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FOREWORD: THE DISFAVORED CONSTITUTION: STATE FISCAL LIMITS AND STATE CONSTITUTIONAL LAW

*Richard Briffault**

I. INTRODUCTION

The dominant theme in the resurgent state constitutional jurisprudence of the last quarter-century has been the effort of many scholars and jurists to find in state constitutions a progressive alternative to the conservative turn federal constitutional doctrine has taken in the Burger and Rehnquist eras. Following the tone set by Justice William Brennan's path-breaking 1977 article in the Harvard Law Review,[1] the state constitutional law literature has sought a more expansive protection of civil liberties through state constitutional provisions dealing with criminal law and procedure,[2] freedom of expression,[3] and equality,[4] and to ground positive rights to public services in state constitutional measures dealing with such affirmative governmental duties as education,[5] welfare,[6] and housing.[7]

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

2. *See* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decision-Making*, 62 BROOK. L. REV. 1 (1996); Note, *Developments in the Law – The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1367-98 (1982) [hereinafter *Developments*].

3. *See, e.g.*, *Developments*, *supra* note 2, at 1398-1429.

4. *See, e.g.*, Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

5. *See Developments*, *supra* note 2, at 1444-59; Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave:" From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. LEGIS. 307 (1991); William E.

With much of the analysis of state constitutional law focused on the failings of federal constitutional law,[8] far less attention has been paid to a distinctive feature of state constitutions that has little to do with civil liberties or positive rights – the many provisions that seek to protect taxpayers by limiting the activities and costs of government. The Federal Constitution says next to nothing about public finance, and when it does so, it either provides authority for congressional action[9] or sets procedures for raising and spending money.[10] It places just a handful of substantive constraints on federal taxation[11] and no restrictions on federal borrowing at all. By contrast, state constitutions accord extensive consideration to state and local spending, borrowing, and taxing. State constitutions limit the purposes for which states and localities can spend or lend their funds, and expressly address specific spending techniques.[12] These "public purpose"

Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827 (1998).

6. *See* Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) [hereinafter Hershkoff, *Positive Rights*]; Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORD. L. REV. 1043 (1999); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989).

7. *See, e.g.*, Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL'Y SYMP. 111 (1996).

8. *See, e.g.*, Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1153 (1993) (citing "the [c]hanged [c]haracter of the [f]ederal [b]ench" as a critical reason for the turn to state constitutional law). The focus on federal constitutional law is equally true of state constitutionalism's leading critic. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780-98 (1992) (examples of state courts' limited use of state constitutions all involve due process, criminal procedure, or freedom of expression).

9. *See* U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress to "lay and collect Taxes, Duties, Imposts and Excises"); *id.* § 8, cl. 2 (authorizing Congress "[t]o borrow Money on the credit of the United States"); *id.* amend. XVI (authorizing imposition of the income tax).

10. *See id.* art. I, § 7, cl. 1 (providing that "[a]ll bills for raising Revenue shall originate in the House of Representatives"); *id.* § 9, cl. 7 (providing that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

11. *Id.* § 8, cl. 1 (providing that "[a]ll Duties, Imposts and Excises shall be uniform throughout the United States"); *id.* § 9, cl. 4 (providing that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"); *id.* § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

12. *See, e.g.*, Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 143 n. 1 (1993) (finding that forty-six out of fifty state constitutions contain some limits on spending).

provisions narrow the range of government action and limit public sector support for private sector activities. Nearly all state constitutions impose significant substantive or procedural restrictions on state and local borrowing.[13] A considerable number also limit state and local taxation.[14] These provisions may be said to constitutionalize a norm of taxpayer protection.

Fiscal limits, as well as positive rights, thus characterize state constitutional law. Indeed, the states' fiscal constitutional provisions may offset the more widely heralded positive rights provisions. By giving priority to taxpayers over service recipients, these provisions can make it more difficult for states and localities to raise funds to finance public services.

But the real significance of fiscal limits in understanding state constitutional law is neither the barriers they create for the financing of public programs called for by positive rights advocates, nor the challenge they pose to the progressive image of state constitutional law that has dominated contemporary scholarly writing in the field. Rather, the most important lesson they provide grows out of the uncertain effect these provisions have had in actually controlling state and local finances. There is an enormous gap between the written provisions of state constitutions and actual practice. State legislatures and local governments have repeatedly sought to expand the scope of "public purpose" and to slip the restraints of the tax and debt limits.[15] Increasingly, these efforts have won the approval of state courts.

Judicial interpretations have effectively nullified the public purpose requirements that ostensibly prevent state and local spending, lending, and borrowing in aid of private endeavors. Supreme court decisions in many states have also held that a host of financial instruments are beyond the scope of the constitutional debt limitations. As a result, although debt limits have altered the forms of state and local borrowing, they probably have had only a modest effect on aggregate state and local debt. The constitutional constraints on state and local taxation have been more effective, but their

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13. *See, e.g.*, Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1315-16 (finding that more than three-quarters of the states have debt limitations in their constitutions).

14. *See, e.g.*, U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 18 (1992) (noting that all but seven states place some restrictions on local property taxation).

15. *See infra* Parts II-IV.

impact has been cushioned by judicial determinations that certain revenue-raising devices are not taxes subject to constitutional limitation.

This Article examines these fiscal limits and their significance for state constitutional law. I refer to these limits as the "disfavored constitution" for two reasons. First, they have been disfavored by state constitutional law scholars, who have largely ignored the state fiscal constitution in favor of other state constitutional provisions. Second, to a considerable degree, they have been disfavored by state courts, who frequently read the fiscal provisions narrowly, technically, and formalistically – often more like bond indentures than statements of important constitutional norms.[16]

Parts II, III, and IV of this Article will sketch out the principal provisions that form the states' fiscal constitution, and examine their contemporary judicial interpretation. In Part V, I will consider why these provisions have often been read so unsympathetically. In Part VI, I will briefly assess whether state constitutions ought to be used to constrain state and local finances. Finally, I will conclude in Part VII by considering the implications of the judicial treatment of state fiscal limits for the study of state constitutional law.

II. PUBLIC PURPOSE REQUIREMENTS: THEIR RISE AND FALL

By one recent count, forty-six state constitutions contain provisions, known collectively as "public purpose" requirements, that expressly limit the authority of their state and/or local governments to provide financial assistance to private enterprises.[17] The New York Constitution is typical in providing that "[t]he money of the state shall not be given or loaned to or in

16. The few state constitutional law scholars who have referred to the fiscal limits have tended to treat them dismissively, too. *See, e.g.*, James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 985 (1993) (referring to the difficulty of developing a state constitutional jurisprudence "on a textual foundation that . . . obsesses in excruciating detail over pecuniary matters").

17. *See* Rubin, *supra* note 12, at 143 n.1. The remaining states appear to rely on judicial doctrines that similarly require that state or local taxpayer funds be spent only for public purposes. *See* Ullrich v. Bd. of County Comm'rs of Thomas County, 676 P.2d 127, 132-33 (Kan. 1984) (noting that expenditure of public money must be for a public purpose); Common Cause v. State, 455 A.2d 1, 15-16 (Me. 1983) (public purpose doctrine implicit in the Maine Constitution); Clem v. City of Yankton, 160 N.W.2d 125, 130-31 (S.D. 1968) (applying public purpose doctrine not based on specific state constitutional provision); State *ex rel.* Hammermill Paper Co. v. LaPlante, 205 N.W.2d 784, 793 (Wis. 1973) ("No specific clause in the constitution establishes the public purpose doctrine. However, it is a well-established constitutional tenet.").

aid of any private corporation or association, or private undertaking"[18] and that no "county, city, town, village or school district shall give or loan any money or property or in aid of any individual, or public or private corporation or association or private undertaking."[19] Many state constitutions supplement this general public purpose requirement with further restrictions on specific forms of assistance.[20]

These public purpose limitations date back to the mid-nineteenth century, and reflect the disastrous consequences of the states' extensive investments in and assistance to private firms in the 1820s and 1830s. The enormous success of the Erie Canal, which opened in 1825, in energizing New York's economy inspired a massive program of state governmental support for turnpikes, canals, and railroads over the next two decades. Many of these projects blurred public and private lines, with states investing in private firms, or providing grants, loans and loan guarantees to private companies. The states frequently obtained the funds they used to aid private firms by borrowing. Fueled by the intense interstate competition for economic development, this era of state-supported infrastructure finance was marked by waste, overbuilding, and mismanagement. The Panic of 1837 led to a contraction in economic activity, and eventually to an economic crisis. Many firms that had borrowed from the states were unable to repay their loans, and many infrastructure projects failed to generate projected revenues. The states had great difficulties meeting their obligations to their creditors; nine defaulted on interest payments and four states – Arkansas, Florida, Michigan, and Minnesota – repudiated all or part of their debts.[21]

In reaction, the states engaged in a wave of constitutional revision.[22] State constitutions were amended to require that state spending or lending be

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18. N.Y. CONST. art. VII, § 8.

19. *Id.* art. VIII, § 1.

20. These may include a prohibition on the state or local government giving or lending its credit to private firms, or a ban on the state or local government becoming a shareholder in a public or private corporation. *See* COLO. CONST. art. XI, §§ 1, 2; N.Y. CONST. art. VII, § 8; *id.* art. VIII, § 1. In addition, public purpose requirements typically apply to state and local borrowing, so that debts may be incurred only to support public purpose projects. ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE 84 (1992).

21. *See* B.U. RATCHFORD, AMERICAN STATE DEBTS 105-14 (1941); ALBERTA M. SBRAGIA, DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT 19-43 (1996).

22. *See, e.g.*, G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 111-12 (1998); *see also* Dale A. Oesterle, *Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies*, 73 U. COLO. L. REV. 587, 589,

for a public purpose; to bar the gift or loan of state credit except for a public purpose; and to ban direct state investment in business corporation obligations. Initially, these provisions applied only to the activities of state governments. As a result, they were sometimes circumvented by state legislation authorizing local governments to provide assistance to private firms. Another round of waste, overbuilding, and economic crisis resulted, and in the late nineteenth century, many states amended their constitutions to apply the public purpose and aid limitations to local governments.[23]

The public purpose requirement was never a complete bar to government financial assistance to the private sector. In the leading mid-nineteenth century case of *Sharpless v. Mayor of Philadelphia*,[24] the Pennsylvania Supreme Court held that aid to a privately owned railroad could serve a public purpose. "The public has an interest in such a road," even if privately owned, because a railroad provides "comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth."[25] Railroads aside, most nineteenth century courts, however, treated their state's public purpose requirements as significant barriers to programs that would provide state or local assistance to private firms or individuals. Public purpose requirements constitutionalized the public/private divide with the goal of protecting the public fisc, and thus, the taxpayers, from private demands. During its heyday, the public purpose requirement operated to constrain the scope of state and local government, resulting in the invalidation of a host of economic development and social welfare programs that state courts found benefitted private, not public, interests.[26]

Starting in the 1930s, state courts, faced with an array of state efforts to counteract the economic effects of the Great Depression, began to widen the definition of public purpose. In 1938, the Mississippi Supreme Court upheld a state program of issuing bonds to finance the construction of factories and the acquisition of machinery and equipment for long-term lease to private firms willing to relocate to the state; such an industrial development program

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594 & n.38 (2002) (noting that several Colorado cities had become insolvent due to their assistance to railroads, thereby contributing to the inclusion in the Colorado Constitution of 1876 of a ban on state and municipal aid to businesses).

23. TARR, *supra* note 22, at 114.

24. 21 Pa. 147 (1853).

25. *Id.* at 169.

26. *See* Allen v. Inhabitants of Jay, 60 Me. 124 (1872) (invalidating government aid to factories); *In re* Opinion of the Justices, 195 N.E. 897 (Mass. 1935) (holding use of tax revenues to insure banks against loss on home mortgages not within "public purpose" limitations); Lowell v. City of Boston, 111 Mass. 454 (1873) (holding financial assistance to private residential housing development violated public purpose requirement).

was held to serve a public purpose.[27] Over time, as state industrial and economic development initiatives spread, courts came to broaden the notion of public purpose to include increased employment and tax base growth, and to approve programs that provided assistance to individual firms. Initially, many of these programs were funded by revenue bonds,[28] that is, bonds backed solely by the new revenues to be generated by the firms receiving assistance, so that courts could find that taxpayer dollars were not at risk.[29] Other courts did not distinguish between programs financed by revenue bonds and programs backed by general treasury funds.[30] Some courts resisted the trend and continued to invalidate public financial assistance to private businesses.[31] In some states where courts were reluctant to permit direct state assistance to private firms, the state constitutions were amended to permit some forms of industrial development assistance.

During the closing decades of the twentieth century, state courts increasingly expanded the scope of permissible public purposes, so that by the end of the century virtually every state supreme court had upheld at least some economic development programs that involved direct assistance – including cash grants, low-interest loans, and tax breaks – to individual firms.[32] Landmark decisions include *Common Cause v. State*,[33] in which the Maine Supreme Court upheld the state's plan to commit $15 million in taxpayer funds to improve the facilities of the Bath Iron Works in order to persuade the company to remain in the state, and *Hayes v. State Property & Buildings Commission*,[34] in which a closely divided Kentucky Supreme Court upheld a package of inducements – with direct costs estimated at between $125 and $268 million – to persuade the Toyota Motor Corporation to open a plant in the state. Some courts have continued to police economic

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27. *See* Albritton v. City of Winona, 178 So. 799, 804 (Miss. 1938).

28. For an explanation of the difference between revenue bonds and general obligation bonds, see *infra* pp. 918-19.

29. *See, e.g.*, Basehore v. Hampden Indus. Dev. Auth., 248 A.2d 212, 223-24 (Pa. 1968).

30. *See, e.g.*, State *ex rel* Beck v. City of York, 82 N.W.2d 269 (Neb. 1957).

31. *See* Vill. of Moyie Springs v. Aurora Mfg. Co., 353 P.2d 767 (Idaho 1960); Mitchell v. N.C. Indus. Dev. Fin. Auth., 159 S.E.2d 745 (N.C. 1968); State *ex rel.* McLeod v. Riley, 278 S.E.2d 612 (S.C. 1981).

32. *See* Maready v. City of Winston-Salem, 467 S.E.2d 615, 627 n.1 (N.C. 1996) (noting that "courts in forty-six states in addition to North Carolina have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives").

33. 455 A.2d 1 (Me. 1983).

