

## TESTIMONY BEFORE THE 2009 INTERIM LEGISLATIVE COMMITTEE ON LONG TERM FISCAL STABILITY

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### **TABOR and the Colorado Constitution's Fiscal Gordian Knot**

Establishing long term fiscal stability for Colorado state government is not a question of precise design so much as it is one of flexible process. Today's economic balance, however perfect, can never anticipate tomorrow's changes. Nonetheless, Colorado voters have a long history of using the initiative and referendum processes to impose both limits on revenues and directed expenditures to preferred programs. These requirements have, over time, intertwined in ways that now significantly undermine the philosophical premise for representative, republican governance.

The Colorado Legislature finds itself increasingly handcuffed in the management of state revenues as its margin for discretionary action rapidly shrinks. I doubt this state of affairs reflects voters' conscious intention. It is, far more, the unintended consequence of a reasonable and episodic desire to insure that particular funding priorities are guaranteed despite economic change. Unfortunately, this constitutional clutter is inexorably steering state government towards a fiscal train wreck without legislative brakes or airbags.

Whatever one believes about the adequacy of state revenues or the appropriate size of Colorado's government, restoration of full control over the state budget is a goal that can and should be supported by both Republican and Democratic legislators. Rather than wait for the next Legislature to be elected, this Legislature can restore the flexibility that will be needed to negotiate the impending 2011 and 2012 budget crises by referring two measures to voters in 2010 that would remove existing fiscal handcuffs without repealing the right of voters to approve tax increases.

*THE GORDIAN KNOT SOLUTION:* Place companion referendums on the 2010 ballot that would remove, first, all existing constitutional spending limits, prohibitions, earmarks or restrictions, and, second, a similar measure that would remove all constitutional revenue limits, including dedicated purpose or assessments, restrictions or earmarks from the constitution and place this existing language into statute.

### **The Problem**

On the third attempt, TABOR was narrowly approved by voters on a crowded 1992 ballot. This was not the first time that voters would place restrictions on revenues and expenditures in the Colorado constitution, nor would it be the last. Doug Bruce was simply more ambitious than his predecessors at the ballot box, crafting a Christmas tree of tax provisions including that automatic incorporation of any pre-existing spending

limitations into the constitution. The complexity of TABOR's provisions was obscured by a campaign which emphasized the appealing notion that future tax increases would require voter approval. Shortly thereafter, in a classic case of closing the barn door after the horses had fled, the Legislature submitted a referendum to voters restricting future initiated amendments to a "single subject". This seemingly reasonable remedy has had the unintended consequence of making it virtually impossible to reconcile what is now a witches' brew of competing constitutional demands on the Legislature.

Colorado's budget process is universally acknowledged to operate under an irrational mix of increasingly irreconcilable demands that have stripped the Legislature of its capacity to function as a genuinely representative assembly. Estimates of the number of 'single subject' ballot questions that would be required to unravel TABOR fall in the range of 12-18 separate measures. To restore sanity to the larger fiscal system, including the impact of the Gallagher amendment, Amendment 23 (K-12 funding) and other revenue set asides, perhaps as many as 25-30 referenda would be required. This scenario would clearly exceed any ability for proponents to adequately explain or voters to comprehend what was actually being attempted.

### **'End Arounds'**

There is virtually zero public understanding of the Rube Goldberg fiscal contraption that has been inadvertently constructed by Colorado voters. It has warped public policy as the Legislature has searched for ways to exempt expenditures from TABOR limits. Despite the challenge, their ingenuity has proven impressive. It is doubtful that three college students in a hundred understand the origin of their "Colorado Opportunity Grants" --- stipends that never actually pass through an individual student's bank account, but which are transferred, in bulk, directly from the state treasury to the higher education institution each student attends. The truth is that these 'scholarships' were created as an 'end around' TABOR spending limits. Why? Because the Legislature can maintain the accounting fiction that these moneys are no longer a general fund contribution to state colleges and universities, but, rather, that they belong to each in-state student. It hardly hurts that these grants make for good politics, but they are an economically inefficient way to transfer funds to higher education. (Recently, creative public policy entrepreneurs have inventively married special interest initiatives with praiseworthy funding promises. Last November's lifting of betting limits in gaming towns was aided at the ballot box by the earmarking of additional tax revenues to cash strapped community colleges.)

