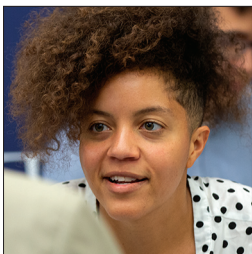




**ALTERNATIVE
MONEY U.**
John B. Taylor
talks to
students
PAGE 14



**FREE
SPEECH**
The state
of campus
activism
PAGE 9



**ART
EXHIBIT**
Crowds
drawn to
Cato
PAGE 13

Cato Policy Report

SEPTEMBER/OCTOBER 2019 VOL. XLI NO. 5

Rocky Mountain Tax Revolt

BY JAY STOOKSBERRY

Imagine if lawmakers were required to ask taxpayers' permission before increasing taxes or going into further debt. Furthermore, imagine if, when lawmakers took in more tax revenue than they were allowed, they were forced to refund the excess to taxpayers. What may sound like a libertarian dream is actual policy in Colorado.

In 1992 Colorado became a model for the national tax revolt when voters adopted the Taxpayer Bill of Rights (TABOR)—a unique constitutional amendment that hamstring the government's power to levy taxes, incur debt, and spend taxpayer money without voter input. Colorado is the only state to boast such a strict charter on taxation, debt, and spending.

Despite its public appeal, TABOR has been a convenient boogeyman to Colorado politicians. Before ballots were cast in 1992, opponents disingenuously claimed that TABOR would neutralize government's ability to perform basic functions. Several Chicken Littles even claimed that Pope John Paul II, who was visiting Denver in 1993 for World Youth Day, would be assassinated due to cuts in law enforcement and security. Fortunately, Coloradans ignored such hyperbole and voted TABOR into law.

For more than two decades, pro-spending lobby groups persisted in their efforts to undermine TABOR. Always falling short of a full repeal, opponents have managed to chip away at some of the key components

of TABOR over the years, weakening the overall impact of the law. Today, TABOR faces some of its biggest challenges yet, including ballot measures that will permanently undermine the spirit of this law.

Despite being a shell of its former self, TABOR still serves as a rudimentary bulwark

Continued on page 6



Teachers for grades 5-12 gather in the F. A. Hayek Auditorium for Cato's Sphere Summit, a special event on teaching civic culture and open dialogue on contentious political issues. See page 16.

JAY STOOKSBERRY is a freelance writer based in Delta, Colorado. His writing has been published by *Reason*, *Foundation for Economic Education*, *Newsweek*, *Colorado Politics*, and numerous other publications.

Continued from page 1

against government's ability to tax and spend, while also remaining broadly popular among voters.

The arc of TABOR's story can serve as a helpful guide for taxpayers in other states who want to replicate similar self-governing models of taxation. Colorado's experience offers insights into best practices, as well as highlighting blind spots and loopholes that were not anticipated when drafting TABOR's precise language.

WHAT DOES TABOR DO?

As articulated by Article X, Section 20 of the Colorado Constitution, TABOR imposes constitutional limitations on state and local government entities' ability to raise taxes, incur debt, and retain public money. Before it can do any of the aforementioned activities, the individual "district"—the legal term that encompasses all separate units of government, such as Colorado's state government and smaller local government entities (e.g., fire departments, mosquito abatement, etc.)—must first seek approval from the voters.

TABOR specifies just how a government district can obtain voter approval. TABOR requires that such votes can only occur during national general elections (November in even-numbered years); biennial local district elections; or the first Tuesday of November in odd-numbered years. A TABOR ballot question cannot be voted on during a special election.

Furthermore, TABOR also requires that all such ballot measures begin with "shall taxes be increased" or "shall debt be increased," including, respectively, the estimated annual tax revenue generated or the principal amount plus repayment costs incurred. The measure must also broadly specify how the money will be spent.

