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## An Unfortunate "Tail": Reconsidering Risk Management Incentives After the Financial Crisis of 2007-2009

Douglas O. Edwards

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# **DISMANTLING THE TROJAN HORSE: MESA COUNTY BOARD OF COUNTY COMMISSIONERS V. STATE**

ANNA-LIISA MULLIS\*

*Under the Taxpayer's Bill of Rights ("TABOR"), an amendment to the Colorado Constitution, the Colorado state and local governments are severely restricted in the amount of revenue they can collect and in their ability to set fiscal policy. As a result, TABOR has forced the state and local governments to shrink relative to the economy and has prevented legislators and government officials from altering TABOR's more unworkable provisions. In 2009, the Colorado Supreme Court decided Mesa County Board of County Commissioners v. State, in which the court rightfully restored a modicum of legislative discretion over the budgeting and taxation processes. This Note closely examines the significance and future implications of the court's holding in Mesa County. Ultimately, this Note argues that, although Mesa County was a crucial step in loosening TABOR's grip on the state, further action must be taken to restore the state and local governments' fiscal health.*

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\* Juris Doctor candidate 2011, University of Colorado Law School; Bachelor of Science, University of Colorado, 2005. I am sincerely grateful to Carol Hedges, Geoff Wilson, Sharon Eubanks, and Professor Richard Collins for their patient explanations and helpful comments. I would also like to thank Brad Young for allowing me to continue the Trojan Horse theme begun in his excellent book. Additionally, I would like to thank everyone on the *University of Colorado Law Review* staff who assisted me throughout the production process. Finally, I would like to dedicate this Note to my family, especially Mark, for their unwavering support.

*[N]o business would survive if it were run like the TABOR faithful say Colorado should be run—with withering tax support for college and universities, underfunded public schools and a future of crumbling roads and bridges.*

—Neil Westergaard<sup>1</sup>

## INTRODUCTION

In 1992, Colorado voters approved the Taxpayer's Bill of Rights ("TABOR"), a citizen initiative,<sup>2</sup> as an amendment to the Colorado Constitution. TABOR promised to hold state and local government revenues to reasonable levels and to wrest control over tax increases from irresponsible government officials, thereby restoring power to the citizens.<sup>3</sup> Specifically, TABOR proponents promised voters three things: (1) that government revenues would be limited and would be allowed to grow only at the same rate as the economy, (2) that excess government revenues would be refunded to the citizens, and (3) that the state and local governments could exceed their limits only with voter approval.<sup>4</sup> Preventing out-of-control government spending by imposing these limits proved to be a popular idea.

But in reality, TABOR was a Trojan Horse. Instead of allowing the state and local governments to grow at the same pace as the economy, TABOR has forced the state and local governments to shrink relative to the economy.<sup>5</sup> At the same time, spending on certain programs, such as Medicaid and prisons, has grown much faster than the TABOR-prescribed

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1. Neil Westergaard, Editorial, *Business Folks Fed Up with TABOR Worship*, DENV. BUS. J., July 22, 2005, available at <http://denver.bizjournals.com/denver/stories/2005/07/25/editorial1.html>.

2. Colorado citizens may petition to place amendments to the Colorado Constitution on the ballot. Such amendments require only a majority vote for passage. Tim Hoover, *Tapia Takes Another Run at Initiative Curbs*, DENV. POST, Apr. 13, 2010, available at [http://www.denverpost.com/ci\\_14871680?source=rss](http://www.denverpost.com/ci_14871680?source=rss).

3. See BRADLEY J. YOUNG, TABOR AND DIRECT DEMOCRACY: AN ESSAY ON THE END OF THE REPUBLIC 1 (2006).

4. *Id.* See *infra* Part I.C for further discussion of TABOR's main provisions.

5. *Id.* Growth in government spending continually loses ground compared to growth in the economy as a whole. See *infra* Part I.D.1 for further discussion of TABOR's forced reductions in government spending.

limits for the overall budget due to external forces such as inflation in the cost of medical services and sentencing and parole laws.<sup>6</sup> This combination of continuous downward pressure on the budget with the upward trend in costs for mandatory programs resulted in cuts to discretionary programs, such as higher education and public health, in an effort to balance the budget.<sup>7</sup> Thus, discretionary programs must fight for every dollar of funding, and any new programs designed to meet changing needs in the population are virtually ruled out. Furthermore, TABOR has imposed “an ongoing degenerative direct democracy over the . . . budget.”<sup>8</sup> It has become increasingly clear that forcing continuous reductions in state and local government budgets while giving control of fiscal policy to disinterested voters is crippling Colorado governments’ ability to function.

In truth, TABOR is designed to starve the government.<sup>9</sup> Although voters were told that TABOR would allow the government to continue to grow at a reasonable pace, “[t]he framers of TABOR were well aware that the limit would shrink government to the point that revenues would not be sufficient to fund what the populace expects of government.”<sup>10</sup> TABOR has succeeded in crippling both the state and local governments. For example, on the state level, between 1995 and 2009, funding for the University of Colorado system dropped from \$8,139 per resident student to \$4,458 per resident student—a decline of 45 percent.<sup>11</sup> Across all state-funded colleges and universities, funding per resident student has “reached a 15-year low, after adjusting for inflation.”<sup>12</sup> At the local level, after Colorado Springs citizens voted down a tax increase in November 2009, the cash-strapped city was forced to turn off one-third of

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6. THE BELL POLICY CTR., TEN YEARS OF TABOR: A STUDY OF COLORADO'S TAXPAYER'S BILL OF RIGHTS 17 (2003) [hereinafter TEN YEARS OF TABOR]. In addition, 93 percent of Colorado's General Fund is spent in just six areas: K-12 Education, Healthcare Policy (which funds Medicaid), Higher Education, Human Services, Corrections, and the Judicial Branch. YOUNG, *supra* note 3, at 41.

7. YOUNG, *supra* note 3, at 38–42.

8. *Id.* at 1 (emphasis removed).

9. *Id.* at 52.

10. *Id.* at 53.

11. IRIS J. LAV & ERICA WILLIAMS, CTR. ON BUDGET & POLICY PRIORITIES, A FORMULA FOR DECLINE: LESSONS FROM COLORADO FOR STATES CONSIDERING TABOR 8–9 (2010), available at <http://www.cbpp.org/files/10-19-05sfp.pdf>. [hereinafter FORMULA FOR DECLINE]. The CBPP's figures are adjusted for inflation.

12. *Id.* at 8.

the street-lights illuminating the city to save money.<sup>13</sup> By July 2010, the city expected to run out of money to water its parks, and the flower and fertilizer budget was slashed to zero.<sup>14</sup>

To be sure, the recent economic recession has forced state and local governments across the country to slash budgets. But Colorado's problems are systemic. Colorado's state and local governments have faced nearly two decades of anemic funding, preventing adequate investment in our schools and universities, transportation infrastructure, programs that promote job creation and economic investment in the state, and programs that increase quality of life.<sup>15</sup> Further, because TABOR is a constitutional amendment and not a statute, legislators and government officials are unable to alter TABOR's unworkable provisions.<sup>16</sup> They are unable to do much more to address a dire financial situation than simply cut services from the budget.

Because elected officials are helpless, the best hope for ameliorating TABOR's negative effects lies with the courts. In March 2009, the Colorado Supreme Court took a much-needed step toward dismantling this Trojan Horse when it decided the landmark case of *Mesa County Board of County Commissioners v. State*.<sup>17</sup> The court loosened TABOR's grip on the state and rightfully restored a modicum of legislative discretion over the budgeting and taxation processes. *Mesa County* gives the state and local governments flexibility to address changing budgetary needs, especially in an economic downturn, by giving the governments more options to address revenue shortfalls beyond simply cutting services.<sup>18</sup> These governments, to a limited extent, can now reinterpret tax policies to collect more revenues. Prior to *Mesa County*, the state and local governments believed that such reinterpretations violated TABOR's requirement that voters must approve all tax policy changes.<sup>19</sup>

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13. Michael Booth, *Colorado Springs Cuts into Services Considered Basic by Many*, DENV. POST, Jan. 31, 2010, available at [http://www.denverpost.com/news/ci\\_14303473](http://www.denverpost.com/news/ci_14303473).

14. *Id.*

15. See TERRY SCANLON & PERRY SWANSON, COLO. FISCAL POLICY INST., REPORT HIGHLIGHTS COLORADO'S CONTINUED BUDGET PROBLEMS 1 (2010), available at [http://www.cclponline.org/pubfiles/Statement%20on%20revenue%20projections%203\\_19ts.pdf](http://www.cclponline.org/pubfiles/Statement%20on%20revenue%20projections%203_19ts.pdf).

16. See COLO. CONST. art X, § 20.

17. 203 P.3d 519 (Colo. 2009).

18. See *infra* text accompanying notes 236–41.

19. See *infra* Part I.C.1.

This Note argues *Mesa County* was a crucial first step in restoring the state and local governments' fiscal health, but further action must be taken. Accordingly, this Note proceeds in four parts. Part I discusses the background of TABOR, explores the ways in which TABOR limits government, and reviews studies that have attempted to measure the effect TABOR has had on the state thus far. Part II discusses key early cases which interpreted TABOR and laid the groundwork for the *Mesa County* case. The future implications of *Mesa County's* holdings are elaborated in Part III. Finally, Part IV evaluates proposals for amending TABOR to lessen the impact of some of its more severe provisions.

## I. PASSAGE OF TABOR AND ITS EFFECTS ON THE STATE

In order to better frame the Colorado Supreme Court's TABOR jurisprudence, this Part gives a brief overview of TABOR's background and its impact on the state.<sup>20</sup> Section A considers the California tax-limitation measures that inspired TABOR and the effects of those measures. Section B discusses the ways in which proponents and opponents characterized TABOR before it was approved by voters in the 1992 election. Section C explains important provisions of TABOR as it was enacted in Colorado. Finally, recognizing that TABOR's effects on the state have been hotly contested by both proponents and opponents, Section D examines the evidence put forth by each side regarding these effects.

### A. TABOR's Origins

The idea of limiting taxes had been prevalent in Colorado for years before TABOR appeared on the ballot in 1992: starting in the mid-1960s, Coloradans had previously voted down eight other tax-limiting measures.<sup>21</sup> Even so, TABOR scholars consider TABOR to be an idea that was imported to Colorado from California.<sup>22</sup> Following California's lead on taxing and spending limits in the early 1970s, other states began to con-

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20. For additional information on the origins and effects of TABOR, see generally, YOUNG, *supra* note 3, at 29–45.

21. Jeffrey A. Roberts, *Bruce: Taxpayers Must Seize Control; Who Decides: People or Politicians?*, DENV. POST, Oct. 14, 1992, at 1A. Two of the eight previous measures were proposed by TABOR author Douglas Bruce. *Id.*

22. YOUNG, *supra* note 3, at 29.

sider such measures, and five had similar limits in place by 1979.<sup>23</sup>

California's version of TABOR emerged haltingly. In 1972, California Governor Ronald Reagan formed a Tax Reduction Task Force made up of luminaries in the fields of economics, government, and law to recommend a plan to reduce the tax burden on California citizens.<sup>24</sup> Voters ultimately rejected the amendment that the Tax Reduction Task Force proposed.<sup>25</sup> Meanwhile, local property taxes in California were skyrocketing as the result of 70 percent increases in property valuations from 1975 to 1978.<sup>26</sup> Like Colorado, California had a provision requiring that the state supplement local school district revenues by granting more money to school districts that collected a low amount of property taxes and granting less money to school districts that collected a high amount of property taxes.<sup>27</sup> When property values rose, school districts needed less money overall, and the state accumulated a large surplus as a result.<sup>28</sup> In fact, the state sat on more than \$5 billion while ordinary citizens worried about losing their homes because of the rapidly increasing property tax payments.<sup>29</sup> When the California legislature failed to institute reform, the voters approved Proposition 13.<sup>30</sup> Proposition 13 severely limited property tax collections, cutting property tax rates to a maximum of 1 percent of 1975 property values, while property assessment values were allowed to increase at a maximum of 2 percent per year.<sup>31</sup> In addition, Proposition 13 required a two-thirds vote by the state legislature to raise state taxes and a two-thirds vote by the citizens to raise local taxes.<sup>32</sup>

The tax revolt continued when, in 1979, the National Tax Limitation Committee ("NTLC"), organized by the chairman of

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23. *Id.* at 31.

24. *Id.* at 29.

25. *Id.* at 30.

26. Richard Reeves, *The Tax Revolt that Wrecked California*, MONEY, Jan. 1, 1994, available at [http://money.cnn.com/magazines/moneymag/moneymag\\_archive/1994/01/01/88570/index.htm](http://money.cnn.com/magazines/moneymag/moneymag_archive/1994/01/01/88570/index.htm).

27. Bob Ewgen, Op-Ed., *Bruce's 'Ratchet' Is a Hatchet That Would Californiate Colorado*, DENV. POST, Sept. 28, 1992, at 7B.

28. *Id.*

29. Reeves, *supra* note 26.

30. Ewgen, *supra* note 27. Proposition 13 is codified at CAL. CONST. art. XIII A.

31. William A. Fischel, *Did John Serrano Vote for Proposition 13? A Reply to Stark and Zasloff's "Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?"*, 51 UCLA L. REV. 887, 888 (2004).

