



# Direct Democracy and Debt

Barry W. Poulson

# INTRODUCTION

The First Amendment to the U.S. Constitution guarantees the right of citizens to “petition the Government for a redress of grievances”. When citizens use the petition process, they are exercising the freedom of speech guaranteed in the First Amendment. The Founders viewed freedom of speech as essential to hold the government accountable. George Washington expressed this sentiment “If men are to be precluded from offering their sentiments... the freedom of speech may be taken away \_\_and, dumb and silent we may be led, like sheep to the slaughter.”

The Founders also intended that citizens should have the final say in amending the Constitution. James Madison expressed this in Federalist 49. “(a)s the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the Republican theory to recur to the same original authority ...whenever it may be necessary to enlarge, diminish, or new-model the powers of government.”

Direct democracy has played a major role in shaping the U.S. Constitution. However, citizens have not been successful in proposing amendments to the Constitution as envisioned by the Founders. Article V gives citizens equal power with Congress to propose amendments through their states; but Congress has preempted that power by proposing its own amendments, and in some cases, such as the fiscal responsibility amendment, Congress has blocked efforts by citizens to propose amendments through their state governments.

This study explores the role of direct democracy in shaping the U.S. Constitution and especially in passage of the fiscal responsibility amendment. A brief history traces how the petition process has been used to enact amendments to the Constitution.

A discussion of Article V reveals how Congress has blocked efforts by citizens to propose a fiscal responsibility amendment. Congress has failed to address the debt crisis and has ignored the issue by inaction thereby attempting to block citizens from using Article V to propose the fiscal responsibility amendment. This has in fact created a constitutional crisis.

At the state level citizens have been using direct democracy to enact more effective fiscal rules since the tax revolt in the 1970s. California’s Proposition 13 was citizen-drafted and placed on the ballot through a volunteer petition drive collecting an estimated 1.5 million signatures. Prop 13’s property tax cap and 1% rate limit passed by 65%. The most effective of these fiscal rules, however, is Colorado’s Taxpayer Bill of Rights (TABOR), a volunteer-petition initiative approved in 1992 by 54% of the voters.

This study explores how a Federal Taxpayer Bill of Rights could be enacted to impose effective fiscal rules on the federal government. The precedent is Switzerland’s Debt Brake, enacted through referendum and introduced in 2003.

This paper makes the case for citizens to use direct democracy to enact a Federal Taxpayer Bill of Rights, bypassing Congress. Passage of a Federal Taxpayer Bill of Rights could set the stage for other amendments proposed by citizens, launching a new era of direct democracy. This is what the Founders intended when they gave citizens through their states equal power with Congress to amend the U.S. Constitution. We are at a crucial turning point when failure of Congress to address the debt crisis threatens the prosperity of the country, and especially the prospects for future generations who will foot the bill for Congressional profligacy.

# How Citizens Have Used the Petition Process to Amend the U.S. Constitution

The Founders viewed the right to petition as essential to hold the government accountable. In the 19th century civic organizations, reformers, and ordinary citizens began to use the petition process to demand changes in the U.S. Constitution. By the early 20th century 16 states had enacted reforms in their state constitutions granting citizens the power of initiative and referendum. Citizens in these states used the new powers of direct democracy to propose reforms in the U.S. Constitution.

## ***The 17th Amendment (1913): Direct Election of Senators***

One of the early targets for this reform movement was the direct election of Senators. Prior to the 17th Amendment, Article 1, Section 3 of the Constitution required that U.S. senators be selected by state legislatures. This power was designed to give states direct influence in national governance. However, relying on state legislatures to select Senators was plagued by corruption and deadlocks, as special interests dominated the selection process. Citizens used the petition process to build support for an amendment providing for direct election.

In 1904 Oregon was the first state to use its newly adopted citizen initiative to propose direct election of Senators. Called the ‘People’s Choice System’, Oregon required candidates to run in a popular election and encouraged legislators to honor the people’s choice. This de facto direct election of Senators became a model for legislation in other states. Between 1904 and 1912 more than 29 states adopted laws or informal systems to allow citizens to vote for U.S. Senators in primary or advisory elections. As citizens in these states demonstrated the feasibility and fairness of direct elections, support for direct election of Senators spread to other states.

As support for direct election of Senators spread to other states, Congress responded by proposing the 17th amendment in 1912. It was ratified by the required number of states in 1913. This strategy of preempting state-led proposals for Constitutional reform was used by Congress to preserve its power to propose amendments. Using this strategy, Congress has blocked efforts by citizens to propose amendments directly. However, passage of the 17th Amendment demonstrated how citizens can use the petition process, and the new tools of direct democracy, initiative and referendum, to shape the U.S. Constitution.

