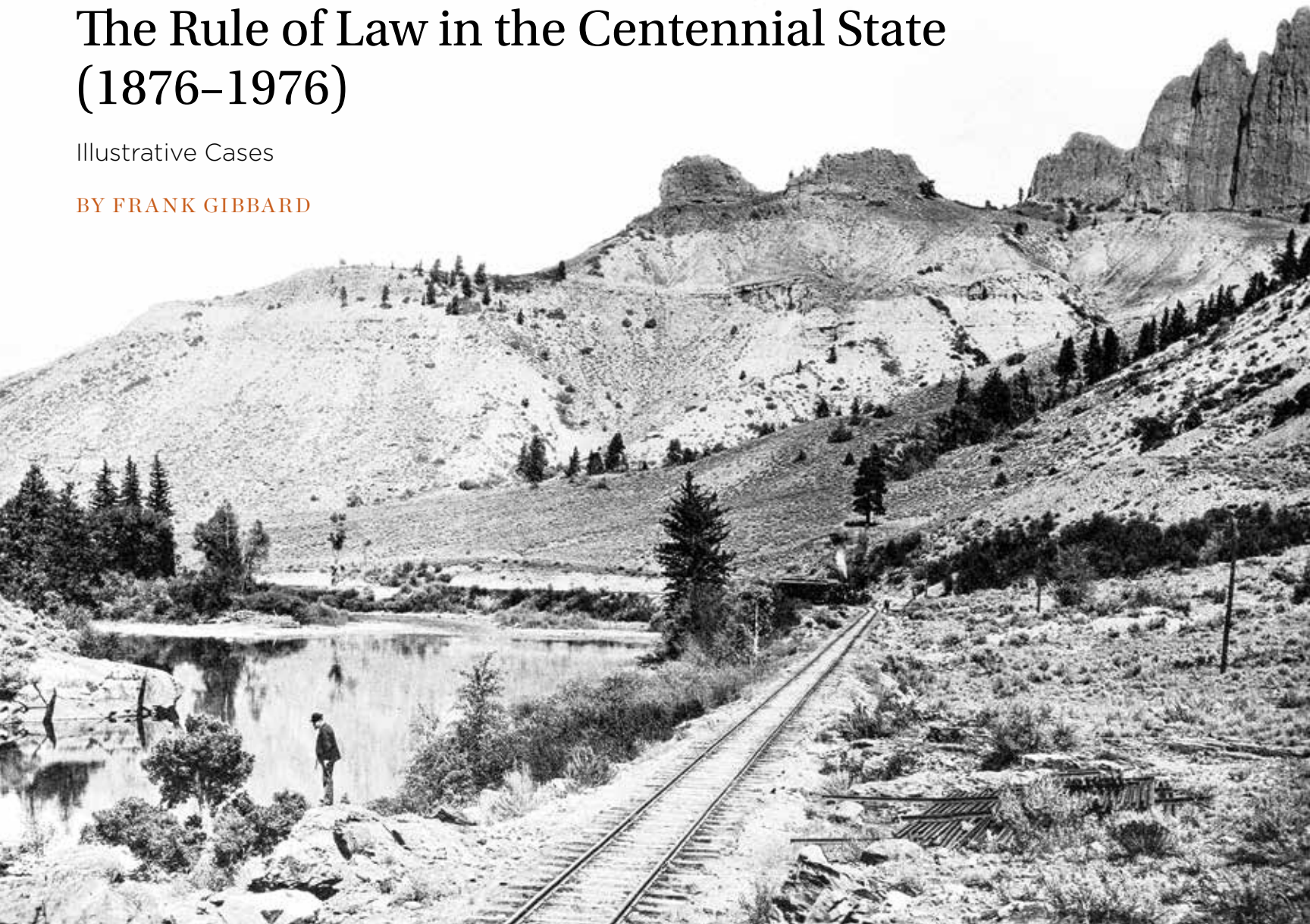


The Rule of Law in the Centennial State (1876–1976)

Illustrative Cases

BY FRANK GIBBARD



This year marks a significant milestone in US history: the 250th anniversary of the adoption of the Declaration of Independence. Notably, this year also marks Colorado's 150th anniversary.