Next, the amendment also restricts how much tax revenue a government can retain and imposes a strict formula that restricts the fiscal growth of government. Annual

“TABOR's story can serve as a helpful guide for taxpayers.”

revenue caps are set based on the previous fiscal year's revenue plus a "population-plus-inflation" formula to account for increasing demands to public services as the population and economy grow. Any excess revenue that exceeds the TABOR cap—whatever is left over after population and inflation are calculated—must be refunded to voters. If a public entity wishes to keep that surplus revenue, it can only do so with voter approval. (This act of seeking approval to waive the revenue cap is colloquially referred to as "de-Brucing," a nod to TABOR architect and activist, Douglas Bruce.)

THE RESULTS

One might think that such restrictions would mean that Colorado governments would never be able to generate additional revenue.

This is untrue at the local level. Between 1993 and 2018, voters have approved more than 1,400 tax-, debt-, or cap-related ballot measures at the municipal level. Nearly 70 percent of all TABOR measures pass at the municipal level. On the local level, the claims of draconian austerity didn't exactly pan out.

On the other hand, TABOR has proven to be more restrictive at the state level. Only two statewide tax increases—a 2004 increase on sales tax on cigarettes and a 2013 imposition of sales and excise tax on retail marijuana—have passed.

TABOR proved to be effective in its primary mission: to slow the growth of government. This was demonstrated by a study written by Fred Holden of Independence Institute, a Colorado-based libertarian think tank. In his report, "Two Decades of Colorado's Taxpayer's Bill of Rights," Holden examined the first decade of TABOR as law (1993–2002) in comparison to its second

decade (2003–2012). Prior to TABOR, state spending was increasing at twice the rate of inflation. In the first decade after TABOR became law, that trend came to a screeching halt. Between 1993 and 2002, spending increased only at a rate comparable to the population-plus-inflation formula. The report also highlights several other economic benefits during this decade: drastic increases in private-sector jobs, personal income, and output growth rate—that were all well above the national averages.

However, the second decade of TABOR tells a different story. Government spending increased, public-sector job growth doubled, and economic productivity fell below the national average. Many of the problems originally targeted by TABOR seemed to resurface.

What happened? During this second decade, lawmakers identified several chinks in TABOR's armor. Though it placed hurdles in front of tax-seeking politicians, TABOR's overall effectiveness dwindled as a result of these loopholes, which allowed public officials to skirt the public-approval component of the law.

A TAX BY ANY OTHER NAME...

Prior to 1992, TABOR proponents tried and failed twice to pass a similar version of the amendment. TABOR opponents presented a hypothetical anecdote that connected with voters during those two elections: would an economically beleaguered special district, such as a library, need to go to the voters to get approval for a nominal fee—say, a 10-cent late fee increase?

The anecdote proved to be effective, so TABOR activists made a significant concession. "On the third time, I didn't mention fees at all, because they had succeeded in bamboozling people by focusing their criticism on fees," said Douglas Bruce, who crafted TABOR's language.

That led to a rebranding campaign by officials who wanted more revenue: the term "tax" was replaced with "fee." Rather than

“Colorado relies heavily upon fees.”

making the effort to seek voter approval to increase taxes, Colorado politicians turned their attention to generating revenue via fees.

The best example of this rhetorical shell game was the Funding Advancements for Surface Transportation and Economic Recovery Act of 2009 (FASTER). Advocates of FASTER disingenuously pitched the new law with the claim that it would raise revenue for road maintenance “without raising taxes.” Dozens of new mandatory fees and surcharges went into effect after FASTER became law. In its first year, FASTER generated more than \$31 million in late fees for vehicle registrations alone. With all state fees combined, FASTER currently raises more than \$200 million per year for Colorado.

FASTER represents a small window into this broader view of this fee-and-spend strategy by Colorado politicians. The Colorado government relies heavily upon fees to finance its programs and obligations, both at the state and local levels. According to the Pew Trust, fees make up roughly 20 percent of the state’s total revenue; the national average is 11 percent. When it comes to reliance upon fees, Colorado is now the third-most fee-dependent state in the nation.

ENTERPRISES: LEGALIZED MONEY LAUNDERING

For TABOR to pass, legal carve-outs for certain sizeable and politically popular public institutions (e.g., public colleges and universities, state-run nursing homes, parks and wildlife system, etc.) were deemed necessary. For political expediency, TABOR created a loosely defined category of public-sector activity: enterprises.

