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THE COLORADO CONSTITUTION IN THE NEW CENTURY

RICHARD B. COLLINS*

TABOR, gay marriage, pit bulls, guns, redistricting, ethics in government, school vouchers, and minimum wage have been on Colorado’s constitutional agenda for the past seven years. Dale Oesterle and I authored a book-length study of the Colorado Constitution through 2001.1 This article reviews amendments and judicial decisions arising since. It should surprise no one that TABOR has generated by far the most decisions.

I. AMENDMENTS

During the past half-century, Colorado voters approved numerous amendments to the Colorado Constitution.2 2001–2005 saw the adoption of but one major amendment, the 2002 addition of article XXVIII governing campaign finance. A 2004 amendment raising tobacco taxes3 would have been a legislative matter in most states but was constitutionalized by the

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3. COLO. CONST. art. X, § 21. The measure raised the cigarette sales tax, imposed a new “tobacco products tax,” and exempted proceeds from revenue limits of TABOR. Id. § 21(2)-(4).
Taxpayers' Bill of Rights (TABOR). The amendment also requires that the tax's proceeds be spent only for designated health-related purposes. By contrast, 2006 was a busy year. Voters added article XXIX, which severely restricts gifts to public officials and employees and their families and contractors; article II, section 31, which limits marriage to unions of one man and one woman; and article XVIII, section 15, which raised and indexed the state's minimum wage. They also extended a property tax exemption to disabled veterans. Other adopted amendments since 2001 were essentially housekeeping measures.

A. Article II, Section 31. Marriage

Colorado statutory law defines marriage as a union between one man and one woman, thereby failing to recognize same-sex or polygamous marriages. However, in lawsuits brought by same-sex couples, courts in other jurisdictions have invoked state constitutions to overturn similar laws. These

4. Id. § 20(4)(a), (7) (requiring voter consent for tax increase and for exemption from revenue limits). Compliance with TABOR did not require a constitutional amendment but did require a statewide vote. Id. § 20(4)(a). However, the measure's other provisions, directing spending of tax proceeds, required a free-standing initiative. Other TABOR issues are discussed infra, text at notes 247–394.


6. COLO. CONST. art. XXIX; art. II, § 31; art. XVIII, § 15.

7. See COLO. CONST. art. X, § 3.5.

8. See COLO. CONST. art. XIV, § 8.7 (authorizing legislature to set qualifications for county coroners); 2006 Colo. Sess. Laws 2955–57 (repealing obsolete provisions); 2004 Colo. Sess. Laws 2745–46 (same); 2002 Colo. Sess. Laws 3094–3101 (same). Each of these was referred to the ballot by the legislature.


cases induced Colorado’s opponents of same-sex marriage to initiate a constitutional definition in 2006, and their proposal was adopted. In the same election, voters rejected a statutory referendum to authorize civil partnerships for same-sex couples. There is some incongruity in placing this and like measures that restrict equality in article II, the Colorado Bill of Rights, but the initiative process allows proponents to choose where to insert amendments into the Constitution.

B. Article X, Section 3.5. Homestead Exemption

Section 3.5 was added in 2000 to reduce the property tax on residences for qualified homeowners 65 years of age or older. Tax on the first $200,000 of actual value is halved, and the state must reimburse local governments for their reduced decisions could have been appealed to the Supreme Court of Canada, but the Prime Minister announced that instead the government would introduce legislation to legalize same-sex marriage. See Susan Munroe, Canada to Make Same-Sex Marriages Legal, CANADA ONLINE, http://canadaonline.about.com/cs/samesex/a/samesexmarrleg.htm (last visited Aug. 28, 2007). He then referred to the supreme court the question whether such legislation would be constitutional (the reverse of the question decided by the lower courts), and the court held that it would be valid. In re Same Sex Marriage, [2004] 3 S.C.R 698. The court carefully avoided stating a viewpoint on the correctness of the lower court decisions. See id. at 701. In 2005, the Canadian Parliament amended the marriage law (a national issue under the Canadian Constitution) to legalize gay marriage. Civil Marriage Act, R.S.C., ch. 33 (2005).

11. COLO. CONST. art. II, § 31.
13. Neither the governing constitutional provision, COLO. CONST. art. V, § 1, nor statutes carrying it out, COLO. REV. STAT. tit. 1, art. 40 (2007), have any provision stating who decides where an initiative creating a new law will be located in the constitution or statutes. The practice is that during statutory review processes, the Legislative Council and Office of Legislative Legal Services may suggest a location to initiators, but the ultimate decision is left to them. See Email from Stephanie Cegielski, Legal Specialist, Colorado Dept. of State (Apr. 22, 2007) (on file with author). For other instances of initiated restrictions on equality in article II, see COLO. CONST. art. II § 30b, forbidding laws providing for equal rights for gays, held to violate the federal Constitution in Romer v. Evans, 517 U.S. 620 (1996), and COLO. CONST. art. II § 30a, making English the official language of Colorado. However, there is no other article of the Colorado Constitution that is an obvious place for these provisions.
14. See OESTERLE & COLLINS, supra note 1, at 236–37. To qualify, seniors must have owned and occupied their homes for the preceding ten years.
revenue. The legislature can raise or lower the $200,000 cap, and it used this power in 2003 to suspend the entire reduction during the economic downturn of 2003-05. The same statute restored the reduction up to $200,000 in value for 2006, and in the latter year, voters amended Section 3.5 to extend the benefit to disabled veterans.

C. Article XVIII, Section 15. State Minimum Wage

Colorado has had statutory minimum wage legislation since 1917, but until 1977, it applied only to women and children. In the latter year, it was extended to most workers. It provides for the Director of the Colorado Division of Labor to determine "the minimum wages sufficient for living wages." Colorado's statutory minimum wage was last raised in 1997 to match the federal minimum that became effective that year, $5.15 per hour.

In 2006, voters initiated and approved a constitutional minimum wage of $6.85 per hour to be adjusted annually for inflation based on "the Consumer Price Index used for Colorado." It is to be paid to anyone eligible for the federal or state statutory minimum wages, and the measure restricts the amount of tip income that can be offset against the minimum.

The state does not determine any consumer price index, and the federal government does not calculate a consumer price index for Colorado, but its greater Denver index "is often used..."

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15. Id.
19. See 1917 Colo. Sess. Laws 380-90 (codified as amended in COLO. REV. STAT. tit. 8, art. 6 (2007)).
20. See id.
22. COLO. REV. STAT. § 8-6-106 (2007). Determination of the wage rate is made pursuant to § 8-6-109.
24. COLO. CONST. art. XVIII, § 15.
25. Id. The offset is limited to $3.02 per hour, and this figure is not indexed for inflation. Therefore, the minimum wage for workers who receive tip income is set at $3.83 per hour, adjusted for inflation in the same way as the minimum for other workers.
as a proxy." Also, the federal greater Denver index is used to measure inflation under TABOR, under the Campaign and Political Finance amendment, and under the new Standards of Conduct in Government amendment. The statute implementing the new wage measure delegated the choice of index and other details to the Director of the State Division of Labor, and the Director announced that the greater Denver index will be used.

D. Article XXVIII—Campaign and Political Finance

1. History

Campaign finance regulation is a triangular war among proponents of restrictions, those who claim that restrictions are unconstitutional denials of free speech, and members of the General Assembly bent on reelection. In 1974, the General Assembly passed a Campaign Reform Act that set modest limits on campaign contributions and adopted requirements for accountability and disclosure. In 1996, voters approved a statutory initiative that replaced most of the 1974 law with much stricter rules. Key features of the 1996 measure were severe limits on contributions to candidates and committees ($100 to $500 per person), prohibitions on contributions by cor-

27. COLO. CONST. art. X, § 20(2)(f).
28. Id. art. XXVIII, § 3(13) (indexing contribution limits). On this amendment generally, see infra text at notes 32–63.
29. COLO. CONST. art. XXIX, § 3(6) (indexing $50 cap on gifts to public officers, employees, and contractors). On this amendment generally, see infra text at notes 64–100.
30. COLO. REV. STAT. §§ 8-6-106, 8-6-108.5 (2007).
porations and labor unions, and voluntary limits on campaign spending. The initiative also renewed restrictions on using public money or other resources to influence the outcome of elections.

First Amendment challenges were immediately filed in federal district court. The court sustained most of the voluntary spending provision, but in 1999 it invalidated the basic contribution limits as too low to satisfy federal free speech standards. While appeals were pending, the General Assembly unwisely repealed all of the contribution limits, including those held valid by the court, and replaced them with much higher limits—$1000 to $5000 per person. The voluntary spending provision that the court had largely sustained was also repealed, as was the prohibition on corporate and labor contributions to candidates. The U. S. Court of Appeals then overturned restrictions on corporations as applied to organizations that promoted issues rather than candidates.

Proponents of restrictions countered with the constitutional initiative adopted in 2002, adding article XXVIII. Drafters of the amendment made some changes to try to meet the judicial objections cited above. Contribution limits range from $200 to $500 for individual donors and are indexed for in-
flation.\textsuperscript{42} Individual donors can pool their resources in “small donor committees,” groups that accept donations only from natural persons who give no more than $50 each per calendar year.\textsuperscript{43} Most corporations and unions cannot directly support candidates but can establish small donor committees to do so.\textsuperscript{44} The article restores voluntary spending limits, regulates political advertisements, and imposes new disclosure requirements.\textsuperscript{45}

The 2003 General Assembly adopted statutes to carry out article XXVIII.\textsuperscript{46} One provision specifies that a corporation or union can contribute directly to a political committee for disbursement to a candidate committee or political party, a point on which article XXVIII is unclear.\textsuperscript{47}

2. Consent of Union Members

An important campaign finance dispute arose in August of 2006, when Secretary of State Gigi Dennis adopted a regulation that required unions and other member organizations to get their members’ advance written consent before transferring any part of members’ dues to a small donor or political committee.\textsuperscript{48} The regulation did this by restricting a “member” of a union’s small donor committee to a person who “at least annually gives the membership organization specific written permission to transfer dues to a political committee or small donor committee.”\textsuperscript{49} Two unions, their small donor committees, and others sued to overturn the regulation, arguing that it exceeded the Secretary’s authority under article XXVIII and violated the First Amendment. The district court found both claims likely to succeed and preliminarily enjoined the regulation’s enforcement, and the court of appeals affirmed.\textsuperscript{50} Therefore the regu-

\begin{footnotesize}
\begin{enumerate}
\item COLO. CONST. art. XXVIII, § 3(1), (13).
\item Id. §§ 2(14), 3(2)–(4)(a).
\item Id. § 2(14)(o)(II).
\item Id. §§ 4–7. In \textit{Harwood v. Senate Majority Fund, LLC}, 141 P.3d 962 (Colo. Ct. App. 2006), the court rejected an attempt to treat an opinion poll as a regulated political advertisement.
\item 2003 Colo. Sess. Laws 2156–61 (codified in scattered sections of COLO. REV. STAT. tit. 1, art. 45 (2007)).
\item COLO. REV. STAT. § 1-45-103.7 (2007).
\item Colo. Sec. of State, Rules Concerning Campaign & Political Finance, Rule 1.14, 8 COLO. CODE REGS. § 1505-6, (2007).
\item Id. at Rule 1.14(b).
\end{enumerate}
\end{footnotesize}
lation was not in force for the 2006 election. No further action in the lawsuit has been reported, but new Secretary of State Mike Coffman reissued the contested regulation in February 2007. The legislature then repealed the rule but did not forbid its reissue. The legal jousting has an obvious political dimension. Republican secretaries of state try to restrict union support, which favors Democrats, and the Democratic legislature tries to maintain it.

If the rule is reissued and goes back to court, the state law challenge appears fairly strong. Article XXVIII does not define a member of a small donor committee, but the natural meaning of its relevant sections is a member of the union; the secretary's restrictive definition strains the text. The First Amendment issue is more uncertain.

3. Nonprofit Advocacy Corporations

Soon after article XXVIII became effective, the Colorado Right to Life Committee (CRLC) sued in federal court, making First Amendment and due process attacks on several of the article's provisions as applied to CRLC's activities. Article XXVIII forbids corporations and labor unions to contribute directly to candidates, to make expenditures expressly advocating the election or defeat of candidates, or to fund political advertising. The article accommodated CRLC and similar nonprofit advocacy corporations by exempting from these prohibitions corporations "formed for the purpose of promoting po-

51. See Colo. Sec. of State, Rule 1.14, supra note 48.
53. See COLO. CONST. art. XXVIII, § 2(5)(b), (14)(a).
54. The Court of Appeals opinion cited a decision of the Supreme Court of Washington that was thereafter unanimously reversed by the U. S. Supreme Court. 148 P.3d at 414–15 (citing State ex rel. Wash. State Public Disclosure Comm'n v. Wash. Educ. Ass'n, 130 P.3d 352 (Wash. 2006), rev'd sub nom., Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372 (2007)). However, the Washington case involved so-called agency dues paid by non-members, and the Court said, "Respondent might have had a point if . . . the statute burdened its ability to spend the dues of its own members." 127 S. Ct. at 2380 n. 2. Therefore, the outcome of the First Amendment issue in the Colorado case would be uncertain.
56. COLO. CONST. art. XXVIII, § 3(4)(a).
political ideas." However, the exemption applies only if an advocacy corporation "does not accept contributions from business corporations or labor organizations," and CRLC was receiving small contributions from corporations. In CRLC's lawsuit, the court held that the ban could not constitutionally be applied to CRLC and like entities that receive de minimis corporate contributions. In other words, the court required that the accommodation for nonprofit advocacy corporations be broadened to allow them to receive de minimis corporate contributions.

CRLC also challenged the amendment's requirement for reporting and disclosure by anyone who spends more than $1,000 per year on political advertising, but this provision was sustained by the court. Finally, CRLC challenged its treatment as a "political committee" subject to additional disclosure requirements because CRLC does not have the major purpose of electing or nominating candidates. Based on governing federal law, the court agreed and held that the amendment's regulation of political committees could not be imposed on organizations like CRLC.

E. Article XXIX—Ethics in Government

1. Description and Free Speech Issues

In 2006, Colorado voters added article XXIX, which outlaws most gifts (other than campaign contributions) to state and local officers, employees, their contractors, and their families. Forbidden gifts are sweepingly defined as any "thing of value" unless received in exchange for something "of equal or

57. Id. § 3(4)(b). This exemption expressly applies to the limits on corporations and unions in art. XXVIII § 3 but not to the limits in § 6(2). The attorney general in defending the case offered a narrowing interpretation that applies the exemption to the latter section by implication, and the court accepted it. Colo. Right to Life, 395 F. Supp. 2d at 1012.

58. COLO. CONST. art. XXVIII, § 3(4)(b)(III).


60. COLO. CONST. art. XXVIII, § 6(1).


62. Id. at 1019. The attorney general offered a narrowing interpretation to avoid this ruling, but the court held that the amendment's wording precluded it. Id. at 1021.

63. Id.

64. COLO. CONST. art. XXIX (also known by its ballot designation as Amendment 41).
greater value." The measure imposes monetary penalties of twice the value of prohibited gifts. It provides for a five-member ethics commission to administer and enforce the prohibition. The commission has broad enforcement authority including subpoena power independent of the courts.

Before and after enactment, the amendment generated controversy because of its breadth of coverage. It forbids a professional lobbyist to give any "gift or thing of value, of any kind or nature" except for campaign contributions to persons on a specified public sector list. The list includes all state employees, independent contractors, and elected officials, and members of their immediate families. It also includes employees, independent contractors, and officials of counties and municipalities, but home-rule entities can remove themselves from coverage by adopting laws "that address the matters covered by this article." Oddly, the ban omits officials, employees, or contractors of local special districts, such as school districts, the

65. Id. § 3(1)–(2). Exceptions in § 3(3) are discussed infra, text at notes 76–81.

66. Id. § 6. This section also states that "additional penalties may be provided by law."

67. Id. § 5. The section provides that one commission member shall be appointed by each house of the General Assembly, by the governor, and by the chief justice. The fifth member shall be an officer or employee of a local government chosen by the other four. No more than two members may belong to the same political party, so at least one member must belong to a minor party or to no party. Persons appointed must have had relevant party affiliations for at least two years prior to appointment.

