly.<sup>80</sup> This rule is discussed later in the course. Section 21 does not apply to local governments, but similar municipal charter provisions are judicially enforced.<sup>81</sup>

5. Colorado separation of powers law includes a standing doctrine less strict than its federal cousin, notably because it broadly allows taxpayer standing. See generally *Ainscough v. Owens*, 90 P.3d 851 (Colo. 2004); *Barber v. Ritter*, 170 P.3d 763, 767-70 (Colo. App. 2007), *appeal pending*. Colorado also has a version of the political question doctrine. See *Busse v. City of Golden*, 73 P.3d 660 (Colo. 2003).

## 5. Redistricting

**Art. V § 44. Representatives in congress.** 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.

**Art. V § 48** (1966, amended 1974, 2000, 2001). **Revision and alteration of districts—reapportionment commission.** (1)(a) After each federal census of the United States, the senatorial districts and representative districts shall be established, revised, or altered, and the members of the senate and the house of representatives apportioned among them, by a Colorado reapportionment commission consisting of eleven members, to be appointed and having the qualifications as prescribed in this section. Of such members, four shall be appointed by the legislative department, three by the executive department, and four by the judicial department of the state.

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<sup>78</sup> See, e.g., *Sullivan v. Siegal*, 245 P.2d 860 (Colo. 1952), reviving a usury statute that the General Assembly had twice tried to repeal by holding both repealers invalid under § 21. A 1935 opinion of the Court that had said the statute was repealed was held to be dictum 17 years later. Compare *People ex rel. Thomas v. Goddard*, 7 P. 301, 304 (Colo. 1885) (sustaining a statute, stating, “the act has been in force for eight years, and valuable rights have accrued under it”).

<sup>79</sup> The Colorado Legislative Council is composed of members of the General Assembly from both parties. It employs a professional staff that is generally considered nonpartisan. See [http://www.state.co.us/gov\\_dir/](http://www.state.co.us/gov_dir/).

<sup>80</sup> See Art. V, § 1(5.5); Art. XIX, § 2(3).

<sup>81</sup> See *City & County of Denver v. McNichols*, 268 P.2d 1026 (Colo. 1954) (ordinance violated charter's title rule); *Scanlon v. City of Denver*, 88 P. 156, 157 (Colo. 1906) (§ 21 not applicable to city ordinance).

**People ex rel. Salazar v. Davidson**

79 P.3d 1221 (Colo. 2003)

**Chief Justice Mullarkey** delivered the Opinion of the Court.

I. In the closing days of the 2003 legislative session, the General Assembly enacted a bill to redraw the boundaries of Colorado's seven congressional districts. With this new law, the General Assembly intended to supplant the court-ordered 2002 redistricting plan, which governed the 2002 general election.

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

The Attorney General argues that although our constitution directs the General Assembly to draw congressional boundaries, it limits the timeframe and frequency within which the General Assembly may do so. Specifically, the General Assembly may redistrict only once every ten years, and this must occur immediately after each federal census. Accordingly, the General Assembly loses its power to redistrict if it does not act within the window of time beginning after each federal census when Congress apportions seats for the House of Representatives and ending with the next general election. The Attorney General also maintains that he may petition this court to exercise its original jurisdiction to decide state constitutional issues of public importance.

Because of the importance of the issues raised, we exercise our discretion to decide two cases. The first is the Attorney General's constitutional challenge to the General Assembly's congressional redistricting bill. The second is the Secretary of State's separate challenge to the Attorney General's authority to bring the first case.

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

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

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

Congressional redistricting, like legislative redistricting, has had a checkered history in Colorado, marked by long periods of time when the General Assembly failed to redistrict even though the state population grew dramatically and Colorado received more congressional seats. The federal government has conducted thirteen federal censuses since Colorado became a state, but the General Assembly has redrawn congressional districts only six times. The legislature's failure to redistrict meant that urban areas were systematically underrepresented, and congressional districts were grossly disproportionate.

This era of inaction came to an abrupt end when the United States Supreme Court announced its "one-person, one-vote" principle and ordered Colorado to comply. *Lucas v. Forty-Fourth Gen. Ass'y*, 377 U.S. 713 (1964). These and other better-known cases ushered in a new era in which there can be no doubt that the state must redistrict both its legislative and congressional seats after every new census.

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

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

Having failed to redistrict when it should have, the General Assembly has lost its chance to redistrict until after the 2010 federal census.

II. In 2000, the United States census prompted Congress to assign Colorado one additional seat in the House of Representatives, bringing our total seats to seven. The old redistricting plan, which contained only six districts, became illegal. 2 U.S.C. § 2c (2000). Consequently, when the federal government released redistricting data in March 2001, the state General Assembly began the task of drawing new congressional districts.<sup>82</sup>

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<sup>82</sup> The terms "redistricting" and "reapportionment" are often used interchangeably. To reduce confusion, we avoid the term "reapportionment," and use "redistricting."

The General Assembly was unable to pass a new plan in its regular session and two special sessions. Therefore, the voters turned to the courts, asking the Denver District Court to hold the existing six-district plan unconstitutional and to replace it with a valid seven-district plan.

The district court considered more than a dozen competing maps during a seven-day trial and ultimately settled upon a new seven-district plan. The court, however, delayed issuing its decision in order to give the legislature yet another chance to pass its own plan during the 2002 session. After the General Assembly again was unable to act, the court announced its redistricting plan in time for the November election. This court unanimously affirmed the district court decision, saying that the plan was "thorough, inclusive, and non-partisan." *Beauprez v. Avalos* at 647, 653.

In the closing days of the 2003 regular session, the newly elected General Assembly enacted a new redistricting plan, SB 03-352. The bill was introduced on May 5, 2003, passed by both houses on May 7, the final day of the session, and was signed into law on May 9. A group of citizens filed suit in Denver District Court, asking the court to enjoin implementation of the plan.<sup>83</sup> *Keller v. Davidson*, No. 03CV3452 (Denv. Dist. Ct.). That case has since been removed to federal court, and is now on hold by order of the federal district court pending this decision.

On May 14, the Attorney General filed an original action in this court pursuant to Article VI, Section 3, asking us to issue an injunction preventing the Secretary of State from implementing the General Assembly's 2003 redistricting plan and requesting a writ of mandamus requiring the Secretary of State to return to the 2002 redistricting plan. Subsequently, the Secretary of State filed her own original action with this court, asking us to dismiss the Attorney General's petition. She claims that the Attorney General cannot bring an original proceeding in this type of case and cannot name the Secretary of State as a respondent because he is ethically obligated to represent her.

III. Both the Attorney General's case and Secretary of State's case are original proceedings pursuant to Article VI, Section 3, which states in relevant part: "The supreme court shall have power to issue writs of . . . mandamus, . . . injunction, and such other . . . writs as may be provided by rule of court." Original proceedings are controlled by Colorado Appellate Rule 21(a)(1), which states that: "Relief under this rule is extraordinary in nature and is a matter wholly within the discretion of the Supreme Court. Such relief shall be granted only when no other adequate remedy . . . is available." Although we have discretion regarding the cases we choose to hear, we have established two basic requirements for original proceedings such as these. First, the case must involve an extraordinary matter of public importance. Second, there must be no adequate conventional appellate remedies. Both of the cases we decide today satisfy both requirements.

There can be no question that the Attorney General's case involves an extraordinary matter of public importance. Congressional redistricting implicates citizens' right to vote for United States Representatives. This right to vote is fundamental to our democracy.

The frequency of redistricting affects the stability of Colorado's congressional districts, and hence, the effectiveness of our state's representation in Congress. When the boundaries of a district are stable, the district's representative or hopeful contenders can build relationships with the

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<sup>83</sup> Plaintiffs in that case allege that the General Assembly violated a variety of state laws regarding the procedure by which the lawmakers must introduce, read, debate and pass bills. Those issues were not raised in this case, and so we do not consider them in today's decision.

constituents in that district. Furthermore, the constituents within a district can form communities of interest with one another, and these groups can lobby the representative regarding their interests. These relationships improve representation and ultimately, the effectiveness of the district's voice in Congress.

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

The second factor in considering whether to exercise our original jurisdiction is whether the parties have an adequate alternative remedy. The remedy may be an action in a trial court or an appeal in an ongoing proceeding. As noted above, there is now a case in the federal district court that also challenges SB 03-352. The Secretary of State urges that this federal case is an adequate remedy to the Attorney General's claims. We disagree.

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

Also, the federal court is not the appropriate forum to decide the frequency of redistricting. This case turns on the Colorado Constitution. State courts are the ultimate expositors of state law. Consequently, even if the *Keller* court were to address the issue of how frequently the General Assembly may draw congressional districts, the federal court would have to turn to this court to answer that question. In sum, the Attorney General's petition presents an issue uniquely suited for resolution in an original proceeding.

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

IV. The Secretary of State contends that the Attorney General has no constitutional, statutory, or common law power to petition this court for the relief requested and that, by filing the petition, the Attorney General violates his ethical duty to represent the Secretary. We reject both arguments. We see no reason to depart from our long-established practice allowing the Attorney General to petition this court in an appropriate case.

We have always recognized the ability of the Attorney General and other public officials to request original jurisdiction in matters of great public importance. The case closest to the one before us today is *People v. Tool*, 86 P. 231, 86 P. 224, 86 P. 229 (1905). In *Tool*, we explicitly recognized the common law power of the Attorney General to bring an original proceeding in order to protect the integrity of the election process.<sup>84</sup>

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

The Secretary of State also asserts that the Attorney General has violated the Colorado Rules of Professional Conduct by naming her as the respondent. We find no ethical violation. The Secretary of State is named as a party in her official capacity because she administers the election laws. No client confidences are involved.

The Colorado Rules of Professional Conduct explicitly recognize that government lawyers may have authority to represent the public interest in circumstances where a private lawyer would not be authorized to do so.

In his role as legal advisor, the Attorney General must advise the Secretary of State on the implementation of the election laws. If the Attorney General has grave doubts about the constitutionality of the impending 2004 general election, he must seek to resolve these doubts as soon as possible.

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

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

This argument is flawed. The Supreme Court has interpreted the word "legislature" in Article I to broadly encompass any means permitted by state law, and not to refer exclusively to the state legislature. A state's lawmaking process may include citizen referenda and initiatives, mandatory gubernatorial approval, and any other procedures defined by the state. See *Smiley v. Holm*, 285 U.S. 355 (1932) (gubernatorial approval); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (referenda).

The word "legislature" also extends to special redistricting commissions. Arizona, for instance, has a special commission that draws congressional districts and then submits the plan directly to the Secretary of State, thus bypassing the Arizona legislature entirely. Ariz. Const. art. IV, part 2,

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<sup>84</sup> The Attorney General's authority to bring an original proceeding in matters involving the public good is also consistent with Colorado's broad conception of taxpayer standing. Under this court's jurisprudence, ordinary taxpayers would have standing to challenge the constitutionality of the 2003 redistricting statute in an original proceeding.

§ 1. Other states with redistricting commissions include Hawaii, Idaho, Montana, New Jersey, and Washington.

Most importantly for our purposes, the word "legislature," as used in Article I of the federal Constitution, encompasses court orders. State courts have the authority to evaluate the constitutionality of redistricting laws and to enact their own redistricting plans when a state legislature fails to replace unconstitutional districts with valid ones. In fact, courts are constitutionally required to draw constitutional congressional districts when the legislature fails to do so. *Branch v. Smith*, 538 U.S. 254 (2003). In such a case, a court cannot be characterized as "usurping" the legislature's authority; rather, the court order fulfills the state's obligation to provide constitutional districts for congressional elections in the absence of legislative action.

B. Although the U.S. Constitution grants the power to draw congressional districts to the states, the states have often abused their broad redistricting authority. Historically, some state legislatures have used redistricting to enhance the power of the majority (racial and/or political), and to suppress minorities. See generally Andrew Hacker, *Congressional Districting: The Issue of Equal Representation 30-70* (1963). The legislatures primarily disenfranchised voters either by gerrymandering or by neglecting redistricting duties altogether, thus allowing the sizes of the districts to become more and more unbalanced as populations shifted over time.

Because of this growing inequality among districts, the Supreme Court and Congress stepped in to protect voters' rights. In 1964, the United States Supreme Court established the one-person, one-vote doctrine, requiring that every state make a good-faith effort to elect all representatives from districts of equal populations. *Wesberry v. Sanders*, 376 U.S. 1 (1964) Under this doctrine, states now have a constitutional obligation to draw congressional districts with equal numbers of constituents, or else justify any differences, no matter how small, with a legitimate reason.

When evaluating constitutionality under the one-person, one-vote doctrine, a court uses the national decennial census figures. The United States Supreme Court has recognized the legal fiction that these figures remain accurate for the entire ten years between censuses. *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Consequently, according to this legal fiction, when states create same-size districts that adhere to one-person, one-vote standards at the beginning of the decade, these districts remain constitutionally valid on equal population grounds until the next census, even though the states' populations actually shift and change in the intervening years. Conversely, new decennial census figures generally render the old districts unconstitutional, and states must redistrict prior to a subsequent election.

C. Federal statutes also restrict how the states may redistrict. The United States Constitution gives Congress the power to "make or alter" election regulations "at any time." U. S. Const. art. I, § 4, cl. 1 ("The times, places and manner of holding elections for senators and representatives shall be prescribed in each State, by the legislature thereof, but the Congress may at any time, by law, make or alter such regulations . . .").

Even so, the Constitution was silent regarding whether states were required to draw single-member districts, or whether they were allowed to elect their representatives in at-large, state-wide elections. After the states ratified the Constitution, many elected all of their members of Congress at large. But in 1842, Congress exercised its authority to regulate elections and passed the Apportionment Act, which prohibited the "winner-take-all," at-large elections, and required that states elect members of Congress from contiguous, single-member districts. Congress al-

lowed this requirement to lapse, however, and by 1962, many representatives were once again elected at large.

Shortly after the United States Supreme Court announced the one-person, one-vote doctrine in 1964, many lower courts began to implement that decision by replacing unconstitutional, disproportionate districts with at-large elections. These courts did so because they found they had no authority to draw new districts. Congress disagreed, and in 1967 enacted 2 U.S.C. § 2c, which once again required single-member congressional districts. With this statute, Congress eliminated the option of at-large elections for states with more than one representative. Thus, states must draw same-size, single-member districts.

D. The crucial question is: "Exactly how does Article V, Section 44, limit Colorado's authority to redistrict?" first sentence states who must redistrict--the "General Assembly"--and what the General Assembly must do--create single-member congressional districts. The second sentence establishes when this redistricting shall take place--after a new congressional apportionment.

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

The term General Assembly does not simply refer to the lawmakers who must pass a bill. Instead, it is a shorthand method of referring to the entire standard lawmaking procedure set forth in the Colorado Constitution. These procedures require a majority quorum, approval by a committee, and reading of the bill at length on two different days in each house. Colo. Const. art. V, §§ 11, 20 & 22. The standard lawmaking procedure includes passage by both houses of the legislature as well as the governor's signature or approval by inaction.

Standard lawmaking procedure in Colorado also includes voter initiative. In 1934, this court upheld a legislative redistricting plan that was created by voter initiative and also rejected a subsequent plan adopted by the General Assembly. *Armstrong v. Mitten*, 37 P.2d 757, 759 (Colo. 1934). In *Armstrong*, we held that the initiated plan was valid and enforceable. In so holding, we reasoned that "the people are sovereign" and they created the General Assembly as "their agent." Consequently, we rejected a literal interpretation of the term "General Assembly," and instead held that "General Assembly" broadly encompassed all legislative processes, including voter initiative. *Armstrong's* holding applies to congressional redistricting as well.

The term "General Assembly" in Section 44 also encompasses the courts, but only in the special instance when the General Assembly fails to provide constitutional districts for an impending election. In 1962, in *Baker v. Carr*, the United States Supreme Court held that redistricting was a justiciable issue. 369 U.S. 186, 208-09 (1962). In the forty years since *Baker v. Carr*, court involvement in redistricting has become more common. Although courts continue to defer to the legislatures, the courts must sometimes act in order to enforce the one-person, one-vote doctrine. Indeed, Congress enacted 2 U.S.C. § 2c specifically for the purpose of forcing courts to draw valid redistricting plans rather than resorting to at-large districts. Hence, courts are heavily in-

volved in ensuring that all federal, state, and local districts satisfy the one-person, one-vote criteria.

When a court is forced to draw congressional districts because the legislature has failed to do so, the court carries out the same duty the legislature would have. Redistricting involves prospective rules for elections, rather than a retrospective decision based on past events. Thus, when redistricting, the court's task closely resembles legislation.

In sum, the term "General Assembly" in the first sentence of Article V, Section 44, broadly encompasses the legislative process, the voter initiative, and judicial redistricting.

2. When Colorado May Redistrict. The second sentence of Section 44 says redistricting may take place "when a new apportionment shall be made by congress." Thus, the second sentence requires that redistricting must take place "when" there is a census: at least once per decade.

The crucial question for us, however, is whether redistricting may occur more often than once per decade. The Secretary of State and General Assembly argue that the General Assembly may redistrict at any time, even more than once per decade. We reject this construction.