32. CAL. CONST. art. XIII A, §§ 3-4.

the Tax Reduction Task Force, proposed the Gann Amendment.<sup>33</sup> The Gann Amendment limited increases in state and local government appropriations to population growth plus inflation, with any excess revenues to be refunded to the citizens.<sup>34</sup> This limit was later weakened when voters approved Proposition 98, mandating that public schools receive a share of the excess revenues to be refunded, and Proposition 111, which considerably raised the limit by replacing the inflation component of the limit with per-capita personal income growth.<sup>35</sup>

In part due to these anti-tax provisions, California faces a serious financial crisis in the current economic downturn.<sup>36</sup> Over fiscal years 2008–2009 and 2009–2010, California cut \$30 billion in funding to local schools, universities, healthcare, welfare, corrections, and recreation, among other programs.<sup>37</sup> Fiscal year 2010–2011, which began in July 2010, is projected to have a budget deficit of some \$20 billion.<sup>38</sup> Although the economic downturn is largely responsible for California's current budget woes, it is nonetheless clear that establishing fiscal policy by direct democracy has contributed to the problem.<sup>39</sup> The "culture of ballot initiatives . . . [has] hamstrung state budgeters by earmarking money for programs with one vote and taking away the ability to pay for them with others."<sup>40</sup>

Although it now appears that California's tax limitation experiments have ultimately contributed to the state's budget crises, other states followed suit with their own tax limitation measures.<sup>41</sup> Colorado's TABOR arrived on the scene in 1992.

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33. YOUNG, *supra* note 3, at 30. The Gann Amendment is codified at CAL. CONST. art. XIII B.

34. YOUNG, *supra* note 3, at 30.

35. Michael New, *The Gann Limit Turns 25*, CATO INST., Oct. 28, 2004, available at [http://www.cato.org/pub\\_display.php?pub\\_id=2871](http://www.cato.org/pub_display.php?pub_id=2871). Proposition 98 and Proposition 111 each amended CAL. CONST. art. XIII B; Proposition 111 also amended CAL. CONST. art. XVI.

36. *California Budget Crisis*, N.Y. TIMES, [http://topics.nytimes.com/topics/news/national/usstatesterritoriesandpossessions/california/budget\\_crisis\\_2008\\_09/index.html](http://topics.nytimes.com/topics/news/national/usstatesterritoriesandpossessions/california/budget_crisis_2008_09/index.html) (last visited Sept. 15, 2010).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. See YOUNG, *supra* note 3, at 31 ("By 1979, five states had adopted some sort of tax or spending limits.").



*B. Mischaracterization Leads to TABOR's Passage in 1992*

Prior to its passage as a citizen initiative in 1992, the debate about TABOR—Amendment 1, as it was known at the time—rarely delved deeply into the complicated and ambiguous provisions of the lengthy amendment.<sup>42</sup> TABOR proponents persisted in characterizing the amendment as a measure that simply limited state and local government growth to the same pace as the economy, allowed voters to approve new taxes, and required that governments refund any revenue collected above their growth limit.<sup>43</sup> Douglas Bruce, TABOR's author and principal proponent,<sup>44</sup> described the amendment as a measure that would “give the Colorado people a larger voice in determining future tax rates while continuing to provide government the necessary flexibility to meet its responsibilities.”<sup>45</sup>

Opponents pointed to the problems California faced after passing its tax limitations, including decreased public school funding and crumbling infrastructure, and argued that Colorado would suffer the same fate.<sup>46</sup> However, opponents apparent-

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42. Betty Ann Dittmore, Op-Ed., *Ballot Issues: Should We Vote on Tax Hikes? No, Let's Not*, DENV. POST, Oct. 18, 1992, at 1G. Dittmore also points out that the short description of TABOR that appeared on ballots did little to illustrate the complexities of the provision for voters. *Id.* The description read only: “Shall there be an amendment to the Colorado Constitution to require voter approval for certain state and local government tax revenue increases and debt; to restrict property, income, and other taxes; to limit the rate of increase in state and local government spending; to allow additional initiative and referendum elections; and to provide for the mailing of information to registered voters?” Colorado Legislative Council, Ballot Issue History, COLO. GEN. ASSEMBLY, <http://www.leg.state.co.us/lcs/ballothistory.nsf> (follow “Next” hyperlink until reaching 1992 data; then follow “01 Tax Limitations—Voting” hyperlink) (last visited Aug. 27, 2010).

43. YOUNG, *supra* note 3, at 1.

44. Douglas Bruce is a former lawyer who “stopped practicing law because the law and the courts need major reforms from the outside.” Douglas Bruce, <http://www.douglasbruce.com> (follow “Background” link) (last visited Sept. 12, 2010). He has been a real-estate investor for more than thirty years. *Id.* Bruce was appointed to fill a vacant seat in Colorado House District 15 in January 2008 and was defeated in the August 2008 Republican primary election. Perry Swanson, *Waller Defeats Bruce; May Routs Newsome*, COLO. SPRINGS GAZETTE, Aug. 13, 2008, available at <http://www.gazette.com/articles/bruce-39268-waller-republican.html>. His tenure in the state legislature is most remembered for the formal censure he received after kicking a newspaper photographer at his swearing-in. *Id.* Bruce was the first Colorado lawmaker to be censured in the history of the state. *Id.*

45. Douglas Bruce, Op-Ed., *Ballot Issues: Should We Vote on Tax Hikes? Yes, Let's Vote*, DENV. POST, Oct. 18, 1992, at 1G.

46. Ewegen, *supra* note 27.

ly did not vigorously disagree with the characterization that TABOR merely limited the growth of government to the rate of growth of the overall economy.<sup>47</sup> In the end, TABOR proponents in Colorado and across the country succeeded in framing the tax-limitation measure as one that constrains the growth of government, rather than one that continually forces the government to shrink.<sup>48</sup>

*C. TABOR's Limits on the Ability of Government to Raise and Spend Revenue*

TABOR states that its purpose is to “restrain . . . the growth of government.”<sup>49</sup> This goal is achieved primarily in five ways: (1) requiring voter approval of tax increases, (2) limiting the amount of revenue the state and local governments can collect, (3) limiting the amount of revenue the state and municipal governments can spend, (4) preventing the “weakening” of other limits on government spending, and (5) limiting types of taxation available to governments.<sup>50</sup> Each of these five provisions will be discussed in turn.

1. Voter Approval of Tax Increases

Under TABOR, voters must give advance approval to “any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.”<sup>51</sup> Although the amendment was sold to the voters with the promise that voters would henceforth be able to vote on all new or extended taxes,<sup>52</sup> the Colorado Supreme Court established that TABOR did not grant voters a new fundamental voting right in one of its earliest cases interpreting TABOR.<sup>53</sup> The court ob-

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47. See YOUNG, *supra* note 3, at 2.

48. *Id.* at 1–2.

49. COLO. CONST. art. X, § 20(1).

50. THE BELL POLICY CTR., UNDERSTANDING TABOR: THE FIRST STEPS 3 (2002) [hereinafter UNDERSTANDING TABOR], available at <http://www.bellpolicy.org/sites/default/files/PUBS/annual/2002/TABOR/UnderstandingTABOR.pdf>.

51. COLO. CONST. art. X, § 20(4)(a).

52. See *supra* text accompanying note 43.

53. That is, TABOR did not grant citizens a fundamental right protected by the doctrine of substantive due process. *Bickel v. City of Boulder*, 885 P.2d 215, 225–26 (Colo. 1994) (quoting COLO. CONST. art. V, § 1); COLO. MUN. LEAGUE,

served that Coloradans already had “the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly” and that TABOR was an example of the people using this power.<sup>54</sup> The measure itself was not worded so as to vest new rights in Colorado citizens, but rather to limit the state and local governments’ taxing and spending powers, as well as to describe the new obligations required of the state and local governments.<sup>55</sup> Thus, the court held that TABOR is more properly construed as a limit on the power of state and local government representatives, rather than a grant of new rights to the citizens.<sup>56</sup> Had the court accepted the plaintiffs’ argument that TABOR established a new fundamental right, government actions affecting that fundamental right would have been subject to strict scrutiny.<sup>57</sup> As strict scrutiny is a notoriously difficult hurdle for governments to overcome,<sup>58</sup> governments could have been liable even for insignificant deviations from TABOR requirements.

## 2. Limiting Revenue Collections by State and Municipal Governments

Although the amendment refers to spending limits, TABOR is better understood as a limit on the amount of revenue that a state or local government can collect and keep.<sup>59</sup> The amendment specifies a growth limit for governments and mandates that all revenue collected above that limit be refunded to the citizens.<sup>60</sup>

TABOR prescribes three different formulas for determining the percentage by which revenue collections can grow for the state government, local governments, and school districts.<sup>61</sup>

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TABOR: A GUIDE TO THE TAXPAYER’S BILL OF RIGHTS 3–6 (1999 ed.) [hereinafter GUIDE TO TABOR]. See *infra* notes 141–51 and accompanying text for further discussion of *Bickel*.

54. *Bickel*, 885 P.2d at 226 (quoting COLO. CONST. art. V, § 1).

55. *Id.* at 225.

56. *Id.* at 226.

57. GUIDE TO TABOR, *supra* note 53, at 97.

58. See, e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794 (2006) (describing popular understanding that strict scrutiny is “‘strict’ in theory and fatal in fact”).

59. UNDERSTANDING TABOR, *supra* note 50, at 3.

60. *Id.*

61. *Id.* at 4.

The formula for all three types of governments has two components: inflation and growth.<sup>62</sup> The state government's revenue collection is limited to inflation plus the growth in the state population in the prior year.<sup>63</sup> Local governments' revenue collections are limited to inflation plus the growth in value of all real property.<sup>64</sup> Finally, school districts' revenue collections are limited to inflation plus the growth in student enrollment.<sup>65</sup>

All of the revenue collected in excess of these limits must be refunded unless the voters approve a measure allowing the relevant government to keep the excess.<sup>66</sup> Because TABOR does not specify the form these ballot measures must take, they have varied widely.<sup>67</sup> For example, many municipalities have made use of broad-form "de-Brucing"<sup>68</sup> ballot questions, "which allow the government to keep and spend an unspecified amount of revenue in excess of TABOR's limits, often for an indefinite period of time."<sup>69</sup> When no such measure is brought to voters, or the voters turn down such a measure, the excess revenue is refunded through a variety of mechanisms. The state government exceeded the limit for the first time in 1997 and continued to exceed the limit each year through 2001. During these years the state refunded money to taxpayers as a mix of temporary tax credits and refunds.<sup>70</sup>

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62. COLO. CONST. art. X, § 20(7)(a)–(c). Inflation is measured by the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder. *Id.* § 20(2)(f).

63. *Id.* § 20(7)(a). Population growth is determined by annual federal census estimates and is "adjusted every decade to match the federal census." *Id.*

64. *Id.* § 20(7)(b). TABOR calculates growth in the value of all real property as the "net percentage change in actual value of all real property in a district from construction of taxable real property improvements, minus destruction of similar improvements, and additions to, minus deletions from, taxable real property." *Id.* § 20(2)(g).

65. *Id.* § 20(7)(c). TABOR calculates growth in student enrollment as the "percentage change in . . . student enrollment." *Id.* § 20(2)(g).

66. *Id.* § 20(7)(d).

67. GUIDE TO TABOR, *supra* note 53, at 31.

68. The "de-Brucing" ballot questions are named for Douglas Bruce, author and principal TABOR proponent.

69. *Id.*

70. TEN YEARS OF TABOR, *supra* note 6, at 13.

### 3. Limiting Spending by State and Local Governments

TABOR has an unusual definition of spending, defining it as “all [government] expenditures and reserve increases” with some exceptions, including “reserve transfers or expenditures.”<sup>71</sup> The TABOR definition of spending thus generally includes, as revenues, money that was saved instead of spent.<sup>72</sup> That is, saving money through increasing reserves is counted as “spending,” whereas spending out of the reserves is not counted as “spending.”<sup>73</sup> In addition, due to the method used for calculating allowable spending increases in subsequent years, it is not possible to save money for future years without limiting future spending levels.<sup>74</sup> Allowable spending increases are calculated by starting from last year’s *actual* expenditures as a baseline, not including any money saved, and increasing by the relevant inflation-plus-growth limit.<sup>75</sup> Thus, the baseline from which next year’s growth is calculated will be lowered if any revenues are saved in a reserve account, and “any savings in one year effectively reduces the spending amounts in subsequent years.”<sup>76</sup>

### 4. Preventing the Weakening of Other Limits on Government Spending

By stating that “[o]ther limits on [government] revenue, spending, and debt may be weakened only by future voter approval,”<sup>77</sup> TABOR essentially locks in and constitutionalizes growth limits enacted prior to TABOR. The most notable example was the Arveschoug-Bird Limit,<sup>78</sup> which limited growth in state general fund appropriations to 6 percent per year.<sup>79</sup> Although Arveschoug-Bird was ultimately repealed in 2009, it was long considered to be the type of “other limit” that could

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71. COLO. CONST. art. X, § 20(2)(e).

72. Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265, 1303 (2007).

