

# UNIVERSITY OF COLORADO LAW REVIEW

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**ALIVE BUT IRRELEVANT:  
THE PRIOR APPROPRIATION DOCTRINE  
IN TODAY'S WESTERN WATER LAW**

REED D. BENSON\*

*The Prior Appropriation Doctrine has long been the foundation of laws governing water allocation and use in the American West, but it has been under pressure from forces both external and internal to the western states. Twenty years ago, Prior Appropriation was pronounced dead in a provocative essay by Charles Wilkinson. Other scholars argued that it was still alive, but it now appears to have lost its force as the controlling doctrine of western water law. This Article analyzes three recent cases upholding state laws that undermine a fundamental Prior Appropriation principle, then considers the water policy implications of the western states' departure from Prior Appropriation.*

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## INTRODUCTION

The Prior Appropriation Doctrine appeared in the water law of the western United States in 1855 when the California Supreme Court applied the rules of the frontier mining camps to a water dispute between miners who had staked their claims on public lands.<sup>1</sup> Thus, Prior Appropriation (PA) was adopted, rather than born, in the water law context. But PA was soon embraced by the courts and legislatures of the western states and territories.<sup>2</sup> Several interior western states even enshrined PA in their state constitutions.<sup>3</sup> And most of the western states adopted fairly comprehensive water codes in the late nineteenth or early twentieth century,<sup>4</sup> largely codifying PA principles with certain modifications.

The central idea of PA is that a person who applies water to a useful purpose, or “beneficial use,”<sup>5</sup> thereby acquires a right to use enough water to serve that purpose. The earliest

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\* Professor, University of New Mexico School of Law. The author acknowledges the fine scholars cited herein—including Michael Blumm, David Getches, Gregory Hobbs, Janet Neuman, Dan Tarlock, and Charles Wilkinson—who have eloquently debated the meaning, utility, and viability of Prior Appropriation. Although none of these six contributed directly to this piece, they have all assisted the author both personally and intellectually over the years. The author is especially grateful for all the help, support, and inspiration he received from the late David Getches, longtime professor and dean at the University of Colorado Law School, and one of the greatest voices for reform of western water law.

1. See Charles Wilkinson, *Introduction to the Culture of Water Symposium*, 6 WYO. L. REV. 287, 288 (2006) (briefly telling the story of the leading case of *Irwin v. Phillips*, 5 Cal. 140 (1855)).

2. See Norman K. Johnson & Charles T. DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 NAT. RESOURCES J. 347, 349–51 (1989).

3. See 2 WATERS & WATER RIGHTS § 11.02(d) n.56 (Robert E. Beck & Amy K. Kelley eds., LexisNexis/Matthew Bender 3d ed. 2010) (citing constitutional provisions from Alaska, Colorado, Idaho, Montana, Nebraska, New Mexico, and Wyoming).

4. See Johnson & DuMars, *supra* note 2, at 352 (noting enactment of statutes in fifteen western states from 1890 through 1919).

5. See Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENVTL. L.J. 343, 349 (1995) (describing beneficial use as “the constitutional hallmark of a water right” under prior appropriation, but noting that state constitutions do not fully define the term, leaving it with a “flexible meaning” that can reflect current priorities).

uses give rise to the best rights, as “senior” rights take priority over “junior” ones at times when water supplies are insufficient to satisfy all users.<sup>6</sup> These PA principles strongly encouraged people to take water from its natural course and put it to use at the earliest possible date. Thus, by the early twentieth century, many western rivers were “fully appropriated” during the growing season—that is, irrigators and other users had already obtained rights to as much (or more) water than the river typically carried in the summer and fall months.<sup>7</sup>

By allocating so much of the region’s limited water early on, and by giving top priority to the oldest uses, PA was sure to come under pressure as the West changed during the twentieth century. And indeed the pressure came from diverse forces, such as explosive population growth in many western states, assertion of water right claims for federal and tribal lands, and demands for water to serve long-neglected environmental purposes.<sup>8</sup> Scholars warned that unless the western states moved to reform their water laws to address these pressures, the system of private water rights might be jeopardized.<sup>9</sup>

Twenty years ago, Charles Wilkinson—a leading western water scholar and advocate for reform—pronounced PA dead in a memorable “In Memoriam” essay.<sup>10</sup> Wilkinson gave human life to the PA doctrine in the form of an old-school but indefatigable western character named Prior Appropriation, and the essay largely told the life story of Prior and his wife Ramona.<sup>11</sup> The essay announced that Prior had died in 1991 of a heart attack over Denver’s decision to accept the U.S. Environmental Protection Agency’s veto of a permit for the

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6. See DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 108 (4th ed. 2009).

7. See David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States’ Role?*, 20 *STAN. ENVTL. L.J.* 3, 9–10 (2001).

8. See Johnson & DuMars, *supra* note 2, at 352–76 (describing various factors influencing the development of western water law).

9. For example, David Getches wrote that Colorado water law had to provide greater protection to public values, and that it could do so while protecting those “attributes of Colorado’s present system that have served private water allocation needs. Inaction is the greatest enemy of the system because it will license the courts and others to impose remedies that may be incompatible with private rights. Federal agencies may also attempt to fill the policy vacuum.” David H. Getches, *Pressures for Change in Western Water Policy*, in *WATER AND THE AMERICAN WEST: ESSAYS IN HONOR OF RAPHAEL J. MOSES* 143, 161 (David H. Getches ed., 1988).

10. See generally Charles F. Wilkinson, *In Memoriam, Prior Appropriation, 1848–1991*, 21 *ENVTL. L.*, at v (1991).

11. *Id.*

city's proposed Two Forks Dam.<sup>12</sup> It noted, however, that Prior had been in failing health for many reasons, including environmental demands for water, the end of the federal dam-building era, and the adoption of state laws providing legal protection for water left to flow in its natural course.<sup>13</sup>

Wilkinson's entertaining and provocative essay prompted a lively academic debate over the ongoing viability of PA, led by Michael Blumm and Gregory Hobbs.<sup>14</sup> Several years later, Dan Tarlock wrote that reports of Prior's death were premature. "The system is not dead. Rather the question is its continuing relevance"<sup>15</sup>—relevance that PA had maintained by constantly evolving to meet the needs of a changing West.<sup>16</sup>

Twenty years after his obituary, is crusty old Prior still alive and well? I would suggest that he is not actually dead,<sup>17</sup> but that he has lost his practical relevance. Western water law has indeed evolved, and that evolution continues to move the law further from the most fundamental PA principles of beneficial use and priority.<sup>18</sup> The law today consists of statutes and rules that remain consistent with certain aspects of PA, but increasingly deviate from its core principles, even in states

12. See *id.* at xvi. Wilkinson tied Prior's demise to an action by a federal agency, applying federal environmental law, to block a water supply project that had valid, longstanding water rights under state law. *Id.*; see also Daniel F. Luecke, *Two Forks: The Rise and Fall of a Dam*, 14 NAT. RES. & ENV'T 24 (1999) (telling the story of the controversial Two Forks Dam permit veto by the U.S. Environmental Protection Agency).

13. Wilkinson, *supra* note 10. Wilkinson listed many factors contributing to Prior's death (and several parentheticals with Prior's pithy comments about them), including:

Indian water settlements ("They don't deserve a single drop."). Environmentalists—just the mere existence of them. Academics who relentlessly criticized Prior's ideas ("The bastards wouldn't know the real world from a beachball."). Federal reserved water rights. State water planning ("We've got a plan. It's called 'first in time, first in right.'"). An especially cruel blow was when they adopted an instream flow program—in Utah.

*Id.* at xvii.

14. See Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37, 38–41 (2002).

15. A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 894 (2000).

16. See A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770 (2001).

17. Perhaps, like the hero Westley in the 1987 movie THE PRINCESS BRIDE (Metro-Goldwyn-Mayer Studios 1987), he is only "mostly dead."

18. See Tarlock, *supra* note 16, at 770–71 (noting that PA's "basic principles, priority and beneficial use, have remained constant").

with PA language in their constitutions.<sup>19</sup> In these states especially, PA retains its exalted status but has largely lost its legal power. The aged Prior is like the now-feeble patriarch who founded a family business, and although he retains the title of president and his giant portrait hangs prominently in the boardroom, he no longer controls the company. The new managers do things their own way, and while they still honor some of old Prior's policies, they do so based on their own choices rather than his presence. He is not dead, but the enterprise would function much the same if he were—and so it is today with PA and water in the West.

This Article begins by identifying the most fundamental PA principles, both under the original common-law doctrine and under western water codes based on PA. Part II describes the forces, ranging from federal law requirements to population growth and environmental demands, that have put PA under pressure in the modern West. Part III then analyzes recent cases from Idaho, Washington, and New Mexico demonstrating how western water law is increasingly moving away from basic PA principles, with judicial approval. Part IV concludes by asking if the western states' departure from PA is good or bad from a water policy standpoint.

## I. KEY PRINCIPLES OF THE PRIOR APPROPRIATION DOCTRINE

This Part focuses on what PA is, summarizing some of the original principles and the ways they have been revised by statute. It begins, however, with a brief mention of what it is not: the riparian rights doctrine, which governed water use across the U.S. at the time of westward expansion. Riparian rights to use water arise from ownership of land alongside a natural stream or lake.<sup>20</sup> Every riparian landowner enjoys a right to make "reasonable" use of water, and although many factors are relevant to a determination of whether a particular use is reasonable, a key criterion is whether that use would harm or destroy another riparian owner's use.<sup>21</sup> All owners along a watercourse have equal rights as against each other,

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19. Christine Klein has identified ten western states with constitutional provisions regarding prior appropriation, although some are more specific than others in requiring that water allocation be based on PA. See Klein, *supra* note 5, at 347 & n.22.

20. See, e.g., *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827).

21. See GETCHES, *supra* note 6, at 34–37.

and all reasonable uses of water on riparian lands are also considered equal (except for certain small uses which enjoy a preference).<sup>22</sup> For the most part, then, no user is “first in right” under the riparian rights doctrine, and all riparian owners may use water in a way that is reasonable.

The western states and territories rejected riparian rights early on, viewing the old common-law doctrine as unsuited to the realities of a region short on both water and economic activity.<sup>23</sup> They perceived a need for a new allocation regime that would promote the use of water for productive enterprises such as mining and irrigation, and they believed that PA would facilitate and encourage such uses.<sup>24</sup> Eager to promote settlement and development, the early West turned to PA to promote an all-important goal: maximum beneficial use of the resource.

### A. *Original Fundamentals*

Given this imperative to put water to work, it is not surprising that PA’s bedrock principle is that *beneficial use is “the basis, the measure and limit of [a water] right.”*<sup>25</sup> Most fundamentally, PA awards water rights to those who apply water to a specific beneficial use—that is, some purpose that the law regards as productive or useful.<sup>26</sup> Water rights are measured by beneficial use because the quantity of the right is primarily determined by the amount of water needed for that use. And because no one who uses water for a particular use can obtain a right to more water than is fairly required for that use, beneficial use is also the limit of a water right.<sup>27</sup> Thus, if a

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22. See *id.* (small uses such as water supply for household and garden use).

23. See *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899) (explaining how mining and irrigation needs for water in the early West “compelled a departure from the common law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands”).

24. See *id.* (describing western states’ choice of prior appropriation to serve mining and irrigation needs); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446–48 (1882) (stating policy rationale for refusing to recognize riparian rights in Colorado).

25. 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(c)(4)(A) (emphasis added).

26. Traditional beneficial uses would include irrigation, mining, domestic, manufacturing, and hydropower generation. See *Dep’t of Parks v. Idaho Dep’t of Water Admin.*, 530 P.2d 924, 927–28 (Idaho 1974) (discussing Idaho constitutional provision listing those five beneficial uses, but holding that the list is not exclusive).

27. See 2 WATERS & WATER RIGHTS, *supra* note 3, § 12.02(c)(2).

farmer diverts water from a stream and uses it to irrigate his hundred-acre pasture, he will obtain a water right for the purpose of irrigating that specific parcel. The quantity of right will be no greater than the amount actually diverted for that purpose, and it may be less if the actual diversion exceeds what is reasonably needed to irrigate those one hundred acres.

This foundational principle of beneficial use has many implications for water rights under PA, but two corollary principles are worth noting here. First, because water rights are measured and limited by beneficial use, no one has a right to waste water—that is, to take more water than needed for the specific use that gave rise to the right, or to use water in a way that would not serve that beneficial purpose.<sup>28</sup> Statutes in at least nine states explicitly prohibit waste as part of the bedrock principle, stating that “beneficial use, without waste, is the basis, measure, and limit of . . . water right[s].”<sup>29</sup> Second, because water rights are based on beneficial use, they may be lost if water is not actually applied to beneficial use for an extended period. This “use it or lose it” feature may not be an obvious outgrowth of the foundational beneficial use principle, but it shows the extent to which PA has been designed to serve the goal of promoting water use.<sup>30</sup>

Another original PA principle is the diversion requirement: for most purposes, a would-be user must divert water from its natural course or location in order to establish a right.<sup>31</sup> In rejecting a non-diversionary appropriation for flows to support fish and recreation, the Colorado Supreme Court stated that “the rule is elementary that the first essential of an appropriation is the *actual diversion of the water* with intent to apply to a beneficial use.”<sup>32</sup> The rule is not absolute, however, as the same court five years earlier had recognized an appropriation for livestock watering even though water had

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28. See Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 933 (1998).

29. See *id.* at 923–24, 924 n.12.

30. See *id.* at 928–33.

31. See 2 WATERS & WATER RIGHTS, *supra* note 3, § 12.02(c)(1).

32. See *Colo. River Water Conservation Dist. v. Rocky Mountain Power Co.*, 406 P.2d 798, 800 (Colo. 1965) (quoting *City & Cnty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992, 998 (Colo. 1954)).

never been diverted, reasoning that diversion was less important than beneficial use.<sup>33</sup>

Perhaps the most familiar original PA principle, however, is *first in time, first in right*.<sup>34</sup> Whereas the riparian rights doctrine gave every owner of riparian land—old or new, large or small—an equal right to “reasonable” use of water, PA establishes a firm and specific hierarchy among users.<sup>35</sup> Roughly speaking, the earliest beneficial uses obtain the most senior rights. In times of shortage those with senior rights are allowed to continue taking their full allotment of water, while those with junior rights must reduce or halt their uses in order to leave water for their “elders.”<sup>36</sup> While the priority principle can lead to harsh results as some users are cut off entirely while others continue getting their full supply, that result is fully consistent with the original design of PA and should be generally expected in a region where PA has been the foundation of water law for over a century.<sup>37</sup>

### B. Statutory Refinements

Beginning with Wyoming in 1890, the western states began enacting statutes that altered the traditional PA system.<sup>38</sup> Most significantly, these statutes required that anyone seeking to commence a new water use must first apply to a state agency and obtain a permit authorizing that use.<sup>39</sup> They established a process for permit applications, including notice to other water users and an opportunity to object.<sup>40</sup> These permitting statutes also imposed substantive standards for the approval of applications: most commonly and

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33. See *Town of Genoa v. Westfall*, 349 P.2d 370, 378 (Colo. 1960) (stating diversion “is not necessary in every case,” and that “[t]he only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use”).

34. See Tarlock, *supra* note 15, at 881 (calling this principle “the central dogma of western water law”).

35. See GETCHES, *supra* note 6, at 108.

36. See Tarlock, *supra* note 15, at 882.

37. See *id.* at 885–86.

38. See Johnson & DuMars, *supra* note 2, at 352.

39. See *id.* Colorado is now the only state that allows new appropriations to proceed without a permit, although it provides for “conditional water rights” which fulfill many of the same purposes as a permit. See 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.05.

40. See 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(a).

importantly,<sup>41</sup> a new permit would be denied if there was no unappropriated water available or if the proposed use would adversely affect existing water rights.<sup>42</sup> The effect of these laws, then, was to allow for new, junior, water rights, while providing both procedural and substantive protection to senior rights.<sup>43</sup>

The statutes provide that a permit is an authorization to use water in accordance with its terms, but it is not a complete and final water right.<sup>44</sup> In order to obtain a full-fledged water right, the permit holder must actually apply water to a beneficial use in accordance with the permit terms and prove such use to the state agency. In other words, a permit represents only an inchoate right to use water and is never “perfected” until the state agency determines actual beneficial use<sup>45</sup> and issues a document (commonly called a certificate) confirming the right.<sup>46</sup>

Permitting, however, is only one of many responsibilities that state agencies received (and still bear) under the western water codes. Perhaps the most important duty is to administer existing water rights by priority—regulating water use by junior users to ensure that senior users receive the water they are due in times of shortage.<sup>47</sup> In response to a “call” by a water

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41. Another common statutory standard is that the proposed use must not impair the public interest. *See id.* § 15.03(c)(3). I tend, however, to discount the practical importance of public interest standards. In practice, state agencies seem to base permitting decisions chiefly on factors such as water availability and harm to other users, while public interest standards rarely play more than a minor role. *See, e.g.,* Amber L. Weeks, *Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to the Statutory Silence of Water Codes*, 50 NAT. RESOURCES J. 255, 272 (2010) (describing Nevada State Engineer’s practice of applying the public interest narrowly, as essentially restating requirements of traditional state water law).

42. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(c)(1)–(2).

43. *See* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 308 (6th ed. 2009) (“Virtually all water laws prevent new rights from being recognized or permits being granted if it would harm vested rights. This is the most fundamental way of protecting priorities. A related requirement is that there be water available for appropriation before a water right will be granted.”).

44. *See* GETCHES, *supra* note 6, at 153.

45. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(d). “To perfect an appropriation in any prior appropriation state, . . . water must actually be put to a beneficial use.” *Id.* § 15.03(d)(1).

46. *See* GETCHES, *supra* note 6, at 154.

47. *See* N.M. STAT. ANN. § 72-3-2 (1978) (authorizing the state engineer to appoint water masters having “immediate charge of the apportionment of waters” in a defined district, subject to state engineer oversight); GETCHES, *supra* note 6, at 163–64 (describing Wyoming system of administration by water commissioners employed by the State Engineer).

user with a priority date of, say, 1905, a state official in the field (commonly called a watermaster or water commissioner) orders users junior to 1905 to stop diverting so as to satisfy the caller's right.<sup>48</sup> In carrying out this duty, the state agency has some discretion in deciding when regulation is needed but has limited authority to deny a call when enforcing it would result in satisfaction of the senior right.<sup>49</sup>

Priority administration may be stymied, however, by the existence of water rights that pre-date the state water code. Where a person has actually and continuously applied water to a beneficial use, there is almost certainly a valid right, but its priority date and quantity are undetermined and may be disputed. To determine these pre-code rights, the statutes provide for general stream adjudications, which are massive, complex cases whereby all the valid older water rights in a particular river basin are confirmed and quantified.<sup>50</sup> Some states have essentially completed adjudication of their major river basins, but several major adjudications are ongoing,<sup>51</sup> and some—including the complicated Middle Rio Grande in New Mexico—have not yet begun.

As the preceding paragraph suggests, PA, in its most basic form, addresses two rather different things: water allocation and water use regulation. PA allocates water by setting the rules for the creation and recognition of water rights, and although permitting statutes have introduced new criteria for approval, the ultimate requirement for a water right has always been beneficial use.<sup>52</sup> PA also governs water use under established rights by providing a clear rule—first in time, first in right—that dictates which users get water in times of shortage.<sup>53</sup> These two functions of PA sometimes conflict, especially in basins with no completed adjudication, where priority administration is unavailable until there is a legal determination of the various users' priorities.<sup>54</sup>

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48. See GETCHES, *supra* note 6, at 111.

49. See *State ex rel. Cary v. Cochran*, 292 N.W. 239 (Neb. 1940).

50. See 2 WATERS & WATER RIGHTS, *supra* note 3, § 16.02.

51. See John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams* (pt. 2), 9 U. DENV. WATER L. REV. 299, 337–56 (2006) (describing status of water right adjudications in the various western states).

52. See *supra* notes 25–30 and accompanying text.

53. See *supra* notes 34–37 and accompanying text.

54. See, e.g., *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 249 P.3d 932, 938 (N.M. Ct. App. 2010); *Rettkowski v. Dep't of Ecology*, 858 P.2d 232, 240 (Wash. 1993); see also *Hobbs*, *supra* note 14, at 44 (noting that “adjudication

As refined by the early state water codes, the structure of PA has stood since the 1800s as the officially accepted framework for water allocation and use in the West.<sup>55</sup> There have certainly been some modifications, and the doctrine has evolved somewhat over the past century.<sup>56</sup> But given all that has changed in the West during that span, the longevity of the foundational principles of beneficial use and priority is rather remarkable, and the next Part addresses how these principles have managed to endure this long despite the pressures they have faced.

## II. PRIOR APPROPRIATION UNDER PRESSURE

Scholars have been saying for many years that various forces are applying pressure for change in western water law, pushing the states away from traditional PA.<sup>57</sup> Some of these forces are external to the states, resulting largely from the requirements of federal law, while others arise from within the states themselves. In general, however, these forces seek to ensure adequate water supplies for certain uses that lack established senior water rights, contrary to traditional PA and its unquestioning protection for the oldest recognized uses.

Among the various forces for change, federal laws may have received the most attention. Since the Supreme Court decided *Winters v. United States*,<sup>58</sup> federal reserved water rights have caused significant consternation in the West.<sup>59</sup> These concerns grew more acute in 1963, when the Supreme

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and administration of rights through governmental action is essential to a functioning prior appropriation system”).

55. Tarlock, *supra* note 16, at 769–75.

56. *Id.* at 770 (“The distinguishing feature of prior appropriation is its continual evolution in response to a changing West.”); Johnson & DuMars, *supra* note 2, at 356–87 (describing various changes to western water law over time).

57. See *supra* text accompanying notes 8–9. See generally Charles T. DuMars & A. Dan Tarlock, Symposium Introduction, *New Challenges to State Water Allocation Sovereignty*, 29 NAT. RESOURCES J. 331 (1989).

58. *Winters v. United States*, 207 U.S. 564, 576–77 (1908) (recognizing a water right for an Indian Reservation in Montana based on a treaty that was silent regarding water, and establishing a basis in federal law to claim water rights for other Indian lands).

59. See Frank J. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DENV. L.J. 473, 476–78 (1977) (describing reaction of western water lawyers and politicians to a 1955 Supreme Court decision that signaled an expansion of the reserved rights doctrine, and noting that in *Arizona v. California*, 373 U.S. 546 (1963), “[t]he chimera became a dragon: [r]eserved rights for non-Indian federal lands were declared to exist in real life”).

Court first recognized reserved rights for federal lands such as national parks and wildlife refuges in *Arizona v. California*.<sup>60</sup> The Court had held in *Winters* that an Indian Reservation had a water right under federal law, but extending the *Winters* doctrine to other non-tribal federal lands posed a threat to the states and their water users: Reserved rights arise from federal rather than state law, based on the purposes of the federal land designation rather than actual beneficial use, with a priority tied to the date of the federal designation.<sup>61</sup> The 1970s saw Congress enact significant national environmental legislation, including the Federal Water Pollution Control Act amendments of 1972 and 1977 (creating the Clean Water Act in its modern form)<sup>62</sup> and the Endangered Species Act of 1973 (ESA).<sup>63</sup> These statutes raised the possibility of federal restrictions on water development and use that would otherwise be authorized under state law.<sup>64</sup>

For the most part, however, these federal laws have forced few major changes to existing water allocation laws and water uses. Federal reserved water right litigation has proceeded almost entirely in state courts since the 1970s, when the western states won a series of jurisdictional battles in the Supreme Court.<sup>65</sup> The great water law scholar Frank Trelease wrote in 1977 that he was still waiting to see a case where a water user suffered real and substantial harm from the operation of the *Winters* doctrine, and he declared that he was “tired of leaping into action at every call of ‘Wolf!’ ”<sup>66</sup> Today, reserved water right claims are typically settled out of court,

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60. *Arizona v. California*, 373 U.S. at 601 (holding that the rationale underlying reserved water rights for Indian reservations also supports reserved rights for other lands designated by the United States for particular purposes).

61. Trelease, *supra* note 59, at 474.

62. 33 U.S.C. §§ 1251–1387 (2006).

63. 16 U.S.C. §§ 1531–44 (2006).

64. DuMars & Tarlock, *supra* note 57, at 342–43.

65. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818–21 (1976); *United States v. Dist. Court*, 401 U.S. 520, 524 (1971).

66. Trelease, *supra* note 59, at 492. Trelease wrote that “at one time . . . federal reserved water right[s]” were compared to the “great white shark” of the book and the movie “Jaws,” but he was beginning to wonder if they were actually “insignificant and worthless,” much like the “measly pupfish” at the center of the Supreme Court decision in *Cappaert v. United States*, 426 U.S. 128 (1976). Trelease, *supra* note 59, at 474–75.

consistent with a longstanding policy of the Western Governors Association (WGA).<sup>67</sup>

As for the Clean Water Act, its implementation (with rare exceptions) has focused exclusively on water quality rather than quantity,<sup>68</sup> despite a Supreme Court case calling that distinction “artificial” and upholding state authority to use water quality standards to protect minimum flows.<sup>69</sup> The ESA, by contrast, has created significant pressure in some locations to reallocate water from existing users to provide habitat for imperiled species<sup>70</sup>—which may explain why the WGA has made ESA reform a priority issue, in hopes of increasing certainty for water users and ensuring state control over water allocation.<sup>71</sup>

These federal pressures, however, have prompted the western states to take only modest steps in reforming their own water laws; David Getches wrote that the states’ small advances in water policy during the 1990s were driven almost solely by federal regulatory pressure and local innovations and that while “the reasons for reform persist and are better

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67. See Reed D. Benson, *A Bright Idea from the Black Canyon: Federal Judicial Review of Reserved Water Right Settlements*, 13 U. DENV. WATER L. REV. 229, 236–38 (2010).

68. For example, in recent years the U.S. Environmental Protection Agency has interpreted the Act’s section 402 permitting requirements quite narrowly, choosing to leave certain pollution sources unregulated so as to avoid any potential conflicts with water supply activities. See *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (upholding EPA rule exempting certain water transfer activities from permitting requirements). The EPA’s position on this issue is criticized elsewhere in this Volume. See generally Chris Reagen, Comment, *The Water Transfers Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, 83 U. COLO. L. REV. 307 (2011). Similarly, the states and EPA have not used their full authority under section 303 to address water pollution problems associated with “flow impairment,” such as that caused by dam operations and water diversions. See Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 228–56 (2005) (describing reserved water right settlements, and citing the WGA policy in favor of tribal reserved water right settlements).

69. *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 719–20 (1994).

70. See Reed D. Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities Between Western Water Law and the Endangered Species Act*, 44 NAT. RESOURCES J. 29, 30–32 (2004) (summarizing notable conflicts between water use and the ESA).

71. See Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 315 & n.517.

understood than ever, existing state legal and institutional frameworks endure virtually unchanged.”<sup>72</sup>

Other forces for change in water laws and practices come from within the individual western states, reflecting each state’s shifting demographics, economic bases, and popular values. As several western states experienced rapid population growth and associated economic change, they experienced pressure to ensure that water is available to serve new residents and new enterprises—including businesses such as whitewater rafting companies that rely on more-or-less natural outdoor amenities. In addition, support has grown within the West for laws allowing water to be left in its natural course, so that rivers and lakes can provide environmental, economic, and recreational benefits to a predominantly dry region.<sup>73</sup>

This latter push for reform has led most of the western states to enact statutes making some provision for preserving “instream flows,” primarily by allowing state agencies to appropriate water in its natural course for environmental or recreational purposes, without the need for diversion.<sup>74</sup> The statutes were otherwise consistent with basic PA principles, however, in that they typically authorized instream flow rights for a specific beneficial use (typically fish habitat) and with a specific priority date.<sup>75</sup> They offered some legal protection for flowing rivers and the amenities they provide, and although protection has often been quite limited in practice, the instream flow laws did represent a significant policy reform for the western water codes.

Recognizing this fact, agricultural water users challenged some of the laws as being fundamentally inconsistent with PA, but courts rejected these challenges and upheld legislative authority to allow this new form of water right.<sup>76</sup> Despite PA language in their respective state constitutions, these courts held that diversion of water was not absolutely necessary for a valid appropriation, effectively allowing statutes to waive a

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72. Getches, *supra* note 7, at 71.

73. See Tarlock, *supra* note 16, at 771–74.

74. See Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177, 179 (1998).

75. DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 143–45 (1997).

76. See generally *Neb. Game & Parks Comm’n v. 25 Corp.*, 463 N.W.2d 591 (Neb. 1990). The court relied on similar holdings from *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570 (Colo. 1979) and *Idaho Dep’t of Parks v. Idaho Dep’t of Water Admin.*, 530 P.2d 924 (Idaho 1974).

once-fundamental PA requirement.<sup>77</sup> Perhaps because they show that western water law can respond to changing needs and values, the instream flow statutes have been touted as a major advance.<sup>78</sup>

Even where state water law remains officially true to PA principles, however, some scholars have argued that the western states do not always apply those principles—even the most fundamental ones. For example, Dan Tarlock wrote in 2000 that the priority principle was “more bluff than substance,” because “experience will demonstrate that priorities are seldom enforced in practice. In many situations, the strict enforcement of prior appropriation would raise substantial fairness and efficiency concerns,” and therefore “it is not surprising that states have taken extraordinary steps to ensure that the rule is never applied in practice.”<sup>79</sup>

Janet Neuman found a similar reluctance by states to enforce PA’s rules banning wasteful uses and terminating water rights after years of nonuse—both key corollaries of the bedrock principle of beneficial use. Her 1998 article found that even though PA’s “requirement of ‘beneficial use without waste’ sounds tight, as if water users must carefully husband the resource, using every drop of water completely and efficiently,” the reality is that it has been applied loosely, showing great tolerance for inefficient old practices.<sup>80</sup> “The prohibitions against waste—even the threat of forfeiture for nonuse—are mostly hortatory concepts that rarely result in cutbacks in water use.”<sup>81</sup>

One of my early articles suggested that the Pacific Northwest states followed a practice of protecting the water use status quo, rather than implementing PA principles:

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77. *Neb. Game & Parks Comm’n*, 463 N.W.2d at 601 (“Although a number of courts and authorities have stated that a diversion is a prerequisite [to a valid appropriation], this view has been criticized as being obsolete” in light of the permitting requirement for new water uses.)

78. Gregory Hobbs has called instream flow laws “the most dramatic innovation” in state water law. Hobbs, *supra* note 14, at 47. “Instream flows were traditionally considered to be a waste of water; today they are fundamental to the implementation of public values.” *Id.* at 55.

79. Tarlock, *supra* note 15, at 883. New Mexico’s efforts to gain compliance with the Pecos River compact and decree represent an extreme example of a state trying to avoid administering water rights by priority. See generally Joshua Mann, *Saving Water in the Pecos: One Coin, Two Sides, Many Overdrafts (And No Bail Outs?)*, 47 IDAHO L. REV. 341 (2011).

80. Neuman, *supra* note 28, at 922.

81. *Id.*

In order to perpetuate current uses, state legislatures, courts, and agencies alike have refused to apply, and sometimes have even changed, legal requirements . . . [B]y consistently choosing to protect established water uses rather than applying the familiar rules of prior appropriation, the Northwest states have significantly undermined those rules.<sup>82</sup>

In spite of the pressures for change, the reforms adopted by western states, and the failure to implement basic rules, PA remains widely accepted as the basis for water allocation and management in the western states. Although Tarlock identified a growing gap between the form of PA and actual water allocations,<sup>83</sup> he rightly acknowledged that PA “remains the primary water law of the western states and is likely to remain so for the foreseeable future.”<sup>84</sup> The core principles of “beneficial use is the basis, measure, and limit of a water right”<sup>85</sup> and “first in time is first in right” are still recognized as the legal basis for water rights and management in the West, even when they are honored in the breach.<sup>86</sup> Thus, PA officially lives on—but even this formal commitment to its basic principles is now fading, as discussed in the next Part.

### III. HOW THE WESTERN STATES HAVE UNDERMINED PRIOR APPROPRIATION

In Wilkinson’s colorful memorial to PA, the death of Prior at age 152 was mostly the work of outside agitators: politicians in Washington D.C., academics, environmentalists, and others pushing for changes in the law and management of western water.<sup>87</sup> Surely the western states, having adopted Prior Appropriation, would stay true to a doctrine they had spent years defending against federal threats. It is rather ironic that when crusty old Prior was finally deposed, it proved to be a

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82. Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881, 916, 918 (1998).

83. Tarlock, *supra* note 16, at 775.

84. *Id.* at 776.

85. 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(c)(4)(A).

86. Focusing on the “first in time, first in right” principle, Tarlock stated that PA “remains deeply entrenched in the states and in the courts,” Tarlock, *supra* note 16, at 773, but also predicted that “the gap between the form of the doctrine and the actual allocation of water will continue to grow,” driven by the evolving needs and values of a changing West. *Id.* at 775.

87. See *supra* notes 10–13 and accompanying text.

palace coup, done by the states themselves. This Part analyzes three relatively recent cases from three states in order to explain how the western states have departed from even the most fundamental PA principles.

A. *Three Recent Cases Addressing Core Prior Appropriation Principles*

The cases discussed in this Section are not the only ones in which state courts have deviated from the traditional PA doctrine.<sup>88</sup> These three decisions were chosen as the focus of this Article because they share certain notable characteristics. First, they all involve a conflict between PA principles and a state statute or rule. Second, they are all recent, having been decided within the last five years. Third, they all involve one of the core principles of PA—either “first in time, first in right” or beneficial use as the basis of a water right.

1. In Idaho, Making Prior Appropriation More “Reasonable” as Between Users

Idaho’s departure from key PA principles, in the context of a dispute between senior surface water users and junior groundwater users, is in some ways the most remarkable of the three examples discussed here. Unlike the other two cases, the Idaho litigation involved rules promulgated by the state water agency, not an act of the state legislature. Moreover, not only is PA written into the Idaho Constitution,<sup>89</sup> but the Idaho Supreme Court had strongly reinforced the “first in time, first

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88. See, e.g., *In re Adjudication of Existing Rights to Use Water*, 55 P.3d 396, 406–07 (Mont. 2002) (holding that no diversion was needed to appropriate water for fish, wildlife, or recreational purposes under pre-1973 Montana law).

89. The most relevant language states:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

IDAHO CONST. art. XV, § 3.

in right” principle in a 1993 decision that spurred adoption of the rules.<sup>90</sup>

The 1993 dispute arose because the Idaho Department of Water Resources (IDWR) was then administering surface water and groundwater as separate resources—what might be called “disjunctive management.”<sup>91</sup> Thus, the agency had no practice of curtailing groundwater pumping to benefit surface water users, regardless of their relative priority dates. When the Curran Tunnel ran short of water in 1993, users with senior (surface) rights to its water asked IDWR to reduce groundwater pumping from the hydrologically connected Snake Plain Aquifer. The agency refused, stating that it had made no “formal hydrologic determination that such conjunctive management is appropriate.”<sup>92</sup> The surface users sued, asking the Idaho courts to order IDWR to fulfill its duty to administer water according to established priorities.

The Idaho Supreme Court concluded that IDWR had a clear legal duty to administer water by priority, and ordered the director to comply. The court acknowledged that the agency had some discretion as to the details, but still had a mandatory duty to distribute water in accordance with PA.<sup>93</sup> IDWR nonetheless insisted that “a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource”<sup>94</sup>—in other words, whether the call should be denied in order to enable continued pumping by the juniors. The court not only rejected that argument, but even required the state to pay the plaintiffs’ attorney fees because the agency’s position had “no reasonable basis in law or fact.”<sup>95</sup>

IDWR then promulgated rules governing calls to reduce junior groundwater pumping.<sup>96</sup> These Rules for Conjunctive

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90. *Musser v. Higginson*, 871 P.2d 809 (Idaho 1994), *abrogated on other grounds by Rincover v. State*, 976 P.2d 473 (Idaho 1999).

91. “Conjunctive management,” by contrast, treats surface water and hydrologically connected groundwater as a single resource for management purposes. The Idaho rules define conjunctive management to mean “[l]egal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply.” IDAHO ADMIN. CODE r. 37.03.11.010.03 (2011).

92. *See Musser*, 871 P.2d at 811.

93. *Id.* at 812.

94. *Id.* at 813 (quoting IDWR).

95. *Id.* at 814.

96. IDWR had no specific statutory authority for the conjunctive management rules, but had general rulemaking authority under section 42-603 of the Idaho

Management of Surface and Ground Water Resources<sup>97</sup> “acknowledge” all elements of PA under Idaho law,<sup>98</sup> but then immediately state a “traditional policy of reasonable use” governing water administration and use.<sup>99</sup> The rules declare that the reasonable use policy “includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe,” as well as principles of “optimum development of water resources in the public interest” and “full economic development.”<sup>100</sup> The rules specify procedures for responding to a delivery call,<sup>101</sup> consisting primarily of a potentially drawn-out “contested case” administrative hearing to determine the factual and legal issues involved in the dispute.<sup>102</sup> The rules also identify numerous factors IDWR could consider in determining whether relief was justified (including potential changes in the senior’s water use facilities or practices),<sup>103</sup> and give the agency several options for addressing the issue.<sup>104</sup>

Surface water users sued, arguing that the rules were contrary to PA in various ways and therefore were facially unconstitutional.<sup>105</sup> Most of their arguments failed in the district court, but they did prevail on some issues,<sup>106</sup> and the district court held that the entire package of rules violated the state constitution. IDWR and groundwater users appealed to the Idaho Supreme Court, which held unanimously in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*<sup>107</sup> that the conjunctive management rules were not facially unconstitutional.

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Code (authorizing IDWR to “to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof”). See also IDAHO CODE ANN. § 42-1805(8) (2011).

97. IDAHO ADMIN. CODE r. 37.03.11 (2011).

98. *Id.* r. 37.03.11.020.02.

99. *Id.* r. 37.03.11.020.03.

100. *Id.*

101. *Id.* rr. 37.03.11.030–.031, .040–.041

102. *Id.* r. 37.03.11.030.02.

103. *Id.* r. 37.03.11.042.

104. *Id.* r. 37.03.11.030.07. Options listed in the rule include granting or denying the petition in whole or in part, designating the area as a type of district for management purposes, or prohibiting or limiting pumping from certain wells by summary order. *Id.*

105. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 154 P.3d 433, 439 (Idaho 2007).

106. See *id.* (summarizing district court’s ruling on summary judgment).

107. *Id.*

After complimenting the district court's opinion as scholarly, detailed, and "exemplary,"<sup>108</sup> the Idaho Supreme Court disagreed with its conclusion that the rule was unconstitutional in certain respects.<sup>109</sup> The district court had held that the rules' procedures for responding to a delivery call violated PA because the rules were silent on three issues: whether a presumption of injury exists in favor of senior users when juniors divert water during shortages, whether juniors bear the burden of proving that such diversions do not cause injury, and whether IDWR must timely respond to calls.<sup>110</sup> The Idaho Supreme Court held that the rules' silence regarding presumption of injury and burden of proof did not make the rules invalid, especially because they specifically recognized PA as established in Idaho law.<sup>111</sup> The *American Falls* court also denied that the rules must set a deadline for responding to calls. "Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call," but nothing in the rules would prohibit that, and neither the state constitution nor the statutes provide a specific timeframe for a response.<sup>112</sup> The court stated that delivery calls raise complex factual issues, and that it is "vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision."<sup>113</sup>

The district court also held the rules unconstitutional because they exempted all domestic and stockwater rights from delivery calls, effectively giving them priority over senior rights.<sup>114</sup> The Idaho Supreme Court, however, pointed to language in the Idaho Constitution that allows junior domestic uses to continue in times of shortage, but seems to require that they compensate senior users for lost water.<sup>115</sup> It then noted that both the constitution and the rules give priority to domestic uses, and although the rules make no provision for

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108. *Id.* at 440.

109. *Id.*

110. *Id.* at 443–44.

111. *Id.* at 444–45.

112. *Id.* at 445.

113. *Id.* at 446. The court's statement is ambiguous: adequate time and information for the Director to make a correct decision is "vastly more important" than what? The court might mean that these factors are more important than a timely response, or that they are more important than specifying a timeframe for response in the text of the rules.

114. *Id.* at 451.

115. *Id.* at 451–52; *see also* IDAHO CONST. art. XV, § 3.

compensation to senior users, neither do they preclude it.<sup>116</sup> Again, the court gave the rules the benefit of the doubt in the context of a facial challenge to their constitutionality.<sup>117</sup>

Equally interesting is the list of issues that were decided against the plaintiffs in the lower court but not appealed. The Idaho Supreme Court made a point of saying that the district court had upheld the rules' provision allowing IDWR, in response to a delivery call, to consider "material injury; reasonableness of the senior water right diversion; whether a senior right can be satisfied using alternate points and/or means of diversion; full economic development; compelling a surface user to convert his point of diversion to a ground water source; and reasonableness of use."<sup>118</sup> The Idaho Supreme Court also noted that there was no appeal of the district court's rejection of the argument "that water rights in Idaho should be administered strictly on a priority in time basis."<sup>119</sup>

*American Falls* illustrates the difficulties of prevailing in a facial challenge, where the plaintiff must show that the law is unconstitutional in all possible applications.<sup>120</sup> But it also indicates that the court views "reasonableness" of water uses as a water law principle no less important than "first in time, first in right."

## 2. In Washington, Recognizing Water Rights Regardless of Beneficial Use

Washington's deviation from PA differs from Idaho's in that it involves a statute rather than a rule. Moreover, the Washington Constitution does not require allocation of water under PA,<sup>121</sup> so the statute did not face the same type of

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116. *American Falls*, 154 P.3d at 452.

117. *Id.* The court did the same on another key issue: the provision of the rules which seemed to allow IDWR to limit the holders of storage water rights to a "reasonable" amount of carryover water—that is, water held in storage at the end of season, to be "saved" for the future. *Id.* at 449–51. The court noted that storage water rights should be protected in their priorities, but that stored water must also be applied to beneficial use, and that the director had discretion to balance those two PA requirements in a particular case. *Id.*

118. *Id.* at 440–41.

119. *Id.* at 441.

120. *Id.* at 442. The Idaho Supreme Court repeatedly indicated that its decision left room for later challenges to the rule as applied, based on a developed factual record. *Id.* at 446–47, 449, 451–52.

121. The Washington Constitution has only one sentence regarding water rights: "The use of the waters of this state for irrigation, mining and

constitutional challenge as the Idaho rules did. The Washington statute is remarkable, however, in that it alters the beneficial use requirement—the most fundamental of all PA principles.

Washington's move away from PA, like Idaho's, arose from a judicial decision that affirmed a key principle of the doctrine. In a 1998 opinion, the Washington Supreme Court reviewed conditions imposed by the Department of Ecology ("Ecology") on an extension of a water use permit held by a developer.<sup>122</sup> Ecology had originally issued the permit in 1973 for a development planned for 253 lots, but water lines had been extended to only ninety-three lots by the early 1990s. The developer, nonetheless, argued that he had a vested right to the full amount of his permitted water right under a policy, followed by Ecology for at least forty years, that provided final water rights for certain kinds of users based on completion of a water delivery system. This "pumps and pipes" policy quantified such vested (certificated) rights based on the capacity of the system rather than on actual beneficial use. Ecology came to doubt the legality of "pumps and pipes" and refused to apply that policy to the developer's permit renewal, imposing a new condition that the final certificate would be quantified based on actual beneficial use.<sup>123</sup> In *State v. Theodoratus*, the Washington Supreme Court upheld the challenged condition, based on statutes and case law requiring "that a water right must be based on actual application of water to beneficial use and not upon system capacity. . . . Perfection of an appropriative right requires that appropriation is complete only when the water is *actually applied* to a beneficial use."<sup>124</sup>

Five years later, the Washington Legislature partially undid *Theodoratus* by adopting a statute upholding the validity of existing certificates issued under the "pumps and pipes" policy.<sup>125</sup> The statute defined "municipal water supply purposes" to include supplying water for residential purposes

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manufacturing purposes shall be deemed a public use." WASH. CONST. art. XXI, § 1.

122. See generally *State v. Theodoratus*, 957 P.2d 1241 (Wash. 1998). A water use permit typically requires the holder to construct facilities and apply water to beneficial use within a specified time (e.g., five years), but that deadline may be extended for cause. 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(d)(1).

123. *Theodoratus*, 957 P.2d at 1243–44.

124. *Id.* at 1246.

125. H.R. 1338, 58th Leg., 1st Spec. Sess. (Wash. 2003).

to at least fifteen residences, thus extending coverage to many small, non-municipal water systems.<sup>126</sup> It then provided that a water right was “in good standing” if it was “represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes . . . where the certificate was issued based on an administrative policy” to administer such certificates after construction of the municipal water supply system, “rather than after the water had been placed to actual beneficial use.”<sup>127</sup> Certificates issued after that date, however, were to be based only on “actual beneficial use of water.”<sup>128</sup> The Washington Supreme Court noted that *Theodoratus* had raised questions about whether existing certificates based on “pumps and pipes” were valid, and it characterized the 2003 statute as having “essentially put the legislature’s imprimatur on our holding in *Theodoratus* prospectively while confirming the good standing of water certificates issued under the former system.”<sup>129</sup>

Two groups of plaintiffs sued, alleging that the municipal water supply statute was facially unconstitutional—but because Washington’s constitution does not establish PA as the basis for water allocation in the state, they could not prevail by showing that the law was contrary to the bedrock principle of beneficial use. They instead argued that the statute violated separation-of-powers principles (partly based on what they saw as its retroactive effect in overturning *Theodoratus*) and denied them substantive and procedural due process. The trial court agreed with their separation-of-powers arguments and ruled the statute unconstitutional.<sup>130</sup>

The Washington Supreme Court unanimously upheld the statute in *Lummi Indian Nation v. State*.<sup>131</sup> In rejecting the lower court’s holding regarding separation of powers, the Washington Supreme Court recognized that the legislature has clear authority to make policy, enact new statutes, and amend existing statutes.<sup>132</sup> The legislature exercised its power appropriately here, said the court, because the municipal water statute simply amended “an area of the law subject to ongoing

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126. See *Lummi Indian Nation v. State*, 241 P.3d 1220, 1226 (Wash. 2010) (explaining provisions of the 2003 statute).

127. *Id.* at 1227 n.7.

128. *Id.* at 1225–26 (citations and quotation marks omitted).

129. *Id.*

130. See *id.* (summarizing the trial court’s holding).

131. *Id.* at 1234.

132. *Id.* at 1229.

legislative refinement in the face of changing conditions.”<sup>133</sup> And by confirming existing certificates that had been issued under the old “pumps and pipes” approach,<sup>134</sup> the legislature was not adjudicating the facts of any one water right, but rather, was making policy.<sup>135</sup>

The plaintiffs also argued that the statute denied them due process by defining the term “municipal water supply purposes” to include water suppliers serving as few as fifteen taps, thus giving many water suppliers significant advantages under state water law; for example, municipal water rights are not lost through nonuse, and the place of use is more flexible than it is for other kinds of rights.<sup>136</sup> Thus, the statute gave a new set of users the benefit of municipal status, but in doing so it imposed a burden on competing users. The court recognized that these changes could harm some junior users, whose “enjoyment of their water rights may be impaired without individualized notice or prior opportunity to comment.”<sup>137</sup> But the court insisted that a facial due process challenge requires more than “mere potential impairment of some hypothetical person’s enjoyment of a right,” and that the statute did not change plaintiffs’ status as “junior water rights holders who take water subject to the rights of senior rights holders whose status may be improved by these changes.”<sup>138</sup> And since those changes did no more than confirm existing certificates and define a previously undefined term (municipal water supply), they did not violate due process.<sup>139</sup>

Interestingly, the *Lummi* court began its opinion by stressing the importance of beneficial use in Washington water law. “The beneficial and wise use of water has been a public concern since before we achieved statehood.”<sup>140</sup> The court also

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133. *Id.*

134. The court noted that *Theodoratus* had not involved a perfected (certificated) right—only a request to extend a permit—and therefore did not reduce or terminate any rights that had vested under the “pumps and pipes” policy. *Id.* at 1232. “While *Theodoratus* may have changed the expectations of those who acquired water rights after the date it was issued, it did not automatically divest or invalidate any vested or perfected rights.” *Id.* Thus, the court read the statute only as confirming existing water rights, not as resurrecting them.

135. *Id.* at 1230.

136. *See id.* at 1230–31.

137. *Id.* at 1231.

138. *Id.*

139. *Id.* at 1232.

140. *Id.* at 1223.

noted that a water use permit represents an inchoate right that does not vest until the right is perfected, and that the state agency's "pumps and pipes" policy had created some confusion about the requirements to perfect a permitted right, even though early Washington cases had held that "rights were not perfected until the water was both appropriated and put to beneficial use."<sup>141</sup> After providing that background, however, the court analyzed the validity of the statute without discussing whether it was faithful to the beneficial use principle of PA.

Thus, the Washington Supreme Court rejected a constitutional attack on the municipal water supply statute, while explicitly leaving the door open for later challenges to the law as applied to specific facts.<sup>142</sup> Because PA does not appear in the state constitution, and the *Lummi* opinion therefore did not assess the statute's faithfulness to PA in a constitutional challenge, one might presume that the case has little bearing on the ongoing role of PA in western water law. But it is significant that the court, after faithfully supporting PA in *Theodoratus*, unanimously upheld a statute recognizing perfected water rights based on system capacity—directly contrary to the bedrock principle of beneficial use as the basis, measure, and limit of a water right.

### 3. In New Mexico, Allowing New Uses Despite Likely Harm to Existing Ones

As in the *Lummi* case, the recent dispute over water law in New Mexico involves a facial challenge to a legislative enactment that arguably contradicts a basic PA principle. In New Mexico, however, the prior appropriation doctrine is written into the state constitution, which states that "unappropriated water . . . [is] subject to appropriation for beneficial use, in accordance with the laws of the state," and that "[p]riority of appropriation shall give the better right."<sup>143</sup> Thus, *Bounds v. State*<sup>144</sup>—on appeal to the state supreme court

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141. *Id.* at 1225 (citing *Ortel v. Stone*, 205 P.2d 1055 (Wash. 1922)).

142. *Id.* at 1229, 1234; *see also id.* at 1227 n.4 (noting at least one "as applied" challenge was pending at the administrative level).

143. N.M. CONST. art. XVI, § 2.

144. 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010), *cert. granted sub nom.* *Bounds v. Dantonio*, 2011-NMCERT-001, 263 P.3d 902 (2011), and *cert. granted sub nom.* *N.M. Livestock v. State Eng'r*, 2011-NMCERT-001, 263 P.3d 902 (2011).

as of this writing—raises the issue of whether a statute is unconstitutional because it conflicts with PA.

The statute at issue in *Bounds* requires the New Mexico State Engineer to issue permits to use groundwater for “household or other domestic use” without regard to the availability of unappropriated water or the impact of the new use on existing water rights.<sup>145</sup> The statute simply states that the State Engineer “shall issue” such permits, and exempts them from the usual standards because of “the varying amounts and time such water is used and the relatively small amounts of water consumed” by domestic wells.<sup>146</sup> This domestic well statute is relatively old, having remained on the books (with minor revisions) since 1953.<sup>147</sup>

Domestic wells might have been a minor matter in the New Mexico of the 1950s, but in recent years they have become a serious concern. The Office of the State Engineer (OSE) estimated that there were 137,000 domestic wells statewide in 2000, and that number continues to increase, with the OSE processing nearly 5,000 new domestic well permits in 2007.<sup>148</sup> The cumulative impact of these domestic wells on surface flows is a growing concern, given that most existing wells are within five miles of a stream, and the OSE has estimated that total annual withdrawals by domestic wells in the Rio Grande basin alone exceed 24,000 acre-feet.<sup>149</sup> Thus, by the early twenty-first century the stage was set for a challenge to the domestic well statute.

The New Mexico litigation began when *Bounds*, an irrigator with senior surface water rights in the Rio Mimbres stream system, sued to enjoin the OSE from issuing any further domestic well permits in the fully appropriated

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145. N.M. STAT. § 72-12-1.1 (2011).

146. N.M. STAT. §§ 72-12-1 to -1.1 (2011). The New Mexico water code has nearly identical permitting provisions for livestock watering, *id.* § 72-12-1.2, and for certain small-scale temporary uses, *id.* § 72-12-1.3, but *Bounds* dealt only with the domestic well statute.

147. Paul Bossert, *Domestic Wells*, in *UTTON TRANSBOUNDARY RES. CTR., UNIV. N.M. LAW SCH., WATER MATTERS!* 11-5, 11-6 (2012), [http://uttoncenter.unm.edu/pdfs/Water-Matters-2012/2012\\_water\\_matters\\_final\\_full-publication.pdf](http://uttoncenter.unm.edu/pdfs/Water-Matters-2012/2012_water_matters_final_full-publication.pdf).

148. *Id.* at 11-8.

149. *Id.* This figure represents nearly one-fourth of the water used by New Mexico’s largest metropolitan area. The Albuquerque Bernalillo County Water Utility Authority uses about 104,000 acre-feet per year to serve nearly 600,000 customers. ALBUQUERQUE BERNALILLO CNTY., WATER UTIL. AUTH., ANNUAL INFORMATION STATEMENT 6–7 (2011), <http://www.abcwua.org/pdfs/2011AIS.pdf>.

Mimbres basin. Bounds argued that the domestic well statute violated the state constitution by requiring issuance of permits without regard to water availability or injury to existing rights, resulting in new groundwater withdrawals that would reduce surface water flows to the detriment of senior users. After initially involving claims alleging harm specifically to Bounds, the case eventually came down to a facial challenge to the constitutionality of the domestic well statute.<sup>150</sup>

The district court granted summary judgment in Bounds' favor, holding that the statute gave senior water users no way to oppose new domestic well permits and allowed no determination of whether the new use would impair existing rights.<sup>151</sup> "It is not logical, let alone consistent with constitutional protections, to require the [State Engineer] to issue domestic well permits without any consideration of the availability of unappropriated water or the priority of appropriated water."<sup>152</sup> The court also noted that the State Engineer had "testified he would not subject domestic wells to a priority call notwithstanding this [was] a derogation of his [constitutional] duty."<sup>153</sup> The district court held the statute unconstitutional, and ordered the OSE to handle all domestic well applications on the same basis as other permit applications.<sup>154</sup>

The New Mexico Court of Appeals reversed, upholding the statute in a unanimous opinion by a three-judge panel.<sup>155</sup> The court reviewed relevant constitutional provisions, statutes, and rules,<sup>156</sup> then discussed cases addressing the protection

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150. See *Bounds v. State*, 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010), *cert. granted sub nom.* *Bounds v. Dantonio*, 2011-NMCERT-001, 263 P.3d 902 (2011), and *cert. granted sub nom.* *N.M. Livestock v. State Eng'r*, 2011-NMCERT-001, 263 P.3d 902 (2011).

151. *Id.* at 711.

152. *Id.* at 710 (alteration in the original) (quoting the trial court's findings).

153. *Id.* at 711 (alterations in the original) (quoting the trial court).

154. *Id.*

155. *Id.* at 719–22.

156. The court noted that the State Engineer had adopted rules in 2006 purporting to allow for priority administration of domestic wells, at least those issued after the date of those rules. See *id.* at 714. The court also quoted extensively from a State Engineer's order relating to the Mimbres basin (from whence the *Bounds* case arose), which provided that if water rights in the basin were to be administered by priority, all out-of-priority domestic rights "shall be curtailed and limited to essential indoor domestic uses and all outdoor uses shall cease." *Id.* The order similarly provided for curtailment of "out-of-priority" stockwatering uses "in order to limit such diversions to the relatively small amounts of water required for essential livestock watering." *Id.* at 713–14.

afforded to senior water rights under New Mexico law.<sup>157</sup> The court quoted from cases involving the statutes for issuing non-domestic water use permits; in one recent decision, the New Mexico Supreme Court had held that under the surface water permitting statute, water availability is the dispositive threshold issue and that the OSE must summarily reject an application if water is not available.<sup>158</sup> In a much earlier case,<sup>159</sup> the New Mexico Supreme Court held that existing statutes allowed the State Engineer to deny groundwater permits that would lead to reduced flows in the fully appropriated Rio Grande, saying that it would be “anomalous for the [L]egislature to enact laws designed to permit water, which would otherwise reach the stream in substantial quantities, to be withdrawn by pumps and thereby attempt to deprive the prior appropriators of their vested rights.”<sup>160</sup> The court of appeals said that these cases show that the OSE generally cannot and does not issue new permits where no water is available but do not establish that PA “forbids the Legislature from enacting a law making an exception” to that principle for new domestic wells.<sup>161</sup>

The court of appeals decision in *Bounds* turns on two fundamental points. First, and most fundamentally, “[t]he Constitution’s priority doctrine establishes a broad priority principle, nothing more. The prior appropriation provision is not self-executing.”<sup>162</sup> Second, “[t]he Legislature establishes the administrative process required for adherence to the broad constitutional principle. Thus, the Legislature has the authority to enact laws setting out the process *and to enact exceptions to or deviate from those laws.*”<sup>163</sup> In other words, the constitution leaves the legislature free to create exceptions

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157. *Id.* at 715–17.

158. The court of appeals quoted from the supreme court’s opinion in *Lion’s Gate Water v. D’Antonio*, 2009-NMSC-057, ¶25, 226 P.3d 622, 632 (N.M. 2009):

“Whether water is available for appropriation is the threshold issue that is dispositive of a permit application when water is not available for appropriation. The Legislature . . . mandated in Section 72-5-7 that the State Engineer ‘shall’ summarily reject water rights applications upon a determination that water is unavailable for appropriation.”

*Bounds*, 252 P.3d at 716.

159. *City of Albuquerque v. Reynolds*, 379 P.2d 73, 79 (N.M. 1962).

160. *Bounds*, 252 P.3d at 717 (alteration in the original) (quoting *Reynolds*, 379 P.2d at 79).

161. *Id.*

162. *Id.* at 719.

163. *Id.* (emphasis added).

from the normal rules of PA, including rules regarding denial of new permits in fully appropriated basins.<sup>164</sup> The court declared that the domestic well statute “is such an exception or variation, ultimately leaving for the State Engineer, as difficult as it looks to be, the administrative determination whether to curtail domestic use when senior water rights are impaired or threatened with impending impairment because of water shortages.”<sup>165</sup>

This power to create “exceptions” to the priority principle does not, however, free the legislature to ignore the rights of senior water users.<sup>166</sup> The court of appeals presumed that the legislature understood the need to balance the demand for domestic wells against the protection of senior rights,<sup>167</sup> and further presumed that the legislature

sees the hydrological expertise of the State Engineer as the preferable, if not the only reasonable way to attempt to reach the right balance of priorities and needs. It is up to the Legislature and the State Engineer to create an efficient, effective, and fair administrative process to reach the required balance and to protect senior water rights.<sup>168</sup>

The court then noted a New Mexico statute providing for administrative appeals of “acts or decisions” of officials subordinate to the State Engineer, followed by judicial review,<sup>169</sup> thus providing a process for senior water users to protect themselves against the effects of domestic wells. The court of appeals concluded that even in fully appropriated basins,

we do not see how the Legislature is forbidden under a facial constitutional attack from nevertheless enacting an exception to its existing statutory regime permitting additional appropriation for domestic purposes as long as senior water rights are not in fact impaired or subject to impending impairment.<sup>170</sup>

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164. *See id.* at 721.

165. *Id.* at 720.

166. *Id.* at 721.

167. *Id.* at 720.

168. *Id.* at 721.

169. *Id.*

170. *Id.*

Like the Idaho and Washington cases, *Bounds* reached a result that not only undermined PA but also differed from a recent decision from its state supreme court. Like the other two courts, the New Mexico Court of Appeals rejected a failed facial challenge to a law but left disappointed water users free to attack it as applied to them. And, as in Idaho, the court determined that the law did not violate the PA provisions of the state constitution. But the *Bounds* decision (if it stands) may have the greatest implications of the three because it holds that one of the most fundamental elements of PA—“first in time, first in right”—is only a broad principle subject to legislatively created exceptions.

*B. Assessing the Damage: Analysis of the Three Cases*

*American Falls*, *Lummi*, and *Bounds* all uphold state laws that contravene basic PA principles. In Idaho, the conjunctive management rules diminish “first in time, first in right” by emphasizing the need for “reasonableness” in all uses, and by subjecting delivery calls to a potentially lengthy administrative process that allows IDWR to weigh many factors in reaching a decision.<sup>171</sup> In Washington, the statute legitimates water rights based on “pumps and pipes” capacity rather than actual beneficial use, not just for cities but also for entities supplying water to as few as fifteen taps.<sup>172</sup> In New Mexico, the domestic well statute gives senior users no protection from harm that could result from issuing new permits, requiring the OSE to authorize new domestic wells without the usual process or standards.<sup>173</sup> Thus, each of these three cases weakens PA as the fundamental doctrine of western water law by undermining one of its most essential principles.<sup>174</sup>

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171. See *supra* Part III.A.1.

172. See *supra* Part III.A.2.

173. See *supra* Part III.A.3.

174. I do not suggest that all of the recent western water cases undermine PA principles; to the contrary, some decisions tend to support them. See, e.g., *Kobobel v. State*, 249 P.3d 1127 (Colo. 2011) (rejecting groundwater users’ claim that curtailment of their groundwater pumping in favor of senior users effected a taking of their property rights, because even though State Engineer had allowed them to pump for years, PA always made their use subject to being curtailed for the benefit of senior users); *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003) (holding that State Engineer’s rules for temporary plans to replace stream depletions caused by junior groundwater wells exceeded his statutory authority); *Mont. Trout Unlimited v. Mont. Dep’t of Natural Res. & Conservation*, 133 P.3d 224 (Mont. 2006) (rejecting agency’s statutory interpretation which provided

Some might argue that these three cases do not, in fact, reflect any trend toward abandonment of PA by the western states. Most obviously, none of the cases represents the last word on the validity of the law at issue given the availability of as-applied challenges, as well as the pending appeal in *Bounds*. Given that a facial challenge to a law must fail unless there is *no* potential application that would be constitutional,<sup>175</sup> the three reported decisions certainly do not provide an unqualified endorsement of the disputed statutes and rules.

The Idaho Supreme Court very recently upheld IDWR's application of the conjunctive management rules,<sup>176</sup> and because the agency ordered curtailment of junior groundwater uses for the benefit of senior surface water rights, that case suggests that PA remains relevant in Idaho despite the rules. The court's opinion in *Clear Springs Foods v. Spackman* seems to support that view, as it repeatedly indicates that senior users in Idaho are constitutionally protected against harm caused by junior users<sup>177</sup>—although most or all of those statements are apparently dicta.<sup>178</sup> Rhetoric aside, however, the court in *Clear Springs Foods* did not simply apply “first in time, first in right” as it had in *Musser v. Higginson*.

Most fundamentally, the court upheld the IDWR Director's reliance on a groundwater model in determining the impacts of

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minimal protection to senior water users from proposed new groundwater wells). The latter two cases turned on statutory interpretation rather than application of basic PA principles, but their results are consistent with the protection of senior users from the impacts of junior groundwater pumping.

175. *American Falls Reservoir v. Idaho Dep't of Water Res.*, 154 P.3d 433, 441 (Idaho 2007); *Bounds v. State*, 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010), *cert. granted sub nom.* *Bounds v. Dantonio*, 2011-NMCERT-001, 263 P.3d 902 (2011), and *cert. granted sub nom.* *N.M. Livestock v. State Eng'r*, 2011-NMCERT-001, 263 P.3d 902 (2011); *Lummi Indian Nation v. State*, 241 P.3d 1220, 1227 (Wash. 2010).

176. *Clear Springs Foods, Inc. v. Spackman*, 252 P.3d 71 (Idaho 2011).

177. *Id.* at 79, 81–82.

178. The court made most of its statements about PA in rejecting the groundwater users' argument that a document called the Swan Falls Agreement essentially protected all rights prior to October 1, 1984 from a senior call, and thus precluded IDWR's order curtailing their pumping. *Id.* at 79. The court held that the Swan Falls Agreement did no such thing, only subordinating certain hydropower water rights held by Idaho Power. *Id.* at 79. Thus, the court's grand statements about how the groundwater users' arguments would contradict PA in Idaho are rather clearly dicta. *Id.* at 78–79, 81. Similarly, the court seemingly did not need to invoke Idaho constitutional and statutory provisions regarding PA to reject the groundwater users' argument that the IDWR order violated a statute protecting “full economic development” of groundwater resources. *Id.* at 82–84. The court correctly held that the statute simply did not apply in the context of a call by senior surface users against junior groundwater users. *Id.* at 84.

pumping and the amount of curtailment needed. Despite some limitations of the model and uncertainty in its application, the Director chose to rely on the model as the best available science, and the court upheld that decision as being “within the outer limits of his discretion” under the applicable law.<sup>179</sup> Similarly, the court rejected the senior water users’ argument that the Director should have ordered a greater curtailment of pumping than he did, holding that he did not abuse his discretion by effectively applying the model’s ten percent margin of error in favor of the groundwater users.<sup>180</sup> The Director’s decision not to curtail pumping within the margin of error was partly based on the “public interest” provision in the conjunctive management rules, although the Idaho Supreme Court did not comment on that aspect of his decision.<sup>181</sup> Thus, while *Clear Springs Foods* might seem like a vindication of PA, it is primarily a victory for IDWR and its authority to exercise its considerable discretion in applying the conjunctive management rules.<sup>182</sup>

Believers in the ongoing viability of PA may also offer a couple of arguments based on established water law. They may point to well-aged and well-recognized judicial decisions to support the contention that PA has always included (or at least accommodated) some of the principles involved in these three cases. For example, in *Schodde v. Twin Falls Land & Water Co.*,<sup>183</sup> the U.S. Supreme Court held a century ago that it was not “reasonable” for an Idaho irrigator to command essentially the entire flow of the Snake River to run water wheels that delivered water to his 430 acres.<sup>184</sup> And the so-called “growing

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179. *Clear Springs Foods*, 252 P.3d at 95.

180. *Id.* at 97–98.

181. *Id.* The district court upheld the decision without regard to the “public interest” factor, and the Supreme Court affirmed the district court and accepted its rationale, so the higher court never considered whether the Director validly based his decision partly on the public interest.

182. IDWR did lose on one issue, as the court held that the groundwater users had been entitled to a hearing before the agency ordered curtailment of their pumping. *Id.* at 95–97. The court stated that “the circumstances of a particular delivery call or curtailment” will dictate whether a prior hearing is required. *Id.* at 96. This holding is another aspect of *Clear Springs Foods* that may cut against the court’s PA rhetoric, because it may tend to delay pumping curtailment orders to allow time for prior hearings, agency decisions, and appeals.

183. 224 U.S. 107 (1912).

184. *Id.* at 114–23; see also Jeffrey C. Fereday & Michael C. Creamer, *The Maximum Use Doctrine and Its Relevance to Water Rights Administration in Idaho’s Lower Boise River Basin*, 47 IDAHO L. REV. 67, 71–74 (2010) (discussing

cities doctrine”—allowing municipalities to hold rights to water they had not yet beneficially used—dates at least to the 1930s, when the Colorado Supreme Court held that it was “the highest prudence on the part of [Denver] to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time.”<sup>185</sup>

While such old cases may contain relevant principles, however, they hold much truer to PA basics than the new laws do. Thus, it is one thing to hold that the water-wheel irrigator in *Schodde* was unreasonable to demand the full flow of the Snake to irrigate one farm; it is a very different thing to suggest that “reasonableness” is a principle equal in importance to priority<sup>186</sup> and a valid basis to deny a call by a senior surface water appropriator using conventional irrigation techniques.<sup>187</sup> And it is one thing to hold, as the Colorado Supreme Court did, that an incorporated municipality could maintain inchoate water rights for future growth, conditioned on the water eventually being applied to beneficial use;<sup>188</sup> it is another thing to allow any entity supplying more than a few

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“maximum use” principles under Idaho water law, including the prohibition on wasteful uses).

185. *City & Cnty. of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939); *see also* TARLOCK ET AL., *supra* note 43, at 97 (identifying *Sheriff* as a case applying the growing cities doctrine).

186. In the PA context, the principle of reasonableness has applied most strongly in the context of disputes between groundwater appropriators, where courts and statutes have protected senior users from interference only to a “reasonable” extent. *See, e.g.*, *Wayman v. Murray City Corp.*, 458 P.2d 861, 865–66 (Utah 1969) (rejecting absolute protection for senior users in favor of a “rule of reasonableness”). The *Wayman* court noted that several western states had enacted statutes codifying such a rule. *Id.* at 866 & n.8 (citing statutes from Alaska, Colorado, Idaho, Kansas, Montana, Nevada, and Wyoming).

Even in this context, however, priority has trumped reasonableness when the two have directly conflicted. For example, in *Baker v. Ore-Ida Foods, Inc.*, the Idaho Supreme Court noted that senior users were protected only in the maintenance of “reasonable [well] pumping levels.” 513 P.2d 627, 636 (Idaho 1973) (citing IDAHO CODE ANN. § 42-226). But it flatly rejected the arguments of junior users that they were entitled to a pro rata share of the available supply of an aquifer they shared with senior users. That sort of “correlative rights” approach, the court said, was “repugnant to our constitutionally mandated prior appropriation doctrine.” *Id.* at 635. Because the aquifer was insufficient for all users, only those with senior water rights got to continue pumping. *Id.* at 636–37.

187. The requirement that all water uses be “reasonable” is a core principle of the riparian rights doctrine, which the western territories and states rejected long ago. *See supra* notes 20–24 and accompanying text.

188. The *Sheriff* court noted, “[t]hat such water must first be applied to a beneficial use by the city before it has any property right in it is not disputed.” *Sheriff*, 96 P.2d at 842.

customers to retain perfected, permanent rights to water *regardless* of actual beneficial use.

The PA faithful might also contend that the results of *Lummi* and *Bounds*, at least, are consistent with many western water statutes. As the Washington Supreme Court noted, “municipal water rights . . . often receive separate treatment in water law.”<sup>189</sup> The Washington water code, for example, exempts municipal water rights from being lost for nonuse.<sup>190</sup> Several states have statutes that essentially codify the “growing cities doctrine,” allowing municipalities to hold water rights in excess of their current needs in order to plan for future growth,<sup>191</sup> although none go as far as the Washington law in disregarding beneficial use. As for the New Mexico domestic well statute at issue in *Bounds*, it has counterparts in several western states, including Oregon and Washington.<sup>192</sup>

While this statutory context does indicate that the three recent cases are within the mainstream of western water law, they also show that the mainstream has been shifting away from PA. Municipal water rights and domestic wells are two areas in which the states have long been willing to deviate from PA in order to accommodate other important goals. By enacting and retaining these kinds of statutes, legislatures have essentially decided that sticking to PA principles is less

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189. *Lummi Indian Nation v. State*, 241 P.3d 1220, 1223 (Wash. 2010) (citing *State v. Theodoratus*, 957 P.2d 1241, 1247 (Wash. 1998)).

190. *Id.* at 1231 (citing WASH. REV. CODE § 90.14.140(2)(d)).

191. *See, e.g.*, N.M. STAT. ANN. § 72-1-9 (2006) (providing for water rights for municipalities and other public water suppliers based on 40-year planning horizon); OR. REV. STAT. § 537.230 (2005) (giving municipalities a standard period of 20 years—instead of the 5 years allowed for other uses—to complete construction activities under a water supply permit, and allowing for extensions of that twenty-year period under certain conditions); Christopher H. Meyer, *Municipal Water Rights and the Growing Communities Doctrine*, WATER REPORT, Mar. 15, 2010, at 1, 4–8 (describing 1996 Idaho municipal water rights statute, including provision allowing water rights to be held by municipalities for “reasonably anticipated future needs” as defined in section 42-202B(8) of the Idaho Code).

192. OR. REV. STAT. § 537.545(1)(d) (2009) (groundwater permit exemption for “[s]ingle or group domestic purposes” using up to 15,000 gallons per day); WASH. REV. CODE § 90.44.050 (2011) (same, with limit of five thousand gallons per day). The Montana water code generally exempts small groundwater uses of no more than thirty-five gallons per minute and ten acre-feet per year, and agency implementation of this exemption is the source of ongoing controversy in that state. *See* Declaratory Ruling on Petition to Amend Rule 36.12.101(13) (Mont. Dep’t of Natural Res. Aug. 17, 2010), *available at* [http://www.dnrc.mt.gov/wrd/declaratory\\_ruling/declaratory\\_ruling.pdf](http://www.dnrc.mt.gov/wrd/declaratory_ruling/declaratory_ruling.pdf) (declaratory ruling regarding agency interpretation of scope of small-scale well exemption).

important than assuring adequate water supplies for growing cities and for landowners' domestic needs.<sup>193</sup> The fact that some such statutes have been around for many years—the New Mexico domestic well law, for example, was first enacted in 1953<sup>194</sup>—only shows that the ongoing exodus from PA is not a recent development. In reality, the western states have been quietly moving away from PA for many years, abandoning it in stages.

I wrote in 1998 that the Pacific Northwest states followed a policy of maintaining the status quo—that is, preserving established water uses, even when such uses should have been curtailed under established state water law.<sup>195</sup> That article identified the Idaho conjunctive management rules, then relatively new, as a prime example of a state seeking to maintain status quo water uses in spite of the “first in time, first in right” principle and IDWR’s mandatory duty to administer water by priority.<sup>196</sup> Another example was the enactment in Montana and Washington of statutes that allowed water users to file claims in ongoing water right adjudications *after* the original statutory filing deadline, effectively reviving time-barred claims for existing uses.<sup>197</sup>

The *Lummi* and *Bounds* cases, however, do not quite fit the model of states protecting status quo water uses. The Washington Supreme Court upheld a statute that preserved existing water right certificates, but not necessarily existing *uses*; indeed, the main beneficiaries of the law would be those who had never beneficially used a portion of their allocated water, and were, therefore, at risk of losing that portion.<sup>198</sup> The New Mexico domestic well statute, of course, protects those who have neither an existing use nor any form of water right, but who may want to drill a new well.<sup>199</sup> Both these statutes could leave some existing users worse off than they would be

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193. Domestic well exemptions may also be justified based on the small size of each individual use, *see* N.M. STAT. ANN. § 72-12-1.1 (2003), and on the administrative burden that would be imposed by requiring a full-blown permit review process for thousands of domestic well applications each year. But as the cumulative effect of pumping by thousands of (individually small) users becomes known, the states can no longer pretend that domestic wells present no real concerns for surface flows and senior users. *See* Bossert, *supra* note 147.

194. *See supra* note 147 and accompanying text.

195. Benson, *supra* note 67.

196. *Id.* at 895–96.

197. *Id.* at 897.

198. *See supra* Part III.A.2.

199. *See supra* Part III.A.3.

under established PA principles, as acknowledged by the courts.<sup>200</sup>

These two statutes are best understood not as maintaining existing uses, but as preserving a perceived right of access to water. The Washington Legislature acted to ensure that the water suppliers with “pumps and pipes” certificates did not lose any of their paper entitlements, which probably seemed secure to them prior to *Theodoratus*.<sup>201</sup> New Mexico’s domestic well law ensures that property owners have continued access to the groundwater beneath their land for purposes of meeting their basic household needs—access they have enjoyed for decades, predating even the 1953 statute.<sup>202</sup> These statutes are therefore similar to those creating exceptions to the forfeiture rule, which otherwise provides that failure to use water for a fixed period of years will result in loss of the right.<sup>203</sup> Unlike PA—which vigilantly protects existing beneficial uses—all of these statutes benefit those who believe they have a right to a certain quantity of water, even though they have not been using all (or perhaps any) of that water.

The Idaho conjunctive management rules do benefit existing (junior) users, and thus at least can reasonably claim to further the maximum beneficial use of water resources.<sup>204</sup> But promoting this underlying goal of PA sometimes means clashing with the core principles of PA,<sup>205</sup> and the Idaho rules

200. See *supra* notes 144, 167 and accompanying text.

201. See *supra* notes 125–36 and accompanying text.

202. See *Bounds v. State*, 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010) (noting 1953 domestic well statute codified pre-existing administrative practice of exempting certain groundwater applications from permit requirement), *cert. granted sub nom.* *Bounds v. Dantonio*, 2011-NMCERT-001, 263 P.3d 902 (2011), and *cert. granted sub nom.* *N.M. Livestock v. State Eng’r*, 2011-NMCERT-001, 263 P.3d 902 (2011).

203. See N.M. STAT. ANN. § 72-5-28 (2002) (providing for loss of water right after four years of nonuse, but providing multiple exceptions to the usual rule); Krista Koehl, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility*, 28 ENVTL. L. 1137, 1142–46 & n.67 (1998) (explaining “use it or lose it” principle and Oregon statutory exceptions; listing 13 exceptions to the usual rule in section 540.610 of Oregon’s revised statutes).

204. See IDAHO ADMIN. CODE r. 37.03.11.010.07 (2011) (defining “[f]ull [e]conomic [d]evelopment of [u]nderground [w]ater [r]esources”); *id.* r. 37.03.11.020.03 (2011) (incorporating “full economic development” principle into “reasonable use” requirement).

205. See, e.g., *Se. Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1974) (denying request for new appropriation, free from priority calls, based on clearing water-wasting streamside vegetation, despite arguments that recognizing such appropriations would promote beneficial use of water and would cause no harm to senior users).

do just that, effectively replacing IDWR's mandatory duty to enforce priorities with a complex framework that allows the agency to consider many factors and choose various remedies in response to a priority call.<sup>206</sup> Groundwater users may see that as entirely fair, because for many years they pumped without ever being subjected to a call, which surely caused many to believe that their uses would not be curtailed for the sake of surface water users regardless of priority. In this respect, then, all three of the recent cases have the same result: they all preserve continued access to water for those who had an *expectation* of that access, even if PA would not have recognized a *right* to ongoing access or use.

