

State Constitutions and Fiscal Policy

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ABSTRACT

This paper proposes a framework for studying the relationship between fiscal policy and state constitutions in terms of direct and indirect fiscal restraints and pressures. Fiscal restraints such as balanced budget rules limit the scope of government, while fiscal pressures such as education rights expand or place demands on government. After detailing the types of fiscal restraints and pressures in state constitutions, this paper discusses four limitations of state constitutions as they relate to achieving sustainable fiscal policies. It then discusses five principles for reform moving forward and calls for giving legislators more discretion about substantive policy matters while placing bounds on the overall scope of government. This paper provides guidance for policymakers and others who want to maintain a state's excellent fiscal health or address budget problems.

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A constitution can be thought of as a set of rules by which a group agrees to live, and it typically includes rules about how to make future rules—whether constitutional or statutory. As constitutional scholar Keith Whittington puts it, “Perhaps most distinctively [constitutions] bind politics.”¹ The main argument of this paper is that state constitutional design creates both risks and opportunities for fiscal policy making. The states vary in fiscal health,² and this paper will provide guidance for policymakers who want to maintain a state’s excellent fiscal health or address fiscal challenges. Moreover, it will provide a framework for readers who are interested in understanding the relationship between state constitutions and fiscal policy.

Well-designed constitutional rules create a foundation for fiscal policy either by restraining politicians or by forcing them to act. For instance, well-designed and enforced balanced budget rules have been shown to produce greater budget surpluses³ and reduce government spending.⁴ Poorly designed constitutional provisions can bind politicians to policies that lock in unsustainable or ill-advised fiscal policies. For example, some states facing significant pension problems, such as Illinois, are constrained by a state constitution that limits changes to pension plans, while states without such provisions have more flexibility. Variations in judicial interpretations and conflicts in constitutional rules add further complexity to the mix.

1. Keith Whittington, “Constitutional Constraints in Politics,” in *The Supreme Court and the Idea of Constitutionalism*, ed. Steven Kautz et al. (Philadelphia: University of Pennsylvania Press, 2011), 221.

2. Eileen Norcross, “Ranking the States by Fiscal Condition” (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, October 2015).

3. Henning Bohn and Robert P. Inman, “Balanced Budget Rules and Public Deficits: Evidence from the U.S. States,” *Carnegie Rochester Conference Series on Public Policy* 45 (1996): 13–76.

4. David M. Primo, *Rules and Restraint: Government Spending and the Design of Institutions* (Chicago: University of Chicago Press, 2007).

“Vague clauses granting rights to services such as education have created uncertainty about a state’s obligations and have given great power to courts.”

This paper creates a framework for thinking about the relationship between fiscal policy and state constitutions in terms of restraints and pressures. These terms will be defined in a later section, but for now, this distinction can be understood by considering two questions. The presence of fiscal *restraints* in a state constitution can be thought of as the answer to this question: What constitutional rules limit the scope of government or the range of government services?

The existence of fiscal *pressures* in a state constitution can be thought of as the answer to this question: What government services or programs are mandated by the state constitution, and what other constitutional provisions produce increases, rather than reductions, in the scope of government?

After discussing such restraints and pressures, the paper will describe the limitations of state constitutions and general principles for state constitutional design as they relate to fiscal policy. Several structural and institutional issues plague state constitutions. Amendments are too frequent; conflicts among provisions are too common. Rules are often poorly designed or lack regard for the presence of other, conflicting rules. Vague clauses granting rights to services such as education have created uncertainty about a state’s obligations and have given great power to courts.

So what can be done to address these and other concerns? Readers desiring a cookbook approach will be disappointed because this paper will not provide one. Instead, this paper will show that rules must be considered in the context of a state’s institutional environment. A constitution is not just the sum of its parts, and care must be taken to ensure that the pieces fit together well. Details matter, and as a result, reform must be undertaken carefully. Perhaps most controversially, this paper will argue that substantive policy matters should largely remain *outside* constitutions and should be left to the discretion of legislators and governors. Constitutions should instead include a limited set of fiscal provisions that place broad constraints

on legislators and governors. The reason is that fiscal health should be a paramount concern for the state. In fact, without fiscally sustainable policies, states are much more limited in the types of activities they can undertake. Demand for specific government programs, however, may vary over time as preferences and circumstances change.

Throughout this paper, I will highlight the findings of research studies that typically rely on the statistical analysis of large datasets. These studies often reach competing conclusions about the same question (e.g., do tax and expenditure limits reduce spending?) for a variety of reasons, including differences in (1) methodological approach, (2) variable construction, (3) the time period under study, and (4) whether the analysts account for endogeneity.⁵ Those differences highlight how difficult it is to estimate the effects of institutions on policy outcomes.

This challenge is exacerbated by the fact that many of the studies referred to in this paper do not delineate between statutory and constitutional rules, thus making it difficult to disentangle the effect of the rule in general from the effect of the rule as *constitutional in nature*. Therefore, instead of comparing apples and oranges when discussing effect sizes that are calculated using different datasets and methodologies or that are based on analyses lumping together constitutional and statutory rules, this paper seeks to unify disparate literatures in economics, political science, and law in an effort to help readers better understand how constitutions shape fiscal policy.

The paper proceeds as follows. Before delving into the relationship between fiscal policy and state constitutions, I first detail the structure and construction of state constitutions. Then I outline the fiscal pressures and fiscal restraints in state constitutions. Next I discuss the limitations of constitutions as they relate to fiscal policy, and I conclude with some general principles for constitutional design.

A PRIMER ON STATE CONSTITUTIONS

Constitutions vary greatly across the United States.⁶ Some state constitutions are long; others are short: they vary from 388,882 words in Alabama to 8,565 in Vermont. Some are replaced often; others are not: Louisiana is on its 11th constitution, while 19 states are still on their first. Some constitutions are amended

5. Endogeneity is a statistical problem that occurs when an institution reflects underlying policy preferences rather than independently having an effect on outcomes. For more details, see footnote 52.

6. Council of State Governments, *The Book of the States* (Lexington, KY: Council of State Governments, 2015).

often; others are not: Alabama's has 892 amendments and Illinois's has 14. The median state constitution has more than 25,000 words with 120 amendments. By comparison, the US Constitution has approximately 7,500 words, including its 27 amendments.

Procedurally, all states allow legislatures to propose amendments subject to ratification by voters,⁷ and 18 states permit voters to propose amendments through the initiative process. In most states, a simple majority vote is sufficient to ratify amendments. Nearly all states have procedures in place for constitutional conventions, with some states requiring that voters periodically decide whether to hold a convention. New York, for example, will be conducting such a vote in 2017.

It is much easier to change a state constitution than to change the federal constitution. This difference is not an accident of history. State constitutions expert G. Alan Tarr argues that drafters “shared the Jeffersonian belief in constitution-making as a progressive enterprise. Instead of emphasizing constitutional continuity and deference to the wisdom of the past, they asserted that the practices and institutional arrangements embedded in state constitutions needed to be constantly readjusted in light of changes in circumstances and in political thought.”⁸

Precisely because constitutions are so easy to change, over time they tend to become larded up with provisions that end up being outdated, that conflict with other provisions, or that produce snowball effects—what one analyst calls “constitutional amendment breeders.”⁹ No big deal, a reformer might think, because one can just “fix” a bloated constitution with more amendments. This is easier said than done, however, because in many states it is difficult to engage in significant constitutional housekeeping, as a Colorado commission noted a few years ago.¹⁰ There is a (blurry) distinction between *amending* a constitution

7. The one exception is Delaware, which does not require ratification of proposed amendments by voters.

8. G. Alan Tarr, introduction to *State Constitutions for the Twenty-First Century*, vol. 1, *The Politics of State Constitutional Reform*, ed. G. Alan Tarr and Robert F. Williams (Albany: State University of New York Press, 2006), 4–5.

9. Frank P. Grad and Robert F. Williams, *State Constitutions for the Twenty-First Century*, vol. 2, *Drafting State Constitutions, Revisions, and Amendments* (Albany: State University of New York Press, 2006), 28. The authors credit John Bebout with originating this phrase. They give the example of a provision in South Carolina's constitution prohibiting special legislation—or a law that applies to specific areas, people, or things—in certain categories. This provision has been amended many times when exceptions to the rule needed to be made, such as for the creation of a civil service commission in a particular city. *Ibid.*, 65–66.

10. 2007 Colorado Constitution Panel, *Final Report: Foundation of a Great State—the Future of Colorado's Constitution* (Denver, CO: University of Denver, 2007).

and *revising* a constitution, with the latter typically possible only with a constitutional convention—a tall order in many states.¹¹ Conventions are relatively rare in part because it may not always be possible to limit a convention’s scope, raising fears of a “runaway convention.” Thus, constitutions tend to be long-lived and to grow in size and scope over time. The implications for fiscal policy are discussed later in this paper.

