

64. See “Deep Six These Six,” *New York Daily News*, November 3, 1997, p. 32 (Editorial).

65. See Richard Perez-Pena, “Voters Reject Constitutional Convention,” *New York Times*, November 5, 1997, p. B1.

66. Ibid.

67. Dao (November 1, 1997).

68. See Gerald Benjamin, “Constitutional Revision in New York State: Retrospect and Prospect,” in N.Y. State Bicentennial Commission, *Essays on the Genesis of the Empire State* (Albany: The Commission, 1979), p. 39, table II.

69. Source for voting data is: New York State Board of Elections, [www.elections.state.ny.us/elections/1997](http://www.elections.state.ny.us/elections/1997).

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## Direct Democracy and Constitutional Reform

### Campaign Finance Initiatives in Colorado

Anne G. Campbell

This chapter examines the political dynamics behind Colorado's campaign finance reform initiatives in 1994, 1996, and 2002 as a way to understanding why, when, and how direct democracy is employed to enact constitutional change. Many have expressed concern about the initiative process, by which citizens and groups of citizens are empowered to propose statutes or constitutional amendments directly to a popular vote. That concern is particularly intense when it comes to amending states' constitutions by citizen-initiated ballot measures, instead of by legislative referenda that are subsequently put to a popular vote. In addition, critics of constitutional initiatives decry their use to ensconce public policy reforms in a document that they believe should only contain fundamental, "organic" law. Colorado's campaign finance reform efforts provide a valuable case to study the use of direct democracy to propose constitutional change, with three separate attempts to achieve reform via both statutory and constitutional initiatives over the past ten years.

In order to investigate constitutional change via the initiative process, this chapter considers direct democracy using a framework that examines how the proponents of campaign finance reform in Colorado used the initiative process to achieve their policy goals. After a brief examination of the broader history of the mechanisms of constitutional change in Colorado,

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I proceed with an examination of why these proponents of reform escalated their issue directly to the electorate via the initiative, what determined the timing of their measures, and the considerations involved in drafting their ballot measures. This case illustrates how the initiative process serves as an alternative policy-making agenda for those whose attempts to promote change through the institutions of republican government are thwarted by entrenched interests. It also demonstrates that the initiative process is most conducive to proposals for change that reflect the views of the voting public, and that they are apt to be the result of significant deliberation and compromise. Finally, the Colorado case demonstrates how initiative proponents may resort to proposing their measures as constitutional amendments as a defensive mechanism against government officials who have proven to be particularly hostile to their policy proposals.

### MECHANISMS FOR CONSTITUTIONAL CHANGE IN COLORADO

The Colorado Constitution dates from 1876, the year Colorado became a state. Although the Constitution retains most of the institutional framework adopted in 1876, it has been amended dozens of times, doubling in length over the past 126 years.<sup>1</sup> The frequent amendment of the Constitution coincides with the expectations of the delegates who drafted it, who noted they had “provided liberally for the amending of the Constitution, thus giving to the people frequent opportunities of changing the organic law when experience and public policy may require it.”<sup>2</sup> Article XIX authorizes the General Assembly to propose a constitutional convention by a two-thirds vote of each house, to be held if a majority of citizens voting at the next general election endorses the proposed convention. It also authorizes the General Assembly to propose amendments by a two-thirds vote of each house, which would take effect if ratified by a majority of those voting at the next general election.

In 1910 Colorado amended its constitution in order to introduce a third method of constitutional change, the initiative, empowering the people to propose statutes and constitutional amendments directly. If supporters collect the requisite signatures in support, then their citizen-initiated measures appear on the ballot at the next general election. Coloradans have employed this power extensively, initiating eighty-five measures from 1964–2002, including “many of the most controversial issues

TABLE 6.1  
Constitutional and Statutory Ballot Measures in Colorado, 1964–2002

	<i>Constitutional Amendments</i>	<i>Statutes</i>	<i>Total</i>
Citizens' Initiatives	61 (23)	24 (8)	85 (31)
Legislative Referenda	62 (49)	14 (7)	76 (56)
Total	123 (72)	38 (15)	161 (87)

*Note:* Numbers based on the Colorado General Assembly, "A History of Statewide Ballot Issues Since 1964," last updated 5/12/2003, available at the Legislative Council Staff's online research publications: [www.state.co.us/gov\\_dir/leg\\_dir/lcssstaff/research/Ballot\\_Hist\\_table\\_top.htm](http://www.state.co.us/gov_dir/leg_dir/lcssstaff/research/Ballot_Hist_table_top.htm).

