NEGATING DEMOCRATIC CONSENT: HOW THE COLORADO SUPREME COURT HAS NULLIFIED COLORADO CONSTITUTIONAL LIMITS ON TAXES, DEBT, AND CORPORATE PRIVILEGE

DAVID B. KOPEL*

ABSTRACT

The Constitution of the State of Colorado strictly limits the Colorado government's power to impose taxes and incur debt, including by requiring voter approval of higher taxes and new debt. Government debt must be approved by taxpayers and is subject to a debt cap, with a time limit of fifteen years for construction debt. The Colorado constitution also forbids governments to grant special privileges to businesses. For example, governments may not pledge their credit to benefit corporations, may not otherwise go into business with corporations, may not enact special laws for the benefit of a particular business, may not give extra uncontracted benefits to state employees or contractors, may not appropriate taxpayer funds to private businesses, and may not grant businesses irrevocable privileges. The Colorado constitution also includes the Taxpayer's Bill of Rights, which requires voter approval tax increases and for spending increases that exceed the rate of inflation plus population growth. However, every one of these restrictions has been effectively nullified, usually with the blessing of the Colorado Supreme Court. Rather than the fair, equal, and democratic state created by the Colorado constitution, Colorado has been turned into a welfare state for the politically powerful, intentionally operating to ignore the constitutional mechanisms for the consent of the governed.

TABLE OF CONTENTS

* Research Director, Independence Institute, Denver; Adjunct Scholar, Cato Institute, Washington, D.C.; author of the law school textbook COLORADO CONSTITUTIONAL LAW AND HISTORY (2d ed. 2022). My late father, Jerry Kopel, served eleven terms as a Democratic State Representative from Denver. I would like to thank Rebecca Sopkin, Bhav Ninder Singh, and Del Schlangen for research assistance.

INTRODUCTION

According to the Constitution of the State of Colorado, Colorado voters may choose to repeal constitutional provisions in general elections. Ballot measures for repeal may originate with either the general assembly or a citizen petition.[1] While this power is retained by Colorado voters, the Colorado Supreme Court has arrogated a de facto power of repeal to itself. For example, if a constitutional rule says that the legislature may not engage in a certain action, the Colorado Supreme Court's replacement rule could instead say that the legislature can always engage in that action as long as it declares a rational basis.

The constitutional provisions that have been the most common subjects of judicial repeals are those that limit the government's power to extract money and property from the public and give that money and property to politically favored businesses. All of the Colorado constitution's provisions on this matter have been judicially nullified.

1. COLO. CONST. art. XIX, § 2; *id.* art. V, § 1.

There were three foundational cases in the judiciary's battles against the text and plain meaning of the Colorado constitution. The first came in 1922, when the Colorado Supreme Court upheld the general assembly's scheme to force taxpayers to pay construction costs for a private railroad in *Milheim v. Moffat Tunnel Improvement District*.[2] Then, the 1934 case *Johnson v. McDonald*[3] allowed the general assembly to incur debt for highway construction without the constitutionally required voter approval.[4] The third case, *Bedford v. White*[5] in 1940, involved a statute that raised the pensions for retired Supreme Court Justices.[6] The Colorado Supreme Court upheld the statute, holding that the increase did not violate article V, section 28 (no extra compensation to state officers after services have been rendered), and section 34 (no appropriation to any person or organization not under the absolute control of the state).[7] In doing so, the court announced a vague "public purpose" exception to the plain constitutional text and has subsequently invented the same exception to other constitutional provisions against special favors for individual businesses.[8]

This Article examines the judicial repeal of eleven constitutional sections involving taxes, debt, and government favoritism to big business. Every one of the discussed constitutional sections has been judicially nullified. Part I addresses six constitutional sections that explicitly forbid special laws for the benefit of particular corporations or other favored insiders. These sections are article XI, section 1 (no pledge of public credit for corporations)[9] and section 2 (no aid to corporations);[10] article V, section 25 (no special legislation),[11] section 28 (no extra compensation to officers, employees, or contractors),[12] and section 34 (no appropriations to private institutions);[13] and article II, section 11 (no laws granting special irrevocable privileges).[14] These have been nullified by Colorado Supreme Court decisions that, for example, hold that corporate welfare is lawful whenever the government declares that the welfare serves "a public purpose" and that declarations about a public purpose for corporate welfare are entitled to "every presumption" of validity.[15]

Next, Part II looks at four partly nullified sections of article XI, which limits government debt: sections 3 (public debt of the state),[16] section 4

2. 211 P. 649, 663–64 (Colo. 1922).
3. 49 P.2d 1017 (Colo. 1935).
4. *Id.* at 1031.
5. 106 P.2d 469 (Colo. 1940).
6. *Id.* at 470.
7. *See* discussion *infra* Sections I.B., I.E.
8. *See* discussion *infra* Part I.
9. COLO. CONST. art. XI, § 1.
10. *Id.* art. XI, § 2.
11. *Id.* art. V, § 25.
12. *Id.* § 28.
13. *Id.* § 34.
14. *Id.* art. II, § 11.
15. *See* discussion *infra* Section I.B.
16. COLO. CONST. art. XI, § 3.

(debt may be no longer than 15 years),[17] 5 (vote on debt for public buildings),[18] and 6 (local government debt limits).[19] The nullification was accomplished by two key steps purporting that long-term debt is not "debt" in a constitutional sense. First, the 1934 *Johnson v. McDonald* allowed debt to be incurred without voter consent if the money for repayment of the debt is kept in a separate account.[20] The second form of nullification involves the construction of government buildings. Under the system created by the Colorado constitution, government buildings are to be financed by voter-approved debt, and the debt for construction costs may have a term of no longer than 15 years. However, today the government evades restrictions on debt incurred to finance the construction of government buildings through the legal fiction of "certificates of participation."[21] In the certificate of participation scheme, a construction company builds a government building and then leases it to the government using year-to-year leases for twenty-five years. Because constitutional "debt" does not include obligations of one year or less, the twenty-five-year mortgage is disguised as merely a series of optional annual leases.[22] The result almost doubles the interest that taxpayers must pay compared with interest under the constitutional rule that the period for repayment of debt for building construction may not exceed fifteen years.[23]

Part III covers the Taxpayer's Bill of Rights (TABOR), article X, section 20, which has been pervasively violated. Each section of Part III describes one of the mechanisms by which court have nullified various parts of TABOR. Most importantly, TABOR provides a standard of judicial review: its "preferred interpretation shall reasonably restrain most the growth of government."[24] The Colorado Supreme Court, however, has adopted an interpretation that in case of ambiguity, the government always wins, unless challengers prove their case beyond a reasonable doubt. By its terms, TABOR applies to taxes (such as sales taxes) but not to "fees" (such as towel rental at a recreation center).[25] The Colorado Supreme Court, however, has ruled that the government can call a tax a "fee" and thereby dispense with the need for voter approval. TABOR applies to all government units (which TABOR calls "districts"), except for "enterprises"; enterprises support themselves by selling services, rather than being dependent on tax revenue. For example, a municipal recreation center does not need taxpayer support because it earns enough to support itself by charging fees to persons who exercise at the recreation center. The Colorado Supreme Court, however, has allowed the "enterprise" exemption

17. *Id.* § 4.
18. *Id.* § 5.
19. *Id.* § 6.
20. *See* discussion *infra* Section II.A.
21. *See* discussion *infra* Section II.C.
22. *See* discussion *infra* Section II.C.
23. *See* discussion *infra* Section II.C.
24. *See* discussion *infra* Section III.B.
25. *See* discussion *infra* Section III.C.

to be applied to fictitious entities that receive all of their income from Colorado tax revenue.[26]

According to TABOR, tax policy changes that increase net government revenue require voter approval. So does repeal of any of the pre-TABOR prior limits on taxes and spending. Yet the courts have nullified both of these protections by inventing a rule that they do not apply as long as the tax and spending increases do not cause the government to exceed TABOR's revenue caps.[27] TABOR's main means of enforcement is citizen lawsuits, but these are hampered by the supreme court's interpretation that attorney fees for victorious plaintiffs are optional, not mandatory.[28] While TABOR provides that local governments have the authority to opt out of some state government mandates, the supreme court has held that counties may never opt out.[29] Finally, TABOR authorizes voters to allow four-year waivers on tax and spending limits. The courts, though, have held that waivers are permanent, even when they were expressly presented to the voters as temporary. Further, ballot measures that expressly promised no increase in mill levies for property taxes have been implausibly construed as voter permission for increases in mill levies, resulting in the largest property tax increase in state history being imposed without a vote of the people.[30]

The constitutional nullification described in this Article involves ten sections of Colorado's 1876 statehood constitution as well as one section that was added in 1992. Among these provisions, there is a common theme: when the government wishes to ignore the plain text of the constitution in order to take from the taxpayers and give to big business and other special interests, the Colorado Supreme Court complies. In other words, while the Colorado constitution had "protected the inarticulate against machinators," the court in fiscal matters protects the machinators against the people.[31]

Throughout this Article, when constitutional text is quoted in block indents, the nullified portions of the text are italicized.

I. SPECIAL BENEFITS TO CORPORATIONS

This Part will discuss six nullified provisions of the original Colorado constitution that sought to prevent the government from giving special benefits to corporations or other special interests. First, sections 1 and 2 of article XI, which prohibit the pledge of public credit to corporations or any other government aid to corporations, were first nullified following a 1922

26. *See* discussion *infra* Section III.D.
27. *See* discussion *infra* Section III.E.
28. *See* discussion *infra* Section III.G.
29. *See* discussion *infra* Section III.H.
30. *See* discussion *infra* Section III.I.
31. Johnson v. McDonald, 49 P.2d 1017, 1034 (Colo. 1935) (Hilliard, J., dissenting). A "machinator" is someone who plans, plots, or devises schemes, especially to do harm. *Machinate*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

decision allowing the government to pay capital constructions costs for a railroad, as long as the government owned the railroad tracks that would be used by the beneficiary railroad.[32] Later, the court went further and invented a loophole allowing corporate welfare whenever the government asserts there is a "public purpose" to the welfare. Then, article II, section 11, which bans the grant of special irrevocable privileges, was nullified in a 1940 decision granting increased pensions to retired supreme court justices. The nullifying "public purpose" loophole invented for that case was later applied to other constitutional sections that forbade special benefits for businesses: article V, section 25 bans special legislation in general; section 28 forbids paying extra compensation to government employees or contractors after service has been rendered; and section 34 forbids appropriations to private institutions.

Separation of business and state is similar to separation of church and state. Because churches are more vibrant when they must attract voluntary members and donors, churches do better, in the long run, when governments do not meddle in church affairs.[33] Thus, governments should treat all churches equally to create a free climate where churches can thrive or fail depending on their ability to win congregants and donors by choice. Taxpayers do not pay for churches, and no government can politically influence a church. Just as churches are more likely to prosper—in members, donations, or both—in a free environment where politically powerful churches receive no taxpayer funding, the same is true for businesses.

Delegates to the 1876 Constitutional Convention of Colorado debated government involvement in private businesses extensively.[34] Ultimately, they chose a moderate position.[35] For instance, convention delegates rejected government meddling in business operations, such as proposals to allow the legislature to set railroad rates, abolish limited liability for corporate shareholders, and enact certain banking regulations.[36] At the same time, the convention adopted a bevy of provisions to prevent government favoritism toward particular businesses.

The convention delegates knew that prohibiting government aid to private corporations would place Colorado at a competitive disadvantage compared to states that allowed corporate welfare.[37] But in ratifying the constitution, the convention delegates and people of Colorado concluded

32. Milheim v. Moffat Tunnel Improvement Dist., 211 P. 649, 663–64 (Colo. 1922).

33. *See* Roger Finke & Laurence R. Iannaccone, *Supply-Side Explanations for Religious Change*, 527 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 39 (1993).

34. COLO. CONVENTION, ADDRESS TO THE PEOPLE OF COLORADO 60 (1876), http://hermes.cde.state.co.us/drupal/islandora/object/co:10467/datastream/OBJ/view ("We have endeavored to take a middle ground . . . .").

35. *Id.*

36. *See* Donald Wayne Hensel, A History of the Colorado Constitution in the Nineteenth Century 138–55 (May 1957) (Ph.D. dissertation, University of Colorado) (ProQuest).

37. RICHARD B. COLLINS & DALE A. OESTERLE, THE COLORADO STATE CONSTITUTION 308–09 (2d ed. 2020).

that Colorado has plenty of natural advantages to attract businesses.[38] "The delegates apparently believed that the loss of some business to other states would be outweighed by the prospect of increased government integrity."[39] The taxpayers did not need to be burdened with placating businesses that demanded special favors to do business in Colorado; a level playing field would create the best business climate.

A. Article XI Section 1. No Pledge of Public Credit for Corporations

> *Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state*.[40]

> Q. What part of "no" don't you understand?[41]
> A. The whole thing. To me, "no" means "yes," as long as I say I have good motives.

Section 1 prohibits the government from pledging credit for corporations. In doing so, it employs some of the most comprehensive, unequivocal words possible in the English language: "directly or indirectly, in any manner . . . for any amount, or for any purpose whatever . . . any debt, contract or liability."

The Colorado Supreme Court, however, has nullified section 1. The last time the Court enforced section 1 was in 1960.[42] Now, instead of a complete prohibition on public credit for any organization "for any purpose whatever" (as the text of the constitution states), the court allows public credit whenever there is an alleged "public purpose." Moreover, the legislative claim that a "public purpose" exists is given near-absolute judicial deference.

The nullification of section 1 is an important reason that Colorado has become a sanctuary state for corporations that seek the privilege of low-cost forced loans from the taxpayers,[43] rather than borrowing money

---

38. *Id.* at 11, 309.

39. Dale A. Oesterle, *Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies*, 73 U. COLO. L. REV. 587, 596 (2002).

40. COLO. CONST. art. XI, § 1.

41. LORRIE MORGAN, *What Part of No*, *on* WATCH ME (BNA Records 1992) (woman rejects an obnoxiously persistent suitor at the bar). *See generally* William D. Evans, Jr., *What Part of 'No' Don't You Understand?: Recent Developments in Workplace Sexual Harassment Law*, 36 TENN. BAR J. 14 (2000).

42. *See Bd. of Cnty. Comm'rs v. Humes*, 356 P.2d 910, 911–12 (Colo. 1960). According to a statute, when a group of people attempted to incorporate a town, the expenses of incorporation (such as legal fees and the cost of holding the election) would be borne by the new town. *Id*. at 911. If the voters rejected creating the new town, then the county would pay the expenses. *Id*. The court found that the statute violated section 1 because the counties were saddled with someone else's debt. *Id*. at 912.

43. *See* discussion *infra* Section I.F.

from banks or the bond market at market rates. Compared with the free market rate, bond issuers can cut their interest rates by about 2% because interest income from state and local government bonds is not subject to state or federal taxes.[44] In effect, the nullification of section 1 created a particular interest rate in Colorado for borrowing by influential businesses, and a higher rate for businesses without political clout.

Because the leading cases often discuss sections 1 and 2 of article XI in conjunction, they are summarized together under section 2.

B. Article XI Section 2. No Aid to Corporations

During the territorial period in Colorado, government joint ventures with railroads resulted in private profits and public losses. From experience, delegates to the 1876 Constitutional Convention of Colorado agreed on the principle of discouraging government entanglement with businesses.[45] Section 2 prohibits the government from aiding corporations:

> *Neither the state, nor any county, city, town, township, or school district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in any corporation or company or a joint owner with any person, company, or corporation, public or private, in or out of the state*, except as to such ownership as may accrue to the state by escheat, or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the state, or to any county, city, town, township, or school district, or to either or any of them, jointly with any person, company, or corporation, by forfeiture or sale of real estate for nonpayment of taxes, or by donation or devise for public use, or by purchase by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fines, penalties, or forfeiture of recognizance, breach of condition of official bond, or of bond to secure public moneys, or the performance of any contract in which they or any of them may be jointly or severally interested. Nothing in this section shall be construed to prohibit any city or town from becoming a subscriber or shareholder in any corporation or company, public or private, or a joint owner with any person, company, or corporation, public or private, in order to effect the development of energy resources after discovery, or production, transportation, or transmission of energy in whole or in part for the benefit of the inhabitants of such city or town.[46]

---

44. 26 U.S.C. § 103(a); 26 C.F.R. § 1.61-7(b)(1) (2024); COLO. REV. STAT. §§ 29-3-106(5), 39-22-104(4)(a) (2024).

45. COLO. CONVENTION, *supra* note 34, at 59–60. *See generally* Hensel, *supra* note 36, at 155–65. Whether for a light rail today or canals in the early nineteenth century, states overspend and overborrow. "By the summer of 1842, eight states and the Territory of Florida were in default on interest payments. . . . Ultimately, Mississippi and Florida repudiated their debts outright, and Louisiana, Arkansas, and Michigan repudiated part of their debts. New York, Ohio, and Alabama barely avoided default." John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211, 216 (2005).

46. COLO. CONST. art. XI, § 2.

The original text of section 2 defines some exceptions to the general rule, such as gifts of stock to government and fines.[47] Then, Colorado voters added section 2(a) in 1972, which authorized the general assembly to set up a student loan program.[48] Because student loans operate "in aid of" public or private educational corporations, the 1972 amendment was the constitutional means to create a specific exception to the general rules of section 2. Two years later, voters created additional exceptions for energy development.[49]

The Colorado Supreme Court has likewise amended section 2, ultimately reducing it to a nullity.[50] From the Colorado constitution's ratification until 1921, the court faithfully enforced the constitutional prohibition on governments going into debt in order to finance businesses.[51] Then, as described by Professor Dale Oesterle, the court began to weaken the constitutional rule, starting with a 1922 decision involving the Moffat Tunnel.[52]

1. *Milheim v. Moffat Tunnel Improvement District*

Long before the Moffat Tunnel's construction, Denver business leaders had sought a direct railroad link to the West via Salt Lake City[53] and feared competition from westward rail shipping lines that ran through Cheyenne or Pueblo.[54] However, the economic viability of a westbound line from Denver was questionable because no railroad company had ever attempted to build such a line using its own capital.

In 1912, advocates for a railroad tunnel through James Peak to connect Denver to the Western Slope convinced the general assembly to refer a ballot measure that would amend the state constitution to allow the state to issue bonds to build the tunnel. Voters said no by a ratio of two to one.[55] The next year, tunnel advocates devised a new plan: amending the Denver

47. COLO. CONST. art. XI, § 2 (excluding escheats, forfeitures, devises, fines, surety bonds, and seizure for nonpayment of taxes).

48. "The general assembly may by law provide for a student loan program to assist students enrolled in educational institutions." COLO. CONST. art. XI, § 2a.

49. COLO. CONST. art. XI, § 2; STATE OF COLO., ABSTRACT OF VOTES CAST 1974, no. 4, at 38 (1974).

50. The judicial nullification of sections 1 and 2 borrowed by analogy from the earlier nullification of article V, section 34, which banned general assembly appropriations to private organizations or individuals. The court concluded that these appropriations are lawful whenever the legislature says they are for a public purpose. Bedford v. White, 106 P.2d 469, 476 (Colo. 1940).

51. The Colorado Supreme Court first enforced section 2 in 1879. Colo. Cent. R.R. Co. v. Lea, 5 Colo. 192, 196–97 (1879). Before the 1876 constitution outlawed government use of taxpayer funds for public–private business partnerships, Boulder County bought stock in a railroad. *Id.* at 193. Then, after the constitution went into effect, Boulder offered to return its stock to the railroad if the railroad built a line from Longmont to Cheyenne. *Id.* at 193–95. The Colorado Supreme Court held the plan unconstitutional. *Id.* at 197. While recognizing that there might be practical advantages to joint ventures of business and government, the court explained that the constitutional prohibition was clear, and that was the end of the matter. *Id.* at 196–97. The rail line was later built without any government financial assistance. Oesterle, *supra* note 39, at 604.

52. Oesterle, *supra* note 39, at 589, 605–06, 608.

53. *Id.* at 606.

54. *Id.*

55. *Id.* at 606.