## ***The 18th Amendment (1919) and the 21st Amendment (1933) Prohibition***

Congress proposed the 18<sup>th</sup> Amendment prohibiting the manufacture of alcohol, referred to as prohibition, in response to growing pressure from temperance groups. Soon after the 18<sup>th</sup> Amendment was ratified in 1919 through state legislatures, private interest groups began to advocate for repeal. Nebraska was the first state to submit an application for repeal in 1925 and was soon followed by other state applications. By 1932 it was clear that a majority of state legislatures supported repeal, at which point Congress proposed the 21<sup>st</sup> Amendment.

Congress chose to preempt the state applications for repeal of prohibition and mandated that the states ratify the 21<sup>st</sup> Amendment by state conventions rather than through state legislatures. Congress chose the convention method of ratification to assure passage of the Amendment, and to provide cover for state legislators from the pressure of temperance groups in state legislatures.

## ***The 19<sup>th</sup> amendment (1920) Enfranchising Women***

Direct democracy played a crucial role in passage of the 19<sup>th</sup> Amendment enfranchising women. In the 19<sup>th</sup> century women organized petition campaigns to place suffrage measures on the ballot. When citizens in some states were given the power of initiative and referendum at the turn of the 20<sup>th</sup> century, this gave new impetus to the suffragette movement.

Because women could not vote, they used the petition process to mobilize public support and ultimately to pressure male voters to approve these ballot measures. States that granted their citizens the power of initiative and referendum were the leaders in enacting this reform. Wyoming was the first state to grant full women's suffrage in 1890. Colorado granted partial voting rights to women through legislative referendum in 1893. Between 1910 and 1914 seven western states passed women's suffrage legislation.

The first national petition drive calling for a national constitutional amendment granting women's suffrage was launched in 1865. A federal amendment to grant women the right to vote was introduced in 1878 by Senator Sargent from California but was rejected by the Senate. In 1917 the Sargent amendment was again rejected by the Senate. After a number of failed efforts, the 19<sup>th</sup> amendment granting women suffrage was passed by Congress in 1919 and was ratified in 1920.

It took half a century from the time that this amendment was first introduced in Congress, and final passage of the 19<sup>th</sup> Amendment. Enfranchisement of women reveals the importance of the petition process and direct democracy in shaping both state and federal Constitutions.

## **Fiscal Responsibility Amendments**

The major flaw in the U.S. Constitution is the absence of constraints on the power of the federal government to tax, spend, and incur debt. For most of our history that constraint was imposed informally by the "Old Time Fiscal Religion" of balanced budgets. Legislators were bound by Thomas Jefferson's admonition that one generation should not pass debt along to the next generation. Congress might need to borrow in periods of war, but that debt must be repaid in peacetime.

### ***State Fiscal Responsibility Amendments***

In the early 19th century citizens recognized this flaw in their state Constitutions. A number of states incurred unsustainable debt, defaulting on bonds issued for canals and other internal improvements. Citizens responded to this debt crisis by incorporating balanced budget rules and debt limits in their state constitutions.

In the 20th century citizens again responded to irresponsible fiscal policies in state and local government. A new tax revolt was launched by Prop 13, a constitutional cap on property taxes in California. Citizens have used the initiative and referendum to incorporate new tax and spending limits in their state Constitutions. For example, Colorado's TABOR Amendment was enacted through a citizen initiative. TABOR caps the rate of growth in taxes and spending at all levels of government. If any jurisdiction in Colorado wants to impose a new tax or incur new debt, they must have citizen approval.

## ***Article V and the Federal Fiscal Responsibility Amendment***

Thomas Jefferson and the Founders anticipated that Congress could pursue irresponsible fiscal policies and fail to constrain debt. They incorporated Article V in the Constitution to give citizens and the states the power to address the failures of Congress. Article V gives citizens and the states, as well as Congress, the power to propose amendments.

While the tax revolt has given new life to direct democracy at the state and local level, Article V has failed to achieve this objective at the federal level. Over the years many resolutions have been introduced in Congress calling for a fiscal responsibility amendment, but none of these have received the requisite two-third vote required to submit the amendment for ratification. For example, Representative Jody Arrington (R-TX) recently submitted HCR 15 calling for an Article V Convention for proposing a Fiscal Responsibility Amendment to the U.S. Constitution, but this resolution has yet to be reported out of committee.

