

BY JOHN A. STRAAYER

On Nov. 7, 2006, Colorado voters handed critics of direct democracy the gold-standard example of the foolishness that the initiative process can produce. Nearly 100 years ago, Grove Johnson voiced his disdain for direct citizen lawmaking, which his son Hiram was so successful promoting in California, when he quipped, “the voice of the people is not the voice of God, for the voice of the people sent Jesus to the cross.” Coloradoans haven’t yet sent anyone to the cross, but they have made a prophet of the senior Johnson by endorsing a measure that has produced a confusing and comical mess rather than new and improved political “ethics,” as promised by the sponsors.

Colorado’s Amendment 41 carried the short title, “Standards of Conduct in Government,” and passed with 62.6 percent of the vote. A constitutional amendment, 41 was intended to restrict gift-giving by interest groups and lobbyists to elected public officials and others in positions of public trust. It was also designed to prevent legislators from immediately becoming lobbyists after their terms of office.

But its consequences to date include issuance of official opinions to the effect that scholarships for children of public employees and performance awards for employees are probably illegal; the resignation of more than a half-dozen legislators; questions as to whether the newly elected governor may legally recruit legislators for positions in his cabinet; and the curtailment of Capitol breakfasts, which had been enjoyed by legislators, staffers and student interns for decades.

Most voters, and indeed, even Amendment 41’s sponsors, saw the measure as a reasonable way to curtail questionable connections among interest groups and public officials and remove even the appearance of such where none existed, and to keep departing legislators from becoming instant lobbyists. Voters might be forgiven for what has resulted, since the actual language of the new law was lengthy and complex and 41 was just one of

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Direct Democracy’s Disaster

Through the initiative process,
Colorado recently passed
a law with loads of
unintended consequences.

Amendment 41

14 ballot measures. But for amendment sponsors Common Cause and millionaire political activist Jared Polis—who following the adoption of their measure, said that they didn’t really mean what it said—forgiveness may be more difficult.

THE POWER OF THE INITIATIVE

Amendment 41 was placed on the Colorado ballot through the initiative process. As described in the ballot title, which ran just under 200 words, and in the full constitutional text, the measure bans gifts to all public elected public officials and all employees of all local and state governments and agencies and their immediate families insofar as the gifts have a cash or in-kind aggregate yearly value of more than \$50. Governments and governmental units covered are cities, counties, colleges and universities, executive branch agencies, the legislature and the courts. Employees, from the governor to professors, state cops, receptionists, janitors, prison guards and legislative staffers are covered, and so are their spouses and kids.

In addition, legislators may not “personally represent another person or entity for com-

ensation before any other such officeholder or members for a period of two years following departure from office.” The measure makes it illegal for a lobbyist to give even a penny’s worth of literally anything to a public official or public employee, including gifts, meals or drinks. The constitutional language reads, “No professional lobbyist... shall give or arrange to give ... any gift or thing of value ... whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such lobbyist’s business or in connection with a personal or social event ...”.

University of Colorado President and former U.S. Senator Hank Brown interpreted the gift ban as prohibiting Nobel prize-winning professors from accepting the financial award that would accompany the prize. On Brown’s request State Attorney General John Suthers reviewed the matter and concurred; a Nobel winner could not accept the award. A fire-fighters association official indicated that the organization might have to close its foundation, which had made scholarships available for fire-fighters’ children and provided funeral assistance for fire-fighters’ sur-



vivors. Lobbyist Frank DeFilippo, who also serves on the governing board of the Colorado School of Mines, wondered if he would be in violation of the law for buying his own groceries since that would amount to a lobbyist gift to a public official. With respect to the curtailment of legislative breakfasts, Representative Alice Borodkin quipped to a *Rocky Mountain News* reporter, “For God’s sake, this whole thing is stupid. All this for a free doughnut?”