During its first hundred years as the Centennial State (1876–1976), the rule of law became firmly established in Colorado through a set of representative institutions, delimited executive power, and a system of federal, state, and local courts. Although the legitimacy of these institutions was overwhelmingly recognized

during this period, the rule of law occasionally required reaffirmation against local challenges. Some of those challenges, and the governmental responses to them, will be explored here through illustrative cases that show how Colorado authorities upheld the rule of law to protect both public safety and order and individual rights.

These cases cover both the negative and positive dimensions of the rule of law. On the negative side, the rule operates as a constraint on governmental power, helping to create a “shackled Leviathan”—a government powerful

enough to achieve its objectives but also constrained by widely understood and accepted norms.¹ Put another way, the rule demands that the law be applied to the government and governmental actors themselves—providing a satisfactory answer to the famous question, “*Quis custodiet Ipsos custodes?*”²

On the positive side, the rule of law helps to protect the rights of individuals and entities that do not benefit from significant social or political power or influence.³ This positive aspect can pop up in unexpected places—like

the invocation by Soviet dissidents during the 1960s of protections written into the Soviet Constitution.⁴ An effective system of law provides both procedural and substantive protections to ordinary individuals.

Early Developments

It may be enlightening, first, to explore the sometimes-rocky history of how the rule of law first became established in Colorado. It took some time for legitimate legal authority to take hold in the territory that would eventually become the Centennial State. Before the founding of the Colorado Territory in 1861, its inhabitants struggled to establish a system of courts that could effectively resolve disputes. Although informally organized miners' courts and so-called "people's courts" (which were often only a step above lynch law) were common, more formal structures struggled for legitimacy. At one point, for example, a Denver litigant who wished to bring a civil action had a choice of four alternative venues: the territorial courts of the Territory of Jefferson; a Court of Common Pleas organized by the City of Denver; the Arapahoe County, Kansas courts; and a miners' court operated by the Arapahoe County Claim Club.⁵

In 1861, this multitude of courts was supplanted by a unified system of territorial courts and a Colorado Supreme Territorial Court. At first, this new court system existed mostly on paper, though by the time Colorado achieved statehood 15 years later, its courts were operating as anticipated. Even so, echoes of the past remained. Notably, conflicts continued between miners accustomed to self-government and the Colorado authorities for decades after territorial institutions were organized,⁶ and cases of lynching and other "Wild West justice" continued well into the 20th century.

Sherman Bell and the Goldfield War

Given the importance of mining in Colorado's early history, it is unsurprising that an early challenge to the rule of law arose in the goldfields of Cripple Creek and Telluride.⁷ Governmental actors like its key antagonist, Sherman Bell, would later become common features of the totalitarian states of mid-century Europe. But this conflict occurred much earlier, just after the

dawn of the 20th century, in September 1903, when Colorado's governor James H. Peabody ordered the Colorado National Guard to Cripple Creek to quell a gold-mine strike.

Bell, the Guard's commander, cut a striking figure. He wore an expensive, gold-braided uniform and liked to pose with his left hand tucked into his shirt, Napoleonic style. He was also prone to making irresponsible statements. Told that a writ of habeas corpus might be used to restrain him, he famously bellowed, "Habeas corpus be damned, we'll give 'em post mortems!"⁸ This remark, gauchely linking unrelated Latin phrases, helped to cement Bell's place among the unthinking enemies of the rule of law.

Under Bell's leadership, the Guard established a military dictatorship in Cripple Creek and Telluride. In March 1904, Bell's militia arrested and jailed Charles H. Moyer, president of the World Federation of Miners. Among other things, Moyer had printed a poster that bore the headline, "Is Colorado in America?"⁹ Below the headline, an American flag appeared, each of whose stripes bore a provocative inscription challenging the excesses and abuses of military rule.