34. 731 S.W.2d 797 (Ky. 1987).

development programs, invalidating some – such as those aimed at aiding non-industrial activities like hotels and restaurants.[35] More generally, courts have taken a posture of extreme deference to state legislatures, finding that a broad range of goals fall under the rubric of public purpose, and that legislative determinations that a spending, loan, or tax incentive program will promote the public purpose are to be accepted as long as they are "not . . . irrational."[36] Even if much of the benefit of an economic development program consists of profits to private firms or individuals, the program may still serve the public purpose of attracting business or promoting growth.[37] Even if the public benefits of aid to the private sector are acknowledged to be "speculative," while the private benefits are more immediate, courts are still likely to find that the measure satisfies the constitutional public purpose requirement.[38] Such a program will be rejected by the courts "only if it is 'clear and palpable' that there can be no benefit to the public."[39] As one dissenting North Carolina justice observed, lamenting the state supreme court's 1996 decision to uphold an economic development program which would permit public funds to be used, inter alia, to pay for spousal relocation assistance when private firms move to the state,[40] under the court's decision a state or locality could use public funds to pay for country club memberships for corporate executives if that would entice firms to relocate to the state.[41]

Today, state constitutional "public purpose" requirements are largely rhetorical. State legislatures define what public purposes are and receive great deference when they determine that a particular program promotes the public purpose. State constitutional provisions articulate the truism that

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35. *See* Purvis v. City of Little Rock, 667 S.W.2d 936 (Ark. 1984) (finding no public purpose in financing private hotel); Holding's Little America v. Bd. of County Comm'rs, 712 P.2d 331 (Wyo. 1985) (finding no public purpose in providing aid to hotel and restaurant). *But see* Hucks v. Riley, 357 S.E.2d 458 (S.C. 1987) (finding public interest in tourism development provides public purpose justifying use of state funds to finance privately owned and operated lodging and restaurant facilities).

36. Delogu v. State, 720 A.2d 1153, 1155 (Me. 1998).

37. *See* Ward v. Commonwealth, 685 A.2d 1061 (Pa. Commw. Ct. 1996); WDW Props., Inc. v. City of Sumter, 535 S.E.2d 631, 636 (S.C. 2000); King County v. Taxpayers of King County, 949 P.2d 1260, 1266 (Wash. 1997); Libertarian Party of Wis. v. State, 546 N.W.2d 424, 434 (Wis. 1996).

38. *See WDW Props., Inc.*, 535 S.E.2d at 635-36.

39. Jackson v. Benson, 578 N.W.2d 602, 628 (Wis. 1998).

40. *See* Maready v. City of Winston-Salem, 467 S.E.2d 615, 633 (N.C. 1996) (Orr, J., dissenting).

41. *Id.* at 636 (Orr, J., dissenting).

public spending must be for a public purpose. But they do not provide a judicially enforceable constraint on state or local government.[42]

III. DEBT LIMITATIONS: FROM RESTRICTION TO EVASION

A. *Substantive and Procedural Restrictions on Borrowing*

The vast majority of state constitutions impose some limitation on the ability of their state and local governments to incur debt.[43] These constitutional limitations take a variety of forms. Some bar state debt

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42. The decline of the public purpose doctrine as a limit on state spending has had some impact on other state constitutional restrictions on public aid to the private sector. In some states, the restriction on lending of credit does not apply if the assistance is provided for a public purpose. *See* ALASKA CONST. art IX, § 6; ILL. CONST. art. VIII, § 1. In those states, the expansion of public purposes simultaneously erodes the ban on lending of credit. *See also* Brower v. State, 969 P.2d 42, 53 (Wash. 1998) (lending of credit restriction does not apply if loan advances a "fundamental purpose" of government).

In other states, however, lending of credit remains an additional restriction. Even if a program constitutes a public purpose, the technique of lending the state or local government's credit may still be proscribed. Most state courts find that a lending of credit has occurred when a state serves as a surety or guarantees a loan made by another lender. *See, e.g.*, Barnhart v. City of Fayetteville, 900 S.W.2d 539 (Ark. 1995). The constitutional provision, thus, protects against the tendency of legislators to discount the risks posed by standing as surety when the state is not required to directly commit any funds at the time the suretyship obligation is assumed. A few state courts have gone further and found that a proscribed lending of credit occurs when a state borrows money and provides the proceeds to another entity. *See, e.g.*, Wash. Higher Educ. Facilities v. Gardner, 699 P.2d 1240 (Wash. 1985). For the most part, however, state courts have distinguished lending of credit from borrowing followed by the provision of public funds to a private recipient, and have limited the lending of credit ban to the former situation. *See, e.g.*, State v. Inland Prot. Fin. Corp., 699 So. 2d 1352 (Fla. 1997).

One nineteenth-century restriction that may have survived the twentieth-century expansion of public purpose is the prohibition on state investment in business corporations. This provision, in the constitution of a number of states, appears to be a direct response to the nineteenth century practice of state subscriptions to canal or railroad company stock. *See* David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historic and Economic Approach*, 111 U. PA. L. REV. 265, 278-79 (1963). Two state supreme courts have indicated that this ban may apply even if the investment is for an economic development purpose. *See* Utah Tech. Fin. Corp. v. Wilkinson, 723 P.2d 406 (Utah 1986); W. Va. Trust Fund, Inc. v. Bailey, 485 S.E.2d 407 (W. Va. 1997). One arguably paradoxical result is that a state may be able to give or lend money to a private firm on a public purpose theory, but may be barred from taking an equity position in the firm, which would enable it to share in any appreciation in the firm's value.

43. *See* Sterk & Goldman, *supra* note 13, at 1315.

outright.[44] Others impose very low limits on the amount of debt a state may incur.[45] Some cap state or local debt or debt service at a specified fraction of state or local taxable wealth or revenues.[46] Tying the debt limit to a fraction of property wealth or revenue is a particularly widespread way of limiting local government debt.[47] This approach suggests an attempt to limit debt to the "carrying capacity" of the state or locality, so that new borrowing does not result in burdensome taxation or cuts in existing services.

Most commonly, state constitutions rely on a procedural restriction: Debt may not be incurred without the approval of a supermajority in the legislature, of voters in a referendum, or both.[48] This legislative supermajority or voter approval requirement may stand on its own or may be combined with a substantive cap on the amount of state or local debt.[49] For the states, the procedural requirements are often the real restrictions on debt.

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44. *See* IND. CONST. art. X, § 5 (prohibiting state debt except "to meet casual deficits in revenue," repel invasion, suppress insurrection or provide for state defense); *accord* W. VA. CONST. art. X, § 4.

45. *See* ARIZ. CONST. art. IX, § 5 (limiting total state debt to $350,000); OHIO CONST. art. VIII, § 1 (providing state debt limit of $750,000); KY. CONST. § 49 (state debt limited to $500,000); R.I. CONST. art. VI, § 16 (limiting total state debt to $50,000).

46. *See* GA. CONST. art. VII, § IV, ¶ II (limiting debt service on state debt to 10% of state revenue); HAW. CONST. art. VII, § 13 (providing that debt service on state debt is limited to 18.5% of the average state general fund revenues in the three prior fiscal years; local government debts limited to 15% of total assessed value of real property in each political subdivision); NEV. CONST. art. IX, § 3 (limiting aggregate state debt to 2% of assessed valuation of property in state); WASH. CONST. art. VIII, § 1 (limiting debt service on aggregate state debt to 9% of average of state revenues over the three prior fiscal years).

47. *See* IND. CONST. art. XIII, § 1 (capping municipal debt at 2% of assessed valuation); KY. CONST. § 158 (setting permissible local government debt between 2% and 10% of local assessed valuation, with debt limit varying according to population of city; county and taxing district limits set at 2% of assessed valuation); MICH. CONST. art. VII, § 11 (setting county debt limit at 10% of assessed valuation); N.Y. CONST. art. VIII, § 2-a (setting debt limits for New York City and Nassau County at 10% of assessed valuation; debt limit for other large cities is 9% of assessed valuation; debt limit for other cities and counties and for towns and villages is 7% of assessed valuation).

48. *See* CAL. CONST. art. VI, § 18 (providing that local government debts require approval of two-thirds of local electorate); MICH. CONST. art. IX, § 15 (providing that state long-term debt requires approval of two-thirds of members of each house of the legislature and a majority of state voters in referendum); S.C. CONST. art. X, § 13 (providing that new state general obligation debt requires approval of either two-thirds of each legislative house or popular referendum).

49. *See* GA. CONST. art. X, § V, ¶ I (limiting county and municipal debt to 10% of assessed valuation; voter approval required); WASH. CONST. art. VIII, § 1 (limiting state debt service to 9% of average of state revenues for past three years; three-fifths majority vote in each house of the legislature required before debt may be incurred).

As state constitutions can be relatively easily amended, an absolute prohibition on debt or a low dollar limit on debt can be circumvented by a constitutional amendment authorizing a specific bond issue. As a result, the legal requirements for a constitutional amendment – typically, a combination of a legislative supermajority and voter approval – also become the requirements for issuance of debt. Thus, although the Alabama Constitution flatly bars state debt, as of the early 1990s, it contained thirty-three amendments authorizing specific bond issues.[50]

Like the public purpose requirements, the "constitutional moment"[51] for the birth of debt limitation was the turnpike, canal, and railroad boom of the 1820s and 1830s, the Panic of 1837, and the resulting wave of tax increases adopted to pay off the state debts blithely assumed during the boom.[52] The first constitutional limits were adopted in the 1840s, and by 1860, nineteen states had constitutional debt limitations.[53] Most of the Reconstructed southern states and western states admitted to the Union after the Civil War included debt limitations in their constitutions.[54] By the early twentieth century nearly all state constitutions limited the borrowing authority of their local governments as well.[55]

Apart from the specific historical background, constitutional restrictions on debt may be justified as a means of reconciling the conflict between short-term and long-term interests that debt generates. When a government finances a capital project with long-term benefits – such as a bridge, school building, or prison – it is appropriate to spread the costs of the project over its useful life. Borrowing the money and repaying the debt over a period of decades spreads the cost to the future generations who will benefit from the project. However, the ability to shift the costs forward may also induce elected officials to incur too much debt. The benefits of the project financed by the debt will be received immediately, while the costs of paying off the debt are deferred into the future. As a result, current elected officials may be

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50. *See* WILLIAM H. STEWART, THE ALABAMA CONSTITUTION: A REFERENCE GUIDE 115-16 (G. Alan Tarr ed., 1994); *see also* James H. White, III, *Constitutional Authority to Issue Debt*, 33 CUMB. L. REV. 561, 565 (2002) (noting that Alabama state debt issued "numerous times" by constitutional amendment).

51. *Cf.* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984) (presenting theory of "constitutional moments").

52. *See* RATCHFORD, *supra* note 21, at 73-104.

53. *Id.* at 122.

54. *Id.* at 122, 167-68.

55. By 1938, forty-five of the forty-eight states had some limitations on state borrowing; the only exceptions were the three New England states of Connecticut, New Hampshire and Vermont. *See id.* at 430-31.

tempted to approve projects that are not fully cost-justified. After all, they can get the credit for the new project immediately, while the blame for the additional taxes needed to pay off the debt will be borne by their successors. A central justification of constitutional limits on debt is to offset the temptations that can cause elected officials to burden future generations with unnecessary debt. Constitutional control can provide a constraint likely to be missing from the ordinary political process.

B. Legislative Evasion and Judicial Ratification

1. The Revenue Bond

Like the public purpose requirements, the state debt limitations have not had quite the effect their terms suggest. State constitutions typically require the state or locality to pledge its "full faith and credit" in support of its debt. This means that such a debt is a "general obligation" of the state or locality, backed not by a particular revenue source, but by the full revenue-raising capacity of the borrowing government.[56] Constitutional debt limitations apply to such debt. However, stimulated in part by the desire to avoid the substantive caps and voter approval requirements of the state constitutions, states and localities have developed financial instruments, what I refer to as "non-debt debts,"[57] that enable them to borrow without pledging their full faith and credit. Instead, the debt is backed only by a specific revenue source. As a result of state judicial interpretation, or, in some states, constitutional amendment, these "non-guaranteed" or "revenue bond" debts are typically not subject to the constitutional limitations that apply to general obligation debt. Today, most state and local borrowing does not involve general obligation debt, but instead uses non-debt debts that avoid the pledge of full faith and credit and thus escape the constitutional debt limitations.

Initially, the only revenue bonds exempt from the debt limitations were project finance bonds, e.g., bonds issued to finance a project whose revenues would be used to pay off the debt incurred to finance the project. For example, to build a bridge, the state might issue a bond, promise the bond buyers to impose a toll on the bridge financed by the bond, and pledge the revenues generated by the bridge toll to repay the bonds.[58] State courts found that as long as the state limited its debt service payment obligation to

56. *See, e.g.*, Flushing Nat'l Bank v. Mun. Assistance Corp., 358 N.E.2d 848 (N.Y. 1976).

57. *See* discussion *infra* Part III.C.

58. *See* RATCHFORD, *supra* note 21, at 498, 503-06.

the "special fund" generated by the project, such a revenue bond was not debt subject to the debt limit.[59]

Over time, the special fund concept spread well beyond debts backed solely by charges imposed on facilities financed by the borrowing. Courts found that bonds to finance highway construction were exempt from debt limitations if they were backed by taxes on motor fuels and vehicle license fees. This was based on the theory that new highways would generate additional auto usage and additional fuel tax and fee revenues and, thus, the costs of repaying the debt would not be borne by the taxpayers.[60] Similarly, a bond issued to finance a convention center might not be "debt" within the meaning of the constitutional constraint if it was backed by a new tax on hotel occupancy. This was done on the theory that the convention center would promote hotel use, generate the necessary new hotel tax revenues, and thus not threaten future taxpayers.[61] The cases are not always consistent,[62] but the trend has been to loosen the nexus required between the project financed by the bond and the revenues committed to paying off the obligation in order to justify avoidance of the debt limitations.[63]

2. Lease-Financing

Another important technique for avoiding debt limitations has been lease financing. Lease financing extends the revenue bond concept – and the attendant exemption from debt restrictions – from the creation of new revenue-generating infrastructure to the construction of new government facilities. In a lease-financing scenario, a private firm or a public authority issues the necessary bonds and builds the facility. Private debts are not subject to constitutional debt limits, and virtually all state courts have held that the debts of public authorities are not debts in the constitutional sense because the authorities lack the capacity to impose taxes or pledge the full faith and credit of the state or local government.[64] To finance the bond, the

59. *Id.* at 446-66.

60. *See, e.g., In re* Okla. Capitol Improvement Auth., 958 P.2d 759 (Okla. 1998).

61. *See, e.g.,* Convention Ctr. Auth. v. Anzai, 890 P.2d 1197 (Haw. 1995).

62. *See, e.g.,* Eakin v. State *ex rel.* Capital Improvement Bd., 474 N.E.2d 62, 67 (Ind. 1985) (holding that bond used to finance a convention center and backed by taxes on hotels, motels, and retail food business is "debt" within the meaning of debt limit).

63. The special fund exemption may not be available if the state is dedicating a pre-existing revenue source to pay off a bond, rather than creating a new tax or increasing the amount to be paid under an existing tax. *See* Opinion of the Justices, 665 So. 2d 1357, 1362-63 (Ala. 1995); State *ex rel.* Marockie v. Wagoner, 438 S.E.2d 810 (W. Va. 1993).