Thus, not only do all three cases depart from PA, they go in the same direction, away from the principles that impose specific restrictions on water usage for certain purposes. By upholding statutes and rules that ease those restrictions, the cases accept that water rights may be created or protected in ways that classic PA would not allow. The cases also recognize that such laws may disadvantage existing (junior or senior) users who would be better protected by PA, but that effect does not necessarily render the laws invalid, even in states where PA is written into the constitution. For those water users who perceive that they will be disadvantaged—such as the disappointed plaintiffs in *American Falls*, *Lummi*, and *Bounds*—the western states' move away from PA is clearly a problem. The benefited users, of course, would see it differently. But the larger question, to which the conclusion turns, is whether this move should be seen as a good thing or a bad thing for water policy in the West.

#### CONCLUSION: IMPLICATIONS OF THE FALL OF PRIOR APPROPRIATION

This Article has shown how Prior Appropriation has lost its hold over western water law as courts have upheld deviations from even the most fundamental PA principles, even in states with PA provisions in their constitutions. From a policy standpoint, that is a positive development—that is, in general and on balance, the states' willingness to depart from PA is likely to benefit water policy. Western water law has long been criticized for its various shortcomings, and despite some

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206. See *supra* notes 96–104 and accompanying text.

recent progress, the states have made only limited headway in resolving them.<sup>207</sup> Letting go of PA may liberate the states to enact stronger policies to address its failures, such as promoting efficiency and flexibility in water use, protecting public values such as recreation and environmental quality, and strengthening state authority to manage water.

Of course, this new freedom from PA may also allow the states to move in the opposite direction, making it legally easier to secure water rights for consumptive, more-or-less private uses without regard for impacts on other users or the sustainability of the resource. The New Mexico domestic well law and the *Bounds* decision do exactly that; the Washington statute upheld in *Lummi* arguably does too, by expanding the universe of “municipal” water suppliers and preventing scrutiny of their potentially unused water rights.<sup>208</sup> If the states depart from PA only to make it easier for people to obtain or retain entitlements to consume water, they will make things worse rather than better—especially as the effects of climate change make it increasingly difficult to balance the West’s water supplies and demands.<sup>209</sup>

The question is whether the western legislatures will enact—and the courts will uphold—statutes that move in the other direction by protecting public values, providing flexibility, advancing efficiency, or promoting forward-looking water management in ways that PA would not. The widespread legal recognition of instream flows is cause for optimism, or at least an indication that positive reforms are indeed possible.

Colorado offers an encouraging example in this regard, and not simply because the legislature enacted an instream flow statute that its supreme court upheld as constitutional.<sup>210</sup>

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207. See Getches, *supra* note 7, at 23–42 (describing limited progress toward western water reforms in the 1990s).

208. In fairness to the Washington statute, it also established certain water conservation requirements for municipal water suppliers. See H.R. 1338, 58th Leg., 1st Spec. Sess. (Wash. 2003); Sarah E. Mack, *Washington’s Municipal Water Law Upheld by State Supreme Court*, 15 W. WATER L. & POL’Y REP. 35, 36 (2010). Thus, the measure arguably advanced progressive water policy goals as well as addressing the concerns of developers and cities.

209. The literature regarding the effects of climate change on western water is extensive. For a recent article dealing with both the projected impacts and the legal and policy implications, see Robert H. Abrams & Noah D. Hall, *Framing Water Policy in a Carbon Affected and Carbon Constrained Environment*, 50 NAT. RESOURCES J. 3 (2010).

210. *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570, 574–75 (Colo. 1979) (upholding Colorado’s 1973 instream flow statute known as Senate Bill 97).

Colorado has beneficially used this authority to develop a relatively robust instream flow program, establishing protected levels in over 1,900 stream segments and lakes by 2005—more than in any other state.<sup>211</sup> Moreover, Colorado has taken steps to revise its laws and invest resources, clearing away obstacles to instream flow protection and restoration.<sup>212</sup> Although Colorado's instream flow program is certainly not an unqualified success, and further revisions could improve its effectiveness,<sup>213</sup> it shows that western states are capable of reforming their water laws and programs to address the chronic deficiencies of PA.

A related question is whether western state water agencies will take actions that deviate from PA in the absence of specific legislative direction to do so, and whether the courts will uphold such actions. Here there may be less reason for optimism, given that state water officials in the West have rarely been famous for taking risks—especially for the sake of protecting public values.<sup>214</sup>

Idaho's conjunctive management rules are one example of an agency taking action without specific statutory authorization, but IDWR was already between a rock and hard place after *Musser v. Higginson*. And when the Idaho Supreme Court upheld the rules in *American Falls*, the primary

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211. SASHA CHARNEY, COLO. WATER CONSERVATION BD., *DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES* 18 tbl. 15 (2005), <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>. Oregon was next with 1,550 protected reaches and lakes as of 2005; no other state had as many as 500 at that time. *Id.*

212. See Reed D. Benson, "Adequate Progress," or *Rivers Left Behind? Developments in Colorado and Wyoming Instream Flow Laws Since 2000*, 36 ENVTL. L. 1283, 1302–03 (2006).

213. *Id.* at 1304–09.

214. See Neuman, *supra* note 28, at 961 (noting that state water agencies play a largely passive role as to existing water uses, and "do not actively seek to define and enforce against waste or inefficient water use . . . . The agencies do not go looking for either forfeiture or waste but simply react to the worst of the complaints brought to them"); Benson, *supra* note 212, at 1301–02 (describing how Wyoming State Engineer Pat Tyrrell denied the Town of Pinedale's request to transfer some of its water to instream use—even though the transfer would not have harmed any other water user—based on a narrow interpretation of Wyoming's instream flow statute). Statutory provisions requiring new permits or transfers to accord with the "public interest" offer another example of state agencies' reluctance to use their authority. See generally Reed D. Benson, *Public on Paper: The Failure of Law to Protect Public Water Uses in the Western United States*, 1 INT'L J. RURAL L. & POL'Y, no. 1, 2011, at 1, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1984062](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984062).

beneficiaries were the private groundwater users who had intervened in the case. In contrast, the New Mexico Court of Appeals recently struck down key portions of the State Engineer's "Active Water Resource Management" rules geared toward strengthening the agency's powers to administer priorities in times of shortage; the court held that the rules exceeded the State Engineer's statutory authority, even though the legislature had specifically directed him to adopt rules to address the serious lack of water management in unadjudicated basins.<sup>215</sup> The court insisted that the legislature could have authorized the state engineer to adopt the rules that he did, but found that it had failed to do so in "direct, clear, and certain terms"<sup>216</sup>—effectively negating an express legislative directive, and blocking the responsible agency from applying its expertise to address the critical problem of water management.

One thing is clear: the state legislatures can now choose to reshape water law to address the problems facing the West today, and tomorrow, without too much concern for the constraints traditionally imposed by PA principles. In making those choices, legislators may be influenced by the expectations created during the years when PA prevailed as state water law, or by the loyal support that PA still has in the agricultural community, especially.<sup>217</sup> But those are political arguments; as a legal doctrine, PA has lost its force. Like the centenarian who founded the company but now has only an honorific title, Prior Appropriation has more symbolic importance than practical influence. In today's western water law, old Prior may still be alive, but he is no longer in charge.

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215. *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2011-NMCA-015, 249 P.3d 932, 939–43 (N.M. App. Ct. 2010), *cert. granted*, 2011-NMCERT-002, 150 N.M. 617, 264 P.3d 129 (2011). The legislature had passed a 2003 statute declaring that "the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the [S]tate [E]ngineer has authority to administer water allocations in accordance with . . . priorities," *id.* at 935 (quoting N.M. STAT. ANN. § 72-2-9.1(A) (2003)) (alteration in the original), and directing the state engineer to adopt rules for priority administration, N.M. STAT. ANN. § 72-2-9.1(B). The court held, however, that the legislature had misperceived the state engineer's existing authority. *Tri-State Generation & Transmission Ass'n*, 2011-NMCA-015, 249 P.3d at 937–39.

216. *Tri-State Generation & Transmission Ass'n*, 2011-NMCA-015, 249 P.3d at 942.

217. See Tarlock, *supra* note 15, at 885–86.

# ADMINISTERING JUSTICE: REMOVING STATUTORY BARRIERS TO REENTRY

JOY RADICE\*

*After years of swelling prison populations, the reentry into society of people with criminal convictions has become a central criminal justice issue. Scholars, advocates, judges, and lawmakers have repeatedly emphasized that, even after prison, punishment continues. State and federal statutes impose severe civil penalties on anyone with a conviction. To alleviate the impact of these punishments, individuals from the ivory tower to the legislative floor have increasingly endorsed state legislation that creates Certificates of Rehabilitation, administratively-issued certificates that legally remove statutory bars to employment, housing, and other benefits. Several states currently offer these post-conviction certificates, and five additional states have proposed and one passed such legislation in 2011. Many look to New York's statute as the archetypal model because it is the oldest and most robust. Yet no article has examined New York's experience with Certificates of Rehabilitation.*

*This Article draws lessons from the fifty-year history of New York's Certificates of Rehabilitation to describe an ideal administrative mechanism for removing statutory barriers to reentry. I argue that a model Certificate of Rehabilitation statute should have a strong enforcement mechanism and clear directives for administering authorities, like a sentencing court or state agency. Successful implementation also requires committed administrative leadership and a means for making certificates accessible to people with*

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*convictions. Certificates of Rehabilitation do not erase a person's criminal history, but they do offer legal and social recognition that after a criminal conviction a person deserves a second chance.*

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## INTRODUCTION

President Barack Obama recently applauded the owner of the Philadelphia Eagles for giving all-star quarterback Michael Vick a second chance after his release from federal prison.<sup>1</sup> Vick served twenty-three months after pleading guilty to participating in a dogfighting ring.<sup>2</sup> President Obama said, “[i]t’s never a level playing field for prisoners when they get out of jail.”<sup>3</sup>

Thousands of civil punishments stand in the way of giving people who served their criminal sentences a true second chance. These punishments are often referred to in academic literature as “collateral consequences”<sup>4</sup> because they are not part of the penal sanction in sentencing laws; rather, they are “scattered throughout a variety of state and federal statutes and regulations, and increasingly in local laws.”<sup>5</sup> In December 2010, the American Bar Association released preliminary findings from a national study identifying over 38,000 statutes and regulations that contain a collateral consequence of a criminal conviction.<sup>6</sup> These consequences take two forms.<sup>7</sup> One is a sanction that is triggered automatically by a civil statute because of a conviction. The other is a discretionary

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1. See Perry Bacon, Jr., *Obama Weighs in on Michael Vick, and Other Cultural Issues*, WASH. POST (Dec. 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/27/AR2010122704579.html>.

2. *Vick Released from Federal Custody*, ESPN (July 21, 2009), <http://sports.espn.go.com/nfl/news/story?id=4340597>.

3. Bacon, *supra* note 1.

4. State and federal civil laws that permit discrimination on the basis of a conviction have been called “invisible punishments,” “hidden sentences,” and “collateral consequences” because, even after a person completes her criminal sentence, there are additional penalties that make the debt owed to society seem to be unending. See JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 64 (2005).

5. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 678 (2008); see also Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 639 & n.91 (2006).

6. ABA, *ABA Criminal Justice Section Consequences Project*, INST. FOR SURV. RES.—TEMPLE U., <http://isrweb.isr.temple.edu/projects/accproject> (last visited Feb. 28, 2011) [hereinafter ABA Demonstration Site]. Visitors can search for statutes by state or key words/phrases. *Id.*

7. See ABA, *ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS* 1 (3rd ed. 2004) (showing that collateral consequences take two forms: collateral sanctions and discretionary disqualifications).

disqualification related to a conviction that a civil court or administrative agency “is authorized but not required” to impose on a person.<sup>8</sup> Consider the following examples:

- A man convicted of assault served twelve years in prison where he became the state prison’s head barber. When he was released, he applied for a barber’s license. State laws permitted the licensing agency, in its discretion, to deny his application because of his single felony conviction.<sup>9</sup>
- An eighteen-year-old was fined and received a summons for illegally selling tickets outside Yankee Stadium. The unpaid summons ultimately resulted in a misdemeanor conviction. Even though the student eventually paid the fine and completed community service, the conviction triggered a federal law requiring his father’s application for public housing to be denied, and they continued living in a shelter.<sup>10</sup>
- A university student convicted of a drug possession misdemeanor completed her sentence at a drug-treatment program. Her financial aid award for college, however, was automatically cut under a mandate of the federal Higher Education Act.<sup>11</sup>

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8. *Id.*

9. The Legal Action Center conducted a nationwide study of collateral consequences and ranked each state by the number of civil punishments catalogued in state statutes and regulations. *See* LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY—A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS: 2009 UPDATE 21–24 (2009), <http://www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry—2009.pdf>. On employment issues, most states allow employers and licensing agencies to even consider arrests that did not lead to a conviction in an application determination. *See id.* at 10. Twenty-six states have no standards for occupational licensing agencies to consider when determining how to consider a criminal record in denying an applicant. *See id.*

10. *See id.* at 11–12. An overview of public housing roadblocks can be found at *After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records: Public Housing*, LEGAL ACTION CENTER, <http://www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=6> (last visited Nov. 21, 2011) (noting that thirty state housing authorities make decisions about eligibility based on arrests that never led to a conviction).

11. *See* LEGAL ACTION CTR., *supra* note 9, at 2. In 2005, the Higher Education Act was amended to make only individuals who receive a drug conviction *while* receiving student aid ineligible for federal financial assistance—a modification of the previous ban that made all students convicted of a drug-related offense

Federal and state-triggered statutory barriers, like those in the above examples, are rarely just collateral to a conviction. They can be more punitive and permanent than a person's actual criminal sentence.<sup>12</sup> Unlike Michael Vick, most people with convictions face severe barriers to employment. This is especially troubling because criminology studies show that employment has the potential to decrease crime and encourage successful reentry.<sup>13</sup>

A major aim of reentry<sup>14</sup> reform over the past two decades has been to make these invisible punishments visible.<sup>15</sup> Numerous academics have catalogued and critiqued these punishments as permanent impediments to successful

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ineligible to receive federal financial assistance whether or not the student was receiving aid at the time of conviction. *After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records: Student Loans*, LEGAL ACTION CENTER, <http://www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=7> (last visited Feb. 24, 2012). States do not have the ability to alter this federal statute. No other criminal offense—including violent felonies, sex offenses, or alcohol-related offenses—prompts automatic ineligibility. *Id.* For a historical perspective of the Higher Education Act's application to people with drug convictions, see *id.*

12. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) (“Despite their innocuous name, for many convicted offenders, and especially those who never serve any prison time, these ‘collateral’ consequences ‘are . . . the most persistent punishments that are inflicted for [their] crime’” (quoting Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROBATION, Sept. 1987, at 52, 52)). The Supreme Court has historically found that civil consequences do not implicate the Eighth Amendment proportionality doctrine even if the civil sanction appears more punitive than the criminal sentence. Eva S. Nilson, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 174 (2007) (arguing that barriers to reentry should have to be justified as rational, but that the Supreme Court has said that the “Eighth Amendment has nothing to say about such collateral consequences”).

13. See, e.g., Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 484 (2006).

14. I adopt the definition of reentry as the “process of leaving prison and returning to society.” See TRAVIS, *supra* note 4, at xxi. As Travis points out, “[r]eentry is not a form of supervision, like parole. Reentry is not a goal, like rehabilitation or reintegration. Reentry is not an option.” *Id.* The vast majority of people who are incarcerated will return to society. *Id.* at xxii.

15. See generally ANTHONY A. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* (2008) (providing a comprehensive discussion about collateral consequences under state and federal law).

reintegration.<sup>16</sup> State and national bar associations have issued reports and standards in an attempt to combat the negative impact that these consequences have on reentry efforts.<sup>17</sup>

In 2010, scholars, advocates, and lawmakers characterized the Supreme Court's decision in *Padilla v. Kentucky* as a watershed event for collateral consequences. In *Padilla*, the Supreme Court identified deportation as a severe civil penalty of a conviction, and held that under the Sixth Amendment right to counsel, defense attorneys must advise defendants whether a "plea carries a risk of deportation."<sup>18</sup> For the first time, the Court recognized the need to inform defendants of a consequence that is not directly a part of the criminal sentence.<sup>19</sup> Since *Padilla*, lower courts have held that other collateral consequences, such as civil commitment, employment termination, and loss of retirement pensions, fall under *Padilla*

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16. Since 2000, an explosion of research on collateral consequences has commented on the far-ranging impact of civil punishments, from denying individuals the right to vote, to limiting employment opportunities. *See id.*; TRAVIS, *supra* note 4; *see also* Regina Austin, "The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons, 36 COLUM. HUM. RTS. L. REV. 173 (2004); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002); Demleitner, *supra* note 12; Alec C. Ewald, "Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 WIS. L. REV. 1045; Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491 (2003); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255 (2004); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15–36 (Marc Mauer & Meda Chesney-Lind eds., 2002).

17. *See, e.g.*, 2007 COLLATERAL SANCTIONS COMM., MINN. LEGISLATURE, CRIMINAL RECORDS AND EMPLOYMENT IN MINNESOTA (2008); ABA COMM. ON EFFECTIVE CRIMINAL SANCTIONS & PUB. DEFENDER SERV. FOR THE DIST. OF COLUMBIA, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (2009); SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, N.Y. STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY (2006).

18. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

19. *See* Gabriel J. Chin & Margaret Colgate Love, *The "Major Upheaval" of Padilla v. Kentucky: Extending the Right to Counsel to the Collateral Consequences of Conviction*, CRIM. JUST., Summer 2010, at 36, 37 (finding that the *Padilla* decision now requires defense attorneys to consider the collateral consequences of their clients' criminal convictions and predicting that "the 'Padilla advisory' may become as familiar a fixture of a criminal case as the *Miranda* warning").

and raise a duty to advise defendants of collateral consequences prior to taking a plea.<sup>20</sup>

As scholars, courts, and lawmakers consider ways to alleviate the burden of collateral consequences, one approach has been recommended repeatedly: administrative relief mechanisms.<sup>21</sup> A state-issued certificate can legally remove some or all statutory barriers to employment, housing, higher education, and other benefits.<sup>22</sup> As far back as 1962, the American Law Institute's Model Penal Code proposed a comprehensive approach to "restoration of rights and status" that included an order of relief that could be issued by the sentencing court.<sup>23</sup> The ABA's Commission on Effective Criminal Sanctions has urged states to "enact laws providing for certificates of rehabilitation . . . . The legal effect of such a certificate should be made clear in each case: the certificate 'may declare that an individual is eligible for all employment, and other benefits and opportunities.'"<sup>24</sup> Several states<sup>25</sup> have

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20. See, e.g., *Bauder v. Dep't. of Corr.*, 619 F.3d 1272, 1273 (11th Cir. 2010) (holding that an attorney was ineffective for giving bad advice about possible civil commitment as a result of a plea); *Taylor v. State*, 698 S.E.2d 384, 385 (Ga. Ct. App. 2010) (holding that counsel was ineffective for failing to inform defendant that a guilty plea to child molestation required sex offender registration); *Commonwealth v. Abraham*, 996 A.2d 1090, 1095 (Pa. Super. Ct. 2010) (holding that counsel needed to inform defendant of the loss of his teacher's pension as a consequence of pleading guilty), *rev'd*, 9 A.3d 1133 (Pa. 2010).

21. See generally COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, AM. BAR ASS'N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES (2007); TRAVIS, *supra* note 4; Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705 (2003); Pinard, *supra* note 16.

22. See ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND ADMINISTRATIVE DISQUALIFICATION OF CONVICTED PERSONS 9–10 (3d ed. 2003); see also MARGARET LOVE & APRIL FRAZIER, ABA COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS 4, 5 n.14 (2006), [http://meetings.abanet.org/webupload/commupload/CR203000/otherlinks\\_files/convictionsurvey.pdf](http://meetings.abanet.org/webupload/commupload/CR203000/otherlinks_files/convictionsurvey.pdf).

23. Love, *supra* note 21, at 1711–12.

24. Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on Collateral Consequences of Conviction*, CRIM. JUST., Fall 2006, at 16, 22; see also ABA COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, CRIMINAL JUSTICE SECTION NAT'L LEGAL AID & DEFENDER ASS'N, REPORT TO THE HOUSE OF DELEGATES ON REPRESENTATION RELATING TO COLLATERAL CONSEQUENCES (2007); JUSTICE KENNEDY COMM'N, REPORT TO THE ABA HOUSE OF DELEGATES ON PUNISHMENT, INCARCERATION, AND SENTENCING 65 (2004) (urging "bar associations to establish programs to encourage and train lawyers to assist prisoners in applying for pardon, restoration of legal rights and privileges, relief from other collateral sanctions, and reduction of sentence").

established administrative relief mechanisms, but none are as old and robust as New York's statutes, which were passed fifty years ago.<sup>26</sup>

In the late forties, New York legislators created two statutes, which I refer to collectively as "Certificates of Rehabilitation," aimed at reducing employment barriers for people with criminal records.<sup>27</sup> In support of the legislation's expansion in 1976, New York Governor Hugh Carey wrote:

The great expense and time involved in successfully prosecuting and incarcerating the criminal offender is largely wasted if upon the individual's return to society, his willingness to assume a law-abiding and productive role is frustrated by senseless discrimination.

Providing a former offender a fair opportunity for a job is a matter of basic human fairness, as well as one of the surest ways to reduce crime.<sup>28</sup>

Governor Carey recognized in 1976 what reentry scholars and advocates are saying today—unless a person is relieved of statutory barriers, the person's likelihood for recidivism increases and the person's attempts to reintegrate into society are frustrated. The unique part of the statutory framework created in New York in the seventies is a two-tier horizontal relief mechanism. For individuals with minor convictions, certificates granted at sentencing were seen as a *means* to rehabilitation. Relieving statutory barriers made reintegration easier. For individuals with multiple and serious felony convictions, the state required a waiting period prior to applying for a certificate. For those individuals, the certificate served as *proof* of rehabilitation. Much of today's conversation about Certificates of Rehabilitation revolves around the latter approach. New York's dual approach offers two different rationales for how these relief mechanisms can work most effectively.

The Certificates of Rehabilitation statutes authorize two administering bodies, the sentencing court and the Department

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25. The states include California, Illinois, Mississippi, Nevada, and New Jersey. See LOVE & FRAZIER, *supra* note 22, at 2; Love, *supra* note 24, at 22.

26. See N.Y. CORRECT. LAW §§ 700, 702–03 (McKinney 2011).

27. See *id.* §§ 700–706. Receiving a Certificate of Rehabilitation relieves an eligible person "of any forfeiture or disability" and "remove[s] any bar to [his or her] employment, automatically imposed by law by reason of [his or her] conviction." 1945 N.Y. Sess. Laws 64–65 (McKinney).

28. 1976 N.Y. Sess. Laws 2459 (McKinney).

of Corrections and Community Supervision (DCCS),<sup>29</sup> to issue certificates.<sup>30</sup> An applicant with any number of misdemeanors and up to one felony can apply to the sentencing court for a certificate as early as the applicant's sentencing date.<sup>31</sup> The department of probation investigates the application and makes a recommendation to the court about whether an individual should be awarded a certificate.<sup>32</sup> The DCCS investigates and awards certificates to individuals who do not fall within the limited category of those who apply to the sentencing court.<sup>33</sup>

New York's Certificates of Rehabilitation statutes have served as a model administrative relief mechanism. In 2006, Illinois's certificate statute, co-authored by then State Senator Barack Obama, was based on New York's statute.<sup>34</sup> The Uniform Law Commission (ULC),<sup>35</sup> in response to the ABA commission's recommendation, drafted a model state statute,<sup>36</sup>

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29. The Division of Parole and the Department of Correctional Services merged in 2011. See *Fact Sheet: Merger of Department of Correctional Services and Division of Parole*, N.Y. ST. DEPT CORRECTIONS & COMMUNITY SUPERVISION, <https://www.parole.ny.gov/merger-factsheet.html> (last visited Apr. 1, 2012) [hereinafter *Merger Fact Sheet*].

30. See *infra* Part I.A.1–2.

31. See *infra* Part I.A.1–2.

32. See *infra* Part I.A.1–2.

33. See *infra* Part I.A.1–2.

34. See 730 ILL. COMP. STAT. 5/5-5-5(i) (2011). Many of the features of the Illinois statute are closely connected to New York's statute. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 779 n.114 (2011) (stating that the New York statute “was the model for the Illinois certificate program”). Originally, Illinois law featured stricter eligibility requirements and limited the number of agency licenses to which the law applied. In 2006, it was expanded to broaden those who are eligible and to lift the bars on more licensing statutes, but it still falls short of New York's certificates statute. See COMP. STAT. 5/5-5-5(i)(1)–(27).

35. The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 118th year, “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.” *About the ULC*, UNIFORM L. COMMISSION, <http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC> (last visited Feb. 28, 2011). “ULC members must be lawyers, qualified to practice law.” *Id.* They consist of practicing lawyers, judges, legislators, legislative staff, and law professors who have been appointed by state governments as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands to research, draft, and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical. *Id.*

36. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010) [hereinafter UCCCA], [http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final\\_amends.pdf](http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.pdf); see also Love, *supra* note 34, at 784–85.

drawing “upon the procedures utilized in New York, the only state with comprehensive procedures to relieve the restrictions imposed by collateral consequences.”<sup>37</sup> North Carolina passed a version of the ULC’s model,<sup>38</sup> and five additional states introduced similar legislation in 2012.<sup>39</sup>

This spotlight on creating administrative relief mechanisms creates an important moment for examining Certificates of Rehabilitation. Although scholars, bar associations, and advocates have endorsed the creation of an administrative relief mechanism, and one based on New York’s certificates statutes specifically, no one has examined how New York’s certificates have actually worked. This Article adds to the academic literature on administrative relief mechanisms<sup>40</sup> by identifying the strengths and shortcomings of New York’s Certificates of Rehabilitation statutes. New York’s experience should inform the larger national debate about how to create a legally robust mechanism for removing the numerous and interminable statutory barriers to reentry.

Part I of this Article examines the legislative history of New York’s statutes.<sup>41</sup> The evolution of Certificates of Rehabilitation in the sixties and seventies reveals that today’s concern about relieving collateral consequences in the reentry literature is not new. Although the impact of certificate statutes waned during the decades of “law and order” politics,<sup>42</sup> they have tremendous potential for revival in New York and should be replicated as states refocus their political attention and resources on successful reentry.

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37. *Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 89 (2010) (statement of Richard T. Cassidy, Burlington, VT).

38. N.C. GEN. STAT. ANN. § 15A-173.1 to 173.6 (West 2011).

39. As of 2012, a version of the UCCCA has been introduced in Minnesota, New York, Vermont, West Virginia, and Wisconsin. *Collateral Consequences of Conviction Act*, UNIFORM L. COMMISSION, <http://www.nccsl.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act> (last visited Apr. 1, 2012).

40. See, e.g., Love, *supra* note 21, at 1711–12 (advocating for restoration of rights through the two-tiered mechanism in section 306.6 of the Model Penal Code).

41. See *infra* Part I.

42. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 9 (2001) (“In the last twenty years, however, we have seen the reappearance of ‘just deserts’ retribution as a generalized policy goal . . .”).

Part II examines the strengths of a Certificate of Rehabilitation model.<sup>43</sup> I argue that this relief mechanism is the most politically attractive because it does not remove a criminal record, and thus is the most viable mechanism for removing collateral consequences when compared to the alternatives of executive pardons and expungement. Certificates can create a legal mechanism for guaranteeing that statutory barriers are lifted. New York's Certificate of Rehabilitation model is the only one that creates a legally enforceable rebuttable presumption of rehabilitation, an important burden-shifting mechanism. Additionally, certificates can offer a range of relief and be crafted for each individual applicant. In their complete capacity, they can lift statutory bars to state licenses, remove obstacles to private employment, reestablish access to public benefits, and restore voting rights, which are critical to both economic and civic reintegration.

Part III identifies and discusses legal, administrative, and social limitations of New York's Certificates of Rehabilitation.<sup>44</sup> Legally, the statute is too vague and discretionary, requiring no oversight of administering authorities and offering no means for appeal. Administratively, applications for Certificates of Rehabilitation suffer from serious agency delay and have no clear criteria for their evaluation. Part of the problem is that the supervisory and punitive priorities of the administering authorities, probation and parole, conflict with the rehabilitative goals of the certificates. Socially, Certificates of Rehabilitation have not entered the mainstream process of reentry. Potential applicants have not heard about them and find it difficult to navigate the application procedures.

Part IV addresses how other states can learn from this fifty-year history.<sup>45</sup> New York's experience points to the need for a Certificate of Rehabilitation statute with clear legislative directives and a strong enforcement mechanism. Successful implementation also requires committed administrative leadership and an effective means for making certificates accessible to the population they serve.

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43. *See infra* Part II.

44. *See infra* Part III.

45. *See infra* Part IV.

## I. REDISCOVERING A REMNANT OF THE REHABILITATION IDEAL

### A. *One Goal, Two Certificates*

New York legislators created two different administrative relief mechanisms: Certificates of Relief from Disabilities (Certificates of Relief)<sup>46</sup> and Certificates of Good Conduct, which I collectively refer to as “Certificates of Rehabilitation.”<sup>47</sup> Both certificates have virtually identical legal force.<sup>48</sup> Either certificate can be awarded to lift a specific disability, like the automatic bar to a security guard license or a bus driver license.<sup>49</sup> Or they can be general and lift all civil bars and disabilities.<sup>50</sup>

Both New York certificates are legally enforceable because they create a presumption of rehabilitation<sup>51</sup> that an employer or licensing agency must consider in evaluating the impact of an applicant’s criminal conviction.<sup>52</sup> Applicants may not be discriminated against solely because of criminal convictions.<sup>53</sup>

46. See N.Y. CORRECT. LAW §§ 701–703 (McKinney 2011). A Certificate of Relief

may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or to be eligible for public office.

*Id.* § 701(1).

47. See *id.* §§ 703-a, 703-b.

48. See *id.* § 701(1) (issuing a certificate grants the eligible person relief from “any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law”); see also *id.* § 703-a(1).

49. See, e.g., N.Y. VEH. & TRAF. LAW § 509-cc(1)(a)(i) (McKinney 2011) (disqualifying a person permanently from operating a school bus in New York for certain felony convictions). However, the disqualification may be waived provided that (1) five years have passed since the applicant was imprisoned for the disqualifying offense, and (2) the applicant has been granted a Certificate of Relief from Disabilities or a Certificate of Good Conduct. *Id.*

50. See CORRECT. § 701.

51. See *id.* § 753(2) (“In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.”).

52. See *People v. Honeckman*, 384 N.Y.S.2d 657, 657 (N.Y. Sup. Ct. 1976). Issuing a Certificate of Relief only guarantees that a conviction will not create an automatic forfeiture of license, permit, or employment under section 701. *Id.* An administrative, judicial, or licensing body “may rely on the conviction as a basis for exercising discretion to refuse to renew any license, perit [sic] or privilege.” *Id.*

53. See CORRECT. § 753.

The major difference between the two certificates is the timing of eligibility, which is based on the seriousness of an applicant's criminal convictions. People with any number of misdemeanors and up to one felony conviction can apply for a Certificate of Relief immediately at sentencing.<sup>54</sup> People with more than one felony conviction are eligible for a Certificate of Good Conduct and can only apply after satisfying a mandatory waiting period upon the completion of their sentence.<sup>55</sup>

### 1. Certificates of Relief

In 2007, the granting of a Certificate of Relief at sentencing drew media attention. Giuseppe Cipriani and his seventy-five-year-old father, Arrigo, well known New York restaurateurs,<sup>56</sup> were charged with evading \$3.5 million in state and city taxes.<sup>57</sup> They pleaded guilty to corporate tax fraud and agreed to pay \$10 million in restitution and penalties.<sup>58</sup> Giuseppe was sentenced to three years of probation, and his father was given a conditional discharge.<sup>59</sup> The judge granted the restaurateurs Certificates of Relief to help them keep their liquor license for the Rainbow Room.<sup>60</sup> Without it, the state liquor licensing agency would have automatically revoked the Ciprianis' license,<sup>61</sup> making it difficult for them to maintain their business and repay the taxes. By granting the certificates immediately at sentencing, the judge guaranteed that the collateral consequences of their convictions did not outweigh the severity of their criminal sentences or stand in their way of fulfilling their court-imposed

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54. *See id.* §§ 700(1)(a), 702.

55. *Id.* § 703-b(3).

56. The Ciprianis owned the famous Rainbow Room atop Rockefeller Center in Manhattan. Charles V. Bagli, *Rainbow Room's Lease Terminated*, N.Y. TIMES (Jan. 9, 2009), <http://www.nytimes.com/2009/01/10/nyregion/10rainbow.html>.

57. *See* Gretchen Morgenson & Charles V. Bagli, *Father and Son Restaurateurs in New York City Plead Guilty to Tax Evasion*, N.Y. TIMES (Aug. 1, 2007), <http://www.nytimes.com/2007/08/01/nyregion/01fraud.html>.

58. *See id.*

59. *See* Anemona Hartocollis, *Ciprianis Avoid Prison Time and Are Allowed to Keep Liquor License*, N.Y. TIMES (Oct. 11, 2007), <http://www.nytimes.com/2007/10/11/nyregion/11cipriani.html>.

60. *See id.*

61. *See In re Application of Restaurants & Patisseries Longchamps, Inc.*, 68 N.Y.S.2d 298, 301 (N.Y. App. Div. 1947) (holding that the State Liquor Authority properly denied a license renewal application because the petitioners' officers attempted to evade income taxes, were convicted of felonies, and made false entries into corporate records).

obligation to pay the back taxes. For first-time and low-level offenders, Certificates of Relief provide an administrative mechanism that offers notice about collateral consequences and enables these civil penalties to be more proportionate to the crime committed. But this case also highlights that sentencing courts have great discretion in issuing certificates.

As in the Ciprianis' case, a person with only one felony conviction and any number of misdemeanor convictions can apply for a Certificate of Relief as early as sentencing.<sup>62</sup> Sentencing judges, under a rule that is rarely followed, must either grant a certificate at sentencing or inform defendants of their eligibility to apply in the future.<sup>63</sup> The lack of a waiting period is significant because only Certificates of Relief can prevent statutory forfeitures. A person's occupational license may be automatically revoked when convicted of any felony and certain enumerated misdemeanors unless a Certificate of Relief is granted.<sup>64</sup> One catch to this statutory construction is that a certificate will not automatically bar a license revocation if the statute allows discretionary (not automatic) revocation.<sup>65</sup> There are also a few exceptions to the automatic forfeiture rule. A Certificate of Relief does not remove driver's license suspensions<sup>66</sup> or overcome the automatic license forfeiture

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62. See N.Y. CORRECT. LAW § 702(1) (McKinney 2011) ("Such certificate may be issued (i) at the time sentence is pronounced, in which case it may grant relief from forfeitures, as well as from disabilities, or (ii) at any time thereafter, in which case it shall apply only to disabilities.").

63. See N.Y. COMP. CODES R. & REGS. tit. 22, § 200.9(b) (2011) ("In all criminal causes, whenever a defendant who is eligible to receive a certificate of relief from disabilities under article 23 of the Correction Law is sentenced, the court, in pronouncing sentence, unless it grants such certificate at that time, shall advise the defendant of his or her eligibility to make application at a later time for such relief."); see also BRONX DEFENDERS, CERTIFICATES THAT PROMOTE REHABILITATION: WHY THEY ARE SO IMPORTANT AND HOW TO GET THEM 2 (2011).

64. See CORRECT. § 702(1) ("Such certificate . . . may grant relief from forfeitures . . ."); see also MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION, at NY3–NY4 (2007), <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/NewYork.pdf> (discussing how New York's Certificates of Relief can prevent automatic forfeitures).

65. N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1983, at 254 (1983) (explaining that "Section 701 of the Corrections Law prohibits the automatic forfeiture of a license, upon the granting of a certificate of relief," but not when revocation is discretionary for the licensing authority).

66. See N.Y. VEH. & TRAF. LAW § 1193(1)(d)(1) (McKinney 2011) ("Notwithstanding anything to the contrary contained in a certificate of relief from disabilities or a certificate of good conduct . . . where a suspension or revocation . . . is mandatory pursuant to paragraph (a) or (b) of this subdivision, the magistrate, justice or judge shall issue an order suspending or revoking such

resulting from felony convictions for hospital and nursing home operation violations.<sup>67</sup>

If a Certificate of Relief is not awarded at sentencing, a person can apply for a certificate for each qualifying offense any time thereafter by filing an application with either the sentencing court or the DCCS.<sup>68</sup> An applicant who has never served a sentence in a state correctional facility applies to her original sentencing court as permitted by section 702 of the New York Corrections Law.<sup>69</sup> Each sentencing court determines its own procedures for making application determinations.<sup>70</sup> Many judges defer to the Department of Probation, as permitted by statute, to investigate the applicant and issue a written report and recommendation.<sup>71</sup> After the investigation, trial judges may schedule a hearing at which the applicant may present an argument for the certificate.<sup>72</sup> Some courts choose simply to mail a decision to the applicant based on the investigation alone.<sup>73</sup>

A person who has served time in a state correctional facility can apply to the DCCS while incarcerated or upon release.<sup>74</sup> The Certificate Review Unit under the DCCS investigates the case. This unit was historically under the Board of Parole, but was moved in 2011 when the Board of

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license upon sentencing, and the license holder shall surrender such license to the court.”).

67. See N.Y. PUB. HEALTH LAW § 2806(5) (McKinney 2011).

68. CORRECT. §§ 702–703.

69. See *id.* § 702(1) (“Any court of this state may, in its discretion, issue a certificate of relief from disabilities to an eligible offender for a conviction that occurred in such court, if the court either (a) imposed a revocable sentence or (b) imposed a sentence other than one executed by commitment to an institution under the jurisdiction of the state department of corrections and community supervision.”).

70. Interview with Vincent Schiraldi, Comm’r, N.Y.C. Dep’t of Prob., in N.Y.C., N.Y. (Mar. 2, 2011). For example, the boroughs of Manhattan, Brooklyn, and the Bronx defer to the Department of Probation to make a recommendation about granting or denying a Certificate of Relief as a part of their preparation of the defendant’s pre-sentencing reports. Queens’s sentencing judges consider Certificate of Relief applications without deferring to probation.

71. See CORRECT. § 702(3) (“The court may, for the purpose of determining whether such a certificate shall be issued, request its probation service to conduct an investigation of the applicant . . . . Any probation officer requested to make an investigation . . . shall prepare and submit to the court a written report in accordance with such request.”).

72. Telephone Interview with Kate Rubin, Coordinator, Reentry Net, N.Y.C., N.Y. (Apr. 6, 2010).

73. *Id.*

74. Interview with Frank Herman, Dir., Exec. Clemency, in Albany, N.Y. (Feb. 4, 2011).

Parole merged with the Department of Corrections.<sup>75</sup> A confidential written report prepared by the Certificate Review Unit as mandated under section 703 of the New York Corrections Law provides each applicant with an explanation of the Certificate Review Unit's determination.<sup>76</sup> When the Board of Parole decides to release a person, the Certificate Review Unit may recommend and issue a temporary certificate that becomes permanent when parole is complete.<sup>77</sup> These certificates offer the same degree of finality as certificates issued by the sentencing court. Certificates issued by the DCCS are "deemed a judicial function" and are not reviewable.<sup>78</sup>

One often confusing and onerous addition to this application procedure is that an applicant must apply for a separate Certificate of Relief for each conviction, including misdemeanors, in order to completely eliminate collateral consequences of a conviction.<sup>79</sup> The sentencing court or the DCCS makes an individualized determination for each conviction.<sup>80</sup> Therefore, a person with four misdemeanors and one felony conviction must apply for five Certificates of Relief to lift all statutory barriers. If this applicant applies only for a certificate for the felony conviction, she will only be relieved of barriers triggered by this specific felony. Her misdemeanors can still bar her from employment licenses, public housing, and other benefits. In addition, there is a ban on holding public office that can only be lifted by a Certificate of Good Conduct.<sup>81</sup>

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75. See *Merger Fact Sheet*, *supra* note 29.

76. Interview with Frank Herman, *supra* note 74.

77. See N.Y. CORRECT. LAW § 703(4) (McKinney 2011) (stating that a certificate issued under the department's supervision is temporary and may be revoked by the board for violations of parole or release, but, "[i]f the certificate is not so revoked, it shall become a permanent certificate upon expiration or termination of the department's jurisdiction over the individual"). This rule also applies to Certificates of Relief issued by the court under section 702(4) when the court issues a revocable sentence. *Id.* § 702(4).

78. See *id.* § 703(5) ("In granting or revoking a certificate of relief from disabilities the action of the department shall be deemed a judicial function and shall not be reviewable if done according to law.").

79. See *id.* § 701(1) (stating that a Certificate of Relief applies to forfeitures and disabilities imposed by "conviction of the crime or of the offense specified therein," and each offense is treated separately).

80. See BRONX DEFENDERS, *supra* note 63, at 1–2.

81. See CORRECT. § 701(1). A Certificate of Relief is limited in that it does not apply "to the right of such person to retain or to be eligible for public office," but no such limitation is imposed on Certificates of Good Conduct.

## 2. Certificates of Good Conduct

Although the two certificate statutes serve different populations, the legal effect of the relief mechanisms is identical. In 2004, Johnnie Britt, Jr., who was twice convicted of felony drug crimes,<sup>82</sup> applied for a Certificate of Good Conduct after completing his sentence and waiting longer than the statutory three-year waiting period.<sup>83</sup> He wanted to be employed as a school bus driver,<sup>84</sup> but a New York Vehicle and Traffic law barred people with convictions from applying.<sup>85</sup> In 2004, the Board of Parole awarded Britt a Certificate of Good Conduct to overcome the statutory employment hurdle.<sup>86</sup>

As the *Britt* case demonstrates, Certificates of Good Conduct lack the immediacy of Certificates of Relief, but offer people with more serious repeat offenses a vehicle to remove or mitigate civil penalties after a statutorily defined waiting period. These certificates mean that statutory barriers to reintegration are not permanent for individuals with longer criminal histories. Because of the waiting period, an additional burden is placed on the applicant to prove conduct “in a manner warranting such issuance.”<sup>87</sup> People with more than one felony conviction must show a period of good conduct, which ranges from one to five years based on a person’s most

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82. *Britt v. Dep’t of Motor Vehicles*, No. 400339/09, slip op. at 1 (N.Y. Sup. Ct. May 5, 2009). Britt was “convicted and sentenced for attempted third degree criminal sale of a controlled substance (a Class C Felony)” in 1992 and “was convicted of fifth degree criminal sale of a controlled substance (a Class D Felony)” five years later in 1997. *Id.*

83. *See id.*

84. *See id.*

85. *See* N.Y. VEH. & TRAF. LAW § 509-cc(1) (McKinney 2011) (creating an automatic bar for certain convictions). The statute bars people specifically with Britt’s conviction of attempted third degree criminal sale of a controlled substance. *See id.* at § 509-cc(4)(b). Interestingly, this case arose because Britt was denied the position and argued that if a person with a Certificate of Relief can qualify, so should a person with a Certificate of Good Conduct. *Britt*, No. 400339/09, slip op. at 2. Until 2010, the statute explicitly stated that only a person with a Certificate of Relief was not automatically barred. VEH. & TRAF. § 509-cc. The statute was amended in 2010 to include Certificates of Good Conduct. *Id.* § 509-cc(1)(a)(iii).

86. *Britt*, No. 400339/09, slip op. at 1; *see also* CORRECT. § 703-a(1) (“A certificate of good conduct may be granted as provided in this section to relieve an individual of any disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein.”).

87. CORRECT. § 703-b(1)(a).

serious conviction.<sup>88</sup> The period begins once a person's sentence is completed, including the discharge from parole and the payment of fines.<sup>89</sup> For misdemeanors and other minor offenses, the waiting period is one year.<sup>90</sup> For class C, D, and E felonies, the waiting period is three years.<sup>91</sup> And for class A and B felonies, the waiting period is five years.<sup>92</sup> Regardless of the number of convictions, a person applies for only one Certificate of Good Conduct that covers all convictions. If a person reoffends during the period of good conduct, he must calculate the waiting period from the completion of the new sentence using the timing set by the statute for the most serious conviction.<sup>93</sup>

For Certificates of Good Conduct, applicants must apply to the DCCS, which is responsible for investigating each application and rendering a decision.<sup>94</sup> Incomplete applications are returned with a cover letter identifying missing information.<sup>95</sup> Once a file is complete, the Certificate Review Unit under the DCCS assigns the file to a local parole office near the applicant's residence.<sup>96</sup> A parole officer conducts an investigation, which can take four to six weeks, including a background check, interview of the applicant, and a home visit.<sup>97</sup> The investigation evaluates evidence of desistance from crime, which the Certificate Review Unit interprets as the essential requirement for this certificate.<sup>98</sup> Once the investigative report is complete, the Certificate Review Unit in Albany issues a decision.<sup>99</sup> Then, a confidential written report is mailed to the applicant explaining the DCCS's decision to approve or defer the application.<sup>100</sup> No internal guidelines or deadlines govern any part of this process, which takes an average of eighteen months to complete.<sup>101</sup>

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88. *See id.* § 703-b(3).

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.* § 703-b(1); *see also* Interview with Frank Herman, *supra* note 74.

95. Interview with Frank Herman, *supra* note 74.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

*B. The Evolution of New York's Certificate Statutes*

New York state legislators created Certificates of Rehabilitation in the mid-forties, and they continued to evolve into the mid-seventies. During this period, the rehabilitation ideal shaped the state's approach toward criminal justice reform.<sup>102</sup> Reformers of the penal system viewed a criminal sentence as more than punishment. They saw sentencing as an opportunity for a "rehabilitative intervention" that would change a person's inclination toward criminal behavior.<sup>103</sup>

Throughout the nation, states prioritized the penal goal of rehabilitation, whenever possible, over punishment and deterrence.<sup>104</sup> New York, considered to be ahead of the curve, reformed its prisons around the "new" rehabilitative model designed to "prepare the offender for that day when he leaves the institution."<sup>105</sup> In 1970, the New York State Correctional Association explained the dramatic shift in focus:

A primary difference between the "old" and the "new" is to be found in the group of employees who are most numerous in the institutions: the "keepers" and "guards" of a century ago and the "correction officers" of today. This is far more than a change in title. The rehabilitation-oriented correction officer is an integral part of the rehabilitative services of the

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102. See N.Y. CORR. HISTORY SOC'Y, 40 YEARS AGO NYS CORRECTION CELEBRATED ACA'S CENTENNIAL WITH '100 YEARS OF PROGRESS' BOOKLET (1970) [hereinafter N.Y. STATE CORRECTIONS BOOKLET], available at <http://www.correctionhistory.org/auburn&osborne/miskell/100yearsnydocs/1970-NYS-Correction-100-Years-of-Progress-Part-1.html>. This booklet explained the great strides New York "has taken over the past 100 years to rehabilitate rather than to merely punish those who have broken its laws . . . . A century ago reformers were at work gradually introducing the emphasis of rehabilitation which was to mark . . . the growth of the whole system of 'reformatories' and 'correctional institutions.'" *Id.*

103. GARLAND, *supra* note 42, at 34 (explaining that the "basic axiom" of penal-welfarism was that "penal measures ought, where possible, to be rehabilitative interventions rather than negative, retributive punishments"); see also TONY WARD & SHADD MARUNA, REHABILITATION 8 (2007).

104. GARLAND, *supra* note 42, at 35 (describing the rehabilitation ideal as "not just one element among others" but "the hegemonic, organizing principle, the intellectual framework and value system that bound together the whole structure and made sense of it for practitioners"); see also EDWARD RHINE, WILLIAM SMITH & RONALD JACKSON, PAROLING AUTHORITIES: RECENT HISTORY AND CURRENT PRACTICE 16–17 (1991) ("There was a growing belief that rehabilitation should be the primary purpose of imprisonment. The rehabilitative ideal was to exercise an ideological hegemony over the field of corrections.").

105. See N.Y. STATE CORRECTIONS BOOKLET, *supra* note 102.

modern correctional institution and exerts crucial influence on the inmates.<sup>106</sup>

The state viewed itself as having an instrumental role in reducing recidivism by reforming people with convictions.<sup>107</sup> The legislature combined prison and parole services under one state agency to create a unified system of rehabilitation and to ensure a “close liaison between the work done in correctional institutions and that of parole officers.”<sup>108</sup> It was in this climate that Certificates of Rehabilitation were created.

The earliest certificate statute dates back to the mid-forties, when a more conservative version of today’s Certificate of Good Conduct was first incorporated into New York’s Executive Law.<sup>109</sup> A person with any level of conviction was eligible for a Certificate of Good Conduct.<sup>110</sup> The legislature granted the Board of Parole broad discretion to issue a certificate, provided that they did so within “a reasonable time period.”<sup>111</sup> In the forties, a Certificate of Good Conduct removed “one or more disabilities created by law.”<sup>112</sup> Unlike the certificates in the current statutory regime, these Certificates of Good Conduct were granted only if they would end a specific disability affecting the applicant.<sup>113</sup> The statute was not aimed

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106. *See id.*

107. *See id.* (“The Division of Correctional Industries aims to teach the inmates modern trades and occupations, and to develop skills and good work habits under the same working conditions and production tempos found in private industries. The inmates are placed in a desirable position in the free labor market so that they may legally and gainfully support themselves and their dependents upon their release.”).

108. PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE 23 (1991) (quoting 1970 N.Y. Sess. Laws 2943 (McKinney)).

109. *See* 1945 N.Y. Laws 123; *see also* Memorandum from Danielle D’Abate, Summer Intern, on Legislative History of Certificate Statutes to Alan Rothstein, Corporate Counsel for the N.Y.C. Bar Ass’n (Aug. 11, 2006) (on file with author). The Certificate of Good Conduct statute was amended twice prior to its incorporation into Article 23. The first amendment to the statute extended the certificate to individuals with convictions outside New York but required that a person had to also reside in New York for five years before applying for a Certificate of Good Conduct (in addition to the five-year post-conviction waiting period). This change was intended to prevent forum shopping. Then, in 1963, the statute was amended to clarify that issuing a certificate required three votes from members of the Board of Parole. Memorandum from Danielle D’Abate to Alan Rothstein, *supra*.

110. 1945 N.Y. Laws 123.

111. *Id.* at 123–24.

112. *Id.*

113. *Id.*

at complete civil reintegration. The changes in the early fifties required applicants to show deserving conduct, a burden that no longer exists.<sup>114</sup> Additionally, the statute required good conduct for a “period of five consecutive years” after the completion of a criminal sentence or payment of a fine, regardless of the severity of the conviction.<sup>115</sup>

In 1966, the state legislature’s growing concern about rehabilitating people with criminal records fueled the passage of a more easily obtainable and immediate certificate—a Certificate of Relief from Disabilities for “first offenders,” which was added as Article 23 of New York’s Corrections Law (Article 23).<sup>116</sup> Governor Rockefeller’s Special Committee on Criminal Offenders initiated the creation of a bill to preserve the right to vote and prevent the forfeiture of other rights, “such as the right to retain or to apply for licenses, which would otherwise follow automatically upon conviction.”<sup>117</sup> Rockefeller viewed the legislation as “an important step beyond the previous system of automatic, indirect sanctions following upon a conviction without regard to the merits of the individual involved.”<sup>118</sup> The Certificate of Relief committee report listed a number of automatic forfeitures imposed without concern for whether the offense “bears on an individual’s fitness.”<sup>119</sup> Many of them are still imposed today, like the forfeiture of licenses to work as an x-ray technician, a real estate broker, an undertaker, an

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114. 1951 N.Y. Sess. Laws 1285–86 (McKinney). The Board of Parole in the forties required a unanimous vote to award a certificate. This changed over the next decade. By 1951, only a majority was necessary; by 1960, a majority of three members of the Board was acceptable; and in 1963, a unanimous vote of three board members was required to grant a Certificate of Good Conduct. The Certificate of Good Conduct statute explained that such certificates had different legal force than pardons: “Nothing contained in this subdivision shall be deemed to alter or limit or affect the manner of applying for pardons to the governor, nor shall the certificate issued hereunder be deemed or construed to be a pardon.” See 1963 N.Y. Sess. Laws 513–14 (McKinney); 1960 N.Y. Sess. Laws 609–10 (McKinney); 1951 N.Y. Sess. Laws 1285–86 (McKinney).

115. 1951 N.Y. Sess. Laws 1285–86 (McKinney). The statute also made clear that a person could not get a Certificate of Good Conduct while on parole, which is still true today. Fines and fees imposed by the court have their own detrimental impact on reintegration, which is described in detail by a recent Brennan Center Report. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 27–29 (2010).

116. See N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1966, at 18–19 (1966).

117. 1966 N.Y. Sess. Laws 3003 (McKinney).

118. *Id.*

119. N.Y. LEGISLATIVE SERV., INC., *supra* note 116, at 19.

insurance adjuster, or a private investigator.<sup>120</sup> The report further explained that the bill would “assist the individual in his rehabilitation process. It would enable certain first offenders to receive immediate consideration for available opportunities for which they are qualified, and thus to complete rehabilitation more rapidly and to contribute to the community in civic, social, economic and professional endeavors.”<sup>121</sup>

With no waiting period, a Certificate of Relief could offer immediate relief to first-time offenders at the time of sentencing or anytime thereafter to remove the “automatic rejection and community isolation that often accompany conviction of crimes.”<sup>122</sup> The standard for the newly-created Certificate of Relief was easier to satisfy than the proof required for a Certificate of Good Conduct. Identical to the current standard, a Certificate of Relief could be issued if the court found that granting the certificate was consistent with the rehabilitation of the first offender and with the public interest.<sup>123</sup> The language of the statute, the legislative record, and the Governor’s report show that Certificates of Rehabilitation were seen as a *means* to rehabilitation.<sup>124</sup> They were not developed solely for those who were *already* rehabilitated.

The legislature, while endorsing rehabilitation, was not unrealistic about the potential danger to public safety that certifying offenders as rehabilitated could pose.<sup>125</sup> In addition to requiring a showing that the certificate was a tool for rehabilitation, the statute gave significant discretion to judges to ensure that issuing a Certificate of Relief would be consistent with the public interest.<sup>126</sup> The statute went even further by providing clear authority to state licensing agencies

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120. *Id.*

121. *Id.*

122. *Id.* at 349.

123. *See* 1966 N.Y. Laws 1420.

124. *See* N.Y. LEGISLATIVE SERV., INC., *supra* note 116, at 19.

125. In making an employment determination for a previously convicted person, a public or private employer must consider several factors including “[t]he public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses,” N.Y. CORRECT. LAW § 753(1)(a) (McKinney 2011), and “[t]he legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public,” *id.* § 753(1)(h). This reflected the language in the statute in 1966, which stated that the relief granted by the certificate be “consistent with the public interest.” 1966 N.Y. Laws 654.

126. 1966 N.Y. Laws 654.

to deny an application even to persons with a Certificate of Rehabilitation.<sup>127</sup>

In 1972, a major amendment to Article 23 expanded the “first offender” scope of Certificates of Relief by granting eligibility to any individual with no more than one felony conviction.<sup>128</sup> The change dramatically enlarged the number of individuals eligible for immediate certificates.<sup>129</sup> In recommending this amendment, State Senator John Dunne emphasized the advantages of Certificates of Relief compared to Certificates of Good Conduct:

[R]estrictions can be removed after five years of good conduct by the offender . . . but the *intervening* period is clearly the most critical in the rehabilitation process . . . . Since our experience with the certificate of relief from disabilities has thus far been satisfactory, it is prudent that we take a step forward by expanding those qualified to receive the certificate.<sup>130</sup>

Dunne recognized that without full restoration of rights at sentencing or upon release, people with convictions hit roadblocks to reintegration during the critical five-year waiting period.<sup>131</sup> These statutory roadblocks exist when people with convictions are at their greatest risk of recidivism.<sup>132</sup>

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127. See CORRECT. § 701(3). Awarding a state license is a highly individualized determination, and Article 23 provided ultimate discretion to administrative decision-makers saying that a certificate “shall not . . . in any way prevent any judicial, administrative, licensing or other body . . . from relying upon the conviction” as a basis for exercising its discretion to deny or refuse to renew any license or other privilege. *Id.*

128. 1972 N.Y. Sess. Laws 763–66 (McKinney). In 1974, the scope of Certificates of Relief was further enlarged to allow the Board of Parole to issue a certificate to an individual “whose judgment of conviction was rendered by a court in any other jurisdiction.” 1974 N.Y. Sess. Laws 630–31 (McKinney).

129. The percentage of people with misdemeanor convictions far exceeds the percentage with felony convictions. Senator Dunne stated: “This bill broadens employment opportunities for persons convicted of crimes by expanding the number of persons eligible to obtain a certificate of relief.” N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1972, at 13 (1972). To illustrate how expansive this population is, consider recent data: In 2010, arrests in the state of New York resulted in 56,476 felony sentences and 155,933 misdemeanor sentences. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., DISPOSITIONS OF ADULT ARRESTS (2011), <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.pdf>.

130. N.Y. LEGISLATIVE SERV., INC., *supra* note 129, at 13–14 (emphasis added).

131. *Id.*

132. See Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 528 (2006).

Individuals with any number of misdemeanor convictions and up to one felony conviction were immediately given the opportunity for a certificate to reduce their likelihood of recidivism. A sponsor of the amendment, State Senator Ralph Marino, added:

This legislation would undoubtedly remove many of the barriers facing ex-offenders in obtaining employment . . . . Unemployment is the greatest deterrence to rehabilitation as statistics indicate that many of the ex-offenders return to lives of crime because other employment is not available.<sup>133</sup>

The rationale behind this statute—engaging individuals in work *immediately* after a conviction as a *means* of reducing recidivism—is consistent with more recent studies showing that if an individual is employed she is less likely to commit a crime.<sup>134</sup>

In 1976, the state legislature brought both certificates together under Article 23 of the Corrections Law and made a Certificate of Good Conduct even easier to obtain.<sup>135</sup> Waiting times for Certificates of Good Conduct were reduced to present-day requirements, and the eligibility standards no longer focused on proof of rehabilitation. Both certificates were intended to “lift job restrictions from rehabilitated [individuals] now deprived of over 125 licensing and employment categories because of their criminal records.”<sup>136</sup> A wide range of agencies and organizations backed the 1976 certificate expansion, including the State Division of Human Rights, the Department of Labor, the American Bar Association, the New York State Bar Association, and the New York Civil Liberties Union.<sup>137</sup>

As the certificate statutes evolved from the mid-forties to the mid-seventies, New York legislators repeatedly made clear that they intended to make certificates as accessible as possible in two different ways. First, the change in eligibility requirements from demanding that a person with convictions

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133. N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1976, at 50 (1976).

134. TRAVIS, *supra* note 4, at 168–69 (“[A range of studies show that] unemployment and crime go hand in hand . . . . If someone has a legitimate job, he or she is less likely to be involved in criminal activity.”).

135. See N.Y. CORRECT. LAW § 703-a(2) (McKinney 2011).

136. Memorandum of Sen. Marino, Bill Jacket, In Support of ch. 931 (1975) (on file with author).

137. N.Y. LEGISLATIVE SERV., INC., *supra* note 133, at 931; see also Memorandum from Danielle D’Abate to Alan Rothstein, *supra* note 109, at 4.

demonstrate conduct warranting a certificate to requiring that the certificate be merely “consistent” with rehabilitation constituted a major shift. Second, eligibility for a Certificate of Relief expanded to include a larger number of people because a waiting period of good conduct did not stand in their way. These changes made certificates within reach for the general population with convictions. Previously, certificates were available only to the few who could earn them after spending five years accumulating proof of an abnormal and perhaps unrealistic level of rehabilitation. These expanded certificate statutes relieved a catch-22: A period of good conduct established that a person was leading a law-abiding life, but leading a law-abiding life would be difficult with legal barriers to work, housing, and other civil benefits. These changes reflected the legislature’s view that certificates were not rewards for rehabilitation but vehicles that enabled rehabilitation.

Despite this historical support for Certificates of Rehabilitation, they rarely have been awarded since they were created. Between 1972 and 2003, on average, only 3200 certificates a year were granted.<sup>138</sup> The situation for Certificates of Good Conduct was even bleaker: Between 1972 and 2003, only 1826 Certificates of Good Conduct were granted.<sup>139</sup> This is an extremely small fraction of the individuals who were eligible during that thirty year period. To put that number in perspective, in 2003 alone, 65,000 people were incarcerated in state facilities and over 126,000 were under the supervision of the Department of Probation.

### *C. The Rise and Fall of the Rehabilitation Ideal*

The commitment to rehabilitation programs, nationally and in New York, began a dramatic decline in the late seventies because of a confluence of political, economic, and social forces.<sup>140</sup> The most cited turning point was a 1974 article by Robert Martinson analyzing the data from over 230 studies

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138. Telephone Interview with Kate Rubin, *supra* note 72.

139. *Summary of State Laws*, LEGAL ACTION CENTER (Apr. 2009), [http://www.lac.org/toolkits/certificates/summary\\_state\\_laws.htm](http://www.lac.org/toolkits/certificates/summary_state_laws.htm).

140. See GARLAND, *supra* note 42, at 9 (“In the last twenty years, however, we have seen the reappearance of ‘just deserts’ retribution as a generalized policy goal . . .”).

of the effectiveness of rehabilitation programs.<sup>141</sup> Martinson's title asked "What Works?," and his answer, according to numerous press accounts about the article, was "nothing."<sup>142</sup> Although his findings were more nuanced, his article contributed to a dramatic decline in political support for rehabilitation programs, "ushering in an era of 'nothing works' pessimism and 'lock'em up' punitiveness."<sup>143</sup>

Beginning in the late seventies, as Certificates of Rehabilitation statutes grew more robust, New York's criminal justice system shifted its penal focus from rehabilitation to retribution.<sup>144</sup> The state separated parole from the Department of Corrections, a symbolic shift to the more punitive approach of incapacitation. From 1973 to 2009, New York's prison population skyrocketed by nearly 388%.<sup>145</sup> Defendants received "determinate" sentences—sentences authorized by strict guidelines with no judicial discretion, and virtually no opportunity for parole.<sup>146</sup> This determinate ideal was endorsed by strange bedfellows—liberal defense advocates and conservative law-and-order advocates.<sup>147</sup> The former wanted a fairer, more uniform sentencing system to reduce disparities in criminal sentences and remove judicial discretion; the latter pushed for an unforgiving, retributist determinate sentencing model.<sup>148</sup>

Many forces, including new laws with mandatory sentencing provisions, contributed to the inmate population growth. New York's Rockefeller drug laws are one example of

141. *Id.* at 58; Jerome G. Miller, *The Debate on Rehabilitating Criminals: Is It True That Nothing Works?*, WASH. POST., Mar. 1989, available at <http://www.prisonpolicy.org/scans/rehab.html> ("An articulate criminologist, Martinson had become the leading debunker of the idea we could 'rehabilitate' criminals.").

142. PETER RAYNOR & GWEN ROBINSON, REHABILITATION, CRIME AND JUSTICE 65–66 (2005). For an extensive argument about the crisis of penal modernism, see GARLAND, *supra* note 42, at 55–68.

143. WARD & MARUNA, *supra* note 103 at 8; *see also* GARLAND *supra* note 42, at 69.

144. *See* GRISET, *supra* note 108, at 61.

145. CORR. ASS'N OF N.Y., WOMEN IN PRISON FACT SHEET 1 (2009), [http://www.correctionalassociation.org/publications/download/wipp/factsheets/Wome\\_in\\_Prison\\_Fact\\_Sheet\\_2009\\_FINAL.pdf](http://www.correctionalassociation.org/publications/download/wipp/factsheets/Wome_in_Prison_Fact_Sheet_2009_FINAL.pdf); *see also* GRISET, *supra* note 108, at 89 (noting that prison crowding had reached dangerous levels according to one New York commission report).

146. GRISET, *supra* note 108, at 2, 61; *see also* SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 277–78 (1998).

147. GRISET, *supra* note 108, at 31–32.

148. *Id.*

the state's more retributive approaches.<sup>149</sup> Until 2004, they required a minimum sentence of fifteen years to life for possession of four ounces or more of a narcotic substance.<sup>150</sup> The sentence was mandatory regardless of the arrested individual's background or criminal history.<sup>151</sup> Judges had no discretion over whether to incarcerate or divert individuals to drug treatment programs.<sup>152</sup> As a result, by the nineties over forty percent of the state prison population was incarcerated for drug offenses.<sup>153</sup> Similar drastic prison population shifts were occurring throughout the country.<sup>154</sup>

In addition to tougher drug sentencing, other factors led to more punitive criminal justice practices. During the seventies, people housed in state correctional facilities could be released by the Board of Parole, which set minimum sentences.<sup>155</sup> New determinate sentencing legislation, fueled also by federal legislation,<sup>156</sup> resulted in longer prison stays.<sup>157</sup>

Throughout the country, increases in violent crime led to swift policy changes. Public opinion polls showed that people were worried about rising crime rates.<sup>158</sup> The public debate

149. See CHRISTIANSON, *supra* note 146, at 277. New York's Rockefeller drug laws were passed in 1973 with Governor Carey's endorsement—the same governor who expanded Certificates of Rehabilitation. *Regarding Lessons Learned from the Rockefeller Drug Laws After Thirty-Five Years: Hearing Before the N.Y. State Assemb. Comms. on Codes, Judiciary, Corr., Health, Alcoholism & Drug Abuse, & Soc. Servs.*, 2007 Leg., 230th Sess. (N.Y. 2007) (statement of Harry G. Levine, Department of Sociology, City University of New York), <http://www.drugpolicy.org/docUploads/HarryGLEvineQueensCollegeCUNY.pdf>; see also GRISET, *supra* note 108, at 64–66.

150. Madison Gray, *A Brief History of New York's Rockefeller Drug Laws*, TIME (Apr. 2, 2009), <http://www.time.com/time/nation/article/0,8599,1888864-1,00.html>.

151. See *id.* “It was thought that rehabilitative efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible, and therefore certain, exceptionally severe punishment.” *People v. Broadie*, 37 N.Y.2d 100, 115 (1975) (citations omitted).

152. GRISET, *supra* note 108, at 65.

153. Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 434, 434–35 (2002), <http://www.prisonpolicy.org/scans/rockefeller.pdf>.

154. See CHRISTIANSON, *supra* note 146, at 278–79.

155. GRISET, *supra* note 108, at 74 (“Allocating such vast discretion to the parole board was intended to provide the flexibility needed to make deferred sentencing decisions based on their expert opinion of the offender's readiness for release.”).

156. PAULA DITTON ET AL., U.S. DEP'T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 1–3 (1999), <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>.

157. GRISET, *supra* note 108, at 75 (“[T]here were an increasing number of people coming to state prison with a minimum sentence set by the judge.”).

158. TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 50 (2007).

therefore had no one to defend the status quo.<sup>159</sup> The debate was about how long sentences should be.<sup>160</sup> “Super predators” who committed egregious violent crimes commanded the media’s attention at this time.<sup>161</sup> Partially in response to accusations of horrible violent crimes perpetrated by teenagers, New York passed the first law in the country allowing children as young as thirteen to be tried as adults.<sup>162</sup>

By the nineties, one out of every four African-American men in New York was incarcerated.<sup>163</sup> Studies showed that seventy-five percent of the state’s inmates came from seven of the poorest neighborhoods in New York City.<sup>164</sup> Prison was no longer intended to “transform, reform or rehabilitate prisoners.”<sup>165</sup> Rehabilitation prison programs—including educational classes, job training programs, and drug counseling—were dramatically cut from the budget.<sup>166</sup>

As the goals of criminal punishment transformed from the seventies through the nineties, Certificates of Rehabilitation statutes remained on the books, but they were no longer a priority of the penal system. The state legislature systematically chipped away at the statutes because certificates did not support the retributive policies in effect.

For example, in 1983, New York’s Article 23 and the Public Health Law were amended to require automatic mandatory suspension of nursing home operator licenses when a person was convicted of an industry-related felony, regardless of whether the person held a Certificate of Relief.<sup>167</sup> The

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159. *Id.* at 51.

160. *Id.*

161. SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 5 (2001). Research findings “constantly contradict” this “myth that drives incarceration mania.” *Id.* at 6.

162. See Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL’Y REV. 57, 69 (2003); see also GRISET, *supra* note 108, at 71 (describing how the New York juvenile offender law played a role in the “flip-flop” from rehabilitation to retribution).

163. CHRISTIANSON, *supra* note 146, at 281.

164. *Id.* at 299.

165. *Id.* at 312.

166. See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 4–5 (2003). Although corrections consume four percent of states’ budgets, the resources are directed not at prison programs but to staff, construction, and health care costs. In fact, “public sentiment and political rhetoric have also forced the reduction of many programs.” *Id.* at 5.

167. See N.Y. PUB. HEALTH LAW § 2806(5) (McKinney 2010); N.Y. CORRECT. LAW § 701(2) (McKinney 2010).

legislature was responding to *Hodes v. Axelrod*,<sup>168</sup> which had permitted a certificate to lift the automatic forfeiture.<sup>169</sup> In 1985, the legislature followed with an amendment preventing Certificates of Relief from removing the automatic suspension of a driver's license when a person was convicted of driving while intoxicated.<sup>170</sup> A similar statute was passed for bus driving licenses.<sup>171</sup> Throughout the eighties, the legislature passed amendments that removed the power of certificates to lift automatic licensing bars.<sup>172</sup>

Also in 1985, the New York state legislature made it more difficult for an applicant with out-of-state convictions to get an employment license.<sup>173</sup> The applicant had the burden to show a necessity for a New York certificate that "bears a rational relationship to an interest within New York."<sup>174</sup> In its statement of support, the State Division of Parole argued that the amendment was necessary to prevent people with convictions from moving to New York because New York certificates made finding employment easier.<sup>175</sup> Although the standard has softened, the current statute still makes it more onerous for people with out-of-state convictions because they must prove a necessity for a certificate.<sup>176</sup>

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168. *Hodes v. Axelrod*, 56 N.Y.2d 930, 932 (1982) (holding that New York Corrections Law section 701 barred automatic revocation of a license where the holder has been issued a Certificate of Relief from Disabilities pursuant to Article 23 of the Corrections Law).

169. N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1983, at 584 (1983) (memorandum of Department of Health). After a discussion of *Hodes*, the memorandum explains that the amendment will "assist in the Department's continuing efforts to remove convicted felons from the operation and provision of health care services." *Id.* The new amendment's "limitation on the scope of the certificate of relief would resurrect the revocations" of a hospital operating certificate. *Id.*

170. Memorandum of Sen. Levy, reprinted in N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1985, at 258 (1985).

171. See 1985 N.Y. Laws 2876 (codified at N.Y. VEH. & TRAF. LAW § 509-cc (McKinney 2011)).

172. In its memorandum in support of the amendment, the State Department of Health noted that the amendment was simply restoring the law to what it had been prior to the court's decision in *Hodes v. Axelrod*. N.Y. LEGISLATIVE SERV., INC., *supra* note 169, at 254–55. This limiting of Article 23 only related to the automatic revocations contained in the Public Health Law.

173. 1985 N.Y. Sess. Laws 3090–91 (McKinney).

174. *Id.*

175. *Id.*

176. N.Y. CORRECT. LAW § 703-b(2) (McKinney 2010) ("The department shall have the power to issue a certificate of good conduct to any person previously convicted of a crime in any other jurisdiction, when the department is satisfied that: (a) The applicant has demonstrated that there exist specific facts and

Minor amendments throughout the eighties and nineties shrunk the breadth of the certificate statutes, reflecting a waning belief in rehabilitation and the certificate's original purpose. Some statutes today continue to prevent people with criminal histories from applying for state licenses even if they earned a Certificate of Rehabilitation.

#### *D. A New Climate for Certificates of Rehabilitation*

Since 2000, the exponentially growing numbers of individuals being released from prison has sparked a new national focus on issues of prisoner reentry. New York state is no exception. Currently, New York has the fourth largest state prison population in the country<sup>177</sup> and released more than 25,000 people from state and federal prison in 2010 alone.<sup>178</sup> With a steadily increasing prisoner population returning home, communities have begun to recognize that reentry is a reality that can no longer be ignored. This renewed focus on reintegration within the criminal justice system may spark a rejuvenation of Certificates of Rehabilitation as a means to successful reentry.

New York has been viewed as a national leader in reentry efforts.<sup>179</sup> In 2004, New York was ranked as the state with the fewest “unfair and counterproductive barriers” in a study comparing collateral consequences in all fifty states and Puerto Rico.<sup>180</sup>

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circumstances, and specific sections of New York state law that have an adverse impact on the applicant and warrant the application for relief to be made in New York.”).

177. Only California, Florida, and Texas have larger prison populations. PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 7 (2010), [http://www.pewcenteronthestates.org/uploadedFiles/Prison\\_Count\\_2010.pdf](http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf).

178. PAUL GUERINO ET AL., U.S. DEPT OF JUSTICE, PRISONERS IN 2010, at 24 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

179. *After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records*, LEGAL ACTION CENTER, <http://www.lac.org/roadblocks-to-reentry> (last visited Feb. 2, 2012).

180. *Id.* In 2004, the Legal Action Center (LAC) completed and published *After Prison: Roadblocks to Reentry*, a comprehensive analysis and grade report of state laws and policies that serve as legal barriers to reentry in the areas of employment, public housing, public benefits, voting, access to criminal records, adoptive and foster parenting, and drivers' licenses. In 2009, LAC issued the *After Prison Report: 2009 Update* to highlight states' progression or regression in improving opportunities for people with criminal histories to successfully reintegrate into society to become productive, law-abiding citizens. *Id.* New York ranked near the top in both reports. It ranked second in 2009 because Illinois

New York opted out of federal bans on public assistance, food stamps, and student loans for people with convictions.<sup>181</sup> In addition, voting rights are automatically restored upon release from state prison.<sup>182</sup> People with misdemeanor convictions can vote even while in jail, and those with felony convictions can vote while on probation or once their sentence is complete.<sup>183</sup>

In 2006, the New York legislature strengthened its commitment to reforming the criminal justice system by passing an amendment that added reentry and reintegration as a new goal for sentencing.<sup>184</sup> In addition to the four traditional sentencing goals of rehabilitation, deterrence, retribution, and incapacitation, the state endorsed the goal of promoting the “successful and productive reentry and reintegration into society” of those with criminal convictions.<sup>185</sup>

New York has been at the forefront of implementing protections for employers who hire people with convictions.<sup>186</sup> A recently passed negligence-in-hiring law gives immunity to employers who comply with antidiscrimination laws when hiring people with criminal records.<sup>187</sup> Any evidence of an

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reduced more barriers to reentry. New York is not without its roadblocks to reentry, however. It has catalogued over 1000 barriers in state statutes and agency regulations. ABA Demonstration Site, *supra* note 6. Yet, the sheer number does not tell the entire story. New York also has passed legislation that is some of the most progressive in the country.

181. ALICE KING, JUSTICE ACTION CTR., COLLATERAL CONSEQUENCES OF CONVICTION: FIVE STATE RESOURCE GUIDE 19 (2007), [http://www.nyls.edu/user\\_files/1/3/4/30/59/65/68/capstone060704.pdf](http://www.nyls.edu/user_files/1/3/4/30/59/65/68/capstone060704.pdf) (explaining that federal law prohibits anyone convicted of a drug-related felony from receiving federally funded cash assistance and food stamps). “The law also prohibits states from providing assistance, food stamps, or supplemental security income (‘SSI’) to anyone in violation of their parole or probation. This is a lifetime ban.” *Id.* New York opted out. *Id.* For a more comprehensive discussion of federal legislative barriers to reentry, see generally THOMPSON, *supra* note 15.

182. Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1512 (2003).

183. See *Voting as an Ex-offender*, NONPROFIT VOTE, <http://www.nonprofitvote.org/voting-as-an-ex-offender.html> (last visited Mar. 10, 2011).

184. N.Y. PENAL LAW § 1.05(6) (McKinney 2010).

185. *Id.*

186. N.Y. EXEC. LAW § 296(15) (McKinney 2010).

187. *Id.* This provision states:

[T]here shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee’s past criminal conviction history, such

employee's convictions is excluded from a negligent hiring lawsuit.<sup>188</sup>

In 2010, Governor Patterson signed eight new reentry bills into law.<sup>189</sup> One reversed the legislature's course by amending over twenty statutes to permit both Certificates of Relief and Certificates of Good Conduct to remove automatic licensing bars.<sup>190</sup> Criminal information will be posted on the state's Department of Corrections online lookup database for only five years after release.<sup>191</sup> Another statute made it easier for people with federal convictions to apply for a Certificate of Rehabilitation.<sup>192</sup> One statute offers inmates free copies of their birth certificates; another statute offers free record of arrests and prosecutions (RAP) sheets.<sup>193</sup>

A 2011 change in the structure of parole signals a return to New York's rehabilitative approach. In the seventies, New York combined parole and corrections to endorse a uniform system of confinement and rehabilitation.<sup>194</sup> During the retributive era, they were divided.<sup>195</sup> In 2011, the state again

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employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.