73. *Id.*

74. UNDERSTANDING TABOR, *supra* note 50, at 5.

75. *Id.*

76. *Id.*

77. COLO. CONST. art. X, § 20(1).

78. COLO. REV. STAT. § 24-75-201.1(1) (repealed 2009).

79. TEN YEARS OF TABOR, *supra* note 6, at 13.

not be weakened without voter approval.<sup>80</sup> Local governments have also had various spending limits locked in by TABOR.<sup>81</sup> For example, Colorado Springs voters approved a version of TABOR that amended the city's charter in 1991, the year before the state-wide TABOR vote, which many consider more restrictive than the state version.<sup>82</sup> Presumably, such a limit could not currently be weakened without voter approval.

### 5. Limiting Types of Taxation Available

TABOR prohibits three types of new taxes: transfer taxes on real property, state real property taxes, and local income taxes.<sup>83</sup> Although it is unclear why these three types of taxes were singled out, commentators have speculated that TABOR author Douglas Bruce, a real estate investor, did not want to leave the former two types of taxes to the whims of voters.<sup>84</sup> But, because the amendment requires voter approval in advance before any new taxes may be levied at all, the prohibition on specific types of taxes hardly seems necessary. If voters did not want any of these three types of taxes, they presumably could reject them at the polls. Nonetheless, instead of allowing voters to later decide whether these three types of taxes would be desirable, TABOR permanently prohibits them.

The five TABOR provisions left a dramatic mark on the state by significantly altering the ability of state and local governments to set budget and taxation priorities. The provision requiring voter approval of new taxes and tax policy changes and the provision setting the inflation-plus-growth formula have arguably made the most impact. The next Section details TABOR's aftermath.

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80. For further discussion of the repeal of Arveschoug-Bird, *see infra* notes 268–71 and accompanying text.

81. UNDERSTANDING TABOR, *supra* note 50, at 5.

82. PUB. COMM'NS DEP'T, CITY OF COLO. SPRINGS, TABOR TUTOR: ABC'S OF TABOR 7 (2008), available at <http://www.springsgov.com/units/communications/TABOR%20ABCs08.pdf>.

83. COLO. CONST. art. X, § 20(8)(a).

84. *See, e.g.,* Dale Oesterle, *Bruce's Hidden Agenda in Amendment 1*, DENV. POST, Dec. 5, 1992, at 15B (arguing that TABOR author Douglas Bruce's "strategy was to hide his pet views in a long-winded referendum, tout the amendment as maximizing voter sovereignty, and exclude his pet views from the basic voter-ratification system he provided for tax and spending increases").

#### D. TABOR's Effects on Colorado

TABOR directly and dramatically affects the budgets of state and local governments in Colorado. This Section discusses the two direct effects on state budgeting—the slow “shrinking” effect and the drastic “ratchet” effect—before turning to examine the direct and indirect effects TABOR has had on the state’s business climate and provision of services.

##### 1. The Shrinking Effect and the Ratchet Effect

As adopted in 1992, TABOR had two effects on government taxation and spending: the “shrinking” effect and the “ratchet” effect. The first effect, the gradual reduction in the size of government relative to the economy as a whole, has not been well-publicized.<sup>85</sup> Although the inflation-plus-growth formula appears reasonable on its face because it allows a government to maintain its current expenditure levels and allows nominal growth, in reality the formula leads to a reduction in government spending. TABOR continually shrinks the size of government relative to the economy because TABOR’s inflation-plus-growth formula does not accurately reflect either growth in the economy generally, or growth in the cost of government services.

The growth of the economy outstrips the growth of government due to the limits imposed by the inflation-plus-growth formula.<sup>86</sup> Brad Young, a Republican former Colorado state representative and Chairman of the Joint Budget Committee, argues that the purposeful omission of growth in the economy due to increases in productivity serves to shrink the size of government relative to the economy.<sup>87</sup> Although the TABOR formula does allow the government to grow to an extent, the omission of productivity growth from the inflation-plus-growth formula causes the government’s growth to continually lose ground against growth in the economy as a whole.<sup>88</sup> This effect is increased by the fact that growth compounds year-to-year, much like compound interest.<sup>89</sup> Young gives the following example: if the state’s budget is calculated from a baseline of \$6

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85. See Collins, *supra* note 72, at 1303.

86. *Id.*

87. YOUNG, *supra* note 3, at 8.

88. *Id.* at 9.

89. *Id.*

billion and is allowed to grow at only 6 percent while the economy as a whole grows at 8 percent, after six years the state government will have shrunk by 10 percent relative to the economy as a whole.<sup>90</sup> Figure 1 below dramatically illustrates this trend.

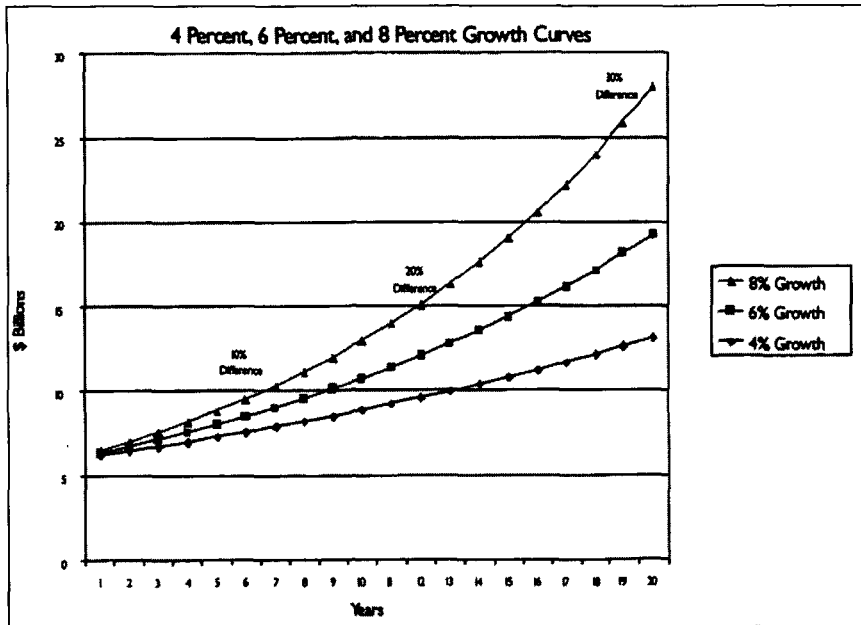


Fig. 1: Growth Curves Under TABOR<sup>91</sup>

Further, growth in the consumer economy does not track growth in the cost of government services. For example, if all states had had an inflation-plus-growth formula similar to TABOR from 1990 to 2004, state expenditures in 2004 would have been 21 percent below their actual levels, a difference of \$162.7 billion.<sup>92</sup> To close this funding gap, state governments would have had to cut K-12 education budgets 78 percent, cut all spending on Medicaid and transportation, or cut 60 percent of all other state spending.<sup>93</sup> Both the inflation measure and

90. *Id.*

91. *Id.* at 10.

92. DAVID H. BRADLEY ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, THE FLAWED "POPULATION PLUS INFLATION" FORMULA: WHY TABOR'S GROWTH FORMULA DOESN'T WORK 1 (2005) [hereinafter FLAWED FORMULA], available at <http://www.cbpp.org/files/1-13-05sfp3.pdf>.

93. *Id.*



the growth measure in the inflation-plus-growth formula fail to accurately capture increases in the cost of government services.

TABOR uses the Consumer Price Index ("CPI") for Denver-Boulder to measure inflation.<sup>94</sup> The CPI is a poor proxy for growth in spending on services purchased by governments because government purchasing habits differ from those of consumers.<sup>95</sup> Consumer spending drives the CPI; consumers spend the majority of their income on housing, transportation, and food.<sup>96</sup> In contrast, governments spend the majority of their budgets on education, health care, transportation, and corrections.<sup>97</sup> The costs of these services tend to rise faster than the costs for goods and services generally.<sup>98</sup> This is because, while goods become cheaper to produce over time due to technology improvements and increases in productivity, public services such as education and police tend to rely on "well-trained professionals" such as teachers and police officers.<sup>99</sup> As a result, "[i]t may take far fewer workers to build an automobile than it did 30 years ago, but it still takes one teacher to lead a classroom of children."<sup>100</sup> Thus, government services do not reap the efficiency and productivity gains from which consumers benefit, making the CPI a poor measure of the increases in costs for government services.<sup>101</sup> Indeed, by 2005, the costs of medical care and education were growing at twice the rate of the CPI overall.<sup>102</sup>

Additionally, the population groups that use government services grow faster than the formula's total population growth measure.<sup>103</sup> From 1990 to 2002, the total state population

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94. COLO. CONST. art. X, § 20(2)(f).

95. FLAWED FORMULA, *supra* note 92, at 1.

96. *Id.* at 6. As to the relative importance of the major CPI components, Housing makes up 42.1 percent, Transportation makes up 16.9 percent, Food and Beverages make up 15.4 percent, Medical Care makes up 6.1 percent, Recreation makes up 5.9 percent, Apparel makes up 4.0 percent, and Other makes up 9.7 percent. *Id.*

97. *Id.* As to the relative importance of the major state spending components, K-12 Education makes up 26.1 percent, Medicaid makes up 13.1 percent, Higher Education makes up 12.9 percent, Transportation makes up 7.4 percent, Corrections makes up 4.9 percent, Public Assistance makes up 1.5 percent, and Other, including the State Children's Health Insurance Program, makes up 34.0 percent. *Id.*

98. *Id.* at 5.

99. *Id.*

100. *Id.*

101. *Id.* at 6.

102. *Id.* at 1.

103. *Id.*

grew by 15.4 percent.<sup>104</sup> Meanwhile, the “total state prison population grew by 83 percent, disabled children in schools grew by 35 percent, and the number of elderly and disabled persons on Medicaid grew by 70 percent.”<sup>105</sup> The United States Census Bureau projects that, while the total population will increase by 39 percent from 2000 to 2040, the elderly population will increase by 128 percent.<sup>106</sup> Thus, including total population growth in the formula fails to capture growth among population segments that rely most heavily on public services.

As a final dramatic example, consider what the world would look like if TABOR had been introduced in 1913, the same year as the CPI:

State government would have been “frozen in time” with the economy as it existed prior to air travel, automobiles and highways, indoor plumbing and electricity in much of the nation, the agricultural chemical revolution, the Great Depression, modern warfare, and so on, except by a vote of the people.<sup>107</sup>

It is clear that the inflation-plus-growth formula is a poor measure of the increase in cost of government services. Thus, even though TABOR proponents strenuously argue that the limit allows the government to continue growing at a reasonable pace, in reality the size of the government relative to the economy is continually shrinking. This in turn jeopardizes a variety of services that the state and local governments provide, a problem detailed in Subsection 2.

The second effect, the “ratchet” effect, is well-documented and more widely acknowledged.<sup>108</sup> The “ratchet” effect occurs when, due to an economic downturn, the government collects less money than the TABOR limit allows.<sup>109</sup> The next year’s spending levels, calculated using the previous year’s actual revenues as a baseline before increasing by the inflation-plus-growth formula, will be lowered because the baseline will be cut to the actual revenues collected in the previous recession

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104. *Id.*

105. *Id.* at 1–2.

106. *Id.* at 8.

107. YOUNG, *supra* note 3, at 78.

108. *See id.* at 39.

109. LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMBLY, 2005 STATE BALLOT INFO. BOOKLET 2 (2005).

year.<sup>110</sup> For example, after the recession in 2001, the state collected only \$7.8 billion in 2002, despite the fact that the state's TABOR limit of population growth plus inflation would have allowed the state to spend \$8.1 billion had there been no recession.<sup>111</sup> As a result, the state's budget was permanently "ratcheted down" to the lower level and was well below the amount that the state would have otherwise been able to collect and spend had no recession occurred.<sup>112</sup>

In 2005, after experiencing some of TABOR's more dire consequences following the 2001 recession, Colorado voters approved Referendum C, a state-wide "de-Brucing" measure that, among other things, effectively eliminated the ratchet effect for state budget purposes.<sup>113</sup> Referendum C ameliorated the ratcheting problem by changing the definition of the baseline. The measure provides that in 2011, the state may set the new baseline for its TABOR limit according to the year between 2006 and 2010 in which the highest amount of revenue was collected; and for each year after 2011, the baseline is increased from the previous year's baseline, rather than the previous year's actual revenue.<sup>114</sup> Thus, one bad recession year in which the state collects less money than expected will no longer permanently cut the baseline from which the state's budget can grow.

## 2. TABOR's Effect on the State Business Climate and Services

Numerous studies have considered whether the gradual shrinking of government taxation and spending and the ratchet effect have had positive or negative effects on the state as a whole.<sup>115</sup> Proponents argue that TABOR is single-handedly re-

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110. *Id.*

111. *Id.*

112. *Id.* Young notes that the same budget reduction accomplished by the 2001 recession would have been accomplished if TABOR had been enacted in 1976 and the gradual shrinking effect noted above had been reducing the size of government relative to the economy since that time. YOUNG, *supra* note 3, at 39.