The Colorado Constitution defines an enterprise as a “government-owned business authorized to issue its own revenue bonds and receiving less than 10 percent of annual revenue in grants from all Colorado state and local governments combined.” What qualifies as a grant is narrowly defined, excluding several sizable sources of revenue,

including federal grants and transfers of state-owned capital assets.

Enterprises have evolved into legal laundering schemes for Colorado lawmakers. Colorado lawmakers abused this nebulous definition to shuffle public funds away from TABOR-restricted entities into enterprise funds.

The most egregious example of abusing the enterprise exemption is Colorado’s hospital provider “fee.” Up until 2017, Colorado assessed a tax on hospitals statewide to match federal funding for Medicaid. However, budget restraints and increased Medicaid coverage following the Affordable Care Act made this funding mechanism unsustainable.

The Colorado General Assembly repealed the existing hospital provider fee with Senate Bill 17-267, removing the funding from the TABOR-restricted general fund. In its place, a new enterprise, named Colorado Healthcare Affordability and Sustainability Enterprise (CHASE), was formed. The revised statute purposely states that CHASE “is a fee, not a tax.” In its first year of existence, CHASE collected more than \$894 million in revenue—all outside of TABOR’s purview.

The TABOR Foundation filed suit to challenge the creation of this enterprise, but lost in court.

According to analysis by the Colorado Legislative Council Staff, in the 10 years following TABOR’s passage, enterprise revenue jumped from \$742 million in 1994 to \$11.2 billion in 2014—a 1,409 percent increase. Today, enterprise revenue makes up nearly half—\$17.9 billion—of Colorado’s \$37 billion budget.

THE BAIT-AND-SWITCH OF REFERENDUM C

The combination of the 2001 economic recession and TABOR created a ratchet-down effect on government spending. As mentioned, TABOR mandates a strict for-

mula wherein governments could only grow fiscally based on previous year’s tax revenue, plus compensation for inflation and population growth. Since consumers were making and spending less, the state experienced declines in dollars collected via income and sales taxes. As government coffers shrank, TABOR restricted them from returning to the higher spending limits of previous boom years.

This sent state lawmakers into a tizzy. In 2005, the Colorado General Assembly referred a ballot measure, Referendum C, to Colorado voters that would institute a five-year reprieve—from 2005 to 2010—of TABOR restrictions for the state government. The measure narrowly passed.

Referendum C proved to be anything but temporary. The referendum allowed the state government to peg its budgetary baseline to the largest revenue-yielding fiscal year during the reprieve (FY2010). As a result, the referendum permanently augmented the spending cap, shortchanging taxpayers on their potential refund year after year since it was passed. Following 2005, all legislative budget reporting still references the Referendum C cap to distinguish it from the actual cap described in the original language of TABOR. Over the course of 12 years, Referendum C freed up roughly \$17 billion in tax revenue that would have otherwise been refunded to Coloradans.

Until recently, Referendum C was the state legislature’s most successful campaign to undermine the spirit of TABOR. Recently, the state legislature referred a measure to be voted on in 2019 that would do away with state refunds permanently. This double down—appropriately titled Referendum CC—would permanently “de-Bruce” state spending and remove all possibilities of a state refund. Projections of the amount of revenue that will exceed the TABOR cap range from \$1.2 to \$1.5 billion over the next three years, meaning that Colorado taxpayers will potentially experience their first significant

tax refund since the Referendum C was passed in 2005. Referendum CC would eliminate those refunds, as well as the potential for any refunds in the future.

STRENGTHENING TABOR

If you ask Doug Bruce how TABOR can be strengthened to avoid the aforementioned pitfalls, he will retort, “There’s no loophole.”

“You can’t say that’s the fault of craftsmanship,” said Bruce. “I don’t feel that there was one sentence in TABOR that wasn’t clear.”

Understandably, as TABOR’s proverbial father, Bruce isn’t entirely objective on the matter. While it’s true that Colorado lawmakers have played fast and loose with the rules, TABOR is past due for some reformation.

