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# Citizen Initiatives Under Attack in Colorado

*by Paul Grant*

INDEPENDENCE INSTITUTE
14142 DENVER WEST PARKWAY, SUITE 185
GOLDEN, COLORADO 80401
(303) 279-6536 FAX (303) 279-4176

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# CITIZEN INITIATIVES UNDER ATTACK IN COLORADO

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Not happy with recent direct citizen legislative efforts through the initiative process, Colorado's elected and appointed government officials have retaliated with actions which threaten the existence of long-established constitutional rights. Disdaining direct citizen involvement in creating legislation, Colorado's Secretary of State, General Assembly and Supreme Court have combined to greatly curtail the power of initiative. Burdensome new regulations, petty and substantial interference from the Secretary of State, legislative attacks on the initiative process, and Colorado Supreme Court interference have made the initiative process more difficult, more expensive, and less effective.

Citizens jealous of their constitutional rights have yet to find an answer to these attacks from their government. This paper briefly reviews the recent history of the initiative process in Colorado, considers the motives and methods of those who attack the initiative, and explores legal analysis which may be useful in resisting—and possibly reversing—some of the damage done by government officials.

***In Brief:***

- *Frustrated old-time politicians are taking desperate steps to resist citizen involvement in the legislative process.*
- *Responsible government officials will try to make the process of change as nondisruptive as possible.*
- *The constitutionally protected rights of referendum and initiative are described as "reserved powers of the people"; theses are not rights given by the legislature, the courts, or the executive.*
- *The legislature has imposed a permanent veto on the referendum process, in open defiance of the Colorado Constitution.*
- *In 1988, the U.S. Supreme Court ruled unanimously that the state of Colorado had arbitrarily and excessively acted to restrict constitutionally protected free speech rights protected by the First Amendment.*
- *Ignoring 100 years of their own judicial precedents, the Colorado Supreme Court has decided that the single subject requirement will be applied more strictly to initiatives than to legislative bills.*
- *By intruding into the legislative process of the initiative, the supreme court has violated the constitutional provisions of "Separation of Powers."*
- *The actions of the General Assembly and the Colorado Supreme Court show that they will disregard constitution protections when the people challenge long-established government power.*

While it should come as no surprise that government officials resist giving any power back to the people, it is critical that this resistance be challenged and overcome. The American political environment is changing rapidly: voters rejected the Democratic Congress in 1994, and are disappointed with the Republican Congress in 1996; more voters than ever are expressing discontent with both major political parties; voters are fed up with Washington, D.C., but they are not happy with their state governments either; ever-increasing numbers of citizens are saying they are just fed up with government—period.

Increasingly they are no longer willing to be led to their opinions by mainstream media. Talk radio, cable television alternatives and the Internet are providing a communication revolution. Candidates, political parties and campaigns cannot manipulate this grass-roots democratic communication network.

Frustrated old-time politicians will try desperate defensive measures to resist these changes. President Clinton's attacks on the evil influence of talk radio reflect the same mentality at work with state government attacks on the initiative process in Colorado. One theme they both have in common is distrust of—and disrespect for—the average citizen and of any citizen who bypasses traditional political thinking and activity.

Radical political change is in the air. We have in the last few years witnessed previously unimaginable political change around the world. Now we are going to have to deal with similar phenomena in America. Gone are the New Deal and the Great Society. Soon to be eliminated is the bureaucratic and administrative state. What will our new political system look like? No one knows, but responsible government officials will try to make the processes of change as nondisruptive as possible.

This requires opening up the political processes (not shutting them down) to allow for new voices to express new ideas. Term limits, third parties, independent candidates, citizen initiatives—these are some of the mechanisms for peaceful change. It is time to instruct our politicians that they must stop trying to protect the political status quo. It is time to instruct obstructive government officials to get out of the way. It is time to remind government officials that the people of Colorado are in charge, the government is merely their servant.

## HISTORY OF THE INITIATIVE IN COLORADO

In 1910, Colorado citizens concerned with a state legislature unresponsive to their needs—and with a legislature too responsive to the demands of special business interests —amended the state constitution to provide for direct citizen legislative power. They created the initiative, the right of citizens to propose legislation directly to the people by a petition process. And they created the referendum, a means for citizens to veto legislative acts with which they did not agree.