City Charter to allow Denver to issue bonds to pay for two-thirds of the tunnel's estimated cost.[56] Under this plan, the Moffat Railroad would pay the other third of construction costs directly and would pay the principal and interest on Denver's bonds.[57] After the bonds were retired, the tunnel would become property of the Moffat Railroad.[58] In *Lord v. City & County of Denver*,[59] a divided Colorado Supreme Court held that the Denver City Charter amendment violated sections 1 and 2 of article XI.[60] The court acknowledged that a city could build a tunnel to supply water for its own municipal water plant, that "being a public purpose."[61] "But the proposed bond issue here is clearly, both in letter and spirit, within the inhibition of sections 1 and 2 of article 11, of the Constitution, and is void."[62] In response to arguments that the tunnel would be advantageous because it could be used for mining minerals,[63] the court answered, "We know of no authority wherein it has even been suggested that such a business comes within the range of municipal purposes."[64] The Moffat Railroad fell into receivership in 1921.[65] Luckily for Denver taxpayers, because the Supreme Court had blocked the 1913 plan in *Lord*, taxpayers were not stuck paying for the bonds that the Moffat Railroad had been expected to pay.[66]

In 1922, the legislature created the Moffat Tunnel Improvement District to build a tunnel under James Peak. The district[67] connected Denver and the western counties with a strip that varied from six-to-eight-miles wide.[68] The legislature delegated to the district the power to issue bonds and to impose property taxes to pay for the bonds.[69] The district, not a private enterprise, would construct and own the new Moffat Tunnel.[70] The district would repay the bonds by leasing the tunnel to railroads at below-market rates.[71] The Colorado Supreme Court upheld this system in *Milheim v. Moffat Tunnel Improvement District*.[72] The majority rejected

56. Lord v. City & Cnty. of Denver, 143 P. 284, 285–86 (Colo. 1914).
57. *Id.*
58. *Id.* at 286–87.
59. 143 P. 284 (Colo. 1914).
60. *Id.* at 295–96.
61. *Id.* at 295.
62. *Id.*
63. *Id.* at 290.
64. *Id.*
65. Oesterle, *supra* note 39, at 607.
66. *Lord*, 143 P. at 296 (Gabbert, J., dissenting).
67. For a discussion on the definition of "district," see *supra* Section III.D.
68. Oesterle, *supra* note 39, at 608.
69. *Id.*
70. *Id.*
71. *Id.* A private railroad company could have borrowed construction funds from banks or from private investors or could have issued bonds. But market rate borrowing would have been at a higher interest rate because the private company, unlike the Moffat Tunnel Improvement District, would have only been able to pay the debt from revenues earned from paying customers—and there might not be enough income to pay the debt. In contrast, the Moffat Tunnel Improvement District could also raise revenue by taxing noncustomers, so the bonds were more financially secure.
72. 211 P. 649, 652–53 (Colo. 1922).

claims that the below-market leases represented "an aid" or "giving aid" to a railroad in violation of article XI.[73]

Once the tunnel was completed, the Moffat Tunnel's actual lease revenues were even lower than the below-market revenues proponents had expected, necessitating a very long payoff period.[74] Proponents of the Moffat Tunnel Improvement District had promised that the job could be done with a $6.7 million bond.[75] The bonds that were actually issued totaled $15.5 million.[76] By 1960, insufficiency of revenues to retire the bonds on schedule and the consequent necessity of refinancing to extend the payment period had ballooned the cost of principal and interest to $45 million.[77]

Milheim cleared the way for governments to subsidize businesses by building business facilities so long as the government retained title to the facility. This logic allowed Denver to issue bonds to expand Mile High Stadium and lease it to professional sports teams.[78] In 1998, the Denver Broncos football team threatened to leave town unless Denver gave them another subsidized new stadium.[79] Voters in the Stadium District (which covers the Denver metro area) approved extending the duration of the baseball sales tax to build another football stadium.[80] The $300 million Broncos bonds were retired in 2012.[81] Although the taxpayers in the Stadium District paid for the new stadium, the Broncos owners received half the revenue from the sale of naming rights.[82]

---

73. *Id.* at 662. The court did not address the state debt limit in section 3 of article XI, even though the debts of the Moffat Tunnel Improvement District, a state agency, pushed state debt far over section 3's $50,000 constitutional limit. Oesterle, *supra* note 39, at 608; COLO. CONST. art. XI, § 3. Section 3 is discussed in Part II.A. The U.S. Supreme Court held that the Moffat program did not violate the Fourteenth Amendment's Due Process Clause. Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710, 715–16 (1923).

74. Oesterle, *supra* note 39, at 608–09.

75. *Id.* at 608, n.111.

76. *Id.*

77. ROBERT G. ATHEARN, THE DENVER AND RIO GRANDE WESTERN RAILROAD: REBEL OF THE ROCKIES 271 (1977). The first lessee, the Denver & Salt Lake Railroad, defaulted on its lease in 1930, two years after the tunnel opened. The insolvent railroad was purchased by the Denver & Rio Grande Western Railroad, based in Pueblo, which assumed the lease. Oesterle, *supra* note 39, at 608–09.

78. Irv Moss, *It Wasn't Always So Easy But Denver Has Rallied*, DENVER POST, Oct. 30, 1998, at D-13 (history of Mile High Stadium).

79. Tom McAvoy, *Bid for Stadium Gets Super Boost*, PUEBLO CHIEFTAIN, Jan. 28, 1998.

80. Peggy Lowe, *Stadium Vote a Vote to Keep Broncos*, DENVER POST, Nov. 8, 1998.

81. Kelsey Whipple, *Sports Authority Field at Mile High Tax Ends, Stadium Finally Paid Off*, WESTWORD, Jan. 4, 2012.

82. Although the original contract had naming rights going to the District, it was modified so that the proceeds are split fifty-fifty between the Broncos and the District. Michael Roberts, *Broncos Officially Granted Naming Rights to Mile High Stadium*, WESTWORD, Aug. 24, 2016. The facility is now officially named "Empower Field at Mile High" in honor of sponsor company Empower Retirement. Joe Rubino, *Broncos, Empower Retirement Agree to Deal for Stadium Naming Rights*, DENVER POST, Sept. 4, 2019. Empower was chosen in 2021 by the state government pension program, the Public Employees Retirement Association, to manage workers' investments. *Empower Selected by Colorado Public Employees Retirement Association to Administer $5 billion in DC Retirement Plans*, EMPOWER (Mar. 24, 2021), https://www.empower.com/press-center/empower-selected-by-colorado-public-employees-retirement-association-administer-5-billion-dc.

The *Milheim* court rejected the idea that anything with a public benefit was compliant with article XI: "If the existence of a public benefit is to . . . take it out of the constitutional prohibition, then the prohibition is utterly nugatory and valueless, as such consideration would exist in every probable case."[83] Oesterle argues that the destruction of the Colorado constitution's prohibitions on corporate welfare that began with *Milheim* in 1922 has continued ever since.[84]

2. *Millheim* and Its Successors

In 1955, the Colorado Supreme Court took the next step toward rendering section 2 "utterly nugatory and valueless." In *McNichols v. City & County of Denver*,[85] the city auditor challenged a pension system for city employees, arguing that it violated sections 1 and 2 of article XI.[86] The court brushed off the constitutional issue by stating that the pensions were for a "public purpose."[87]

The final step came in 1970 in *Allardice v. Adams County*.[88] Before *Allardice*, government bond attorneys, pursuant to *Milheim* and *Lord*, had been careful not to issue bonds that allowed bondholders to seize the government property if the government defaulted on its bond payments because *Milheim* and *Lord* had suggested that these bonds would violate section 2.[89] *Allardice* upheld such a bond, and in doing so, the Colorado Supreme Court made clear that courts should not bother closely examining an alleged valid public purpose. Rather, courts must make "every presumption" in favor of there being a valid public purpose—in this case, for bonds to subsidize an agricultural feed plant.[90]

As Oesterle summarizes *Milheim* and its successors, "Through this line of cases, any substantial residual effect of the [convention] delegates' ban on business subsidies was effectively nullified. All that is necessary is good lawyering to employ the proper fictions."[91]

C. Article V, Section 25. No Special Legislation

At the Colorado Constitutional Convention, section 25's main objective was to prevent legislative determinations of the legal status or rights of particular individuals or businesses.[92] For example, consider a husband who files for divorce. Under the restrictive laws of the time, the judge

83. Lord v. City & Cnty. of Denver, 143 P. 284, 289 (Colo. 1914).
84. Oesterle, *supra* note 39, at 609.
85. 280 P.2d 1096 (Colo. 1955).
86. *Id.* at 1098–99.
87. *Id.* at 1099–1100. Although the "public purpose" exception was novel in article XI, it had previously appeared in *Bedford v. White*, 106 P.2d 469, 454 (Colo. 1940), discussed in the next Section, regarding judicial pensions. Oddly, *McNichols* did not quote *Bedford*, although *Bedford* did appear in a string cite about the court's "liberal attitude" towards pensions. *McNichols*, 280 P.2d at 1100.
88. 476 P.2d 982, 989–90 (Colo. 1970) (en banc).
89. Oesterle, *supra* note 39, at 611.
90. *Allardice*, 476 P.2d at 990.
91. Oesterle, *supra* note 39, at 615.
92. COLLINS & OESTERLE, *supra* note 37, at 128.

rejects the suit because the husband has not proven proper cause, such as abandonment or adultery. Nonetheless, the well-connected husband goes to the legislature for special legislation; the legislature complies and enacts a law granting him a divorce.

Opposition to special legislation predated Congress's creation of the Colorado Territory in 1861. Once the 1858 gold rush began, settlers found themselves living in the fringes of other territories (Kansas, Nebraska, New Mexico, and Utah), none of which had the capacity to govern the Colorado settlements, which were very far from the territories' population centers.[93] The people of Colorado created their own territory by election in 1859 and dubbed it the Jefferson Provisional Territory.[94] Its first governor, Robert W. Steele, addressed the opening session of the provisional legislature on November 7, 1859, and warned against special legislation, especially in regards to businesses:

> [I]t would be well to avoid, as much as possible, special legislation: but provide by general laws for the incorporation of all bodies, whether corporations for pecuniary profit or municipal governments.
>
> The evil of too much special legislation is one which Western legislators are very prone to run into, thereby neglecting important laws of a general character; when once the door is thrown open to this abuse of legislative power, it is very difficult to check it. It is therefore hoped, that your course on this subject will be a conservative one.[95]

Section 25 provides a litany of matters on which the general assembly may not enact legislation. The general assembly has generally obeyed these prohibitions, except for the underlined text below:

> The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say; for granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys and public grounds; locating or changing county seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of police magistrates; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions or giving effect to informal or invalid deeds; summoning or impaneling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election, or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; the protection of game or fish; chartering or licensing ferries or toll bridges; remitting fines, penalties or forfeitures; creating, increasing or decreasing fees, percentage or allowances of public officers; changing the law of

93. DAVID B. KOPEL, COLORADO CONSTITUTIONAL LAW AND HISTORY 144 (2d ed. 2022).
94. *Id.* at 145–48.
95. 2 FRANK HALL, HISTORY OF THE STATE OF COLORADO app. at 518 (1890).

> descent; granting to any corporation, association or individual the right to lay down railroad tracks; *granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever*. In all other cases, where a general law can be made applicable no special law shall be enacted.[96]

Bans on special legislation, including the grant to any corporation of "any special or exclusive privilege, immunity, or franchise whatsoever," were "unqualifiedly beneficial and probably constitute the most important achievements of American public policy in dealing with private enterprise."[97] The section 25 limit on special legislation fell as collateral damage in the nullification of other provisions against special legislation. The problem began with the 1922 *Milheim* case, which held that using taxpayer funds to create and lease a railroad line *at below-market rates* was not a "special . . . privilege" for the beneficiary railroad.[98] Later, as described in Part II.F, the Court in 1991 upheld a corporate welfare package designed for United Airlines.[99] Using an "any reasonable relation[ship]" standard, the court upheld the welfare package because the package did not specifically mention the name of the intended beneficiary, and there was a theoretical possibility that another airline might qualify for the welfare—hypothesizing that the $115 million cap on benefits had not yet been exhausted.[100]

D. Article V, Section 28. No Extra Compensation to Officers, Employees, or Contractors

Section 28 prohibits extra compensation given to public officers:

> *No bill shall be passed giving any extra compensation to any public officer or employee, agent, or contractor after services have been*

---

96. Section 25 was slightly amended by referendum in 2000 to eliminate references to "justices of the peace" and "constables," which no longer exist in Colorado. S. Con. Res. 00-005, 62d Gen. Assemb. (Colo. 2000).

97. ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 174 (2d ed. 1965); *see also* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1209 (1985).

98. Milheim v. Moffat Tunnel Improvement Dist., 211 P. 649, 654–55 (Colo. 1922). The court stated:

> There is nothing in this act which can be considered as granting any special or exclusive privilege, within the meaning of this article of the Constitution. The only authority given to the district is that necessary to carry out the purpose of its creation. If, as is settled by the case above cited, the Legislature may create municipal corporations by special charters, the power which it gives to those corporations to carry out their purposes cannot be within this inhibition.

Id. The reasoning was defective. A municipal charter is granted for a local government to carry out multiple activities for the general benefit of the public, such as building roads that anyone can use, enacting generally applicable laws, and providing police protection to the public as a whole. In contrast, the Moffat Tunnel Improvement District was enacted for the particular purpose of granting a below-market lease to reduce the expenses of the particular railroad corporation that would lease the railroad line. Oesterle, *supra* note 39, at 608.

99. *In re* Interrogatory Propounded by Governor Roy Romer, 814 P.2d 875 (Colo. 1991) (en banc).

100. *Id.* at 886–88.

> *rendered* or contract made nor providing for the payment of any claim made against the state without previous authority of law.[101]

This prohibition—which applies to judicial pensions because judges are public officers—was enforced for decades but was nullified in *Bedford v. White* in 1940. There, the Colorado Supreme Court upheld a statute increasing judicial pensions in a 4–3 decision.[102]

At the time, there was no retirement system for state employees, as there is now under the Colorado Public Employees Retirement Association (PERA).[103] The 1939 judicial pension system and its 1925 statutory predecessor were gratuitous, not by right of contract.[104] For sitting judges who were promised future benefits, the *Bedford* court recognized that there was a straightforward contract argument: the pension statutes were contract offers that Supreme Court Justices could accept by following their terms: serving at least ten years, and then retiring sometime after age sixty-eight (1925 system) or after age sixty-five (1939 system).[105] The pension contract offer induced justices to serve at least ten years and to retire when they grew older and less capable.[106] But the 1939 pension increase could not be claimed to be a contractual offer and acceptance by the two former justices who had retired before 1939. The Colorado Supreme Court majority glossed over the problem by simply stating that pensions were common: "under Anglo Saxon jurisprudence since the close of the eighteenth century," for federal judges since 1869, "in nearly half of the states of the Union," and for military service.[107] However, the court could not point to a single pensioning government that had a constitutional provision like section 28.

In dissent, Justice Burke wrote:

> My position is that there must be some reasonable theory of public benefits. If there be such the soundness of it rests with the Legislature. If, as here, there is no such theory, the grant is purely private and the constitutional inhibition stands. . . . [The retired judges] could neither have come into the service, stayed in it, nor left it, because of the Act

101. COLO. CONST. art. V, § 28.

102. Bedford v. White, 106 P.2d 469, 475–76 (Colo. 1940).

103. COLO. REV. STAT. §§ 24-51-101 to -1748 (2024). Under that system, state employees, besides receiving immediate compensation as salary, also receive deferred compensation in the form of retirement income, the cost of which is partially paid by deductions from employee salaries, with the rest paid by the taxpayers and by income from PERA's investment of employee deductions. *Id.* at §§ 24-51-101 (defining terms for benefit calculation), -201(1) (authorizing PERA board to create the system), -206 (investment rules), -208 (PERA funds), -209 (2024) (disbursements). The PERA system is compliant with section 28 because it provides payments pursuant to contacts that were in existence when the now-retired employees rendered services to the state.

104. "A pension is not a matter of contract, and is not founded upon any legal liability. No man has a legal vested right to a pension; it is a mere bounty or gratuity given by the government in consideration or recognition of meritorious past services . . . ." *Bedford*, 106 P.2d at 471 (quoting 48 C.J. *Pensions* § 2 (1929)).

105. *Id.* at 472 (describing eligibility rules).

106. *Id.* at 475–76.

107. *Id.* at 472.

> of 1939. Hence I think they are not permitted by the constitution to take under that Act and the judgment of the court should be reversed.[108]

The majority did not, and could not, refute Justice Burke's point. The 1939 pension increase for two retired Justices could not be justified in relation to a contract that had existed before the Justices had retired. Accordingly, the pension increase fell within the plain language of section 28's prohibition, being "extra compensation to any public officer or employee, agent, or contractor after services have been rendered."[109] The Court's list of dissimilar judicial pension systems in other states did nothing to address the specific language of the Colorado Constitution. By upholding the judicial pension increase in *Bedford* without any reasoning about the text of the constitution, the court effectively ignored section 28.

Over time, the issue of pensions for retired employees who had never worked when a pension system was in effect diminished as pension systems became more common. Later, PERA created a unified pension system, and only covers employees who make PERA contributions during their employment.[110]

E. Article V, Section 34. No Appropriations to Private Institutions

The *Bedford* retroactive judicial pension increase also involved section 34, which states:[111]

> *No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association*.[112]

As the Colorado Attorney General challenging the judicial pensions in *Bedford* pointed out,[113] the 1895 Colorado Supreme Court enforced section 34 as written, holding unconstitutional an appropriation to give farmers in some drought-stricken eastern counties money to buy seeds.[114] After 1895, if the effects of section 34 prohibition were considered too harsh, then the legislature could have asked the people to amend or repeal section 34, or (after 1910) the people could have directly initiated a vote on repeal or revision.[115] Instead, the people and the legislature left section 34 as it was.

In *Bedford*, the court said "that if such payments are for a public purpose, the incidental fact that the recipients are private persons does not

108. *Id.* at 478–79 (Burke, J., dissenting).
109. COLO. CONST. art. V, § 28.
110. COLO. REV. STAT. § 24-51-101(29) (2024).
111. *Bedford*, 106 P.2d at 471.
112. COLO. CONST. art. V, § 34.
113. *Id.*
114. *In re* Relief Bills, 39 P. 1089, 1090–91 (Colo. 1895) (per curiam).
115. The right of citizen initiative was guaranteed by a 1910 revision of article V, § 1.

violate this constitutional provision," and anything that "is sanctioned by time and the acquiescence of the people may well be said to be a public purpose."[116] According to the court, the "public purpose" of the retroactive pension was to reduce the "economic doubts" of "an able man" contemplating entry into judicial service.[117] But this is a minuscule "public purpose" in comparison to the widespread social benefits of helping farmers buy seeds during a drought, which had been held unconstitutional in 1895 before *Bedford* created the public purpose loophole in section 34.[118] Other than noting that the Attorney General had raised the 1895 precedent, the court did not attempt to distinguish it, nor did they overrule it.[119]

The public purpose loophole has nullified section 34. Now, government grants to private individuals or organizations are easy to defend in court because virtually anything enacted for a private benefit can be claimed to have some sort of public benefit. The Colorado Constitution text, however, did not come with a loophole allowing appropriations to private institutions whenever there is a real or purported public benefit.

F. Article II, Section 11. No Laws Granting Special Irrevocable Privileges

Section 11's prohibition against ex post facto laws and laws impairing the obligation of contracts mirror the restrictions that Article I, Section 10 of the U.S. Constitution imposes on states:

> No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, *or making any irrevocable grant of special privileges, franchises or immunities*, shall be passed by the general assembly.[120]

However, Colorado's section 11 goes further, by also outlawing "any irrevocable grant of special privilege." The only case enforcing the prohibition against irrevocable grants happened to be one in which enforcement worked in the government's favor.[121] However, when enforcement would be contrary to a government's wishes, the court has taken a different attitude.

In 1991, Governor Roy Romer and the general assembly offered United Airlines a $115 million tax rebate to entice it to build a maintenance facility near Denver International Airport, which was then under

116. *Bedford*, 106 P.2d at 476.
117. *Id.* at 476–77.
118. *In re Relief Bills*, 39 P. at 1091.
119. *Bedford*, 106 P.2d at 471.
120. COLO. CONST. art. II, § 11 (emphasis added). "No State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts . . . . " U.S. CONST. art. I, § 10.
121. *See* City of Englewood v. Mountain States Tel. & Tel. Co., 431 P.2d 40, 44 (Colo. 1967) (en banc) (city's grant of a utility franchise for a term of years does not create a permanent right for that utility).

construction.[122] The Colorado Supreme Court held that the grant did not violate section 11, but the court's reasoning was scant.[123] The court cited several Tenth Circuit cases, including one that, as the Colorado Supreme Court described it, "apparently apply[ed] 'reasonable grounds' test to uphold Colorado Ski Safety Act against article II, section 11, 'irrevocable grant' claim."[124] Then the court added, "To come within the constitutional prohibition, the 'irrevocable grant' must be contained in a 'law.' There is no "irrevocable grant of special privileges, franchises or immunities" within the four corners of H.B. 1005, and we conclude that the bill does not, on its face, violate article II, section 11."[125] This reasoning appears opaque and coy: the grant would only come into effect if United later accepted the bill's offer, so the bill was not "facially" unconstitutional.