The second sentence of Section 44 places a temporal restriction on redistricting. The word "when" is used as a subordinating conjunction. It indicates the relationship of redistricting and apportionment--redistricting "shall" take place "when" apportionment occurs. "When," in this context, means "just after the moment that," "at any and every time that," or "on condition that." Webster's Third New World International Dictionary of the English Language 2602 (1993). All of these definitions indicate that in Section 44, the word "when" means that redistricting may only occur after a new apportionment. Applying this language in the instant case: a new apportionment is a "condition" for redistricting; redistricting must take place "any and every time" a new apportionment occurs; and, redistricting must take place "just after" a new apportionment. Conversely, redistricting may not happen spontaneously or at the inducement of some other unspecified event; it must happen after and only after a new apportionment.

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

The framers' intent to limit the frequency of congressional redistricting is evident when the congressional redistricting language in the 1876 Constitution is compared with the legislative redistricting language from 1876. Section 44 originally limited the timeframe for congressional redistricting, as it still does, to "when a new apportionment shall be made by Congress." Section 47 originally said that "senatorial and representative districts may be altered from time to time, as public convenience may require." Colo. Const. art. V § 47 (amended 1974). The contrast between these two sections clearly demonstrates that the framers intended to restrict the frequency of congressional redistricting to once per census.

Our interpretation is supported by history and custom. We have never been called upon to interpret Section 44 in the past because the General Assembly has never before drawn congressional

districts more than once per decade. Just the opposite is true. As we discussed earlier in this opinion, the legislature has only redistricted six times when it should have done so thirteen times.

F. Our holding today also rests upon solid policy foundations. The framers intended the House of Representatives to "have an immediate dependence upon, and sympathy with the people." Joseph Story, *Story's Commentaries on the Constitution* § 291 (1833). Unlike the Senate, the House should "emanate directly from" the American people and "guard their interests, support their rights, express their opinions, make known their wants, redress their grievances, and introduce a pervading popular influence throughout all the operations of the government." *Id.* at § 300.

The framers knew that to achieve accountability, there must be stability in representation. During the debates over the frequency of congressional elections, James Madison said: "Instability is one of the great vices of our republics, to be remedied." I 1787: *Drafting the U.S. Constitution* 212 (1986) (notes of Mr. Madison). At the same time, the framers recognized that as the new union evolved, the population of the states would shift and grow and require changes in the distribution of congressional seats. This fundamental tension between stability and equal representation led the framers to require ten years between apportionments. This ten-year interval was short enough to achieve fair representation yet long enough to provide some stability.

Our interpretation of Article V, Section 44 supports these notions of accountability and fairness. Limiting redistricting to once every ten years maximizes stability. If the districts were to change at the whim of the state legislature, members of Congress could frequently find their current constituents voting in a different district in subsequent elections. In that situation, a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents.

VI. Having held that the Colorado Constitution limits redistricting to once per decade, we now turn to the facts of the redistricting case at hand. Here, the Colorado General Assembly failed to create new congressional districts before the 2002 general elections, despite one regular session and two special sessions. In lieu of a legislative plan, the state district court was obligated to set forth its own carefully considered plan. In May of 2003, however, the General Assembly passed a new congressional redistricting plan of its own.

Under our holding today, the General Assembly may only create a redistricting plan after the federal census (and the resulting congressional apportionment to the states) and before the ensuing general election. In this case, that would have been between April 1, 2001, when the U.S. Congress notified Colorado that it would gain an additional representative, and March 11, 2002, when the election process began. As we know, the General Assembly failed to act within this time frame. Congressional districts created by a court are equally effective as those created by the General Assembly and disruption of those districts triggers the same policy concerns. Consequently, the General Assembly's 2003 redistricting plan is not permitted by Article V, Section 44, of the Colorado Constitution because it is the second redistricting plan after the 2000 census. Hence, Senate Bill 03-352 is unconstitutional and void.

**Justice Kourlis** dissenting.

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

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

I fundamentally disagree. Courts do not enact or create laws; courts declare what the law is and what it requires. The only authority that courts have to intervene in this purely political, legislative process is to protect the voting rights of aggrieved claimants. Within that limited framework, courts may enter emergency or remedial orders for the purpose of allowing elections to go forward. Such court orders are interstitial, and cannot then serve to preempt the legislature from reclaiming its authority to redistrict.

The majority also determines that redistricting must occur within the narrow window of time between Congressional approval of a reapportionment and preparation of precinct information for the next general election. According to the majority, if the General Assembly fails to act within that time, it abdicates the responsibility to the courts for a decade. I find nothing in our Constitution that so provides.

I. Article I, Section 4 of the United States Constitution provides that "the times, places and manner of holding elections for senators and representatives shall be prescribed in each state, by the legislature thereof, but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators". Article V, Section 44 implements that responsibility.

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

In *Smiley*, the U.S. Supreme Court did hold that the term legislature in the U. S. Constitution refers to a state's lawmaking process, which is then defined by state law. In *Smiley*, the Minnesota legislature attempted to implement a redistricting bill without gubernatorial approval or overturn of gubernatorial veto. The Supreme Court of Minnesota interpreted Article 1, Section 4, as vesting the power to redistrict solely in the legislative body of Minnesota, without the need for gubernatorial approval. The United States Supreme Court disagreed, concluding instead that the term referred to the lawmaking process applicable in Minnesota.

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

That circuitous process avails the majority little. Colorado law could not be clearer with respect to the meaning of the term "General Assembly." Under the mandate of *Smiley*, however, "General Assembly" cannot just mean that the two houses may independently exercise the redistricting authority. In Colorado, we reached that same conclusion shortly after the *Smiley* decision was announced. See *Armstrong v. Mitten*, 37 P.2d 757, 758 (Colo. 1934) (in which this court approved redistricting by initiative). Together, then, *Armstrong* and *Smiley* dictate that the narrow

reference in Article V, Section 44, to the "General Assembly" must be read more broadly to include the process of initiative on the one hand, and gubernatorial approval on the other.

II. The courts do have the ultimate responsibility of reviewing redistricting plans, just as we may review all other laws, to determine whether they comport with the constitution. Prior to 1964, courts played only an anecdotal role in the process. In 1962, the U.S. Supreme Court issued *Baker v. Carr*, 369 U.S. 186 (1962). The following year, the U.S. Supreme Court announced a decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, for the first time, the Court declared that congressional districts were to be divided as nearly equally as possible by population.

The third case in this trilogy was announced in 1964. In *Reynolds v. Sims*, 377 U.S. 533, 568-69, (1964), the Supreme Court held an Alabama legislative redistricting plan unconstitutional. Reynolds emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Id.* at 586.

Courts act in the first instance only because an existing apportionment of districts is constitutionally deficient. In order to have the capacity to remedy that deficiency, we must be able to issue remedial orders. Yet, neither the federal nor the state constitution supports a conclusion that such emergency relief can supplant the later exercise of legislative authority. Quite simply, the judiciary cannot legislate.

The court order is interstitial -a temporary remedy in place to satisfy the needs of the electoral system until the General Assembly can exercise its rightful legislative function. In other situations, if a court declares a statute unconstitutional, the court would never presume to replace the statute with a constitutional version. That is not our function. In the electoral setting, we act on an emergency basis, to enable the pending election to go forward. However, the fundamental nature of what we do is not altered.

III. The majority also concludes that Section 44's use of the term "when" is an independent basis under Colorado law upon which to delimit the authority to redistrict -whether exercised by the General Assembly or by the court. Thereby, the majority concludes that the brief window of time within which redistricting could occur came and went, with only the court-ordered plan in place, which operated to divest the General Assembly of its authority.

Colorado's Constitution neither assigns a specific function in redistricting to the courts, nor a specific time within which to complete that role. I find no support in Article V for the majority's definition of "when," which restricts not only legislative authority but also court supervisory authority. The Article does contain time frames for action in great detail in some sections, such as those imposed upon the Reapportionment Commission in Section 48. The absence of such time limits in Section 44 is telling.

The plain and ordinary meaning of "when" is that it must follow the condition precedent, which in this instance is the new apportionment by Congress. Although "when" might well be read as imposing a duty upon the legislature to act as soon as possible after the predicate event, it does not in any way imply the imposition of a back-end limitation upon that duty.<sup>85</sup>

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<sup>85</sup> The majority goes even further in concluding that redistricting can only occur once each decade. In my view, we need not reach that question because it is not before us. From my perspective, redistricting by the General Assembly has only taken place once -in Senate Bill 03-352 -and I would not opine further.

IV. In *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002), we affirmed the decision of the Denver District Court declaring the then current congressional districts unconstitutional for failure to satisfy the one-person, one-vote principle. The Denver District Court acted only after the General Assembly failed to act in sufficient time to allow the November, 2002 election to proceed. There is no question but that the court-ordered redistricting governed that election by virtue of the legislative abdication.

In my view, that court order was a temporary, emergency order -to be honored until such time as the legislature acted to create districts that are constitutionally sufficient.

V. Lastly, I suggest that this court should not have accepted original jurisdiction over this case, but should have allowed the Denver District Court action to proceed to completion. On May 9, 2003, two plaintiffs brought an action in Denver District Court challenging its constitutionality. *Keller v. Davidson*. The plaintiffs in that case contend that the General Assembly's 2003 redistricting plan violates: Colorado's GAVEL amendment (Colo. Const. art. V, § 20; Colorado's Sunshine Law (CRS § 24-6-101, et seq.); the Colorado State Senate Rules; plaintiffs' equal protection rights; and the Colorado Constitution art. V, § 22, and art. II, § 10. In short, that case includes, but is not limited to, the constitutional issues raised in this case.

Because of the additional claims, there were numerous issues of disputed fact, and an evidentiary hearing would have been necessary to resolve those disputes. The disputed facts relate to certain claims, such as the claim that SB 03-352 does not comport with the GAVEL amendment, with the Sunshine Law or with the Colorado rules.

In taking this case as an original proceeding, our court has violated two bedrock rules. First, this court does not interfere in the normal process of a case when the issues can be properly resolved below and the rights of all parties preserved. Second, this court does not resolve cases on constitutional grounds when non-constitutional grounds are raised and may be dispositive.

In order to satisfy the electoral time frame of this case, precincts must be established by March 15, 2004, which is 29 days prior to the precinct caucus day in 2004. Thus, at the time the case was filed in district court, there was ample time to conduct an evidentiary hearing, await a trial court ruling, and appeal the *Keller* case. These proceedings could have been completed on an expedited basis well in advance of the March 14, 2004 deadline, and would have resulted in a full resolution of the issues.

Thus, I suggest that this case is a particularly inappropriate one in which to accept jurisdiction on an original basis, and that by proceeding in this fashion, we have inserted ourselves further than necessary into the political process.

VI. While eliminating political considerations from redistricting may or may not be a laudable goal, redistricting is an inherently political activity, and rests with the democratically elected branch of government for good reason. Absent express constitutional authority granting a role to the judiciary -which I suggest is wholly absent from our constitution -the courts should serve only to protect constitutional interests in redistricting: not to commandeer the process.

I am authorized to state that **Justice Coats** joins in this dissent.

**Colorado General Assembly v. Salazar**

541 U.S. 1093 (2004)

The petition for a writ of certiorari is denied.

**Chief Justice Rehnquist**, with whom **Justice Scalia** and **Justice Thomas** join, dissenting from the denial of certiorari.

As a result of the 2000 census, Congress allotted an additional seat in the House of Representatives to Colorado. The Colorado General Assembly failed to pass a congressional redistricting plan in time for the 2002 elections. In response to a suit brought by Colorado voters, a Colorado State District Court drew a congressional district map for the 2002 elections that took account of the new census figures and conformed to federal voting rights requirements. *Beauprez v. Avalos*, 42 P. 3d 642 (Colo. 2002).

At the end of the 2003 regular session, the newly elected General Assembly enacted a redistricting plan. Shortly thereafter, the Colorado Attorney General filed an original action in the Supreme Court of Colorado, seeking an injunction to prevent the Colorado Secretary of State, Donetta Davidson, from implementing the General Assembly's redistricting plan and requesting a writ of mandamus requiring Davidson to return to the 2002 redistricting plan. The General Assembly intervened on the respondents' side to join Davidson.

The Supreme Court of Colorado held that Article V, § 44, of the Colorado Constitution limits redistricting to once per decade, to be completed in the time between the decennial census and the first election of the decade. *People ex rel. Salazar v. Davidson*, 79 P. 3d 1221, 1231 (2003).

The court ordered Davidson to employ the judicially created plan through the 2010 elections. While purporting to decide the issues presented exclusively on state-law grounds, the court made an express and necessary interpretation of the term "Legislature" in the Federal Elections Clause in concluding that "nothing in state or federal law contradicts this limitation." *Id.*, at 1232. The General Assembly and Davidson have asked this Court to review the Colorado Supreme Court's conclusion that Article V, § 44, of the Colorado Constitution does not violate Article I, § 4, cl. 1, of the Federal Constitution. While not disputing state courts' remedial authority to impose temporary redistricting plans so long as the legislature does not fulfill its duty to redistrict, they argue that the *permanent* use of a court-ordered plan, despite the legislature's proposal of a valid alternative, violates the Federal Constitution.

By interpreting "general assembly" in Article V, § 44, of the Colorado Constitution to include the state courts, the Supreme Court of Colorado held that the Colorado Constitution makes the state courts part of the legislative process.

Generally the separation of powers among branches of a State's government raises no federal constitutional questions. But the words "shall be prescribed in each State by the *Legislature* thereof" operate as a limitation on the State. And to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts.

We should grant certiorari to review the Colorado state court's debatable interpretation of this provision of federal law. I dissent from the denial of the petition for writ of certiorari.

## Notes

1. While the *Salazar* case was pending, defendants removed the second suit challenging validity of the 2003 redistricting statute to federal district court. A few days after the Colorado Supreme Court's decision, a member of the General Assembly and three other citizens who *favored* the legislature's 2003 reapportionment filed a separate federal lawsuit that disputed the state court's interpretation of the federal Elections Clause. Both federal cases were heard by a three-judge

federal district court. In the removed case, the court held that because the federal question had been decided by the Colorado Supreme Court, issue preclusion would bar its consideration when the state court case became final.<sup>86</sup> After denial of certiorari in the state case, the federal court dismissed the action.<sup>87</sup> In the separate case, the court held that it lacked jurisdiction over the Elections Clause issue because the lawsuit was an improper attempt to appeal a state decision to a federal court.<sup>88</sup> This ruling was reversed by the U. S. Supreme Court, and the case was remanded for consideration of issue preclusion.<sup>89</sup> The district court dismissed on the merits, and an appeal to the Supreme Court failed.<sup>90</sup>

2. The *Salazar* decision involved two inferences from the constitutional text, that there can be but one reapportionment per census, and that the judicially ordered apportionment of 2002 was that one. Do you agree with one, both, or neither? The five justices comprising the *Salazar* majority were appointed by Democratic governors. Justice Kourlis was also appointed by a Democratic governor but is a prominent Republican. Justice Coats was appointed by Governor Owens, a Republican. Was the *Salazar* case a political decision within the Court?

3. The procedural defects alleged in the trial court case included constitutional requirements for committee review and reading of bills. As noted in prior readings, the original Constitution forbade bills introduced late in a session, but that provision was removed in 1950.

4. Current Section 48, adopted by initiative in 1974, establishes the Colorado Reapportionment Commission and requires it to reapportion the general assembly after each federal census according to a strict timetable. The Commission has eleven members, the speaker and minority leader of the House, the majority and minority leaders of the Senate, three appointed by the Governor, and four by the Chief Justice. No more than six members can be affiliated with the same political party, and there are geographic and other limits on who may be a commissioner.

#### D. Courts; Term Limits

**Art. VI § 1 (1962). Vestment of judicial power.** The judicial power of the state shall be vested in a supreme court, district courts, a probate court in the city and county of Denver, a juvenile court in the city and county of Denver, county courts, and such other courts or judicial officers with jurisdiction inferior to the supreme court, as the general assembly may, from time to time establish; provided, however, that nothing herein contained shall be construed to restrict or diminish the powers of home rule cities and towns granted under article XX, section 6 of this constitution to create municipal and police courts.

#### Notes

1. Article VI of the 1876 Constitution established the Colorado Supreme Court, district courts, and county courts as constitutional courts and district attorneys as constitutional officers. Their status continues under current article VI. The Legislature can create additional courts, and it established the Colorado Court of Appeals by statute in 1969.<sup>91</sup> In general, litigants have a right to

<sup>86</sup> Keller v. Davidson, 299 F. Supp.2d 1171 (Colo. 2004) (3 judge court).

<sup>87</sup> Keller v. Davidson, 378 F.Supp.2d 1289 (D. Colo. 2004).

<sup>88</sup> Lance v. Davidson, 379 F.Supp.2d. 1117 (D. Colo. 2005).

<sup>89</sup> Lance v. Dennis, 546 U.S. 459 (2006).