*Id.*

188. See, e.g., *New York Adds Further Employment-Related Protections for Individuals with Criminal Conviction Record*, JACKSON LEWIS (Nov. 12, 2008), <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1554>; *New York Employment Law Update*, SULLIVAN & CROMWELL (Oct. 16, 2008), [http://www.sullcrom.com/files/Publication/f3fe6330-745e-42fe-8229-0f2890543617/Presentation/PublicationAttachment/ab9c3cf2-addc-4817-9909-0ffe03a941fa/SC\\_Publication\\_New\\_York\\_Employment\\_Law\\_Update.pdf](http://www.sullcrom.com/files/Publication/f3fe6330-745e-42fe-8229-0f2890543617/Presentation/PublicationAttachment/ab9c3cf2-addc-4817-9909-0ffe03a941fa/SC_Publication_New_York_Employment_Law_Update.pdf).

189. *Recent Reports and Legislation*, FORTUNE SOC'Y, <http://fortunesociety.org/get-involved/advocate-for-change/drcpp/recent-reports-legislation/> (last visited Jan. 3, 2012).

190. For a summary of the statutes, see *NY: 8 Re-entry Bills in State Budget Signed into Law*, LEGAL ACTION CENTER, <http://www.lac.org/index.php/lac/520> (last visited Apr. 4, 2012).

191. N.Y.C. BAR, REPORT ON LEGISLATION BY THE CORRECTIONS COMMITTEE AND THE LABOR & EMPLOYMENT LAW COMMITTEE (2010), [http://www.nycbar.org/pdf/report/DOCS\\_Corrections&Employment\\_Report051409.pdf](http://www.nycbar.org/pdf/report/DOCS_Corrections&Employment_Report051409.pdf). Conviction information on the Department of Corrections website will be expunged five years after the expiration of sentence of imprisonment and period of parole or post-release supervision. However, when a person is committed to the Department of Corrections, any prior conviction information is available on the website and will remain available until five years after expiration of the most recent commitment to the Department of Corrections.

192. See *NY: 8 Re-entry Bills in State Budget Signed into Law*, *supra* note 190.

193. See *id.*

194. GRISET, *supra* note 108, at 23.

195. See 1970 N.Y. Sess. Laws 2943 (McKinney).

merged parole and the Department of Corrections, which oversees prison administration, and formed the Department of Corrections and Community Supervision.<sup>196</sup> The primary aim is “to create a more seamless, more comprehensive operation through a continuum of care from the moment an offender enters the correctional system until he or she successfully completes the required period of community supervision.”<sup>197</sup>

This discussion offers only a snapshot of how New York is reordering its criminal justice priorities to focus on reentry. Yet, it is not meant to overstate reality. New York has increased its statutory barriers from 125 in 1976 to over 1000 in force today.<sup>198</sup> These reentry barriers continue to counter the positive measures the state is taking.

Certificates of Rehabilitation are part of New York’s complex and contradictory set of state laws that create both legal obstacles and relief for people with criminal convictions. The legislative landscape reflects a cautious approach to reentry that attempts to balance community safety with the state’s role in restoring rights to enable full reintegration of people after their convictions. Certificates of Rehabilitation offer a politically attractive and administratively effective mechanism for achieving that balance.

As evidence of this, the Certificate Review Unit has recently issued a significantly higher number of certificates annually.<sup>199</sup> Whereas only 380 certificates were granted by the Board of Parole in 2003, over 1000 certificates have been issued each year since 2007, with 3046 issued in 2008 alone.<sup>200</sup>

## II. THE POTENTIAL OF NEW YORK’S CERTIFICATE PROGRAM

### A. *Political Viability*

Certificates of Rehabilitation are politically attractive forms of relief for people facing collateral consequences. The main alternatives, pardons and expungement, have gained little traction over the past fifty years.<sup>201</sup> Pardons and expungements result in a greater degree of finality than

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196. *Merger Fact Sheet*, *supra* note 29.

197. *Id.*

198. ABA Demonstration Site, *supra* note 6.

199. Interview with Frank Herman, *supra* note 74.

200. *Id.*

201. See LOVE & FRAZIER, *supra* note 22, at 2, 7.

certificates, virtually erasing a person's convictions and the collateral consequences that stem from them.<sup>202</sup> Those benefits, however, also make them a far greater political liability for politicians to endorse.

Federal and state pardons are extremely rare and have declined over the past four decades.<sup>203</sup> In most states, a pardon establishes "good moral character" and is the only means for lifting legal barriers to licenses and jobs.<sup>204</sup> The odds of receiving a pardon are minuscule in the forty states that constitutionally vest the pardon power solely in the governor.<sup>205</sup> New York is one such state. Often, it is customary for governors to issue pardons only at the end of their term.<sup>206</sup> In 2010, immediately before leaving office, Governor Patterson issued over twenty pardons to immigrants facing deportation.<sup>207</sup> Prior to that, less than a handful of applications were granted in New York each year.<sup>208</sup> In 2006, the year New York Governor Pataki left office, he refused to grant even one pardon.<sup>209</sup> In the year prior, he only granted one.<sup>210</sup> The sharp contrast between the number of pardons issued by the past two New York governors exemplifies the extremely discretionary nature of the pardon and its political vulnerability. It is not

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202. *See id.*

203. *See* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009) ("Recent decades have seen a precipitous drop in the number of clemency requests being granted by state executives and the president. The number of pardons has decreased, and commutations are particularly rare, with the president and the vast majority of states governors granting only a handful of commutations in the past decade—all while the number of people being sentenced escalates at a rapid rate.").

204. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 7 (2005), <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf> (explaining that a pardon in "most jurisdictions . . . is the *only* mechanism by which adult felony offenders can avoid or mitigate collateral penalties and disabilities").

205. *See* Love, *supra* note 24, at 17–18 (finding that "most chief executives no longer regard pardoning as an integral and routine function of their office, and members of the public regards [sic] pardoning with deep suspicion and cynicism").

206. *See* Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. F. ON C.L. & C.R. 191, 193 (2003) (stating that "the great majority of clemencies are granted at the end of the executive term, suggesting a clear connection between political considerations and the denial of clemency").

207. *Twenty-Four Immigrants Pardoned by Governor*, N.Y. TIMES (Dec. 25, 2010), <http://www.nytimes.com/2010/12/25/nyregion/25pardon.html>.

208. *See New York Clemency Decisions*, N.Y. ST. DEFENDERS ASS'N, <http://www.nysda.org/clemency.html> (last visited Mar. 13, 2011).

209. *Id.*

210. *Id.*

surprising that the public regards receiving a pardon as equivalent to “a favor bestowed on political contributors at the end of an administration, [or] winning [a] lottery ticket rather than a remedy that can reasonably be sought by ordinary people.”<sup>211</sup>

The remaining ten states give the pardon power to administrative bodies that act as a political buffer, resulting in higher pardoning rates.<sup>212</sup> Even these numbers, which are higher than those for gubernatorial pardons, represent only a tiny fraction of the population with criminal histories. Overall, pardons are politically unpopular, exposing politicians, especially governors, to the public critique of being “soft on crime” if a pardoned individual reoffends.<sup>213</sup>

Expunging records also does not fit into tough-on-crime rhetoric and exposes its political supporters to criticism if a person with an expunged record commits another crime. Expungement usually removes a conviction from the public record after a certain period of time following the completion of a criminal sentence.<sup>214</sup> It permits a person to deny that he has been convicted, even on job applications.<sup>215</sup> Over the past fifty years, expungement efforts have declined, and under federal law virtually no record is expunged.<sup>216</sup> While endorsed by some as an effective and necessary reentry tool, its detractors argue that expungement runs counter to the compelling interest of protecting the public from repeat offenders.<sup>217</sup> Expungement also has been criticized for perversely revising history, saying that a conviction did not happen when it did.<sup>218</sup>

As criminal records become more accessible to employers through criminal background checks, however, a pardon or expungement no longer guarantees that employers will not

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211. See Love, *supra* note 24, at 18.

212. *Id.*

213. See Barkow, *supra* note 203, at 153.

214. 21A AM. JUR. 2D *Criminal Law* § 1219 (2011) (“Expungement of a criminal record requires physical destruction of the record by whomever and in whatever depository the record is maintained, such that all traces of the criminal process relating to that offense are destroyed. ‘Expungement’ means to erase all evidence of the event as if it never occurred.”).

215. Love, *supra* note 24, at 20.

216. *Id.* at 21.

217. Pinard, *supra* note 16, at 529 (arguing that opponents of expungement claim “that expungement ‘seeks to rewrite history, establishing that something did not happen although it really did,’ and, by essentially erasing the conviction from public view, ‘devalue[s] legitimate public safety concerns’”).

218. *Id.*

discover a person's criminal history.<sup>219</sup> Three decades ago, either a pardon or an expungement would mean that an individual could start over with a clean slate. Today, states have made criminal records more accessible by posting searchable criminal record databases online and by allowing individuals to purchase criminal history records.<sup>220</sup> A growing industry of private companies that conduct background checks purchase and store criminal records in their databases without any mechanism for removing expunged records.<sup>221</sup> The massive accessibility of criminal history information dilutes the purpose and benefit of political pardons and expunging records.<sup>222</sup>

New York's Certificates of Rehabilitation, on the other hand, remove civil barriers without denying the existence of a criminal conviction. A person's official criminal history report actually indicates that a Certificate of Relief or a Certificate of Good Conduct has been granted. Because certificates are administered by the sentencing court or the DCCS, they are further distanced from legislative or executive decision-making. Therefore, the administering body is insulated from potential political backlash should a certificate holder be convicted again. Theoretically, certificates should be issued at a higher rate and to more people than pardons. Certificates offer the most politically palatable and administrable state-authorized stamp of approval that one's debt to society has been paid and that the person's rights are fully restored.<sup>223</sup>

### *B. Legal Robustness*

Other states have certificates that purport to relieve collateral consequences, but not one provides a mechanism for a certificate recipient to enforce that relief. In California, the certificate process is simply the first step in the pardon

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219. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 186 (2008).

220. The New York Office of Court Administration (OCA) centralizes all criminal cases from state courts. Although the full database is accessible only to personnel, such as judges with passwords, OCA sells criminal records to the public. See PUB. REC. CENTER, <http://www.publicrecordcenter.com/newyorkpublicrecord.htm> (last visited Jan. 3, 2012); see also Jacobs & Crepet, *supra* note 219, at 186–87.

221. Jacobs & Crepet, *supra* note 219, at 186.

222. *Id.* at 185–86.

223. See Love, *supra* note 24, at 22.

process.<sup>224</sup> Certificates create no change in legal status, and pardons are only granted in rare cases.<sup>225</sup> New Jersey provides certificates only to people who have been paroled.<sup>226</sup> Parolees comprise only a small portion of the U.S. population with criminal records.<sup>227</sup> In Nevada, a state board can issue a certificate only after five years of release.<sup>228</sup> Because certificates are the functional equivalent of a pardon and completely erase a conviction, Nevada has not issued a certificate in years.<sup>229</sup> Mississippi's certificates serve one purpose—to grant gun permits to people with convictions.<sup>230</sup>

Even the model certificate provisions under the ULC's Uniform Collateral Consequences of Conviction Act do not offer any legal force to discourage agencies or employers from making adverse decisions based on an applicant's criminal history.<sup>231</sup> As a result, the value of these certificates is largely symbolic.

By contrast, New York's Certificates of Relief and Good Conduct establish a legally enforceable rebuttable presumption of rehabilitation.<sup>232</sup> The presumption affects decisions by government licensing agencies, other administrative bodies, and private employers.<sup>233</sup> For example, in New York, the public housing authority imposes waiting periods on people with convictions.<sup>234</sup> The certificate is evidence of rehabilitation, and the presumption shifts the evidentiary burden to an employer

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224. See CAL. PENAL CODE §§ 4852.01-.21, .13 (West 2011); see also Love, *supra* note 24, at 22.

225. Between 1991 and 2004, California Governors granted only sixteen pardons. See Press Release, Governor Arnold Schwarzenegger, Governor Schwarzenegger Grants Three Pardons (Dec. 22, 2004) (on file with author).

226. See N.J. ADMIN. CODE § 10A:71-8.2 (2011).

227. In 2009, it was estimated that there are almost six times as many adults on state probation in the United States (4,221,563) than on parole (727,824). See LAUREN E. GLAZE ET AL., U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2009, at 23 app. tbl.2, 33 app. tbl.12 (2010).

228. See NEV. ADMIN. CODE § 213.140 (2011).

229. See LOVE & FRAZIER, *supra* note 22, at 5.

230. See MISS. CODE ANN. § 97-37-5(1), (3) (West 2010).

231. See UCCCA, *supra* note 36.

232. N.Y. CORRECT. LAW § 753(2) (McKinney 2011) ("In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.").

233. See *id.*

234. N.Y.C. HOUS. AUTH., TENANT SELECTION AND ASSIGNMENT PLAN app. at 5-7 (2011), <http://home2.nyc.gov/html/nycha/downloads/pdf/TSAPlan.pdf>.

or agency decision-maker, like the housing authority, to rebut. If the presumption is ignored, a person can file a petition in the New York Supreme Court challenging the decision as impermissible discrimination based on the person's criminal history.

The certificates have force partly because Article 23-A of New York's Correction Law prohibits discrimination against a person solely on the basis of a criminal conviction without conducting an eight-factor inquiry.<sup>235</sup> Under Article 23-A, an employer may deny a license or employment application because of a criminal conviction only (1) when there is a "direct relationship" between a previous conviction and the license or position, or (2) when granting the license or job would involve an "unreasonable risk" to property or public safety.<sup>236</sup> To make that determination, an employer or agency must consider eight independent factors including: "[t]he specific duties and responsibilities necessarily related to the license or employment," "[t]he time which has elapsed since the occurrence of the criminal offense," "[t]he seriousness of the offense," and "[a]ny information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct."<sup>237</sup>

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235. CORRECT. § 752. The law states:

In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

*Id.* § 753(2).

236. *Id.* § 752.

237. *Id.* § 753(1). The law states:

In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.

Article 23-A states that an employer “*shall also* give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant,” and that the certificate creates a “presumption of rehabilitation.”<sup>238</sup> The presumption applies with equal force whether an employer denies an application based on either a direct relationship or unreasonable risk.<sup>239</sup> New York courts have also held that the protections for employees under Article 23-A apply both to convictions prior to employment and convictions during the course of employment.<sup>240</sup>

Courts have been clear that the presumption of rehabilitation “imposes a burden on respondents to come forward with evidence to rebut it.”<sup>241</sup> Shortly after the inception of the eight-factor analysis, the New York Supreme Court held that failing to consider all of the factors in Article 23-A or neglecting to rebut the presumption of rehabilitation resulted in an arbitrary and capricious denial of employment or a state license.<sup>242</sup>

Courts retreated from this forceful language in the late eighties by saying that certificates satisfy only “1 of 8 factors to be considered,” namely, that the applicant be rehabilitated.<sup>243</sup>

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

*Id.*

238. *Id.* § 753(2) (emphasis added).

239. See *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 614 (1988) (finding that the “presumption of rehabilitation which derives from a certificate of good conduct or certificate of relief from civil disabilities, has the same effect, however, whether the employer or agency seeks to deny the application pursuant to the direct relationship exception or the unreasonable risk exception”).

240. See *Branesch v. Scully & Scully, Inc.*, No. 103534/2009, slip op. at 3 (N.Y. Sup. Ct. Sept. 8, 2009) (citing *Ass’n of Surrogates v. State of N.Y. Unified Court Sys.*, 48 A.D.3d 228 (N.Y. App. Div. 2008); *Rosa v. City Univ.*, 13 A.D.3d 162, 163 (N.Y. App. Div. 2004)).

241. See *Soto v. N.Y. State Office of Mental Retardation & Dev. Disabilities*, 907 N.Y.S.2d 104, \*8 (N.Y. Sup. Ct. 2010) (citing *Marra v. City of White Plains*, 96 A.D.2d 17, 24 (N.Y. App. Div. 1983); *Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361, 365 (1999); *Peluso v. Smith*, 540 N.Y.S.2d 631 (N.Y. Sup. Ct. 1989)).

242. See *Maloney v. Waterfront Comm’n of N.Y. Harbor*, 96 Misc. 2d 688, 691 (N.Y. Sup. Ct. 1978).

243. *Bonacorsa*, 71 N.Y.2d at 614 (“[A]lthough rehabilitation is an important factor to be considered by the agency or employer in determining whether the license or employment should be granted, it is only 1 of 8 factors to be considered.”) (citation omitted); see also Jocelyn Simonson, *Rethinking “Rational*

Denying an applicant based on a prior conviction without considering the factors is not sufficient to overcome or rebut a certificate's presumption of rehabilitation.<sup>244</sup> However, if the employer "considers all eight factors . . . it need not in every case produce independent evidence to rebut the presumption of rehabilitation" before denying a license or employment.<sup>245</sup> In *Arrocha v. Board of Education*, the Board of Education denied an applicant a license to teach high school Spanish following a nine-year-old conviction for the sale of a ten-dollar bag of cocaine.<sup>246</sup> The Board considered all eight factors but did not offer any evidence to rebut the applicant's Certificate of Relief from Disabilities.<sup>247</sup> The court held that "the Board was not obligated to rebut the presumption of rehabilitation and was entirely justified in considering the nature and seriousness of this particular crime . . . of overriding significance when issuing a high school teaching license."<sup>248</sup>

In recent opinions, however, New York appellate courts seem to be reviving the diluted power of the presumption of rehabilitation by clarifying that an agency or employer cannot superficially refer to the eight factors to rebut a certificate's presumption of rehabilitation without providing evidence.<sup>249</sup> In *Matter of El v. New York City Department of Education*, the court found that the Board's decision denying an applicant's substitute teacher application was arbitrary and capricious for failing to consider all of the eight factors under Article 23-A and neglecting to consider the petitioner's Certificate of Relief from Disabilities.<sup>250</sup> In 2010, a New York Supreme Court also

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*Discrimination" Against Ex-offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 286, 303 (2006).

244. See *Peluso*, 540 N.Y.S.2d at 635.

245. *Bonacorsa*, 71 N.Y.2d at 614.

246. *Arrocha*, 93 N.Y.2d at 366.

247. *Id.*

248. *Id.*

249. See *Boatwright v. N.Y. State Office of Mental Retardation & Dev. Disabilities*, No. 0100330/2007, slip op. at 6 (N.Y. Sup. Ct. Apr. 18, 2007) (distinguishing *Arrocha*, stating that "in that case, the Board did evaluate and analyze each element of the statute and did not just issue a cavalier denial as appears to be the case here").

250. *In re El*, No. 401571/08, 2009 WL 1271992, at \*5 (N.Y. Sup. Ct. Apr. 1, 2009) ("[T]his Court finds that respondent's decision denying petitioner's substitute teacher application is arbitrary and capricious and must be annulled. The Board of Education failed to consider petitioner's Certificate of Relief from Disabilities and has not adequately demonstrated that it considered all eight of the statutorily-required factors in light of the specific evidence presented by petitioner in this case.").

held that merely referring to the eight factors does not amount to rebutting or justifying a rejection of the presumption of rehabilitation established by a certificate.<sup>251</sup> The state of the law on the certificate's rebuttable presumption is in flux, but the presumption at the very least satisfies one of the eight Article 23-A factors—proof of rehabilitation.<sup>252</sup>

### C. *Immediate Restoration of Political Rights*

In New York, certificates encourage civil reintegration by restoring the right to vote to parolees and restoring the right to hold public office for anyone with a conviction. People with misdemeanor convictions<sup>253</sup> and people with felony convictions who are on probation retain the right to vote.<sup>254</sup> New York disenfranchises more than 108,000 people with felony convictions who are in state prison or on parole.<sup>255</sup> However, a Certificate of Relief granted to a person on parole automatically restores that person's right to vote.<sup>256</sup> Many scholars argue that disenfranchisement is one of the most severe invisible punishments because it removes a right of citizenship.<sup>257</sup> By restoring the right to vote, Certificates of Rehabilitation offer a

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251. *Soto v. N.Y. State Office of Mental Retardation*, No. 3010/09, 2010 WL 334857, at \*8 (N.Y. Sup. Ct. Jan. 29, 2010).

252. See N.Y. CORRECT. LAW § 753(1)(g) (McKinney 2011) ("Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.").

253. A person with a misdemeanor who is incarcerated does not lose the right to vote and can vote by absentee ballot. No data is available about how many people in local jails exercise this right. BRENNAN CTR. FOR JUSTICE, N.Y. UNIV. SCH. OF LAW, *THE VOTING RIGHTS OF PEOPLE WITH CRIMINAL CONVICTIONS IN NEW YORK* 4, [http://www.brennancenter.org/page/-/d/download\\_file\\_9371.pdf](http://www.brennancenter.org/page/-/d/download_file_9371.pdf).

254. *After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records: New York*, LEGAL ACTION CTR., <http://www.lac.org/roadblocks-to-reentry/main.php?view=profile&subaction1=NY> (last visited Dec. 15, 2011); *Voting Rights of People in N.Y. with Criminal Records*, LEGAL ACTION CTR., <http://www.lac.org/index.php/lac/381> (last visited Dec. 15, 2011); see also N.Y. ELEC. LAW § 5-106(2) (McKinney 2011).

255. ERIKA WOOD ET AL., BRENNAN CTR. FOR JUSTICE, *JIM CROW IN NEW YORK* 5 (2009). Eighty percent of that group is black or Hispanic, and half of the 108,000 are released but currently on parole. *Id.*; see also John Eligon, *Racial Roots Underlie Debate on Felon's Voting Rights*, N.Y. TIMES BLOG (Feb. 12, 2010, 11:14 AM), <http://cityroom.blogs.nytimes.com/2010/02/12/a-call-for-voting-rights-for-parolees>.

256. Telephone Interview with Glenn Martin, Vice President of Policy and Dev., Fortune Soc'y (Jan. 7, 2011). Glenn Martin stated the he has never heard of a person on parole receiving a certificate to vote.

257. Pinard, *supra* note 16, at 524.

formal mechanism for returning a person to full citizenship status upon release from incarceration, even while on parole.<sup>258</sup>

### III. LIMITATIONS OF NEW YORK'S CERTIFICATE PROGRAM

Given that so few certificates have been issued since their inception even counting the recent uptick, Certificates of Rehabilitation in New York have not achieved their potential to meaningfully relieve statutory barriers for people with convictions. The major hurdles to successful administration of Certificates of Rehabilitation stem from three sources: legislative, administrative, and social obstacles. First, the statutory language is vague in defining the burden of proof for awarding certificates, unclear about how to interpret the presumption of rehabilitation requirement in conjunction with Article 23-A, and lacks a mechanism for appeal or any check on the administering authority's discretion. Second, the primary administering agencies that have been responsible for issuing certificates—parole and probation—present an institutional bias because of their law enforcement missions that evolved during the “tough on crime” decades of the eighties and nineties. The lack of attention to certificates by both agencies seems to have led to a lack of clearly established regulations, especially in defining the burden of proof for applicants, resulting in serious agency delays in issuing certificates. Third, Certificates of Rehabilitation are not an integral part of the reentry landscape—no one within the criminal justice system educates people about the possibility of a certificate, few people with convictions apply, and the application process is burdensome.

#### *A. Legal Obstacles*

##### 1. A Highly Discretionary Standard

Although Certificates of Relief and Good Conduct lift automatic bars to thousands of licenses and other benefits, they overcome only an initial hurdle. Article 23 gives licensing agencies broad discretion to use convictions to justify the denial of a license, like those for dental hygienists, boiler inspectors,

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258. *Id.*

or doctors.<sup>259</sup> On the one hand, Article 23 states that with a certificate a conviction on a criminal record will not

be deemed to be a conviction within the meaning of any provision of law that imposes, by reason of a conviction, a bar to any employment, a disability to exercise any right, or a disability to apply for or to receive any license, permit, or other authority or privilege.<sup>260</sup>

The certificate holder can apply for a license or job without automatic denial. On the other hand, the statute gives discretion to government agencies to rely on a conviction in deciding whether to suspend, revoke, or not issue a license, or deny a civil right.<sup>261</sup> The statute sends a conflicting message about the legal significance of either certificate. Without a certificate, many licenses are not an option because of a statutory bar; however, with a certificate, the license, even if not statutorily barred, is only a possibility.<sup>262</sup>

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259. See N.Y. CORRECT. LAW § 701(3) (McKinney 2011). Article 23 provides ultimate discretion to administrative decision-makers: A certificate “shall not . . . in any way prevent any judicial, administrative, licensing or other body . . . from relying upon the conviction” as a basis for exercising its discretion to deny or refuse to renew any license or other privilege. *Id.*

260. *Id.* § 701(2). The statute has a few exceptions, including not permitting certificates to relieve the statutory bar for gun licenses under section 400 of the penal code for people convicted of an “A-I felony” or “violent felony offense” under section 70.02 of the penal code.

261. *Id.* § 701(3) (“A certificate of relief from disabilities shall not, however, in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege.”).

262. The certificate statutes themselves do not aid agency decision-makers in how the certificates fit into the agency’s decision-making process. Rather, agencies must look to Article 23-A to determine permissible discrimination on the basis of a conviction. Leaving such discretion to the agencies may not inherently be problematic because applicants with certificates can appeal agency license denials through an administrative hearing process. For a more general discussion of the problems with agency discretion in administering justice, see Rachel Barkow, *The Ascent of the Administrative State and the Rise of Mercy*, 121 HARV. L. REV. 1332, 1334 (2008) (arguing that “[t]he expansion of the administrative state has showcased the dangers associated with the exercise of discretion, and without a check on the power of agencies, benefits could be bestowed and sanctions imposed on the basis of an array of inappropriate factors”).

## 2. Statutory Vagueness

Although the legislative history describes a Certificate of Relief as a *means* to rehabilitation,<sup>263</sup> the language of both section 702 and section 703 requires that either certificate be issued only if the relief granted by the certificate is both “consistent with the rehabilitation” of the applicant and “consistent with the public interest.”<sup>264</sup> The statutes therefore authorize an individualized determination for granting either certificate that implies some showing, but what the determination is evaluating and whether it is the same for both certificates is unclear. The investigation for a Certificate of Relief can be done by either the Certificate Review Unit of the DCCS<sup>265</sup> or the sentencing court,<sup>266</sup> which usually asks probation to conduct an investigation. For Certificates of Good Conduct, all applicants apply to the Certificate Review Unit of the DCCS.<sup>267</sup> Therefore, the sentencing court or the Certificate Review Unit must balance the benefits of granting the certificate to enable successful reintegration of the applicant with any potential risk the applicant poses to the public based on the conviction. For example, if a person is convicted of defrauding homeowners, a sentencing court balancing both objectives might grant a Certificate of Relief that lifts all statutory bars to licenses with the exception of a real estate license because the criminal conviction is closely linked with that benefit. For a person convicted of marijuana possession, the balancing may result in a full certificate so a person can apply for a license in cosmetology assuming that the relationship between the conviction and cosmetology is tenuous. For some applicants, like the former, where a conviction may be highly correlated with a particular public safety risk, this discretion can enable the applicant to receive a limited certificate with only a few statutory barriers. For the latter, it can mean that a person is able to remove all barriers to enable full reintegration.

But the language of the statute offers no specific guidance as to how a decision maker should balance “the rehabilitation

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263. See *supra* text accompanying note 124.

264. CORRECT. §§ 702(2), 703(3), 703-b(1).

265. *Id.* § 703.

266. *Id.* § 702.

267. *Id.* § 703-b.

of the eligible offender” and “the public interest.”<sup>268</sup> The default could be two very different approaches—to deny a certificate unless the applicant offers extraordinary proof of rehabilitation or to grant a certificate unless the applicant presents serious aggravating circumstances. The latter favors issuing certificates while the former does the opposite. Nothing in the statute or regulations guides local probation officers, sentencing courts, or the DCCS Certificate Review Unit. In addition, nothing in the statute or regulations provides for an emergency certificate process for individuals who need a certificate for certain licenses, job applications, or benefits. The statute is not clear about how long an applicant must wait for reapplication. For each of these issues, the sentencing court or the DCCS may have a standard answer or respond on a case-by-case basis, but nothing transparent has been promulgated under the regulations to help applicants or their advocates.<sup>269</sup> This vacuum could lead to vastly different interpretations of the statute and result in disparate treatment of applicants based on where one lives geographically or which authority is issuing the certificate. For example, an applicant in northern New York could face different evaluative criteria than an applicant in the Bronx.

The language for Certificates of Relief also could be interpreted to discourage granting certificates at sentencing. The statute states that a Certificate of Relief “shall *not* be issued by the court *unless*” the court or the Certificate Review Unit is satisfied that the person is eligible and the relief granted is consistent with rehabilitation and the public interest.<sup>270</sup> Simply using the negative, *not*, in the sentence may suggest that the default for the sentencing court is not to grant certificates to eligible defendants.<sup>271</sup> Evidence in New York City indicates that sentencing courts, which rarely issue Certificates of Relief, may interpret the language as discouraging their issuance.<sup>272</sup> The Department of Probation found that even if a presentencing report recommended a certificate, the sentencing judge rarely granted it.<sup>273</sup> This

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268. *Id.* § 702(2)(b)–(c) (certificate issued by courts); *id.* § 703(3)(b)–(c) (certificate issued by the DCCS).

269. Letter from reentry.net to Martin F. Horn, Comm’r, N.Y.C. Dep’t of Corr. & Prob. (Apr. 15, 2008) (on file with author).

270. CORRECT. § 702(2) (emphasis added); *see also id.* § 703(3).

271. CORRECT. §§ 702(2), 703(3).

272. Interview with Vincent Schiraldi, *supra* note 70.

273. *Id.*

interpretation may be supported by the fact that the language is different for issuing Certificates of Good Conduct, which states that the DCCS “shall have the power to issue a certificate of good conduct . . . *when the department is satisfied*” that the certificate is consistent with the rehabilitation of the applicant and the public interest.<sup>274</sup> The two objectives of the balancing test are the same, but the affirmative language encourages the DCCS to grant a Certificate of Good Conduct.

The statute also implies that a showing of rehabilitation is required because it permits an individualized investigation for each certificate determination. Yet, the statute does not explain the purpose of the investigation or its evaluative criteria, opening the door to different evaluation standards by the two issuing authorities.<sup>275</sup> For example, the Certificate Review Unit has historically interpreted “investigation” to mean that a local parole officer must interview the applicant, complete a home visit, inquire about work history, and consider evidence of rehabilitation.<sup>276</sup> Probation’s report to the sentencing court does not require such an onerous investigation. The more intensive inquiry suggests that a showing of rehabilitation—a stable home, contacts in the community, and employment—is required. Consequently, applicants often are advised to submit certificates of completion for drug treatment programs, General Equivalency Degrees, letters of recommendation, and evidence of community service.<sup>277</sup> But the statute does not state that “evidence of rehabilitation” is a prerequisite for a certificate. In fact, it is difficult to imagine how a person could immediately be granted a Certificate of Relief at sentencing if such a showing is required. The statute is silent, though, leaving the answer to the discretion of the sentencing court and the DCCS, which can result in inconsistent and arbitrary outcomes.

### 3. Barriers to Appeal

The statute does not provide a mechanism for administrative review of certificate decisions. The statute is clear: “In granting or revoking a certificate of relief from

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274. CORRECT. § 703-b(1) (emphasis added).

275. *Id.* § 702(3) (allowing a court to “conduct an investigation of the applicant” in order to determine “whether such certificate shall be issued”); *id.* § 703(6) (“For the purpose of determining whether such certificate shall be issued, the department may conduct an investigation of the applicant.”).

276. Interview with Frank Herman, *supra* note 74.

277. BRONX DEFENDERS, *supra* note 63, at 2.

disabilities the action of the department shall be deemed a judicial function and shall not be reviewable if done according to law.”<sup>278</sup> To challenge a denial, a person must file a petition in state court with the onerous burden of showing that the decision was arbitrary and capricious or an abuse of discretion.<sup>279</sup> This procedure may be especially difficult, costly, and time consuming for a pro se litigant. Therefore, the discretion of the sentencing court and the DCCS Certificate Review Unit to make certificate determinations goes essentially unchecked. In sharp contrast, most government agency decisions can be reviewed by an administrative law judge in a hearing where a person can be represented by counsel or attend the hearing pro se.<sup>280</sup> For example, all licensing decisions within New York’s Department of State can be appealed to an independent office that conducts administrative hearings.<sup>281</sup> Decisions adverse to a licensee can be further appealed to the Secretary of State, and the Secretary of State’s determinations are subject to judicial review. Therefore, an applicant for a license has two levels for appeal before filing in court. A private employer’s decision can also be challenged as unlawful discrimination on the basis of a criminal conviction through a hearing before the state or local human rights commission.<sup>282</sup> There is no such right to appeal certificate decisions of the sentencing court or the DCCS.

### *B. Administrative Obstacles*

#### 1. Administrative Delay

The most fundamental administrative hurdle facing certificate applicants is the excessive delay in making certificate determinations. The certificate statutes give the

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278. CORRECT. § 703(5).

279. Using Article 78, a person can challenge that “a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.” N.Y. C.P.L.R. § 7803 (McKinney 2011).

280. See *Mission*, DEP’T OF STATE, OFF. OF ADMIN. HEARINGS, <http://www.dos.state.ny.us/ooah/index.htm> (last visited Apr. 11, 2012).

281. *Id.*

282. *How to File a Complaint*, N.Y. STATE DIV. HUMAN RTS., [http://www.dhr.state.ny.us/how\\_to\\_file\\_a\\_complaint.html](http://www.dhr.state.ny.us/how_to_file_a_complaint.html) (last visited Dec. 15, 2011); *Employment*, N.Y.C. COMM’N ON HUMAN RTS., <http://www.nyc.gov/html/cchr/html/employment.html> (last visited Dec. 15, 2011).

DCCS expansive discretion with no review procedure and no requirement to collect data on its decisions.<sup>283</sup> The sentencing courts often cede investigative authority over certificate applications to probation, as permitted by statute.<sup>284</sup> Probation officers who write sentencing reports offer an initial recommendation with the submission of their investigation to the court.<sup>285</sup> For either certificate, the administering body schedules interviews with applicants to review their applications and also investigates their cases.<sup>286</sup> The waiting time for decisions from the DCCS is over eighteen months.<sup>287</sup> For Certificates of Good Conduct, applicants add this waiting period onto the current good conduct waiting periods ranging from one to five years.<sup>288</sup> Because sentencing courts do not collect data on certificates, it is difficult to evaluate the delay, although anecdotal evidence suggests that the process can take months.<sup>289</sup> The lengthy waiting period may indicate that insufficient resources are devoted to certificate determinations.

## 2. No Standard of Proof

Neither the sentencing court nor the DCCS has promulgated rules or regulations to guide local offices on how to evaluate certificate applications. Therefore, applicants have no notice about what constitutes a showing that a certificate is “consistent with the rehabilitation of the eligible offender” or “consistent with the public interest.”<sup>290</sup> The statute does not instruct the court or the DCCS to collect detailed data on how many certificates are granted, to whom, and for what reasons. Because clear guidelines would erode the vast discretion granted to both administering bodies, neither the sentencing court nor the DCCS has any incentive to develop public

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283. Under Article 23, both the courts and the DCCS have the same authority to issue Certificates of Relief from Disabilities. CORRECT. §§ 702–703, 703-b. Only the DCCS issues Certificates of Good Conduct. *Id.* § 703-b(1).

284. *Id.* § 702(3) (providing that a court may, for the purpose of determining whether a Certificate of Relief will be issued, request probation to conduct an investigation of the applicant).

285. *See id.*

286. Local divisions of parole have excluded legal counsel from advocating for clients at these interviews.

287. Telephone Interview with Kate Rubin, *supra* note 72; *see also* BRONX DEFENDERS, *supra* note 63, at 2.

288. CORRECT. § 703-b(3).

289. Telephone Interview with Kate Rubin, *supra* note 72.

290. CORRECT. §§ 702(2), 703(3).

regulations that can be used to challenge determinations. But the lack of concrete criteria for making a certificate determination leaves applicants uninformed about the proof they must submit. Consequently, applications can be denied because of insufficient evidence of rehabilitation without a clear standard of proof.<sup>291</sup>

### 3. Mission Conflict

Nationwide, the mission of parole and probation has changed dramatically over the past fifty years,<sup>292</sup> and New York has been no exception.<sup>293</sup> The culture of both administrative bodies shifted from a predominantly case management and rehabilitative model in the sixties to a more punitive policing model in the eighties and nineties.<sup>294</sup> The shift mirrors the dominant tough-on-crime approach discussed in Part I and has had a lasting impact on both administrative bodies. Parole violations constitute forty percent of all state prison admissions in the country, “a number that has more than doubled since 1980 and tripled over the last 50 years.”<sup>295</sup> The increase in conviction and incarceration rates in New York overburdened parole and probation, which responded in the eighties by focusing more on monitoring the conditions of parolees and probationers than on helping them find services, employment, and housing.<sup>296</sup>

The mission of parole and probation in New York throughout the eighties and nineties emphasized protecting the public over rehabilitating those who had been convicted. The core mission of the New York Division of Parole (prior to its

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291. See Letter from reentry.net to Martin F. Horn, *supra* note 269.

292. LEANNE FIFTAL ALARID ET AL., COMMUNITY-BASED CORRECTIONS 6 (7th ed. 2008); PETERSILIA, *supra* note 166, at 88 (“[P]arole was originally designed to make the transition from prison to community more gradual and, during this time, parole officers were to assist the offender in addressing personal problems and searching for employment and a place to live . . . . Increasingly, however, parole supervision has shifted away from providing services to parolees and more toward providing surveillance activities, such as drug testing, monitoring curfews, and collecting restitution.”).

293. ALARID ET AL., *supra* note 292, at 294.

294. *Id.*

295. *Id.* at 291.

296. See SCOTT M. STRINGER, BREAKING PAROLE: AN ANALYSIS OF THE NEW YORK STATE DIVISION OF PAROLE’S CASELOAD MANAGEMENT GUIDELINES 3 (2006) (“Between 1980 and 1995, the [Division of Parole] focused primarily on the use of parole releases in an effort to help manage the ever-expanding state prison population.”).

merger with the Department of Corrections) was “[t]o promote public safety by preparing inmates for release and supervising parolees to the successful completion of their sentence.”<sup>297</sup> Similarly, the State Department of Probation was “committed to improving practices that promote public safety, ensure offender accountability, provide restitution to victims and reduce recidivism.”<sup>298</sup> These mission statements show that both agencies have moved away from a rehabilitative caseworker model toward a policing and supervision model. The success of a parole or probation officer is evaluated by evidence that the parolee or probationer is being supervised and complying with conditions, a focus that does not encourage efficient and effective administration of certificate applications.

Under bureaucracy theory, this tension is an example of mission conflict. If an agency task is not a core part of its mission, the task is “often performed poorly or starved for resources.”<sup>299</sup> When agency tasks are only vaguely defined, the front line agency operators, the probation or parole officers, will understand their role in a manner that is “consistent with their predispositions,”<sup>300</sup> which in this context is supervision and crime control. The task of issuing Certificates of Rehabilitation or encouraging parolees and probationers to apply for these certificates runs counter to the historical mission of parole and probation. Acknowledging that a person with convictions is rehabilitated or should be relieved of statutory bars, especially for employment, may be viewed as antithetical to the agency’s mission and how its officers prioritize tasks of supervising probationers and parolees.

Given this conflict between mission and task, it is not surprising that few applications have been granted and application rates are correspondingly low despite the thousands of eligible applicants. Probation and parole officers who interact directly with potential certificate applicants are not required to educate their probationers or parolees about these reentry resources. Because of their punitive focus, the officers who conduct investigations and make recommendations for awarding or denying a certificate may be overly harsh on

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297. N.Y. STATE DIV. OF PAROLE, ANNUAL REPORT 1 (2010), <https://www.parole.ny.gov/pdf/parole-annual-report-2010.pdf>.

298. See N.Y. STATE OFF. OF PROBATION & CORRECTIONAL ALTERNATIVES, <http://www.criminaljustice.ny.gov/opca/> (last visited Apr. 11, 2012).

299. JAMES Q. WILSON, BUREAUCRACY 110 (1989).

300. *Id.*

applicants. Advocates report that parole and probation officers are poorly trained on certificates and provide inaccurate information when questioned about them.<sup>301</sup> For example, certificates have been denied because an evaluating parole officer incorrectly believed that an applicant must be actively applying for a license or a specific job for which a certificate is needed.<sup>302</sup> Some certificate denials state inaccurately that the statute permits the lifting of only specific employment bars, not all statutory barriers.<sup>303</sup> One applicant's certificate was denied for using an incorrect application even though that application was downloaded from the department's website.<sup>304</sup> All of these reasons for denial directly contradict the statutory mandate.

Thus, the decision-making process can be highly influenced by the punitive approach toward parolees and probationers. Discretion can lead to unequal and arbitrary treatment of applicants. And a lack of agency oversight over decisions made by local parole or probation officers can result in rejected applications after serious delay, without any administrative remedy for appeal.

### C. *Social Obstacles*

Few people file certificate applications each year because potential applicants either do not know about certificates or they find the process too daunting.<sup>305</sup> A number of institutional actors within the criminal justice system can educate people about certificates—judges, prosecutors, and defense attorneys, as well as parole and probation officers. All of these individuals interact with potential applicants at some stage in the criminal justice system, from arraignment through conviction and during the reintegration process. Yet few of these actors actually know that Certificates of Rehabilitation exist.<sup>306</sup>

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301. Letter from reentry.net to Martin F. Horn, *supra* note 269.

302. *Id.*

303. *Id.*

304. *Id.*

305. SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, N.Y. STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY 105 (2006) (“[T]he option of using a certificate of rehabilitation to assist in obtaining employment is either unknown to many potential applicants or too difficult for an applicant to complete without assistance.”).

306. Telephone Interview with Kate Rubin, *supra* note 72; Interview with Vincent Schiraldi, *supra* note 70.

By law, judges are required to inform defendants at sentencing about the existence of Certificates of Relief from Disabilities.<sup>307</sup> The sentencing colloquy could easily and routinely include a discussion about preventing forfeiture of benefits and restoring civil rights. But many criminal court judges do not know about this rule or choose not to follow it. A recent study surveyed people with convictions about whether they knew about the existence of Certificates of Rehabilitation.<sup>308</sup> Of the participants who did, ninety percent learned about them through postconviction reentry organizations,<sup>309</sup> revealing that there were many missed opportunities throughout the criminal justice process to educate people about certificates.

The two types of certificates create great confusion for applicants.<sup>310</sup> Although they differ only in who is eligible for them, the two certificates have different application forms and procedures.<sup>311</sup> Potential applicants find it difficult to locate the applications using the easiest source, the Internet, and even more applicants find it difficult to understand which one they qualify for.<sup>312</sup>

Additionally, both applications are difficult to read. Researchers have found that the applications are written at a “13th grade” (beyond high school) reading level.<sup>313</sup> The average adult reading level in the country is eighth grade, and seventy percent of people with convictions function below a sixth grade level.<sup>314</sup>

Applying for a certificate also has hidden costs. Applicants must first retrieve a copy of their conviction record to accompany their application. This official conviction record has to be retrieved from a separate state agency (Department of

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307. See N.Y. COMP. CODES R. & REGS. tit. 22, § 200.9(b) (2011) (“In all criminal causes, whenever a defendant who is eligible to receive a certificate of relief from disabilities under article 23 of the Correction Law is sentenced, the court, in pronouncing sentence, unless it grants such certificate at that time, shall advise the defendant of his or her eligibility to make application at a later time for such relief.”).

308. See FORTUNE SOC’Y, APPLYING FOR CERTIFICATES OF RELIEF FROM DISABILITIES AND CERTIFICATES OF GOOD CONDUCT: OBSTACLES AND CHALLENGES 9 (2010).

309. *Id.*

310. *Id.* at 14–15.

311. See *id.* at 5; see also *supra* Part I.A.1–2.

312. FORTUNE SOC’Y, *supra* note 308, at 11–14.

313. *Id.* at 15–16.

314. *Id.*

Criminal Justice Services) and in many cases these records are full of mistakes.<sup>315</sup> Arrests that have not led to a conviction are improperly listed.<sup>316</sup> Cases that have been closed are listed as unresolved and convictions are often misreported.<sup>317</sup> Applicants must comb through their RAP sheets, which are difficult to read, to identify all of these problems.<sup>318</sup> After making corrections, applicants must request a corrected RAP sheet before applying for a certificate.<sup>319</sup> In New York City, this process can take months, further extending an applicant's waiting period.<sup>320</sup>

People with convictions have no incentive to apply for a certificate if they perceive it as offering them nothing more than a piece of paper. Many unanswered questions exist about how employers actually use certificates in their decision making. If the court decisions described above are any indication, the consideration may be minimal at best. Fighting a job or license denial is a time and resource intensive struggle. Having these statutes on the books does nothing to restore rights if the certificates are not issued, publicly recognized, and enforced.

#### IV. THE FUTURE OF CERTIFICATE PROGRAMS: LEGISLATIVE REFORM, ADMINISTRATIVE LEADERSHIP, AND SOCIAL REINTEGRATION

The above discussion about the potential and limitations of New York's Certificates of Rehabilitation statutes adds a new perspective to the academic literature. Statutes creating administrative mechanisms like certificates are no guarantee that intractable civil punishments will be relieved and

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315. One study found that 87% of New York Division of Criminal Justice Services RAP sheets contained at least one mistake or omission, and 41% contained more than one error. Some errors included unsealed cases, missing or inaccurate disposition information, and un-recorded vacated warrants. LEGAL ACTION CTR., STUDY OF RAP SHEET ACCURACY AND RECOMMENDATIONS TO IMPROVE CRIMINAL JUSTICE RECORDKEEPING 3 (1995) [hereinafter LEGAL ACTION CTR., RAP SHEET ACCURACY]; see also LEGAL ACTION CTR., SETTING THE RECORD STRAIGHT 3–5 (2001), [http://www.hirenetwork.org/pdfs/setting\\_the\\_record\\_straight.pdf](http://www.hirenetwork.org/pdfs/setting_the_record_straight.pdf) (discussing the most common mistakes found in New York criminal records that total more than 4 million records since 1890).

316. LEGAL ACTION CTR., RAP SHEET ACCURACY, *supra* note 315.

317. *Id.*

318. *Id.*

319. *Id.*

320. See BRONX DEFENDERS, *supra* note 63, at 2.

reintegration will be successful. As administrative mechanisms like Certificates of Rehabilitation gain traction, and as many states continue to look to New York as a model, New York's experience offers lessons for how legislative, administrative, and social improvements can better integrate Certificates of Rehabilitation into the current criminal justice system before sentencing or release from prison.

### *A. Legislative Direction*

In 2010, the New York legislature acknowledged its commitment to Certificates of Rehabilitation by amending additional licensing statutes to allow certificates to lift their immediate bars for convictions. These amendments were consistent with New York's recent addition of reentry to its criminal justice goals. Even while endorsing certificates in this way, state legislators have not looked at whether Certificates of Relief or Certificates of Good Conduct effectively serve this purpose given their discretionary nature. As other states look to the statutory construction of Article 23, the discussion of its historical development in Part I and its limitations in Part III raise questions about how the statutory construction plays a direct role in its effectiveness. Can the statutes be clearer about their intent? Is there a need for two types of certificate statutes? How can the statutes better guide administering authorities?

#### 1. Nomenclature and Statutory Intent

The nomenclature for Certificates of Rehabilitation can obscure their purpose. New York's legislative history shows that Certificates of Rehabilitation were intended to lift legal barriers created by state statutes, like licensing bars, and to restore legal rights that were lost upon conviction. The legislature required that awarding a certificate be "consistent with rehabilitation," but did not require proof of rehabilitation.<sup>321</sup> If Certificates of Relief are intended to immediately lift legal barriers that are not substantially connected to the conviction, the term "rehabilitation" may imply too much.

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321. N.Y. CORRECT. LAW §§ 702(2), 703(3), 703-b(1) (2003).

Similarly, for Certificates of Good Conduct, the requirement of “consistent rehabilitation” may suggest that evidence of rehabilitation must be presented in addition to the waiting period of three to five years. A showing of three to five years without an additional conviction should be sufficient proof of good conduct without additional evidence.

If the purpose of a certificate is to aid in the reintegration process, the name and requirements should reinforce that goal. “Rehabilitation” may be too forceful of a term and may imply that to be awarded a certificate applicants must offer concrete evidence that they are rehabilitated. If such a showing is not required, using a name like Certificates of Restoration of Rights or Certificates of Relief from Disabilities without referring to rehabilitation would be clearer.

On the other hand, state legislatures may think that a showing of “rehabilitation” should be made to justify the certificate. The New York statutes permit an investigation of the applicant, which could suggest an inquiry into whether there is evidence of rehabilitation. If the legislative purpose is to require an applicant to show rehabilitation, the statutory language should be explicit or require the administrative agency to promulgate regulations that define the criteria for showing rehabilitation. If proposed legislation includes such criteria, lawmakers should recognize that such criteria may undermine the state’s interest in offering immediate relief of bars to encourage successful reintegration. The longer the applicant must wait to apply for or qualify for a certificate, the more difficult reentry will be.

Regardless of whether the legislative intent is to require evidence of rehabilitation, the language of the statutes should be clear. Currently, the discretion left to administrative bodies means that applicants may need to meet different standards depending on whether they are applying to the Certificate Review Unit of the DCCS or the sentencing court.

## 2. Legal Robustness

If proposed legislation does not define the legal force of the certificate, a Certificate of Rehabilitation can be reduced to a symbolic piece of paper, severely limiting its ability to help a person apply for a license, employment, housing, or other benefits. Currently, model Certificates of Rehabilitation, even those modeled on New York, do not establish a legal standard

that can help agencies or employers understand the legal force of the certificates. As described in Part II, the impact of New York's presumption of rehabilitation is not entirely clear. The courts initially interpreted a certificate as prima facie evidence that a conviction should not be used against a certificate holder unless evidence to rebut the presumption was offered.<sup>322</sup> Over time, the New York Court of Appeals has weakened this interpretation and limited the effect of the presumption. The presumption of rehabilitation only satisfies one of eight Article 23-A factors—a showing of rehabilitation.<sup>323</sup> Other factors, such as the type of conviction, the length of the sentence, and the time passed since the conviction could override the presumption of rehabilitation without any specific evidence that rebuts the presumption.<sup>324</sup> Although New York courts have clarified that employers and agencies cannot ignore the certificate, courts have left open how to weigh the certificate.

The presumption of rehabilitation would be more forceful if it automatically shifted the burden from the applicant to the employer or agency, requiring the employer or agency to present evidence that rebuts the presumption. For example, if a person with previous drug convictions tested positive for drugs as part of a job application, that would serve to rebut the presumption of rehabilitation. Evidence that there is a *substantial* connection between a previous conviction and the duties of the job or license which would create an *unreasonable risk* to public safety could also be sufficient to rebut the presumption. For example, a person who was convicted of a bank robbery could be denied a security guard license.

The New York legislature is currently considering an amendment to Article 23-A to include language that could act as a model for certificate legislation.<sup>325</sup> Under Article 23-A, a person can be denied a job or a license if “there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual,”<sup>326</sup> or the person poses an “unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”<sup>327</sup> The amendment would refine the

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322. See *supra* Part II.B.

323. See *supra* Part II.B.

324. See *supra* Part II.B.

325. *Amendment to Article 23-A*, NEWYORKSENATE.GOV, <http://open.nysenate.gov/legislation/bill/S4368B-2009>. (last visited Mar. 9, 2012).

326. N.Y. CORRECT. LAW § 752(1) (McKinney 2011).

327. *Id.* § 752(2).

language to limit the number of denials.<sup>328</sup> Evidence of a direct relationship would require a showing that there is a “substantial connection” between the crime and the duties of the job or license *and* an unreasonable risk to public safety.<sup>329</sup> This amendment heightens the burden of proving a “substantial connection” before denying a job, license, or other opportunity to an applicant with a conviction.<sup>330</sup> The lawmakers’ justification for the 2010 amendment applies equally to the need for creating a robust rebuttable presumption of rehabilitation for certificates: “Unfortunately, many employers maintain blanket barriers to employment based solely on criminal conviction records even when the conviction may be completely unrelated to the job sought and no threat to the public or property is present.”<sup>331</sup>

### 3. One Goal, One Certificate

The New York experience raises the question: Is there a need for two types of certificates if they both have the same legal force? Having two certificates in New York appears to lead to unnecessary confusion for administering agencies, eligible applicants, and private employers. It may also dilute their social impact and create the appearance of a legal distinction when there is none. One certificate can function effectively the same way as New York’s two versions by requiring different eligibility requirements based on the seriousness of a person’s convictions. A single certificate would create greater clarity—a single application process with uniform requirements. The only distinction would be the timing of a person’s application depending on the extent of the person’s criminal record.

The Legal Action Center’s model legislation for a Certificate of Rehabilitation is an example of one certificate with two different eligibility criteria.<sup>332</sup> If a person is convicted of a crime but not sentenced to a state prison, the person is immediately eligible to apply to the sentencing court for a certificate at sentencing, which prevents automatic forfeitures

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328. *Amendment to Article 23-A, supra* note 325.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Certificate of Rehabilitation Model Legislation*, LEGAL ACTION CENTER, <http://www.lac.org/toolkits/certificates/Model%20legislation%20-%20certificates.pdf> (last visited Mar. 10, 2012).

and disabilities.<sup>333</sup> If a person is sentenced to more than one year at a state facility, the person can apply to the equivalent of the Certificate Review Unit for a certificate.<sup>334</sup> A certificate issued upon release while a person is on parole is temporary until parole is completed.<sup>335</sup> This model removes the waiting periods of New York's Certificates of Good Conduct.<sup>336</sup> The intent is clear: Certificates are immediate mechanisms that can be granted upon sentencing or release from incarceration. The model gives administering agencies discretion only to make an individualized determination about which statutory barriers should not be lifted. All other unrelated statutory bars are removed to better enable an applicant's successful reentry.<sup>337</sup>

#### 4. Oversight of Certificate Administration

A certificate statute should include provisions to ensure that the agencies administering the certificate will exercise their discretion in a manner that is consistent with the legislature's intent. The statute could easily include reporting requirements, a definition of three months to clarify a "reasonable time" for issuing a certificate, and a process for administrative appeal of a certificate decision. Another administrative body, like the State Division of Human Rights or the Reentry Department of the DCCS, could be tasked with evaluating the data collected and issuing a report to the legislature at the end of each year to ensure proper administration of certificates.

Lawmakers should also consider how certificates are a part of the criminal justice process. How and when should defendants learn about certificates? Lawmakers should extend the *Padilla*<sup>338</sup> obligation by requiring defense counsel to inform clients about a wider range of collateral consequences and the availability of certificates to relieve some of them.<sup>339</sup> This

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333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.>").

339. *See Chin & Love, supra* note 19, at 37.

requirement could also encourage more defense attorneys to ask for Certificates of Relief at sentencing when their clients are eligible.

Amendments to the statutes should also create an enforcement mechanism to guarantee that sentencing judges follow the rule requiring judges to inform defendants about both Certificates of Relief and Certificates of Good Conduct.<sup>340</sup> Currently, the rule only requires judges to tell defendants about Certificates of Relief.<sup>341</sup>

Integrating required disclosure about certificates into sentencing is consistent with New York's recent inclusion of reentry and reintegration as sentencing goals. Many defendants only appear before a judge for sentencing and are released without serving time in a state prison, without being supervised by probation or parole, and without reentry social services. For these individuals, the sentencing process and their defense counsel provide the only opportunity to learn about certificates. And given that these individuals are typically convicted of minor offenses, collateral consequences are usually severely disproportionate to their conviction, making them exactly the type of applicant whom the legislature intended to benefit from a Certificate of Rehabilitation.

### *B. Administrative Leadership*

In addition to the sentencing court, the DCCS and probation stand in the front lines of implementing New York's new sentencing goals of reentry and reintegration. Both agencies need to consider how to make their mission statements conform to these goals, and, more specifically, how the goals translate into tasks for their front-line officers. Without adding concrete tasks, front-line officers, who have embraced their punitive law enforcement roles, have no incentive to engage in activities that assist in reentry.<sup>342</sup> Organizations consistently resist change.<sup>343</sup> Therefore, leaders are critical to the success of innovative measures that alter an

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340. See N.Y. COMP. CODES R. & REGS. tit. 22, § 200.9(b) (2011).

341. *Id.*

342. Interview with Vincent Schiraldi, *supra* note 70.

343. WILSON, *supra* note 299, at 222 ("Changes that are consistent with existing task definitions will be accepted; those that require redefinition of those tasks will be resisted.").

agency's mission.<sup>344</sup> To encourage the administration of Certificates of Rehabilitation, the DCCS and probation will need strong leadership that defines tasks to incorporate this as part of the front-line officers' day-to-day practices.

One nod in the right direction comes from the merging of the state's Division of Parole and the Department of Corrections into a Department of Corrections and Community Supervision.<sup>345</sup> Reminiscent of the parole merger in the sixties, the purpose of this merger was to create a clear continuum of services for individuals who are incarcerated. The new department's mission is to "improve public safety by providing a continuity of appropriate treatment services in safe and secure facilities where offenders' needs are addressed and they are prepared for release, followed by supportive services under community supervision to facilitate a successful completion of their sentence."<sup>346</sup> This type of structural shift (merging the departments), combined with a mission that aligns more with the state's reentry goals, can positively impact the tasks performed by front-line DCCS parole officers. Assisting in the application for and awarding of Certificates of Rehabilitation would have a natural connection to the mission of "supportive services under community supervision."<sup>347</sup> The interesting part of the new mission is that it pulls together potentially contradictory purposes—supervision and services. Only time will tell how meaningful this merger can be for people with convictions.

The New York City Department of Probation provides a different example—how to prioritize issuing certificates through strong leadership. Under its current, innovative commissioner, Vincent Schiraldi, the Department of Probation has adopted a policy of recommending a certificate in every presentencing report for every eligible defendant unless a certificate application presents aggravating circumstances.<sup>348</sup>

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344. *See id.* at 227 ("As persons responsible for maintaining the organization it is executives who identify the external pressures to which the agency must react. . . . Almost every important study of bureaucratic innovation points to the great importance of executives in explaining change.").

345. *See supra* Part I.D.

346. *Departmental Mission*, N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, <http://www.doccs.ny.gov/mission.html> (last visited Apr. 12, 2012).

347. *Id.*

348. IMPROVEMENT TEAM ON COLLATERAL CONSEQUENCES, N.Y.C. DEP'T OF PROB., A REPORT TO COMMISSIONER VINCENT N. SCHIRALDI 21 (2010) [hereinafter REPORT TO THE COMMISSIONER] (stating that Department of Probation "policy for more than a year has been to recommend certificates with each PSI

Consistent with the language of Article 23 and its legislative history, the department views certificates as tools that aids rehabilitation.<sup>349</sup> Accordingly, the department's investigations do not require evidence of rehabilitation, but presume that a Certificate of Relief is appropriate at sentencing unless "aggravating circumstances" apply.<sup>350</sup> This practice reflects the commissioner's belief that enabling successful reentry is one of the agency's core goals.<sup>351</sup>

Even prior to its merger with Corrections, the Division of Parole offered another example of how the prioritization of administering certificates can result in a jump in the number of certificates awarded. In August 2005, the agency decided to incorporate issuing Certificates of Relief into the parole hearing process.<sup>352</sup> If a person was paroled and eligible for a Certificate of Relief, a temporary certificate would be granted to the parolee.<sup>353</sup> The members of the Parole Board, in 2005, decided that a person eligible for parole should also be eligible for a certificate to enable reintegration when paroled back to the community.<sup>354</sup> As Table 1 shows, the numbers of certificates issued by the Board of Parole increased since the policy changed.

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[presentencing report] . . . unless aggravating circumstances exist, such as a threat to public safety"); *see also* Interview with Vincent Schiraldi, *supra* note 70.

349. REPORT TO THE COMMISSIONER, *supra* note 348, at 21.

350. *Id.* ("The current statute [referring to Article 23 and 23A] does not require that evidence of rehabilitation be demonstrated in order to issue a certificate of relief from disabilities . . . . In fact there is no waiting period to issue a [certificate].").

351. Interview with Vincent Schiraldi, *supra* note 70.

352. Interview with Frank Herman, *supra* note 74.

353. *Id.* Only Certificates of Relief can be granted without a post sentence waiting period. *See supra* Part I.A.

354. *Id.*

Table 1: Combined Certificates of Good Conduct and Certificates of Relief from Disabilities Awarded by the Board of Parole from 1995 – 2010.

YEAR	CERTIFICATES GRANTED
1995	321
1996	263
1997	259
1998	222
1999	251
2000	292
2001	223
2002	219
2003	223
2004	219
2005	380
2006	657
2007	1637
2008	3046
2009	1857
2010	1621

Administering authorities should also consider how to streamline the application process, making it more accessible to potential applicants. For example, should parole and probation officers be tasked with providing each parolee or probationer with information about Certificates of Rehabilitation? Should these front-line officers help prepare applications? As Commissioner Schiraldi recognizes, an organization's culture shifts when its officers are given incentives to complete a task.<sup>355</sup> Ensuring that a person complies with rules has an impact on an officer's performance evaluation.<sup>356</sup> If helping prepare certificates is part of a parole or probation officer's annual performance review, then that officer will be more inclined to prioritize the task.<sup>357</sup> The administering authorities have a tremendous role to play in the success of a Certificates of Rehabilitation program. Only if certificates are endorsed as part of the agency's mission will

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355. Interview with Vincent Schiraldi, *supra* note 70.

356. *Id.*

357. *Id.*

they be integrated into the day-to-day functioning of the agency.

### *C. Social Reintegration*

For Certificates of Rehabilitation to enable successful reintegration, they must be more than a symbolic piece of paper. They must actually overcome civil barriers for people with criminal records. The relatively low number of certificates issued since 1976 calls their effectiveness into question. Certificates have yet to become a socially recognized end to a person's involvement with the criminal justice system.

Current evidence indicates that most people who are eligible for certificates do not apply for them.<sup>358</sup> The low number of applications stems from a combination of factors: a lack of information, a lack of capacity, and a lack of belief in their effectiveness. The administrative and legislative changes discussed above will make certificates more accessible to the applicant pool. But they will do little to affect an applicant's belief in a certificate's effectiveness until these administrative mechanisms become a socially integrated solution to reentry barriers.

If the criteria for certificates are set too high, certificates will only be awarded to people who can show exemplary evidence of rehabilitation. This could create two tiers of people with convictions. Only a select few will be relieved of civil punishments, and the vast majority will continue to face an unending debt to society. In this context, certificates could do more harm than good. Employers will begin to ask for certificates and only consider candidates who have earned this higher status.

Reentry advocates and social service organizations have an important role to play in integrating Certificates of Rehabilitation into the reentry process. Reentry programs in particular can be rich resources for pilot certificate projects where agencies can study the experiences of certificate applicants and learn how to make certificates more accessible.

Certificates are only meaningful if they are widely recognized by employers, agencies, and other individuals who deny benefits because of criminal records. A stronger presumption of rehabilitation will help, even if it is not an

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358. FORTUNE SOC'Y, *supra* note 308, at 10.

immediate answer to the problem. Serious enforcement of the presumption, however, will require litigation.

Public education initiatives also would support the integration of certificates into the reentry discourse. For example, legislation that requires all employers to add information about Certificates of Rehabilitation to their hiring process, such as including this information on job applications, could serve the dual purpose of educating employers and informing applicants about certificates. New York recently passed legislation requiring employers to post Article 23-A in every workplace.<sup>359</sup> Public education can begin with instructing employers who routinely but incorrectly believe that they can indiscriminately deny individuals job opportunities because of their criminal convictions.

For Certificates of Rehabilitation to succeed, they must serve as legal and social recognition that people with convictions deserve a second chance.

#### CONCLUSION

This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. . . . America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.<sup>360</sup>

—President George W. Bush, State of the Union Address, January 2004.

[T]here are people who've made mistakes . . . . [I] think one of the great things about America is that we give people second chances. . . . [Y]ou reduce the recidivism rate, they pay taxes, it ends up being smart for taxpayers to do.<sup>361</sup>

—President Barack Obama at a town hall meeting, January 22, 2010.

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359. N.Y. LABOR LAW § 201-f (McKinney 2003). On August 5, 2008, Governor Paterson signed an amendment, which took effect on February 1, 2009, requiring employers to post “a copy of article twenty-three-A of the correction law” in a “visually conspicuous manner” in an accessible location in the workplace. N.Y. LABOR LAW § 201-f (McKinney 2011).

360. President George W. Bush, State of the Union Address (Jan. 20, 2004).

361. President Barack Obama, Remarks at a Town Hall Meeting (Jan. 22, 2010).

Over the past decade, the country has shifted its thinking about tough-on-crime politics. We are at a unique moment in evaluating what happens on the back end of the criminal justice system when people are released. This prioritization of reentry initiatives makes sense on both sides of the political aisle from a normative and economic perspective.

Bar associations, politicians, advocates, and scholars have shined a spotlight on state-issued certificates because they can remove the myriad unending civil punishments that attach to even the most minor criminal convictions. This attention recognizes that the state, which has set up these legal barriers to reentry, has a reciprocal obligation to play its part in their removal. In our technologically advanced society, where criminal records can be retrieved easily on the Internet, removing all memory of a criminal record is futile. As New York's experience with Certificates of Rehabilitation shows, a certificate does not wipe away the reality of the past. It merely stands for the proposition that a person with a conviction still has a future. Certificates of Rehabilitation can be administered to ensure that the impact of collateral consequences is proportionate to the crime and to offer protection against persistent discrimination. Certificates can help us reshape the purpose of our criminal justice system toward a more forgiving reintegration ideal.

# “OF GREATER VALUE THAN THE GOLD OF OUR MOUNTAINS”: THE RIGHT TO EDUCATION IN COLORADO’S NINETEENTH-CENTURY CONSTITUTION

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*As the contemporary battle for educational opportunity has moved to state courts, the education clauses of a state’s constitution have played prominent roles in the litigation. Of particular concern has been the role that history should play in interpreting the scope and meaning of various provisions of a clause. This Article advances this debate by examining the development of article IX (the education clause) in Colorado’s 1876 “Centennial” Constitution. The Article first details the efforts to provide free public education in the United States in the decades leading to the drafting of the Colorado state constitution in 1876. Colorado, as part of a nationwide movement to ensure public education as a state constitutional right, reflected a much larger conversation over the scope and meaning of education to citizenship and civic engagement, economic opportunity, public versus private right, and, in some cases, civil rights. The Article accordingly turns to how these issues emerged quite pointedly in Colorado: from the discovery of gold on the banks of the Platte River and the opening of the first schoolhouse in 1859, to its formation as a territory and the subsequent passage of a comprehensive School Law in 1861, to internal and external debates over the education clause*

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*that eventually came to be drafted and adopted by the Framers to the state's constitution. While Colorado's pioneers struggled to reconcile competing visions over the precise role that a statewide system of education should play, they nevertheless were in agreement that it be "thorough and uniform" for all of the state's students now and into the future. As the final part of the Article documents, however, it was readily apparent that systemic and structural inequities were already dividing the state's emerging school districts in the immediate years after statehood. Part of a much larger nineteenth-century commitment to public education, Colorado's early legal experiences reflected the hopes, aspirations, and maddening limits of a substantive and meaningful constitutional right to education that would be available for all of its habitants.*

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## INTRODUCTION

On February 28, 1861, the United States Congress created the territory of Colorado.<sup>1</sup> As one of the last states to be organized into a territory prior to the Civil War,<sup>2</sup> Colorado's petition for statehood nearly fifteen years later would play an instrumental role in bringing the Civil War and its Reconstruction era of hostilities to a psychological end.<sup>3</sup> Given that Colorado's existence was a function of the sectional crisis that included such issues as slavery, the territorial ambitions of the federal government, and natural resource extraction to fuel an industrial United States, it is perhaps surprising that the future course and direction of public education would be among those issues dividing the nation.

For many, however, public education captured perfectly all that was at stake in the Civil War between North and South. Indeed, in explaining the importance of the Act to Establish the Common School System passed by the first territorial Legislative Assembly of Colorado in 1861,<sup>4</sup> the territory's

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1. Act of Feb. 28, 1861, ch. 59, 12 Stat. 172.

2. Congress created the Nevada Territory and the Dakota Territory days later on March 2, 1861. *See* Act of Mar. 2, 1861, ch. 83, 12 Stat. 209 (creating Nevada); Act of Mar. 2, 1861, ch. 86, 12 Stat. 239 (creating Dakota).

3. Recognizing that the 1876 national presidential election between Rutherford B. Hayes and Samuel Tilden would be close, national Republican leaders pushed through a proposal for Colorado statehood in 1875. *See generally* Tom I. Romero, II, *Wringing Rights out of the Mountains: Colorado's Centennial Constitution and the Ambivalent Promise of Human Rights and Social Equality*, 69 ALB. L. REV. 569 (2006). *See also* ROBERT G. ATHEARN, *THE COLORADANS* 102 (1976); Colin B. Goodykoontz, *Some Controversial Questions Before the Colorado Constitutional Convention of 1876*, COLO. MAG., Jan. 1940, at 1, 2, 4 (discussing the role of party politics at the Colorado Constitutional Convention of 1876); Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century* 82–83 (1957) (unpublished Ph.D. thesis, University of Colorado) (describing the circumstances under which congressional Republicans passed the bill granting Colorado statehood). Critically, without Colorado's three electoral votes, Republican Rutherford B. Hayes may not have become President of the United States. ATHEARN, *supra*, at 102; *see also* KEITH IAN POLAKOFF, *THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION* 149–50 (1973) (providing background on Colorado's support for Hayes). As Professors Dale Oesterle and Richard Collins point out, "the 1874 election of a Democratic delegate from the Colorado Territory to Congress, Thomas Patterson, jeopardized Republican sponsorship. Colorado Republicans convinced congressional Republicans that Patterson's election was a unique protest vote against the corrupt governor, Edward M. McCook, a Republican appointed by [President Ulysses S.] Grant." DALE A. OESTERLE & RICHARD B. COLLINS, *THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE* 22 n.24 (2002).

4. GENERAL LAWS, JOINT RESOLUTIONS, MEMORIALS, AND PRIVATE ACTS, PASSED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY

Superintendent of the Common Schools, William J. Curtice, expounded upon a “lesson” taught by “good and wise” statesmen in “a majority of States loyal to the Government and constitution of the country”:

When the heads and hearts of men are generally cultivated and improved, virtue and wisdom must reign, and vice and ignorance cease to prevail . . . This lesson . . . having been carried into practice in the establishment of schools for the education of the children of the mass of the people in a majority of our States, has produced results in the extension of prosperity, intelligence, and happiness . . .<sup>5</sup>

In contrast, Curtice painted a very different picture for “a minority of the States” that, “while educating the few, have neglected the many; while alive to the pecuniary and political advantages of the few, have been dead to the interests of the common schools and the instruction thereby of the children of the masses.”<sup>6</sup>

To be sure, Curtice’s thinly veiled assault on the lack of public education in the Confederacy carried some risk. Colorado’s first territorial governor, William Gilpin, appointed Curtice to serve as the first superintendent of the common schools and territorial librarian.<sup>7</sup> Governor Gilpin, who was appointed by President Abraham Lincoln, was asked to govern a “territory in which a third of the population openly supported the Confederacy and three-fifths of the voters were Democrats.”<sup>8</sup> To further complicate matters was the fact that

OF COLORADO 154 (Denver, Rocky Mountain News Publ’g Co. 1861) [hereinafter FIRST LEGISLATIVE ASSEMBLY OF COLORADO TERRITORY].

5. HORACE MORRISON HALE, STATE TEACHERS’ ASS’N, EDUCATION IN COLORADO: A BRIEF HISTORY OF THE EARLY EDUCATIONAL INTERESTS OF COLORADO 14–15 (Denver, News Prtg. Co. 1885) (quoting W.J. Curtice).

6. *Id.* at 15 (quoting W.J. Curtice).

7. Harry M. Barrett, *Education in Colorado*, in COLORADO: SHORT STUDIES OF ITS PAST AND PRESENT, 122, 126 (Junius Henderson ed., 1971). Colorado’s first territorial legislature required that the territorial superintendent of common schools “shall be, and is hereby declared, *ex officio* Librarian for the Territory of Colorado.” FIRST LEGISLATIVE ASSEMBLY OF COLORADO TERRITORY, *supra* note 4, at 110. The territorial librarian had a scholarly function and was charged with “custody of all books, maps, papers, charts, engravings, [and] paintings . . . and shall also keep a regular file of all newspapers published in the Territory.” *Id.* at 111.

8. ATHEARN, *supra* note 3, at 66. Lincoln’s selection of Gilpin as Governor of Colorado Territory seemed to be an obvious choice. A longtime explorer and subsequent developer of what became the American West, Gilpin had traveled with legendary explorer John Fremont in 1843 and on the return east traveled

the territory had so few children. Whereas a settlement of Catholic Spanish-speaking families had found a foothold in the area's southern mountain valleys nearly ten years earlier, the gold rush of 1859 suddenly brought a lot of fortune-seeking men, few women, and even fewer children to settle in the high plains of Eastern Colorado and emerging industrial sectors in the mountains.<sup>9</sup>

Nevertheless, Curtice's introduction is a bold statement about the role that public education would play in the development of Colorado, first as a territory and later as a state. Despite the political divisions and social differences that already racked the fledgling territory and the fact that there were so few children in Colorado's resource-rich lands, Curtice was laying out a vision of something upon which all could agree. According to Curtice, "developing an educational system among us, *for the future*, [is] of greater value than the gold of our mountains, and a better safeguard to society than the elective franchise or standing armies."<sup>10</sup>

As a result, he commended the territory's First Legislative Assembly for prioritizing the establishment of a statewide system of public schools among its many tasks of establishing law and infrastructure for the new government. It "now remains for the people and their duly chosen school officers, to imitate the commendable zeal of the Legislative Assembly in behalf of education, by carrying into effect the school law and inaugurating a public school system in every county of the Territory."<sup>11</sup> In spite of the fact that the new territory was being torn asunder by the Civil War, Curtice and his fellow Coloradans found common ground in principles that identified a statewide system of public schools as one of the essential building blocks to the territory's growth.<sup>12</sup>

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through the mountain valleys and plains of what became Colorado. He was especially taken with the San Luis Valley and wrote a series of articles on the entire region just after the discoveries of gold on the Front Range that was published in 1860 as *The Central Gold Region*. See WILLIAM GILPIN, *THE CENTRAL GOLD REGION: THE GRAIN, PASTORAL, AND GOLD REGIONS OF NORTH AMERICA* (Phila., Sower, Barnes & Co. 1860).

9. The migrants to Colorado were mostly Protestant and hailed from states such as Illinois, Pennsylvania, and Missouri and the countries of Canada, Ireland, and Germany. See ATHEARN, *supra* note 3, at 17, 104; OESTERLE & COLLINS, *supra* note 3, at 1 & n.5.

10. HALE, *supra* note 5, at 13 (emphasis added) (quoting W.J. Curtice).

11. *Id.* (quoting W.J. Curtice).

12. See generally *infra* Part II.

Not surprisingly, Coloradans enshrined such sentiment in article IX of the state constitution, which eligible voters overwhelmingly ratified on July 1, 1876.<sup>13</sup> Known as the education clause in the Colorado Constitution, article IX, as originally ratified, contained sixteen sections that mandated that the General Assembly “provide for the establishment and maintenance of a thorough and uniform system of free public schools”<sup>14</sup> through such measures as the creation of both statewide<sup>15</sup> and local boards of education;<sup>16</sup> the creation and maintenance of a school fund<sup>17</sup> solely for public, non-sectarian schools;<sup>18</sup> and the establishment of a state university.<sup>19</sup> Congress’s grant of authority to Coloradans to write a state constitution and petition for statehood recognized the basic expectation that the state would establish a system of common or public schools.<sup>20</sup> However, Colorado’s pioneers had long

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13. OESTERLE & COLLINS, *supra* note 3, at 1.

14. COLO. CONST. art. IX, § 2 (“The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the State, wherein all residents of the State between the ages of six and twenty-one years may be educated gratuitously.”).

15. *Id.* § 1 (“The general supervision of the public schools of the State shall be vested in a Board of Education, whose powers and duties shall be prescribed by law; the Superintendent of Public Instruction, the Secretary of State and Attorney General, shall constitute the Board, of which the Superintendent of Public Instruction shall be President.”).

16. *Id.* § 15 (“The General Assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a Board of Education . . .”).

17. *Id.* § 3 (“The public school fund of the State shall forever remain inviolate and intact . . .”); *id.* § 4 (“Each County Treasurer shall collect all school funds belonging to his county, and the several school districts therein . . .”); *id.* § 5 (“The public school fund of the State shall consist of the proceeds of such lands as have heretofore been, or may hereafter be granted to the State by the General Government for educational purposes . . .”); *id.* §§ 9–10 (providing for the creation of a Board of Land Commissioners to govern and, if necessary, alienate the public lands used for either the general fund or educational purposes).

18. *Id.* § 7 (“Neither the General Assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever . . .”).

19. *Id.* §§ 12–14 (establishing a Board of Regents to create and govern a state university).