68. Id. § 5(4) (power to subpoena documents and witnesses). This appears to encompass power to subpoena any communication between a public official and any other person. The amendment has no provision for judicial review of commission activities, though the courts will very likely imply the power to review commission rulemaking, advisory opinions, and adjudications. See COLO. REV. STAT. §§ 24-4-102(3), 24-4-106 (2007). There has been some public controversy about the possibility that each member of the commission is to have subpoena power, an issue not settled by the text. See infra note 94 and accompanying text.

69. COLO. CONST. art. XXIX, § 3(4). See id. § 2(5) (defining "professional lobbyist").

70. See id. § 2(1) (defining "government employee" as "including independent contractors"). The prohibition has an exception for members of a lobbyist's immediate family. Id. § 3(4). It appears to include part-time employees.

71. Id. §§ 2(2)–(3), 7. Home-rule municipalities and counties are likely to invoke § 7 to remove themselves from coverage. Whether they must meet any minimum standard of rigor is unclear from the text of art. XXIX. If they succeed, art. XXIX will govern only statutory cities and towns, but it will apply to most counties because only two have home rule. See OESTERLE & COLLINS, supra note 1, at 305.
Regional Transportation District, and the like.\textsuperscript{72} It expressly excludes members “of the judiciary,” though the scope of this exclusion is unclear.\textsuperscript{73} The provision raises an important issue about free expression. Information is often a “thing of value,” and the ban on lobbyists’ gifts makes no exception for it. To the extent that the measure bars lobbyists’ communications to officials, it is likely to be invalid under the First Amendment.\textsuperscript{74}

The most controversial part of the article forbids the same list of public officials, employees, their contractors, and their families from \textit{receiving} anything of value from \textit{any person}

\textsuperscript{72} \textit{Id.} § 2(2) (“Local government’ means county or municipality.”).

\textsuperscript{73} \textit{Id.} § 2(6). The exclusion of members “of the judiciary” can of course be read to exempt all judges at every level. However, the subsection defines the covered category of “public officer” to include only statewide officers, so the exception from it of members “of the judiciary” seems to exempt only statewide judges. The section expressly excludes “any local government official,” but they are separately covered under § 2(3), applying to “an elected or appointed official of a local government.” Whether county judges are local officials is uncertain. They are appointed by the governor and paid by the state, but they normally serve locally. See \textit{COLO. CONST.} art. VI, §§ 16, 18; \textit{COLO. REV. STAT.} § 13-30-103 (2007). Municipal judges do seem to be covered, though most of them are in home-rule municipalities that may remove themselves from Art. XXIX. \textit{See supra} note 71 and accompanying text.

A parallel issue is whether employees of judicial branches are covered. The section defining covered employees is expressly limited to the executive and legislative branches at the state level but includes “any employee” of “any local government,” which appears to include employees of local judicial branches unless in an exempt home-rule entity. \textit{Id.} § 2(1).

Another uncertainty is whether art. XXIX applies to district attorneys. \textit{Davidson v. Sandstrom}, 83 P.3d 648 (Colo. 2004), held that judicial districts are “political subdivisions” of the state for purposes of term limits on local government officials. \textit{See infra} notes 985–412 and accompanying text. On the other hand, preexisting state ethics statutes define district attorneys as statewide officers. \textit{See COLO. REV. STAT.} § 24-6-203(1)(c) (2007). If judicial districts are local governments for purposes of art. XXIX, they are not covered because the only covered local governments are counties and municipalities. \textit{Id.} § 2(2). If they are instead part of state government for purposes of the article, district judges and employees are expressly excluded, but district attorneys are covered as statewide officers. \textit{Id.} § 2(1)(6).

\textsuperscript{74} \textit{See infra} notes 97–100 and accompanying text, discussing a pending lawsuit raising this and other First Amendment claims, \textit{Developmental Pathways, Inc. v. Ritter}, No. 2007CV1353, slip op. at 2 (Denver Dist. Ct. May 31, 2007), appeal pending.

As noted in the text below, one proposal to narrow the scope of art. XXIX would require that violations be breaches of the public trust for private gain. \textit{See infra} text at notes 82–83. However, a lobbyist by definition works for private gain. For lobbyists, the proposed narrowing would thus depend on the vague phase “breach of the public trust.” If public trust in lobbyists is illustrated by the vote to adopt art. XXIX, this would be little protection for lobbyists’ communications.
unless that person receives "lawful consideration of equal or greater value in return." The ban has major exceptions for campaign contributions and gifts by "a relative or personal friend of the recipient on a special occasion" and several minor exceptions, notably non-cash gifts worth no more than $50 per year. It allows reimbursement of expenses to attend events at which the recipient is to take an active part when the sponsor is a state or local government or nonprofit entity. To the extent that it forbids reimbursement for passively attending such events to gain information pertinent to official duties, or for attending events sponsored by the federal government, it raises yet another First Amendment issue. Forbidden gifts are defined to include "promises or negotiations of future employment," which appears to impose severe limits on the ability of many part-time legislators to make a living and to impair many other covered persons' ability to change or augment their employments.

The gift ban has an important exception for unsolicited "informational material"; free expression is accommodated to that extent. Given the importance of free expression, the quoted phrase should and probably will be interpreted broadly to cover all forms of communication. However, the exception is expressly limited to unsolicited information. To the extent that solicited information of value is prohibited, this provision is also likely to be invalid under the First Amendment.

The apparently sweeping terms of section 3's gifts ban may be limited by section 6, which authorizes penalties to be imposed only on a public officer or employee who "breaches the

75. COLO. CONST. art. XXIX, § 3(1)–(2). "Person" is broadly defined to include "any legal entity." Id. at § 2(4). Family members are expressly covered by § 3(2) but are omitted from § 3(1). The scope of § 3(1) is largely included in the broader terms of § 3(2) except that the latter has an annual exemption of gifts worth $50 or less.

76. Id. § 3.

77. Id. § 3(3)(f). An odd omission is reimbursement of expenses to attend events sponsored by the federal government or federal agencies, which appear to be forbidden even if the covered person is an invited speaker. Nonprofit sponsors do not qualify if they receive more than 5% of their funding from for-profit entities. Id.

78. See infra text at notes 97–100. Forbidding reimbursement of expenses to be a speaker at a federal government event, see supra note 77, is a yet more direct interference with freedom of communication.

79. COLO. CONST. art. XXIX, § 3(2).

80. Id. § 3(3)(d).

81. See infra text at notes 97–100.
public trust for private gain” or on anyone “inducing such breach.” One can read sections 3 and 6 two ways. The stricter reading interprets section 3 to be a per se definition of breaches of the public trust for private gain. Its extremely specific detail makes this reading fit the wording quite well. A less strict reading would require proof in each case that an officer or employee not only took a gift forbidden by section 3 but did so in a way that breached the public trust for private gain. The key words are the vague phrase “breaches the public trust” because any gift of a thing of value is by definition a private gain. The latter reading is somewhat cumbersome but has the virtue of restricting what is otherwise a remarkably broad gift ban. However, it requires a system of case-by-case application, which could prove burdensome. The legislature imposed a version of this reading on the ethics commission, so it may be tested in practice.

A third provision of the amendment that has generated some controversy forbids any statewide elected officer or member of the General Assembly from personally representing “another person or entity for compensation before any other statewide elected officeholder or member of the general assembly, for a period of two years” after leaving office. This is another provision that is literally extremely broad. Its apparent core purpose is to forbid those leaving high office to become lobbyists for two years. But the section forbids any person leaving office from appearing before the executive or legislative branches in any way connected with his or her employment, however briefly or incidentally. The provision authorizes statutes to impose further restrictions, implying that its terms are to be read as minimum requirements.

2. Implementing Statute

During and after article XXIX’s enactment, controversies arose over whether the ban forbids disaster relief or scholarships and academic prizes awarded to members of the targeted classes or disaster relief to them. Sponsors of the measure ar-

82. COLO. CONST. art. XXIX, § 6. Presumably the definitions of officers and employees in other sections apply to § 6, so they include independent contractors and forbid certain gifts to family members. See id. § 2.
83. See infra text at note 88-89.
84. COLO. CONST. art. XXIX, § 4.
gued that it was not intended to do so, and after enactment, they drafted and supported a bill in the legislature to exclude altogether these and many other categories from the gift ban. The bill put considerable strain on the literal terms of article XXIX. Section 1 insists on “specific standards to guide their conduct,” and section 3 appears to be just that, specific standards. Moreover, forbidding academic awards appears to have been a particular purpose of section 3’s explicit prohibition of “rewards” and “honoraria.” And by legalizing all scholarships, academic prizes, disaster relief, and the other named categories, the bill seemed to claim that receipt of those benefits could never amount to a “violation of the public trust” or result from “an effort to realize personal financial gain through public office.” Human experience makes that a doubtful proposition.

However, the Senate rejected the House bill. The two houses eventually agreed on a bill that established the commis-

85. Colo. H.B. 07-1304, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007) (at proposed COLO. REV. STAT. § 24-18.5-102(8)(b)) (excluding student financial aid; academic awards; benefits to address the impacts of illness, injury, crime, act of God, or accident; bequests, inheritances, and estate planning gifts; investment income; insurance proceeds; court judgments or payments to settle a legal claim; and “any other gift or thing of value that the [Ethics Commission] determines not to constitute a breach of the public trust”).

The bill offered an alternative fix. It specified that a person does not receive a gift at all if, in return for a benefit, he or she gives anything “of value sufficient to sustain a contract.” Id. (at proposed COLO. REV. STAT. § 24-18.5-102(5)). This flatly contradicted the strict language of the amendment, which demands that the public officer receiving a benefit give something “of equal or greater value” in return. COLO. CONST. art. XXIX, § 3(2). Consideration to sustain a contract can be much less than that; a classic definition says that one peppercorn can be sufficient. 1 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 115 (rev. ed. 1936). If valid and taken seriously, this definition could have virtually canceled section 3(1)-(2)’s gift ban altogether. For scholarships, the bill included yet a third fix, claiming that any duty of diligence undertaken by a scholarship recipient is sufficient exchange to remove the scholarship from the gift ban. H.B. 07-1304 § 1, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007) (at proposed COLO. REV. STAT. § 24-18.5-102(5)). Corrupt instances are conceivable.

The bill also sought to narrow article XXIX’s provision that forbids any statewide elected officer or member of the General Assembly from personally representing anyone before any state elected official for two years after leaving office. The bill would have limited this provision to persons who become employed “in a position primarily dedicated to lobbying.” Id. (at proposed COLO. REV. STAT. § 24-18.5-102(7)). This was a sensible provision but one again at war with the literal terms of the amendment.

86. COLO. CONST. art. XXIX, § 1(1)(e).
87. Id. § 3(2).
sion and adopted a version of the section 6 interpretation explained above. It requires that "the Commission shall dismiss as frivolous any complaint filed under article XXIX that fails to allege that a public officer, member of the general assembly, local government official, or government employee has accepted or received any gift or other thing of value for private gain or personal financial gain." The latter terms are defined as any "thing of value given or offered by a person seeking to influence an official act." The bill also requires the Commission to render advisory opinions when sought by covered persons and to do so within twenty days after a request is made.

This bill was submitted to the Colorado Supreme Court requesting an opinion on its validity, but the court declined to hear it. It is hard to know what to make of the quoted provision defining frivolous claims. A gift of a thing of value is by definition a financial gain to the donee, so a complaint can allege this freely. If the complaint must also allege that the donor sought to "influence an official act" and must specify that act, complainants are somewhat constrained, though not severely. Moreover, that reading would essentially define bribery of a lawmaker, which has been criminal from the state's founding, making article XXIX redundant except that its penalty appears to be civil with a lower standard of proof.

The statute also restricts the commission's subpoena power by requiring concurrence of at least four members to issue a subpoena.

Despite the many inconsistencies between various narrowing proposals and the amendment's terms, if the ethics com-

88. See supra text at note 82–83.
92. See Peter Blake, Op-Ed, Ethics Commission Put in a Bind, ROCKY MOUNTAIN NEWS, Apr. 28, 2007, at A32 (interpreting the law to require that complaints allege an improper motive for a gift). However, the statutory text specifies only an allegation of personal financial gain.
93. See COLO. CONST. art. XII, §§ 6–7; COLO. REV. STAT. tit. 18, art. 8 & tit. 24, art 18 (2007). These are current laws. For original bans, see COLO. CONST. art. V, §§ 41–42 (1876); GEN'L LAWS COLO. §§ 684–85 (1877).
mission were to adopt such measures, the fix might work. The Colorado Supreme Court has on a number of occasions rescued Colorado from the literal words of initiative measures when the words would have produced burdensome results that voters probably did not intend. For example, Mesa County tried to use the literal wording of TABOR to end tax support for its courthouse, but the court used imaginative reasoning to reject the effort. Other TABOR interpretations were similar. However, the conflict of wording in the present instance would surpass any previous case.

3. First Amendment Lawsuit

In March 2007, a diverse group of plaintiffs sued the state to enjoin enforcement of article XXIX's gift bans as violations of First Amendment rights of free speech, association, and petition. They sought and obtained a preliminary injunction against application of sections 2 and 3 of the article. The court held that the amendment "chills the ability of lobbyists and legislators to communicate with one another, as well as the right of organizations to hire lobbyists to convey their views to legislators and government employees" in violation of the First Amendment. The state sought and obtained direct review in the Colorado Supreme Court, which heard argument in October.

95. State ex rel. Norton v. Bd. of County Comm’rs of Mesa County, 897 P.2d 788 (Colo. 1995).
96. See In re Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549, 557 (Colo. 1999) (rejecting literal interpretation of TABOR term because it "could lead to absurd results" and "cripple the everyday workings of government"); Bolt v. Arapahoe County Sch. Dist. No. 6, 898 P.2d 525, 537 (Colo. 1995) (rejecting rigid interpretation of TABOR "which would have the effect of working a reduction in government services").
98. Id., slip op. at 41. The suit did not challenge the provisions banning legislators from lobbying for two years after leaving office or the provisions establishing an ethics commission. Id., slip op. at 2.
99. Id., slip op. at 33.
F. Constitutional Clutter

Articles XXVIII and XXIX are two more detailed provisions in the Colorado Constitution—more than nine and five pages respectively in the Revised Statutes—that would work better as statutes that could be readily adjusted based on experience. Placing the measures in the constitution also eliminated any role for the Colorado Bill of Rights provision on free speech, making free speech disputes depend solely on the federal Constitution. The tobacco tax measure embedded yet another spending directive in the Colorado Constitution.

Disputes over article XXIX induced the legislature to consider amending article V to make constitutional initiatives more difficult than legislative measures, thus providing an incentive for petitioners to elect the latter form.\(^\text{101}\) The measure also provided that the General Assembly’s power to amend or repeal successful legislative initiatives requires a two-thirds vote of both houses for five years after passage, an additional incentive to choose the legislative form.\(^\text{102}\) The proposal did not get the necessary two-thirds vote for the 2008 ballot, but proposals like it will probably be considered in the 2008 session.

II. INTERPRETATIONS AND DECISIONS\(^\text{103}\)

A. Article II—The Colorado Bill of Rights

1. Search and Seizure, Juries, and Proof Beyond a Reasonable Doubt

Rights issues are routinely raised in criminal cases and just as routinely addressed under federal law, mostly with no distinctive discussion of the Colorado Constitution.\(^\text{104}\) However, a few post-2000 decisions merit discussion.

The Colorado Supreme Court continued to interpret the Colorado Constitution’s protection against search and seizure to give accused persons more protection than its federal coun-

\(^{102}\) Id.
\(^{103}\) These are organized in numerical order of the constitutional provisions addressed.
\(^{104}\) See OESTERLE & COLLINS, supra note 1, at 31–32.
Drugs found by a dog during a traffic stop were suppressed because the court held the dog’s sniff to be a search under the Colorado Constitution, contrary to federal precedents. To justify a dog’s sniff of a stopped car, officers need not meet the full standard of probable cause but must have reasonable suspicion of crime, which was lacking.