<sup>90</sup> Lance v. Dennis, 444 F.Supp.2d 1149 (D. Colo. 2006), *vacated in part & aff'd in part sub nom.* Lance v. Coffman, 549 U.S. 437 (2007). The Supreme Court held that plaintiffs lacked standing to bring the Elections Clause claim.

<sup>91</sup> Prior versions of the Court of Appeals operated in 1891-1905 and 1911-15.

appeal to the Court of Appeals, but review by the Supreme Court is in the discretion of that court. As in the U. S. Supreme Court, litigants file petitions for certiorari, which the Supreme Court can deny without precedential effect. Denials of certiorari by the Colorado Supreme Court are customarily not cited, while those by the U. S. Supreme Court are.

2. Original Article VI provided for a Supreme Court of three justices. A 1904 amendment increased the court to seven. A 1962 amendment allows an increase to nine upon request of the court and concurrence of both houses of the Legislature. Art. VI § 5. This has not happened. Except for constitutional cases, the Supreme Court is authorized to sit in panels of three, but in modern times it never does; all decisions are en banc. This may reflect the fact that lack of any constitutional issue in a modern case is increasingly unusual.

3. An 1886 amendment to Art. VI § 3 requires the Supreme Court to give advisory opinions on request of the governor or either house of the Legislature “upon important questions upon solemn occasions.” This provision is invoked fairly often; the captions of these cases usually begin with the phrase, “In re Interrogatories . . . .” For a recent example, see the case cited in footnote 85 of these readings.

4. The Colorado Constitution is silent on the power of judicial review of legislation, the power established for federal courts in *Marbury v. Madison*. However, the Colorado Supreme Court quietly assumed the power in 1880.<sup>92</sup> When its power was challenged in 1892, it summarily rejected the attack.<sup>93</sup> A modern decision held that the Legislature can’t change the court’s interpretation of the Colorado Constitution.<sup>94</sup>

5. As related in the History, Colorado voters in 1912 used the new initiative power to amend the Constitution to restrain the courts. The measure prohibited any court other than the Supreme Court from declaring any state or federal law unconstitutional. And when the Supreme Court did so, citizens could petition to force a popular vote on whether to overturn the decision. In two 1921 decisions, the Colorado Supreme Court held that this provision violated the federal due process clause.<sup>95</sup> The provision was formally removed from the Constitution in 1962.

6. The 1876 Constitution provided for election and reelection of Colorado judges in contested, partisan elections. A citizens’ initiative adopted in 1966 substituted the present system for appointing judges, who later face the electorate in retention elections. A number of states continue to elect their judges, either in partisan or nonpartisan elections. There is continuing debate about the wisdom of various systems of election and appointment.

When a judicial vacancy occurs, nominations to fill it are made by judicial nominating commissions. Members of the commissions are appointed for six-year terms by the governor, the attorney general, and the chief justice; the governor appoints a majority of each commission. The commissions send two or three nominees to the governor, who appoints one of them to the vacancy. New judges face an up-or-down retention election after two years. Thereafter, the terms of office are ten years for supreme court justices, eight for court of appeals judges, six for district court judges, and four for county court judges. When a term expires, the judge can elect to seek another term in another retention election.

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<sup>92</sup> *People v. Rucker*, 5 Colo. 455 (1880) (statute overturned without discussing power of judicial review).

<sup>93</sup> *Greenwood Cemetery Land Co. v. Routt*, 28 P. 1125 (Colo. 1892).

<sup>94</sup> *People ex rel. Juhan v. District Ct.*, 439 P.2d 741, 745 (Colo. 1968).

<sup>95</sup> *People v. Max*, 198 P. 150 (Colo. 1921); *People v. Western Union Tel. Co.*, 198 P. 146 (Colo. 1921).

7 Judges must retire at age 72 and can be removed for “misconduct.” Art. VI § 23. They can be impeached “for high crimes or misdemeanors or malfeasance in office” under Art. XIII. An impeachment bill against a Denver district judge (because he had issued a ruling in favor of a lesbian woman) was filed during the 2004 legislative session (the first since the late 1930s), but it did not come to a floor vote.

**Davidson v. Sandstrom**

83 P.3d 648 (Colo. 2004)

**Justice Rice** delivered the Opinion of the Court.

I. In 1994, the voters of Colorado enacted a constitutional amendment which imposed a two-term limit on any "nonjudicial elected official of any county, city and county, city, town, school district, service authority, or any other political subdivision of the State of Colorado." Colo. Const. art. XVIII, § 11(1). However, the amendment permitted voters of the enumerated entities to "lengthen, shorten or eliminate" term limits for any particular office. *Id.* at § 11(2).

In 2001, the Board of County Commissioners of Pueblo County referred a measure to the voters of the Tenth Judicial District which sought to exempt the district attorney for that district from term limits. The Tenth Judicial District has the same boundaries as Pueblo County. Donetta Davidson, the Colorado Secretary of State, instructed Chris Munoz, the Clerk and Recorder for Pueblo County, to remove the term limit question from the ballot. Munoz did not follow the Secretary's instructions, and the question was submitted to the voters, who chose to eliminate term limits for the District Attorney.

G. F. Sandstrom is the District Attorney for the Tenth Judicial District, and has served in that capacity for over twenty years. The Secretary contends that the Board lacked authority to refer a measure to the voters of the Tenth Judicial District. Hence, the Secretary asserts that the referred measure is void and the results of the vote on the measure may not be recognized by the Secretary.

Sandstrom, Munoz, the Board, and two Pueblo County voters filed a complaint against the Secretary in Pueblo District Court. They sought a declaratory judgment that district attorneys are not subject to the limits of section 11. In the alternative, they sought a judgment that the Board had legal authority to refer the measure to the voters of the Tenth Judicial District and the Secretary must therefore recognize the results of the vote on the measure.

II.A. In 1990, Colorado voters imposed term limits on the governor, lieutenant governor, secretary of state, attorney general, and state treasurer, Colo. Const. art. IV, § 1(2), and all state representatives and state senators. Colo. Const. art. V, § 3(2). In 1994, voters extended term limits to many other officials:

No nonjudicial elected official of any county, city and county, city, town, school district, service authority, or any other political subdivision of the State of Colorado, no member of the state board of education, and no elected member of the governing board of a state institution of higher education shall serve more than two consecutive terms in office.

Colo. Const. art. XVIII, § 11(1).

More recently, the General Assembly referred an amendment to the voters of Colorado for the November 2002 ballot which would have exempted all district attorneys from term limits. In 2002, the voters rejected this measure by a wide margin.

B. Section 11 applies to terms of office beginning on or after January 1, 1995. Respondent Sandstrom has been the District Attorney for the Tenth Judicial District for over twenty years and thus has served two consecutive terms since January 1, 1995. Consequently, if section 11 covers the terms of office of district attorneys, Sandstrom would be ineligible to run for reelection in 2004.

In September 2001, the Secretary notified Munoz that only the General Assembly possessed the authority to refer a measure to the voters regarding term limits of district attorneys. On November 6, 2001, the election was held. Munoz did not follow the Secretary's instructions, and instead counted the votes. The voters approved the measure to exempt their district attorney from term limits, and Munoz certified these results.

On August 16, 2002, Sandstrom, Munoz, Matt Puelen, Loretta Kennedy, John Klomp, Anthony Nunez, and Ray Koester filed a complaint against the Secretary, seeking a declaratory judgment that district attorneys are not subject to the term limits contained in section 11, or in the alternative, that the Board validly referred the term limits measure to the voters of the Tenth Judicial District. Puelen, Kennedy, and Klomp are members of the Board and sued in their official capacity, while Nunez and Koester sued in their capacity as individual electors. Nunez is the chair of the Democratic Party of Pueblo County and Koester is the chair of the Republican Party of Pueblo County.

III. District attorneys are elected to serve within a judicial district by the voters of that judicial district. Colo. Const. art. VI, § 13. Thus, in order to determine if district attorneys are subject to the term limits of section 11, we must decide two questions: whether a district attorney is a "non-judicial elected official" and whether judicial districts belong to any of the categories of government entities enumerated in section 11. We find that district attorneys are "nonjudicial elected officials" and that judicial districts are a political subdivision of the state. We therefore hold that district attorneys are subject to the term limits of section 11.

A. Only judges are judicial officers. Furthermore, we have consistently held that district attorneys are neither a "judicial officer" nor a member of the judiciary. Because a district attorney is not a judicial officer, but is undoubtedly an elected official, the plain meaning of "nonjudicial elected official" encompasses district attorneys.

B. Having concluded that a district attorney is a "nonjudicial elected official," we must also determine whether judicial districts are political subdivisions of the state. Each judicial district represents a finite geographical area, and exists to provide judicial services to residents of that district or those who have transacted business in that district. Although district attorneys are state officers charged with prosecuting violations of state law, they are elected solely by the voters of their judicial district. Thus, they exhibit a fundamental characteristic of a political subdivision--political control by some community other than the state as a whole. We therefore hold that the plain meaning of "any other political subdivision" in section 11 encompasses judicial districts.

IV. Section 11(2) allows for the voters of any political subdivision to "lengthen, shorten or eliminate the limitation on terms of office imposed by this Section 11." Thus, the voters of the Tenth Judicial District unquestionably had the power to eliminate term limits for the office of district attorney. However, section 11 is silent as to how the voters of a political subdivision may exercise this power. Thus, the question before us is whether section 11 is self-executing, requiring no further action by the legislature to implement its provisions. If it is self-executing, we must also answer how section 11(2) is to be implemented with respect to district attorneys. In other words, we must decide whether the Board had the authority to refer a measure on term limits to the vot-

ers of the Tenth Judicial District. Determination of this issue is further complicated by the fact that most judicial districts are not comprised of a single county. Thus, if the Board had the authority to refer such a measure, we must also determine the mechanism by which multi-county judicial districts may vote on similar measures.<sup>96</sup> We hold that section 11 is entirely self-executing, and that the Board had the implied authority to refer a term limits measure to the voters of the Tenth Judicial District. For a term limits measure in a multi-county judicial district, the board of county commissioners for each county comprising the judicial district must refer a measure to their voters.

Section 11(2) does not call for any further action by the legislature. Indeed, nothing in the language of the amendment or in the history of term limits in general in Colorado indicates an intent on the part of the voters to require further action by the legislature for implementation of section 11(2). We therefore hold that the powers granted under section 11(2) are intended to be self-executing.

However, our inquiry does not end here. Section 11(2) expresses no mechanism by which it may be implemented. We must therefore determine precisely how section 11(2) executes itself with respect to district attorneys. Only if implementation is impossible will we find that it is not self-executing. We hold that implementation of 11(2) is not impossible, and that in the absence of more explicit statutory procedures, the voters of Colorado impliedly authorized the boards of county commissioners to refer term limits measures regarding district attorneys to the voters of their respective judicial districts.<sup>97</sup>

The judgment of the district court is affirmed.

**Justice Hobbs** concurring in the judgment

I concur in the court's judgment, but for different reasons. In my view, Colorado's constitution does not term limit any district attorney from seeking re-election. My analysis proceeds from the text of Article XVIII, section 11(1) and the organization of the Colorado Constitution.

The text of the amendment limits the terms of non-judicial elected officials of local governments and certain other designated officials. In my view, the term "nonjudicial official" refers to officers of the executive and legislative branches of Colorado local governments. Article VI, section 13 of the Colorado Constitution places district attorneys in the judicial branch of state government.

The amendment does not itself define "political subdivision," and the majority does not cite to any constitutional or statutory provision, or any decision of our court, that classifies a judicial district as a political subdivision. Typically, a political subdivision is an entity of local government that has a governing body, depends on local tax revenue for its funding, and can incur debt. Article XVIII, section 11 follows this very pattern by enumerating examples of what it means by a "political subdivision," namely a "county, city and county, city, town, school district, service authority." By accepted principles of interpretation, the meaning of an undefined general term

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<sup>96</sup> Each judicial district is "bounded by county lines." Colo. Const. Art. VI, § 10(1). Thus, every judicial district is made up of one or more counties, and no county spans more than one judicial district.

<sup>97</sup> We note that the legislature may replace the procedure that we sanction today with one of its own choosing, so long as the procedure it installs further facilitates, rather than hinders or limits, the people's exercising of their rights under section 11(2).

being used in a particular context is limited according to the nature of the specific examples to which it applies itself.

Judicial districts are sui generis in the design of the separation of powers. In contrast to political subdivisions, judicial districts have no local governing body to which their officers --judges and district attorneys --are responsible; judicial district funds that pay salaries are predominately state funds appropriated by the General Assembly; and judicial districts may not incur debt. They exist by reason of Article VI, section 10 to deliver the services of the third branch of government--the administration of justice--to the citizens of Colorado. As part of this basic design, judges hear criminal cases; district attorneys serve an executive function within the judicial branch by bringing those cases to the courts.

By operation of the constitution and implementing legislation, the services of the judicial branch of state government therefore include those provided by both judges and district attorneys. Article VI, section 13 requires that district attorneys possess all of the qualifications of district judges prescribed by the Colorado Constitution. As officers of the court they are subject to the supervision and regulation of the supreme body of the judicial branch. Both judges and district attorneys are provided salaries, retirement, and insurance by the state.

Although the District Attorney has executive functions, the District Attorney is an officer of the judicial branch. District judges and district attorneys are both state officers, elected by the registered voters within the boundaries of judicial districts.

Construing the above-cited constitutional provisions and laws together, I conclude that district attorneys are not term limited by any present provision of the Colorado Constitution, and they may hold office for as many consecutive four year terms under Article VI, section 13 as the voters of the judicial district may elect them to.

I am authorized to say that **Justice Coats** joins in this concurrence.

## **Note**

There is no strong backing to restore an elected judiciary for Colorado. Only the very small American Constitution Party supports that change. See Troy A. Eid, *Judicial Independence and Accountability: The Case Against Electing Judges*, 30 Colo. Lawyer 71 (2002). However, during the 2004 legislative session, a proposed constitutional amendment was introduced that would have reduced the terms of all judges to four years and limited appellate judges to three terms. S. Conc. Res. 04-007. It failed to pass, but in 2006, its sponsors proposed a measure by citizens' initiative that would have limited terms only of appellate judges. It qualified for the ballot, but voters rejected it. Another such measure is proposed this year; we'll consider it later.

## **E. General Purpose Local Governments**

### **1. Counties**

Colorado's local governments are typical of those in other states. Colorado Territory had counties, cities, towns, and school districts, and these were carried forward as entities of the state.<sup>98</sup> We have since added combined city and county governments, home rule entities, and other special districts.

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<sup>98</sup> The Territory also had governmental townships, as in some other states, but these were not continued as state subdivisions. See *County Court Garfield County v. Schwarz*, 22 P. 783 (Colo. 1889). Township in Colorado law today refers only to the land surveying term.

Article XIV of the 1876 Constitution was titled Counties, and it also provided for incorporation of cities and towns. The present article is the same for both; changes and additions appear elsewhere in the Constitution.

An 1861 act of the territorial legislature divided Colorado into 17 counties. By statehood these had become 26, and art. XIV § 1 declared these to be counties of the state. By 1913, the Legislature had divided them into the current 63. Constitutional amendments established two combined city and county governments outside county boundaries, Denver in 1902 and Broomfield in 2001. See art. XX. In 1970, voters adopted art. XIV § 16, allowing counties to adopt home rule charters. To date, only Pitkin and Weld Counties have done so. Home rule counties are so new that there are few reported applications of sec. 16. It is assumed that the law relating to home rule cities will be applied by analogy.

Most county officers are constitutional. County commissioners are the governing body. Art. XIV § 6. Every county must have at least three. Counties with populations of 70,000 or more may elect, by popular vote, to have five. Only El Paso, Arapahoe, Weld and Pitkin Counties have five at this time. Commissioners have both executive and legislative powers and duties; there is no separation of powers by assigning these functions to different persons, as is axiomatic in state and federal governments. Courts have labeled some commissioners' duties as "quasi-judicial," although most judicial authority at the county level is exercised by district and county courts.

Other constitutional officers are county clerk and recorder, sheriff, coroner, treasurer, surveyor, assessor, and county attorney. Art. XIV § 8. The Legislature can provide for additional officers. The most important it has created is the Public Trustee, who administers our trust deed (mortgage) system.

The Legislature has full authority to create new counties by dividing existing ones.<sup>99</sup> As stated above, it often did so until 1913. However, shifting territory from one county to another is forbidden without a consenting vote of the losing county. Art. XIV § 3. In 1902, Denver was exempted from this rule by its home rule amendment, Art. XX § 1. But a 1974 constitutional amendment subjected Denver to the consent rule. Thus adding DIA to Denver required the consent of Adams County voters in a referendum.

When a new county is created, the Legislature can also specify its county seat. Moving a county seat is a different matter altogether. Contests about relocating county seats were all too common in Colorado Territory, so the Constitution prohibited the Legislature from moving them and made changing them by local vote difficult. Art. XIV § 2. But contests continued, the most notable causing the bloody clash on the 4<sup>th</sup> of July, 1883, in Grand County. In a shootout in Grand Lake, four were killed including all three commissioners.<sup>100</sup> No county seat has moved since 1941.