20. In 1875, the U.S. House of Representatives passed the Enabling Act for the State of Colorado and invited the citizens of the territory to write a constitution and form a state government that conformed to certain federal mandates. Enabling Act, *reprinted in* PROCEEDINGS OF THE CONSTITUTIONAL

placed public education as a central principle of good government and economic opportunity since Colorado's inception as a territory in 1861.<sup>21</sup>

This Article accordingly examines the meaning of education among the Framers and their contemporaries in and around the time that Colorado became a state. As I have written elsewhere, Colorado's state constitution reflects not only local but nationally enduring tensions between individual freedom and social equity.<sup>22</sup> Perhaps nowhere in the document is this reflected more clearly than in article IX and in two recent concurrent, but unrelated, cases examining its scope, meaning, and applicability to the state's current system of public education. The plaintiffs in the first case, *Lobato v. State*,<sup>23</sup> asked the court to consider whether state standards and mandates are "rationally related" to article IX's requirement that the legislature maintain "a *thorough and uniform* system of public schools throughout the state"<sup>24</sup> while at the same time empowering local school boards to control the

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CONVENTION HELD IN DENVER, DECEMBER 20, 1875, TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO 9–13 (1907) [hereinafter PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION]. In section 7, the Enabling Act granted sections 16 and 36 of every township for the support of common schools. *Id.* at 11. Section 14 required that the land in sections 16 and 36 could not be sold for less than \$2.50 per acre and that the proceeds thereof would constitute a permanent school fund. *Id.* at 13; *see also infra* note 79.

21. *See generally infra* Part II.

22. Romero, *supra* note 3, at 569–70.

23. *Lobato v. State*, No. 05 CV 4794, 2006 WL 4037485 (Colo. Dist. Ct. Mar. 2, 2006), *aff'd*, 216 P.3d 29 (Colo. App. 2008), *rev'd*, 218 P.3d 358 (Colo. 2009). In *Lobato*, school districts and parents of schoolchildren from around the state—in particular the San Luis Valley—brought an action against the State challenging the adequacy of the school finance system under the education clause of the Colorado Constitution. Initially, District Judge Michael A. Martinez dismissed the plaintiffs' claims for lack of standing and also dismissed the complaint for failure to state a claim. *Lobato*, 2006 WL 4037485. In reversing, the Colorado Supreme Court held (1) it was unnecessary to address the school districts' standing because the districts were bringing the same claims as the parents, and the parents had sufficient standing, *Lobato v. State*, 218 P.3d 358, 368; (2) whether the public school financing system is in conflict with Colorado's constitutional mandate for a "thorough and uniform" system of public education was a justiciable issue, *id.* at 374; (3) the constitutionality of the public school financing system would be subject to review under the rational-basis standard, *id.*; and (4) Amendment 23 of the Colorado Constitution, which set forth minimum increases in the state funding of education, did not render the issue of the adequacy of the current school finance system nonjusticiable, *id.* at 376. Justice Rice dissented, arguing that the case presented a nonjusticiable political question that should be resolved by the legislature. *Id.* (Rice, J., dissenting).

24. COLO. CONST. art. IX, § 2 (emphasis added).

content of classroom instruction within their school districts.<sup>25</sup> Central to this claim is the power of Colorado courts, unlike many other states who have considered the issue,<sup>26</sup> to examine whether the state is adequately meeting its substantive mandates under article IX, sections 2 and 15.<sup>27</sup> At the crux of the legal question is whether it is possible “to create a judicial standard or rule that can define, accommodate, and limit the enormity of preparing students for meaningful ‘civic, political, economic, [and] social’ engagement in the world.”<sup>28</sup>

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25. “We hold that the judiciary must similarly evaluate whether the current state’s public school financing system is funded and allocated in a manner rationally related to the constitutional mandate that the General Assembly provide a ‘thorough and uniform’ public school system.” *Lobato*, 218 P.3d at 374. As a matter of full disclosure, I produced much of the research for this Article after the plaintiffs asked me to serve as an expert witness regarding the intent of the delegates to the Colorado Constitutional Convention who drafted article IX, sections 2 and 15.

26. Many other states have examined the justiciability of education adequacy claims, and, in so doing, many have relied on a variety of factors, including but not limited to their own education clauses—as well as state constitutional principles concerning separation of powers and judicial review—to determine whether a system is justiciable. *See, e.g.*, *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Idaho Sch. for Equal Educ. Opportunity, Inc. v. Evans*, 850 P.2d 724 (Idaho 1993); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164 (Neb. 2007); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); *State v. Campbell Cnty. Sch. Dist.*, 32 P.3d 325 (Wyo. 2001).

27. The Colorado Supreme Court made clear that article IX “contains a substantive mandate to the state subject to review by the courts.” *Lobato*, 218 P.3d at 371. Of particular importance for the court was its decision in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982). Though the *Lujan* court rejected the plaintiffs’ claims that absolute equality in per-pupil funding was not required under the equal protection clause of either the Federal or state constitution, it argued nevertheless that article IX, section 2 “is a mandate to the State through the legislature to establish a complete and uniform system of public education for Colorado elementary and secondary school students.” *Id.* at 1027. In a subsequent case, Justice Kourlis cited *Lujan* to note that the “actions of the general assembly must be judged against its charge to provide a free and uniform system of public schools within each school district, and against whatever level of control is needed by the local school district to implement the state’s mandate.” *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 947–48 (Colo. 2004) (Kourlis, J., dissenting).

28. *Lobato*, 218 P.3d at 380 (Rice, J., dissenting). Answering her own question, Justice Rice asserted that “[i]t is impossible.” *Id.*

The *Lobato* case began when Anthony Lobato filed suit against the State of Colorado after he noticed that his daughter was competing in high school state history competitions against other students who had far better economic resources in their classrooms, schools, and school districts.<sup>29</sup> Five years later, twenty-one additional families and twenty-one school districts joined Lobato to address whether the State was meeting its obligations under sections 2 and 15 of the education clause.<sup>30</sup> According to Jefferson County Public School Superintendent Cindy Stevenson, the district joined the lawsuit because “school funding was at a crisis point” due to recent budget cuts that slashed funds for public education.<sup>31</sup> When she made her statement, the district had lost approximately \$58 million in funding in the preceding two years.<sup>32</sup>

A primary argument of the *Lobato* plaintiffs is that the state’s current school-funding system makes achieving a constitutionally proscribed “thorough and uniform” system of education impossible to achieve.<sup>33</sup> Objectors to the litigation argue that the money to remedy this failure would have to come from somewhere, and the State currently spends \$3 billion annually, or greater than forty percent of its general fund on education.<sup>34</sup> Accordingly, they are concerned that a plaintiff’s verdict in the *Lobato* suit could mean a \$2 billion to \$4 billion increase in school funding from the state budget.<sup>35</sup> One of the plaintiffs’ attorneys, Kathy Gebhardt, dismissed arguments that the suit would require the State to spend too much of its budget on education. Instead, Gebhardt stated, “[w]e’re asking for a declaration that the system is unconstitutional, and then the legislature has to respond.”<sup>36</sup> Compelling is the fact that Colorado, although “one of the nation’s wealthiest states, is among the lowest-spending states”

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29. Karen Auge, *Suit Seeks School Funds: A Case Set for Monday in Denver Pivots on Colorado’s Obligations*, DENVER POST, July 31, 2011, at B1.

30. *Id.*

31. *Id.*

32. *Id.*

33. See Tim Hoover, *Hick AG Assail Lawsuit: The School-Funding Suit, They Say, Could Cost the State Billions*, DENVER POST, July 29, 2011, at B1.

34. *Id.*

35. *Id.* Colorado Governor John Hickenlooper and Attorney General John Suthers took a bipartisan stand against the *Lobato* suit, claiming that it could cost the state billions of dollars if it loses in court and stating that education funding should be determined by the legislature and the voters, not the courts. *Id.*

36. *Id.*

in funding for primary and higher education.<sup>37</sup> Particularly as the General Assembly continues to slash its general education budget, the outcome of the *Lobato* suit promises to shape how Colorado will meet its constitutional mandate to provide “thorough and uniform” schools while at the same time respecting local control by a school district.<sup>38</sup>

After a five-week trial in late summer of 2011, the Denver District Court on remand held that (1) the school finance system and the education system are not rationally related to each other; (2) the public education system is significantly underfunded; and (3) local school districts’ authority to “control instruction” is undermined because they are financially unable to provide necessary services, programs, materials, and facilities.<sup>39</sup> The State and its Board of Education have appealed this most recent ruling.<sup>40</sup> A historical inquiry into the development of the education clause in the Colorado Constitution in the nineteenth century, therefore, can help illuminate the contours of the constitutional mandate that the Framers had in mind.

While the Denver District Court was hearing testimony in the *Lobato* case, testimony was being heard in an adjacent courtroom about whether the school board for Douglas County public schools should be permanently enjoined from enacting a

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37. MARK FERMANICH, BUECHNER INST. FOR GOVERNANCE, COLORADO’S FISCAL FUTURE: WE’LL GET WHAT WE PAY FOR, at ii (2011), available at <http://www.ucdenver.edu/academics/colleges/SPA/Documents/Fermanichreport2-16-11.pdf>. For a summary of the state’s declining fiscal commitment to public education since the late 1980s and early 1990s, see *id.* at 5–6.

38. The 2011–12 budget proposal by Governor Hickenlooper is illustrative of this point. Governor Hickenlooper proposed to cut the education budget by an additional \$332 million for the 2011–12 fiscal year. Brian Kurz, Op-Ed., *Education Cuts Will Be Devastating*, DENVER POST, Mar. 12, 2011, at B11. This proposal came after the State had already lost \$175 million in education funds by failing to earn federal “Race to the Top” funds. *Id.* A Cherry Creek school teacher, Brian Kurz, sums up the challenge: Including the lost federal money, “Colorado school districts are being asked to function with more than half of a billion dollars less than the amount believed to be available last June. . . . Now, all schools are being asked to do more with much less.” *Id.* These policies are drowning the state’s educators “in a sea of unfunded mandates and budget cuts.” *Id.* Recently, Colorado was finally awarded a multi-million-dollar “Race to the Top” grant. Yesenia Robles, *Colorado Receives \$17.9 Million Race to the Top Education Grant*, DENVER POST (Dec. 23, 2011), [http://www.denverpost.com/news/ci\\_19605742](http://www.denverpost.com/news/ci_19605742).

39. *Lobato v. State*, No. 2005CV4794, at 178–82 (D. Colo. Dec. 9, 2011) (on file with author).

40. Todd Engdahl, *State Board of Education Appeals Lobato*, EDUC. NEWS COLO. (Dec. 26, 2011), <http://www.ednewscolorado.org/2011/12/26/30409-the-churn-try-one-more-time>.

pilot project voucher program that would allow approximately 500 district students to use public monies to attend private—and, in many cases, religious—schools.<sup>41</sup> The plaintiffs in that case argued that such a program was a direct violation of article IX's commitment to “free public schools,” a provision that directly forbids educational “aid of any church or sectarian society . . . for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever.”<sup>42</sup> The Douglas County program was to provide up to \$4575 for each of the eligible students (its approximate costs would total up to \$2,287,500) to help cover private-school tuition.<sup>43</sup>

The local school board, in contrast, attempted not only to defend the private school vouchers as constitutional under article IX but also argued that a prohibition against the use of a voucher at a religiously affiliated school would violate the Colorado Constitution's religious freedom clause.<sup>44</sup> Importantly, Douglas County's arguments tapped into two concurrent trends in “school-choice” litigation. The first was an inversion of the local control argument. Although the Colorado Supreme Court in 2004 found that a statewide voucher program targeted at low-performing school districts violated the provision of article IX, section 15 for “local control,”<sup>45</sup> it

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41. See *Larue v. Colo. Bd. of Educ.*, Nos. 11cv4424, 11CV4427, ¶¶ 35, 37 (Aug. 12, 2011) (on file with author); Editorial, *The Latest Hurdle for School Choice: We Hope the Recent Ruling Against Douglas County's Voucher Plan Won't Deraile the Push for Innovative Education Reforms*, DENVER POST, Aug. 21, 2011, at D3.

42. COLO. CONST. art. IX, § 7; see also Carlos Illescas, *Voucher Students to Stay Put: Private Schools Agree to Keep the Kids in Douglas County's Program During a Court Fight*, DENVER POST, Aug. 18, 2011, at B1.

43. Carlos Illescas, *Douglas County District Asks for Return of Voucher Cash*, DENVER POST, Aug. 20, 2011, at B1. At the time that it approved the program, the Douglas County School Board claimed that the district actually might net approximately \$400,000 as mandatory state-wide test costs and other expenses were deducted from the nearly \$3 million in vouchers. Karen Auge, *Douglas County School Board Unanimously OKs Voucher Plan to Help Pay for Private-School Tuition*, DENVER POST (Mar. 16, 2011), [http://www.denverpost.com/news/ci\\_17623486](http://www.denverpost.com/news/ci_17623486).

44. COLO. CONST. art. II, § 4 (“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion . . .”).

45. In 2004, the Colorado General Assembly enacted the Colorado Opportunity Contract Pilot Program, which targeted school districts with at least eight schools rated as low or unsatisfactory under the state's accountability system for the preceding year. Students in such schools would then be given

nevertheless left open the possibility for individual school district choice and experimentation with voucher programs. As one of the few states with a “local control” section in its education clause, Colorado is poised to have a prominent voice in the national debate regarding the extent to which public funds should be used to support private school education.<sup>46</sup> The second issue is a debate concerning the extent to which article IX, sections 2 and 7 in the Colorado Constitution absolutely bar public monies to religiously affiliated educational institutions. Emboldened by state courts that held that public monies could be used by individual families for religiously affiliated private schools despite the existence of “no-aid provisions” in state constitutions,<sup>47</sup> voucher advocates have moved to enact such programs at a local level.<sup>48</sup> And, despite the U.S. Supreme Court finding that a state constitution’s “no-aid provisions” may be more stringent than the federal Establishment Clause that bars governmental aid to nonpublic schools, the Court left open the possibility that a clear and unambiguous history of religious animus in the establishment clause’s drafting and application might compel a different result.<sup>49</sup> Douglas County’s

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vouchers to attend private schools. COLO. REV. STAT. § 22-56-104 (2004). The Colorado Supreme Court held that the pilot voucher program violated article IX, section 15 by removing local school district discretion over spending funds for instruction and taking financial control away from local school boards. *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 944 (Colo. 2004).

46. Allison Fetter-Harrott & Martha McCarthy, *A Perplexing Step Backward for the Establishment Clause and a Winn for School Privatization*, 270 EDUC. L. REP. 1, 16–19 (2011) (detailing the U.S. Supreme Court’s recent decision in *Arizona Christian School Tuition Organization v. Winn* on April 4, 2011, and the potential role of state constitutional education clauses, including Colorado’s, in the financing of private schools); see also Preston C. Green III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, 2010 BYU EDUC. & L.J. 275, 288–93 (examining in particular litigation surrounding the “local control” provision of Colorado’s education clause).

47. See, e.g., *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); see also Frank R. Kemerer, *School Vouchers: Constitutional Questions Remain*, EDUC. COMMISSION STS. (Aug. 2002), <http://www.ecs.org/clearinghouse/38/98/3898.htm>.

48. See, e.g., *Larue v. Colo. Bd. of Educ.*, Nos. 11cv4424, 11CV4427 (Aug. 12, 2011) (on file with author).

49. *Locke v. Davey*, 540 U.S. 712, 722–25 (2004). The *Locke* Court upheld the State of Washington’s decision to bar the use of state-supported scholarships for students to pursue theology degrees, declaring that a state’s more stringent antiestablishment provision did not implicate the Free Exercise Clause’s prohibition on practices impairing religious beliefs without a compelling governmental interest or the Establishment Clause’s prohibition on government action representing hostility toward religion. *Id.* The Court in *Locke* explicitly noted that it did not find anti-Catholic sentiment or other religious hostility in Washington’s “no-support” provision, reasoning that there were

voucher program was intended to “increase choice and competition” for school students,<sup>50</sup> but, like the *Lobato* case, its total costs in a time of state mandates and devastating budget cuts call into question both the scope and intent of the education clause of the Colorado Constitution.<sup>51</sup> The stakes are even higher if one considers that Colorado, despite its education clause, ranks near or at the bottom among the fifty states in such indicators as per-pupil spending, student-teacher ratio, updated technology, teacher salaries, resources committed by state and local government, and the poverty gap.<sup>52</sup> Adding insult to injury is that many of Colorado’s

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nondiscriminatory reasons for the provision’s inclusion in the state constitution. *Id.* at 728–29. In so doing, the Court left open the possibility that evidence of solely religious animus may be pertinent to a provision’s constitutionality.

50. *The Latest Hurdle for School Choice*, *supra* note 41.

51. As of this writing, the judge in *Larue* has issued a permanent injunction against the school district. *Larue*, *supra* note 48, at 68. Denver District Judge Michael A. Martinez issued a permanent injunction against the Douglas County Choice Scholarship Program because the program would use taxpayer money to pay tuition to private and religious schools in violation of the Colorado Constitution. The court found:

Sixteen of the twenty-three private partner schools approved to participate in the Scholarship Program are sectarian or religious, as those terms are used in Article II, Section 4; Article V, Section 34; and Article IX, Section 7, of the Colorado Constitution. They teach “sectarian tenets or doctrines” as that term is used in Article IX, Section 8 of the Colorado Constitution.

. . . .

As of the time of the injunction hearing, approximately 93% of the confirmed private school enrollment was attending religious schools.

*Id.* Judge Martinez wrote, “[t]he prospect of having millions of dollars of public school funding diverted to private schools, many of which are religious and lie outside of the Douglas County School District, creates a sufficient basis to establish standing for taxpayers seeking to ensure lawful spending of these funds.” *Id.* at 21. However, the permanent injunction issued by Judge Martinez has halted the program, and there isn’t much room for optimism. Adding to the confusion, Martinez’s opinion did not offer any guidance as to what becomes of the \$300,000 of preliminary payments that the program had already paid out. Illescas, *supra* note 43. Douglas County School District stated that it expects private schools to repay about \$300,000 in tuition costs that the district had already paid out through its school voucher program. The district had sent out 265 first-quarter payments that totaled about \$300,000 before the program was enjoined by Judge Martinez’s ruling. *Id.*

52. *Statistics*, GREAT EDUC. COLO., <http://www.greateducation.org/statistics-faqs/statistics> (last visited Nov. 13, 2011). Adjusted for regional variations, Colorado ranks fortieth for per-pupil spending and student-teacher ratio, forty-first for updated technology, forty-eighth for resources committed by state and local government, and dead last for both teacher salaries and the gap between school lunch-eligible and non-eligible children (the “poverty gap”). *Id.* Lurking in the background of the funding discussion is the Taxpayers’ Bill of Rights (TABOR), added to the state constitution in 1992 as COLO. CONST. art. X, § 20.

schools are considered some of the most racially unequal in the nation despite various policy and legal attempts to overcome such discrepancies.<sup>53</sup>

This Article puts these two cases in historical perspective by examining what “thorough and uniform” as well as “public and private” education meant to Colorado’s pioneers. Part I of the Article details the efforts to provide free public education in the United States in the decades leading up to the drafting of the Colorado state constitution in 1876. Colorado, as part of a nationwide movement to ensure public education as a state constitutional right, reflected a much larger conversation over the scope and meaning of education to citizenship and civic engagement, economic opportunity, and, in some cases, civil rights. Part II then turns to how these issues emerged in the early years of Colorado’s political formation. Looking in particular at territorial antecedents to article IX in the Colorado Constitution, the Article assesses how and in what ways access to public education surfaced as a stunted piece of territorial statecraft.

Part III focuses on the Constitutional Convention in 1875 and 1876. While consensus was achieved fairly rapidly on much of article IX, the issue of public funding of religious and sectarian education became one of the most contentious issues of the entire Constitutional Convention. The debate over state support of private schools, moreover, obscured other important developments in the crafting of the education clause, including a commitment to nondiscrimination and an attempt to balance state and local control of the public schools. This Article accordingly details the debate and the Framers’ fairly clear resolution of all of these issues. Finally, Part IV assesses how

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The core of this constitutional requirement is that Colorado citizens must ratify any tax rate increase or new tax, as well as requiring state and local governments to spend no more in real dollars than they spent the previous year. *Id.* § 20(7)(b)–(c). As TABOR contributed to a serious decline in education revenues, efforts to stabilize funding for education culminated with the passage of Amendment 23 in 2000, which was designed to gradually restore K-12 funding back to 1988 levels by 2011 and to grow funding by at least the rate of inflation thereafter. COLO. CONST. art. IX, § 17. As one study noted, however, “even with the funding floor provided by Amendment 23, PK-12 funding has remained far behind the rest of the nation.” FERMANICH, *supra* note 37, at 5.

53. See, e.g., CHUNGMEI LEE, DENVER PUBLIC SCHOOLS: RESEGREGATION, LATINO STYLE (2006). For an analysis of attempts to overcome racial inequality in the Denver Public Schools, see Tom I. Romero II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEA. J. FOR SOC. JUST. 73, 77–90, 97–120 (2004).

the General Assembly and state educators attempted to implement article IX at the primary educational level. Though article IX was imbued with the “spirit” of providing a “thorough and uniform” education for all of the state’s students then and into the future, it was readily apparent that systemic and structural inequities were already dividing the state’s emerging school districts. The pursuit of public education in Colorado from its earliest inception, therefore, was about law’s ability to bridge these gaps. In this sense, the culmination of all the efforts was the inscription of education as a constitutional right in 1876. This right reflected the primary role that early Coloradans believed the education clause would have in creating the substantive conditions and content, no matter how improbable, “of preparing students for meaningful ‘civic, political, economic, [and] social’ engagement” in a world that was changing rapidly before their eyes.<sup>54</sup>

#### I. THE NINETEENTH-CENTURY MOVEMENT FOR PUBLIC SCHOOLS

No sooner had gold been discovered on the banks of the Platte River in what would become Denver, Colorado, than local boosters were clamoring for schoolhouses.<sup>55</sup> By all accounts, the first school was started by O.J. Goldrick, “a dapper little Irishman who drove into town wielding a long bull-whackers’ whip over a team of weary oxen. . . . [H]e was reputed to have exhibited his erudition by roundly cursing the lumbering beasts in Latin.”<sup>56</sup> With degrees from the University of Dublin and Columbia University, he was “invited” to start a fee-paying school that, by October 1859, included among the students “some fifteen young scholars, two or three of whom were part Indian, three or four more what Goldrick described as ‘Mexican half-breeds,’ and most of the remainder

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54. *Lobato v. State*, 218 P.3d 358, 380 (Colo. 2009) (Rice, J., dissenting). I would suggest that, for Colorado’s earliest pioneers who identified a public education system as essential to the state’s present and future growth despite the lack of children and institutions of education, the word “impossible” was antithetical to the limitless possibilities they encountered as they struggled to form, build, and grow the state.

55. ATHEARN, *supra* note 3, at 52 (describing how one of the local newspapers, *The Rocky Mountain News*, complained about the lack of schools and churches in the emerging city).

56. *Id.*

Missourians.”<sup>57</sup> While Goldrick would later be elected the first superintendent of the Arapahoe County Schools (which then included Denver) in 1862, a handful of other private schools would open in Denver, Boulder, Pueblo, Golden, and Nevada City.<sup>58</sup> In 1860, the City Council debated a move for “Free Schools” in Denver, but the state would not have its first public school until District Number 2 in Denver was established on December 1, 1862, in response to the Territorial Legislature’s enactment of a comprehensive school law in late 1861.<sup>59</sup>

The fact that Colorado’s pioneers would immediately erect schools, be they public or private, was not unique. Indeed, throughout the United States during the late eighteenth and early nineteenth centuries, education emerged as an explicit constitutional guarantee. This development was a noticeable feature of nineteenth-century state constitutional innovations. Whereas many of the original states, as well as those newly admitted to the Union, scarcely mentioned education in their constitutional documents,<sup>60</sup> between 1800 and the adoption of the Colorado constitution in 1876, thirty-two out of thirty-seven state constitutions (excluding Colorado) contained detailed provisions for education.<sup>61</sup> This Part examines the rise to prominence of education in state constitutional documents during the nineteenth century. As Section A details, education emerged as an essential issue in responding to important changes in social, political, and economic life for many Americans. State constitutions, and their corresponding

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57. *Id.*; see also Barrett, *supra* note 7, at 123 (noting that, on the first day of school, “there were thirteen children, including nine whites, two Mexicans and two half-breeds”). This school and its student population is described by Goldrick himself in O.J. Goldrick, *The First School in Denver*, 6 COLO. MAG. 72 (1929); see also FRANK HALL, *HISTORY OF THE STATE OF COLORADO* 218 (Chicago, Blakely Prtg. Co. 1889); A.J. Fynn & L.R. Hafen, *Early Education in Colorado*, 12 COLO. MAG. 13 (1935).

58. ATHEARN, *supra* note 3, at 53.

59. Fynn & Hafen, *supra* note 57, at 23; Lynn I. Perrigo, *The First Decade of Public Schools at Central City*, 12 COLO. MAG. 81, 82 (1935). For a discussion of the school law, see *infra* notes 168–82 and accompanying text.

60. Professor John Eastman notes that, of the twenty-five constitutions adopted or revised between 1776 and 1800, only twelve contain education provisions. John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education: 1776–1900*, 42 AM. J. LEGAL HIST. 1, 3 (1998).

61. See BUREAU OF EDUC., CIRCULARS OF INFORMATION OF THE BUREAU OF EDUCATION: CONSTITUTIONAL PROVISIONS IN REGARD TO EDUCATION IN THE SEVERAL STATES OF THE AMERICAN UNION (D.C., 1875); David Tyack & Thomas James, *State Government and American Public Education: Exploring the “Primeval Forest,”* 26 HIST. EDUC. Q. 39, 56 (1986).

conventions examined in Section B, accordingly reflected this fact, as nineteenth-century Framers in a variety of states struggled to make education a state constitutional guarantee. What a constitutional right to education would mean and to whom it would apply, however, was by no means universal. This Part ends by outlining some of the ways that Framers in representative states differently sought to define both the substantive scope and the precise content of their education clauses.

A. *“Necessary to Good Government and the Happiness of Mankind”*

The prominence of education in state constitutional documents during the nineteenth century was the result of a variety of interconnected developments in the demography, economy, and ideology in the maturing republic. One cause revolved around shifts both in population and economy, leading to greater urbanization, industrialization, and movement of people across what would become the United States.<sup>62</sup> Education, accordingly, emerged as a site where these demographic transformations and resulting economic, social, and political anxieties were reflected and could be resolved. For some, education was the means to soften tensions generated from urbanization and immigration by integrating these new workers into a wage-labor system.<sup>63</sup> For others, education reflected growing concern that the nation needed a more educated and skilled labor force capable of adapting to the technological changes taking place at all levels of the economy.<sup>64</sup> Collectively, such concerns created tremendous support for formal, age-grade schooling that would, in turn, foster economic productivity and social mobility.<sup>65</sup> The consequence is striking. As one study notes, “[t]wenty years

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62. MARIS A. VINOVSIS, HISTORY AND EDUCATIONAL POLICYMAKING 149–52 (1999).

63. See generally SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE (1976); MICHAEL B. KATZ, RECONSTRUCTING AMERICAN EDUCATION (1987).

64. See VINOVSIS, *supra* note 62, at 160.

65. See *id.* at 170. See generally CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860 (1983); IRA KATZNELSON & MARGARET WEIR, SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL (1985).

before the Civil War, just under 38 percent of white children aged five–nineteen were attending schools. By 1860, the figure had risen to 59 percent.”<sup>66</sup> Whereas families, particularly mothers, had been primarily responsible for teaching children how to read and write until the late eighteenth century—and whereas apprenticeships had long served to educate students to learn a vocational skill or trade—both private and public schools during the nineteenth century became the primary site to teach children and young adults the skills that they would need for an emerging industrial economy.<sup>67</sup>

Another and equally important feature in the rise of mass public education was the role that schools played in teaching the tools of good government and good citizenship and in perpetuating the prevailing ideology of the Republic. For instance, the terms that Congress created for the sale of the public lands and for the creation of new states, otherwise known as the Northwest Ordinances of 1785 and 1787, stated forcefully that “knowledge” was “necessary to good government and the happiness of mankind.”<sup>68</sup> For this reason, the ordinance declared that “schools and the means of education shall forever be encouraged.”<sup>69</sup> It is thus not a surprise that Colorado’s First Territorial Superintendent of Education, William Curtice, identified education as the difference between the wise and good government of the Union and the corrupt and treasonous governments of the Confederate states.<sup>70</sup> As one study points out, “[s]o settled became this notion of public education as essential to republican government that in the late nineteenth century Congress required several territories to create free, nonsectarian public schools as a precondition for statehood.”<sup>71</sup> Simply put, schools—particularly public schools—would be the place where the principle of democracy (and, to a lesser extent, equality), would be nurtured.

As a matter of legal and political history, the consensus revolving around mass education created an important variance in the ways that Americans structured or reformed

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66. BOWLES & GINTIS, *supra* note 63, at 154.

67. VINOVSIS, *supra* note 62, at 153.

68. The Northwest Territorial Government Ordinance of 1787, § 14, Art. III, in THE ORGANIC LAWS OF THE UNITED STATES OF AMERICA, *reprinted in* 1 United States Code, at LVII (Office of the Law Revision Counsel of the House of Representatives ed., 2006).

69. *Id.*

70. HALE, *supra* note 5, at 14–15.

71. Tyack & James, *supra* note 61, at 59.

their state and local governments during the nineteenth century. Whereas Americans during this time used state constitutions “as a way to correct abuses or to protect against the power of special interests” by providing distinct and innumerable limits on state authority, the right to education was the anomaly.<sup>72</sup> Colorado’s experience is illustrative. In the convention delegates’ address to the people, the delegates explicitly noted that in direct response to “anxiety and concern,” the Colorado Constitution would place “positive restrictions on the powers of the Legislature.”<sup>73</sup> Particularly important, from the delegates’ perspective, were various provisions designed to deny the general assembly the ability to create and sustain “dormant and sham corporations claiming special and exclusive privileges.”<sup>74</sup> Aside from concern with the public funding of “religious or sectarian dogmas,” however, education did not raise such anxieties.<sup>75</sup> The delegates’ understanding about the primary function of Colorado’s constitution to limit corporate and private influence but promote public schools, accordingly, reflected a larger national trend where education had become the one area of government in which a “strong and evolving sense of governmental responsibility gradually emerged.”<sup>76</sup>

On one level, the commitment to mass education was made easier by the increase in population concentration and the growth of aggregate wealth caused by industrialization.<sup>77</sup> On another level, however, state constitutions themselves recognized the direct link between the common schools and the use of governmental authority to redistribute wealth. Although Americans “were often reluctant to tax themselves, . . . almost all welcomed federal subsidies for common schools.”<sup>78</sup> Excluding all of the original states, almost all of the remaining state educational clauses contained provisions for the sale of certain federal lands that would in turn stimulate the creation

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72. *Id.* at 48.

73. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 728.

74. *Id.*

75. *See id.* at 727. For a discussion of the delegates’ concern over the place that religion would have in the public education system, see *infra* notes 226–42 and accompanying text.

76. Tyack & James, *supra* note 61, at 53.

77. VINOVSIS, *supra* note 62, at 153.

78. Tyack & James, *supra* note 61, at 55.

of a general school fund to provide for the common schools.<sup>79</sup> Equally important was the role that state and local government would play in school financing. By the time Colorado gained statehood in 1876, almost all states, either in their constitutions or in their legislative enactments, had provisions for the creation and state stewardship of a school fund (to be initially financed by federal land grants) while empowering the appropriate state or local government entities to levy taxes for schools.<sup>80</sup> This was no small feat. According to one contemporary, the varied local, state, and federal funding schemes found in federal acts and codified in state constitutions “recognize[d] the principle . . . that every citizen is entitled to receive educational aid from the government.”<sup>81</sup>

It should come as no surprise, then, that one of the most salient features in the rise of the consensus regarding mass education during the nineteenth century was the sharpening line between public and private education. If education was to serve the dual goals of fostering republican ideology and providing broad-based skills for a changing economy, and if this system was to be stimulated by public wealth, it followed that private schools would be legally proscribed from receiving the educational monies of state and local governments. A common feature of education clauses in state constitutions in the middle-to-second half of the nineteenth century was an explicit provision forbidding the public funding of private

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79. *See id.* at 55–56. Colorado’s own history provides an example. The Enabling Act for Colorado Statehood granted two sections of every township for the support of the common schools. *See* PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 11, 13. There had been some question about the constitutionality of federal support for public education until Congress passed the Morrill Land Grant Act in 1862, in which sections 16 and 36 in each township were automatically granted to the State for support of public education. Act of July 2, 1862, ch. 130, 12 Stat. 503. For a discussion of the constitutional issues, see Eastman, *supra* note 60, at 22. To be sure, Eastman argues that the passage of the Morrill Act in 1862 suggested the possibility of an “entrance onto the national stage of the view, periodically expressed in early nineteenth century state constitutional debates, that a free, common-school education is a natural right, perhaps even a ‘privilege or immunity’ of citizenship protected by the Fourteenth Amendment to the Federal Constitution.” *Id.* at 33. A compelling analysis of the role of the federal government in public education remains HAROLD M. HYMAN, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL (1986).

80. Tyack & James, *supra* note 61, at 60.

81. 2 SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 310 (1937) (quoting agriculturist L.H. Bailey).

(especially sectarian or religious) schools.<sup>82</sup> The result was a profound drop in the number of children who attended private schools and a concomitant rise in the ratio of public expenditures devoted to public education.<sup>83</sup> By the end of the nineteenth century, the United States spent “more per pupil for schooling than other industrialized nations, including England, France, and Germany,” leading, in turn to a greater proportion of its school-aged population attending free public schools.<sup>84</sup> In an era marked by a sharp skepticism of government, education of the masses by public schools became the largest—and relatively least controversial—part of the public sector.<sup>85</sup>

While there was general consensus about the importance of public education, there were also considerable differences among states about the scope of the educational right.<sup>86</sup> To some degree, this was a matter of experimentation, and throughout the nineteenth century, a state constitution’s education clause reflected very different concerns about

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82. For mid-to-late nineteenth-century non-sectarian education clauses, see ARK. CONST. art. II, § 24 (1874); COLO. CONST. art. V, § 34, art. IX, § 7 (1876); IDAHO CONST. art. IX, § 5 (1890); KAN. CONST. art. VI, § 6(c) (1859); MISS. CONST. art. IV, § 66, art. VIII, § 208 (1890); MONT. CONST. art. IX, § 4, art. X, § 6 (1889); NEB. CONST. art. VII, § 11 (1875); N.D. CONST. art. VIII, § 5 (1889); S.C. CONST. art. XI, § 4 (1868); S.D. CONST. art. VI, § 3 (1889); UTAH CONST. art. I, § 4, art. X, § 9 (1895); WASH. CONST. art. I, § 11 (1889); WIS. CONST. art. I, § 18 (1848); WYO. CONST. art. I, § 19, art. III, § 36, art. VII, § 8 (1890). Recent school voucher litigation has raised the possibility of anti-Catholic bias driving the no-funding provisions of a state constitution’s education clause. See Jill Goldenziel, *Blaine’s Name in Vain? State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 65–66 (2005). The historical record, however, “reveals little to support” this argument. *Id.* at 68. Rather, the no-funding provisions reflected a larger nineteenth-century American trend to support a rigid church-state distinction in spite of the biases that dominated the era. See PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE 192 (2002); Noah Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. 65, 96 (2002). Of particular note is the failed federal constitutional amendment proposed by Congressman James G. Blaine of Maine that would have prohibited the public funding of religious institutions. While many of Blaine’s supporters harbored anti-Catholic sentiments, the evidence indicates that Blaine was motivated by the much larger church-state question. See generally Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 FIRST AMEND. L. REV. 107 (2004).

83. Tyack & James, *supra* note 61, at 54.

84. *Id.* at 53. See generally Albert Fishlow, *Levels of Nineteenth-Century American Investment in Education*, 26 J. ECON. HIST. 418 (1966).

85. Tyack & James, *supra* note 61, at 53–54.

86. Professors Tyack and James note, “[t]o stress elements of consensus and forces leading toward centralization is not to deny diversity and conflict, for education was a domain in which growing agreement over purpose coexisted with sharp disagreement over means.” *Id.* at 55.

centralization, funding, local control, and the public versus private distinction.<sup>87</sup> Accordingly, nineteenth-century politicians and educators well understood that the educational laws and constitutional educational guarantees were themselves works in progress. Colorado Territory's own inaugural Superintendent of Common Schools reflected on the legal history of public education in the United States. According to Curtice, in spite of "mature deliberation" and countless amendments "from year to year," public education laws "are still far from perfect. Time and experience . . . will also suggest many improvements, better adapting it to the *peculiar requirements of popular education in our new Territory.*"<sup>88</sup>

Indeed, just a few years earlier, delegates to Illinois's state constitutional convention argued persuasively that the phrase "a common school education" was too specific and might limit the power of future legislatures to pass school laws that were appropriate by the standards of the era.<sup>89</sup> As the following Section will show, by the middle of the nineteenth century, most politicians and educators seemed to be in agreement that the particular constitutional guarantees of a state's education clause would depend on the time and circumstance of a particular territory's or state's condition, though its precise application by educators, policymakers, and the courts would still be the subject of considerable debate.

### *B. The Right to Education in State Constitutional Statecraft*

There are countless differences in wording between the particular provisions of the education clauses of the nineteenth-century state constitutions. Nevertheless, almost all struggled to implement a statewide system of education in relation to an equally compelling desire to retain flexibility and local control. In the years in and around statehood for Colorado, "[n]early all of the states provided legally for a state superintendent, local school trustees, a public school fund, local

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87. Eastman, *supra* note 60, at 8–31; Tyack & James, *supra* note 61, at 55–56.

88. HALE, *supra* note 5, at 13 (emphasis added) (quoting W.J. Curtice).

89. "The standard of 'common school education' is liable to undergo great changes, and its degree and limited character should not be fixed in a Constitution." ELY, BURNHAM & BARTLETT, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1733 (Springfield, E.I. Merritt & Brother 1870) [hereinafter ILLINOIS CONSTITUTIONAL CONVENTION].

(county or township) school taxes, teacher certification, and a defined school age.”<sup>90</sup> Moreover, as public schooling became more institutionalized throughout the United States, state educational constitutional guarantees became much more substantive than philosophical. According to one study:

Whereas the eight new state constitutions written between 1841–1860 contained an average of 6.3 educational provisions, the seven approved by Congress between 1881–1900 had an average of 14.0. These latter constitutions often contained elaborate blueprints of their *own version* of the one best system, creating bureaucracies even while there were sometimes only a few thousand schoolchildren within state borders.<sup>91</sup>

Consequently, this Section will give voice to many of the themes explored in Part I.A of this Article. In so doing, it will highlight the different approaches that nineteenth-century statesmen brought to drafting education clauses that provided for a statewide system of education.<sup>92</sup>

Useful in this regard are the debates surrounding the education clauses in Illinois’s 1870 and Indiana’s 1851 constitutions. This Section will examine Illinois first, largely due to the fact that Illinois’s constitutional convention was convened only six years before the ratification of Colorado’s constitution and the State was once the home to several members of Colorado’s Constitutional Convention Committee

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90. Tyack & James, *supra* note 61, at 60.

91. *Id.* at 59 (emphasis added). For a useful, if largely ahistorical, study of different state education provisions and the constitutional debates surrounding their adoption, see generally John Dinan, *The Meaning of State Education Clauses: Evidence from Constitutional Convention Debates*, 70 ALB. L. REV. 927 (2007).

92. Every state’s constitution includes an education clause, and twenty-five states other than Colorado constitutionally require that their legislatures provide an education that is “uniform,” “thorough,” or both. State constitutions with a “uniform” provision include: ARIZ. CONST. art. XI, § 1; FLA. CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VII, § 201; NEV. CONST. art. XI, § 2; N.M. CONST. art. XII, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OR. CONST. art. VIII, § 3; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TEX. CONST. art. VII, § 1; WASH. CONST. art. IX, § 2; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. State constitutions with a “thorough” provision include: GA. CONST. art. VIII, § 1; ILL. CONST. art. X, § 1; MD. CONST. art. VIII, § 1; N.J. CONST. art. VIII, § 4; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; W. VA. CONST. Art. XII, § 1. State constitutions with a “uniform and thorough” provision include: IDAHO CONST. art. IX, § 1; MONT. CONST. art. X, § 1. Colorado was the first state in the Union to include both of the words “uniform” and “thorough” in its constitutional education clause.

on Education, many of whom had been educators in Illinois before moving to Colorado.<sup>93</sup> Accordingly, it would not be a stretch to conclude that Illinois's relatively recent experience in the drafting of its education clause shaped how Colorado's constitutional delegates approached the issue.<sup>94</sup> Also salient is the experience of Illinois's neighboring state, Indiana. In 1851, residents of Indiana chose, in their constitutional document, to provide for a "uniform system of schools."<sup>95</sup> By 1870, Illinois adopted its third constitution, providing for "a thorough and efficient system of free schools whereby all children . . . may receive a good common school education."<sup>96</sup> Both the 1870 Illinois and 1851 Indiana conventions, therefore, provide a window into understanding how Framers in each state attempted, in very different ways, to give substantive meaning to the constitutional guarantees of providing a "thorough" and "uniform" system of public education in the years and decades leading to Colorado's statehood.

#### 1. "Thorough and Efficient" in 1870 Illinois

The effort to create a constitutional mandate for public education in Illinois began as early as 1847, when the State adopted a second constitution. Although an education clause was debated during Illinois's constitutional convention, the final document remained "singularly silent on educational provisions."<sup>97</sup> Nevertheless, education had emerged by 1870 as one of the largest sectors of the Illinois government. To be sure, "the total sums raised for education in 1869 amounted to over \$7 million—more than the entire revenue" collected by the State.<sup>98</sup> Given the 1870 constitutional convention's size and importance, delegates made the issue of education a consistent part of the debate. Early in the convention, for instance, a delegate suggested that the Committee on Education prepare

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93. See *infra* notes 219–21 and accompanying text.

94. To be sure, the first draft of the education clause in the Colorado Constitution provided, like the Illinois Constitution, that the General Assembly provide a "thorough and efficient" system of public education. See *infra* note 221 and accompanying text.

95. IND. CONST. art. VIII, § 1.

96. ILL. CONST. art. VIII, § 1.

97. THE INST. OF EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK ON THE HISTORY OF THE STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION 72 (2008).

98. JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS: 1818–1970, at 72 (1972).

an education clause that provided for “a uniform, thorough and efficient system of free schools throughout the State.”<sup>99</sup> What “uniform,” “thorough,” or “efficient” would precisely mean, however, was subject to considerable debate.

At issue for many of Illinois’s Framers was the importance of education to the advancement of certain social goals. Delegate John Abbott, for instance, referred a resolution to the committee that contended “that the moral elevation of human society[ ] depend[s] upon the general dissemination of early education; that as education is early and generally distributed among the masses of the people, the spirit of evil is curbed, and crime proportionally diminished.”<sup>100</sup> Likewise, delegate W.G. Bowman argued that “this Convention ought to provide every rational means to encourage schools, colleges, universities, academies and every institution for propagating knowledge, virtue and religion, among all classes of the people . . . as the only means of preserving our Constitution from its natural enemies.”<sup>101</sup> Delegate John Haines, on the other hand, identified an affirmative obligation of the State to provide for the educational right of the individual.<sup>102</sup> According to Haines, the state’s education clause should “affirm[ ] the naked principle of the right of all citizens or inhabitants of the State of Illinois to partake of and enjoy a civil right—that of deriving from the common school fund a share thereof.”<sup>103</sup>

Importantly, the delegates appeared to recognize the state’s paramount role in distributing the school fund equitably across districts that were not similarly situated. One delegate asserted, “[t]he only principle by which we can justify taxing all the property of the country for educational purposes is, that the benefits of those taxes, like the tax itself, reach and spread out over all ranks and classes of society.”<sup>104</sup> Illustrative of this attitude were the comments from the delegates representing Chicago. Although noting that Cook County paid nearly \$100,000 more in school taxes than it received, one Chicago delegate did not “begrudge the constituents of any gentleman

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99. ILLINOIS CONSTITUTIONAL CONVENTION, *supra* note 89, at 176.

100. *Id.* at 965.

101. *Id.* at 211.

102. *Id.* at 281.

103. *Id.* at 321. Haines initially put forth a resolution that proposed that “the Committee on Education be instructed to consider and report a proposition, as an amendment to the Constitution, securing the advantages of the Public School Fund to all inhabitants of the State.” *Id.* at 281.

104. *Id.* at 1733.

from any part of the State, what they draw from that surplus fund of one hundred thousand dollars from Cook county, which we pay for the support of the schools in other portions of the State.”<sup>105</sup> Though the delegates’ proposals and rhetoric varied as to the purpose of the education clause, all the delegates were generally united in their view that the funding of education was to be extensively and uniformly shared.<sup>106</sup>

Despite these broad affirmations of support for a general system of public education, it was only during the final debate over the phrasing of “thorough and efficient” that delegates specifically explained their detailed expectations for the future of public education and the nature of the free schools. Delegate William Underwood assessed whether section 1 of article VIII should omit any reference to a common-school education and should only state that “the General Assembly shall provide a thorough and efficient system of free schools.”<sup>107</sup> Delegate Lawrence Church argued that the terminology of “a common school education” was too specific and might limit the power of future legislatures to pass school laws appropriate to the standards of the era.<sup>108</sup> He later went on to say:

[T]he definition of a “common school education” may be very much misunderstood, and reference must be had, sometimes, to some particular law in force at some particular time . . . ; whereas, providing here for a good education, leaves the matter to the improvements and advancements that the age may suggest and require.

I can well remember when a common school education meant, simply, “to read, write and cypher [sic].” I have no doubt that that is so understood by some people to this day, even, notwithstanding all the advancement on the subject of education. I want this provision so broad that whatever

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105. *Id.* at 326.

106. A historian would later argue that Illinois constitutional delegates agreed that “the well-being of the children was the concern of the state rather than of the individual counties . . . for they instituted the principle of equalization in state support of common school education.” CORNELIUS, *supra* note 98, at 73 (internal quotation marks omitted). Illinois subsequently determined the rate of the property tax in support of the schools and collected that amount from each county. The revenue was placed in the school fund, and the school fund was then distributed to each county on the basis of school-age children. Hence, counties in Illinois with high property values and few children partially paid for the education of children in counties with lower property values. Illinois’s funding scheme engendered some intrastate strife, particularly on behalf delegates from the northern counties where property values were generally higher. *Id.*

107. ILLINOIS CONSTITUTIONAL CONVENTION, *supra* note 89, at 1733.

108. *Id.*

education the spirit of the age may demand, that all the citizens and people of the State shall receive in common, they may receive under the system of free schools here sought to be perpetuated.<sup>109</sup>

Concurring with delegate Church was delegate William Vandeventer. He hoped “to see this system left in such shape that, if, hereafter in the further development of civilization, the Legislature should see fit to authorize all of the higher branches to be taught, in these common schools, there should be no constitutional impediment in the way.”<sup>110</sup>

Nonetheless, not all of the delegates agreed with the principle that educational standards were fluid and that future legislatures ought not to be bound by outdated educational standards that no longer applied. Rather, some hoped to constitutionally limit the education clause to more modest ends. William Underwood, for instance, argued that “[t]he common school system of late years has improved and is improving, but it is not contemplated that an academic education shall be taught in the common schools . . . . [T]he common school is designed for the many, and affords a knowledge of those indispensable branches to all ranks of society.”<sup>111</sup> He later argued, “the people of the State are not yet prepared to establish free schools for any other branches than those required in all kinds of business, to enable one to perform his duties as a good citizen.”<sup>112</sup> Underwood did not contest the importance of the public schools. Moreover, he argued that a degree of education in certain branches was uniformly “indispensable” for rich and poor alike. Nevertheless, he did not wish to grant future legislatures the leeway to craft school laws that provided for a more expansive education. He believed that the only constitutionally permissible educational provision ought to be one that conformed to 1870 standards.<sup>113</sup>

Delegate Moore voiced his assent to Underwood’s position. He maintained:

These [school] taxes are large, and very burdensome, and there are complaints in some portions of the State, that the poor people are taxed much more than their proportion,

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109. *Id.*

110. *Id.* at 1734.

111. *Id.* at 1733.

112. *Id.*

113. *Id.* at 1734.

because their children go only three or four months, while the children of the wealthier people go eight or nine months. I insist that the system should be limited . . . .<sup>114</sup>

He continued to argue that the State should be constrained in the education that it provided. Moore believed the State should provide

an education which every child can reach, but [it] should certainly include, and it will always include a common education good enough for all ordinary business—what is called a good English education. The poor men owning lots and little homesteads ought not to be taxed in order that other children may learn Latin or music.<sup>115</sup>

One issue that threatened to divide the convention was the issue of racial integration. Delegate James Washburn introduced a resolution that offered to submit the question of separate schools for White and Black students to a public vote.<sup>116</sup> According to Washburn, it would be

impolitic and unjust to appropriate any part of the taxes paid by the colored people of this State to the education of the white children of the State, and that it is equally impolitic and unjust to appropriate any part of the taxes paid by the white people of the State to the education of the colored people of the State.<sup>117</sup>

Washburn further declared that his resolution was “so manifestly just and equal” that the delegates should forgo extended discussion on an issue that had so “agitated” the public.<sup>118</sup> Though most Democrats from the southern part of the state favored the resolution, it was tabled, and the convention took no further action.<sup>119</sup>

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114. *Id.*

115. *Id.*

116. *Id.* at 679.

117. *Id.*

118. *Id.*

119. *Id.* at 703. A similarly divisive debate took place over a resolution to permit the reading of the Bible in public schools. See CORNELIUS, *supra* note 98, at 74. Although delegates prohibited the use of public funds in the aid of religious schools, delegate James Bayne argued that the Bible was perhaps the most important book that Illinois students should know. Several other delegates challenged this assertion, arguing, among other things, that “neither the federal constitution nor the constitutions of any of the other states carried such a provision.” *Id.*

The Illinois delegates eventually agreed that the State ought to provide a “thorough and efficient system of free schools, whereby all children of this State may receive a good common school education.”<sup>120</sup> As a result of this provision, “school boards immediately made arrangements for the education of hundreds of black children where this had not been previously provided.”<sup>121</sup> Much the same could be said about the impact of the state’s education clause more generally. Though the delegates disagreed over the scope and specific content that would comprise such a system, almost all indicated that some level of education was necessary to achieve societal goals of extending civic education, virtue, and socially desirable skills to all of the state’s residents. Perhaps for this reason, the delegates achieved general consensus over the equitable distribution of the taxes, funds, and other monies that would be used to meet the state’s constitutional obligations. Whatever education the state did provide, the 1870 constitutional debates in Illinois made evident that education should be available to all.

## 2. The Duty to Encourage “Uniform” Schools in 1850 Indiana

In contrast to Illinois in 1870, the Indiana constitution ratified in 1851 mandates a “uniform” system of public schools.<sup>122</sup> As one of the earliest states to deploy the word “uniform” in its education clause,<sup>123</sup> Indiana’s constitutional

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120. ILL. CONST. art. VIII, § 1.

121. CORNELIUS, *supra* note 98, at 73.

122. IND. CONST. art. VIII, § 1 (“Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and *uniform* system of Common Schools, wherein tuition shall without charge, and equally open to all.”) (emphasis added).

123. The Wisconsin Constitution of 1847 was the first to use the word “uniform” in reference to education. WIS. CONST. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . . .”). Regrettably, the debates of Wisconsin’s constitutional convention were not recorded, and so understanding the Framers’ reasoning for using the word “uniform” is not immediately accessible. A brief analysis of the struggle for the education clause in the Wisconsin Constitution is found in ALBERT ORVILLE WRIGHT, AN EXPOSITION OF THE CONSTITUTION OF THE STATE OF WISCONSIN 136–44 (Madison, Wis., Midland Publ’g 1884). For other states that deploy the word “uniform” in their education clauses, see *supra* note 92.

debates confirm the emerging consensus about the importance of education to the perpetuation and preservation of democracy among the state's residents.<sup>124</sup> And, just as in Illinois, Indiana delegates framed the issue of education as one related to the equitable distribution of resources.

Indiana delegates initially framed the education debate, and the issue of "uniformity," as one related to the centralization of administrative authority. Delegate Read, for instance, responded to the vagueness of the language in the state's education clause in its 1816 constitution.<sup>125</sup> He argued that the state's education clause should require the State to elect a superintendent of public instruction.<sup>126</sup> According to Read:

The education of every child in the State has become simply a political necessity. . . . We *must*—yes, sir, I repeat it, we *must* have a better devised and more efficient system of general education. On this subject, there can be but one opinion in this body, and indeed, among the people of the State at large.<sup>127</sup>

He further indicated that the current system of education was in poor shape and specifically said, "[w]e have had no system, no uniformity of action, no well directed general effort on the great subject of education."<sup>128</sup> Another delegate indicated that the state needed a standard curriculum. This delegate emphasized, "[t]he truth is, we have no uniform system. In one county, a particular course of instruction is pursued; and in an adjoining county, the course is altogether different."<sup>129</sup> A state superintendent of education, accordingly, would have authority

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124. See RICHARD G. BOONE, A HISTORY OF EDUCATION IN INDIANA 10–42 (Ind. Historical Bureau 1941) (1892); JAMES H. MADISON, THE INDIANA WAY: A STATE HISTORY 108–15, 179–80 (1986).

125. IND. CONST. of 1816, art. IX, §§ 1–2 ("Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government, and spreading the opportunities and advantages of education through the various parts of the country being highly conducive to this end . . . [i]t shall be the duty of the General Assembly, as soon as circumstances will permit, to provide, by law, for a general system of education, ascending in a regular gradation from township schools to a State University, wherein tuition shall be gratis, and equally open to all.").

126. H. FOWLER, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1858 (Indianapolis, A.H. Brown 1850).

127. *Id.*

128. *Id.* at 1859.

129. *Id.* at 1861.

to manage the vast amount of resources required to run a statewide system of schools while also effectuating a standard curriculum.<sup>130</sup>

The issue of “uniformity” turned into a robust discussion about funding the state’s schools, especially given limitations in the 1816 constitution.<sup>131</sup> Of particular importance was how the state would be able to support a system of common schools “wherein tuition shall be without charge, and equally open to all.”<sup>132</sup> Delegate Foster, for instance, spoke against the centralization of a common school fund that threatened to divert monies set aside for higher education.<sup>133</sup> He argued, “the fund amounts to about fifty-four thousand dollars, as I have said; and if the interest on that sum should be divided among the children of the State, between the ages of five and twenty-one, it would amount to one cent and two-thirds to each.”<sup>134</sup> In his rebuttal to Foster, Delegate Shoup clarified that he was strongly in favor of the State spending whatever funds were necessary to support the common schools. He maintained that providing a common school education could never be accomplished “unless we collect together and husband all the various funds within our reach.”<sup>135</sup> Further, Shoup argued for distributing the university fund to the common schools “in order that *all* may participate in its advantages, though ever so small.”<sup>136</sup>

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130. Delegate Read asked, “[s]hall the management of this vast [school] fund, its preservation and disbursement, and the system which it will support, have no controlling head?” *Id.* at 1859. The final Indiana Constitution ultimately created a state superintendent of education. IND. CONST. art. VIII, § 8 (“There shall be a State Superintendent of Public Instruction, whose method of selection, tenure, duties and compensation shall be prescribed by law.”).

131. IND. CONST. of 1816, art. IX, § 1 (“[I]t shall be the duty of the general assembly to provide, by law, for the improvement of such lands as are, or hereafter may be, granted by the United States to this State for the use of schools, and to apply any funds which may be raised from such lands, or from any other quarter, to the accomplishment of the grand object for which they are or may be intended. But no lands granted for the use of schools or seminaries of learning shall be sold, by authority of this State, prior to the year eighteen hundred and twenty; and the moneys which may be raised out of the sale of any such lands, or otherwise obtained for the purposes aforesaid, shall be and remain a fund for the exclusive purpose of promoting the interest of literature and the sciences, and for the support of seminaries and the public schools.”).

132. IND. CONST. art. VIII, § 1.

133. FOWLER, *supra* note 126, at 1864.

134. *Id.*

135. *Id.*

136. *Id.* (emphasis added).

Delegate Hawkins consented to Shoup's position and stated, "I have no objection to offer; on the contrary, I am in favor of diverting that fund from its present channel, and bidding it flow out in such a manner as that *all* may reap the advantages in an equal degree."<sup>137</sup> He continued by affirming that he was

as much the friend of that system of schools that has for its object the education of all the children of the State at the public expense, out of one common, general fund, as, perhaps, any man in the State. I would like to see that fund large enough to furnish a constant school in every district in the State, dispensing its blessings upon all alike.<sup>138</sup>

Delegate Colfax also agreed that the State should "increase the resources of the common school fund, as far as possible, that the blessings of education may be increased and widened."<sup>139</sup>

For many of the delegates, the funding of a "uniform" system of education was substantively connected to the purpose of creating a statewide system in the first place. As Delegate Allen summed up:

[I]f there is any cause that should call to its aid the universal sympathies and unflinching support of this people, it is the cause of common schools. We should cherish it as one of the strongest safeguards of human freedom; we should encourage it by every legitimate means in our possession; and we should not stay our efforts until we shall have placed within the reach of every child within the State, poor or rich, the means of a common school education.<sup>140</sup>

Delegate McClelland, likewise, articulated his belief that "uniform" education was perhaps the most important function of state government: "[O]ur government owes to every child in the land the education which should be given it . . . I hold, sir, that all the schools endowed by the public—all sources of

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137. *Id.* at 1868 (emphasis added).

138. *Id.*

139. *Id.* at 1867. Delegate Clark was the only delegate who seemed to challenge the consensus emerging around the school fund. He argued that "[a]ny contrivance by which the ability of the parent is diminished, (even though it be to create a *sacred* school fund,) . . . operates as a discouragement and hindrance to the business of education." *Id.* at 1881.

140. *Id.* at 1892.

education should be within the reach of the meanest individual in the community as well as the wealthiest.”<sup>141</sup>

Adopted nearly twenty years prior to Illinois’ 1870 constitution, Indiana’s education clause had different language and different provisions to effectuate a statewide system of common schools. Nevertheless, its delegates identified very early the primary role that a centralized system would have in achieving a “uniform system of education.” Whether it was the constitutional requirement for a state superintendent of public instruction<sup>142</sup> or the constitutional authorization that extended to the General Assembly the power to tax for the common schools,<sup>143</sup> the drafters of Indiana’s 1851 constitution gave substantive meaning to its “duty” to provide a “uniform” education.

The 1870 Illinois and 1850 Indiana constitutional debates over the scope and meaning of proposed education clauses, particularly in relation to how “thorough” or “uniform” the system would be, are revealing in two respects. First, they demonstrate that education created an affirmative obligation of state government that was different in scope and degree from any other constitutional right. From Illinois Delegate Bowman’s passionate plea that education was the only bulwark against tyrannical government<sup>144</sup> to Indiana Delegate McClelland’s argument that the government’s unique obligation to provide education to all of the state’s residents,<sup>145</sup> debates surrounding the education clauses in each state highlight the privileged role that education would play as a function of state government. While some scholars have raised the question of whether the Framers of these constitutions contemplated the commitment to a “thorough” or “uniform” system as an individual’s constitutional right to education,<sup>146</sup>

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141. *Id.* at 1885.

142. IND. CONST. art. VIII, § 8.

143. *Id.* § 2.

144. *See supra* text accompanying note 101.

145. *See supra* text accompanying note 141.

146. This debate has been framed as contrasting education clauses that are hortatory in scope to education clauses that, on their face, appear to be much more substantive in their orientation. *See Eastman, supra* note 60, at 3–20. While this might be a helpful tool to understand the scope of the education clause, there is little evidence to indicate that the Framers of the various constitutional conventions themselves understood such a distinction. *See generally* William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993) (surveying differences in the wording of the education clauses in state constitutions).

the debates nevertheless highlight the extent that the Framers of all of these constitutions expected the State to provide an education that was substantive and, to some degree, approximated a level of equity for all of the state's students. Second, the Framers of these constitutions also demonstrated not only that words matter but that context does as well. What a "thorough" education system meant to the Framers of the Illinois constitution was substantively different from what a "uniform" system of education was for Indiana. For some, such as Illinois Delegate Church, it meant ensuring that all residents were given the tools of that day and age to be productive citizens;<sup>147</sup> for others, like Indiana Delegate Read, it meant equalization of resources and standardization of curriculum and textbooks.<sup>148</sup> Regardless, time, circumstance, and the peculiar and particular needs of the residents of a particular state shaped both the debate and the content that would emerge in the education clause that appeared in the final constitutional document.

## II. TERRITORIAL ANTECEDENTS TO THE CONSTITUTIONAL RIGHT TO PUBLIC EDUCATION

From Colorado's inception, its gold-rush pioneers attempted to legally prescribe a sovereign duty to provide for the creation and maintenance of a system of public schools. In one sense, this was an extraordinarily ambitious exercise. At the time that gold was discovered in 1858, the land was under the jurisdictional control of the territory of Kansas.<sup>149</sup> Recognizing that their interests were extremely distinct, prospectors and speculators to the Front Range of the Rockies in the spring of 1859 began clamoring for statehood. Although "no great mines had been opened, farming had not been successful, the population was almost wholly transient [and male], and the legal status of local government was most uncertain," Colorado's newest settlers convened for the purpose of creating a constitution for the proposed State of Jefferson.<sup>150</sup>

This Part details the various ways that education emerged in Colorado Territory's legal and political machinery. While the constitutional right to education was contemplated from the

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147. See *supra* text accompanying notes 108–10.

148. See *supra* text accompanying notes 125–28.

149. Hensel, *supra* note 3, at 20–21.

150. *Id.* at 22.

start, Colorado's multicultural and multiracial pioneer students, parents, educators, and statesmen struggled mightily to build a system that met the often divergent needs of all of these groups. As in other states, education emerged in Colorado Territory as one of the most important functions of government. In attempting to operationalize this role, Coloradans established early in their history that the territory's education system should be both "thorough" and "uniform" in orientation. Yet the lack of people, a poorly conceived and inadequately funded infrastructure, and the importation of racial attitudes that created the conditions for separate and unequal schools made the goal of attaining a "thorough" and "uniform" system of public education elusive. Nevertheless, Colorado's territorial experience with education created the contours of the statewide system that would emerge in 1876.

*A. Education at the Margins of Sovereign Control*

Colorado's first experience with state constitution-making occurred in 1859, when Colorado's gold rush pioneers united to form "here in our golden country, among the ravines and gulches of the Rocky Mountains, and the fertile valleys of the Arkansas and Platte," the State of Jefferson.<sup>151</sup> These pioneers believed from the beginning that the area and the constitutional matters to be taken up therein would constitute the literal and symbolic "*real* centre of the Union."<sup>152</sup> By most accounts, the final draft of the Constitution for the State of Jefferson that was submitted before voters on September 5, 1859, was modeled after Iowa's 1857 constitution.<sup>153</sup> When it came to education, however, Colorado's pioneer founders provided for a constitutional provision that was substantively different from its Iowa counterpart. Of particular note was article XI, section 4 of the Constitution for the State of Jefferson, which declared: "The General Assembly shall provide for a uniform system of common schools *and for a uniform distribution of the school fund.*"<sup>154</sup> Drafted fewer than ten years

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151. H.P.A. Smith et al., *Address of the Preliminary Convention, to the Electors of the Intended State of Jefferson*, ROCKY MOUNTAIN NEWS WEEKLY, May 7, 1859, at 3.

152. *Id.* (emphasis added).

153. Hensel, *supra* note 3, at 26.

154. *Constitution of the State of Jefferson*, ROCKY MOUNTAIN NEWS, Aug. 20, 1859, at 2 (emphasis added).

after Indiana's constitution, which itself contained one of the first provisions for "uniform" schools, the education clause in the proposed Constitution for the State of Jefferson attempted to explicitly ensure equal economic support for local schools—a provision not at all common to state constitutions.<sup>155</sup> That early migrants to what would become Colorado should explicitly ensure equal economic support for local schools is a sign that, to some degree, they supported the equitable distribution of resources across school districts. In spite of such ambitions, however, voters in the territory rejected the proposed constitution at the polls, and this section never had the force of law.<sup>156</sup>

Later that year, delegates assembled again to form a government that was distinct from that of Kansas. This time, however, delegates were much less ambitious in their aims and instead sought territorial status for the fledgling mining empire. On October 10, 1859, approximately eighty-seven delegates, "most of whom had not been members" of the convention for the State of Jefferson, convened to draft another constitution—this time for the territory of Jefferson.<sup>157</sup>

Despite having a completely different group of delegates, the territory of Jefferson retained a similar commitment to public education in its draft territorial constitution. Article VII of the Constitution for the Provisional Government of the Jefferson Territory similarly called for the General Assembly to "provide at its first session for a uniform system of common schools, and for the creation of a school fund, and take such action as shall be for the interest of education in the Territory."<sup>158</sup> The document also provided for a state superintendent of public instruction.<sup>159</sup>

The voters approved the document on October 24, 1859, and, in so doing, chose a full set of territorial officers. Henry H. McAfee was "duly elected Superintendent of Public Instruction."<sup>160</sup> McAfee, it must be noted, had publicly called for citizens of the fledgling mining cities to establish schools as rapidly as possible. In a letter to the *Rocky Mountain News* in

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155. See Tyack & James, *supra* note 61, at 55–56, 60.

156. *State vs. Territory—The Election and the Missouri Republican*, ROCKY MOUNTAIN NEWS, Sept. 17, 1859, at 2; Hensel, *supra* note 3, at 26–27.

157. Hensel, *supra* note 3, at 30.

158. *Constitution of the Provisional Government of Jefferson Territory*, ROCKY MOUNTAIN NEWS, Oct. 20, 1859, at 2.

159. *Id.*

160. Fynn & Hafen, *supra* note 57, at 19.

August of that same year, he identified the “School House” as the “watch-tower of social advancement of our day.”<sup>161</sup>

The First General Assembly of Jefferson Territory met in November 1859, though the “sluggish ineptitude of the provisional government” prevented any substantive legislation from being passed.<sup>162</sup> This assembly, in particular, “ignored Article VII of the Constitution” and thus failed to pass any legislation establishing public schools throughout the territory.<sup>163</sup> Yet, in the law that incorporated and consolidated the fledging towns of Denver, Auraria, and Highland, the territorial legislature “authorized and required” the newly constituted Denver to “provide for the support of the common schools . . . at the expense of the city.”<sup>164</sup> The law further provided that the city purchase lots and erect public school houses; extended to the city the ability to levy a one-mill tax on property; called for an election for a Board of Trustees for the schools that would in turn provide for examination and certification of teachers; and, most notably, allowed for segregated schools.<sup>165</sup> No doubt influenced by the number of Missourians who comprised Colorado’s early pioneers, and prefiguring the sectional split that would soon send the nation into Civil War, Colorado’s pioneer statesmen provided a legal mechanism by which it could racially segregate its schools.<sup>166</sup> Although a territory-wide system of education in the State of Jefferson was aborted almost immediately after its conception,

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161. Editorial, ROCKY MOUNTAIN NEWS, Aug. 27, 1859, at 2.

162. Hensel, *supra* note 3, at 33, 41; *see also* PROVISIONAL LAWS AND JOINT RESOLUTIONS PASSED AT THE FIRST AND CALLED SESSIONS OF THE GENERAL ASSEMBLY OF JEFFERSON TERRITORY (Omaha, Robertson & Clark 1860) [hereinafter LAWS OF JEFFERSON TERRITORY].

163. Fynn & Hafen, *supra* note 57, at 19. There are likely several reasons that the General Assembly of Jefferson failed to enact any school law. First, the legislature was largely concerned with legitimizing itself among the miners in the area. *See* Hensel, *supra* note 3, at 33–35. Second, there were very few children living in, much less attending school in, Jefferson’s “jurisdiction.” The 1860 census identified approximately 2000 children and young adults under the age of twenty living in Colorado Territory, with nearly half of those being young men and some young women between the ages of fifteen and twenty. JOSEPH C.G. KENNEDY, BUREAU OF THE CENSUS LIBRARY, POPULATION OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 546 (Washington, Government Prtg. Office 1864).

164. LAWS OF JEFFERSON TERRITORY, *supra* note 162, at 277.

165. *Id.* at 277–79.

166. It appears that the Denver City Council, acting under the power of the “People’s Government of Denver,” attempted to establish segregated public schools for the city in October 1860, but the efforts were aborted. *See* Hensel, *supra* note 3, at 42; *see also* Fynn & Hafen, *supra* note 57, at 23.

Jefferson educators empowered local school districts to fill the void. Without a legitimate form of government to provide for “uniform” schools, the foundations for the “watch-tower of social advancement” would remain stunted and subject to the whims and will of local government.

*B. The Pursuit of a “Thorough and Uniform” System of Education in Colorado Territory*

The government of Jefferson was short lived and rapidly dissolved. Indeed, disgusted by the General Assembly’s failure to pass a territorial school law, Superintendent McAfee resigned on January 26, 1860, on the premise that he held “an empty office.”<sup>167</sup> In early 1861, Congress authorized the creation of Colorado Territory.<sup>168</sup> According to one study:

The rapid withdrawal of Southern members from Congress [in 1861 as a result of the Civil War] removed the most persistent obstacle to organization of the West. Kansas was admitted as a state with its present boundaries on January 29, 1861, compelling Congress to cope with the Pikes Peak part of Kansas Territory, now completely set adrift.<sup>169</sup>

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167. ROCKY MOUNTAIN NEWS, Feb. 8, 1860, at 1.

168. Act of Feb. 28, 1861, ch. 59, 12 Stat. 172.

169. Hensel, *supra* note 3, at 51. A more nuanced account of the creation of Colorado Territory points out the interdependent roles that the sectional crisis, mineral wealth, and manifest destiny played in its creation. According to Professor Schulten:

The creation of the Colorado Territory occurred at the convergence of these three stories: a political crisis coincided with the discovery of mineral wealth and a more optimistic view of the region’s pastoral potential. No single factor “caused” the creation of Colorado Territory, but the absence of any of these would have delayed it further. Without the *gold rush*, there would have been little urgency to organize this region. Migration to the region would have come with the Homestead Act, but the character of that growth would have been slow and agricultural rather than rapid and urban. Without *secession*, the legislature simply could not have organized these territories without inciting violence over slavery. Both of these events occurred alongside increasingly optimistic assessments of the region’s potential to support settlement. Without the *new assessments* of the areas east of the Rocky Mountains, the end of the gold rush—which drained thousands away from the front range in the 1860s—might have left few settlers to this semi-arid region.

Susan Schulten, *The Politics of Space and the Origins of Colorado Territory* 3–4 (2011) (unpublished manuscript) (on file with author).

As part of the creation of Colorado Territory, Congress provided that two sections in “each township in said Territory shall be and the same are hereby reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same.”<sup>170</sup> Colorado Territory, carved out of the territories of Kansas, Utah, and New Mexico, convened its first territorial assembly on September 9, 1861.<sup>171</sup>

In his address to this assembly, Territorial Governor William Gilpin articulated a mid-nineteenth-century sensibility about the importance of education in the lives of the territory’s citizens. Importantly, amidst the variety of concerns facing the territory at the commencement of the Civil War, Gilpin dedicated a significant portion of his speech to a discussion of the “pre-eminent” importance of education. Gilpin articulated his belief that an educated electorate was the strongest safeguard of the nation’s republican institutions.<sup>172</sup> To that end, he called upon the legislature to establish schools where all the children of the territory would “receive generous instruction, *uniform and thorough* in its character.”<sup>173</sup> Animated no doubt by the spirit of state-constitution-making in the earlier years and decades of the nineteenth century, Gilpin’s words and the subsequent acts of the territorial and state legislature reflected a nineteenth-century understanding that broad and equitable education was an essential element of an informed and engaged citizenry.

Within two months of Governor Gilpin’s speech, the Colorado Territorial Legislature passed and Governor Gilpin approved “An Act to Establish the Common School System.”<sup>174</sup> Section 3 of this act explicitly ordered the territorial superintendent to “see that the school system is, as early as practicable, put into uniform operation.”<sup>175</sup> Pursuant to that goal, the superintendent was authorized to prescribe a single set of textbooks to the various school districts and to authorize any additional rules or regulations necessary to ensure their

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170. Ch. 59, 12. Stat. at 176.

171. See FIRST LEGISLATIVE ASSEMBLY OF COLORADO TERRITORY, *supra* note 4; Schulten, *supra* note 169, at 22.

172. HOUSE JOURNAL OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO 10 (Denver, Colo. Republican & Herald Office 1861) [hereinafter HOUSE JOURNAL OF TERRITORIAL ASSEMBLY].

173. *Id.* (emphasis added).

174. FIRST LEGISLATIVE ASSEMBLY OF COLORADO TERRITORY, *supra* note 4, at 154.

175. *Id.*

uniform operation. His only other enumerated duty was that of compiling data on the schools and then relaying that information to the legislature.<sup>176</sup>

The 1861 school law also created significant power for district electors. Among the privileges that section 29 gave to the electors were the powers to determine the number of schools in a district, how long each school should be in session, and which subjects should be taught, and also “to lay such tax on the taxable property of the district, as the meeting shall deem sufficient.”<sup>177</sup> Moreover, districts and counties were not required to levy a school tax or to provide for public schooling. Section 75, for instance, provided that “[t]he provisions of this act shall not extend to districts, communities or counties, when, in the opinion of the people residing in such localities, they shall not deem it expedient to establish common schools.”<sup>178</sup> Nevertheless, where a district did establish a public school, it needed to conform to territorial law.<sup>179</sup>

Denver was the first city to take advantage of the law. Under “Professor Goldrick,” who was superintendent for Arapahoe County, school districts were established in East Denver (District No. 1), West Denver (District No. 2), and Highland, stretching up and down the Platte River for three miles (District No. 3).<sup>180</sup> Moreover, the first territorial superintendent of common schools corroborated the relationship between the critical importance of a uniform system of public education for the territory and the emphasis on both local control and responsibility.<sup>181</sup> Indeed, to identify education as more important than the gold and the fortune-seeking men that brought the territory into fruition signaled the central place that a broad-based system of public education would have for Colorado’s emerging statesmen.<sup>182</sup>

At the second session of the territorial legislature in 1862, the assembly attempted to supplement school revenue by linking education to the territory’s singular mineral wealth. Accordingly, the assembly enacted a law that for “any new mineral lode . . . discovered in this Territory, one claim of one hundred feet in length on such lode shall be set apart and held

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176. *Id.* at 154–55.

177. *Id.* at 158.

178. *Id.* at 164–65.

179. *Id.*

180. Goldrick, *supra* note 57, at 74.

181. HALE, *supra* note 5, at 13.

182. *Id.*

in perpetuity for the use and benefit of schools in this Territory, subject to the control of the Legislative Assembly.”<sup>183</sup> Although there were two aborted attempts at statehood in 1864 and 1865, the constitutional commitment to statewide public education, to be operationalized by local school districts, found its way into each document.<sup>184</sup>

In 1865, the Fourth Territorial Legislature abolished the position of superintendent of public instruction. With a salary of only \$500 per year, the position of territorial superintendent had “degenerat[ed] into [an] ex-officio practice.”<sup>185</sup> The attempt to streamline the office by placing the responsibilities of education under the territorial treasurer, however, proved for the most part to be a failure, and in 1870, a new school law recreated the position.<sup>186</sup> Importantly, a system of territory-wide schools was neither “thorough” nor “uniform” in the years leading to statehood. In 1867, for instance, Columbus Nuckolls, the Territorial Treasurer and Superintendent of Public Instruction, lamented the failure of most counties and school districts in the state to comply with the territorial law.<sup>187</sup> He also strongly criticized the territorial assembly for not properly creating, maintaining, or supervising the general school fund.<sup>188</sup> According to one contemporary account, it was “no uncommon thing for the school funds to be misappropriated by

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183. *Id.* at 12.

184. The proposed 1864 education clause “encouraged” the Legislative Assembly to promote the “intellectual, moral, scientific and agricultural improvement [sic]” of the proposed state by “establishing a uniform system of common schools.” COLO. CONST. of 1864, art. XIV, § 3. The proposed 1865 education clause was nearly identical. COLO. CONST. of 1865, art. XIII, § 3.

185. Barrett, *supra* note 7, at 126; *see also* THE REVISED STATUTES OF COLORADO: AS PASSED AT THE SEVENTH SESSION OF THE LEGISLATIVE ASSEMBLY, CONVENEED ON THE SECOND DAY OF DECEMBER, A.D. 1867, at 573 (Central City, David C. Collier 1868) [hereinafter REVISED STATUTES OF SEVENTH LEGISLATIVE ASSEMBLY] (indicating that the territorial treasurer is “*ex officio* superintendent of public instruction”).

186. Barrett, *supra* note 7, at 127. By 1867, the territorial treasurer (who had assumed the duties of the secretary of public instruction) began to argue that the two positions were each too important to be carried out by one person. Moreover, the treasurer argued that the duty for maintaining effective schools did not solely belong to the districts and that the state had a responsibility to compel districts and counties to comply with the provisions of the school law. COLUMBUS NUCKOLLS, ANNUAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF COLORADO (1867), *reprinted in* HALE, *supra* note 5, at 17–18.