The court also overturned a search warrant issued to gain access to the book-buying records of a criminal suspect at Denver’s celebrated Tattered Cover Book Store. The court based the decision on constitutional rights to freedom of speech and freedom from unwarranted searches, and it discussed the rights provisions of both federal and state constitutions. The court stated that the state rights were broader than federal, although it did not cite any conflicting federal decision—indeed, the federal decision most nearly on point, involving the book purchases of Monica Lewinsky, was consistent with the court’s ruling.

In any case, the court rested the decision on the state provisions and adopted a balancing test and procedural rule to govern attempts to search for expressive materials that have free speech protections. Under the test, which was not met in the Tattered Cover case, the government must demonstrate a compelling need for specific information, and the third-party bookstore must be afforded a hearing prior to execution of the warrant.

Another important bill of rights decision involved the size of Colorado juries. By statute, accused persons in Colorado are entitled to trial by jury of twelve for felonies, six for misdemeanors. The Colorado Constitution requires trial by jury for all “criminal cases” and provides that in “courts not of record,” a criminal jury “may consist of less than twelve persons.” The text implies that juries in courts “of record” must have twelve members. A man charged with misdemeanors in a

105. For prior decisions, see id. at 37–38.
107. Id. at 673–74. Three justices disagreed with both rulings. Id. at 677–81 (Kourlis, J., joined by Rice, J. & Coats, J., dissenting).
108. Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044 (Colo. 2002).
109. Id. at 1051–56.
110. Id. at 1056 (citing In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc., 26 Med. L. Rptr. 1599 (D.D.C. 1998)).
111. Id. at 1058–61.
113. COLO. CONST. art. II, § 23.
county court demanded a jury of twelve, arguing that county courts are courts of record, but the supreme court rejected his claim.\textsuperscript{114} Based on an extensive analysis, the court decided that the Colorado Constitution requires a jury of twelve for felonies, but interpreted the “courts not of record” phrase to equate historically with misdemeanor offenses, so that the General Assembly can provide for juries of six in misdemeanor cases, as it has provided.\textsuperscript{115} The decision raises a question for trials in which excusing jurors reduces a jury to fewer than twelve.\textsuperscript{116}

In 2004, the Colorado Supreme Court considered the proof necessary for conviction of crime.\textsuperscript{117} Proof beyond a reasonable doubt has always been required by Colorado constitutional law.\textsuperscript{118} The 2004 case turned on the principle’s application to sufficiency of evidence to support a general verdict when more than one theory is presented to a jury. The defendant argued that in his case, proof of one theory was insufficient, causing the general verdict of guilty to deny him due process of law. The U. S. Supreme Court had rejected this interpretation of the federal due process requirement,\textsuperscript{119} so the case depended on interpretation of the Colorado Constitution.\textsuperscript{120} The Colorado Supreme Court sustained the conviction, conforming its interpre-

\begin{itemize}
\item \textsuperscript{114} People v. Rodriguez, 112 P.3d 693 (Colo. 2005). The court pointed out that county courts are courts of record under the current judicial article adopted in 1962, but it distinguished modern usage from that of section 23. \textit{Id.} at 705–09.
\item \textsuperscript{115} \textit{Id.} at 696–709. The court rejected contrary dicta in prior decisions. \textit{Id.} at 697.
\item \textsuperscript{116} \textit{See id.} at 712 (Coats, J., concurring in the judgment). By statute and court rule, alternate jurors can replace those excused, and if alternates are unavailable, the trial can proceed with fewer than twelve by consent of the parties. \textit{Colo. Rev. Stat.} § 18-1-406(2) (2007) (except for class 1 felonies); \textit{Colo. R. Crim P.} 23 (7) (in all cases). The latter provisions should be valid because the right to jury trial can be waived altogether. \textit{See Colo. Rev. Stat.} § 18-1-406(2) (2007) (except for class 1 felonies); \textit{Colo. R. Crim P.} 23(5) (in all cases but only with “consent of the people”); Garcia v. People, 615 P.2d 698 (Colo. 1980) (statute controls; consent of prosecutor not required). However, \textit{Colo. Rev. Stat.} § 18-1-406(7) (2007) allows a court to accept a verdict from eleven regardless of the parties’ consent when a juror is excused for cause after the jury has retired to consider its verdict. This provision is in doubt under the decision in \textit{Rodriguez}.
\item \textsuperscript{117} People v. Dunaway, 88 P.3d 619 (Colo. 2004).
\item \textsuperscript{118} People ex rel. Juhan v. Dist. Ct., 439 P.2d 741, 744 (1968).
\item \textsuperscript{120} \textit{Colo. Const.} art. II, § 25 (due process clause).
\end{itemize}
tation of the state requirement to the federal and overruling a prior, contrary decision.121

2. Gun Rights

Gun regulation under article II section 13 was once again at issue when a Denver lawyer sued the city and county, claiming constitutional rights to carry an unconcealed firearm on his person and to carry a concealed firearm in a motor vehicle, contrary to Denver ordinances. A divided court of appeals rejected his claim, and the Colorado Supreme Court declined review.122

2003 state statutes sought to overturn most of the Denver laws at issue.123 Denver successfully challenged these on home-rule grounds.124

3. Eminent Domain and Retroactivity

Since 2000, the Colorado Supreme Court has decided two notable cases about the constitutional power of eminent domain. The first arose when Public Service Company of Colorado raised the capacity of a Douglas County power line from

121. Dunaway, 88 P.3d at 628–31 (overruling James v. People, 727 P.2d 850 (Colo. 1986)). James’s conviction was upheld because the court found the evidence sufficient to support all theories presented to the jury. Nevertheless, the Dunaway court treated the James ruling on proof beyond a reasonable doubt as a holding. The court also pointedly opined, “Where the analogous federal and state constitutional provisions are textually identical, we have always viewed cases interpreting the federal constitutional provision as persuasive authority.” Dunaway, 88 P.3d at 630. Dissenting justices disagreed and advocated adherence to James. Id. at 636 (Bender, J., dissenting). Dunaway was a clear holding because a majority of the court found the evidence insufficient on the alternative theory presented to the jury. Id. at 624–28, 636.


124. See infra text at notes 450–52. No home-rule issues were raised in the Trinen case. See 53 P.3d at 759.
115 to 230 kilovolts, and neighboring landowners sued the company in inverse condemnation and tort. The court rejected their inverse condemnation claim, holding that, as a matter of law, alleged invasions by noise and electromagnetic radiation do not constitute takings in violation of article II section 15.  

The second decision rejected a claim to compensation when the T-REX highway project put up a concrete retaining wall that obstructed the view of Happy Church from Interstate 25.  

The court held that owners have no property right to be seen by motorists on a public highway. The court distinguished a prior decision holding that owners must be compensated for reduction of their properties' natural beauty by construction of a power line across it. In other words, there is a constitutionally protected property right in the natural appearance of one's land but not in its visibility from a public highway. Two other recent constitutional cases were routine applications of federal precedents.  

However, the court and the General Assembly addressed important issues about the statutory scope of the eminent domain power. The Department of Transportation (DOT) condemned land near Aspen for a highway project that included a parking and transit facility. The landowner argued that DOT's statutory authority to condemn for highway purposes did not authorize takings for parking and transit uses. The supreme court's opinions, ruling for DOT, included an extensive discussion of the relationship between eminent domain statutes and constitutional standards.

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125. Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377 (Colo. 2001). The court rejected the company's claim that article XXV, governing the Public Utilities Commission, insulated it from plaintiffs' claims. Id. at 384-85. It also rejected plaintiffs' tort claim for trespass, although by a 4-3 vote, it sustained their tort claim based on nuisance. Id. at 389-97.

126. Dep't of Transp. of Colo. v. Marilyn Hickey Ministries, 159 P.3d 111 (Colo. 2007).

127. Id. at 113-15 (distinguishing La Plata Elec. Ass'n v. Cummins, 728 P.2d 696 (Colo. 1986)). The court said its decision accords with the majority rule among states on denying compensation for lost visibility. Id. at 114.

128. See Animas Valley Sand & Gravel v. Bd. of County Comm'rs, 38 P.3d 59 (Colo. 2001) (following federal precedents on regulatory takings); Fowler Irrevocable Trust 1992-1 v. City of Boulder, 17 P.3d 797, 802 (Colo. 2001) (following federal precedents on temporary takings).

129. Dep't of Transp. v. Stapleton, 97 P.3d 938 (Colo. 2004).

130. Id. at 939.

131. Id. at 941-45, 945-46 (Coats, J., concurring in the judgment), 946-51 (Kourlis, J., dissenting).
The General Assembly tackled the issue of condemnation for urban redevelopment, an issue that received extensive coverage in the national press after the U. S. Supreme Court’s 2005 decision in a Connecticut case.\(^{132}\) The constitutional issue is whether redevelopment conducted by private investors is a “public use,” which state and federal constitutions require.\(^{133}\) Colorado law has allowed this power,\(^{134}\) but statutory amendments adopted in 2004 narrowed its availability. For condemnation to aid private redevelopment, Colorado law now requires a finding of blight, gives affected owners a right of first refusal if the property is no longer needed for the project, and gives affected owners a right to bid on redevelopment projects.\(^{135}\) Several 2006 session bills and proposed constitutional amendments would have further limited, or forbidden, eminent domain for redevelopment, but none passed.\(^{136}\) An enacted measure restricts its use for private toll roads.\(^{137}\)

Another 2004 amendment restricted the power of municipalities to condemn land outside their boundaries by limiting the power to utilities purposes.\(^{138}\) This was dubbed the Telluride Amendment, intended to stop the town of Telluride’s condemnation of a large tract of land just outside town boundaries for open space and recreational purposes.\(^{139}\) The statute generated constitutional issues about home-rule powers discussed

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134. See OESTERLE & COLLINS, supra note 1, at 48.
137. See S.B. 06-078, (codified at COLO. REV. STAT. § 7-45-104 (2007)). More stringent measures have been proposed. See, e.g., H.B. 07-1068, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007), and Initiative 37 at the website cited supra note 136.
It might also have been challenged under Colorado’s ban on a law “retrospective in its operation,”\(^{141}\) though Telluride did not do that. There is no doubt that the legislature intended the statute to forbid Telluride’s pending condemnation. Therefore, the governing tests would be to determine whether the statute impaired vested rights or imposed new obligations on past transactions, and whether the law was remedial or procedural in character.\(^{142}\) The law was plainly substantive, but it would be difficult to characterize it as impairing vested rights or altering past transactions.

A statute enacted in 2007 purports to forbid federal condemnation of land for use by the Army.\(^{143}\) About two years ago Fort Carson announced its intention to expand the 235,000-acre Piñon Canyon Maneuver Site southwest of La Junta.\(^{144}\) The proposed Piñon expansion area, which could include 418,000 acres in at least four counties, is home to dinosaur tracks and archaeological treasures, including wagon imprints from the Santa Fe Trail, as well as many farms and ranches.\(^{145}\) Does the legislature have authority to limit the U.S. Army’s power of eminent domain? The form of the statute withdraws existing state consent under the federal Arsenals and Docks-Yards Clause.\(^{146}\) That clause allows the federal government to “exercise exclusive Legislation” over land in federal ownership; it says nothing about how federal ownership is acquired or about eminent domain. Therefore, it is unlikely that the state action will defeat federal efforts to condemn the land legally, though of course it may have important political effects.\(^{147}\)

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140. See infra text at notes 456–58.
141. COLO. CONST. art. II, § 11.
142. See OESTERLE & COLLINS, supra note 1, at 44–45.
4. Equal Protection, Civil Juries, and Tort Law

In 1988 the General Assembly passed the Health Care Availability Act (HCAA), which caps tort damages in medical malpractice actions. In 1993, the Colorado Supreme Court sustained the caps against claims that they denied equal protection, due process, and jury trial rights.149 On the jury trial claim, the court followed several prior decisions holding that the Colorado Constitution does not guarantee juries in civil cases and overruled an isolated decision to the contrary.150 In a 2002 decision, the court rejected an equal protection attack on a section of the HCAA that applies different damages rules to an “incapacitated person represented by a conservator” and a “non-incapacitated person.”151 A 2004 decision rejected renewed equal protection and jury trial attacks on the HCAA.152 In each equal protection decision, the court held that the rational basis test of state and federal law applies, and the statute had a rational basis for its distinctions.153

B. Article III—Separation of Powers

For some years, the General Assembly and the governor have sparred over control of federal funds allocated to the state. The Colorado Supreme Court held that custodial or trust funds for specified purposes are constitutionally subject to executive control and beyond the legislature’s power of appropriation.154 A 2004 bill sought to limit the definition of custodial funds to those granted “for a particular purpose” and to claim

150. Scholz, 851 P.2d at 905–07, overruling City of Denver v. Hyatt, 63 P. 403 (Colo. 1900).
153. Garhart, 95 P.3d at 584; Rodriguez, 50 P.3d at 893–94; Scholz, 851 P.2d at 906–07.
154. See OESTERLE & COLLINS, supra note 1 at 93, 137–38, 435.
legislative control over funds granted “for the support of general or essential state government services.” While the bill was pending, the General Assembly submitted two interrogatories to the supreme court seeking to determine the bill’s constitutional validity. The first sought an opinion on the bill’s definition of custodial money in general; the second sought an opinion on the definition as applied to a particular federal grant program. The court approved the latter but refused to answer the former, stating that each application must be evaluated on particular facts. As the dissent pointed out, this gives the courts detailed supervisory power over federal and other outside funds received by the state. However, the court’s decision went far toward approving the statute’s general definition.

Challenges to plaintiffs’ standing are a staple of litigation, and most generate nothing notable. One exception was the Colorado Supreme Court’s detailed review of Colorado standing law in a 2004 decision, Ainscough v. Owens. The court held that union members had standing to challenge Governor Owens’s 2001 executive order ending automatic payroll deductions of union dues for state employees. Standing was also at issue in a major tax and public debt case discussed under that heading.

In 2003, the supreme court reviewed Colorado’s version of the political question doctrine. The decision held that review of local bond elections is not a nonjusticiable political question, but the opinion recognized that the doctrine is part of Colorado constitutional law.

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157. Id. at 1203, 1205.
158. Id. at 1205–07 (Coats, J., dissenting).
159. The bill as amended was enacted as COLO. REV. STAT. § 24-75-201 (2007).
160. 90 P.3d 851 (Colo. 2004).
162. See infra, text at notes 375–85.
164. See id. at 664–65. See infra text accompanying notes 360, 386–92, discussing other issues in Busse.
C. Article V—The Initiative

1. Single Subject Rule

In 1994 voters limited citizens’ initiatives to a single subject, and the General Assembly established original jurisdiction in the Colorado Supreme Court to review the issue before a measure appears on the ballot. Since then, the court has issued numerous opinions applying the standard. One notable example involved the measure seeking to forbid bilingual education in Colorado. A 2002 decision of the court approved the proposal for the ballot that year. Voters then defeated it. However, in 2006 the court held that a proposed initiative to forbid most public services to illegal alien residents of the state violated the single subject rule because it included two distinct kinds of services, those “that benefit members of the targeted group” and “other administrative services that are unrelated to the delivery of individual welfare benefits.” This was an overly technical application of the requirement; the dissenting opinion was more persuasive. In reaction to it, the governor called the legislature into special session, where it adopted several statutes to restrict such services and proposed two related statutory referendums, both of which were approved by voters.