A state district court ordered Moyer's release. Bell ignored the order. Moyer sought relief from the Colorado Supreme Court. He argued that Governor Peabody had no right to suspend the writ of habeas corpus or to declare martial law. But the court's majority rejected his arguments, concluding that the governor was empowered to call out the militia to suppress an insurrection.¹⁰ This unreviewable power included the authority to use all necessary means to suppress the insurrection, and Moyer could be detained until the governor determined it was over.

Justice Robert W. Steele dissented. He feared that if the governor had unchecked power to declare a state of rebellion, then any citizen could be subject to arbitrary arrest and detention at the whim of the executive. His dissent expressed traditional concerns about the necessary limits on executive action under the rule of law.

Moyer was eventually released. More than 20 years later, a similar situation arose during a round of labor disturbances in 1927-28. Colorado's governor called out the militia without declaring martial law, citing his power to suppress

an insurrection. This time, the federal courts stepped in. District of Colorado Judge John Foster Symes concluded that unless martial law had been declared, "no rogatory body can lawfully go around in this state depriving individuals of the rights that the Constitution . . . guarantees."¹¹

Judge Symes's decision illustrates the advantages of a federalist system where either state or federal authorities may take it upon themselves to enforce the rule of law. It is not the only example of that dynamic that will be explored here.

The Denver City Hall War

Another challenge to the rule of law in Colorado occurred a decade earlier, in 1894, and it also involved the Colorado militia, although under very different circumstances. The circumstances seemed downright apocalyptic, in fact. According to a petition that Colorado Governor Davis H. Waite filed with the Colorado Supreme Court on March 17, 1894, Denver's police and firemen had deserted their posts and hundreds of men had barricaded themselves inside Denver's City Hall, armed with firearms and explosives.¹² Waite had called out the state militia, and troops were on their way from Fort Morgan. He sought the court's intervention to help resolve the crisis.

How had such a disastrous situation arisen? The conflict essentially resulted from tensions between Waite, a reformist governor, and Denver's corrupt establishment. Waite had taken office a year earlier, at a time of crisis for Colorado resulting from the Panic of 1893 that all but ruined Colorado's key industry, silver mining. In the wake of the crisis, Waite's populist rhetoric had whipped up tensions in the Colorado populace.

Waite expressed fear that the crisis would lead to the erosion of workingmen's rights. His statement that it would be better to see blood flow up to "our horses' bridles" than suffer the loss of liberties earned him the nickname "Bloody Bridles" from a scornful conservative press, which accused him of "leaning toward . . . communistic ideas."¹³

Meanwhile, the city of Denver had become incredibly corrupt, swarming with gamblers and conmen, including Bat Masterson, "Soapy"

Smith, and Sam and Lou Blonger. Tourists and visitors to the town were often fleeced by sophisticated con games. Denver's conmen also financed political campaigns and paid off the police.

In the 1890s, Denver did not yet have home rule, so Colorado's governor still had the right, with the advice and consent of the Colorado Senate, to appoint some Denver city officials. This included members of Denver's Fire and Police Board. Those board members in turn influenced the hiring and firing of Denver police and firemen—coveted positions in an economic downturn.

Waite initially made some remarkably non-partisan appointments to the board. But he was later forced to fire two of them, C.B. Stone as fire commissioner and George H. Phelps as police commissioner, after an investigation revealed the men had engaged in alleged payoffs. Stone and Phelps refused to leave and had to be forcibly removed by Denver police. This set a bad precedent that would soon get much worse.

Waite replaced the men with political appointees. But he later suspected one of those replacements, Jackson Orr, along with another of his initial appointees, D.J. Martin, of corrupt ties to the gambling industry. After an investigation, Waite decided Orr and Martin would have to go. In response, the two men pursued a two-track strategy: resort to the rule of law in the form of court action, and flout the rule of law by joining forces with members of the fire department, police department, and gambling interests to engage in outright armed rebellion.