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<sup>99</sup> Frost v. Pfeiffer, 58 P. 147 (Colo. 1899). The boundaries of existing counties are defined by statute. CRS tit.30 art. 5.

<sup>100</sup> See People ex rel. Dean v. Commissioners of Grand County, 2 P. 912 (Colo. 1883). Present county seats are designated in CRS § 30-7-101. The removal procedure is in CRS tit. 30 art. 8.

**Robbins v. County Comm'rs of Boulder County**

115 P. 526 (Colo. 1911)

**Chief Justice Campbell** delivered the opinion of the court.

In the last will of Andrew J. Macky, of Boulder County, is this item:

7th. I further give and bequeath to and for a hospital building and a home to be built in Boulder, County of Boulder, and State of Colorado, for the comfort of poor widows and orphan children, while sick and unable to care for themselves, the sum of Fifty Thousand (\$50,000) Dollars. Providing the City of Boulder, by its officers, or the County Commissioners and their successors in office, will support and maintain the same, otherwise the said \$50,000 to revert back and the same to be divided up among the following legatees, to-wit, [names omitted].

The individual plaintiffs below, members of the Board of County Commissioners of Boulder County, brought this action and in their complaint alleged the execution and probating of Mr. Macky's will and that the Board of County Commissioners had complied with the condition of the foregoing bequest by accepting the same for the purposes and upon the conditions therein named, and, as stated in their prayer for relief, they asked to be appointed trustees of the legacy of \$50,000 for the purposes set forth in the bequest..

The trial judge appointed plaintiffs as trustees to take the legal title to the fund and carry into effect the testator's supposed intention.

The court are of opinion that this bequest is invalid, because its vesting is made to depend upon an impossible, legally unenforceable condition. The proviso or condition is that "the county commissioners and their successors in office, will support and maintain the same". This language plainly indicates that it was Mr. Macky's intention that the condition which he prescribed is to be first complied with before his gift vested. The question then recurs, Has the condition been performed, or, in the present state of our laws, can it be legally met? County commissioners are constitutional officers. The board possesses only such powers as are by the constitution and statutes expressly conferred upon it, and, in addition, such implied powers as are reasonably necessary to the proper execution of its express powers. Various specific or particular powers are to be found throughout our statutes, but the general powers of the board are enumerated in sec. 1204, Revised Statutes 1908. Neither therein, nor elsewhere, so far as we are advised, is given to the board expressly the power to enter into such a binding engagement as this gift requires. It is only, if at all, that the board in office at the time of the testator's death had the power, and exercised it, to bind their successors and the county forever to support this hospital, that its so-called acceptance of the bequest obligated the county forever to maintain it. In the resolution of the board, which is said by plaintiffs to constitute a perpetual obligation of the county to support and maintain the hospital, the language is that the board, in behalf of the county, "accept said bequest for the purposes and upon the conditions in said will specified."

Unquestionably the testator did not intend that his bequest should take effect upon an agreement for maintenance that bound only the board as it existed at the time of his death, for, in effect, he says that not merely the then present board of commissioners, but their successors as well, should maintain the hospital. There is no statute of this state that confers upon a board of county commissioners any such power, either expressly or by reasonable implication. Under our laws a board can expend money, except in designated emergencies, only when it has been previously

appropriated for the given purpose. Each year the board must make its various appropriations of money for the necessary public purposes and levy the necessary taxes to meet them. Within the statutory or constitutional limits each board must for itself determine the tax levy and the amount of such appropriations, and it is beyond the power of any board, in any one year, to determine for its successor, in any subsequent year, how it shall perform such duties, or prescribe or limit its action in the exercise of governmental functions. All of which is equivalent to saying that, under our existing laws, it is legally impossible for a board of commissioners to bind the county forever to maintain and support the hospital which Mr. Macky was desirous of building, and, for that reason, his bequest is void as depending upon an impossible condition.

*Reversed and remanded.*

### **Note**

*Robbins* represents the standard American rule that, absent a constitutional home rule provision, local governments have only the powers clearly delegated to them by state statute. The rule applies to municipalities as well as to counties. It is often called Dillon's Rule because of its articulation in an 1868 treatise by Judge John F. Dillon. It is sometimes said to have three parts: the powers of local governments are limited to those expressly granted, necessarily or fairly implied, or absolutely indispensable. Accordingly, most legal disputes about the powers of counties and municipalities that are not home rule entities turn on interpretation of controlling state statutes, applying the tenets of the rule.<sup>101</sup>

### **Cimarron Corp. v. Board of County Comm'rs of the County of El Paso** 563 P.2d 946 (Colo.1977)

**Mr. Justice Lee** delivered the opinion of the Court

Appellants challenge the constitutional validity of section 30-28-133(4)(a), C.R.S. 1973, and the regulations adopted pursuant to that statute by appellee Board of County Commissioners of El Paso County. The El Paso County District Court generally upheld the statute and regulations. We affirm the district court judgment upholding the statute, but reverse as to certain of the regulations.

Appellants Cimarron Corporation and Homebuilders Association of Metropolitan Colorado Springs filed this action in district court against appellees Board of County Commissioners, El Paso County Park and Recreation District Board, and several school districts. The complaint sought a declaratory judgment that section 30-28-133(4)(a) C.R.S, and portions of the County Subdivision Regulations were invalid.

Section 30-28-133(4)(a) empowers the board of county commissioners to adopt subdivision regulations providing for the acquisition of school and park sites to serve proposed subdivisions. Accordingly, the El Paso county commissioners adopted regulations. The parties stipulated that these regulations had been applied to every subdivision and that the county commissioners had required dedication of land, payment of money, or both from every subdivision.

The district court held the statute and regulations constitutional. Appellants assail the constitutionality of section 30-28-133(4)(a) on the grounds that it is an invalid exercise of the police power and that it delegates legislative power to the county commissioners. Appellants attack the

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<sup>101</sup> Colorado statutes defining general powers of counties are found in CRS tit. 30 arts. 11 & 15. Particular powers are found in many other statutes scattered through CRS.

subdivision regulations as inconsistent with the statute, an invalid exercise of the police power, and violative of due process of law.

I. Appellants argue that the statute fails to satisfy the test for a valid exercise of the police power, that land or money obtained by exercise of the police power must be used for the benefit of the affected subdivision and its residents, not for the benefit of the general public.

The principle espoused by appellants finds support in other jurisdictions. [citations omitted] However, we need not decide whether the police power is so limited, as appellants urge. Whether constitutionally mandated or not, section 30-28-133(4)(a) authorizes the acquisition of school and park sites only "when such are reasonably necessary to serve *the proposed subdivision and the future residents thereof*" (emphasis added). Thus, the statute already contains the limitation which appellants advocate, and appellants' argument is misconceived.

II. Next, appellants argue that section 30-28-133(4)(a), in authorizing regulations for the acquisition of school and park sites "when such are reasonably necessary," is so vague as to be a delegation of legislative power to the board of county commissioners in violation of Colo. Const. art. V, Sec. 1.

As noted in *Fry Roofing v. Dept. of Health*, 499 P.2d 1176, the modern trend favors broad grants of discretion by the legislature, because the legislature cannot be absolutely precise in all areas it seeks to regulate. Thus, we upheld a broad standard of "reasonableness" in that case, while recognizing that such a standard cannot be precisely defined. *Accord, Asphalt Paving v. County Com.*, 425 P.2d 289 ("reasonable" standard upheld). For the same reason, the standard in the statute challenged here -- "when such are reasonably necessary" -- satisfies constitutional requirements in this regard.

III. We next turn to the regulations challenged by appellants as beyond the county's authority. The regulations contemplate that a petitioner for approval of a subdivision plat may be required to dedicate land, pay a fee in lieu of such dedication, or both. Section 30-28-133(4)(a)(II), however, authorizes "[d]edication of such sites and land areas . . . or, *in lieu thereof*, payment of a sum of money" (emphasis added). Appellants maintain that the statute does not permit counties to require a combination of land and money. We agree.

Appellants complain that the regulations are invalid because they contain no standards or guidelines controlling the county commissioners' discretion in requiring dedication of land or payment of money. As we observed in part I, park and school sites may be reserved or dedicated and funds may be required only "when such are *reasonably necessary* to serve the proposed subdivision and the future residents thereof." Here, as in part II, we uphold this standard as an adequate limitation on the county commissioners' powers.

## Notes

1. *Cimarron* is a typical attack on county powers. Challengers are often land developers. Many succeed on statutory claims, but few constitutional challenges prevail.
2. The claim of unconstitutional or unlawful delegation can be made regarding delegation by a legislature to another branch at the same level of government or, as in the primary issue in *Cimarron*, to a lower level of government. In Con Law, you may have read *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), in which the Court articulated the lenient federal standards for delegations by Congress to a federal executive agency. For a Colorado case reject-

ing a claim of excessive delegation from the Legislature to a statewide agency, see *Colorado Auto. & Truck Wreckers Ass'n v. Department of Revenue*, 618 P.2d 646 (Colo.1980).

In theory, the two kinds of delegation do not raise the same concerns. Delegation to an executive agency raises issues of democratic accountability. Delegation to a lower level of government is usually regulated by electoral accountability of the lower government. Thus when Congress delegates authority to states, the states' legislatures provide a democratic check on arbitrary power. The same is true when a legislature delegates to a county, as in *Cimarron*. However, courts generally take no explicit notice of this distinction. On the other hand, claims of unlawful delegation to counties and municipalities as in *Cimarron* are rarely successful. See *Cottrell v. City and County of Denver*, 636 P.2d 703, 708 (Colo.1981) ("the nondelegation doctrine has been an argument frequently invoked but seldom sustained"). Modern cases tend to focus on procedural adequacy, a due process question.

3. Colorado courts are reviewing a conflict between mining companies and county regulations. In 2004 Summit County amended its land use and development regulations to impose strict regulations on mining. These were challenged by mining companies, and in *Colorado Mining Ass'n v. Board of County Commissioners of Summit County*, 170 P.3d 749 (Colo. App. 2007), the court held that some of the regulations were preempted by the Colorado Mined Land Reclamation Act, CRS tit. 34 art. 32. The Supreme Court granted the companies' petition for certiorari. 2007 Colo. LEXIS 1068. As in the cases above, the case depends entirely on interpretation of the state statute.

## 2. Cities and Towns

**Differences.** As stated in the last assignment, Colorado has counties, cities, towns, and combined city-county governments. The most important differences between counties and cities arise from their method of creation. Counties originated as divisions of the state for administrative purposes. They are top-down in creation. Colorado Territory divided itself into counties, and the Constitution defined the counties of the state and allowed the Legislature to divide them to create new ones. Division into counties takes little account of population concentration. Cities (and towns) usually originate when residents of a locale band together to propose a municipal corporation and seek a state charter, a bottom-up, ad hoc process. Population density is typically a fact that inspires creation of a city or town.

Counties perform some functions in all the territory within their boundaries, within or without cities and towns, mostly functions that the state requires. These include recording of deeds; conduct of federal, state and county elections; tax assessments of property; collection and disbursement of taxes and fees; and the activities of surveyors and coroners. County courts serve entire counties for most matters. Sheriffs have county-wide duties, particularly those related to courts and jails. The Public Trustee manages the trust deed (mortgage) system for the entire county.

Cities and towns have few duties dictated by the state. They assume internal powers that the state permits or that their home rule charters provide. Counties are the local government for unincorporated areas outside the boundaries of any city or town. Sheriffs are the local police. County officials issue building permits and can pass zoning laws. Cities maintain roads and streets within, counties without, except for state and interstate highways, which are directly under the state Department of Transportation.

**Municipalities.** Colorado has 270 active municipalities (not including counties). Of these, 95 operate under home rule charters governed by Art. XX. The other 175 are governed by statute and are often called statutory cities and towns. By statute, municipalities with populations over 2000 are cities; those with 2000 or fewer are towns.<sup>102</sup> However, these classifications are not accurate for home rule municipalities. (For example, Castle Rock, population 31,000, continues to call itself a town.) There is no other legal classification, such as village, though nothing prevents a city or town from styling itself in some other term. For example, Greenwood Village and Cherry Hills Village in Arapahoe County are cities. About 65% of the state's population lives in home rule municipalities.

Statutory municipalities are subject to Dillon's Rule and the other legal doctrines studied in the last class. Any of the cases in that assignment could have involved statutory cities or towns and had the same reasoning and outcome. There is a verbal difference. The Supreme Court often recites the idea that counties are administrative departments (or even "mere" administrative departments) of the state to perform state functions, while the Court never says that for cities or towns. But it is hard to find situations where that characterization makes any difference.

### **Incorporation of Cities and Towns**

**Colorado Revised Statutes** [quoted sections are edited and are not complete]

**31-2-101. Petition to district court.** (1) Whenever the inhabitants of any territory not embraced within the limits of any existing municipality desire to be organized into a city or town, they shall file a petition for incorporation with the district court. The petition shall be signed by not less than one hundred fifty of the registered electors who are landowners and residents within the territory or, in cases where the territory involved is wholly situate in a county having a population of twenty-five thousand or less, signed by forty such registered electors who are landowners and residents and shall:

(a) Describe the territory proposed to be embraced in such city or town, which description shall determine the boundaries thereof;

(b) Have attached thereto an accurate map or plat thereof;

(c) State the name proposed for such city or town;

(d) Be accompanied with satisfactory proofs of the number of inhabitants within the territory embraced within the limits of the proposed city or town. At the time of the filing of said petition, the petitioners shall file a bond, in an amount to be determined and approved by the court, to cover the expenses connected with the proceedings in case the incorporation is not effected. In no case shall there be incorporated in such city or town any undivided tract of land consisting of forty or more acres lying within the proposed limits of such city or town without the consent of the owners thereof.

(2) No such petition shall be filed where any portion of the boundaries of the proposed city or town is within one mile from the boundaries of any existing municipality, unless the terri-

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<sup>102</sup> CRS § 31-1-101(2), (13). Home rule municipalities include the City-County governments of Denver and Broomfield.. Statutory municipalities include 161 statutory towns, 13 statutory cities, and Georgetown, which uniquely operates under its 1868 charter issued by Colorado Territory. *Colorado Cities and Towns: Facts*, [http://www.cml.org/pdf\\_files/FACTStowns.pdf](http://www.cml.org/pdf_files/FACTStowns.pdf), last visited 7/21/08. See Also *Active Colorado Municipalities as of July 20, 2008*, Colorado Department of Local Affairs, <http://www.dola.state.co.us/LGS/localgovtinfo/municipalities.htm>, last visited 7/21/08.

tory proposed to be included within such city or town is composed of three hundred twenty acres or more.

(3) (a) No incorporation election shall be held unless the court finds that the proposed area of incorporation is urban in character and unless the court additionally finds that the proposed area of incorporation has an average of at least fifty registered electors residing within the boundaries of the proposed area of incorporation for each square mile of area.

(b) (I) If the proposed area of incorporation has fewer than five hundred registered electors residing therein, a public hearing shall be held before the board of county commissioners to consider whether the petitioners may hold an incorporation election.

(II) After public hearing, the board of county commissioners may refuse to permit the incorporation election to be held if the board finds upon satisfactory evidence that:

[criteria omitted]

**31-2-102. Incorporation election.** (1) If the district court finds and determines that the territory described in the petition and the petition itself meet the requirements of this part 1, it shall appoint not less than five nor more than nine commissioners, who shall be registered electors residing within the territory described in the petition. Such commissioners, within ten days following their acceptance, shall call an election of all the registered electors residing within the territory embraced within said territory, such election to be held not later than ninety days after the date of the call thereof, except as provided in this section.

**31-2-106. Legal incorporation – validation.** (1) Any city or town which is formed, organized, or incorporated and which exercises the rights and powers of a city or town and has in office a governing body exercising its duties is deemed legally incorporated. The legality of such formation or organization shall not be legally denied or questioned after six months from the date thereof; it is deemed a legally incorporated city or town; and its formation, organization, or incorporation shall not thereafter be questioned.

## Note

The incorporation statute has produced little reported litigation. The only reported invalidation was in *Norton v. People ex rel. Rudbeck*, 81 P.2d 393 (Colo. 1938). The courts overturned an attempt to create a new town named Garden City near Greeley based on proof that most petition signatories were unqualified (“that no one of said signers, except Ida F. Ray, was at the time of signing and presenting said petition a bona fide owner, resident and qualified elector of said territory”).

## Annexation, Consolidation, Disconnection

Annexation, consolidation, and disconnection are governed by a detailed statute first passed in 1965, now codified as amended at CRS tit. 31 art. 12. Some of its features are described in the following decisions.

### **Adams v. City of Colorado Springs**

308 F. Supp. 1397 (D. Colo. 1970)

**William E. Doyle, District Judge.** This action is brought by a group of 277 registered voters and property owners living in an area commonly known as Cragmor, an unincorporated community adjacent to the city of Colorado Springs, to enjoin a proposed annexation of Cragmor to

Colorado Springs. Plaintiffs seek to have the Colorado Annexation Act of 1965 declared unconstitutional.