165. COLO. CONST. art. V, § 1. See supra text accompanying notes 101–02, discussing a proposal to amend this provision.
166. COLO. CONST. art. V, § 1(5.5). The 1994 measure also limited referred measures to a single subject. See OESTERLE & COLLINS, supra note 1, at 116, 117, 119.
168. In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2001-2002 # 21 and # 22 (“English Language Educ.”), 44 P.3d 213 (Colo. 2002). An earlier proposal on the same subject failed because its title was found to be misleading. In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 258(A) (English Language Educ. in Pub. Schools), 4 P.3d 1094 (Colo. 2000).
171. Id. at 283–85.
2. Local Government Cases

The initiative was at issue in three decisions seeking to extend the right to county voters. Article V, section 1 of the Colorado Constitution guarantees the initiative to voters of “every city, town, and municipality.”\(^{173}\) This provision has been assumed not to include counties. Statutes provide for county initiatives for specific purposes,\(^{174}\) but no general right has been established. When home rule was made available to counties in 1970, the statute passed to carry it out required that county home-rule charters provide for initiative and referendum powers.\(^{175}\) Recently, citizens of statutory counties challenged lack of the right in three lawsuits. Litigants in two state cases argued that the article V provision should be interpreted to include all counties, but both the supreme court and court of appeals disagreed.\(^{176}\) A federal case argued that granting the power to residents of home-rule counties but not statutory counties violated the federal equal protection clause, but the Tenth Circuit Court of Appeals rejected the claim.\(^{177}\)

Another decision depended on the rule that the initiative power is limited to legislative matters. Petitions werefiled to place several matters on the Colorado Springs ballot. The city council adopted one of the measures proposed and sued for a declaratory judgment that the remaining measures were administrative rather than legislative and thus not proper sub-

\(^{173}\) COLO. CONST. art. V, § 1(9).


\(^{176}\) Bd. of County Comm’rs v. County Road Users Ass’n, 11 P.3d 432 (Colo. 2000); Dellinger v. Bd. of County Comm’rs, 20 P.3d 1234 (Colo. Ct. App. 2000). The former decision was based mostly on statutory interpretation; its statement on the Colorado Constitution was something of an aside. See id. at 436. The latter decision was squarely based on the constitutional issue.

A proposed initiative that appeared on the 2006 ballot would have required the initiative right for statutory counties and all special districts, but voters rejected it. See Amendment 38, Fiscal Impact Statement, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/06Amendment38fiscalnote.pdf.

\(^{177}\) Save Pallisade Fruitland v. Todd, 279 F.3d 1204 (10th Cir. 2002).
jects of the initiative power.\textsuperscript{178} The court of appeals agreed in part. It severed the administrative and legislative measures and ordered the latter placed on the 2006 ballot.\textsuperscript{179}

\textbf{D. Article V—GAVEL Amendment}

The 1988 amendment to article V known as Give a Vote to Every Legislator (GAVEL) requires legislative committees to consider every bill “upon its merits.”\textsuperscript{180} A house rule allowed a member to move, out of docket order, that a committee favorably report a measure to the entire House of Representatives. Dubbed a “supermotion,” this device was allegedly used three times in the 2002 session to kill measures proposed by minority members.\textsuperscript{181} In 2002, a minority member sued house majority leaders, claiming that use of a “supermotion” was an invalid method to kill bills without considering their merits.\textsuperscript{182} The court of appeals agreed that use of a “supermotion” without any discussion or testimony was invalid under GAVEL, but the court sustained validity of the House rule if discussion and testimony were allowed.\textsuperscript{183}

\textbf{E. Article V—Redistricting Congressional Seats}

In 1974, Colorado voters removed the power to draw state legislative districts from the General Assembly, establishing the bipartisan Reapportionment Commission.\textsuperscript{184} The legislature retains authority to draw districts for members of Congress\textsuperscript{185} but, it turns out, only if the power is exercised

\textsuperscript{179} Id. at 1132–39. The two measures that were placed on the ballot failed to pass. See El Paso County Clerk and Recorder, 2006 Coordinated Election Results (2006), http://www.elpasoelections.com/2006-general/results-text.html (last visited Aug. 28, 2007).
\textsuperscript{180} COLO. CONST. art. V, § 20. See OESTERLE & COLLINS, supra note 1 at 127–28.
\textsuperscript{182} Id. at 956.
\textsuperscript{183} Id. at 961. The court also sustained plaintiff's standing to sue and rejected defendants' claim that the issue was a nonjusticiable political question, applying established precedents. See id. at 957–61. Neither side sought Colorado Supreme Court review.
\textsuperscript{184} COLO. CONST. art. V, § 48; see OESTERLE & COLLINS, supra note 1 at 145–47.
\textsuperscript{185} COLO. CONST. art. V, § 44.
promptly after a decennial census. After the 2000 census granted Colorado a seventh House seat, the General Assembly attempted to agree on a districting plan in time for the 2002 election but failed, largely because different political parties controlled the two houses.  

A lawsuit was filed in Denver District Court against the secretary of state, asserting that the existing apportionment (based on six seats) was invalid and asking the court to impose a plan to replace it. After extensive proceedings, the court adopted one of the plans submitted to it by the parties and ordered the secretary of state to conduct the 2002 election under it. The court’s judgment was issued on January 25, 2002, and appealed. The Colorado Supreme Court affirmed on March 13. The decision was novel in the Colorado courts but was presaged and supported by a 1982 Colorado federal court decision and by federal decisions arising in other states.

In the 2002 election, the Republican Party gained control of both houses of the General Assembly. In the closing days of its 2003 session, the General Assembly passed a new districting plan, one more favorable to the majority party. The bill was introduced on May 5, passed by both houses on May 7 (the final day of the session), and signed into law on May 9.

Two lawsuits challenged the validity of the 2003 districting statute. Several citizens sued in Denver District Court, alleging procedural irregularities in the hasty consideration of the bill. A few days later, Colorado Attorney General Ken Salazar filed an original writ proceeding in the Colorado Supreme Court against Secretary of State Donetta Davidson, asking the court to take jurisdiction, hold the statute invalid, and rein-

186. See Beauprez v. Avalos, 42 P.3d 642, 645–46 (Colo. 2002). The legislature tried but failed to agree on a plan during its regular session in 2001, during two special sessions the same year, and during the first few weeks of the 2002 session. Id. at 646.
187. Id.
188. Id. at 646–47.
189. Id. at 646.
190. Id. at 642.
193. The action alleged violations of COLO. CONST. art. V, §§ 20, 22 & art. II, § 10 and of COLO. REV. STAT. tit. 24, art. 6. See Davidson, 79 P.3d at 1227 (dissenting opinion).
state the district court's 2002 apportionment. Davidson opposed the petition, claiming that the attorney general could not bring an original proceeding in that kind of case and could not name the secretary of state as a respondent because he was ethically obligated to represent her.

The supreme court set the case for argument and issued its decision on December 1, ruling in favor of Salazar. After deciding to entertain Salazar's petition, the court held that the attorney general had standing and was not barred by an ethical obligation to Davidson. On the merits, the court considered the relevant provision of the Colorado Constitution, the second sentence of article V, section 44: "When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly." The court held that this provision restricts apportionment to once per decade, following a census, reading the quoted sentence as if it began "when and only when." Therefore, the General Assembly has no authority to adopt a second, revised apportionment during the decade. The court then determined that the 2002 judicial districting plan constituted the one and only redistricting allowed before the 2010 census. This interpretation effectively confines the legislature's power to redistrict congressional seats to the period between the census report and the closing date to establish precincts for the general election after the census, a period of about one year, in this instance, from March 2001 to March 2002.

In reaching its decision, the court rejected defendants' challenge to its authority based on the Elections Clause of the U.S. Constitution. The relevant part of this provision states,
"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." The claim is that this provision commits exclusive authority over congressional redistricting to state legislatures. The court rejected the claim based on U.S. Supreme Court precedents approving state laws that submitted reapportionment authority to state referendums and that sustained state gubernatorial vetoes. Based on this federal issue, defendants sought certiorari in the U.S. Supreme Court. Review was denied, but three dissenting justices (of the four needed to grant review) wrote an opinion indicating that they would likely have voted to reverse.

Meanwhile, defendants had removed the second suit challenging validity of the 2003 redistricting statute to federal district court. And a few days after the Colorado Supreme Court's decision, a member of the General Assembly and three other citizens who favored the legislature's 2003 reapportionment filed a separate federal lawsuit that disputed the state court's interpretation of the federal Elections Clause. Both federal cases were heard by a three-judge federal district court. In the removed case, that court held that because the federal question had been decided by the Colorado Supreme Court, issue preclusion would bar its consideration when the state court case became final. After denial of certiorari in the state case, the federal court dismissed the removed case. In the third, original case, the federal court held that it lacked jurisdiction over the Elections Clause issue because the lawsuit was an improper attempt to appeal a state decision to a federal court. This ruling was reversed by the U.S. Supreme Court.

203. See Davidson, 79 P.3d at 1232. The court also pointed out that several states have committed districting of congressional seats to nonpartisan commissions, although the Supreme Court has not yet determined their validity. See id.
remand, the district court dismissed on the merits.\textsuperscript{209} This ruling was vacated by the U.S. Supreme Court, which held that plaintiffs lacked standing to bring the Elections Clause claim.\textsuperscript{210} The Colorado Supreme Court's holding, that article V section 44 limits the General Assembly to one reapportionment after each census and that the judicial districting constituted the one, was hardly dictated by the constitutional text. This was demonstrated by the court's dissenting opinion, which disagreed with both parts of the ruling.\textsuperscript{211} The inference that the legislature is limited to one reapportionment per census decade was reasonable. The court pointed out that the original state constitution expressly empowered the General Assembly to re-apportion state legislative districts "from time to time," so the court inferred that lack of such language in the provision for apportioning congressional seats implicitly denied a like power.\textsuperscript{212} Like most inferences of implied negatives by omission, this was not conclusive, but it had some force, and the dissent did not refute it directly. However, the second inference, that the judicial apportionment used up the one opportunity per decade, was more troublesome. Although districting is a historically sordid act of self-interest by legislatures, the relevant constitutional texts, state and federal, clearly committed the power to legislatures. Reapportionment by courts can become necessary when legislatures fail to act, but the dissenters' argument that such judicial action should be temporary had considerable force.

Partisan political aspects of this dispute were everywhere. The General Assembly's 11\textsuperscript{th}-hour apportionment bill in 2003 was of course a raw political act. But courts are supposed to operate on a higher plane. Did they? The dissenters in the Colorado Supreme Court were the two justices associated with the Republican Party, while the majority justices had associa-


\textsuperscript{210} Lance v. Coffman, 127 S. Ct. 1194 (2007). Plaintiffs had also alleged a claim under the Petitions Clause that was dismissed by the district court for failure to state a claim; this ruling was affirmed by the Supreme Court. \textit{Id.} at 1198.

\textsuperscript{211} People ex rel. Salazar v. Davidson, 79 P.3d at 1243–1253 (Kourlis, J., joined by Coats, J., dissenting).

\textsuperscript{212} \textit{Id.} at 1239.
tions with the Democrats. In the U.S. Supreme Court, the three justices who indicated they would likely have overturned the decision were that Court's most conservative members, commonly associated with Republican Party positions and states' rights.

F. Article VII—Voting Rights of Parolees

Article VII section 10 provides that persons confined in prison shall not be entitled to vote, but voting rights are restored to persons who serve their "full term of imprisonment" or who receive a pardon. The applicable statute specifies that persons confined for a felony conviction or who are "serving a sentence of parole" are ineligible to register or vote. In 2006, parolees sued the state, claiming that the statute was invalid because their release from custody restored their right to vote under the constitution. However, the Colorado Supreme Court rejected their claim, interpreting the constitutional provision to include parole as part of the sentence; in other words, that a person on parole remains in legal custody.

213. The five majority justices were appointed by Governor Roy Romer, a Democrat. See Colorado Supreme Court Justices Webpage, http://www.courts.state.co.us/supct/suptjustices.htm (follow hyperlinks on each judge's name for date of appointment) (last visited May 14, 2007) [hereinafter Justices Webpage]; Colorado State Archives, List of Governors, http://www.colorado.gov/dpa/doitlarchives/offic/gov.html (last visited Aug. 30, 2007). Dissenting Justice Coats was appointed by Republican Governor Owens. See id; Justices Webpage, supra. Dissenting Justice Kourlis was also appointed by Governor Romer but was identified as a Republican. See State Justice Touted as Nominee, DENVER POST, July 12, 2005, at B-01.

214. See supra note 204 and accompanying text.

215. COLO. CONST. art. VII, § (10).


217. Danielson v. Dennis, 139 P.3d 688, 690 (Colo. 2006).

218. Id. at 692. The court had previously held that persons on probation or in custody awaiting trial are entitled to vote; the Danielson court distinguished those decisions. Id. at 693.

A provision in a 2007 Colorado Senate bill proposed to amend the statute to give parolees the vote. See sections 4 and 37 of the version of S.B. 07-83, 66th Gen. Assem., 1st Spec. Sess. (Colo. 2007), available at http://www.leg.state.co.us/docs/2007a/csl.nsf/fshbillcont3/3BEB2FCE7EF9D03187257251007A4B33?open&file=083_ren.pdf. To try to conform to the court's interpretation of section 10, the measure specified that parole is not part of a convict's sentence. However, the House removed the provision from the bill before passage. See Parolee Voting Provision Stripped, DENVER POST, Apr. 25, 2007, available at http://www.denverpost.com/legislature/5743224. See also The Sen-
G. Article IX—School Vouchers

In 2003, the General Assembly enacted a pilot program to entitle poor children in certain school districts to public support to pay private school tuition. However, the Colorado courts held the statute unconstitutional. Were the statute valid, participation in the program was mandatory for school districts with low academic performance ratings based on statewide tests. Private schools wishing to participate in the program had to submit applications and meet statutory criteria. Children who performed poorly in public schools within participating districts were entitled to have tuition support, in the form of vouchers to their parents, to attend participating private schools.

Soon after enactment, opponents filed suit in Denver District Court. The court held the statute invalid, and the Colorado Supreme Court affirmed. Plaintiffs made a number of claims, notably that the statute violated provisions of the Colorado Constitution providing for local control of "instruction" in public schools, prohibiting state aid to religious schools, and prohibiting compulsory support for religion. The district court and supreme court sustained the local control claim and did not rule on any of the others.

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219. See COLO. REV. STAT. tit. 22, art. 56 (repealed 2004).
221. See id. at 936. The tests were those popularly known as CSAP, required by the Educational Accountability Act as amended in 1997, found in COLO. REV. STAT. tit. 22, art. 7 (2007). Id. Districts required to participate were those with eight or more schools rated low or unsatisfactory based on CSAP tests. Id. At the time, eleven Front Range districts fit this definition. Id. Other districts could participate voluntarily. Id.
222. COLO. REV. STAT. § 22-56-106 (repealed 2004).
223. See Colo. Cong. of Parents, Teachers & Students, 92 P.3d at 936. Because it was a pilot program, participation was limited to 1% of a participating school district's students in 2004-05, 2% in 2005-06, 4% in 2006-07, and 6% in 2007-08 and after. See id.
225. See id. at 936 n. 3; COLO. CONST. art. IX, § 15 (local control of instruction), § 7 (state aid to religious schools forbidden), art. II, § 4 (prohibiting compulsory support of religion). Of course some private schools are not religious, but many are.
The supreme court's decision centered on use of local school funds to pay private school tuition.\textsuperscript{227} As stated above, the constitution guarantees local control of "instruction in the public schools."\textsuperscript{228} A competing provision commits "general supervision of the public schools" to the State Board of Education.\textsuperscript{229} Several early decisions held that state statutes attempting to reallocate local funds were invalid under the local control provision.\textsuperscript{230} But a 1999 decision sustained partial state authority over local districts under the Charter Schools Act.\textsuperscript{231} The court's decision overturning the voucher statute relied on the statute's reallocation of local funds and distinguished the 1999 decision.\textsuperscript{232} Three dissenting justices would have sustained the statute by limiting the constitution's local control provision to public school curricula, rejecting or overruling the older decisions that had applied it to control over local funds.\textsuperscript{233}

The decision made it clear that were only state funds involved, the enactment would not have violated the local control provision.\textsuperscript{234} Although not discussed in the case, the legislature might avoid the decision in another way, by conditioning receipt of existing state support on school districts' compliance with a voucher plan. Conditional federal funds are a routine aspect of federal-state relations,\textsuperscript{235} but conditional state funds have not been directly at issue in Colorado's state-local disputes.