187. NUCKOLLS, *supra* note 186, at 17.

188. COLUMBUS NUCKOLLS, SCHOOL SUPERINTENDENT’S REPORT (1869), *reprinted in* HALE, *supra* note 5, at 19–20.

both county and district officers.”<sup>189</sup> Noticeably, the superintendent’s reports repeatedly lamented the same problems:

“Lack of interest,” “My predecessor in office has left no records,” “I hope to get matters in shape so as to render a complete account next year,” “School matters here are in a very bad condition; for the past two years the County Commissioners have neglected to levy a school tax, hence we have no money,” etc., etc.<sup>190</sup>

Notably, the territory’s superintendents of public instruction who had been reestablished under the 1870 School Law identified two issues that would animate Coloradans in their final push for statehood in 1875 and 1876. First was concern over the role that religious institutions would play in the territory’s system of education. In 1872, for example, then-Superintendent William C. Lothrop sought to distinguish the importance of education for moral purposes, as opposed to religious purposes. For this reason, he argued that “as all contribute to the common school fund, no sectarian views should be advanced” by the schools.<sup>191</sup> Two years later, Lothrop’s successor, Horace Hale, argued quite passionately against the enemies of public education. He expressed a great deal of anxiety about those who would “level to dust, at one fell swoop, every *public non-sectarian* school house on the face of the earth.”<sup>192</sup> Without ever mentioning religious schools, his statement implicated an acrimonious national debate over the public funding of “sectarian” schools.<sup>193</sup>

Second and related was concern over the appropriate balance between state and local control. In order to respond to

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189. HALE, *supra* note 5, at 21.

190. *Id.*

191. FIRST BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF COLORADO, FOR THE SCHOOL YEARS ENDING SEPTEMBER 30, 1870, AND SEPTEMBER 30, 1871, at 17 (Central City, D.C. Collier 1872) [hereinafter FIRST BIENNIAL TERRITORY REPORT].

192. SECOND BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF COLORADO, FOR THE TWO YEARS ENDING SEPT. 30, 1873, at 14 (Denver, Wm. N. Byers Public Printer 1874) [hereinafter SECOND BIENNIAL TERRITORY REPORT] (emphasis added).

193. Though various states had constitutionally proscribed the funding of religious schools, the issue came to a head in the early 1870s with the so-called “Blaine Amendments” to the U.S. Constitution. Though these efforts failed, they had widespread support, including that of President Ulysses S. Grant. *See* Goldenziel, *supra* note 82, at 63–64.

the system's critics, each of the superintendents called for reform that would ensure a "thorough system of instruction" and a "systematic course" of study.<sup>194</sup> Indeed, one superintendent argued that "[t]here is no reason why the country schools cannot or should not adopt a course of instruction similar to that adopted by city schools. *Uniformity in the character and modes of teaching is feasible . . .*"<sup>195</sup> Therefore, proposed reforms included minimum educational requirements for county and district superintendents as well as teachers, "uniformity of textbooks," compulsory attendance laws, and better local and state financing of public schools.<sup>196</sup>

Another item that continued to vex public education in the territory was the issue of segregated schools. Although the first school in the region was integrated,<sup>197</sup> racial antipathies continued to rear their ugly heads and, indeed, were prescribed by territorial legislation that gave school districts the ability to prevent "colored" students from attending publicly financed schools.<sup>198</sup> In 1864, Black parents in Central City "objected to paying the school tax since they were not legal voters and their children were not at the time admitted to the public schools."<sup>199</sup> Two years later, the presence of Black students in District No.

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194. See SECOND BIENNIAL TERRITORY REPORT, *supra* note 192, at 101.

195. *Id.* (emphasis added).

196. See FIRST BIENNIAL TERRITORY REPORT, *supra* note 191, at 17 ("Uniformity of text-books is of great importance in a system of public free schools."); *id.* at 22 (discussing "Compulsory Education"); SECOND BIENNIAL TERRITORY REPORT, *supra* note 192, at 11–12 (discussing the need for a "School Tax" for better local and state financing of schools); *id.* at 19 ("So far as this department is able to exercise an influence in the selection of teachers, either directly, or indirectly, through county superintendents and district officers, *it will not countenance the employment of incompetent persons.*"); *id.* at 18 ("School officers are elected by the people, and that any candidate may be elected he must, in a certain degree, reflect the average intelligence, and morality, and political principles of those who give him their votes."); THIRD BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF COLORADO, FOR THE TWO YEARS ENDING SEPT. 30, 1875, at 17–18 (Denver, Rocky Mountain News Steam Prtg. House 1876) [hereinafter THIRD BIENNIAL TERRITORY REPORT] (lamenting frequent teacher attrition as well as frequent changes in school administration).

197. See *supra* text accompanying note 57.

198. See GENERAL LAWS, JOINT RESOLUTIONS, MEMORIALS, AND PRIVATE ACTS PASSED AT THE FIFTH SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO 83 (Central City, David C. Collier 1866) ("The secretary shall keep a separate list of all colored persons in the district, between the ages of five (5) and twenty-one (21) years, . . . and shall report the same to the president, who shall issue warrants on the treasurer in favor of such colored persons . . . for educational purposes.").

199. Perrigo, *supra* note 59, at 86.

1 (East Denver) prompted White parents to open a private school in Denver. William Byers, the editor and publisher of the territory's most influential paper, editorialized: "We do not propose to eat, drink or sleep with one, and neither do we believe it right that our children should receive their education in Negro classes."<sup>200</sup> His solution, that each group contribute proportionally to its own educational needs, would ensure that Black schools would receive no funding given the Black community's small size.

The issue of unequal funding among the state's poorest and increasingly smaller communities of color, especially those of the Spanish-speaking Latinos in the Southern half of the territory, were implicitly addressed in the reports of the territorial superintendents.<sup>201</sup> In partial response to some of these concerns, the territorial assembly amended the School Law in 1868, giving school districts the discretion to open separate "colored" schools.<sup>202</sup> Black parents in Central City, meanwhile, secured admission for their children to the city's schools in 1869 after their attorneys "demanded admission on the basis of the Civil Rights Act of Congress and the equality of treatment granted by the local coach line since 1865."<sup>203</sup>

Despite the existence of a system that was wrecked by financial mismanagement, simmering religious tensions, and de facto inequality, Coloradans nevertheless continued to advocate for public schools. The *Rocky Mountain News* in 1867 identified "common schools" as the "ground work of our society" and advocated for generous financial support of the system.<sup>204</sup> Indeed, the paper argued that in "the future interests and prosperity of the west . . . [t]he first duty of our authorities should be to provide for the maintenance of common schools."<sup>205</sup> To educate the more than 20,000 school-age children residing in the territory on the eve of statehood, school districts were formed in Pueblo, Trinidad, Colorado City,

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200. ATHEARN, *supra* note 3, at 54 (quoting Editorial, ROCKY MOUNTAIN NEWS, Jan. 31, 1866).

201. See JOSEPH SHATTUCK, FIRST BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF COLORADO, FOR THE TWO YEARS ENDING AUGUST 31, 1878, at 24–25 (Denver, Tribune Steam Prtg. House 1878) (discussing "Our Mexican Population").

202. REVISED STATUTES OF SEVENTH LEGISLATIVE ASSEMBLY, *supra* note 185, at 580.

203. Perrigo, *supra* note 59, at 87.

204. *Our Schools and Seminaries*, ROCKY MOUNTAIN NEWS, Sept. 12, 1867, at 1.

205. *Id.*

Central City, Black Hawk, Boulder, San Luis, and Nevada City, some with impressive physical structures.<sup>206</sup> Though most students were grouped according to ability and not grade through the territorial period, two public high schools in Denver and Boulder were established, heralding a shift to a system where children were grouped in grades according to age.<sup>207</sup> A School of Mines was purchased by the territorial assembly in 1874, while the same assembly began the process of building infrastructure for an agricultural college.<sup>208</sup> A University of Colorado had long been planned, but most university education during the territorial period was provided by the religiously affiliated University of Denver, established in 1864, and Colorado College, established in 1874.<sup>209</sup> Finally, in 1876, the last of the territorial legislatures passed “An Act to Amend, Revise, and Consolidate the Acts Relating to Public Schools.”<sup>210</sup> Anticipating that statehood would soon follow, this Act became the framework that would guide the implementation of the constitutional guarantees to education that were hashed out by delegates to the Constitutional Convention in the cold months of 1875 and 1876.

### III. EDUCATION IN COLORADO’S 1875–76 CONSTITUTIONAL CONVENTION

On a cold December morning in 1875, the fifth and last constitutional convention of what would become the State of Colorado met in Denver.<sup>211</sup> In his speech to the convention, President of the Convention Joseph Wilson, a Republican from El Paso County, addressed his fellow delegates. Thanking each of them in advance for the seriousness with which each of the delegates would discharge their duties, Wilson indicated that “[t]he eyes of not only the people of Colorado are upon this Convention, but the whole Nation is watching it with an

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206. ATHEARN, *supra* note 3, at 55; HALE, *supra* note 5, at 21–24; THIRD BIENNIAL TERRITORY REPORT, *supra* note 196, at 5 (identifying school age as males and females between five and twenty-one years of age); Barrett, *supra* note 7, at 132; Perrigo, *supra* note 59, at 82–83.

207. Barrett, *supra* note 7, at 132.

208. *Id.* at 135.

209. *Id.* at 138–39.

210. Act of Feb. 11, 1876, pt. 1, 1876, Colo. Sess. Laws 127 (“An Act to Amend, Revise, and Consolidate the Acts Relating to Public Schools”).

211. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 18.

interest—an unusual degree of interest.”<sup>212</sup> Wilson’s speech was not pure hyperbole. Indeed, considering the territory’s importance in potentially putting a literal and psychological end to the sectional crisis that had divided the nation,<sup>213</sup> how Colorado’s constitutional delegates dealt with the complex and delicate issues that would emerge in the document for statehood was of considerable national importance.

Perhaps because so many embraced education’s role in transforming politics, just days after the convention convened and after Education and Educational Institutions was identified as one of the constitutional convention’s twenty-four standing committees,<sup>214</sup> superintendents of school districts throughout the territory, as well as teachers and “friends of public schools,” convened a three-day meeting only blocks away from the site of the Constitutional Convention.<sup>215</sup> Though the ostensible purpose of the meeting was to form a State Teachers’ Association, the group was designed to chart “some course that would tend to unify the school system of the State,” most immediately, to advocate for “liberal provisions incorporated into the State Constitution that should render the school system secure and efficient.”<sup>216</sup> Over the course of several days, the participants to the meeting passed resolutions that a constitutional requirement be inserted for the “maintenance of a uniform system of schools,” that Spanish be taught in the public schools with sizeable Mexican-American populations, that a school fund be established and subsequently financed and maintained through land and property taxes, that local school boards were to retain authority over content and curriculum, and, finally, that education was to be secular in its orientation.<sup>217</sup>

In this regard, attendees felt confident that they would find sympathetic allies from the members of the Committee on Education: Daniel Hurd (chair), Byron Carr, Wilbur Stone, John Wheeler, and Robert Douglas.<sup>218</sup> Hurd was a Denver businessman who had served as the director of the public

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212. *Id.* at 19.

213. *See supra* note 3 and accompanying text.

214. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 36–37.

215. HALE, *supra* note 5, at 30.

216. *Id.* at 31.

217. *Id.* at 31–40.

218. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 36; *see also* Hensel, *supra* note 3, at 404–26 app.

schools of Cairo, Illinois.<sup>219</sup> He joined the Denver school board in May 1874 and became president of the board in 1876.<sup>220</sup> Carr had been a pioneer for education in Illinois and was elected to the position of superintendent of public schools for Lake County in 1868. After moving to Colorado, Carr established the first public school in Longmont in 1871.<sup>221</sup> After moving to Colorado from Connecticut, Wilbur Stone both worked as a teacher and served as a county commissioner in Pueblo County. In 1876, he was elected president of the Pueblo County School Board.<sup>222</sup> Wheeler was the only member with no obvious connection to education, as he served as a Weld County judge between 1865 and 1868.<sup>223</sup> Douglas was a member of the 1864 Colorado Constitutional Convention. He also served as county superintendent of El Paso County in 1868, where he directed six school districts and 235 school-age children.<sup>224</sup>

This Part examines the work of the Committee on Education and the subsequent debate around the education clause during the constitutional convention. While the separation of church and state catalyzed the most visible discord among the delegates and the state's residents, it obscured the rigor with which the education clause came to be drafted. Whether the issue was the prohibition of racial discrimination or the appropriate balance between centralization and local control, Colorado's constitutional Framers inscribed education as a broadly conceived constitutional right.

#### A. *The Framers Debate for the Right to Public Education*

On January 5, 1876, delegates referred a comprehensive resolution for the Committee on Education to consider. The resolution in its entirety read as follows:

Resolved, That the State of Colorado shall never pass any law respecting an establishment of religion or prohibiting the exercise thereof; but Church and State shall

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219. *The Teachers' Ticket*, DENVER DAILY TIMES, May 2, 1874, at 4.

220. *Id.*; Hensel, *supra* note 3, at 415 app.

221. Hensel, *supra* note 3, at 407–08 app.

222. FIRST BIENNIAL TERRITORY REPORT, *supra* note 191, at 62–63 (noting Stone's "early and long experience as a teacher of every grade" and his subsequent role in examining applicants to become a teacher in Pueblo County).

223. Hensel, *supra* note 3, at 424 app.

224. HALE, *supra* note 5, at 22; Hensel, *supra* note 3, at 410 app.

forever be separate and distinct, and each be free within its proper sphere.

Neither the Legislature, nor any county, city, town, township, school district or other municipal or public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or literary or scientific institution controlled by any church or sectarian denomination whatever, nor shall any grant or donation of land, money or other personal property ever be made by the State or by any county, city, town, township, school district or other municipal or public corporation, to any church or for any sectarian purpose.

The Legislature shall provide for the establishment and maintenance of a *thorough and efficient* system of free schools, whereby all children of the State between the ages of six and twenty-one years, irrespective of *color*, birthplace or religion, shall be afforded a good *common school* education.

No theological, religious or sectarian tenets or instructions shall ever be imparted; nor shall any theological or religious book or any version of the Bible be introduced as a text book, or read as a school exercise; nor shall any religious services or worship be permitted in any school, college, academy, seminary or university supported in whole or in part by taxation or by money or property derived from public sources.<sup>225</sup>

The scope of the resolution and its initial focus on a “thorough and efficient” public system of education that was both non-sectarian and nondiscriminatory identified the pillars that would animate the work of the Committee on Education. In a symbolic sense, the committee’s determination of such issues was a microcosm of the tensions that would come to animate educational disputes in Colorado and the rest of the nation then and into the twenty-first century.

Perhaps no issue was as controversial as whether the constitution should draw a sharp distinction between public and private schools, especially religious, primarily Catholic schools.<sup>226</sup> That this issue should be handled delicately was an

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225. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 43 (emphasis added).

226. Importantly, this issue was debated and recorded with the same vigor, passion, and sense of urgency regarding how rights would be allocated to perhaps the territory’s most precious resource: water. See Hensel, *supra* note 3, at 165–74, 182.

understatement. While Baptist, Episcopal, Congregational, and Presbyterian settlers of Colorado comprised a sizeable number of settlers to the territory, an organized and vocal group of Roman Catholics—who counted as their dutiful parishioners miners in the north of the territory and long-settled Latinos in the southern valleys—threatened to scuttle any constitution that attempted to trammel upon religious rights.<sup>227</sup>

The relationship of this issue to the work of the Committee on Education emerged when delegates proposed to tax church property, including parochial schools. While Chairman Hurd led an unopposed effort to exempt public schools from taxation, Bryon Carr and other delegates were of the opinion that “anyone sending his children to a parochial school had [no] right to ask the public to contribute to its support through tax relief, with the consequent increase in taxes elsewhere.”<sup>228</sup> Not long after the Committee on Education took up its work, the “convention was flooded with petitions. The church-goers tended to defend the traditional immunity from taxation . . . . In extreme opposition to them was a group of fifty-six petitioners who took a thoroughly anti-clerical approach and sought to end all tax privileges for churches.”<sup>229</sup> In the end, the delegates voted to exempt both private and public schools from taxation.<sup>230</sup>

Arousing even more intense discord among the populace was what the *Rocky Mountain News* termed “the everlasting school fund question.”<sup>231</sup> According to one study, the answer to this question put at stake nearly \$9 million of the monies that would initially be available to fund the common schools of the state.<sup>232</sup> In their initial resolution that was sent to the

227. Goodykoontz, *supra* note 3, at 6.

228. Hensel, *supra* note 3, at 186.

229. *Id.* at 183; *see also* PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 83, 138, 146, 152; Goodykoontz, *supra* note 3, at 6–8.

230. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 547.

231. *Constitutional Convention: The Petitions Still Rolling In*, ROCKY MOUNTAIN NEWS, Feb. 11, 1876, at 3.

232. Goodykoontz, *supra* note 3, at 8. Section 7 of the Enabling Act of Congress provided that sections 16 and 36 of every township surveyed in the territory were to be granted to the state for the support of the common schools. In turn, Section 14 provided that these two sections were not to be sold for less than \$2.50 an acre. By Goodykoontz’s calculation, “[i]f all this land were sold at that minimum price the school fund would be enriched by nearly \$9,000,000.” *Id.* Hensel, however, suggests a more modest figure of \$5 million as a result of much of the public land “being depleted by sale.” Hensel, *supra* note 3, at 189.

Committee on Education in January, the Convention delegates signaled their strong preference for a rigid separation of public as opposed to private, religious schools.<sup>233</sup> Bishop Joseph P. Machebeuf of the Roman Catholic Church ignited a firestorm when he suggested that Catholics, “as American citizens,” would “oppose any Constitution which shall show such contempt of our most valued rights, both political and religious.”<sup>234</sup> Delegate Jon Hough likewise argued that a ban on private schools receiving public funds would pit the whole Catholic vote in opposition to the constitution.<sup>235</sup> While various denominational orders stood together in the fight to prevent the taxation of private parochial schools and other religious properties, Bishop Machebeuf’s threats aroused a deeper-rooted discord between Protestants and Catholics in the territory, invoking the ire of former Territorial Governor John Evans and several newspapers in the state.<sup>236</sup> Over the course of the convention, “45 petitions were presented to the Convention on this subject. Seven of these, with about 1,100 signatures, asked that the Legislature be left free to divert the school funds; thirty-eight, with over 1,500 names attached, urged that the use of public money for sectarian education be forever prohibited.”<sup>237</sup>

For Protestants and, indeed, most Catholics in the constitutional convention, the larger issue was the rigid separation of church and state—almost all seemed to be in agreement that it should exist.<sup>238</sup> The Committee on

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233. See *supra* text accompanying note 226.

234. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 235 (quoting Jos. P. Machebeuf). To be fair, Bishop Machebeuf was likely rooting his objections in the Enabling Act’s mandate that “perfect toleration of religious sentiment shall be secured.” Enabling Act, § 4, *supra* note 20, at 10. That provision is modified by the following phrase: “[A]nd no inhabitant of said State shall ever be molested in person or property, on account of his or her mode of religious worship . . . .” *Id.* Outside of this “freedom of religious exercise” clause, there is nothing in the Enabling Act to suggest that this provision was meant to apply to the funding or public provision of religious schools.

235. *Constitutional Convention*, DENVER DAILY TRIB., Feb. 21, 1876, at 4; *The School Fund and the Constitution*, ROCKY MOUNTAIN NEWS, Feb. 2, 1876, at 4.

236. Hensel, *supra* note 3, at 192.

237. Goodykoontz, *supra* note 3, at 10. That historians would use such precision to note support for and opposition to the prohibition of the school fund is interesting given Chairman Hurd’s “official” declaration that “these petitions for and against such division [of the school fund] contain nearly an equal number of names.” PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 310 (quoting Daniel Hurd).

238. Hensel, *supra* note 3, at 194–98. But, the Colorado Constitution’s preamble (which has no legal force) nevertheless speaks of the “profound

Education's first draft of what would become the education clause of the constitution adopted almost verbatim as section 7 the initial January 5 referendum's broad-based prohibition against funding private education.<sup>239</sup> Though section 8 of the draft education clause signaled the delegates' concern with religious discrimination by prohibiting any "religious test or qualification" as a "condition of admission into any public educational institution of this State,"<sup>240</sup> there was near-unanimous consensus that the proposed constitution retain its ban on granting public funds—in any way, shape, or form—to private institutions.<sup>241</sup> When the final education clause was submitted to the Committee of the Whole, section 7 of article IX remained virtually unchanged from its original draft.<sup>242</sup>

*B. A Right That Is as Broad as Colorado's Boundless  
Prairies and as High as Its Snowcapped Peaks*

The public consternation caused by the school funding controversy overshadowed three important developments in the evolution of the education clause during the convention. First and most remarkable was the Committee on Education's expansion of section 8. Whereas the section was originally written to forbid religious discrimination in the state's public schools,<sup>243</sup> by February 14, 1876, the Committee on Education expanded its scope to prohibit not only religious discrimination

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reverence for the Supreme Ruler of the Universe." COLO. CONST. pmbl. In this sense, Colorado's constitution, like the sixty-two state constitutions written between 1840–1900, "revealed an evangelical characteristic of Christianity, not present when states wrote constitutions" earlier in the nineteenth century. Hensel, *supra* note 3, at 202.

239. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 186. It is also important to note that the Colorado Teachers' Association resolved in its parallel meeting that the convention adopt article VIII, § 3 of the Illinois Constitution that banned the public funding of private schools. HALE, *supra* note 5, at 38. According to Hensel, "[w]ith one very minor exception the Colorado provision, Article IX, section 7, is identical to the provision the Colorado teachers favored." That provision was also part of the initial draft resolution sent to the Committee on Education. Hensel, *supra* note 3, at 195 n.40.

240. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 361.

241. Hensel, *supra* note 3, at 195; *see also* ROCKY MOUNTAIN NEWS, Feb. 13, 1876.

242. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 361.

243. *Id.* at 186.

but “any distinction or classification of pupils . . . on account of race or color.”<sup>244</sup>

The education clause, like the school funding clause, remained unchanged throughout the remainder of the convention. Unlike the school funding issue, however, this provision provoked neither debate nor mass citizen commentary, largely because such a provision was a requirement of the 1875 Enabling Act.<sup>245</sup> Moreover, the explicit antidiscrimination provisions of the Enabling Act and its inclusion in article IX suggested that the Framers understood the entire education clause of the Colorado Constitution to be a civil right.<sup>246</sup> With the clause’s adoption during the convention, the delegates rejected soundly the territorial urge for de jure segregation. Educators in the state wholeheartedly endorsed the antiracism provisions, as most generally agreed that “a proper school system” should be available to “all our children and youth, of whatever rank, race or sect.”<sup>247</sup>

Racial animosities, however, lingered under the surface. Most prominent was the recognition by many that Colorado’s territorial system of education “is practically inoperative among a large portion of the Spanish speaking people of Southern Colorado.”<sup>248</sup> For this reason, Colorado’s educators endorsed provisions that the Spanish language not only be taught in the public schools but that a “compendium” be published in Spanish as well.<sup>249</sup> This issue came to a head during the constitutional convention in the heated discussion over what became article XVIII, section 8’s mandate to print all laws of the state in Spanish and German until 1900. In the debate over the precise wording and application of this clause,

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244. *Id.* at 318, 353.

245. Enabling Act, § 4, *supra* note 20, at 10 (“[T]he constitution shall . . . make no distinction in civil or political rights on account of race or color, except Indians not taxed . . .”).

246. *See id.* The question about whether the state’s education clause, like other education clauses adopted by other states, is a civil, political, or fundamental right is generally explored and put into context by Professor Eastman, *supra* note 60. The fact that Colorado’s Enabling Act mandated an explicit nondiscrimination principle for all parts of the constitution relating to civil or political rights suggests an answer to the question that Eastman poses in his article of whether “free public education is a right and privilege the State governments are [judicially] bound to respect.” *Id.* at 33. If nothing else, it indicates the importance of reading education clauses of state constitutions in relation to such documents as a state’s enabling act or other national and contextual legislation.

247. HALE, *supra* note 5, at 38–39.

248. *Id.* at 39.

249. *Id.*

one delegate proposed an amendment that translations be constitutionally required, specifically for the reports produced by the Superintendent of Public Instruction.<sup>250</sup> The defeat of this amendment and resistance to acknowledging the multiracial and multicultural reality of the state, however, would foreshadow more contemporary concerns about foreigners, assimilation, and integration of the state and nation.<sup>251</sup>

The second development was the fairly rapid shift in identifying the broad constitutional mandate for public schools from one that was “thorough and efficient” to one that was “thorough and uniform” in its operation.<sup>252</sup> In the first weeks of the convention, Committee on Education member and Delegate Byron L. Carr congratulated the constitutional convention for beginning the process of establishing a “thorough and efficient system of popular education, whereby every child and youth of this vast commonwealth shall receive regular and free instruction.”<sup>253</sup> Carr noted, in particular, that the education clause his committee and fellow delegates drafted would work “to erect a superstructure upon a solid and lasting foundation, . . . a system of education as high as our snow capped mountains, as broad as our boundless prairies, . . . and as free to all as the air of heaven.”<sup>254</sup>

A few weeks later, the Committee on Education submitted its report to the Committee of the Whole on January 29, and at that time, article IX, section 2 read, “[t]he General Assembly shall, as soon as practicable, after the adoption of this Constitution, provide for the establishment and maintenance of a *thorough and uniform* system of free public schools

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250. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 283.

251. See Hensel, *supra* note 3, at 214–15. For an assessment of the legal meaning of race and color, see Tom I. Romero, II, ¿La Raza Latina?: *Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 249–54, 273 & nn.193–94 (2007).

252. Prior to the Colorado Constitutional Convention, the constitutions of Illinois, Minnesota, Nebraska, New Jersey, Ohio, and West Virginia included the terms “thorough and efficient” in their education clauses. See ILL. CONST. of 1870, art. VIII, § 1; MINN. CONST. of 1857, art. VIII, § 3; NEB. CONST. of 1866, art. VII, § 1; N.J. CONST. of 1844, art. IV, § 7; OHIO CONST. of 1851, art. VI, § 2; W. VA. CONST. of 1861, art. X, § 2.

253. *The Banquet*, Scrapbook of Daniel Hurd, Scrapbook of Newspaper Clippings (newspapers unidentified) (1868–1952) (Denver Public Library, W. History Collection).

254. *Id.*

throughout the State.”<sup>255</sup> Less than a month later, on February 19, the convention considered and adopted this language.<sup>256</sup> With almost no comment, Colorado became the first state in the Union to constitutionally mandate a system that was both “thorough” and “uniform” in its operation. To give further effect to this requirement, article IX, section 2 required that one or more schools be maintained in each school district.<sup>257</sup> While other state constitutions included terms such as “thorough and efficient” to describe the state’s constitutional guarantee to education, the rejection of the particular term “efficient” from the initial draft indicates that Colorado’s constitutional delegates understood the state’s constitutional duty to be more than a matter of bureaucratic administration or centralization. To be sure, this was an issue addressed largely in other sections of the education clause.<sup>258</sup> Rather, “thorough and uniform” suggested a qualitative element in the state’s education clause that continued a course of action that had animated the region from almost the inception of its territorial days.<sup>259</sup>

The third and related development was the commitment to local control that became sections 15 and 16 of article IX in the final constitution. While the official proceedings of the constitutional convention do not report any controversy about these provisions, tension underlying their drafting certainly existed. For instance, on February 12, the *Denver Daily Times* included excerpts from the debate over the statewide adoption of uniform textbooks. William Bromwell contended “that the schoolbook question was a mine of bribery and corruption, and should be taken entirely out of politics, and put as near the people as possible.”<sup>260</sup> Bryon Carr concurred and argued “that every school district should adopt whatever text books it desired, particularly as the teachers’ institutes generally discussed those matters pretty thoroughly.”<sup>261</sup> Another

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255. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 185 (emphasis added).

256. *Id.* at 354, 360.

257. COLO. CONST. art. IX, § 2.

258. *See, e.g., id.* § 1 (creating a state board of education); *id.* § 16 (prohibiting the state board of education from prescribing textbooks).

259. *See* HOUSE JOURNAL OF TERRITORIAL ASSEMBLY, *supra* note 172, at 10; *see also supra* text accompanying notes 172–73.

260. *Constitutional Convention*, DENVER DAILY TIMES, Feb. 12, 1876, at 1.

261. *Id.* Another delegate argued that “allowing the state board to control text book selection would create a system ‘whereby school officers could line their pockets with money derived from the taxes of the people.’” *Owens v. Colo. Cong.*

delegate argued that the proposed draft of article IX, section 1 “gave the [State] Board the direction of the schools, therefore making the whole thing a political affair; there ought to be no possibility of a suspicion that politics should run the schools of the territory.”<sup>262</sup> Ultimately, the delegates chose to confer responsibility for instruction and curriculum (including textbooks) on the local school districts while entrusting the state board of education with “general supervision” of the public schools.<sup>263</sup>

With its final adoption of the local control provisions, Colorado became only the second state, after Kansas, with an express constitutional local control requirement.<sup>264</sup> Together, these two provisions ensured for district-wide autonomy over the content of education delivered to a school district’s students. Given Colorado’s territorial experience with local control, this was no small leap of faith.<sup>265</sup> And so it was that, as article IX was initially drafted, it vested responsibility for the selection of content for public school instruction, including textbook selection, in the state board of education.

Article IX emerged out of a contentious and sometimes colorful history over the meaning of scope of education to Colorado’s pioneers. While the historical records around the convention itself only provide a small and often unreported sample of this history,<sup>266</sup> it nevertheless highlighted the place that education would have for the new State. The Colorado Constitution, like most of its mid-nineteenth-century predecessors, was adopted in an atmosphere of deep distrust of

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of Parents, Teachers & Students, 92 P.3d 933, 938 (Colo. 2004) (quoting *The Constitutional Convention*, DENVER DAILY TRIB., Feb. 14, 1876). The delegate insisted that “the best way to avoid such corruption was to distribute decision making authority ‘to as small a degree as possible, and bring it home to each district. It should be left to the people at home.” *Id.* at 939 (quoting *The Constitutional Convention*, *supra*).

262. *Owens*, 92 P.3d at 938 (alteration in original) (quoting *The Constitutional Convention*, *supra* note 261).

263. *Id.* at 939 (citing COLO. CONST. art. IX, §§ 1, 15, 16).

264. See KAN. CONST. art. VI, § 5 (providing that local public schools “shall be maintained, developed and operated by locally elected boards”).

265. See *supra* notes 194–203 and accompanying text.

266. Because of the paucity of original sources pertaining to education in the convention, most of the secondary material on the constitutional convention neglects the subject of education entirely. In addition to the sources that I have cited *supra* notes 3 and 7, reference was made in E.T. Wells, *State Constitutional Convention*, in LEGISLATIVE, HISTORICAL AND BIOGRAPHICAL COMPENDIUM OF COLORADO 147 (C.F. Coleman ed., Denver, 1887), and H.P.H. Bromwell, *Constitutional Convention*, in 2 HISTORY OF THE STATE OF COLORADO, 288 (Frank Hall ed., Chicago, Blakely Prtg. Co. 1890).

centralized authority.<sup>267</sup> For this reason, much of the document reflects the “assiduous” precision by which delegates “wrote provisions that took away much of [the General Assembly’s] discretionary authority.”<sup>268</sup> There is no doubt that this distrust of state government animated the shape and form of the school fund and local control provisions of article IX.

Yet the totality of the education clause, also like its mid-nineteenth-century predecessors, reflected a substantively more positivist vision of the state educational guarantee for public education. In its sixteen sections, article IX of the Colorado Constitution provided for a state board of education as well as a superintendent of public instruction; it ensured the creation and maintenance of a school fund that would help to get public schools in every county started; it included a principle of nondiscrimination; and it put into place the components that would allow the state to have a distinguished university.<sup>269</sup> Perhaps most significantly, Colorado became the first state to commit itself to provide an education that was “thorough and uniform” both in its design and substantive scope. More important than the gold of its mountains, the education clause of the Colorado Constitution provided the state the opportunity, or so the founders hoped, to build a system that matched the peaks and prairies that had made it such a desirable place to live.

#### IV. THE MEANING OF EDUCATION IN COLORADO’S POST-CONSTITUTIONAL SCHOOL LAWS

The hopes undergirding article IX were carried over into the first session of the Colorado General Assembly. In 1877, the general assembly sought to operationalize many of the provisions of article IX by passing “An Act to Establish and Maintain a System of Free Schools.”<sup>270</sup> Based in large measure

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267. Tyack & James, *supra* note 61, at 50–53.

268. OESTERLE & COLLINS, *supra* note 3, at 2. Professors Oesterle and Collins point out that that constitution drafted in 1876 was designed to “protect citizens from legislative misbehavior.” *Id.* at 1. One study argues that the educational clauses, along with other “social clauses” in the Colorado Constitution, “were more *relentlessly* written than either their political or economic counterparts.” Hensel, *supra* note 3, at 215–16 (emphasis added).

269. See COLO. CONST. art. IX, §§ 1–3, 8, 12–14.

270. Act to Establish and Maintain a System of Free Schools, ch. 92, 1877 Colo. Gen. Laws 807.

upon the 1876 territorial law, the Act had some important additions.

First, it created a state board of education in sections 2 through 6.<sup>271</sup> In addition, the law also gave county superintendents much more direct supervisory authority over the schools. Section 15 granted them the authority to examine teacher qualifications and issue teaching certificates.<sup>272</sup> Section 16 further required that the superintendents issue first-, second-, and third-grade certificates based on applicants' performance. Section 20 required county superintendents to maintain "careful supervision" of their district schools and required that they visit each school in a district once a term to see that there was compliance with the school law.<sup>273</sup>

Despite the increased responsibility granted to both state and county superintendents, much authority still remained with locally elected school boards.<sup>274</sup> Under section 50, the legislature authorized and required the school boards to employ and fix salaries of teachers; fix the course of study, exercises, and textbooks; determine how many teachers to hire; determine how many months (beyond three) should be in the school year; set the beginning and end of the school day; provide books for indigent children; and exclude sectarian tracts from the curriculum and libraries.<sup>275</sup> Section 51 gave authority to the school boards to determine the expediency of opening a high school; provide for the teaching of the subjects enumerated in section 15; decide upon the number of schools; and, crucially, determine the amount of additional revenue to be raised by special taxation if a district was willing to fund beyond its original appropriation.<sup>276</sup>

In the ten years following the ratification of the Colorado Constitution, the general assembly made very few major amendments to the school law. A notable exception occurred in 1881, when the legislature amended section 8 of the public school law so that county superintendents were no longer

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271. *Id.* at 807–08.

272. *Id.* at 811–12.

273. *Id.* at 813.

274. Much of the school law was procedural, and most of sections 25–50 pertained to specifics regarding the process of forming districts and electing school boards. *See id.* at 814–23.

275. *Id.* at 823–25.

276. *Id.* at 825.

allowed to examine teachers with their own questions.<sup>277</sup> Instead, the legislature required the state superintendent to prepare “uniform” exams.<sup>278</sup> In 1887, the legislature amended section 64 of the school act so that county commissioners could only levy a tax between two and five mills for the support of schools.<sup>279</sup>

From 1870 thereon, the school law mandated that every state superintendent make a biennial report on the condition of the public schools.<sup>280</sup> The basic statistics, which collected a vast swath of comparative data—such as aggregate attendance, teacher-student ratios, average number of school days, and aggregate school taxes from every county—paint an informative picture of the actual uniformity of Colorado’s public schools in the 1870s.

The effects of the law were evident fairly rapidly. Most apparent was the fact that every county in the state elected a superintendent of public instruction within months of the 1877 law’s passage.<sup>281</sup> In turn, the state built upon its territorial precedent to support 313 school districts and 219 schoolhouses and educate greater than sixty percent of the children who were eligible for public education within two years of the law’s passage.<sup>282</sup> Nevertheless, building a “thorough and uniform” system that simultaneously respected local autonomy and control had its many challenges.

First, and not surprisingly, was the issue of effectively funding a statewide public education system. With article IX and the constitutional debates decisively settling the question of whether public funds should be used for private schools, there was still the question of how to provide all of the resources that a public school needed. As Shattuck made clear in his 1881 report, “[o]ur entire free school system is based on two ideas; first that property must support the schools, and next, that these schools shall be so planted and managed as to afford, as nearly as possible, equal advantages to *all* people

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277. Act to Establish and Maintain a System of Free Schools, ch. 92, sec. 8, § 3, 1881 Colo. Sess. Laws 211, 212.

278. *Id.*

279. Schools, ch. 97, sec. 64, § 28, 1887 Colo. Sess. Laws 379, 398.

280. GENERAL LAWS, JOINT RESOLUTIONS, MEMORIALS, AND PRIVATE ACTS PASSED AT THE EIGHTH SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO 95–96 (1870).

281. See SHATTUCK, *supra* note 201, at 28 (listing the school superintendent for each county).

282. *Id.* at 32–33 tbl.II, 36–37 tbl.IV.

. . . .”<sup>283</sup> The fact of the matter, at least from Shattuck’s perspective, was that schools were inequitably funded. Of immediate concern was the mill levy. As local school districts attempted to raise revenue after statehood, counties kept their taxes low, and wealthier districts then levied their own higher taxes to support the public school districts that were formed. The superintendents’ reports are revealing in this regard. Whereas Elbert County, for instance, collected about \$38 per student, La Plata County collected less than \$2 per student.<sup>284</sup>

The impact of this, moreover, was understood to have more than just economic ramifications. Shattuck, for instance, quoted liberally from a letter he received from the superintendent of public instruction for Costilla County. In his letter, the Costilla County superintendent questioned the state’s funding scheme:

Cannot the State do something to assist the Mexican people, who strain every nerve to have imparted to their children . . . such knowledge as can be procured by the scanty means of county taxes . . . and perhaps a special tax; the latter a burden hardly to be borne by the impoverished half-starved people . . . ?<sup>285</sup>

Costilla County, to be sure, expended considerably less per student than other counties and had attendance rates well below the state average.<sup>286</sup>

In 1878, Superintendent Shattuck proposed that the law be changed so that county commissioners would be required to levy a tax of at least four mills. He argued that doing so would “distribute educational expenses more equitably upon all taxable property, strengthen weak districts, and *not increase the burdens of the people as a whole.*”<sup>287</sup> Shattuck, in fact, indicated that increasing the taxation rate would particularly aid poorer counties with significant Latino populations where, because of circumstance, the people could not afford to levy a

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283. JOSEPH SHATTUCK, SECOND BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF COLORADO, FOR THE YEARS ENDING AUGUST 31, 1879, AND AUGUST 31, 1880, at 44 (Denver, Tribune Publ’g Co. 1881) (emphasis added).

284. See SHATTUCK, *supra* note 201, at 32–33 tbl.II, 38–39 tbl.V.

285. *Id.* at 24–25 (quoting Costilla County Superintendent Charles John).

286. Specifically, Costilla County spent less than \$8 per student, see SHATTUCK, *supra* note 283, at 126 tbl.IV, 130 tbl.VII, and achieved an attendance rate of only 40%, see *id.* at 125–26 tbls.III & IV.

287. SHATTUCK, *supra* note 201, at 13.

special tax. In making this argument, Shattuck hoped that a more comprehensive funding scheme would better equalize the support of schools upon all classes of property and render a special tax unnecessary.<sup>288</sup> Despite Shattuck's assessment, the general assembly in the formative years of the state kept this system intact.<sup>289</sup>

Second, Superintendent Shattuck's reports also highlight the early emergence of state standards in education and the tensions they produced. One of Shattuck's first tasks as state superintendent of public instruction was to issue a statewide teacher examination that covered subjects mandated by the school law. Though he did not require county superintendents to deploy this exam, he argued that his exam would ensure some degree of consistency in the education offered by the state.<sup>290</sup> In his second biennial report, he argued that experience proved that his "examinations, uniform in questions and in methods, are in every way superior to those having as many processes and grades as there are counties."<sup>291</sup>

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288. *Id.* at 10–11.

289. *Id.* at 13. Until 1935, Colorado financed its public schools through locally levied property taxes and state contributions. *See* Burton K. Chambers, *The Colorado Centennial of Public School Finance: A One-Hundred Year History* (Dec. 3, 1976) (unpublished Ph.D. dissertation, University of Colorado) (on file with author). The state's contribution was initially limited to the revenue generated through the interest, rentals, and leases on the state-owned school lands as detailed in article IX, section 3 of the Colorado Constitution. In 1935, the first direct state support of local school districts was enacted. It was challenged and found to be constitutional in *Wilmore v. Annear*, 65 P.2d 1433 (Colo. 1937). Since that time, a combination of local property tax levies and direct state contributions has been the principal source of financial support for public schools in the state, though with significant modifications. For instance, in 1952, the general assembly passed the first Public School Finance Act after a legislative report detailed systemic financial inequity among the school districts in the state. *See* COLO. LEGIS. COUNCIL, *STATE AID TO SCHOOLS IN COLORADO*, Gen. Assemb. 46-117 (1966). The Act provided each school district with an equalization "support level" or set amount of money for each district in each calendar year. *Id.* Twenty years later, in response to criticism that the Act failed to eliminate the spending disparities among the school districts, the general assembly enacted the Public School Finance Act of 1973, Colo. Rev. Stat. §§ 22-50-101 to -105 (1973) (repealed 1989) [hereinafter PSFA], giving the general assembly power to supplement poorer property districts with state subsidies. Its constitutionality was affirmed in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1011 (Colo. 1982). The PSFA has subsequently been amended several times since this time. *See* *Lobato v. State*, 218 P.3d 358, 364–66 (Colo. 2009). In addition, Colorado voters in 2000 adopted Amendment 23, prescribing minimum increases for state funding of education. *See* COLO. CONST. art. IX, § 17.

290. *See* SHATTUCK, *supra* note 283, at 29.

291. *Id.*

Similarly, Shattuck advocated for a uniform course of study in Colorado's many ungraded schools. Largely because these schools tended to attract teachers who had no formal training in education and thus featured high turnover, Shattuck hoped that such a curriculum would ameliorate weaknesses in a system that was neither thorough nor uniform.<sup>292</sup> Though he contended that he was merely trying to aid County Superintendents and local school districts and not "control" them,<sup>293</sup> his enthusiasm nevertheless pointed to the enduring tension between the state and its local governments over the content, meaning, and quality of education.

By 1880, the foundation for a "thorough and uniform" system of education in Colorado had been laid. From the time article IX was adopted, the general assembly, the state superintendent of public instruction, and local educational bureaucrats all struggled with questions about how schools would be financed and maintained, the inequitable distribution of resources to multiracial public schools, and the wisdom of state standards in relation to the needs and capacities of local communities.<sup>294</sup> More than a century of school laws, jurisprudence, constitutional amendments, and changes in demography and pedagogy have created a modern system of public education operating in response to the challenges of our contemporary age that would make Colorado's constitutionally required system of public education scarcely recognizable to its founders.<sup>295</sup> Nonetheless, even in its formative stages in the nineteenth century, it was a system that was rapidly besieged by problems that continue to this very day.

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292. *See id.* at 33–38.

293. *See id.*

294. The early decades of schooling in each Colorado county is recounted in 1 HISTORY OF COLORADO 588–602 (Wilbur Fisk Stone ed., 1918).

295. The basic numbers tell a vivid story. As of the 2009–10 academic school year, 832,368 students attended public schools in 182 School Districts comprising 1792 schools. These schools served a student body that was 61% White, 29% Latino, 6% Black, 4% Asian-Pacific Islander, and 1% American Indian. Of these students, nearly 40% are economically disadvantaged, while approximately one in ten has limited English proficiency or a documented disability. *2011 Summer EDFacts: State Trends Profile—Colorado*, COLO. DEPT. EDUC., <http://www.schoolview.org/documents/2011StateProfile.pdf> (last visited Apr. 7, 2012). This has created dramatic differences in how schools are funded, experimentation in charter and magnet schools, struggles to meet the needs of individual students through Individual Education Plans, and the challenges of meeting both state and federal mandates, such as No Child Left Behind.

## CONCLUSION

Article IX, the education clause of the Colorado Constitution, was firmly rooted in the nineteenth-century movement to provide public schools for a rapidly changing United States. Not merely a check upon burgeoning and suspect administrative power of state government and its legislative assemblies, the education clause in Colorado's 1876 Constitution, like so many other clauses that existed in other state constitutions, reflected the hopes, aspirations, and sensibilities of providing a substantive and meaningful education that would benefit the nation's future citizens, workers, mothers, and fathers. While Colorado's struggle for public education mirrored efforts of other territories and states, it also provided unique innovations that created its own set of challenges for the future. Particularly in attempting to balance the pursuit of a "thorough *and* uniform" system of public education in relation to the distinct needs and concerns of students, parents, and educators in local school districts with vastly disparate resources and abilities, article IX provided a dynamic framework for the future. Without a doubt, this balance is the core issue at the center of both the *Lobato* school financing and *Larue* school choice suits.<sup>296</sup>

As Colorado courts provide guidance to the legislature, school administrators, parents, and voters about what the appropriate legal balance should be, we should recall why understanding both the context and spirit of the drafting of article IX in 1876 is and should remain important. The delegates who crafted the Colorado Constitution believed that it would enable the state to be a leader in a rapidly changing United States. The education clause was central to this vision by making a positive and forward-looking constitutional commitment to public education in the state. Article IX was not merely a check on state government nor a hortatory constitutional commitment to "thorough and uniform" public schools. Rather, its prominence in the Colorado Constitution indicates that it was designed to empower students, parents, and educators to grow the State and achieve success in the world they encountered. By making public education both a constitutional commitment and a right to be enjoyed by residents of the state, the delegates to the Colorado

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296. See *supra* notes 22–43 and accompanying text.

Constitutional Convention also suggested the corresponding duty of courts to give legal meaning to its scope and application. Given all the challenges that faced the state's pioneer founders, the task of educating students across widely disparate landscapes, abilities, and resources was likely viewed with the same determination and ingenuity required to cross the state's treacherous mountain peaks or making whole communities grow in a semi-arid state.<sup>297</sup>

The pursuit for innovative and substantive commitments to public education animated Colorado lawmakers almost from the erection of the very first school house. Since its inception as a territory, Colorado was one of the first states to attempt to balance a system of public schools that was "thorough and uniform" while at the same time recognizing important differences in funding, temperament, culture, and ability between local districts. First as a territory and then as a new state, Colorado's early inhabitants who drafted its constitutions, wrote its laws, and enacted its provisions recognized the centrality of statewide public education to engaged citizenship and social—as well as economic—opportunity among a diverse and disparate student body. That commitment rings just as true today, as when Colorado's pioneers discovered gold in its snowcapped peaks and, in turn, chose to make the state's boundless prairies, mountains, and deserts home.

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297. Here I am reminded of the innovation shown in the protection of the right to prior appropriation guaranteed in the Colorado Constitution. COLO. CONST. art. XVI, § 7. See generally Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1 (1997); Tom I. Romero, II, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado's Legal Past*, 73 U. COLO. L. REV. 521, 532–40 (2002). While it is well beyond the scope of this Article, the complex jurisprudence surrounding article XVI, including the organization of water courts and water commissioners in the state, suggest the critical role that courts have played in identifying, detailing, and protecting the constitutional right. Water, like education, was understood by the state's founders as essential to Colorado's growth and development. See *id.* at 537–40; see also *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446–47 (1882).

# THE RIGHT TO FLOAT: THE NEED FOR THE COLORADO LEGISLATURE TO CLARIFY RIVER ACCESS RIGHTS

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*For years, Colorado judges and legislators have struggled to clearly define and delineate public access rights for rivers running through private property. In Colorado, it is settled law that land underlying non-navigable streams is the subject of private ownership, but beyond this basic principle, little is settled. As a result, a dispute has developed between private landowners exercising their right to exclude individuals from their land and recreational river users seeking access to Colorado's rivers. The failure to resolve this longstanding dispute jeopardizes Colorado's multimillion-dollar commercial rafting industry and creates avoidable transaction costs. This Note examines the right-to-float debate as it pertains to Colorado law and argues that, to preserve the right to raft Colorado's rivers, the state legislature should adopt the modern and majority rule and grant a limited public access right to Colorado's rivers.*

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## INTRODUCTION

*We'd go down to the river,  
And into the river we'd dive.  
Oh down to the river we'd ride*

—Bruce Springsteen, “The River”<sup>1</sup>

For years, Colorado judges and legislators have struggled to clearly define and delineate access rights for rivers running through private land.<sup>2</sup> Currently, public access to rivers turns on whether the river is classified as “navigable” or “non-navigable.”<sup>3</sup> A navigable river is considered state property and is therefore open to public use.<sup>4</sup> Rivers can be classified as navigable under federal or state law.<sup>5</sup> Under federal law, the Supreme Court has defined a navigable river as one “susceptible to being used as an ‘avenue of commerce’ in its

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1. BRUCE SPRINGSTEEN, *The River*, on THE RIVER (Columbia Records 1980).

2. See, e.g., *People v. Emmert*, 597 P.2d 1025, 1026 (Colo. 1979); Jessica Fender, *Navigation Rights Make a Splash in Landowner's Skirmish with River Rafters*, DENVER POST (Jan. 31, 2010), [http://www.denverpost.com/ci\\_14303397](http://www.denverpost.com/ci_14303397); Will Shoemaker, *Trouble on the Taylor*, GUNNISON TIMES (Jan. 14, 2010), [http://www.gunnisontimes.com/index.php?content=C\\_news&newsid=6341](http://www.gunnisontimes.com/index.php?content=C_news&newsid=6341).

3. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 234 (4th ed. 2009); Lori Potter et al., *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 U. DENV. WATER L. REV. 457, 459–60 (2002).

4. Richard Gast, Note, *People v. Emmert: A Step Backward for Recreational Water Use in Colorado*, 52 U. COLO. L. REV. 247, 263 (1981).

5. *Id.* at 263–65 (1981); see also John R. Hill, Jr., *The “Right” to Float Through Private Property in Colorado: Dispelling the Myth*, 4 U. DENV. WATER L. REV. 331, 341–42 (2001) (noting that “[f]ederal law is used to determine whether the federal government can regulate the waterway,” while states “may adopt . . . less stringent tests of navigability” to determine title).

ordinary condition at the time of statehood.”<sup>6</sup> In place of this traditional federal definition, “states may develop (and, indeed, many have developed) their own [broader] definitions of navigability for distinguishing public from private waters.”<sup>7</sup> When defining navigability, state determinations typically do not depend on a waterway’s ability to sustain commercial navigation; rather, many states tend to focus instead on a stream’s ability to support recreational use.<sup>8</sup>

Alternatively, public access rights to rivers classified as non-navigable are much more limited.<sup>9</sup> In Colorado, it is settled law that “the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands.”<sup>10</sup> Beyond this basic principle, however, little is settled.<sup>11</sup> While the courts and the legislature have concluded that rafters who enter a river on public land and float through private property on a river cannot be held criminally liable,<sup>12</sup> whether they may be liable for civil trespass remains unresolved.<sup>13</sup>

Despite uncertainties surrounding the right to float, Colorado offers rafting opportunities unmatched by any other state, and, with over 150 named rivers,<sup>14</sup> recreational river use

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6. GETCHES, *supra* note 3, at 238 (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1870)).

7. Potter et al., *supra* note 3, at 460; *see, e.g.*, ALASKA STAT. § 38.05.965(13) (2006) (defining “navigable water” as “any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes”).

8. GETCHES, *supra* note 3, at 240.

9. *See* Potter et al., *supra* note 3, at 458.

10. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

11. Fender, *supra* note 2.

12. *See id.* In Colorado, a property owner of parcels through which rivers and streams flow also owns the underlying streambed. Therefore, an individual can be liable for trespass for touching the streambed of a river that flows through private property. *Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1905) (“[T]he owner of lands along a nonnavigable fresh water stream, as an incident of such ownership, owns the bed of the stream, and the exclusive right of fishery therein to the middle thereof . . .”).

13. Fender, *supra* note 2 (noting that the question of whether “floaters can be sued for civil trespass if they float through private land” remains unresolved).

14. Potter et al., *supra* note 3, at 458; *see also Feature Query Results*, U.S. BOARD ON GEOGRAPHIC NAMES, <http://geonames.usgs.gov/pls/gnispublic/>

has become a favorite pastime for residents and visitors alike.<sup>15</sup> Colorado's rivers attract numerous outdoor enthusiasts to the state each year.<sup>16</sup> In 2010 alone, individuals logged a total of over 500,000 user days rafting Colorado's rivers,<sup>17</sup> making Colorado the most popular locale for whitewater rafting in the country.<sup>18</sup> As a result, Colorado's commercial rafting industry is the largest in the nation.<sup>19</sup> Given the river-rafting industry's economic and cultural importance to Colorado,<sup>20</sup> it is surprising and ironic that the law surrounding the right to float remains ambiguous.<sup>21</sup>

Despite recreational rafting's popularity, there has been a "longstanding unease" between rafters and Colorado landowners concerning whether the public should be allowed to float over private lands.<sup>22</sup> Since the early 1900s, disputes between those in favor of a public right to float and those opposed have been typically resolved through private mediation.<sup>23</sup> At the same time, the modern and majority public access rule acknowledges a limited right to float through private property for recreational purposes.<sup>24</sup> This Note argues that the Colorado Legislature should adopt the majority public access rule and grant the public a limited right to float. This rule would protect the interests of private property owners by preventing undue hardship and nuisance to their land, and it

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f?p=132:2:178124501513393:.....:YES (last visited Mar. 19, 2012) (listing all named rivers in Colorado).

15. John R. Hill & Lori Potter, *The Right to Float in Colorado: Differing Perspectives*, COLO. WATER, Nov.–Dec. 2009, at 17, 17–19 (explaining that river rafting has grown in popularity in recent years).

16. *Id.*

17. COLO. RIVER OUTFITTERS ASS'N, COMMERCIAL RIVER USE IN THE STATE OF COLORADO: 1988–2010 (2011), available at <http://www.croa.org/media/documents/pdf/2010-commercial-rafting-use-report-final.pdf> ("A user day is defined as a paying guest on a river for any part of a day.").

18. Hill & Potter, *supra* note 15, at 18.

19. *Id.*

20. *Id.*

21. *Id.*

22. Jessica Fender, *Rafting Compromise Diffuses Debate for Now*, DENVER POST (June 15, 2010, 11:58 AM), <http://blogs.denverpost.com/thespot/2010/06/15/rafting-compromise-diffuses-debate-for-now/10578>; see also Hill & Potter, *supra* note 15, at 18.

23. Fender, *supra* note 22.

24. See, e.g., Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984) ("[A]ny surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."). But see GETCHES, *supra* note 3, at 245; Potter et al., *supra* note 3 (noting that the majority rule has not been adopted in Colorado).

would also maintain Colorado's high quality of life and its important outdoor-adventure industries.

This Note examines the right-to-float debate as it pertains to Colorado law. Part I traces the current debate surrounding a public right to float over private lands. *People v. Emmert*,<sup>25</sup> the landmark Colorado Supreme Court case concerning river access in Colorado, is examined in Part II. Part III presents the arguments for and against granting the public a right to float through private lands. Finally, Part IV concludes that the Colorado Legislature should adopt the modern and majority rule as determined by other states and allow a limited public right of access for rafters.

## I. THE SUMMER OF 2010 AND THE TAYLOR RIVER DEBATE

In the summer of 2010, Jackson-Shaw, a Dallas-based residential and commercial real estate developer,<sup>26</sup> purchased land in Colorado along a two-mile stretch of the Taylor River<sup>27</sup> and informed two local river rafting companies that they would not be permitted to float through the property.<sup>28</sup> Jackson-Shaw worried that the commercial rafters would “interfere with the fishing” in the area,<sup>29</sup> and, for Jackson-Shaw, access to fishing is a popular incentive to purchase homes in the development.<sup>30</sup>

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25. 597 P.2d 1025 (Colo. 1979).

26. While the company is involved in all aspects of real estate development, see JACKSON-SHAW, <http://www.jacksonshaw.com> (last visited Mar. 16, 2011), the particular development project along the Taylor River was a vacation home development designed to be “an exclusive fishing club community,” Fender, *supra* note 2.

27. Fender, *supra* note 22. The Taylor River is located in west central Colorado, near Gunnison County. Together with the East River, it later forms a section of the larger Gunnison River. *Taylor River*, THREE RIVERS RESORT & OUTFITTING, <http://www.3riversresort.com/activities/rafting> (last visited Mar. 27, 2012); see also Fender, *supra* note 2.

28. Fender, *supra* note 22; see also Steven K. Paulson, *Spring Brings Temporary Truce Between Property Owners, Rafters*, DENVER POST (May 15, 2010), [http://www.denverpost.com/search/ci\\_15090063](http://www.denverpost.com/search/ci_15090063). The two commercial rafting companies denied access by Jackson-Shaw were Three Rivers Outfitting and Scenic River Tours. *Id.*

29. Dan Frosch, *Dispute Revives Battle Between Rafters and Property Owners*, N.Y. TIMES (Apr. 16, 2010), <http://www.nytimes.com/2010/04/17/us/17colorado.html>.

30. *Id.* The interference by the rafters allegedly involved “disrupting” the natural habitat of fish and destroying structures designed to improve fishing in the area by floating the rivers. Fender, *supra* note 2 (acknowledging landowners’ concerns that rafting crews “float[ ] big groups through [their] land twice a day, sometimes disrupting fish and upsetting . . . clients”).

The commercial river rafters, however, vowed to continue to float through the property.<sup>31</sup> This disagreement sparked a contentious battle between those in favor of public river access rights and those opposed to such rights.<sup>32</sup> Additionally, the State of Colorado expended numerous resources sponsoring third-party negotiations in an attempt to avoid litigation and settle the conflict between Jackson-Shaw and the commercial rafting companies.<sup>33</sup> These efforts compelled the Colorado General Assembly to attempt to clarify whether the public has a right to float on rivers that flow through private property.

The General Assembly drafted a bill titled “Concerning Clarification of the Scope of the Existing Right of Navigation of Guides Employed by River Outfitters” to resolve the access debate.<sup>34</sup> The bill successfully passed both the House and the Senate but in two different forms. Ultimately, the two houses could not agree on a final version, and the bill failed to make it out of committee.<sup>35</sup> The initial draft allowed rafting companies licensed with the State of Colorado to legally float on rivers through private land without being liable for civil trespass as long as they only made “incidental contact with the beds and

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31. Paulson, *supra* note 28.

32. Interested parties included representatives for various commercial river rafting operations, numerous coalitions of individual recreational river users, real estate development companies, and numerous coalitions of individual property owners. Fender, *supra* note 2; Fender, *supra* note 22.

33. See Fender, *supra* note 22.

34. H.R. 10-1188, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (re-revised version), available at [http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/4FD1374D97E6422B872576AA00693103?Open&file=1188\\_rer.pdf](http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/4FD1374D97E6422B872576AA00693103?Open&file=1188_rer.pdf). The bill's sponsors were Representative Kathleen Curry and Senator Mary Hodge. See *id.* Representative Curry drafted the bill. Representative Curry was an unaffiliated Representative for House District 61, *Bio*, KATHLEEN CURRY, [http://kathleencurry.org/?page\\_id=42](http://kathleencurry.org/?page_id=42) (last visited Dec. 9, 2011), which includes parts of Eagle, Garfield, Pitkin, Gunnison, and Hinsdale Counties, *State Representative District 61*, COMAPS, <http://www.comaps.org/disthd61.html> (last visited Dec. 9, 2011). Representative Curry held office from 2004 to 2010, *Bio, supra*, until being defeated by Roger Wilson in the November 2010 election, Marianne Goodland, *Election 2010: Shift of Power*, COLO. STATESMAN (Nov. 9, 2010), <http://www.coloradostatesman.com/content/992291-election-2010-shift-power>. Representative Curry specializes in property and water rights and has served as the manager of the Upper Gunnison River Water Conservancy District and as a physical scientist for the State of Colorado Water Conservation Board. She holds a Master's Degree in Water Resources Planning and Management from Colorado State University. *Bio, supra*.

35. Jessica Fender, *Rafting Access Likely Headed to November Ballot After Bill Sinks in Legislature*, DENVER POST (May 12, 2010), [http://www.denverpost.com/politics/ci\\_15065989](http://www.denverpost.com/politics/ci_15065989).

banks” of the river.<sup>36</sup> After a series of amendments and revisions, the bill extended access beyond commercial outfitters to all private individuals.<sup>37</sup> The bill eventually stalled, however, once it became uncertain whether the legislation would constitute a taking under the Colorado Constitution.<sup>38</sup>

After it was clear that the bill would not receive the necessary support, the legislature recommended that the Colorado Water Congress (CWC)<sup>39</sup> study House Bill 10-1188.<sup>40</sup> The CWC was tasked with determining “the legal, economic, environmental, and law enforcement issues related to boating through private property.”<sup>41</sup> Typically, studying a bill is a “face-saving” tactic that “spare[s] the egos of sponsors while giving cover to opponents who don’t want to go on record with a ‘no’ vote.”<sup>42</sup> As a result, this approach is used most often to “defuse an overheated political issue.”<sup>43</sup> Practically speaking, this legislative maneuver is a common “result of [the] inability to get a bill passed,” and it effectively killed House Bill 10-1188.<sup>44</sup>

Because the legislature failed to clarify whether individuals have the right to float rivers overlying private property, both supporters and opponents of the bill sought a solution through the ballot initiative process.<sup>45</sup> This process

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36. H.R. 10-1188, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (initial draft).

37. Fender, *supra* note 35.

38. See COLO. CONST. art. II, § 15 (“Private property shall not be taken or damaged, for public or private use, without just compensation.”); *People v. Emmert*, 597 P.2d 1025, 1033 (Colo. 1979) (Carrigan, J., dissenting) (“[T]he General Assembly, therefore, cannot give the public recreational access to rivers without taking away from landowners their newly recognized property interests and paying them just compensation.”) (internal quotation marks omitted); Charles B. White, *Water Congress Can Help Find a Solution*, DENVER POST (Apr. 16, 2010), [http://www.denverpost.com/search/ci\\_14893369](http://www.denverpost.com/search/ci_14893369).

39. The CWC provides the state with “an open forum to share information, form positions, and provide leadership for Colorado’s water community.” *Advocacy*, COLO. WATER CONGRESS, <http://www.cowatercongress.org/advocacy/advocacy.aspx> (last visited Feb. 22, 2012). Additionally, the CWC offers legislatures a venue “to share water-related legislation, and to vet and shape that legislation among a coalition of organizations representing the broad interests of the Colorado water community.” *Id.*

40. Debi Brazzale, *Want to Kill a Bill Without Voting Against It? Study It*, STATE BILL COLO. (May 24, 2010), <http://www.statebillnews.com/2010/05/want-to-kill-a-bill-without-voting-against-it-study-it>.

41. H.R. 10-1188, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (re-revised version), available at [http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/4FD1374D97E6422B872576AA00693103?Open&file=1188\\_rer.pdf](http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/4FD1374D97E6422B872576AA00693103?Open&file=1188_rer.pdf).

42. Brazzale, *supra* note 40.

43. *Id.*

44. *Id.*

45. See Fender, *supra* note 22.

allows citizens to propose statutes and amendments to the Colorado Constitution.<sup>46</sup> All initiatives that meet statutory requirements are then subject to a majority vote in a general election.<sup>47</sup> If any amendment received majority support, it would become law.<sup>48</sup> Therefore, interested parties were allowed to propose amendments concerning river access on the November 2010 ballot for a vote.<sup>49</sup> For example, one initiative advanced by rafting advocates granted unfettered access by “allow[ing] anyone to use any portion of Colorado’s rivers.”<sup>50</sup> Ultimately, all of the twenty-plus ballot initiatives were inadequate because they “glossed over” complicated issues such as portage for individuals in emergency situations.<sup>51</sup> At the eleventh hour, however, the parties agreed to mediation and withdrew their initiatives.<sup>52</sup>

Jackson-Shaw and the two commercial rafting companies involved in the dispute, Three Rivers Outfitting and Scenic River Tours, agreed to a compromise that required the Governor’s Office and the Colorado Department of Natural Resources to mediate future disputes on a case-by-case basis.<sup>53</sup> This settlement formalized<sup>54</sup> the system of mediation that Colorado had used to resolve similar rafting disputes in the past.<sup>55</sup> As the agreement pertains to the Taylor River debate, the compromise stipulated that Jackson-Shaw must allow passage through its property.<sup>56</sup> The river outfitters, in turn, may only send a limited number of rafts “during certain hours” when water flow is high enough “to prevent damage to the river bottom.”<sup>57</sup> The compromise would also allow rafters to “briefly

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46. COLO. CONST. art. V, § 1; *see, e.g.*, *Billings v. Buchanan*, 555 P.2d 176 (Colo. 1976).

47. COLO. CONST. art. V, § 1.

48. *See id.*

49. *See Fender, supra* note 22.

50. Jessica Fender, *Critics Question Rafter’s Motives After Land, Money Talk*, DENVER POST (Apr. 7, 2010, 12:42 PM), <http://blogs.denverpost.com/thespot/2010/04/07/critics-question-rafters-motives-after-land-money-request/8051>.

51. Fender, *supra* note 35.

52. Fender, *supra* note 22.

53. *Id.*

54. The mediation process was previously informal because mediation was neither required nor sanctioned by the Governor’s Office or the Colorado Department of Natural Resources. *See id.*

55. *Id.*

56. *Id.*

57. *Id.* This requirement is significant because Colorado recognizes that ownership of land underlying streams is “vested in the proprietors of the adjoining lands.” *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

land on the banks to bypass dangerous obstacles in the river.”<sup>58</sup> Although it was an acceptable short-term solution for all parties involved, both sides acknowledged that the “piecemeal” compromise would not preclude them from taking future legal action to protect their interests.<sup>59</sup> The agreement was inadequate because it did nothing to determine whether rafters ultimately had the right to float through private land.<sup>60</sup> Therefore, a “cleaner decision” is necessary to bring finality to this longstanding dispute.<sup>61</sup>

Private landowners want greater protection of their right to exclude individuals from trespassing through their land, while recreational river users seek to increase access to Colorado’s rivers.<sup>62</sup> Specifically, commercial river rafters are unhappy with the current system where they “have to sit down and come to an agreement with every single land owner.”<sup>63</sup> Negotiations are often time-consuming and highly contentious because the private landowners believe they have the right to exclude the rafters, while the rafting companies argue they have unlimited access and do not need permission to raft.<sup>64</sup> Additionally, while the mediation agreements between landowners and private rafting companies resolve individual situations, they do nothing to solve the problem as a whole or establish a system of rules to resolve future disputes.

The current system of mediation also results in high transaction costs<sup>65</sup> to all parties involved.<sup>66</sup> Not only is it

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58. Fender, *supra* note 22. Overall, the agreement was reasonable to both sides. Scenic River Tours touted it as a “big victory” for rafters everywhere. *Id.* Jackson-Shaw initially sought to deny all rafters access to float through its property, but mediation led to a deal that ultimately would not have a “big impact” on Scenic River Tours’s commercial river rafting operations. *Id.* (noting that the only impact on Scenic River Tours’s daily operations was that it “may have to add a few more passengers to each boat” to comply with the terms of the agreement).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Fender, *supra* note 22 (quoting the owner and operator of Scenic River Tours, Matt Brown, on his concerns about how “ineffective” it is to come to a temporary agreement with every landowner); Paulson, *supra* note 28.

65. “Transaction costs include the costs of searching for an appropriate exchange partner, negotiating the terms of the deal, producing information, policing strategic behavior, and enforcing the contract.” Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1587 (2006).

66. See Fender, *supra* note 22.

inefficient for each commercial rafting company to negotiate with each individual landowner, but this system is also susceptible to serious collective action, free rider, and holdout problems.<sup>67</sup> For example, a holdout problem occurs when a private landowner, knowing that she is the final party required for approval to float, demands higher compensation for allowing rafters to cross her land. Collective action also poses challenges and results when multiple individuals would all benefit from a certain action, but “they will still not voluntarily act to achieve that common or group interest.”<sup>68</sup> Here, although society would benefit from the certainty of a clear standard, interested parties—“as rational, self-interested individuals”—will instead advance their own personal interests.<sup>69</sup> A cursory examination of the ballot initiatives proposed by various groups illuminates this. Rather than developing a comprehensive plan that furthers all common interests, the interested parties instead presented one-sided proposals that simply advanced their own interests.<sup>70</sup> Without a definite answer, these costs will continue to prevent efficient solutions.<sup>71</sup>

## II. *PEOPLE V. EMMERT*

*People v. Emmert*, decided in 1979, is the seminal case in Colorado concerning the right to float. In *Emmert*, a group of rafters touched the riverbed of private land without obtaining permission to raft through the property.<sup>72</sup> In determining whether the rafters were liable for criminal trespass, the Colorado Supreme Court held that the Colorado Constitution does not grant an affirmative right to float through private property without consent and found the defendant-rafters liable for criminal trespass.<sup>73</sup> However, the legislature complicated matters by amending the statutory definition of premises while the case was pending.<sup>74</sup> This legislative action raised questions concerning the proper interpretation of the court’s holding. An in-depth discussion of this case is important

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67. *See id.*

68. MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION 2* (Harvard Univ. Press 1965).

69. *Id.*

70. *See supra* text accompanying notes 49–52.

71. *See Fender, supra* note 22.

72. *People v. Emmert*, 597 P.2d 1025, 1026 (Colo. 1979).

73. *Id.* at 1028.

74. *Id.* at 1029–30.

because the court's opinion in *Emmert* is subject to opposing interpretations concerning the right to float.<sup>75</sup> To understand the court's holding, the *Emmert* facts are examined in detail below, followed by an outline of the majority and dissenting opinions.

### A. Facts

In the summer of 1976, the defendants—an adult and three children—went rafting on the Colorado River.<sup>76</sup> They entered the river from public land and traveled downstream.<sup>77</sup> After the river passed the town of Parshall,<sup>78</sup> it bisected the Ritschard Cattle Company ranch.<sup>79</sup> The river varied in depth from a few inches to several feet,<sup>80</sup> and as a result, the defendants' rafts occasionally touched the river bottom on the Ritschard Cattle Company's property.<sup>81</sup> However, while on the private property, the defendants never left their rafts or touched the shoreline or banks of the river.<sup>82</sup>

Although they floated through private property, the defendants had not asked for, nor received, permission from the property owner.<sup>83</sup> After an employee informed the ranch owner of the defendants' activity, the ranch owner extended barbed wire across the river to stop the rafters.<sup>84</sup> The owner informed the defendants that they were trespassing on private property and had them arrested and charged with third-degree criminal trespass.<sup>85</sup> The river had previously been used for recreational rafting but, at the time of the incident, "No Trespassing" signs were posted.<sup>86</sup>

At trial, both parties stipulated that the river was "non-navigable"<sup>87</sup> and had therefore not been used "for commercial

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75. Compare Hill, *supra* note 5, with Potter et al., *supra* note 3.

76. Gast, *supra* note 4, at 247.

77. *Emmert*, 597 P.2d at 1026.

78. Gast, *supra* note 4, at 247.

79. *Emmert*, 597 P.2d at 1026.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* Regarding the term "navigable," Professor Robin Kundis Craig notes: Colorado retains a "commercial use" definition of "navigable waters." However, the Colorado Supreme Court has declared most streams in Colorado non-navigable: "the natural streams of this state are, in fact,

or trade purposes of any kind.”<sup>88</sup> The defendants conceded that they floated on the property “without the owner’s consent”<sup>89</sup> and were, therefore, in violation of Colorado’s third-degree criminal trespass statute.<sup>90</sup> They argued, however, that article XVI, section 5 of the Colorado Constitution—which requires that “every natural stream, . . . within the state of Colorado, . . . [be] dedicated to the use of the people of the state”—grants the right to float through private property.<sup>91</sup> Additionally, in response to the lawsuit, the legislature amended the criminal trespass statute to clarify the definition of “premises.”<sup>92</sup> The amendment stated that “premises,” in this context, means “the stream banks and beds of any non-navigable fresh water streams flowing through such real property.”<sup>93</sup> This clarification was significant because it impacted whether the water overlying a streambed could be classified as “premises” in the trespass context.<sup>94</sup>

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nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and . . . no stream of any importance whose source is without those boundaries, flows into or through this state.” As a result, there is almost no case law further explicating the definition of “navigable water.”

Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53, 117–18 (2010) (alteration in original) (footnotes omitted) (quoting *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912), *overruled by* *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982)).

88. *Emmert*, 597 P.2d at 1026; *see also* Hill, *supra* note 5, at 342 (“For purposes of public use of waters, states may adopt different and less stringent tests of navigability. Some states define navigability for public use based on the state constitution or statutory law. Some states recognize a right to float if the stream accommodates recreational watercraft . . . .”) (footnotes omitted); Gast, *supra* note 4, at 263 (explaining that a “declaration that all of the state’s streams, or those with certain characteristics, *are navigable* opens them up to public use . . . [and] the riparian landowner’s uninhibited use of the stream is restricted”) (emphasis added).

89. *Emmert*, 597 P.2d at 1027.

90. “A person commits the crime of third degree criminal trespass if he unlawfully enters or remains in or upon premises. Third degree criminal trespass is a class 1 petty offense.” *Id.* at 1026 (quoting COLO. REV. STAT. § 18-4-504 (1973)).

91. *Id.* at 1028.

92. *Id.* at 1029–30.

93. *Id.* at 1030 (quoting COLO. REV. STAT. § 18-4-504.5 (1977)).

94. *See id.* at 1026–27.

*B. The Majority Opinion*

The case ultimately turned on the court's interpretation of article XVI, section 5 of the Colorado Constitution.<sup>95</sup> This section, entitled "Water of streams public property," falls under "Irrigation" and states that "[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation."<sup>96</sup> In a split decision, the court ruled that the Colorado Constitution does not grant a public access right to Colorado's rivers.<sup>97</sup>

The court rejected the defendants' argument that article XVI, section 5 of the Colorado Constitution provided an affirmative right to float through private property. Instead, the court found that the provision "simply and firmly establishes the right of appropriation" as opposed to "assur[ing] public access to waters."<sup>98</sup> Relying on *Hartman v. Tresise*, the court held that "the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands."<sup>99</sup>

The court closely scrutinized the text of article XVI, section 5 of the Colorado Constitution, concluding that the Colorado Legislature intended that section 5 "preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded."<sup>100</sup> The majority noted that, because article XVI was titled "Mining and Irrigation" and section 5 was under the heading "Irrigation,"<sup>101</sup> section 5 applied to water appropriation for irrigation purposes only, as

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95. *Id.* at 1026.

96. COLO. CONST. art. XVI, § 5.

97. *Emmert*, 597 P.2d at 1026.

98. *Id.* at 1028. Oxford English Dictionary defines "appropriation" as "[t]he assignment of anything to a special purpose." *Appropriation, n.*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/9877?redirectedFrom=appropriation#eid> (last visited Jan. 26, 2012). For example, water can be appropriated for irrigation purposes.

99. *Emmert*, 597 P.2d at 1027 (citing *Hartman v. Tresise*, 84 P. 685 (Colo. 1905)).

100. *Id.* at 1028. Essentially, the court held that section 5 "does not create any public right to make non-consumptive surface uses of water such as floating, but instead recognizes only the right to appropriate water for consumptive uses," meaning the public has a right to use the water for activity such as irrigation and other consumptive uses. Gast, *supra* note 4, at 251 n.20.

101. *Emmert*, 597 P.2d at 1028.

opposed to providing a public right for recreational use.<sup>102</sup> Ultimately, this provision granted the public the right to use Colorado's waters for consumptive use, which was the only protection that the legislature intended.<sup>103</sup> The majority reiterated that "[i]f the increasing demand for recreational space on the waters . . . is to be accommodated, the legislative process is the proper method to achieve this end."<sup>104</sup>

The *Emmert* court also relied on section 41-1-107 of the Colorado Revised Statutes, which provides that "[t]he ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft."<sup>105</sup> The majority acknowledged that the common-law rule—*cujus est solum, ejus est usque ad coelum*, which stands for the ancient rule that "he who owns the surface of the ground has the exclusive right to everything which is above it"—is codified in section 41-1-107.<sup>106</sup> Therefore, the law vests the property owner with the "right of control [over] everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations."<sup>107</sup>

While the *Emmert* court alluded to other potential solutions to the access debate,<sup>108</sup> it rejected them without further examination because it saw no reason to stray from the common-law doctrine announced in *Hartman*.<sup>109</sup> Additionally, the court concluded that any alteration of the *Hartman* approach is best left to the legislature because "it is a legislative and not a judicial function to make any needed change."<sup>110</sup> For example, *Emmert* explicitly rejected the Wyoming Supreme Court's approach in *Day v. Armstrong*,<sup>111</sup> which held that the public has a right to float on the surface

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102. *Id.*

103. *Id.*

104. *Id.* at 1029.

105. *Id.* at 1027 (quoting COLO. REV. STAT. § 41-1-107 (1973)).

106. *Id.*

107. *Id.*

108. *Id.* ("We recognize the various rationales employed by courts to allow public recreational use of water overlying privately owned beds, *i.e.*, (1) practical considerations employed in water rich states such as Florida, Minnesota and Washington; (2) a public easement in recreation as an incident of navigation; (3) the creation of a public trust based on usability, thereby establishing only a limited private usufructary right; and (4) state constitutional basis for state ownership.").

109. *Id.*

110. *Id.* (quoting *Smith v. People*, 206 P.2d 826, 832 (Colo. 1949)).

111. 362 P.2d 137 (Wyo. 1961).

waters of rivers that run through private property for recreational purposes.<sup>112</sup> The *Emmert* majority acknowledged that the Wyoming Supreme Court reached its conclusion based on constitutional language similar to Colorado's,<sup>113</sup> but because the Wyoming Constitution makes no reference to appropriation rights, the Wyoming Legislature intended to make "a stronger statement of the public's right to recreational use" than the Colorado Legislature.<sup>114</sup> The court stressed that appropriation rights should not be twisted to "subvert a riparian bed owner's common law right to the exclusive surface use of waters bounded by his lands."<sup>115</sup>

To further support its interpretation, the *Emmert* court held that sections 33-1-112(g),<sup>116</sup> 33-41-101,<sup>117</sup> and 33-6-123(1)<sup>118</sup> of the Colorado Revised Statutes supported its reading that the legislature did not intend to "unrestrictedly open" the waters of the state to the public.<sup>119</sup> Lastly, the majority concluded its opinion by merely noting that the

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112. *Emmert*, 597 P.2d at 1028.