State constitutions typically include a preamble; a bill of rights; a set of articles delineating the structure and authority of each branch of government; and a set of articles for education, public finance, local governments, and so on.¹² Important fiscal policy provisions of state constitutions appear throughout the document—for instance, in Illinois, pension protections are in an article titled “General Provisions”¹³—with the finance article typically being the one that deals most directly with fiscal policy. The finance article will often articulate the mechanics of the budget process, including the role of the governor and the legislature.

The legislative article sometimes contains voting provisions relevant for the budget, as in Nevada, where this article includes a supermajority requirement for tax increases.¹⁴ The public education article often has a finance component, as well as a declaration that education is a right. This declaration of education as a right has led to decades of litigation, ultimately placing fiscal pressures on the states. It is to this issue that I now turn.

FISCAL PRESSURES IN STATE CONSTITUTIONS

Constitutional rights can be distinguished by whether they are positive or negative. If an individual has a positive constitutional right, then this right imposes an “affirmative duty” on government to undertake certain actions.¹⁵ If an individual has a negative constitutional right, then this right obligates the government *not* to act vis-à-vis the individual. An example of a positive right would be a constitutional provision mandating that the government fund health care. An

11. States vary in how they draw the amendment–revision distinction, and in some cases do not draw one explicitly. For instance, in 2005, the State Budget Process Act, a proposed amendment to New York State’s constitution, would have altered two articles of the state constitution. New York’s constitution does not define what constitutes a revision. For details about the amendment and revision process, see Gerald Benjamin, “Constitutional Amendment and Revision,” in *State Constitutions for the Twenty-First Century*, vol. 3, *The Agenda of State Constitutional Reform*, ed. G. Alan Tarr and Robert F. Williams (Albany: State University of New York Press, 2006), 177–209.

12. Grad and Williams, *State Constitutions for the Twenty-First Century*, vol. 2, 50.

13. Ill. Const. art. XIII, § 5.

14. Nev. Const. art. IV, § 18.

15. David P. Currie, “Positive and Negative Constitutional Rights,” *University of Chicago Law Review* 53 (1986): 864.

example of a negative right is the right to practice a religion without interference from the government.

A common, though far from universally held, view of American constitutional law is that it is one of negative rather than positive rights. Judge Richard Posner writes, “The men who wrote the Bill of Rights [the first 10 amendments to the US Constitution] were not concerned that government might do too little for the people but that it might do too much to them.”¹⁶

As constitutional scholar Emily Zackin notes, this view of American constitutionalism is at best incomplete because it focuses on the US Constitution but ignores the long history of positive rights in state constitutions.¹⁷ The push for positive rights and expansive government is not a modern phenomenon reflecting the increased role of government, but rather a process that began in the 19th century and evolved alongside the growth of government.¹⁸ Zackin argues that activists, relying on tools such as constitutional conventions and the initiative and referendum process, have used state constitutions to achieve policy objectives that they were unable to attain through legislative means.¹⁹

Because constitutional provisions trump statutory law, advocates for greater government services or spending have an incentive to add positive rights to constitutions—either through a direct amendment or through lawsuits seeking favorable judicial interpretations of existing provisions. The goal of reformers in many cases is not “long-term stability or entrenchment, but the achievement of immediate change.”²⁰

Direct Fiscal Pressures

Although all rights entail some governmental costs, such as those associated with adjudicating First Amendment disputes and providing for due process, special fiscal obligations are associated with positive rights that require government expenditures, leading to what I call *direct fiscal pressures*.

The positive rights in state constitutions vary, but every state includes provisions for public education.²¹ Education is arguably the most expensive positive right in state constitutions. It is the largest expenditure category for state and

16. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (1983).

17. Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton, NJ: Princeton University Press, 2013).

18. *Ibid.*, 34–35.

19. *Ibid.*, 14.

20. *Ibid.*

21. Paul L. Tractenberg, “Education,” in *State Constitutions for the Twenty-First Century*, vol. 3, 241–305.

local governments, totaling more than 25 percent of state and local government outlays nationally.²²

Constitutional education mandates vary greatly in scope and detail.²³ The implications of the general education provisions in state constitutions—such as requiring “general and uniform” (8 states) or “thorough and efficient” (11 states) systems of education²⁴—are vague and therefore especially open to interpretation and, as a consequence, legal challenge. For instance, the three branches of Kansas’s government have been in a battle for years over exactly how much authority the courts have to dictate what many believe to be legislative prerogatives regarding the allocation of education monies.²⁵

Resulting in part from ambiguity, nearly every state has seen judicial challenges to state education finance—with wide-ranging outcomes.²⁶ These lawsuits have come in three “waves”; the second and third waves are focused on state constitutional provisions with regard to equal protection and education. The focus of such lawsuits has been on equity, adequacy, and quality.²⁷

Some court decisions have reshaped education policy and finance in their respective states. In New Jersey, for instance, a series of state court decisions (the *Robinson v. Cahill* decisions and the *Abbott v. Burke* decisions) relied

“Because constitutional provisions trump statutory law, advocates for greater government services or spending have an incentive to add positive rights to constitutions.”

22. State and local spending is combined because state governments can impose mandates on local governments. This statistic was calculated by the author using the US Census Bureau’s 2013 dataset, “State and Local Government Finances by Level of Government and by State: 2013.” Those data are available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SLF_2013_SLF003&prodType=table.

23. Tractenberg, “Education”; Molly A. Hunter, “State Constitution Education Clause Language,” undated report of the Education Law Center, <http://www.educationjustice.org>.

24. Hunter, “State Constitution Education Clause Language.”

25. Julie Bosman, “Court Gives Deadline to Fix School Financing in Kansas,” *New York Times*, February 12, 2016, A10.

26. Sheila E. Murray, William N. Evans, and Robert M. Schwab, “Education-Finance Reform and the Distribution of Education Resources,” *American Economic Review* 88, no. 4 (1998).

27. Tractenberg, “Education”; Murray, Evans, and Schwab, “Education-Finance Reform”; Molly McUsic, “The Use of Education Clauses in School Finance Reform Litigation,” *Harvard Journal on Legislation* 28, no. 2 (1991).

on the state’s “thorough and efficient” clause to impose funding and other mandates on that state’s government.²⁸ The Texas Supreme Court relied on that state’s “efficiency” clause when imposing “fiscal neutrality” requirements that, among other things, placed limits on variation in education spending across localities.²⁹ In both states, a single case spawned multiple decisions (referred to with names such as *Abbott I* and *Abbott II*, not unlike a movie sequel) as legislatures attempted to address courts’ demands, often not to judges’ satisfaction.

Even in situations where the fiscal implications of provisions appear to be clear, there is room for interpretation and litigation. Under Colorado’s Amendment 23, the “base” in school financing from the state must increase by at least 1 percent plus the rate of inflation from 2001 to 2011, and it must increase at least at the rate of inflation thereafter. In 2015, Colorado’s Supreme Court ruled that it was constitutional for the state to cut education aid elsewhere to offset the mandated increase in the base.³⁰

Studies probing the effect of court intervention on education spending have reached mixed conclusions. By conducting statistical analyses over multiple decades and across the states, some researchers have found that court-mandated reforms of education finance have, on average, led to increases in education spending—perhaps by as much as 20 percent—while others have shown that court rulings have led to an increase in state aid to localities but with no net change in total education spending.³¹ Several studies also have found that inequality in spending across districts has declined because of court decisions.³²

While the education clauses in state constitutions have influenced state finances in a significant way (even if it is not clear whether they have affected

28. Margaret Goertz and Malik Edwards, “In Search of Excellence for All: The Courts and New Jersey School Finance Reform,” *Journal of Education Finance* 25, no. 1 (1999).

29. Lawrence O. Picus and Linda Hertert, “Three Strikes and You’re Out: Texas School Finance after Edgewood III,” *Journal of Education Finance* 18, no. 4 (1993).

30. *Dwyer v. State*, 357 P.3d 185 (Colo. 2015).

31. For positive total effects, see William N. Evans, Sheila E. Murray, and Robert M. Schwab, “Schoolhouses, Courthouses, and Statehouses after Serrano,” *Journal of Policy Analysis and Management* 16, no. 1 (1997), and Murray, Evans, and Schwab, “Education-Finance Reform.” For positive effects on state spending only, see Christopher Berry, “The Impact of School Finance Judgments on State Fiscal Policy,” in *School Money Trials: The Legal Pursuit of Educational Adequacy*, ed. Martin R. West and Paul E. Peterson (Washington, DC: Brookings Institution Press, 2007), 213–40. For an argument that any such fiscal effects are small relative to other drivers of education spending and that the effects may vary across states, see Sarah A. Hill and D. Roderick Kiewiet, “The Impact of State Supreme Court Decisions on Public School Finance,” *Journal of Law, Economics, and Organization* 31, no. 1 (2015).