The two-year lobbying prohibition prompted more than a half-dozen lawmakers, who were term-limited out or lost their elections, to resign their offices early in advance of gubernatorial certification of the election. Some intended to go into lobbying but others, referring to the language “personally represent,” worried that even communicating with lawmakers on matters of concern to an employer or association with which they might be connected would constitute a violation. Senator and pediatrician Kiki Traylor told the *Rocky Mountain News* that she was resigning because she wanted to “protect my ability to advocate for kids and health care issues.”

As the full implications of Amendment 41 came into focus, its sponsors explained that they didn’t really mean what the plain language of their measure said, and they hired an attorney to try to help the legislature clarify the sponsors’ true intentions. Government officials asked the attorney general to interpret the new law. He concluded that the measure means what it says, not what the authors now say they meant it to say. The attorney general lamented that his conclusions were “extremely unfortunate, yet unavoidable” and that the measure’s results were “absurd.” Government lawyers and administrators went about issuing warnings and behavioral guidelines for public employees. The mix of the plain legal language and the measure’s intent as expressed after the fact by its sponsors caused enough worry and confusion that when a Denver law firm arranged a seminar on the new law, 100 people signed up.

NO EASY FIX

But fixing the new constitutional law will be difficult, both legally and politically. Legally, there is a limit to what the legislature can do by statute to clarify a constitutional provision. The amendment states that legislation may not “limit or restrict the provisions” of the law. And politically, lawmakers risk appearing disingenuous and self-serving if they tinker too much. Some members, along with the amendment’s own sponsors, seemed optimistic that legislation designed to implement and/or interpret the measure could steer it more clearly toward the authors’ intent.

Others were not so sure. Deborah Fallin, a spokesperson for the Colorado Education Association echoed the view of many others, noting that “it doesn’t really matter what they meant. It matters how the courts interpret the language.” Senator Shawn Mitchell, an attorney, told *Rocky Mountain News* columnist Peter Blake that the amendment is “a poorly drafted pile of quicksand,” but “the legislature can’t convert it into an innocuous, reasonable measure.” Mitchell added that if the legislature redefined the broad coverage of the measure so as to target lawmakers but not all government employees, “... that simply ignores the plain and simple language of the amendment.”

Attorney General Suthers is on the side of Fallin, Mitchell and other skeptics. In his words to the *Rocky Mountain News*, “Legislative action can’t supplant the clear language of the measure, nor will a reviewing court

necessarily be bound by the legislature’s interpretation.” As the start of the 2007 legislative session approached, lawmakers were already at odds on both the wisdom and legality of tinkering with 41.

To oversee the new ethics law, Amendment 41 established a commission, which is itself a matter of some confusion and controversy. A lengthy portion in the amendment describes the commission, but the basics are these. There are five members, one each appointed by the Senate, the House of Representatives, the governor and the chief justice of the Colorado Supreme Court, with the fifth member selected by the other four on a vote with a minimum majority of three. All must be registered voters in the state, with no more than two from one political party. The commission is authorized to “hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article.”

UNFORSEEN CONSEQUENCES

The constitutional wording provides commission “members” with subpoena power but it is unclear whether that power belongs to them individually or collectively. The law stipulates that “Any person may file a written complaint” and this, combined with the possibility that any one of the commissioners may individually issue a subpoena, has led some to worry that the whole process may have political witch-hunt potential.

This is not the first time voters in Colorado, like those in other states, have endorsed initiated measures that had great “curb appeal” but turned out to be problematic with unforeseen consequences. And it is not the first time direct democracy critics have had reason to question both voter competence and the wisdom of legislating through a process lacking in hearings, testimony, compromise and amendment. Through a series of initiated measures, Colorado voters have stripped the state legislature of much of its fiscal authority, deprived it of an institutional and policy memory by limiting legislative terms, and helped give birth to unaccountable independent campaign groups through highly restrictive campaign finance “reform.” And now, with Amendment 41 in place, the voters have made it legally problematic for a college janitor’s kid to receive a scholarship or for a lobbyist to invite the neighboring policeman and his family over for Easter dinner. ■