64. *See* Train Unlimited Corp. v. Iowa Ry. Fin. Auth., 362 N.W.2d 489 (Iowa 1985);

state or local government enters into an arrangement with a private firm or public authority bond issuer to lease the bond-financed facility for a period of time, with the government's lease payments covering the annual debt service. In theory, the state or local debt payment is rental for the use of the bond-financed facility. Courts have long held that long-term contracts for the purchase of basic operating goods and services, such as electricity, water, solid waste disposal or space for government offices, are not subject to constitutional debt limitations.[65] Although such a contract raises a danger of long-term commitment akin to that posed by debt, these long-term contracts have been held not to be debt so long as the government's duty to pay is tied to the receipt of service when the payment is made.[66] Thus, a long-term rental agreement does not create "debt" in the constitutional sense.

In most contemporary lease-financings the state or local "rent" payment is based not on the market value of the lease but on the private firm's or public authority's debt service requirements. Nevertheless, as long as the government's commitment to make payments is contingent on its use of the facility and is subject to annual legislative appropriation, most courts have found that the commitment is not "debt" in the constitutional sense.[67]

3. Subject-to-Appropriation Debt

Subject-to-appropriation debt, which emerged in the closing decades of the twentieth century, dramatically expands the opportunities for evasion. Subject-to-appropriation debt - also known as "contract debt" - takes the lease-financing model of public authority issuance backed by state or local contract payments one step further by dispensing with the need for the government backing the debt to obtain anything of value from the issuer. Rather, a public authority, special district, or other entity not subject to constitutional restriction issues a bond, uses the borrowed funds to undertake a project for the state or local government, and then enters into a contract with the state or local government in which that government agrees to make

Schulz v. State, 639 N.E.2d 1140 (N.Y. 1994); Dykes v. N. Va. Trans. Dist. Comm'n, 411 S.E.2d 1 (Va. 1991).

65. *See, e.g.*, Crowder v. Town of Sullivan, 28 N.E. 94 (Ind. 1891); Struble v. Nelson, 15 N.W.2d 101, 104 (Minn. 1944); Bd. of Supervisors of Fairfax Co. v. Massey, 169 S.E.2d 556, 559 (Va. 1969); State *ex rel.* City of Charleston v. Hall, 441 S.E.2d 386, 389 (W. Va. 1994).

66. *Hall*, 441 S.E.2d at 389.

67. *See* Bulman v. McCrane, 312 A.2d 857 (N.J. 1973); Dep't of Ecology v. State Fin. Comm., 804 P.2d 1241 (Wash. 1991); Dieck v. Unified Sch. Dist. of Antigo, 477 N.W.2d 613 (Wis. 1991). *But see* Montano v. Gabaldon, 766 P.2d 1328 (N.M. 1989).

an annual payment to the authority equal to the annual debt service on the authority's bond. So long as the state's or local government's payment to the authority is subject to annual appropriation, and any duty to make an annual appropriation is specifically disclaimed, most state courts which have considered this device have concluded that the state or local contractual commitment to cover the authority's debt service is not a "debt" subject to state constitutional constraint.[68] In other words, by nominally limiting its liability, the state or local government avoids creating "debt."[69]

Subject-to-appropriation borrowing resembles moral obligation debt, which loomed large in municipal finance in the 1960s and 1970s.[70] Under the moral obligation scenario, a public authority issued a bond, which would be backed by authority revenues, typically revenues to be generated by the facility to be financed by the bond. When the authority, or the potential investor, was uncertain whether the facility so financed would be able to produce the necessary revenues, the state would make a non-binding commitment of state funds to cover debt service in the event that revenues from the bond-financed project fell short. The state's moral obligation provided a psychologically significant safety net for public authority bond issues for moderate-income housing, hospitals, universities, and mental

68. *See* Carr-Gottstein Props. v. State, 899 P.2d 136 (Alaska 1995); *In re* Anzai, 936 P.2d 637 (Haw. 1997); Wilson v. Ky. Transp. Cabinet, 884 S.W.2d 641 (Ky. 1994); Employers Ins. Co. of Nev. v. State Bd. of Exam'rs, 21 P.3d 628 (Nev. 2001); Schulz v. State, 639 N.E.2d 1140 (N.Y. 1994); Fent v. Okla. Capitol Improvement Auth., 984 P.2d 200 (Okla. 1999); Dykes v. N. Va. Transp. Dist. Comm'n, 411 S.E.2d 1 (Va. 1991).

69. In one very recent case, even the arguable absence of such a disclaimer was unnecessary as the court proved willing to read one into the authorizing legislation. In the summer of 2003, the New York state legislature created a complex financing scheme that would permit the use of state sales tax receipts to back bonds that would be issued to refinance the debt of the Municipal Assistance Corporation (MAC), and thus reduce New York City's current fiscal year MAC interest obligation, and thereby enable the City to close its annual budget deficit. The legislature, however, may have failed to make it clear that the sales tax payments were subject to annual appropriation; indeed, one provision of the law appeared to make the "subject to appropriation" language inapplicable to this arrangement. *See* N.Y. PUB. AUTH. LAW §§ 3238-a, 3240(5) (McKinney 2003). When the arrangement was challenged, the trial court noted the "poor draftsmanship," but observed that if the "subject to appropriation" language did not apply that would lead to "the absurd result of attributing the intent of enacting a statute that is facially unconstitutional, thus, negating the very payments the Legislature sought to establish . . . .[A] poorly drafted provision should not overcome the overriding purpose of the statute" – that is, use of a constitutionally acceptable financing device to circumvent the debt limitation. *Local Government Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 230 N.Y. L.J. 17, 17 (2003).

70. *See* Janice C. Griffith, *"Moral Obligation" Bonds: Illusion or Security?*, 8 URB. LAW. 54 (1976).

institutions.[71] State courts generally concluded that the legislature's mere "moral" obligation to appropriate debt service did not constitute a debt triggering the constitutional debt limitations.[72] The moral obligation device, however, came under a cloud in the mid-1970s when New York State had to come to the rescue of its Urban Development Corporation (UDC) and make good on its moral obligation to support the UDC.[73]

In one sense, subject-to-appropriation debt is less troubling that moral obligation debt since states typically did not make any initial appropriation to the authority issuing the moral obligation bond but rather acted on the hopeful assumption that they would never have to spend state funds to make good on their "obligation." That may have created the illusion that moral obligation debt was cost-free to the state, and may have led states to take on such obligations too easily. By contrast, contemporary subject-to-appropriation obligations assume the regular appropriation of public funds to the authority issuing the debt, and thus can be factored into budget projections and counted as part of regularly recurring government costs. The fiscal illusion inherent in the moral obligation bond is thus avoided. Yet, by treating subject-to-appropriation obligations as part of baseline expenses, the states have only underscored the degree to which this device exists solely to evade the debt limits. These bonds do not involve using the state to provide extra security for public authority bonds; instead, their only purpose is to enable the state to use a public authority to circumvent the state constitution.

Subject-to-appropriation debt has become increasingly widespread. According to a 2001 statement issued by Standard & Poor's, a leading bond rating agency, "this type of debt issuance is now common in at least 33 states."[74] One recent court decision found that courts in thirty-two states had upheld some form of subject-to-appropriation debt.[75] Default levels have been comparable to those of full faith and credit general obligation bonds. "[W]hile appropriation-backed bonds are not considered debt under a strict legal definition, Standard & Poor's considers all appropriation-backed bonds of an issuer to be an obligation of that issuer and a failure to appropriate will

71. *Id.* at 57-60.

72. *See* Steup v. Ind. Hous. Fin. Auth., 402 N.E.2d 1215 (Ind. 1980); Utah Hous. Fin. Agency v. Smart, 561 P.2d 1052 (Utah 1977); State *ex rel.* Warren v. Nusbaum, 208 N.W.2d 780 (Wis. 1973).

73. *See generally* N.Y. STATE MORELAND ACT COMM'N, RESTORING CREDIT AND CONFIDENCE: A REPORT TO THE GOVERNOR ON THE URBAN DEVELOPMENT CORPORATION AND OTHER STATE FINANCING AUTHORITIES (1976).

74. Richard J. Marino & Colleen Waddell, *Revised Lease and Appropriation-Backed Debt*, STANDARD & POOR'S RATING SERVICES, June 13, 2001.

75. Lonegan v. State, 819 A.2d 395, 404 n.2 (N.J. 2003) [hereinafter *Lonegan II*].

result in a considerable credit deterioration for all types of debt issued by the defaulting government."[76]

Indeed, even as they have held that subject-to-appropriation agreements are beyond the scope of constitutional debt limitations, many state courts have candidly acknowledged that the state or locality behind the obligation will do its best to assure that the annual appropriations are made, since failure to make the appropriation would surely have a dramatically negative impact on the state's or locality's own bond rating and interest rates. As the California Supreme Court has stated, "[W]e are not naïve about the character of this transaction."[77] Yet, these "practical consequences" have usually not been enough to trigger the application of state constitutional debt constraints.[78] Instead, courts have relied on the state's or local government's formal disclaimer of legal obligation to pay debt service as conclusively eliminating the central threat of state or local debt – the danger to future taxpayers of long-term financial commitments. As a result, state debt limitations need not and do not apply to subject-to-appropriation debt.[79]

Not all state judges have been happy with this development. Many of the cases in which state supreme courts have found subject-to-appropriation agreements are not debt have been marked by close votes and sharp dissents, with the dissenters decrying the evisceration of the constitutional debt limitations and calling for a "common sense" or realistic interpretation that would recognize that these borrowings are binding in practice.[80] Yet, the steady trend has been to exempt these agreements from debt limitations.

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76. Marino & Waddell, *supra* note 74.

77. Rider v. City of San Diego, 959 P.2d 347, 358 (Cal. 1998).

78. *See* Wilson v. Ky. Transp. Cabinet, 884 S.W.2d 641, 644 (Ky. 1994) ("The argument that the practical consequences [of subject-to-appropriation debt] produce some kind of constitutional general obligation is without merit . . . . Practical, moral or righteous claims do not pass the test of contract or constitutional law."); Employers Ins. Co. of Nev. v. State Bd. of Exam'rs, 21 P.3d 628, 632 (Nev. 2001) (rejecting argument from "realism"). A handful of state courts have given greater weight to practical effects in assessing whether an obligation is "debt" within the meaning of a state's constitution. *See* State *ex rel.* Ohio Funds Mgmt. Bd. v. Walker, 561 N.E.2d 927, 932 (Ohio 1990) (noting obligation to be considered "not only for what it purports to be, but what it actually is"); Winkler v. Sch. Bldg. Auth., 434 S.E.2d 420, 433, 435 (W. Va. 1993) (noting that the court was unwilling to "abandon . . . logic and common sense" and finding that "where the only source of funds for revenue bonds [was] general appropriations, it defie[d] logic to say that the [l]egislature ha[d] no obligation to fund such bonds.").

79. *See Wilson*, 884 S.W.2d at 644; Enourato v. N.J. Bldg. Auth., 448 A.2d 449, 456 (N.J. 1982); Dep't of Ecology v. State Fin. Comm., 804 P.2d 1241, 1246 (Wash. 1991).

80. *See Wilson*, 884 S.W.2d at 646-67 (Stumbo, J., dissenting) ("Through smoke and mirrors we have allowed debt to be labelled something else for too long. The economic reality

In 2002, the New Jersey Supreme Court appeared to signal a shift to a more critical review of subject-to-appropriation debt.[81] In *Lonegan I*, the court considered a challenge to $8.6 billion in bonds for repairing and constructing new public schools – the "largest, most comprehensive school construction program in the nation."[82] The bonds were to be issued by a state authority, and backed by a contract pursuant to which the state committed, subject to annual appropriation, to pay the authority an amount each year that would cover the costs of debt service. As the state's obligation was subject-to-appropriation, the voter approval the New Jersey Constitution requires for new state debt was neither sought nor obtained. The state supreme court expressed serious doubt about the propriety of the appropriation contract device, but ultimately concluded that as the school construction program involved the "provision of constitutionally required"[83] educational facilities and was a direct response to the court's own orders in New Jersey's longstanding school funding litigation, the financing plan did not violate the state's debt limitation provision.[84] The court, however, intimated that subject-to-appropriation debts outside the shelter of the state's education finance requirements might be subject to challenge.[85] Noting that New Jersey's growing use of subject-to-appropriation debt raised the "troubling question" of whether the state's debt limitation "retains its purpose and vitality" and warning that "[a] literal interpretation of the Debt Limitation Clause that eviscerates the strictures the Clause expressly contains cannot serve the constitutional mandate,"[86] the court set down for reargument the question of whether subject-to-appropriation debt outside the school facilities setting is "debt" in the constitutional sense.[87]

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is that these bonds are debts of the Commonwealth."); Fent v. Okla. Capital Improvement Auth., 984 P.2d 200, 211-15 (Okla. 1999) (Lavender, J., concurring in part and dissenting in part) ("no amount of legal semantics, word-massaging or linguistic subterfuge can turn this express commitment into some non-enforceable moral obligation to repay"); Dep't of Ecology v. State Fin. Comm., 804 P.2d 1241, 1246 (Dore, J., dissenting) (arrangement "violates both the letter and spirit" of the Washington debt limit); *id.* at 1255 (a "commonsense interpretation" of the debt limit requires that subject-to-appropriation debt be treated as debt); *id.* at 1257 (the "escape hatch" provided by the non-appropriation clause "is really an illusory one").

81. Lonegan v. State, 809 A.2d 91 (N.J. 2002) [hereinafter *Lonegan I*].

82. *Id.* at 104.

83. *Id.* at 105.

84. *Id.* at 104-07.

85. *See generally id.*

86. *Id.* at 93.

87. *See id.* at 109. The plaintiffs had attacked a number of state financing schemes, in addition to the school-funding program, that combined authority-issued debt and state debt

Ultimately, however, the court drew back from the brink and nine months later sustained the general exemption of subject-to-appropriation debt from the state's constitutional debt restriction.[88] The court held that the constitutional limits apply only to "debt that is legally enforceable against the State . . . ."[89] Because "the State is not legally bound" to pay debt service on subject-to-appropriation debt "and can opt not to do so," subject-to-appropriation debt is not subject to constitutional limitation.[90] To be sure, "the State acknowledge[d] that payments on appropriation debt are 'highly likely'"[91] as "non-payment would adversely affect the State's credit rating."[92] Yet, the state's nominal freedom not to pay debt service was doctrinally decisive.

C. Consequences of Evasion

As a result of the rise of revenue bonds, lease-financing arrangements, subject-to-appropriation debt, and other various evasive techniques, nearly three-quarters of all state debt and two-thirds of city and county debt are "non-debt debts" exempt from the panoply of substantive limitations on and procedural requirements for debt found in state constitutions.[93] Debt limits have affected the form of state and local debt, but they do not appear to have significantly affected the total amount of debt.[94]

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service contracts to avoid the state's constitutional debt restriction. *Id.*

88. *Lonegan II*, 819 A.2d 395 (N.J. 2002). The *Lonegan I* decision, directing that the question of subject-to-appropriation debt be set down for re-argument, was decided by a vote of 6 to 1, with the dissenter voting to invalidate all future subject-to-appropriation debt arrangements, other than the school facilities financing scheme, without need for re-argument. *Lonegan I*, 809 A.2d at 132 (Stein, J., dissenting). *Lonegan II* sustained the constitutionality of subject-to-appropriation debt by a vote of 4 to 3. 819 A.2d at 407. Chief Justice Poritz wrote the opinions for the court in both cases. *Id.* at 397; *Lonegan I*, 809 A.2d at 93.

