Tabor at Twenty

Colorado's well-known tax and spending measure is praised by some and criticized by others for its success at limiting government.

BY TIM HOOVER

Twenty years after Coloradans approved the most restrictive tax and expenditure limitation in the country, the Taxpayer Bill of Rights has reshaped state government and sparked debate on similar proposals across the country and now is under greater assault than ever before.

At its inception, conservatives lauded TABOR for its promise to restrict the growth of government and to empower citizens. But its legacy has been one of near-constant controversy; it has never been completely replicated outside of Colorado; its defenders say TABOR foes have consistently tried to find work-arounds; and there have been a few supporters who have changed their minds about the constitutional amendment.

For most conservatives, TABOR's 20th anniversary is a moment to rejoice.

"Colorado has largely stayed away from the fiscal cliff that states like California went over. That, in and of itself, is cause for celebrating TABOR," says Jon Caldara, president of the libertarian-conservative Independence Institute. "It has required more transparency of government, and that is worth celebrating. And most importantly, it has angered every politician and 'taking' group because now they have to lobby all of us instead of just taking out a few legislators to dinner to get what they want."

For liberals, the law acts more like an ever-tightening vise on state government.

Wade Buchanan, president of the liberal Bell Policy Center, says Colorado's unique experiment has failed. "It promised power to the people, but it gave us more of a Rube Goldberg mechanism for funding public structures and systems,"

Tim Hoover is a reporter with The Denver Post. This article appeared there on Dec. 23, 2012, and is reprinted with permission.

Limits Defined

State revenue, expenditure and appropriation limits vary considerably in their features and restrictiveness. But generally, they fall into one of the following categories.

Revenue limits tie allowable yearly increases in tax revenue to personal income growth or some other type of index, such as inflation and population. Taxpayers are refunded revenues in excess of the limit.

Expenditure limits also are typically tied to personal income growth or another growth index. These limits are the most common, but how much of an impact they make depends on their parameters, such as what index they are tied to and what happens to excess revenues when spending levels have been reached.

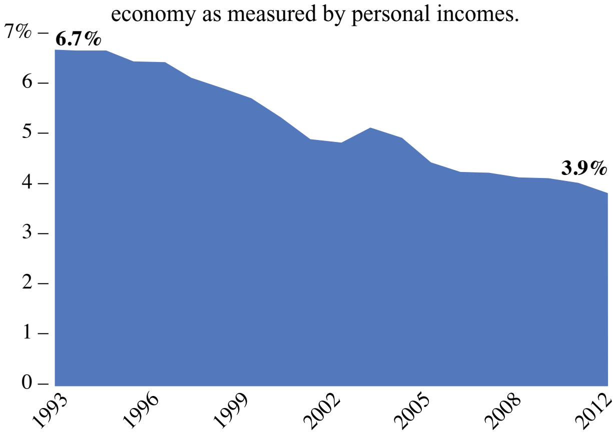
Some states tie appropriations to the revenue forecast, typically within the range of 95 percent to 99 percent of the expected revenues. Although this budgeting practice is not an absolute limit, because it does not tie growth to a measurable index, it is viewed as a variation of a spending limit.

—Mandy Rafool, NCSL

Colorado Spending Under TABOR

(As a Percentage of Coloradans' Personal Income)

Even though state spending has increased under TABOR rules, it has steadily decreased in relation to the size of the state's economy as measured by personal incomes.



Source: State Controller's Office, U.S. Bureau of Economic Analysis, The Denver Post.

Buchanan says, referring to the cartoonist's whimsical drawings of imaginary and complex machines. "You've got a legislature that is supposed to make spending decisions and the people, who are supposed to make revenue decisions. You don't really have a way of effectively rationalizing the two of those processes."

Voters Get to Decide

Under TABOR, state and local governments must ask voters to approve new taxes, and revenue growth is limited to increases in population and inflation. If revenues exceed limits, the government issues refunds to taxpayers. TABOR also contains a slew of other provisions that include prohibitions on local income taxes and on a statewide mill levy.

Polling shows Coloradans like to vote on taxes. But it is this popular portion of TABOR that is now being targeted in a federal lawsuit filed in 2011 by Herb Fenster, a noted Republican lawyer from Boulder. There are 33 plaintiffs on the lawsuit, mostly Democrats. The suit alleges TABOR violates the U.S. Constitution's guarantee that every state have a republican form of government, or one where elected officials govern, rather than a direct democracy.