32. Evans, Murray, and Schwab, “Schoolhouses, Courthouses, and Statehouses after Serrano”; Murray, Evans, and Schwab, “Education-Finance Reform”; Berry, “Impact of School Finance Judgments on State Fiscal Policy.” Berry’s paper provides a nice overview of the literature.

total education spending), the effects of positive rights clauses in two other major policy areas—health care and the environment—have thus far had limited effect. However, the presence of such provisions opens the door to future, more expansive interpretations.

Thirteen state constitutions contain language regarding a state’s obligations to public health, with six states explicitly requiring the states “to promote and protect the public health.”³³ One such clause—article I, section 51, of Michigan’s constitution—reads, “The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of public health.”³⁴ Thus far, state courts have been “reluctant to identify express, enforceable rights to health care for all, although they extend protection to certain groups and certain types of services.”³⁵ Courts and constitutions also draw a distinction between public health, which is focused on overall health and issues such as infectious diseases, and individual health, which is focused on the health of each individual.³⁶

About half of state constitutions contain some reference to environmental protection or quality, with about a quarter framing a “quality” or “healthful” or “clean” environment as a right.³⁷ The courts have not used this language to mandate specific action by state legislatures,³⁸ but many provisions are “awaiting clarity through advocacy” (i.e., lawsuits).³⁹ A supporter of the judicial approach to policy change writes, “An informed, courageous judiciary is needed to help stem the tide of political and economic compromises which have resulted in the current, perhaps irreversible levels of environmental pollution.”⁴⁰

Courts in Montana have used strict scrutiny—the highest standard of legal review—to determine whether state laws with environmental impacts are

33. Elizabeth Weeks Leonard, “State Constitutionalism and the Right to Health Care,” *Journal of Constitutional Law* 12, no. 5 (2010); Kathleen S. Swendiman, “Health Care: Constitutional Rights and Legislative Powers” (Publication R40846, Congressional Research Service, Washington, DC, July 9, 2012).

34. Mich. Const. art. I, § 51, quoted in Leonard, “State Constitutionalism and the Right to Health Care,” 1348.

35. Leonard, “State Constitutionalism and the Right to Health Care,” 1368–69.

36. *Ibid.*, 1379.

37. James R. May and William Romanowicz, “Environmental Rights in State Constitutions,” in *Principles of Constitutional Environmental Law*, ed. James R. May (Washington, DC: American Bar Association, 2011), 305–27.

38. Barton H. Thompson Jr., “The Environment and Natural Resources,” in *State Constitutions for the Twenty-First Century*, vol. 3, 307–39.

39. May and Romanowicz, “Environmental Rights in State Constitutions,” 307.

40. Robert A. McLaren, “Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation,” quoted in Barton H. Thompson Jr., “Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance,” *Rutgers Law Journal* 27, no. 3 (1996).

constitutional;⁴¹ if adopted by other states, this approach could open the door to a much more expansive role for the courts in directing state environmental policy, with significant costs for the states.⁴²

Indirect Fiscal Pressures

While education is the best example of a direct fiscal pressure emerging from state constitutions, collective bargaining rights and pension protections are the best examples of *indirect fiscal pressures* in state constitutions. Indirect fiscal pressures emerge from positive rights that alter the environment in which budgetary decisions are made at both the state and local levels.

In most states, the right to bargain collectively is statutory, but several states refer to collective bargaining in their constitutions. At least three states (Hawaii, Missouri, and New York) explicitly grant collective bargaining rights to public employees *and* do not include “right-to-work” provisions that allow workers not to join unions (a provision that many believe dilutes the effectiveness of collective bargaining).⁴³ An attempt to add collective bargaining rights to Michigan’s constitution failed in 2012, but the fact that it was attempted suggests that such provisions are of value to unions (and are fiscal pressures for states). This suggestive evidence is backed up by statistical work showing that the ability to collectively bargain leads to increases in government spending on salaries and benefits.⁴⁴

This spending is both immediate, in salaries and benefits paid today, and deferred, in the form of pension payments and “other postemployment benefits” (OPEB). As several scholars have argued, pensions are highly valued by public employees, and lawmakers have tended to support pensions because they are a way to hold down out-of-pocket costs today and to push those costs into the future.⁴⁵ Public employee pensions are explicitly

41. May and Romanowicz, “Environmental Rights in State Constitutions,” 312.

42. For a clear articulation of the concerns with Montana’s approach, see Thompson, “The Environment and Natural Resources,” 322–23.

43. Other states, like Michigan, offer collective bargaining rights to select public employees. For instance, Michigan’s constitution (art. XI, § 5) grants collective bargaining rights to state police troopers and sergeants. Edwin Render, “United States of America,” in *The Actors of Collective Bargaining: A World Report*, ed. R. Blanpain (The Hague: Kluwer Law International, 2004), 303–21; Josh Sefton, November 2012 Ballot Proposal 12–2: An Overview, Michigan Senate Fiscal Agency, <http://www.senate.michigan.gov/sfa>.

44. Sarah F. Anzia and Terry M. Moe, “Public Sector Unions and the Cost of Government,” *Journal of Politics* 77, no. 1 (2015).

45. See, for example, Daniel DiSalvo, *Government against Itself* (New York: Oxford University Press, 2015), 156; D. Roderick Kiewiet, “The Day after Tomorrow: The Politics of Public Employee Retirement Benefits,” *California Journal of Politics and Policy* 2, no. 3 (2010).

protected by constitutional provisions in seven states and by contract law in dozens of others.⁴⁶

The stringency of pension protections varies. In some states, earned benefits are protected, while in others, both earned and *prospective* benefits of current employees are protected.⁴⁷ OPEB are also protected to varying degrees; in at least one instance, OPEB have been determined to be protected by a state's constitution.⁴⁸

One defense of these protections is that workers have good reason to worry that future legislatures may reduce pension benefits, especially in times of fiscal stress. Therefore, placing such protections in the constitution is a way to give credibility to pension plans. This defense would be plausible if the plans were structured to ensure program stability and if the costs to taxpayers were transparent. Of course, program stability is difficult to achieve in defined benefit pension plans, for which there is a great deal of uncertainty with respect to the investment returns needed to support payouts.

Not surprisingly, then, many state and local governments have failed to effectively manage their pension systems, often gaming the system and causing massive shortfalls. Although estimates vary depending on the modeling assumptions made, the unfunded liabilities of state and local pension plans are thought to be in the \$1 trillion to \$4 trillion range.⁴⁹ Finance experts Robert Novy-Marx and Joshua Rauh estimate that to fully fund pension systems over the next 30 years would require a tax increase of, on average, \$1,385 per household per year in affected states.⁵⁰

What's Wrong with a Little Pressure?

One could argue that fiscal pressures are entirely warranted. Children *should* have the right to a quality education, everyone *should* have access to quality

46. Alicia H. Munnell and Laura Quinby, "Legal Constraints on Changes in State and Local Pensions" (State and Local Pension Plans No. 25, Center for Retirement Research at Boston College, Chestnut Hill, MA, August 2012).

47. Daniel DiSalvo, "The Limits of Retrenchment: The Politics of Pension Reform" (Civic Report No. 103, Center for Civic Leadership, Manhattan Institute, New York, 2015).

48. *Kanerva v. Weems*, 2014 IL 115811. Article XIII, section 5, of Illinois's Constitution states, "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

49. Robert Novy-Marx and Joshua Rauh, "Public Pension Promises: How Big Are They and What Are They Worth?," *Journal of Finance* 66, no. 4 (2011).

50. Robert Novy-Marx and Joshua Rauh, "The Revenue Demands of Public Employee Pension Promises," *American Economic Journal: Economic Policy* 6, no. 1 (2014).

“In the case of fiscal pressures, the constitution requires or causes funding to be allocated to issue area X. Fiscal restraints, conversely, are designed to limit (or have the effect of limiting) government’s scope.”

health care, and we *should* protect the environment. Even if we could reach agreement on questions such as what constitutes an adequate education, the challenge is as follows. Asserting that certain government activities have spending priority has one of two consequences: (1) if budgets are fixed, then other government activities will be crowded out (either today, or, in the case of hidden obligations such as pensions, tomorrow) or (2) if rights tend to push up overall government spending, then private-sector activities will be crowded out by increased taxes or debt.