Citizens have been proposing a fiscal responsibility amendment to the U.S. Constitution through their state representatives for more than two centuries. In fact, in 1979 more than two-thirds of the states had submitted resolutions calling for an Article V “Convention for proposing Amendments state-limited to fiscal responsibility, but Congress failed to even count these resolutions let alone call the convention, which the Constitution requires it to do. State Attorneys General could sue Congress for this failure to call the Convention, and while a few of them have expressed interest in such a lawsuit, no one has yet stepped up to file the lawsuit. Private organizations continue to urge that a state’s convention under Article V is urgently needed to enact a fiscal responsibility amendment in the U.S. Constitution, but efforts to enact a fiscal responsibility amendment using Article V appear to be at a standstill.

The founders proposed Article V as the vehicle of direct democracy via the states at the federal level, but it is time to acknowledge that Article V has to date failed to achieve this objective -- simply because Congress unconstitutionally ignores it. When it appears that citizens, through their state representatives, are about to enact an amendment, Congress preempts the effort by proposing its own amendment. In the case of fiscal responsibility amendments proposed by the states, Congress has blocked the proposed amendments by failing to record state applications and calling the convention. This is certainly in conflict with the founder’s vision of the states as equal partners with Congress in proposing and ratifying amendments.

New fiscal rules are needed at the federal level to balance the budget and stabilize debt. The statutory fiscal rules enacted by Congress have been routinely circumvented and suspended for several decades by both Republican and Democratic Administrations. The Big Beautiful Bill that has been enacted is consistent with this greatly expanded role for the federal government. With the federal debt projected to continue to grow at an unsustainable rate in coming years, citizens cannot allow the President and Congress to have this discretionary power over fiscal policy, they must correct this flaw in the Constitution.

With debt projected to continue to grow at an unsustainable rate in the coming decades, the U.S. is at a crucial turning point. We now confront a constitutional crisis as well as a debt crisis. Citizens must regain control of federal fiscal policy, just as they have state fiscal policies. A Federal Taxpayer Bill of Rights enacted through direct democracy could impose an effective constraint on federal fiscal policies and restore sustainable levels of debt.

# Second Generation Fiscal Rules

## ***Colorado's Taxpayer Bill of Rights (TABOR)***

In the mid-1980s Colorado experienced one of the worst recessions of the post-World War Two period. While the private sector stagnated, government revenue and spending continued to grow, much of it financed by borrowing. There were some years when the only growth occurring was in the public sector. Clearly the statutory fiscal rules in place were not working, and citizens responded by launching a tax revolt. The TABOR amendment was introduced as a citizen initiative, and after several failed attempts, was enacted in the Constitution in 1992.

TABOR is one of the most effective tax and spending limits in the nation. The most important provision is that state revenue and spending cannot increase more rapidly than the rate of inflation plus the rate of growth in population. A similar cap is imposed on the growth in local government revenue and spending. If any jurisdiction in Colorado wants to increase taxes or debt they must have voter approval.

The TABOR Amendment mandates that any surplus revenue above the spending cap must be rebated to taxpayers. Colorado has rebated surplus revenue to taxpayers in a number of years of rapid economic growth. If any jurisdiction wants to spend the surplus revenue rather than rebate the money to taxpayers, they must have citizen approval at the ballot box. Many of these ballot measures have been presented to citizens, and at the local level, many of these have been approved.

When TABOR was first proposed in Colorado, many viewed it as a long shot; and when it was enacted, critics argued that the impact on the economy would be catastrophic. Critics continue to attack TABOR each year, but TABOR has served Colorado well for three decades. With TABOR in place Colorado has balanced the budget and stabilized debt. TABOR has also kept the growth of government in balance with growth in the private sector, and as a result Colorado created one of the best business tax climates in the country.

Tabor could serve as a model for a Federal Taxpayer Bill of Rights. The most important provision in TABOR is to cap the growth in revenue and spending. A Federal Taxpayer Bill of Rights must bring federal spending into balance with revenue in the near term; and in the long-term, deficits must be offset by surplus revenue to stabilize debt and decrease debt as a share of national income.

## ***The Swiss Debt Brake***

New fiscal rules like Tabor have been enacted by the European countries, and by the European Union. Often referred to as 'second generation' fiscal rules, the most famous of these rules is the Swiss debt brake. The Swiss debt brake was enacted through a referendum with support from 85% of Swiss citizens. Over the past two decades with the debt brake in place the Swiss have cut federal debt as a share of national income roughly in half. Other European countries have had similar success with 'second generation' fiscal rules.

