



Marcy Glenn

Senior Counsel
303.295.8320
Denver
mglen@hollandhart.com



Christopher Jackson

Partner
303.295.8320
Denver
cmjackson@hollandhart.com



Stephen Masciocchi

Partner
303.295.8451
Denver
smasciocchi@hollandhart.com

Supreme Court OK's TABOR Repeal Initiative

Signals Potential Shift in Review of Ballot Initiatives

Insight — June 29, 2020

Law Week Colorado

Last year, a divided Colorado Supreme Court ruled that an initiative to repeal the Taxpayers' Bill of Rights didn't violate the state's "single subject" rule and could move forward. But the impact of this decision goes beyond its effects in 2020; it suggests that the court might be rethinking its initiative jurisprudence.

The Fight over TABOR

The Taxpayers' Bill of Rights, or TABOR, has become the third rail of Colorado politics. Championed by Doug Bruce, a former state representative who was later convicted of tax evasion, TABOR was adopted as a constitutional amendment in 1992 through the initiative process. Its mechanisms are notoriously complex, but at its core, TABOR requires state and local governments to hold an election before they impose new taxes or keep money collected from existing taxes that exceed a certain amount. Bruce's name has become so closely connected to TABOR that these votes on whether to raise taxes or keep existing revenue have come to be known as "de-Brucing" measures.

Initiative #3

This year, a citizens group filed a measure that would abolish TABOR. Now known as "Initiative #3," the proposal is exceedingly short. It says in its entirety, "Be it Enacted by the People of the State of Colorado: Section 1. In the Constitution of the state of Colorado, repeal section 20 of article X." Adopted as a constitutional amendment two years after TABOR, the single-subject rule provides that no ballot measure may "contain more than one subject, which shall be clearly expressed in its title[.]" It's intended to prevent both logrolling (including unrelated subjects in a single measure to appeal to distinct segments of the voting population) and the inclusion of "surreptitious provisions" that are "coiled up in the folds of a complex bill."

The Title Board agreed with the opponents and declined to set a title for Initiative #3.

The proponents of Initiative #3 petitioned the Colorado Supreme Court to review the Title Board's decision, arguing that Initiative #3 complies with the single-subject rule. In June 2019, the Supreme Court reversed the Title Board. In *In re Title, Ballot Title and Submission Clause for 2019–2020 #3*, 2019 CO 57, the court held that the measure "effectuates one and only one general objective or purpose, namely the repeal of TABOR." Because the initiative "on its face reflects a single subject," the court rejected the

opponents' claims that several of its previous decisions had determined that a wholesale repeal of TABOR necessarily involves multiple subjects because TABOR itself is a multi-subject provision.

Writing for the majority, Justice Gabriel recognized that in past decisions, the court had indeed indicated that initiatives seeking to repeal provisions containing several subjects would violate the single-subject rule, but he concluded that those comments were “in dicta and without any analysis,” and therefore didn't control. The Court also relied on practical implications: If “an initiative contains multiple subjects merely because the targeted provision contained multiple subjects,” this would “effectively make the original provision impervious to challenge.”

Because TABOR contains multiple subjects and was passed before Colorado adopted the single-subject rule, “[t]his would make it exceptionally difficult, if not impossible, to repeal”

The case drew an impassioned dissent from Justice Monica Márquez. Joined by Justice Brian Boatright, she argued that the Court's previous decisions had made clear for years that TABOR contains more than one subject. Moreover, when Colorado adopted the single subject requirement in 1994, the Blue Book “expressly cautioned voters that, if enacted, the single subject requirement would preclude the comprehensive revision of existing complex constitutional provisions” Justice Márquez concluded with an insightful hypothetical involving a measure seeking to repeal the state's Bill of Rights, which covers a wide range of topics from free speech to cruel and unusual punishment to due process. That measure can be written just as concisely as Initiative #3, asking if article II of the state constitution should be repealed. Surely, Márquez reasoned, that measure would violate the single-subject rule. And because there's no principled way to distinguish that case from this one, she concluded that Initiative #3 cannot be put to a vote.

Moving Forward

Beyond permitting proponents of Initiative #3 to press on with their measure, *In re Ballot Title #3* may also presage a significant, longer-term change in the law. Perhaps the court's majority was largely motivated by its reluctance to make TABOR impervious to challenge. That's certainly a plausible reading given the unique position TABOR occupies in Colorado politics. Or perhaps it's merely evidence that, as many academic commentators have argued, the single-subject rule is an amorphous standard that's susceptible to inconsistent application and will always draw differing opinions.

But *In re Ballot Title #3* might instead signal a significant loosening of the single-subject rule. The Court's treatment of its earlier decisions — and in particular its expansive understanding of what constitutes dicta — suggests that it's adopting a much more permissive view of initiatives. Though not expressly articulated in *In re Ballot Title #3*, that view would almost certainly be grounded in the refrain, oft-repeated by judges in election-law cases, that courts must defer to the democratic process whenever possible. That is, because an election gives voters a chance to

make their own voices heard, courts should be loath to step in and prevent a vote from taking place. Political activists should keep a close eye on future Supreme Court decisions to see which way we're headed.

Chris Jackson, Marcy Glenn, and Stephen Masciocchi are partners at Holland & Hart in Denver.

This article is reprinted with permission and originally appeared in Law Week Colorado's June 29, 2020 print issue, published by Circuit Media.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.