113. "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." WYO. CONST. art. VIII, § 1.

114. *Emmert*, 597 P.2d at 1028.

115. *Id.* at 1029.

116. *Id.* ("[The Wildlife commission may enter] into agreements with landowners for public hunting and fishing areas. Such agreements shall be negotiated by the commission or its authorized agent and shall provide that if the landowner opens the land under his control to public hunting and fishing, the commission shall reimburse him in an amount to be determined by the parties to the agreement. Under the agreement the commission shall control public access to the land to prevent undue damage to the land. In no event shall the commission be liable for damages caused by the public other than those specified in the agreement.") (quoting COLO. REV. STAT. § 33-1-112(g) (1973)).

117. *Id.* ("The purpose of this article is to encourage owners of land within rural areas to make land and water areas available for recreational purposes by limiting their liability toward persons entering thereon for such purposes.") (quoting COLO. REV. STAT. § 33-41-101 (1973)).

118. *Id.* ("It is unlawful for any person to enter upon the privately owned land of any other person, firm, or corporation to hunt or fish without first obtaining permission from the owner or person in charge. A violation of the provisions of this section is a misdemeanor and, upon conviction thereof, shall be punished as provided in section 33-6-127.") (quoting COLO. REV. STAT. § 33-6-123(1) (1973)); *id.* at 1029-30 ("As used in sections 18-4-503 and 18-4-504, 'premises' means real property, buildings, and other improvements thereon, and the stream banks and beds of any non-navigable fresh water streams flowing through such real property.") (quoting COLO. REV. STAT. § 18-4-504.5 (1977)).

119. *Id.* at 1029.

legislature amended the criminal trespass statute to clarify the definition of premises.<sup>120</sup>

In sum, the court found that the language and structure of the Colorado Constitution and statutes evidenced legislative intent that article XVI, section 5 of the Colorado Constitution was not meant to grant the public unrestricted access to all of Colorado's rivers and streams.<sup>121</sup> Additionally, the court reaffirmed its holding in *Hartman* that land underlying non-navigable streams is subject to the private ownership vested in the owner of the adjoining land.<sup>122</sup> This rule, in combination with section 41-1-107—that the space above waters is “vested in the several owners of the surface beneath”—did not grant the public the right to float on waters overlying private land.<sup>123</sup> Finally, the majority declined to follow the modern trend adopted in neighboring states granting the right to recreational use of the states' waters based on similar constitutional provisions.<sup>124</sup>

### C. *The Dissent*

Justice James Groves was one of two dissenters in *Emmert*. Justice Groves took issue with the court's “narrow construction” of article XVI, section 5.<sup>125</sup> The justice opined that the appropriation clause “functions as a caveat” establishing appropriation as “superior to other uses” but that the clause does not bar other potential uses, such as recreation.<sup>126</sup> Justice Groves reasoned that if the legislature intended section 5 to apply only to appropriation, it would have clearly said so.<sup>127</sup>

Next, Justice Groves argued that *Hartman* is distinguishable from *Emmert*.<sup>128</sup> The issue in *Hartman* was whether a statute that provided an easement for a public right to fish in any stream was constitutional.<sup>129</sup> The *Hartman* court

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120. See *id.* But see Potter et al., *supra* note 3, at 475–80 (arguing that COLO. REV. STAT. § 18-4-504.5 “support[s] the concept of a public right to float the navigable rivers and streams of the state of Colorado”).

121. *Emmert*, 597 P.2d at 1030.

122. *Id.*

123. *Id.* at 1027–30 (quoting COLO. REV. STAT. § 41-1-107 (1973)).

124. *Id.* at 1027.

125. *Id.* at 1030 (Groves, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

concluded that the statute “constituted a taking of private property without compensation.”<sup>130</sup> Therefore, because the law in *Hartman* was held invalid, “[n]o determination as to the rights to use of streams in the absence of a trespass to land was necessary.”<sup>131</sup> More importantly, the *Hartman* opinion concerning article XVI of the Colorado Constitution was “merely *dicta*, not precedent.”<sup>132</sup> Therefore, any language in the *Hartman* court’s ruling that concerns the public’s right to float on rivers through private property was not controlling.<sup>133</sup>

Regarding the *Emmert* majority’s reliance on the common-law *ad coelum* doctrine, Justice Groves opined that “it is not clear that *Hartman* adopted this rule.”<sup>134</sup> The justice reasoned that the language in *Hartman* relied on by the *Emmert* majority is susceptible to multiple interpretations.<sup>135</sup> Therefore, it was imprudent for the *Emmert* majority to adopt an expansive common-law doctrine from a case that dealt with fishing rights and had little in common with the facts at hand.

Justice James Carrigan penned the second dissenting opinion in *Emmert*. Justice Carrigan echoed Justice Groves’s sentiment but took special issue with the majority overstepping its bounds by unnecessarily deciding a “major constitutional issue of far-ranging implications.”<sup>136</sup> Justice Carrigan’s opinion focused on the pragmatic consequences of the majority’s constitutional interpretation.<sup>137</sup> Most importantly, he reasoned, “no individual ‘owns’ the beauty or buoyancy of [Colorado’s] streams.”<sup>138</sup> Therefore, the *Emmert* majority’s utilization of “medieval concepts” to secure “unlimited fee simple title[s]” for wealthy property owners is not appropriate in the modern-day access debate.<sup>139</sup> The court’s split reveals the difficulty in finding an adequate solution.

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130. *Id.* at 1031.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (“This language could just as well mean that the court concluded that the defendant could not fish without trespassing, and that since trespassing was forbidden, so was fishing.”).

136. *Id.* at 1032 (Carrigan, J., dissenting).

137. *Id.*

138. *Id.*

139. *Id.* at 1033.

### III. THE DIFFERING VIEWPOINTS

This Part will examine the current state of the law surrounding the right to float on rivers through private property and discuss the Colorado General Assembly's response to the multiple interpretations of *Emmert*.<sup>140</sup> Section A discusses the legislative and executive responses to the court's holding. Section B examines the private landowners' argument for denying the right to float through their property. Finally, Section C analyzes the argument in favor of a right to float through private property.

#### A. *The Current State of the Law*

In response to the *Emmert* litigation, the General Assembly enacted several statutes aimed at clarifying criminal trespass liability.<sup>141</sup> In section 18-4-504.5 of the Colorado Revised Statutes, the legislature defined "premises" as "real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property."<sup>142</sup> Both proponents and opponents of the right to float cite this amendment to support their respective arguments.<sup>143</sup> Opponents argue that, because *Emmert* was decided with the premises definition set forth in section 18-4-504.5 in mind, this amendment does nothing to alter the law.<sup>144</sup> At the same time, proponents argue that the statute clarifies that rafting does not constitute a trespass because water is explicitly excluded from the definition.<sup>145</sup>

Unfortunately, the Colorado Legislature offered little guidance on how this modified definition affected the right to float after the *Emmert* decision.<sup>146</sup> As a result, the public asked

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140. See Hill, *supra* note 5; Potter et al., *supra* note 3.

141. E.g., COLO. REV. STAT. § 18-4-504 (1977) ("A person commits the crime of third degree criminal trespass if he unlawfully enters or remains in or upon premises. Third degree criminal trespass is a class 1 petty offense."); see Hill & Potter, *supra* note 15, at 17.

142. COLO. REV. STAT. § 18-4-504.5 (1977).

143. Hill, *supra* note 5; Potter et al., *supra* note 3; see *infra* Part III.B-C.

144. See Hill, *supra* note 5, at 338.

145. Potter et al., *supra* note 3, at 476.

146. Compare *People v. Emmert*, 597 P.2d 1025, 1029-30 (Colo. 1979) (holding that despite clarifying the meaning of "premises," section 18-4-504.5 does not approve a public right to use rivers floating through private land), *with* Potter et

the Colorado Attorney General, Duane Woodard, to clarify the purpose and effect of the modified definition.<sup>147</sup> Attorney General Woodard concluded that the legislature intended that “one who floats upon the waters of a river or stream over or through private property, without touching the stream banks or beds, does not commit a criminal trespass.”<sup>148</sup> Next, when considering whether section 18-4-504.5 authorizes private landowners “to prohibit . . . floating or boating,” Attorney General Woodard concluded that the phrase “stream banks and beds,” as used in the statute, does not include the water itself.<sup>149</sup> Therefore, it follows that section 18-4-504.5 does not authorize private landowners to prevent the public from floating through their land.<sup>150</sup> In regard to the *Emmert* majority’s reference to section 18-4-504.5 in its opinion, Attorney General Woodard stated that section 18-4-504.5 could not apply to the court’s decision because “[t]he majority did not analyze or interpret” the section.<sup>151</sup> Attorney General Woodard’s opinion is significant because it clarifies the definitions at issue and forms much of the backbone of the current debate discussed in the next Section.

### B. *The Private Landowners’ Claim*

To justify excluding rafters from floating on rivers running through their property, private landowners in Colorado often cite *Emmert* for the proposition that there is “no affirmative right to float”<sup>152</sup> because the court concluded that “the land underlying non-navigable streams is the subject of private ownership.”<sup>153</sup> Additionally, opponents of the right to float claim that the amended definition of “premises” in section 18-4-504.5 does nothing to change the *Emmert* holding because the

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al., *supra* note 3, at 476 (arguing that the legislature “deliberately amended the trespass statute in order to approve of floating through private property”).

147. The request for an opinion was filed by Hamlet J. Barry III, the Executive Director of the Department of Natural Resources. Purpose & Effect of C.R.S. 1973, 18-4-504.5 (1978 repl. vol. 8), 1983 WL 167506, at \*1 (Op. Colo. Att’y Gen. Aug. 31, 1983) [hereinafter Woodard Opinion].

148. *Id.* at \*5.

149. *See id.* at \*1–2.

150. *See* COLO. REV. STAT. § 18-4-504.5 (1977); Travis H. Burns, Note, *Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*, 5 WYO. L. REV. 561, 587 (2005).

151. Woodard Opinion, *supra* note 147, at \*3.

152. Hill, *supra* note 5, at 332.

153. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

court was aware of the amendment yet still concluded that the defendants were in violation of the Colorado Criminal Trespass statute.<sup>154</sup> Further, section 18-4-504.5 “contains no express grant of access” to streams.<sup>155</sup> Despite criticisms of the *ad coelum* doctrine,<sup>156</sup> private landowners argue that the *Emmert* court held that section 41-1-107 codifies the doctrine and that the legislature must repeal the statute to abolish it.<sup>157</sup> Therefore, private landowners argue that the current statute grants them the right to exclude rafters from the water running over their property.<sup>158</sup>

In response to Attorney General Woodard’s opinion, private landowners note that this opinion is not binding legal precedent.<sup>159</sup> Furthermore, because it does not address “whether an affirmative right to float exists, it cannot be relied upon as a basis for an affirmative right to float.”<sup>160</sup> Private landowners argue that Attorney General Woodard’s opinion merely states that section 18-4-504.5 does not provide a legal basis for private landowners to exclude rafters from floating through their lands but does not grant the right to float either.<sup>161</sup> Finally, opponents of the right to float point out that “[n]o Colorado statute expressly confers a right on the public to float through private property.”<sup>162</sup> Therefore, the private landowners argue that the public has no right to float through the rivers that run alongside private land<sup>163</sup> and that any statute that would allow access for river rafters through private land would infringe upon their recognized property interest and constitute a taking.<sup>164</sup>

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154. *Id.* at 1030.

155. Hill, *supra* note 5, at 338.

156. *See Emmert*, 597 P.2d at 1030 (Carrigan, J., dissenting).

157. *See Emmert*, 597 P.2d at 1027 (“The ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft.”) (quoting COLO. REV. STAT. § 41-1-107 (1973)); Hill, *supra* note 5, at 336–37.

158. Hill, *supra* note 5, at 336–37.

159. *Id.* at 335.

160. *Id.*

161. *Id.*

162. Hill & Potter, *supra* note 15, at 17.

163. *Id.*

164. *Id.* at 17–18; *see also* COLO. CONST. art II, § 15; *infra* Part IV.B–C.

C. *The River Rafters' Claim*

While some private property owners believe that the law is clear, advocates of the right to float argue that the law is “about as clear as the water of a mighty river at the height of spring runoff.”<sup>165</sup> They assert that *Emmert's* holding is limited to the issue of “criminal trespass from recreational use of a non-navigable river.”<sup>166</sup> However, “what remains unresolved in Colorado is whether boaters who float through private property . . . without touching the beds and banks . . . are subject to civil liability for trespass.”<sup>167</sup>

Right-to-float advocates make strong policy arguments against a decision that they believe is no longer applicable in modern society.<sup>168</sup> For example, access proponents feel that *Emmert* is out of touch with the modern trend for river access because Colorado has “parted ways with neighboring states”<sup>169</sup> that permit a right to float and have nearly identical constitutional provisions.<sup>170</sup> The uncertainty in Colorado law does not exist elsewhere. Neighboring states have clearly outlined who has the right to float rivers running through private land and under what circumstances. It is unsound policy for a popular whitewater-rafting destination like Colorado to have the “most ambiguous” river access law of any western state.<sup>171</sup> Additionally, proponents cite the law’s financial harm to Colorado’s economy and how denying this right jeopardizes the \$150 million per year industry.<sup>172</sup> To support this, access proponents argue that the state legislature “reacted” to the *Emmert* decision by amending the criminal trespass law to clarify the legislature’s intent.<sup>173</sup> While the *Emmert* court did not adequately address exactly what effect

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165. Hill & Potter, *supra* note 15, at 19. In a partial ruling on access to the Gunnison River in 2001, a district court acknowledged that Colorado law is in a state of flux. *Id.*

166. Potter et al., *supra* note 3, at 458 (emphasis omitted).

167. *Id.*

168. Hill & Potter, *supra* note 15, at 18.

169. *Id.* at 19; see MONT. CONST. art. IX, § 3(3) (“All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.”); WYO. CONST. art. VIII, § 1 (“The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.”).

170. Hill & Potter, *supra* note 15, at 19.

171. See Burns, *supra* note 150, at 602.

172. COLO. RIVERS OUTFITTERS ASS’N, *supra* note 17, at 6.

173. Hill & Potter, *supra* note 15, at 19.

section 18-4-504.5 had on the public's right to access,<sup>174</sup> Attorney General Woodard found that the *Emmert* rationale applies only in criminal trespass situations and does not provide a civil remedy.<sup>175</sup> Access proponents argue that Attorney General Woodard's opinion supports their argument that *Emmert* did not prohibit a person's right to float over private property "when [the] banks and beds are not touched by the floater."<sup>176</sup>

#### IV. THE NEED FOR LEGISLATIVE CHANGE GRANTING THE RIGHT TO FLOAT

Considering these opinions and looking forward, the Colorado Legislature should balance the interests of private landowners and river rafters by allowing public access to waters that overlie private land. Throughout the years, disputes between property owners and recreational river users have threatened the entire commercial rafting economy.<sup>177</sup> Because it is unrealistic to negotiate a settlement with every single property owner, clarity is needed to eliminate disputes resulting from the *Emmert* decision. This Part will address the rationale for legislation granting a public access right. Section A examines the public policy reasons that support the right to float. Section B analyzes the potential arguments against allowing the right to float over private land. Finally, Section C addresses these concerns by presenting the counterarguments to private landowners' concerns. Section C further argues that the Colorado Legislature should clarify this unsettled law by establishing a limited right to float in Colorado.

##### A. *Public Policy Supports Allowing a Right to Float*

Public policy supports legislative action granting a limited right to float because the right benefits the commercial rafting industry, assuages environmental concerns, and is consistent with the modern and majority trend allowing access. First, commercial rafting brings a significant amount of income into

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174. Potter et al., *supra* note 3, at 478 ("[T]he Court did not interpret or apply the new statutory definition. The present statute addressing trespass contains the best and clearest statement by the legislature on whether boating is a trespass.")

175. See Hill & Potter, *supra* note 15, at 19.

176. Burns, *supra* note 150, at 587.

177. See Hill & Potter, *supra* note 15, at 19.

the state.<sup>178</sup> Colorado rafting companies both attract tourists and generate tax revenue.<sup>179</sup> In the last ten years alone, commercial rafting had a \$1.3 billion economic impact on Colorado.<sup>180</sup> Without the legislature clarifying the law, these companies are in jeopardy of being “sued out of business” if private landowners block passage on traditionally traveled streams that flow through their land.<sup>181</sup>

Typically, disputes between commercial rafting businesses and private landowners occur about once a year.<sup>182</sup> Therefore, every year that the legislature neglects to take action increases the risk that the entire industry could be “wipe[d] . . . off the map.”<sup>183</sup> Article X, section 2 of the Colorado Constitution requires the legislature to keep a balanced budget.<sup>184</sup> Because of how heavily the state relies on tax revenues from the rafting industry, the demise of that industry would have devastating economic implications. The state would lose not only the tax revenue associated with rafting businesses but also the economic benefits from rafting-based tourism. In order to maintain a balanced budget, the state would be forced either to find new sources of revenue or to decrease spending in other areas to offset these lost earnings.<sup>185</sup>

Additionally, there are serious pragmatic consequences if the legislature fails to act. If rafters are denied access to rivers that float over private land, the result will be an “intensification of use of those waters flowing through public lands.”<sup>186</sup> Currently, commercial rafting companies operate on twenty-seven different rivers in the state,<sup>187</sup> and “all of them go through private land.”<sup>188</sup> Because only public rivers will be available for rafting, river traffic will become focused on a smaller number of rivers.<sup>189</sup> With the same number of users focusing on a smaller supply of accessible whitewater rafting,

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178. See *supra* text accompanying notes 16–19.

179. See COLO. RIVERS OUTFITTERS ASS’N, *supra* note 17, at 1.

180. *Id.* at 5.

181. Fender, *supra* note 2.

182. *Id.*

183. Frosch, *supra* note 29.

184. COLO. CONST. art. X, § 2 (“The general assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year.”).

185. See COLO. RIVER OUTFITTERS ASS’N, *supra* note 17, at 6.

186. Gast, *supra* note 4, at 258.

187. See COLO. RIVER OUTFITTERS ASS’N, *supra* note 17, at 8.

188. Fender, *supra* note 22 (quoting Scenic River Tours owner Matt Brown).

189. Gast, *supra* note 4, at 258.

the higher “intensity of use” will decrease the benefit that each user experiences;<sup>190</sup> for example, this phenomenon of overuse occurred on the Colorado River, where excessive use resulted in “resource damage[ ] and serious aesthetic and sanitary problems.”<sup>191</sup> Therefore, denying access to any one of the twenty-seven rivers used by commercial outfitters would increase the pressure on the other rivers of the state and would potentially reduce the quality of our natural resources, similar to what happened on the Colorado River.<sup>192</sup> The legislature should “spread the impact of public recreational energy over as broad a range of resource facilities as possible”<sup>193</sup> and affirmatively grant the public access to float rivers through private land, so long as the rafters do not touch the beds or banks.<sup>194</sup>

In granting the public river-floating access, Colorado would join the majority of Western states.<sup>195</sup> Currently, Colorado is one of only two mountain states that have not affirmatively granted river access for recreational use, the other being North Dakota.<sup>196</sup> The concerns of allowing a limited right to float in these states have been addressed by various means.<sup>197</sup> These include, but are not limited to, interpreting constitutional provisions similar to Colorado’s as granting a right to float and classifying rivers as navigable to open them up to the public.<sup>198</sup> This has been accomplished through both judicial and legislative means.<sup>199</sup> Additionally, these states “have protected the right to float, notwithstanding those states’ unquestioned sensitivity to private property interests,” as recreational river

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190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Because property owners own the right to the streambed, touching the banks qualifies as a trespass. *See* Frosch, *supra* note 29.

195. *See id.* (“[Sixteen] Western states clearly allow rafters to float freely through private property without the threat of trespassing charges.”); *see also* Dustin Trowbridge Till, Comment, *The Right to Float on By: Why the Washington Legislature Should Expand Recreation Access to Washington’s Rivers and Streams*, 28 SEATTLE U. L. REV. 1093, 1109 n.136 (2005) (noting that only “[n]ine states have explicitly refused” to grant recreational access rights). These include Alabama, Colorado, Delaware, Georgia, Indiana, Louisiana, Kansas, Missouri, and Pennsylvania. *Id.*

196. Frosch, *supra* note 29 (noting that in North Dakota, rafting laws are less clear).

197. *See* Potter et al., *supra* note 3, at 486–92.

198. *Id.* at 490–92.

199. *Id.*

rafters have used the property with little to no damage to owners' interests.<sup>200</sup>

*B. Arguments Against Allowing Access*

Private property owners argue that the legislature “cannot give the public recreational access to rivers without taking away from landowners their newly recognized property interests and paying them just compensation.”<sup>201</sup> Landowners argue that the Colorado Constitution demands that “[p]rivate property shall not be taken or damaged, for public or private use, without just compensation.”<sup>202</sup> To assess the proper amount of compensation, the Colorado Constitution stipulates that a jury, or a commission of three landowners, should determine a reasonable amount to be awarded should the legislature affirmatively grant a right to float through their private property.<sup>203</sup> Landowners justify receiving compensation because *Emmert* “clearly enunciated the right of a riparian landowner to exclude the public from the surface and bed of streams overlying his land.”<sup>204</sup> Therefore, allowing access would infringe on the landowner’s right to exclude others.<sup>205</sup> Considering that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property,” it would be unfair to deny landowners their due compensation.<sup>206</sup> Private property advocates also point to the Colorado Legislature’s codification of the *ad coelum* doctrine at section 41-1-107.<sup>207</sup> If the legislature intrudes on this property interest and denies landowners the right to exclude persons from this property, it would constitute a taking.

Landowners also stress that they have an interest in protecting their land.<sup>208</sup> With an abundance of rivers available to raft in the state, landowners question why rafters need to

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200. Hill & Potter, *supra* note 15, at 19.

201. *People v. Emmert*, 597 P.2d 1025, 1033 (Colo. 1979) (Carrigan, J., dissenting) (internal quotation marks omitted).

202. COLO. CONST. art. II, § 15.

203. *Id.*

204. Hill, *supra* note 5, at 333.

205. *Id.* at 335.

206. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

207. COLO. REV. STAT. § 41-1-107 (2011).

208. *See Fender*, *supra* note 2.

pass through their property at all.<sup>209</sup> Large commercial rafting operations can create a nuisance for property owners, as boatfuls of rowdy individuals can lead to property damage as they float through.<sup>210</sup> In essence, property owners are “overrun with trespassers because trespassing is [so] popular.”<sup>211</sup>

Landowners also point to the rafting industry’s post-*Emmert* success as a sign that fears of a shutdown are overstated.<sup>212</sup> Additionally, legislative action is unnecessary because the system of case-by-case mediation, recently formalized by the Governor’s office following the Taylor River compromise, has “served Colorado well by balancing the needs” of both property owners and recreational river users.<sup>213</sup> Therefore, landowners argue that property owners’ concerns of the industry being shut down and damaging the Colorado economy are hyperbolic because under the current regime the commercial rafting industry has seen unprecedented growth.<sup>214</sup>

### C. *Response to Arguments Against Access*

Despite these arguments, the risk of failing to acknowledge a right to float has significant consequences. First, there is debate concerning whether the right granted in *Emmert* constitutes a protectable property interest that justifies compensation.<sup>215</sup> The property interest at stake in *Emmert* can be characterized as “the right to exclude.”<sup>216</sup> The Colorado Supreme Court, however, has “only recognized the right to make beneficial use of the water as a protected property right,”

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209. Jessica Fender, *Raft Rift Bill Floats Through Committee*, DENVER POST (Feb. 9, 2010, 10:40 AM), <http://blogs.denverpost.com/thespot/2010/02/09/raft-rift-bill-floats-through-committee/5126>.

210. *Id.*; see also Fender, *supra* note 2 (quoting one landowner’s concerns that rafters on his property are “splashing the water, going ‘wheel’ over the dams [he] created when [he] improved the fishing [and are] hit[ting his] bridge with paddles”).

211. Fender, *supra* note 2 (quoting a landowner).

212. See COLO. RIVER OUTFITTERS ASS’N, *supra* note 17, at 7–8.

213. Fender, *supra* note 22 (quoting John Leede, president of the Creekside Coalition, which represents 600 riverfront property owners).

214. See COLO. RIVER OUTFITTERS ASS’N, *supra* note 17, at 7–8. *But see* Hill & Potter, *supra* note 15, at 18 (discussing a 2001 river access dispute that caused a commercial rafting company to go out of business after a landowner denied the company access through its land).

215. Gast, *supra* note 4, at 260.

216. *Id.*

not the right to exclude.<sup>217</sup> The right to exclude is “not necessarily a positive right to make beneficial use.”<sup>218</sup> This interpretation is justified because it incentivizes and rewards individuals for improving land through positive rights.

Furthermore, the majority in *Emmert* did not assess whether action by the legislature allowing access would constitute a taking.<sup>219</sup> Rather, the Colorado Supreme Court suggested that the legislature is the proper avenue rather than the judiciary.<sup>220</sup> Language suggesting that any action would result in a taking was in the dissent and therefore is not law.<sup>221</sup> In regard to the *ad coelum* doctrine, this law is outdated and is not a reliable basis for justifying compensation. In fact, the doctrine has been rejected by the U.S. Supreme Court as having “no place in the modern world.”<sup>222</sup> Colorado should no longer be restricted by the dead hand of history, and it is time for Colorado to reevaluate the most “conservative [river access] policies in the [W]est.”<sup>223</sup>

In the alternative, assuming *Emmert* did grant a protectable property interest, the Colorado Supreme Court could rule that a public access law would not require compensation because any infringement on landowners’ rights is *de minimis*.<sup>224</sup> For example, both the Montana Supreme Court and the Ninth Circuit have found that statutes allowing recreational access to individuals on rivers running through private property do not justify compensation because the imposition on the property right at stake is *de minimis* when individuals merely float through a landowner’s property.<sup>225</sup> Public policy supports this conclusion because “mere[ ] . . . fleeting, non-consumptive use of the quality of buoyancy inherent in the water” should not amount to a compensable taking.<sup>226</sup> For example, where floaters only pass over a

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217. *Id.* at 260 n.43 (citing *Town of Sterling v. Pawnee Ditch Extension Co.*, 94 P. 339 (Colo. 1908)).

218. *Id.*

219. *See* *People v. Emmert*, 597 P.2d 1025 (Colo. 1979).

220. *Id.* at 1027.

221. *Id.* at 1033 (Carrigan, J., dissenting).

222. *United States v. Causby*, 328 U.S. 256, 261 (1946).

223. Burns, *supra* note 150, at 575.

224. *See* *Madison v. Graham*, 316 F.3d 867, 872 (9th Cir. 2002); Jas. Jeffrey Adams & Cody Winterton, *Navigability in Oregon: Between a River Rock and a Hard Place*, 41 WILLAMETTE L. REV. 615, 651 n.234 (2005).

225. Adams & Winterton, *supra* note 224, at 651 n.234.

226. *People v. Emmert*, 597 P.2d 1025, 1032 (Colo. 1979) (Carrigan, J., dissenting).

landowner's property, without touching the banks or streambed, and are mindful of the property owner's rights, the nuisance value is minimal.<sup>227</sup>

To assuage opponents of the right to float, the Colorado Legislature should establish a right to float that balances the interests of property owners with those of recreational users. The legislature should incorporate statutory limitations similar to those found in previous agreements between landowners and recreational rafters.<sup>228</sup> The hours and number of commercial rafts allowed through certain areas should be limited. This would decrease the likelihood that private property would be damaged. Also, the legislature should limit the rivers accessible to those that have historically been commercially rafted. These measures would protect the interests of property owners without unduly burdening rafting operations because rafting outfitters would be free to continue floating the rivers that they currently raft. These are practical solutions to private landowner concerns because they have been forged through decades of mediation between proponents of the right to float and those opposed.<sup>229</sup> Therefore, by incorporating past individual agreements into the legislative solution, the legislature can formulate a practical solution without risking opportunistic behavior by individuals through an inefficient case-by-case approach.

Additionally, Attorney General Woodard's opinion clarified that section 18-4-504.5 controls, not the *Emmert* decision.<sup>230</sup> Therefore, the legislature intended section 18-4-504.5 to "approve of floating through private property" because it specifically mentioned beds and banks in the new definition while purposefully omitting the word "water."<sup>231</sup> Because the *Emmert* majority did not address the definition of "premises" in its opinion, this amendment "contains the best and clearest statement by the legislature on whether boating is a trespass," and its intent clearly shows a desire to allow the right to float.<sup>232</sup>

Finally, private landowners' concern that it is unnecessary for rafters to have access to their private land when there is an

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227. Gast, *supra* note 4, at 260.

228. Fender, *supra* note 22.

229. *See id.*

230. Potter et al., *supra* note 3, at 478.

231. *Id.* at 476.

232. *Id.* at 478.

abundance of public streams in Colorado is unfounded. Every commercially rafted river in Colorado passes through private land at some point.<sup>233</sup> This showcases the opportunism that landowners can use to hold rafting companies hostage. Considering the significant positive economic impact that rafting has on the state, landowners can effectively hold an entire \$150 million industry hostage to secure more benefits and concessions.<sup>234</sup> To deny the right to float and force rafting companies to negotiate with every single landowner exposes companies to transactional costs that could ruin the most prosperous rafting industry in the country and harm an industry that is vital to Colorado's tourism economy.<sup>235</sup> This effect would trickle down to consumers and result in much higher costs to enjoy Colorado's natural streams or, even worse, completely destroy the ability to raft in Colorado.

#### CONCLUSION

To preserve the right to raft Colorado's rivers, the state legislature should pass a bill that would grant a limited right of access to float rivers through private property. The legislature, as *Emmert* suggested, is the proper avenue to resolve this issue because "[a]t some point, . . . you have to put your foot down and clarify . . . the right to float."<sup>236</sup> Because the right to exclude is a crucial part of the bundle of rights property owners enjoy, it is necessary to protect those rights within reasonable limits. At the same time, rafting is invaluable to Colorado. Benefits derive both from the revenue that the rafting industry brings to the state and the quality of life that it promotes. These interests need to be balanced properly. The Colorado Legislature should take action to clarify a murky law by establishing a public right to float that respects landowners' private property concerns but also ensures the continued economic prosperity of the rafting and tourism industry that is essential to Colorado's quality of life.

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233. See Fender, *supra* note 2.

234. See COLO. RIVER OUTFITTERS ASS'N, *supra* note 17, at 7.

235. See *id.*; Fender, *supra* note 2.

236. Frosch, *supra* note 29 (quoting a local raft guide).

# RESTORE COLORADO’S REPAIR DOCTRINE FOR CONSTRUCTION-DEFECT CLAIMS

MICHAEL F. LUTZ\*

*The “repair doctrine” is a common law defense to statutes of limitations. It protects defective product and property buyers who delay suit due to sellers’ promises to make repairs. Recently, in Smith v. Executive Custom Homes, the Colorado Supreme Court rejected the repair doctrine for construction-defect claims due to an apparent redundancy between the doctrine and the notice-and-opportunity-to-repair provision of Colorado’s Construction Defect Action Reform Act. This Note explains why Smith was wrongly decided.*

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## INTRODUCTION

Imagine that a little over two years ago one of your friends moved to Colorado and purchased a newly constructed home. Soon after she moved in, water flooded her basement. Dismayed, she called the builder, who assured her that the problem could easily be fixed—she just needed to clean the sump pump<sup>1</sup> that drained her basement. For a time this solution worked, but then the flooding recurred. Again, your friend called the builder, who this time installed a new, higher-capacity pump. Several more months passed uneventfully, but then one day the basement flooded again. This time the builder told her that, free of charge, he would install new drainage pipes, which almost certainly would solve the problem.<sup>2</sup>

Because your friend knew very little about home construction, she trusted the builder's judgment that the new pipes would fix the flooding. For a moment she thought of suing him, but she immediately rejected that drastic step—if she threatened to sue, she would have to hire someone else to make the repairs. Unfortunately, the new pipes did nothing to alleviate the flooding, which led to a mold problem that has made your friend's house unhealthy to live in and will cost several thousand dollars to fix. Recently her situation became

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1. "A sump pump is a small pump installed in the lowest part of a basement or crawlspace. Its job is to help keep the area under the building dry and to prevent it from flooding." Murray Anderson, *How Sump Pumps Work*, HOWSTUFFWORKS, <http://www.howstuffworks.com/home-improvement/plumbing/sump-pump.htm> (last visited Dec. 14, 2011).

2. This fact pattern is loosely based on *Amodeo v. Ryan Homes, Inc.*, 595 A.2d 1232, 1234, 1237–38 (Pa. Super. Ct. 1991).

even more dire when she received a letter from the builder in which he stated that he would not attempt to make any more repairs.

Your friend immediately consulted an attorney, but, to her surprise, a statute of limitations barred a lawsuit against the builder. Until recently, she could have argued that under the “repair doctrine” the builder should not be allowed to assert the statute of limitations because your friend reasonably relied on the builder’s promises that he would fix the flooding. However, in 2010 the Colorado Supreme Court eliminated this option because your friend supposedly had a “plain, speedy, [and] adequate remedy”: an elaborate statutory notice-of-claim procedure.<sup>3</sup> Unfortunately, by the time the lawyer explained the procedure to your friend, it was too late to invoke it.

Many courts apply<sup>4</sup> or reject<sup>5</sup> the repair doctrine with only cursory justifications. Likewise, although other authors have discussed the repair doctrine, none have collected and evaluated the arguments for and against it.<sup>6</sup> This Note begins to fill the gap in the existing scholarship. However, rather than attempting a comprehensive analysis, this Note focuses on *Smith II*, the Colorado Supreme Court decision that rejected the repair doctrine to the extent that it supposedly conflicts

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3. See *Smith v. Exec. Custom Homes, Inc. (Smith II)*, 230 P.3d 1186, 1192 (Colo. 2010), *rev'g Smith v. Exec. Custom Homes, Inc. (Smith I)*, 209 P.3d 1175 (Colo. App. 2009).

4. See, e.g., *Sierra Diesel Injection Serv. v. Burroghs Corp.*, 648 F. Supp. 1148, 1152–53 (D. Nev. 1987) (accepting the repair doctrine on the grounds that cases that have adopted it are “more persuasive,” without explaining why); *Weeks v. Slavick Builders, Inc.*, 180 N.W.2d 503, 507 (Mich. Ct. App. 1970) (applying the repair doctrine with no justification other than that it is supported by the “weight of authority”). For an encouraging counterexample, see *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 579–80 (Iowa 1990) (noting the variety of versions of the repair doctrine and “look[ing] to the purpose of the doctrine of equitable estoppel” when formulating its own version).

5. See, e.g., *Bobo v. Page Eng'g Co.*, 285 F. Supp. 664, 667 (W.D. Pa. 1967) (rejecting the repair doctrine without analysis on the basis of a single Pennsylvania state district court case); *K/F Dev. & Inv. Corp. v. Williamson Crane & Dozer Corp.*, 367 So. 2d 1078, 1080 (Fla. Dist. Ct. App. 1979) (resorting to the odd justification that the repair doctrine is out of step with “modern society”); *Tomes v. Chrysler Corp.*, 377 N.E.2d 224, 227 (Ill. App. Ct. 1978) (rejecting the repair doctrine solely on the authority of a single non-controlling federal case that applied the law of a different state).

6. For a short but thorough overview of the repair doctrine that includes limited commentary on the doctrine, see Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345, 386–90 (2003). For a short discussion of the repair doctrine in Colorado pre-*Smith*, see Ronald M. Sandgrund & Scott F. Sullan, *Statutes of Limitations and Repose in Construction Defect Cases* (pt. 2), COLO. LAW., June 2004, at 67, 69.

with the notice-and-opportunity-to-repair provision<sup>7</sup> of Colorado's Construction Defect Action Reform Act (CDARA). This Note argues that *Smith II* was wrongly decided.

Part I of this Note first surveys other jurisdictions' formulations of the repair doctrine and then combines the best aspects of these formulations into a proposed "compromise" doctrine. Part II illustrates why the compromise doctrine is desirable. The remainder of this Note focuses on Colorado. Part III summarizes relevant aspects of Colorado construction-defect law and the *Smith II* opinion. Finally, Part IV explains why *Smith II* was wrongly decided and argues that it should be overruled or at least limited to its facts.

## I. THE PROPOSED COMPROMISE DOCTRINE

A court considering the repair doctrine as a matter of first impression is not faced with a simple choice of either adopting or rejecting the doctrine but rather has a wide range of options. The doctrine has two main branches: repair tolling and repair estoppel. Under repair tolling, the limitations period ceases to run during the time that the seller<sup>8</sup> promises to make repairs.<sup>9</sup> In contrast, repair estoppel deprives the seller of the ability to assert a statute-of-limitations defense when, due to his repair promises, it would be unjust to allow him<sup>10</sup> to do so.<sup>11</sup> This Part defends a particular version of repair estoppel, referred to later in this Note as "the compromise doctrine," as superior to either repair tolling or other formulations of repair estoppel.

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7. COLO. REV. STAT. § 13-20-803.5 (2011).

8. In rare cases the repair doctrine applies outside of a buyer-seller relationship. *See, e.g.,* *Carlson v. Ray Geophysical Div.*, 481 P.2d 327, 328 (Mont. 1971) (defendant's geophysical tests for oil caused plaintiff's spring to cease flowing; defendant claimed to have plugged the hole in the spring); *Nat'l Zinc Co. v. Crow*, 103 P.2d 560, 560-61 (Okla. 1940) (defendant's zinc plant killed many of plaintiff's colts; after plaintiff threatened to sue, defendant suggested a series of tests to determine whether fumes from the zinc plant killed the colts). However, for simplicity, when this Note discusses the repair doctrine at a theoretical level, the injured party is referred to as the "buyer" and the party promising repairs is referred to as the "seller."

9. *See Lantzy v. Centex Homes*, 73 P.3d 517, 523 (Cal. 2003).

10. For simplicity's sake, the buyer arbitrarily will be referred to with feminine pronouns and the seller with masculine pronouns.

11. *See Lantzy*, 73 P.3d at 532.

### A. *Repair Tolling*

Some courts have recognized the existence of both repair tolling and repair estoppel,<sup>12</sup> but other courts conflate the two, either when deciding whether to adopt the repair doctrine or when applying the doctrine to specific cases.<sup>13</sup> For good reason, courts that differentiate between the two branches of the doctrine are significantly more likely to reject repair tolling than they are to reject repair estoppel.<sup>14</sup>

Some early repair tolling cases held that attempted repairs prevented buyers' causes of actions from accruing<sup>15</sup> in the first instance. These courts reasoned that attempted repairs are experiments through which a buyer and seller collaboratively determine whether a defect can be fixed, and thus whether a lawsuit is necessary.<sup>16</sup> Other courts rejected this argument because, rather than having no claim prior to the conclusion of the repair efforts, the buyer was dissuaded from pursuing her

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12. *See id.* ("Equitable tolling and equitable estoppel are distinct doctrines."); *Richard O'Brien Cos. v. Challenge-Cook Bros.*, 672 F. Supp. 466, 470–71 (D. Colo. 1987).

13. *See, e.g., Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 473 (Minn. Ct. App. 2006) ("[A]ssurances may toll statutes of limitations on the theory of equitable estoppel."); *Amodeo v. Ryan Homes, Inc.*, 595 A.2d 1232, 1237 (Pa. Super. Ct. 1991) (quoting *A.J. Aberman, Inc. v. Funk Bldg. Corp.*, 420 A.2d 594, 602 (Pa. Super. Ct. 1980)) ("[T]he repair doctrine would seem nothing more than a form of estoppel . . ."); *see also Garvin, supra* note 6, at 389 (noting that courts often conflate repair tolling and estoppel by repair).

14. *See, e.g., Standard Alliance Indus., Inc. v. Black Clawson Co.*, 587 F.2d 813, 821–22 (6th Cir. 1978) (rejecting repair tolling as inconsistent with the statute of limitations, but noting that Ohio courts might apply repair estoppel); *City of Bedford v. James Leffel & Co.*, 558 F.2d 216, 217–18 (4th Cir. 1977) (same; applying Virginia law); *Lantzy*, 73 P.3d at 522–34 (rejecting tolling of statute of repose as inconsistent with the text of the statute, but accepting that, on other facts, estoppel could apply); *New Eng. Power Co. v. Riley Stoker Corp.*, 477 N.E.2d 1054, 1059 (Mass. App. Ct. 1985) (same); *see also Jacqueline R. Kanovitz, The Seller Fiddles and the Clock Ticks: Seller's Cure and the U.C.C. Statute of Limitations*, 60 NOTRE DAME L. REV. 318, 341–42 (1985) (discussing courts' interpretations of the U.C.C. statute of limitations); *cf. Colo.-Ute Elec. Ass'n v. Envirotech Corp.*, 524 F. Supp. 1152, 1156 (D. Colo. 1981) (accepting repair tolling, but also reaching the conclusion that the statute of limitations did not apply on the alternate grounds of repair estoppel).

15. A cause of action "accrues" when it becomes enforceable. BLACK'S LAW DICTIONARY 23 (9th ed. 2009).

16. *See Woodward-Wight & Co. v. Engel Land & Lumber Co.*, 49 So. 719, 724 (La. 1909); *Felt v. Reynold's Fruit Evaporating Co.*, 18 N.W. 378, 379 (Mich. 1884); *Heath v. Moncrieff Furnace Co.*, 156 S.E. 920, 922 (N.C. 1931); *Sierra Diesel Injection Serv. v. Burroghs Corp.*, 648 F. Supp. 1148, 1152–53 (D. Nev. 1987) (no breach of warranty until seller ceased repair efforts).

existing claim.<sup>17</sup> Furthermore, if the buyer is aware that a lawsuit may be necessary to resolve the dispute, it is unclear why the law should protect the buyer despite her delay filing suit or failure to secure from the seller a waiver or extension of the statute of limitations.<sup>18</sup>

The modern view of repair tolling is that it does not prevent the buyer's cause of action from accruing but rather stops the statutory period from running during the time that the seller promises repairs.<sup>19</sup> However, this version of repair tolling is also flawed because it is inflexible. Repair tolling, unlike repair estoppel,<sup>20</sup> does not take into account whether a buyer has diligently pursued her claim after the seller's repair efforts cease. Repair attempts that end early in the statutory period would delay the bar on filing suit, even if a large amount of time remained: "[T]he tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred."<sup>21</sup> Repair tolling also fails to take into account a seller's culpability, so that even a seller who undeniably acted in good faith may nonetheless be deprived of the protection of the statute of limitations.<sup>22</sup> Again, repair estoppel avoids this pitfall.<sup>23</sup>

### B. *Repair Estoppel: A Proposed Doctrine*

The central theme of repair estoppel is that, under some circumstances, it would be unjust to allow a seller to assert a statute of limitations or repose when the seller has made repair promises to the buyer that led the buyer not to sue until after

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17. See, e.g., *Carlson v. Ray Geophysical Div.*, 481 P.2d 327, 329 (Mont. 1971); *Fairbanks, Morse & Co. v. Smith*, 99 S.W. 705, 707 (Tex. Civ. App. 1907) ("[T]he fact remains that [the buyer] might have sued at once for the breach of the warranty . . .").

18. See generally G. Van Ingen, Annotation, *Validity of Contractual Waiver of Statute of Limitations*, 1 A.L.R.2D 1445 (1948) (providing background on validity of contractual waiver of statutes of limitations); Sally A. Smith, Annotation, *Validity of Contractual Provision Establishing Period of Limitations Longer than That Provided by State Statute of Limitations*, 84 A.L.R.3D 1172 (1978) (providing background on validity of contractual provisions extending statutes of limitations).

19. See *Lantzy*, 73 P.3d at 523–25, 523 n.5 (describing and rejecting repair tolling).

20. See *infra* notes 50–60 and accompanying text.

21. *Lantzy*, 73 P.3d at 523; see also Garvin, *supra* note 6, at 389.

22. See Garvin, *supra* note 6, at 389.

23. See *infra* Part I.B.1.

the statutory period had expired.<sup>24</sup> However, there are many variations on this theme. As one commentator aptly noted, “[t]he cases . . . show almost every combination of elements imaginable.”<sup>25</sup> This Section examines several of the options that a court has when crafting a repair estoppel doctrine, and suggests a compromise doctrine that: (1) requires that the seller negligently misrepresented the likelihood that the repairs would be successful; (2) requires that the buyer reasonably relied on the seller’s misrepresentations, with reasonableness determined by a multi-factor test; (3) does not apply to statutes of repose, except in extraordinary circumstances; and (4) is limited by the doctrine of laches, severability of different causes of action, and protection of third parties who did not participate in the repairs.

Before explaining the justifications for these features, it is important to acknowledge the general rule that the burden of proof rests on a party asserting estoppel as a defense to a statutory time bar.<sup>26</sup> States are divided on whether the party’s burden is a preponderance of evidence or clear and convincing evidence.<sup>27</sup> The latter standard likely offers greater protection for sellers asserting a statute of limitations defense.<sup>28</sup> Therefore, courts in jurisdictions that require a buyer to prove estoppel by clear and convincing evidence should be more

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24. *Lantzy*, 73 P.3d at 532.

25. Garvin, *supra* note 6, at 390.

26. 54 C.J.S. *Limitations of Actions* § 428 (2010); *see also, e.g.*, *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990).

27. *Compare* *Harrison Enters. v. Trilogy Commc'ns, Inc.*, 818 So. 2d 1088, 1095 (Miss. 2002) (preponderance of the evidence), *with* *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 578 (Iowa 1990) (clear and convincing evidence).

28. It is unclear to what extent juries reach different outcomes when given a “preponderance of the evidence” instruction versus a “clear and convincing” instruction. *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POLY & L. 589, 632–33 (1997) (noting “mixed” results of empirical studies of jurors’ comprehension of standard-of-proof instructions). However, even if different standard-of-proof instructions do not predictably affect jury verdicts, they may impact settlement negotiations between lawyers or summary judgment decisions by judges, who are more familiar with standards of proof than laypersons. *See, e.g.*, *Proctor v. Huntington*, 238 P.3d 1117, 1118 n.2 (Wash. 2010) (trial court found estoppel by a preponderance, but not by clear and convincing evidence); *see also* Michael Meehan, *Increasing Certainty and Harnessing Private Information in the U.S. Patent System*, 2010 STAN. TECH. L. REV. 1, ¶101, available at <http://stlr.stanford.edu/pdf/meehan-increasing-certainty.pdf> (“[E]ven if juries [are] unable to differentiate among legal standards, . . . the presumably subtler legal minds of the judiciary [can] apply the correct standards, at least at the summary judgment level.” (footnotes omitted)).

receptive to accepting the repair doctrine, as it will apply in only those cases where it is clearly warranted.

### 1. Seller's Culpability

Courts disagree on the level of culpability a seller must exhibit to justify repair estoppel. At one extreme, some courts have held that the seller's culpability is irrelevant; only the buyer's reliance is considered.<sup>29</sup> At the opposite extreme, other courts have held that repair estoppel applies only if the seller intentionally dissuaded the buyer from suing after the buyer began contemplating a lawsuit.<sup>30</sup> The most reasonable position is to require only that the seller negligently misrepresented the likelihood that the repairs would be successful, regardless of whether the buyer actually was contemplating a lawsuit at the time. In other words, the buyer should prevail on this element so long as a reasonably knowledgeable seller, under similar circumstances, would have found the probability of success substantially lower than the likelihood that the seller communicated.

The first approach, which examines only the buyer's reliance, is flawed because the main justification for repair estoppel—that the law should not reward wrongful acts—is not implicated if the seller acted in good faith.<sup>31</sup> If the seller was not even negligent in believing that the repairs would succeed, then the seller has committed no wrongful act.

However, the second approach is also flawed. Requiring that the buyer contemplated litigation punishes precisely the sort of buyers whom equity should protect: those who are especially trusting, perhaps because of their lack of sophistication in the seller's area of expertise; those who are too poor to pay for legal advice; and those who are not so litigious as to sue immediately when initial repair attempts

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29. See, e.g., *Senior Hous., Inc. v. Nakawatase, Rutkowski, Wyns & Yi, Inc.*, 549 N.E.2d 604, 608–09 (Ill. App. Ct. 1989) (“The only requirements are that plaintiff reasonably relied on the defendant’s conduct in forbearing suit and that plaintiff suffered a detriment as a result of his reliance upon the words or conduct of the defendant.” (citations omitted)).

30. See, e.g., *Meier*, 454 N.W.2d at 580; *Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc.*, 266 S.E.2d 887, 890 (Va. 1980) (relying on decisions that discussed fraudulent concealment rather than estoppel).

31. See *New Eng. Power Co. v. Riley Stoker Corp.*, 477 N.E.2d 1054, 1060 (Mass. App. Ct. 1985); *Nowell v. Great Atl. & Pac. Tea Co.*, 108 S.E.2d 889, 891 (N.C. 1959).

fail.<sup>32</sup> Moreover, the second approach rewards the most dishonest sellers. By conveying false confidence from the outset that the repairs will be successful, thereby preventing the buyer from ever considering a lawsuit, the seller escapes liability.

The compromise approach protects innocent sellers, but also protects buyers from culpable sellers. This approach also recognizes that it would be unfair to force a buyer to offer direct evidence that a seller intended to deceive her, as this frequently would be an insurmountable burden. Instead, the inference of intent raised by the seller's violation of an objective standard of care should be sufficient.

## 2. Buyer's Reliance

The general rule for all forms of estoppel is that a party is entitled to estoppel only if that party actually and reasonably relied on another's misrepresentations.<sup>33</sup> Therefore, repairs alone, without any reliance by the buyer, cannot justify repair estoppel.<sup>34</sup> However, courts disagree about the type of representations and other attendant circumstances that are necessary to show that the buyer's reliance was "reasonable." Some courts recognize that reasonable people will rely on communications that suggest, but do not guarantee, that repair attempts will succeed.<sup>35</sup> Other courts, however, require explicit promises.<sup>36</sup> The first approach better comports with the

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32. *Cf.* *MGIC Indem. Corp. v. Cent. Bank of Monroe, La.*, 838 F.2d 1382, 1387 (5th Cir. 1988) (equity excuses unsophisticated insureds from strict compliance with insurer's notice policy); *Girlish v. Acme Precision Prods., Inc.*, 273 N.W.2d 62, 65 (Mich. 1978) (equity excuses often-unsophisticated employees from compliance with statutory notice requirement for workers' compensation claims during time that employers voluntarily provide benefits; employees receiving alternative benefits have "no reason to believe there is any further need to act to preserve [their] right[s] to [workers'] compensation").

33. *See* 4 AM. JUR. 2D *Proof of Facts* § 641 (1975).

34. *Highway Sales, Inc. v. Blue Bird Corp.*, 559 F.3d 782, 790 (8th Cir. 2009) (buyer did not allege, and record did not support, an inference of reliance); *Beckenstein v. Potter & Carrier, Inc.*, 464 A.2d 18, 23–24 (Conn. 1983) (buyer failed to even allege reliance).

35. *See* cases cited *infra* note 37.

36. *Jim Walter Homes, Inc. v. Kendrick*, 810 So. 2d 645, 651 (Ala. 2001) (closely paraphrasing *City of Birmingham v. Cochrane Roofing & Metal Co.*, 547 So. 2d 1159, 1167 (Ala. 1989)) (reliance is unreasonable unless the seller made "a promise to repair in return for a promise not to sue"); *Amodeo v. Ryan Homes, Inc.*, 595 A.2d 1232, 1236 (Pa. Super. Ct. 1991) (quoting *Ranker v. Skyline Corp.*, 493 A.2d 706, 709 (Pa. Super. Ct. 1985) (seller must represent that the repairs "have cured or will cure the defect")). For an even higher standard, see *Carlson v.*

realities of human nature. A seller can easily induce reliance through statements that are just ambiguous enough to fall short of explicit promises.<sup>37</sup> The danger of such calculated misrepresentations is particularly high when the buyer has no independent means to verify the likelihood that the repairs will succeed and therefore has little choice but to take the seller at his word. For example, recall your cash-strapped and credulous friend from the hypothetical at the beginning of this Note. She would have no reason to hire an independent engineer to evaluate the likely success of the repairs that the builder proposed if he assured her he would “do whatever it took” to fix the flooding.

“Reasonableness” is always an elusive concept, but case law suggests three useful factors for determining reasonableness in the repair estoppel context. First, because the repair doctrine is designed to protect laypersons, courts should evaluate sellers’ communications from a lay perspective. In order to prevent sellers from evading the repair doctrine through clever word choice, courts should treat as tantamount to express promises those statements that strongly suggest that repairs will succeed.<sup>38</sup>

A second consideration is the relative sophistication of the parties. At one extreme are disputes between large

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Ray Geophysical Div., 481 P.2d 327, 328–29 (Mont. 1971) (although the defendant oil exploration company’s geologist assured the plaintiff landowner that the damage that caused the plaintiff’s spring to run dry could and would be repaired, plaintiff still “had the choice” either to hire his own expert independently to assess the problem or to sue upon first discovering the damage).

37. See *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184, 1188 (4th Cir. 1977) (referencing the seller’s ambiguous statement that “we . . . will take care of any deficiencies which are our responsibility regardless of the warranty expiration date” as a basis for reversing summary judgment in favor of the defendant; reasonable minds could find that the defendant’s statements induced the plaintiff to delay suing); *City of Bedford v. James Leffel & Co.*, 558 F.2d 216, 218–19 (4th Cir. 1977) (seller wrote letter to buyer stating: “Your threat of litigation is not good common sense, that will not cure anything . . .”); *U.S. Leasing Corp. v. Biba Info. Processing Servs., Inc.*, 436 N.W.2d 823, 826 (Minn. Ct. App. 1989) (reversing summary judgment based on the statute of limitations because facts establishing estoppel were disputed; noting that one might reasonably postpone suing based on a statement by a computer system seller that he would “do whatever it took,” including possibly replacing a defective computer system). Two psychological factors make buyers particularly likely to rely on ambiguous repair promises. One is dissonance aversion—the tendency to reject information that does not comport with a chosen course of conduct. The other is regret aversion—the tendency to reject information that impugns one’s earlier decisions. See Garvin, *supra* note 6, at 391–92.

38. See *supra* note 37.

corporations with equal bargaining power. Here, there is little risk that the buyer will be wholly reliant on the seller's expertise and therefore will fail to contemplate litigation.<sup>39</sup> A large corporation likely is aware of the relevant statute of limitations, is better able to protect itself by negotiating a favorable warranty, and possesses the expertise necessary to independently evaluate a seller's statements.<sup>40</sup> At the opposite extreme, an impoverished individual who is completely unacquainted with the technicalities involved in a repair is very likely to rely heavily on a seller's representations.<sup>41</sup>

A final factor bearing on the reasonableness of a buyer's reliance is whether, assuming as true that the seller's representation of the likelihood that the repairs would succeed, a lawsuit would make economic sense. If a seller promises to repair a defect without charge and guarantees success, it would be unreasonable to expect the buyer to drag the seller into court, thereby losing his free assistance. Even when the seller bills the buyer for repairs, the buyer's reliance often will be reasonable. However, if the seller repeatedly fails to repair the defect as promised, and nonetheless bills the buyer for each failed attempt, eventually a reasonable buyer will become skeptical of the seller's promises.<sup>42</sup>

### 3. Differentiation Between Statutes of Limitations and Repose

Another choice in crafting a repair estoppel doctrine is whether the doctrine should apply to statutes of limitations

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39. See, e.g., *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 587 F.2d 813, 822 (6th Cir. 1978); *New Eng. Power Co. v. Riley Stoker Corp.*, 477 N.E.2d 1054, 1059 (Mass. App. Ct. 1985).

40. See *Standard Alliance*, 587 F.2d at 822 ("Here . . . we have two corporate behemoths, well able to look out for themselves, and no evidence that one lulled the other into not suing on time.").

41. This is particularly true for those individuals who cannot easily afford legal advice. See, e.g., *Robinson v. Poudre Valley Fed. Credit Union*, 654 P.2d 861, 863 (Colo. App. 1982) (a borrower is not negligent in relying on a credit union's advice, rather than hiring an attorney, when financing a car purchase). Because licensed professionals, such as architects, possess specialized knowledge well beyond the understanding of laypersons, reliance on their representations is almost always reasonable. See *Cnty. of Broome v. Vincent J. Smith, Inc.*, 358 N.Y.S.2d 998, 1002-03 (App. Div. 1974).

42. See *Bowman v. Okla. Natural Gas Co.*, 385 P.2d 440, 446 (Okla. 1963) (holding that, where plaintiffs paid over half the cost of a defective air conditioning unit over a six-year period, their reliance was not reasonable).

only, or also to statutes of repose.<sup>43</sup> Statutes of limitations bar suits that are not filed within a certain time period after the event giving rise to the claim. In contrast, statutes of repose bar actions not filed within a certain number of years after some other, fixed event.<sup>44</sup> For example, a statute of limitations might be triggered by a plaintiff's injury, whereas a statute of repose might be triggered by the sale of the product that caused the injury.<sup>45</sup> To the extent that statutes of repose embody a legislative determination of the time period after which no defendant within the legislature's contemplation ought to be sued,<sup>46</sup> courts should be highly reluctant to read an equitable exception into the statute in the absence of actual intent to deceive.<sup>47</sup>

#### 4. Protective Caveats

Courts have recognized three caveats to repair estoppel that ensure fairness to sellers and third parties. One intuitive limit is that a third party who did not promise repairs should remain free to raise a statute-of-limitations defense<sup>48</sup>—except

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43. See *e.g.*, *Carlson v. Kelso Drafting & Design, Inc.*, 2010 Ark. App. 205, at 5 (conceding the validity of the repair doctrine, but refusing to apply it to “not a mere statute of limitation but instead a statute of repose”).

44. See BLACK'S LAW DICTIONARY 1546 (9th ed. 2009); see also Matthew T. Boyer, *Modern Legislation Creates Ambiguities in Determining Deadlines for Asserting Residential Construction Defect Claims*, CONSTRUCTION LAW., Winter 2006, at 28, 29; Ronald M. Sandgrund & Scott F. Sullan, *Statutes of Limitations and Repose in Construction Defect Cases* (pt. 1), COLO. LAW., May 2004, at 73, 74.

45. See, *e.g.*, *Wyatt v. A-Best Prods. Co.*, 924 S.W.2d 98, 102–03 (Tenn. Ct. App. 1995).

46. See *Carlson*, 2010 Ark. App. at 5. However, it is doubtful that statutes of repose always indicate a careful balancing of moral and policy concerns. Indeed, one author has noted plain drafting errors in two states' statutes of repose. See Boyer, *supra* note 44, at 29.

47. Where a seller actually intended to deceive a buyer, repair estoppel's cousin—the fraudulent concealment doctrine—may apply. See, *e.g.*, *Windham v. Latco of Miss., Inc.*, 972 So. 2d 608, 614 & n.8 (Miss. 2008) (holding that fraudulent concealment defeats a construction-defect statute of repose, but noting that there is a “high standard . . . for proving fraudulent concealment”). *But see* *Rosenberg v. Falling Water, Inc.*, 709 S.E.2d 227, 229–31 (Ga. 2011) (statute of repose bars claim for injury related to construction defect, even assuming fraudulent concealment).

48. Examples of third parties who might be protected by this rule include manufacturers and distributors. See *Smith v. Am. Flange & Mfg. Co.*, 139 F. Supp. 917, 920 (S.D.N.Y. 1956) (declining to decide on the validity of the repair doctrine because repair efforts by frozen-food-unit installer could not be imputed to the insulation manufacturer and distributor); *Church of the Nativity of Our Lord v. WatPro, Inc.*, 474 N.W.2d 605, 611 (Minn. Ct. App. 1991).

when the third party had the power to control the promisor or ratified the promise.<sup>49</sup> Another caveat is the doctrine of laches,<sup>50</sup> which requires that a buyer diligently pursue a remedy after a seller has ceased attempting repairs; if the buyer fails to do so, the buyer loses the right to sue notwithstanding repair estoppel.<sup>51</sup> In contrast, when a buyer diligently files suit soon after the seller's repair efforts cease, the doctrine of laches does not apply.<sup>52</sup> In this way, laches and statutes of limitations both bar stale claims.<sup>53</sup> Some courts have incorporated as an element of a buyer's showing justifying repair estoppel that the buyer diligently pursued suit upon the termination of repair attempts.<sup>54</sup>

The length of the statute of limitations established by the legislature should serve as a presumptive maximum for the amount of time a buyer may delay after repair efforts cease,<sup>55</sup> but laches remains a flexible concept of equity, allowing courts to evaluate the reasonableness of the buyer's delay.<sup>56</sup> Although courts are divided over whether parties may argue laches in legal actions,<sup>57</sup> it is only fair that if a buyer invokes the equitable doctrine of estoppel, the buyer also should answer to

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49. *Cf., e.g.,* Aiello v. Ed Saxe Real Estate, Inc., 499 A.2d 282, 285 (Pa. 1985) (principal liable for agent's misrepresentations).

50. Laches is synonymous with "sleeping on [one's] rights." BLACK'S LAW DICTIONARY 953 (9th ed. 2009).

51. *See* Jim Walter Homes, Inc. v. Kendrick, 810 So. 2d 645, 651 (Ala. 2001) (holding that a five-year delay was unreasonable); Ludwig v. Ford Motor Co., 510 N.E.2d 691, 699 & n.4 (Ind. Ct. App. 1987) (declining to decide whether repair doctrine should be adopted when plaintiff inexcusably delayed for thirty-nine months after defendant ceased making repairs); Fablok Mills, Inc. v. Cocker Mach. & Foundry Co., 310 A.2d 491, 497 (N.J. Super. Ct. App. Div. 1973) (same result when the plaintiff inexcusably delayed for twenty-one months after attempting to revoke acceptance).

52. *See, e.g.,* Rhee v. Golden Home Builders, Inc., 617 N.W.2d 618, 622 (Minn. Ct. App. 2000) (refusing to apply laches where repair promises continued "until a few months before [homeowners] filed the lawsuit").

53. *See* Stone v. Williams, 873 F.2d 620, 624 (2d Cir. 1989), *vacated on other grounds*, 891 F.2d 401 (2d Cir. 1989).

54. *See, e.g.,* Lantzy v. Centex Homes, 73 P.3d 517, 525, 533 (Cal. 2003) (one element of repair estoppel is that "the plaintiff proceeds diligently once the truth is discovered"); Gundogdu v. King Mai, Inc., 89 Cal. Rptr. 3d 489, 495 (Ct. App. 2009) (diligence element of repair estoppel not satisfied due to multi-year delay in filing suit).

55. *See* Kanovitz, *supra* note 14, at 341 n.87; *cf.* Interbank Invs., L.L.C. v. Vail Valley Consol. Water Dist., 12 P.3d 1224, 1229–30 (Colo. App. 2000) (in equitable actions, courts look to statutes of limitations for analogous legal actions).

56. *See* Stone, 873 F.2d at 624 ("[Laches] is more flexible [than statutes of limitations] and requires an assessment of the facts of each case—it is the reasonableness of the delay rather than the number of years that elapse . . .").

57. 27A AM. JUR. 2D *Equity* § 117 (2008).

the equitable doctrine of laches.<sup>58</sup> However, courts should differentiate between cases in which a seller clearly states that he will not attempt further repairs and cases in which a seller simply stops attempting repairs without explicit notice. In the latter cases, depending on the circumstances, the buyer might reasonably assume that the repairs are ongoing.

An additional caveat that courts should recognize when crafting a repair estoppel doctrine arises in situations where a defect causes damage to other property besides the defective item.<sup>59</sup> In such cases, unless the seller promises to repair the additional damage as well as the defective item, often repair estoppel should apply only to the latter claim.<sup>60</sup> However, courts should not be blind to economic realities. If a seller has promised to make free repairs to the defective property, the value of which approaches or exceeds the value of the damage to the other property, a reasonable buyer would not sue the seller. Were the buyer to sue, she would incur both the cost of repairs and litigation, and she would also risk a lower-than-expected recovery. In this situation courts should not sever claims for the defective property from claims for resulting damage to other property, because the seller's misrepresentations effectively delayed all of the claims. The caveats described above ensure that the compromise doctrine is properly limited and best serves the interests of justice.

## II. WHY COURTS SHOULD ADOPT THE COMPROMISE DOCTRINE

Part I suggested several aspects of a compromise repair estoppel doctrine. However, one might argue that it is better—on utilitarian, moral, or interpretive grounds—to reject repair estoppel in any form. This Part examines the arguments for and against the compromise doctrine, and concludes that each of these three considerations favors its adoption.

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58. See *In re Dynaco Corp.*, 200 B.R. 750, 758–59 (D.N.H. 1996). This comports with one of the traditional maxims of equity: “[H]e who seeks equity must do equity.” See 30A C.J.S. *Equity* § 101 (2007).

59. See, e.g., *Louisville Silo & Tank Co. v. Thweatt*, 295 S.W. 710, 713 (Ark. 1927) (holding that promises to repair a grain silo tolled statute of limitations for an action based on defects in the silo, but not an action for the consequential destruction of rice stored in the silo); *Mack v. Hugh W. Comstock Assocs., Inc.*, 37 Cal. Rptr. 466, 470 (Ct. App. 1964) (holding that promises to repair heating system did not estop assertion of the statute of limitations against claim for damage to furniture).

60. See *infra* note 64 and accompanying text (courts should avoid interfering with amicable dispute resolution).

### A. *Utilitarianism*

This Section addresses the utilitarian criticisms of, and justifications for, repair estoppel. It begins by examining the utilitarian goals of statutory time bars in general, and then moves to concerns that are specific to repair estoppel.

#### 1. Deterring Frivolous Filings

One justification for strict adherence to statutory time bars is that potential plaintiffs should be discouraged from filing claims that ultimately will fail.<sup>61</sup> Filing a claim, even one that is dismissed or resolved through a motion for summary judgment, still imposes significant costs on courts and litigants. The greater the number of exceptions to statutes of limitations and repose, the more likely a plaintiff will file an ultimately futile claim in the hope that an exception will apply.<sup>62</sup> In other words, even if an absolute bar is unfair in individual cases, it might nonetheless be justified because it is beneficial as a matter of general policy.

Although this argument has force in the abstract, the relevant consideration is the *increased* number of futile filings due to the adoption of the compromise doctrine rather than the *absolute* number of futile filings. If, in most cases where the compromise doctrine would apply, another exception to the statute of limitations also is available, the increase in futile claims attributable to the compromise doctrine will be low.<sup>63</sup>

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61. See Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 463 (1997).

62. See *id.*

63. For example, in Colorado, juries typically decide the uncertain issue of when a homeowner “knew or should have known” of the manifestation of a defect under section 13-80-104 of the Colorado Revised Statutes. Sandgrund & Sullan, *supra* note 44, at 78. Because the proper resolution of this issue often will depend on disputed facts, the statute of limitations fails to provide the certainty needed to deter ultimately futile lawsuits. See *id.* The definition of an “improvement to real property,” which triggers the statutes of limitations and repose, also is ambiguous. See *infra* notes 135–43 and accompanying text. In states other than Colorado, an additional means of avoiding a statute of limitations is available in cases involving licensed professionals. Courts following the “continuous treatment” doctrine hold that a client’s cause of action against a professional does not accrue until the professional relationship terminates. See, e.g., *Cnty. of Broome v. Vincent J. Smith, Inc.*, 358 N.Y.S.2d 998, 1001–03 (App. Div. 1974) (repair efforts delayed termination of professional relationship between architect and client, thereby delaying accrual of cause of action). However, the “continuous treatment” doctrine is not applicable in Colorado, where actions against construction professionals are triggered by the discovery of the physical

Additionally, the compromise doctrine will discourage many weak claims. For example, a buyer who realizes that she cannot prove the seller's negligence, or the reasonableness of her reliance, often will refrain from suing. More importantly, the compromise doctrine actually *deters* frivolous filings because it eliminates the incentive to sue in spite of ongoing and potentially successful repair efforts.<sup>64</sup> In this way, the compromise doctrine helps promote stable business relationships that would be destroyed by the insult of filing a lawsuit.<sup>65</sup> In such cases the doctrine also avoids litigation costs, which frequently "exceed[ ] the cost of repair[s]."<sup>66</sup>

## 2. Promoting Commerce

Statutory time bars are also intended to promote commerce.<sup>67</sup> Absolute cutoffs for filing actions allow businesses to save money by destroying old records, which no longer will be needed to disprove liability and avoid claims of spoliation, and by ceasing to purchase insurance coverage after the statutory period has elapsed.<sup>68</sup> In theory, time bars also reduce insurance premiums because insurers' potential exposure is reduced,<sup>69</sup> allowing sellers to pass on the savings to buyers in the form of reduced prices.<sup>70</sup> Absolute cutoffs also allow

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manifestations of a defect, rather than the termination of a professional relationship. *See infra* note 128 and accompanying text.

64. *See* City of Bedford v. James Leffel & Co., 558 F.2d 216, 219 n.18 (4th Cir. 1977); Amodeo v. Ryan Homes, Inc., 595 A.2d 1232, 1239 (Pa. Super. Ct. 1991); Garvin, *supra* note 6, at 393.

65. *See* Ochoa & Wistrich, *supra* note 61, at 491.

66. *See* Alice M. Noble-Allgire, *Notice and Opportunity to Repair Construction Defects: An Imperfect Response to the Perfect Storm*, 43 REAL PROP. TR. & EST. L.J. 729, 735 & n.17 (2009) (quoting AM. ACTUARIAL CONSULTING GROUP, INSURANCE ANALYSIS: REFORMS, ALTERNATIVES, AND PRICING 9 (2006), available at <http://library.state.or.us/repository/2007/200701121021455/>).

67. *See* Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261, 1266 (D. Del. 1983); Ochoa & Wistrich, *supra* note 61, at 466–68.

68. *See* sources cited *supra* note 67.

69. *See* Ochoa & Wistrich, *supra* note 61, at 496 n.191. The actual effect of a statute of limitations on insurance premiums is contingent on the percentage of all potential damages that are barred by the statute. If this percentage is relatively small, then the statute will fail to reduce insurance premiums. *See* Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 682–83 (Utah 1985).

70. *See* Norwest Bank Neb., N.A. v. W.R. Grace & Co.—Conn., 960 F.2d 754, 761 (8th Cir. 1992). However, if insurance rates are tied to nationwide insurance payouts, the citizens of a state that passes a stringent statute of limitations will see little benefit in the form of decreased prices, but they still will suffer the detriment of being deprived of otherwise-valid claims. *See* Berry, 717 P.2d at 681–82.

businesses to enter into stable relationships with investors, employees, and other businesses, without those third parties fearing an unexpected lawsuit.<sup>71</sup>

Three of these concerns are easily dispensed with. First, as data storage becomes increasingly inexpensive, a business's interest in destroying old documents becomes less compelling.<sup>72</sup> Second, if a seller has engaged in an ongoing and possibly unsuccessful series of repairs, the seller is on notice of the potential for litigation and therefore reasonably should refrain from destroying business records regarding those repairs or allowing his insurance coverage to expire.<sup>73</sup> Third, although the compromise doctrine admittedly cannot protect the seller's innocent employees and creditors from suffering if the seller is found liable, it is difficult to see why the interests of these third parties should outweigh the buyer's far more compelling right to redress. To argue otherwise would allow the culpable seller to use his employees or creditors as human shields to ward off otherwise meritorious claims.

It also is important to note that under the compromise doctrine the seller controls the running of the statute; therefore, concerns that lawsuits will interrupt the seller's business are unpersuasive.<sup>74</sup> The seller can avoid repair estoppel by exercising ordinary care when explaining to the buyer any known risk that the repairs will be unsuccessful, thereby precluding findings of culpability and reasonable reliance.<sup>75</sup> Even a seller who at first makes bad-faith

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71. See *Ontario Hydro*, 569 F. Supp. at 1266; Ochoa & Wistrich, *supra* note 61, at 466–68.

72. See Symposium, *Data Privacy Laws and the First Amendment*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 21, 41 (2000) (“Automation, electronic records, electronic record-keeping, . . . and the incredibly inexpensive storage of that information means there is very little reason for anybody to let go of any data . . .”).

73. See *City of Bedford v. James Leffel & Co.*, 558 F.2d 216, 219 n.18 (4th Cir. 1977); *Amodeo v. Ryan Homes, Inc.*, 595 A.2d 1232, 1238–39 (Pa. Super. Ct. 1991); Garvin, *supra* note 6, at 353, 395; Kanovitz, *supra* note 14, at 343; Sandgrund & Sullan, *supra* note 6, at 69.

74. See Ochoa & Wistrich, *supra* note 61, at 468.

75. See, e.g., *Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.*, 524 F.3d 315, 319, 326 n.10 (1st Cir. 2008) (in breach of warranty action, seller's eventual refusal to pay for additional repairs refuted buyer's argument that earlier promises induced continued reliance); *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919–20 (Minn. 1990) (seller's express statement that skid loaders were defective established precise time at which repair efforts ceased, and therefore would allow trier of fact to determine whether buyer's delay in filing suit after that time was reasonable; remanding for a determination of the reasonableness of

representations to a buyer can nevertheless protect himself against a delayed lawsuit by stating explicitly that he will not attempt further repairs. If the buyer nonetheless delays unreasonably before suing, the buyer's claim will be barred by the doctrine of laches.<sup>76</sup> Thus, rather than exposing sellers to undeserved liability, the compromise doctrine has the beneficial effect of encouraging candid and timely communication between sellers and buyers.

### 3. Encouraging Amicable Repairs

Another criticism of repair estoppel is that the doctrine potentially could discourage businesses from voluntarily making repairs when no obligation to do so exists.<sup>77</sup> Businesses often undertake repairs free of charge to maintain clients' goodwill.<sup>78</sup> Detractors argue that the repair doctrine might make businesses reluctant to make free repairs because of the risk of being unable to assert the statute of limitations.<sup>79</sup> Even worse, repair estoppel would tend to punish those businesses that are the least blameworthy—those that tried as much as possible to appease their clients by continuing their repair efforts for long periods of time.<sup>80</sup> This argument deserves consideration because an end to amicable repairs would likely lead to an increase in litigation, which imposes significant costs on parties and courts.<sup>81</sup> Litigation not only breeds conflict and ill will, it also entails massive transaction costs,<sup>82</sup> and thus is inefficient compared to amicable, non-litigious solutions.

However, this concern is grounds only for limiting the scope of the repair doctrine, rather than rejecting it outright.<sup>83</sup>

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the buyer's delay); *Trinity Church v. Lawson-Bell*, 925 A.2d 720, 728–29 (N.J. Super. Ct. App. Div. 2007).

76. See *supra* notes 50–58 and accompanying text.

77. See *City of Birmingham v. Cochrane Roofing & Metal Co.*, 547 So. 2d 1159, 1167–68 (Ala. 1989) (using this argument to justify a limited scope for the repair doctrine); *Holbrook, Inc. v. Link-Belt Constr. Equip. Co.*, 12 P.3d 638, 644 (Wash. Ct. App. 2000) (quoting with approval the seller's assertion that “there would be little incentive for sellers to work with purchasers to repair equipment” if the court applied the repair doctrine).

78. See *City of Birmingham*, 547 So. 2d at 1167–68.

79. See *id.*; *Holbrook*, 12 P.3d at 644.

80. See *City of Birmingham*, 547 So. 2d at 1167–68.

81. See *Noble-Allgire*, *supra* note 66, at 735; *Ochoa & Wistrich*, *supra* note 61, at 504.

82. See *Noble-Allgire*, *supra* note 66, at 735 & n.17.

83. See *City of Birmingham*, 547 So. 2d at 1167. However, the Alabama Supreme Court went too far, requiring either intentional or fraudulent

There is little risk that the compromise doctrine will discourage amicable repairs because a non-negligent seller has a vanishingly small chance of being held liable merely because the compromise doctrine applies. The repair doctrine will affect a non-negligent seller only if: (1) the repairs fail; (2) the buyer sues despite the risk of an adverse judgment due to the seller's lack of negligence; (3) the buyer's suit is untimely; (4) no other exception to the statute of limitations exists besides repair estoppel; (5) the doctrine of laches does not bar the buyer's claim; (6) the trier of fact erroneously finds that the seller negligently misrepresented the chance that the repairs would succeed, and (7) the trier of fact erroneously finds liability on the merits. No seller will decide not to make repairs on the basis of the slight possibility of this extraordinary series of coincidences. Conversely, if the seller negligently misrepresented the likelihood of success, the seller's conduct has little social utility.

It also is important to remember that the seller is not faced with an all-or-nothing choice. As the seller gathers more information over the course of his repair efforts, he can constantly reevaluate whether the benefit of business goodwill outweighs the risk of losing the protection of the statute of limitations. As soon as the costs exceed the benefits, the seller can explicitly end the repair attempts.<sup>84</sup> Instead of deterring amicable repairs, the compromise doctrine will encourage sellers to make forthright and timely representations about the probability that repairs will succeed.

### *B. Morality*

In addition to policy justifications, statutes of limitations also rest on moral foundations. Some courts characterize statutes of limitations not only as a protection for defendants, but also as a punishment for plaintiffs who fail to enforce their

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misrepresentation or concealment, or a specific statement by the defendant that the plaintiff should not sue because the defendant will make repairs. *Id.* at 1167–68. These requirements place too heavy a burden on the plaintiff in light of the purposes of statutes of limitations. *See supra* Part I.B.2.