In 1965, the Colorado legislature enacted a comprehensive annexation law, C.R.S. 1963, 139-21-1, et seq.. This statute establishes two different procedures for effectuating an annexation of unincorporated area by an adjacent municipality. Under the first of these, which may be used only when the area to be annexed has at least one-sixth and not to exceed two-thirds of its perimeter contiguous with the municipality, annexation may be initiated in one of two ways: (1) by a petition signed by a specified number of qualified electors in the territory to be annexed requesting that an annexation election be held in the said area; or (2) by a petition signed by the landowners of more than fifty percent of the territory to be annexed. If the annexation is initiated by a landowners' petition, persons who are qualified electors in the area to be annexed may cause an election to be held by submitting a proper petition.

Under the second procedure, which is limited to a situation in which the area to be annexed has over two-thirds contiguity with the municipality, annexation is initiated by a petition of landowners of more than fifty percent of the territory to be annexed or by resolution of the city council of the annexing municipality. In this situation no election is permitted and no right to vote is provided. If the landowners of more than fifty percent of the territory to be annexed petition for annexation, the city *must* annex the area. The city, after notice and hearing, may adopt a resolution unilaterally annexing the contiguous area without any participation by those living in such an area.

IV. The crucial issue on the merits revolves around the equal protection clause; the claim of plaintiffs that unlawful discrimination exists; that there is no rational basis for the legislature's distinction between territory with less than two-thirds contiguity with the annexing city and territory with more than two-thirds contiguity for the purpose of requiring the consent by vote of the inhabitants to the annexation.

Plaintiffs seek to equate their position with that of the plaintiffs in voting rights cases. They thus say that one group is given the right to vote while the other group is subjected, so to speak, to government without the consent of the governed, and that on its face this compels the state to come forward with justification for the attempted distinction.

On its face this argument appears to have merit in that the right to vote poses a sensitive constitutional issue. However, on a closer look, it does not appear that the plaintiffs' rights are of the kind that have been upheld by the Supreme Court. In most instances one group had votes with disproportionate weight as opposed to a group which was partially or wholly disenfranchised, or there has been a purposeful juggling of boundaries for the purpose of excluding a particular group. In the case at bar none of the described conditions are present. Hence, the only question which qualifies for consideration is whether the Assembly's classification is palpably irrational.

We must also recognize that there is no absolute constitutional right under the due process clause of the Fourteenth Amendment to vote on a proposed annexation. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). The state legislature has the ultimate control of the method of annexing by its agency cities. This allows the legislature to grant the right to vote in some types of annexation and to deny it in others, provided that there is some rational basis for the distinction.

We are unable to hold that the distinction recognized by the Assembly as to when the franchise may be exercised is unreasonable. Thus, where the area to be annexed has less than two-thirds

contiguity with the annexing city, the interrelationship between the annexed area and the city may not be great enough to warrant a politically undesirable unilateral merger. Where, however, the territory to be annexed has over two-thirds contiguity with the annexing city, the interrelationship between the two areas is or can be so close that the city should be allowed to annex despite the unwillingness of the residents of the annexed territory. The law thus recognizes that a municipality such as Colorado Springs is severely handicapped by an annexation law which requires the approval of the property owners and qualified electors of an annexed area. It is unable to deal with groups of citizens who form small tax colonies on the borders of the core city which is the economic base of the urban area and to which the colonies owe their very existence and yet pay nothing for the advantages which the city provides. These people would seldom consent to the annexation and their non-consent would threaten the very existence of the core city.

It cannot be said then that the classification is unreasonable. Greater or lesser contiguity with a municipality is about the only reasonable test for the legislature to provide for unilateral annexation. We therefore must conclude that the Colorado Annexation Act does not deprive plaintiffs of the equal protection of the laws.

### **Slack v. City of Colorado Springs**

655 P.2d 376 (Colo.1982)

**Justice Lee** delivered the opinion of the Court.

This is an appeal from the ruling of the District Court of El Paso County which declared void an attempt by the City Council of Colorado Springs to annex land in the southwest area, commonly known as the Broadmoor, Skyway, Stratton Meadows, Ivywild, and Cheyenne Canyon areas of El Paso County. This case involves similar parties and interests as were represented in the case of *Cesario v. City of Colorado Springs*, 616 P.2d 113 (Colo. 1980). In that case we affirmed the trial court's ruling that a prior attempt at annexation was invalid based upon statutory and procedural grounds.

Soon after *Cesario* was announced, the City Council of Colorado Springs enacted a resolution expressing the intent to once again annex the southwest area. On September 24, 1980, landowners in the area, Slack, et al., appellees, filed petitions with the city clerk requesting an annexation election to determine whether the southwest area should be annexed.

The city council referred the petitions to the clerk for a determination whether they were in substantial compliance with the Municipal Annexation Act of 1965, section 31-12-101, *et seq.* Later that day the city council published notice of its proposed unilateral annexation of the southwest area. On October 6, 1980, Slack filed a complaint and a motion for a preliminary injunction in the district court, contending that the city could not proceed with its proposed annexation because of the filing of the Petitions for Annexation Election. On October 14, the city rejected the Petitions for Annexation Election because they improperly proposed to split city-owned land without the city's permission. Slack filed amended petitions on October 20 in an attempt to correct the deficiencies. On October 21, 1980, the district court denied Slack's request for a preliminary injunction.

The city council held a public hearing on October 27, 1980, to discuss the proposed southwest area annexation. Slack appeared and opposed the annexation. The city council rejected the amended Petitions for Annexation Election because they had been filed after the city had commenced unilateral annexation proceedings, and because all of the area described in the election

petitions was included in the city's proposed annexation. The city council then adopted the annexation ordinance as an emergency ordinance.

Statewide elections were held on November 4, 1980, and Amendment No. 3 to the Constitution of the State of Colorado was approved by the electorate.<sup>103</sup> That amendment allows those living within an area proposed to be annexed to vote on whether the land will be annexed.

Slack challenged the city's actions in the district court and the court ruled that the unilateral annexation proceedings had priority over the petitions for the annexation election. However, the court held that it was improper for the council to use its emergency powers to accomplish unilateral annexation when the constitutional amendment which would have prohibited such action was to be voted on only a few days later. Therefore, the annexation attempt failed. We reverse.

I. The appellees (Slack) argue that the emergency declarations of the ordinance exceeded the city council's legislative power since the ordinance did not define a "genuine emergency." They argue that the threat of an affirmative vote on Amendment No. 3 did not constitute a genuine emergency, and governmental action taken to emasculate the sovereign power of the people must be condemned. We are not persuaded by these arguments.

This court has often held that a legislative declaration of purpose for enacting emergency legislation is conclusive and will not be reviewed in the courts [citations omitted]. Only upon a showing of bad faith or fraud are legislative judgments reviewable. The trial court made no finding of fraud or bad faith.

There was substantial evidence presented at the hearing before the city council on October 27, 1980, that an emergency existed and that the city should act quickly. The emergency clause included an elaborate, detailed explanation of why, in the judgment of the city council, immediate action should be taken. We hold that the fact that the ordinance was enacted as an emergency measure on October 27, 1980, does not invalidate it.<sup>104</sup>

Slack argues that Amendment No. 3, approved in a statewide election on November 4, 1980, precluded the unilateral annexation. We do not agree. Since the constitutional amendment had not been voted on at the time of the October 27 adoption of the ordinance, the annexation did not violate the provision of Amendment No. 3, which was not retroactive in its effect. Amendment No. 3 did not become effective until the Governor's proclamation announcing the completion of the canvassing was made in December of 1980.

II. The appellee Slack argues that once the city council received the Petitions for Annexation Election, it was prohibited from either commencing or prosecuting the unilateral annexation proceeding. Slack also argues that even if the petitions submitted were not in substantial compliance with the Annexation Act, substantial compliance with the Act is not required and all other proceedings for annexation should cease once petitions are filed.

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<sup>103</sup> That amendment may be found at article II, section 30 [see text after the case].

<sup>104</sup> We are not unaware that the city by its action avoided a vote on the annexation and our cases have stressed the importance of the people's right of referendum. However, that right is not unlimited, and our constitution provides that those laws which are "necessary for the immediate preservation of the public peace, health or safety," are excepted from the power of referendum. Colo. Const. Art. V, sec. 1. The enactment of this ordinance under the emergency power of the city council has effectively taken this matter out of the hands of the people, at least as to the initial annexation. The people are free at this point to initiate a measure to revoke the annexation, if such a remedy would otherwise be available to the legislative body.

We cannot agree with this interpretation of the statute. Once the petitions are received, the city council is on notice of the request for the annexation election. However, unless the petitions are found to be in compliance with the provisions of the Annexation Act, they do not trigger a cessation of all other annexation proceedings pursuant to section 31-12-118(2). Since the petitions were found to be defective, they were ineffective. The appellees' attempts to correct the deficiencies and modify the petitions could not succeed because once the petitions had been rejected as defective, it was not possible to revive them by subsequent amendment. In *Cesario, supra*, we held that the city council could not amend the description on its unilateral annexation ordinance after hearings on the ordinance had been concluded. Similarly, here, the amended petitions were without restorative effect since the description for the proposed annexation was changed *after* the petitions were circulated and signed.

III. Slack next asserts that the trial court erred in concluding that the legal description of the area to be annexed by city ordinance was sufficient. We agree with the trial court that the legal description was in substantial compliance with the requirements.

IV. Finally, Slack argues that the entire Municipal Annexation Act is unconstitutional as being vague. We do not agree.

We hold that the annexation ordinance enacted October 27, 1980, is valid.

**Art. II § 30 (1980). Right to vote or petition on annexation—enclaves.** (1) No unincorporated area may be annexed to a municipality unless one of the following conditions first has been met:

(a) The question of annexation has been submitted to the vote of the landowners and the registered electors in the area proposed to be annexed, and the majority of such persons voting on the question have voted for the annexation; or

(b) The annexing municipality has received a petition for the annexation of such area signed by persons comprising more than fifty percent of the landowners in the area and owning more than fifty percent of the area, excluding public streets, and alleys and any land owned by the annexing municipality; or

(c) The area is entirely surrounded by or is solely owned by the annexing municipality.

(2) The provisions of this section shall not apply to annexations to the city and county of Denver, to the extent that such annexations are governed by other provisions of the constitution.

(3) The general assembly may provide by law for procedures necessary to implement this section. This section shall take effect upon completion of the canvass of votes taken thereon.

## Notes

1. After adoption of Art. II § 30, the annexation statute was amended to conform to § 30, and consenting votes are required for most annexations. As stated in the prior assignment, shifts of territory from one county to another (and treating Denver and Broomfield as counties) also require consenting votes.

2. CRS tit. 31 art. 12 parts 5-7 provide for “disconnection” of tracts from statutory cities and towns. Owners can apply to the municipality; if it agrees, disconnection occurs by mutual con-

sent. If the municipality does not agree, owners of at least 20 undeveloped acres touching the boundary of a municipality can petition the district court to remove their land. If the statutory facts are proved, disconnection is mandatory. However, the statute severely restricts development rights in the land for six years thereafter.

### 3. Constitutional Home Rule

Home rule as a term of local government law is sometimes used in a loose sense to refer to whatever local powers municipalities have, regardless of legal structure, so that the term includes powers granted by the legislature that it can withdraw at will. But in the Colorado context, it refers to constitutional rules that insulate municipalities from control by the Legislature. The 1876 Constitution had a few protections for local government, but these were very limited and ineffectual.<sup>105</sup> One is:

**Art. V § 35. Delegation of power.** The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

§ 35 was copied from the 1874 Pennsylvania Constitution. Clauses like it exist in six other states, all in the West. The Pennsylvania original was adopted to address perceived abuses of cities by the legislature. For reasons not apparent, it was dubbed the Ripper Clause (was that its sponsor's name?), but this term has not been picked up by Colorado courts. Art. V § 35 lacks broad importance because the Supreme Court has interpreted the term "special commission" narrowly. The only important agency found to be one is the Public Utilities Commission (PUC). Decisions are not fully consistent. The need for the section is much reduced by the availability of constitutional home rule. Because the section's only important application is to the PUC, we'll consider it later, when we study that agency.

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The movement for home rule grew out of the Legislature's persistent interference in Denver's affairs during the 1890s. This varied with the party in power, and in 1901, a pro-Denver Legislature referred to the voters a proposed constitutional amendment with four purposes: to create home rule powers for Denver, to separate Denver from Arapahoe County and create a combined city-county government, to adopt Colorado's first powers of citizens' initiative and referendum, and to authorize other Colorado cities to adopt home rule charters. The people adopted the amendment in the 1902 general election as article XX, the first new article after statehood.

The Colorado Supreme Court nearly undid the amendment. Opponents of home rule sued, and the Court sustained the amendment only by a 2-1 vote, and one of those in favor wrote a grudging opinion.<sup>106</sup> After Denver began to operate under its home rule charter, the Court astonishingly held that Denver had no home rule powers for county functions, only for city.<sup>107</sup> This was widely condemned and so unpopular that it contributed to the electoral defeat of the judges who rendered it. The changed Court overruled the decision in 1911.<sup>108</sup> Because of this and other anti-Denver decisions, a citizens' initiative passed in 1912 amended Art. XX § 6 to make home

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<sup>105</sup> See Colo. Const. Art. V §§ 25, 35; Art. X §§ 3, 7; Art. XIV § 13.

<sup>106</sup> See *People ex rel. Elder v. Sours*, 74 P. 167 (Colo. 1903). The dissent was a remarkably activist legal opinion.

<sup>107</sup> *People ex rel. Miller v. Johnson*, 86 P. 233 (Colo. 1905).

<sup>108</sup> *People ex rel. A. G. v. Cassidy*, 117 P. 357 (Colo.), *error dismissed*, 223 U.S. 707 (1911).

rule powers more explicit. Two 1970 amendments extended home rule smaller towns and counties.

**Art. XX § 6** (1902, amended 1912). **Home rule for cities and towns.** The people of each city or town of this state, having a population of two thousand inhabitants. . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith. . . . such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article,<sup>109</sup> and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

- a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;
- b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;
- c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;
- d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;
- e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;
- f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;
- g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

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<sup>109</sup> Sections 4 and 5 provide for citizens' rights of initiative and referendum. Section 1 provides for Denver's control over its property and for its right to operate public utilities and transportation systems.

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

**Art. XX § 9 (1970). Procedure and requirements for adoption.** (1) Notwithstanding any provision in sections 4, 5, and 6 of this article to the contrary, the registered electors of each city and county, city, and town of the state are hereby vested with the power to adopt, amend, and repeal a home rule charter.

(2) . . . Action to initiate home rule shall be by petition, signed by not less than five percent of the registered electors of the proposed or existing city and county, city, or town, or by proper ordinance by the city council or board of trustees of a town, submitting the question of the adoption of a municipal home rule charter to the registered electors of the city and county, city, or town. No municipal home rule charter, amendment thereto, or repeal thereof, shall become effective until approved by a majority of the registered electors of such city and county, city, or town voting thereon. A new city or town may acquire home rule status at the time of its incorporation. . . .

**Art. XIV § 16 (1970). County home rule.** (1) . . . the registered electors of each county of the state are hereby vested with the power to adopt a home rule charter establishing the organization and structure of county government consistent with this article and statutes enacted pursuant hereto.

(2) [similar to Art. XX § 9(2)]

(3) A home rule county shall provide all mandatory county functions, services, and facilities and shall exercise all mandatory powers as may be required by statute.

(4) A home rule county shall be empowered to provide such permissive functions, services, and facilities and to exercise such permissive powers as may be authorized by statute applicable to all home rule counties, except as may be otherwise prohibited or limited by charter or this constitution. . . .

## Notes

1. Detailed statutes carry out the home rule amendments. CRS tit. 30 art. 35 (county home rule); tit. 31 art. 2 part 2 (municipal home rule).
2. In applying the amendments, note these possible situations:
  - a. A state statute applies, and there is no relevant local ordinance.
  - b. A local ordinance applies, and there is no relevant state statute.
  - c. A state statute expressly authorizes a local ordinance.
  - d. A state statute and a local ordinance have the same purpose and (1) are duplicative, or (2) one has stricter penalties.
  - e. A state statute expressly overrides local ordinances.
  - f. A state statute does not expressly override local laws and a local ordinance on the same subject arguably conflict.

### **Woolverton v. City and County of Denver**

361 P.2d 982 (Colo. 1961)

**Mr. Justice Doyle** delivered the opinion of the Court.

Defendants were prosecuted by the City and County of Denver for gambling. On trial to a jury, defendants were found guilty and sentenced to 90 days in jail and a \$300.00 fine. They were charged with violating Sec. 821.1 Denver, Colo. Rev. Municipal Code (1950):

821.1. *Maintaining Gambling Devices, Playing Gambling Devices, Betting on Games Prohibited.* It shall be unlawful for any person to play for money or any valuable thing at any game with cards, dice, or with any article, device, or thing whatever, which may be used for the purpose of playing or betting upon, or winning or losing money or other property; or to bet on any game others may be playing.

