

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

mean people are shouting! When the *Wall Street Journal* writes articles—but I mean, really, I just smelled it. I just knew it *had* to be '96.¹⁷

In 2002, *Denver Post* polls showed Amendment 27 as having a decline in support shortly before the election—from 63 percent in July and 65 percent in early October, to 52 percent in late October,¹⁸ prior to its passage in November with 66 percent of the vote. However, Ms. Johnson explained she had not been very concerned about the late October poll because the percentages of likely voters who knew they were *against* Amendment 27 remained at 20 percent. Peter Maysmith also remained optimistic about the initiative's chances at the polls because:

there's such frustration and disenchantment with our politics. I think people are fed up. That's obvious, I think, because if you just talk to your friends and neighbors and go to a coffee shop, and live in this world—people are fed up with politicians and campaigns. And then, of course, if you look at the number of people that aren't voting, if you want a more statistical analysis of where people are, the numbers are lousy. They're down and they're trending down.

The groups opposed to initiatives also have a keen interest in public opinion. While opponents of the 1994 measure, primarily wealthy special interests such as the Tobacco Institute and the Colorado Education Association, spent over \$875,000 to oppose Amendment 15 and one other initiative,¹⁹ they barely managed to defeat the measure. Johnson commented regarding both the 1996 and 2002 initiatives that she believed that the lack of significant organized opposition was due to the fact that the groups interested in opposing campaign finance reform did not like the odds of winning, even if they spent another million dollars: "I think money just dried up. People just looked at the polls."

The financial statements of the opposing issue committees in 2002 support Johnson's assessments. In 2002, one group raised less than \$60,000 from a few individuals to oppose Amendment 27 along with three other ballot amendments.²⁰ Another opposition committee collected \$12,500 from the Colorado Education Association, Colorado Firefighters, and the Colorado Realtors Political Action Committee, but after commissioning \$10,000 of polls, it reported nothing more in the way of

contributions or expenditures.²¹ The issue committee “Protect Freedom 2002” did not raise or spend any funds for its declared goal to “muzzle voter Amendment 27.”²²

While the proponents believed that public opinion naturally favored their proposals, they also recognized that while campaign finance reform might be *their* priority, and a priority of the members of the groups working on the campaigns, it was not necessarily a priority of most citizens. Johnson conceded in 1997 that “people are not thinking about it; it’s not in the forefront of most minds.” Maysmith, her 2002 cosponsor from Common Cause, agreed:

I think it’s certainly safe to say that this is not the issue that people get out of bed each morning and think about as they’re making coffee and getting the kids off to school. I understand that. But I do think that people, when you pose the question and start talking to them about campaign finance reform, absolutely believe and understand that this is a real critical element or component of how we elect folks, who then of course govern and make decisions that impact us all.

While not driven by a public hue and cry for campaign finance reform, the proponents were convinced of the need for reform and that the legislature would not act to achieve it; and they were also convinced that an overwhelming majority of the public also wanted their proposed reforms. However, they also noted one more key factor in deciding to go the initiative route.

The third determinant of the campaign finance proponents’ decision to turn to the initiative process concerned having the resources necessary to run the campaign. With lawyers available on staff at Common Cause and others willing to do pro bono work, the resources to draft the initiative and to help fend off any court challenges to the ballot title or on the basis of a violation of the state’s “single subject” requirement for initiatives were not a problem. The first real hurdle for the coalition was the petition stage. In 1994 and 1996 they relied primarily on volunteer petition circulators, with an army of COPIRG and League of Women Voters volunteers standing out in front of grocery stores, shopping malls, and post offices.²³ However, noting that it is getting more and more difficult to rely entirely on volunteer petition bearers, in 2002 the proponents relied heavily on paid petitioners to augment their volunteer efforts, spending

\$108,000 to paid signature gatherers between April and the August deadline for qualifying for the 2002 ballot—about half of their total contributions that were about \$220,000.²⁴ The coalition did not wage a paid media campaign, relying instead on free news coverage, opinion pieces, editorials, a web site, and mailings. Overall, even relying on full- and part-time workers and volunteers from Voter Revolt, Common Cause, and League of Women Voters (none of which show up as expenses), the proponents spent over \$220,000 for the Amendment 27 campaign in 2002.²⁵ Initiative campaigns are not cheap, even when the “organized” opposition only spends \$60,000.

As a practical matter, just about any proposal for constitutional or statutory reform *could* make it to the ballot. Why, then, are there not dozens of initiatives on the ballot in Colorado in any given year instead of the usual six to eight? There are an infinite number of policy proponents, many of whom would have considerable resources. However, considering the natural bias of the initiative process that, by definition, seeks to bring an issue to the attention of the voters, the role of public opinion is undoubtedly the most limiting factor. Most groups would not consider going through the time and expense of qualifying a ballot initiative, because it does not do any good to get onto the ballot unless the voters are going to vote “yes.”