Were a statute enacted to authorize vouchers using only state funds or by expressly conditioning state funds, opponents would surely revive their claim that state aid to religious schools is invalid. The court's most relevant precedent suggests that granting aid to parents rather than directly to paro-

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\item \textsuperscript{227} \textit{Id.} at 933.
\item \textsuperscript{228} COLO. CONST. art. IX, § 15.
\item \textsuperscript{229} COLO. CONST. art. IX, § 1.
\item \textsuperscript{230} See OESTERLE & COLLINS, \textit{supra} note 1, at 207. The connection between the local control provision and local funds was renewed in \textit{Lujan v. Colorado Board of Education}, 649 P.2d 1005 (Colo. 1982). \textit{See} \textit{Colo. Cong. of Parents, Teachers & Students}, 92 P.3d at 940–41.
\item \textsuperscript{231} Bd. of Educ. of School Dist. No. 1 v. Booth, 984 P.2d 639 (Colo. 1999). \textit{See} OESTERLE & COLLINS, \textit{supra} note 1, at 207–08.
\item \textsuperscript{232} \textit{Colo. Cong. of Parents, Teachers & Students}, 92 P.3d at 937–44.
\item \textsuperscript{233} \textit{Id.} at 944 (Kourlis, J., joined by Rice and Coats, JJ., dissenting).
\item \textsuperscript{234} See \textit{id. passim} (majority opinion).
\item \textsuperscript{235} \textit{See} NOWAK & ROTUNDA, \textbf{TREATISE ON CONSTITUTIONAL LAW}, \textit{supra} note 147, at 734–36.
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That decision involved higher education, so opponents can argue that primary and secondary education should be subject to a stricter constitutional rule. The leading federal precedent rejected an attack on vouchers under the Establishment Clause of the First Amendment, but the Colorado Constitution's provision is more specific. On the other hand, if Colorado excludes religious schools from participation in grants to private schools, a challenge could be mounted under the Free Exercise Clause of the First Amendment. Therefore, the outcome of such a case is uncertain.

H. Article X—Hotel Taxes

In 1958, the Colorado Supreme Court held that city income taxes are implicitly forbidden by article X section 17, authorizing the state income tax. But in 1969 the court distinguished "occupational privilege taxes" levied at flat rates on businesses and employees as valid excise taxes. Then a 1976 decision overturned a town's tax on gross income, deciding that it was a forbidden income tax. This led to an attack on a Colorado Springs tax levied on utilities' gross income. The

236. See Am. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982); OESTERLE & COLLINS, supra note 1, at 211–12.
237. Zelman v. Simmons-Harris, 536 U.S. 639 (2002). Plaintiffs in the voucher case also alleged violation of the federal Constitution, but the Zelman decision probably forecloses that claim. Id.
238. See COLO. CONST. art. IX, § 7 (specifically forbidding funds for "sectarian" schools).
239. The Supreme Court's most relevant precedent rejected a constitutional right to state funding. Locke v. Davey, 540 U.S. 712 (2004). An attack in Colorado would try to distinguish that case by claiming COLO. CONST. art. IX, § 7 to be a so-called little Blaine Amendment, based on anti-Catholic bias, distinguishing it from Locke. See 540 U.S. at 723 n.7 (distinguishing little Blaine Amendment issue); id. at 726–34 (Scalia, J., dissenting, making the argument reserved by the Court). For a scholarly analysis, see Thomas C. Berg & Douglas Laycock, The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions, 40 TULSA L. REV. 227, 249–50 (2004).
city argued that it was a valid sales tax, but the court rejected the claim, saying that the city’s intent had been to levy an income tax, and the tax incidence was on the utilities and not on their customers.243 These issues returned to the court in 2000, when a lawsuit challenged the town of Eagle’s hotel tax, arguing that it was a forbidden tax on gross income.244 But the court sustained it as a valid occupation tax, reasoning that it was levied at a fixed rate per room per day regardless of the room charge, so it was not based on a percentage of gross income.245 The issue these decisions leave open is whether a home-rule city or town can rely on the dictum in the Colorado Springs case to designate a tax measured by gross income as a sales tax levied on buyers.246

I. Article X—TABOR247

1. Statewide TABOR Consent Votes

TABOR requires voter consent to increase or extend taxes, to authorize government borrowing, and to exceed revenue limits defined by inflation and population changes.248 The General Assembly asked voters to approve debt for Great Outdoors Colorado in 2001, and voters agreed.249 But a measure to bor-

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244. Town of Eagle v. Scheibe, 10 P.3d 648 (Colo. 2000).
245. Id. at 654.
246. See text accompanying note 243, supra.
248. COLO. CONST. art. X, § 20. The text purports to limit spending rather than revenue, but its definition makes clear that the limit is on revenue. Id. at §§ 20(2)(e), 20(7). See infra text accompanying note 258. TABOR authorizes consent votes to be held in a “state general election, biennial local district election, or on the first Tuesday in November of odd-numbered years.” Id. § 20(3)(a). The last part of the definition differs from the standard American election day when November 1st falls on Tuesday of an odd-numbered year, as it did in 2005.
249. See Colorado Legislative Council, Ballot Issue History, http://www.leg.state.co.us/lcs/ballothistory.nsf/ (follow “2001” hyperlink; then fol-
row for water projects failed in 2003. However, the most important issues about consent were 2005 Referendums C and D on state spending and debt limits, referred to voters by the General Assembly. Voters approved C but rejected D.

Referendum C authorized the state to retain revenue in excess of TABOR limits for five fiscal years (July 1, 2005 to July 1, 2010) for specified but broad purposes (education, health care, "strategic" transportation projects, and police and firefighters' retirement plans) and established as the new TABOR base the highest revenue year of the five. Referendum D would have authorized the state to borrow for three specified purposes (transportation, school construction, and fire and police pensions), provided that Referendum C also passed.

Lawsuits to challenge the validity of Referendum C have been threatened but not yet filed. Although C involved a statewide vote, it did not purport to amend the text of TABOR. Hence opponents can argue that C is in conflict with TABOR. The fact that C covers more than one tax year appears valid based on Colorado Supreme Court decisions approving local TABOR consent referendums lasting more than one tax year. Moreover, the logic of those decisions extends as well to C's provision changing the TABOR base to the highest allowed revenue level of C's five years. However, TABOR's text does not expressly allow or forbid this provision. In prior cases of uncertainty, the Colorado Supreme Court has favored...
taxpayer democracy over strict readings of TABOR’s text, but no precedent directly addresses the validity of this part of Referendum C.

2. TABOR’s Reductions of Government

Unless voters override it, TABOR’s revenue cap reduces the size of government in two ways, one gradual and relative, the other sharp and absolute. TABOR limits increases in a government’s fiscal year “spending” to the amount in the prior fiscal year adjusted for changes in population and inflation. However, the term “spending” is misleading, as TABOR’s definition of spending includes all revenue whether spent or not. It states that fiscal year spending means all of a government’s “expenditures and reserve increases except. . . reserve transfers or expenditures . . . .”

    “Reserve” refers to a government’s savings, so the definition includes saving as “spending,” and spending out of savings as not “spending.” The ordinary meanings of spending and saving are the opposite.

The first effect of the TABOR revenue cap is gradually to reduce the relative size of government. Over time the size of the economy increases faster than population and inflation, so capping government revenue by these metrics reduces the percentage of the economy in the public sector. The second and much more drastic result has been dubbed TABOR’s ratchet effect. TABOR bases a fiscal year’s revenue limits on the prior year’s actual revenues. An economic downturn such as that of 2001–04, or a tax reduction, causes government revenues to

257. See supra notes 95–96 and accompanying text.
258. COLO. CONST. art. X, § 20(2)(e).
fall. This reduces the government's revenue base and thus its revenue limit for the following year. Unless voters consent to waive the limit, each such decline reduces government revenues below their previous TABOR baseline level, causing the size of government to contract in absolute terms.\textsuperscript{261}

The legislature's cuts in the state income and sales taxes in 1999–2000,\textsuperscript{262} combined with the economic downturn in 2001–04, caused the state's revenues to fall sharply. Moreover, voters in 2000 mandated annual increases in spending on K–12 education.\textsuperscript{263} The result was a huge reduction in state funds for other purposes, and this in turn caused the legislature to propose Referendum C.\textsuperscript{264}

The downturn also reduced revenues to local governments. However, votes to override TABOR revenue limits on local governments are frequent and mostly successful.\textsuperscript{265} Some municipalities have set aside their revenue caps indefinitely.\textsuperscript{266} Statewide votes are another matter. Getting political consent to put Referendum C on the ballot was difficult, and C was only narrowly approved by voters.\textsuperscript{267} Therefore another TABOR effect has been to reduce the relative size of state government vis-à-vis local and thus to increase modestly the advantages of more prosperous parts of the state.\textsuperscript{268}

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  \item[261.] See OESTERLE & COLLINS, supra note 1, at 254. A graph of the actual ratchet effect at the state level appears in LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMBLY, 2005 STATE BALLOT INFORMATION BOOKLET 5 (2005), http://www.state.co.us/gov_dir/leg_dir/icsstaff/2005/ballot/2005BluebookforInterne\texttt{t.pdf.}
  \item[263.] See COLO. CONST. art. IX, § 17; infra note 282.
  \item[264.] 2005 Colo. Sess. Laws 2323. It also induced the legislature to transfer cash from special funds to the general fund in order to balance the budget, a practice challenged in the courts. See infra notes 375–85 and accompanying text.
  \item[265.] See, e.g., Havens v. Bd. of County Comm’rs, 924 P.2d 517, 519 n.3 (Colo. 1996).
  \item[266.] See, e.g., id.
  \item[268.] Colorado is one of only four states in which local tax revenues exceed state revenues. See CENTER FOR TAX POLICY, HOW COLORADO COMPARES: STATE TAXES AND SPENDING 12 (2006), http://www.centerfortaxpolicy.org/reports/How_Colorado_Comares.pdf [hereinafter HOW COLORADO COMPARES].
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The ratchet effect could be greatly eased by amending TABOR to give the term "spending" its ordinary meaning, omitting savings but including spending out of savings. A government could then set aside revenue in fat years (such as the late 1990s) and spend it in lean years (such as 2001–04), reducing or eliminating the ratchet effect. However, there does not appear to be any organized effort to seek such an amendment to TABOR.

Essential background decisions that allowed the state to conduct the 2005 referendums were several supreme court decisions in the 1990s that sustained voters' consent to exceed TABOR limits over more than one year. A 2002 decision sustained an indefinite waiver of a county's revenue limits. Another waiver was interpreted to include pre-TABOR statutory limits that TABOR converted into constitutional caps.

3. TABOR and Arveschoug-Bird

Referendum C revived another regulation of state revenue. In 1991, a statute known as the Arveschoug-Bird Amendment imposed a statutory limit of 6% on annual increases in appropriations to the general fund, although it allows revenue above the limit to go to reserve accounts and capital construction projects. After TABOR's revenue limit became effective in 1993,
the general fund was limited by the stricter of the two limits. For the first three years under TABOR, Arveschoug-Bird was the operative limit, then TABOR became stricter, then neither applied during the downturn years after 2001.\textsuperscript{274} Referendum C suspended the TABOR limit in 2005 but expressly retained Arveschoug-Bird.\textsuperscript{275} In 2005–06, revenues increased more than 6%, so Arveschoug-Bird capped appropriations to the general fund.\textsuperscript{276} Additional revenue was allocated to reserve accounts and to capital construction projects, particularly for highways.\textsuperscript{277} Forecasters say that revenues will increase more than 6% in each of the remaining years of Referendum C.\textsuperscript{278}

These events raised the question whether TABOR requires voter consent to amend Arveschoug-Bird’s statutory 6% limit. The relevant TABOR text states, “Other limits on district revenue, spending, and debt may be weakened only by future voter approval.”\textsuperscript{279} Arveschoug-Bird does not limit the state’s debt, so the key questions are whether its regulation of the allocation of revenue between the general fund and other uses is a “limit” on “revenue” or “spending” and whether any shift in the formula would cause it to be “weakened.” In other words, does the TABOR clause regulate only how much money can be raised or spent overall, or does it also regulate the allocation of revenue and spending between operating, reserve, and capital accounts? Opinions of the legislature’s Office of Legislative Legal Services concluded that TABOR prevents raising Arveschoug-Bird’s 6% limit, but the opinions gave the word “spending” in the quoted TABOR provision its ordinary meaning rather than the special


\textsuperscript{275} See COLO. REV. STAT. §§ 24-75-201.1(1)(a)(II) (Arveschoug-Bird) to revenues retained under Ref. C.


\textsuperscript{277} Id. at 1–3. See COLO. REV. STAT. §§ 24-75-201.1(d), 24-75-218, 39-26-123 (2007).

\textsuperscript{278} See June 20 Memo, supra note 276, at 3.

\textsuperscript{279} COLO. CONST. art. X, § 20(1). For other applications of this provision, see infra notes 299, 303 and accompanying text.
TABOR definition that includes savings. If the TABOR definition of "spending" to mean overall revenue is applied, nothing in its text regulates allocation of revenue among operational spending, saving, and capital investment.

Even if TABOR does not require voter consent to amend Arveschoug-Bird, legislators may be reluctant to tamper with Referendum C, which was adopted by a statewide vote that expressly retained it. Still a further complication is a provision within Arveschoug-Bird that requires the General Assembly to consider its modification whenever "the general assembly significantly restructures the method by which elementary, secondary, or post-secondary education in this state is financed." This has occurred at least twice since 1991, but no action has been taken.

4. Property Taxes for Schools

School support has always been Colorado's largest public expense, so paying for schools is naturally the state's biggest tax issue. Once mostly local, school support is now more than sixty percent a state expense. In 1952 the legislature crafted the first Public School Finance Act to govern this subject, since replaced by similar acts passed in 1962, 1969, 1973,


282. An initiated amendment to the Colorado Constitution approved in 2000 mandates increases in state funding for K-12 education. See COLO. CONST. art. IX, § 17. The legislature necessarily reexamined school funding to carry out this requirement. See COLO. REV. STAT. §§ 22-54-104 to -104.2 (2007). In 2004, the legislature extensively revised the system for funding higher education. See COLO. REV. STAT. §§ 23-18-101 to -208 (2007).


284. See HOW COLORADO COMPARES, supra note 268, at 5.
A section of each act allocated state and local shares of school expense and defined the local tax effort required to qualify for state support. Relevant here is part of the section passed in 1994, soon after TABOR took effect. For purposes of the state-local funding program, it limited school districts' property tax levy to the "number of mills that may be levied by the district under the property tax revenue limitation imposed on the district by [TABOR]." For districts where tax bases grew faster than TABOR revenue limits allowed, the TABOR caps forced cuts in the mill levy.

In 2007, the legislature repealed the statutory TABOR restriction except for districts that have not voted to allow their schools to retain revenues exceeding TABOR limits. Most districts have voted to do so. For them, the effect of the amendment was to define their levy under one of the other caps in the statute. For most of them, the operative limit became the levy in force in the previous tax year, so the press called the amendment a tax freeze. But as noted above, in many dis-

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287. 1994 Colo. Sess. Laws 791 (formerly codified at COLO. REV. STAT. § 22-54-106(2)(a)(III) (2006)). This was one of three mill levy caps; COLO. REV. STAT. § 22-54-106(2)(a) required the lowest of the three.


289. 2007 Colo. Sess. Laws 733 (codified at COLO. REV. STAT. § 22-54-106(2)(a)(III) (2007)). The other two caps remain in § 22-54-106(2)(a), and a new overall cap of twenty-seven mills was added. The latter applies to a few districts that had high levies owing to declining enrollment and low property tax bases. See Bell Policy Center, Bell Supports Gov. Ritter's School District Mill Levy Freeze (Apr. 13, 2007), http://www.thebell.org/issues/fiscal/millfreeze2.php (last visited Aug. 28, 2007).