> [T]he people reserve to themselves the power to propose laws and amendments to the constitution and to enact or to reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly. Art. V, Section 1, Colorado Constitution.

*These constitutionally protected rights* of referendum and initiative are described as *reserved powers of the people;* these are not rights given by the legislature, the courts, or the executive. But these rights have never been secure. The right of referendum was compromised from the start, by the very language creating referendum: "The second power hereby reserved is the referendum, and it may be ordered, *except as to laws necessary for the immediate preservation of the public peace, health or safety* ... against any act, section or part of any act of the general assembly. . ." [emphasis added]. This *safety clause, or safety clutch* as it was once called, has been used by the Colorado general assembly almost continuously since 1913, to exclude from referendum any bill the sponsor did not want "second-guessed" by the people. The Colorado legislature attaches to nearly every bill, by routine administrative procedure (they don't vote on it), a "safety clause" finding each law *necessary for the immediate preservation* ... Thus the legislature has imposed a permanent veto on the use of the referendum process, in open defiance of the constitutionally established right of referendum and in open disrespect for this legislative power reserved by the people.

Court challenges to this legislative usurpation were brought, but long ago ( *People ex rel. Keifer v. Ramer,* 61 Colo. 422, 158 P. 146 (1916)) the Colorado Supreme Court sided with the legislature and said that the reserved right of referendum had no legal significance if the legislature chose to attach the safety clause. The Court would not review—ever—whether there really was any emergency requiring suspension of the referendum. They would defer completely to the action of the general assembly (and thus render meaningless the constitutionally reserved right of citizens to veto actions of the general assembly).

All Colorado citizens have left of the rights to initiative and referendum (at a state level), is the initiative, hence the title of this paper. As might be expected, a legislature afraid of the power of referendum, is also no friend to the initiative process. As citizen interest has grown in the initiative process, legislative encroachment on initiative powers has been the response.

The passage of Proposition 13 (a citizen initiative) in California in 1978 demonstrated the threat of citizen initiatives to long-vested governmental powers. Proposition 13 directly limited the power of California to tax its citizens, requiring new taxes be approved by a vote of the people. This attack on legislative power shook state governments everywhere, especially in those states—like Colorado—where citizens had the power of initiative. The response to Prop. 13 was bitter criticism of citizen legislation

and the initiative process. Prop. 13 was described as "simplistic," "unrealistic," "radical," "poorly conceived," and worse.

In Colorado, one of the first responses to Prop. 13 was to make it more difficult to place citizen initiatives on the ballot. Colorado's constitution was amended in 1980, through a legislatively promoted referendum, to require for the first time that only registered voters could sign or circulate initiative petitions. From 1910 through 1980, any qualified elector (a person eligible to be a registered voter) had been constitutionally able to sign or circulate petitions. Now, anyone not registered could not participate—either as a petition circulator or a signer—in this important political process. Valid registration was restrictively interpreted by the Colorado courts to mean that any citizen who had moved and not yet transferred their voter registration, was not a valid signer or circulator. Since persons interested in initiative processes tend to be outside mainstream political processes, and since many such persons were eligible but not registered to vote, these changes tremendously increased the difficulty of collecting sufficient petition signatures. Unregistered electors were silenced.

These new restrictions then forced initiative proponents to deal with another long-standing obstacle inhibiting the initiative process—a 1941 Colorado statute making the payment of petition circulators a felony crime. Coloradans for Free Enterprise (CFE) confronted this obstacle when CFE organized an initiative effort in 1984 to end monopoly protection for Colorado's transportation industry. The Public Utilities Commission had for many years effectively prevented competition in freight hauling, furniture moving, taxi cabs and other transportation businesses. Monopoly trucking companies had amassed huge fortunes through PUC protection. The special interests dominating the PUC and the legislature intimidated small transportation companies so that they would not take a chance on publicly supporting the efforts. Enough signatures could be obtained to qualify for the ballot if CFE could reach the voters, and CFE could do that despite the intimidation factor being used against petitioners, if petitioners could be paid. Since the law made that a crime, and since CFE knew that law was interfering with free speech rights to promote an initiative, CFE challenged the law as an unconstitutional restriction on political speech. In 1987 the 10th Circuit Court of Appeals struck this law down, and in 1988, the U.S. Supreme Court unanimously agreed that this law was an unconstitutional restriction on First Amendment rights.