Issue Framing

Issue framing is crucial because initiative proponents must be concerned not only with getting an issue onto the ballot, but also with designing and proposing a specific policy solution. In the multistage process that prevails in the halls of republican government, policy entrepreneurs first seek an elective official to sponsor a policy change, or alternatively, they seek to raise public awareness and concern about an issue that will push the problem onto the policy makers’ agenda. Initiative sponsors take on both roles; they serve as both policy entrepreneurs and policy makers. They must define the specifics of the policy solution and, in states like Colorado that allow both statutory and constitutional initiatives, they must also determine which of these forms their measure will take.

A common criticism of direct democracy is that it does not allow for deliberation or the give-and-take of representative democracy; critics argue there is no room for compromise, which will inevitably result in

extremist groups proposing extremist policies. A further criticism is that initiative proponents frequently resort to constitutional amendments to enact policy changes rather than “fundamental law.” I would suggest that although these criticisms are to some extent interrelated, it may be useful to introduce and discuss them separately. The following discussion demonstrates how public opinion, legal precedents, and the legislature’s actions factor into the process of determining the content and form of initiatives.

The previous sections on conflict escalation and timing clarified the importance of the views of the voting public to initiative proponents when it comes to deciding to attempt this time-consuming and costly policy-making process. It makes little sense for a policy entrepreneur to use direct democracy to propose policies that the general public would oppose. It makes equally little sense for the sponsors of an initiative to forward a particular policy solution, even if it is the proponents’ preferred solution, if that solution would not appeal to the majority of voters. Both of the national organizations of Common Cause and the League of Women Voters support public financing of campaigns as the best policy for reforming the campaign finance system. The sponsors of the 2002 initiative also personally favor public financing of campaigns, however, they never considered proposing it by initiative. Patricia Johnson of the League of Women Voters of Colorado replied the following in 2002 when asked if the coalition would support public financing:

We talked about that too. And we just could not see that passing—because of the [state’s] financial situation. Things were, the corporate scandals were beginning to surface, and we just didn’t think it was a good idea, because we wanted it to pass. Public financing is a good idea, both Common Cause and the League support it, and it’s working.

Colorado Common Cause Director Peter Maysmith also cited public opinion and the reality of the fiscal situation in the state as the reason the proponents had to compromise on the very essence of their policy proposal. If the decision about the policy to deal with campaign finance issues were up to them, they would have enacted a system with public financing of statewide political campaigns. However, with the initiative process the proponents know that it is *not* up to them; the proposed policy has to be one that the majority of voters will agree to.

In drafting their initiatives, proponent Peter Maysmith noted that Common Cause was guided by the basic principle of enacting reform that would “help to address the issue of corruption and the appearance of corruption in our politics.” In addition, both Maysmith and his co-proponent, Patricia Johnson, indicated that they relied on past experience with campaign finance reform in Colorado and other states across the country. The reforms enacted by Amendment 27 in 2002 contained very similar contribution limits to the reforms enacted by Amendment 15 in 1996, because experience demonstrated “that candidates were able to raise healthy amounts of money and ran robust campaigns under contribution limits in 1998” before those limits were eliminated.²⁶

Both proponents were extremely well-versed in legal precedents that had been established with respect to campaign finance reform across the country. After having parts of their 1996 initiative struck down by the courts for being unconstitutional infringements of the First Amendment of the U.S. Constitution, the coalition paid considerable attention to the legal advice of the Brennan Center for Justice, from the New York University School of Law (national experts on campaign finance reform law) when they drafted their 2002 initiative. The proponents spent a great deal of time studying cases themselves, such as the U.S. Supreme Court case *Nixon v. Shrink Missouri Government PAC* that upheld contribution limits as a constitutional means of preventing corruption and the appearance of corruption in political campaigns, and upheld contribution limits that were lower than the 1996 Amendment 15 limits that the district court had thrown out and that the legislature subsequently raised.²⁷ Just as it does not make any sense to qualify an initiative on the ballot only to have the public shoot it down, it does not make any sense to seek public approval of a policy change only to have it reversed by the courts. Compromise and deliberation were, therefore, an essential part of drafting the campaign finance initiatives.

The decision to sponsor their campaign finance initiative as a constitutional amendment was a major strategic decision for Colorado Common Cause and the League of Women Voters. Common Cause Director Richard Bainter explained why the coalition’s first initiative in 1994 was proposed as an amendment:

We would prefer to do statutory initiatives, again [for] policy reasons and not putting a lot of detail in the constitution. We did a constitutional amendment in ‘94. Our ballot initiative in ‘94 was

constitutional primarily because Doug Bruce had a campaign reform-related initiative on the ballot which was constitutional, and we had to go head to head with that. So that if they both were to pass, ours would be implemented. . . . That's what tipped the scales towards constitutional amendment in '94, but then in '96, without Doug Bruce, there we went the statutory route.²⁸

Even then, Mr. Bainter said it was never an easy decision to propose an initiative as a statute.