The court likewise found the United deal not to be a constitutional problem for article V, section 25 (special laws);[126] article V, section 34 (appropriations to private institutions);[127] article XI, section 2 (aid to corporations),[128] and article XI, section 3 (state debt).[129] Dissenting in part, Justice Kirshbaum would have found a violation of the article V, section 34 prohibition on appropriations to private institutions.[130] Justice

---

122. *In re* Interrogatory Propounded by Governor Roy Romer, 814 P.2d 875, 878–80 (Colo. 1991) (en banc). The United Airlines welfare law is detailed in Oesterle, *supra* note 39, at 615.

123. *In re Interrogatory Propounded by Governor Roy Romer*, 814 P.2d at 884–85. It should be noted that article XV, § 12, contains a separate ban on retrospective laws that benefit corporations:

> The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.

In an employment discrimination case, this section was held, "[f]or purposes of this case," not to go beyond the requirements of art. II, § 11. Cont'l Title Co. v. Dist. Ct., 645 P.2d 1310, 1314 n.5 (Colo. 1982) (en banc) (upholding retrospective changes in procedures for employment discrimination cases).

124. *In re Interrogatory Propounded by Governor Roy Romer*, 814 P.2d at 885 (citing Schafer v. Aspen Skiing Corp., 742 F.2d 580, 583–84 (10th Cir.1984)).

125. *Id.* (quoting Perl–Mack Enters. v. City & Cnty. of Denver, 568 P.2d 468, 472 (1977)).

126. *See id.* ("While judicial notice may be taken of the fact that the impetus for this legislation was to structure incentives to cause United Airlines to locate its maintenance facility in Colorado, that fact by itself does not vitiate H.B. 1005 as special legislation. The question posed by article V, section 25, is whether the legislation creates true classes and, if so, whether the classifications are reasonable and rationally related to a legitimate public purpose."). First, the bill was not limited to United, because another aviation company could make a deal on similar terms after the thirty-year statutory period for the United deal. *Id.* at 887. Second, even within the initial thirty years, a second aviation company might meet the bill's terms, and thus would get a share of the $115 million tax rebates. *Id.* Besides, the narrow classifications of how to qualify for the aviation tax rebate were "reasonably related" to promoting employment. *Id.* at 888.

127. *See id.* at 884 (explaining that the general assembly identified the "public purposes" of building new business facilities that would increase long-term employment, and of "direct and indirect benefits to the state aviation system"). Moreover, the bill had declared that "the public purpose to be served by the passage of this article outweighs all other individual interests," a declaration being "entitled to reverent weight." *Id.* (quoting Allardice v. Adams Cnty., 476 P.2d 982, 989 (Colo. 1970)).

128. *See id.* at 882 ("Notwithstanding the apparent absolute prohibition of article XI, section 2, a 'public purpose' exception has evolved."). And, "On its face, H.B. 1005 makes no 'donation or grant to, or in aid of . . . any corporation or company . . . . '" because "H.B. 1005 does not require that any private corporation or company receive a grant or donation from the state." *Id.* at 883.

129. *See id.* at 888–89 (citing Johnson v. McDonald, 49 P.2d 1017, 1025 (Colo. 1935)).

130. *Id.* at 890 (Kirshbaum, J., concurring in part and dissenting in part).

Quinn, dissenting, agreed the law violated article V, section 34 and also argued that the law contravened article V, section 25 and article XI, section 2.[131]

Today, some businesses that are considering relocation hold a competition among several states to determine which one can offer the most welfare, including special tax abatements.[132] In the Colorado executive branch, the Colorado Office of Economic Development and International Trade specializes in creating corporate welfare packages to incentivize businesses to choose Colorado in these competitions.[133] This is the opposite of the system of government created by the Colorado constitution.

II. ARTICLE XI LIMITS ON DEBT

This Part examines four sections of article XI of the Colorado constitution that place limits on debt. It describes mechanisms that Colorado governments have used to nullify constitutional limits on debt, beginning with the National Industrial Recovery Act during the Great Depression and continuing today with certificates of participation (COPs).

A. Article XI, Section 3. Public Debt of the State

> *The state shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenue, erect public buildings for the use of the state, suppress insurrection, defend the state, or, in time of war, assist in defending the United States*; and the amount of debt contracted in any one year to provide for deficiencies of revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the state, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of said valuation, until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars; and the debt incurred in any one year for erection of public buildings shall not exceed one-half mill on each dollar of said valuation; and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars (except as provided in section 5 of this article), and in all cases the valuation in this section mentioned

131. *Id.* at 896, 903–04 (Quinn, J., dissenting).

132. *See, e.g.*, Alan Greenblatt, *Tax Incentives: The Losing Gamble States and Cities Keep Making*, GOVERNING (Feb. 25, 2020), https://www.governing.com/finance/tax-incentives-the-losing-gamble-states-and-cities-keep-making.html ("Study after study shows that tax incentives don't pay off in real economic gains and often fail to produce the jobs that were promised. When managed correctly, however, they can build on local strengths.").

133. *Programs and Funding*, COLO. OFF. OF ECON. DEV. & INT'L TRADE, https://oedit.colorado.gov/programs-and-funding (last visited Nov. 9, 2024) (noting that listed programs include: Advanced Industry Tax Credit (25–35% credit on state income taxes); Colorado Film Incentive (tax credits of 20–22% for qualified expenses); Job Growth Tax Credit (for relocating or expanding industries; state income tax credit for 50% of the employer's share of Social Security taxes on pay to employees); CHIPS Refundable Tax Credit Program (80% refundable credit for certain semiconductor and advanced industry expenses); Opportunity Now Tax Credits (refundable state income tax credits for up to 50% of the cost of capital assets related to certain federal programs); Freight Rail Tax Credit (to encourage use of certain rail lines, including in Northwest Colorado); and five different Enterprise Zone tax credits (for businesses in economically weak areas)).

> shall be that of the assessment last preceding the creation of said debt.[134]

Section 3 prohibits "any" state debt, except for certain specified purposes. First, the government may borrow to cover "casual deficiencies"—for example, the government can borrow in order to pay expenses in February, knowing that tax payments will arrive in April. Second, the government may borrow a limited amount to erect public buildings, like by issuing bonds to pay for construction of a courthouse. Finally, the government may incur debt to defend the state in dire circumstances.[135]

During the Great Depression, Congress passed the National Industrial Recovery Act (NRA), which created a federal agency to control wages, prices, and most other economic activity.[136] Part of the NRA authorized the federal government to loan money to states for highway projects.[137] In a special session called by the governor, the Colorado general assembly considered taking a $10 million loan with a 4% annual interest rate and a twenty-year repayment period.[138] Because "the Senate still entertain[ed] doubts as to the constitutionality of said bill," the Colorado Senate sent interrogatories to the Colorado Supreme Court.[139]

In *In re Senate Resolution No.* 2, the court explained that the loan plainly violated section 3:

> We venture the assertion that no man, able to read and understand ordinary English, however otherwise educated or uneducated, wise or foolish, would question for a moment that this bill was a plain violation of the constitutional prohibition, or find any reason to the contrary, save by a resort to profound legal learning and a doubtful application of judicial precedents. Apparently acquiescing in this position, the Attorney General and his assistants raise no such question. They say, in effect, that while House Bill No. 6 appears, prima facie, to contract a debt, it does not in fact do so because payment thereof must be made from a "special fund," and in such cases this and other courts, by a course of reasoning here applicable, have held that no debt is thus contracted within the constitutional prohibition.[140]

Although the loan payoff would be from a special fund, it would still violate section 3 because the money that went into the fund would simply be

---

134. COLO. CONST. art. XI, § 3.

135. *See* COLO. CONST. art. X, § 16 (explaining that the balanced budget requirement contains an identical exception when necessary to "suppress insurrection, defend the state, or [in time of war] assist in defending the United States").

136. Rogene A. Buchholz, *National Industrial Recovery Act*, BRITANNICA (Dec. 3, 2019), https://www.britannica.com/topic/National-Industrial-Recovery-Act. The NRA, as it was known, was later unanimously held unconstitutional by the U.S. Supreme Court due to the standardless delegation of so much power. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

137. *In re* Senate Resol. No. 2, 31 P.2d 325, 326–27 (Colo. 1933).

138. *Id.*

139. *Id.* at 328.

140. *Id.* at 330.

some of the tax revenue that the state had been raising for years.[141] However, the court indicated that if there were a new revenue source to pay the loan, then the loan might not violate section 3:

> Since the purpose of section 3 of article XI is to prevent the pledging of revenues of future years, a statute which at the same time it creates a debt creates the fund to pay it, and which fund would not be otherwise available for general purposes, is clearly outside the constitutional prohibition. If, for example, the state could purchase a machine for making gold out of common clay, and agreed to pay for the contrivance only out of the product, that debt would not be prohibited by said section 3.[142]

Similarly, a loan does not violate section 3 when, as the court's precedents allowed, "debts for local improvements [are] paid for by special assessments. . . . In such cases the improvement is paid for solely out of the value which it adds to the property of the taxpayer."[143] The same analysis applies to loans for public utilities improvements that are repaid solely from the new revenue generated by the improvements.[144]

The attorney general also argued that the loan was sustainable as a "continuing appropriation" because the general assembly would have to appropriate payments every year.[145] The court found this argument to be a sham; the loan was obviously a debt, and the need for annual appropriations for debt payments did not change that fact.[146]

The attorney general additionally contended that, due to the emergency of the Great Depression, the highway program could be considered a debt "to defend the state."[147] The court disagreed.[148] It reasoned that if the executive and the legislature could freely determine what qualifies as an emergency requiring the taking on of debt "to defend the state," and if such declarations bound the courts, then

---

141. *Id.* at 330–31.
142. *Id.* at 331.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

> [A]n appropriation made by one General Assembly to pay for services of materials to be thereafter annually furnished, and which "continues" only because future General Assemblies do not, as well they might, discontinue both consideration and payment, and a "continuing appropriation" by a so-called "irrepealable act" to pay in installments, over a long period of years, for services or materials furnished in toto during the current year, are so different in all essential particulars as to have nothing in common save an arbitrary name. If the latter can be upheld under the cloak of continuing appropriations, this constitutional prohibition against contracting debts is construed out of existence, for under that cloak any debt may pass.

147. *Id.*
148. *See id.* at 331–32 (explaining that the court finds it "unnecessary here and now to determine").

> the Constitution would cease to have even the force of a statute. If the people's "Thou shalt not," can be brushed aside by the simple ipse dixit of their servants thus bound, the mandate is impotent. Such a construction, once adopted, breaks the barrier, and future legislatures, protected by the precedent, might pile up mountains of debt on future generations, resulting in inevitable impoverishment or ruthless repudiation.[149]

After all, the drafters of the 1876 constitution were familiar with the recent Civil War and with "grave economical and industrial emergencies,"[150] yet they "gave no permission to the [l]egislature to violate their mandate in emergencies."[151] And while the court did not deny the present existence of an economic emergency,[152] it did reject perceived expediency as an excuse for adopting a "broad construction" that would effectively nullify part of the constitution:

> [I]n this jurisdiction, the bulwarks erected in former times still stand unshaken. High dikes are built for great floods.
>
> It has been said, in substance, that this bill, by a "broad" construction, may be squared with the Constitution, and that only by a "narrow" construction can it be made repugnant thereto. That position rests upon an erroneous interpretation of those terms, and follows the popular fallacy that all interpretation which upholds legislation is broad and all which overthrows it is narrow. . . . [The people's intent in enacting section 3 being clear,] the construction which resorts to technical terms and find distinctions to frustrate that intent is narrow, and that which imports its common meaning to simple language to effectuate that intent is broad. We must not be frightened by mere words.[153]

The dissent pointed out that the gas tax enacted in the 1933 regular legislative session would repay the loan.[154] At that time, only a little of the gas tax money was pledged to other purposes. Under the terms of the federal government's contract, the loan would create a legal obligation only on the gas tax revenue fund, not on state general revenues.[155]

After the court rejected the loan in *In re Senate Resolution No.* 2, voters in the 1934 election adopted a citizen initiative creating an

149. *Id.* at 331.

150. *Id.* at 332. An example is the Panic of 1873, which had devastated Colorado's economy after President Grant and Congress turned the United States to a gold standard instead of the longstanding gold and silver standard established during the Washington administration. *See* Adam Hayes, *Crime of 1873*, INVESTOPEDIA, https://www.investopedia.com/terms/c/crime-1873.asp (Sept. 15, 2022) (explaining that President Grant and Congress signed a law ending coinage of the silver dollar); *see also* Graeme Pente, *Populism in Colorado*, HIST. COLO., https://coloradoencyclopedia.org/article/populism-colorado#id-field-additional-information-htm (last visited Nov. 3, 2024) (explaining that silver miners had to find other customers for silver productions after 1873).

151. *In re* Senate Resol. No. 2, 31 P.2d 325, 332 (Colo. 1933).

152. *See id.* at 331 (explaining "[t]hat an emergency, and a grave one, exists, we doubt not").

153. *Id.* at 332.

154. *Id.* at 334–35 (Butler, J., dissenting).

155. *Id.*

amendment to require that all automobile and gas tax revenue "be used exclusively for construction, maintenance and supervision of the [p]ublic [h]ighways of the [s]tate."[156] The next year, the general assembly borrowed $25 million from a federal highway loan program.[157] The bill approving this loan also created a state highway fund to receive the automobile and gas tax revenue[158] and specified that the federal loan would be repaid only from the state highway fund and no other source.[159]

The Colorado Supreme Court upheld the constitutionality of the loan 4–3 in *Johnson v. McDonald*.[160] The majority quoted the court's *In re Senate Resolution No. 2* opinion from a year before:[161] section 3 does not prohibit a loan if the revenue to repay the loan "would not be otherwise available for general purposes."[162] Because of the 1934 constitutional amendment, revenue from automobile and gas taxes "would not be otherwise available for general purposes."[163] The court concluded it did not matter that the gas tax was existing revenue, not new revenue.[164]

Dissenting, Justice Hilliard wrote, "I admire, while I deplore, the cunning logic that convinces the court that black is white and that there is no difference between heaven and hell."[165] According to Justice Hilliard, $25 million of borrowing plus $1 million of annual interest was obviously "a debt."[166] If the gas tax were insufficient to pay the debt, then the bondholders would ask for, and receive, repayment of the bonds from general revenues.[167] Justice Hilliard felt "deeply embittered," declaring that "[t]he court has worshipped at the shrine of construction, often and here the falsest of gilded gods, and for that sin the sweat of the people shall not fail for more than a generation."[168]

Quoting a recent U.S. Supreme Court case, he continued:

> "The [U.S.] Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition." [The Colorado Supreme Court] has often announced the same wholesome doctrine. The Constitution of Colorado ordains that "The state shall not contract any debt by loan in any form." . . . The very heavens

156. *Constitutional Amendment 5: State of Colorado*, COLO. SEC'Y OF STATE, https://historicalelectiondata.coloradosos.gov/eng/ballot_questions/view/13070/ (last visited Nov. 5, 2024); COLO. CONST. art. X, § 18.
157. Johnson v. McDonald, 49 P.2d 1017, 1019–20 (Colo. 1935).
158. *Id.* at 1021.
159. *Id.*
160. *Id.* at 1023.
161. *Id.* at 1024–25 (citing *In re* Senate Resol. No. 2, 31 P.2d 325, 330–31 (Colo. 1933)).
162. *Id.* (emphasis omitted).
163. *Id.* at 1025.
164. *Id.*
165. *Id.* at 1032 (Hilliard, J., dissenting).
166. *Id.* at 1032–33.
167. *Id.* at 1033.
168. *Id.* at 1032–33.

> protest against so monstrous a construction of the document conceived by the people for their protection against rapacity. If this be law, and the court has said it is, there is no limit whatever, and the constitutional limitation and prohibition of debt might as well be stricken from the instrument altogether. The language of the Constitution could not have been more imperatively or understandingly phrased. And yet, it is overthrown by niceties so refined as to be nonexistent and logic that destroys both the letter and the spirit.[169]

As the attorney general candidly admitted while defending the highway debt, "the legislature is now at liberty to set up a 'State Excise Corporation,' make all (other) excises payable to it, give it power to issue anticipation warrants, and pledge all excises to the end of time to repay them. . . ."[170] The *Johnson* majority destroyed the "constitutional protection against present spoliation of next year's income"[171] and instead licensed an "orgy of exploiting the future."[172] Justice Hilliard concluded, "I am unable to frustrate this scheme, but I can pay modest tribute to the framers of our organic law, who, well advised of the danger, believed they had protected the inarticulate against machinators."[173]

Ever since the court decided *Johnson* in 1935, the machinators have increasingly exploited the inarticulate. From a twenty-first century perspective, Professors Richard Collins and Dale Oesterle observe:

> It is interesting to speculate about what state government would look like if the simple debt limits of the 1876 Constitution were respected today. State government would be on a cash basis except for public building projects, which would have to pass a popular vote. Capital leases (long-term leases with an option to purchase) would be construed, as they are in private industry, as long-term loans and would also require a popular vote. If the state government wanted to undertake a major highway project, for example, and annual appropriations over the life of the project would be insufficient to pay for the project, the state would have to save, not borrow to do the job, or turn the construction over to a private toll road company. The state could not incur debt to finance utilities or railroad tunnels or sports stadiums; it would have to turn such enterprises over to private owners who could sell bonds (and stock) to finance construction.[174]

The following Sections describe COPs, another mechanism that Colorado governments have used to nullify the Colorado constitution's limits on debt.

---

169. *Id.* at 1033 (citations omitted) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)); COLO. CONST. art. XI, § 3.
170. *Id.*
171. *Id.* at 1034.
172. *Id.*
173. *Id.*
174. COLLINS & OESTERLE, *supra* note 37, at 284–85.

B. Article XI, Section 4. Time Limits on State Debt

> In no case shall any debt above mentioned in this article be created except by a law which shall be irrepealable, until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purposes to which the funds so raised shall be applied, and provide for the levy of a tax sufficient to pay the interest on and extinguish the principal of such debt within the time limited by such law for the payment thereof, which in the case of *debts contracted for the erection of public buildings and supplying deficiencies of revenue shall not be less than ten nor more than fifteen years*, and the funds arising from the collection of any such tax shall not be applied to any other purpose than that provided in the law levying the same, and when the debt thereby created shall be paid or discharged, such tax shall cease and the balance, if any, to the credit of the fund shall immediately be placed to the credit of the general fund of the state.[175]

Usually, one legislature can repeal any act of a previous legislature. But the legislature may not repudiate debts contracted by previous legislatures. So a bond that is issued by the legislature in year one, for a fifteen year term, may not be repudiated in year seven by a subsequent legislature.

Under section 4, when the legislature borrows money, it must raise taxes enough to pay the interest and principal on the debt. These new taxes must sunset when the debt is paid. Money borrowed to erect public buildings must be repaid within ten to fifteen years. Section 4 has not been formally nullified as some other sections have; the courts have not fabricated a "public purpose" loophole that allows debt longer than fifteen years whenever a public purpose is asserted. Instead, section 4 has been rendered nugatory by the practice of issuing COPs, which are long-term debt pretending to be a series of one-year leases, as described next.

C. Article XI, Section 5. Vote on Debt for Public Buildings

> A debt for the purpose of erecting public buildings may be created by law as provided for in section four of this article, not exceeding in the aggregate three mills on each dollar of said valuation; provided, that before going into effect, *such law shall be ratified by the vote of a majority of such qualified electors of the state as shall vote thereon at a general election* under such regulations as the general assembly may prescribe.[176]

COPs are the modern means for evading section 4 (fifteen-year limit on debt), section 5 (vote on state debts for public buildings) and section 6 (vote on local government debt—discussed in the next Section).[177] COPs are long-term mortgages disguised as a series of year-to-year leases. When

175. COLO. CONST. art. XI, § 4.
176. COLO. CONST. art. XI, § 5 (emphasis added).
177. *See generally What Is a Certificate of Participation in Financing?*, INDEED, https://sg.indeed.com/career-advice/career-development/what-is-certificate-of-participation (June 27, 2024).

the state legislature or a local government entity appropriates funds to be spent in the coming fiscal year, this spending is not classified as a debt. Rather, it is pay-as-you-go. For example, if a city council leases an office building for one year and paying for it from current revenue, then the lease would not be classified as a debt.