89. *Lonegan II*, 819 A.2d at 402.

90. *Id.* at 405.

91. *Id.* at 406.

92. *Id.*

93. *See* WILLIAM D. VALENTE ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 647 (William D. Valente ed., 5th ed. 2001) (reporting debt figures for 1996).

94. James C. Clingermayer & B. Dan Wood, *Disentangling Patterns of State Debt Financing*, 89 AM. POL. SCI. REV. 108, 116 (1995) (stating that debt limitations "have no statistically significant impact on net increases in state debt"). To be sure, as Professor Stewart Sterk has pointed out to me, it is unlikely that debt limitations have no impact on the overall level of state and local borrowing. Some debts may not be capable of shifting to revenue bond form, and the costs of evading debt limitations may discourage some avoidance efforts.

The debt limitations, however, are not without consequences. Evading state constitutions has costs. In order to avoid falling into the category of constitutional debt, these instruments avoid pledging the full faith and credit of the state or locality, and they limit the recourse of lenders seeking principal and interest payments to certain funds. As a result they present a slightly greater risk to investors, and thus usually carry a slightly higher interest rate than general obligation bonds.[95] They also involve greater administrative and legal costs than general obligation debt since issuers not pledging full faith and credit have to provide lenders with other forms of security. Over time, as the bond market has grown familiar and comfortable with these debts, the interest rate differential between the guaranteed and non-guaranteed obligations of the same jurisdiction has narrowed. However, some distinction usually continues, and the higher administrative costs of issuing these bonds remains.

Debt limitations, or the state and local efforts at avoiding them, have also contributed to the baroque structure of state and local government, and to the major role played by un-elected public authorities and similar agencies that are technically independent of the state or of general purpose local governments.[96] Unless the state constitution specifically provides otherwise, state courts have generally found that because public authorities lack the power to impose taxes or to pledge the full faith and credit of their states, public authority debt is not subject to constitutional debt limits.[97] As a result, in many states, public authorities have become conduits for the

Nevertheless, it is doubtful that debt limitations have had a significant effect on debt levels. As Professor Clayton Gillette has recently written, even when local officials have sought to comply with debt restrictions by submitting bond issues to voter approval, if the voters do reject the debt proposal, officials may still be able to finance the same project through an alternative borrowing mechanism not subject to the voter approval requirement. *See* Clayton P. Gillette, *Direct Democracy and Debt*, XXX J. CONTEMP. LEGAL ISSUES (forthcoming 2004) (New York University Public Law and Legal Theory Research Paper Series, Research Paper No. 69, at 13-17) [hereinafter Gillette, *Direct Democracy*]. However, Professor Gillette concludes that voter approval requirements may have some effect in constraining local officials from overinvesting in capital spending. *See id.* at 42-53.

95. This has long been the case. *See* RATCHFORD, *supra* note 21, at 514 (noting that "the most definite and tangible disadvantage of revenue bonds in comparison with general state obligations is their greater interest cost").

96. *See, e.g.*, Beverly S. Bunch, *The Effect of Constitutional Debt Limits on State Governments' Use of Public Authorities*, 68 PUB. CHOICE 57 (1991).

97. *See* Rider v. City of San Diego, 959 P.2d 347 (Cal. 1998); Albuquerque Metro Arroyo Flood Control Auth. v. Swinburne, 394 P.2d 998 (N.M. 1964); Ragsdale v. City of Memphis, 70 S.W.2d 56, 68 (Tenn. Ct. App. 2001).

"backdoor financing" of appropriation-backed debt.[98] The evasion of debt limits has been an important stimulus to the creation of public authorities, particularly those controlling public infrastructure. These authorities have been repeatedly criticized for their lack of accountability to state and local voters and for the resulting fragmentation of state and local infrastructure policies and management.[99]

IV. TAX AND EXPENDITURE LIMITATIONS: PROPOSITION 13 AND THE STATE FISCAL CONSTITUTION

State constitutional provisions dealing with taxation and expenditure levels are both less widespread and more diverse than public purpose requirements and debt limitation provisions. Some state constitutions are silent on the subject; in others, the tax provisions, like those in the Federal Constitution, are primarily facilitative or structural rather than restrictive. They authorize certain kinds of taxation, determine which level of government shall levy what kind of tax, or establish the basic ground rules for taxation, such as the requirement of uniformity of assessments and rates,[100] the classification of different categories of property or activity for different rates of taxation, or the provision of exemptions from taxation. These provisions may have some effect on state and local tax policy and may indirectly limit overall revenues,[101] but their thrust is to define and assure the equal treatment of taxpayers rather than to limit tax levels per se.

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98. *See Rider*, 959 P.2d at 359; Schulz v. State, 639 N.E.2d 1140 (N.Y. 1994); Fent v. Okla. Capitol Improvement Auth., 984 P.2d 200, 210 (Okla. 1999); Dykes v. N. Va. Transp. Dist. Comm'n, 411 S.E.2d 1, 5 (Va. 1991).

99. For critical appraisals of the role of public authorities in state and local governance, see DIANA B. HENRIQUES, THE MACHINERY OF GREED: PUBLIC AUTHORITY ABUSE AND WHAT TO DO ABOUT IT (1986); ANNMARIE HAUCK WALSH, THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS (1980). For a more balanced assessment, see PUBLIC AUTHORITIES AND PUBLIC POLICY: THE BUSINESS OF GOVERNMENT (Jerry Mitchell ed., 1992).

100. Almost all state constitutions contain some provisions for equal or uniform taxes. *See, e.g.*, JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION: CASES & MATERIALS 34 (6th ed. 1997). In some states this applies to all taxes. *See* GA. CONST. art. VII, § 1 ("all taxation shall be uniform upon the same class of subject within the territorial limits of the authority levying the tax"). In other states, the uniformity or equality requirement is focused on the property tax. *See* IND. CONST. art. X, § 1 ("uniform and equal rate of property assessment and taxation"); ME. CONST. art. IX, § 8 ("all taxes upon real and personal estate . . . shall be apportioned and assessed equally").

101. By requiring equal levels of taxation for all taxpayers, the uniformity clause makes it more difficult for state and localities to tax commercial property owners or

Tax limitation, however, is an important theme in the state fiscal constitution, and one of growing significance. More than half the state constitutions include some substantive or procedural limitation on the level of state or local taxing or the level of spending funded by own-source revenues. Although some constitutional measures are addressed to the sales tax,[102] the income tax,[103] or taxation generally,[104] most limitations are focused on the property tax – historically the most important form of subnational taxation and still the single most important form of local own-source revenue.[105]

Like the debt limitations, tax limits take many forms: limits on the property tax rate;[106] limits on the increase in assessed valuation and thus on the year-to-year change in the tax liability of the property owner;[107] limits on the rate of increase in state expenditures and in the revenues needed to

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corporations at a higher rate than residential property owners or individuals. Many states have addressed this problem by amending their constitutions to permit the classification of taxpayers into different groups – such as commercial and residential property owners – and then requiring uniformity of treatment only within the designated classes. Uniformity also poses an obstacle to the graduated income tax. "A graduated income tax by its very nature lacks the uniformity of taxation typically required by state constitutional restrictions. A controversy which raged throughout the country, as states enacted income tax levies, was whether the income tax constituted a property tax that violated the uniformity provisions." *See* HELLERSTEIN & HELLERSTEIN, *supra* note 100, at 36.

102. *See* MICH. CONST. art. IX, § 8 (capping the sales tax rate); *accord* MONT. CONST. art. VII, § 16.

103. *See* FLA. CONST. art. V, § 5 (prohibiting personal income tax); MICH. CONST. art. IX, § 7 (prohibiting graduated income tax); N.C. CONST. art. V, § 6 (limiting income tax); TEX. CONST. art. VIII, § 9 (prohibiting personal income tax without voter approval).

104. *See* CAL. CONST. art. XIIIA, § 3 (requiring state legislative supermajorities in order to increase state taxes); *id.* art. XIIID (making voter approval a requirement for all tax increases); DEL. CONST. art. VIII, §§ 10, 11 (requiring legislative supermajorities for imposing or increasing a tax or a fee); MICH. CONST. art. IX, § 25 (requiring voter approval as condition for new or increased state or local taxes); MO. CONST. art. X, §§ 18, 22 (setting tax limits and conditioning new or increased taxes and fees on voter approval); S.D. CONST. art. XI, §§ 13, 14 (requiring either legislative supermajority or voter approval in order to increase state taxes or the property tax).

105. *See* VALENTE ET AL., *supra* note 93, at 489.

106. *See* ARIZ. CONST. art. IX, § 18; CAL. CONST. art. XIIIA, § 2; FLA. CONST. art. VII, § 9; LA. CONST. art. VI, § 6; MO. CONST. art. X, § 11; NEB. CONST. art. VIII, § 5; NEV. CONST. art. X, § 2; N.Y. CONST. art. VIII, § 10; OHIO CONST. art. XII, § 2; WASH. CONST. art. VII, § 2; W. VA. CONST. art. X, § 1; WYO. CONST. art. XV, §§ 5-7.

107. *See* ARIZ. CONST. art. IX, § 19; CAL. CONST. art. XIIIA, § 2; FLA. CONST. art. VII, § 4; LA. CONST. art. VI, § 3; MICH. CONST. art. IX, § 3; OKLA. CONST. art. IX, § 8B; OR. CONST. art. XI, § 11(1)(b).

fund them;[108] and requirements that new or increased taxes be subject to either a legislative supermajority or voter approval (sometimes with popular supermajorities).[109]

1. Proposition 13 and Its Aftermath

The earliest tax limitations appeared in state statutes during the 1870s and 1880s and were later incorporated in many state constitutions.[110] These statutes capped property tax rates at a fraction of property values. A "second round of constitutional tax limitations appeared during the Depression of the 1930s. They were aimed at forcing tax reductions, thereby stemming the tide of tax delinquencies and tax foreclosures of residential property."[111] But the most important event in the development of tax limitations – the "constitutional moment" for tax limitation comparable to the Panic of 1837 and its aftermath for public purpose and debt limitations – was in June 1978 when California adopted Proposition 13.[112]

Proposition 13 was a response to soaring property taxes in California, a surge attributable to housing price inflation, which was "translated automatically into higher assessed valuations."[113] When local governments failed to lower property tax rates and the state legislature failed to provide tax relief, Howard Jarvis, "a longtime opponent of government spending and ardent champion of lower taxes, organized a campaign" to get a tax relief constitutional amendment on the ballot and enacted by the voters.[114]

Although it built on popular concern about the property tax, Proposition 13's reach swept well beyond that tax. Its initial provision was a relatively

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108. *See* ARIZ. CONST. art. IX, § 17; CAL. CONST. XIIIB, § 1; COLO. CONST. art. X, § 20; CONN. CONST. art. III, § 18; FLA. CONST. VII, § 1; HAW. CONST. art. VII, § 9; LA. CONST. art. VII, § 10; MICH. CONST. art. IX, § 26; MO. CONST. art. X, §§ 18, 20; S.C. CONST. art. X, § 7.

109. *See* ARIZ. CONST. art. IX, § 22; CAL. CONST. arts. XIIIA, XIIIC, XIIID; COLO. CONST. art. X, § 20; DEL. CONST. art. VIII, §§ 6, 10, 11; GA. CONST. art. VIII, § 6, ¶ II; HAW. CONST. art. VII, § 9; LA. CONST. art. VI, § 25; *id.* art. VII, § 2; MICH. CONST. art. IX, § 25; MO. CONST. art. X, §§ 18, 22; S.C. CONST. art. X, § 7.

110. M. DAVID GELFAND ET AL., STATE AND LOCAL TAXATION AND FINANCE IN A NUTSHELL 38 (2d ed. 2000).

111. *Id.*

112. CAL. CONST. art. XIIIA; *see* Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191, 192 (2001) ("Proposition 13 marked a watershed moment in the evolution of American attitudes toward government and taxation.")

113. Stark, *supra* note 112, at 197.

114. *Id.* at 198.

traditional cap on the property tax rate as a percentage of property value;[115] other provisions broke new constitutional ground. Section 2 rolled back property assessments,[116] but more significantly, limited future reassessments, except upon change in ownership, to the lesser of 2% per year or the rate of inflation.[117] This measure, which has been emulated by six other state constitutions,[118] secures property owners against inflation, while producing significantly different tax liabilities for owners of identically valued parcels, depending on when they were purchased.[119] Section 3 went beyond the property tax by requiring that any increase in any state tax must first be adopted by a two-thirds vote in each house of the legislature.[120] Section 4 provided that a city, county, or special district may impose a "special tax" in addition to the now-restricted property tax only with the approval of two-thirds of local voters.[121]

Proposition 13 had a catalytic effect, sparking tax revolts and anti-tax constitutional amendments around the country.[122] Some of these focused on the property tax, while others, like Proposition 13 itself, were far more ambitious.

Just a few months after California acted, Michigan voters adopted an amendment which conditioned local tax increases on voter approval, imposed legislative supermajority requirements for increases in state taxes, and limited future increases in state revenues.[123] The measure required that a state revenue limit be

> equal to the product of the ratio of Total State Revenues in fiscal year 1978-79 divided by the Personal Income of Michigan in calendar year 1977

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115. CAL. CONST. art. XIIIA, § 1.

116. *Id.* § 2.

117. *Id.*

118. *See supra* note 107 and accompanying text.

119. Proposition 13's imposition of "acquisition value" assessment and the resulting disparities in the tax treatment of comparably valued properties has been sustained against arguments that it violates the Federal Equal Protection Clause. *See* Nordlinger v. Hahn, 505 U.S. 1, 10-18 (1992); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1292-94 (Cal. 1978).

120. CAL. CONST. art. XIIIA, § 3.

121. *Id.* § 4.

122. Over the next dozen years, fourteen states imposed limitations on the growth of state taxes and expenditures, and twenty-three imposed limits on local property tax revenue growth, including ten that adopted new or more restrictive tax rate limits. *See* Mark Skidmore, *Tax and Expenditure Limitations and the Fiscal Relationships Between State and Local Governments*, 99 PUB. CHOICE 77, 83, 88 (1999).

123. MICH. CONST. art. IX, §§ 25-32.

> multiplied by the Personal Income of Michigan in either the prior calendar year or the average of Personal Income of Michigan in the previous three calendar years, whichever is greater.[124]

The amendment prohibited the state legislature from imposing "taxes of any kind which, together with all other revenues of the state, federal aid excluded, exceed the revenue limit."[125] This limit can be exceeded only if the governor's declaration of emergency is confirmed by the vote of two-thirds of each house of the legislature.[126] Missouri quickly followed suit with its Hancock Amendment, which imposed a similar set of restrictions on Missouri's state and local governments.[127] In 1979, California voters adopted a second initiative, which followed Headlee and Hancock by imposing limits on the growth of state spending.[128]

In the years that followed, at least eight additional states – Alaska,[129] Arizona,[130] Connecticut,[131] Delaware,[132] Florida,[133] Hawai'i,[134] Louisiana,[135] and South Carolina[136] – adopted constitutional measures that impose, or require the state legislature to impose, state revenue or expenditure limitations based on the growth in state population, the cost of living, or some combination of these measures relative to a baseline year, and also require legislative supermajorities before the legislature can alter or

124. *Id.* § 26.