Throughout the 1980s and early 90s, a continuous battle was fought in Colorado between initiative proponents and the Secretary of State's office. The Secretary's office became a stickler for petition correctness, invalidating hundreds of thousands of petition signatures by one method or another. Occasionally, a court would find these actions too arbitrary, and reverse them. The Secretary of State was openly critical of the initiative process and many of the people in it. The Secretary of State pushed for—and got—legislative changes giving the state more power and more funding to reject petitions.

During this same period Colorado had its own citizen initiative tax limitation struggle, a struggle led by Doug Bruce through several election seasons, finally culminating in the passage of Amendment 1, the Taxpayers' Bill of Rights, in 1992. Like Prop. 13 in California, this measure also greatly curtailed (at first) the power of elected officials to raise taxes, requiring citizen approval at the polls. Like Prop. 13, Amendment 1 offended government officials at all levels.

They responded with every imaginable form of criticism, including criticisms aimed at the complexity of the measure and at the wisdom and intelligence of the voters who approved of it. The Secretary of State led the criticism of "poorly conceived" or "misleading" citizen initiatives.

In 1993, at the urging of the Secretary of State, the Colorado General Assembly further tightened initiative petition restrictions, in S.B. 93-135. Among other provisions was the requirement that all petition circulators wear identification badges, so that persons who did not like their activities could take names and appropriate action (i.e., harassment) when offended by petition circulators. It seems a few legislators didn't like the criticisms they heard from petitioners, and didn't like the arguments petitioners were using to persuade voters to sign petitions. In order to better "police" the petitioning process, identification badges would be required. Not wearing the badge was a crime, punishable by imprisonment. Free speech protections in the Colorado and United States Constitutions never slowed down these initiative regulators. (But the federal courts may, as this issue is currently being litigated in the courts.)

Bruce really pushed the opponents of citizen initiatives over the edge with his 1994 proposal for a constitutional amendment which would radically modify many election procedures, and repeal the bad effects of SB 93-135. His proposal, titled "Election Reform" and listed as Amendment 12, also provided for the *recall of judges* through a petition and voting process. You could hear the screams of outrage throughout Colorado. The president of the Colorado Bar Association called Amendment 12 "The Anarchy Amendment," and he issued a call for lawyers to hit the streets to tell everyone why they must oppose Amendment 12.

## SINGLE SUBJECT REQUIREMENT

Something had to be done. More changes were obviously needed to prevent citizen initiatives from being used by agitators like Bruce to destroy state government. While government officials were persuading the Colorado courts to dismember Amendment 1 through judicial interpretation, others were looking for tools to further limit the power of initiatives. A new proposal, described innocently by its proponents, was to require all initiatives be limited to a single subject—as legislative acts have been limited in Colorado for the past century. The language is:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed... Article V, § 1, para. (5.5), Colorado Constitution.

How could that be unreasonable? A single subject requirement helps prevent surprise which might occur by hiding unrelated subjects under a misleading title. The Colorado general assembly put this innocent-appearing referendum for a constitutional amendment on the 1994 ballot, and the voters approved it. And they voted down Doug Bruce's Amendment 12.

Now the innocent-sounding single subject requirement has been implemented. Ignoring 100 years of their own judicial precedents, the Colorado Supreme Court has decided that the single subject requirement for initiatives will be strictly applied—and not in any way similar to their analysis of legislative bills under a single subject requirement. Three of the first challenges brought before the court (through a questionable legal procedure) resulted in initiatives being found to violate the single subject requirement. It appears that the Colorado Supreme Court considers Colorado's citizens in need of protection and incapable of intelligent self-government.

## SUPREME COURT REVIEW MAY BE UNCONSTITUTIONAL

The Colorado Supreme Court has taken upon itself the authority to rule on single subject challenges to initiatives before they have been considered by the people, an apparently obvious but overlooked—*intrusion on the constitutional requirement of the separation of powers* between the branches of government. Article III of the Colorado Constitution, entitled "Distribution of Powers," reads:

> The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, *except as in this constitution expressly directed or permitted.* [Emphasis added]. Art. III, Colorado Constitution.