Suppose the state wants to build a new state office building to replace an existing one. The state conveys a parcel of land to a business, and the business builds a new office building on that land and leases it to the state on a year-to-year basis. If the state renews the lease every year and pays the full rent for twenty-five years, then the business gives the office building to the state at the end of the twenty-five years.[178] Because the lease is year-to-year, the state has no formal future year continuing legal obligation. Colorado courts have upheld this form over substance.[179]

The state began using COPs in 1979.[180] By using a COP, the state or local government evades all article XI restrictions on government debt, as well as TABOR's requirement that new debt be put to a vote of the people (discussed in Part III). This sham costs taxpayers greatly. The total interest paid on a twenty-five-year loan is nearly double that of a fifteen-year loan.[181] Taxpayers get stuck paying ten years' worth of extra interest for the unconstitutional twenty-five-year loans for debt to which they never consented.

D. Article XI, Section 6. Local Government Debt Limits

> No political subdivision of the state shall contract any general obligation debt by loan in any form, whether individually or by contract pursuant to article XIV, section 18(2)(a) of this constitution except by adoption of a legislative measure which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged, specifying the purposes to which the funds to be raised shall

178. *See* KORI DONALDSON, COLO. LEG. COUNCIL, ISSUE BRIEF NO.18-09, CERTIFICATES OF PARTICIPATION 1 (2018); *see also* James Chen, *Certificate of Participation (COP): Definition, Uses, Taxation*, INVESTOPEDIA, https://www.investopedia.com/terms/c/certificateofparticipation.asp (Aug. 17, 2024) ("A certificate of participation (COP) is a type of financing where an investor purchases a share of the lease revenues of a program rather than the bond being secured by those revenues. Certificates of participation are, therefore, secured by lease revenues.").

179. *See* Glennon Heights, Inc. v. Cent. Bank & Tr., 658 P.2d 872, 879 (Colo. 1983) ("developmentally disabled" housing); Gude v. City of Lakewood, 636 P.2d 691, 701 (Colo. 1981) (new city hall, after the voters rejected a ballot measure for a bond to build a new city hall); Fischer v. City of Colorado Springs, 260 P.3d 331, 335 (Colo. App. 2010) (police and fire) ("[E]ven where practical circumstances would exert substantial social or political pressure upon future city councils to appropriate money to repay outstanding obligations, unless an agreement affirmatively requires them to do so, the obligation does not amount to constitutional debt."); Colorado Crim. Just. Reform Coal. v. Ortiz, 121 P.3d 288, 290, 294 (Colo. App. 2005) ("a high-custody correctional facility for the Colorado Department of Corrections and new academic facilities for the University of Colorado Health Sciences Center at Fitzsimons").

180. DONALDSON, *supra* note 178, at 1.

181. Calculated as follows: Assume a 4% interest rate. The interest for $10 million for twenty-five years is $5,835,105.21. The interest for that same amount for fifteen years is $3,314,382.66. *Mortgage Calculator*, CALCULATOR.NET, https://www.calculator.net/mortgage-calculator.html (last visited Nov. 9, 2024). The former is 76% greater than the latter.

> be applied and providing for the levy of a tax which together with such other revenue, assets, or funds as may be pledged shall be sufficient to pay the interest and principal of such debt. Except as may be otherwise provided by the charter of a home rule city and county, city, or town for debt incurred by such city and county, city, or town, *no such debt shall be created unless the question of incurring the same be submitted to and approved by a majority of the qualified taxpaying electors voting thereon, as the term "qualified taxpaying elector" shall be defined by statute*.[182]

Section 6 applies sections 4 and 5's debt rules to local governments.[183] The judicial precedents that allow the state government to borrow money without classifying it as a debt apply equally to local borrowing. Thus, local governments often use COPs to finance construction projects. For example, after Jefferson County voters rejected a ballot measure to construct an expensive new government building, the Jefferson County Board of County Commissioners used COPs to build the new Jefferson County Government Center (known as "the Taj Mahal") anyway.[184] Just as state taxpayers are stuck paying double the interest for unconstitutional loans after section 5's nullification, local taxpayers are equally taken advantage of due to section 6's nullification.

In sum, the Colorado constitution forbids most debt except for public buildings and sets caps on the amount of debt (article XI, section 3), limits debt to 15 years (section 4), requires a vote of the people for debt for state buildings (section 5), and the same for local buildings (section 6). As things stand today, these four sections of article XI might as well never have been written. Through the shams of special funds and certificates of participation, state and local governments incur debt far in excess of constitutional limits, ignore the requirement for voter approval, and force the taxpayers to pay grossly excessive amounts of interest.

The nullification of sections 3 through 6, described in this Part II, can be taken in conjunction with the nullification of sections 1 and 2 of article XI (aid and debt for the benefit of corporations) described in Part I. The entirety of the 1876 constitution's restriction on government debt has been obliterated.[185] While we cannot know for certain whether the people of

182. COLO. CONST. art. XI, § 6(1) (emphasis added).

183. *Id.* Originally, school district debt was in section 7, and municipal debt was in section 8. In 1970, all the local debt provisions were consolidated in section 6.

184. An early application of section 6 came in 1883, when Leadville city solicitor Daniel E. Parks took the lead in relieving bankrupt Lake County of a million dollars of debt. The debt was the consequence of "the rascality of [early] boards of county commissioners," in the words of the Leadville *Herald-Tribune.* Finally, the people "elected men of unimpeachable integrity" to run the county government. The Colorado Supreme Court held that county debts that were in excess of the constitutional limit were uncollectable. The Lake County debt cases had national influence in changing fifty years of precedents on local government debt, as was recognized in the leading national treatise, *Dillon on Municipal Corporations*. 3 FRANK HALL, HISTORY OF COLORADO 428 (1895).

185. Practically speaking, the only remaining functional section of article XI is section 7, a 1970 amendment allowing statutes to authorize state or local government subsidies to local governments. COLO. CONST. art. XI, § 7.

Colorado in 1876 would have voted to approve a proposed constitution that contained no limits at all on government debt or on special legislation for the benefit of powerful businesses, such a state constitution would have been highly eccentric compared to other states.[186]

The people of Colorado in 1876 did choose to enact a constitution with strict limits on government debt and on aid to big business. Since 1876, the people have amended the Colorado constitution 176 times.[187] They have never chosen to repeal the restrictions on government debt and corporate welfare. Instead, de facto repeal has been accomplished by the Colorado Supreme Court through specious interpretations and fabricated exceptions that swallow the rule.

After decades of constitutional nullification of the original Colorado constitution by the Colorado Supreme Court, the people of Colorado enacted new constitutional fiscal rules in 1992. The Court promptly set about nullifying those as well, as will be described next.

III. ARTICLE X, SECTION 20. TAXPAYER'S BILL OF RIGHTS

TABOR is the most controversial section of the Colorado constitution—at least from the perspective of many government officials.[188] In the three decades since voters enacted TABOR, the judiciary, legislature, and governor have eviscerated many of its provisions.

In 1992, the people of Colorado adopted TABOR through Amendment 1 by a vote of 53.7% in favor and 46.3% against.[189] TABOR's primary purpose is to restrain the nonconsensual growth of government, and

---

186. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 109–13, 118–21 (1998). After New York's constitution was amended in 1846 to require a vote for debt and to forbid lending the state's credit, "[m]ost existing states adopted similar provisions, and all states entering the Union after 1845 wrote some sort of debt restriction into their constitutions." *Id.* at 112.

187. *Colorado Constitution*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Constitution (last visited Feb. 24, 2024).

188. For example, State Senator Chris Hansen was Chair of the legislature's joint Commission on Property Tax. He wrote:

> Our government is handcuffed by the effects of TABOR, which was added to our constitution in 1992. The provisions make it difficult for the state to adjust to continuously changing economic conditions and reduce the revenue available that could be used to improve infrastructure and fund education. Simply put, time has shown that TABOR makes governing Colorado in a reasonable way extremely difficult. This is why I joined the lawsuit to repeal TABOR on my first day in office. All of our families have felt the negative consequences of TABOR for far too long. It's time we get our government and our state back on track.

Chris Hansen, *My Priorities*, CHRIS STATE SENATE, https://www.hansenforcolorado.com/issues (last visited Nov. 9, 2024). Colorado State Treasurer Dave Young "said he'd like to see Colorado's tax policy changed because he feels TABOR has hampered the state's ability to fund schools, health care and infrastructure." Jesse Paul & Elliott Wenzler, *Where Colorado Candidates Dave Young and Lang Sias Stand on the Issues*, COLORADO SUN (Oct 13, 2022, 3:45 AM), https://coloradosun.com/2022/10/13/dave-young-lang-sias-colorado-treasurer/.

189. STATE OF COLO., ABSTRACT OF VOTES CAST 132 (1992), https://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/1900-1999/1992AbstractBook.pdf (there were 812,308 in favor and 700,906 opposed: 812,308/1,513,214 = 53.68).

its provisions effectuate this purpose in two major ways. First, TABOR allows tax and debt increases only when authorized by voters. Second, state and local government spending or revenue may not grow faster than the rate of inflation plus population growth unless voters give their permission. Some government officials and commentators have argued that TABOR unduly constrains the government's ability to act for the general welfare.[190] The Colorado constitution, however, declares that the people are sovereign and the government is their subordinate creation.[191] Principals have the authority to instruct their agents how to act on their behalf.[192] The final decisions about the welfare of the people—who are the principal—are up to the people.

TABOR provides:

> (1) General provisions. This section takes effect December 31, 1992 or as stated. *Its preferred interpretation shall reasonably restrain most the growth of government*. All provisions are self-executing and severable and *supersede conflicting state constitutional, state statutory, charter, or other state or local provisions. Other limits on district revenue, spending, and debt may be weakened only by future voter approval.* Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. *Successful plaintiffs are allowed costs and reasonable attorney fees*, but a district is not unless a suit against it be ruled frivolous. . . . Subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return. . . .
>
> (2) Term definitions. Within this section:
>
> . . . .
>
> (b) *"District" means the state or any local government, excluding enterprises.*
>
> . . . .
>
> (d) *"Enterprise" means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.*
>
> . . . .

190. For example, Metro State political science professor Dr. Norman Provizer calls TABOR "a bad thing" because "School boards can't vote on a tax increase and then impose it on the people." Russell Haythorn & Blair Miller, *Is TABOR Hurting Education and Infrastructure in Colorado?*, DENVER7 (Oct. 8, 2018, 9:49PM), https://www.denver7.com/news/360/is-tabor-hurting-education-and-infrastructure-in-colorado-#.

191. COLO. CONST. art. II, §§ 1–3.

192. *See Agency*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/agency (last visited Nov. 9, 2024).

(3) Election provisions.

. . . .

(b) At least 30 days before a ballot issue election, districts shall mail at the least cost, and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to "All Registered Voters" at each address of one or more active registered electors. . . . Titles shall have this order of preference: "NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE." *Except for district voter-approved additions, notices shall include only:*

(i) [Election date, hours, ballot title, etc.].

(ii) [For tax or debt increases, total district spending in the current fiscal year and the preceding four years], and the overall percentage and dollar change.

(iii) [D]istrict estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase.

(iv) [For debt], its principal amount and maximum annual and total district repayment cost, and the principal balance of total current district bonded debt and its maximum annual and remaining total district repayment cost.

(v) Two summaries, up to 500 words each, one for and one against the proposal, of written comments filed with the election officer by 45 days before the election. No summary shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments. The provisions of this subparagraph (v) do not apply to a statewide ballot issue, which is subject to the provisions of section 1 (7.5) of article V of this constitution.

(c) [B]allot titles for tax or bonded debt increases shall begin, "SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY...?" or "SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost),...?"

(4) Required elections. Starting November 4, 1992, districts must have voter approval in advance for:

(a) Unless (1) or (6) applies, any new tax, tax rate increase, *mill levy above that for the prior year*, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a *tax policy change directly causing a net tax revenue gain to any district*.

. . . .

> (5) *Emergency reserves. To use for declared emergencies only, each district shall reserve for 1993 1% or more, for 1994 2% or more, and for all later years 3% or more of its fiscal year spending excluding bonded debt service.* Unused reserves apply to the next year's reserve.
>
> . . . .
>
> (7) Spending limits.[193]

Since TABOR became law, Colorado voters in counties, municipalities, and special districts have approved many measures for higher taxes, greater spending, and additional debt. Under TABOR, voters in the past three decades have been presented with seventeen statewide ballot measures for general increases in taxes, spending, and borrowing; voters have approved five of the seventeen.[194] Voters have also repeatedly approved taxes on specific items, such as marijuana and tobacco.[195]

Unfortunately, there are also many other tax, spending, and debt increases that occur contrary to TABOR. For example, in 2021, the general assembly enacted bills to (1) increase gasoline taxes and taxes on delivery services by $200 million, with less than half of that new revenue earmarked for roads and highways;[196] (2) eliminate various tax deductions to

193. COLO. CONST. art. X, § 20.

194. *See* STATE OF COLO., ABSTRACT OF VOTES CAST 42 (1997) (Transportation Need Act, 109,663 to 585,055); *id.* at 197–98, 209 (Referendum B, Excess Revenues, 477,504 to 765,654); *id.* at 204–05, 209–10 (1999, Referendum A, bonds for transportation construction with no tax increase, *passed* 477,982 to 296,971); STATE OF COLO., ABSTRACT OF VOTES CAST 169, 177 (2000) (Referendum F, $50 million excess revenue for schools, 697,673 to 884,071); STATE OF COLO., OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST 46, 48 (2001) (Amendment 26, $50 million in excess states revenues for monorail study, 546,224 to 830,303); STATE OF COLO., ABSTRACT OF VOTES CAST 45, 47 (2005) (Referendum C, suspended TABOR revenue caps for five years, then reset baseline, *passed* 600,222 to 552,662); *id.* at 46, 48 (Referendum D, borrow against anticipated revenues of Referendum C, 567,540 to 581,751); STATE OF COLO., ABSTRACT OF VOTES CAST 142, 156 (Amendment 51, $186.1 million sales tax increase for developmental disabilities, 853,211 to 1,414,065); STATE OF COLO., ABSTRACT OF VOTES CAST 60, 62 (2013) (Amendment 66, $950 million tax increase for schools, 496,151 to 899,927); STATE OF COLO., ABSTRACT OF VOTES CAST 147, 156 (2016) (Amendment 69, to raise taxes by $25 billion for single-payer state health care system, 568,683 to 2,109,868); STATE OF COLO., ABSTRACT OF VOTES CAST 147, 157 (2018) (Amendment 73, progressive tax for schools, 1,137,527 to 1,312,331, failed to reach the 55% needed for a constitutional amendment); *id.* at 150, 158 (Proposition 109, to borrow 3.5 billion for roads, 952,814 to 1,472,933); *id.* at 151, 159 (Proposition 110, to increase sales taxes by .62%, some of it for road bonds, 990,287 to 1,448,535); STATE OF COLO.: DEP'T OF STATE, COLORADO COORDINATED ELECTION RESULTS, at 1 (2019) (Proposition CC, to eliminate TABOR refunds, 724,060 to 838,282); STATE OF COLO., ABSTRACT OF VOTES CAST 150, 155 (2020) (Proposition 118, 1.2% payroll tax for family and medical leave, 1,804,546 to 1,320,386); STATE OF COLO., ABSTRACT OF VOTES CAST 164, 173 (2022) (Proposition FF, $101 million income tax increase above $300,000 for free school meals for all students, *passed* 1,384,852 to 1,055,583); *id.* at 168, 174 (Proposition 123, raise income tax 1/10th of 1% for affordable housing, *passed* 1,269,816 to 1,143,974).

195. *See* COLO. CONST. art. X, § 21; COLO. REV. STAT. § 39-28.8-301 (2024); *id.* § 3928401.

196. The $200 million figure is the legislative council's estimate for fiscal year 2023–2024. The Council expects the amount to increase every year thereafter. LEGIS. COUNCIL STAFF, REVISED FISCAL NOTE, S. 21-260, at 1–2, 7 (2021), https://leg.colorado.gov/sites/default/files/documents/2021A/bills/fn/2021a_sb260_r4.pdf.

increase state revenues by $372 million annually;[197] and (3) order local school districts to impose the largest property tax increase in state history.[198] As described below, each of these violations of the plain text of TABOR was made possible by the Colorado Supreme Court, either at the time or beforehand.[199] Today, the Supreme Court's extreme hostility towards TABOR continues what has become a century of escalating hostility to the fiscal rules of the original 1876 constitution.

Section A addresses the Colorado Supreme Court's hostility to TABOR and the Court's assertion that the "Taxpayer's Bill of Rights" does not enforce rights. Section B discusses how the Court has replaced TABOR's express standard of review with a standard that the government always wins. One of the most important ways that the Court has allowed legislative bodies to raise taxes without voter approval is by labeling taxes as "fees," as detailed in Section C. Another method of evasion, described in Section D, is falsely labeling certain government operations as "enterprises." According to TABOR, tax policy changes that result in a net tax increase require voter approval, and so does the removal of the pre-TABOR statutory limits on taxes and spending; both of these protections have been nullified, as will be explained in Sections E and F. Section G details the Court's constrictive interpretation of TABOR's citizen lawsuit provision. TABOR gives local governments the authority to opt out of some state mandates, but the Court has eliminated that authority for county governments, as explained in Section H. Finally, Section I focuses on voter approval of temporary local exemptions from TABOR's revenue or spending caps. The Court has upheld fraudulent and deceptive misconstruction of ballot measures so that temporary exemptions have become permanent and mill levies for property taxes will be raised without voter consent for the largest property tax increase in state history.

A. The Bill of Rights Does Not Contain Rights

The Colorado Supreme Court demonstrated its hostility to the TABOR in its first TABOR case, *Bickel v. City of Boulder*.[200] The court

---

Using gas tax revenue to subsidize the purchase of automobiles is plainly contrary to the 1934 constitutional amendment dedicating gas tax revenue solely to highway construction and maintenance:

> On and after July 1, 1935, the proceeds from the imposition of any license, registration fee, or other charge with respect to the operation of any motor vehicle upon any public highway in this state and the proceeds from the imposition of any excise tax on gasoline or other liquid motor fuel except aviation fuel used for aviation purposes shall, except costs of administration, be used exclusively for the construction, maintenance, and supervision of the public highways of this state.

COLO. CONST. art. X, § 18.

197. LEGIS. COUNCIL STAFF, ECONOMIC & REVENUE FORECAST 31 (2023), https://leg.colorado.gov/sites/default/files/images/dec2023forecastforposting.pdf.

198. *See* discussion *infra* Section III.I.

199. *See* discussion *infra* Section III.C (gas tax), III.E (deductions), III.I (property tax).

200. 885 P.2d 215, 226 (Colo. 1994).

disapproved of TABOR so strongly that it could not bear to call it by name.[201] In *Bickel*, plaintiffs brought suit against several ballot measures that voters approved in 1993.[202] The court rejected the argument that TABOR "create[d]" a new "fundamental right."[203] Notwithstanding the title "Taxpayer's Bill of Rights," *Bickel* declared that there were no "rights" involved: "The provisions of the amendment are worded, however, not as creating 'rights' vested in Colorado's taxpayers but as imposing limitations on the spending and taxing powers of state and local government. For example, the 'preferred interpretation' of Amendment 1 is one that 'reasonably restrain[s] most the growth of government.'"[204] Likewise, TABOR's new rules of elections about taxes and debts were characterized as procedural restrictions on government, rather than as voting rights for the public.[205] The court added, "Amendment 1's provisions regulating state and local spending and revenue also are phrased in terms of the obligations imposed on state and local government and not in terms of vesting any new rights in the citizens of Colorado."[206] In other words, limits on government taxing and spending did not involve a right to taxpayers to keep their earnings. "Thus, Amendment 1's requirement of electoral approval is not a *grant* of new powers or rights to the people, but is more properly viewed as a *limitation* on the power of the people's elected representatives."[207]

This rationale contradicts many other constitutional provisions that limit the power of elected representatives but are universally understood as protecting rights. For example, every step of the court's *Bickel* analysis could apply equally to article II, section 11 of Colorado's original bill of rights: "No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly."[208] Textually, section 11 does not declare new rights. It simply sets limits on the exercise of government power.