Orr and Martin obtained pledges from police and firemen to resist any attempt by the governor to remove them with armed force. The rebels barricaded themselves in City Hall at 14th and Larimer Streets. Meanwhile, on the legal track, they obtained an order from a Denver district court judge enjoining the governor from calling out the militia and the governor's replacement appointees from taking their seats.

Although Waite was initially reluctant to defy the injunction, by March 14 he decided he'd had enough. He called out the Colorado militia to besiege City Hall and remove Orr and Martin from office. The militia arrived, with Gatling guns and field cannons. On March 15,

the militia drew up in front of City Hall, training their cannons on the building's doorways. The three or four hundred men inside, armed with Winchesters and revolvers, waited for the siege. A third armed force arrived, as peacekeepers: five companies of US infantry.

Just as things rose to a fever pitch, the tensions suddenly dissipated. In response to ongoing negotiations, Governor Waite withdrew his forces in favor of a judicial resolution by the Colorado Supreme Court, which resolved the conflict.

The court determined that "although the governor had the power to appoint and remove members of the Fire and Police Board, he did not have the power to enforce his decisions through the use of force."¹⁴ The governor could suppress an insurrection, but Orr and Martin's conduct did not constitute an "insurrection" that warranted calling out the militia. The courts, not the National Guard, should decide the question of the men's continued entitlement to their position. Although this could result in some delay, that could not justify "a resort to the summary exercise of arbitrary power, either by the civil or military authority," which could only result in injustice, despotism, and anarchy.¹⁵

A month later, the court issued a separate decision addressing Orr and Martin's termination. It determined the termination had been warranted and not an illegal political decision, as the men had insisted. Orr and Martin accepted the court's decision. Their armed supporters melted away. The rule of law had prevailed. The court had defused a dramatically dangerous situation.

Freedom of the Press and a "Lettre de Cachet"

Pre-revolutionary France featured an odd form of detention under an extraordinary writ. If the king of France determined that a particular subject was a danger to the established order, or a disgrace to his aristocratic family, the king could simply issue a "lettre de cachet" against the offender, countersigned by one of his ministers. The letter would order the person incarcerated without trial. The unfortunates subject to such royal writs often found themselves confined in the notorious Bastille prison, sometimes for

years. Both Voltaire and the Marquis de Sade, for example, spent time imprisoned on a *lettre de cachet*.

These unusual writs were abolished after the French Revolution, in March 1790. But over a century later, a Colorado town essentially revived the practice to rid itself of a journalistic gadfly.

Sylvia T. Smith ran a newspaper in Marble, Colorado, known as the *Marble City Times*. Her paper took a very jaundiced view of the town and its principal employer, the Colorado-Yule Marble Company.¹⁶ Although Marble was booming at the time, the readers of Smith's paper could be excused for thinking otherwise. "She sneered in her paper that Colorado-Yule was more interested in selling stock than in producing marble. She characterized purchasers of Colorado-Yule stock as 'suckers.' She even sent copies of her newspaper back East to warn people not to invest in Colorado-Yule."¹⁷ The *Times* ran other articles personally insulting Marble's officials and its local ladies.

The final straw occurred after an avalanche struck the Colorado-Yule Marble Mill. Rather than showing sympathy for the company's losses (which would no doubt have affected the lives and fortunes of most people in town), the *Times* ran articles two days after the disaster suggesting that Marble had got what it deserved for stealing the life savings of its hard-working investors. The townspeople, who had been frustrated for years by Smith's articles besmirching their town, now organized a town meeting through handbills circulated ominously "By order of Committee," to finally do something about Smith.¹⁸

As a result of the meeting, those assembled organized a committee of 25 local citizens to present resolutions they had drafted calling on Smith to leave the town of Marble within 72 hours and never return. The delegation went to Smith's home, where the town clerk read the resolutions to Smith.