As it is, government programs are relatively sticky—once a spending trajectory is set, it is difficult to change. Constitutional rights increase the stickiness of such policies, thereby taking away government’s flexibility to serve the public. The “limitations” section of this paper discusses the implications of this argument in more detail, but now I turn to the countervailing effect that constitutional fiscal restraints may have on government.

FISCAL RESTRAINTS IN STATE CONSTITUTIONS

Just as constitutional provisions may place pressure on elected officials to allocate scarce resources in particular ways, *fiscal restraints* place limits on the capacity of government. Note the different mechanisms at work in restraints versus pressures. In the case of fiscal pressures, the constitution requires or causes funding to be allocated to issue area X. Fiscal restraints, conversely, are designed to limit (or have the effect of limiting) government’s scope.⁵¹ Where pressures impose floors on government action, restraints impose ceilings.

51. For a comparison of the relative effectiveness of fiscal restraints, see Timothy Besley and Anne Case, “Political Institutions and Policy Choices: Evidence from the United States,” *Journal of Economic Literature* 41, no. 1 (2003); Robert Krol, “The Role of Fiscal and Political Institutions in Limiting the Size of State Government,” *Cato Journal* 27, no. 3 (2007); Matthew Mitchell and Nick Tuszynski, “Institutions and State Spending: An Overview” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, June 2011).

Direct Fiscal Restraints

Direct fiscal restraints are rules that place limits on the scope of government. In state constitutions, the three major types of restraints on permissible total levels of state expenditures, taxation, or debt are (1) debt limits, (2) tax and expenditure limits (TEs), and (3) balanced budget requirements.⁵²

Debt limits, which are present in nearly all state constitutions,⁵³ address whether and under what conditions states may incur debt. Some states prohibit debt entirely, while other states require (1) voter approval, (2) a supermajority legislative vote, (3) the use a revenue-based formula, or (4) some combination of those requirements to limit debt issuance.⁵⁴

Such limits typically apply only to general obligation bonds that are backed by the “full faith and credit” of the states, and state governments often issue nonguaranteed debt that is not subject to constitutional limitations. This nonguaranteed debt is often issued for projects that will generate revenue that can then be used to pay back the bonds; for instance, bridge construction can be funded with debt that is paid back from bridge tolls.⁵⁵ One study finds, however, that the issuance of nonguaranteed debt in a state does not appear to be driven by attempts to circumvent constitutional restrictions. That same study also finds that stricter limits at the state level do tend to increase debt incurred by local governments.⁵⁶

While debt limits restrict how much debt a state can incur, TEs restrict the size of taxation or expenditure levels in a state. Over a quarter of state constitutions contain TE provisions, which vary along several dimensions: (1) whether they apply to taxation, expenditures, or both; (2) how taxes and expenditures are defined; and (3) what formulas are used to calculate the limits—these formulas can be based on population growth, inflation, and state personal income, among other factors.⁵⁷ In part because of the difficulty in comparing

52. Studying the effect of direct fiscal constraints is complicated by a statistical concern known as endogeneity. Specifically, does the presence of those restraints actually produce lower spending, or do preferences for lower spending lead to the creation of such restraints, so that the restraints do not actually have an independent effect? There are several ways to handle endogeneity, but a detailed discussion is beyond the scope of this paper. For an accessible discussion of this issue, see James M. Poterba, “Balanced Budget Rules and Fiscal Policy: Evidence from the States,” *National Tax Journal* 48, no. 3 (1995), as well as Primo, *Rules and Restraint*.

53. D. Roderick Kiewiet and Kristin Szakaly, “Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness,” *Journal of Law, Economics, and Organization* 12, no. 1 (1996).

54. *Ibid.*

55. Richard Briffault, “State and Local Finance,” in *State Constitutions for the Twenty-First Century*, vol. 3, 211–40, example given at 217.

56. Kiewiet and Szakaly, “Constitutional Limitations on Borrowing.”

57. For an overview of the history of TEs, see Matthew Mitchell, “T.E.L. It Like It Is: Do State Tax and Expenditure Limits Actually Limit Spending?” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, December 2010).

the rules across states, there is mixed evidence regarding whether TELs are effective at reducing the scope of or growth in government, but in studies finding that TELs are effective, constitutional TELs are shown to be more effective than statutory TELs.⁵⁸

Balanced budget requirements, meanwhile, address the need for revenues and expenditures to be in sync. They emerge either directly through explicit language or indirectly by prohibiting debt (which has the practical effect of requiring budget balance). They also vary in terms of whether they are prospective or retrospective (i.e., whether budgets must be balanced when proposed or enacted, or whether they must be balanced at the end of the fiscal year), as well as in terms of whether deficits can be carried over to the next fiscal year. Such requirements typically apply to a state's operating budget and not to its capital budget.

One perspective is that balanced budget rules are not particularly relevant for states. Instead, tradition and expectation⁵⁹ or the realities of bond markets⁶⁰ may be the real constraints. Some researchers, although not necessarily disagreeing that these factors also matter, still find that states with the strictest, best-enforced requirements for a balanced budget have higher surpluses that are driven by spending reductions rather than by tax increases⁶¹ and have lower spending overall.⁶² Others find that those states with stringent requirements for a balanced budget respond to unexpected deficits caused by fiscal shocks by cutting spending more dramatically than do states with weaker requirements.⁶³

In addition to being constrained by limits on spending, revenues, or debt, state policymakers can be constrained by (at least) three other mechanisms: (1) requirements regarding how certain types of spending must be accounted for and funded, (2) rules for revenue generation, and (3) boundaries restricting how public funds may be spent.

58. Mitchell, "T.E.L. It Like It Is"; Krol, "Role of Fiscal and Political Institutions." For a skeptical view of TELs' effectiveness, see Thad Kousser, Mathew D. McCubbins, and Ellen Moule, "For Whom the TEL Tolls: Can State Tax and Expenditure Limits Effectively Reduce Spending?," *State Politics and Policy Quarterly* 8, no. 4 (2008).

59. General Accounting Office, *Balanced Budget Requirements: State Experiences and Implications for the Federal Government*, GAO Report AFMD-93-58BR (Washington, DC, 1993); National Conference of State Legislatures, *NCSL Fiscal Brief: State Balanced Budget Provisions* (Denver, CO: National Conference of State Legislatures, 2010).

60. Richard Briffault, *Balancing Acts: The Reality Behind State Balanced Budget Requirements* (New York: Twentieth Century Fund, 1996).

61. Bohn and Inman, "Balanced Budget Rules and Public Deficits."

62. Primo, *Rules and Restraint*.

63. James M. Poterba, "State Responses to Fiscal Crises: The Effects of Budgetary Institutions and Politics," *Journal of Political Economy* 102, no. 4 (1994).

Apart from distinguishing between operating and capital budgets, states often create constitutionally protected, dedicated (or “earmarked”) funds or budget categories for activities such as transportation, education, or even “The Great Outdoors.”⁶⁴ Other states have constitutional restrictions on how the state government may generate or use revenue. For instance, along with a handful of other states’ constitutions, Florida’s constitution prohibits individual state income taxes.⁶⁵

Earmarked funding comes from specific sources, and it can be used only for specific purposes. One example is in Colorado’s constitution, which mandates the creation of an education fund that generates revenues from a dedicated tax, with expenditures being restricted to items such as “class size reduction.”⁶⁶ Another is an amendment to Minnesota’s constitution that increased the state sales tax and earmarked the increased revenue for environmental and cultural programs.⁶⁷

Most states have budget stabilization, or rainy day, funds, and some of these funds are constitutional in nature.⁶⁸ The structure of the funds varies greatly across the states, with the most stringent requirements mandating either contributions or withdrawals (or both) based on formulas or thresholds. These “rule-bound” funds are the most effective in reducing the volatility of state expenditures because they reduce legislative and gubernatorial discretion, thereby reducing the possibility of gaming.⁶⁹

Supermajority voting requirements for legislative tax increases (a close cousin of TELs) are also thought to keep government spending in check by preventing an increase in taxes unless a supermajority of a legislature approves such an increase. Although some studies have found that these rules have a dampening effect on spending,⁷⁰ others have found that such rules have led

64. For the Great Outdoors Colorado Trust Fund, see Colorado Constitution, art. XXVII. For an overview of earmarking generally, see Arturo Perez, *Earmarking State Taxes* (Denver, CO: National Conference of State Legislatures, 2008). For an example of how earmarking works in a specific state, Minnesota, see Joel Michael, *Earmarking State Tax Revenues*, Policy Brief, Research Department, Minnesota House of Representatives.

65. Fl. Const. art. VII, § 5.

66. Colo. Const. art. IX, § 17.

67. Minn. Const. art. XI, § 15.

68. Pew Charitable Trusts, *Building State Rainy Day Funds: Policies to Harness Revenue Volatility, Stabilize Budgets, and Strengthen Revenue* (Washington, DC: Pew Charitable Trusts, 2014).