I think with any of the issues where people go through the process of putting something on the ballot, I think most of those folks have already tried the legislative route and it hasn't worked. So then you *know* that the legislature is going to be somewhat hostile to what you've done, and it's a hard thing to do, to go through all that work and do it as a statute and know that the legislature is going to—or at least has the ability to make drastic changes to what you've just done. Which is why most initiatives are constitutional in Colorado.

Patricia Johnson noted the coalition's determination to propose a statutory initiative in their 1996 attempt; they wanted to avoid the controversy and negative publicity generated by opposition committees' advertisements and the news media that helped defeat their constitutional amendment for campaign finance reform in 1994. In 1997, Ms. Johnson said they were willing to accept "a little risk" that the legislature would significantly change the statutes enacted by the voters. However, Richard Bainter's comments on the potential for hostile legislative action proved to be prophetic.

When the General Assembly "gutted" the campaign finance reform enacted by their statutory initiative in 1996, Common Cause and the League of Women Voters decided they had no choice but to propose a constitutional amendment for their third initiative in 2002. Once again they were criticized for that decision, even while their critics sympathized with their rationale. The editorial board of the newspaper with the largest circulation in the state, the *Denver Post* said:

It's constitutional. If passed, the amendment would be part of the state constitution and impossible to fine tune without going

back to the ballot. Amendment proponents, however, can't really be blamed for making it a constitutional amendment. In 1996, when a similar proposal was statutory, the legislature gutted it. If 27 had been statutory, some of these fatal flaws could have been fixed. But as a constitutional amendment, we just can't support it.²⁹

Even after their experiences with the statutory Amendment 15, the coalition did not make that decision to propose a constitutional amendment without a great deal of deliberation. Johnson noted that they looked at whether they could:

just take the essence of it and just make a very short amendment, [but] then you have the problem of getting the legislature to implement it. There's no way that you could get the thing implemented except by putting it all in [the constitution].

Without some protection from wholesale legislative revision of initiated statutes, Common Cause's Maysmith said they just could not risk another statutory initiative:

No. We've been there. We've done that. I mean it's a *lot* of work! A lot of volunteer work, staff work, board work. It's a lot of financial resources to mount a ballot initiative. We can't just do that every 4 years—2, 4, 6 years—and just wait for them to gut it.

The proponents of campaign finance reform initiatives in Colorado and the organizations they represented were on principle opposed to using the initiative process to propose policy changes by constitutional amendment. However, the initiative proponents were simply unable to trust the legislature.

There was a great deal of deliberation and compromise regarding both the substance and the form of the three campaign finance reform initiatives. The proponents did not propose what they thought would be the *best* policy, public financing of campaigns. Instead they proposed what they considered to be *better* policy based on experience in Colorado and other states, because that is what they thought the voters would approve. In addition to considerations of what was practicable, they engaged in lengthy consultations with constitutional experts to ensure

their initiative would pass constitutional muster when the inevitable court challenges came. Finally, after experience demonstrated that the state legislature was willing to significantly alter their first statutory initiative, Colorado Common Cause and the League of Women Voters Colorado reluctantly resorted to a constitutional amendment in 2002, even though they knew that would give opponents to their measure a significant point for criticism, as it had in their unsuccessful 1994 campaign.

CONSTITUTIONAL REFORM VIA DIRECT DEMOCRACY

Every state requires that its legislature's proposed constitutional amendments be submitted to the citizenry via legislative referendum for approval or rejection.³⁰ Clearly, there is a consensus that significant alterations in the form and institutions of democratic government should be decided directly by the people, rather than by their elected representatives. The primary controversy involved in citizens' initiatives to achieve constitutional reform is not, therefore, that the people are voting on constitutional issues, but that the people are circumventing the legislature by determining the *content* of the constitutional amendments. Such amendments, say critics, will not benefit from the deliberation and compromise inherent in measures proposed by state legislatures. Furthermore, the critics continue, citizen-initiated amendments "clutter" state constitutions with public policy prescriptions that do not belong in a document dedicated to "fundamental" law.