125. In any fiscal year in which total state revenues exceed the revenue limit by 1% or more, the constitution requires:

> [T]he excess revenues shall be refunded pro rata based on the liability reported on the Michigan income tax and single business tax (or its successor tax or taxes) annual returns filed following the close of such fiscal year. If the excess is less than 1%, this excess may be transferred to the State Budget Stabilization Fund.

Id.

126. *Id.* § 27.

127. MO. CONST. art. X, §§ 16-22.

128. CAL. CONST. art. XIIIB.

129. ALASKA CONST. art. IX, § 16 (limiting increases in state appropriations according to population growth and the rate of inflation, using 1981 as a baseline year).

130. ARIZ. CONST. art. IX, § 17 (providing for state spending limit, which may be exceeded only by two-thirds vote in each house).

131. CONN. CONST. art. III, § 18 (limiting increases in state spending).

132. DEL. CONST. art. VIII, § 6 (requiring legislative supermajority for increase in state expenditure level).

133. FLA. CONST. art. VII, § 1 (limiting increase in state revenue).

134. HAW. CONST. art. VII, § 9 (providing for limit on increases in state expenditures).

135. LA. CONST. art. VII, § 10 (setting state spending limit).

136. S.C. CONST. art. X, § 7 (requiring legislature to limit growth in state spending; limit can be changed only be two-thirds legislative vote).

exceed these limits.[137] Similarly, a number of states have followed California, Michigan, and Missouri in making voter approval a prerequisite for new or increased local taxes.[138]

2. Tax Limitations and the Rise of Non-Tax Revenues

Modern tax and expenditure limitations appear to have had a real impact on state and local finances. Property tax levels, as well as the role of the property tax in financing local government, have dropped sharply across the United States, particularly in the states that adopted the most stringent property tax limitations.[139] The effects of the comprehensive state revenue or expenditure limitations on state government are more uncertain, however, with some researchers finding they have had little effect,[140] while others conclude that they have slowed government revenue growth.[141]

The effect of the tax limits in holding down the property tax, however, have been offset to some degree by increases in other local taxes and, especially, by the dramatic growth in the local use of fees, user charges, and special assessments.[142] The rise in these "non-tax taxes" has had multiple policy, ideological, and political causes – but surely evasion of the tax limits is one of them.

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137. *See supra* notes 129-36.

138. *See* COLO. CONST. art. X, § 20; WASH. CONST. art. VII, § 2 (noting that ad valorem taxation of property at a rate greater than 1% of full cash value requires approval by a supermajority of voters); *see also* Stark, *supra* note 112, at 203-06 (discussing efforts to add voter approval requirements in Montana, Washington, Arizona, Oregon, and Florida). The Louisiana Constitution requires both houses of its legislature to approve new or increased local taxes before they can take effect. LA. CONST. art. VII, § 2.

139. *See* Terri A. Sexton et al., *Proposition 13: Unintended Effects and Feasible Reforms*, 52 NAT'L TAX J. 99, 107 (1999) (finding that in California, the share of county revenue from the property tax dropped from 33.2% in 1977-78 to 11.6% in 1995-96).

140. *See, e.g.*, Ronald J. Shadbegian, *Do Tax and Expenditure Limitations Affect the Size and Growth of State Government?*, 14 CONTEMP. ECON. POL'Y 22 (1996) (finding that tax and expenditure limitations are little more than "political cover for state legislatures").

141. *See* Skidmore, *supra* note 122, at 95.

142. *See* Gary M. Galles & Robert L. Sexton, *A Tale of Two Tax Jurisdictions: The Surprising Effects of California's Proposition 13 and Massachusetts' Proposition 2 ½*, 57 AM. J. ECON. & SOC. 123 (1998) (finding that local governments made up lost property tax revenues through increased non-tax fees and charges); Sexton et al., *supra* note 139, at 107 (noting that in California cities, the percentage of current revenue from service charges rose from 25% in 1997-78 to 41% in 1995-96). In 1992, fees and charges accounted for 14.6% of total local revenues and 23% of local own-source revenues. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 112-13 (1994).

There are many reasons, apart from the proliferation of tax limitations, for the increased utilization of special assessments, fees, and charges. Fees can promote efficiency by requiring the user of a municipal service to internalize the costs of her use. So, too, it can be argued that it is more equitable for the principal beneficiaries of a public service or neighborhood improvement to pay for it through a special assessment or fee than to have the community as a whole finance it through the property tax. User charges, which are earmarked for funding the service for which the charge is imposed, may provide a more certain source of revenue than general taxation. The rise of a particular fee – the development impact fee – reflects a new ambivalence about growth and the desire to make newcomers to a community pay for the additional services and infrastructure that their presence necessitates.[143] The move from broad-based taxes to special charges is clearly tied to a more general turn against redistributive taxation and a growing preference to link taxes paid to services received.[144] More generally, with "no new taxes" the dominant mantra of contemporary public finance, it is not surprising that state and local politicians prefer to raise revenue through means other than broad-based taxes.

Yet the explosion in special taxes, fees, charges, and assessments at the state and local level in recent decades is due at least in part to the desire to evade the legal constraints on taxation resulting from Proposition 13 and its aftermath. Where the property tax is tightly limited, other taxes and non-tax revenue sources become far more legally and politically appealing. This has been facilitated by judicial decisions narrowing the scope of constitutional restrictions. For example, shortly after Proposition 13's adoption, the California Supreme Court undermined the amendment's restriction on local revenue sources other than the property tax.[145] Section 4 of the amendment provides that a city, county, or "special district" may impose or increase a "special tax" only with the approval of two-thirds of local voters.[146] One reading of this provision might be that it conditions all local taxes other than the property tax, which is restricted by the amendment's other provisions, on local voter approval. But the court concluded that "special tax" refers only to

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143. *See* VALENTE ET AL., *supra* note 93, at 596-616; *see generally* ALAN A. ALSCHULER & JOSE GOMEZ-IBANEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 77-96 (1993).

144. For a description and sharp criticism of this trend, see Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. (forthcoming 2004).

145. City & County of San Francisco v. Farrell, 648 P.2d 935 (Cal. 1982).

146. CAL. CONST. art. XIIIA, § 4.

taxes whose proceeds are specially earmarked for a specific program.[147] Taxes that produce revenue for the local general fund were deemed not "special" and therefore not subject to restriction.[148] Similarly, while the voters might have thought that "special district" was an omnibus term for the many types of local governments other than cities and counties, the California court held that the term applies only to local governments with the power to impose the property tax.[149] As a result, local governments without power to impose a property tax could adopt other new local taxes without obtaining supermajority approval from local voters.[150]

More generally, state courts have exempted a host of special assessments, fees, and charges from tax limitations. These decisions grow out of, but often expand, the longstanding judicial determination that fees, charges, and assessments are not taxes because they lack the hallmarks of taxation – coercion and potential for retribution. Special assessments are charges to property to finance new public infrastructure directly adjacent or connecting to the payer's property, such as street or sidewalk paving, electric lighting, or connections to water and sewer lines. Special assessments are coercive; the payer must pay and receive the benefit whether she wants to or not, but they are not redistributive as the payer must be provided with a benefit worth at least as much as the assessment paid. Consequently, a special assessment is considered not to be a tax.[151] User charges are not coercive because the obligation to pay the charge is incurred only when someone chooses to use the service subject to the charge. Similarly, for a regulatory fee intended to offset the cost of regulating a fee payer whose activity imposes some costs on the community, the fee is nominally voluntary since the duty to pay arises from the payer's decision to undertake the activity subject to regulation. By not consuming the service or avoiding the activity, the payer could avoid the charge or fee. So, too, by reducing the amount of service consumed or the amount of activity subject to regulation,

147. *Farrell*, 648 P.2d at 940.

148. *Id.*

149. *Id.* at 937.

150. L.A. County Transp. Comm'n v. Richmond, 643 P.2d 941, 947 (Cal. 1982). *But see* Rider v. County of San Diego, 820 P.2d 1000, 1002-09 (Cal. 1991) (questioning *Richmond* and narrowing the scope of the *Richmond* exemption).

151. *See, e.g.*, McNally v. Township of Teaneck, 379 A.2d 446, 451 (N.J. 1977) (finding a special assessment not a tax subject to certain constitutional requirements because the purpose of the assessment was to reimburse the municipality for its expenditure); Lakewood Park Cemetery Ass'n v. Metro. St. Louis Sewer Dist., 530 S.W.2d 240, 245-46 (Mo. 1975) (finding that charitable property constitutionally exempt from taxation may be required to pay a special assessment).

the payer can reduce her liability.[152] Lacking the coerciveness that is the hallmark of a tax, user charges and regulatory fees have traditionally been treated as not subject to many of the rules applicable to taxes.

State courts have not only regularly applied the non-tax treatment of special assessments, fees, and charges to the new state tax limitations,[153] they have also frequently accepted state and local government efforts to widen the scope of what may be accomplished by these non-tax taxes. With the acquiescence of state courts, special assessments have been expanded to finance a broad array of programs and services that provide diffuse benefits to relatively large neighborhoods, not just the properties adjacent or connected to new infrastructure.[154] This has often involved exemption from a tax limitation.[155] Similarly, some state courts have validated regulatory fees even when a particular firm's fee is not a result of the costs attributable to that firm – thereby reducing the ability of the firm to use changes in its behavior to control its fee liability and thus undermining the voluntary nature of the fee.[156] This has permitted governments to avoid the special

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152. Fees and charges are arguably non-redistributive as well. Since the determination of whether or not to pay, or how much to pay, is up to the payer, it can be assumed that she will pay only if the benefit to her from the service or the permit or license to engage in the regulated activity is greater than the fee charged.

153. *See* Knox v. City of Orland, 841 P.2d 144, 152 (Cal. 1992) (holding that Proposition 13 does not apply to special assessments); Russ Bldg. Partnership v. City & County of San Francisco, 234 Cal. Rptr. 1 (Ct. App. 1987) (holding transit development impact fee not subject to Proposition 13); Trent Meredith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685, 687-91 (Ct. App. 1981) (finding that Proposition 13 does not apply to fee for issuance of a building permit); Mills v. County of Trinity, 166 Cal. Rptr. 674, 675-78 (Ct. App. 1980) (holding that Proposition 13 does not apply to fees for processing subdivision, zoning, and land use applications); Zahner v. City of Perryville, 813 S.W.2d 855, 857-60 (Mo. 1991) (finding that Hancock Amendment does not apply to special assessments); City of Huntington v. Bacon, 473 S.E.2d 743, 751-54 (W. Va. 1996) (fire protection and flood control fees exempt from tax limitation amendment).

154. *See Knox*, 841 P.2d at 151 (allowing special assessment for parks); City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992); 2d Roc-Jersey Assocs. v. Town of Morristown, 731 A.2d 1 (N.J. 1999) (allowing assessment for business improvement district).

155. *See Knox*, 841 P.2d at 151; Evans v. City of San Jose, 4 Cal. Rptr. 2d 601 (Ct. App. 1992).

156. *See* Sinclair Paint Co. v. State Bd. of Equalization, 937 P.2d 1350 (Cal. 1997); Cal. Ass'n of Prof'l Scientists v. Dep't of Fish & Game, 94 Cal. Rptr. 2d 535 (Ct. App. 2000) (holding that regulatory fee is not subject to legislative supermajority requirement even when individual's payment is not tied to the costs of regulating that individual, so long as total fees collected do not surpass the costs of regulatory programs they support); Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd., 656 N.E.2d 563 (Mass. 1995).

voting rules required by tax limitation amendments.[157] Other courts have permitted localities to charge landowners "fees" for traditional municipal services, such as fire protection and flood control.[158] Combining the assessment and fee concepts, many state courts have upheld development impact fees, which require developers to pay in advance for a host of municipal services and improvements, including new roads, new schools, and expansions of water supply and sewage systems, required by the population growth attributable to their developments. These charges pay for traditional municipal services, are based on property values, and may be passed along to new homebuyers. But when treated as assessments or fees, they are not subject to state constitutional constraints on taxation.[159]

To be sure, some courts police the fee/tax line more closely and require that to avoid treatment as a tax, a fee must be truly voluntary and calibrated according to the payer's use or the cost the payer imposes.[160] Indeed, in a recent case, the Michigan Supreme Court, expressed its concern that "the imposition of mandatory 'user fees' by local units of government has been characterized as one of the most frequent abridgements 'of the spirit, if not the letter,'" of that state's anti-tax amendment.[161] As a result, the Michigan court indicated it would take a more narrow, traditional approach to the determination of what is a service charge lest "municipalities supplement existing revenues by redefining various government activities as 'services' and enacting a myriad of 'fees' for those services."[162]

Moreover, some state constitutions have sought to deal with the proliferation of assessments, fees, and charges by regulating these as well. Missouri's Hancock Amendment subjects increases in fees and licenses as

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157. *See Sinclair Paint Co.*, 937 P.2d at 1352-53.

158. *See* City of Huntington v. Bacon, 473 S.E.2d 743 (W. Va. 1996) (sustaining a municipal fee imposed on all building owners to cover costs of fire and flood protection services); *see also* St. Johns County v. N.E. Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (sustaining development impact fee to finance school construction). ***But see*** Covel v. City of Seattle, 905 P.2d 324 (Wash. 1995) (rejecting "residential street utility charge" for maintaining, repairing, and improving city streets).

159. *See* Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997); *N.E. Fla. Builders Ass'n*, 583 So. 2d at 640-41; Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990).

160. *See* Emerson Coll. v. City of Boston, 462 N.E.2d 1098 (Mass. 1984); Bolt v. City of Lansing, 587 N.W.2d 264 (Mich. 1998).

161. *Bolt*, 587 N.W.2d at 273.

162. *Id.* at 272.

well as local taxes to voter approval.[163] Similarly, in response to the California Supreme Court's exemption of many special taxes, special assessments, fees and charges from Proposition 13, California voters in 1996 adopted Proposition 218, which extended the voter approval requirement to nearly all revenue-raising devices and narrowed the definition of the special assessments exempt from tax limitations.[164]

Yet, even these provisions have been trimmed by courts. The Missouri Supreme Court determined that, despite the broad reach of the Hancock Amendment's text, not all fees are actually subject to the constitution's voter approval requirement.[165] Instead, the court adopted a complicated five-part test for determining which fees are "tax-fees" subject to the Amendment and which are true user fees and, thus, exempt from constitutional restriction.[166] Missouri's courts have since divided over whether a range of license fees and user charges are restricted quasi-taxes or protected fees.[167] The application of Proposition 218's restrictions has also been uneven; although a host of local fees are now subject to the requirement of local voter approval,[168] the California courts have found that many local fees and assessments remain beyond the scope of the new constitutional limitation.[169]

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163. MO. CONST. art. X, § 22(a).