Likewise, many other provisions of the original bill of rights, article II, do not declare the existence of a "right." They simply impose what *Bickel* called a "limitation on the power of the people's elected representatives."[209] Section 9 limits how the people's elected representatives may

201. The court deleted the words "Taxpayer's Bill of Rights" from seven quotes and replaced them with a bracketed "Amendment 1." *See id.* at 221–23. The court used the ballot issue number, "Amendment 1," over a hundred times and wrote the actual words of the title only once. Later the court reconciled itself to using the name when doing so bolstered an argument in favor of the government. *See* Zaner v. City of Brighton, 917 P.2d 280, 284 (Colo. 1996). Eventually, the court began using the words "Taxpayer's Bill of Rights" in all relevant cases—although never to enforce those words, as will be described below.

202. *Bickel*, 885 P.2d at 240.

203. *Id.* at 225.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 226 (emphasis added).

208. COLO. CONST. art. II, § 11.

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

penalize treason, felonies, or suicide, but does not create a "right" to commit those acts.[210] Similarly, section 12, which prohibits imprisonment for debt in most cases, does not create a "right" to default on debt.[211] In addition, section 25, which dictates that "[n]o person shall be deprived of life, liberty or property, without due process of law," did not create the rights of life, liberty or property.[212] Instead, section 25 imposes "a limitation on the power of the people's elected representatives"[213] to deprive persons of life, liberty, or property. It is perfectly ordinary for provisions in a bill of rights to be structured as limitations on the powers of the people's elected representatives, rather than as affirmative declarations of a particular right.

TABOR is structurally the same as all the above clauses. TABOR does not purport to create a "right" of Coloradans to the fruits of their labor. The rights "of acquiring, possessing and protecting property" have always been "natural, essential and inalienable rights," according to the Colorado constitution.[214] TABOR simply adds specific procedures for how private property may be taken and used via taxation, just as sections 14 and 15 of the original Colorado bill of rights specify how property may be taken and used via eminent domain.[215] Thus, *Bickel*'s conclusion that TABOR is not a bill of rights was erroneous. Applied to Colorado's original bill of rights, *Bickel* would indicate that at least seven sections do not qualify as "rights."

TABOR protects the fundamental right of citizens to consent to or withhold their consent from taxation. More broadly, it protects the people's sovereign right to control government spending and taxation. Violations of these rights led to the British Civil Wars in the 1640s,[216] to the United Kingdom's Glorious Revolution in 1688,[217] and to the American Revolution in 1775.[218] In the United Kingdom, the people reinforced

---

210. COLO. CONST. art. II, § 9.

211. *See id.* § 12.

212. *See id.* § 25.

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

214. COLO. CONST. art. II, § 3. Property rights are not created by constitutions; they precede society, as the Colorado constitution's bill of rights affirms: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." *See id.* Bills of rights prevent governments from violating the rights that government was created to protect.

215. The takings sections of article II of the Colorado constitution do not declare any new "rights," but those sections do impose a limitation on the power of the people's elected representatives. Private property may not be taken for private use, with specific exceptions. *Id.* § 14. When the government takes private property for public use (or for specifically authorized private uses), it must pay just compensation of an amount ascertained according to certain procedures. *Id.* § 15. The owner's property rights already being in existence, "the proprietary rights of the owner" shall not be "divested" until the owner is compensated. *Id.*

216. *See generally* JOHN FORSTER, THE DEBATES ON THE GRAND REMONSTRANCE: NOVEMBER AND DECEMBER 1641 (1860).

217. *See generally* GEORGE MACAULAY TREVELYAN, ENGLAND UNDER THE STUARTS (Folio Soc. 1996) (1904).

218. *See, e.g.*, JOHN JOACHIM ZUBLY, GREAT BRITAIN'S RIGHT TO TAX . . . BY A SWISS (1774); THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776) ("For imposing taxes on us without our Consent . . . . ").

traditional constitutional limits on the monarch taxing or spending without the consent of the people's representatives in Parliament.[219] According to the winners of the American Revolution, only the colonial or state legislatures held the power of the purse;[220] that power belonged neither to the Parliament in London nor to the royal colonial governors appointed by the king.

The American experience with state legislatures showed that taxation being controlled by a properly-elected legislature was important, but insufficient.[221] State and local governments financed borrowing and spending money to support favored businesses, including railroads; special laws for their benefit were enacted.[222] Accordingly, from the 1830s onward, state constitutions have included more and more provisions against abuse of tax, debt, spending, and favoritism.[223] Colorado's TABOR is part of a long state constitutional law tradition protecting the rights of the public to control how they are taxed and what debts they must assume.[224]

B. "Its Preferred Interpretation Shall Reasonably Restrain Most the Growth of Government."[225]

Unlike most sections of the Colorado constitution, TABOR expressly provides the standard of review for its interpretation: "Its preferred interpretation shall reasonably restrain most the growth of government."[226] The "Reasonably Restrain Clause" is the first substantive sentence of TABOR, preceded only by the effective date; it is the controlling rule for all text that follows.

Colorado courts' rules of statutory interpretation readily demonstrate the meaning of the Reasonably Restrain Clause: "The starting post for our construction is the 'ordinary and popular meaning' of the plain language of the constitutional provision."[227] Courts should follow the "natural and popular meaning usually understood by the people who adopted" constitutional provisions.[228] "In discerning the ordinary and popular meaning of an undefined word in a constitutional provision, [courts] may consult definitions in recognized dictionaries."[229]

---

219. *See* MAGNA CARTA arts. 12, 14 (Eng. 1215).
220. *See, e.g.*, GORDON WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 64 (2021).
221. *See* TARR, *supra* note 186, at 118–21.
222. *See id.*
223. *See id.*
224. COLO. CONST. art. II, § 2.
225. *Id.* art. X, § 20 (alterations added).
226. *Id.*
227. Markwell v. Cooke, 482 P.3d 422, 429 (Colo. 2021) (citing Gessler v. Smith, 419 P.3d 964, 969 (Colo. 2018) (quoting Colo. Ethics Watch v. Senate Majority Fund, LLC, 269 P.3d 1248, 1253–54 (Colo. 2012))).
228. Urbish v. Lamm, 761 P.2d 756, 760 (Colo. 1988).
229. *Markwell*, 482 P.3d at 429 (citing Wash. Cnty. Bd. of Equalization v. Petron Dev. Co., 109 P.3d 146, 152 (Colo. 2005)).

Because usage may change, dictionaries published close to the time of enactment are the most persuasive. The following definitions are from *The New Shorter Oxford English Dictionary* (1993), which reflects usage at the time of TABOR's 1992 adoption:

> *preferred*: The first two definitions are not relevant here ("advanced to high office"; "having a prior claim to payment," as in preferred stock). The third is "[m]ost favoured; desired by preference."[230]
>
> *interpretation*: "The action of explaining the meaning of something; *spec.* the proper explanation or signification of something."[231]
>
> *reasonably*: "with good reason, justly."[232] Or as the Colorado Court of Appeals wrote: "'Reasonably' is commonly defined to mean 'in a reasonable manner,' *Webster's Third New International Dictionary* 1892 (2002), and 'reasonable' means '[f]air, proper, or moderate under the circumstances; sensible,' *Black's Law Dictionary* 1456 (10th ed. 2014)."[233]
>
> *restrain*: "1. Hold back or prevent *from* some course of action. ME. [origin in Middle English]. 2. Put a check or stop on, repress, keep down; keep in check, under control, or within bounds; hold in place."[234]
>
> *growth*: "The action, process, or manner of growing; development; increase in size or value."[235]

Thus, "[i]ts preferred interpretation shall reasonably restrain most the growth of government" means "TABOR's most favored signification shall with good reason and sensibly keep down increase in the size of government."[236] If more than one interpretation is plausible, then the correct interpretation is the one that reasonably restrains government growth the most—as the TABOR text states, the leading purpose of TABOR is restraint of government growth.

By *ipse dixit*, the Colorado Supreme Court declared in *Bickel* that the Reasonably Restrain Clause means only that "where multiple interpretations of an Amendment 1 provision are equally supported by the text of that amendment, a court should choose that interpretation which it

---

230. 2 *Preferred*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2331 (1993).

231. 1 *Interpretation*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1399 (1993).

232. 2 *Reasonably*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2496 (1993).

233. Gagne v. Gagne, 338 P.3d 1152, 1160 (Colo. App. 2014); *see also* Oberhamer v. Deep Rock Water Co., No. 06-CV-02284-JLK, 2009 WL 1193737, at *10 (D. Colo. Apr. 29, 2009) (defining "reasonably" based on *Merriam-Webster Online Dictionary* definition of "reasonable": "being in accordance with reason").

234. 2 *Restrain*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2569 (1993) (emphasis in original).

235. 1 *Growth*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1153 (1993).

236. COLO. CONST. art. X, § 20(1). The first quote in the sentence is the text of TABOR; the second quote is a rephrasing of the TABOR quote using equivalent words from the OXFORD ENGLISH DICTIONARY and Colorado case law.

concludes would create the greatest restraint on the growth of government."[237] This *Bickel* dictum, which the court repeated in later cases, nullifies constitutional text, as scholars have observed:

> The language of TABOR that "[i]ts preferred interpretation shall reasonably restrain most of the growth of government" has been rendered virtually meaningless by the Colorado Supreme Court's statement in *Havens v. Board of County Commissioners of Archuleta County*; the court stated that "this principle is applicable only if multiple interpretations are equally supported by the text."[238]

Having refused to apply the Reasonably Restrain Clause in *Bickel* in 2004, the court went a step further in its 2008 case *Barber v. Ritter*.[239] In *Barber*, the court invented an opposite standard of review for TABOR: "The presumption of a statute's constitutionality can be overcome only if it is shown that the enactment is unconstitutional beyond a reasonable doubt."[240]

---

237. Bickel v. City of Boulder, 885 P.2d 215, 229 (Colo. 1994); *see also* Nicholl v. E-470 Pub. Highway Auth., 896 P.2d 859, 867 (Colo. 1995). Some of the court's other statements in *Bickel* about the Reasonably Restrain Clause were well-reasoned. For example, the court held plaintiffs bear the burden to establish that a given interpretation most reasonably restrains the growth of government—a "mere assertion" is "not dispositive." *Bickel*, 885 P.2d at 231. Meeting this burden should be relatively easy. If one interpretation would result in the growth of government revenues, and a different interpretation would result in smaller growth or no growth, then the second interpretation must be "preferred," according to the constitution's text. Additionally, *Bickel* declared that the Reasonably Restrain Clause would not be applied to reach an "absurd result," such as an individual being able to "undermine" taxes and debt authorized by the voters "without presenting any evidence." *Id.* This is consistent with the text, which states that the standard of review is "*reasonably* restrain." COLO. CONST. art. X, § 20(1) (emphasis added).

238. Michael R. Johnson, Scott H. Beck, & H. Lawrence Hoyt, *State Constitutional Tax Limitations: The Colorado and California Experiences*, 35 URB. LAW. 817, 827 (2003) (citing Havens v. Bd. of Cnty. Comm'rs, 924 P.2d 517, 523 n.8 (Colo. 1996)).

239. 196 P.3d 238 (Colo. 2008).

240. *Id.* at 247–48. *Barber* declared that TABOR interpretations that would "hinder basic government functions or cripple the government's ability to provide services" should be avoided. *Id.* at 248. This language in *Barber* can be read in harmony with the Reasonably Restrain Clause. The clause applies only to "the *growth* of government." *Id.* at 247 (emphasis added). Existing government tax and spending is left untouched. The "preferred interpretation" is relevant only when a court must choose between two or more reasonable interpretations, and one of them restrains growth more than the others. However, *Barber* cannot be read to allow for interpretations that would put a judicial thumb on the scales to increase spending or taxation.

As shown in "defund the police" debates, people disagree about which government services are "basic." The Colorado constitution definitively answers the question for at least some government services. The Colorado government must create and operate certain state institutions, including public schools and higher education. COLO. CONST. arts. VIII, IX. There must be certain executive branch officers who must perform certain duties. *Id.* art. IV. There must be a general assembly that must enact certain types of laws. *Id.* art. V; *see also* DAVID B. KOPEL, COLORADO CONSTITUTIONAL LAW AND HISTORY 37–38 (2d ed. 2022) (the 1876 Constitutional Convention of Colorado did not want a "do nothing" legislature; instead, the Convention mandated that the general assembly "shall" enact legislation on numerous topics). There must be general elections, and, by implication, the resources to conduct those elections. COLO. CONST. art. VII. County governments must have certain officers—such as county commissioners, sheriffs, treasurers, attorneys, clerks, and assessors—who must perform certain duties. *Id.* art. XIV. An interpretation of TABOR that would "cripple" any of the above would not be reasonable.

Reasonably restraining the *growth* of any of the above does not "hinder" a basic government function, in a constitutional sense. Any government entity can readily explain how more money would

TABOR's Reasonably Restrain Clause is fundamentally incompatible with the beyond a reasonable doubt standard. Suppose plaintiffs claiming that a governmental action violates TABOR and a government defendant both provide the court with a reasonable interpretation of a particular TABOR provision. The plaintiffs cannot possibly prove beyond a reasonable doubt that their interpretation is correct because both interpretations are reasonable. In such a case, TABOR directs the court to choose whichever interpretation "shall reasonably restrain most the growth of government." Yet in this scenario, the beyond a reasonable doubt standard the Colorado Supreme Court adopted in *Barber* would require the court to automatically rule in favor of the government—to choose the interpretation that will most increase the growth of government. This is the opposite of the result that the constitution's text plainly requires.

If a case involved disputed facts, then *Barber* could plausibly require challengers to prove their facts beyond a reasonable doubt. For example, TABOR exempts tax policy changes that are revenue neutral.[241] Suppose that the legislature lowered the overall state income tax rate and eliminated various deductions that exempt certain income from taxation. If opponents of the new income tax statute thought that the statute was not revenue neutral, then the opponents would have the burden of proving the net revenue increase beyond a reasonable doubt. A fact-based interpretation of *Barber* "beyond a reasonable doubt" is the only way to read *Barber* without bringing *Barber* into direct conflict with express constitutional text.

The Colorado Supreme Court, however, has ventured beyond that permissible interpretation. In *Mesa County Board of Commissioners v. State*,[242] the court reversed a district court decision that had properly applied the Reasonably Restrain Clause.[243] The supreme court reiterated that *Barber*'s "beyond a reasonable doubt" is the standard to apply and the constitution's provided test is not: "[T]he district court did not have the benefit of our recent decision in *Barber v. Ritter* . . . . The trial court erroneously held that the relevant test . . . came from the interpretive guideline included in the text of article X, section 20 . . . ."[244] In dissent, Justice Eid

help it achieve more good. The general assembly could operate better if every member had a full-time professional staff of a half-dozen or more, as members of Congress do. All state institutions could presumably attract even better employees and serve more people by raising the number of employees and their pay, but the constitution does not mandate that government services be maximized. The court said so regarding public school spending, even though the court acknowledged that more funding would be better. *See* Lobato v. State, 304 P.3d 1132, 1144 (Colo. 2013). Likewise, when it was argued that the constitutionally mandated state institution for individuals with mental illness should be expanded to greater patient capacity, the Court agreed, but stated "the appeal for relief should go to the Legislature." Wicks v. City & Cnty. of Denver, 156 P. 1100, 1106 (Colo. 1916).

241. COLO. CONST. art. X, § 20(4)(a).

242. 203 P.3d 519 (Colo. 2009).

243. *Id.* at 522.

244. *Id.* at 523.

wrote, "In my view, the presumption of constitutionality cannot be used as a cover to excise article X, section 20 from our Constitution."[245]

Nullification of TABOR's constitutionally defined standard of review has enabled the court to manipulate two pairs of categories at the heart of TABOR. The first pair consists of taxes (which require voter consent) and fees (which do not). Aided by judicial acquiescence, legislative bodies regularly claim that government exactions that are obviously taxes are merely fees—even when the Colorado constitution specifically labels them as taxes. The second pair of categories consists of districts and enterprises. Districts must receive voter consent to increase taxes or to increase their rate of spending faster than the inflation plus population growth formula permits. In contrast, "enterprises" are government entities that receive less than 10% of their funding from state or local government.[246] Because of their independence from taxes, enterprises do not need voter consent for rapid revenue growth or to increase the prices that they charge their customers. Colorado courts, however, have authorized the creation of fictitious "enterprises" that generate income exclusively from involuntary payments by taxpayers and provide no service to those taxpayers.

C. Taxes Versus Fees

In normal usage, a "fee" is an amount of money voluntarily paid in exchange for a good or service. For example, if you rent a towel at the city's recreation center, then you pay a fee that covers the cost of the recreation center buying and cleaning towels. Or you may have to pay a fee to enter a state park. However, because TABOR requires voter consent to impose or raise taxes but does not impose restrictions on fees, Colorado courts have defined "fee" very broadly and "tax" very narrowly—so narrowly that billions of dollars of additional taxes imposed on, for example, drivers and hospital patients, have been legally classified as fees, thereby avoiding TABOR's taxpayer consent requirement.[247]

TABOR does not define "tax" or "fee." Colorado statutes have always defined specific types of taxes, such as income taxes or gas taxes, but no single statute defines "tax" for all purposes for all levels of state and local government. Likewise, statutes create particular fees, such as for fishing or hunting licenses, but they do not comprehensively define "fee." There being no definitions of "tax" or "fee" in TABOR nor in general statutes, courts have relied on judicial precedents for the meaning of "fee."

---

245. *Id.* at 539 (Eid, J., dissenting); *see also* Daniel D. Domenico, *The Constitutional Feedback Loop: Why No State Institution Typically Resolves Whether a Law is Constitutional and What, If Anything, Should Be Done About It*, 89 DENV. U. L. REV. 161, 187–88 (2011) (describing disparity between *Mesa County* and the constitution).

246. COLO. CONST. art. X, § 20(2)(d) ("'Enterprise' means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.").

247. *See* discussion *infra* Section III.D.

The 1961 case *Western Heights Land Corp. v. City of Fort Collins*[248] concluded that special charges for hookups to a municipal sewer system were not a tax[249] because the sewer charges were to fund the operation of the sewer system, not for general government revenue.[250] In reaching this conclusion, the court disregarded the fact that the government had set sewer charges so high that they not only funded the sewer system but also produced profits that were transferred to the general fund.[251] The court later applied the same logic to "special assessments" for storm drainage.[252] Relying on these Colorado Supreme Court precedents, the court of appeals held that fees can include involuntary payments.[253] The court of appeals also upheld an arrangement that decoupled fees from services, choosing to "defer to the sound discretion of the government agency imposing such fee."[254]

Since the enactment of TABOR, Colorado courts have gone much further. The government can now impose a tax without consent and get away with calling it a "fee" as long as the government puts the money in a separate account.[255]

A so-called fee need not provide a benefit or service to taxpayers who pay the fee. For example, when certain bridges in rural Colorado needed repairs, the legislature could have imposed tolls (which genuinely are fees) on users of the bridges and used the tolls to pay for repairs. Alternatively, the legislature could have been more frugal with other spending and used the savings to pay for bridge repairs. Or the legislature could have asked voters to raise the gasoline tax. Instead, the legislature raised automobile registration taxes, called them "fees," and dedicated the extra revenue to a "Bridge Enterprise Fund"—which the court of appeals approved.[256] The vast majority of people who pay auto registration fees never drive over any of the bridges operated by the so-called enterprise, so they receive zero benefit from the fees.

---

248. 362 P.2d 155 (Colo. 1961).
249. *Id.* at 158.
250. *Id.*
251. *Id.*
252. Zelinger v. City & Cnty. of Denver, 724 P.2d 1356, 1358 (Colo. 1986). People can choose not to rent a towel at the recreation center, visit a state park, or attend a state college. People do not have a choice about whether to use sewers or storm drainage.
253. Bloom v. City of Fort Collins, 784 P.2d 304, 310–11 (Colo. 1989).
254. Westrac, Inc. v. Walker Field, Colo. Airport Auth., 812 P.2d 714, 718 (Colo. Ct. App. 1991). The court pointed to a prior case upholding a ten percent tax on taxicabs accessing Denver's Stapleton International Airport, which had stated that Denver could charge whatever it wanted "in every legal sense as a private owner." *Id.* at 717 (quoting Rocky Mountain Motor Co. v. Airport Transit Co., 235 P.2d 580, 585 (Colo. 1951)). The fee was not "arbitrary" or "confiscatory" because it was reasonably related to the airport's overall operating expenses. *Id.* at 718.
255. *See, e.g.*, TABOR Found. v. Colo. Bridge Enter., 353 P.3d 896, 904 (Colo. App. 2014); Bruce v. City of Colorado Springs, 131 P.3d 1187, 1191 (Colo. App. 2005).
256. "Funding Advancement for Surface Transportation and Economic Recovery Act" (FASTER), COLO. REV. STAT. § 43-4-805 (2024); *TABOR Found.*, 353 P.3d at 904.