"The idea that the only way to have constrained government is through this expression of populism is absurd," Fenster says, adding that he believes that if his lawsuit succeeds, a court is likely to throw out TABOR altogether, not just voter approval of taxes.

TABOR supporters are taking Fenster's challenge seriously. "TABOR is under more assault than it's ever been, and the tactics have changed," Caldara says. "Their line of attack now is to go to the least accountable sector of government—old people in black robes—to try to rid the state of TABOR."

Critics of TABOR have talked before about asking voters to alter it, but currently there are no proposals to do so. TABOR foes say its effects are made worse by its interaction with two other voter-approved constitutional provisions, the Gallagher Amendment, which has lowered residential property-tax rates and shifted most of the burden for funding schools from local districts to the state, and Amendment 23, which requires annual spending increases on schools.

> *TABOR "has shrunk government relatively, and that is a very good thing."*
>
> —Former Colorado Senate President John Andrews (R)

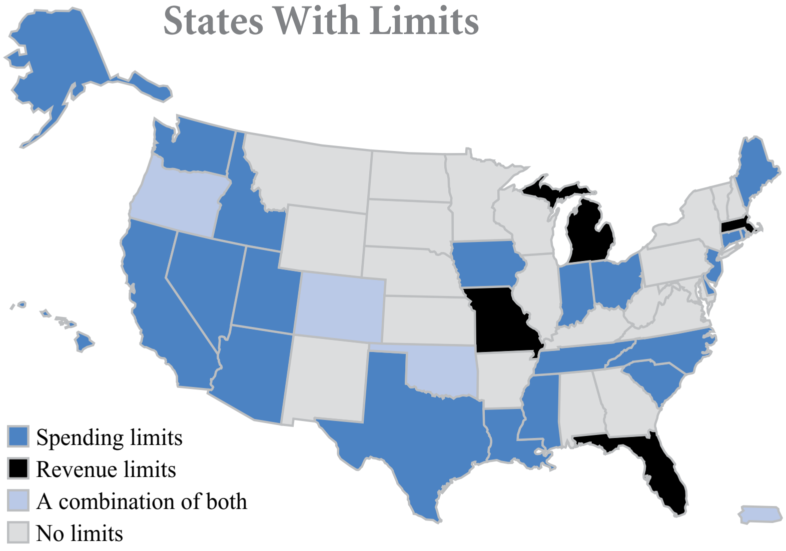
The last attempt to alter TABOR failed in 2008 when voters rejected Amendment 59, which would have eliminated automatic refunds and required that excess revenues go to schools.

Douglas Bruce, the anti-tax crusader who put TABOR on the ballot, declined to be interviewed for this article. He made headlines most recently after being convicted of tax evasion for using his charity to shield millions of dollars from taxation and then using the money to anonymously fund ballot initiatives. He served 104 days in jail.

The prohibition on lawmakers' raising taxes has had a profound result over 20 years. Many services that once were funded by the state's general fund are now funded by fees.

This is especially evident in higher education. In 1993-94, funding for higher education represented 15.7 percent of the state's general fund. In the current budget year, higher-education

States With Limits



Note: Delaware, Iowa, Mississippi, Oklahoma and Rhode Island limit appropriations to a percentage of the revenue forecast.

Source: NCSL, February 2013

funding is 8.2 percent of the state's general fund.

While appropriations for colleges and universities have decreased, institutions have tried to make up for the losses with hefty tuition and fee increases. Bruce Benson, president of the University of Colorado, says even with those hikes on students, the university has had to cut services to fill the gap of state support for CU's operating budget that has fallen below 6 percent.

Benson, a prominent Republican who supported TABOR, now expresses regrets over its passage. "I'd just say that I think we did too much with TABOR," he says. "Tax limitations are great, but you can over limit. "I think we probably should have done something differently [than TABOR]."

The Same Mistake We Made

Other states have largely avoided TABOR-like legislation. According to the National Conference of State Legislatures, 22 states have spending limits, four have tax limits and three have both. No other state features TABOR's prohibition on new taxes without voter approval. Efforts to replicate the stricture have failed. Recent efforts to enact TABOR's revenue-limit formula in other states have faltered.

In 2006, voters in Maine, which already had approved a revenue limitation tied to personal-income growth, rejected a proposal to change the formula to TABOR's population growth plus inflation. The same year, voters in Nebraska and Oregon rejected similar limits by wide margins, and efforts to enact such stricter limits have failed in Michigan, Missouri, Montana, Nevada and Oklahoma.