### **Expanding Our Point of View**

For those who must wrestle daily with the budget dictates and constraints built into the Colorado constitution, the search for loopholes, dodges and 'end arounds' quickly becomes an all consuming focus. Their objective transforms into one of delaying the date of financial catastrophe rather than the avoidance of that approaching cataclysm. This small bore view generally confines the political debate to the question of whether we are or are not raising taxes.

The fundamental problem is, of course, that fiscal rules should never be incorporated into the governing by-laws of a well managed organization. As circumstances change, a successful organization must be able to swiftly adapt to those new circumstances. This is especially true for a representative government organized as a republican legislature. But, in fact, Colorado voters have repeatedly embroidered our constitution with instructions to their legislators which, individually, may have made sense at a particular time or, in light of, a particular circumstance. Collectively, they have placed us on a disastrous course that no Legislature, however enlightened, can alter without a restoration of the authority it should properly enjoy. In other words, the freedom to exercise the most fundamental right of legislative governance to assess, collect and expend revenues in a prudent and responsible program for the benefit of the people of Colorado.

I am appearing before the committee to suggest that the sword of Alexander, who sliced the original Gordian knot, remains in the hand of Colorado voters. It could be wielded to reset a proper balance that would empower the Legislature to fully govern. While I am not an attorney, I have run my solution past several election specialists, and they all agree that, while these measures would predictably be challenged by the usual suspects, there is a good chance they would prevail as *single subject* revisions of Colorado's constitution:

- (1) Shall all provisions of the Colorado constitution directing, limiting, regulating, restricting or prohibiting the expenditure of state moneys be removed from the constitution and placed into statute, effective January 1, 2011? (A listing of the affected sections would be included)**
- (2) Shall all provisions of the Colorado constitution directing, limiting, regulating, restricting or earmarking state revenues be removed from the constitution and placed into statute effective January 1, 2011? (A listing of the affected sections would be included)**

The courts have previously ruled that revenues and expenditures are separate subjects, requiring separate questions. Consideration of these two questions shifts the political debate from taxation to governance. The requirement for voter approval of tax increases, the popular heart of TABOR, would remain as a constitutional election provision. Voters would be asked to decide whether fiscal policy should be established at the ballot box or in the Legislature. Absolutely nothing would change when these measures are approved by voters. Neither taxes, nor spending, would automatically increase. The Legislature would be free, however, to mold these statutes into a coherent and functioning whole. Admittedly, the first session following voter approval could prove to be something of a political rugby scrum. It will not prevent an eventual fiscal crisis, but it will provide desperately needed tools to our elected representatives for the management of that crisis.

### **Strengths & Weaknesses**

Opponents could and certainly would complain about the dangers of a runaway Legislature, but voters would retain their right to veto tax increases. Eventually, the debate could be directed to the question of whether or not any of the existing budget

provisions actually belong in the Colorado Constitution. The single issue on which voters would pass judgment is the question of whether or not fiscal instructions to the Legislature should remain in or be removed from the Constitution. This is an argument easily made, and easily understood!

Unfortunately, a lot of sacred cows could be gored. The HUTF, GOCO, old age pensions and many other 'earmarks' have been cemented into the constitution by voters who wanted to insure these programs or policies were funded. These ballot box 'carve outs' reflect a widespread mistrust of legislative priorities and would only be placed at risk reluctantly. Unchanged, however, TABOR and its constitutional companions will lead to an eventual and not too distant struggle over resources from a shrinking budget that can only end badly for everyone.

### **Next Steps**

The interim committee should instruct staff to develop draft legislation, together with an interrogative to the Supreme Court regarding the constitutionality of these proposed referenda. A successful effort by the Legislature to send both questions to voters in 2010 would help expand the options for whatever even more difficult recommendations will have to be referred to voters in 2011 or 2012.

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