A 2018 case challenged the Aspen City Council's imposition of a $0.20 "fee" on paper bags.[257] The city justified the fee by pointing to a San Francisco study that found it costs the government $0.17 per bag to dispose of paper bags by hauling them to a landfill.[258] Aspen rounded up to $0.20 on the theory that it has to transport municipal waste across longer distances than San Francisco.[259] Had the revenue been used simply for waste disposal, the Aspen system would have been a legitimate fee. Instead, most of the money was used to provide multiuse bags to residents and visitors of Aspen, regardless of whether they used paper bags.[260] The Aspen City Council also used these revenues for public relations campaigns on recycling.[261] Hence, the paper bag fee did not benefit paper bag users because the funds collected did not go toward the city's expenses for disposing of paper bags. Yet the supreme court upheld Aspen's system,[262] reasoning that the $0.20 fee would only be a tax if the plaintiffs had proven beyond a reasonable doubt that the fee bore "no reasonable relationship to Aspen's cost of permitting the use of the bag."[263]

While taxpayers have never won a single TABOR case in the Colorado Supreme Court, the Aspen case produced an unusually close 4–3 decision.[264] Justice Coats, joined by Chief Justice Boatright, wrote a dissenting opinion, and Justice Hood dissented separately.[265]

The Coats–Boatright dissent argued that the court's precedent and common sense support

> the intuitive and virtually universally-accepted understanding that a charge for no more than the value or cost of some benefit—whether that be in the form of a privilege, a franchise, a license, a permit, or a good or service—provided by the government to a purchaser, or payer, does not amount to raising revenue at all, but is rather in the nature of a sale or direct exchange of things of comparable value, as in any proprietary transaction.[266]

In other words, if you buy something from the government (e.g., tuition at a state college) and the government sells that thing for the cost of providing it, then the transaction is not "raising revenue at all"; the transaction is a fee, not a tax. Conversely, when the government is not engaging in

257. Colo. Union of Taxpayers Found. v. City of Aspen, 418 P.3d 506, 509 (Colo. 2018) (en banc); ASPEN MUN. CODE § 13.24.030 (2017).
258. *City of Aspen*, 418 P.3d at 509.
259. *Id.*
260. *Id.* at 510; *Single-Use Bag Fee*, CITY OF ASPEN, https://aspen.gov/369/Single-use-bag-fee (last visited Nov. 9, 2024) (noting that old banners recycled into bags are available at City Hall).
261. ASPEN MUN. CODE § 13.24.050(g)(1)–(2).
262. *City of Aspen*, 418 P.3d at 509.
263. *Id.* at 515.
264. *Id.* at 508, 516. In *Bickel v. City of Boulder*, plaintiffs lost on three issues but did prevail on one: the court held that a ballot measure allowing unspecified increases in property taxes to pay an open space bond should have specified the maximum amount of the potential tax increase. 885 P.2d 215, 232–37 (Colo. 1994).
265. *City of Aspen*, 418 P.3d at 516.
266. *Id.* (Coats, J., dissenting).

transactions but is instead exacting money, as Aspen was doing, that is a tax, regardless of the label. In the words of the *Aspen* dissent: "the mere fact that an exaction is imposed for regulatory purposes, or is earmarked to fund a 'regulatory regime,' cannot change its character as a tax or other revenue-raising exaction."[267] To Justice Coats and Chief Justice Boatright, it was

> obvious that a $0.20 charge can in no way reflect the cost of recycling a single paper grocery bag . . . . Rather than the city's general waste reduction program being incidental, in any meaningful sense, to the disposal and recycling of paper grocery bags, it is the latter that is clearly incidental to the former.[268]

The charge on grocery bags was a type of "sin tax"—a tax on certain activities that are considered harmful or immoral, such as tobacco use.[269]

Justice Hood's dissent argued that under the court's precedents, the "primary purpose" of a fee is "to defray the cost of services provided to the payer."[270] Therefore, "there must be a meaningful correlation between the class of people charged and the class of people benefitted."[271] The language of the Aspen ordinance clearly indicated that its primary purpose was to confer benefits (such as environmental education and free bags) on "residents, businesses, and visitors," and the "Aspen community"—not on people who paid the grocery bag tax.[272]

The state budget includes many cash accounts funded by fees. For example, real estate license fees pay for realtor regulation.[273] A special fee on gasoline pays for cleanup of leaking underground storage tanks.[274] Hunting and fishing license fees fund Colorado Parks and Wildlife.[275] The money that government entities collect counts as state government revenue for purposes of TABOR's limits on annual growth of state revenue. From 2001–2004, state general revenues from income taxes and sales taxes declined.[276] Rather than cutting state general spending proportionately, the legislature helped itself to $442 million from thirty-one fee accounts, transferring cash from the accounts to the general fund.[277] Once moved into the general fund, the money was, definitionally, spent on programs that had nothing to do with the reasons for which the fees had been collected. The government agencies that had collected the fees were now

267. *Id.* at 517.
268. *Id.* at 518–19.
269. *Id.* at 519.
270. *Id.* at 520, 522 (Hood, J., dissenting).
271. *Id.* at 521.
272. *Id.* at 522. Had the Aspen City Council bothered to ask the voters of Aspen for consent, the eco-conscious residents might well have voted for a straightforward tax to fund waste reduction and recycling education.
273. COLO. REV. STAT. § 12-10-215.
274. *Id.* § 8-20.5-103.
275. *Id.* § 33-1-112.
276. Barber v. Ritter, 196 P.3d 238, 242 (Colo. 2008).
277. *See id.* at 241.

short of money, so they raised their fees to replenish the funds that the general assembly had raided.[278] The bottom line: money collected as fees for a particular purpose was eventually used as general-purpose tax revenue. As a result, the people who originally paid the fees had to pay increased fees.[279]

The Colorado Supreme Court held that nothing in the chain of events required the people's consent.[280] First, the court held that the money taken from the cash funds should not count as increased state revenue for purposes of TABOR's revenue cap[281] This was correct because the fees had already counted against the cap once—in the year they were collected.[282] To count them as revenue years later, when they were transferred to the general fund, would be double counting. Second, the court held that moving the fee funds into the general fund did not turn them into taxes.[283] The court only cared about how the fees were originally collected, not how they were ultimately spent.[284] Nor did increasing fee amounts to replenish the funds raided by the general assembly count as a tax increase for which voter approval was required.[285] The money was still ostensibly collected as a "fee"—even though the legislature had used the previous fees for purposes other than those for which they were collected.[286]

In 2019, the Colorado general assembly presented the voters with Proposition CC, which would have allowed the legislature to retain revenues above the TABOR limit; the legislature promised that the excess funds would be spent on transportation and education.[287] The voters said no.[288] After the voters demonstrated their belief that the legislature could maintain roads and highways without even more of the taxpayers' money, the 2021 legislature raised the gasoline tax and imposed new taxes on delivery services. This time, the legislature called the new taxes fees.[289] As discussed in the next Section, the government plans to use revenue from many of the new "fees" imposed on drivers and delivery services to

278. *Id.* at 243.
279. *Id.*
280. *Id.* at 241.
281. *Id.* at 242.
282. *Id.*
283. *Id.* at 248–50.
284. *Id.*
285. *Id.* at 251–52.
286. *Id.* at 252.
287. H.R. 19-1257, 74th Gen. Assemb., Reg. Sess. (Colo. 2019).
288. STATE OF COLO., COLORADO COORDINATED ELECTION RESULTS 1 (2019), https://www.coloradosos.gov/pubs/elections/Results/2019/2019StateAbstractCertAndResults.pdf (53.66% opposed).
289. S. 21-260, 75th Gen. Assemb., Reg. Sess. (Colo. 2021) (the additional gasoline tax, labeled a "road usage fee" starts at two cents per gallon in fiscal year 2022–2023, rises by one cent per gallon annually until hitting eight cents, and is thereafter increased annually for inflation).

provide benefits—such as subsidies for electric vehicles—to people other than those paying the fees.[290]

If the Colorado Supreme Court had not nullified the Reasonably Restrain Clause, then the outcomes described above would have been different. If there are reasonable arguments on both sides about whether an exaction is a "tax" or a "fee," then the Reasonably Restrain Clause requires the court to choose the clause that most restrains the growth of government.[291] Thus, the exaction would be classified as a tax, and subject to TABOR's requirement for voter consent.

D. Districts Versus Enterprises

TABOR defines a district as "the state or any local government, excluding enterprises."[292] Districts thus include the state of Colorado, and political subdivisions of the state, such as counties, municipalities, school districts, and special districts.[293]

TABOR applies to "districts" but not to "enterprises."[294] This distinction was once clear. An "enterprise" is an entity that receives less than 10% of its revenue from state or local government.[295] For example, a municipal recreation center that pays over 90% of its costs from user fees can raise its prices for memberships, daily passes, or towel rentals whenever it wants. Government entities that do not qualify as enterprises are "districts" and thus may raise taxes only if the voters consent. Because an "enterprise" receives less than ten percent of its revenue from state or local government, it would be natural to conclude that enterprises are entities that receive most of their revenue from fees that are voluntary transactions—for example, a tollway receives most of its revenue from tolls. However, a loose and hostile interpretation of TABOR—the kind of interpretation that the Reasonably Restrain Clause should forbid—has allowed many

290. Bickel v. City of Boulder, 885 P.2d 215, 235 (Colo. 1994). Another means of raising new taxes has been to combine them with the grant of a franchise to a business monopoly. In a ballot measure that did not comply with TABOR's election rules, Boulder city voters approved a referendum from the city council to grant a heating and electricity monopoly to a utility corporation. The city would impose a franchise fee on the business, which would pass along the fee in the form of higher heating and electricity charges on all residents of Boulder, who would have no choice but to buy from the city's favored monopoly. The Boulder city council recognized that the monopoly and franchise fee might be found to violate state public utility laws. So as a backup, the referendum said that if the franchise fee were declared illegal, then it would be recharacterized as "an occupation or a sales and use tax." *Id.* at 222. Thus, the referendum involved a large contingent tax and should have followed TABOR's rules for ballot measures to raise taxes. But the Colorado Supreme Court held that compliance was not required. According to the court, the ballot measure was "more properly viewed as a ballot issue for the granting of a franchise, rather than one 'for tax or bonded debt increases.'" *Id.* at 235. The court created a false dichotomy; the referendum was for both a franchise grant and a tax increase.

291. COLO. CONST. art. X, § 20.

292. COLO. CONST. art. X., § 20(2)(b).

293. *Id.* "A municipality or county that adopts home rule is not exempt from TABOR. HCA-HealthOne, LLC v. City of Lone Tree, 197 P.3d 236, 241 (Colo. App. 2008); COLO. CONST. art. XX (constitutional provisions for home rule).

294. COLO. CONST. art. X., § 20(2)(b) (all the TABOR restrictions apply only to a "district").

295. COLO. CONST. art. X., § 20(2)(d).

government operations to escape TABOR by relabeling themselves as enterprises even though almost all of their income comes from tax revenues.

TABOR defines enterprises according to several characteristics. First, enterprises are "government-owned business[es] authorized to issue [their] own revenue bonds."[296] Revenue bonds include pledges to use a particular income stream (not general revenues) to repay a debt. For example, a municipal recreation center issues bonds to expand its buildings; the bonds are backed only by the recreation center's income from users, not by the municipality's general revenues. Early judicial decisions about TABOR enterprises were reasonable. A "business" was judicially defined as an entity "engaging in an activity conducted in the pursuit of benefit, gain[,] or livelihood."[297] A business cannot tax; it can only acquire revenues from voluntary transactions. Thus, the fact that the E-470 Public Highway Authority could impose taxes meant that it was a district, not an enterprise.[298] Subsequently, the general assembly revoked E-470's taxing powers so it could be an enterprise.[299]

The key characteristic of an enterprise is "receiving under 10% of annual revenue in grants from all Colorado state and local governments combined."[300] But this provision is now riddled with loopholes—some from TABOR's text and some from judicial interpretation. TABOR's 10% limit includes "grants from all Colorado state and local governments combined,"[301] so federal grants do not count against the limit according to TABOR's text. By judicial interpretation, Colorado government cash grants count, but grants of other property, such as real estate or capital assets, do not.[302] A government entity that receives most of its revenue from mandatory fees is, according to Colorado courts, still an enterprise.[303] Similarly, an enterprise need not win customers in the marketplace. Rather, its "customers" can consist entirely of other units of government that are forced to give their money to the alleged enterprise.[304]

Today, most of Colorado's spending has been exempted from TABOR. According to the state auditor, total state spending for fiscal year 2023–2024 was nearly $70 billion, including pass-through federal

296. *Id.*; Freedom Newspapers, Inc. v. Tollefson, 961 P.2d 1150, 1158 (Colo. App. 1998) (explaining that enterprises are government businesses—although they receive certain exemptions from TABOR, they must still comply with other laws that regulate governments, such as the Open Records Act).

297. Nicholl v. E-470 Pub. Highway Auth., 896 P.2d 859, 868 (Colo. 1995).

298. *Id.*

299. *In re* The Petition of the E-470 Pub. Hwy. Auth., No. 96-CV-946 (Colo. Dist. Ct. June 26, 1996).

300. COLO. CONST. art. X, § 20(2)(d); COLO. REV. STAT. § 24-77-102(3) (2024) (codifying TABOR rule).

301. COLO. CONST. art. X., § 20(2)(d).

302. TABOR Found. v. Colo. Bridge Enter., 353 P.3d 896, 905–06 (Colo. App. 2014).

303. *Id.* (describing pass-through of automobile registration "fee" on automobile owners for use of bridges that they do not use); Bd. of Cnty. Comm'rs v. Fixed Base Operators, Inc., 939 P.2d 464, 468–69 (Colo. App. 1997) (describing pass-through of "fees" on airport travelers).

304. Colo. Att'y Gen., Formal Op. No. 95-7 (1995); Colo. Att'y Gen., Formal Op. No. 16-01 (2016) (describing courts' loose standards for what constitutes an enterprise).

grants.[305] The operating budget appropriated by the general assembly for fiscal year 2023–2024 was $38.9 billion.[306] Capital construction spending that year was an additional $505 million.[307] Thus, the general assembly appropriated approximately $39.4 billion in state funds.[308] Of this, only $20.2 billion was classified as "nonexempt" from TABOR.[309] According to a 2022 Legislative Council memorandum, enterprise revenues exempt from TABOR grew from $742 million in TABOR's first year to $27.1 billion in fiscal year 2020–2021.[310] Some of the TABOR-exempt state spending was lawfully exempted by the voters as described below.[311]

Today, 71% of state government spending (some of which is on autopilot and is not annually appropriated) is classified as "enterprises," meaning that it is exempt from TABOR.[312] Putting aside the Higher Education Enterprise, "total enterprise revenue grew from $97 per Coloradan in 2000 to $1,295 in 2023."[313] While Colorado's nominal state income tax rate is 4.4%, the nonvoluntary fees impose the equivalent of 2.75% more,

305. COLO. OFF. OF THE STATE AUDITOR, PERFORMANCE AUDIT NO. 2357P, SCHEDULE OF TABOR REVENUE FISCAL YEAR 2023, at 7 (2020), https://leg.colorado.gov/sites/default/files/documents/audits/2357p_schedule_of_tabor_revenue_fy23_0.pdf (identifying total state spending for fiscal year 2023–2024 as $69,992,353,065). This number includes federal grants, which are exempt from TABOR. COLO. CONST. art. X., § 20(2)(e) ("'Fiscal year spending' means all district expenditures and reserve increases except, as to both, those . . . from . . . federal funds . . . .").

306. JOINT BUDGET COMM., STATE OF COLO., APPROPRIATIONS REPORT FISCAL YEAR 2023–24, pt. I-12 (2023) https://spl.cde.state.co.us/artemis/gaserials/ga39internet/ga39202324internet.pdf (subtracting $2.6 billion in reappropriated funds from the topline figure of $41.5 billion).

307. *Id.* pt. II-127 (showing precisely, $504,737,443; of this, one-half of one percent was from federal funds).

308. This figure includes the $38.9 billion operating budget plus $505 million capital construction.

309. COLO. OFF. OF THE STATE AUDITOR, *supra* note 305 (identifying the exact number at $20,225,929,940).

310. Memorandum on State Gov't Enters. from Elizabeth Ramey, Legis. Council Staff, to Interested Persons 2 (Aug. 30, 2022), https://www.leg.colorado.gov/sites/default/files/r21-99_state_government_enterprises_0.pdf.

311. Some of the exempt revenue is from genuine enterprises, including some higher education and the lottery proceeds that are granted to Great Outdoors Colorado. LANG SIAS, ERIK GAMM, & ALEX STEVINSON, COMMON SENSE INST., SNAPSHOT OF FEES IN COLORADO: 2024 UPDATE 10 (2024), https://www.commonsenseinstituteus.org/colorado/research/taxes-and-fees/snapshot-of-fees-in-colorado-2024-update (listing the following enterprise funds and 2023 revenue: Higher Education Enterprises (13,937,749,908); Colorado Healthcare Affordability & Sustainability Enterprise (the hospital tax discussed in this Section) (5,148,694,666); CollegeInvest (1,178,278,868); State Lottery (892,346,392); College Assist (550,536,971); Unemployment Compensation Section (488,067,809); Health Insurance Affordability Enterprise (386,189,018); Parks and Wildlife (329,841,605); Bridge and Tunnel Enterprise (118,892,323); State Nursing Homes (64,972,665); Statewide Transportation Enterprise (49,848,148); Correctional Industries (43,901,395); Family and Medical Leave Insurance (41,969,927); Petroleum Storage Tank Fund (33,791,358); Community Access Enterprise (19,400,000); Clean Motor Vehicle Fleet Enterprise (17,300,000); 988 Crisis Hotline (10,134,849); Air Pollution Mitigation Enterprise (9,200,000); Clean Transit Enterprise (8,400,000); Brand Board (6,508,013); Front Range Waste Diversion Enterprise (5,010,029); Clean Screen Authority (4,040,845); Electronic Recording Technology Fund (534,830); Capitol Parking Authority (1,424,895); Orphaned Wells Enterprise (390,592); Air Quality Enterprise (167,620); Natural Disaster Mitigation (16,275); Student Loan Program (0)); *see also* STATE OF COLO., ABSTRACT OF VOTES CAST 154, 166 (1996) (regarding the Unemployment Compensation Section "enterprise" being exempted from TABOR; in 1996 Colorado voters rejected by 376,860 to 908,476 a proposal to amend TABOR to take unemployment compensation taxes off the books).

312. *See* SIAS, GAMM, & STEVINSON, *supra* note 311, at 5.

313. *Id.*

making the total effective Colorado income tax rate 7.15%.[314] Since 2018, the voters have cut the state income tax rate by .23%, but fee increases since then have effectively added .51% to the effective state income tax rate.[315] Colorado's nominal income tax rate of 4.4% ranks it as the fourteenth-lowest in the United States, but when one accounts for involuntary "fees" for fictitious enterprises, the income tax rate of 7.15% makes Colorado taxes the eleventh-highest nationally.[316]

The Colorado Healthcare Affordability and Sustainability Enterprise receives its income from the Healthcare Affordability and Sustainability Fee[317]—an annual tax of more than one billion dollars on hospitals.[318] This tax revenue pays for a portion of Colorado's matching funds for the federal Medicaid program.[319] Medicaid provides medical care for low-income individuals and individuals with disabilities. Pursuant to the "enterprise" statute, hospitals pay the bed fee, which is a tax on patient care.[320] Hospitals receive some of this money back as compensation for their care of patients on Medicaid.[321] Some hospitals are net losers in this exchange, while others make a profit.[322]

---

314. *Id.* (showing that in fiscal year 2023, enterprise revenue was $23.3 billion); *id.* at 10 (showing that of this total, $13,937,749,908 came from Higher Education Enterprises, which means non-higher education enterprise revenue was approximately 9.4 billion dollars); *id.* at 5 (calculating that direct state income tax payments for these 9.4 billion dollars would raise the income tax rate by 3.28% (7.68% minus 4.4%); *id.* at 9, 10 (suggesting that three important enterprises should be subtracted from the calculations: The CollegeInvest program ($1,178,278,868 in FY 2023) is a voluntary program for people to save for college education expenses. Parks and Wildlife ($329,841,605) is mainly funded by hunting and fishing licenses. Capitol Parking (1,424,895) is for people who choose to park in government lots near the Capitol. Subtracting these from the 9.4 billion dollar figure leaves us with approximately $7.89 billion. 7.89 billion is 83.9% of 9.4 billion. Multiplying the 3.28% income tax increase by .839 equals 2.75%.).