Important in determination of the controversy were two statutes. C.R.S. '53, 40-10-10 provides a penalty for gambling. This statute declares:

40-10-10. Wagering upon games -- penalty. -- If any person shall play at any game whatsoever, for any sum of money or other property of value, or shall make any bet or wager for any sum of money or other property of value, upon the result of such game, every such person, on conviction thereof, shall be fined in any sum not less than fifty dollars nor more than one hundred and fifty dollars.

Another section has authorized municipalities to enact policing regulations in various fields among which is that presently before us. 139-32-1 (52) empowers cities and towns:

To suppress . . . gaming and gambling houses, lotteries and fraudulent devices and practices, for the purposes of gaining or obtaining money or property, . . .

The main contention advanced by defendants is that the City lacked legislative jurisdiction to enact the above quoted ordinance and was powerless to prosecute under it. They summarize their arguments by asserting:

The regulation of gambling being a matter of state-wide concern, the subject ordinance is in excess of the powers and jurisdiction of the City and County of Denver, and which power

and jurisdiction to regulate has been withheld by statute to the people of the State of Colorado and not to the municipalities of the State.

I. The defendants' argument is an extension of the principles embodied in *Canon City v. Merris*, 323 P. (2d) 614, wherein it was held that a home rule municipality lacked power to enact legislation prohibiting driving a motor vehicle while under the influence of intoxicating liquor. The gist of the Court's decision is found in these words:

We hold that the operation of a vehicle by one who is under the influence of intoxicating liquor is a matter of state-wide concern.

In the course of the opinion, Article XX, sec. 6 h, was commented upon as follows:

In Article XX, Section 6, the term 'supersede' means that the law of the state is displaced on a local and municipal matter where there is an ordinance put in its place. Where, however, the matter is of state-wide concern, supersession does not take place. *Application of state law or municipal ordinance, whichever pertains, is mutually exclusive.* (Emphasis supplied.)

The underscored sentence in the above quotation, which was given by way of dictum, carries with it the following implied corollary rules:

1. Article XX, sec. 6, authorizing home rule municipalities, not only serves as a grant of power to such municipalities but also to strictly limit the powers of such municipalities. Its legislative powers are limited to matters strictly and exclusively local in nature, thus rendering abortive any attempt of a city to legislate on a subject having a semblance of general or state-wide character.
2. The state is limited in *its* authority to matters having a state-wide or general nature so that its efforts to legislate on matters having local quality are also void.

If these definitions were to be carried to an extreme conclusion, it would become necessary to void the ordinance now before us, since it has both local and state-wide aspects. The mutual exclusion concept would create two distinct spheres of exclusive legislative jurisdiction and two distinct bodies of law; the one local, the other state-wide. Since neither could exercise power in the area belonging to the other, it would then become necessary for each subject to be treated and classified by this Court as general or local, to the end that the legislative jurisdiction of the state and that of the local authority could be properly circumscribed.

The first inquiry is whether such a rigid and narrow approach is required by the language of the constitution. Article XX, sec. 6 h, does indeed grant to home rule cities exclusive jurisdiction over subjects local and municipal. The municipality, by passage of an ordinance dealing with a strictly local subject, supersedes an existing statute on the same subject. By the same token, if the subject matter is inherently and entirely a matter of state sovereignty, the state, by asserting its authority, effectively thwarts any attempted exercise by the city of legislative jurisdiction in the same field. It follows that the doctrine of mutual exclusion pronounced in the *Merris* case has validity as between the home rule city and the state where the subject matter is unquestionably and wholly local or is strictly state-wide. For example, it could not be contended that the home rule municipality could, even with the consent of the state, define felonies or that the state could assume authority of traffic regulation within the home rule city.

II. Accepting the foregoing premise that there are black and white areas of state and local mutually exclusive legislative jurisdiction, the question remains whether all subjects must be so cate-

gorized. We are of the opinion that such approach is arbitrary, highly impractical and not demanded by either the constitution or by our decisions.

First, Article XX, sec. 6, does not impose any such *strict* requirement. It recognizes that a state statute on a subject over which the city has exclusive power -- that which is local and municipal - continues in force *until* it is superseded by a local ordinance. A pure application of the mutual exclusion idea would preclude any legislative action in a field reserved for local regulation.

*Secondly*, pre-*Merris* decisions of this Court have long recognized the existence of subjects neither exclusively state-wide nor exclusively local, but having the attributes of both. *Denver v. Tihen*, 235 P. 777, is generally regarded definitive of the extent and operation of Article XX. There the city of Denver undertook to levy a tax against cemetery property. Denver's position was that a state statute exempting cemeteries was superseded by the city's exercise of authority to levy, assess and collect taxes, without recognizing any such exemption. The Court recognized the local nature of the levy and assessment of ad valorem taxes but held that it did not supersede the state authority to declare exemptions:

We say that while the matter of the taxation and assessment of cemeteries in this state is, in a sense, local to every city and county in the state, yet in the larger and fuller sense, considering the general sentiment of all civilized people that ground set apart for the burial place of the dead is sacred, it is a matter of state-wide importance and of governmental import, and not merely of local or municipal concern. Certainly in the absence of a specific contrary provision on the subject, this court should not hold that the people of the state did nor would consent that cemeteries in any part of the state should be subject to taxation or assessment.

See also *Bay v. City and County of Denver*, 121 P.(2d) 886, where the validity of local legislation regulating interest rates on small loans which conflicted with legislation enacted by the state was considered. It was held, of course, that in such circumstances the state statute must prevail. At the same time it was pointed out that conflict is the only reason for voiding such an ordinance. If the two legislative acts are consistent they can exist side by side.

If an ordinance and a statute which do not conflict can coexist, it would follow that a city, acting with the express consent of the state, can legislate on a subject within the legitimate sphere of both its interest and that of the state. Clear recognition of this consent principle is apparent in *McCormick v. City of Montrose*, 99 P. (2d) 969, which upheld a local ordinance declaring house to house non-consensual peddling a nuisance. A state statute authorized towns and cities to declare nuisances and the question was whether the ordinance was within the terms of a legislative grant to the city.

It seems clear then that the cases have not recognized exclusive spheres of activity whereby the authority of the state and the city must be meticulously separated and the respective powers so isolated as to involve the severe penalty of death to any ordinance which strays onto state soil. On the contrary, the Courts have sensibly recognized the practical impossibility of such divisions.

III. Proceeding on the premise that some subjects are neither strictly local nor exclusively state-wide and that the mutual exclusion doctrine is not applicable to these intermediate subjects, we turn to the next inquiry, whether gambling is to be fitted into one of the extreme categories or is a problem having both general *and* local interest.

Historically, gambling was not regarded as a matter subject exclusively to state regulation. Therefore it differs from offences such as larceny, the prohibition of which was the exclusive province of the sovereign.

That the State of Colorado has depended upon the cities to adopt ordinances prohibiting and punishing gambling is disclosed not only by sec.139-32-1 (52) but also by the fact that the state statute on this subject prescribes highly inadequate remedies. The minimum fine is \$50.00, and the maximum \$150.00. No jail sentences are prescribed. No doubt the professional gambler would submit without complaint to the payment of such a fine on a regular basis, regarding it as nothing more than a modest license fee, and would not be deterred by such penalties. This manifests clearly that the state has asserted no intent to preempt or monopolize this field.

It must be conceded that gambling is a matter in which the state as a whole has a strong interest in regulating and perhaps prohibiting. Recognizing this dual interest, we are persuaded that the subject of gambling is not such that it must be categorized as either strictly local *or* strictly state-wide in nature.

IV. Since the state has not asserted its authority so as to exclude the city as in *Denver v. Tihen, supra*, and has in fact manifested consent to the adoption of such an ordinance by 139-32-1(52), it follows that the ordinance before us is a valid exercise of municipal authority.

It might be argued that the consent statute cited above applies to non-home rule towns and cities only. The cases do not hold to such a distinction. To hold that a statutory city has more power than a home rule city would be anomalous indeed.

V. The mere fact that the city has the power to legislate does not mean that there could ever be recognition of dual sovereignty or double prosecutions. This holding clearly recognizes, just as the General Assembly has recognized, that it is more practical for the city to prohibit and punish gambling within its borders than for the state to do so, and that those ordinances adopted with the consent or approval of the state are valid.

**Mr. Justice Moore** specially concurring in the result [opinion omitted].

**Mr. Justice Frantz** dissenting.

By statute gambling is forbidden and a penalty provided for its violation. By another statute, cities and towns are vested with the authority to "*suppress* gaming and gambling houses, lotteries and fraudulent devices and practices, for the purpose of gaining or obtaining money or property" (Emphasis supplied.)

Is there an area of interest in gambling which can be said at once to be state-wide and local and municipal, in which either may enact laws enforceable by the enactor, and if so, does the first to proceed against the violator take jurisdiction to the exclusion of the other?

There can be no concurrent authority. Whatever is adequate to warrant the exercise of the "legislative power of the state" is a matter of statewide concern, and if the General Assembly legislates thereon, the statute is applicable throughout the length and breadth of the state.

C.R.S. '53, 139-32-1(52), empowers cities and towns to "suppress gaming and gambling houses," and gambling devices and practices. To the extent that Denver suppresses gambling houses or devices, or gambling, it had the power without resort to the statute. But gambling per se is a problem of general importance to the state, so much so that several statutes have been enacted

prohibiting various phases of gambling. The legislature believed that gambling was the proper subject of a public law.

**Question.** What is the essential difference between majority and dissent on interpretation of Art. XX § 6?

#### **4. Current Home Rule Doctrine**

##### **City and County of Denver v. State**

788 P.2d 764 (Colo. 1990)

**Justice Mullarkey** delivered the Opinion of the Court.

This is an appeal from a summary judgment and permanent injunction finding unconstitutional section 8-2-120, C.R.S. (1989 Supp.), which forbids municipalities, with few exceptions, from adopting residency requirements for municipal employees. The court permanently enjoined the state from enforcing section 8-2-120 against the appellees, the City and County of Denver and the City of Durango, finding that it violated Article XX, Section 6(a) of the Colorado Constitution by improperly interfering with the power of home rule municipalities to determine conditions of employment for their employees. We affirm.

I. On September 12, 1978, Denver voters approved an initiative amending the City Charter to require that all employees hired after July 1, 1979 become residents of the City and County of Denver as a condition of continued employment with the city. Effective January 1, 1980, the City Council of Durango enacted Rule 4.1 of its personnel rules which requires residency in certain instances as a condition of continued employment.

On April 11, 1988, Governor Roy Romer signed House Bill 1152, codified at section 8-2-120, 3B C.R.S. (1989 Supp.), which purports to preempt residency rules such as those of Denver, Durango and other local governments.

The cities of Denver and Durango filed their complaint on June 21, 1988 seeking a preliminary injunction to enjoin the state from enforcing section 8-2-120. The Denver Police Protective Association, the Colorado Professional Fire Fighters, and several individual Denver employees, successfully moved to intervene. The district court found that the Denver and Durango residency provisions were in direct conflict with section 8-2-120 and that because the residency requirements were a term and condition of employment under Article XX, Section 6(a), those requirements superseded section 8-2-120.

II. Once again this court is required to delineate the limits of the power of a home rule municipality to adopt charter provisions and ordinances which are in conflict with state statutes. Article XX, Section 6 granted "home rule" to municipalities opting to operate under its provisions and thereby altered the basic relationship of such municipalities to the state. It abrogated "Dillon's Rule."

The effect of the amendment was to grant to home rule municipalities every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs.. Although the legislature continues to exercise supreme authority over matters of statewide concern, a home rule city is not inferior to the General Assembly with respect to local and municipal matters. In determining the respective authority of the state legislature and home rule municipalities, we have recognized three broad categories of regulatory matters: (1) matters of local concern; (2) matters of statewide concern; and (3) matters of mixed state and local concern.

In matters of local concern, both home rule cities and the state may legislate. However, when a home rule ordinance or charter provision and a state statute conflict with respect to a local matter, the home rule provision supersedes the conflicting state provision. In matters of statewide concern, the General Assembly may adopt legislation and home rule municipalities are without power to act unless authorized by the constitution or by state statute. Finally, we have held that in matters of mixed local and state concern, a charter or ordinance provision of a home rule municipality may coexist with a state statute as long as there is no conflict, but in the event of conflict the state statute supersedes the conflicting provision of the charter or ordinance.

Although we have found it useful to employ the "local," "mixed," and "statewide" categories in resolving conflicts between local and state legislation, these legal categories should not be mistaken for mutually exclusive or factually perfect descriptions of the relevant interests of the state and local governments. Those affairs which are municipal, mixed or of statewide concern often imperceptibly merge. To state that a matter is of local concern is to draw a legal conclusion based on all the facts and circumstances presented by a case. In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail. Thus, even though the state may be able to suggest a plausible interest in regulating a matter to the exclusion of a home rule municipality, such an interest may be insufficient to characterize the matter as being even of "mixed" state and local concern.

We have not developed a particular test which could resolve in every case the issue of whether a particular matter is "local," "state," or "mixed." Instead, we have made these determinations on an ad hoc basis, taking into consideration the facts of each case. We have considered the relative interests of the state and the home rule municipality in regulating the matter at issue in a particular case. *See City & County of Denver v. Board of County Comm'rs*, 782 P.2d 753 (court compares interest of Denver in construction of water projects outside its boundaries with the interest of the state and of the counties in which the water projects are located); *National Advertising Co. v. Department of Highways*, 751 P.2d 632 (Colo. 1985) (court compares city's interest in controlling outdoor advertising signs within its municipal borders, i.e., safety, recreation, aesthetics, with state's interest in continued eligibility for federal highway funds threatened by inconsistent local regulations); *Denver & Rio Grande W. R.R. v. City & County of Denver*, 673 P.2d 354 (Colo. 1983) (court compares city's interest in construction of certain viaducts with the "paramount" interest of those living outside of Denver and holds that the construction of the viaducts was of mixed concern); *City of Craig v. Public Util. Comm'n*, 656 P.2d 1313 (Colo. 1983) (court finds that although city has interest in safety of railroad crossings, state's interest is predominant).

Although other asserted state interests may be relevant, there are several general factors which are useful to consider. These include the need for statewide uniformity of regulation, *see National Advertising*, 751 P.2d 632 (uniform regulation of highway advertising signs necessary to preclude potential loss of federal revenue); *Bennion v. City & County of Denver*, 504 P.2d 350 (Colo. 1972) (state residents have an expectation of uniformity in local criminal laws); and the impact of the municipal regulation on persons living outside the municipal limits.

Also relevant to this determination are historical considerations, i.e., whether a particular matter is one traditionally governed by state or by local government. Finally, we have considered relevant the fact that the Constitution specifically commits a particular matter to state or local regula-

tion. We now apply these principles to the present case to determine whether the issue of the residency of municipal employees is of state, local, or of mixed state and local concern.

1. *Uniformity.* The state has not asserted any particular state interest in uniformity of regulation with respect to residency requirements for municipal employees, nor do we perceive one. The Denver residency rule has been in existence since 1979. The fact that other municipalities may have declined to adopt such a requirement presents no special difficulties. There are many differences in the terms and conditions of employment among Colorado's municipalities, yet such inconsistencies alone do not require that we find municipal residency requirements to be of state concern.

2. *Extraterritorial Impact.* The state argues that the home rule residency requirements have an adverse economic impact beyond the borders of the particular municipalities. The state claims, for example, that by requiring its employees to live in Denver, the city makes it more difficult for the surrounding communities to compete for property tax and sales tax revenues, arguing that "for every economic gain caused by a person moving into Denver there is a corresponding loss of revenue in the municipality from which the person moved." The state offered evidence to the trial court that 70 percent of fire fighters and 66 percent of police officers hired since January 1, 1986 by the City of Denver lived outside the corporate limits of the city at the time they were hired. From this statistic, the state concludes that 60 percent to 70 percent of all Denver employees would live outside of Denver in the absence of the residency requirement.

We are unpersuaded. The fact that a majority of persons hired were living outside of Denver before they were hired does not demonstrate that a significant number of them, by their own choice, would not have moved to Denver in order to be closer to their work. With respect to potential sales tax revenues, there is no evidence as to what extent Denver employees residing within the city limits of Denver spend dollars solely at commercial establishments in Denver rather than in the surrounding communities. Further, even if the state's assertions respecting the desired residency and the consumer spending of Denver employees were true, the state has not shown that such an impact is significant. To the contrary, Denver for its part presented evidence, which was not challenged by the state, that Denver employees comprise merely one-seventh of one percent of the total workforce in the state. In light of this fact, we conclude that the economic impact of the Denver residency requirement on the remainder of the state is *de minimis*.<sup>110</sup>

We also find unconvincing the state's condemnation of "interjurisdictional competition for tax money." Municipalities compete in numerous ways for tax dollars. For example, they may offer tax preferences to encourage industries to relocate to the municipalities. In a more general sense the development of recreational, educational, and cultural facilities also serves to attract businesses and residents. Thus, we are unpersuaded that the impact of the residency requirement on other communities is so significant as to make the residency of a home rule municipality's employees a matter of state concern.