Figures in parentheses indicate the number of measures that passed. The number of statutes includes two legislative "Question" referenda seeking government authority to assume new debt.

on the ballot."<sup>3</sup> Initiative proponents have overwhelmingly favored addressing these controversial issues through amendments rather than statutes—since 1964, sixty-one of the eighty-five ballot initiatives in Colorado have been proposed as constitutional amendments.<sup>4</sup> Altogether, 32 percent of amendments to the Colorado Constitution during the past thirty-eight years have been made via the initiative process.

From the outset the initiative was controversial in Colorado. The proposal to adopt the initiative divided the state along partisan lines, with Democrats favoring its adoption and Republicans opposing it.<sup>5</sup> Proponents viewed the initiative—like the referendum, the recall, and other electoral reforms—as necessary to counter the perceived corruption of the institutions of representative democracy. Legislatures, courts, and political parties were widely perceived as having been "captured" by wealthy special interests and as unresponsive to the people and the public interest. The initiative thus sought to ensure that the people were heard even when powerful interests prevented their concerns from being addressed in the legislature.

The initiative remains controversial in Colorado (and elsewhere) today. Opponents of the initiative, which include many members of the Colorado General Assembly, insist that the initiative process circumvents the legislature, curtails the opportunity for debate and deliberation that might result in better-refined policy proposals, and ties the legislature's hands on issues. Proponents agree that initiatives seek to circumvent the legislature and tie its hands—indeed, these are seen as virtues—but they

argue that their measures involve more debate and deliberation, and more concern for the public good, than do many laws enacted by the legislature. This last claim is particularly important when constitutional initiatives are at issue, because adequate debate and deliberation are crucial when instituting major constitutional reforms.

### THE POLICY AGENDA AND CONSTITUTIONAL INITIATIVES

Three considerations—conflict escalation, timing, and issue framing—are crucial for understanding how constitutional initiatives become part of the policy agenda. Conflict escalation refers to how political actors encourage “bystanders” (in this case, the electorate) to weigh in on an issue in order to effect policy change.<sup>6</sup> Typically, policy entrepreneurs play a key role in drawing the public’s attention to an issue, thereby forcing elected officials to act or at least publicly address the issue. However, because the scope and duration of public attention and concern tend to be limited, politicians may seek to avoid politically disadvantageous issues that are opposed by active and well-organized interest groups by waiting out the “issue attention cycle” of the public and the media.<sup>7</sup> By circumventing these policy subsystems, direct democracy seeks to create an alternative policy agenda.

Timing is likewise crucial in promoting significant constitutional reform. Objective changes in the environment, ranging from natural disasters to economic downturns, may serve as “triggering events” and create “windows of opportunity” for pursuing reform.<sup>8</sup> This can be done by enlisting the support of strategic politicians seeking issues that “strike a chord” with the public and enhance their political fortunes. However, some reforms do not appeal to those politicians, either because taking a position might alienate key constituencies and powerful groups or because the reforms threaten the self-interest of politicians. In such circumstances, direct democracy provides an alternative path for responding to these windows of opportunity.

Issue framing is also important. Policy entrepreneurs who seek to push issues onto the legislative agenda must frame them so that they are “fresh, clear-cut, easily synopsisized, affecting as large a portion of the news audience as possible, and packaged with reforms that seem able to resolve the problems.”<sup>9</sup> Legislators tend to shun policy initiatives that are not likely to generate much public interest or are likely to generate significant opposi-

tion from influential groups. Direct democracy changes issue framing in two respects. First, issues that cannot be framed to attract legislators may nonetheless find their way onto the ballot, because their supporters are focused on policy change, not reelection. Second, whereas legislators have broad discretion in designing the policies that they will support to deal with the issues before them, the initiative process allows supporters to control not only the issues addressed but also the proposed policy solutions.