315. *Id.* at 5.

316. ARTHUR B. LAFFER, STEPHEN MOORE, & JONATHAN WILLIAMS, THE RICH STATES, POOR STATES: ALEC-LAFFER STATE ECONOMIC COMPETITIVENESS INDEX (17th ed. 2024), https://www.richstatespoorstates.org/app/uploads/2024/04/2024-17th-RSPS-State-Pages_WEB.pdf; *see also Top Marginal Personal Income Tax Rate*, RICH STATES, POOR STATES (Jan. 1, 2024), https://www.richstatespoorstates.org/variables/personal_income_tax_rate/ (showing states ranked by top income rate).

317. COLO. REV. STAT. § 25.5-4-402.4 (2024).

318. SIAS, GAMM, & STEVINSON, *supra* note 311, at 10. The revenue for fiscal year 2023–2024 was $1,310,113,321 and is expected to rise to $1,487,138,292 in FY 2026–2027. *FY 2024–25 Budget Request*, DEP'T OF HEALTH CARE POL'Y AND FIN. (Nov. 1, 2023), https://hcpf.colorado.gov/budget/fy-2024-25-budget; DEP'T OF HEALTH CARE POL'Y AND FIN., COLORADO HEALTHCARE AFFORDABILITY AND SUSTAINABILITY ENTERPRISE UPDATE 1 (2024), https://hcpf.colorado.gov/sites/hcpf/files/FY%202025-26%2C%20CHASE%20Update%20November%202024%20Final.pdf.

319. COLO. REV. STAT. § 25.5-4-402.4 (2024).

320. *Id.* § 25.5-4-402.4(4) (The enterprise is authorized to impose a "healthcare affordability and sustainability fee" of an amount chosen by the enterprise "on outpatient and inpatient services provided by all licensed or certified hospitals.").

321. *Id.* § 25.5-4-402.4.

322. Appellants' Answer-Reply Brief at 6–7, TABOR Found. v. Colo. Dep't. of Health Care Pol'y & Fin., No. 2019 CA 621 (Colo. App. Dec. 13, 2019), 2019 WL 13421505, *appeal docketed*, 487 P.3d 1277 (Colo. App. 2020) ("It is undisputed that Ms. Sopkin paid for private health insurance while she received medical services at Lutheran Medical Center in May 2012. CF, p. 436, ¶ 6; CF, pp. 1726–29. During fiscal year 2011–12, Lutheran Medical Center received $445,000 less than it paid in charges under the Hospital Provider Charge program. CF, p. 1456 (detailing Lutheran Medical

When governments raise taxes on business provision of services to consumers, businesses usually pass on some of the higher costs to the consumers. Just like any other cost increase to a service provider, the state tax forces hospitals to raise prices; thus for patients who pay out of pocket or who have insurance end up paying more (such as via higher insurance premiums due to higher hospital charges on insured patients) in order to subsidize the medical care of other people.[323] This operates as a tax, not a fee. By design, the ultimate payer of the fee—the insured patient—receives no benefit from it. Indeed, the benefit is earmarked for someone who is definitionally not the payer—Medicaid patients.

In a case challenging the new health care taxes, the court of appeals held that none of the plaintiffs had standing.[324] The court acknowledged that in Colorado, taxpayers have standing "to seek to enjoin an unlawful expenditure of public funds."[325] However, a plaintiff must "establish a clear nexus between her status as a taxpayer and the constitutional violation she alleges."[326] According to the foundational case on taxpayer standing, "[T]he interest of the taxpayer who challenges the constitutionality of government action is her 'economic interest in having h[er] tax dollars spent in a constitutional manner.'"[327] In this case, the hospitals, not the individuals and taxpayer organization who brought the challenge, paid the tax.[328] The hospitals were not complaining about the tax; on the contrary, they had lobbied for it, and they intervened in the case as defendants.[329] The bed tax covertly increased prices for some patients. The Colorado statute that created the bed tax forbids hospitals to disclose it as a line item on hospital bills.[330] Undoubtedly, the hospitals who pay the bed tax would have standing. But hospitals were defending the bed tax, not challenging it.[331]

Center's losses). Because Lutheran Medical Center lost money in the program, it had to recoup those losses from patients using private insurance, like Ms. Sopkin. Defendant-Intervenor-Appellee Colorado Hospital Association ("CHA") admitted this to the court below, stating, 'some of the costs entailed in operating the provider fee may be subsumed in hospital bills generally (like any element of overhead)[.]' CF, p. 1267; *see also* CF, pp. 1525–26 ('Hospitals neither pay the same charges nor receive the same supplemental payments. In practice, the patients who pay the fees at hospitals that routinely pay more in fees than they receive in supplemental payments likely get fewer services than they pay for.'). Thus, Ms. Sopkin suffered an economic injury when she used services at Lutheran Medical Center and was required to pay for a portion of the losses it suffered because it was forced to pay the Hospital Provider Charge.").

323. Patients typically do not have the time to shop among hospitals for best prices, to the limited extent that hospitals disclose prices in advance.

324. TABOR Found. v. Colo. Dep't of Health Care Pol'y and Fin., 487 P.3d 1277, 1279 (Colo. App. 2020).

325. *Id.* at 1280 (quoting Nicholl v. E-470 Pub. Highway Auth., 896 P.2d 859, 866 (Colo. 1995)).

326. *Id.* at 1281 (quoting Reeves-Toney v. Sch. Dist. No. 1, 442 P.3d 81, 87 (Colo. 2019)).

327. *Id.* (quoting Conrad v. City & Cnty. of Denver, 656 P.2d 662, 668 (Colo. 1982) (brackets in original)).

328. *Id.*

329. *Id.* at 1279–80.

330. *Id.* at 1283.

331. *Id.* at 1279–80, 1283.

In response, the plaintiffs argued that their tax dollars were involved.[332] Although hospitals pay the tax first, they then pass it on to patients. Some patients pay hospitals directly, and others pay via insurance. When insurance companies must pay hospitals more, they raise patients' premiums. One way or another, patients pay at least some of the new hospital taxes.

According to the Colorado Hospital Association's brief in district court,

> [t]he hospital provider fees are not passed through to patients as charges on bills or otherwise. While some of the costs entailed in operating the provider fee may be subsumed in hospital bills generally (like any element of overhead), there is no pass-through or linear relationship between the hospital provider fee and hospital charges.[333]

In other words, hospitals do not include the fee as a line item on hospital bills because the statute outlaws this disclosure. Instead, hospitals count the fee as part of their "overhead."[334] In patient bills, the fee is charged silently—"subsumed" in "overhead."[335]

To the court of appeals, the indirect nature of the pass-through meant that none of the plaintiffs could specifically prove that patients received higher hospital bills as a result.[336] Therefore, no plaintiffs had standing. Accordingly, the court could not rule on the merits of whether the new hospital tax violates TABOR.[337] Stated another way: the legislature raised the price of medical care for a select group of patients by over a billion dollars annually; the money was shuffled around among various hospitals, with some hospitals being net revenue gainers, and others net losers. The revenue was used to pay for the health care of other persons. Because the general assembly had so carefully muddled the money flow, and had outlawed cost disclosure, none of the patients who were paying the extra billion dollars a year could prove they were paying more, so none of them had taxpayer standing.[338]

---

332. *Id.* at 1282–83.
333. *Id.* at 1283.
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.* at 1283–84.
338. Another evasion to take substantial amounts of government spending off the books for TABOR purposes involves special purpose authorities. These entities created by the general assembly are governed by appointed boards and have a limited degree of autonomy. COLO. REV. STAT. § 29-4-1104(2)(a)–(b) (2024) (governing takes place by a fourteen-member appointed board). While they lack the power to tax directly, they may be able to issue bonds. COLO. REV. STAT. §§ 29-4-1105 to -1109 (2024) (allowing the Colorado Middle Income Housing Authority the power to issue bonds for housing construction). Some of them have the power of eminent domain. ROBERT G. NATELSON, INDEP. INST., IP-3-2016, THE COLORADO TAXPAYER'S BILL OF RIGHTS 19 (2016). Among the largest are the Colorado Housing and Finance Authority, the Colorado Water Resources and Power Development Authority, and the Colorado Agricultural Development Authority. COLO. REV. STAT. § 24-77-102(15)(b)(I), (III), (VIII) (2024). Pursuant to TABOR, these authorities are to be classified

In 2020, voters approved Proposition 117, a statutory initiative to require voter consent for new enterprises with anticipated revenues of over $100 million in their first five years.[339] In 2021, the legislature designed a fee revenue dispersal scheme to avoid triggering the Proposition 117 requirement for voter consent. The legislature raised the gas tax by calling it a "fee" and imposed new "fees" on delivery services and rental cars.[340] These new fees were predicted to bring in approximately $200.4 million of revenue for fiscal year 2023–2024.[341] To evade the requirement for a vote on new enterprises with forecasted five-year revenues over $100 million, the legislature divided the money from the new fees between one existing enterprise and four new ones; three of the five are dedicated to subsidizing electric vehicles.[342] In other words, people who drive gasoline-powered automobiles must pay a "road usage fee," but most of the fee revenue is not spent on roads; instead, it is redirected to the electric car industry and its customers. Some of the money also goes to the Highway Users Tax Fund, which is not an enterprise but an account that holds gas tax revenues dedicated to highways and federal highways grant funds.[343]

Even though the legislature designed its fee revenue dispersal scheme to keep any single one of the enterprises from triggering the Proposition 117 requirement for voter consent, subsection (2) of Proposition 117 states: "Revenue collected for enterprises created simultaneously or within the five preceding years serving primarily the same purpose shall be aggregated in calculating the applicability of this section."[344] Thus, the three enterprises dedicated to electric vehicles should be aggregated. However, a state district court ruled that the five different enterprises—even the three whose purposes were to subsidize electric vehicles, were to "serve different primary purposes."[345]

---

either as districts or as enterprises, depending on the composition of their revenue streams. COLO. CONST. art. X § 20(2)(b), (d) (meaning if more than 10% of revenue comes from Colorado taxes, the entity should be a district). However, the legislature has declared that the special purpose authorities it creates are not government entities at all, rendering TABOR's spending limits inapplicable. COLO. REV. STAT. § 24-77-102(15) (2024). *Cf. In re* Interrogatories by Colo. State S., 566 P.2d 350, 355–57 (Colo. 1977) (suggesting that the declaration is based on the Colorado Supreme Court's prior holding that special purpose authorities created by the state government are not government entities).

339. COLO. REV. STAT. § 24-77-108 (2024).

340. LEGIS. COUNCIL STAFF, FINAL FISCAL NOTE: SB 21-260, at 2–3 (2021), https://leg.colorado.gov/sites/default/files/documents/2021A/bills/fn/2021a_sb260_f1.pdf.

341. *Id.* at 1, 6–7.

342. Community Access Enterprise (to promote adoption of electric vehicles in an equitable manner); Clean Fleet Enterprise (to subsidize electric vehicles and fleets); Statewide Bridge and Tunnel Enterprise; Nonattainment Area Air Pollution Mitigation Enterprise (to collect fees on riders and on retail delivery); Clean Transit Enterprise (to subsize electric vehicles for government transit agencies). LEGIS. COUNCIL STAFF, FINAL FISCAL NOTE: SB 21-260, at 3–4 (2021).

343. COLO. REV. STAT. § 43-4-201 to -217.

344. COLO. GEN. ASSEMBLY, 2020 STATE BALLOT INFORMATION BOOKLET 74–75 (2020), http://leg.colorado.gov/sites/default/files/blue_book_english_for_web_2020_0.pdf.

345. Order Re: Defendants' Motion for Summary Judgment at 15–16, Ams. for Prosperity v. State, No. 2022-CV-30971 (Colo. Dist. Ct. Apr. 29, 2024), https://wp-cpr.s3.amazonaws.com/uploads/2024/04/ORDER-RE_-DEFENDANTS-MOTION-FOR-SUMMARY-JUDGMENT.pdf.

Colorado Constitutional Convention delegates were familiar with fictitious enterprises. Article XV, on corporations, declares:

> [A]ll fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock, first obtained at a meeting held after at least thirty days' notice given in pursuance of law.[346]

Fictitious stocks take property from shareholders;[347] fictitious enterprises take property from taxpayers—in both cases, the taking occurs "without the consent of the persons."[348] Article XV of the Colorado constitution outlawed fictitious organizations for transferring wealth without consent, but they have returned in the form of the fictitious enterprises designed to evade TABOR's restrictions.

Again, the problem exists because the Colorado Supreme Court has chosen to ignore the Reasonably Restrain Clause. Under this clause, if there are reasonable pro/con arguments about whether a government entity is an enterprise or a district, a court must classify the entity as a district, because the classification most reasonably restrains the growth of government. Classification as a district requires the entity to ask for voter approval when its spending growth exceeds inflation plus population growth. But instead, the courts allow the legislature to get away with putting the "enterprise" label on anything it wants.

E. Tax Policy Changes

Tax policy changes can increase government revenue even when tax rates stay the same. For example, if the legislature repeals certain income tax deductions, then taxpayers' taxable incomes will be higher, and the government will raise more income tax revenue. TABOR requires a vote on all tax policy changes that directly increase a district's net revenue.[349]

In 2009, the Colorado Supreme Court nullified this provision of TABOR.[350] Under TABOR, voters can allow a district to retain excess tax revenue. For example, consider a municipality where the population did not change, annual inflation was 3%, and government revenues grew eight percent; voters can choose to allow the municipal government to keep the

346. COLO. CONST. art. XV, § 9.

347. Loud v. Solomon, 154 N.W. 73, 75 (Mich. 1915) (quoting WILLIAM W. COOK, A TREATISE ON STOCKS AND STOCKHOLDERS, BONDS, MORTGAGES AND GENERAL CORPORATION LAW § 13 (1894)) ("By watered or fictitious stock is meant stock which is issued as fully paid up, when in fact the whole amount of the par value thereof has not been paid in. If any amount less than the whole face value of the stock has not been paid, and the stock has been issued as fully paid, then the stock is watered to the extent of the deficit. Watered stock is, accordingly, stock which purports to represent, but does not represent, in good faith, money paid in the treasury of the company, or money's worth actually contributed to the working capital of the concern.").

348. COLO. CONST. art. XV, § 9.

349. COLO. CONST. art. X, § 20(4)(a).

350. *See* Mesa Cnty. Bd. of Cnty. Comm'rs v. State, 203 P.3d 519, 536 (Colo. 2009) (en banc).

extra 5%, rather than refunding it. According to the court, when voters allow a district to retain excess revenue, they implicitly waive their right to vote on tax policy changes.[351] The court held that tax policy changes only require a vote if the new policies would cause a district to exceed its revenue caps.[352] But the opinion failed to account for the fact that TABOR separately requires voter approval for revenue increases above the cap, for any reason.[353] An express voter decision to waive the revenue limits cannot plausibly be claimed to be a waiver of tax policy changes.

In 2021, the legislature enacted tax policy changes to raise Coloradans' taxes by $372.3 million annually without asking for voters' consent.[354] Some of the new revenue was offset by reductions of the business personal property tax and by expansion of the Earned Income Tax Credit (EITC) and Child Tax Credit (CTC).[355] EITC and CTC are partially tax credits and partially welfare spending programs, because the so-called tax credits are "refundable."[356] To the extent that the EITC or CTC fully offset the amount that an individual owes in Colorado state income taxes, they are genuine tax credits. But the "refundable" EITC or CTC payment can exceed the amount of income tax owed individual. To the extent that the EITC or CTC pays individuals *more* than what they owe in taxes, the programs are welfare payments to those individuals, not tax reductions.[357] And even if one counts all the EITC/CTC expansion as if it were tax reduction, the tax policy changes raised state revenue by $57.2 million for fiscal year 2023–2024.[358] But because these tax policy changes did not cause the state government to exceed its fiscal year spending cap, the Colorado Supreme Court's precedent denies voters the opportunity to approve it. As a result, the general assembly helped itself to hundred of millions of dollars of increased annual revenue by eliminating or reducing various tax deductions and exemptions, and giving most of the money to people who do not pay income taxes.

---

351. *See id.* at 529.

352. *Id.*

353. "[D]istricts must have voter approval in advance for . . . a tax policy change directly causing a net tax revenue gain to any district." COLO. CONST. art. X, § 20(4)(a).

354. BEN MURREY & MARK BERNDT, INDEP. INST., IP-1-2024, COLORADO TAX EXPENDITURE MODIFICATIONS, 2023: SPECIAL INTEREST TAX BENEFITS VS. BROAD-BASED TAX RELIEF 26–27 (2024), https://i2i.org/wp-content/uploads/IP_1_2024_g.pdf. The figure is for the total tax increase for fiscal year 2022–2023. Net revenues are lower because of increases in some tax deductions or credits and additional spending on EITCs.

355. LEGIS. COUNCIL STAFF, REVISED FISCAL NOTE: HB 21-1311, at 7 (2021); Ben Murrey, *To Keep Campaign Promise, Polis Must Veto House Bill 1311*, COMPLETE COLO. (June 5, 2021), https://pagetwo.completecolorado.com/2021/06/05/murrey-to-keep-campaign-promise-polis-must-veto-house-bill-1311/.

356. MURREY & BERNDT, *supra* note 354, at 11, 19.

357. *Id.* at 27.

358. LEGIS. STAFF COUNCIL, REVISED FISCAL NOTE: HB 21-1311, at 1, 5 (2021); MURREY & BERNDT, *supra* note 354.

F. Preservation of Prior Limits on Taxes and Spending

According to TABOR's first paragraph, "[o]ther limits on district revenue, spending, and debt may be weakened only by future voter approval."[359] When the voters enacted TABOR in 1992, there were two major "other limits" already in existence. At the state level, the Arveschoug–Bird statute limited annual increases in general fund appropriations to six percent.[360] For local governments, another state statute limited annual property tax growth to 5.5% for counties and for non-home-rule municipalities.[361]

Nevertheless, the legislature has greatly weakened Arverschoug–Bird and never asked voters for approval.[362] The legislature justified its actions by asserting that Arverschoug–Bird was not one of the "other limits" TABOR that referred to because it had not been effective in limiting increased general fund spending.[363] But the legislature's actions undermines this argument: if Arverschoug–Bird were not effective at limiting

359. COLO. CONST. art. X, § 20(1).

360. H.R. 91-1262, 58th Gen. Assemb. (Colo. 1991) (Colo. L. No. 91-166), *amending* inter alia COLO. REV. STAT. § 24-75-201.1. The statute was not formally titled Arveschoug–Bird, but it was commonly called by that name, for its sponsors, Representative Steve Arveschoug and Senator Mike Bird. As noted above, the general fund comprises around half of the annual state budget and only about a quarter of all state government spending.

361. COLO. REV. STAT. § 29-1-301(1)(a).

362. *See* Act of May 1, 2009, ch. 211, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d) (2009)); Act of June 1, 2009, ch. 331, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d) (2009)); Act of June 3, 2009, ch. 410, §§ 7–9 (codified as amended at COLO. REV. STAT. 24-75-201.1(1) (2009)); Act of Mar. 9, 2011, ch. 9, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1) (2011)); Act of June 9, 2011, ch. 305, § 5 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d)(XI.5) (2011)); Act of May 24, 2012, ch. 206, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(e) (2012)); Act of Apr. 29, 2013, ch. 155, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1) (2013)); Act of Apr. 21, 2014, ch. 129, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1) (2014)); Act of June 6, 2014, ch. 378, § 48 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(b) (2014)); Act of May 1, 2015, ch. 137, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1) (2015)); Act of May 11, 2015, ch. 179, § 3 (codified as amended at COLO. REV. STAT. 24-75-201.1(2) (2015)); Act of May 4, 2016, ch. 136, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d) (2016)); Act of May 4, 2016, ch. 153 § 26 (codified as amended at COLO. REV. STAT. 24-75-201.1(1) (2016)); Act of June 10, 2016, ch. 289, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d) (2016)); Act of Apr. 28, 2017, ch. 168, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d) (2017)); Act of May 25, 2017, ch. 264, § 77 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d) (2017)); Act of June 1, 2018, ch. 357, § 2 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)–(2) (2018)); Act of June 22, 2020, ch. 117, § 2 (codified as amended at COLO. REV. STAT. 24-75-201.1(2)(d) (2020)); Act of June 30, 2020, ch. 209, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d) (2020)); Act of May 13, 2021, ch. 134, § 3 (codified as amended at COLO. REV. STAT. 24-75-201.1(2)(d) (2021)); Act of May 17, 2021, ch. 150, § 1 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d) (2021)); Act of Apr. 20, 2023, ch. 89, § 5 (codified as amended at COLO. REV. STAT. 24-75-201.1(2)(e) (2023)); Act of Apr. 29, 2024, ch. 133, § 14 (codified as amended at COLO. REV. STAT. 24-75-201.1(2)(e) (2024)); Act of May 1, 2024, ch. 143, § 3 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d)(XXIII) (2024)); Act of June 5, 2024, ch. 429, §§ 5–6 (codified as amended at COLO. REV. STAT. 24-75-201.1(1)(d)(XXIII) (2024)).