The *power of initiative is a legislative power* (and is so described in the Colorado Constitution) reserved by the people, and nowhere in the Colorado Constitution is there *express direction or permission* for the Colorado Supreme Court (or any other court, or the general assembly, or the executive) to intervene and interfere in the initiative process. In fact, Article V, Section 1 expressly states the *power of citizen initiatives is independent of the general assembly.*

*There is express legislative authorization* for the Court to review whether the "titles, submission clause, and summary provided by the title board ... are *unfair or that they do not fairly express the true meaning and intent* of the proposed [measure]." But this authorization does not speak to the "single subject" requirement and it *is not in the Colorado Constitution!* This authorization is in the form of a statute passed by the Colorado General Assembly, a statute codified at C.R.S. § 1-40-107 (Supp. 1995).

Thus, the Colorado General Assembly has spoken in a statute about giving the Supreme Court authority to review unfair or misleading ballot titles, and the Colorado Supreme Court has interpreted that as proper authority to *violate separation of powers and interfere with the constitutionally reserved power of initiative!* A statutory authorization has been utilized to override two constitutional provisions—Article III (Distribution of Powers) and Article V, Section 1 (General assembly—initiative and referendum). The Court and the Legislature have teamed up to deny constitutional protections. The statute authorizing Supreme Court review of titles does not mention the single subject requirement—yet the court uses that statute to strike down initiatives in perfunctory fashion!

The only logical inference which can be drawn from the actions of the general assembly and of the Colorado Supreme Court is that they will disregard constitutional protections when the people challenge long-established government power. Remember, the *power of initiative* is to be *independent of the general assembly.* Initiative and referendum were created for the very purpose of restraining arbitrary government power, because the people did not trust their elected representatives. The Colorado Supreme Court has allowed the General Assembly to permanently veto the referendum and they have accepted the legislature's [unlawful] authorization to interfere with initiatives. It is clear in Colorado that the fears of the people in 1910 are still valid today.

## THE SUPREME COURT'S DOUBLE STANDARD

In reviewing the Colorado Supreme Court's application of the single subject requirement to initiatives, it is clear that the Court lacks confidence in the capacity of the people of Colorado to exercise intelligent self-government. That attitude is in sharp contrast to near-total Court deference to legislative judgment in bill writing. A few examples demonstrate this vividly:

1 . A recently proposed initiative entitled "Petition Procedures" was found to violate the single subject requirement because it dealt with several different types of petitions, and because the initiative told the courts how to construe petition language. The title was inadequate because it provided no cost impact summaries and it [the title] didn't "set out the differing substantive and procedural provisions."

But this is the same court that said, regarding legislative bills, that there is *no requirement that a title express the details of the provisions of the act. Board of Commissioners v. Board of Commissioners,* 32 Colo. 310, 76 P.368 (1904).

This is the same court which said it is wiser and safer not to attempt to enumerate several subordinate matters in the title, it is *better to select an appropriate general title* broad enough to include all the subordinate matters considered. *Edwards v. Denver & R. G.R.R.* @ 13 Colo. 59, 21 P. 1011 (1889). Generality in a title is commendable. *Roark v. People,* 79 Colo. 181, 244 P. 909 (1926); *Tinsley v. Crespin,* 137 Colo. 302, 324 P.2d 1033 (1958).

This is the same court that said that *the constitutional limitation* of bills to a single subject, *did not apply* to legislation enacting an official code, or compiling or revising existing general law—and that this constitutional limitation does not apply to the general revision of statutes. *In re interrogatories of House of Representatives,* 127 Colo. 160, 254 P.2d. 853 (1953).

This court previously said that whenever a matter contained in a statute may fairly be considered *germane to the subject* expressed by the title, it is sufficient. *Dallas v. Redman, 10* Colo. 297, 15 P. 397 (1887).