164. CAL. CONST. art. XIIIC; *id.* art. XIIID.

165. Keller v. Marion County Ambulance Dist., 820 S.W.2d 301, 304-05 n.10 (Mo. 1991).

166. *Id.* at 304.

167. *Compare* Beatty v. Metro. St. Louis Sewer Dist., 867 S.W.2d 217 (Mo. 1993) (holding sewer charge subject to Hancock Amendment's voter approval requirement), *and* Avanti Petroleum, Inc. v. St. Louis Co., 974 S.W.2d 506 (Mo. Ct. App. 1998) (holding that retail tobacco vendor's license fee was subject to voter approval requirement), *with* Ashworth v. City of Moberly, 53 S.W.2d 564 (Mo. Ct. App. 2001) (holding that permit and inspection fee needed to obtain a rental permit is not subject to voter approval requirement), *and* Mo. Growth Ass'n v. Metro. St. Louis Sewer Dist., 941 S.W.2d 615 (Mo. Ct. App. 1997) (holding sewer charge not subject to voter approval requirement).

168. *See* Howard Jarvis Taxpayers Ass'n v. City of Salinas, 121 Cal. Rptr. 2d 228 (Ct. App. 2002) (subjecting storm drainage fee to voter approval); Howard Jarvis Taxpayers Ass'n v. City of Roseville, 119 Cal. Rptr. 2d 91 (Ct. App. 2002) (subjecting in-lieu franchise fee for municipal water, sewer, and refuse collection services).

169. *See* Apartment Ass'n of L.A. County, Inc. v. City of Los Angeles, 14 P.3d 930 (Cal. 2001) (finding apartment inspection fee imposed on private landowners to be outside Proposition 218); Howard Jarvis Taxpayers Ass'n v. City of Riverside, 86 Cal. Rptr. 2d 592 (Ct. App. 1999) (finding assessments for street lighting not subject to Proposition 218); Howard Jarvis Taxpayers Ass'n v. City of San Diego, 84 Cal. Rptr. 2d 592 (Ct. App. 1999) (holding business improvement district assessment not subject to Proposition 218).

3. Consequences of Limitation and Evasion

State judicial treatment of constitutional tax limitations defies easy characterization. Certainly the tax limits seem to have had far more bite than the public purpose requirements or the debt limits. Nevertheless, it appears that much as the debt limitations stimulated the proliferation of new forms of public borrowing that avoid the constitutional "debt" label, the tax limitations have also spawned a host of revenue-raising devices that avoid the constitutional "tax" label. As with debt, a significant share of state and local revenue is now raised by devices not subject to tax limits. However, unlike debt, most state and local revenue is still raised by constitutional taxes.

As with debt, the shift to alternate methods of raising revenue has had consequences other than circumventing tax limitations. With many local tax limitations targeting specific categories of local government, such as cities and counties, states and localities have an incentive to create special districts and other new forms of local governments not expressly subject to constitutional limitation.[170] These entities may be given some revenue-raising authority, yet so long as they cannot levy the property tax they may be deemed to be exempt from constitutional restrictions. So, too, the imposition of assessments or fees has often been accompanied by the creation of a special purpose government - such as a municipal utility district or a business improvement district - which collects and spends the assessment or fee revenue. The creation of a separate, limited purpose government providing a particular service to the payers will bolster the argument that the charge in question is an assessment or fee and not a tax. Thus, the tax limits can add to the complex nature of local governance and may ultimately make local government less accountable to local residents - probably not the outcome that proponents of tax limitation were seeking.[171]

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170. *See, e.g.*, L.A. Co. Transp. Comm. v. Richmond, 643 P.2d 941 (Cal. 1982); *see also* KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL PURPOSE GOVERNMENT 17-18 (1997) (finding that older tax limitations were a "significant motivation for formation of municipally coterminous" special districts); John J. Kirlin, *The Impact of Fiscal Limits on Governance*, 25 HASTINGS CONST. L.Q. 197, 206-08 (1998) (noting that local adaptations to Proposition 13 have included the creation of new governmental entities that contribute to governmental fragmentation and reduce the popular visibility of government). ***But cf.*** Rider v. County of San Diego, 820 P.2d 1000 (Cal. 1991) (holding agency created in order to circumvent Proposition 13's limits was a "special district" within the meaning of Proposition 13).

171. There are two other consequences that flow from local government tax limits. Local tax limits cause a shift in political power from local governments to the states. *See*

The turn to non-tax revenue sources also tends to reduce the ability of states and local governments to engage in redistributive programs. The key to the exemption of fees, charges, and special assessments from the label of "tax" is that they provide the payers with a benefit at least equal to their payments (or to the social costs imposed by the payer's behavior). By definition, this precludes the use of fees and assessments to finance broadly redistributive activities. Assessments and fees enable those willing and able to pay for higher levels of service for themselves to do so, but services for the poor must be funded out of general, redistributive taxation, and those taxes are more likely to be subject to constitutional restrictions. This, however, may well be consistent with the goals of those who favor tax limitation.

V. EXPLAINING THE DISFAVORED CONSTITUTION

Why have so many state courts given state fiscal limits, particularly the public purpose requirements and the debt restrictions, a crabbed and unsympathetic interpretation, tied to a narrow reading of the specific text rather than a broader approach building on the constitutional spirit of limitation and control? It is difficult to say. The judges in these cases rarely explain their motives or even acknowledge that they are engaged in narrowing interpretations. Still, several interrelated factors appear to play a significant role.

First, courts tend to treat fiscal limits not as issues of fundamental rights – like speech, religion, or privacy – or as matters fundamental to government structure – like separation of powers, bicameralism, or federalism – but rather as ordinary legislation. As the California Supreme Court observed in a case narrowing the scope of Proposition 13's requirement that new local "special taxes" receive the approval of two-thirds of local voters, "[w]e are not here concerned with a measure that affects those fundamental rights of individuals which might be endangered in the hands of a majority."[172] Decisions concerning how the state will raise or spend money, whether to

Skidmore, *supra* note 122, at 95-98; Alvin D. Sokolow, *The Changing Property Tax and State-Local Relations*, 28 PUBLIUS J. FED. 165 (1998). Moreover, local tax limits provide incentives to local governments to promote and compete for commercial development. *See* Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 SO. CAL. L. REV. 183 (1997) (labeling such incentives as the "fiscalization of municipal land use decisions").

172. *Richmond*, 643 P.2d at 945; *see also* City & County of San Francisco v. Farrell, 648 P.2d 935, 938 (Cal. 1982) (stating that "the two-thirds vote requirement in section 4 [of Proposition 13] is inherently undemocratic").

invest in projects that aid the private sector, to authorize an arcane appropriation-clause debt deal, or to impose a "broad-based tax on consumers"[173] to pay for local public services are seen as matters of policy and politics, not matters of rights and law, and therefore, as "best resolved by the people's elected representatives in the Legislature"[174] rather than by the courts.[175]

As the Oklahoma Supreme Court observed in a 1999 decision validating a subject-to-appropriation debt arrangement, "[r]espect for the integrity of the tripartite scheme for distribution of governmental powers commands that the judiciary abstain from intrusion into legislative policymaking [because] the legislature has the right and responsibility to declare Oklahoma's fiscal policy. . . ."[176] Similarly, the Kentucky Supreme Court, in a 1994 case authorizing the use of a public authority as a conduit for the issuance of debt for the state's transportation program, found that "there is a special deference to the legislature in regard to matters of fiscal policy and taxation."[177]

Indeed, the debt provisions are often treated as little more than technical shoals to be navigated by clever lawyering rather than as embodiments of substantively valuable principles. As the New Jersey Supreme Court observed in *New Jersey Sports & Exposition Authority v. McCrane*,[178] "the modern science of government has found a method of avoiding [the debt] clause, and the courts have approved it."[179] Conduit financing through an independent public authority is "the constitutionally acceptable device of modern day progressive government" and may be used for "the expeditious accomplishment of public purpose projects."[180] More recently, in affirming the constitutionality of "subject-to-appropriation" debt, the court implicitly praised the "sophisticated means now used to finance"[181] state and local

173. *Richmond*, 643 P.2d at 945.

174. CLEAN v. State, 928 P.2d 1054, 1061 (Wash. 1996).

175. *Id.* ("[P]ublic purpose is not a static concept. Rather, it is a concept that must necessarily evolve and change to meet changing public attitudes . . . . The Legislature with its staff and committees is the branch of government better suited to monitor and assess contemporary attitudes than are the courts."); *see also id.* at 1068 ("Of the three branches of government, the Legislature is best able to consider what measures promote the general welfare.").

176. Fent v. Okla. Capitol Improvement Auth., 984 P.2d 200, 204 (Okla. 1999).

177. Wilson v. Ky. Transp. Cabinet, 884 S.W.2d 641, 646 (Ky. 1994).

178. 292 A.2d 545 (N.J. 1972).

179. *Id.* at 557.

180. *Id.* at 559.

181. *Lonegan II*, 819 A.2d 395, 403 (N.J. 2003).

activities. Noting the important role that debt avoidance has come to play in state finance, the court stressed the "need to maintain stability in respect of the variety of financial instruments authorized by the Legislature."[182]

Contemporary judicial approaches to the public purpose and debt limitation provisions may have been influenced by the United States Supreme Court's post-New Deal jurisprudence treating economic and social issues as political matters for legislative determination, rather than as constitutional issues for the courts. But the Federal Constitution is largely silent on fiscal questions, whereas state constitutions have a long history of regulating state and local finance. By treating public finance as largely political, with little role for the courts, state judges have caused state constitutional law in this area to resemble federal constitutional law despite the significant differences between the state and federal constitutional texts.

Second, the state courts often appear quite sympathetic to the goals of the programs that would be curbed by the fiscal limits. State judges, most of whom are elected,[183] appear to share with state governors and legislators a belief in the legitimacy of the modern activist state and the many projects – roads, dams, schools, power plants, convention centers, stadiums, and aid to targeted industries and firms – that contemporary state and local governments undertake. As the New Jersey Supreme Court asserted in a case dealing with the financing of a sports complex in that state's Meadowlands area, "under our democratic form of government public projects are not confined to the barebones of political life."[184] This may be another aspect of the acceptance of the expanded post-New Deal public sector, not only at the federal level, but at the state and local levels as well. The political branches have assumed a responsibility for promoting jobs and growth – it is, after all, "the economy, stupid," that makes and unmakes governments – and the courts appear to agree that politicians are right, or at least reasonable, in doing so.[185] Virtually all public spending programs can be defined as

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182. *Id.* at 397.

183. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-26 (1995) (noting that in thirty-eight states, most or all judges are elected).

184. *McCrane*, 292 A.2d at 552.

185. *See* Delogu v. State, 720 A.2d 1153, 1155 (Me. 1998) (noting that "employment is one of the government's principal concerns . . . indirect economic benefits, such as job creation and retention, may qualify as valid public purposes"); WDW Props., Inc. v. City of Sumter, 535 S.E.2d 631, 635-36 (S.C. 2000) (finding that "economic welfare is one of the main concerns of the city, state, and the federal government"); Libertarian Party of Wis. v. State, 546 N.W.2d 424, 434 (Wis. 1996) (stating that economic development, tourism, and reducing unemployment are "clearly public purposes").

promoting economic growth, as in some Keynesian sense they all do. Consequently, public purpose requirements impose little constraint on government action.

By the same token, as the notion of public purpose has grown, the definition of debt has narrowed. Some courts acknowledge that they treat debt limitations as disfavored provisions, to be gotten around if at all possible. As the Nevada Supreme Court recently observed, "the public interest is likely promoted" if an agreement that could be treated as either debt or not debt is held not to be debt. Modern financing arrangements, the court noted, provide government agencies with the "flexibility" they need.[186] Similarly, both the New Jersey and Wisconsin Supreme Courts, in almost identical language, have made the point that "it is never an illegal evasion of a constitutional provision or prohibition to accomplish a desired result, which is lawful in itself, by discovering or following a legal way to do it."[187] In other words, lease-purchase financing, appropriation clause financing, or moral obligation debt are not so much gimmicks challenging a desirable constitutional norm of limited government as legitimate measures enabling states and local governments to fund needed projects. In the absence of an outright conflict between a financing instrument and the constitutional text, "the debt clause of the Constitution must be construed . . . to the end that public progress and development will not be stifled and that public problems with their ever increasing complexity may be met and solved."[188] The New Jersey Supreme Court put it most candidly when it proclaimed a position of "broad tolerance to permit public financing devices of needed facilities not constituting on their face present, interest-bearing obligations of the State itself."[189]

State courts are at times critical of these evasions of the state constitutional text. But their perception that these are matters of ordinary politics, not constitutional principle, makes them reluctant to strike down a creative financing scheme. As Chief Judge Judith Kaye of the New York Court of Appeals observed: "Modern ingenuity, even gimmickry" may have

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186. Employers Ins. Co. of Nev. v. State Bd. of Exam'rs, 21 P.3d 628, 633 (Nev. 2001).

187. *See McCrane*, 292 A.2d at 557 (quoting Clayton v. Kervick, 244 A.2d 281, 288 (N.J. 1968)); Dieck v. Unified Sch. Dist. of Antigo, 477 N.W.2d 613, 619-20 (Wis. 1991); *see also In re* Okla. Improvement Auth., 958 P.2d 759, 763 (Okla. 1998) (holding that "[i]t is not unconstitutional to accomplish a desired result, lawful in itself, by innovative legal measures").

188. *McCrane*, 292 A.2d at 559-60.

189. Bulman v. McCrane, 312 A.2d 857, 861 (N.J. 1973).

"stretched the words of the [New York] Constitution beyond the point of prudence . . . ."[190] But fiscal imprudence is not a matter for the courts. According to Chief Judge Kaye, "that plea for reform in state borrowing practices and policy is appropriately directed to the public arena."[191]

Third – and this may help explain some of the difference in treatment between the public purpose requirements and debt limits on the one hand and the tax limits on the other – is the question of whether government measures that evade these restrictions are seen as imposing any burdens or creating any harms. In public purpose and debt cases, individual taxpayers often do not appear before the court and are effectively invisible. Even when they do appear, the connection between a particular spending or borrowing program and any particular taxpayer is highly attenuated. As a result, in public purpose cases, new types of government programs do not seem to have any negative effects on individuals at all, while the only individuals affected by innovative schemes are those who buy government bonds. So long as the financial instruments plainly disclaim the commitment of the state's full faith and credit or any state obligation to pay, they give notice to the bond buyer that they are not "debt," and the bond buyers' interests are thereby protected. The potential impact on current or future taxpayers is either not seen or not treated as significant.

By contrast, in cases involving tax limitations, plaintiffs are frequently the individuals or firms subject to tax, or associations of taxpayers, who can make a convincing claim that they are directly and negatively affected by the asserted tax. Moreover, although courts have expanded the category of non-tax revenue-raising devices, there will still be some payers who can argue that a particular fee, charge or assessment is sufficiently redistributive or coercive that it ought to be treated as a tax. It may, thus, be easier to see that these measures are taxes in tension with constitutional constraints on taxation and that these measures infringe the very interests that the constitutional measures were intended to protect. Still, although courts have trimmed tax limitations at the margins – at times reflecting an awareness that tax limitations affect the ability of governments to fund their programs[192] – the central provisions of such limitations have been enforced.