But the town's marshal, R.J. Mahoney, did not wait 72 hours to rid the town of Smith and her pesky reporting. Marble's mayor had drafted a letter authorizing him to detain Smith for her own safety. Acting on the letter, Mahoney arrested Smith and placed her in the town jail. (Both the mayor and the marshal, incidentally, were Colorado-Yule employees.) While she sat

in jail, the townspeople went to her offices, dismantled her printing press, and placed her belongings in storage.

Two days after the town meeting, on March 28, 1912, Marshal Mahoney escorted Smith from the jail onto a train bound for Carbondale, Colorado. Her journalistic career in Marble was finished.

Smith later sued Colorado-Yule and various other town defendants, seeking \$1 million in damages. A jury awarded her an amended verdict of just over \$10,000. On appeal, the Colorado Supreme Court upheld the verdict. Smith then returned to the town of Marble to execute on her judgment. She watched as the Gunnison County sheriff walked up and down the town's main street with her, closing up shops until the owners paid their share of her damages. Some of the defendants could not pay and purportedly had to sell their businesses or homes to satisfy

their portion of the judgment.¹⁹ Enforcement of the rule of law in a case of arbitrary detention had proved a costly lesson for the violators of a gadfly's civil rights.

The Japanese Internment

On February 19, 1942, two months after the Japanese attack on Pearl Harbor, President Franklin Roosevelt issued Executive Order 9066. The order authorized the removal of Japanese Americans, including Japanese American citizens, from the West Coast to relocation centers further inland. One of the relocation centers/ internment camps, known as Amache, was located in Granada, Colorado.

Many Western governors supported the internment policy but opposed housing Japanese Americans in their states. The exception was conservative Republican Colorado governor Ralph Lawrence Carr. He welcomed Japanese

Americans to Colorado and spoke out against their internment. His stand was unpopular, and it is believed it later cost him the US Senate election in 1942 and his political career.

Japanese Americans who were relocated to Colorado by the War Relocation Authority often encountered prejudice and mistrust from their fellow Colorado citizens.²⁰ This prejudice was an unfortunate feature in Colorado both before and during the wartime period.

During the bicentennial year of 1976, President Gerald Ford signed a presidential proclamation that terminated Executive Order 9066 and apologized to the Japanese Americans who had been interned. In that same year, a bust was erected honoring Governor Carr in Denver's Sakura Square.

Governor Carr died in 1950. His efforts to preserve constitutional protections for an unpopular group of Americans during wartime



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have earned him widespread acclaim as a champion of the rule of law. The Ralph L. Carr Judicial Center, home to the Colorado Supreme Court, the Colorado Court of Appeals, and the Colorado Supreme Court Library, is named for him.

Protections for Interracial Marriage

The final example illustrates how the rule of law, when appropriately extended, can operate positively to protect individual rights. In 1967, the US Supreme Court held that laws banning marriage between couples of different races were unconstitutional.²¹ Before then, so-called anti-miscegenation laws were not an isolated phenomenon in 20th century America. Between 1913 and 1948, such laws were in effect in 30 out of 48 states.²²

Colorado had one of the most unusual anti-miscegenation laws in the country. Although the law made marriages between white and Black or mixed-race people null and void, there was a geographically based exception. People living in that portion of the state acquired from Mexico could marry according to Mexican customs. This meant that interracial couples whose marriage was perfectly legal in one portion of the state might find themselves illegally cohabitating if they moved to a different part of the state. This differential application helped to illustrate the arbitrary and irrational character of the law.

Colorado's law was put to the test in 1942, when a Denver couple claiming to be common law married was convicted under a Denver ordinance of vagrancy for illegal cohabitation.²³ The husband, James W. Jackson, was African American, and his wife, Lydia Jackson, was white. Their race, as treated under Colorado's anti-miscegenation law, prevented the Jacksons from enjoying the full benefit of the rule of law to protect their marriage. As an interracial couple asserting a common law marriage, they were convicted of pursuing an "immoral course of life."²⁴

The couple challenged their conviction in the Colorado Supreme Court. The court's majority rejected their challenge. Among other things, the court concluded that the Denver ordinance was nondiscriminatory because it forbade

cohabitation by Black and white people alike. It swept aside the Jacksons' claim that their common law marriage should have protected them from a vagrancy conviction.