291. UNDERSTANDING MILL LEVY STABILIZATION, supra note 288, at 4.

292. See Mike Littwin, Property-Tax Freeze Heated, ROCKY MTN. NEWS, May 12, 2007, available at
districts the frozen mill levy will be applied to larger assessed valuations and therefore cause tax bills to rise.

Soon after passage of the 2007 repeal, a lawsuit was filed claiming that without voter approval, the amendment violates TABOR. The threshold issue in the case is how to interpret the 1994 statutory text, which has two plausible meanings. One is simply to place in the statute the limit that TABOR otherwise imposes on the revenues of each school district. If this is correct, the 2007 repeal is valid because it applies only to school districts that have voted to remove TABOR’s revenue limits. The alternative interpretation is that the 1994 provision is an independent restriction on school district tax levies. Plaintiffs in the lawsuit can argue that the former interpretation would be redundant because TABOR imposes that limit anyway, and statutes should be interpreted to give them operative meaning. Defendants can respond that many statutes passed soon after TABOR took effect simply duplicated its requirements.

If the 1994 provision were an independent restriction, did the legislature have authority to impose it? The answer is almost certainly yes. Whatever question there might be about state control over school taxes in the abstract, the provision in question was a condition for receipt of state funds and surely valid as such.

If the 1994 provision were a valid, independent restriction, did the 2007 amendment contravene TABOR? It did not violate TABOR’s specific requirements of voter approval for a new tax, tax rate increase, higher mill levy, or increase in assessment valuation. The case depends instead on two general TABOR provisions: one requires voter approval for a “tax policy change directly causing a net tax revenue gain to any dis-


296. See supra text accompanying notes 234–35.
If read literally and strictly, TABOR’s requirement of voter approval for a “tax policy change directly causing a net tax revenue gain to any district” would require voter approval for a law that improved methods to enforce taxes against scofflaws or for a “supply side” tax cut that lowered tax rates for the purpose of increasing revenues. These and other examples make it unlikely that the courts will read it literally, to outlaw any unapproved increase in tax revenue.

Finding a way to confine the provision to sensible bounds—yet ones not already prohibited by TABOR’s specific ban on any new tax, tax rate increase, higher mill levy, or increase in assessment valuation—is challenging. One approach would focus on the modifier “directly” in the text. However, a law improving tax collection methods is at least as direct as the 2007 amendment removing the property tax cap. Another approach would focus on the words “net tax revenue gain” and limit application to changes in laws or policies that explicitly restrict revenue. The 1994 law is such a law, so this interpretation would invalidate it if it is an independent restriction. As explained in the next paragraph, this also makes the two TABOR limits quite similar in scope.

The second TABOR challenge, that other “limits on district revenue . . . may be weakened only by future voter approval,” can also be read to require a vote to authorize a law that improves tax collections or that enacts a “supply-side” tax cut that increases revenues, and similar hypotheticals, so it also is unlikely to be read literally. However, its scope is “limits on district revenue,” a less sweeping phrase than “tax policy change.” Confining it to measures that are explicit limits on revenue is a reasonable reading and avoids overbroad applications. Applying that reading, the 1994 statute is by its terms a limit on district revenue. Therefore, if the 1994 statute is an

298. Id.
299. Id. at § 20(1). For other issues arising under this provision, see text accompanying note 279, supra, and note 303, infra.
300. Contrast COLO. REV. STAT. § 39-22-606(4)-(5) (2007). This statute requires estimated payments of severance taxes. Until 2007, it required quarterly payments; as amended payments are due monthly. This was intended to increase interest revenue to the state. See June 20 Memorandum, supra note 277, at 10. However, the statute is not an explicit limit on revenue, so the change should not violate TABOR.
independent restriction, it appears to be subject to the "future voter approval" clause of this TABOR provision.

Opponents of the statute also claimed that the previous local votes waiving TABOR limits on school district revenues were invalid because their ballot titles failed to indicate that a tax increase was involved or were misleading. This claim confronts statutes of limitations and negative precedents.

5. Did TABOR Override Preexisting Indexed and Variable Taxes?

The political branches have reached inconsistent decisions when applying TABOR to preexisting tax laws that require administrative or legislative increases. The legal question is whether TABOR's general provisions that "supersede all conflicting state constitutional [and] statutory ... provisions" overrode preexisting laws calling for tax rate and assessment increases so that voter consent is required by TABOR's bans on unconsented tax or revenue increases.

The most important situation to date concerned unemployment insurance taxes that are paid by most employers. The statutory scheme calculates taxes based on complex and fluctuating formulas. Soon after TABOR became effective, an attorney general's opinion concluded that TABOR was not inconsistent with the unemployment scheme. Its statutory tax increases could continue because the formula was in place before TABOR and "unemployment taxes are calculated based on established objective criteria." However, TABOR would require voter consent if the formula were changed to increase

301. *See supra* note 293.
303. *COLO. CONST.* art. X § 20(1), (4)(a). TABOR rules that could apply are those requiring voter consent to any weakening of revenue limits, to any new tax, to any tax or mill levy or assessment ratio increase, or to any tax policy change directly causing a net revenue gain. *Id.*
tax rates or revenue.\textsuperscript{307} Another attorney general's opinion concluded that TABOR did not forbid the fluctuating "surcharge" required by the workers' compensation act because, although imposed on insurers, it was a fee and not a tax.\textsuperscript{308} A series of opinions allowed mill levy fluctuations under a 1915 statute that limits certain property tax revenue increases to 5.5% over the prior year.\textsuperscript{309} Two other opinions concluded that sunset provisions in statutes granting tax breaks are not canceled by TABOR.\textsuperscript{310} Income tax credits with sunset provisions have expired without a TABOR vote.\textsuperscript{311}

In 1990, Colorado voters adopted an amendment to the Constitution authorizing limited gaming in Central City, Blackhawk, and Cripple Creek.\textsuperscript{312} The amendment authorized a tax of up to 40% on the gross proceeds of gaming enterprises, established the Limited Gaming Commission with power to set the tax annually, and directed allocation of the tax proceeds.\textsuperscript{313} In 1991, the legislature passed a gaming tax statute that tracks the amendment.\textsuperscript{314} The Limited Gaming Commission's rules provide for setting the tax annually, and since 1993, it

\textsuperscript{312} COLO. CONST. art. XVIII, § 9.
\textsuperscript{313} Id. § 9(5). Part of the proceeds are allocated to pay the gaming commission's expenses and might be characterized as a fee rather than a tax, but most of the proceeds are plainly tax receipts.
\textsuperscript{314} COLO. REV. STAT. § 12-47.1-601 (2007).
has raised the tax several times. The Commission therefore appears to view itself as not constrained by TABOR.

In 1977, the legislature imposed a severance tax on coal extraction. The statute set a specific rate per ton of coal, provided for adjustment of the rate based on changes in the federal index of producers' prices for all commodities, and required that the executive director of the department of revenue calculate the adjustment. When TABOR took effect, the director decided that TABOR precluded increases in the tax rate without voter approval, and this has remained the operative rule. However, a 2007 attorney general's opinion concluded that the director had been mistaken, and the tax should have been raised.

Another question is presented by application of TABOR to the 1982 amendment to article X, section 3 governing property tax assessments. Popularly called the Gallagher Amendment, this provision set the assessed valuation of residential property at 21% of actual value and that of other property at 29%. It also required that the 1985 ratio of total statewide valuation for assessment of residential property to that for nonresidential property remain fixed. To accomplish this, it required future

316. See memo of telephone conversation with Deputy Att'y Gen. Jason R. Dunn, July 25, 2007 (on file with author). In Interrogatories on S.B.93-74, 852 P.2d 1, 12-15 (Colo. 1993), the supreme court replied to an interrogatory from the legislature asking if it had authority to restrict limited gaming tax revenues in order to comply with TABOR's revenue limit. The court held that the legislature lacked such authority. The opinion described the Commission's taxing authority in the context of the TABOR revenue issue, but it said nothing about validity of the tax. However, it is possible that the opinion encouraged the Commission to believe that TABOR did not override its taxing authority. In 2006, the attorney general issued an opinion on control over Gaming Division personnel and budget. Op. Colo. Att'y Gen. No. 06-05, 2006 Colo. AG LEXIS 4. The opinion again recited the Commission's taxing authority but did not discuss its validity under TABOR. Id.
318. Id. § 106(1), (5).
321. See OESTERLE & COLLINS, supra note 1, at 233–34.
adjustment of the residential assessed valuation percentage as needed to maintain the ratio, which turned out to be roughly 47% residential to 53% nonresidential.\footnote{See LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMBLY, RESEARCH PUBLICATION NO. 515-0, ANALYSIS OF THE 2003 BALLOT PROPOSALS (BLUE BOOK) 4–5, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2003/ballot/2003bluebookforinternet2.pdf.} To comply, the legislature established a system of revaluation and adjustment of the residential assessed valuation percentage every two years.\footnote{COLO. REV. STAT. §§ 39-1-104(10.2), 39-1-104.2 (2007).} After 1985, the statewide assessed value of residential property grew much faster than that of nonresidential. The legislature maintained the required valuation ratio by reducing the assessed valuation percentage for residential property so that the aggregate residential assessed valuation remained at about 47%.\footnote{See Colo. Dep't of Local Affairs Div. of Property Taxation, Report to the General Assembly: Estimated Residential Assessment Rate for 2007-2008 Pursuant to 39-1-104.2(6), C.R.S. 18–19 (13 Apr. 2007), http://www.dola.state.co.us/dpt/dpt_news/docs/AprilReport041307.pdf [hereinafter Report to the General Assembly].} Accordingly, the assessed valuation percentage for residential property fell every two years from the 1985 figure of 21% to the 1997 figure of 9.74%.\footnote{See id.; COLO. REV. STAT. § 39-1-104.2 (2007).}

In 1999, for the first time under this scheme, the aggregate value of nonresidential property increased more than that of residential, so the Gallagher formula called for an increase in the residential valuation percentage. However, legislative leaders decided that TABOR forbade this, so rather than increase the residential percentage, the legislature maintained it at the 1997 figure.\footnote{See Report to the General Assembly, supra note 324, at 18–19.} The relative increase in residential assessments resumed in 2001, and the residential percentage continued to be reduced, reaching 7.96% in 2003.\footnote{COLO. REV. STAT. § 39-1-104.2(3)(i) (2007).} In 2005 and 2007, the nonresidential aggregate again increased more than the residential, but the legislature again declined an increase and maintained the 2003 figure.\footnote{Id. § 39-1-104.2(3)(j, k). See Report to the General Assembly, supra note 324, at 1, 19.} In 1999, 2005, and 2007, the upward adjustment in the residential percentage
called for by Gallagher would have been modest,\textsuperscript{329} so the consequences of the decision not to raise the residential percentage were slight. However, the issue could become more significant if the value of nonresidential property were to undergo a sustained and significant increase.

In all the situations involving pre-TABOR laws, competing legal rules can be invoked on both sides of the legal question whether TABOR overrode preexisting laws calling for tax rate and assessment increases. TABOR's comprehensive terms are a straightforward argument for repeal. Countering it are the rule that repeals by implication are not favored, and the rule that general laws usually do not override specific ones.\textsuperscript{330} The TABOR terms are explicit but do not specifically address the issues posed here. New laws, including TABOR, are normally prospective in operation, a proposition suggested by TABOR's term "supersede."\textsuperscript{331} However, the tax rises at issue occur after TABOR took effect, so they are in a sense prospective.

Another factor of possible relevance is that the preexisting provisions in the limited gaming law and in Gallagher are constitutional provisions, of equal dignity with TABOR, while the other taxes are statutory. A third possible issue arises from the form of the increase provisions. Gallagher and the statutory tax laws provide for mandatory increases pursuant to fixed formulas involving no administrative discretion, while the limited gaming law calls for discretionary action by the Commission. No court has considered any of these issues. The nearest precedents held that pre-TABOR voter consents to tax or revenue increases were not overridden by TABOR.\textsuperscript{332} Of course, the courts will not address these issues unless a taxpayer attacks the taxes that have risen, or the political branches impose the increases mandated by the original terms of the coal

\textsuperscript{329} See Report to the General Assembly, \textit{supra} note 324, at 1, 20 (1999 rate would have been 9.83% instead of 9.74%; 2005 rate 8.17% and 2007 rate 8.19% instead of 7.96%).

\textsuperscript{330} See, e.g., the majority and dissenting opinions on a similar issue of statutory law in \textit{West v. Roberts}, 143 P.3d 1037, 1044-47 (Colo. 2006).

\textsuperscript{331} COLO. CONST. art. X, § 20(1).

tax or Gallagher. Their reluctance in the latter case could be explained by the political sensitivity of residential property tax rates.

6. Taxes, Fees, and Special Assessments Under TABOR

Another TABOR lawsuit depended on the distinction between a tax that requires prior consent under TABOR and a fee for service that does not. In 1989, before TABOR, the Colorado Supreme Court held that a Fort Collins “transportation utility fee” was not a tax subject to the uniformity requirement of article X section 3. The court defined fees broadly: they need not be voluntary, and their relation to the service need not be an exact match. After TABOR became effective in 1993, the distinction took on added significance. In addition to TABOR’s requirement of prior voter consent for a new tax, TABOR exempts from all its restrictions a government “enterprise,” defined as a “government-owned business” that receives less than 10% of its revenue from other units of government. TABOR enterprises cannot themselves have any power to tax, so they are supported at least 90% by their own fees. Prominent examples of TABOR enterprises are the E-470 toll road authority and the University of Colorado. TABOR thus makes the tax/fee distinction a general question of constitutional law. The new issue was quietly recognized by the Legislative Drafting Office in 1993, and it issued guidelines. In the same year, an attorney general’s opinion concluded that TABOR did not

333. The Department of Revenue held a public hearing on Oct. 2, 2007, to consider whether to follow the AG’s opinion and raise the tax. See also Colorado Confidential, http://www.coloradoconfidential.com/showDiary.do?diaryId=2530 (last visited Sept. 28, 2007) (blog discussing this tax).
335. Bloom, 784 P.2d at 310-11.
336. COLO. CONST. art. X, § 20(2)(b), (d).
337. The supreme court interpreted TABOR to require that enterprises have no power to tax. Nicholl, 896 P.2d at 869.
forbid raising the "surcharge" required by the workers' compensation act because, although imposed on insurers, it was a fee and not a tax. But the question did not generate a public controversy until a decade later.