69. Gary A. Wagner and Erick M. Elder, “The Role of Budget Stabilization Funds in Smoothing Government Expenditures over the Business Cycle,” *Public Finance Review* 35, no. 4 (2005); Erick M. Elder, “Weathering the Next Recession: How Prepared Are the 50 States?” (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, January 2016).

70. Besley and Case, “Political Institutions and Policy Choices”; Brian G. Knight, “Supermajority Voting Requirements for Tax Increases: Evidence from the States,” *Journal of Public Economics* 76, no. 1 (2000).

to *increased* spending, perhaps because of more extensive logrolling resulting from the need to build bigger coalitions.⁷¹

Nearly all states have public purpose limits that “expressly limit the authority of [state or local or both] governments to provide financial assistance to private enterprises and, in some cases, public enterprises.”⁷² Such limits on financial assistance to private enterprises have little practical effect today because the courts have eviscerated the requirements by creating very broad definitions of “public purpose” and by giving great deference to state legislatures in this regard.⁷³

Indirect Fiscal Restraints

Indirect fiscal restraints are institutional features of state governments that may play a role in constraining the actions of government officials even if they do not place specific limits on government actions. These restraints include (1) the relative power of the executive versus the legislature in budget making, (2) executive line-item veto power, (3) the internal organization of state legislatures, (4) citizen initiatives and referenda, and (5) term limits for elected officials. These types of restraints are indirect because their influence on policy, if any, comes by influencing the *process* of budget making rather than by constraining outcomes directly. For example, the citizen initiative process does not restrain government directly, but it can be used to create rules that do restrain government.⁷⁴

Some restraints, such as the structure of the committee system in a state legislature, are almost never (if ever) constitutional and are typically determined by statute or legislative rule. As an example, New York State’s constitution refers to “the appropriate committees of the legislatures” in its description of the budget process, rather than specifying which committees have jurisdiction over the budget.⁷⁵

The balance of power between the legislature and the executive is determined by both constitutional and nonconstitutional factors, but there is evidence that the balance of power between the branches has an effect on fiscal policy. Political scientists Thad Kousser and Justin Phillips find that “the chief

71. Dongwon Lee, Thomas E. Borcherting, and Youngho Kang, “Public Spending and the Paradox of Supermajority Rule,” *Southern Economic Journal* 80, no. 3 (2014).

72. Briffault, “State and Local Finance,” 212.

73. *Ibid.*, 214.

74. I am focused here on the citizen initiative and the referendum as optional processes, not on requirements that, say, school budgets be approved by residents of a school district.

75. New York Const. art. VII, § 1.

executive’s proposed budget has a positive and statistically significant effect on the budget that is ultimately passed and signed into law.” Moreover, this effect is more pronounced in states where legislatures are less professionalized.⁷⁶ Others find that unilateral gubernatorial control over budget formulation or revenue forecasts leads to greater spending growth.⁷⁷ There is some evidence that another gubernatorial power—the line-item veto—leads to lower spending under divided government.⁷⁸

Importantly, at least two of the constitutionally based reforms often thought to restrain government may not actually do so—at least not in a consistent way. There is virtually no robust evidence that legislative term limits, which are often promoted at the federal level as necessary institutional reforms for restraining federal spending, actually do constrain state spending in a meaningful way. In fact, there is some evidence that term limits, both legislative and gubernatorial, may *increase* spending.⁷⁹

Citizen initiatives are also thought to act as a restraint on legislative behavior by holding the legislature in check, especially through the creation of fiscal restraints such as TELs. Matsusaka does find that the presence of a citizen initiative in a state leads to *lower* spending in modern times. But Matsusaka also finds that in the first half of the 20th century, when government was far smaller, citizen initiatives acted as a fiscal pressure, leading to higher spending.⁸⁰ Citizen initiatives, therefore, seem to be a tool of democratic responsiveness and not necessarily a tool of fiscal restraint.

STRUCTURAL AND INSTITUTIONAL LIMITATIONS OF STATE CONSTITUTIONS

Although much ink has been spilled on constitutional reform generally and although significant work has been done on discrete constitutional reforms

76. Thad Kousser and Justin H. Phillips, *The Power of American Governors: Winning on Budgets and Losing on Policy* (New York: Cambridge University Press, 2012), 137.

77. George A. Krause and Benjamin F. Melusky, “Concentrated Powers: Unilateral Executive Authority and Fiscal Policymaking in the American States,” *Journal of Politics* 74, no. 1 (2012).

78. Douglas Holtz-Eakin, “The Line-Item Veto and Public Sector Budgets: Evidence from the States,” *Journal of Public Economics* 36, no. 3 (1988).

79. Besley and Case, “Political Institutions and Policy Choices”; H. Abbie Erler, “Legislative Term Limits and State Spending,” *Public Choice* 133, no. 3 (2007); Yasushi Asako, Tetsuya Matsubayashi, and Michiko Ueda, “Seniority, Term Limits, and Government Spending: Theory and Evidence from the United States,” *IMES Discussion Paper Series 2012-E-5* (Tokyo: Institute for Monetary and Economic Studies, Bank of Japan, 2012).

80. John G. Matsusaka, *For the Many or the Few: The Initiative Process, Public Policy, and American Democracy* (Chicago: University of Chicago Press, 2004).

thought to influence fiscal policy, comparatively little work is focused on the structural and institutional limitations of constitutions in this regard.

An underlying theme in all the limitations that follow is that constitutional clauses do not exist in a vacuum and are subject to institutional interactions.⁸¹ The effect of a rule in isolation or in theory may be very different from its effect in practice, depending on the other institutions in place. Readers can think of government as a complex system whereby a change to one rule propagates throughout the system. A conflict between provisions, or the interpretation of a single provision, might be resolved very differently in one state than in another, depending on the composition of—or manner of selection for—the judiciary. The effect of term limits might be very different in one state than in another, depending on the overall balance of power between the executive and the legislature.

Limitation 1: Vague Constitutional Provisions Create Uncertainty for State Fiscal Policy

What is an “adequate” or a “thorough and efficient” education? What does it mean to say that a legislature “shall pass suitable laws for the protection and promotion of the public health”? The answers, not surprisingly, will depend on whom one asks, and differing perspectives can lead to lawsuits.

Vague language gives judges enormous powers to expand or restrict the scope of constitutional provisions. In the case of education, decades of litigation have placed significant budgetary burdens on states. In the case of health care, the Michigan public-health provision quoted earlier was judged not to obligate that state to provide state-funded healthcare coverage, though the plaintiffs argued that it did.⁸²

The challenge for state fiscal health is that courts’ opinions can change as personnel or understandings of the law change. In Michigan, for instance, it was determined by the courts that the public health section was not “self-executing” and that, therefore, the plaintiffs did not have standing, meaning that some legislative action was necessary before a lawsuit could be filed.⁸³ There have been similar disputes with regard to whether environmental provisions are self-executing.⁸⁴

Meanwhile, education clauses sometimes have been interpreted as self-executing and as imposing obligations on state governments, often *as determined*

81. This concept is introduced in Primo, *Rules and Restraint*.

82. Leonard, “State Constitutionalism and the Right to Health Care.”

83. *Ibid.*

84. *Ibid.*; May and Romanowicz, “Environmental Rights in State Constitutions.”

by judges.⁸⁵ Understandings with regard to health care or the environment could change in the future, especially if different legal strategies are used. After all, attempts to reform education were initially unsuccessful on federal Fourteenth Amendment equal protection grounds but then succeeded through other strategies that focused on equal protection and education clauses in state constitutions.⁸⁶

Vague provisions also give judges an opening to limit the types of innovations that can help states improve the quality of their services. The mandate in Washington that certain funds could be used only to support “common schools” was used by Washington State courts in 2016 to strike down a law that would have diverted funds for traditional public schools to charter schools. Common schools are not defined in the state constitution; instead, Washington courts relied on a 1909 court decision defining the term.⁸⁷ Similar battles are being waged across the country with regard to voucher programs and terms like “uniform” in state constitutions.⁸⁸

Limitation 2: Provisions Inserted into Constitutions Are Not Immune to Issues of Rule Design, Institutional Interactions, Implementation, and Enforcement Simply by Virtue of Being Constitutional

Constitutions can elevate the status of a rule or can give it relative permanence compared to a statute,⁸⁹ but they will not magically transform poorly designed rules into effective rules. Constitutions will not avoid institutional interactions,

“Vague provisions . . . give judges an opening to limit the types of innovations that can help states improve the quality of their services.”

85. Tractenberg, “Education.”

86. Murray, Evans, and Schwab, “Education-Finance Reform and the Distribution of Education Resources.”

87. *League of Women Voters of Washington v. State*, 355 P.3d 1131 (Wash. 2015).