113. COLO. FISCAL POLICY INST., THE COLORADO ECONOMIC RECOVERY ACT—REFERENDUM C 1–2 (2005), available at <http://www.cclponline.org/pubfiles/RefC6-08-05.pdf> [hereinafter REFERENDUM C ISSUE BRIEF]. For further examination of "de-Brucing" measures, see discussion *infra* Part II.B.

114. REFERENDUM C ISSUE BRIEF, *supra* note 113, at 2.

115. Compare TEN YEARS OF TABOR, *supra* note 6, and FORMULA FOR DECLINE, *supra* note 11, with AMERICANS FOR PROSPERITY, COLORADO IN TRANSITION: KILLING THE GOLDEN GOOSE (2010), available at

sponsible for Colorado's economic growth, whereas opponents argue that TABOR is single-handedly responsible for the decline in availability of services in the state.<sup>116</sup> In reality, both sides are largely talking past each other, with each emphasizing different statistics.<sup>117</sup>

TABOR proponents largely point to studies that favorably rank Colorado's job and business climates.<sup>118</sup> In its "Killing the Golden Goose" report, Americans for Prosperity concludes that the Colorado business climate has recently deteriorated due to tax policy changes that "promote an atmosphere of uncertainty that is not conducive to job growth."<sup>119</sup> The organization includes the *Mesa County* decision as an example of the tax policy changes likely to cause uncertainty and lead to deterioration of the business climate in Colorado, arguing that it "opens the door to major tax hikes and calls into question the applicability of TABOR's spending limitations and requirement for voter approval of any tax hikes."<sup>120</sup> The report praises TABOR, arguing that the positive aspects of the "fiscal discipline" TABOR requires have outweighed any negative consequences of the amendment.<sup>121</sup> It concludes that "the single greatest threat to Colorado's tax climate and fiscal future going forward" is the potential that TABOR principles will ultimately be nullified rather than reaffirmed.<sup>122</sup>

Strangely, Americans for Prosperity reaches this conclusion after reviewing mixed evidence from seven studies that "analyze the attractiveness of the state's business and jobs environment compared to other states."<sup>123</sup> Five of the studies

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[http://americansforprosperity.org/files/golden\\_goose\\_report.pdf](http://americansforprosperity.org/files/golden_goose_report.pdf) [hereinafter GOLDEN GOOSE REPORT].

116. See YOUNG, *supra* note 3, at 43.

117. Both sides also frequently use statistics that are merely correlated with the period of time after TABOR was enacted to prove that TABOR caused a particular effect. See, e.g., YOUNG, *supra* note 3, at 42–43 (arguing that attributing particular effects to TABOR is spurious). Nevertheless, it is still useful to examine the data each side has gathered in an effort to bolster its arguments as to the true effect of TABOR. The data largely appears in the form of Colorado's ranking in particular areas in comparison with other states' rankings in the same area. See *id.*; compare FORMULA FOR DECLINE, *supra* note 11, with GOLDEN GOOSE REPORT, *supra* note 115.

118. See GOLDEN GOOSE REPORT, *supra* note 115, at 13.

119. *Id.* at 16.

120. *Id.* at 17.

121. *Id.* at 20.

122. *Id.*

123. *Id.* at 12–14. The studies were conducted by CNBC, Forbes, Site Selection Magazine, Chief Executive Magazine, Small Business & Entrepreneurship Council, Dr. Ronald Pollina, and the Pacific Research Institute. *Id.*

rank Colorado in the top ten, whereas the other two rank Colorado in the bottom twenty-five.<sup>124</sup> Although acknowledging that “these studies provide insufficient data to make any empirical conclusions,” Americans for Prosperity argues that Colorado is dangerously close to becoming another California, complete with a poor business climate.<sup>125</sup> As evidence, Americans for Prosperity contends that Governor Ritter and the Democrat-controlled state legislature have pursued policies “bear[ing] a striking resemblance to those pursued by California,” including “elimination of spending caps, a union-oriented labor policy, intrusive regulatory policies, and a mindset of entitlement and government dependence.”<sup>126</sup> Americans for Prosperity fails to consider whether California’s confusing web of Constitutional budgetary provisions—a direction Colorado is unfortunately headed in—has contributed to California’s problems.<sup>127</sup>

Opponents, on the other hand, emphasize the effects that TABOR has had on the services and infrastructure provided by the state. The Center on Budget and Policy Priorities (“CBPP”), a nonprofit think tank, cites a host of rankings that it argues indicate the profoundly negative effect TABOR has had on Colorado. For example, the CBPP contends that, after TABOR was enacted, higher education spending per resident student declined 31 percent in Colorado, and the state declined from thirty-fifth to forty-ninth for K–12 spending as a percentage of personal income, from twentieth to forty-eighth for the percentage of low-income adults and children covered by Medicaid, and from twenty-fourth to fiftieth for children who were fully vaccinated.<sup>128</sup> As to the last measure, the report also notes that at one point, Colorado suspended the requirement that school children be vaccinated against particular diseases due to lack of funds to provide the vaccine.<sup>129</sup>

The CBPP places the blame for the reduction in services squarely on TABOR, arguing that costs for services, particularly health care, have grown faster than government coffers constrained by TABOR’s inflation-plus-growth formula.<sup>130</sup> Because the government cannot act on its own to increase reve-

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124. *Id.* at 11.

125. *Id.* at 15.

126. *Id.*

127. See discussion *supra* Part I.A.

128. FORMULA FOR DECLINE, *supra* note 11, at 1–2.

129. *Id.* at 2.

130. *Id.* at 3–4.

nues and keep pace with the demand in services, services must instead be reduced.<sup>131</sup> The report argues that “[b]y creating what is essentially a permanent revenue shortage, TABOR pits state programs and services against each other for survival each year and virtually rules out any new initiatives to address unmet or emerging needs.”<sup>132</sup>

Other evidence proffered by opponents directly contradicts proponents’ claims that TABOR has led to economic growth in the state. A comprehensive study by the Bell Policy Center, completed in 2003 after TABOR had been in effect for ten years, concludes that there was no evidence that TABOR was a factor in economic growth.<sup>133</sup> The study notes that growth began before, and continued after, the passage of TABOR.<sup>134</sup> The study attributes the growth in Colorado and other Western states such as Nevada, Arizona, Utah, and Idaho to regional factors, “such as quality of life and diversification of economies.”<sup>135</sup>

The Bell Policy Center study also makes findings on other TABOR issues that are not typically considered by either proponents or opponents. For example, the study considers whether TABOR has increased voter participation in elections that shape the governments’ fiscal policy and concludes that participation rates in special tax measure elections held in odd-numbered years had continuously been much lower than in even-numbered year presidential or gubernatorial elections.<sup>136</sup> The prevailing side in these special off-year elections has had to garner as little as 16.9 percent of the votes of registered voters to win.<sup>137</sup> Despite the fact that TABOR requires voter approval for, among other things, raising taxes, increasing taxes, and extending taxes, many voters seem disinterested in participating.<sup>138</sup> This has resulted in “a very small number of voters

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131. *Id.* at 4.

132. *Id.*

133. TEN YEARS OF TABOR, *supra* note 6, at 38.

134. *Id.*

135. *Id.* at 39.

136. *Id.* at 50. Tax measures may be placed on the ballot in state general elections, biennial local elections, or in odd-numbered years. COLO. CONST. art. X, § 20(3)(a).

137. TEN YEARS OF TABOR, *supra* note 6, at 54–55. Only 30.6 percent of registered voters turned out for the 1993 election regarding the tourism promotion tax, with the prevailing side garnering 16.9 percent of the votes. *Id.* Even in the 1997 election, in which voters could cast mail-in ballots, the voter turnout rate was 30.0 percent. *Id.* at 54.

138. *See id.* at 51.

deciding fiscal policy issues that have a profound impact on the government's ability to shape its budget."<sup>139</sup>

Considering the apparent disinterest by voters in directing fiscal policy at both a state and local level and the potential negative effects TABOR has had on the ability of the state to provide services to citizens, it is not surprising that Colorado courts have stepped in to ameliorate the situation. The next Part of this Note reviews the early TABOR interpretation cases before considering *Mesa County* in Part III.

## II. A BRIEF HISTORY OF TABOR JURISPRUDENCE

Litigation began almost immediately after TABOR took effect in January of 1993. From the earliest cases, the Colorado Supreme Court interpreted TABOR in a way that lessened the amendment's impact on the state and local governments. Section A discusses the beginning of the state supreme court's TABOR jurisprudence and its loosening of the amendment's requirements. Next, Section B explains the groundwork the court laid in approving broad-form "de-Brucing" measures (an issue that would resurface in *Mesa County*). Finally, *Barber v. Ritter*,<sup>140</sup> a case decided a few months before *Mesa County* and which set the stage for the Court's landmark decision in the latter case, is considered in Section C.

### A. *Establishing the Initial Framework: Bickel v. City of Boulder and Bolt v. Arapahoe County School District Number Six*

The first case testing the limits of TABOR was the landmark 1994 Colorado Supreme Court decision, *Bickel v. City of Boulder*, which reviewed local governments' compliance with various TABOR provisions.<sup>141</sup> Although mainly addressing complicated ballot questions and election procedures, the court held that TABOR should not always be strictly interpreted according to the rule of construction—explicitly stated in the text of TABOR—that "the preferred interpretation [of TABOR] shall reasonably restrain most the growth of government."<sup>142</sup> *Bickel* established that a court must select the "interpretation which

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139. *Id.*

140. 196 P.3d 238 (Colo. 2008).

141. 885 P.2d 215 (Colo. 1994).

142. *Id.* at 229 (quoting COLO. CONST. art. X, § 20(1)).

it concludes would create the greatest restraint on the growth of government” only when TABOR’s text supports more than one interpretation.<sup>143</sup> The court cautioned, however, that “an unjust, absurd, or unreasonable result should be avoided.”<sup>144</sup> In addition, the court took note that TABOR itself claims to supersede only pre-existing conflicting law<sup>145</sup> and determined that when there is no conflict, the amendment must be interpreted in light of pre-existing law and in harmony with other constitutional provisions.<sup>146</sup> Thus, the court cautioned that it would neither blindly apply unreasonable interpretations of TABOR provisions that most restrain the growth of government, nor would it interpret TABOR so as to artificially force a conflict with pre-existing law, thus overriding the pre-existing law.

*Bickel* also rejected the plaintiffs’ argument that TABOR’s election provisions require strict compliance based on the creation of a new fundamental right to vote on tax and spending measures.<sup>147</sup> TABOR placed limits on state and local government representatives, but did not vest in Colorado citizens a new fundamental right with the concomitant strict scrutiny standard of review.<sup>148</sup> The court determined that the real issue was whether governments must strictly comply with TABOR provisions.<sup>149</sup> Requiring strict compliance would unduly restrict the citizens’ ability to vote on such measures, and an election should not be invalidated absent “clear grounds” for doing so, such as a showing of fraud or intentional wrongdoing.<sup>150</sup> The court then held that TABOR’s election provisions must meet only a “substantial compliance” standard and set out various factors to be used in evaluating whether a government substantially complied with a particular provision.<sup>151</sup>

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143. *Id.*

144. *Id.*

145. COLO. CONST. art. X, § 20(1).

146. *Bickel*, 885 P.2d at 228–29.

147. *See id.* at 226–27.

148. *See* discussion *supra* notes 53–59 and accompanying text.

149. *Bickel*, 885 P.2d at 226.

150. *Id.* at 226–27.

151. *Id.* at 227. (“In determining whether a district has substantially complied with a particular provision of [TABOR], courts should consider factors including, but not limited to, the following: (1) the extent of the district’s noncompliance with respect to the challenged ballot issue, that is, a court should distinguish between isolated examples of district oversight and what is more properly viewed as systematic disregard of [TABOR] requirements, (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the district’s noncompliance, and (3) whether it can reasonably be inferred that the district



Each of these holdings dramatically lessened the impact that TABOR otherwise could have had on the state and local governments. TABOR says that its "preferred interpretation shall *reasonably* restrain most the growth of government,"<sup>152</sup> and it was valuable for the court to specify that it would hold such interpretations to the reasonableness requirement. TABOR could have had a more profoundly negative impact on state and local governments' ability to set budget priorities if the Colorado Supreme Court had determined that this new constitutional amendment designed to restrain the growth of government should trump any other consideration.<sup>153</sup> In addition, it is problematic for governments to strictly comply with the TABOR election provisions. Invalidating elections in which voters approve a tax increase or authorize the government to retain excess revenue because of minor technical violations<sup>154</sup> thwarts the will of the voters who have approved of the extra revenue. Invalidating these elections could force the government into a Hobson's choice: either incur the expense of holding a second election—an election the government could very well lose—or forgo the extra revenue.

One year after *Bickel*, the Colorado Supreme Court decided *Bolt v. Arapahoe County School District Number Six*.<sup>155</sup> *Bolt* is most notable for the court's continuation of the *Bickel* trend of loosening the requirement that the preferred interpretation is that which most restrains government growth. The *Bolt* court "decline[d] to adopt a rigid interpretation of [a particular TABOR provision] which would have the effect of working a reduction in government services."<sup>156</sup> The court thus reaffirmed

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made a good faith effort to comply or whether the district's noncompliance is more properly viewed as the product of an intent to mislead the electorate.").