In 2001, pursuant to a voter-approved cable television franchise agreement, Colorado Springs and its cable service provider agreed to charge each subscriber fees for use of the city's rights-of-way and for construction of a dark fiber system for the city. The next year the city imposed a fee to cover the power and capital costs of the city's streetlights. A 2003 lawsuit alleged that these charges were taxes subject to TABOR and thus invalid for want of prior voter approval. The city argued that the charges were properly characterized as fees for services and thus not subject to TABOR, invoking the 1989 Fort Collins decision. The court of appeals agreed with the city and sustained the charges. The court acknowledged that this opens the way for many local charges to avoid prior TABOR approval but said that issue was for the supreme court. However, that court denied review, two justices dissenting. Still another Colorado Springs fee, for storm water drainage, is the subject of a pending TABOR challenge. The issue arose at the state level in 2007, when the legislature im-

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342. Bruce v. City of Colorado Springs, 131 P.3d at 1189. Plaintiff was Douglas Bruce, author of TABOR. Id. The cable franchise agreement had been approved by voters, but the ballot measure had not complied with TABOR's wording requirements to approve a tax. Id.
343. Id. at 1189-92.
344. Id. at 1191. A dissenting judge would have found the charges to be taxes subject to TABOR. Id. at 1193-95 (Graham, J., dissenting). The dissent cited Okeson v. City of Seattle, 78 P.3d 1279 (2003), holding a similar street light charge to be a tax under Washington law. Id. at 1193-94.
posed a fee for solid waste disposal.\footnote{347} Opponents called it a tax, requiring a TABOR vote.\footnote{348} Potential disputes are many, as all levels of government impose numerous fees.\footnote{349}

The fee versus tax dispute in these cases is of relatively modest importance because government income from fees is usually subject to TABOR’s revenue cap.\footnote{350} As explained above, the issue has much greater import to define the scope of a TABOR enterprise because enterprise income is not subject to the revenue cap.\footnote{351}

Special assessments are charges imposed by governments for specific local improvements. They are not mentioned in TABOR, so a further question is whether they are taxes for TABOR purposes. Their historical use has been by local governments for construction and repair of improvements such as roads, sewers, curbs, gutters, sidewalks, and parks. They have had a rocky history in Colorado law, in and out of the Constitution,\footnote{352} but their modern definition is reasonably stable. They

\begin{itemize}
\item \footnote{347} See Peter Blake, A Fee By Any Other Name, ROCKY MTN. NEWS, Mar. 7, 2007, available at \url{http://www.rockymountainnews.com/drmn/opinion_columnists/article/0,2777,DRMN_239725399253,00.html} (last visited Oct. 27, 2007).
\item \footnote{349} See Peter Blake, A Fee By Any Other Name, ROCKY MTN. NEWS, Mar. 7, 2007, available at \url{http://www.rockymountainnews.com/drmn/opinion_columnists/article/0,2777,DRMN_239725399253,00.html} (last visited Oct. 27, 2007).
\item \footnote{350} See June 20 Memo, supra note 276, at 8 (twenty-eight bills in 2007 legislative session imposed or raised fees estimated to yield $122.2 million).
\item \footnote{351} See COLO. CONST. art. X, § 20(2)(e) (definition of spending).
\item \footnote{352} See COLO. CONST. art. X, § 20(2)(e) (definition of spending).
\end{itemize}
must be used exclusively for specific improvements that benefit
owners at least as much as the owners pay.\textsuperscript{353} They are often
imposed within specially established improvement districts,\textsuperscript{354}
are subject to review by initiative and referendum, and are
sometimes imposed only upon majority consent.\textsuperscript{355}

Are special assessments taxes subject to TABOR? A rea-
sonable case can be made for either answer. On the one hand,
they can be imposed without payers' consent and are always
imposed without at least dissenting payers' consent. And many
historical references to them call them taxes or use synonyms
for that term.\textsuperscript{356} On the other hand, other references different-
tebrate them from taxes.\textsuperscript{357} And by definition they must benefit
payers at least as much as they pay. This feature of their legal
definition is more restrictive than the definition of fees,\textsuperscript{358}
which are not taxes under TABOR. Moreover, the supreme
court's lone relevant opinion supports their exclusion from
TABOR's requirements for taxes.\textsuperscript{359} If so, they can be used by
TABOR enterprises.
7. Ballot Titles and Election Notices

Other new TABOR litigation involved challenges to ballot titles and election notices. A 1994 statute imposes a five-day statute of limitations to challenge a ballot title, and a 1992 statute imposes a ten-day limitation for election contests. In 2001, the Eagle County School District held a successful election to increase the property tax mill levy. Four months later a taxpayer filed suit to challenge the ballot title and information. The suit was dismissed as untimely, and the supreme court rejected claims that the 1994 statute violated TABOR requirements.

A 2003 Colorado Springs city election to extend a dedicated sales tax was challenged for TABOR violations. The main issue was whether extension of an existing tax constitutes a “tax increase” for TABOR notice purposes. TABOR section (4) expressly requires an election for “extension of an expiring tax,” and the city did hold the required election. Section (3) imposes detailed requirements for mailing an election notice to voters, wording of the notice, and wording of the ballot title. These require that the mailed notice and the ballot title use specified wording to describe a “tax increase.” The city’s notice and title did not comply; the city argued that a tax extension was not an “increase” for section (3) purposes. The district court disagreed and held that a tax extension is an increase for section (3) purposes, but the supreme court reversed and sustained the extension.

360. COLO. REV. STAT. § 1-11-203.5(2)(2007). In Busse v. City of Golden, 73 P.3d 660, 663–64 (Colo. 2003), the court held that this statute barred an untimely challenge based on the claim that the ballot title improperly included multiple, separate purposes in a single measure. No constitutional issue was raised regarding the statute of limitations. On other issues in the case, see supra text at note 163; infra text at notes 386–92.


363. Id. at 458.

364. Id. at 470.

365. Bruce v. City of Colo. Springs, 129 P.3d 988 (Colo. 2006). Plaintiff in the case was Douglas Bruce, author of TABOR. Id. at 988.


367. Id. at §§ 20(3)(b), (c).

368. Bruce, 129 P.3d at 991.

369. Id. at 996–97. Plaintiff challenged both the ballot title and mailed notice. Id. at 990. The district court held that challenge to the title was time-barred un-
8. What Is a TABOR “District”?

Other TABOR litigation concerned the kinds of governmental entities subject to TABOR limitations. Its section (2)(b) applies TABOR to all “districts,” defined as “the state or any local government, excluding enterprises.” Section (2)(d) defines an “enterprise” as “a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue” from state and local governments. An earlier supreme court decision that arguably extended the reach of TABOR held that a governmental entity that otherwise meets the enterprise definition cannot qualify if it has taxing power.

Another new case involved the other part of the TABOR definition: what constitutes a “local government” for TABOR purposes. The supreme court had held that an irrigation district was not subject to TABOR because it could not levy taxes on the public and did not hold elections based on the concept of one person, one vote. In 2002 the court of appeals applied the same criteria to determine that an urban renewal district was not a TABOR “local government.”

J. Articles X and XI—TABOR and Debt

1. Special Funds

During the economic downturn of 2001–04, the General Assembly transferred more than $442,000,000 from thirty-one special funds in the Treasury, known as “cash funds,” into the
general fund in order to balance state budgets.\textsuperscript{375} In 2004 several taxpayers sued the state, claiming that these transfers violated TABOR and debt limits in article XI. The court of appeals rejected most of their claims.\textsuperscript{376} It first addressed the somewhat novel question whether taxpayer standing allowed suits to challenge fund shifts within the state treasury and concluded that it did.\textsuperscript{377} On the merits, the taxpayers’ TABOR claim asserted that the transfers were invalid because they constituted a “new tax” or “tax policy change directly causing a net tax revenue gain” requiring advance voter approval.\textsuperscript{378} The court rejected the claim, reasoning that fund shifts do not raise revenue.\textsuperscript{379} Plaintiffs argued that most of the cash funds had been accumulated from fees, so that transferring them to the general fund converted them to taxes and required voter approval under TABOR.\textsuperscript{380} This claim appears to have some force, and the court did not directly address it.\textsuperscript{381} Had the claim succeeded, the court would have had to decide on a remedy. The most obvious would have been an injunction to forbid the transfers at the outset, but that would have required a preliminary injunction. Another possibility would have been to


\textsuperscript{377} Barber, 170 P.3d at 771–79. The district court rejected all claims. Id. at 766–67. Plaintiffs’ counsel then unsuccessfully sought direct review in the supreme court. Barber v. Owens, No. 05SC279, 2005 Colo. LEXIS 501 (Colo. May 23, 2005).

\textsuperscript{378} Barber, 170 P.3d at 767–70. One judge dissented from this ruling. Id. at 779–81 (Hawthorne, J., dissenting). One plaintiff was held to lack standing to bring a particular claim, but this did not affect the decision on the merits. See id. at 770.

\textsuperscript{379} See COLO. CONST. art. X, § 20(4)(a).

\textsuperscript{380} Barber, 170 P.3d at 771–74 (extensively discussing decisions in other states).

\textsuperscript{381} Id. at 771–74. Plaintiffs invoked the court’s distinctions among taxes, fees, and special assessments in Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989), discussed supra, text accompanying notes 334–59. Id.

\textsuperscript{381} The court correctly noted that Bloom was decided before TABOR was adopted, but the distinction between taxes and fees has more, not less, importance under TABOR. See supra text at notes 336–37, 356–59.
order repayment of the special funds after the fact, and this was the remedy sought by the taxpayers' debt claim. Plaintiffs' debt claim contended that the transfers created an implied obligation to repay the money to the special funds, a debt without new revenue to repay it in violation of article XI, sections 3 and 4. The court rejected this claim for most of the funds by determining that there was no obligation to repay. Three of the funds had the word “trust” in their titles; for these, the court held that it was unable to determine whether public trusts had been created with legal restraints on transfer, and this question was remanded to the trial court. Both sides obtained review by the Colorado Supreme Court.

2. Single Subject and Purpose Rules for Local Debt

Article XI, section 6(1) provides that no political subdivision of the state shall contract any general obligation debt except by a measure “specifying the purposes to which the funds to be raised shall be applied” and “unless the question of incurring the same be submitted to and approved by” its voters. The supreme court has defined and enforced two limits derived from this section, both discussed in a 2003 opinion reviewing a bond election in Golden. First, a local government cannot spend bond proceeds for a purpose not stated in the ballot measure. Second, a measure to approve debt cannot submit “separate and distinct purposes on a single ballot proposition, on the theory that the voter is deprived of the right to vote for one purpose and against others.” The opinion defined these

382. Barber, 170 P.3d at 774. Plaintiffs apparently argued as well that TABOR's restriction on creation of new, multiple-fiscal year debt without advance voter consent (COLO. CONST. art. X, § 20(4)(b)) was violated. The court briefly cited this section but did not discuss its application. Barber, 170 P.3d at 771.

383. Id. at 779.

384. Id.


386. COLO. CONST. art. XI, § 6(1). This provision was adopted in 1970. For municipalities it replaced original article XI, section 8, which had the same requirements. See OESTERLE & COLLINS, supra note 1, at 274–75.


388. Id. at 665–66. Despite the specific language in section 6(1), the opinion did not tie this requirement to it.

389. Id. at 665.
rules in favor of a local government's broad discretion, but precedents had enforced both under the predecessor of section 6(1).

These rules do not have wide application because article XI, section 6 covers only general obligation debt and excepts borrowing for water projects, and governments often elect to borrow in other forms. However, most government debt of every kind must now have the voter approval required by TABOR. This raises the question whether either of these limits will be read into TABOR. The question has not arisen in a reported case and perhaps never will arise because of TABOR's detailed specifications for ballot measures.

K. Article XVIII—Term Limits

Colorado voters' affection for term limits generated two recent constitutional events. The first involved district attorneys. In 1990, voters amended the Constitution by citizens' initiative to impose term limits on members of the General Assembly and on state-level executive officials. A 1994 amendment imposed term limits on every "nonjudicial elected official of any county, city and county, city, town, school district, service authority, or any other political subdivision of the

390. Id. at 665–66. The case was remanded for trial on these issues.
392. See OESTERLE & COLLINS, supra note 1, at 273–75. Article XI, section 6(1) expressly allows home-rule municipalities to opt out of its election requirement by charter. (The exception does not exclude them from the purposes requirement.) The exception was likely inserted because the home-rule amendment expressly authorizes covered municipalities to issue bonds "upon the vote of the taxpaying electors . . . as may by the charter be provided." COLO. CONST. art. XX, § 1. However, when municipal charters have provisions like section 6(1), similar issues are raised. See Busse, 73 P.3d at 665; McNichols, 209 P.2d at 911–15; People v. Graham, 203 P. 277, 278 (Colo. 1921) (Boulder charter).
394. COLO. CONST. art. X, § 20(3), (4)(b).
395. See generally OESTERLE & COLLINS, supra note 1, at 359–66.
396. COLO. CONST. art. IV, § 1(2); art. V, § 3(2) (limiting consecutive terms, not total number of terms). The same measure attempted to impose term limits on Colorado's members of Congress and senators.
State” and on members of the State Board of Education and Regents of the University of Colorado. However, the amendment empowered “voters of any such political subdivision” to alter or abolish the limits.

Neither amendment specifically applied to district attorneys, and opponents (notably the district attorneys themselves) argued that they were not limited. Term limits advocates argued that DAs are officials of judicial districts, which are within the amendment’s coverage of “any other political subdivision of the State.” The issue was married to voting by the provision authorizing local voters to alter or abolish term limits, and this became the focus of its resolution. In 2001, the Pueblo County Commissioners referred a measure to the ballot to exempt the Tenth Judicial District Attorney from term limits. This was formally possible because the Tenth District is coterminous with Pueblo County, and it was practically possible because the local DA, Gus Sandstrom, was extremely popular. But Secretary of State Donetta Davidson would have none of it and ordered the county clerk not to put the measure on the ballot. The clerk disobeyed the order, and the measure went to a vote and was approved by a large margin. Davidson declared the vote void and refused to recognize it.

Sandstrom and other Pueblo County officials and residents sued Davidson, seeking a declaratory judgment that DAs were not subject to term limits, or in the alternative that the referral and vote were valid to exempt the Tenth District DA. While the case was pending, the General Assembly referred a measure to the 2002 state ballot to try to resolve the uncertainty by

397. COLO. CONST. art. XVIII, § 11(1) (limiting consecutive terms, not total number of terms). See OESTERLE & COLLINS, supra note 1, at 361–66.
398. COLO. CONST. art. XVIII, § 11(2).
400. For facts in this and the next paragraph, see Davidson v. Sandstrom, 83 P.3d 648, 651–55 (Colo. 2004).
401. Sandstrom’s popularity was manifested by the fact that, to insure his exemption from term limits, plaintiffs in the lawsuit included the county chairs of both major political parties. See id. at 653.
402. Davidson relied principally on the lack of any statute authorizing county commissioners to place judicial district matters on the ballot. See id. at 653 n. 3. Except for home-rule counties, commissioners have no general power to refer proposals to the ballot. However, pursuant to statutes and TABOR, they can and must refer tax, debt, and spending measures to the ballot. See COLO. REV. STAT. §§ 29-2-103 to 105, 30-26-301 (2007).
specifying that DAs were not subject to term limits, but voters trounced the measure.\footnote{See Sandstrom, 83 P.3d at 653.} The following February, the Pueblo District Court held that DAs are subject to term limits under the 1994 amendment, but the referral and vote to exempt the Tenth District DA were valid. The next year, the supreme court affirmed both rulings.\footnote{Id. at 652, 660.}

To find DAs within the 1994 amendment, the Court had to interpret two phrases. First, is a DA a “nonjudicial elected official”? Second, are judicial districts “political subdivisions of the State”? In one of those infuriatingly simplistic opinions, the court’s majority asserted that the “plain meaning” of the amendment answered both questions affirmatively, with citations to dictionaries.\footnote{Id. at 655, 656.} The concurring opinion disagreed on both issues and showed that the meaning was anything but plain.\footnote{Id. at 661–63 (Hobbs, J., joined by Coats, J., concurring in the judgment). The opinion was a concurrence rather than a dissent because Sandstrom won under either view.}

If one reads the amendment’s language with no eye on voters’ intent, the concurrence made a very persuasive case on the “political subdivisions” issue\footnote{Id. at 662.} and a reasonable case on the “nonjudicial” question.\footnote{The argument on this point was based on the constitutional structure, placing state executive officials in article IV, local executive officials in articles XIV and XX, and judges and DAs in article VI. \textit{Id.} at 661–62.} However, if voters’ intent is considered, the majority came out well ahead. There is little doubt that the amendment’s purpose included DAs; as is often the case with initiatives, the ambiguity arose from careless drafting.\footnote{The attorney general’s opinion, \textit{supra} note 399, detailed the ballot review process in which initiative proponents added language to include Regents and the State Board of Education. No one thought of the DA issue, but the process made broad intent apparent. Of course, it is voters’ intent that counts, not drafters’. \textit{See, e.g.}, Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996). However, when the 1994 ballot title and Blue Book used the phrase “any political subdivision of the state,” voters surely understood the measure to be comprehensive. \textit{See} \textit{Legislative Council of the Col. Gen. Assembly, Research Pub. No. 392, Analysis of 1994 Ballot Proposals.}}