84. *Cf. Stiff v. BilDen Homes, Inc.*, 88 P.3d 639, 642 (Colo. App. 2003) (holding that a homeowner was on notice of a builder's failure to perform warranty work, and therefore the statute of limitations began to run, when the homeowner demanded repairs and the builder declined to perform the repairs).

rights.<sup>85</sup> However, this argument does not militate against the compromise doctrine. So long as the buyer has sought repairs from the seller, the buyer has attempted to enforce her rights, albeit not through the courts.<sup>86</sup> To punish the diligent through the overbroad application of a rule designed to punish the dilatory is itself a moral wrong.<sup>87</sup> Thus, repair estoppel with a laches caveat<sup>88</sup> protects buyers who are diligent yet not litigious.

Two moral maxims militate heavily in favor of repair estoppel. First, courts should not reward wrongdoing.<sup>89</sup> The compromise doctrine applies only if the buyer proves the seller's culpability and the buyer's lack of culpability.<sup>90</sup> To nonetheless deprive the buyer of her claim punishes innocence and rewards guilt. Second, those capable of controlling their own actions must accept the foreseeable consequences of those actions. Allowing a seller to deceive a buyer into filing a late claim, and then to complain that her claim is late, would be to allow the seller to have his cake and eat it too.<sup>91</sup>

### C. *Statutory Interpretation*

Some courts have rejected the repair doctrine based on a radical textualist argument that courts should not recognize

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85. See, e.g., *State v. Lombardo Bros. Mason Contractors*, 980 A.2d 983, 1004 (Conn. Super. Ct. 2009); *Ochoa & Wistrich*, *supra* note 61, at 490.

86. See *Garvin*, *supra* note 6, at 395.

87. See *In re Virtual Network Servs. Corp.*, 98 B.R. 343, 351–52 (N.D. Ill. 1989) (rejecting vicarious punishments as inconsistent with both deontological and utilitarian conceptions of justice); *Richmond & D.R. Co. v. Freeman*, 11 So. 800, 802 (Ala. 1892) (“[T]he whole policy of our laws, as of every civilized system of jurisprudence, is utterly at war with the idea of vicarious punishment . . .”).

88. See *supra* notes 50–58 and accompanying text.

89. As the United States Supreme Court has noted: “[N]o man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.” *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–33 (1959) (footnotes omitted); see also *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978) (equitable estoppel); cf. *Windham v. Latco of Miss., Inc.*, 972 So. 2d 608, 612 (Miss. 2008) (applying this maxim in the analogous context of fraudulent concealment).

90. If a buyer's reliance is reasonable, then by definition the buyer is not even negligent, and thus not culpable.

91. See *City of Bedford v. James Leffel & Co.*, 558 F.2d 216, 219 (4th Cir. 1977) (citing *Nowell*, 108 S.E.2d at 891); *Nowell v. Great Atl. & Pac. Tea Co.*, 108 S.E.2d 889, 891 (N.C. 1959) (observing that a seller who implicitly invites the buyer to file a late claim “should not complain that the invitation was accepted”).

equitable defenses to statutes of limitations absent an explicit legislative authorization to do so.<sup>92</sup> The argument is “radical” because even mainstream textualists recognize that courts may read statutes in light of background equitable principles.<sup>93</sup> Nonetheless, some courts have found radical textualism a persuasive basis for rejecting repair estoppel, and therefore it should be considered. This Section uses public choice theory to show that rejecting repair estoppel simply because of legislative silence inhibits, rather than facilitates, the democratic process.<sup>94</sup>

Public choice theory is a model that describes how interest groups influence legislative outcomes.<sup>95</sup> It suggests that, because we now live in an “interest-group state,”<sup>96</sup> legislation often deviates from the preferences of a majority of the electorate.<sup>97</sup> Courts can use this insight as a “warning beacon” to identify, and narrowly interpret, legislation that effects an anti-democratic redistribution of wealth.<sup>98</sup> In instances where a statute of limitations supports a narrow interest group at the

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92. See *Binkley Co. v. Teledyne Mid-American Corp.*, 333 F. Supp. 1183, 1187 (E.D. Mo. 1971).

There is no Missouri law on whether or not a seller's efforts at repair tolls the statute of limitations, and in Missouri the decision to toll the statute under a given set of facts is for the legislature. Missouri courts will not engraft exceptions upon specific statutes of limitation even on considerations of apparent hardship.

*Id.*; see also *Neal v. Laclede Gas Co.*, 517 S.W.2d 716, 719 (Mo. Ct. App. 1974) (“[S]tatutes of limitations may be suspended or tolled only by specific disabilities or exceptions enacted by the legislature, and courts cannot extend those exceptions. . . . [E]ven cases of hardship make no difference.” (emphasis added) (citations omitted)); *Poppenheimer v. Bluff City Motor Homes*, 658 S.W.2d 106, 111–12 (Tenn. Ct. App. 1983) (following *Binkley*, 333 F. Supp. 1183); cf. *J.R. Simplot Co. v. Chemetics Int'l, Inc.*, 887 P.2d 1039, 1041–42 (Idaho 1994) (conceding that estoppel can act as a “non-statutory bar to a statute of limitation defense,” but nonetheless stating that the relevant statute of repose was not subject to estoppel).

93. See *infra* notes 214–15 and accompanying text.

94. For additional discussion of textualism in the context of the *Smith II* decision, see *infra* Part IV.B.

95. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 10–12, 15–16 (1997); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986).

96. Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 437 (1989) (notably including “building contractors and members of building trades” as one of the groups that rules the “interest-group state”).

97. See Macey, *supra* note 95, at 230; Posner, *supra* note 96, at 437.

98. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 322–24 (1988).

expense of the general public, courts should presume that the repair doctrine applies unless the legislature has explicitly rejected it.

Public choice theory rests on three premises. First, legislators are brokers of legislation—they grant favorable legislation to interest groups that expend the most money, mobilize the most voters for direct lobbying, or both.<sup>99</sup> Second, a rational citizen would rather acquiesce to legislation whenever that legislation harms her less than the cost that she would incur in successfully opposing the legislation.<sup>100</sup> Third, a citizen will only contribute money and time to an interest group if she expects to receive a greater benefit in return.<sup>101</sup> As a result of these premises, a narrow segment of society capable of reaping significant benefits from legislation will successfully form an interest group that will convince legislators to enact legislation that favors the interest group.<sup>102</sup> In contrast, a broad segment of society, each member of which will suffer only minimal harm from the same legislation, will be unable to mobilize effectively against it.<sup>103</sup> The ultimate result is a redistribution of wealth from the larger group to the smaller group.<sup>104</sup>

There are two types of statutes that favor interest groups: those that explicitly transfer wealth and those that are phrased ambiguously yet still effect the same result.<sup>105</sup> When the statute is explicit, courts lack the power to defy it merely because it likely is contrary to the preferences of a majority of

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99. *See id.* at 287.

100. Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 343 (1988).

101. These benefits need not always be direct monetary rewards. For example, individuals may contribute to interest groups in order to achieve intangible, ideological benefits, or because they are compelled to join the group to obtain a professional license. *See Eskridge, supra* note 98, at 286–87.

102. *See id.* at 287.

103. *See id.*

104. A simple hypothetical example is an agricultural subsidy that encourages farmers to under-produce a particular crop. The subsidy both contributes to the national debt and raises food prices. However, the impact per consumer likely is miniscule, so that it is irrational for any individual consumer to organize an interest group opposed to the subsidy, or to donate time and money to such an interest group if one already has formed. In contrast, the farmers will form an interest group and support it adequately to make it effective, because the benefit of the subsidy to the farmers exceeds the costs of forming and supporting the interest group. The legislature, in turn, will respond to the disproportionate pressure from the agricultural interest group and will pass the subsidy, thereby redistributing wealth from the public at large to the small but vocal minority.

105. *See Macey, supra* note 95, at 232–33.

citizens. Open judicial defiance of clear legislative commands would upset the constitutional balance of powers.<sup>106</sup> Even if it could be justified in theory, in practice it likely would backfire.<sup>107</sup> The public would side with the legislature,<sup>108</sup> particularly given increasing popular belief that judges do not adequately respect the constitutional balance of powers.<sup>109</sup> This would lead to the judicial decision being overturned by subsequent legislation, thus defeating the purpose of the decision.

When a statute is ambiguous, on the other hand, narrow interpretation is firmly within the courts' intended constitutional power.<sup>110</sup> When explaining the role of the judiciary, Alexander Hamilton noted that the narrow interpretation of redistributive statutes "operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts."<sup>111</sup> When the ambiguity in a statute results from legislative silence, courts' interpretative powers should be at their maximum. Because negotiation may be difficult and time-consuming, a legislature that is unable to reach a compromise often will leave the issue for the courts to decide.<sup>112</sup> Thus, rather than reflecting a conscious decision to deprive courts of power, silence may be an implicit *grant* of interpretive power.

The narrow interpretation of ambiguous statutes that appear to redistribute wealth against the wishes of the majority is not merely permissible; it is desirable. Admittedly,

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106. See *id.* at 239, 241–42.

107. See *id.* at 242.

108. See Posner, *supra* note 96, at 449–50 (urging judges to consider their opinions' consequences to inter-branch relations and noting that the legislature is better able to interact with the public).

109. See Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1442–43 (2004); see also Adam Liptak & Michael D. Shear, *G.O.P. Field Stoking Anger at U.S. Courts*, N.Y. TIMES, Oct. 24, 2011, at A1. Although voters in the Republican presidential primary contest are not representative of the national electorate, their extreme antipathy toward an independent judiciary is noteworthy.

110. See Macey, *supra* note 95, at 249–50. Furthermore, Congress typically acquiesces to the narrow interpretations. Eskridge, *supra* note 98, at 312–13.

111. See THE FEDERALIST NO. 78, at 488–89 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

112. See Eskridge, *supra* note 98, at 288, 312; Posner, *supra* note 96, at 440–41.

the interest group whom the statute favors can return to the legislature to clarify the ambiguity.<sup>113</sup> However, forcing interest groups to obtain explicit statutory language reduces the amount of such legislation.<sup>114</sup> It is more difficult to secure the passage of detailed, unambiguous legislation.<sup>115</sup> Furthermore, clear language places the rest of society on notice that the redistribution is taking place, and therefore allows others to better mobilize against the legislation.<sup>116</sup> While the interpretive solution cannot eliminate anti-democratic statutes, it at least helps level the playing field.

Admittedly, scholars dispute how courts should determine whether a statute is anti-democratic. Professor Eskridge suggests determining which groups will benefit or suffer from the legislation.<sup>117</sup> In contrast, Professor Macey argues that courts lack the capacity to identify these groups, because legislators typically defend even anti-democratic legislation with pro-public rhetoric.<sup>118</sup> He therefore suggests that courts should follow a simpler approach of taking the legislature at its word and according significant weight to pro-public statements of intent.<sup>119</sup>

However, it is not difficult to identify the affected parties in the context of repair estoppel. For example, if a court reads an ambiguous construction-defect statute of limitations to preclude repair estoppel, then construction professionals benefit at the expense of property buyers.<sup>120</sup> Compared to these parties' interests, the interests of third parties are greatly attenuated.

The next step is for the court to determine where to place the burden of clarifying the ambiguous statute by comparing the relative capacities of the parties to lobby the legislature to "correct" the court's decision. For example, consider the hypothetical described in the introduction, but assume that the validity of the repair doctrine in Colorado construction-defect

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113. See Eskridge, *supra* note 98, at 310.

114. See *id.*

115. See *id.*

116. See *id.* Admittedly, this will make a difference only in those borderline situations where a lack of public awareness is the only barrier preventing effective action against the legislation.

117. See *id.* at 323–25.

118. See Macey, *supra* note 95, at 228 n.29, 244.

119. See *id.* at 251, 253.

120. Precisely which individuals constitute the "sellers" and "buyers" depends on the subject matter of the statute.

claims still is an open question. If the court applies the repair doctrine, then the burden of “correcting” the decision will be placed on construction professionals and their insurers. Both are repeat players—they will engage in many similar transactions in the future—and therefore have an incentive to petition the legislature for the elimination of the repair doctrine. Moreover, construction and insurance corporations and trade groups have the organizational structures and resources needed to lobby the legislature.<sup>121</sup> In contrast, the likelihood that the homeowner will ever wish to invoke the repair doctrine in the future is essentially zero, because each individual homeowner engages in at most a few such transactions over the course of a lifetime.<sup>122</sup> Even assuming a homeowners interest group exists, that group is unlikely to command the same resources as the opposing homebuilder and insurance interest groups. There simply is too little incentive for any homeowner to dedicate time or money to such a group, because the benefits of the contribution would be too dispersed. This makes it extraordinarily difficult, although not impossible, for the repair doctrine to be enacted by statute.<sup>123</sup> Thus, by applying the insights of public choice theory, it is apparent that courts should interpret statutes of limitations to permit the repair doctrine. This interpretation avoids a result that is at once undesirable to a majority of society and yet will not be corrected through the democratic process.

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121. Giant construction firms are increasingly dominating the market, *see* Noble-Allgire, *supra* note 66, at 778, and expending massive resources to lobby for favorable legislation, *see Home Builders: Long-Term Contribution Trends*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/totals.php?cycle=2010&ind=C02> (last visited Jan. 24, 2011). During the 2010 election cycle, the homebuilding industry’s \$13 million in federal campaign contributions ranked thirty-fifth compared to over eighty other industries. *Id.* During 2010 the homebuilding industry also spent \$5 million on lobbying and retained 116 lobbyists at the federal level. *See Home Builders: Lobbying, 2010*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/lobbying.php?cycle=2010&ind=C02> (last visited Jan. 24, 2011).

122. *See* Colo. Homes, Ltd. v. Loerch-Wilson, 43 P.3d 718, 721 (Colo. App. 2001) (“[T]he purchase of a residence may be the most significant investment in the purchaser’s lifetime.”).

123. A single state, Louisiana, has adopted the repair doctrine by statute. *See* LA. CIV. CODE ANN. art. 2534 (1996 & Supp. 2011); *see also* Panagiotis v. Gauthier-Matherne Homes, Ltd., 571 So. 2d 881, 883 (La. Ct. App. 1990). Perhaps this can be explained by the fact that Louisiana’s statutory repair doctrine applies to all sales. *See* the discussion of public choice theory, *supra* notes 95–104 and accompanying text. If a statutory repair doctrine applies to all sales, then everyone will be on the “buyer” side in at least some transactions. This could prevent an effective interest group from forming to oppose the statute.

### III. *SMITH II* BACKGROUND AND DECISION

In order to understand this Note's criticism of the *Smith II* decision, one must first understand the legal context in which *Smith II* was decided. Colorado has an unusually harsh statute of limitations for construction-defect actions,<sup>124</sup> but before *Smith II* it was tempered by the repair doctrine. The operation of the construction-defect statute of limitations is complicated by two issues: the uncertain definition of "improvements to real property," and a "notice-and-opportunity-to-repair" provision. After explaining these issues, this Part describes the *Smith II* decision.

#### A. *Colorado Construction-Defect Law*

Colorado's statute of repose and limitations for actions against construction professionals is codified at Colorado Revised Statutes section 13-80-104 ("section 104"). In 1986, Colorado shortened the repose period for "all" such actions from ten years to six.<sup>125</sup> Under both the current statute of repose and its predecessor, the event that triggers the statute is the "design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property."<sup>126</sup> However, the statute of repose is extended by two years if the physical manifestations of a defect are discovered during the fifth or sixth years, resulting in a maximum repose period of eight years.<sup>127</sup>

The trigger date for Colorado's two-year statute of limitations is the actual or constructive discovery of the *physical manifestations of a defect* whether or not those manifestations would support a cause of action.<sup>128</sup> This is contrary to the "discovery rule" followed in many other jurisdictions, under which construction-defect actions do not

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124. See *infra* notes 128–31 and accompanying text.

125. COLO. REV. STAT. § 13-80-104(1)(a) (2011); 1986 Colo. Sess. Laws 695, 697.

126. COLO. REV. STAT. § 13-80-104(1)(a).

127. *Id.* § 13-80-104(2).

128. *Id.* § 13-80-104(1)(b)(I) (emphasis added). Notably, the prior version of Colorado's construction-defect statute of limitations was triggered by the discovery of only those defects that were "of a substantial or significant nature," as opposed to the mere physical manifestations of a defect, no matter how insignificant. See *Williams v. Genesee Dev. Co. No. 2*, 759 P.2d 823, 825 (Colo. App. 1988) (quoting COLO. REV. STAT. § 13-80-127(1)(b)) ("puddle of water" did not trigger statute of limitations).

accrue until the plaintiff is or should be aware of the facts giving rise to her *cause of action*.<sup>129</sup> Notably, in addition to damage to property, section 104 also covers personal injury and wrongful death claims arising from construction defects.<sup>130</sup> Because the general tort statute of limitations accrues on the date of the discovery of the injury—not merely its cause—section 104 provides significantly greater protection to construction professionals as compared to other tort defendants.<sup>131</sup>

Before *Smith II* was decided, Colorado state courts had recognized the repair doctrine several times in the construction-defect context and in other contexts.<sup>132</sup> Although the Colorado Supreme Court once reversed the Colorado Court of Appeals on the ground that it was unnecessary to apply the repair doctrine, prior to *Smith II* the Colorado Supreme Court had never impugned the doctrine's validity.<sup>133</sup> Like the state courts, the United States District Court for the District of Colorado also recognized the repair doctrine.<sup>134</sup>

In contrast to the repair doctrine, which was well-accepted in Colorado before *Smith II*, what constitutes an “improvement to real property” under section 104 and its predecessor statute is a nettlesome issue<sup>135</sup> and a perennial source of litigation.<sup>136</sup>

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129. See *G & H Assocs. v. Ernest W. Hahn, Inc.*, 934 P.2d 229, 233 & n.5 (Nev. 1997) (quoting *Petersen v. Bruen*, 792 P.2d 18, 20 (Nev. 1990)) (noting that many courts have embraced the discovery rule); *Stuart v. Weisflog's Showroom Gallery, Inc.*, 746 N.W.2d 762, 768–69 (Wis. 2008); cf. *Mills v. Garlow*, 768 P.2d 554, 555 (Wyo. 1989) (defining discovery rule).

130. COLO. REV. STAT. § 13-80-104(1)(c)(III).

131. *Id.* § 13-80-108(1), (2), (8). As of 2004, this discrepancy was “unique to Colorado.” Sandgrund & Sullan, *supra* note 6, at 71.

132. See *Curragh Queensland Mining Ltd. v. Dresser Indus., Inc.*, 55 P.3d 235, 239–40 (Colo. App. 2002); *Hersh Cos. v. Highline Vill. Assocs.*, 996 P.2d 250, 255–57 (Colo. App. 1999), *rev'd in part on other grounds*, 30 P.3d 221, 225–26 (Colo. 2001) (holding that the appellate court need not have reached the repair doctrine issue because the warranty provided for repairs); Sandgrund & Sullan, *supra* note 6, at 69 & n.34 (citing four state district court orders based on the repair doctrine).

133. *Hersh Cos.*, 30 P.3d at 226.

134. See *Richard O'Brien Cos. v. Challenge-Cook Bros.*, 672 F. Supp. 466, 470–71 (D. Colo. 1987) (applying Colorado law); *Colo.-Ute Elec. Ass'n v. Envirotech Corp.*, 524 F. Supp. 1152, 1155–56 (D. Colo. 1981) (same).

135. Although not specific to Colorado, the comment that “[t]he boundaries of this concept invite controversy” is a fair assessment of the law in Colorado. See PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., 2 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 7:174.53 (2010 Cumulative Supp. at 245).

136. See *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637, 640 (Colo. 1988) (whether an outdoor conveyor belt is an improvement to real property); *Stanske v. Wazee Elec. Co.*, 722 P.2d 402, 407 (Colo. 1986) (indicator light for grain elevator

The case law is filled with various, and sometimes conflicting, definitions. For example, the law of fixtures<sup>137</sup> may be “helpful by analogy,” but it is not “controlling” when determining whether something attached to real property is an “improvement” to real property.<sup>138</sup> Instead, the Colorado Supreme Court has embraced the unhelpful test that “the ordinary meaning of the language provides the best guidance”<sup>139</sup>—thereby leaving lower courts to determine which possible interpretation is the most “ordinary.” In recent dicta, the court quoted with approval a Colorado Court of Appeals decision that called for the examination of whether “the result of the construction is a product that is ‘essential and integral to the function of the construction project.’”<sup>140</sup> However, divisions of the Colorado Court of Appeals have held that “[t]he principal factor to be considered . . . is the intention of the owner.”<sup>141</sup> Importantly, it seems that the Colorado Supreme Court never has addressed<sup>142</sup> the badly blurred threshold between “mere

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electrical system); *Barron v. Kerr-McGee Rocky Mountain Corp.*, 181 P.3d 348, 349 (Colo. App. 2007) (oil storage tank); *Two Denver Highlands Ltd. Liab. Ltd. P’ship v. Stanley Structures, Inc.*, 12 P.3d 819, 822 (Colo. App. 2000) (design, manufacture, and installation of precast concrete products); *Hersh Cos. v. Highline Vill. Assocs.*, 996 P.2d 250, 254 (Colo. App. 1999) (repainting building exterior), *rev’d in part*, 30 P.3d 221 (Colo. 2001); *Two Denver Highlands Ltd. P’ship v. Dillingham Constr. N.A., Inc.*, 932 P.2d 827, 829 (Colo. App. 1996) (preparing and installing concrete); *Gleason v. Becker-Johnson Assocs.*, 916 P.2d 662, 664 (Colo. App. 1996) (pre-buy inspection); *Flatiron Paving Co. of Boulder v. Great Sw. Fire Ins. Co.*, 812 P.2d 668, 669–70 (Colo. App. 1990) (moving historical monument); *Calvaresi v. Nat’l Dev. Co.*, 772 P.2d 640, 643 (Colo. App. 1988) (having property re-zoned and approved for subdivision); *Enright v. City of Colo. Springs*, 716 P.2d 148, 149 (Colo. App. 1985) (plate glass vestibule); *Embree v. American Cont’l Corp.*, 684 P.2d 951, 951 (Colo. App. 1984) (grading a lot). The same issue has vexed courts in other states. *See, e.g.*, *Horosz v. Alps Estates, Inc.*, 642 A.2d 384, 387 (N.J. 1994).

137. A fixture is an item which has become part of real property, whereas an improvement may remain separable. 42 C.J.S. *Improvements* § 2 (2007).

138. *Stanske*, 722 P.2d at 407.

139. *Id.*

140. *Smith v. Exec. Custom Homes, Inc. (Smith II)*, 230 P.3d 1186, 1191 n.6 (Colo. 2010) (quoting *Highline Vill. Assocs. v. Hersh Cos.*, 996 P.2d 250, 254 (Colo. App. 1999)).

141. *Two Denver Highlands Ltd. P’ship v. Dillingham Constr. N.A., Inc.*, 932 P.2d 827, 829 (Colo. App. 1996); *Enright v. City of Colo. Springs*, 716 P.2d 148, 150 (Colo. App. 1985).

142. *See Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221, 224 n.4 (Colo. 2001) (declining to decide this issue as it was not presented on appeal; failing to mention any controlling precedent).

repairs” and those that are substantial enough to constitute “improvements to real property.”<sup>143</sup>

During the housing boom that preceded the 2008 recession, there was a surge in construction-defect litigation in Colorado and other high-growth states.<sup>144</sup> Although the increase in the number of homes constructed was a contributing factor, there also was an increase in the rate of defects per home<sup>145</sup> due to factors such as inexperienced construction workers filling the labor shortfall, a scarcity of high-quality building materials, and an insufficient number of municipal inspectors to ensure compliance with building codes.<sup>146</sup> Moreover, plaintiffs’ attorneys increasingly pursued construction-defect claims.<sup>147</sup> In turn, the increase in construction-defect litigation placed a severe strain on insurance companies,<sup>148</sup> which had set their premiums too low to cover their exposures<sup>149</sup> and failed to tailor their premiums to individual companies’ likely liabilities.<sup>150</sup> In reaction to the perceived insurance crisis, states enacted “notice-and-opportunity-to-repair” (NOR) statutes.<sup>151</sup> Colorado’s NOR provision, which was adopted in 2003 as part of a bill known as “CDARA II,”<sup>152</sup> would prove crucial to the *Smith II* decision.<sup>153</sup>

The crux of a NOR statute is that a property owner must formally notify a construction professional of defects a specific number of days before filing suit in order to give the construction professional a chance to cure the defect through monetary compensation or repairs.<sup>154</sup> Supposedly, this

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143. BRUNER & O’CONNOR, *supra* note 135, § 7:174.53 n.14 (2010 Cumulative Supplement at 246 & n.14) (citing contradictory holdings from other states).

144. See Noble-Allgire, *supra* note 66, at 732–35.

145. M.P. McQueen, *Cracked Houses: What the Boom Built*, WALL ST. J., July 1, 2009, at D1; Peter Robinson & Kathleen M. Howley, *Builders Undermined by Cost of Construction Boom’s Flaws*, WASH. POST, Feb. 12, 2011, at E8 (reporting “a doubling of defects per unit from 2000 through 2005 compared with the previous six-year period”).

146. See Noble-Allgire, *supra* note 66, at 737–38; McQueen, *supra* note 145.

147. See Noble-Allgire, *supra* note 66, at 738–39.

148. Melissa C. Tronquet, Comment, *There’s No Place Like Home . . . Until You Discover Defects*, 44 SANTA CLARA L. REV. 1249, 1249–50 (2004).

149. See Noble-Allgire, *supra* note 66, at 742.

150. See *id.* at 744.

151. See Boyer, *supra* note 44, at 31, 37 n.96 (discussing NOR statutes); Noble-Allgire, *supra* note 66, at 747.

152. COLO. REV. STAT. § 13-20-803.5 (2011). See generally Ronald M. Sandgrund & Scott F. Sullan, *The Construction Defect Action Reform Act of 2003*, COLO. LAW., July 2003, at 89, 94 (discussing CDARA II).

153. See *infra* Part IV.B.2.

154. See Noble-Allgire, *supra* note 66, at 748–49.

requirement promotes amicable dispute resolution,<sup>155</sup> although critics argue that most property owners would seek amicable solutions without prodding from the legislature.<sup>156</sup> Alternatively, for property owners determined to litigate, the NOR procedure merely forces both parties to go through a series of empty gestures before the buyer files her lawsuit.<sup>157</sup> With the context to *Smith II* established, the remainder of this Part focuses on the case.

## B. Smith I and II

### 1. Facts

In 2001, Judith and James Smith purchased a new townhome<sup>158</sup> in a development constructed by Executive Custom Homes (ECH).<sup>159</sup> On February 6, 2004, in response to a patch of ice that had formed below the first step of the sidewalk leading to the Smiths' front door, Mr. Smith sent an e-mail to the property manager asking ECH either to repair the defect that caused the ice accumulation or to reimburse the Smiths for the cost of repairs.<sup>160</sup>

After Mr. Smith sent his e-mail, the property manager forwarded it to ECH.<sup>161</sup> ECH arranged for another company, Intrawest Seamless Gutters, to inspect the Smiths' roof and rain gutters.<sup>162</sup> Between February and June of 2004, Intrawest repaired the roofs and gutters of the Smiths' home and other homes throughout the subdivision; however, these repairs were ineffective.<sup>163</sup> Neither the property manager nor ECH replied to Mr. Smith's e-mail,<sup>164</sup> and the Smiths were unaware that the repairs ever had taken place.<sup>165</sup>

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155. See Boyer, *supra* note 44, at 28 & n.2.

156. See Noble-Allgire, *supra* note 66, at 759.

157. See *id.* at 764. For example, in Colorado a homeowner is under no obligation to accept a construction professional's offer of monetary compensation or repairs. See COLO. REV. STAT. § 13-20-803.5(6).

158. *Smith v. Exec. Custom Homes, Inc. (Smith I)*, 209 P.3d 1175, 1177 (Colo. App. 2009), *rev'd by Smith v. Exec. Custom Homes, Inc. (Smith II)*, 230 P.3d 1186 (Colo. 2010).

159. *Smith II*, 230 P.3d at 1188.

160. See *Smith I*, 209 P.3d at 1177.

161. *Id.*

162. *Id.*

163. *Id.*

164. See *Smith II*, 230 P.3d at 1188; *Smith I*, 209 P.3d at 1177-78.

165. See *Smith I*, 209 P.3d at 1181.

Although the repairs were ineffective, the Smiths, nonetheless, did not notice further ice accumulation until February 2, 2005.<sup>166</sup> That day Mrs. Smith was injured when she slipped on ice that had again accumulated below the bottom step of the front walk.<sup>167</sup> The Smiths then notified ECH of the accident by letter; ECH responded by denying liability and, for the first time, notified the Smiths of the repairs.<sup>168</sup> The Smiths filed a complaint against ECH on January 17, 2007.<sup>169</sup>

## 2. Procedural History

The trial court granted ECH's motion for summary judgment, holding that the Smiths' action accrued when they first detected the ice in 2004 and therefore that the suit was barred by section 104's two-year limitations period for actions against builders.<sup>170</sup> Notably, when arguing for summary judgment before the trial court, ECH did not contest the validity of the repair doctrine or its applicability to the case.<sup>171</sup> Rather, ECH argued only that, because the Smiths were not aware of the repairs and there had been no communication to the Smiths, they could not reasonably have relied on the repairs to defer filing their suit.<sup>172</sup>

The Colorado Court of Appeals reversed, adopting a version of the repair doctrine that encompassed repair "promises" that are "reasonably implied from all of the circumstances."<sup>173</sup> The court considered two issues: (1) when the Smiths' action accrued and (2) whether the repair doctrine applied. The appellate court sided with ECH on the issue of accrual, holding that section 104 plainly states that the Smiths' action accrued when they first discovered the ice.<sup>174</sup> Although

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166. *See id.* ("[I]t was not disputed that, after making their demand, [the Smiths] did not notice any further incidents of ice or water accumulation until the date of the accident.")

167. *Smith II*, 230 P.3d at 1188.

168. *Id.* ECH did not notify the Smiths at that time that the repairs had failed. *See Smith I*, 209 P.3d at 1178.

169. *Smith II*, 230 P.3d at 1188.

170. *Id.*; *see also* COLO. REV. STAT. §§ 13-80-104(1)(a), -102 (2011).

171. *Smith I*, 209 P.3d at 1180.

172. *Id.*

173. *Id.* (quoting *Highline Vill. Assocs. v. Hersh Cos.*, 996 P.2d 250, 256 (Colo. App. 1999)).

174. *Id.* at 1179–80. The statute reads, in relevant part: "[A] claim for relief arises . . . at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the

the court admitted that the outcome might be unfair, it held that this interpretation was not so “absurd” as to justify ignoring the plain meaning of the statute.<sup>175</sup>

On the second issue, however, the court sided with the Smiths. The court reasoned that, because Mr. Smith never received a response to his e-mail, the Smiths reasonably could have inferred that ECH had repaired the defect that caused the ice accumulation—an assumption that could have been bolstered by the apparent disappearance of the ice.<sup>176</sup> The court remanded the case because this possibility created a disputed issue of fact that precluded summary judgment.<sup>177</sup>

On appeal to the Colorado Supreme Court, the Smiths challenged the appellate court’s accrual holding; ECH challenged the appellate court’s repair doctrine holding.<sup>178</sup> As in the courts below, ECH did not argue that the repair doctrine was invalid; rather, ECH contended that the repair doctrine was inapposite because ECH did not communicate with the Smiths and because the Smiths were unaware that ECH had attempted repairs.<sup>179</sup> During oral argument, the Smiths’ counsel noted that the validity of the repair doctrine was not in dispute,<sup>180</sup> and ECH’s counsel confirmed this assertion.<sup>181</sup> None of the justices asked any questions regarding the validity of the repair doctrine.<sup>182</sup>

### 3. Accrual Holding

The Colorado Supreme Court concluded that section 104 unambiguously states that actions against builders arise when defects in improvements are first discovered, which may be

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physical manifestations of a defect in the improvement which ultimately causes the injury.” COLO. REV. STAT. § 13-80-104(b)(I).

175. *Smith I*, 209 P.3d at 1179–80.

176. *See id.* at 1180–81.

177. *Id.* at 1181.

178. *Smith II*, 230 P.3d at 1187–88.

179. Respondent/Cross-Petitioner’s Combined Opening-Answer Brief at 27–41, *Smith II*, 230 P.3d 1186 (No. 09SC223), 2009 WL 3815876 (“This is not a case for the application of the repair doctrine, no less for the *adoption* of the repair doctrine in Colorado.”).

180. Oral Argument at 17:50–18:10, 19:30, *Smith II*, 230 P.3d 1186 (No. 09SC223), available at [http://www.courts.state.co.us/Courts/Supreme\\_Court/Oral\\_Arguments/Index.cfm?year=2010](http://www.courts.state.co.us/Courts/Supreme_Court/Oral_Arguments/Index.cfm?year=2010) (follow “Mar 10” tab; then follow “09SC223-Smith v. Executive Custom Homes” hyperlink).

181. *See id.* at 45:25, 48:15 (“I don’t think this is the case to apply the repair doctrine.”).

182. *See id.*

before an injury occurs.<sup>183</sup> Although this provision is unheard of in other states and arguably unfair, the court's accrual holding is justified by the plain language of the statute.<sup>184</sup>

The court acknowledged two potential problems with holding that the Smiths' claim accrued when they originally discovered the ice. First, the court conceded that its holding could force property owners to file lawsuits over minor defects for fear that a later collateral injury could be barred by the statute of limitations.<sup>185</sup> The court addressed this issue by implicitly distinguishing two types of claims. The first are "unripe" claims—those that have not yet accrued. The second type are premature<sup>186</sup> claims—for example, a property damage claim with only a nominal value that precedes a later personal injury claim arising from the same defect. The court apparently reasoned that it is reasonable to construe CDARA as encouraging premature claims so long as it does not encourage "unripe" claims:

[I]t is not the case that a literal, plain meaning interpretation of section 104 would encourage unripe lawsuits under the CDARA. A homeowner may file a claim under the CDARA as soon as the defect is noticed; the homeowner does not have to wait until such a defect causes collateral injury to a person or property. As such, incentivizing homeowners to resolve construction defect issues at the time the defect is first noticed rather than waiting until the defect later causes an injury directly serves the purpose of streamlining litigation that underlies the CDARA.<sup>187</sup>

Second, the court acknowledged that its interpretation of section 104 could result in "unfair" dismissals of actions brought by plaintiffs who might suffer serious injuries more than two years after noticing only minor construction defects.<sup>188</sup> In response, the court noted that it is appropriate to reinterpret a clear statutory text to avoid only results that are

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183. *Smith II*, 230 P.3d at 1189–91.

184. *See supra* note 131 and accompanying text.

185. *See Smith II*, 230 P.3d at 1190–91.

186. The court did not use the term "premature." However, it is fair to state that it would be premature to hire a lawyer and to sue a builder over mere ice accumulation.

187. *Smith II*, 230 P.3d at 1190–91 (citations omitted). For an analysis of this reasoning, *see infra* Part IV.B.2.

188. *Smith II*, 230 P.3d at 1190–91.

so “absurd” that they “shock the general moral or common sense,” as opposed to results that are merely “harsh or unfair, . . . inequitable or unwise[,] . . . [or] undesirable.”<sup>189</sup> Because the court determined that section 104 fell within the latter category, it applied the statute as written.<sup>190</sup>

#### 4. Repair Doctrine Holding

The Colorado Supreme Court rejected the repair doctrine as inconsistent with Colorado’s NOR procedures.<sup>191</sup> The court’s analysis proceeded in two steps. The court began by reasoning that “the repair doctrine is a form of equitable tolling, and ‘equitable tolling is not permissible where it is inconsistent with the text of the relevant statute.’ ”<sup>192</sup> The court cited two United States Supreme Court decisions and one California Supreme Court decision to support this proposition.<sup>193</sup> Next, the court reasoned that the NOR procedures were incompatible with the repair doctrine because they are “redundant” as the statute of limitations is tolled so long as the NOR procedures are followed.<sup>194</sup> When there are redundant statutory and equitable rules, the court held, the statutory rule must prevail.<sup>195</sup>

#### 5. Dissent

Justices Mullarkey and Hobbs dissented on two grounds. First, the dissenters contended that the repairs by ECH

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189. *Id.* at 1191 (quoting *Dep’t of Transp. v. City of Idaho Springs*, 192 P.3d 490, 494 (Colo. App. 2008)).

190. *See id.*

191. *See id.* at 1191–93.

192. *Id.* at 1191–92 (quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998)) (citing *United States v. Brockamp*, 519 U.S. 347, 350–54 (1997); *Laird v. Blacker*, 828 P.2d 691, 698 (Cal. 1992)).

193. *Id.*

194. *Id.* at 1192. *See also* COLO. REV. STAT. § 13-20-805 (2011) (statutes of limitations and repose are tolled until sixty days after the completion of the notice-of-claim process).

195. *Smith II*, 230 P.3d at 1192 (“[W]e do not resort to equity where there is a ‘plain, speedy, adequate remedy at law’ . . . .” (quoting *Szaloczi v. John R. Behrmann Revocable Trust*, 90 P.3d 835, 842 (Colo. 2004))). Interestingly, the court never intimated that the NOR tolling provision was redundant with repair *estoppel* as opposed to repair *tolling*. This argument will have added strength if the General Assembly reduces the NOR tolling provision’s scope. A court could hold that, even if the tolling provision currently in effect provides an “adequate remedy,” a later version of the provision may not.

constituted improvements to real property.<sup>196</sup> For that reason, the date that the Smiths discovered the physical manifestations of the defect in the original construction no longer was relevant; the statute began to run anew on the date that the Smiths discovered the physical manifestations of the defective repairs.<sup>197</sup> Thus, in the dissenters' view, the Smiths' action accrued in 2005 rather than 2004, and was therefore timely filed. Although Justices Mullarkey and Hobbs accepted the well-established principle that "improvements" do not include repairs that are "merely routine,"<sup>198</sup> they would have held that the repairs in this case surpassed that threshold.<sup>199</sup> The majority, in contrast, declined to discuss whether the repairs could constitute improvements because neither party raised the issue.<sup>200</sup> Second, the dissenters differentiated the NOR statute from the repair doctrine, arguing that the former is a mere notice requirement, not intended to supplant the repair doctrine.<sup>201</sup> For this reason, the dissenters would have declined to address the validity of the repair doctrine.<sup>202</sup>

#### IV. CORRECTING *SMITH II*

The Colorado Supreme Court should overrule *Smith II* in order to avoid negative policy consequences and because the decision was based on a misunderstanding of the NOR procedure—a misunderstanding that can be excused by the fact that the court did not have the benefit of adversarial briefing and argument about the NOR procedure.<sup>203</sup> Alternatively, Colorado courts should limit the precedential value of *Smith II*, construing the case as holding that the repair doctrine is unavailable in only those cases where a construction-defect defendant does not communicate repair promises to the plaintiff. Throughout this Part, such an interpretation of *Smith II* will be referred to as the "narrow reading" of the case. An

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196. See *id.* at 1193–94 (Mullarkey, C.J., dissenting).

197. See *id.*

198. See *id.*; BRUNER & O'CONNOR, *supra* note 135, § 7:174.53 (2011 Cumulative Supplement at 246); BLACK'S LAW DICTIONARY 757 (6th ed. 1990) (defining "improvement" as "[a] valuable addition . . . amounting to more than mere repairs or replacement").

199. See *Smith II*, 230 P.3d at 1193–94 (Mullarkey, C.J., dissenting).

200. See *id.* at 1191 n.6.

201. *Id.* at 1194 (Mullarkey, C.J., dissenting).

202. See *id.*

203. See *supra* notes 179–82 and accompanying text.

interpretation that extends *Smith II* beyond its facts will be referred to as the “expansive reading.”

### A. *Policy Consequences*

*Smith II*'s elimination of the repair doctrine in cases implicating the NOR procedure is bad policy. To understand why, consider how the hypothetical case described in the introduction might unfold post-*Smith II*.

A broad reading of *Smith II* will incentivize premature suits and, in turn, will discourage amicable repairs. Returning to the hypothetical, recall that the builder offered to install new drainage pipes and seemed sure that the pipes would solve the flooding problem. However, if your friend accepts the builder's offer, the results of the repair will not be clear until after the statute has elapsed. Even if it might not have made sense to sue the builder before *Smith II*, now your friend probably should litigate instead of consenting to repairs, because there is no assurance that a court later will find that the new sump pump was an improvement to real property. The Colorado Supreme Court's policy preferences against premature construction-defect suits<sup>204</sup> and in favor of out-of-court dispute resolution<sup>205</sup> both counsel against the expansive reading of *Smith II*. The court appears to have glossed over these concerns by stating that claims should be resolved quickly without considering whether they will be resolved amicably.<sup>206</sup>

Nor are the policies that justify strict adherence to statutes of limitations served by an expansive reading of *Smith II*: Your friend likely will file suit even if she cannot assert repair estoppel. She still can argue that either the pump or the pipes

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204. *Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221, 225 (Colo. 2001) (premature construction-defect suits “compromis[e] business relationships and burden[ ] courts with unripe claims”).

205. See two cases where the court rejected outcomes that would have encouraged litigation at the expense of settlement, *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1088 (Colo. 2009) (“Colorado courts have long enunciated a strong policy favoring settlement.”) and *Smith v. Zufelt*, 880 P.2d 1178, 1185–86 (Colo. 1994) (citing *Accord Colo. Ins. Guar. Ass'n v. Harris*, 827 P.2d 1139, 1142 (Colo. 1992)) (“When considering alternative consequences, we will defer to results that encourage the settlement of disputes.”). Although forcing a plaintiff to initiate the NOR procedure will not always result in a lawsuit, it likely will contribute to a breakdown in friendly relations between the property owner and the construction professional, which will increase the likelihood of a lawsuit compared to a situation in which the repairs are wholly amicable.

206. See *supra* note 187 and accompanying text.

are improvements to real property.<sup>207</sup> Thus, even if your friend's suit fails, both the court and the parties will incur the burden of litigation.<sup>208</sup> Even if the trial court dismisses the suit on the grounds that the pump and pipes were not improvements to real property, this is an issue of law that is reviewed *de novo*,<sup>209</sup> so your friend likely will appeal, expending more of the courts' and the parties' time and money.

Additionally, an expansive interpretation of *Smith II* may undermine the statute of limitations by diluting the definition of improvements to real property. Returning to the hypothetical, assume that the builder never installed a new sump pump or pipes, but attempted several times to seal cracks in the foundation to prevent the water from entering. Two years after your friend first noticed the flooding, her young child drowned after getting into the basement, which had flooded unexpectedly. The district court would be forced to choose between depriving your friend of any recovery or expanding the definition of an improvement to real property to cover sealing cracks.<sup>210</sup> The problem is that cases that expand the definition of improvements will serve as precedent for future cases—regardless of the seller's culpability, the buyer's reasonable reliance, or any other limits on the scope of the repair doctrine. This dilemma is peculiar to Colorado due to its unusual law that a cause of action against a construction professional accrues when a plaintiff first discovers the physical manifestations of the defect, not when the plaintiff is injured.<sup>211</sup> Particularly after the *Smith II* court held that

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207. See, e.g., *Horosz v. Alps Estates, Inc.*, 642 A.2d 384, 388–89 (N.J. 1994) (although construction-defect statute of repose was not tolled, repair efforts constituted “improvement[s] to real property,” and therefore suit for defects “related” to repairs was timely).

208. See *supra* Part II.A.1.

209. *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637, 641 (Colo. 1988).

210. So long as the defendant falls within the list of construction professionals in section 13-80-104(1)(a) of the Colorado Revised Statutes, the court would not be able to escape this dilemma by holding that the repair was *not* an improvement, and therefore that the suit is instead based on the negligent provision of a service, in which case the plaintiff's cause of action accrues only when she knows of her injury. See COLO. REV. STAT. § 13-80-108(1) (2011). The difficulty is that the plaintiff's cause of action accrues when she discovers “the physical manifestations of a defect in the improvement *which ultimately causes the injury.*” *Id.* § 13-80-104(1)(b)(I) (emphasis added). Even a repair that is not itself an improvement, if made to an improvement, apparently is subject to section 104's time bar. Thus, to evade applying section 104, the court must find that a new improvement has taken place.

211. See *supra* note 131 and accompanying text.

depriving a plaintiff of a serious personal injury claim before she suffers her injury is not “absurd,”<sup>212</sup> courts will be strongly incentivized to expand the definition of improvements.

### B. *Statutory Interpretation*

As the *Smith II* court noted, even deleterious policy consequences may be compelled by faithful adherence to the plain meaning of a statute.<sup>213</sup> However, the court’s conclusion that the NOR provision was incompatible with repair estoppel rests on shaky legal and factual grounds. Even ardent textualists acknowledge courts’ equitable power, which is not derived from a statutory source,<sup>214</sup> and construe statutes to *avoid* stripping courts of this power.<sup>215</sup> The court overlooked this maxim as well as other relevant rules of statutory construction. Furthermore, the court placed too much faith in the NOR procedure’s ability to fully supplant repair estoppel, despite the fact that the former offers substantially less protection.

#### 1. Precedent

The *Smith II* court seems to have misunderstood the distinction between repair tolling and repair estoppel.<sup>216</sup> Other courts are much more hesitant to find that a statutory scheme implicitly conflicts with estoppel as opposed to equitable tolling. According to a United States Supreme Court case relied on by the Colorado Supreme Court in *Smith II*:

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212. See *supra* Part III.B.3.

213. See *supra* notes 106–09, 189 and accompanying text.

214. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 114 & n.449 (2001). Both Justices Scalia and Thomas, who frequently are identified as textualists, joined in the *Beggerly* and *Brockamp* opinions discussed *infra* notes 217–31. The Colorado Supreme Court itself has observed that “where a party’s acts or omissions contribute to the running of a statute of limitations, the doctrine of equitable estoppel may bar that party’s raising the limitations statute as a defense.” *Shell W. E & P, Inc. v. Dolores Cnty. Bd. of Comm’rs*, 948 P.2d 1002, 1007 (Colo. 1997).

215. See *Miller v. French*, 530 U.S. 327, 340 (2000) (“[W]e should not construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command’ or an ‘inescapable inference’ to the contrary . . .”) (opinion of O’Connor, J., joined by Scalia and Thomas, JJ.) (quotation marks and citations omitted).

216. In contrast, the court carefully discussed the distinction in *Shell*, 948 P.2d at 1008–09.

We are not confronted with the question whether . . . *equitable estoppel* might apply if the Government were guilty of outrageous misconduct that prevented the plaintiff, though fully aware of the Government's claim of title, from knowing of her own claim. [That] doctrine[ ] [is] *distinct from equitable tolling*, and conceivably might apply in such an unlikely hypothetical situation.<sup>217</sup>

Similarly, although California's precedent regarding *equitable tolling* is mixed,<sup>218</sup> the California Supreme Court holds that "*equitable estoppel* is available even where the limitations statute at issue expressly precludes *equitable tolling*."<sup>219</sup> This rule is logical because tolling directly affects the running of the statute, and therefore conflicts with the statute. In contrast, estoppel leaves the statute unaffected; it merely deprives a defendant of the right to assert the statute if the defendant, through his wrongful conduct, waives that right.<sup>220</sup>

The *Smith II* court also seems to have overlooked the fact that the two United States Supreme Court cases that it cited express a strong presumption in favor of reading equitable *tolling* into statutes. Both *Beggerly* and *Brockamp* involved suits against the government, and therefore implicated the principle that waivers of sovereign immunity must be "strictly construed."<sup>221</sup> These cases cast serious doubt on prior Supreme Court precedent that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants

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217. *United States v. Beggerly*, 524 U.S. 38, 49 (1998) (Stevens, J., concurring) (emphasis added) (citations omitted); *see also* *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–33 (1959) (applying repair estoppel in a case involving an unambiguous statute of limitations).

218. *Compare* *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 194 P.3d 1026, 1036–37 (Cal. 2008) (stating that courts and legislatures have concurrent power to impose equitable tolling on statutes of limitations "in the absence of an explicit legislative directive"), *with* *Lantzy v. Centex Homes*, 73 P.3d 517, 524–26, 534 (Cal. 2003) (holding that equitable *tolling* did not apply to California's ten-year statute of repose for construction defects, but that defendants might be *estopped* from asserting the statute of repose).

219. *Lantzy*, 73 P.3d at 533 (emphasis added). Any discussion of *Lantzy* was conspicuously absent from the *Smith II* court's opinion.

220. *See* *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978) (differentiating tolling and estoppel in the context of the statute of limitations for the Interstate Land Sales Full Disclosure Act: "[B]ecause equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it might apply no matter how unequivocally the applicable limitations period is expressed").

221. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990).

should also apply to suits against the United States” *despite* sovereign immunity.<sup>222</sup> However, neither case disturbed that presumption with respect to suits between private parties.<sup>223</sup> Thus, upon an initial reading, *Beggerly* and *Brockamp* might seem to support the *Smith II* court’s conclusion. However, a more careful reading shows that they actually weigh against it.

The Colorado Supreme Court seems to have missed another important point in *Beggerly*: the shorter a statute of limitations, the more likely a court should find it compatible with equitable tolling.<sup>224</sup> The statute of limitations at issue in *Beggerly* was “unusually generous”—it did not bar actions until twelve years after the date of discovery, and there was no repose provision.<sup>225</sup> In contrast, the time limitations in section 104 are “some of the shortest limitations periods in the United States.”<sup>226</sup> While thirty-four states have statutes of repose for actions based on defective improvements to real property that are longer than Colorado’s six-year limit, and five states have no statute of repose at all, only four states have statutes shorter than Colorado’s.<sup>227</sup> Under *Beggerly*’s reasoning, to counterbalance Colorado’s unusually harsh statutes of limitations and repose, *Smith II* should not have found any conflict between the limited NOR procedure and repair estoppel.

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222. *Id.* at 95–96. *Irwin* further stated that “[t]ime requirements in lawsuits between private litigants are customarily subject to ‘equitable tolling.’” *Id.* at 95 (quoting *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27 (1989)).

223. See Manning, *supra* note 214, at 114 & n.449 (observing in the footnote that even “[t]he Court’s most consistent textualists, Justices Scalia and Thomas, have joined opinions acknowledging the background understanding that federal statutes of limitations are subject to common law rules of equitable tolling” when there are no “persuasive indications to the contrary in the statute” (citations omitted)).

224. *United States v. Beggerly*, 524 U.S. 38, 48–49 (1998); *cf.* *Metzger v. Kalke*, 709 P.2d 414, 417 (Wyo. 1985) (“Statutes prescribing a relatively short period for suit are usually construed narrowly to give the holder of a cause of action a fair opportunity to present his claim.” (paraphrasing *Safeco Ins. Co. of Am. v. Honeywell, Inc.*, 639 P.2d 996, 1001 (Alaska 1981)). Admittedly estoppel, rather than equitable tolling, was at issue in *Smith II*. However, as described *supra* in notes 217–20 and the accompanying text, courts should be even less likely to find an implicit conflict with a statute in a case involving estoppel rather than tolling.

225. *Beggerly*, 524 U.S. at 48–49; see also *Holland v. Florida*, 130 S. Ct. 2549, 2561 (2010) (distinguishing a one-year statute of limitations from the twelve-year statute of limitations in *Beggerly*).

226. *Sandgrund & Sullan*, *supra* note 44, at 73.

227. See Boyer, *supra* note 44, at 29 n.23 (listing the law in every state). Interestingly, one of these states is Louisiana, which applies a statutory repair doctrine as a caveat to its statute of repose. See *supra* note 123.

*Brockamp's* reasoning also militates against the result in *Smith II*. Initially, *Brockamp* seems to support the result in *Smith*: the Court refused to read equitable tolling into a provision that set time limits for plaintiffs to recover excess sums accidentally paid to the Internal Revenue Service (IRS).<sup>228</sup> In addition to the sovereign immunity issue, discussed above, the Court gave three other reasons for refusing to accept equitable tolling in that context. First, the Court stated that tax law is “not normally characterized by case-specific exceptions reflecting individualized equities.”<sup>229</sup> Second, the Court noted that the statute of limitations never had been subject to equitable tolling prior to one of the district court decisions that was before the Court on appeal.<sup>230</sup> Third, the IRS is a public agency that issues 90 million tax refunds per year, and therefore has an overwhelming need for certainty that claims against it will not unexpectedly be asserted long after they arise.<sup>231</sup>

Each concern in *Brockamp* favors finding the NOR procedure in accord with repair estoppel. Compared to tax cases, personal injury cases are a more appropriate context for “case-specific exceptions reflecting individualized equities.”<sup>232</sup> Furthermore, prior to *Smith II*, Colorado courts applied repair estoppel in several decisions.<sup>233</sup> Finally, construction professionals do not share the IRS's volume-driven need for certainty. Like *Beggerly*, *Brockamp* favors finding the NOR procedure in harmony with repair estoppel.

*Laird*—the California Supreme Court case that *Smith II* relied on—also fails to support the Colorado Supreme Court's decision. In *Laird*, a client's attorneys failed to pursue a lawsuit on her behalf, resulting in a dismissal for lack of prosecution.<sup>234</sup> The client fired her attorneys and appealed the dismissal, but later voluntarily dismissed her appeal.<sup>235</sup> Seventeen months after the client fired her attorneys, but only eight months after she voluntarily dismissed her appeal, the client sued her former attorneys for malpractice.<sup>236</sup> The

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228. *United States v. Brockamp*, 519 U.S. 347, 348–49 (1997).

229. *Id.* at 352.

230. *Id.* at 353–54.

231. *Id.* at 352–53.

232. *Id.* at 352.

233. *See supra* notes 132–34 and accompanying text.

234. *Laird v. Blacker*, 828 P.2d 691, 692 (Cal. 1992).

235. *Id.*

236. *Id.*

applicable statute of limitations barred a malpractice plaintiff from suing more than one year after she discovered the malpractice, but tolled that statute if she had not yet suffered an “actual injury.”<sup>237</sup> The client argued that she did not suffer an “actual injury” until she dismissed her appeal,<sup>238</sup> but the California Supreme Court held that the statute was not tolled by the appeal.<sup>239</sup>

Crucially, the court’s reasoning was based on a functional evaluation of the consequences of recognizing the client’s proposed tolling rule. Tolling the statute of limitations pending appeal would “allow clients, with knowledge that they have suffered actual injury, unilaterally to control the commencement of the statute of limitations and hence undermine the legislative goal of resolving cases while the evidence is fresh.”<sup>240</sup> In contrast, the court noted that tolling due to pending appeals is necessary in those states that do not also toll their statutes of limitations for the duration of a malpracticing attorney’s representation of a client.<sup>241</sup> If these states did not toll malpractice actions due to pending appeals, an attorney could evade a malpractice suit by continuing to represent the client on appeal until the statute had expired.<sup>242</sup> In other words, if the plaintiff controls the tolling condition, then tolling is inappropriate; if the defendant controls the tolling condition, then tolling is appropriate. *Laird*’s functional approach counsels against the result reached in *Smith II*. Unlike the proposed tolling condition in *Laird*, which would have been within the plaintiff’s control, the predicate conditions for repair estoppel are firmly within the seller’s control.<sup>243</sup>

## 2. Colorado Rules of Statutory Construction

Four rules of statutory construction that the *Smith II* court overlooked weigh against finding an implicit conflict between

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237. *Id.*

238. *Id.* at 693.

239. *Id.* at 698.

240. *Id.*

241. *See id.* at 699.

242. *See id.*

243. *See supra* notes 75–76 and accompanying text (explaining that the seller can avoid repair estoppel altogether by honestly explaining the likelihood that the repairs will succeed, and also that the seller can lay the basis for a laches defense by clearly stating that he will not attempt further repairs).

the NOR procedure and repair estoppel. One is that Colorado has codified a concept similar to the public choice theory “warning beacon”<sup>244</sup> by declaring that courts, when interpreting statutes, should presume “that the [*p*]ublic interest is favored over any private interest.”<sup>245</sup> As explained earlier, eliminating the repair doctrine typically will work against the public interest because of the difficulty of mobilizing the beneficiaries of the repair doctrine into a successful interest group.<sup>246</sup> Therefore, the court should have avoided striking down the repair doctrine.

Another relevant principle is that “statutes in derogation of the common law”—statutes that partially conflict with a common law doctrine<sup>247</sup>—“must be strictly construed *in favor of the person against whom the provision[ ] [is] intended to apply.*”<sup>248</sup> Because NOR procedures were enacted to benefit construction professionals in disputes against property owners,<sup>249</sup> NOR statutes should be construed in favor of property owners. Colorado courts usually are reluctant to hold that a statute fully abrogates a common-law doctrine. The Colorado Supreme Court has stated that no abrogation will be found unless it was “clearly the intent of the general assembly.”<sup>250</sup> Another decision set an even higher bar, requiring an explicit statutory command to overturn a common-law doctrine: “It is well-settled that the legislature does not intend by a statute to make any change in the common law beyond what it declares by its *express terms.*”<sup>251</sup>

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244. *Supra* note 98 and accompanying text.

245. *Smith v. Zufelt*, 880 P.2d 1178, 1185 (Colo. 1994) (emphasis added); *see also* COLO. REV. STAT. § 2-4-201(1)(e) (2011); *id.* § 2-4-203(1)(b), (e) (When interpreting an ambiguous statute, courts may consider “[t]he circumstances under which the statute was enacted” and “[t]he consequences of a particular construction.”).

246. *See supra* Part II.C.

247. *See* BLACK’S LAW DICTIONARY 444 (6th ed. 1990) (“The partial repeal or abolishing of a law, as by a subsequent act which limits its scope or impairs its utility and force. Distinguished from *abrogation*, which means the entire repeal and annulment of a law.”).

248. *Robbins v. People*, 107 P.3d 384, 388 (Colo. 2005) (emphasis added).

249. *See supra* note 148–154 and accompanying text.

250. *Robbins*, 107 P.3d at 387; *see also* *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 611 (Colo. 2005) (“Statutes may not be interpreted to abrogate the common law unless such abrogation was clearly the intent of the General Assembly. Absent such clear intent, statutes must be deemed subject to the common law.” (quoting *Preston v. Dupont*, 35 P.3d 433, 440 (Colo. 2001))).

251. *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1021 (Colo. 2003) (emphasis added).

For example, consider *Robbins v. People*,<sup>252</sup> a Colorado Supreme Court case decided only five years before *Smith II*. In *Robbins*, an inmate who had served thirty-five years of a life sentence for first-degree murder sought post-conviction relief, alleging that he had received ineffective assistance of counsel.<sup>253</sup> The trial court dismissed the inmate's motion due to laches.<sup>254</sup> Although the applicable statute of limitations expressly stated that there was "no limit" for post-conviction relief in cases involving class-one felonies such as first-degree murder,<sup>255</sup> the Colorado Supreme Court affirmed.<sup>256</sup> The court reasoned that that the "statute's *silence with respect to . . . common law defenses* [was] ambiguous."<sup>257</sup> In light of the legislative silence—which the court held created ambiguity—the court turned to a combination of legislative history and case law to prove that the statute did not implicitly preclude the application of laches.<sup>258</sup>

Undeniably, the NOR procedure was silent with respect to the repair doctrine.<sup>259</sup> It is equally undeniable that limitations on actions against construction professionals are in derogation of the common law.<sup>260</sup> The *Smith II* court seems to have forgotten the teaching of *Robbins*: When determining the existence of a conflict between a statute of limitations and a common law defense, statutory silence necessitates an examination of legislative history and case law.<sup>261</sup> These two subjects are discussed next.

*Smith II* also neglected "[p]erhaps the best guide to [legislative] intent"—"the declaration of policy which frequently forms the initial part of an enactment."<sup>262</sup> A legislative declaration is even more compelling than legislative history

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252. 107 P.3d 384 (Colo. 2005).

253. *Id.* at 387.

254. *Id.*

255. *Id.* at 388.

256. *Id.* at 391.

257. *Id.* at 389 (emphasis added).

258. *Id.* at 389–90.

259. See COLO. REV. STAT. § 13-20-803.5 (2011).

260. *Homestake Enters. v. Oliver*, 817 P.2d 979, 982 (Colo. 1991) (citing *Leaf v. City of San Mateo*, 163 Cal. Rptr. 711, 714 (Ct. App. 1980)) ("[U]nder the common law prior to the enactment of statutes of limitations relating to construction, builders and contractors were subjected to potentially indefinite liability.").

261. *Robbins*, 107 P.3d at 389–90.

262. *St. Luke's Hosp. v. Indus. Comm'n*, 349 P.2d 995, 997 (Colo. 1960); accord *Adams v. Farmers Ins. Grp.*, 983 P.2d 797, 803–04 (Colo. 1999) (noting legislative declaration); COLO. REV. STAT. § 2-4-203(1)(g) (2011) (when interpreting an ambiguous statute, courts may consider "[t]he legislative declaration or purpose").

because it is a duly-enacted part of the statutory text. When promulgating CDARA II, the Colorado General Assembly left unchanged the relevant portion of the codified declaration of legislative intent to “preserv[e] adequate rights and remedies for property owners who bring and maintain [construction-defect] actions.”<sup>263</sup> “Preserving” suggests a desire to maintain, rather than eliminate, the repair doctrine.<sup>264</sup>

Finally, Colorado courts interpret statutes in light of an assumption that “when the General Assembly adopts legislation it is aware of judicial precedent relating to the subject matter under review.”<sup>265</sup> This argument is particularly strong when the statute was amended after the relevant case or cases.<sup>266</sup> Therefore, when the General Assembly passed CDARA II in 2003, it was presumptively aware of a line of prior cases embracing the repair doctrine.<sup>267</sup> This makes it likely that, had the General Assembly intended to abrogate the repair doctrine, it would have done so expressly.

### 3. The NOR Procedure

As explained above, the *Smith II* court should have been highly reluctant to reject the repair doctrine due to a perceived incompatibility with the NOR procedure. However, if the two were irreconcilable, the court’s decision would be justified. This is not the case. The repair doctrine does not upset a carefully-balanced legislative scheme because the NOR procedure already allows repairs (and therefore statutory tolling) to

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263. COLO. REV. STAT. § 13-20-802 (2011); 2003 Colo. Sess. Laws 1361.

264. Cf. *Adams*, 983 P.2d at 803–04 (holding that legislative declaration of the since-repealed No-Fault Act for automobile insurance—“to avoid inadequate compensation to victims of automobile accidents”—implied that the statute should be “liberally construed” in “favor of insureds”).

265. *Pulsifer v. Pueblo Prof'l Contractors Inc.*, 161 P.3d 656, 662 (Colo. 2007) (citing *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496, 504 (Colo. 1993)); accord *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862, 869–70 (Colo. 2005); see also COLO. REV. STAT. § 2-4-203(1)(d) (2011) (when interpreting an ambiguous statute, courts “may consider . . . [t]he common law . . . [regarding] the same or similar subjects”); *Smith v. Zufelt*, 880 P.2d 1178, 1185 (Colo. 1994).

266. See *A.C. Excavating*, 114 P.3d at 869–70 (General Assembly implicitly assented to judicial extension of independent tort duty to construct residences in a good and workmanlike manner to subcontractors, because legislature failed to overturn decisions despite amending related statutes); *Vaughan v. McMinn*, 945 P.2d 404, 408–09 (Colo. 1997) (rejecting argument that a statute implicitly eliminated a common law doctrine announced in a judicial decision where the statute had been amended several times after the decision).

267. See *supra* notes 132–34 and accompanying text.

continue indefinitely. And, rather than being redundant with the NOR procedure, the extra protection of repair estoppel is necessary to adequately protect construction-defect plaintiffs from misleading repair promises.

The court's description of the NOR procedure is factually inaccurate. In finding a conflict between the NOR procedure and the repair doctrine, the court stressed that "the repair doctrine could frustrate the operation of the statutory notice of claim procedure laid out in detail in section 803.5 because the repair doctrine could result in tolling for repairs outside of the limited circumstances and *specific durations* set forth by the General Assembly in the statute."<sup>268</sup> The NOR procedure does set forth a specific timetable for the period of the notice-of-claim process that begins when a property owner serves a construction professional with a notice of claim and ends when the property owner either accepts or rejects the construction professional's offer.<sup>269</sup> However, the entire process is not complete until the construction professional finishes any repairs promised in his offer. Any timetable for the repair stage of the notice-of-claim process is specified by the construction professional alone, rather than the General Assembly.<sup>270</sup> Therefore, the "specific durations" set forth in section 803.5 leave unaffected the ultimate duration of the statutory tolling.<sup>271</sup>

More importantly, repair estoppel protects those buyers who are unfamiliar with construction-defect law. In contrast, one cannot follow the NOR procedures unless one is aware that

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268. See *Smith v. Exec. Custom Homes, Inc. (Smith II)*, 230 P.3d 1186, 1192 (Colo. 2010) (emphasis added).

269. The NOR process begins with the property owner presenting a notice of claim to the construction professional. COLO. REV. STAT. § 13-20-803.5(1) (2011). The construction professional then has thirty days to inspect the property. *Id.* § 13-20-803.5(2). After completing the inspection, the construction professional has thirty days (for residential property) or forty-five days (for commercial property) to offer a cash settlement or repairs. *Id.* § 13-20-803.5(3). The property owner has fifteen days to accept the offer; otherwise it is deemed rejected. *Id.* § 13-20-803.5(4)–(5).

270. See *id.* § 13-20-803.5(5) ("If an offer to remedy is accepted by the claimant, the remedial construction work shall be completed *in accordance with the timetable set forth in the offer* unless the delay is caused by events beyond the reasonable control of the construction professional." (emphasis added)). There is neither a statutory maximum on the construction professional's self-imposed time limit, nor is there any presumptive time limit that applies in the event that the construction professional fails to specify one in his offer. See *id.* § 13-20-803.5.

271. The tolling lasts until "the completion of the notice of claim process described in section 13-20-803.5." *Id.* § 13-20-805. Presumably this encompasses the repairs as well as the earlier stages of the process.

the statute exists. It is doubtful that many homeowners have heard of the NOR provision, and even those who are aware of it may find it too complex to navigate without a lawyer's help.<sup>272</sup> The property owners who most need the protection of repair estoppel are those who lack access to legal advice—precisely the same property owners disadvantaged by the NOR statute.

Legally unsophisticated homeowners likely will not be aware that the NOR procedure sets strict standards for the form of communications that toll the statute of limitations. Property owners must send written notices to construction professionals in such a manner that the construction professional actually receives the notice,<sup>273</sup> such as via certified mail.<sup>274</sup> Although courts might potentially read the “actual receipt” provision broadly to encompass a variety of informal written communications,<sup>275</sup> these situations would raise difficult issues of proof. The statute of limitations apparently would not be tolled by communications in person or via telephone; it is unclear whether text messages or e-mails would be sufficient.

The NOR procedure also sets standards for the content of the notice, which must include a description of the claim “in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect.”<sup>276</sup> Only future litigation will reveal the level of detail necessary to satisfy this requirement.

Finally, the NOR procedure includes time limitations that can be waived only through a written agreement.<sup>277</sup> For instance, if the property owner does not accept in writing an offer from the construction professional within fifteen days, the

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272. See Noble-Allgire, *supra* note 66, at 775–77 (“In some cases . . . a homeowner’s failure to understand the interrelationship between the NOR process and the statutes of limitation or repose may prove fatal to the claim.”). A dissatisfied homeowner’s first reaction likely will be to consult informally with the construction professional, rather than hiring an attorney. *Cf.* Mills v. Garlow, 768 P.2d 554, 558 (Wyo. 1989) (taxpayer’s natural response, upon learning that her accountant’s advice increased her tax liability, will be to contact her accountant for help, rather than contacting an attorney).

273. COLO. REV. STAT. § 13-20-803.5(1), (11).

274. *Id.* § 13-20-803.5(1).

275. See Sandgrund & Sullan, *supra* note 152, at 94.

276. COLO. REV. STAT. § 13-20-802.5(5) (2011).

277. *Id.* § 13-20-803.5(8).

offer is deemed rejected.<sup>278</sup> If a homeowner accepted the construction professional's offer in person or by telephone, then the statute of limitations would resume running seventy-five days after the construction professional's offer.<sup>279</sup> In the event of repairs that continue for a long period of time, the homeowner might unwittingly lose her claim due to this technical mistake. For all of these reasons, the NOR procedure often will fail to protect a trusting and legally unsophisticated homeowner from manipulative repair promises by a construction professional. Repair estoppel fills the many gaps in the NOR procedure's tolling provision, and therefore the two are compatible.

### C. *Limiting Smith II*

Until the Colorado Supreme Court has the opportunity to overrule *Smith II*, lower Colorado courts should adopt a narrow reading of its holding. Even if the Colorado Supreme Court is reluctant to overrule *Smith II* outright, its precedential value should be limited to cases presenting similar facts.

Admittedly, *Smith II* stated in dicta that "equitable tolling under the repair doctrine is inconsistent with the CDARA."<sup>280</sup> However, *Smith II* confronted only one type of equitable "tolling"—the otherwise-unheard-of version advanced by the Smiths. The court pointedly observed that "[n]either the property manager nor ECH ever contacted the Smiths regarding the repairs, and the Smiths had no personal knowledge that the repairs took place."<sup>281</sup> It also noted that the repairs ceased in June 2004 but that the Smiths did not file suit until January 2007.<sup>282</sup> In conjunction with these facts, the court expressed concern that the version of the repair doctrine that the Smiths urged "could frustrate the operation of the [NOR] procedure . . . because the repair doctrine could result in tolling for repairs outside of the *limited circumstances* and specific durations set forth by the General Assembly in the statute."<sup>283</sup>

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278. *Id.* § 13-20-803.5(4).

279. *Id.* § 13-20-805.

280. *See Smith v. Exec. Custom Homes, Inc. (Smith II)*, 230 P.3d 1186, 1188 (Colo. 2010).

281. *Id.*

282. *Id.* at 1188, 1193.

283. *Id.* at 1192 (emphasis added).

The court's concern that the repair doctrine might extend far beyond the "limited circumstances" of the NOR procedure certainly is justified under the Smiths' version of the repair doctrine. While the crux of the NOR procedure is two-way communication,<sup>284</sup> the Smiths' version of repair estoppel oddly treats even *silence* as a "promise." In contrast, although the compromise doctrine suggested in this Note does not precisely match the NOR procedure, it shares the essential requirement of back-and-forth communication contemplated by the NOR statute.<sup>285</sup> Likewise, the court's concern about the repair doctrine extending beyond the "specific durations" of the NOR procedure is justified under the Smiths' version, which would excuse an unexplained delay of well over two years between the termination of repairs and the filing of a lawsuit. Under the compromise doctrine, however, the Smiths' claim would presumptively be barred by laches as it was filed longer than the statutory period after the termination of repairs.<sup>286</sup> For these reasons, *Smith II*'s holding should be understood as a rejection of only the extreme version of the repair doctrine that the Smiths proposed, rather than the compromise doctrine proposed in this Note.

#### CONCLUSION

This Note shows that a carefully circumscribed version of repair estoppel is beneficial for utilitarian, moral, and interpretive reasons. A broad reading of the *Smith II* decision cannot be justified on the ground that it advances the goals behind statutes of limitations, because so long as the scope of "improvements to real property" remains unresolved in Colorado, eliminating the repair doctrine will not discourage homeowners from filing potentially time-barred lawsuits. Moreover, the central argument behind the court's rejection of repair estoppel—a supposed implicit conflict with the NOR procedure—is unsupported by precedent and contradicted by an analysis of the statute. For the protection of Colorado's

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284. See generally COLO. REV. STAT. § 13-20-803.5 (2011).

285. See *supra* Part I.B.1 (requiring that seller negligently misrepresented to buyer probability that repairs would succeed); Part I.B.2 (requiring that buyer reasonably relied on a statement by the seller); Part I.B.4 (allowing seller to trigger beginning of period for determining laches by communicating to buyer that he would not attempt more repairs).

286. See *supra* notes 55–56 and accompanying text.

homeowners, *Smith II* should be overruled or limited to its facts.

# THE SEARCH FOR LUXURY PRUDENCE: APPLYING ALTERNATIVE DISPUTE RESOLUTION TO CONTRIBUTORY TRADEMARK LIABILITY IN THE ONLINE MARKETPLACE

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*Online counterfeit luxury goods are a problem for luxury trademark owners, online marketplaces, and the consuming public. The doctrine of contributory trademark liability developed as a response to this problem, but litigation under the doctrine has failed to adequately define the rights and obligations of the involved parties. This Note proposes a uniform anti-counterfeiting system that more effectively resolves trademark disputes in the online marketplace. The proposed system would (1) monitor online marketplaces for counterfeit listings and (2) provide alternative dispute resolution for parties with protracted issues.*

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## INTRODUCTION

The desirability of luxury fashion has always hinged on its exclusivity.<sup>1</sup> Fashion has the power to transform a “bag into a cult object”<sup>2</sup> or a dress into a woman’s entire “underpinning.”<sup>3</sup> Fashion magazines perpetually describe new pieces as “must-haves,” despite being aware that fashion is an unattainable fantasy for most.<sup>4</sup> This demand for exclusivity has allowed the counterfeit fashion industry to thrive. Knock-off purses, jewelry, and perfume provide a cheaper, but similar, entry into the fashion world for those consumers who cannot afford to pay the luxury premium.

But in Western countries where intellectual property rights are respected and enforced, counterfeiters, and even

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1. In the opening monologue of *THE SEPTEMBER ISSUE*, a documentary about the fashion magazine *Vogue*, editor-in-chief Anna Wintour muses:

I think what I often see is that people are frightened of fashion, and that because it scares them or it makes them feel insecure, they put it down. On the whole, people that say demeaning things about our world, I think that’s usually because they feel in some ways excluded or not part of the cool group—so as a result, they just mock it.

*THE SEPTEMBER ISSUE* (Lionsgate Home Entertainment 2009).

2. *The History of Fendi*, FENDI, <http://www.fendi.com/#/en/foreverfendi/historyoffendi> (last visited Mar. 27, 2012).

3. See *Donna Karan Quotes*, QUOTELUCY, <http://www.quotelucy.com/quotes/donna-karan-quotes.html> (last visited Mar. 27, 2012) (“I feel very strongly about dresses on every level—a dress feels like underpinning.”).

4. In the classic book *The Theory of the Leisure Class*, sociologist Thorstein Veblen discusses how social elites use dress to demarcate themselves from lower classes. See THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 118–24 (1973). Therefore, fashion is conspicuously expensive, nonfunctional, and mercurial. See *id.* Fashion magazines sometimes juxtapose images of unaffordable, high-fashion items with similar, low-priced items so that the ordinary consumer can emulate the fashion trends. C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 *STAN. L. REV.* 1147, 1157 (2009).

some buyers,<sup>5</sup> must be held accountable to the law. The body of federal and international law rendering counterfeiting illegal is well established and frequently enforced.<sup>6</sup> But some players in the counterfeit game have hidden deeper in the shadows. These counterfeit sellers have moved to the Internet, where there is less likelihood of detection and cheaper rent.<sup>7</sup> With a substantially larger potential consumer base, business is better too.<sup>8</sup>

Luxury trademark owners have instinctively reacted to online counterfeiters in the most obvious way—by filing lawsuits.<sup>9</sup> As the largest online marketplace,<sup>10</sup> eBay has been the chief target for legal claims alleging that it knowingly facilitated its sellers' counterfeiting activities.<sup>11</sup> European courts have punished eBay for opening the floodgates to online counterfeiting, while U.S. courts have been slightly more forgiving.<sup>12</sup> Although some trademark and Internet laws have been applied to this counterfeit phenomenon, none of these laws have completely solved the problem.<sup>13</sup>

Furthermore, litigation efforts have been shortsighted.<sup>14</sup> Due to the continued profitability of eBay, new online competitors have emerged,<sup>15</sup> and counterfeit listings have

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5. In France, criminal penalties for intellectual property infringement apply to consumers of counterfeit or pirated products. ORG. FOR ECON. CO-OPERATION & DEV., *THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY* 230 (2008), available at <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/OECD-FullReport.pdf>.

6. See *id.* at 185–259.

7. See David S. Wall & Joanna Large, *Jailhouse Frocks: Locating the Public Interest in Policing Counterfeit Luxury Fashion Goods* 1 (BRIT. J. OF CRIMINOLOGY, Working Paper, Vol. 50 No. 6, 2010).

8. See PEGGY CHAUDHRY & ALAN ZIMMERMAN, *THE ECONOMICS OF COUNTERFEIT TRADE: GOVERNMENTS, CONSUMERS, PIRATES, AND INTELLECTUAL PROPERTY RIGHTS* 137–39 (2009).

9. See *infra* discussion in Part II.C–D.

10. *Who We Are: Overview*, EBAY, <http://www.ebayinc.com/who> (last visited Mar. 27, 2012).

11. See, e.g., *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010); *S.A. Louis Vuitton Malletier v. eBay, Inc.*, Tribunal de Commerce [Commercial Court], Paris, 1B ch., Case No. 2006077799, June 30, 2008; *Rolex, S.A. v. eBay GmbH*, 1 ZR 35/04 (German Fed. S. Ct., Apr. 19, 2007).

12. Compare *S.A. Louis Vuitton Malletier*, Case No. 2006077799 (finding eBay liable for €38.6 million for contributory trademark infringement) with *Tiffany*, 600 F.3d at 109 (holding eBay not liable for contributory trademark infringement).