These observations reveal that the political dynamics of direct democracy differ considerably from the political dynamics within representative bodies. As our discussion of campaign finance reform in Colorado will show, the initiative process provides an alternative path for fundamental reform when state legislators are at odds with popular sentiments. The proponents' rationale for using the initiative process to escalate conflict, as well as in deciding when to promote their policy changes as initiatives, was determined by events in the legislative and executive branches, but public opinion was also critical to the timing of their initiatives. In terms of issue framing, the initiative proponents sought to draft their initiatives to appeal to the general voting public in both form and substance, and they resorted to constitutional measures as a defense against future tampering by state legislators.

## CAMPAIGN FINANCE AND CONSTITUTIONAL REFORM IN COLORADO

In 2002 Colorado voters addressed ten measures on the statewide ballot, including four constitutional amendments. Among these was a constitutional initiative (Amendment 27) on campaign finance reform that was approved by 66 percent of voters. The lopsided vote for the amendment could have been predicted, for a very similar initiative sponsored by the same groups had been adopted by voters had been adopted by voters in 1996. Why, then, was the issue on the ballot once again?

### Conflict Escalation: Campaign Finance Reform in Colorado, 1974 to 1996

In fact, campaign finance reform has appeared periodically on the state's legislative agenda since the early 1970s and on Colorado's statewide initiative

agenda since the early 1990s. The General Assembly first enacted campaign finance legislation in 1974, in the wake of Watergate. The Colorado chapter of Common Cause, formed just a few years before, lobbied in support of this legislation and continued to press in ensuing years for additional legislation to strengthen the 1974 law. In 1992 efforts at wholesale reform failed, when the governor vetoed a bill that had passed the General Assembly (House Bill 92-1316) and Common Cause failed to qualify its proposed initiative for the ballot. After the governor vetoed another reform effort in 1993 (HB 93-1159) despite significant bi-partisan support in the legislature,<sup>10</sup> the Colorado chapters of Common Cause and the League of Women Voters teamed with several other groups in 1994 to qualify an initiative for the ballot, but it failed with only 46 percent of the vote. These groups enjoyed better success two years later when their statutory initiative passed by an overwhelming margin (66 percent of voters supported the measure), superseding less stringent requirements adopted by the legislature earlier in 1996.

According to the proponents of the 1994 and 1996 campaign finance initiatives in Colorado, they turned to direct democracy precisely because they did not foresee achieving meaningful reform through regular legislative channels. According to Richard Bainter of Common Cause of Colorado:

We generally try to go through the legislature first. We just think that's good public policy. That's what the legislature is there for, and actually the initiative is . . . our opinion of it is that it's kind of a "safety valve." It's there for times when the legislature won't act.<sup>11</sup>

Pat Johnson of the League of Women Voters of Colorado concurred, noting that although one legislator introduced legislation in 1996 similar to their initiative, it "never got out of committee, so there was no full debate, no full consideration. And we gave them their chance, and what they wanted to do was make it all go away . . . and this is what they get!"<sup>12</sup> The problem, as she saw it, lay not with which party controlled the legislature, but with legislators' self-interest and the opposition of the powerful groups such as the Colorado Education Association that contributes heavily to legislative campaigns: "They're all against us, because you're talking to a leadership that controls the money and dishes it out." According to Common Cause's Bainter, the only reason the General Assembly enacted a campaign finance law in 1996 was the threat of an initiative—"It would never have happened if we had not been out there with a ballot initiative.

It was on the people's agenda or it wouldn't have been on their agenda." He noted that the supporters of finance reform went ahead with the initiative because they viewed the legislature's bill as very weak: "If they had passed something stronger, we probably would have stopped, or been tempted to."

### Conflict Escalation: Campaign Finance Reform in Colorado, 1997–2002

For the initiative's proponents, the adoption of Amendment 15 in 1996 seemed to have resolved the issue of campaign finance reform. However, as often happens with initiatives, those who lost at the ballot box turned to the courts and the legislature. A 2000 decision by the Tenth Circuit Court of Appeals invalidated Amendment 15's definitions of what constituted independent expenditures, political committees, and political messages, as well as the limits imposed on independent expenditures.<sup>13</sup> The appeals court ruled that other district court decisions, that ruled Amendment 15's dollar limits on contributions to be unconstitutionally low, were made moot by the General Assembly's passage of new, higher limits in 2000.<sup>14</sup>