On the question of the election’s validity, the Court held that the 1994 amendment’s provision for local voters to amend term limits is self-executing and gave the supervisors implied
authority to refer the issue to the ballot. For judicial districts in more than one county, the court said that supervisors of all affected counties could (concurrently) refer a measure.\textsuperscript{410} This part of the court's opinion abandoned reliance on allegedly plain meaning and embraced voters' intent, augmented by the general policy in favor of allowing voters to have their say.\textsuperscript{411} An issue the decision left open is whether, absent a statute, the initiative power is available to put DAs' term limits to a vote. The court's expansive language implies that the power should be available, but lack of statutory procedures is a greater obstacle for initiated measures than for referred.\textsuperscript{412}

Other events concerning term limits arose in 2004. Legislators unhappy with some judicial decisions proposed a constitutional amendment to impose term limits and several other restraints on Colorado judges.\textsuperscript{413} The measure would have limited judicial terms for all state judges to four years and barred service after twelve,\textsuperscript{414} but it was not adopted by the General Assembly. In 2006 a measure to impose term limits on appellate judges only was proposed as a citizens' initiative.\textsuperscript{415} Its most striking feature was retroactivity; it would have forced out five of seven supreme court justices and seven of nineteen court of appeals judges in 2008.\textsuperscript{416} The measure qualified for the ballot but was defeated.\textsuperscript{417}

\textsuperscript{410} Davidson, 83 P.3d at 658.
\textsuperscript{411} See id. at 658–59.
\textsuperscript{412} See COLO. REV. STAT. tit. 1, art. 40 and tit. 31, art. 11 (2007) (procedures for, respectively, statewide and municipal initiatives and referendums).
\textsuperscript{414} Id.
\textsuperscript{415} See Colorado Ballot Proposal 2005–2006 #90, http://www.leg.state.co.us/lcs/0506initrefr.nsf/dac421ef79ad243487256def0067c1df7e314af66b4569cc8725711e00583b31?OpenDocument (last visited June 7, 2007) [hereinafter Colorado Ballot Proposal #90]. Colorado's term limits on elected officials restrict only consecutive terms, supra notes 396–97, while this proposal limited total as well as consecutive terms.
\textsuperscript{416} See Colorado Ballot Proposal #90, supra note 415.
L. Article XX—Local Home Rule

1. Cases

The Colorado Constitution provides home-rule cities and towns with immunity from the General Assembly's control for "local and municipal matters." Since adoption of this home-rule provision in 1902, the supreme court has wrestled with its application often, though hardly consistently. The court's current doctrine first determines whether a contested matter is within municipal competence at all or is a matter of exclusively statewide concern. Most decisions sustain municipal competence. The next issue is whether the subject is exclusively local or is of mixed state and local concern. For this question, the court applies a four-part test adopted in 1990: whether the subject calls for statewide uniformity, external effects of a municipal regulation, the history of activity in the particular field, and specific constitutional provisions allocating authority over the subject. At least one recent decision adds a criterion of deferring to ardent declarations of the General Assembly. If the subject is of mixed concern, the court then determines whether state and local laws conflict, a question sometimes stated as whether state law preempts local. Some opinions change the order and address preemption before home rule.

Since 2000, a number of decisions have applied these criteria to home-rule issues. The first involved photo radar and red-light cameras. In 1997 the General Assembly passed a detailed statute restricting and regulating use of these devices in traffic enforcement, and more restrictions were added in 1999. Commerce City, Westminster, Fort Collins, and Colorado

418. COLO. CONST. art. XX, § 6.
419. See OESTERLE & COLLINS, supra note 1, at 393–94.
421. See OESTERLE & COLLINS, supra note 1, at 394.
422. See Ibarra, 62 P.3d at 155.
425. See id. at 35–37.
426. See, e.g., id.
427. See COLO. REV. STAT. §§ 42-3-113(10), 42-4-110.5 (2007). Current § 42-3-113(10) was contained in § 42-3-112 prior to 2005, and § 42-4-110.5 includes other amendments added in 2002 and 2004. See id.
Springs sued the state of Colorado in Denver District Court, claiming that some of the regulations invaded their constitutional home-rule powers. The district court sustained almost all of the statute, and the supreme court affirmed. The challenged provisions restrict the penalties cities can impose, require signs to be posted notifying drivers that devices are in use, and prohibit contracts with vendors of radar and cameras where the contracts base compensation on fines recovered. The court applied its home-rule tests and determined that the subject matter was of mixed state and local concern, so conflicting local laws were preempted by the state statute.

In a second home-rule case, a Northglenn city ordinance prohibited two registered sex offenders from living together if they were unrelated or unmarried. When the ordinance took effect, Juliana and Eusebio Ibarra were foster parents to four unrelated foster children, three of whom had been both perpetrators and victims of incest and were registered sex offenders. Juliana Ibarra was charged and convicted of a criminal violation of the Northglenn ordinance. A sharply divided Colorado Supreme Court overturned the conviction, reaching the unusual conclusion that the subject matter was of exclusively statewide concern, beyond the reach of municipal law regardless of any conflict with state law. Three dissenters argued that the subject was of mixed state and local concern and that there was no conflict between state and local law. It is hard to escape the inference that the decision was driven by the case's unusual facts.

The next case was easier. The town of Frisco approved an application for development of a tract of land within the

428. City of Commerce City v. State, 40 P.3d 1273, 1276 (Colo. 2002).
429. Id. The district court struck down a requirement of personal service of process on grounds of separation of powers and violating authority granted to the judiciary, and the state did not appeal. Id. at 1277 n.13.
430. See id. at 1276.
431. Id. at 1279–85. Chief Justice Mullarkey dissented, arguing that traffic enforcement is a local and municipal subject, as older decisions had held. Id. at 1285–86.
433. Id. at 153–54.
434. Id. at 154.
435. See id. at 163. To reach its statewide-only conclusion, the court applied the factors it usually employs to decide whether an issue is local or mixed state and local. See id. at 160–63; supra text accompanying notes 423–24.
436. Id. at 163–64 (Coats, J., dissenting, joined by Kourlis and Rice, JJ.).
Harry Baum lived next door and filed suit to overturn the decision in Summit County District Court. The district court dismissed the suit because Frisco’s home-rule charter gave the municipal court “exclusive original jurisdiction over all matters arising under this Charter, the ordinances, and other enactments of the Town,” which included Baum’s claims. The Colorado Supreme Court unanimously sided with the town. Because the Colorado Constitution specifically authorizes home-rule municipalities to establish courts and define their jurisdiction, the Frisco court had exclusive, original jurisdiction over Baum’s claims. The court held that the subject matter was one of exclusively local concern. However, the court also held that there was no conflict between state and local law, and it said in dictum that “it is possible that a claimant would be justified in filing in district court if s/he reasonably believed that the matter was of state or mixed concern.” Presumably a mixed case could begin in either district or municipal court; otherwise, litigants would have to determine in advance whether a case is local or mixed, which is often a difficult issue.

Perhaps the most interesting home-rule case of recent years involved a conflict between Denver’s ordinance banning pit bull terriers and a state statute intended to overturn it. Denver’s ordinance was enacted in 1989 and was sustained against various legal attacks in 1991. At that time there was no conflicting state law, but in 2004, the General Assembly passed a statute specifically intended to overturn breed-specific

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438. Id.
439. Id.
440. Id.
441. Id. at 847, 850 (citing COLO. CONST. art. XX, § 6).
442. Id. at 850 n.6.
443. Id. at 849 & n.4. As the court noted, if Frisco had no municipal court, Baum could have filed in district court, and in the actual case, he had a right of appeal from municipal to district court. Id. at 850. The former proposition arises from the express terms of article XX, section 6 of the Colorado Constitution, under which municipal law supersedes state law only in case of conflict. COLO. CONST. art. XX, § 6.
444. Colo. Dog Fanciers, Inc. v. City & County of Denver, 820 P.2d 644, 646 (Colo. 1991). The court rejected claims based on substantive due process, equal protection, and taking of property. Id. at 650, 652, 654. By a 4-3 vote, it did overturn a provision placing the burden of proof of breed on dog owners. Id. at 648, 654.
ordinances like Denver's.\textsuperscript{445} Denver sued the state, claiming that the statute unconstitutionally invaded Denver's home-rule powers. The district court held against the state except for preemption of Denver's regulation of inter-city transportation of pit bulls.\textsuperscript{446} Several months later, the court held a hearing on the state's claim that new knowledge since 1991 had undermined the rationality of the pit bull ban and concluded that the state failed to prove its claim.\textsuperscript{447} The state filed an appeal of the first ruling but later dismissed it voluntarily.\textsuperscript{448} Still another attack on the Denver ordinance was filed in 2007.\textsuperscript{449}

Another decision arose out of one more conflict between Denver and the state. After the courts sustained Denver's gun control laws against right-to-bear-arms claims,\textsuperscript{450} gun advocates persuaded the General Assembly to enact statutes in 2003 setting statewide standards for permits to carry concealed weapons and preemitting all municipal ordinances that regulate guns more strictly than state or federal laws.\textsuperscript{451} Denver sued the state on home-rule grounds, and in November 2004, the district court held in favor of the city and county, sustaining almost all its ordinances as matters of exclusively local concern under article XX, section 6 of the Colorado Constitution.\textsuperscript{452}

Home rule became entangled with eminent domain in a case from Telluride. In 2002, the town filed an action to condemn a large parcel of land outside the town and abutting its

\textsuperscript{447} See id.
\textsuperscript{449} Dias v. City & County of Denver, No. 07CV0722 (Denver Dist. Ct.).
\textsuperscript{450} See supra note 122 and accompanying text.
\textsuperscript{452} City & County of Denver v. State, No. 03-CV-3809 (Denver Dist. Ct. Nov. 5, 2004), aff'd by equally divided court, 139 P.3d 635 (Colo. 2006).
eastern border at the mouth of Telluride Canyon. The landowner obtained support from the 2004 General Assembly, which passed a statute removing the power of municipalities to condemn land outside their borders except for utilities purposes.\textsuperscript{453} In the condemnation action, the San Miguel District Court held the statute an invalid invasion of Telluride's home-rule powers and rejected other defenses to the action.\textsuperscript{454} The case went to a jury verdict on valuation of the land. The jury favored the landowner's valuation, but the town came up with the funds to meet the verdict. The landowner then appealed based on the 2004 statute.\textsuperscript{455}

The eminent domain power of home-rule municipalities is specifically defined in section 1 of article XX: A home-rule city or town "shall have the power, within or without its territorial limits, to construct, condemn and purchase . . . water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent . . . for public use by right of eminent domain . . . ."\textsuperscript{456} The 2004 statute restricting municipalities' extraterritorial eminent domain specifically allows the power for "water works, light plants, power plants, transportation systems, heating plants and any other public utilities or public works" and specifically disallows the power for "parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes."\textsuperscript{457} Therefore, the legislature attempted to restrict the power to the greatest extent of its authority under article XX section 1. Unless the courts interpret section 1's general phrase "and other public utilities or works or ways local in use and extent" broadly enough to encompass Telluride's purpose, the town seems likely to lose its pending appeal. Two precedents relied on by the district court appear to be distinguishable.\textsuperscript{458}

\begin{thebibliography}{9}
\bibitem{456} COLO. CONST. art. XX, § 1.
\bibitem{458} In \textit{City of Thornton v. Farmers Reservoir & Irr. Co.}, 575 P.2d 382 (Colo. 1978), the court sustained Thornton's power to condemn water rights contrary to
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2. Home-Rule Doctrine

The court’s home-rule doctrine is appropriate as far as it goes, but it could be improved in three important ways. First, other states have expressly recognized that local control is least appropriate for regulation of private markets and relationships. The theoretical basis for this proposition is at least as old as Federalist No. 10, explaining the problem of oppression by local majorities. Conversely, local control is most appropriate for municipal operations, where market forces and revenue limits discipline governments. Harder cases arise over public safety issues, where private behavior poses an arguable danger to others. Colorado decisions fit these categories but without any express recognition of them.

The second improvement would be to adopt an explicit rule of clear statement for state preemption of local control over subjects of mixed state and local competence that directly involve local governments. In these situations, the state is free to make its intent clear by amending the governing law. In the meantime, local governments should have freedom to experiment and compete. The U.S. Supreme Court has applied such

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a state statute, but Thornton’s purpose was within the specific public utilities right guaranteed by article XX, section 1. In City and County of Denver v. Board of Commissioners, 156 P.2d 101 (Colo. 1945), the court sustained Denver’s power to condemn land for an airport. A state statute allowed such condemnation within five miles of a municipality, but most of the land Denver took was outside that boundary. However, the statute was phrased as a grant of power, not as a prohibition, and an airport is closer to a utility than is Telluride’s purpose. Moreover, both decisions antedated the court’s adoption of its modern structure for home rule based on mixed state-local questions, which Telluride’s action appears to involve.

459. See Osborne M. Reynolds, Jr., Handbook of Local Government Law 135–37 (2d ed. 2001) and cases cited. In some states, the distinction appears in the organic home-rule law itself. See, e.g., CHR General, Inc. v. City of Newton, 439 N.E.2d 788, 790 (Mass. 1982).

460. The Federalist No. 10 (James Madison).


462. See, e.g., supra text accompanying notes 444–52 (discussing pit bull and gun control issues).

a rule for federal preemption of state law. For similar policy reasons, the Colorado Supreme Court should do likewise. For a third change, the court should abandon its rulings that purport to defer to declarations of the General Assembly on the constitutional criteria for home rule. The standard ought to be the same, with or without self-serving declarations. Giving the General Assembly extra weight for the strength of its desire is inappropriate double counting.

**M. Schedule**

Colorado's 1876 Constitutional Convention appended to its draft constitution twenty-two sections under the heading of Schedule. These were transitional measures to ease conversion from territory to state. Most of them are plainly obsolete, and only two reported judicial decisions have referred to them. However, none has been repealed, despite numerous measures purging other obsolete provisions. In 2007, a section of the Schedule suddenly became relevant. A bill in the legislature would have added Colorado to a national plan to award electoral college votes to the presidential candidate who receives the largest popular vote. This appeared to conflict with Schedule section 20, which states, “The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.” The bill did not pass, but it could be reintroduced in future sessions. Whether section 20 would have invalidated it raised at least two issues. First, should section 20 be interpreted as a continuing requirement, or was it

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464. N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973). However, the Court is far from consistent on this point. See NOWAK & ROTUNDA, supra note 147, § 9.4.
465. See supra note 424 and accompanying text.
466. See OESTERLE & COLLINS, supra note 1, at 438.
467. Packer v. People, 8 P. 564 (Colo. 1885); Wilson v. People, 3 Colo. 325 (1877). See OESTERLE & COLLINS, supra note 1, at 438.
468. See, e.g., supra note 8 and accompanying text.
470. COLO. CONST. schedule § 20.
satisfied when the legislature first complied with it?\textsuperscript{472} The wording appears to be ongoing, but because it was part of the transitional Schedule, the latter interpretation is plausible. Second, if it is a continuing requirement, is the Schedule an enforceable part of the constitution? It appears to be. It was part of the text voted on at the convention and ratified by voters.\textsuperscript{473} The Colorado Supreme Court has treated it as law.\textsuperscript{474}

CONCLUSION

Notwithstanding the flashy issues of 2006, Colorado's most important constitutional events since 2001 involved measures to adjust TABOR restraints on state government and court contests over TABOR and municipal home rule. A major issue for the immediate future is whether to make significant changes in the state's initiative method of lawmaking.

\textsuperscript{472} The statutes passed to carry out the Schedule provision were and are less explicit. \textit{See GEN'L LAWS COLO.} § 933 (1877) (presidential electors "shall be elected"); \textit{COLO. REV. STAT.} § 1-4-301 (2007) (same).

\textsuperscript{473} \textit{PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875, TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO} 703–07, 736 (1907).

\textsuperscript{474} \textit{See Packer v. People}, 8 P. 564, 566 (Colo. 1885); \textit{Wilson v. People}, 3 Colo. 325, 330–31 (Colo. 1877).