3. *Other State Interests.* The state argues that it has an interest in allowing every citizen the right to reside at the place of his or her choosing. First, Denver's residency requirement is constitutional under the federal constitution. *McCarthy v. Philadelphia Civil Service Commission*, 424

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<sup>110</sup> According to the brief of Amicus Curiae, the Colorado Municipal League, 21 home rule municipalities have adopted residency requirements or preferences. No evidence was offered regarding the aggregate economic impact of such residency requirements.

*U.S. 645 (1976)*. Second, the Colorado Constitution itself recognizes the value of residency provisions, requiring residence as a condition of employment in the state government.<sup>111</sup>

4. *Local Interests*. In contrast to the asserted state interests in forbidding municipal residency rules, the asserted local interests here are substantial. Article XX, Section 6(a) by its terms grants to home rule cities the power to legislate upon, provide, regulate, conduct and control “the creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees . . . .” Thus, the cities' claim that the residency of municipal employees is a matter appropriate for local regulation finds direct textual support in Section 6(a).

On the other hand, the authority granted to home rule municipalities in Section 6(a) is not unlimited. For example, the cities do not dispute the applicability of laws which implement the state's general public policy regarding such matters as workers' compensation or employment discrimination even though such laws may interfere with a municipality's right to determine the “terms or tenure” of municipal employment. This result follows because, with respect to aspects of municipal employment which are of statewide concern, state statutes may supersede inconsistent municipal provisions. *City of Aurora v. Aurora Firefighters' Protective Ass'n*, 566 P.2d 1356 (Colo. 1977) (collective bargaining of public employees matter of both statewide and local concern).

Denver offered other reasons supporting local control of city employee residency. Denver Mayor Federico Pena testified before the district court and explained the policy reasons behind Denver's residency requirement. First, according to the Mayor, the residency requirement was intended to increase the investment of city tax dollars in the community under the assumption that Denver workers living in Denver are more likely to pay taxes in Denver. For example, as property owners, they will pay Denver property taxes and as consumers they will pay the sales tax. Second, Pena testified that requiring employees to live within the city limits would make them more readily available in the event of a civic emergency. Third, requiring city residency for workers will make them more attentive, compassionate and diligent in their work.

Although the ready availability of employees for an emergency may be most applicable to a relatively small number of employees, such as fire fighters and police officers, the other legitimate reasons offered by the city apply equally to all city employees. Particularly, we are impressed with Denver's argument that requiring municipal employees to reside within the city limits will instill a sense of pride in their work by guaranteeing that the employees have a stake in the common enterprise of municipal government and thereby may make them more attentive, compassionate and diligent in the way that they provide municipal services to Denver residents.

In finding that the residency of municipal employees is of local concern and therefore governed by a charter provision or ordinance of a home rule city rather than a conflicting state statute, we distinguish several cases. First, in *City of Colorado Springs v. Industrial Commission*, 749 P.2d 412 (Colo. 1988), we found that unemployment compensation was a matter of statewide concern and thus that state statutory provisions superseded any conflicting local charter provisions or ordinances of home rule cities. Like the sign code at issue in *National Advertising*, 751 P.2d 632, unemployment compensation is subject to pervasive federal standards.

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<sup>111</sup> District judges, county judges, and state senators and representatives are all subject to constitutional residency requirements. Doubtlessly, these were enacted to ensure that such officials will have close links to the community which each serves. See art. VI, Section 11; art. VI, Section 16; art. V, Section 4 respectively.

III. In summary, we hold that the residency of the employees of a home rule municipality is of local concern. Thus, section 8-2-120 does not limit the authority of home rule municipalities to enact charter provisions or ordinances requiring employees to reside within the corporate limits of the municipality as a condition of continuing employment. The decision of the district court is affirmed.

#### **Note**

Was there a racial subtext to Denver's residency rule? Denver repealed its rule in 1998. Nevertheless, the Court cites the Denver/Durango residency case as its leading authority on municipal home rule, and the opinion appears in national casebooks on local government law.

#### **Voss v. Lundvall Brothers, Inc.**

830 P.2d 1061 (Colo. 1992)

**Justice Quinn** delivered the Opinion of the Court.

The questions in this case are whether the Oil and Gas Conservation Act, §§ 34-60-101 to -126 C.R.S. (1984 & 1991 Supp.), preempts the City of Greeley, a home-rule city, from enacting a land-use ordinance that imposes a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city. We hold that while the Oil and Gas Conservation Act does not totally preempt a home-rule city's exercise of land-use authority over oil and gas development and operations within the territorial limits of the city, the statewide interest in the efficient development and production of oil and gas resources in a manner calculated to prevent waste, as well as in protecting the correlative rights of owners and producers in a common pool or source to a just and equitable share of the profits of production, prevents a home-rule city from exercising its land-use authority so as to totally ban the drilling of oil, gas, or hydrocarbon wells within the city.

#### **Robertson v. City and County of Denver**

874 P.2d 325 (Colo. 1994)

**Justice Rovira** delivered the opinion of the Court

This case presents questions of whether an ordinance banning the manufacture, sale, or possession of "assault weapons" within the City and County of Denver violates article II, section 13 of the Colorado Constitution, and the constitutional proscription against laws that are impermissibly vague or overbroad.

I. In October 1989, the Denver City Council enacted Ordinance No. 669 which was codified as section 38-130 of the Denver Revised Municipal Code. The individual plaintiffs challenged the constitutionality of the ordinance on numerous grounds. The attorney general intervened as a plaintiff-intervenor on behalf of the State of Colorado.

The trial court granted plaintiffs' motion. It determined that certain provisions of the ordinance were vague or overbroad, and that those provisions were not severable from those which passed constitutional muster. Thus, the trial court invalidated the entire ordinance.

II. The earliest decision of this court applying Article II section 13 is *People v. Nakamura*, 62 P.2d 246 (Colo. 1936). We struck down a statute prohibiting unnaturalized foreign-born residents from owning or possessing a firearm, stating that the state "cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article II of the Constitution, to bear arms in defense of home, person and property." *Id.* at 247.

The next occasion in which this court applied section 13 was *Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972). We reviewed the constitutionality of a municipal ordinance proscribing the possession or use of any deadly weapon except in one's home. In voiding the ordinance, we observed "that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police power be reasonably classified as unlawful and thus, subject to criminal sanctions." *Id.* at 745.<sup>112</sup>

Similarly, in *People v. Blue*, 544 P.2d 385 (Colo. 1975), we upheld the constitutionality of a statute which prohibited the possession of any firearm by persons convicted of certain crimes. In so holding, we recognized that the Colorado Constitution does not guarantee an absolute right to bear arms under all circumstances.

In *People v. Ford*, 568 P.2d 26 (Colo. 1977), we concluded that a "flat prohibition" on the right of certain felons to possess firearms was subject to the guarantee of section 13. The constitution required recognition of an affirmative defense to this statute if a defendant shows that his purpose in possessing weapons was the defense of his home, person, and property.

Finally, in *People v. Garcia*, 595 P.2d 228 (Colo. 1979), we upheld, against a vagueness and overbreadth challenge, the constitutionality of a statute which prohibited the possession of any firearm by a person under the influence of intoxicating liquor or of a narcotic or dangerous drug.

As these cases make clear, the question in each case is whether the law at issue constitutes a reasonable exercise of the state's police power. This approach is in accordance with the vast majority of cases construing state constitutional provisions which guarantee an individual's right to bear arms in self-defense [citations omitted].

III. We turn next to the question of whether the ordinance is constitutional under the analysis outlined above. The statement of legislative intent contained in the ordinance reads as follows:

The city council hereby finds and declares that the use of assault weapons poses a threat to the health, safety and security of all citizens of the City and County of Denver. Further, the council finds that assault weapons are capable both of a rapid rate of fire as well as of a capacity to fire an inordinately large number of rounds without reloading and are designed primarily for military or antipersonnel use.

The city council finds that law enforcement agencies report increased use of assault weapons for criminal activities. This has resulted in a record number of related homicides and injuries to citizens and law enforcement officers.

There can be no doubt that an ordinance, intended to prevent crime, serves a legitimate governmental interest sufficiently strong to justify its enactment. In addition, the evidence presented to the trial court clearly showed that the ordinance is reasonably related to this interest [discussion omitted]. In addition, the evidence at trial supports the conclusion that weapons which are easily concealed, such as shotguns equipped with folding stocks, pose a greater threat to law enforcement officials and the public at large because their concealability makes them better suited to criminal purposes.

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<sup>112</sup> As examples of such activities, the court "noted that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense.

Finally, the evidence presented to the trial court established that Denver has sought to prohibit the possession and use of approximately forty firearms. The evidence also established that currently there are approximately 2,000 firearms available for purchase and use in the United States. The evidence plainly shows there are ample weapons available for citizens to fully exercise their right to bear arms in self-defense.

In our judgment, the evidence presented to the trial court undeniably demonstrates that the ordinance is reasonably related to a legitimate governmental interest and constitutes a valid exercise of the state's police power on the right to bear arms in self-defense.

IV. The trial court also concluded that section 38-130(b)(1)(c) is unconstitutionally vague. That section defines an assault weapon to include "all semiautomatic pistols that are modifications of rifles having the same make, caliber and action design but a shorter barrel and no rear stock or modifications of automatic weapons originally designed to accept magazines with a capacity of twenty-one (21) or more rounds." Defendants argue this conclusion is erroneous because it is "not unreasonable" to require persons purchasing or possessing pistols to determine if it is an assault pistol as defined by section 38-130(b)(1)(c), that a number of publications are available which provide all the information needed to determine whether a pistol is an assault pistol. In our judgment, this fact does not render this section of the ordinance constitutional. Section 38-130(b)(1)(c) does not provide sufficient information to enable a person of common intelligence to determine whether a pistol they possess or may purchase has a design history of the sort which would bring it within this section's coverage.

We conclude that this section, though vague, is severable from the remainder of the ordinance. It is clear that the remaining sections of the ordinance are autonomous from section 38-130(b)(1)(c). This section attempted to proscribe the possession of one type of assault weapon. The other provisions of the ordinance, which proscribe the possession of other weapons and dictate the scope and exceptions to the prohibition, are given their full force and effect irrespective of section 38-130(b)(1)(c).

**Justice Vollack** concurring in the result [opinion omitted].

**Justice Erickson** dissenting:

I agree with the majority that the General Assembly may regulate the manufacture, possession, and use of firearms that by proper and adequate definition are assault weapons. However, I agree with the attorney general that the City and County of Denver does not have the authority to regulate all firearms identified as assault weapons because the regulation is a matter of statewide concern. Accordingly, I respectfully dissent.

I. B. Historically, our General Assembly has regulated possession of firearms that are designed to inflict serious bodily injury or death in either warfare or in violation of the criminal laws. In my view, manufacture, possession, and use of firearms that by proper definition are assault weapons may also be regulated under the state's police power if the regulation does not prohibit or abrogate legal activity or unduly infringe on an individual's right to bear arms.

III. Although the General Assembly has the power to regulate assault weapons, every hamlet and home-rule city does not have the same power. Local governments should not have a separate and different legislative definition, penalty, and proscription against the manufacture, use, and possession of so-called assault weapons. In my view, local regulation of firearms is an undue in-

fringement on the right to bear arms under the Colorado Constitution and is preempted by state law.

If a matter is of statewide concern, a home-rule municipality is precluded from acting. The basis of the prohibition on local action in matters affecting the entire state is that uniformity of regulation is advantageous. A patchwork of conflicting municipal regulations will not serve the interests of the state, and local attempts to regulate firearms, in my opinion, are prohibited by article II, section 13. Owners of firearms who desire to hunt, target shoot, or pursue other lawful recreational activity in different parts of the state could be subject to a wide range of criminal penalties in different cities or towns if the definition of an assault weapon is not uniform and subject to clear definition.

## Notes

1. The majority viewed *Robertson* as a bill of rights case. Justice Erickson agreed that the state could pass such a regulation but would have denied the power to municipalities though relying on the right to bear arms for his conclusion—the fourth factor in the formula adopted in the 1990 residence rule case.
2. Denver’s laws also forbid persons other than law enforcement personnel “to wear under their clothes, or concealed about their person any dangerous or deadly weapon” or “to carry, use or wear any dangerous or deadly weapon.”<sup>113</sup> In *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002), these provisions were alleged to violate the right to bear arms under Art. II § 13, but the court sustained them, and the Supreme Court denied review.
3. In 2003, gun advocates persuaded the General Assembly to enact statutes preempting all municipal ordinances that regulate guns more strictly than state or federal laws.<sup>114</sup> Denver sued the state on home rule grounds, and in November 2004, the Denver District Court ruled in favor of the City and County, sustaining almost all its gun laws as matters of exclusively local concern under Article XX Section 6. Appeals to the Supreme Court yielded the following decision.

### **State v. City & County of Denver**

139 P.3d 635 (Colo. 2006)

#### **Per Curiam**

Chief Justice Mullarkey, Justice Hobbs, and Justice Martinez are of the opinion that the judgments of the trial courts in *State of Colorado v. City and County of Denver*, case number 03CV3809, and in *Sternberg v. City and County of Denver*, case number 03CV8609, should be affirmed; whereas Justice Bender, Justice Rice, and Justice Coats are of the opinion that the judgments should be reversed. Justice Eid does not participate.

Because the court is equally divided, the judgments of the trial courts are affirmed by operation of law.

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<sup>113</sup> Denver Rev. Muni. C. §§ 38-117 & -118.

<sup>114</sup> See CRS tit. 18 art. 12 pt. 2, tit. 29 art. 11.7, § 30-10-523.

**Town of Telluride v. Lot Thirty-Four Venture, L.L.C.**  
3 P.3d 30 (Colo. 2000)

**Justice Kourlis** delivered the Opinion of the Court.

This case concerns the scope of the state prohibition on rent control contained in section 38-12-301, C.R.S. (1999). We must determine whether a local affordable housing measure constitutes rent control prohibited by the statute, and whether a home rule municipality may exercise its authority over matters of local concern to regulate rents despite the state rent control statute.

Telluride enacted Ordinance 1011, which imposes an "affordable housing" requirement on the majority of new developments in the Town. Lot Thirty-Four Venture challenged the ordinance.

We hold that Ordinance 1011 does fall within the commonly understood meaning of rent control. We further hold that the state statute supersedes the authority of a home rule municipality to regulate rents. The issue of rent control implicates both state and local interests, and therefore, we find that it is properly characterized as a "mixed" concern.

I.A. In September 1994, the Town Council adopted Ordinance 1011, which amends the Telluride Land Use Code to add "affordable housing" mitigation requirements. The ordinance requires owners engaging in new development to mitigate the effects of that development by generating affordable housing units for forty percent of the new employees created by the development. Ordinance 1011 provides developers with four general options, or a combination thereof, to satisfy the affordable housing requirement. They may (1) construct new units and deed-restrict them as affordable housing; (2) deed restrict "existing free market units" as affordable housing; (3) pay fees in lieu of deed restricted housing; or (4) convey land to the Town with a fair market value equivalent to the fee paid under option three.

The Town Council also adopted Affordable Housing Guidelines. If the developer chooses either of the deed restriction options, then the Guidelines set maximum rental rates for the property. The Guidelines cap rental rate increases for units designated as affordable housing at no more than 2.5% per annum, unless the Telluride Housing Authority allows a higher increase. The sale of deed restricted properties is similarly limited. Properties may be sold only to qualified residents, or to a qualified owner who will rent to qualified residents, for a maximum sale price per square foot with the annual growth of the sale price capped.

II. The first issue requires us to determine whether Telluride's affordable housing scheme falls within section 38-12-301's prohibition of "rent control." The statute states,

The general assembly finds and declares that the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution which would control rents on private residential property.

A. The General Assembly did not define rent control. "Rent control statutes come in all types, shapes and sizes." Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L.Rev. 741, 742 (1988). Generally, rent control statutes peg allowable rent to the historic rent in an area at some fixed point in time, and permit increases in rent payments only on the basis of the consumer price index or some other neutral yardstick. "Every rent control statute has only one *raison d'etre* to insure that the landlord's rent is kept below the fair market rental of the property." *Id.* at 746.

Rent control is commonly understood to mean allowable rent capped at a fixed rate with only limited increases. See Epstein, *supra*, at 742. Because Ordinance 1011 sets a base rental rate per square foot and then strictly limits the growth of the rental rate, the ordinance constitutes rent control. The scheme as a whole operates to suppress rental values below their market values.

Although the ordinance has the laudable purpose of increasing affordable housing within the communities where lower income employees work, the ordinance nevertheless violates the plain language of the state prohibition on rent control.

We note that the General Assembly enacted the provision in 1981 in response to a citizen initiative in Boulder that would have imposed rent controls within that city. However, the broad language of the statute does not suggest an intent to limit the ban on rent control to the types of local measures proposed at the time of enactment.

B. Ordinance 1011 cannot be saved on the grounds that it applies only to new construction while existing housing units are not subject to the controls. The salient fact is that the ordinance caps rental rates for a class of housing at a price below what the market can bear. The effect of the ordinance is the same, regardless of whether new or existing units are exempt. In addition, the statutory ban on rent control makes no distinction between existing units and those subsequently developed.