88. Preston C. Green III and Peter L. Moran, “The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant,” *Brigham Young University Education and Law Journal* 2010, no. 2 (2010).

89. Given the ease of amending the constitution, the word *relative* is important here.

nor will they work if poorly implemented. For instance, just because pensions are guaranteed by constitutions in several states does not mean that pension programs will be well designed or that the state will be able to pay out all promised monies. Government officials are not always forward-looking—politicians, after all, typically have difficulty looking past the next election. In fact, politicians may take on today more than they can handle tomorrow. For this reason, one should be very cautious about inserting economic protections and rights that impose fiscal obligations into state constitutions.

Meanwhile, constitutional restraints often fail because workarounds are easy to find⁹⁰—Norcross calls these workarounds “fiscal evasion.”⁹¹ TELs, discussed earlier, have been vulnerable to gaming. California’s 1979 Proposition 4 (known as the Gann Limit) capped expenditures funded from taxation but defined taxation narrowly, meaning that legislators could implement user fees and other “nontax” taxes to skirt the rule.⁹² Kousser and his coauthors even argue that the much-touted Taxpayer’s Bill of Rights Amendment adopted in Colorado led to some amount of evasion (before being partially undone by yet another amendment) in the form of shifting how higher education was funded in the state.⁹³

In addition to being evaded, fiscal restraints can also be manipulated. Researchers have linked the creation of weak rainy day funds (those that do not have stringent rules associated with deposits and withdrawals) to the desire to circumvent TELs, making rainy day funds piggy banks for legislators to raid rather than emergency funds.⁹⁴

Fiscal restraints may also produce unintended consequences that may transform them into pressures. As discussed earlier, supermajority rules for

90. For a discussion of effective budget rule design, see David M. Primo, “Making Budget Rules Work,” 2014 ed. (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, January 2014).

91. Eileen Norcross, “Fiscal Evasion in State Budgeting” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2010).

92. Cal. Const. art. XIII(B), § 8(c). The limit defines “proceeds of taxes” as follows: “Proceeds of taxes shall include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues.” This limit creates an opening for a governmental workaround: simply structure the provision of the government service so it is paid for with a user fee. Then, by definition, it is no longer paid for by a tax and is therefore not subject to a limit. Kousser and his colleagues find that governments in 15 of 23 states with similar rules also evaded those limits. Kousser, McCubbins, and Moule, “For Whom the TEL Tolls.” See also Primo, “Making Budget Rules Work.”

93. Kousser, McCubbins, and Moule, “For Whom the TEL Tolls.”

94. Gary A. Wagner and Russell S. Sobel, “State Budget Stabilization Fund Adoption: Preparing for the Next Recession or Circumventing Fiscal Constraints?,” *Public Choice* 126, no. 1 (2006).

tax increases may lead to increased spending as a result of logrolling. To give another example, the earmarking of tax revenues for specific purposes by creating a dedicated funding mechanism may put upward pressure on total government spending rather than simply acting as a lockbox.⁹⁵

Although indirect restraints are more difficult to evade, they can nonetheless have unanticipated consequences as a result of institutional interactions. Political scientist Abbie Erler theorizes that term limits may have exacerbated the common pool problem facing legislatures by increasing the power of interest groups, regulators, and rank-and-file legislators, thereby weakening the constraining effects of party leaders and committee chairs.⁹⁶

The bottom line is that it is nearly impossible to design an ironclad rule—constitutional or otherwise—so evasion or implementation issues are inevitable, even under the best of circumstances. Given these realities and given the primacy of constitutional rules, reformers should be cautious about placing new budget rules into constitutions.

Limitation 3: Constitutional Provisions That Grant Rights May Conflict with Fiscal Restraints

A third limitation in state constitutions is that grants of rights may conflict with provisions that place budgetary restraints on government. The clearest example of this conflict arose in Nevada in 2003 amid a budget battle between the governor and the state legislature. The governor sued the legislature, asking Nevada’s Supreme Court to force the legislature to fulfill its constitutional duty to pass a balanced budget. The court responded by taking note of the “conflict among several provisions of the Nevada Constitution”; according to the court, its job was to “reconcile the provisions which cause the present crisis.”⁹⁷

As the court saw it, the conflicting provisions were (1) a balanced budget requirement, (2) a requirement that revenue measures be passed by a two-thirds supermajority but that appropriations be passed with a simple majority, and (3) a mandate that the state fund education. The court ordered the legislature to proceed in passing the budget under majority rule, arguing, “Due to the impasse that has resulted from the procedural and general constitutional

95. George R. Crowley and Adam J. Hoffer, “Dedicating Tax Revenue: Constraining Government or Masking Its Growth?” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, May 2012).

96. Erler, “Legislative Term Limits and State Spending.”

97. *Guinn v. Legislature*, 71 P.3d 1269 (Nev. 2003).

requirement of passing revenue measures by a two-thirds majority, we conclude that this procedural requirement must give way to the substantive and specific constitutional mandate to fund public education.”⁹⁸ In a subsequent decision, the court reinforced its concerns with the supermajority rule for tax increases.⁹⁹

In 2006, the Nevada Supreme Court overturned this ruling, writing, “We take this opportunity to clarify [the earlier decision], wherein this court, in construing the Nevada Constitution, distinguished between ‘procedural’ and ‘substantive’ requirements, concluding that procedure must yield to substance if the requirements conflict. We expressly overrule that portion of the opinion. The Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision.”¹⁰⁰

All’s well that ends well? Perhaps. After all, legal scholar Richard Briffault considers these initial rulings to be “extraordinary.”¹⁰¹ And, just last year, a New Jersey court ruled that a state law protecting pension funding was not covered by the state constitution’s contract clause because it amounted to a state incurring debt without seeking taxpayer approval, in violation of that state’s constitution.¹⁰²

I view these cases differently, as sending a message that fiscal constraints in state constitutions are open to challenges that they violate substantive provisions of state constitutions. As Libonati puts it, “legislative and executive powers over budgetary and spending priorities” may be in conflict with clauses articulating “affirmative rights” such as education.¹⁰³

Briffault—who, as noted above, views the Nevada cases as outliers—acknowledges that the initial Nevada decisions highlight “the structural tension that supermajority tax-voting rules create for the accomplishment of other fiscal goals, such as meeting service needs while balancing the budget.”¹⁰⁴ Meanwhile, the New Jersey case could very well have gone the other way. As the court itself noted, in several other states, debt limitation

98. Ibid.

99. *Guinn v. Legislature*, 76 P.3d 22 (Nev. 2003).

100. *Nevadans for Nevada v. Beers*, 142 P.3d 339 (Nev. 2006).

101. Richard Briffault, “Courts, Constitutions, and Public Finance,” in *Fiscal Challenges: An Interdisciplinary Approach to Fiscal Policy*, ed. Elizabeth Garrett, Elizabeth A. Graddy, and Howell E. Jackson (New York: Cambridge University Press, 2008), 423.

102. *Burgos v. State of New Jersey*, A-55-14, 075736 (2015).

103. Michael E. Libonati, “The Legislative Branch,” in *State Constitutions for the Twenty-First Century*, vol. 3, 42.

104. Briffault, “Courts, Constitutions, and Public Finance,” 424.

clauses have been interpreted to refer to explicit borrowing, not to other forms of obligations.¹⁰⁵

Limitation 4: Constitutional Grants of Substantive Rights Limit Flexibility in Ways That May Harm Fiscal Health

To the extent that affirmative rights prioritize certain types of spending over others, states will be constrained in policy making in ways that may be harmful or at best neutral with respect to fiscal health. A legislative staffer expressed this view very clearly in the midst of a 2016 debate in Alaska over cuts to the state budget in response to significantly reduced revenue from oil: “We are looking at it [spending] as what we are constitutionally required to give the citizens.”¹⁰⁶

Moreover, rights may limit policy flexibility. For instance, as political scientist Richard DiSalvo notes, some states have been able to handle pension problems effectively in part because they faced “lower legal hurdles to reform” than did states such as Illinois that are hamstrung by constitutions.¹⁰⁷ This argument is not to say that the programs backed up by these rights should not be funded by government—but rather that enshrining the spending categories in constitutions is problematic. Nor am I claiming that constitutional protections *cause* mismanagement. New York and Illinois pension programs are both protected by their respective state constitutions, though the former is far better managed than the latter. What constitutional protections do is make it more difficult to dig out of a hole when pensions are mismanaged.

Another example can be seen in the very detailed constitutional requirements regarding public education that led a Nevada court in early 2016 to issue a preliminary injunction preventing a voucher program from going into effect.¹⁰⁸ That program would have drawn from funding accounts earmarked for public education. If this injunction remains in place, implementing the voucher program would require increased taxes or cuts to other government programs.