152. COLO. CONST. art. X, § 20(1) (emphasis added).

153. For example, a plaintiff could arguably have prevailed under a theory "based merely upon a philosophical desire to restrain government growth" and need not even assert a theory expressly based on TABOR. Under the court's construction, however, the plaintiff must demonstrate that his or her claim is "firmly grounded in the express requirements of TABOR." GUIDE TO TABOR, *supra* note 53, at 95.

154. An example of such an election with a minor technical violation is the one at issue in *Bickel*. Boulder Valley School District RE-2, the City of Boulder, and the County of Boulder had placed measures on the ballot asking voters to approve a debt increase and a tax increase for the purpose of repaying the debt. After establishing that only substantial compliance was necessary, the *Bickel* court went on to reject the plaintiffs' claim that consolidating the debt issue and the tax increase violated TABOR's election requirements. *Bickel*, 885 P.2d at 228–31.

155. 898 P.2d 525 (Colo. 1995).

156. *Id.* at 537.

the rule in *Bickel* that an unreasonable interpretation of a particular TABOR provision will not be adopted. An interpretation that would have the effect of reducing government services could be one potential definition of an “unreasonable” interpretation. This is problematic, however, because although on its face TABOR purports to restrain, rather than shrink, the growth of government, shrinking the growth of government was arguably the true purpose of this provision.<sup>157</sup> This means that judicial interpretations of TABOR may contravene its true intentions in that judicial interpretations have prevented TABOR from shrinking the government as much as proponents intended. As evidenced by the effects discussed above,<sup>158</sup> the heart of TABOR is to reduce the government as a whole, including government services. Thus, *Bolt* may indicate that the Colorado Supreme Court is at least somewhat resistant to TABOR’s true goal of persistently shrinking the size of government.

*B. Laying the Groundwork for “de-Brucing”: City of Aurora v. Acosta and Havens v. Board of County Commissioners*

In two subsequent cases, the Colorado Supreme Court laid the groundwork for governments to put ballot issues waiving the TABOR limits before the voters, thus allowing governments to “keep and spend an unspecified amount of revenue in excess of TABOR’s limits, often for an indefinite period of time.”<sup>159</sup> First, *City of Aurora v. Acosta*<sup>160</sup> clarified that TABOR ballot measures do not require a specific dollar amount that the government wishes to keep. Second, *Havens v. Board of County Commissioners*<sup>161</sup> explained that it is permissible for a government to keep excess revenues if voters so approve.

In *Acosta*, the Colorado Supreme Court considered TABOR’s election rules and the requirements for the different types of elections. The *Acosta* court established that TABOR requires voter approval in three circumstances: first, measures that fall under the required election provisions under article X section 20(4)(a) of the Colorado Constitution, such as new tax-

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157. See discussion *supra* Part I.D.1.

158. See discussion *supra* Part I.D.2.

159. GUIDE TO TABOR, *supra* note 53, at 31.

160. 892 P.2d 264 (Colo. 1995).

161. 924 P.2d 517 (Colo. 1996).

es, tax rate increases, or tax policy changes causing net tax revenue gain; second, measures asking voters to authorize retaining excess revenue collected above the inflation-plus-growth limit; and third, measures asking voters to authorize retaining excess revenue collected above the estimated dollar amount specified in a previously-approved tax increase.<sup>162</sup> The court went on to state that ballot issues need to specify the dollar amount of the tax increase only in the first scenario, relying on TABOR language indicating that the voters must be advised of the proposed maximum increase in terms of dollars for a "tax increase."<sup>163</sup> There is no other provision in TABOR specifying the form that ballot issues proposing revenue changes must take.<sup>164</sup> Thus, voters must be apprised of the proposed dollar amount of a revenue change only if the revenue change is a new tax or tax increase under subsection (4)(a).<sup>165</sup> This decision opens the door for voters to approve of government retention of an unspecified amount of revenue collected above the government's inflation-plus-growth limit. That is, voters can waive their right to receive all future refunds of revenue collected in excess of the government's TABOR limit regardless of the amount.

Subsequently, *Havens* was the first case in which the Colorado Supreme Court upheld voter approval of a local government retaining revenue collected above its inflation-plus-growth limit. In *Havens*, the court tackled the meaning of subsection (7)(d), which provides that "[i]f revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset."<sup>166</sup> The plaintiff argued that this provision means that, in order for a government to keep revenues collected above the TABOR limits, the government must reduce revenue in future years by an equal amount to compensate for the extra revenue the government kept.<sup>167</sup> However, the court reasoned that under this interpretation the voters would essentially be prohibited from authorizing the government to spend the excess revenue because later budget cuts would be required to account for

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162. 892 P.2d at 268.

163. *Id.* (quoting COLO. CONST. art. X, § 20(3)(b)(iii)).

164. *Id.*

165. *Id.*

166. *Havens*, 924 P.2d at 519 (quoting COLO. CONST. art. X, § 20(7)(d)).

167. *Id.*

the excess revenue kept.<sup>168</sup> The court stated that such a result would “prohibit voters from authorizing the accomplishment of objectives they deem justified which would not be achieved in the absence of supplementary revenues to the governmental entity.”<sup>169</sup> Thus, the court held that the subsection (7)(d) “offset” refers to the voter-approved retention of excess revenue that the government would otherwise be required to refund, and that the government is not required to counterbalance the amount of excess revenue kept with an equal future budget cut.<sup>170</sup>

*Acosta* and *Havens* thus opened the door for voters to authorize the government to retain excess revenue collected above the government’s particular inflation-plus-growth limit. Under *Acosta*, the ballot issue can be open-ended, proposing that the government be able to keep all future excess revenue. Under *Havens*, the government need not offset all the future excess revenue collected with a corresponding budget cut. In essence, if the voters approve such a “de-Brucing” measure, the government is free to keep all excess revenue in the future. Indeed, in a second *Havens* case, the Colorado Court of Appeals approved an indefinite waiver of TABOR limits in a particular county.<sup>171</sup>

In addition, according to these cases, a ballot issue could express a new tax in terms of the maximum dollar increase and also ask the voters to authorize the government to retain excess revenue collected above that dollar amount.<sup>172</sup> A new tax can be proposed, and the government need not be held to the maximum dollar increase noted in the ballot if the voters approve of the government retaining all excess revenue collected above that dollar amount.

The ability of voters to waive their right to a refund and allow the government to keep and spend the excess revenue indefinitely is arguably in line with TABOR’s purpose of allowing voters to decide budgetary issues. Yet such a waiver is unlikely to serve TABOR’s purported purpose of restraining growth in government or its arguable actual purpose of shrinking government. This is because allowing the government to keep an

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168. *Id.* at 522.

169. *Id.*

170. *Id.* at 523–24.

171. *Havens v. Bd. of Cnty. Comm’rs*, 58 P.3d 1165, 1167–68 (Colo. Ct. App. 2002).

172. GUIDE TO TABOR, *supra* note 53, at 115.

unspecified (but likely ever-growing) amount of excess revenue for an indefinite amount of time almost certainly encourages the growth of government. Even so, TABOR was sold to the voters with the promise that they would be allowed to vote on taxes.<sup>173</sup> If the voters decide they need not scrutinize each request for additional revenue over the government's inflation-plus-growth limit and instead cede control over all such additional revenue to their elected representatives, they are free to make such a choice under TABOR. The ultimate question, then, may be whether limiting growth in government or maintaining voter control is the more important consideration—a question considered in *Mesa County*.

These “de-Brucing” measures have proven to be very popular and highly successful, at least at the local government level. From 1993 to 1999, local governments held 1,100 “de-Brucing” elections, with a success rate of 93 percent.<sup>174</sup> New local governments crop up rapidly in Colorado, however.<sup>175</sup> Between December 2004 and July 2009, 767 new local governments were created in the state, bringing the total to 3,223.<sup>176</sup> Thus, despite local governments’ success at “de-Brucing,” TABOR cannot be discounted as a non-issue for all of Colorado’s local governments.

On the state level, two “de-Brucing” attempts failed<sup>177</sup> before the state made some headway with Referendum C in 2005.<sup>178</sup> Referendum C provided little long-term help for the state government, however, as it waived the state’s inflation-plus-growth limit for only five years—the waiver expired on June 30, 2010<sup>179</sup>—and only for the purpose of funding “K-12 and higher education, health care, transportation, and the payment of an obligation for fire and police pensions.”<sup>180</sup> Thus,

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173. See discussion *supra* Part I.B.

174. TEN YEARS OF TABOR, *supra* note 6, at 58.

175. UNIV. OF DENV. CTR. FOR COLO.’S ECON. FUTURE, ISSUE BRIEF: COLORADO’S STATE BUDGET TSUNAMI 8 (2009), available at [http://www.du.edu/economicfuture/documents/BudgetTsunami\\_001.pdf](http://www.du.edu/economicfuture/documents/BudgetTsunami_001.pdf).

176. *Id.*

177. *Id.*

178. REFERENDUM C ISSUE BRIEF, *supra* note 113, at 1.

179. Tim Hoover, *TABOR Faithful Celebrate Expiration of Ref C, but it Ain’t Exactly Over*, DENV. POST (July 13, 2010), <http://blogs.denverpost.com/thespot/2010/07/13/tabor-faithful-celebrate-passage-of-ref-c-but-it-aint-exactly-over/11760/> (last visited Sept. 10, 2010).

180. YOUNG, *supra* note 3, at 70. By specifying that the excess funds could be spent only in specific areas, Referendum C implied that other state funding areas, such as “corrections, public safety, courts, natural resources and the environment, [and] economic development,” were of lesser importance. *Id.*

although Referendum C provided temporary relief for some areas of state funding, it was far from a permanent solution for the state's budgetary woes. In the end, "de-Brucing" may work better on the local level than on the state level because voters feel closer to the decision-making process and can ensure that their elected representatives are properly investing the extra revenue.<sup>181</sup>

Even after a successful "de-Brucing" measure, however, the relevant government is still held to the other TABOR requirements, most notably the provision requiring voter approval of all new taxes or tax increases. Thus, TABOR remains a problem, albeit a less onerous one, for those governments that have persuaded voters to waive the inflation-plus-growth limit. TABOR still squeezes the budgets of governments that have not persuaded voters to indefinitely waive the limit through a "de-Brucing" election, particularly the state government. The "de-Brucing" that has occurred at the local government level—town-by-town and county-by-county—has done little to ameliorate the situation on the state level. Although "de-Brucing" has provided limited relief to some governments, the decision in *Mesa County* was necessary to further loosen TABOR's grip.

### C. *On the Road to Mesa County: Barber v. Ritter*

When *Barber v. Ritter* reached the Colorado Supreme Court in 2008, the court again took pains to clarify that it was not interested in construing TABOR so as to paralyze government functions. Rather, the court spoke of the "cautious line we have drawn to reasonably interpret [TABOR] and maintain the government's ability to function efficiently" as well as its history of "consistently reject[ing] readings of [TABOR] that would hinder basic government functions or cripple the government's ability to provide services."<sup>182</sup> The court also reminded the plaintiffs that the construction that would "reasonably restrain most the growth of government" applies only when there is more than one plausible interpretation of a provision of TABOR itself, and will not be used to hold legislative acts unconstitutional under TABOR.<sup>183</sup> Legislation challenged

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181. See TEN YEARS OF TABOR, *supra* note 6, at 58.

182. *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008).

183. *Id.* at 247–48.

as unconstitutional under TABOR must instead be proven to be unconstitutional beyond a reasonable doubt.<sup>184</sup>

The court also began laying the groundwork for the legislative discretion it would ultimately give to the General Assembly in its *Mesa County* holding. *Barber* centered on the General Assembly's instructions to the state treasurer to transfer \$442 million from special cash funds, funded through fees, surcharges, and special assessments, to the state's General Fund to help ameliorate the effects of the economic downturn that lasted from 2001 to 2004.<sup>185</sup> The plaintiffs argued that the transfer violated TABOR because it amounted to a " 'tax policy change directly causing a net tax revenue gain,' a 'new tax,' or a 'tax rate increase' " that had not been approved by the voters.<sup>186</sup>

In rejecting the plaintiffs' arguments, the court relied heavily on the fact that the special cash funds were funded by fees.<sup>187</sup> If the transfers at issue involved "fees," rather than "taxes," the transfers did not violate the cited TABOR provisions that deal with "taxes."<sup>188</sup> In distinguishing between a fee and a tax, "courts must look to the primary or principal purpose for which the money was *raised*, not the manner in which it was ultimately *spent*."<sup>189</sup> Fees are collected primarily to cover the costs of a particular government service, whereas taxes are collected primarily to cover the costs of government operation generally.<sup>190</sup> So long as money is collected primarily to cover the costs of a particular government service, and not to pay for government generally, it is characterized as a fee even if it indirectly pays for government generally.<sup>191</sup>

With this holding, the Colorado Supreme Court indicated that it would not strictly hold the General Assembly to TABOR

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184. See *id.* at 252. The court said only "it cannot be said beyond a reasonable doubt" that the legislature acted in violation of TABOR and did not explain the standard further. The *Mesa County* court would later cite *Barber* for the proposition that "a statute challenged under [TABOR] must be proven to be unconstitutional beyond a reasonable doubt." *Mesa Cnty. Bd. of Cnty. Comm'rs v. State*, 203 P.3d 519, 523 (Colo. 2009).