The fact that the ordinance offers developers several options for satisfying the "affordable housing requirement" does not change the character of, or redeem, the rent control provisions. Whether the balance of the ordinance is severable and remains enforceable is not an issue that was before the court of appeals or before us. Therefore, we do not address it.

III. Telluride is a home rule municipality. If a home rule city takes action on a matter of local concern, and that ordinance conflicts with a state statute, the home rule provision takes precedence over the state statute. If the matter is one of statewide concern, however, home rule cities may legislate in that area only if the constitution or a statute authorizes the legislation. If the matter is one of mixed local and statewide concern, a home rule provision and a state statute may coexist, as long as the measures can be harmonized. If the home rule action conflicts with the state legislature's action, however, the state statute supersedes the home rule authority.

There is no litmus-like indicator for resolving whether a matter is of local, statewide, or mixed concern. Courts should take the totality of the circumstances into account. As part of the totality of the circumstances, this court has considered a number of issues, all directed toward weighing the respective state and local interests implicated by the law. We have looked at whether the General Assembly declared that the matter is one of statewide or local concern. Although such a declaration is not conclusive, it will be afforded deference in recognition of the legislature's authority to declare the public policy of the state in matters of statewide concern.

Even if a home rule city has considerable local interests at stake, a particular issue may be characterized as "mixed" if sufficient state interests also are implicated. This Court has articulated various factors that drive the analysis. These include: (1) the need for statewide uniformity of regulation; (2) the impact of the measure on individuals living outside the municipality; (3) historical considerations concerning whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. All of these factors are intended to assist the court in

measuring the importance of the state interests against the importance of the local interests in order to make the ad hoc decision as to which law should prevail.

The first consideration is whether the state has a pervading interest in statewide uniform regulation. This court has found uniform access to markets throughout the state to be an important state concern. See *Century Elec. Serv. & Repair, Inc. v. Stone*, 564 P.2d 953, 955 (Colo. 1977) (holding that a state statute superseded home rule authority regarding the licensing of electricians because "the state has a clear concern in ensuring that Colorado electricians have free access to markets throughout the state").

Here, both the municipality and the state have significant interests in maintaining the quality and quantity of affordable housing in the state. Ordinances like Telluride's can change the dynamics of supply and demand in an important sector of the economy: the housing market. A consistent prohibition on rent control encourages investment in the rental market and the maintenance of high quality rental units.

In addition, the rent control statute is part of the state statutory scheme regulating landlord and tenant relations. Landlord-tenant relations are an area in which state residents have an expectation of consistency throughout the state. Uniformity in landlord-tenant relations fosters informed and realistic expectations by the parties to a lease, which in turn increases the quality and reliability of rental housing, promotes fair treatment of tenants, and could reduce litigation.

The second factor is the closely related question of whether the home rule municipality's action will have any extraterritorial impact. In *Denver & Rio Grande Western Railroad Co.*, this court looked at the potential ripple effect from a local ordinance that directed the construction of a viaduct and apportioned the costs for the project. 673 P.2d at 358-59. The court realized that the municipality's efforts to impose costs on the railroads could impact the railroads' overall ability to serve their customers, resulting in a reduction, or even termination, of service in areas outside the municipality. Because of the potential impact beyond the municipality's borders, the court concluded that the ordinance presented a matter of mixed local and statewide concern.

Managing population and development growth is among the most pressing problems currently facing communities throughout the state. Restricting the operation of the free market with respect to housing in one area may well cause housing investment and population to migrate to other communities already facing their own growth problems. Although such a ripple effect may well be minimal in Telluride because of its geographic isolation, the growth of other mountain resort communities has impacted neighboring communities greatly. The fact that the Telluride ordinance is an affirmative effort to mitigate that impact does not change the fact that the growth of the one community is tied to the growth of the next, thereby buttressing the need for a regional or even statewide approach.

The third factor inquires as to whether the matter traditionally has been regulated at the state or the local level. Because our courts have not yet confronted the characterization of the state's interest in rent control, we can look only to other states to determine how they regulate rent control. A number of other state legislatures have prohibited rent control. Some of these states specifically have concluded that rent control is an issue of statewide concern [citations omitted].

The fourth factor similarly focuses on whether the constitution commits the matter either to state or local regulation. The constitution does not assign the issue of rent control, or economic regulation generally, either to state or local regulation.

Where does this analysis lead us, then? The state's interests include consistent application of statewide laws in a manner that avoids a patchwork approach to problems. Further, the state has a legitimate interest in preserving investment capital in the rental market, ensuring stable quantity and quality of housing, maintaining tax revenues generated by rental properties, and protecting the state's overall economic health. Telluride, on the other hand, has a valid interest in controlling land use, reducing regional traffic congestion and air pollution, containing sprawl, preserving a sense of community, and improving the quality of life of the Town's employees.

On the whole, we cannot conclude that this matter is so discretely local that all state interests are superseded. Given the legitimacy of both the state interests and Telluride's interests, we conclude that rent control represents an area of mixed state and local concern.

Since we find Ordinance 1011 to be a form of rent control, the ordinance clearly conflicts with the state statute. Because the two measures conflict, the local ordinance must yield to the state statute. Therefore, Ordinance 1011 is invalid. The rent control statute is constitutional, and does not violate the home rule amendment.

**Chief Justice Mullarkey, dissenting.**

I. There is no sound authority for the majority's broad reading of the prohibition against rent control imposed by the state statute. To the contrary, the statute, its legislative history, and other legislative enactments support the conclusion that the legislature intended to prohibit enactment of a specific type of ordinance, and the Telluride ordinance is not within that category.

A. The legislative history very clearly shows that the statute was intended to prevent the enactment of a proposed citizen initiative in the city of Boulder and any other similar ordinances. While identifying a need to control rental rate increases, these jurisdictions also recognized that rate restrictions would deter future investment, thereby exacerbating the housing stock shortage. Thus, all jurisdictions enacting rent control measures in the 1970's and the early 1980's expressly limited the restrictions to existing units by exempting new construction.

The economic condition precipitating the creation of Ordinance 1011, and consequently, the intended effect of that ordinance--to mitigate the deleterious effects of high levels of economic development--are not within the scope of "rent control" as the General Assembly understood it.

The ordinance applies the affordable housing requirements only to new development. Thus, not one single housing unit that is subject to Ordinance 1011 would fall within any of the rent control laws considered by the legislature. Finally, Ordinance 1011 differs substantially from the scope of the phrase "rent control" as used in the legislative hearings with respect to the applicability criteria [citations omitted].

It is improper to construe these qualitative differences, as does the majority, as mere variations of rent control legislation. Ordinance 1011 emerged from very different economic circumstances and seeks to remedy a very different concern; it employs different applicability criteria and burdens different individuals or entities. These are fundamental structural differences that place the Telluride ordinance outside of the construct of the rent control model contemplated by the legislature.

II. The majority also holds that rent control "falls within an area of mixed state and local concern and interest". I disagree. The majority ultimately concludes that rent control represents an area of mixed state and local concern. Narrowly construed, I agree that rent control may be an area of mixed concern. Broadly construed, however, it is not. This ordinance is on the fringe of the ma-

majority's extraordinarily broad understanding of rent control. As so applied, it passes beyond the mixed area and into the area of local concern. I would hold that Ordinance 1011 is of local concern, and therefore, the ordinance supersedes section 38-12-301 to the extent that they conflict.

The majority finds Ordinance 1011 to be economic legislation. To the contrary, I contend that Ordinance 1011 is fundamentally a land use regulation, an area that the General Assembly and this court have consistently recognized to be a matter of local concern. Land use policy is not limited to the mere definition of permissible uses; rather, land use policy encompasses conditions implemented within the rubric of zoning and planning decisions.

Ordinance 1011 requires developers within prescribed zoning districts to mitigate the effect of their developments through the creation of affordable housing units. As such, I view Ordinance 1011 as a component of the city's overall land use plan, and therefore, it should properly be characterized as land use legislation.

With this distinction in mind, I now turn to the factors established under *City & County of Denver*. The majority's finding of a state interest in the first factor, the need for uniformity, is contrary to the General Assembly's consistent refusal to consider land use regulations as requiring statewide legislation. Ordinance 1011 is integrated into the larger context of Telluride's land use policy--an area demonstrably within the purview of local governmental regulation. As such, the state's interest in uniformity in this area is minimal.

With respect to the second factor, the extraterritorial impact, the majority raises the specter of a "ripple effect" produced on surrounding communities. I find the majority's argument unpersuasive for several reasons.

First, in *City & County of Denver*, this court considered the extraterritorial impact of a city-imposed residency requirement for city employees. We rejected the state's argument that focused on the adverse economic impacts accruing outside of the city, primarily because of the speculative nature of the argument. I view the majority's extraterritoriality analysis to suffer from the same speculative defects.

Second, the majority's extraterritoriality analysis strikes at the fundamental premise of land use planning, zoning, and development regulations by exalting free operation of the housing market over the police power of local government to shape the design of a community.

Third, Telluride's ordinance is aimed directly at mitigating the effects on other localities of an ever-increasing public problem in mountain resorts. Workers cannot afford to live where they work because the housing market left to itself prices out the laborers in favor of tourists and second home owners. Enabling people to live where they work is a key concept in reducing pollution, congestion, and demand on transportation infrastructure, such as new or expanded roads or transit to carry workers from their overnight abodes to where they earn their wages.

Because Telluride's interests so significantly outweigh those of the state, I would hold that Ordinance 1011 constitutes legislation of a matter of local concern. Therefore, to the extent that section 38-12-301 conflicts with the ordinance, the statutory provision is unconstitutional in violation of article XX, section 6.

**Justice Hobbs** joins in this dissent.

**City of Commerce City v. State**  
40 P.3d 1273 (Colo. 2002)

**Justice Rice** delivered the Opinion of the Court.

In this case, the cities of Commerce City, Westminster, Fort Collins, and Colorado Springs, each home-rule municipalities under Article XX, challenge the constitutionality of certain provisions of section 42-4-110.5 and section 42-3-112(14) regulating the use of automated vehicle identification systems (AVIS), popularly known as photo radar and photo red light, in Colorado.

Because we find that the regulation of automated vehicle identification systems to enforce traffic laws is a matter of mixed local and state concern, we hold that the challenged provisions supersede the conflicting provisions of the Cities' local ordinances and charters.

**City of Northglenn v. Ibarra**  
62 P.3d 151 (Colo. 2003)

**Justice Bender** delivered the Opinion of the Court.

I. In this case we determine the enforceability of Northglenn's Ordinance 1248, which prohibits registered sex offenders from living together in a single-family residence in Northglenn. We hold that state law preempts Ordinance 1248 as it applies to a particular subset of registered sex offenders: adjudicated delinquent children whom the state places and supervises in state-created foster care families. Neither the Colorado Constitution nor state statutes grant Northglenn the power to regulate this matter of statewide concern.

The trial court convicted and fined respondent because she provided a foster home for three unrelated adjudicated delinquent children who were also registered sex offenders. Considering the totality of the circumstances, we hold that the state's interest in fulfilling its statutory obligations to place and supervise delinquent children in state-created foster care families in a uniform manner overrides any city interest in regulating land uses.

IV. Ultimately, we hold that Ordinance 1248, as it applies to adjudicated delinquent children in foster care homes, regulates a matter of statewide concern. The state's interest in fulfilling its statutory obligations to place and supervise adjudicated delinquent children in foster care homes pursuant to uniform, statewide criteria overrides any home-rule city's interest in controlling land uses within its territorial limits.

**Justice Coats**, dissenting.

The majority analysis subtly misapplies our precedent in this area in a way that radically alters the relationship between home rule cities and the state, by virtually eliminating the area of mixed concern, in which both city and state had previously been permitted to legislate. Because I believe our well-established precedent requires not only that Northglenn's ordinance be considered the regulation of a matter of mixed state and local concern, but also that it be found to be consistent with state law, I would uphold the validity of the ordinance and reverse the district court.

Allowing both governments to legislate with regard to matters of mixed concern is not a compromise for situations in which it cannot be said which concern is greater; it is a recognition that some matters legitimately concern both local and state governments and both must be permitted to legislate, as long as their enactments do not conflict.

I.B. With regard to preemption generally, we have delineated three basic ways in which an ordinance or regulation can be preempted by state statute. An ordinance will be considered completely preempted by express statutory language preempting all local authority over the subject matter or by an implicit legislative intent to completely occupy a given field by reason of a dominant state interest, and an ordinance may be partially preempted where its operational effect would conflict with the application of the state statute. There appears to be no suggestion by the parties (or the majority opinion) that state statutes contain any provision expressly preempting, or for that matter expressly conflicting with, Northglenn's ordinance.

III. Because the ordinance is supported by legitimate local concerns, I would reverse the judgment of the district court. Because the state also has a legitimate concern for the placement of delinquent children that is potentially impacted by the ordinance, the General Assembly may act to preempt that effect of the ordinance if it finds that action to be appropriate.

I am authorized to say that **Justice Kourlis** and **Justice Rice** join in this dissent.

## **5. Home Rule Theory**

### **Federalist No. 10**

The Same Subject Continued

(The Union as a Safeguard Against Domestic Faction and Insurrection)

From the New York Packet. Friday, November 23, 1787.

To the People of the State of New York:

AMONG the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . .

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects. . . .

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. . . . The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS.

When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. . . .

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended. The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to

sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic,--is enjoyed by the Union over the States composing it. . . .

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

Publius. [Madison]

### **Note and Questions**

The arguments in favor of local government are straightforward. Decisions can be tailored to local conditions. Citizens have stronger feelings of participation, that their votes count, that decisions are made with awareness of local needs. Local areas can more readily experiment with new solutions and institutions. Many kinds of decisions will be more efficient when made closer to the problems they address. Local governments can compete with one another to attract and retain productive citizens and investment.

Arguments against local government are less obvious. Two are part of the Colorado Supreme Court's rules: need for uniformity and extraterritorial effects. Another is the trade parochialism known in federal constitutional law as protectionism or discrimination against interstate commerce, which is inefficient. Another has never been better expressed than in The Federalist No. 10. You have encountered this essay before, but an edited version of it appears above.

The Colorado Supreme Court's rules for determining the scope of municipal home rule expressly recognize two of these policies. How well do they serve the others? Are there unarticulated factors driving some of the decisions?

How do the Court's rules relate to its willingness to imply preemption by a state statute? Some version of implied preemption was at issue in the Telluride, Northglenn, and Voss cases in your readings.

### **6. Home Rule and Dogs**

Issues about domestic animals (other than farm animals) are a staple of local government law. Boulder residents are familiar with the interminable battles over unleashed dogs in the city's open space. Consider the following.

#### **Colorado Dog Fanciers, Inc. v. City and County of Denver**

820 P.2d 644 (Colo.1991)

**Justice Erickson** delivered the Opinion of the Court.

The plaintiffs, dog owners, filed a complaint in the Denver District Court against the City and County of Denver seeking both a declaratory judgment on the constitutionality of the "Pit Bulls Prohibited" ordinance, Denver Rev. Mun. Code § 8-55 (1989), and injunctive relief to prevent enforcement. This appeal is taken from the district court's order which held that section 8-55, as construed by the court, was constitutional. We affirm in part, reverse in part.

II. The dog owners claim that, under the United States Constitution, the ordinance, both facially and as applied to them, violates their rights to procedural and substantive due process and equal protection, is unconstitutionally vague, and constitutes a taking of private property. [The Court sustained the ordinance against each of these claims except for a provision that required owners to bear the burden of proof on identity of dogs as pit bulls and other issues.]

In 2004, the General Assembly passed House Bill 04-1279, Concerning Liability Regarding the Behavior of Dogs. This amended the comprehensive 1991 statute regulating owners of dangerous dogs to override the Denver ordinance and to strengthen tort claims against owners of vicious dogs. Its relevant provisions regarding Denver state:

**CRS § 18-9-204.5. Unlawful ownership of dangerous dog.** (1) The general assembly hereby finds, determines, and declares that: . . .

(b) The regulation and control of dangerous dogs is a matter of statewide concern.

(5) (a) Nothing in this section shall be construed to prohibit a municipality from adopting any rule or law for the control of dangerous dogs; except that any such rule or law shall not regulate dangerous dogs in a manner that is specific to breed.

(b) Nothing in this section shall be construed to abrogate a county's authority . . . to adopt dog control and licensing resolutions . . . ; except that any such resolution shall not regulate dangerous dogs in a manner that is specific to breed.

Denver sued the State, claiming that the 2004 statute unconstitutionally invaded Denver's home-rule powers. The District Court held against the State except for the statute's preemption of Denver's regulation of inter-city transportation of pit bulls. Several months later, the court held a hearing on the State's claim that new knowledge since 1991 had undermined the rationality of the pit bull ban and concluded that the State failed to prove its claim. The State filed an appeal of the first ruling but later dismissed it voluntarily.<sup>115</sup>

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<sup>115</sup> City & County of Denver v. State, Colo. Ct. App. No. 05-CA-000149. A member of the American Canine Foundation unsuccessfully appealed denial of her attempt to intervene in the case. City & County of Denver v. Grebing, 2006 Colo. App. LEXIS 1368.