Supreme Court decisions over the last 100 years have led the general assembly to the practice of making bill titles as broad as possible, and *anything remotely related* to the general topic may be included. Recent examples include bills with titles and details such as: (1) SB 95-043, "Concerning the Colorado Probate Code," a bill which modifies 24 distinct parts of the Colorado Revised Statutes; (2) BB 95-1044 "Concerning Procedural Criminal Laws," which deals with such "related issues" as statute of limitations, procedures for obtaining arrest warrants, amending public nuisance laws to reflect a change in the drinking age, instructing prosecutors on a schedule for disclosing witness names to a defendant, eliminating jury determination whether a convicted defendant should be sentenced as an habitual offender, and requiring sex offenders to annually register with local law enforcement; and (3) HB 94-1286, "Concerning Election Law Changes," *a bill requiring more than 80 specific changes to* the Colorado Revised Statutes. Is it possible that these titles "failed to set out the differing provisions?" Is it possible that these bills contain more than one subject? Is this okay, but citizen initiatives are too complicated?

2. A proposed initiative entitled "Public Rights in Waters," was found to violate the single subject requirement because the initiative "seeks to accomplish more than one purpose, and the two purposes are not connected to each other." The proposed initiative would have established a strong "public trust doctrine" regarding water rights and would have imposed certain water district election procedures to see that this doctrine was properly implemented by elected officials. *The court found* no "necessary connection"

between these two ideas. So, substituting their judgment of necessity for the judgment of the initiative proponents, the Court prevented this initiative from being presented to the voters.

Imagine the outrage if during the legislative enactment of a bill—before it is signed into law by the governor, the court intruded and said "the bill violates the single subject, you may not vote on it or submit it to the governor. The title is misleading; it will confuse members of the legislature."

A more intolerable intrusion into the legislative process would be hard to imagine. The Court would be impeached. But that is exactly what the Colorado Supreme Court is doing to citizen initiated legislation. And the reasons are not hard to guess: The people (but not the legislature) will be confused or misled; the people are not (but the legislature is) capable of drafting intelligent legislation; the people don't have the wisdom to reject poorly conceived legislation; the people are too stupid to consider an initiative dealing with more than one simple subject; the people should be protected from their lack of sophistication and experience in making laws. Real law making should be left to the professionals in the general assembly. Citizen initiatives can be tolerated only if the people are carefully limited and controlled as to what they are allowed to consider.

Has the Colorado Supreme Court adopted two single subject standards—one for the legislature and one for proposed initiatives? Where did they get the authority?

## ANOTHER ATTACK ON INITIATIVES—THE SUPERMAJORITY REQUIREMENT

Not satisfied with the results achievable with the single subject requirement, initiative opponents in the legislature are proposing another constitutional amendment, now known as Senate Concurrent Resolution 95-002 ("SCR 95-2") to be considered by the voters in 1996, to require that the constitution can be amended, after January 1, 2003, only by a supermajority of 60% of the voters. Clearly, this is to take more power out of the hands of the voters, allowing the General Assembly and the courts and the executive to continue to operate as they have grown accustomed to over the years. Clearly this again violates Article V, Section 1 which says *the initiative is to be independent of the general assembly.* The Supreme Court should declare this legislative attack on the initiative unconstitutional, as they should do also for the legislature-sponsored referendum on the single subject requirement. This anti-change amendment clearly reflects fear that voters will otherwise be making "unwise" changes in their form of government.

# CONCLUSION

There is no constitutional provision for a double standard for single subject review: one for bills of the General Assembly and one for citizen initiatives. If the Colorado Supreme Court's recent decisions on the single subject requirement accurately reflect the law in this state, then *dozens of legislative enactments are in violation of the single subject requirement.* These unconstitutional acts should be immediately struck down by the courts.

The Court should also be put on notice that state government is not a government of unlimited power. The constitution delegates power from the sovereign People to the government and defines the limits of that power. All other rights and powers are reserved by the People, to themselves.

The initiative process is a vital check on runaway government power. When legislators and courts and governors won't listen, the People speak directly through the initiative. They may not always speak eloquently, but with practice, they will get better. The initiative is a right we can give up only if we want to trust all power with the politicians and if we believe our liberty no longer requires our vigilance. ◆





TOM TANCREDO is President of the Independence Institute.

PAUL GRANT is an attorney in Parker, Colorado specializing in constitutional law, commercial litigation, and criminal defense. He received his J.D. degree from the University of Denver and his M.S. degree in Chemical Engineering from the University of Maryland, Grant was lead plaintiff in a 1988 U.S. Supreme Court decision (Meyer v. Grant, 486 U.S. 414) establishing First Amendment protections for proponents of initiative and referendum petitions.