To be fair, one could argue that procedural limits on spending, debt, or deficits also limit legislative flexibility. After all, in a recession, tax receipts drop, meaning that a balanced budget constraint hinders the ability of legislators to adapt without making spending cuts or imposing tax increases.

105. *Burgos v. State of New Jersey*, A-55-14, 075736 (2015).

106. Jim Carlton, “Alaska Eyes ‘Third Rail’ Budget Fix,” *Wall Street Journal*, April 18, 2016, A3.

107. DiSalvo, “Limits of Retrenchment.”

108. *Lopez v. Schwartz*, Case No. 15 OC 00207 1B (Nev. 2016).

“It is vital that constitutional reforms be considered in light of the institutional environment in which they are placed.”

However, states can develop ways to manage such situations; for example, states keep reserves in rainy day funds precisely for circumstances such as this.

Positive rights, conversely, override the judgment of the legislature *on substantive policy grounds*. With respect to policy issues that do not involve the protection of fundamental rights, it is important to acknowledge that such provisions have the effect of prioritizing some spending over other spending and may shift the balance of power to the courts as they adjudicate claims regarding those rights.

GUIDING PRINCIPLES FOR STATE CONSTITUTIONAL REFORM

So where do we go from here? As some states, such as New York, mull whether to hold a constitutional convention, and as others continue to consider amendments to existing constitutions, the issue of how state constitutions affect fiscal policy is not going away. Given what I have written about the importance of institutional interactions in state constitutional design, I am hesitant to articulate specific constitutional reforms in the next section. Just as in my work on budget rule design,¹⁰⁹ I instead prefer to articulate a set of principles for policymakers and others to consider as they engage in or contemplate constitutional reform with budgetary implications.

Principle 1: The Impact of a Constitution Is Not Just the Sum of Its Parts

There is a temptation when assessing constitutions (or institutional environments) to focus on inputs. For example, the Goldwater Institute, as part of its overall ranking of state constitutions, evaluates a state’s constitutional fiscal restraints on the basis of whether they include (1) balanced budget requirements, (2) population and inflation

109. Primo, “Making Budget Rules Work.”

restraints, and (3) supermajority requirements with regard to tax or spending increases.¹¹⁰ However, as discussed earlier, simply having such rules on the books does not guarantee their success. Consider education: legal scholar Paul Tractenberg notes the weak relationship between the stringency of state education clauses and courts' interpretations of them. He concludes, "There are no guarantees how even the most directive language ultimately will be construed."¹¹¹

Because of the interaction effects discussed earlier, it is vital that constitutional reforms be considered in light of the institutional environment in which they are placed. This caveat is especially relevant for states with citizen initiatives, which make it easier for interest groups or activists to bypass the legislature and take a proposal directly to the voters.

As one report on Colorado's (an initiative state) economic future noted, "A most serious issue facing Colorado is its tangled fiscal policy process. Central to the problem is the practice of making fiscal policy by public referendum through amendments to the Colorado Constitution. It is a haphazard approach where citizens are asked to make major fiscal decisions in isolation."¹¹² The authors of the report were concerned more about the inclusion of fiscal restraints in the constitution than about substantive rights, but the point they are making applies to both rights and restraints in constitutions.

Principle 2: Sweat the Details

The details of rules matter because, in the absence of effective design (and enforcement), the rules will not have the desired effect.¹¹³ For example, all states but Vermont have some form of a balanced budget rule on their books, whether constitutional or statutory, but the details of those rules vary in ways that affect their impact on state spending and deficits.

Similarly, states with supermajority requirements for debt approval rack up more guaranteed debt than do states without debt limits, while referendum requirements for debt seem to limit guaranteed debt.¹¹⁴ As discussed earlier,

110. Nicholas C. Dranias, *50 Bright Stars: An Assessment of Each State's Constitutional Commitment to Limited Government*, Policy Report No. 233 (Phoenix, AZ: Goldwater Institute, 2009).

111. Tractenberg, "Education," 267.

112. "Principles for Progress: Shaping the Economic Future of Colorado" (Final Report, Colorado Economic Futures Panel, Denver, CO, 2005), 3.

113. Primo, "Making Budget Rules Work."

114. Kiewiet and Szakaly, "Constitutional Limitations on Borrowing," 89.

rainy day funds that give discretion to legislators are less effective than are those that have clear conditions associated with deposits and withdrawals.

The fact that details matter—and that if we get the details wrong, it is relatively difficult to fix the problem in a constitution compared with a problem in a statute—means that caution is the watchword when adding new provisions to constitutions. Principles 1 and 2 combined might be thought of as a call for caution reflecting the imperfection of rules and the risks associating with entrenching poorly designed rules. The next principle builds on this idea of caution, especially as it relates to substantive policy matters.

Principle 3: Tie Legislators' Hands on Fiscal Policy Making; Untie Their Hands on Substantive Policy Making

There is significant debate about whether constitutional provisions should be specific or general, and there is no magic formula for striking the appropriate balance between specificity and generality. If an amendment is written too vaguely, it is likely to be a magnet for litigation. If it is written too specifically, it might become outdated. Specifics limit flexibility and may spur the creation of more amendments,¹¹⁵ but in some cases—especially with respect to fiscal restraints—that specificity may be warranted to avoid rule evasion.

For instance, I have argued elsewhere that drafters of constitutional budget rules should not leave implementation details to Congress.¹¹⁶ Rights are more complicated. As the discussion of education clauses earlier in the paper demonstrates, vague grants of rights create an opportunity for judges to shape policy in significant ways. Recent research suggests that vague clauses are so pliant that court decisions with regard to education are unaffected by whether the decisions are based on “adequacy” or “equity” arguments,¹¹⁷ leading two scholars to conclude, “It seems fairly clear that constitutional language has had little influence on state courts.”¹¹⁸ Conversely, specifics may unreasonably constrain state legislatures. Although this debate is important, for the purposes of fiscal health, we need to take a step back and ask whether the subject in question is appropriate for inclusion in a constitution—period.

115. Grad and Williams, *State Constitutions for the Twenty-First Century*, vol. 2, chap. 3.

116. Primo, “Making Budget Rules Work.”

117. Berry, “Impact of School Finance Judgments on State Fiscal Policy.”

118. Joshua Dunn and Martha Derthick, “Adequacy Litigation and the Separation of Powers,” in *School Money Trials: The Legal Pursuit of Educational Adequacy*, ed. Martin R. West and Paul E. Peterson (Washington, DC: Brookings Institution Press, 2007), 332.

This position may sound heretical; after all, who does not support education? The point here, though, is that even *including a general principle* can, depending on judicial interpretations, lead to significant financial obligations for a state. It is certainly reasonable to debate whether such spending is warranted, but that debate is properly conducted through the legislative process. Moreover, while there is some evidence that judicial decisions on education have led to increased and redistributed education spending, there is much less convincing evidence that all this spending has actually improved education.¹¹⁹

Despite these lessons from education policy, the push to add additional policy obligations into state constitutions continues. For instance, there have been attempts to add much more forceful healthcare rights into state constitutions.¹²⁰ And Michigan voters, as mentioned earlier, stopped attempts in 2012 to give public-sector unions significant power; many analysts argued that voters were wary of enshrining such strong rights in the state's constitution.¹²¹

To encourage states to remain or become fiscally healthy, then, constitutions should give legislators great leeway on substantive *policy* matters (which may have fiscal implications, of course) and should place significant constraints on them with regard to *fiscal* matters. This approach means that affirmative rights that have an economic component and that go beyond fundamental rights (admittedly a term about which there is not universal agreement) should be avoided. To the extent that such provisions are placed into state constitutions, they should be made as specific as possible to give policymakers flexibility outside of the specific provision.

Thus, rather than featuring a general “public health” clause, a constitutional provision could instead specify that the state will provide access to clean drinking water to all residents, with “clean” defined using some external, well-defined standard (say, those determined by the federal government). This definition could minimize discretion and make clear what the state's liability is. Of course, an event such as the recent water crisis in Flint, Michigan, shows that even a limited right can cause significant unanticipated liabilities for a state or locality, but such liabilities are preferable to a more general obligation such as “public health,” which could be essentially boundless in this regard.

119. See, for example, Russell S. Harrison and G. Alan Tarr, “School Finance and Inequality in New Jersey,” in *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns* (Westport, CT: Greenwood Press, 1996), 178–201.

120. Kathrin Ruegg, “Embedding the Human Right to Health Care in US State Constitutions: A Progress Review and Lessons for Advocates” (Working Document prepared for the Human Right to Health Program, a project of the National Economic & Social Rights Initiative and the National Health Law Program, February 2009).