Finally, and this too may explain some of the difference in treatment between public purpose and debt restrictions on the one hand and the tax and expenditure limitations on the other, courts may be influenced by the degree

190. Schulz v. State, 639 N.E.2d 1140, 1150 (N.Y. 1994).

191. *Id.*

192. *See, e.g.*, City & County of San Francisco v. Farrell, 648 P.2d 935, 938 (Cal. 1982); Guinn v. Legislature of Nev., 71 P.3d 1269 (Nev. 2003).

to which the provisions reflect current political values and enjoy contemporary political support. The public purpose and debt limits tend to be quite old, typically dating back to the mid-nineteenth century, or, for the younger states, to their admission to the Union. There is little evidence that they enjoy much active current support. Broad trends in government lasting more than a half-century have included both expansions of the scope of public responsibilities and an increase in public-private partnerships. These developments are at odds with the limited definition of public purpose and the desire for the sharp separation of public and private that animated the mid-nineteenth century public purpose requirements. Moreover, there has been an enormous growth in government borrowing and debt-financed public investment.

By contrast, many tax and expenditure limitations, including all the more restrictive ones, were adopted relatively recently. Many are the products of grass-roots activism and were enacted by voter initiative. There are anti-tax and taxpayer rights organizations committed to their defense. In at least one instance – California's Proposition 218 – voters responded to a state supreme court's narrow reading of constitutional tax restrictions by enacting a new measure intended to undo some of the court's actions.[193] Where public purpose requirements and debt limitations appear to be unsupported by, if not at odds with, contemporary politics, tax and expenditure limitations continue to embody the active political current that brought them to life.

VI. OF DEBT AND TAXES: THE PLACE FOR FISCAL LIMITS IN STATE CONSTITUTIONS

What does the history of state fiscal limits, and the current relatively disfavored status of the public purpose requirement and debt limits, tell us about the project of constitutionalizing constraints on state and local finance? Are these desirable provisions which have suffered from mistaken judicial decisions? Or do the court decisions suggest deeper problems with constitutionalizing fiscal limits?

Two initial considerations ought to shape the general question of whether public finance restrictions ought to be in state constitutions. First, does a matter need to be constitutionalized, that is, placed beyond the day-to-day control of the political process and instead entrenched in the

193. *See* CAL. CONST. art. XIIID, § 6(c); Stark, *supra* note 112, at 200-03 (describing Proposition 218 and another ballot initiative, Proposition 62, as responses to California Supreme Court decisions narrowing Proposition 13).

fundamental structure of the states? Second, even if in theory a rule or principle ought to constrain ordinary politics and be protected from politics rather than subject to politics, is constitutionalization an effective means of obtaining that goal?

A. *Public Purpose*

The first consideration suggests that there is something to be said for a public purpose requirement. The fundamental purpose of government, justifying the coercive taxation that enables government to pursue its spending and lending programs, is the promotion of the public good. Public purpose is essential to all government action. Moreover, it would be desirable to adopt a constitutional rule limiting the ability of the states and local governments to dedicate public funds to private ends. State and local spending presents the classic problem of concentrated benefits of the politically influential few at the expense of the broad polity of taxpayers. Special interest groups have the incentive to lobby and the means to reward legislators who provide them with benefits. But the general public is unlikely to be sharply affected by any one interest group giveaway and lacks both the incentive and the means to closely police spending programs. Thus, there is a case for a public purpose limit on government spending.

Yet, for reasons suggested by the second general consideration, the public purpose requirement as a constraint on legislative action is a dead letter today.[194]

While it may be generally agreed that all government spending should promote a public purpose, there is no generally agreed-upon standard for defining the public purpose. The courts have essentially concluded that the meaning of public purpose is to be politically, not judicially, determined, so that the public purpose is defined by the results of the pulling and hauling,

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194. Two specific constitutional limitations on aid to the private sector – the bans on the lending of credit, and the limits on public subscriptions of private stock – have fared better. The ban on the lending of credit makes sense. Lending credit in the sense of suretyship generates the fiscal illusion that it is cost-free. Government officials may persuade themselves that the contingent liability will never come due. Given that there is no initial out-of-pocket cost, voters may have little incentive to police these arrangements either. For that very reason, constitutional restriction is appropriate. On the other hand, the stock subscription ban seems to make little sense. Today, the principal effect of the ban is to preclude the government from taking an equity interest in the firms it is assisting, thus eliminating the possibility that the public might gain directly from its investment. *See, e.g.*, Utah Tech. Fin. Corp. v. Wilkinson, 723 P.2d 406 (Utah 1986). It is difficult to see why it is permissible for the government to give public money away but not to get some of it back.

the conflicts and compromises, and the deliberations and maneuvers that mark the political process.[195] More specifically, state judges have largely deferred to the decisions of governors and legislatures throughout the country that economic development, jobs, and expansion of the tax base are public purposes justifying the gift or loan of public funds. Given the broad public assumption of governmental responsibility for the economy, and given the dependence of state and local governments on the well-being of state and local economies and on the sufficiency of their particular tax bases, the emergence of economic development as the ultimate public purpose is not surprising. It is certainly difficult to see courts – particularly state courts composed of elected state judges – challenging the legislature's declaration of the public importance of economic growth, more jobs, and expanding the tax base.

Even with judicial deference to the legislative definition of economic development as public purpose, courts could in theory play a role in determining whether a particular economic development program actually advances its stated public purpose. With many economic development programs little more than giveaways of tax breaks or low-interest loans to private firms, courts could more strictly scrutinize the fit between the public end and the means chosen, or the balance between the public and private benefits, particularly for measures that provide significant private gains but only speculative public ones. But this would involve difficult empirical questions of assessing the benefits from a program and calculating how likely they are to occur. In many cases a more difficult question would be deciding whether to classify a particular benefit as public or private, or what is the proper balance between public and private benefits. Given that the theory of economic-development-as-public-purpose assumes a public interest in individuals getting jobs or in persuading a business to remain in a jurisdiction, then most benefits of these programs are simultaneously public and private. Requiring a court to disentangle the two may be an impossible job. Moreover, even if the public and private elements can be distinguished, determining how much public benefit is enough to justify a program that also provides significant private benefits is just as problematic. The state courts may well be wise in concluding that such review is beyond their capacity, and that the means for pursuing economic development as well as

195. State judicial treatment of public purpose is, thus, similar to the federal and state judicial treatment of "public use" in eminent domain cases. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

the determination that economic development is a legitimate public end is a political question, not a judicial one.

This is not to deny that many contemporary economic development strategies present serious questions about the diversion of public resources to private ends. Most studies indicate that government financial assistance and tax breaks are relatively minor factors in corporate location decisions.[196] Moreover, corporations have proven adept at playing competing localities against each other in order to extract government payments or tax exemptions.[197] Even when companies do create new jobs in response to a government incentive, the payments may be short-term and the firm may pull up stakes a few years later.[198] In these situations, the public benefits are dubious at best and the opportunities for special interest abuse are clear. Yet, given the difficulties of judicial policing of constitutional limits on economic development programs, a better strategy for protecting the public fisc from economic development programs that unduly benefit private firms might be statutory reforms that provide for better record keeping and public disclosure of the benefits that economic development programs produce, as well as closer legislative and media scrutiny of the asserted benefits of these programs.[199] Contemporary economic development programs raise political issues that require political solutions, not judicial resuscitation of the public purpose doctrine.

B. Debt Limitations

There is also a plausible case for the constitutionalization of debt limitations. Debt promises gains in terms of new facilities or programs that

196. *See* PETER K. EISINGER, THE RISE OF THE ENTREPRENEURIAL STATE: STATE AND LOCAL ECONOMIC DEVELOPMENT POLICY IN THE UNITED STATES 200-24 (1988); Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance*, 32 URB. LAW. 97 (2000).

197. *See, e.g.*, Bryan D. Jones & Lynn W. Bachelor, *Local Policy Discretion and the Corporate Surplus*, *in* URBAN ECONOMIC DEVELOPMENT 223-44 (Richard D. Bingham & John P. Blair eds., 1984)

198. *See* Charter Township of Ypsilanti v. Gen. Motors Corp., 506 N.W.2d 556 (Mich. Ct. App. 1993) (finding a company's receipt of a long-term tax abatement for a new plant does not estop the company from closing the plant during the abatement period); City of Yonkers v. Otis Elevator Corp., 649 F. Supp. 716 (S.D.N.Y. 1986) (dismissing breach of contract and equitable estoppel claims against company that accepted economic development benefits and subsequently closed its plant).

199. *See, e.g.*, Michael LaFave, *Taking Back the Giveaways: Minnesota's Corporate Welfare Legislation and the Search for Accountability*, 80 MINN. L. REV. 1579 (1996).

come on line immediately, with the associated costs deferred into the future. With easy access to debt, current elected officials may be tempted to approve projects that are not cost-justified. They can get the credit for the new project,[200] but the blame for the additional taxes needed to pay off the debt will be borne by their successors. With future debts unlikely to become a present campaign issue, ordinary politics may fail to provide effective checks on the decision to incur debt. Thus, constitutional debt limitations may be justified by the lack of effective political controls over the borrowing decision.

Yet, like public purpose requirements, debt limitations are increasingly ineffective, and courts are complicit in the widespread evasion of constitutional restrictions.[201] Like legislators and governors, state judges seem quite sympathetic to the programmatic spending goals that the debt limits would thwart. In the era of the modern activist state, state judges, like other state elected officials, appear to believe that debt limits are more likely to get in the way of good government than to promote it.

One reason for this lack of judicial sympathy for debt limitation may be the archaic nature of many of the constitutional debt provisions. Many state constitutions either prohibit long-term debt outright, or impose laughably low dollar limits that date back to the nineteenth century. Such provisions, inspire, if they do not justify, evasion. Debt limitations might be more defensible, and might receive more effective judicial enforcement, if they were increased to levels consistent with current capital needs and with the revenue-raising capacities of contemporary state and local governments. Hawai'i's relatively modern debt limit, which caps state debt service to 18.5% of the average of state general fund revenues over the preceding three fiscal years, suggests one possible formulation.[202]

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200. That credit may involve not simply the appreciation of the voters for new facilities and services, but also the special gratitude of campaign donors and interest groups with a specific stake in building and financing facilities, such as construction contractors, construction workers and municipal finance lenders and lawyers.

201. *But see* Sterk & Goldman, *supra* note 13, at 1365. Sterk and Goldman contend that public purpose and debt limitations have in fact been effective, arguing that although courts have liberalized the constitutional restrictions the courts still use the limitations to police public borrowing decisions. *Id.* Part of the difference between their evaluation and mine may be a matter of timing. They published their article more than a dozen years ago, when some state courts continued to enforce public purpose requirements and before the subject-to-appropriation device had received widespread state judicial ratification.

202. HAW. CONST. art. VII, § 13; *see also* WASH. CONST. art. VIII, § 1 (limiting debt service on state debt to 9% of average of state revenues over three prior fiscal years).

But a carrying capacity approach also opens new issues. One difficulty is determining the appropriate base for calculating carrying capacity. As previously noted, many limits on local debt actually take a carrying capacity approach by making permissible debt levels a fraction of local assessed valuation. Yet today many localities rely significantly on sources of revenue other than the property tax so that property valuation may well understate local resources for debt service. Even if the denominator for calculating carrying capacity were modernized to take into account the role of sales and income taxes and other contemporary revenue sources, the numerator would still be problematic. Constitutional debt limits have been set at widely varying levels. As two municipal finance experts have noted, the enormous difference in state and local debt limits "belies the notion that there is some consensus about the optimal level of debt."[203] Thus, although the carrying capacity concept is appealing in principle it may be difficult to implement in practice. In any event, there has been little effort generally to modernize limits along these lines, as evasion has provided legislators with an acceptable and more readily available alternative to constitutional reform.

Moreover, it could be argued that the real issue with state and local debt is not the adequacy of taxable resources to pay debt service, but the adequacy of state and local debt to meet future capital needs. Debt can play a crucial role in providing the physical infrastructure vital to the future economic and social health of a community, particularly schools, hospitals, roads, and mass transit facilities. Low levels of debt and the resulting low levels of capital investment can be as harmful to a state or locality as excessive debt. A constitutional debt limitation ought to take into account future capital needs as well as ability to pay. But there is no obvious metric for assessing future needs or for incorporating a concern about capital needs into the constitutional standard. As a result, constitutional debt limitations are likely to fail to address the question of future capital needs or to balance the competing concerns of future capital investment and future taxpayer liability.

Thus, much like the public purpose requirement, a constitutional debt limit seems attractive in theory but it has proven extremely difficult to operationalize in practice.[204]

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203. AMDURSKY & GILLETTE, *supra* note 20, at 171.

204. Professor Clayton Gillette has suggested that if the principal concern about debt is the ability of state taxpayers to repay their obligation, then creditors may be very good representatives of the taxpayers' interest. Clayton P. Gillette, Municipal Creditors as Municipal Monitors (Sept. 6, 2001) (unpublished manuscript, on file with author). Creditors have the incentive to monitor the finances of state and local borrowers, and their interests in

C. *Tax and Expenditure Limitations*

Unlike public purpose requirements and debt limitations, there is not even much of a theoretical case to be made for constitutional tax and expenditure limitations. Whereas debt has binding long-term consequences, and the decision whether or not to incur debt may receive inadequate public scrutiny, tax rates may be easily changed, and taxation is typically an extremely salient political issue. New taxes and tax increases trigger an immediate burden on current voters, and anti-tax forces are well-represented in the political process. Politicians who enact high taxes may be punished by the voters in the next election, and few politicians are likely to doubt the political significance of anti-tax sentiment. It is not clear why further constitutional protection needs to be superimposed on the protections provided by the ability of the voters to vote out of office elected officials who raise taxes.

State constitutional limitations on local taxation seem particularly inappropriate. Local government actions may be more transparent than state decisions, and many local governments are subject to effective monitoring, participation, and political control by grassroots taxpayers. Local taxation is further constrained by the vigorous inter-local competition for mobile taxpayers.[205] Given the existence of both significant exit and significant voice opportunities at the local level it is unclear what constitutional need state tax limits on localities serve. Rather, substantive constitutional limits on local taxation interfere with local autonomy since they preclude localities whose people are willing to support tax increases from taking such action. Holding all local governments in a state to the same limit fails to recognize the inter-local variations in needs, circumstances, and preferences that animate home rule.[206]

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state and municipal solvency to some degree overlap those of state and local taxpayers. *Id.* Gillette suggests that certain subconstitutional changes in municipal finance law could improve the capacity of creditors to stand as surrogates for taxpayer interests. *Id.*

205. For the classic authority on the significance of inter-local mobility for local decision-making, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

206. City & County of San Francisco v. Farrell, 648 P.2d 935, 938 (Cal. 1982) (noting that Proposition 13 "was imposed by a simple majority of the voters throughout the state upon a local entity to prohibit a majority (but less than two-thirds) of the voters of that entity from taxing themselves for programs or services which would benefit largely local residents"). Indeed, local tax limits appear to have made local governments more fiscally dependent on their states and to have resulted in a loss in local power. *See* Skidmore, *supra* note 122, at 95-96; Sokolow, *supra* note 171, at 178-86.