185. *Barber*, 196 P.3d at 242. Cash funds are usually made up of user fees that support the particular program used, such as fishing licenses. The General Fund is largely made up of income and sales taxes and supports programs that are not fee-based, such as prisons and K-12 schools. See YOUNG, *supra* note 3, at 39-41.

186. *Barber*, 196 P.3d at 244.

187. *Id.* at 248.

188. *Id.*

189. *Id.* at 249.

190. *Id.* at 248.

191. *Id.* at 249.

requirements, but rather that it would tolerate the General Assembly's use of at least a small amount of legislative discretion in shaping fiscal policy. That is, so long as fees are not used to directly fund the government's general activities, the General Assembly retains budgetary discretion.<sup>192</sup>

Thus, throughout its TABOR jurisprudence, the Colorado Supreme Court has incrementally loosened TABOR's restrictions as well as restored legislative discretion over taxing and spending. The court went on to greatly expand upon this grant of legislative discretion in *Mesa County*, which is considered in the next Part.

### III. *MESA COUNTY BOARD OF COUNTY COMMISSIONERS V. STATE*

*Mesa County*, decided in March 2009, radically changed the TABOR landscape. Arguably the most important TABOR case since the 1990s, *Mesa County* not only firmly established the validity of broad-form "de-Brucing" elections, but also interpreted two of the catch-all provisions of TABOR requiring voter approval: the "tax policy change directly causing a net tax revenue gain to any district" clause<sup>193</sup> and the clause governing the weakening of other limits on government revenue or spending.<sup>194</sup>

The court in *Mesa County* considered the General Assembly's 1993 and 2007 revisions to the School Finance Act.<sup>195</sup> Required by the state constitution to provide for "the establishment and maintenance of a thorough and uniform system of free public schools throughout the state,"<sup>196</sup> Colorado has long funded public schools in the state through a mixture of local property taxes and state funds.<sup>197</sup> In 1993, after TABOR was adopted, the General Assembly revised the School Finance Act to incorporate TABOR's property tax revenue limit.<sup>198</sup> School

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192. *Id.*

193. COLO. CONST. art. X, § 20(4)(a).

194. *Id.* at § 20(1).

195. *Mesa Cnty.*, 203 P.3d at 523. The version of the School Finance Act at issue in *Mesa County* was the Public School Finance Act of 1994, COLO. REV. STAT. §§ 22-54-101 to 134 (1994).

196. COLO. CONST. art. IX, § 2.

197. *Mesa Cnty.*, 203 P.3d at 523.

198. *Id.* at 524.



districts' property tax mill levies<sup>199</sup> were thereafter limited to the lesser of the number of mills levied the previous year, the number of mills that would generate an amount equal to the district's total program minus various other revenues, or "the number of mills that may be levied by the district under the property tax revenue limitation imposed on the district by [TABOR]."<sup>200</sup> The relevant TABOR provision limits property tax revenue growth in school districts to inflation in the economy plus growth in school enrollment.<sup>201</sup> Voters are permitted to waive the limit, however, if they "approve a revenue change as an offset."<sup>202</sup>

Beginning in 1995, voters in school districts around the state began to waive the limit for their districts in "de-Brucing" elections.<sup>203</sup> Voters in 175 of the 178 school districts in Colorado approved measures to exempt their district from the limit.<sup>204</sup> With one exception, all of the approved ballot measures contained broad language "authoriz[ing] the school district to retain and expend 'all revenue' or 'full revenue' from 'any source,' notwithstanding the limitations of [TABOR]."<sup>205</sup>

Despite the success of these "de-Brucing" elections, the Colorado Department of Education continued to advise the school districts that they were bound by the TABOR limits because of the language in the School Finance Act incorporating the TABOR language.<sup>206</sup> The result was that although the voters in the school districts had voted to waive the TABOR limits, the school districts were still bound by them because the limits had been incorporated in the School Finance Act.<sup>207</sup> Thus, school districts that had held successful "de-Brucing" elections were nonetheless required to reduce their mill levies to comply

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199. A mill levy calculates property tax based on each \$1,000 of assessed value. *How Property Taxes are Determined*, BOULDER COUNTY ASSESSOR, <http://www.bouldercounty.org/assessor/taxes/index.html> (last updated June 29, 2010). One mill yields \$1 of property tax per \$1,000 in assessed value. *Id.*

200. *Mesa Cnty.*, 203 P.3d at 524 (quoting COLO. REV. STAT. § 22-54-106(2) (1994)). The statute was slightly revised in 1994, but the changes were not relevant to the issue in *Mesa County*. *Id.* at 524 n.1.

201. *Id.* at 524 (quoting COLO. CONST. art. X, § 20(7)(c)).

202. *Id.* (quoting COLO. CONST. art. X, § 20(7)(d)).

203. *Id.*

204. *Id.*

205. *Id.* at 524–25. The exception: the Steamboat Springs School District allowed the school district to retain all revenues except those raised through property taxes. *Id.* at 524 n.3.

206. *Id.* at 525.

207. *Id.*

with the TABOR limit.<sup>208</sup> Over time, the local share of school funding dropped significantly due to the mill levy reductions, causing a corresponding increase in the state share of school funding.<sup>209</sup>

To address this problem, the General Assembly enacted Senate Bill 07-199 in 2007, amending the School Finance Act to remove the TABOR limits for school districts that had waived them.<sup>210</sup> Language was added to the portion of the School Finance Act that had incorporated the TABOR limits to specify that the TABOR limit only applied in school districts that had “not obtained voter approval to retain and spend revenues in excess of the property tax revenue limitation imposed on the district by [TABOR].”<sup>211</sup> Although this change did not result in a mill levy increase in any school district, the school districts as a whole collected an additional \$117.8 million as the result of increased property values.<sup>212</sup>

The plaintiffs, comprising the Mesa County Board of County Commissioners, Main Street Café, and a variety of private individuals as representatives of similarly situated taxpayers and registered voters, challenged Senate Bill 07-199 on three grounds.<sup>213</sup> They argued that it violated subsection (4)(a) of TABOR, requiring voter approval of a “tax policy change directly causing a net tax revenue gain in any district;” subsection (7), requiring voter approval to waive property tax limits; and subsection (1), requiring voter approval to weaken “other lim-

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208. *Id.*

209. Local school districts were responsible for 47 percent of the total funding in 1994, but were responsible for only 36 percent by 2007. *Id.* The Gallagher Amendment (“Gallagher”), codified at COLO. CONST. art. X, § 3, has also affected local property tax assessment rates. *See TABOR and the Gallagher Amendment*, SALIDA CITIZEN, <http://salidacitizen.com/411/gallagher>. Gallagher permanently fixed the ratio of property taxes collected from residential and commercial property at 45 percent residential and 55 percent commercial. *Id.* When the value of residential property rises, residential property tax rates must fall to maintain the ratio and ensure that residential properties do not make up more than 45 percent of all property taxes collected. *Id.* Residential property tax rates have been continually cut to maintain the ratio, further exacerbating school funding problems. *Id.*

210. *TABOR and the Gallagher Amendment*, *supra* note 209; Act of May 9, 2007, ch. 199, sec. 5, § 22-54-106(a)(2), 2007 Colo. Legis. Serv. 733 (West).

211. *Mesa Cnty.*, 203 P.3d at 525–26.

212. *Id.* at 526.

213. *Id.* at 526, 528. The Mesa County Board of County Commissioners did not have standing to challenge the constitutionality of Senate Bill 07-199, but the court nonetheless adjudicated the case on the merits because the other plaintiffs had standing as taxpayers. *Id.* at 526 n.6.

its” on government revenue or spending.<sup>214</sup> Each of these arguments will be discussed in turn.

A. *Voter Approval of a “Tax Policy Change” in Section 20(4)(a)*

As a threshold matter, the Colorado Supreme Court determined that subsection (4)(a) does not apply to any modifications that would have only a *de minimis* impact on a government’s revenue, reasoning that to require an election for such small amounts would “cripple the government’s ability to function.”<sup>215</sup> In establishing the boundaries of the new *de minimis* exception, the court gave only one example: the situation in which the cost of an election requesting voter approval of additional revenue exceeds the amount of additional revenue approved.<sup>216</sup> The court theorized that voters could not have intended that the government be required to spend money on elections requesting approval for such small amounts when they had approved TABOR.<sup>217</sup> Beyond this cost-of-election example, the court did not otherwise define the parameters of *de minimis* revenue changes.<sup>218</sup> Thus, because the court did not discuss the exception further, the outer limits of the *de minimis* exception are unclear; the cost of an election requesting voter approval may well define the upper limit of the *de minimis* exception.

The Office of Legislative Legal Services (“OLLS”), the General Assembly’s non-partisan, in-house counsel charged with advising the legislature on issues related to TABOR,<sup>219</sup> has also not attempted to further define a *de minimis* tax policy change.<sup>220</sup> Rather, the OLLS’s memorandum advising the

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214. *Id.* at 528 (quoting COLO. CONST. art. X, § 20(4)(a)). For discussion regarding TABOR’s main provisions, see discussion *supra* Part I.C.

215. *Id.* at 529.

216. *Id.*

217. *Id.*

218. In her dissent, Justice Eid took issue with the *de minimis* exception, pointing out that the \$117 million at issue in *Mesa County* was hardly a *de minimis* amount. *Id.* at 538 (Eid, J., dissenting).

219. *Duties and Responsibilities*, OFFICE OF LEGISLATIVE LEGAL SERVICES, [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/duties\\_and\\_responsibilities.htm](http://www.state.co.us/gov_dir/leg_dir/olls/duties_and_responsibilities.htm) (last visited Nov. 15, 2010).

220. See Memorandum from the Office of Legislative Legal Servs. to Members of the Gen. Assembly, Test to Be Applied to Determine Whether Prior Voter Approval Is Required for a Tax Policy Change Directly Causing a Net Tax Revenue Gain to any Dist. 3 (Nov. 12, 2009) (on file with author).

General Assembly regarding the test to be applied in determining whether prior voter approval is needed for a tax policy change refers only to the cost-of-election example given by the court.<sup>221</sup> Thus, the only reference point for determining the meaning of a *de minimis* tax policy change is currently the cost-of-election example.

More importantly, the court determined that subsection (4)(a) must draw its context from the inflation-plus-growth spending limits outlined in subsection (7), holding that “a ‘tax policy change directly causing a net tax revenue gain to any district’ only requires voter approval when the revenue gain exceeds one of the subsection (7) limits.”<sup>222</sup> Given this new framework, the court went on to hold that it was not necessary to have a second election for the purpose of allocating the revenue gained as the result of the original waiver elections.<sup>223</sup> No election was necessary at the local level because once the voters have authorized a waiver of the TABOR limit, later legislation directing the use of the funds is merely an implementation of the waiver, not a “tax policy change directly causing a net tax revenue gain to *any* district” requiring an election.<sup>224</sup> No election was required at the state level because the school district is the relevant taxing authority for this purpose, rather than the state, and the state does not have the authority to cause a local “tax policy change.”<sup>225</sup> The court rejected the argument that because state action caused a net revenue gain to the local school districts, an election on the state level was required.<sup>226</sup>

In the court’s view, an election is required only when the government’s action causes a net revenue gain to that specific government and is not required when the government’s action causes a net revenue gain to a separate government. Thus,

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221. *Id.*

222. *Mesa Cnty.*, 203 P.3d at 529 (quoting COLO. CONST. art. X, § 20(4)(a)). The dissent vigorously disagreed that the language of subsection (4)(a) requires advanced voter approval only when the government seeks to exceed its subsection (7) limit. Justice Eid argued that Senate Bill 07-199 was a change in state tax policy that directly caused a net revenue gain to the local school districts and thus required advance voter approval. Contending that the majority created a loophole in subsection (4)(a), Justice Eid pointed to TABOR language requiring that the “distric[t] [here, the state] must have voter approval in advance for . . . a tax policy change [here, SB 07-199] directly causing a net tax revenue gain [here, the \$117 million] to any district [here, the local school districts].” *Id.* at 538 (Eid, J., dissenting) (brackets in original) (quoting COLO. CONST. art. X, § 20(4)(a)).

223. *Id.* at 529 (majority opinion).

224. *Id.* at 530 (quoting COLO. CONST. art. X, § 20(4)(a)).

225. *Id.*

226. *Id.*

*Mesa County* authorizes the state government to change its own tax policies, resulting in a net revenue gain to a local government or school district, even if the net revenue gain to the local government or school district causes a corresponding savings to the state government. The Attorney General, arguing against the Governor and the Colorado Department of Education, contended that in passing Senate Bill 07-199 the state decreased the amount of its obligation under the School Finance Act, which could be considered an effective net revenue gain.<sup>227</sup> The court rejected this argument, stating that it would be impossible to limit such an expansion of the net revenue gain provision and would require the court to read language into the constitution that is not there.<sup>228</sup>

The court thus articulated three extremely important holdings in the section of its opinion dealing with subsection (4)(a). First, there is no need for an election if the tax policy change would result in a *de minimis* revenue gain. Second, an election is necessary only where the government wishes to exceed its relevant subsection (7) inflation-plus-growth limit. Finally, an election is necessary only where a government action causes a net revenue gain to that particular government, but it is not necessary if the government action causes a net revenue gain to another government. The significance and future implications of each of these three holdings will be examined in turn.