Constitutional scholar Robert G. Natelson describes how TABOR proponents have been broadly playing defense since 1992, and need to develop a strategy of offense instead. “Coloradans who value freedom have been playing that kind of game, but need not continue to do so,” Natelson writes. “The focus should be on strengthening, rather than weakening, the successful experiment in self-government that TABOR represents—and thereby honor Colorado’s heritage of freedom, and the promise and opportunity it brings.”

One defensive measure is obvious: reject Proposition CC. But if fiscal conservatives play offense—such as repealing Referendum C—TABOR could be strengthened for the long run. Other strengthening measures include the following.

Explicitly define taxes, fees, and enterprises

Much of the confusion over what is or isn’t a tax boils down to the vagueness of terminology. Each side of the debate claims to have the conclusive definitions for what qualifies as taxation, fees, and enterprises, as well as the rules as to whether TABOR explicitly restricts proposed fiduciary activities.

Explicitly differentiating taxes from fees is critical to strengthening taxpayer rights in Colorado. A meaningful legal test—one used

“TABOR remains popular with Coloradans.”

to determine whether a specific financial activity falls under TABOR—needs to be established. And the keyword for this test needs to be “mandatory”—namely, what mandate does the government have, be it implicit or explicit, to collect the revenue in question? Even if used for specific government services, a fee should be considered the same as a tax in the absence of a viable alternative for the consumer. All mandatory payments to any government entity—whether labeled as a tax, fee, assessment, or whatever—should fall under TABOR restrictions.

A good-faith effort to exclude smaller, nominal fee increases (e.g., the 10-cent late fee for the library) can be accommodated by setting an annual threshold that grows with the population-plus-inflation formula.

Fortify the citizen initiatives and referenda

Before any of the above reforms can occur, Coloradans must protect and reinforce the state’s referendum and initiative process. Furthermore, the existence of such a process—which is not readily available in every state—is critical to the replication of TABOR outside of Colorado.

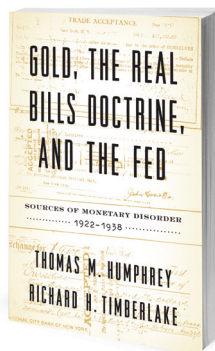
Colorado’s rich tradition of citizen petition came under attack in the aftermath of TABOR. Bruce jokes, “My tombstone will say: ‘Here lies Douglas Bruce; he gave us the right to vote on tax increases, but at the cost of our right to petition the government.’”

Following TABOR, a concerted effort to erode these rights took place in Colorado. In 2016, Amendment 71, which imposed significant changes to a citizen’s right to petition, was voted into the Colorado Constitution. Amendment 71 requires a proposed amendment to receive at least 2 percent of registered electors from *each* state senate district, as well as a supermajority vote of 55 percent or higher. Currently, Amendment 71 is being challenged in the courts, but likely won’t be decided upon for another year.

CONCLUSION

Despite the decline in its effectiveness, TABOR remains popular with Coloradans. A 2019 poll—commissioned by a coalition of pro-TABOR organizations, including Americans for Prosperity and the Independence Institute—revealed that 47 percent of respondents supported TABOR, while 26 percent opposed it. After a pollster read a statement that explained TABOR in greater detail, support skyrocketed to 71 percent.

TABOR is a worthy model to replicate outside of Colorado for those interested in reining in the government’s appetite for taxation and debt. And since politicians won’t willingly give up their authority to increase taxes whenever they want, such restrictions on government must come from a grassroots, citizen-driven campaign. The replication of TABOR in other states will lean heavily upon a vigilant, bottom-up mobilization of taxpayers who demand that their government seek—as promised by the Declaration of Independence—the consent of the governed. ■



“The most important book written on the Great Depression since Friedman and Schwartz.”

—PHIL GRAMM, *economist and former chairman, Senate Banking Committee*

CATO
INSTITUTE

HARDBACK AND EBOOK
AVAILABLE NATIONWIDE.