In November, voters in Florida rejected a measure to replace the state's current revenue limits, which are based on average personal income, with an inflation-plus-population limit like TABOR's.

In 2011, Arizona Governor Jan Brewer vetoed a bill that imposed a population-plus-inflation formula on state revenue. In her veto letter, Brewer, a Republican, pointed right at TABOR. "We should learn from the state of Colorado that experimented with a similar measure, and failed," she wrote.

Some of those who helped lead the charge against TABOR-like measures in other states were Coloradans.

Steve Johnson, a Republican who is a Larimer County commissioner and a former state senator, traveled to Maine, Nebraska and Florida to tell what he says are stories about the damage TABOR has done to Colorado.

"One of the years I was in the legislature, we were refunding over $900 million to taxpayers at the same time we were making cuts," Johnson says. "I didn't want to see them (other states) make the same mistake that Colorado did."

Johnson says the growth limit based on inflation plus population is flawed because many of government's costs rise faster than the cost of consumer goods and services. And Colorado's graying population means there is a larger proportion of state residents with limited incomes who rely more on government services.

Government-Shrinking Device

Former Governor Bill Owens, a Republican who helped campaign for TABOR when he was a lawmaker, says he's still a strong supporter, even though he was heavily criticized as governor for supporting Referendum C, a measure that TABOR purists say violated and weakened the law.

Ref C, approved by voters in 2005, ended the "downward ratchet" in TABOR that required the state's revenue limit to be reset lower every time revenues fell. Under the ratchet, if the state suffered a sudden, sharp drop in revenues, it couldn't recover to prior spending levels if revenue rebounded the next year. That's what happened during Owens' first term in the early 2000s, when the decade's first recession hit hard.

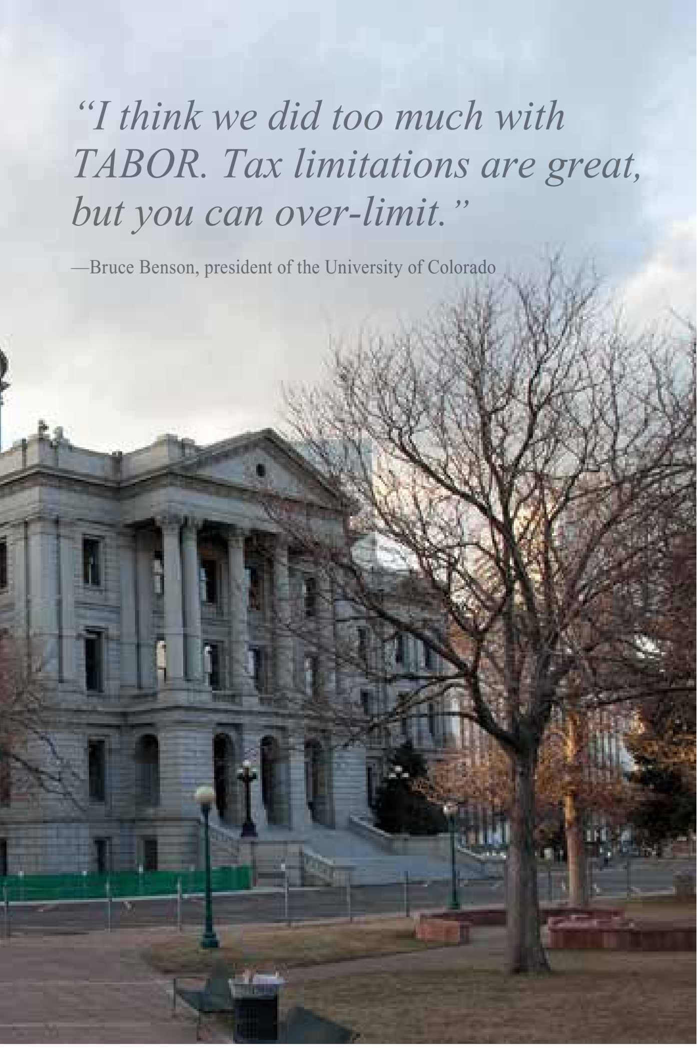
Ref C also allowed the state to keep $3.6 billion in revenues over the TABOR limit for five years—money that otherwise would have been refunded—and set the new TABOR limit at the highest of those years, which came in 2006-07.

And without the newly reset limit, the state would have had to refund $2.2 billion in the past two budget years, when there were deep cuts to K-12 schools, higher education and other services.