The Swiss debt brake is a model for a Federal Taxpayer Bill of Rights in the U.S. The key provisions of the Swiss debt brake are straightforward and easily understood by citizens:

### ***1. Bring Federal Expenditures into Balance with Revenues in the Near Term***

The most effective way to bring federal expenditure into balance with revenues in the near term is to impose a cap on rate of growth in federal spending. The Swiss cap the rate of growth in total federal spending at the long-term rate of growth in the economy. The potential future growth of the economy is estimated based on the average rate of growth of the economy over a historical time period. Capping the rate of growth in federal spending at the long-term rate of growth in the economy and bringing federal spending into balance with federal revenues has enabled Switzerland to stabilize and reduce their debt burden.

### ***2. Maintain a Rainy-Day Fund***

The Swiss debt brake allows the government to run a deficit, but the deficit must be offset by surplus revenue, i.e. a cyclically balanced budget. To maintain this balance, the Swiss use what is in effect a rainy-day fund. Any surplus revenue above the spending cap is automatically allocated to the rainy-day fund. If the rainy-day fund is in negative balance the government must offset that negative balance with surplus revenue over the next budget cycle. In fact, the Swiss have had a surplus in the rainy-day fund for many years, requiring adjustments in spending to eliminate the surplus.

### ***3. Maintain Actuarial Balance in Entitlement Programs***

In Switzerland, separate rules designed to maintain actuarial balance in entitlement programs are part of the constitutional rules of the game. If the Social Security program is not in actuarial balance, benefit levels and contribution rates are automatically adjusted to bring the program back into actuarial balance.

In the U.S. the major entitlement programs, Social Security and Medicare, are not in actuarial balance, in fact, the trust funds for both programs will be exhausted within the next decade. At that point, under current law, benefit levels and contribution rates will have to be adjusted to bring the programs back into actuarial balance.

Many reforms have been proposed to bring our entitlement programs back into actuarial balance. The precedent for these reforms is the reform in Social Security initiated during the Reagan administration. As in the Swiss case, these reforms included changes in benefit levels and contribution rates.

For several decades Congress has failed to enact reforms required to bring entitlement programs back into actuarial balance. It is now up to citizens to enact these reforms through direct democracy, as the Swiss have done. Given the importance of these reforms in addressing the debt crisis, new rules for Social Security and Medicare must be enacted along with new fiscal rules as part of the constitutional contract.

### ***4. Enacting Second Generation Rules in State and Local Governments.***

In Switzerland and other European countries, second generation fiscal rules have been enacted at the state and local level as well as the federal level. When Switzerland enacted their debt brake they confronted a fiscal imbalance. While some cantonal and municipal governments quickly adapted to the new debt brakes, some had incurred unsustainable levels of debt and were dependent on the federal government for bailouts to keep them afloat. The Swiss, through their judicial system, brought these bailouts to an end. Impecunious state and local governments were given a fixed time period to eliminate deficits and bring their debts to a sustainable level.

The U.S. faces a challenge in bringing the federal budget into balance, similar to that encountered in Switzerland. The U.S. Constitution gives state and local governments more fiscal autonomy than that in



European countries. While most state and local governments have enacted second generation fiscal rules, like Colorado's TABOR amendment, some have not. Some states, such as Illinois, continue to incur deficits and accumulate debt at an unsustainable rate. These failed states depend upon bailouts from the federal government through intergovernmental transfers to keep them afloat. New fiscal rules must mandate that these state and local government solve their debt crisis within a fixed time period. This will require a fundamental overhaul of intergovernmental transfers to eliminate bailouts to state and local governments. The precedent for these reforms was the downsizing and devolution of federal programs during the Reagan administration.

## **Using Direct Democracy to Enact a Federal Taxpayer Bill of Rights**

Enacting a Federal Taxpayer Bill of Rights amendment through direct democracy is challenging, but feasible. To understand these challenges, we can learn from the experience with Colorado's TABOR amendment, enacted through a citizen initiative. Enacting the Federal Taxpayer Bill of rights amendment in states without the initiative and referendum would require approval from the state legislature. In some states this requires a simple majority vote, but in others it requires a supermajority vote of the legislature.