First, the court established that an election is not needed if the tax policy change would result in a *de minimis* revenue gain. Although this holding lacks textual support in TABOR, the court was correct in establishing the *de minimis* exception, for it would be an absurd result for a government to hold an election that costs an equal or greater amount than the amount of revenue sought. The voters who approved TABOR, believing that they were restraining the growth of government, could not have intended for the government to waste resources in attempting to retain a comparatively insignificant amount of money.

The cost of an election, however, will necessarily change depending on a number of factors, including the length of the ballot and the corresponding print costs.<sup>229</sup> Of course, these costs vary depending on how expensive it is for the relevant

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227. *Id.* at 531.

228. *Id.*

229. Interview with Sharon Eubanks, Deputy Dir., Office of Legislative Legal Servs., in Denver, Colo. (Jan. 6, 2010).

government to hold an election. For example, the 2008 general election cost Hinsdale County \$21,000 but cost Jefferson County more than \$2 million.<sup>230</sup> Thus, application of the *de minimis* exception, as currently defined by the cost to have an election, likely will vary widely across the state.

The next question that must be resolved is how much the extra revenue generated by the tax policy change must exceed the cost of an election before the change is no longer *de minimis*. Even if this question is answered, however, the many local governments that have successfully held broad-form “de-Brucing” elections<sup>231</sup> may not have much use for the *de minimis* exception because the governments that have “de-Bruced” presumably have more budgetary flexibility than those that have not. Finally, there is a legitimate concern that, because the court did not apply the *de minimis* exception in the case, it may be dicta.<sup>232</sup> Therefore, the ultimate importance and use of the *de minimis* exception remains to be seen.

The second important holding is that an election is necessary only where the government wishes to exceed its relevant inflation-plus-growth limit. Although Senate Bill 07-199 may very well have amounted to a “tax policy” change, the court wisely side-stepped the issue of defining what is and is not a “tax policy” and instead granted the General Assembly discretion to make such changes so long as it stays below its subsection (7) inflation-plus-growth limit.<sup>233</sup> In addition, the subsection (4)(a) language requiring advance voter approval for any “tax policy change directly causing a net tax revenue gain to any district” cannot literally mean what it says.<sup>234</sup> Professor Richard Collins of the University of Colorado Law School argues that, if the provision were to be read literally, it would be necessary for the voters to give advance approval for a policy change that merely improves tax collection methods, causing a net revenue gain.<sup>235</sup> Although such changes may now also be covered under the *de minimis* exception, this second holding—that no election is needed unless the government will exceed its

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230. Myung Oak Kim, *Counties Struggle on Election Costs*, ROCKY MTN. NEWS (Jan. 24, 2009), available at <http://www.rockymountainnews.com/news/2009/jan/24/counties-struggle-on-election-costs/>.

231. See *supra* note 174 and accompanying text.

232. Interview with Sharon Eubanks, *supra* note 229.

233. Interview with Carol Hedges, Senior Fiscal Analyst, Colo. Fiscal Policy Inst., in Denver, Colo. (Jan. 5, 2010).

234. Collins, *supra* note 72, at 1310.

235. *Id.*

inflation-plus-growth limit—may prove more useful to governments given the uncertainty surrounding the definition, limits, and viability of the *de minimis* exception.

Indeed, this holding has already proved lucrative on the state government level. One of the most fruitful uses of this holding thus far has been in narrowing tax exemptions and revising tax credits. Changing or repealing a tax exemption was previously considered a classic example of a “tax policy change directly causing a net tax revenue gain to any district” requiring prior voter approval.<sup>236</sup> The General Assembly, likely motivated by the economic downturn that started in 2008,<sup>237</sup> immediately began making use of the holding that no election is needed unless the government will exceed its inflation-plus-growth limit. In reliance on *Mesa County*, the General Assembly changed a tax credit for alternative fuel cars such that it now ends at an earlier date,<sup>238</sup> altered the capital gains tax,<sup>239</sup> and temporarily suspended a sales tax exemption on cigarettes.<sup>240</sup> The Governor’s Office of State Planning and Budgeting has also jumped in wholeheartedly, having proposed suspending, eliminating, temporarily limiting, revising, or enforcing thirteen existing tax exemptions and credits—with a fiscal impact totaling \$131,800,000—as part of its budget proposal for the fiscal year 2010-2011 budget.<sup>241</sup> At last, the state government has a tool to mitigate the effects of an economic downturn other than cutting services or putting a tax increase before the voters.

This holding likely will also prove useful to governments that have successfully “de-Bruiced,” and thus essentially have no inflation-plus-growth limit. As previously noted, many local governments have had their inflation-plus-growth limits waived by voters.<sup>242</sup> Even the state government, which waived the inflation-plus-growth limit for 2005–2010 through Referen-

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236. Interview with Geoff Wilson, Gen. Counsel, Colo. Mun. League, in Denver, Colo. (Oct. 7, 2009).

237. See *infra* text accompanying notes 295–97.

238. H.B. 09-1331, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009).

239. H.B. 09-1366, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009).

240. H.B. 09-1342, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009).

241. GOVERNOR’S OFFICE OF STATE PLANNING AND BUDGETING, GOVERNOR BILL RITTER’S BALANCED BUDGET REQUEST FY 2010–11 (Nov. 10, 2009), <http://www.colorado.gov/cs/Satellite/OSPB/GOVR/1244121587930> (follow “Governor Ritter’s FY 2010-11 Budget Request” hyperlink; then follow “Power Point Presentation: Governor Ritter’s FY 2010–11 Budget Balancing Plan” hyperlink).

242. See *supra* text accompanying notes 174–81.

dum C, had an opportunity to exceed its inflation-plus-growth limit.

Finally, the last important holding in this section of the case is that an election is necessary only where a government action causes a net revenue gain to that particular government, not if the government action causes a net revenue gain to another government. Although there are programs other than local schools that are funded jointly by the state and local governments, including public assistance programs and old age pensions,<sup>243</sup> it is not clear how much the state or local governments will attempt to make use of this holding. In addition, it is not known whether this holding applies only to such jointly-funded programs. If it does not apply only to jointly-funded programs, one potential use of this ruling is for the state to repeal sales tax exemptions and allow the benefit to inure to those municipalities whose sales tax policies are defined by the state.<sup>244</sup> Even so, this holding is not likely to prove very useful: it seems unlikely that one government would want to change its tax policy such that a benefit inures to another government unless the first government also receives some benefit, such as the funds the state government was able to retain after amending the School Finance Act to remove the TABOR limit for the school districts that had waived their limits.

*B. The Validity of the “de-Brucing” Elections under Section 20(7)(c)*

The Colorado Supreme Court next considered the legality of the “de-Brucing” elections the school districts held. Recall that the plaintiffs in *Mesa County* argued that Senate Bill 07-199, the statute amending the School Finance Act to remove the reference to the TABOR limits, violated subsection (7)(c) because voters did not approve Senate Bill 07-199 in advance.<sup>245</sup> The plaintiffs argued that the school districts’ waiver elections did not supply the requisite voter approval.<sup>246</sup> Despite noting that none of the school districts were parties to the case, the court decided to consider the validity of the waiver

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243. *Mesa Cnty.*, 203 P.3d at 527.

244. Interview with Geoff Wilson, *supra* note 236.

245. See *supra* text accompanying note 214.

246. *Mesa Cnty.*, 203 P.3d at 531.



elections held by the individual school districts because of the importance of the School Finance Act.<sup>247</sup>

The plaintiffs argued that the voters who approved the “de-Brucing” measures in each school district had intended to address only the narrow problem that, because of TABOR, the school districts might not be able to collect money from sources such as “vending machine concessions, activity fees, and non-federal grants.”<sup>248</sup> These voters, according to plaintiffs, approved their school district’s “de-Brucing” measure but still intended to retain the TABOR property tax limit codified in the School Finance Act, as demonstrated by the plaintiffs’ extrinsic evidence.<sup>249</sup> Some school districts supposedly relied on the property tax limit remaining in the School Finance Act when fashioning their “de-Brucing” measures.<sup>250</sup> The plaintiffs argued that the school districts failed to place specific language in the ballot issues alerting voters to the fact that voting for the measure could result in a property tax increase.<sup>251</sup>

Although the district court had agreed with the plaintiffs, the Colorado Supreme Court rejected the plaintiffs’ voter intent and ballot language arguments. The court reasoned that it was improper for the district court to consider extrinsic evidence supposedly demonstrating the true voter intent because language used on the ballot measures, such as “all revenues” and “full revenues,” was unambiguous.<sup>252</sup> The court noted that “[i]t strains credulity to argue that references to ‘all revenues’ or ‘full revenues’ did not include property tax revenues when the ballot measures only applied to school districts and it is common knowledge that the great majority of local funding for schools comes from property tax revenues.”<sup>253</sup> In rejecting the plaintiffs’ argument that the “de-Brucing” measures ought to have included language making clear the danger that a “yes” vote could lead to higher property taxes, the court observed that there is nothing in the language of subsection (7) that requires specific wording in ballot measures seeking to waive the TABOR limits.<sup>254</sup> Thus, the court definitively upheld broad-

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247. *Id.* at 528 n.12.

248. Brief for Plaintiffs-Appellees at 10, *Mesa Cnty. Bd. of Cnty. Comm’rs v. State*, 203 P.3d 519 (Colo. 2009) (No. 08SA216), 2008 WL 4203506 at \*10.

249. *Id.* at \*3.

250. *Id.* at \*27–28.

251. *Mesa Cnty.*, 203 P.3d at 528.

252. *Id.* at 533.

253. *Id.* at 534.

254. *Id.* at 532.

form waiver elections in which the relevant government may request voter approval for collecting and spending “ ‘all revenues’ or ‘full revenues’ from whatever source, notwithstanding the limitations of [TABOR].”<sup>255</sup>

The dissent disagreed with the majority’s decision to consider the validity of the school districts’ “de-Brucing” elections.<sup>256</sup> Justice Eid stated that the majority was incorrect in saying that the issue was “fully briefed,” as none of the parties had actually argued that the waiver elections were valid or invalid.<sup>257</sup> The dissent was likely correct in saying that the majority’s decision to proceed with adjudicating the validity of the waiver elections was questionable given that none of the school districts were parties and thus were not able to argue on their own behalf. Ultimately, though, the decision may have been harmless, because any attempt by the plaintiffs to bring claims against the school districts directly might have run up against an expired statute of limitations.<sup>258</sup> Anyone wishing to challenge the language of a ballot issue has only five days after the ballot title is set to file suit.<sup>259</sup>

In the end, although procedurally questionable due to the fact that the school districts were not parties, it was pragmatically valuable for the court to uphold broad-form “de-Brucing” elections. Had the Colorado Supreme Court struck down the “de-Brucing” elections, or held that the voters had not approved retaining excess property taxes collected, the consequences would have been dire for school districts that would have had to refund all of the excess revenues collected.<sup>260</sup> For example, Holyoke’s refund obligation would have been 50 percent of its total annual expenditures.<sup>261</sup> Thus, it was better for the court to uphold the waiver elections and avoid this result.

### C. *Weakening Other Limits under Section 20(1)*

Finally, the court briefly addressed another catch-all provision in subsection (1), which states that “[o]ther limits on dis-

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255. *Id.*

256. *Id.* at 539 (Eid, J., dissenting).

257. *Id.* at 539–40 (majority opinion). The defendants did argue in the alternative that, were the court to hold that Senate Bill 07-199 required voter approval, the school districts’ waiver elections satisfied that requirement.

258. See Collins, *supra* note 72, at 1311.

259. COLO. REV. STAT. § 1-11-203.5(2) (2009).

260. Interview with Geoff Wilson, *supra* note 236.

261. *Id.*

strict revenue, spending, and debt may be weakened only by future voter approval.”<sup>262</sup> Recall that, following TABOR’s passage in 1992, the legislature amended the School Finance Act in 1993 to incorporate TABOR’s inflation-plus-growth limit.<sup>263</sup> The *Mesa County* plaintiffs argued that the School Finance Act’s inflation-plus-growth limit was an “other limit” that SB 07-199 impermissibly weakened.<sup>264</sup> Professor Collins had suggested that the “weakening” provision could be applied to the School Finance Act in one of two ways: either the language in the School Finance Act represented an independent limit, requiring future voter approval before it could be weakened, or it merely referred to the TABOR limit and was not an independent limit, exempting this provision of the School Finance Act from the future voter approval requirement.<sup>265</sup>

Ultimately, the court declined to hold that the language in the School Finance Act restricting school districts to their inflation-plus-growth limit was an independent “other limit,” instead determining that it was a reference to the subsection (7)(c) limit.<sup>266</sup> The court colorfully mused that to hold that the School Finance Act was an independent limit “would amount to treating a reflection in a mirror to be a real object.”<sup>267</sup>

If the true import of this holding is that none of the TABOR limits transposed in statutes are “other limits” that may be “weakened only by future voter approval,” the General Assembly is presumably free to remove all other references to TABOR limits that are codified in the Colorado Revised Statutes. Moreover, this holding may have served to embolden the legislature to remove other spending limits. Most notably, the General Assembly repealed Arveschoug-Bird,<sup>268</sup> a statute that had limited General Fund growth to the lower of 6 percent of the previous year’s budget or 5 percent of personal income.<sup>269</sup> It is not likely that the General Assembly relied on the *Mesa County* decision in repealing the 6 percent limit because the bill

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262. *Mesa Cnty.*, 203 P.3d at 535. (quoting COLO. CONST. art. X, § 20(1)).