13. See *infra* Part II.

14. See *infra* Part II.

15. See ALLAN AFUAH & CHRISTOPHER L. TUCCI, *INTERNET BUSINESS MODELS AND STRATEGIES: TEXT AND CASES* 291 (2001); see also KIERAN LEVIS, *WINNERS & LOSERS: CREATORS AND CASUALTIES OF THE AGE OF THE INTERNET* 183 (2009).

spread throughout these various marketplaces.<sup>16</sup> The absence of uniform legal authority has made the rights, obligations, and liabilities of all parties unclear. Buyers *seeking* luxury goods cannot judge whether the items are genuine, while sellers *owning* legitimate luxury goods are faced with various roadblocks when looking to sell on the secondary market.<sup>17</sup> Furthermore, online marketplaces and luxury trademark owners, who theoretically share the same goal of curbing counterfeit sales, have been thrust into the adversarial court system where they merely point fingers at each other regarding who carries the burden of monitoring the Internet.<sup>18</sup> Although some anti-counterfeiting safeguards have been put in place on eBay and other sites,<sup>19</sup> the more fundamental questions have yet to be answered: What are the true costs of the luxury counterfeit market? What is in the consuming public's best interest? Who is in the best position to protect luxury trademarks? And can these problems be resolved more cheaply and effectively outside of the courts?

This Note argues that the varying interests of luxury trademark owners, online marketplaces, and the consuming public can be balanced more effectively through an alternative dispute resolution system. It then proposes a process that deals with the evolving complexities of online contributory trademark infringement outside of litigation and the court system. Part I explores the elements and development of the contributory trademark infringement doctrine. Part II discusses the parties in the fashion industry and the secondary market that are affected by online counterfeiting, as well as relevant legal developments in the United States and Europe.

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16. See Press Release, MarkMonitor, Report Sheds Light on Scale and Complexity of Online Piracy and Counterfeiting Problem (Jan. 11, 2011), available at <https://www.markmonitor.com/pressreleases/2011/pr110111.php>.

17. For example, an eBay France user cannot sell perfumes from Dior, Guerlain, Kenzo, and Givenchy or products by Hermès or Louis Vuitton. See *SA Louis Vuitton Malletier v. eBay*, Tribunal de Commerce [Commercial Court] Paris, B ch., Case No. 2006077799, June 30, 2008.

18. See, e.g., *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 469 (S.D.N.Y. 2008), *aff'd in part, rev'd in part*, 600 F.3d 93 (2d Cir. 2010) ("Accordingly, the heart of this dispute is not whether counterfeit Tiffany jewelry should flourish on eBay, but rather, who should bear the burden of policing Tiffany's valuable trademarks in Internet commerce.")

19. See, e.g., *eBay Against Counterfeits*, EBAY, <http://pages.ebay.com/against-counterfeits/> (last visited Mar. 27, 2012); *Copyright and Intellectual Property Policy*, ETSY, <http://www.etsy.com/help/article/482> (last visited Mar. 27, 2012); *Silkgfair's Terms of Use Agreement*, SILKFAIR, [http://www.silkgfair.com/account/tos\\_site#](http://www.silkgfair.com/account/tos_site#) (last visited Mar. 27, 2012).

Part III discusses how alternative dispute resolution systems have already been integrated into intellectual property law for online settings. Finally, Part IV proposes an international anti-counterfeiting treaty that creates a two-part system that would (1) monitor for counterfeit listings on online marketplaces and (2) provide alternative dispute resolution for parties with protracted issues.

#### I. DEVELOPMENT OF CONTRIBUTORY TRADEMARK LIABILITY

The Lanham Act, which established the statutory foundation of U.S. trademark law in 1946,<sup>20</sup> does not address contributory trademark liability.<sup>21</sup> Therefore, U.S. courts have relied on common law principles to create a body of law governing contributory liability for trademark infringement.<sup>22</sup> This Part first discusses the overarching goals of trademark law. Next, it describes the trademark infringement category of counterfeiting. Lastly, this Part addresses how the doctrine of contributory trademark law has evolved in response to the growing problem of counterfeit goods.

Trademark law protects the exclusive right to use a mark to distinguish one's goods and services from another's.<sup>23</sup> Trademark law serves the parallel goals of protecting both consumers and trademark owners.<sup>24</sup> First, the law prohibits "conduct that is likely to confuse or deceive consumers as to the source of goods or services."<sup>25</sup> Thus, consumers are able to minimize search costs and obtain the desired products they expect.<sup>26</sup> Second, the law allows trademark owners to protect their investment of "energy, time, and money in presenting to

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20. See Lanham Act, 15 U.S.C. §§ 1051–1127 (2006).

21. Sofia H. Ahmed, Note, *Life, Liberty, and the Pursuit of Luxury: eBay's Liability for Contributory Trademark Infringement in the United States, Germany, and France*, 5 *BYU INT'L L. & MGMT. REV.* 247, 256 (citing Brian D. Kaiser, *Contributory Trademark Infringement by Internet Service Providers: An Argument for Limitation*, 7 *J. TECH. L. & POL'Y* 65, 86 (2002)).

22. See *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982).

23. 15 U.S.C. § 1115.

24. Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 *N.Y.U. L. REV.* 60, 64 (2008).

25. DAVID C. HILLIARD ET AL., *TRADEMARKS AND UNFAIR COMPETITION* 5 (7th ed. 2008).

26. Grynberg, *supra* note 24, at 64.

the public the product.”<sup>27</sup> A trademark owner’s trademark rights are often characterized as property rights.<sup>28</sup>

Although the goals of trademark owners and consumers are typically compatible, trademark owners have a tendency to exploit the value of their trademark rights, even when it is detrimental to consumer interests.<sup>29</sup> For example, when sports teams exert trademark rights over their logos, their fans are forced to accept higher prices and lower quality for team merchandise because market competitors are prevented from offering comparable products.<sup>30</sup> Similarly, luxury trademark owners often charge premiums on their goods in excess of quality or cost.<sup>31</sup>

Trademark infringement generally occurs when an unauthorized use of a trademark is likely to cause confusion, to cause mistake, or to deceive.<sup>32</sup> Counterfeiting is “hard core” or “first degree” trademark infringement.<sup>33</sup> Counterfeiting is the act of producing, selling, or distributing products with “a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.”<sup>34</sup> Often, counterfeit goods are made to imitate well-known products in construction and appearance so as to deceive customers into thinking that they are receiving genuine merchandise.<sup>35</sup> U.S. federal law imposes both civil and criminal penalties for counterfeiting,<sup>36</sup> with a legislative trend towards stiffer penalties and new causes of action to protect trademark owners and punish

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27. *Id.* (quoting S. Rep. No. 79-1333, at 3 (1946)).

28. *See id.* at 67; HILLIARD ET AL., *supra* note 25, at 6.

29. Grynberg, *supra* note 24, at 65.

30. Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 482 (2005).

31. Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1392 n.22 (2005). However, consumers may not be “duped”; rather, they may appreciate the host of social and psychological benefits that transcend functionality. *See* Jerre B. Swann, Sr., David A. Aaker & Matt Reback, *Trademarks and Marketing*, 91 TRADEMARK REP. 787, 797–803 (2001).

32. Lanham Act, 15 U.S.C. § 1114 (1946).

33. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:10 (4th ed. 2011).

34. 15 U.S.C. § 1145 (1946).

35. MCCARTHY, *supra* note 33, at § 25:10.

36. *See* 15 U.S.C.A § 1114(1) (West 2010) (imposing civil liability for counterfeiting); 18 U.S.C.A § 2320 (West 2010) (imposing criminal liability for counterfeiting), *amended by* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 818(h), 125 Stat. 1298 (2011).

counterfeiters.<sup>37</sup> The workings of the counterfeit market are discussed further in Part II.A.

In various ways, the law has trended towards expanding trademark protections—primarily for the benefit of trademark owners.<sup>38</sup> A recent example of a non-statutory expansion of trademark protection is contributory trademark liability.<sup>39</sup> The doctrine extends trademark infringement liability to those who merely contribute to the counterfeit process.<sup>40</sup> Specifically, third parties who knowingly assist or somehow provide the counterfeiter with the tools or means for trademark infringement, but do not control the direct infringer, may be liable for contributory infringement.<sup>41</sup> To prove a contributory trademark infringement claim, the underlying direct infringement claim must be first established.<sup>42</sup> In recent cases, trademark owners have alleged that online marketplaces, such as eBay, have knowingly assisted online sellers' counterfeiting activity.<sup>43</sup>

The Supreme Court first recognized the doctrine of contributory trademark liability in 1982 in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*<sup>44</sup> In this case, Ives Laboratories, the manufacturer of the brand-name drug Cyclospasmol, sued generic pill manufacturers because pharmacists were buying the generic pills, substituting them for Cyclospasmol prescriptions, and mislabeling them as Cyclospasmol.<sup>45</sup> The Supreme Court held that generic pill manufacturers could be liable for contributory trademark infringement because liability extends not only to the pharmacists who actually mislabel goods, but also to the manufacturers who continue to provide the generic drugs with

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37. See generally Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181, 120 Stat. 285 (2006); Anticounterfeiting Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386 (1996).

38. This includes trademark doctrines of initial interest confusion, post-sale confusion, ornamental use, and dilution. Grynberg, *supra* note 24, at 66. For consumers, expanded trademark protection provides unclear and perhaps doubtful benefits. See *id.* at 67–77.

39. The Supreme Court first acknowledged that liability for trademark infringement can extend beyond those who directly infringe on a trademark in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 853–54 (1982).

40. *Id.*

41. *Id.* at 854.

42. See *id.* at 853–54.

43. See *infra* Part II.

44. See *Inwood Labs.*, 456 U.S. at 853–54.

45. *Id.* at 850.

knowledge of such mislabeling.<sup>46</sup> The Court set the standard for analyzing contributory trademark claims: a party is contributorily liable when it either (1) “intentionally induces another to infringe a trademark” or (2) “continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.”<sup>47</sup>

*Inwood* cleared the path for other contributory trademark cases in physical, non-Internet settings.<sup>48</sup> Many of the cases were brought against landlords for allowing tenants and vendors to sell trademark-infringing goods on their premises.<sup>49</sup>

Contributory trademark liability was first litigated in the Internet context in response to the rise of cybersquatting.<sup>50</sup> Cybersquatting is when an individual or company registers a domain name that incorporates another’s trademark in order to exploit profit from that trademark’s goodwill.<sup>51</sup> In *Lockheed Martin Corp. v. Network Solutions, Inc.*, the Ninth Circuit held that a domain name registrar, an organization that issues and registers domain names, is not contributorily liable for the trademark infringement of a domain name.<sup>52</sup> Due to the great volume of information on the Internet, a domain-name registrar could not “reasonably be expected to monitor the Internet” for potential infringement.<sup>53</sup> However, the *Lockheed*

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46. *Id.* at 853–54. In the particular facts of the *Inwood* case, the Supreme Court showed deference to the trial court’s finding that there was insufficient evidence to show that the general pill manufacturers intentionally induced the pharmacists to mislabel generic drugs, or knowingly continued to supply the drugs to pharmacists who were mislabeling generic drugs. *Id.* at 855.

47. *Id.* at 854.

48. See *Hard Rock Cafe Licensing Corp. v. Concession Servs. Inc.*, 955 F.2d 1143 (7th Cir. 1992); see also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996); *Polo Ralph Lauren Corp. v. Chinatown Gift Shop*, 855 F. Supp. 648 (S.D.N.Y. 1994).

49. See *Fonovisa*, 76 F.3d at 260–61; *Hard Rock Cafe*, 955 F.2d at 1145–46; *Polo Ralph Lauren*, 855 F. Supp. at 649.

50. See *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 983–85 (9th Cir. 1999) (summarizing prior non-Internet applications of contributory trademark doctrine and applying it to the online context as a matter of first impression).

51. See 15 U.S.C. § 1125(d) (2006) (cyberprivacy prevention); see generally Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999). For example, in *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, a video rental store was enjoined from using moviebuff.com because it attracted viewers who were initially searching for MovieBuff, a database of entertainment-related news. 174 F.3d 1036, 1066–67 (9th Cir. 1999).

52. *Lockheed Martin*, 194 F.3d at 987.

53. *Id.* at 985 (quoting *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 962 (C.D. Cal. 1997)).

*Martin* court did not foreclose the possibility of “the application of contributory infringement in the Internet context.”<sup>54</sup>

But the common law doctrine of contributory trademark liability was entirely ineffective in dealing with cybersquatting.<sup>55</sup> As cybersquatting continued to be a pervasive problem, the Internet Corporation for Assigned Names and Numbers (ICANN) ultimately established an alternative dispute resolution process called the Uniform Domain-Name Dispute-Resolution Policy (UDRP) to resolve cybersquatting matters.<sup>56</sup> This is discussed further in Part II.D–E.

Even though contributory trademark liability failed to solve the problem of cybersquatting, trademark owners have inexplicably turned to contributory trademark liability doctrine once again to tackle the latest online trademark problem—online counterfeiting. The next Part describes this problem.

## II. THE PROBLEM OF ONLINE COUNTERFEITING

This Part provides a broad overview of the market drivers, online business models, and case history relevant to the conflict between luxury trademark owners and online marketplaces. Section A discusses the interests and implications of luxury counterfeiting. Section B describes eBay’s business model and treatment of legal matters. Section C analyzes the landmark contributory trademark case *Tiffany (NJ) Inc. v. eBay, Inc.*, and Section D examines the case within the international legal framework. Finally, Section E discusses the emerging industry of e-commerce and the responsive technology that is growing with it.

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54. *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 416 (S.D.N.Y. 2001) (citation omitted). In *Gucci*, the court found that the trademark owner had a triable contributory trademark infringement claim against an Internet service provider that provided web page hosting services to a direct trademark infringer. *Id.* at 412.

55. See *Lockheed Martin*, 194 F.3d at 985; *Acad. of Motion Picture Arts & Sciences v. Network Solutions, Inc.*, 989 F. Supp. 1276, 1280 (C.D. Cal. 1997); see also G. PETER ALBERT, JR. & LAFF, WHITESEL & SARET, LTD., *INTELLECTUAL PROPERTY LAW IN CYBERSPACE* 172–73 (1999).

56. *Uniform Domain Name Dispute Resolution Policy* (UDRP) (Oct. 24, 1999), available at <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm> (last visited Mar. 27, 2012); see *infra* Part III.

A. *The Growing Counterfeit Market and its Social Costs*

Although counterfeiting activity has been occurring for centuries,<sup>57</sup> the current amount of counterfeited goods has grown to unprecedented heights.<sup>58</sup> Incentivized by large profits and low perceived risk of criminal sanctions,<sup>59</sup> counterfeiters intentionally deceive purchasers into believing that imitative products are genuine.<sup>60</sup> Moreover, consumers are willing to purchase counterfeit goods, even when they know their purchases are fake.<sup>61</sup>

The actual cost of counterfeiting is disputed.<sup>62</sup> Several studies present eye-popping figures about the costs of counterfeiting.<sup>63</sup> The International AntiCounterfeiting Coalition (IACC) places the estimated annual loss at \$600 billion a year, with a burden of \$200–250 billion on U.S. businesses.<sup>64</sup> Rick Cotton, chairman of the U.S. Chamber of Commerce-led Coalition Against Counterfeiting and Piracy said, “[i]f the counterfeiting trend continues, it is going to ravage our economy and undermine our future.”<sup>65</sup>

However, more recent studies reveal that these figures, typically sponsored by fashion interest groups, are often under-researched or blatantly exaggerated.<sup>66</sup> Calculations of lost revenue equate each sale of a counterfeit good to the lost sale of the full-priced genuine good, even though most counterfeit

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57. CHAUDHRY & ZIMMERMAN, *supra* note 8, at 7.

58. *See id.* at 11–13.

59. Wall & Large, *supra* note 7, at 1.

60. DAVID C. HILLIARD, JOSEPH NYE WELCH, II & ULI WIDMAIER, TRADEMARK AND UNFAIR COMPETITION DESKBOOK § 6.12 (2011).

61. *See* Wall & Large, *supra* note 7, at 8–9.

62. *See* CHAUDHRY & ZIMMERMAN, *supra* note 8, at 11–15. Counterfeiting costs trademark owners more than lost revenue. Counterfeiting requires trademark owners to bear the added costs of monitoring and enforcing their trademark rights as well.

63. *See The Truth about Counterfeiting*, INTERNATIONAL ANTICOUNTERFEITING COALITION, <http://www.iacc.org/about-counterfeiting/the-truth-about-counterfeiting.php> (last visited Mar. 27, 2012).

64. *Id.*

65. Larissa MacFarquhar, *Bag Man: Cracking Down on Fashion Fakes*, THE NEW YORKER, Mar. 19, 2007, at 133–34 (internal quotation marks omitted). The Coalition Against Counterfeiting and Piracy is led by the U.S. Chamber of Commerce. GLOBAL INTELLECTUAL PROPERTY CENTER, U.S. CHAMBER OF COMMERCE, *Coalition Against Counterfeiting and Piracy*, <http://www.theglobalipcenter.com/pages/coalition-against-counterfeiting-and-piracy> (last visited Mar. 27, 2012).

66. *See generally* Wall & Large, *supra* note 7, at 4.

buyers cannot afford authentic goods.<sup>67</sup> Most of the evidence is anecdotal, “perhaps a reflection of the shadowy nature of the business itself.”<sup>68</sup>

Some even suggest that counterfeiting may benefit the trademark owner, promoting the product’s desirability and increasing the market demand for the genuine goods.<sup>69</sup> Nevertheless, counterfeiting does pose some public concerns about the actual loss of tax revenues, loss of employment, and environmental and safety concerns.<sup>70</sup>

In addition, the growing counterfeiting problem has been exacerbated by the online marketplace. On the Internet, the likelihood of consumer confusion over the authenticity of goods is even greater because consumers do not have an opportunity to inspect the goods before purchase.<sup>71</sup> Furthermore, online counterfeiters are less likely to be identified and prosecuted.<sup>72</sup> Consequently, anti-counterfeiting organizations have supported efforts to hold eBay and other online marketplaces contributorily liable for counterfeiting activities.<sup>73</sup>

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67. *See id.*

68. *See* Aubrey Fox, *The High Price of Counterfeit Goods*, GOTHAM GAZETTE (Mar. 2008), [www.gothamgazette.com/article/20080331/4/2476](http://www.gothamgazette.com/article/20080331/4/2476) (last visited Mar. 27, 2012).

69. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 340 F. Supp. 2d 415, 448 (S.D.N.Y. 2004) (“Louis Vuitton’s own expert report revealed that, for at least some consumers, awareness of Dooney & Bourke’s It-Bags makes Louis Vuitton’s bag *more desirable*.”); Barnett, *supra* note 31, at 1401 (“[T]he spectacle of non-elite consumers herding around street vendors to purchase obvious imitations of a difficult-to-obtain original luxury item may provide significantly more concrete evidence of the original’s exclusivity than the limited number of owners of the original.”).

70. *See* Wall & Large, *supra* note 7, at 17–18. For example, counterfeit manufacturers, not bound by the same environmental and safety regulations, may use toxic or abrasive chemicals to treat the materials. *See id.* at 18.

71. *See* Fara S. Sunderji, *Protecting Online Auction Sites from the Contributory Trademark Liability Storm: A Legislative Solution to the Tiffany Inc. v. eBay Inc. Problem*, 74 FORDHAM L. REV. 909, 909 (2005). Although consumers can discern that some luxury goods are counterfeit based on their low prices, other counterfeit luxury goods are sold at higher price points, deliberately designed to deceive consumers into thinking that the items are genuine. Wall & Large, *supra* note 7, at 14–16.

72. *See* Steve Abreu, *Going Once, Going Twice: Tiffany Makes Another Bid to Restrict Auctions of Counterfeit Jewelry on eBay*, 2010 EMERGING ISSUES 5143, 5143.

73. The International Anticounterfeiting Coalition, Coty, Inc., and the Council of Fashion Designers of America, Inc. filed amicus briefs in support of Tiffany in the case, *Tiffany (NJ) Inc. v. eBay Inc.*, the first U.S. case on contributory trademark liability for online marketplaces. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 95–96 (2d Cir. 2010).

Although there are several categories of counterfeit products,<sup>74</sup> this Note focuses on the counterfeiting of luxury goods. A luxury good is defined as a good for which consumer preference for a product increases as the price increases.<sup>75</sup> The most frequently purchased counterfeit luxury goods include clothing, shoes, leather goods, jewelry, and watches.<sup>76</sup>

### B. *EBay*

EBay is an online auction website that boasts more than 97 million active users globally.<sup>77</sup> Founded in 1995, eBay sought to create a level playing field, or “‘perfect marketplace,’ where buyers and sellers could meet on equal terms and arrive at a fair price.”<sup>78</sup> It revolutionized the online sale of goods, especially collectible goods, and has facilitated millions of transactions, while making a profit by retaining a percentage of each transaction.<sup>79</sup>

Although it was initially unclear whether people would be comfortable doing business online with complete strangers, eBay’s founder “believed that people are basically good, and that any issues would work themselves out by the community.”<sup>80</sup> EBay created the “eBay Café,” an online message board that acts as a quasi-neighborhood watch system to stop users from committing fraud or unfairly abusing their eBay privileges.<sup>81</sup> This laissez-faire attitude has also been the underlying rationale of eBay’s defense in contributory infringement cases.<sup>82</sup> Under the European Union’s Directive on Electronic Commerce, a service provider may not be held liable for storing illegal content unless the provider has actual

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74. See Wall & Large, *supra* note 7, at 6. Other categories include “safety-critical goods,” such as aircraft parts and pharmaceuticals, and “copyright piracy,” such as bootlegged versions of music and movies. *Id.* (emphasis omitted).

75. See *id.* at 7.

76. See *id.* at 9.

77. *Who We Are: Overview*, EBAY, <http://www.ebayinc.com/who> (last visited Mar. 27, 2012).

78. LEVIS, *supra* note 15, at 170–71.

79. See *id.* at 171–74.

80. *Who We Are: History*, EBAY, <http://www.ebayinc.com/history> (last visited Mar. 27, 2012).

81. Sunderji, *supra* note 71, at 915 (quoting ADAM COHEN, *THE PERFECT STORE* 52 (2002)).

82. See discussion *infra* Part II.C–D.

knowledge of it.<sup>83</sup> eBay has asserted repeatedly that it is a “mere host” and therefore cannot be held liable for the activities of its users.<sup>84</sup>

Despite eBay’s assertions of a laissez-faire business model, its actual business practices have shown otherwise. eBay has fifty-five categories of items that are either prohibited completely or placed under special conditions for sale.<sup>85</sup> eBay contends that these limitations are often “based on country and state laws, although in some cases, they may also be based on input from our members and our own discretion.”<sup>86</sup> Additionally, eBay maintains the Verified Rights Owner (VeRO) Program that allows intellectual property rights owners to ask eBay to remove certain listings that infringe on their intellectual property rights.<sup>87</sup> Before the item is removed, the rights owner must provide information that verifies its right to report and correctly identifies the suspected listing.<sup>88</sup> After the item is reported, eBay sends an e-mail that notifies the alleged infringer about the request for removal.<sup>89</sup> The alleged infringer can then respond to eBay or the VeRo participant directly.<sup>90</sup> The VeRO system only allows the intellectual property rights owner or an authorized agent to

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83. Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on the Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, art. 14, 2000 O.J. (L 178)

1. The “mere host” privilege is:

Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access the information.

*Id.*

84. See generally Ahmed, *supra* note 21, at 266.

85. *Prohibited and Restricted Items—Overview*, EBAY, <http://www.pages.ebay.com/help/policies/items-ov.html> (last visited Mar. 27, 2012).

86. *Id.*

87. *Reporting Intellectual Property Infringements (VeRO)*, EBAY, <http://pages.ebay.com/help/tp/vero-rights-owner.html> (last visited Mar. 27, 2012).

88. *What is VeRO and why was my listing removed because of it?*, EBAY, <http://pages.ebay.com/help/policies/questions/vero-ended-item.html> (last visited Mar. 27, 2012).

89. *Id.*

90. *Id.*

report potentially infringing listings.<sup>91</sup> Other users cannot file complaints on behalf of rights owners; they can only get in touch with rights owners and encourage them to file a VeRO complaint.<sup>92</sup>

In addition to the VeRO program, eBay implements the following enforcement measures:

- \$20 million a year on tools to promote trust and safety on its website.
- Buyer-protection program which reimburses the buyer if it discovered the items were not genuine.
- 200 employees who focus exclusively on combating infringement.
- “Fraud engine” implementation, which applies complex rules and models to uncover auction listings that are likely to include counterfeit goods, factoring in the IP address of the seller, issues with the seller’s eBay account, and previous feedback the seller has received.
- Notice-and-takedown system where a trademark owner could request the de-listing of an auction if one of its trademarks was being used improperly.
- Rights owners are granted an “About Me” page to inform eBay users about their products, intellectual property rights and legal positions.
- Special warnings when listing certain luxury items.
- Suspension of hundreds of sellers every year on suspicion of engaging in trademark infringement.<sup>93</sup>

It appears that eBay has made every feasible attempt to protect the rights of trademark owners.<sup>94</sup> However, the nature of eBay’s business model makes it nearly impossible to eliminate the existence of counterfeit listings completely.<sup>95</sup> eBay continues to disclaim liability for the “quality, safety or legality of the items advertised” and the “truth or accuracy of users’ content or listings.”<sup>96</sup> Nevertheless, the disclaimer has

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91. *Id.*

92. *See id.*

93. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 98–100 (2d Cir. 2010).

94. *See id.* at 100 (quoting *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 493 (S.D.N.Y. 2008)) (“[E]bay consistently took steps to improve its technology and develop anti-fraud measures as such measures became technologically feasible and reasonably available.”).

95. eBay asserts that vetting its millions of auctions in advance would be an undertaking “so labor-intensive it could . . . put eBay out of business.” Sunderji, *supra* note 71, at 916 (quoting ADAM COHEN, *THE PERFECT STORE* 91 (2002)).

96. *Your User Agreement*, EBAY, <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Mar. 27, 2012).

not prevented trademark owners from suing eBay.<sup>97</sup> Despite eBay's legitimate efforts to curb online counterfeiting, eBay has had to defend several lawsuits at considerable expense.<sup>98</sup> Litigation has created an economic burden on eBay and its customers.<sup>99</sup> Furthermore, eBay has been forced to move away from its desired laissez-faire business model to substantial regulation, without the benefit of providing practical guidance to other online marketplaces moving forward.<sup>100</sup> The substantial legal hurdles that eBay is facing are likely to become increasingly problematic for the online marketplace industry as a whole.

### C. Tiffany (NJ) Inc. v. eBay Inc.

*Tiffany (NJ) Inc. v. eBay Inc.* was the first U.S. case to consider whether an online auction site can be held contributorily liable for trademark infringement of third-party sellers.<sup>101</sup> Tiffany & Co. (Tiffany) is a famous jeweler that has established itself as a high-end quality and style brand.<sup>102</sup> Similar to most luxury goods, Tiffany's premier status is based on its exclusivity.<sup>103</sup> "It does not use liquidators, sell overstock merchandise, or put its goods on sale at discounted prices."<sup>104</sup> Tiffany is one of the international luxury brands that has

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97. See *infra* Part II.C–D.

98. See generally Brian W. Brokate, *What's New in Anticounterfeiting*, in 14TH ANNUAL INSTITUTE ON INTELLECTUAL PROPERTY LAW PRACTISING LAW INSTITUTE 615 (2008).

99. Increased litigation costs likely will force eBay to pass the financial burden on to its users. Brandon Peene, Comment, *Lux for Less: eBay's Liability to Luxury Brands for the Sale of Counterfeit Goods*, 40 SETON HALL L. REV. 1077, 1099–1106 (2010); see also Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 273 (2005) ("It is well recognized that imposing liability on intermediaries will affect the services and prices they present to their customers.").

100. The *Tiffany* court did not address whether *all* of eBay's anti-counterfeiting measures must be implemented for other online marketplaces to avoid similar litigation or whether fewer measures would be sufficient for smaller online marketplaces with fewer potential counterfeit listings. See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 105–09 (2d Cir. 2010).

101. *Id.* at 105.

102. *Id.* at 96.

103. Tiffany's website states, "[t]he world has been infatuated with Tiffany style since the early twentieth century. From Hollywood premieres to elite sporting events, celebrities choose Tiffany for its sophistication and glamour." *People & Parties: Celebrities, Events, and News about Tiffany*, TIFFANY & CO., <http://www.tiffany.com/About/news/> (last visited Mar. 27, 2012).

104. *Tiffany*, 600 F.3d at 97.

waged a comprehensive anti-counterfeiting legal battle against eBay.<sup>105</sup>

When Tiffany became aware that counterfeit Tiffany items were being sold on eBay's site,<sup>106</sup> it conducted its own surveys, called "Buying Programs," which concluded that approximately seventy-three percent of the sterling silver Tiffany merchandise available on eBay was counterfeit.<sup>107</sup> Even though Tiffany considered eBay's counterfeit-detecting tools to be inadequate, it did not attempt to develop its own technology to detect counterfeit Tiffany goods.<sup>108</sup>

After fruitless negotiations with eBay, Tiffany eventually sued for, among other claims, contributory trademark infringement.<sup>109</sup> Tiffany contended that eBay was liable for contributory trademark infringement "by virtue of the assistance that it provides to, and the profits it derives from, individuals who sell counterfeit Tiffany goods on eBay."<sup>110</sup> Applying the *Inwood* test, the Second Circuit examined whether eBay was liable for contributory trademark infringement by (1) intentionally inducing another to infringe a trademark or (2) continuing to supply its service to one whom it knows or has reason to know is engaging in trademark infringement.<sup>111</sup>

Tiffany argued that eBay was contributorily liable because eBay continued to supply its services to Tiffany counterfeit sellers while knowing or having reason to know that such sellers were infringing on Tiffany's trademark.<sup>112</sup> Tiffany contended that eBay's generalized notice that some portion of the Tiffany items might be counterfeit was sufficient to meet the second part of the *Inwood* test.<sup>113</sup>

eBay argued that such generalized knowledge is insufficient to meet the knowledge requirement of the *Inwood* test.<sup>114</sup> eBay pointed to the numerous measures it took to prohibit specifically known and particular instances of

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105. See Ahmed, *supra* note 21, at 255.

106. *Tiffany*, 600 F.3d at 97.

107. *Id.*

108. *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 484 (S.D.N.Y. 2008), *aff'd in part, rev'd in part*, 600 F.3d 93 (2d Cir. 2010).

109. *Id.* at 481–82.

110. *Id.* at 470.

111. *Tiffany*, 600 F.3d at 106–07.

112. *Id.* at 106.

113. *Id.*

114. *Id.* at 107 (quoting *Tiffany*, 576 F. Supp. 2d at 508).

counterfeiting.<sup>115</sup> Furthermore, eBay contended that it was Tiffany's burden, not eBay's, to monitor the eBay website for counterfeits and to bring them to eBay's attention.<sup>116</sup>

The court noted that there was at least some evidence that one of Tiffany's goals was to shut down the legitimate secondary market in authentic Tiffany goods.<sup>117</sup> Reducing or eliminating the sale of all second-hand Tiffany pieces on eBay would unfairly diminish the market competition for genuine Tiffany merchandise.<sup>118</sup> On the other hand, shutting down the counterfeit market would have the "immediate effect" of revenue loss to eBay, but a "countervailing gain" of increased consumer confidence about the authenticity of luxury goods sold through eBay's site.<sup>119</sup>

The *Tiffany* court held that eBay was not contributorily liable for trademark infringement.<sup>120</sup> The court affirmed the district court's holding that generalized knowledge of counterfeiting was insufficient to meet the *Inwood* test for contributory trademark liability.<sup>121</sup>

Although Tiffany appealed the case, the U.S. Supreme Court denied certiorari.<sup>122</sup> Other circuit courts have yet to address contributory trademark claims for online counterfeiting, so whether future cases will lead to conflicting decisions is uncertain. Furthermore, the *Tiffany* court did not address broadly the legal obligations of other online marketplaces to implement anti-counterfeiting measures.<sup>123</sup>

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115. *Id.* at 100.

116. *See id.* at 107.

117. *Id.* at 98 (quoting *Tiffany*, 576 F. Supp. 2d at 510 n.36).

118. *Id.*

119. *Id.*

120. *Id.* at 109 ("[W]e affirm the judgment of the district court insofar as it holds that eBay is not contributorily liable for trademark infringement.").

121. *Id.* at 107.

122. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 647 (2010).

123. The *Tiffany* court did not address whether *all* of eBay's anti-counterfeiting measures must be implemented for other online marketplaces to avoid similar litigation or whether fewer measures would be sufficient for smaller online marketplaces with fewer potential counterfeit listings. *See Tiffany*, 600 F.3d at 105–09.

D. Tiffany (NJ) Inc. v. eBay Inc. *in the Global Context*

The *Tiffany* case has been subjected to criticism due to its inconsistency with prior decisions in foreign courts.<sup>124</sup> Earlier in 2008, Tribunal de Commerce de Paris, the Commercial Court of Paris, held in *Louis Vuitton v. eBay* that eBay France had failed to take sufficient measures to prevent counterfeit sales on eBay France's site under a negligence theory.<sup>125</sup> The tribunal awarded an astounding €38.6 million (almost \$54 million) for financial and reputational damage.<sup>126</sup>

Some commentators have suggested that European courts are handing down harsher legal penalties for contributory infringement because of the overwhelming, nation-defining clout of fashion and luxury goods in Europe.<sup>127</sup> As home to many prominent luxury companies, France in particular has been at the forefront in the battle against counterfeit luxury goods.<sup>128</sup> French law grants courts the authority to impose fines and jail time on distributors, sellers, and even consumers of counterfeit goods, with a mandatory forfeiture of the counterfeit goods.<sup>129</sup> In 2007, the Council of Sales, a French government consumer watchdog, filed a lawsuit to shut down eBay in France because it did not comply with strict auction laws that regulate French auction houses.<sup>130</sup> In 2008, French luxury companies Christian Dior, Louis Vuitton, Moët Hennessy, and L'Oréal first brought lawsuits against eBay, albeit unsuccessfully.<sup>131</sup> Later in 2008, Hermès, another French luxury company, brought the first successful case against eBay in France, obtaining a judgment of €20,000 (over \$31,000).<sup>132</sup> Accordingly, the *Hermès* ruling established

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124. See, e.g., Ahmed, *supra* note 21, at 249–72; Ellie Mercado, Note, *As Long as "It" is Not Counterfeit: Holding eBay Liable for Secondary Trademark Infringement in the Wake of LVMH and Tiffany Inc.*, 28 CARDOZO ARTS & ENT. L.J. 115, 133–47 (2010); Peene, *supra* note 99, at 1099–1106.

125. SA Louis Vuitton Malletier v. eBay, Tribunal de Commerce [Commercial Court] Paris, 1B ch., Case No. 2006077799, June 30, 2008, 12A.

126. Ahmed, *supra* note 21, at 267 (quoting SA Louis Vuitton Malletier at 17-A to 18-A).

127. See MacFarquhar, *supra* note 65, at 133.

128. Doreen Carvajal, *Court Sides with LVMH over eBay*, N.Y. TIMES (June 30, 2008), <http://www.nytimes.com/2008/06/30/technology/30ihtlvmh.4.14109529.html?scp=1&sq=Court%20sides%20with%20LVMH%20over%20ebay&st=cse>.

129. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 5, at 230–31.

130. See Brokate, *supra* note 98, at 627.

131. See *id.*

132. *Id.*

precedent that would allow other luxury companies to bring similar claims against eBay.<sup>133</sup>

In other European countries, similar contributory trademark liability cases have been filed against eBay. In 2007, the German Federal Court of Justice ruled in *Rolex v. eBay* that, although eBay was not financially responsible for Rolex's damages resulting from the sale of counterfeit Rolex watches on eBay, eBay was required to implement a monitoring system to prevent the listing of counterfeit goods.<sup>134</sup> On remand two years later, a German court in Dusseldorf relieved eBay of all liability after assessing eBay's anti-counterfeiting measures.<sup>135</sup> L'Oréal, a French cosmetics and beauty company, launched several lawsuits against eBay in 2007—with mixed results.<sup>136</sup>

The numerous European and U.S.<sup>137</sup> lawsuits against eBay by luxury trademark owners have provided contradicting legal precedents for eBay and other online marketplaces. Online marketplaces that wish to do business internationally must attempt to enact various policies that comply with the frequently changing case law of each nation. Compliance with the law becomes even more convoluted when disputes arise from cross-border transactions. The rights, obligations, and liabilities of all parties remain unclear from country to country,<sup>138</sup> and it is unlikely that similar litigation will cease anytime soon.

### *E. Online Marketplaces and Responsive Technology*

Despite the uncertainty in the law, online commerce is continuing to grow at exponential rates. According to IBISWorld, a market research company, revenue from e-

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133. *See id.*

134. *Id.* at 632.

135. *Rolex v. eBay*, Oberlandesgericht Dusseldorf [OLG Dusseldorf] [Dusseldorf Higher Regional Court] Feb. 26, 2004, I-20 U 204/02 (Ger).

136. Compare Stephanie Bodoni & Heather Smith, *EBay May Be Liable in L'Oréal Trademark Suit, EU Court Says*, BLOOMBERG (July 12, 2011), <http://www.bloomberg.com/news/2011-07-12/ebay-may-be-liable-in-l-oreal-trademark-suit-eu-court-says-1.html> (last visited Mar. 27, 2012), with Eric Pfanner, *French Court Clears eBay in Selling Fake Goods*, N.Y. TIMES (May 13, 2009), <http://www.nytimes.com/2009/05/14/technology/companies/14loreal.html> (last visited Mar. 27, 2012).

137. Because the U.S. Supreme Court denied certiorari in *Tiffany (NJ) Inc. v. eBay Inc.*, 131 S. Ct. 647 (2010), other U.S. circuits may diverge from the Second Circuit's decision in the future.

138. *See supra* Part II.D.

commerce and online auctions grew at a cumulative rate of 468.9% from 2000 to 2009.<sup>139</sup> Amazon.com has emerged as one of eBay's biggest competitors, creating an online marketplace with better customer service for buyers and specialized services for sellers.<sup>140</sup> A number of alternative online marketplaces with lower service fees have sprung up as well.<sup>141</sup> Instead of offering a broad selection of goods, these smaller marketplaces provide a narrower category of items.<sup>142</sup>

With the growth of these new e-commerce websites, monitoring only eBay is not enough to detect counterfeit goods. Many luxury trademark owners have responded by turning to private online brand-protection services to take over monitoring.<sup>143</sup> New technology, such as holograms, micro printing, chemically sensitized particles, specialty inks, watermarks, tamper-evident labels, encrypted bar codes, and chemical tracers have become the new anti-counterfeit detection tools.<sup>144</sup> Some larger luxury companies are spending from \$2 million to \$4 million a year to combat online counterfeiting.<sup>145</sup>

But even when luxury trademark owners take proactive steps to protect their trademarks, it is difficult for smaller online marketplaces to keep up. According to Etsy, an online marketplace for handmade and vintage items, it "may, without notice, and without refunding any fees, delay or immediately remove Content."<sup>146</sup> Several complaint websites<sup>147</sup> cite

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139. Press Release, IBISWorld, Top Ten Industries of the Decade: IBISWorld Identifies Best and Worst Performing Sectors by Revenue Growth (Dec. 22, 2009).

140. See LEVIS, *supra* note 15, at 101, 104–05. Amazon has "Amazon Marketplace" for part-timers and "Amazon Merchants" for other retailers. *Id.* at 104.

141. *Id.*

142. For example, Etsy.com is a marketplace for handmade and vintage items, Textbooks.com provides a platform for students to buy and sell used textbooks, and Bidz.com is an online auction for jewelry (although Bidz.com directly sells and ships to buyers).

143. *Knock-offs catch on*, THE ECONOMIST (Mar. 4, 2010), available at [http://www.economist.com/node/15610089?story\\_id=15610089](http://www.economist.com/node/15610089?story_id=15610089).

144. Phillip A. Rosenberg, Note, *A Legislative Response to Tiffany v. EBay: In Search of an Online Commerce Certification Act (OCCA)*, 36 RUTGERS COMPUTER & TECH. L.J. 99, 122 (2009).

145. THE ECONOMIST, *supra* note 143.

146. Etsy's Terms of Use, § 12–Breach, ETSY'S, <http://www.etsy.com/policy/terms> (last visited Mar. 27, 2012).

147. Complaint websites allow consumers to post and research consumer complaints about companies and individuals. See Jennyfer Grant, *Consumer and Customer Complaint Websites*, YAHOO! VOICES (May 15, 2009),

instances of these smaller online marketplaces shutting down a seller's store or deleting items without notice or explanation.<sup>148</sup> It appears that these marketplaces sometimes remove product listings arbitrarily and solely upon the word of a single (often anonymous) report because they do not have the vast resources to implement efficient and accurate notice and take-down systems.<sup>149</sup> It is important to note, however, that these observations are largely anecdotal.<sup>150</sup> Although a lack of empirical evidence makes it difficult to gauge the extent of this problem, there is certainly a legitimate concern for sellers who are subject to haphazard trademark enforcement.

In sum, the expansive growth of online markets and the development of new anti-counterfeiting technology further complicate contributory trademark matters. Without a legal framework to define the roles of the involved parties, counterfeiting continues to pose a threat to online marketplaces.

### III. TRADEMARK LAW AND ALTERNATIVE DISPUTE RESOLUTION

Although trademark owners, online marketplaces, buyers, and sellers all seek a definitive solution to the online counterfeiting problem, litigation has done very little to resolve their rights and obligations under the contributory trademark doctrine.<sup>151</sup> Non-litigation options provide an alternative to managing and resolving emerging legal issues in numerous areas of intellectual property disputes. Alternative dispute resolution (ADR) is a "structured process with a third party intervention and an escape from court litigation."<sup>152</sup> Because ADR uses a range of techniques to reach a mutually beneficial

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[http://www.associatedcontent.com/article/1732060/consumer\\_and\\_customer\\_complaint\\_websites.html?cat=7](http://www.associatedcontent.com/article/1732060/consumer_and_customer_complaint_websites.html?cat=7).

148. See, e.g., Meg Marco, *Sellers Growing Increasingly Unhappy with Lack of Professionalism at Etsy*, THE CONSUMERIST (Feb. 26, 2008), <http://consumerist.com/2008/02/sellers-growing-increasingly-unhappy-with-lack-of-professionalism-at-etsy.html>; Mekunove, *Etsy Complaints – Deleted Without an Explanation and Harassing Emails Without Provocation*, COMPLAINTSBOARD.COM (Apr. 2, 2010), <http://www.complaintsboard.com/complaints/etsy-c327605.html>.

149. See Marco, *supra* note 148; Mekunove, *supra* note 148.

150. See Marco, *supra* note 148; Mekunove, *supra* note 148.

151. See *supra* Part II.

152. FAYE FANGFEI WANG, INTERNET JURISDICTION AND CHOICE OF LAW: LEGAL PRACTICES IN THE EU, US AND CHINA 143 (2010).

resolution, the process is focused on “helping the parties help themselves.”<sup>153</sup>

ADR was virtually nonexistent for intellectual property cases prior to 1982.<sup>154</sup> The courts were reluctant to approve private resolutions because of the underlying nature of intellectual property as a “public interest.”<sup>155</sup> However, the judicial attitude towards ADR shifted after Congress declared that the overall policy benefits of arbitration are more important than the public interest arguments.<sup>156</sup> The benefits of ADR include: cost savings, control of outcomes, less expenditure of time, confidentiality, flexibility, preservation of relationships, satisfaction with outcome, universality of application, ease of enforcement in foreign jurisdictions, and minimization of risk.<sup>157</sup> ADR has been particularly successful in intellectual property cases because such cases often involve new technological developments, complex issues of fact that are difficult for a jury to understand, and disputes arising out of an innovative approach to something previously unseen or not yet dealt with by the law.<sup>158</sup>

There are two main forms of ADR: mediation and arbitration. Mediation is a private, voluntary process where a neutral intermediary helps parties in conflict reach a mutually satisfactory settlement of their dispute, which is then recorded in an enforceable contract.<sup>159</sup> Outcomes are specifically tailored to the needs and interests of the parties, and the parties are permitted to walk away at any point in the mediation process.<sup>160</sup> Arbitration is similar to mediation, but the neutral third party renders a final, binding resolution that is enforceable as a court judgment.<sup>161</sup> Arbitration decisions can be

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153. Julia A. Martin, Note, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 919 (1997).

154. Charles P. Lickson, *The Use of Alternative Dispute Resolution in Intellectual Property, Technology-Related or Innovation-Based Disputes*, in 55 AM. JUR. TRIALS 483, 503 (1995).

155. *See id.* at 503–04.

156. *See id.* at 504.

157. *See id.* at 575–80.

158. *Id.* at 504.

159. ELLEN P. WINNER & AARON W. DENBERG, INTERNATIONAL TRADEMARK TREATIES WITH COMMENTARY 17–18 (2004).

160. Lela P. Love & Joseph B. Stulberg, *Understanding Dispute Resolution Process*, in MICHIGAN MEDIATOR-SKILL BUILDING MANUAL (1997), reprinted in MEDIATION: PRACTICE, POLICY, AND ETHICS 14-15 (2006).

161. *Id.*

appealed only on extremely limited grounds, such as corruption, fraud, or undue means.<sup>162</sup>

With the growth of online commerce in the mid-1990s, online dispute resolution (ODR) was created to resolve disputes between businesses and consumers engaging in e-commerce.<sup>163</sup> ODR uses online technology to facilitate both mediation and arbitration.<sup>164</sup> Rather than arranging ADR sessions in a physical setting, ODR uses the Internet as the primary platform for submitting evidence, negotiating with one another, and reaching a settlement.<sup>165</sup> ODR effectively circumvents conflicts of jurisdiction that complicate most international disputes.<sup>166</sup> Because ODR systems are mostly automated, a larger volume of disputes can be resolved at a lower cost.<sup>167</sup>

Although ODR has not been widely used in trademark disputes,<sup>168</sup> it has been effectively implemented in similar areas of law. Section A provides examples of ODR in consumer law and Section B describes the success of the Uniform Dispute-Resolution Policy (UDRP), which is the ODR system for domain name disputes.

#### A. Existing ODR Systems

In areas of consumer law, ODR technologies are being developed to help resolve online disputes. SquareTrade is a private ODR provider for online companies such as eBay that

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162. See 9 U.S.C.A § 10(a) (West 2011).

163. See PABLO CORTÉS, ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION 51 (2011).

164. See 1 JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 2:75 (3d. ed. 2005).

165. See *id.* However, the entire ODR process does not have to be conducted online; parties may choose to file a case through an online filing system and submit electronic evidence but arrange a face-to-face negotiation, mediation, or arbitration. WANG, *supra* note 152, at 145.

166. Colin Rule, Vikki Rogers & Louis F. Del Duca, *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small-Value High-Volume Claims—OAS Developments*, 42 UCC L.J. 221, 228 (2010). Because the ODR process takes place in an online environment, the parties do not have to establish jurisdiction and resolution in a national court. *Id.*

167. See Colin Rule, *Making Peace on eBay: Resolving Disputes in the World's Largest Marketplace*, ACRESOLUTION, Fall 2008, at 10–11.

168. Trademark disputes only make up fourteen percent of the international ADR disputes dealt with by the World Intellectual Property Organization (WIPO). *WIPO Caseload Summary*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/amc/en/center/caseload.html> (last visited Mar. 27, 2012).

helps resolve consumer disputes between buyers and sellers.<sup>169</sup> SquareTrade provides two stages of dispute resolution: first, a free web-based forum that allows users to attempt to resolve their differences on their own, and second, an online professional mediator for a nominal fee (partially subsidized by the online company) if settlement cannot be reached at the first stage.<sup>170</sup> SquareTrade's extremely high success rate in resolving disputes (over eighty percent) is credited to its advanced technology.<sup>171</sup> By dealing with a large number of disputes,<sup>172</sup> SquareTrade is able to categorize disputes by issue and tailor the dispute resolution process accordingly.<sup>173</sup> The online platform has encouraged "constructive and polite negotiation" by limiting free text space, encouraging the proposition of agreements, establishing deadlines, and setting the tone of exchanges.<sup>174</sup> As a result, eBay and SquareTrade have cooperated strategically to share each other's resources and promote each other's businesses.<sup>175</sup>

The joint alliance between the American Arbitration Association (AAA) and Cybersettle is another successful model for ODR.<sup>176</sup> The AAA, a non-profit, public service organization, and Cybersettle, a private company, jointly offer ODR for settling insurance claims.<sup>177</sup> This strategic alliance ensures that private ODR services comply with the high standards of AAA's professional regulations, thereby enhancing the standardization of the ODR systems and increasing the legitimacy of Cybersettle's services.<sup>178</sup>

Privacy disputes have frequently been resolved through ODR. TRUSTe, a privately run company, monitors websites' privacy practices, particularly for the misuse of personally identifiable information and violations of a website's privacy

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169. See *Dispute Resolution Overview*, EBAY, <http://pages.ebay.com/services/buyandsell/disputeres.html> (last visited Mar. 27, 2012).

170. *Id.*

171. See CORTÉS, *supra* note 163, at 67.

172. eBay has 40 million disputes a year. See Rule, *supra* note 167, at 8.

173. See CORTÉS, *supra* note 163, at 67.

174. *Id.* at 67.

175. See WANG, *supra* note 152, at 149.

176. "The cooperation between AAA, an experienced public organisation, and Cybersettle, a young enthusiastic private organisation, can be a model with good strategic plans for the development of ODR industry." *Id.* at 150.

177. *Id.* at 149-50.

178. *Id.*

statement.<sup>179</sup> TRUSTe clients include eBay, Yahoo, Facebook, Microsoft, and Apple.<sup>180</sup> Companies pay a fee to TRUSTe, which then certifies the website and continues to monitor the website for privacy violations.<sup>181</sup> As an additional measure, TRUSTe's "Watchdog Dispute Resolution" program provides free ODR to anyone who files a complaint against a TRUSTe-certified website.<sup>182</sup> If a consumer complaint is filed, TRUSTe provides mediation between individuals and the company.<sup>183</sup> TRUSTe's final determinations are binding on the TRUSTe client but non-binding on the consumer.<sup>184</sup> The system builds online trust between Web sites and consumers without clogging the courts with nominal claims.<sup>185</sup>

At the international level, Global Trustmark Alliance (GTA) is an organization that was created to foster consumer trust in transnational online commerce.<sup>186</sup> Rather than relying on multi-governmental regulation, members of the GTA<sup>187</sup> are creating a self-regulated code of standards for cross-border

179. *Holding TRUSTe Clients to Higher Online Privacy Standards*, TRUSTe, [http://www.truste.com/why\\_TRUSTe\\_privacy\\_services/online-privacy-watchdog.html](http://www.truste.com/why_TRUSTe_privacy_services/online-privacy-watchdog.html) (last visited Mar. 27, 2012).

180. *See Trusted Directory*, TRUSTe, [http://www.truste.com/trusted\\_sites/index.html](http://www.truste.com/trusted_sites/index.html) (last visited Mar. 27, 2012).

181. *See Small Business*, TRUSTe, [http://www.truste.com/privacy\\_seals\\_and\\_services/small\\_medium\\_business\\_privacy/index.html](http://www.truste.com/privacy_seals_and_services/small_medium_business_privacy/index.html) (last visited Mar. 27, 2012).

182. *Resolving Privacy Disputes*, TRUSTe, [http://www.truste.com/privacy\\_seals\\_and\\_services/consumer\\_privacy/about\\_online\\_privacy\\_watchdog](http://www.truste.com/privacy_seals_and_services/consumer_privacy/about_online_privacy_watchdog) (last visited Feb. 12, 2012).

183. *Id.*

184. *Holding TRUSTe Clients to Higher Online Privacy Standards*, TRUSTe, [http://www.truste.com/why\\_TRUSTe\\_privacy\\_services/online-privacy-watchdog](http://www.truste.com/why_TRUSTe_privacy_services/online-privacy-watchdog) (last visited Mar. 27, 2012). This asymmetric treatment is due to concerns about procedural fairness and consumer protection. *See* ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 108 (2001). Although binding decisions promote finality and efficiency, consumers are often unaware that agreeing to arbitration means giving up their rights to sue in court. *Id.* Furthermore, binding arbitration clauses in consumer contracts are prohibited in Europe, which ultimately affects any cross-border online transactions involving European parties. *Id.* However, even if consumers are permitted to sue in court, the financial burden and time consumption remains a challenge. Chi-Chung Kao, *Online Consumer Dispute Resolution and the ODR Practice in Taiwan—A Comparative Analysis*, 5 *ASIAN SOC. SCI.* 113, 119 (2009), available at <http://ccsenet.org/journal/index.php/ass/article/view/2977/2744> (last visited Mar. 27, 2012).

185. *See* Kao, *supra* note 184, at 119.

186. *GLOBAL TRUSTMARK ALLIANCE*, <http://www.globaltrustmarkalliance.org> (last visited Mar. 27, 2012).

187. Members include Better Business Bureau (BBB), Federation of European Direct Marketing, Eurochambers, as well as other organizations. *See* CORTÉS, *supra* note 163, at 63.

transactions.<sup>188</sup> By partnering with other national ODR organizations, GTA's "trustmark" will incorporate existing national schemes into a single transnational system for consumer disputes.<sup>189</sup>

Recent efforts to promote trust and legitimacy in online commerce have centered on incorporating third-party ODR services. Rather than litigating small commercial disputes and privacy infractions, consumers are turning to ODR services to seek redress for their grievances. These ODR systems provide a cheap, effective, and flexible method to deal with online consumer disputes without relying on new legislation or the courts.

### *B. Uniform Domain-Name Dispute-Resolution Policy (UDRP)*

The Uniform Domain-Name Dispute-Resolution Policy (UDRP) is one of the most successful ADR mechanisms for resolving trademark infringement issues,<sup>190</sup> and therefore serves as a model for this Note's proposed ADR system.

The UDRP was created to address the problem of cybersquatting.<sup>191</sup> Cybersquatting is registering, trafficking in, or using a domain name with bad faith intent to profit from the registered trademark of someone else.<sup>192</sup> Cybersquatters often register hundreds of domain names that incorporate others' well-known trademarks and try to sell or license them to the actual trademark owners.<sup>193</sup> For example, Dennis Toeppen registered approximately 240 domain names containing famous trademarks with the intent of selling the domain names back to the trademark owners.<sup>194</sup> In one case, Toeppen offered to sell the domain name panavision.com for \$13,000 to Panavision, a motion picture equipment company.<sup>195</sup>

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188. GLOBAL TRUSTMARK ALLIANCE, *supra* note 186.

189. *See* CORTÉS, *supra* note 163, at 63.

190. *See* KATSH & RIFKIN, *supra* note 184, at 65.

191. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 771 (4th ed. 2007).

192. *See* 15 U.S.C. § 1125(d) (2006).

193. *See* David Nelmark, *Virtual Property: The Challenges of Regulating Intangible, Exclusionary Property Interests Such as Domain Names*, 3 *NW. J. TECH. & INTELL. PROP.* 1, 13 (2004).

194. *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227, 1230 (N.D. Ill. 1996).

195. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1318 (9th Cir. 1998).

Cybersquatting, like online counterfeiting, was a trademark-related issue that did not fall neatly into earlier trademark doctrines because lawmakers did not anticipate its development before the Internet.<sup>196</sup> When cybersquatting first became a problem, trademark owners attempted to stop cybersquatting through traditional litigation. A large number of trademark owners brought trademark dilution claims<sup>197</sup> under the Federal Trademark Dilution Act of 1995,<sup>198</sup> even though the statute did not apply to domain names.<sup>199</sup> Subsequently, Congress enacted the Anticybersquatting Consumer Protection Act (ACPA) to create a separate cause of action against cybersquatters.<sup>200</sup> Congress enacted the ACPA in 1999 to “protect consumers and American business, to promote the growth of online commerce, and to provide clarity in the law for trademark owners.”<sup>201</sup>

Although the ACPA granted trademark owners the right to sue in federal court, the Internet Corporation for Assigned Names and Numbers (ICANN) established UDRP to implement an administrative proceeding that provided a faster, cheaper ADR process.<sup>202</sup> UDRP, which is international in scope, sets forth procedures and applicable substantive law for domain name disputes without expressly relying on any nation’s trademark law.<sup>203</sup>

Under UDRP, any party that wants to register a domain name must agree to participate in mandatory administrative proceedings if a dispute arises.<sup>204</sup> The registrant must also attest that the domain name does not “infringe upon or otherwise violate the rights of any third party.”<sup>205</sup> The scope of

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196. See KATSH & RIFKIN, *supra* note 184, at 64–65.

197. See, e.g., *Sporty’s Farm L.L.C. v. Sportman’s Market, Inc.*, 202 F.3d 489 (2d Cir. 2000). Dilution is the lessening of the capacity of famous trademarks to identify and distinguish goods and services. 2-7A GILSON ON TRADEMARKS § 7A.06 (2011).

198. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified, in part, at 15 U.S.C. § 1125(c) (2006)).

199. HILLIARD ET AL., *supra* note 25, at 418.

200. S. REP. NO. 106-140, at 7 (1999).

201. *Id.*

202. See ICANN, *Uniform Domain-Name Dispute-Resolution Policy*, <http://www.icann.org/en/help/dndr/udrp> (last visited Mar. 27, 2012); see also *InterNIC FAQs on the Uniform Domain Name Dispute Resolution Policy (UDRP)*, INTERNIC, <http://www.internic.net/faqs/udrp.html> (last visited Mar. 27, 2012).

203. MERGES ET AL., *supra* note 191, at 771.

204. ICANN, *Uniform Domain Name Dispute Resolution Policy* § 4 (1999), <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm> (last visited Mar. 27, 2012).

205. *Id.* § 2.

UDRP is limited to straightforward cases of cybersquatting, leaving the ambiguous cases to the jurisdiction of the courts.<sup>206</sup> In addition, UDRP's powers are limited to cancelling, transferring, or otherwise making changes to domain name registrations.<sup>207</sup> UDRP's panel decisions are non-binding and therefore can be appealed to federal courts.<sup>208</sup> If parties choose not to appeal, UDRP commences a self-enforcing process.<sup>209</sup> Currently, the Arbitration and Mediation Center of the World Intellectual Property Organization, the National Arbitration Forum, and the Asian Domain Name Dispute Resolution Centre decide cases under the UDRP.<sup>210</sup>

As a privatized domain-name system, UDRP has been successful because of its credibility, transparency, self-enforcement, and accountability.<sup>211</sup> Because ICANN, the organization that established UDRP, has public authority, participants are assured of the credibility of the process due to its professional expertise and resources.<sup>212</sup> All decisions are immediately available online in full text, which increases both transparency and public accountability.<sup>213</sup> The fast, efficient process allows most cases to close within two months after filing and to be enforced within ten days.<sup>214</sup> Because of its proven successes, the UDRP system provides a model for this Note's proposed system.

#### IV. PROPOSED ANTI-COUNTERFEITING SYSTEM (PACS)

In both the United States and Europe, online contributory trademark infringement cases have focused on which party should carry the burden of patrolling the Internet for

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206. MERGES ET AL., *supra* note 191, at 771.

207. ICANN, *supra* note 204, § 3.

208. *Id.* § 4(k).

209. *Id.* § 4(k).

210. Julia Hörnle, *The Uniform Domain Name Dispute Resolution Procedure: Is Too Much of a Good Thing a Bad Thing?*, 11 SMU SCI. TECH. L. REV. 253, 256 (2008).

211. See WANG, *supra* note 152, at 151.

212. *Id.*

213. *Id.*

214. *Id.* at 152. One of the main critiques of UDRP is the lack of procedural due process. See Hörnle, *supra* note 210, at 257–89. Others have proposed solutions to this problem. See, e.g., A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy": Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 688–711 (2002). These solutions could be considered for this Note's proposed anti-counterfeiting system as well.

counterfeit goods.<sup>215</sup> Putting all of the responsibility on online marketplaces hinders their reasonable business activities and the public's access to a legitimate secondary market.<sup>216</sup> Smaller online marketplaces cannot compete effectively because they do not have the resources to implement their own complex anti-counterfeiting monitoring systems.<sup>217</sup> On the other hand, accepting eBay's "mere host" theory allows online marketplaces to profit from the black market of counterfeit goods bought and sold on their forums while avoiding liability with luxury trademark owners.<sup>218</sup> To effectively combat the proliferation of counterfeiting, all sides must engage in a collaborative, uniform solution that reasonably allocates the burden among them.

This Part proposes an anti-counterfeiting system modeled after the UDRP. Section A calls for a new international treaty and outlines the elements of the proposed anti-counterfeiting system (PACS). Section B discusses the potential benefits of PACS, and Section C briefly mentions further considerations for PACS' implementation.

#### A. *Proposed International Treaty*

Because of the conflicting laws on contributory trademark liability,<sup>219</sup> an international treaty would be the best solution to bring uniformity to the law. As the online marketplace industry continues to grow globally,<sup>220</sup> the treaty would clearly define the rights, obligations, and liabilities of all the parties for cross-border transactions.

Another international treaty has recently been signed.<sup>221</sup> The Anti-Counterfeiting Trade Agreement (ACTA) aims to

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215. See, e.g., *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 469 (S.D.N.Y. 2008), *aff'd in part, rev'd in part*, 600 F.3d 93 (2d. Cir. 2010) ("Accordingly, the heart of this dispute is not whether counterfeit Tiffany jewelry should flourish on eBay, but rather, who should bear the burden of policing Tiffany's valuable trademarks in Internet commerce."); *S.A. Louis Vuitton Malletier v. eBay, Inc.*, Tribunal de Commerce de Paris [Paris Commercial Court], Case No. 200677799 (June 30, 2008).

216. Ahmed, *supra* note 21, at 265.

217. See *supra* Part II.E.

218. See Ahmed, *supra* note 21, at 266.

219. See *supra* Part II.D.

220. See *supra* Part II.E.

221. *Anti-Counterfeiting Trade Agreement*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN [hereinafter ACTA], [http://www.mofa.go.jp/policy/economy/i\\_property/pdfs/acta1105\\_en.pdf](http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf) (last visited Mar. 27, 2012).

provide an international framework that creates a model for “effectively combating global proliferation of commercial-scale counterfeiting and piracy.”<sup>222</sup> However, the treaty is essentially toothless when it comes to creating uniformity in the law: It is implemented “without prejudice to provisions in a Party’s law governing the availability, acquisition, scope, and maintenance of intellectual property rights,” and it “does not create any obligation on a Party to apply measures where a right in intellectual property is not protected under its laws and regulations.”<sup>223</sup> ACTA does not contribute solutions that are different from what most developed countries have already implemented on their own.<sup>224</sup> And while the treaty promotes international cooperation for enforcement procedures,<sup>225</sup> it does not address the problem of too much litigation.<sup>226</sup>

One interesting feature of ACTA is its provision dealing with “capacity building and technical assistance.”<sup>227</sup> In Article 35, the treaty provides that a party may undertake capacity building and technical assistance “in conjunction with the relevant private sector or international organizations” and “shall strive to avoid unnecessary duplication between the activities described in this Article and other international cooperation activities.”<sup>228</sup> Although this provision captures the need for collaboration, it provides very little practical guidance.

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222. *Anti-Counterfeiting Trade Agreement (ACTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, [www.ustr.gov/acta](http://www.ustr.gov/acta) (last visited Mar. 27, 2012). Australia, Canada, Japan, Korea, Morocco, New Zealand, Singapore, and the United States signed the treaty on October 1, 2011. *Id.* The European Union, Mexico, and Switzerland, which also participated in ACTA negotiations, have shown their “strong support for and preparations to sign the Agreement as soon as practicable.” *Id.*

223. ACTA, *supra* note 221, at ch. I, § 1, art. 3.

224. Rather, ACTA focuses mainly on enforcement measures of pre-existing intellectual property rights under the participating countries’ varying laws. *See id.* Another possible impediment to ACTA is the lack of cooperation from certain countries. China, for example, accounts for about 77% of the aggregate value of counterfeit goods that were imported to the United States from 2004 to 2009. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-423, OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 8 (2010), *available at* [www.gao.gov/new.items/d10423.pdf](http://www.gao.gov/new.items/d10423.pdf) (last visited Mar. 27, 2012).

225. ACTA, *supra* note 221, at ch. IV.

226. ACTA simply makes civil judicial procedures available for the enforcement of any intellectual property right as specified in Section 2. *Id.* at ch. II, § 2, art. 7.

227. *Id.* at ch. IV, art. 35.

228. *Id.*

Unlike ACTA, any future anti-counterfeiting treaty should incorporate concrete solutions for implementing anti-counterfeiting measures. Recent developments, such as counterfeit-detection technology and alternative dispute resolution processes, should be incorporated into shaping an international anti-counterfeiting treaty.

This Note's proposed anti-counterfeiting system would consist of two parts. First, a streamlined counterfeit monitoring process would detect a greater number of counterfeit listings and therefore act as a prophylactic defense against litigation. Second, any complaints that arise from the monitoring process would be sent to a mandatory ADR process similar to UDRP's ADR process.

### 1. Monitoring Process

Currently, detection and enforcement against counterfeit listings is costly and often inefficient.<sup>229</sup> By streamlining the process into a single, centralized system, both trademark owners and online marketplaces could share their resources and spread the costs of monitoring for counterfeit listings.<sup>230</sup> Just as SquareTrade is able to analyze the characteristics of a large number of disputes and tailor the process accordingly,<sup>231</sup> PACS could gather data from verified counterfeit listings and create more efficient monitoring processes for future listings. As counterfeiters found new ways to avoid detection, PACS could better track these developments through its large-scale coordination of online marketplaces.

PACS would execute a fraud engine and a notice-and-takedown system similar to eBay's VeRO program on a larger, global scale.<sup>232</sup> PACS would have the authority to monitor new listings, contact potential counterfeiters and trademark owners, and remove listings. Although the monitoring process

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229. See *supra* Part II.B for a discussion on how eBay's costly anti-counterfeiting efforts have failed to reduce trademark-related litigation.

230. Trademark owners and online marketplaces would prefer not to implement PACS' monitoring process if they found more cost-effective alternatives, including in-house monitoring. The international, all-encompassing scope of the system may seem extraneous for certain trademark owners and online marketplaces. In order to address this concern, PACS would establish different participatory levels for online marketplaces based on their size, market, and other various traits.

231. See *supra* notes 169–75 and accompanying text.

232. See *supra* notes 87–90 and accompanying text.

would largely benefit emerging online marketplaces that do not already have their own monitoring processes, all online marketplaces would have the opportunity to tailor PACS processes according to the marketplace's specific needs. Established marketplaces like eBay would be able to outsource their monitoring efforts to a less costly, more efficient anti-counterfeiting process.<sup>233</sup>

Furthermore, buyers and sellers also could inquire directly to PACS about individual listings. Currently, eBay only permits trademark owners to file complaints of trademark infringement.<sup>234</sup> By granting non-trademark owners the power to report directly as well, PACS would create another resource for detecting counterfeiting. This would cause a larger influx of complaints, but PACS would have more resources than individual online marketplaces to weed out frivolous complaints and detect counterfeit activity.

The makers of luxury items, which have a higher likelihood of being counterfeited than other secondary goods, will have the option to elect a more rigorous screening process. Private companies that are currently offering anti-counterfeiting monitoring to luxury trademark owners<sup>235</sup> could bid for contracts and provide large-scale services for PACS. The luxury trademark owners who want heightened scrutiny could pay higher fees for greater protection from counterfeit sales of their trademarked goods. The fees would still be much lower than self-monitoring because the aggregation of the luxury trademarks into a single system would streamline the screening process.

## 2. Alternative Dispute Resolution Process

PACS would incorporate an ADR process to resolve disputes that are uncovered by the monitoring process. Under the international treaty, trademark owners would be required by law to present their counterfeiting concerns to the online

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233. In an analogous situation, eBay outsourced its back-end Internet technology to Abovenet Communications and Exodus Communications for the maintenance and performance responsibilities of Web servers, database servers, and Internet routers after several in-house outages in 1999. AFUAH & TUCCI, *supra* note 15, at 291.

234. *Rules About Intellectual Property—Overview*, EBAY, <http://pages.ebay.com/help/policies/intellectual-property-ov.html> (last visited Mar. 27, 2012).

235. MarkMonitor, IP Cybercrime, and OpSec Security are examples of private companies offering anti-counterfeiting monitoring to luxury trademark owners.

marketplace through the ADR process rather than filing suit in court.<sup>236</sup> Likewise, online marketplaces would have to address the trademark owners' concerns in good faith during the ADR process.<sup>237</sup> A neutral PACS arbitrator with special expertise in intellectual property and Internet issues would guide the parties to a reasonable resolution. Unlike the UDRP,<sup>238</sup> PACS would grant arbitration decisions an extremely deferential standard of judicial review, similar to the standard of review provided in the Federal Arbitration Act.<sup>239</sup>

Sellers and buyers would also be required to participate once they registered with a particular marketplace and sold or bought a trademarked good. PACS' ADR process would be compulsory for all trademark infringement issues, but a wider range of trademark issues, such as dilution and false advertising, would also be permitted with the consent of both parties.

Similar to ICANN, PACS would be a bipartisan, not-for-profit system with both private and public elements of governance.<sup>240</sup> The public functions would provide legitimacy and global participation, while the private functions would promote competition and bottom-up coordination.<sup>241</sup> Because

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236. Trademark owners may argue that mandatory ADR severely undercuts their rights to procedural due process. However, the overall policy benefits of ADR have already been affirmed. See *supra* Part III for a discussion.

237. Like a monitoring process, some online marketplaces may prefer not to participate in an ADR process if the costs exceed the potential risks of litigation. However, the overall long-term benefits to the online marketplace industry would ultimately outweigh the short-term cost savings to individual online marketplaces.

238. UDRP does not fall under the Federal Arbitration Act. See *Dluhos v. Strasberg*, 321 F.3d 365 (3d Cir. 2008); *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14 (1st Cir. 2001); *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745 (E.D. Va. 2001).

239. See 9 U.S.C. § 16 (2006).

240. Although ICANN is incorporated in the United States as a private, not-for-profit corporation with board members from all over the world, it was formed through a contract agreement with the U.S. government and carries out public functions. See THE NGO AND ACADEMIC ICANN STUDY, ICANN, LEGITIMACY, AND THE PUBLIC VOICE: MAKING GLOBAL PARTICIPATION AND REPRESENTATION WORK 19 (2001) [hereinafter NAIS Study] ("Thus, its legal structure is consistent . . . with a *private* set of activities, but those activities are in many ways *public*.").

241. See *id.* at 15, 18–19. It is important to acknowledge that an international treaty spanning both the public and private sectors is a massive undertaking that may be difficult to accomplish politically. However, if PACS provides an attractive enough solution for the parties that are most concerned with online counterfeiting, there will likely be sufficient economic incentive and political influence guiding the implementation of the international anti-counterfeiting treaty.

the ADR process would partially limit parties' access to courts, precautionary measures ensuring due process must exist. In order to make sure arbitration is impartial and independent, conflicts of interest, such as a personal financial interest, a prior representation of a party, representation of a third party in a dispute against one of the other parties, or any personal bias would be screened out.<sup>242</sup>

### *B. Benefits of PACS*

PACS would share the same policy goals as ICANN: intellectual property protection, promotion of competition, and allocation of Internet resources.<sup>243</sup> Just as ICANN's primary purpose was to globalize Internet coordination in a new way,<sup>244</sup> PACS would further that purpose by extending Internet coordination to stop online counterfeiting.

Like the fast, accessible, and efficient nature of the UDRP,<sup>245</sup> contributory trademark liability disputes could be quickly and efficiently resolved through PACS. PACS would first establish cooperative agreements with online marketplaces (and a default agreement for newly created marketplaces) and establish uniform standards for contributory trademark liability disputes. Choice of jurisdiction and choice of law would be predetermined by the international treaty, eliminating the uncertainties of geographically-oriented conflict-of-laws.<sup>246</sup> Unlike general jurisdiction courts, the parties would also benefit from specialized expertise to resolve trademark disputes.<sup>247</sup>

More efficient online consumer transactions would serve the overarching goals of trademark law.<sup>248</sup> Buyers would have lower search costs and increased confidence in the authenticity of the luxury goods purchased online, while individual sellers would not face as many restrictive barriers when selling legitimate goods on the secondary market. Online marketplaces would also benefit from eliminating counterfeit listings because they will garner trust from buyers, who will be

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242. The UDRP also states an express obligation of independence and impartiality. *See Hörnle, supra* note 210, at 259.

243. *See NAIS Study, supra* note 240, at 4.

244. *Id.*

245. Hörnle, *supra* note 210, at 253.

246. *See id.* at 284.

247. WANG, *supra* note 152, at 155.

248. *See supra* Part I.

more willing to conduct business through the online marketplace. Finally, luxury trademark owners whose merchandise is sold on the secondary market would be able to effectively protect their trademark rights and maintain control over the quality of their products.

Due to the slow process of legislation, the speed of the Internet, and the sophistication of counterfeiters, enacted legal rules quickly become outdated and ineffective. PACS, on the other hand, would have the capability of evolving with changing online standards. As counterfeiters found increasingly sophisticated ways of avoiding detection, PACS would keep up with these developments and impart the benefits to all participating online marketplaces and luxury trademark owners. The continued development of new technology and the aggregated nature of the system would lead to cheaper and more streamlined measures to curb counterfeiting activities in online marketplaces.

### *C. Further Considerations for PACS*

To attain legitimacy, PACS, like the UDRP, must be a “fair, open, participatory, and inclusive process of decision-making that takes account of the public interest in how the Internet functions.”<sup>249</sup> Online marketplaces, trademark owners, sellers, and buyers must be entitled to a voice in the development of PACS. This is a particular challenge because of the various and, at times, incompatible views and interests involved. In negotiating the terms of an international treaty, the conflicting laws of the participating countries might delay, if not entirely block, the possibility of a resolution. Therefore, negotiating parties must be receptive to changing existing laws in their respective countries. The treaty would also need the support of powerful industry organizations such as the International Anti-Counterfeiting Coalition (IACC). The fashion industry is unlikely to support any measures that limit their rights and legal incentives. Ultimately, public participation and transparency would be needed as a “key element and a safeguard against domination by governmental or commercial interests.”<sup>250</sup>

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249. NAIS Study, *supra* note 240, at 102.

250. *Id.* at 4.

PACS would likely face problems similar to the UDRP system. The UDRP has been criticized for being a biased procedure because trademark owners financially support it.<sup>251</sup> Luxury trademark owners may overstep their legal boundaries by bringing actions against sellers who are engaging in legal, but directly competitive activity. While eBay has the same legal heft as the luxury trademark owners, smaller, less experienced online marketplaces may be coerced into making concessions.

Lastly, PACS would need sufficient infrastructure to deal with the enormity of the anti-counterfeiting problem. The monitoring process would need the capability of screening a great number of listings, handling the counterfeit listings, and weeding out frivolous or groundless complaints. In addition, the ADR process must be inexpensive and efficient, while treating all parties fairly. An international treaty would have to address how the entire system would be adequately funded and maintained.

## CONCLUSION

International Anti-Counterfeiting Coalition (IACC) President Robert Barchiesi was correct when he asserted that new online anti-counterfeiting policies and procedures will result in “less piracy and counterfeiting, thus improving the overall climate for legitimate businesses and consumers of genuine products.”<sup>252</sup> However, he was wrong to assume that holding eBay contributorily liable within the adversarial court system is the only way for this to occur.<sup>253</sup> The unproductive burden-shifting role of the courts has left both online marketplaces and luxury trademark owners with little

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251. See CORTÉS, *supra* note 163, at 124–26. About 54% of all UDRP cases were default cases, and 94% of those cases were in favor of the claimants. *Id.* at 126.

252. Press Release, IACC President Robert Barchiesi, IACC Urges U.S. Appeals Court to Hold eBay Contributorily Liable for Continuing Rampant Internet Sales of Counterfeit Goods (Oct. 22, 2008), *available at* <http://www.iacc.org/news-media-resources/press-releases/iacc-urges-us-court-to-hold-ebay-liable.php>.

253. See *id.* (“[U]ntil the U.S. judicial system takes appropriate action with respect to eBay in forcing it to more aggressively fight the proliferation of counterfeit sales through its site, the IACC warns consumers that they should not feel confident in the legitimacy of certain of the [sic] products they acquire on eBay.”).

guidance, and has simply opened the floodgates to more litigation.

New detection technology and ADR processes provide a different, more effective way to curb online counterfeit sales. Rather than pushing abstract burdens on one side or another, the collective needs of the online marketplace can be served through a uniform, mutually agreed-upon system. An anti-counterfeiting program can be externalized to a third-party provider to balance the needs of all parties. There will be a monitoring process, which will screen for the authenticity of goods listed online. If any contributory liability disputes occur, the parties will be required to submit to an arbitration-like proceeding. Just as the UDRP system has become streamlined in solving cybersquatting disputes such that the urgency of the problem has faded, there is an opportunity for a system dealing with contributory trademark infringement problems to achieve the same result.

Further examination will be required to outline the specific substantive and procedural rules of PACS. This Note simply offers an approach that reduces the transaction costs of contributory trademark liability and uniformly serves the interests of online marketplaces, trademark owners, buyers, and sellers. By pooling resources and working towards a unified goal, rather than working within an adversarial court system, contributory trademark liability, like cybersquatting, will lose its controversial muster and become effectively diminished through a streamlined, two-tiered system. Fake Louis Vuitton handbags and Gucci sunglasses will soon be evicted from the Internet and sent back to the dark, musty corners of the physical world.