363. The legislative rationale was based on an analysis by former Supreme Court Justice Jean Dubofsky. John Tomasic, *Ritter Signs Budget Reform Bill, Ends Reign of Arveschoug-Bird*, COLO. INDEP. (June 3, 2009), https://www.coloradoindependent.com/2009/06/03/ritter-signs-budget-reform-bill-ends-reign-of-arveschoug-bird/; Colo. Att'y Gen., Formal Op. No. 98-02 (1998), *modified by*, Colo. Att'y Gen., Formal Op. No. 99-05 (1999); Johnson, Beck, & Hoyt, *supra* note 238, at 820–21.

spending, then the general assembly would not have bothered to weaken it.[364]

In 1994 and 1997, La Plata County asked its residents to waive the TABOR revenue caps, and they assented.[365] The court of appeals held that La Plata County voters had also waived the statutory 5.5% limit on property tax revenue increases, which was one of the "[o]ther limits on district revenue," that according to TABOR, may only be changed with voter approval.[366] Although the La Plata ballot measure never even the mentioned the 5.5% cap, the court held that the 5.5% had been implicitly waived by ballot language that said the county could keep revenue "without any other condition or limitation."[367] Like adhesion contracts offered by big businesses, tax and spending referenda seem to hide their most extreme waivers of rights among a mass of otherwise reasonable language.

G. Enforcement Lawsuit Constriction

TABOR is self-executing—it does not rely on government officials to limit their own powers to tax and spend.[368] Foreseeing the likelihood of government hostility and noncompliance, TABOR's drafters also included language authorizing citizens to bring enforcement actions.[369] To facilitate these lawsuits, TABOR provides that enforcement suits shall receive top judicial priority among civil cases.[370] Unlike in federal courts, Colorado legal doctrine has long granted standing to taxpayers to challenge unlawful expenditures of taxpayer money.[371] However, Colorado courts have recently narrowed this doctrine, as demonstrated by the Colorado Court of Appeals opinion denying taxpayers standing to sue in the hospital bed tax case.[372]

Courts have held that TABOR's encouragement of taxpayer suits does not alter the general rule that local governments, such as counties, do not have standing to sue except when conferred by statute.[373] By taking local governments out of the picture as potential plaintiffs, the county standing rule prevents protaxpayer local governments, who have full-time lawyers on staff, from using their lawyers to fight for taxpayer interests. Meanwhile, the state government or other local governments can use their

364. *See* Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV 1265, 1305–06 (2007) (describing how Arveschoug–Bird limited spending in 1993–1995 and 2005–2006).
365. Wilber v. Bd. of Cnty. Comm'rs, 42 P.3d 49, 50 (Colo. App. 2001).
366. *Id.* at 50–52; *see also* COLO. CONST. art. X, § 20.
367. *Wilber*, 42 P.3d at 50.
368. COLO. CONST. art. X, § 20(1).
369. *Id.*
370. *Id.*
371. *See, e.g.*, Conrad v. City & Cnty. of Denver, 656 P.2d 662, 668 (Colo. 1982).
372. *See* TABOR Found. v. Colo. Dep't of Health Care Pol'y and Fin., 487 P.3d 1277, 1283 (Colo. App. 2020).
373. Bd. of Comm'rs of the Cnty. of Boulder v. City of Broomfield, 7 P.3d 1033, 1037 (Colo. App. 1999), *cert. granted* (Sept. 11, 2000), *cert. denied as improvidently granted* (Feb. 5, 2001).

own full-time lawyers to fight against taxpayers' claims that their rights have been violated.

To encourage private enforcement, TABOR provides: "Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous."[374] The Colorado Supreme Court held that awards of attorney fees and court costs are optional, based on the judge's discretion.[375] Posing as the taxpayers' friend, the court invoked "Amendment 1's overarching goal of limiting government spending."[376] The court's purported concern for frugality ignored the obvious fact that a successful suit will typically recover or save amounts of taxpayer money far in excess of the amount of attorney fees and court costs. Moreover, few private individuals can afford to pay for a lawsuit, and attorneys' pro bono time is finite. By preventing plaintiffs from recovering fees and costs in successful private enforcement suits, the court has decreased the likelihood of taxpayers challenging TABOR violations in court.

H. Local Opt-Out of Mandates

State governments often try to evade tax or expenditure limits by ordering local governments to perform certain tasks without compensation.[377] TABOR section 9 provides a process for local governments to withdraw from state mandates:[378] local governments must give ninety days' notice, and the withdrawal must be in take place of three years—with equal annual step reductions in local government spending on the state mandate.[379] The process is recorded with the state Department of Local Affairs.[380]

There are two express exemptions in the text of TABOR. First, because of the U.S. Constitution's Supremacy Clause, TABOR does not attempt to authorize local governments to escape federal mandates.[381] Second, school districts cannot opt out of mandates.[382] The Colorado Supreme Court invented a third exemption in two 1995 cases—*Romer v. Board of County Commissioners for the County of Weld*[383] and *State ex rel. Norton v. Board of County Commissioners of Mesa County*:[384] counties may not opt out.[385] In the court's view, a county cannot decline to participate in mandatory spending by which the state legislature forces a county to match the funds that the legislature has appropriated for a state welfare program

374. COLO. CONST. art. X, § 20(1).
375. City of Wheat Ridge v. Cerveny, 913 P.2d 1110, 1114–15 (Colo. 1996).
376. *Id.* at 1115.
377. NATELSON, *supra* note 338, at 56.
378. COLO. CONST. art. X, § 20(9).
379. *Id.*
380. COLO. REV. STAT. § 29-1-304.7 (2023).
381. COLO. CONST. art. X, § 20(9).
382. *Id.*
383. Romer v. Bd. of Cnty. Comm'rs, 897 P.2d 779, 781–83 (Colo. 1995).
384. State *ex rel.* Norton v. Bd. of Cnty. Comm'rs, 897 P.2d 788, 791 (Colo. 1995).
385. *Romer*, 897 P.2d at 781–783; *State ex rel. Norton*, 897 P.2d at 791.

in the county.[386] A county does not exist by "any inherent sovereign authority of its residents; rather, it is a political subdivision . . . of the state government, created to carry out the will of the state."[387] The court reasoned that TABOR applies to a "subsidy." According to the court, the county revenue that a county is forced to provide to pay for part of the expenses of a state welfare program cannot be "subsidy." Because counties are just arms of the state government, and because it is impossible for an entity to subsidize itself, the TABOR subsidy limit does not apply.[388]

The court's 1995 reasoning in *County of Weld* and *Mesa County* is broad enough for future courts to eliminate the opt-out entirely. *All* local governments—counties, municipalities, and special districts—are political subdivisions of the state. Hence, the courts could extend its reasoning to any or all of them.

I. Waivers

TABOR allows voters to authorize extra taxes or spending. Normally, these waivers are to last for up to four years, according to TABOR. The courts of appeals, however, has removed the four-year limit, as will be detailed in Subsection 1. The Colorado Supreme Court has worsened the damage by claiming that many temporary and limited waivers approved by the voters should be construed as permanent and unlimited waivers; further, ballot measure waivers that expressly disclaimed any increase in mill levies were to be construed as waiving voter consent for future mill levy increases. Thus, the court allowed the state legislature to impose the largest property tax increase in Colorado history, without a vote of the people, as described in Subsection 2.

1. Four-Year Time Limit on Voter Waiver of TABOR Tax and Spending Limits

TABOR's text suggests that voter authorizations for extra spending or taxes last for four years. One of TABOR's election law rules is that "[e]xcept for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues and voters may approve a delay of up to four years in voting on ballot issues. District actions taken during such a delay shall not extend beyond that period."[389] In the only case interpreting this language, the court of appeals stated, "[W]e reject plaintiff's assertion that delay here means that voters may approve the ballot issue for up to four years, thereby delaying (or postponing) further votes on similar ballot issues for a period not to exceed four years."[390] Instead, the court determined this section of TABOR "allows the voters to authorize a *delay* in voting on a ballot issue, but limits any such delay to a

386. *Romer*, 897 P.2d at 782–783.
387. *Id.* at 782 (citing Bd. of Cnty. Comm'rs v. Love, 470 P.2d 861, 862 (Colo. 1970)).
388. *Romer*, 897 P.2d at 782–783.
389. COLO. CONST. art. X, § 20(3)(a).
390. *Id.* at 1167.

period of four years."[391] This suggests that a board of county commissioners that wants to ask voters for a tax increase could schedule the vote for a general election up to four years in the future instead of putting the proposed tax increase on the next general election ballot. The court of appeals decision would be a defensible, and perhaps even superior, reading of the first sentence if that sentence stood alone. However, the court of appeals ignored the second sentence: "District actions taken during such a delay shall not extend beyond that period."[392] If a board of county commissioners schedules a tax election for three years hence, then the county (the "district") would not be taking any "[d]istrict actions" during the three-year interim. Therefore, the TABOR language about "[d]istrict actions" must refer to "actions" that a district takes, such as collecting extra taxes or spending extra revenue.

This reading is fortified by *all* the exceptions to the four-year rule: "petitions, bonded debt, or charter or constitutional provisions."[393] A citizen-initiated petition shows a greater degree of citizen support for a tax or spending increase than does a government-initiated referendum. An amendment to the state constitution or to a county or municipal charter is, by its nature, a permanent change, and not one with an automatic sunset. "[B]onded debt" is almost always for a repayment term of greater than four years;[394] a government would likely find it difficult to sell fifteen-year bonds if the extra taxes to repay the bonds had to be approved every four years. Accordingly, it is fair to criticize the court of appeals for nullifying the four-year limit on tax or spending increases that are put on the ballot by the government and do not change the constitution or any charter, and do not involve bonded debt.

2. Permanent Waivers Disguised as Temporary Waivers

It is often said that 174 of Colorado's 178 school districts,[395] 230 of Colorado's 271 municipalities,[396] and fifty-one of Colorado's sixty-four counties[397] have obtained voter exemptions from TABOR's revenue caps. The Colorado Supreme Court has loosely decided when local voters have chosen to waive TABOR restraints. For example, voters in a 1988 referendum approved a tax to fund the E-470 Public Highway Authority.[398] The

391. *Id.*
392. COLO. CONST. art. X, § 20(3)(a).
393. *Id.*
394. *Nuveen Colorado Municipal Bond Fund Class A*, FIDELITY, https://fundresearch.fidelity.com/mutual-funds/composition/67065L609 (last visited Nov. 8, 2024) (as of November 8, 2024, the weighted average maturity of the Nuveen Colorado Municipal Bond Fund Class A was 18.30 years).
395. *See, e.g.*, Jesse Paul, *Lawmakers Can Allow School Districts to Raise Property Taxes Without Voter Approval, Colorado Supreme Court Rules*, COLO. SUN (May 24, 2021, 10:29 AM), https://coloradosun.com/2021/05/24/colorado-property-taxes-house-bill-1164/.
396. *What is Debrucing?*, THE BELL POL'Y CTR., https://www.bellpolicy.org/2019/07/12/what-is-debrucing/ (Feb. 9, 2023).
397. *Id.*
398. Nicholl v. E-470 Pub. Highway Auth., 896 P.2d 859, 863 (Colo. 1995).

court held that the 1988 referendum presciently functioned as a waiver of the TABOR limits that would be enacted by voters in 1992.[399]

A 2021 case concluded that voters' approval of their district retaining excess revenue can be interpreted as voter waiver of their right to vote on the largest property tax increase in Colorado history.[400] From 1995 to 2006, the Colorado Department of Education (CDE) issued instructions to school districts about the mill levy rates.[401] In 2007, the legislature decided that the CDE instructions had been unlawful.[402] It ordered school districts to raise their mill levy rates and to grant taxpayers a credit to offset the increased rates.[403] A 2021 bill provided for a twenty-year process to fully eliminate the credits and for school districts to raise their mill levies by one mill per year.[404] The increase was about $90 million in the first year, and will grow to $288 million annually by 2040.[405] The legislature sent an interrogatory to the supreme court asking if TABOR stood in the way because TABOR requires voter consent for any "mill levy above that for the prior year."[406] The majority held that the mill levy increases did not require a vote of the people.[407] In the court's view, the CDE instructions were illegal because they ordered districts to lower their mill levy rates to avoid exceeding TABOR's revenue limits, even though the voters in the districts had approved waivers.[408] The court concluded that by voting to allow school districts to retain excess revenue, voters had implicitly waived their right to vote on increases on any mill levy, as long as the increased mill levy was no higher than the 1994 level.[409]

In dissent, Chief Justice Boatright argued that the record on what CDE did and how school districts had responded was too murky.[410] Rather than deciding the issue based on an interrogatory from the general assembly, he reasoned, the court should have waited for a more developed record from the ordinary process of civil litigation.[411] Chief Justice Boatright also pointed to the actual text of the revenue limit waivers in 161 of the 174 school districts: "[N]o local or property tax mill levy shall be increased at

399. *Id.* at 873 ("Any increase in revenue collected over that generated by the bond proceeds is therefore a 'voter approved revenue change' and need not be approved again.").
400. *In re* Interrogatory on H.B. 21-1164 Submitted by the Colo. Gen. Assemb., 487 P.3d 636, 648 (Colo. 2021).
401. *Id.* at 639.
402. *Id.* at 640; Act of May 9, 2007, ch. 199, § 5 (codified as amended at COLO. REV. STAT. § 22-54-106(2)(a) (2007)).
403. Act of May 9, 2007, ch. 199, § 5 (codified as amended at COLO. REV. STAT. § 22-54-106(2)(a) (2007)).
404. *In re Interrogatory on H.B. 21-1164*, 487 P.3d at 640; Act of June 11, 2021, ch. 223, § 1 (codified as amended at COLO. REV. STAT. § 22-54-106(2.1) (2021)).
405. Paul, *supra* note 395.
406. COLO. CONST. art. X, § 20(4)(a).
407. *In re Interrogatory on H.B. 21-1164*, 487 P.3d at 648.
408. *Id.*
409. *Id.* at 645.
410. *Id.* at 658 (Boatright, C.J., dissenting).
411. *Id.*

any time, nor shall any new tax be imposed, without prior consent of the voters."[412] He continued:

> [T]he only issue before the voters—and thus the only issue on which they conceivably could have expressed their intent—was whether TABOR's revenue limit should be waived. In other words, no one knows what the voters intended to do about the mill levy rates in their districts because they were never asked. But, the majority "assume[s] that in voting to waive TABOR's revenue limits, school district voters understood that their votes were predicated on the continuation of the mill levy rates then in effect." Maj. op. ¶ 41 (emphasis added). That is a big assumption—one I am unwilling to make, and in my view, one that the constitution prohibits. With the majority's decision today, voters must now be aware that any vote on revenue limits may act as permission to always maintain applicable tax rates at their current levels. Maj. op. ¶ 42 ("[I]n voting to waive the TABOR revenue limits . . . the voters who authorized those waivers necessarily approved the mill levies in effect at the time they voted.").[413]

Justice Samour concurred in the majority's result only.[414] Acknowledging the dissent's "potent criticisms," he took a different approach to uphold the legislature's bill:[415] the CDE instructions had been *ultra vires* and therefore illegal.[416] TABOR's rule about any "mill levy above that for the prior year" should be read as applying the most recent prior year of legal mill levies.[417] Because the reduced mill levies were illegal, they could not be a "prior year."[418] Thus, TABOR would apply to the last year of legal mill levies, which Justice Samour said was 1994.[419]

In short, voters in 161 school districts approved ballot measures that exempted school districts from TABOR revenue caps and that promised, "[N]o local or property tax mill levy shall be increased at any time, nor shall any new tax be imposed, without prior consent of the voters."[420] In flagrant defiance of the text of the ballot measures, a Colorado Supreme Court majority held that the ballot measure also authorized future mill levy increases without voter consent. Thus, the Court deprived the people of their right to vote on the largest property tax increase in state history. Unlike aid to big business, which the Colorado constitution forbids, public schools are a central function of government in the Colorado

412. *Id.* at 653 (Boatright, C.J., dissenting).
413. *Id.* at 653–54 (brackets in original) (footnote omitted).
414. *Id.* at 648 (Samour, J., concurring in the result only).
415. *Id.* at 651.
416. *Id.* at 648–50.
417. *Id.* at 650–51.
418. *Id.*
419. *Id.* Chief Justice Boatright replied that even if TABOR could be read as Justice Samour preferred, the baseline year for the reset should be 2007, not 1994. "In Mesa, we approved of SB 07-199, which froze the mill levy rates in 2007, meaning districts' rates were at least 'legal' since 2007. So, if our reference point is the last 'legal' rate (though I don't agree that our constitution supports such an interpretation), then why wouldn't the current rates serve as the reference point?" *Id.* at 657, n.10 (Boatright, C.J., dissenting).
420. *Id.* at 653.

constitution.[421] However, the power of funding of local schools by local property taxes is a power that under the constitution belongs to the voters, based on their experience with the performance and efficiency of local schools.

CONCLUSION

Rather than adhering to the text of the Colorado constitution, the Colorado Supreme Court has usurped the people's power of constitutional repeal.[422] In fiscal matters, the court has exercised this power so that the government can avoid asking taxpayers for consent for extraction of their earnings.

The Colorado Supreme Court has obliterated all of the original 1876 constitution's article XI limits of debt and aid to politically-favored businesses: section 1 (no pledge of public credit for corporations),[423] section 2 (no aid to corporations),[424] section 3 (limits on public debt of the state),[425] section 4 (debt may be no longer than 15 years),[426] section 5 (vote on debt for state buildings),[427] and section 6 (vote on debt for local government buildings).[428] Likewise, the court has erased every provision in the original constitution that thwarted government subsidies for big business and other special interests: article V, section 25 (no special legislation),[429] section 28 (no extra compensation to officers, employees, or contractors),[430] and section 34 (no appropriations to private institutions);[431] plus article II, section 11 (no laws granting special irrevocable privileges).[432]

Following the seven decades of judicial repeal of constitutional fiscal protections for the taxpayers, beginning in the 1922 *Milheim* case, the people of Colorado enacted new protections in TABOR. The Colorado Supreme Court has been just as lawlessly hostile to TABOR as it has been to the protections in the 1876 constitution. Instead of applying TABOR's express standard of review, the court fabricated a different standard of review guaranteeing that the government would always win. Under this purported standard of review, the court has given the legislature unlimited power to impose new taxes by labeling them "fees" and to exempt many government operations from TABOR limits by inaccurately labeling them "enterprises." The court has erased TABOR rules requiring voter approval of tax policy changes that increase net government revenue, and voter

421. *See* COLO. CONST. art. IX.
422. *See* COLO. CONST. art. XIX, § 2 (stating that the only method of repeal is by voters at a general election).
423. COLO. CONST. art. XI, § 1.
424. *Id.* § 2.
425. *Id.* § 3.
426. *Id.* § 4.
427. *Id.* § 5.
428. *Id.* § 6.
429. *Id.* art. V, § 25.
430. *Id.* § 28.
431. *Id.* § 34.
432. *Id.* art. II, § 11.

approval for repeal of pre-TABOR limits on taxes and spending. The court has crippled TABOR enforcement lawsuits and speciously forbidden counties to exercise their TABOR right to opt out of general assembly spending mandates. Time-limited voter waivers of local government revenue caps have been willfully misconstrued as permanent waivers, and the court has denied the people the right to vote on the largest property tax increase in Colorado history.

According to the Colorado constitution, "[a]ll political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."[433] Yet although the constitution enacted by the people "protected the inarticulate against machinators," the Colorado Supreme Court in fiscal matters protects the machinators against the people.[434]

433. COLO. CONST. art. II, § 1.
434. Johnson v. McDonald, 49 P.2d 1017, 1034 (Colo. 1935) (Hilliard, J., dissenting).