Moreover, because the property tax has long been a central focus of the tax limitations movement, tax limitations often bind local governments far more tightly than they bind the states. Although localities have proved inventive in expanding the range of non-tax taxes, the property tax is still central to local finances and in many states property tax limits have really constrained local revenues. As a result, localities have become more dependent on state aid, and states generally account for a greater share of the total of state and local spending. It is unlikely that tax limit proponents desired such a centralization of power from localities to the states but that has often been the result.

Of course, states as well as local governments have also been targeted by the most recent tax limitation efforts, with a number of state constitutions now requiring either voter approval or legislative supermajorities to increase tax rates or impose new taxes. Not much is known empirically about the effect of these requirements, but one study of California – which requires a two-thirds vote in each legislative house to pass a new tax or tax increase – found that "gridlock and irresponsibility can be observed much more frequently . . . than mature compromise."[207] Certainly the two-thirds rule contributed to California's fiscal and political problems in 2003.

The consequences for Governor Gray Davis are by now internationally known, but a less heralded, although comparably interesting, development illustrating the effects of a recently adopted constitutional provision requiring a supermajority for tax increases played itself out in neighboring Nevada in the summer of 2003. There, due to a two-thirds requirement for tax increases, the Nevada legislature failed to reach agreement on the budget for public education during its regular session, then failed again in two extra sessions. In the second session, the necessary tax increases passed the upper house but failed twice in the lower house, by votes of 27 to 15, or one vote shy of the constitutionally mandated supermajority. The governor then petitioned the Nevada Supreme Court for a writ of mandamus directing the legislature to pass a budget. Faced with this constitutionally provoked impasse and noting the state's constitutional obligation to provide for the "support and maintenance" of the public schools, the court took the extraordinary step of suspending the two-thirds requirement and then directed the legislature to consider the education budget under a simple

207. Matthew D. McCubbins, *Putting the State Back into State Government: The Constitution and the Budget*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 366 (Bruce E. Cain & Roger Noll eds., 1995).

majority rule.[208] Like many of the state courts in the debt limit cases, the Nevada Supreme Court simply concluded that the two-thirds rule – a mere "procedural requirement" – was less important than the "basic, substantive right" to an adequately funded education.[209]

Yet, despite the theoretical difficulties with tax and expenditure limitations, they have done much better in the state courts than the theoretically more defensible public purpose and debt provisions – this summer's extraordinary Nevada decision to the contrary notwithstanding. This may be due to their recent nature and continuing popular support. It is no surprise that a constitutional provision that reflects strongly held current political values is more likely to be effectively enforced than measures that are seen as archaic and arcane. So, too, the success of these limits may be due to the fact that, unlike the public purpose requirements, their meaning is relatively clear; and, unlike the debt limitations, state and local legislators have not come up with revenue-raising devices that do the work of broad-based taxes as successfully as contemporary revenue bonds have substituted for general obligation debt.

D. Voter Approval Requirements

Many state fiscal limits take the form of voter approval requirements. Voter approval has long been an important component of debt limitations. So, too, as Professor Kirk Stark has recently written, voter approval requirements are an important theme in contemporary tax and expenditure limitations, particularly at the local level.[210] Voter approval is certainly a more flexible means of controlling taxes than a specific limit carved into the constitution. Moreover, for local governments, a requirement that the local electorate approve new taxes or debts is more consistent with home rule than a statewide provision capping local taxes or debt. Professor Stark has also argued that by bringing voters into the process of raising taxes these limits can promote democracy by assuring that new taxes have obtained the consent of those affected,[211] and by enabling the voters to participate directly in an important question of governance.[212]

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208. Guinn v. Legislature of Nev., 71 P.3d 1269 (Nev. 2003). The legislature did ultimately pass the necessary revenue-raising legislation by a two-thirds majority. *See* Guinn v. Legislature of Nev., 76 P.3d 22, 25 (Nev. 2003).

209. 71 P.3d at 1275.

210. *See* Stark, *supra* note 112, at 207.

211. *Id.* at 207-16.

212. *Id.* at 236-50.

Whether conditioning new taxes or new debts on voter approval is desirable is inevitably linked to the more general debate over direct democracy.[213] To be sure, most of the discussion of direct democracy has concerned the voter initiative – that is, the ability of individuals and interest groups to sidestep the legislature and bring constitutional amendments and legislative proposals directly to the electorate for enactment – whereas voter approval requirements for new taxes or debts involve referenda following legislative action, with voter approval an additional requirement, not a substitute for legislative approval. As a result, one important argument for direct democracy, that it enables voters to act on popular measures bottled up in the legislature by political gridlock or hostile interest groups,[214] is inapplicable since voter approval requirements apply only to measures that have already emerged from the legislature. On the other hand, some of the concerns about the voter initiative – that it can enable majority groups to ride roughshod over minorities or that the lack of legislative deliberation can lead to the adoption of ill-considered and poorly drafted laws[215] – is equally inapposite since protection for minority rights and opportunities for deliberation are still provided by the legislature. Still many of the concerns raised about direct democracy, including whether the voters are competent enough and sufficiently informed to address complex questions of public policy[216] and whether the fraction of voters that actually votes on ballot propositions is actually representative of the full electorate,[217] continue to apply to voter approval requirements for new taxes or debts.

Professor Stark argues that the possibility that voter approval requirements will "stimulate greater public deliberation regarding . . . tax

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213. For criticisms of direct democracy, see generally DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984); Sherman Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Philip Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421 (1998). For more sympathetic treatments, see DAVID SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989); Clayton Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609 (1998). For a particularly negative account of the effect of direct democracy concerning fiscal matters in California, see PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE (1998).

214. *See, e.g.*, Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1348 (1985).

215. *Id.* at 1360-64.

216. *See* THOMAS CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 60-90 (1989); MAGLEBY, *supra* note 213, at 122-44.

217. MAGLEBY, *supra* note 213, at 77-99.

burdens"[218] is an important benefit of the new tax limitation amendments. As he notes, "[i]t is hard to imagine a public policy issue more suitable for community deliberation, especially at the local level."[219] Yet, the very high level of voter interest in questions of taxation calls into question the need for voter approval requirements to spark public dialogue. Taxes are typically a major issue even when only elected officials and not the tax increases themselves are on the ballot. Moreover, whatever public dialogue results from a voter approval requirement is likely to be impoverished if the *only* question the voters are asked is whether to approve a new tax or a tax increase, not which services to cut if the tax is not approved, which of two or more different taxes with different impacts on different payers to approve, or how to combine a range of tax and service packages.[220]

Voter approval requirements take us beyond the eighteenth century concern with "no taxation without representation" to a twenty-first century doctrine of "no taxation, even with representation, without direct voter consent." It is not clear that this is necessary to correct political process failures or to promote deliberation concerning levels of taxation given the intense public concern with these questions already. Indeed, whatever benefits they may have in promoting civic engagement or assuring that tax increases reflect the "consent of the governed," voter approval requirements, like the substantive tax and expenditure limitations, appear to be driven primarily by the desire to make it more difficult to enact or increase taxes than to adopt nearly all other forms of legislation. Thus, the case for including such a voter approval requirement in a state constitution must ultimately rest on hostility to taxation. Surely, only such an anti-tax principle, rather than a commitment to democracy or popular deliberation, can explain such provisions as Proposition 13's mandate of a local supermajority popular vote for new local taxes. Such a rule does not empower local majorities; it thwarts them. However, even rules requiring local simple majorities for tax increases seem as much concerned with erecting new hurdles to taxation as assuring that tax decisions reflect the local popular will. Thus, whether new or increased taxes ought to be contingent on voter approval ultimately turns on whether substantive

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218. Stark, *supra* note 122, at 237.

219. *Id.* at 240.

220. Professor Stark acknowledges this when he observes that "simply requiring voter approval for new or increased taxes is unlikely to ignite substantive democratic dialogue regarding the allocation of tax burdens." *Id.* at 241; *see also* Clark, *supra* note 213 (criticizing direct democracy for limiting voters to simple yes-or-no choices and not enabling them to express their priorities over a range of issues).

hostility to taxation ought to be a constitutional norm, not on the need to reform the state and local political processes for addressing tax questions.

Voter approval requirements for bond issues present a slightly different question. New debt, with its binding long-term nature, bears some resemblance to a constitutional amendment. Both commit future generations to a long-term course of action. Indeed, a new bond issue may be more binding than a new state constitutional provision since a constitution may be amended and a new provision repealed while debt creates debt service commitments protected by the Federal Contracts Clause from subsequent state impairment.[221] Moreover, in the absence of a referendum vote, questions about the level of state and local debt and the worthiness of debt-funded projects are less likely to be the subject of public debate than questions about taxation, even though debt levels ultimately affect taxes. Thus, there may be something to be said for a constitutional requirement that makes debt harder to incur, even as many questions about voter information, voter competence, and the representative nature of the electorate in bond-issue elections make it unclear whether voter approval is the right test for determining the appropriateness of new debt.[222]

VII. CONCLUSION: FISCAL LIMITS AND STATE CONSTITUTIONAL LAW

Finally, what does the uncertain fate of state constitutional fiscal limits tell us about the project of state constitutional law generally? Certainly, it would be wrong to overstate the meaning or to predicate the analysis of state constitutional law on a specific and relatively discrete set of issues. The state judicial treatment of state fiscal limits may have only limited relevance to the interpretation of the civil liberties or positive rights guarantees of state constitutions. Yet, several implications emerge which may be a little unsettling to the vision of state constitutions as an independent, and progressive, alternative to a conservative Federal Constitution.

First, state constitutions are by no means simply "progressive," if progressive is used to mean more supportive of activist, redistributive government. Even as they impose affirmative duties on their governments, state constitutions are also strongly marked by limited-government, taxpayer-protective principles that are entirely absent from the Federal

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221. *See, e.g.*, U.S. Trust Co. v. New Jersey, 431 U.S. 1, 32 (1977).

222. *See, e.g.*, Gillette, *Direct Democracy*, *supra* note 94, at 21-28 (discussing the low turnout in bond issue elections, the unrepresentativeness of bond issue voters of the broader electorate, and the concern that voters' aversion to change will lead to inadequate support for financing necessary public facilities).

Constitution. The rise of tax and expenditure limitations over the past three decades has underscored this facet of state constitutional law. Although in a rare case like the recent Nevada decision nullifying the requirement that tax increases requires legislative supermajority approval,[223] positive rights can prevail over taxpayer protection, state fiscal limits, particularly tax limits, generally if subtly constrain government activism at the state and local level.[224]

Second, turning from constitutional texts to constitutional doctrine, state constitutional law often operates in the shadow of the Federal Constitution. Even where state courts deal with state constitutional provisions that have no federal analogues, and where the United States Supreme Court cannot review their judgments, state courts may still be deeply influenced by federal constitutional jurisprudence. The state courts' many references to state fiscal limits as matters of state economic policy, and the repeated calls for deference to the legislature on fiscal questions, indicate that state courts accept the Supreme Court's *Carolene Products* settlement – the determination that economic and social matters that do not affect fundamental rights or involve discrimination against discrete and insular minorities are for the legislatures and not the courts.[225] This appears to be the case even though state constitutions give extensive consideration to these matters while the federal document is largely silent about them.

Finally, state constitutional law is closely intertwined with state politics. The fiscal limits with the strongest contemporary political support do best; those limits that lack current political backing are virtually unenforced. The Nevada case might seem less extraordinary once we notice that the Nevada Supreme Court was not acting on its own but responding to a petition from the governor and that the court's decision effectively empowered the state legislature's majority over the objection of a recalcitrant minority.[226] That politics matters should not be news to students of state constitutional law.

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223. *See* Guinn v. Legislature of Nev., 71 P.3d 1269 (Nev. 2003).

224. *See* SCHRAG, *supra* note 213, at 154-57.

225. U.S. v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); *accord* Ferguson v. Skrupa, 376 U.S. 726, 730 (1963) ("courts do not substitute their economic and social beliefs for the judgment of the legislative bodies").

226. The legislature had previously rejected a proposal to amend the state constitution to add the two-thirds rule; the rule was imposed by voter initiative over legislative opposition. As the court dryly noted in apparently giving weight to the legislature's action, "[t]he voters were not privy to the Assembly's concerns that culminated in the requirement's legislative rejection." Guinn v. Legislature of Nev., 76 P.3d 22, 30 (Nev. 2003).

The combination of greater ease in amending state constitutions;[227] the existence of the voter initiative in half the states; extensive state constitutional textual attention to the nitty-gritty of government operations; and a judiciary that is either elected[228] or appointed for limited, renewable terms rather than for life all make some significant interplay between state politics and state constitutional law inevitable.[229] Still, the example of the fiscal limits challenges and unsettles the notion of a state constitution as something fundamental, separate from, and constraining ordinary state politics. The fiscal limits suggest that at least for some features of state constitutions – those with direct bearing on the operations of state and local government – the constitution is constrained by politics rather than the other way around.

I suppose none of these lessons is surprising. Constitutional law is not autonomous. It is shaped by broader jurisprudential currents, the political beliefs of the judges and justices, and the politics of the surrounding society. Nor is it irrelevant. State fiscal limits have contributed to the proliferation of new forms of borrowing and revenue-raising, held down the property tax, weakened local governments, and promoted the growth of public authorities and special purpose local units. However, the example of the fiscal limits and their disfavored treatment by many state courts may be helpful in reminding us of the need for modesty in considering the potential for the emergence of state constitutional law as a source of alternative constitutional norms in the American federal system.

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227. The United States has operated under the same constitution since 1787, and that document has been amended twenty-seven times. *See* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 2000-01, at 3 (2000). By contrast, the fifty states have had 146 constitutions, or nearly three per state. *Id.* Eighteen states have had four or more constitutions. *Id.* Only nineteen of the states have operated under just one constitution. *Id.* Moreover, these constitutions are frequently amended. At the start of 2000, the current constitutions of the states had been amended over 6500 times. *Id.* Alabama led the way with 664 amendments, and California and South Carolina trailed closely behind with 500 and 480 amendments respectively. *Id.* Even the newest state constitution, the Georgia Constitution of 1982, has been amended fifty-one times as of the start of 2000. *Id.*

228. *See* Croley, *supra* note 183, at 725-26 (noting that in thirty-eight states, most or all judges are elected).

229. Helen Hershkoff has suggested that some of these factors, particularly voter initiative, the ease of state constitutional amendment and the elective state judiciary, eliminate some of the separation-of-powers and political legitimacy objections to more aggressive judicial review at the state level and to state judicial enforcement of the positive rights provisions of state constitutions. *See* Hershkoff, *Positive Rights*, *supra* note 6, at 1157-63; Helen Hershkoff, *State Courts and the "Passive Virtues:" Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1886-87 (2001).