263. *See supra* text accompanying notes 198–201.

264. *Id.*

265. *See* Collins, *supra* note 72, at 1310–11.

266. *Mesa Cnty.*, 203 P.3d at 535.

267. *Id.*

268. S.B. 09-228, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009).

269. *See* Memorandum from the Office of Legislative Legal Servs. To Interested Persons, The Arveschoug-Bird Gen. Fund Appropriations Limit, section 24-75-201.1(1)(a)(II) through (VII), C.R.S. 2 (Nov. 1, 2004), available at [http://www.cde.state.co.us/artemis/ga5\\_15/ga61552ar82004internet.pdf](http://www.cde.state.co.us/artemis/ga5_15/ga61552ar82004internet.pdf).

was introduced, and some votes on the bill occurred, before the Colorado Supreme Court even handed down the *Mesa County* decision.<sup>270</sup> Even so, it had been assumed since 1994 that a court would strike down any tinkering with the Arveschoug-Bird limit without prior voter approval as an impermissible weakening of that limit.<sup>271</sup> It may be that legislators, emboldened by the court's permissive reading of the "weakening" language in *Mesa County*, were persuaded that eliminating the Arveschoug-Bird limit would not be an impermissible weakening.

#### IV. THE FUTURE VIABILITY OF TABOR

For years, Colorado has had trouble adequately funding projects that are state priorities, largely due to the fact that its legislators' hands are tied by TABOR.<sup>272</sup> The landmark *Mesa County* decision weakened the effects of some of TABOR's provisions and restored some amount of discretion regarding fiscal policy to the people's elected representatives. Given the negative effects of TABOR detailed in Part I.D.2., however, it is clear that further work is needed to improve the fiscal health of the state and local governments.

Unfortunately, it is likely no longer possible to repeal the amendment wholesale given the so-called "single subject rule" that was enacted after TABOR's passage. TABOR opponents succeeded in amending the Colorado Constitution to prevent another TABOR-like amendment comprising multiple subjects from being approved in the future. Currently, measures proposed by petition must contain only one subject.<sup>273</sup> The single-subject rule likely prevents another plebiscite repealing TABOR, although there is some support for the idea that a plebiscite repealing TABOR wholesale, rather than repealing only parts and retaining others, would not run afoul of the single-subject rule.<sup>274</sup>

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270. Colorado General Assembly, Summarized History for Bill Number SB 09-228, <http://www.leg.state.co.us/clics/clics2009a/csl.nsf/> (use "Go Directly to Bill Number" to search for "228"; then follow "History" hyperlink).

271. Memorandum from the Office of Legislative Legal Servs. to Members of the Gen. Assembly, Exceeding the Arveschoug-Bird Limit for Purposes of School Finance—Amendment No. 1 Implications (Jan. 24, 1994) (on file with author).

272. See *supra* Part I.C.2.

273. COLO. CONST. art. V, § 1(5.5).

274. *In re Proposed Initiative 1996-4*, 916 P.2d 528, 535 (Mullarkey, J., concurring).

At this point, the Colorado local governments appear prepared to live with the effects of TABOR.<sup>275</sup> TABOR did not have the universally negative effect on local governments that some feared. Ironically, this is due in large part to the fact that, with few exceptions, many municipalities have held successful “de-Brucing” elections.<sup>276</sup> Most municipalities are thus able to exceed their inflation-plus-growth limits, mitigating the effects of TABOR. However, one potential proposal for reform aimed at municipalities would be especially helpful for mountain communities—repealing the portion of TABOR that forbids transfer taxes on real property.<sup>277</sup> As previously noted, it made little sense for TABOR to specifically prohibit new transfer taxes on real property because TABOR already requires voter approval before any new taxes are enacted.<sup>278</sup> Colorado mountain communities have a large number of absentee homeowners who are contributing little, if any, to other tax bases, such as sales tax.<sup>279</sup> Allowing a transfer tax on these large vacation homes would help mountain communities to recoup some of this loss.

Moreover, many potential reform proposals will need to be framed with the Colorado state government in mind. It is the state government that will likely need to take a more aggressive approach in loosening TABOR’s grip, largely because of the state’s poor showing in “de-Brucing” elections. Some Colorado lawmakers have gone so far as to call for a constitutional convention in the state, arguing that a drastic, comprehensive overhaul is needed to solve the state’s budget problems.<sup>280</sup> But calling a constitutional convention adds even more challenges by requiring the legislature to approve a convention by a two-thirds majority before the question of whether to hold a convention may be sent to voters for approval.<sup>281</sup> Given the difficulties in calling a convention, it is unlikely that a constitutional convention is the key to reforming fiscal policy in the state.

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275. Collins, *supra* note 72, at 1310.

276. See *supra* text accompanying notes 174–81.

277. COLO. CONST. art. X, § 20(8)(a).

278. See *supra* Part I.C.5.

279. Interview with Geoff Wilson, *supra* note 236.

280. Berny Morson, *Colorado Constitutional Rewrite Considered*, ROCKY MTN. NEWS (Feb. 21, 2009), available at <http://www.rockymountainnews.com/news/2009/feb/21/colorado-constitutional-rewrite-considered/>.

281. *Id.*

Thus, at this point, the most realistic avenue for the state to loosen TABOR's grip is likely the courts, as demonstrated by *Mesa County*. One way to reach this result could be for a plaintiff to prevail on a suit to enforce a state spending obligation to the extent that it would cripple the state. For example, in *Lobato v. State*, the Colorado Supreme Court recently upheld the justiciability of a suit seeking to enforce Colorado's constitutional promise of a "thorough and uniform system of free public schools throughout the state."<sup>282</sup> If the plaintiffs ultimately prevail on the merits, bringing the school system into compliance could dramatically impact the state budget.<sup>283</sup> After similar challenges to K-12 funding in Kentucky and New Jersey, those states respectively spent \$532 million and \$1 billion to comply with court orders mandating increased funding.<sup>284</sup> Thus, should the *Lobato* plaintiffs prevail, the court may have to take a hard look at TABOR when fashioning a remedy.

Others have considered the possibility of suing the state in federal court on the theory that TABOR violates the federal Constitution, which guarantees "to every State in this Union a Republican Form of Government."<sup>285</sup> Colorado lawyer Herb Fenster intends to file a suit in federal court arguing that TABOR violates this clause because it interferes with the legislative branch's taxing and spending responsibilities.<sup>286</sup> Although an interesting argument, such a suit would likely never reach the merits because suits under the Guaranty Clause have long been held to be nonjusticiable political questions.<sup>287</sup>

Any attempt by the courts to loosen TABOR's grip may ultimately backfire, however. Citizens who disagree with a court's permissive interpretation may simply propose new citizen initiatives or constitutional amendments to restore their vision of TABOR. Three such initiatives were proposed for the 2010 election,<sup>288</sup> and one, Amendment 60, was intended to overrule *Mesa County* and undo the legislature's revisions to

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282. 218 P.3d 358, 363 (Colo. 2009) (quoting COLO. CONST. art. IX, § 2).

283. Interview with Carol Hedges, *supra* note 233.

284. FLAWED FORMULA, *supra* note 92, at 10–11.

285. U.S. CONST. art. IV, § 4.

286. Colleen O'Connor, *Lawyer, Education Supporter to Sue Colorado over TABOR*, DENV. POST (Feb. 11, 2010), available at [http://www.denverpost.com/frontpage/ci\\_14378211?source=rss](http://www.denverpost.com/frontpage/ci_14378211?source=rss).

287. *Baker v. Carr*, 369 U.S. 186, 223 (1962) (citing cases in which the "Court . . . refused to resort to the Guaranty Clause . . . as the source of a constitutional standard for invalidating state action").

288. Op-Ed., *Ballot Madness*, DURANGO HERALD NEWS (Dec. 17, 2009), available at [http://durangoherald.com/sections/Opinion/2009/12/17/Ballot\\_madness/](http://durangoherald.com/sections/Opinion/2009/12/17/Ballot_madness/).

the School Finance Act by restoring the property tax limits that were “weakened” without voter approval.<sup>289</sup> The Amendment would also have forced school districts to halve mill levies by 2020.<sup>290</sup> Colorado could find itself in a cycle whereby courts loosen TABOR and the voters re-tighten it.<sup>291</sup>

The ultimate efficacy of the courts in loosening TABOR’s grip on the state government is thus uncertain. Although the court system has been helpful thus far, it may be necessary to avoid bringing about sweeping change through the courts if such change would merely provoke the TABOR faithful to return to the polls to ask voters to restore or strengthen TABOR. One hopes that Colorado voters will ultimately recognize that TABOR is crippling the state’s ability to function and will reject new TABOR measures at the polls.<sup>292</sup>

## CONCLUSION

As noted in Part I.A, California currently faces extreme budget shortfalls, likely due in part to the web of conflicting constitutional taxation provisions enacted by the people of that state.<sup>293</sup> The situation in Colorado is not yet as dire.<sup>294</sup> By the conclusion of fiscal year 2009 in June 2010, Colorado weathered a \$2.2 billion shortfall and faced a \$1.3 billion shortfall

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289. *Id.*

290. *Id.*

291. Although lamenting the death of the Republic is beyond the scope of this article, Young’s book is an excellent discussion of the trouble with allowing voters to decide nuanced public finance issues through direct democracy, rather than through a representative form of government. He argues that the TABOR debate should be centered on whether direct democracy creates a better society. YOUNG, *supra* note 3, at 2.

292. Just before this Note went to press, voters overwhelmingly rejected all three initiatives—Amendment 60, Amendment 61, and Proposition 101—at the polls. *Colorado Amendment 2010 Election Results*, DENV. POST, <http://data.denverpost.com/election/results/amendment/2010/> (last visited Nov. 7, 2010) (reporting that 75 percent of voters voted “no” on Amendment 60 and 73 percent voted “no” on Amendment 61); *Colorado Proposition 2010 Election Results*, DENV. POST, <http://data.denverpost.com/election/results/proposition/2010/> (reporting that 68 percent of voters voted “no” on Proposition 101) (last visited Nov. 7, 2011).

293. See *supra* text accompanying notes 36–40.

294. Or, perhaps it *is* as dire, given that the California state government serves a population of nearly forty million whereas the Colorado state government serves a population of five million. Compare U.S. Census Bureau, California Quickfacts, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Aug. 16, 2010) with U.S. Census Bureau, Colorado QuickFacts, <http://quickfacts.census.gov/qfd/states/08000.html> (last visited Aug. 16, 2010). Thanks to Charlie Sommers for this observation.

in fiscal year 2010.<sup>295</sup> Fiscal year 2011's prospects are not much

brighter, with current projections showing a \$954.1 million shortfall.<sup>296</sup> To be sure, Colorado's current budget woes are exacerbated in large part by the overall economic downturn, but Colorado has already begun to follow in California's footsteps. Colorado voters tied legislators' hands by approving of limiting taxes through TABOR and later limited their discretion even further by approving of earmarking money for particular programs. For example, Amendment 23, approved by voters in 2000, mandated increases in funding to local K-12 public schools,<sup>297</sup> a difficult act for governments constrained by TABOR. Hopefully judicial reforms, such as *Mesa County*, will loosen TABOR's grip on the state and prevent Colorado from further developing a conflicting, California-like budget.

Thus, *Mesa County* was a decision whose time had come. Colorado has faced years of crumbling infrastructure and declining state services, and the state and local governments were often left with no option but to cut services in order to balance their budgets. At last, the governments now have some discretion and may consider other options, such as reinterpreting tax policies, so long as they do not run afoul of TABOR's inflation-plus-growth limits. Governments now have space in which to maneuver and no longer face the unsavory dilemma of being forced to cut from the budget or to ask the citizens for an increase in taxes. Despite the fact that feasibility of further TABOR reform through the court system is unclear, *Mesa County* was a necessary first step in dismantling the Trojan Horse.

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295. Tim Hoover, *Colorado Hardly Alone in Budget Troubles*, DENV. POST (Feb. 14, 2010), available at [http://www.denverpost.com/commented/ci\\_14398427?source=commented-news](http://www.denverpost.com/commented/ci_14398427?source=commented-news).

296. COLO. FISCAL POLICY INST., COLORADO'S REVENUE CRISIS PROJECTED TO FORCE A FOURTH ROUND OF DEEP CUTS TO SERVICES IN 2011-12 (2010), available at [http://www.cclponline.org/uploads/files/issue\\_brief\\_colorado\\_revenue\\_crisis.pdf](http://www.cclponline.org/uploads/files/issue_brief_colorado_revenue_crisis.pdf).

297. *Constitutional Provisions*, COLO. DEPARTMENT OF THE TREASURY, <http://www.colorado.gov/cs/Satellite/Treasury/TR/1196935260080> (last visited Sept. 22, 2010).



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