Despite his support for Ref C, Owens argues that TABOR's fundamental logic is sound. "The essence of TABOR has been that it allows government to grow at the sum of population plus inflation," he says. "When someone says government isn't allowed to grow under TABOR, they're incorrect. It says government gets to grow at about the same rate as the nongovernmental sector unless the people allow it to grow more."

But former Representative Brad Young, a Republican from Lamar and a former chairman of the legislature's Joint Budget Committee, agrees with many on the left who say TABOR reduces the size of government over time.

He and others point to state spending as a proportion of Colo-



"I think we did too much with TABOR. Tax limitations are great, but you can over-limit."

—Bruce Benson, president of the University of Colorado

radans' personal income, which has dropped from 6.7 percent of personal income in fiscal 1993-94, the first year TABOR took effect, to 3.9 percent in fiscal 2011-12, the budget year that ended in June.

"The economy will grow faster than the TABOR line," Young says. "It shrinks government relative to the economy. I would say that it's a government-shrinking device. If you're shrinking government relative to the economy, you're shedding programs. In the long run, that's what it was designed to do."

Former Senate President John Andrews (R) applauds that result. "It has shrunk government relatively, and that is a very good thing," he says. "America as of 1992 and Colorado specifically had more government than was good for us and more government than our founders would have ever dreamed of or recommended."

Young and other critics say this shrinking aspect of TABOR wasn't sold to voters, who understood mainly that they would have the right to approve tax increases. Yet Young says the voter-approval provision of TABOR, which even few Democrats openly question, is one of its biggest problems. In 1999, the Republican-controlled legislature reduced the state's income tax from 5 percent to 4.75 percent and then, a year later, to 4.63 percent.

Meanwhile, lawmakers cut the state's sales tax from 3 percent to 2.9 percent in 2000. Colorado, like many states, was flying high in those years and could afford to simultaneously increase spending, give tax refunds and cut taxes. But because of TABOR, those effectively became permanent tax cuts, Young and others say.

Statewide Tax Hikes Hard to Pass

Supporters of TABOR see an easy fix to this problem: Ask voters to increase taxes. Yet while voters are often willing to raise taxes at the local level, they are less willing to do so at the state level. In 20 years, voters have approved one statewide tax-rate increase: Amendment 35 in 2004, which increased taxes on cigarettes.

Multiple other statewide tax hikes failed, including a 2011 measure that would have returned income- and sales-tax levels to 1999 levels to fund education.

Meanwhile, voters in all but four of the state's 178 school districts have voted to allow their districts to keep revenue above TABOR limitations—or "de-Bruce" as the practice is known. And 459 municipalities, now including Denver, have de-Bruced completely or partially.

The state's 22-cents-per-gallon gasoline tax hasn't been increased since 1991. The only recent infusion of funding for statewide transportation came in 2009, when a legislature controlled by Democrats increased car-registration fees to generate an estimated $250 million a year.

Although TABOR allows lawmakers to increase fees, which are meant to be charged for a specific service, a lawsuit now challenges the 2009 fees as a violation of TABOR.

Colorado ranks 45th in the nation in terms of combined local and state tax burden as measured by taxes paid per $1,000 earned. By that measure, Colorado's combined state and local tax burden is lower than every one of its surrounding states.

Two decades after its passage, conservatives consistently point to California's fiscal problems as reason to be thankful for TABOR. Buchanan, of the Bell Policy Institute, says the comparison is inapt.

"There's only one California, and a whole bunch of states that don't have TABOR aren't California either," he says. "I think it's a silly argument. I think TABOR makes us much more like California. What is significant about California is that it has become virtually ungovernable. The thing that has made Colorado close to ungovernable is TABOR."

Fenster's lawsuit challenging TABOR, to the surprise of many, cleared an important hurdle last summer when a federal judge ruled the suit could proceed to trial. The state has appealed that ruling to the U.S. Court of Appeals, and the outcome is pending.

In any case, Fenster, a lifelong Republican who worked for Ronald Reagan's presidential campaigns, expects that the lawsuit is likely to end up before the U.S. Supreme Court in two to three years, where the nation's highest court will have to decide if taking the power to tax from lawmakers is unconstitutional.

In the meantime, lawmakers and civic leaders continue discussions about going to voters and asking them to alter the constitution, something that could include change to TABOR. But there are no formal proposals at this stage, and even many involved in the talks say it's unlikely voters would be asked to give up the right to approve tax increases.