The General Assembly originally solicited the support of Amendment 15's proponents to help draft the legislation to "fill in the gaps" for contribution limits thrown out by the district court, however, the end result of the legislation was characterized by the *Denver Post* as "gutting" Amendment 15, and its proponents agreed. League of Women Voter's Pat Johnson saw the legislature's bill as a reflection of the fact that "the legislature in general doesn't like campaign finance reform."<sup>15</sup> The current Director of Colorado Common Cause, Peter Maysmith, was also part of the Amendment 15 effort in 1996. He said the legislators:

blew open some of these loopholes in political giving to the political parties, which we saw exploited in a *big* way this [2002] election. Big time. We worked with them initially and ultimately opposed them strenuously, and lost. That's why we went back to the voters.<sup>16</sup>

Maysmith also recounted that although he thought Speaker George deserved credit for bringing them into the process:

Ultimately our concerns were ignored. Which, that's his prerogative as Speaker of the House, and the legislature's prerogative. I would argue it's at their peril because the way we did this. You can't ignore us. We didn't act like this was a secret. Every time we talked to somebody we said, "Look, if you ignore us, we're going to go back—we're not just going to run and hide in a corner—we're going to go back to the initiative. And I'm telling you, if I'm a betting guy, I would bet that the citizens are going to once again support campaign finance reform."

After the legislature "gutted" the statutory campaign finance reforms in 2000, the two groups did turn directly to the voters—for a third time. The General Assembly's actions "triggered" the 2002 constitutional initiative that passed, once again, with 66 percent of the vote.

The initiative allows groups disadvantaged by the status quo to appeal their case to the public—to escalate the conflict over the heads of the legislature. Perhaps what is most notable, given the potential for policy change provided by this form of direct democracy, is the *rarity* of its use. While state legislatures regularly pass hundreds of laws each year, and fail to pass hundreds more, only several dozen initiatives appear on the ballot in most years. Something more than legislative action or inaction must determine when people turn to the initiative process for statutory and constitutional reform.

### The Timing of Campaign Finance Reform Initiatives

The issue of campaign finance had been on the Colorado legislative agenda and on the agenda of Colorado Common Cause periodically since the early 1970s. What drove Common Cause and the League of Women Voters of Colorado to sponsor initiatives in 1994, 1996, and 2002, in particular? In this case, there were three determinants of the timing of the initiatives beyond the legislature's actions/inaction. First, the groups were convinced that there was a significant problem that necessitated immediate reforms. Second, the initiative proponents believed that their proposed measures would receive the backing of the voters. Third, the groups believed they had sufficient resources to run a campaign. For a "window of opportunity" to exist, all conditions had to be met at the same time.

Both Common Cause and the League had long been convinced there was a pressing need to reform campaign finance law. Shortly after Amendment 15 passed in 1996, Patricia Johnson discussed how recent elections had spurred their initiative, because of the high cost of campaigns for state office. Similarly, when asked why Colorado Common Cause had sponsored Amendment 27 in 2002, Peter Maysmith noted:

Well, it was basically as soon as we could get back to the ballot. We feel like we have a major problem in Colorado the way our campaigns are financed, and I think the 2002 election was Example 1A of that. . . . If you look at state senate races, there were a number of state senate races that blew past a half a million dollars. Half a million dollars! These guys meet for four months out of the year, they make \$30,000. Sure, is it an important post? Yes. Half a million dollars? That's out of control. And if you charted it out, it was doing nothing but growing exponentially. So it isn't like it would have reverted back again in '04. No, it would have just kept right on climbing. We felt that we had to act. Time was a-wasting. The need was pressing.

The initiative proponents and the public interest groups they represented were convinced that there was a major policy problem that necessitated prompt action.

Second, as public interest groups, Common Cause and the League of Women Voters have one advantage when it comes to using the initiative process; they seek policies that will benefit the public, not special interests. However, that is no guarantee that voters will agree with their views of what is good policy, as the campaign finance proponents learned when Coloradans voted down Amendment 15 in 1994. It is clear that the proponents were very much concerned with public opinion when they decided to go the route of direct democracy. Discussing the League's first attempt to pursue reform through initiatives in 1994 and 1996, Patricia Johnson indicated that the coalition relied on polling data, news coverage of the campaign finance issue, and their own sense of Coloradans' views.

I thought the temper of the public was getting stronger and stronger, as revelation after revelation turned up. After '95 we could see the rumblings getting louder and louder. . . . I just read the papers all the time and watched the decibel level grow. I