Passage of the TABOR amendment in Colorado provides unique insights that should inform a campaign to enact a Federal Taxpayer Bill of Rights. The Colorado story begins with a statutory tax and expenditure limit enacted by the legislature in 1978. That fiscal rule was effective in constraining the growth in state spending for several years. In some of those years the state received revenue that exceeded the spending limit, surplus revenue that was rebated to taxpayers. But that statutory tax and spending limit was the victim of special interests in Colorado who were able to exempt expenditures from the spending limit. Eventually those exemptions were so large that the tax and spending limit was ineffective in constraining state spending.

In the mid-1980s Colorado experienced a recession triggered by a fall in oil prices. While the private sector contracted, the public sector continued to grow, imposing heavier tax burdens on citizens. Private organizations responded by proposing a more effective tax and spending limit through the initiative process. After two failed attempts, the TABOR amendment was enacted through a citizen initiative in 1992.

The Colorado Legislature attempted unsuccessfully to preempt TABOR. Special interests pressured the Colorado legislature into proposing a less stringent fiscal rule. Both measures were on the ballot and were approved by citizens in 1992, leaving Colorado with two tax and expenditure limits, one proposed by citizens and one proposed by the legislature.

The lesson here is that special interests are likely to preempt a Federal Taxpayer Bill of Rights proposed by citizens. We should expect that a Federal Taxpayer Bill of Rights designed by Congress will be less stringent than one designed by citizens. For this reason, citizens should not rely on Congress but rather should propose their own Federal Taxpayer Bill of Rights.



Special interests in Colorado have also attempted to block and weaken TABOR through the courts. For example, they challenged TABOR as a violation of the single subject rule in the Colorado Constitution. Private organizations have not always been successful in protecting TABOR from these court challenges. However, it is important to emphasize that TABOR was proposed and enacted as a citizen initiative. Private organizations and taxpayers have standing in the Colorado Supreme Court in responding to these challenges.

Every year special interests in Colorado place measures on the ballot designed to weaken and circumvent TABOR. Citizens have rejected most of these measures. When I served on the Colorado tax Commission, we conducted a survey of citizen attitudes toward TABOR and the Colorado tax system. Citizens responded that they think government wastes tax dollars at all levels of government, but they have more confidence that their tax dollars are spent efficiently at the local level than at the state and federal level. TABOR has more support from citizens today than when it was enacted in 1992; citizens have learned to live with the constraints imposed on government spending and are better able to decide how much government they want and are willing to pay for.

Eighteen states have constitutions that provide for initiative and referendum. In these states proposal of a Federal Taxpayer Bill of Rights would follow the procedures used in Colorado to propose TABOR. In these states the only role for the state is to certify that the ballot measure is approved by a majority of voters.

In states without the initiative and referendum process approval by the state legislature is required to propose a Federal Taxpayer Bill of Rights. In some states this requires majority approval in the legislature, in others it requires a supermajority vote. Whatever the voting procedures, proposing the Federal Taxpayer Bill of Rights will depend upon strong support from citizens. A national petition campaign can help generate that popular support. The petitions must be carefully drafted to be consistent with the unique procedural rules for proposing amendments in each state.

Finally, it is important to emphasize the difference between using the petition process to propose the Federal Taxpayer Bill of Rights, and proposals for an amendment using Article V. The states have been proposing a fiscal responsibility amendment under article V for centuries. Congress has effectively blocked these efforts by simply failing to record and count the state applications. State Attorneys General could file a lawsuit challenging this breach of the Constitution by Congress, but thus far no state attorney general has been willing to file the lawsuit. Private organizations are not able to file suit challenging Congress because they lack standing before the Supreme Court. It is fair to say that the effort to enact a fiscal responsibility amendment using Article V is at a standstill.

A petition campaign by private citizens to propose a Federal Taxpayer Bill of Rights could break this logjam in Congress. If Congress fails to record and count applications from states that use the petition process, citizens would have standing before the Supreme Court to challenge this breach of the Constitution. In states with the initiative and referendum the applications using the petition process is directly from citizens, not the state legislature. While the state legislature must certify that a majority of citizens approve the ballot measure, the application is directly from private citizens, and private citizens would have standing to file suit in the Supreme Court challenging Congress.

If a citizen petition campaign to propose a Federal Taxpayer Bill of Rights is successful, this could open a new era for direct democracy. We should expect petition campaigns for other amendments to the U.S. Constitution. This is what the Founders intended when they gave citizens and the states equal power with Congress to propose amendments.



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386-423-4744



[team@prosperityforus.foundation](mailto:team@prosperityforus.foundation)



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