The dissenting justice, Otto Bock, showed a remarkable sympathy for the Jacksons. He reasoned the majority should have treated their asserted common law marriage as presumptively valid. He also questioned the validity of the anti-miscegenation law, which had created a "geographic immorality."²⁵

As noted, in 1967 the Supreme Court held the remaining anti-miscegenation statutes unconstitutional. But a decade before that (and 15 years after the *Jackson* case), Colorado repealed its anti-miscegenation law. The repeal came in part due to efforts by attorney John E. Gorsuch, chair of the CBA Domestic Relations Committee.²⁶ This was an example of the legislature stepping in to extend protections under the rule of law to a category of people who had previously suffered discriminatory enforcement.

Conclusion

Many more examples could be cited, from quo warranto actions seeking to remove politicians who allegedly obtained their positions through organized corruption, to the role of the Ku Klux Klan in seeking to limit the extensions of protections of the rule of law to certain Colorado citizens. Hopefully, the examples provided illustrate some instances of how the rule of law was reaffirmed by Colorado's institutional actors during its first hundred years. The key takeaway may be that federalism and the separation of powers have been significant guarantors of the rule of law: often, when one branch or level of government failed to protect it, another stepped in to fill the gap.

Both the United States and Colorado have benefited from a remarkable set of institutions enjoying legitimacy under the rule of law and have managed to shrug off some of the worst challenges they have faced. We should fervently hope this remains the case. 



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NOTES

1. Acemoglu and Robinson, *The Narrow Corridor: States, Society and the Fate of Liberty* (Penguin Press 2019).
2. The remark, attributed to the Roman poet Juvenal, has been translated as "who will guard the guardians themselves?"
3. That is not to say that the elected branches of government always exert their power in a disinterested manner. See, e.g., de Jouvenel, *On Power: The Natural History of Its Growth* (Liberty Fund 1993).
4. See Nathans, *To the Success of Our Hopeless Cause: The Many Lives of the Soviet Dissident Movement* (Princeton University Press 2024).
5. Gibbard, *Steam, Steel & Statues* 6 (CLE in Colorado 2010).
6. See *id.* at 104–05 (discussion in Tom Romero article on law and authority in Colorado's early mining towns).
7. See *id.* at 231–34.
8. *Id.* at 231.
9. *Id.* at 232.
10. *In re Moyer*, 85 P. 190, 192 (Colo. 1904).
11. *U.S. ex rel. Palmer v. Adams*, 26 F.2d 141, 144 (D.Colo. 1927).
12. See Gibbard, "The Denver City Hall War," 42

- Colo. Law.* 57 (June 2013).
13. *Id.* at 57–58 (internal quotation marks omitted).
14. *Id.* at 60–61.
15. *Id.* at 61 (internal quotation marks omitted).
16. See Gibbard, "Journalist Carves Through Marble—A Town Crumbles," 40 *Colo. Law.* 47 (Feb. 2011).
17. *Id.* at 47.
18. *Id.* at 48 (internal quotation marks omitted).
19. See *id.* at 50.
20. Gibbard, *supra* note 5 at 57–60 (Tom Romero article concerning the wartime murder trial of George Honda, resulting in the only execution of a Japanese American during World War II in the United States).
21. *Loving v. Virginia*, 388 U.S. 1 (1967).
22. Gibbard, *supra* note 5 at 65.
23. *Jackson v. City & Cnty. of Denv.*, 124 P.2d 240 (Colo. 1942).
24. Gibbard, *supra* note 5 at 66 (quoting *Denv. Mun. Code* §§ 1345, 1346 (1927)).
25. *Jackson*, 124 P.2d at 242 (Bock, J., dissenting).
26. Gibbard, *supra* note 5 at 67.