During the past forty years, initiative proponents in Colorado have greatly favored the use of constitutional amendments (72 percent) over statutory initiatives (28 percent). This essay has examined the case of campaign finance reform in Colorado as a means of understanding the dynamics behind the use of citizen-initiated constitutional amendments to enact reform. It is a particularly instructive case because the proponents of the three campaign finance measures have attempted both constitutional and statutory initiatives to achieve the same policy reforms on three separate occasions. The examination of the process by which these advocates of reform decided to attempt the initiative process in 1994, 1996, and 2002, as well as the process by which they determined to propose constitutional versus statutory initiatives and the content of those initiatives, provides some valuable insights regarding constitutional reform via direct democracy.

First and foremost, it is clear that the initiative process is used precisely because it *does* circumvent the legislature. In particular, the proponents of campaign finance reform turned to direct democracy because they judged that the majority of voters wanted reforms that the majority of legislators opposed; the bias of the initiative process is such that it favors the introduction of measures that are almost certain to have public support. However, the expense of the initiative process is such that it is primarily used as a last resort. Colorado Common Cause and the League of Women Voters of Colorado turned to the initiative process to enact campaign finance reform only after several years attempting to work with the General Assembly. The legislature's gutting of the successful 1996 statutory initiative, and the subsequent public approval of a similar constitutional initiative in 2002, would seem to indicate that the initiatives' proponents were correct in their assessment that the majority of legislators were biased against reforms that adversely affected themselves. The initiative can be a preferred mechanism for constitutional reform for those issues on which legislators have an inherent conflict of interest.

Second, the record of these three initiatives demonstrates that the initiative proponents regard deliberation and compromise as essential to their success. Because the proponents believed that their optimal solution (public financing of campaigns) would not be approved by the voters, they compromised and proposed an initiative that they believed would improve the political process *and* would pass on election day. Furthermore, in drafting their initiative they considered practical experience with campaign finance rules in Colorado and other states, and they were very deliberate in seeking legal advice and considering legal precedents from all relevant cases on campaign finance reform. It only makes sense to go to the expense of using the initiative process if your measure will likely pass *and* if, once passed, it will stand up to the legal challenges that will inevitably follow.

Finally, experience with campaign finance reform in Colorado demonstrates the logic that is likely at work in the decisions of the overwhelming majority of initiative proponents to pursue constitutional rather than statutory initiatives. Once their 1996 statutory initiative had passed with an overwhelming 66 percent "yes" vote, Common Cause and the League of Women Voters thought that they had achieved their reforms. However, the legislature's willingness to rewrite and delete many of the major provisions enacted into law by the initiative convinced these two groups that they had no choice but to go the route of a constitutional

amendment on their next initiative—even though they, themselves, objected in principal to incorporating campaign finance reform in the constitution. When the state legislature is strongly opposed to proposed reforms, the constitutional initiative may very well be the only viable mechanism for reform.

Recent history of campaign finance reform in Colorado reveals how the initiative process, and constitutional initiatives in particular, can be used to fulfill the role for which they were created almost one hundred years ago. Constitutional initiatives can be very effective tools to make government more responsive to the people, by allowing the people to circumvent the institutions of representative government when elected officials are opposed to the views and the interests of the people they are designed to serve.

NOTES

1. Thomas E. Cronin and Robert D. Loevy, *Colorado Politics and Government* (Lincoln, Nebraska: University of Nebraska Press, 1993), 53; Robert S. Lorch, *Colorado's Government: Structure, Politics, Administration, and Policy*, 6th ed. (Niwot, Colo.: University Press of Colorado, 1997), 22.

2. Timothy O'Connor, Secretary of State, *Proceedings of the Constitutional Convention Held in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado* (Denver, Colorado; Smith-Brooks Press, 1907), 731.

3. Colorado General Assembly, "A History of Statewide Ballot Issues Since 1964," available at www.state.co.us/gov_dir/leg_dir/lcssstaff/research/Ballot_Hist_table_top.htm and Colorado General Assembly's Legislative Council Staff, *Issue Brief #02-03*, updated by this author to include the 2002 elections.

4. Colorado General Assembly, "History."

5. Cronin and Loevy, *Colorado Politics*, 95.

6. E. E. Schattschneider, *The Semi-Sovereign People: a Realist's View of Democracy in America* (New York: Rinehart and Winston, 1960); Roger W. Cobb and Charles D. Elder, *Participation in American Politics: the Dynamics of Agenda-Building* (Boston: Allyn and Bacon, 1983); Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993).

7. Cobb and Elder, *Participation in American Politics*; Anthony Downs, "Up and Down with Ecology—The 'Issue-attention Cycle,'" *Public Interest* 28 (1972): 38; Edward G. Carmines and James A. Stimson, *Issue Evolution: Race and the Transformation of American Politics* (Princeton, N.J.: Princeton University Press, 1989); Maxwell McCombs and Jian-Hua Zhu, "Capacity, Diversity, and Volatility of the Public Agenda: Trends from 1954 to 1994," *Public Opinion Quarterly* 59 (1995): 495.