121. Steven Greenhouse, “In Michigan, a Setback for Unions,” *New York Times*, November 9, 2012, B1.

States should also consider provisions that make it clear that when procedural fiscal rules conflict with policy rules, the procedural rules should dominate. Such provisions would have the effect of increasing the flexibility of legislators on policy matters while imposing fiscal restraints on them with regard to the overall budget.

Of course, fiscal rules also influence policy, albeit indirectly. A budget rule that limits total spending, for instance, may give an advantage to some policy areas over others. However, although the *practical* effect of the rule may be to advantage some spending priorities over others, this outcome is not guaranteed if preferences over the distribution of spending change. In contrast, policy-specific provisions in state constitutions allow for less flexibility as preferences or circumstances change, as legislators have learned the hard way with regard to education and pensions.

It is reasonable to ask whether this principle unreasonably limits the potential for state constitutions to create a more effective government. One consequence of the incentive structure facing elected officials who seek the support of voters and interest groups is that spending offering relatively immediate gratification (such as the building of a new school) may find more support than does infrastructure maintenance, which arguably pays significant dividends but is less “sexy.” To tie the hands of legislators, why not simply expand the use of tax earmarking and then constitutionalize it?

Putting aside concerns regarding rule evasion (discussed earlier), earmarking is problematic because it prioritizes one category of spending over others. This presents a temptation that leads to a slippery slope. After all, public health is also important. So is education. So is public safety. The upshot is that once one goes down the road of managing the allocation of spending through state constitutions, it is difficult to know where to stop.

Principle 4: Transparency in Budgeting May Help Improve the Effectiveness of Constitutional Restraints and Limit the Fiscal Pressures Imposed by Positive Rights

Earlier I referred to Norcross’s concept of “fiscal evasion,” which limits the effectiveness of budget rules. One way to make constitutional rules more effective is to provide greater transparency about a state’s fiscal picture, including its long-term obligations.¹²² Admittedly, this approach is not a panacea; after all,

122. Truth and Integrity in Government Finance Project, *Truth and Integrity in State Budgeting: Lessons from Three States* (New York: Volcker Alliance, 2015).

Medicare and Social Security’s problems are well established, yet meaningful reform of these programs is not on the horizon.¹²³ Still, in the case of pension obligations, if voters had more information—for example, if they knew the per-person costs associated with pension promises—they might have a different perspective on the issue.

Political scientist D. Roderick Kiewiet has suggested that the California state constitution be amended to prevent the state government from offering employees defined benefit pension plans.¹²⁴ States should go further and prevent future pension-like problems by constructing provisions that prevent the states from taking on liabilities that are not explicitly issued as debt. In other words, if a state wants to make a financial promise payable in the future that is not fully funded today, it must account for this obligation in some way, including by creating a debt instrument for any unfunded liabilities as they emerge or by purchasing insurance for the uncertainty associated with programs whose solvency depends on future market returns (such as defined benefit plans). Such rules harness the discipline and (relative) wisdom of financial markets.

Despite its appeal, transparency may have unintended consequences. Political scientist John Ferejohn has argued that transparency may lead to *increased* spending because better monitoring increases the quality of politicians, which, in turn, makes voters more willing to support a larger government.¹²⁵ However, Ferejohn’s theoretical model does not incorporate existing budget restraints, nor does it account for unfunded liabilities such as pensions.

If Ferejohn’s model were adapted to incorporate limits on government, then transparency might be seen to have the effect of spurring more sustainable fiscal behavior. The consequence of such a shift might be a short-run increase in government spending (say, to overhaul pension systems), but it would put government on a more sustainable path in the long run.

Econometrically, one could study whether the effect of budgetary transparency in the United States is conditioned by the presence of fiscal restraints.¹²⁶

123. In the case of Medicare and Social Security, information on the programs’ problems typically is not presented in ways that nonexperts can understand it.

124. Kiewiet, “Day after Tomorrow.”

125. John Ferejohn, “Accountability and Authority: Toward a Theory of Political Accountability,” in *Democracy, Accountability, and Representation*, ed. Adam Przeworski, Susan C. Stokes, and Bernard Manin (New York: Cambridge University Press, 1999), 131–53.

126. The most sophisticated study that links transparency and fiscal outcomes in the United States and that also controls for fiscal rules does not study the interaction of transparency with these rules. James E. Alt, David Dreyer Lassen, and David Skilling, “Fiscal Transparency, Gubernatorial Approval, and the Scale of Government: Evidence from the States,” *State Politics and Policy Quarterly* 2, no. 3 (2002).

Greater transparency could enhance the effectiveness of fiscal restraints and, to the extent that Ferejohn’s monitoring argument is accurate, could produce more efficient and effective government programs.

Principle 5: Pursue a Middle Ground between Amendments and Conventions

As mentioned earlier, it is much easier to amend a constitution than it is to *revise* a constitution, because revisions typically require constitutional conventions. Not only are conventions difficult to convene, but also they tend to evoke fears of a wholesale rewrite of a state constitution.¹²⁷ As one recent news account discussed, in 1977 and 1997, conventions were rejected in New York State in part because of fears by interest groups that their preferred policies could be on the chopping block.¹²⁸

Yet amendments are often insufficient to obtain the type of fiscal reform one might seek, because several changes may be necessary to achieve a desired effect. An alternative approach is a constitutional revision commission, which typically is advisory in nature but could be given the authority—as one Colorado commission has suggested after examining the experience of Florida—to bring a limited set of proposals to voters, with the goal of helping to address the links among provisions.¹²⁹ A commission structure is likely to alleviate fears that the entire constitution is up for grabs and at the same time give voters the opportunity to make the constitution a more effective governing document.

CONCLUSION

This paper has detailed the fiscal pressures and restraints in state constitutions, as well as the limitations of state constitutions in fostering effective fiscal policy making. Constitutions are not a cure-all for fiscal ailments in the states. At best, they can provide the foundation for fiscal health, leaving policy decisions to elected officials. At worst, they limit flexibility, impose fiscal pressures, and favor funding for some policy areas over others.

127. For details about recent state constitutional conventions and fears regarding scope, see Vladimir Kogan, “Lessons from Recent State Constitutional Conventions,” *California Journal of Politics and Policy* 2, no. 2 (2010).

128. David Klepper, “New York to Decide Whether to Revise State Constitution,” *thedailynewsonline.com*, December 13, 2015.

129. 2007 Colorado Constitution Panel, “Final Report.”

There is no magic formula for constructing a constitution that promotes fiscal health, but the principles in this paper provide a framework for thinking about better and worse ways to structure constitutions. A theme unifying much of this paper’s argument is caution. It may be tempting to include positive rights in state constitutions, but doing so often gives the judiciary great power and may constrain states that face limited tax revenues and the need to prioritize across spending areas. Similarly, it may be tempting to include budget rule upon budget rule in the state constitution (e.g., TELs, a line-item veto, or supermajority rules for tax increases). But the effects of those rules may not be as anticipated, and the more rules that exist, the more likely it is that unanticipated consequences will arise from institutional interactions.

Another reason to urge caution in the overuse of constitutions is that states are constrained by bond markets and by the ability of residents to “vote with their feet,” so there is an upper bound on fiscal mismanagement that is far lower than at the federal level. For all the problems the states face—and there are many—their long-term liabilities are about one-sixth of those facing the federal government.¹³⁰ Constitutional provisions may do more harm than good.

However, constitutions do have a role to play in state fiscal policy by providing a structure for legislative decision making. States face important policy debates in the coming years about issues such as education, health care, unionization, pensions, and economic policy. These are important debates, but they should be conducted through the legislative process, not through constitutions. Otherwise, we are binding future generations to our policy preferences today—often with associated fiscal obligations and debt. Imposing constraints on government’s scope does the opposite—it leaves future generations free of burdens that have been imposed on them by others.

130. Laurence J. Kotlikoff and Scott Burns, *The Clash of Generations: Saving Ourselves, Our Kids, and Our Economy* (Cambridge, MA: MIT Press, 2012), 33.

“There is no magic formula for constructing a constitution that promotes fiscal health, but the principles in this paper provide a framework for thinking about better and worse ways to structure constitutions.”

Some might argue that if government does not do enough, then the people are imposing a different sort of burden on future generations—poorly educated workers, crumbling infrastructure, and so on. But this argument misses a fundamental point: the framework proposed here does not place limits on education, infrastructure, or other spending priorities. Instead, the framework builds on the perspective (1) that spending priorities should be determined by legislatures, not imposed by judges or constitutions, and (2) that ensuring a fiscally sustainable government is an important way in which constitutions can allow legislatures, governors, and voters to determine spending and taxing priorities.

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