

THE CONSTITUTION OF LIBERTY TO TAX AND SPEND

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The modern economics of constitutions attempts to define the optimal set of rules for constraining the activities of government. Such an efficient constitution would allow government to function effectively to protect the lives and liberty of citizens without violating the rights of some in order to provide gains to others.

Although the set of rules constraining governmental behavior may not necessarily take the form of a formal, written document—for example, the British constitution does not—formal, written constitutions have received much attention in the constitutional political economy literature. Many writers in the field of constitutional economics have focused their attention on the U.S. Constitution—which, for all its acknowledged limitations, is usually regarded as one of the most successful real-world constitutions.¹

However, there are really at least 51 constitutions in effect in the United States.² The governments of all American states, like the federal government itself, are formally based on constitutions, documents similar in general design to that of the federal Constitution itself. These state constitutions serve as the foundation of state law, in addition to providing the framework for overall government opera-

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¹Scholars of constitutional economics have frequently commented on the failure of the U.S. Constitution to regulate government efficiently. Some of these writers have devoted much thought to desirable reforms which would improve the ability of the Constitution to function as a “treaty” between government and society. See, for example, Buchanan (1984).

²Actually, a total of 60 different constitutions are in effect within the United States, if the constitutions of U.S. Commonwealths and Territories are included. Shore (1994) includes constitutions for Guam, the Panama Canal Zone, the Federated States of Micronesia, the Republic of the Marshall Islands, the Northern Marianas Islands, the Commonwealth of Puerto Rico, the Republic of Palau, the U.S. Territories (including Guantanamo Bay, Diego Garcia, and eight others), and the U.S. Territory, Virgin Islands. This article considers only the state documents.

tions. Just as the U.S. Constitution can be said to “regulate” the federal government, state constitutions regulate state governments. But the “regulating government” function of these state constitutions has heretofore received comparatively little attention from scholars of constitutional political economy.

Our intention here is to examine the role of these state constitutions as constraints on political rent seeking. After all, to the extent that state constitutions successfully “regulate” government, rent seeking activity would be what was constrained. Do state constitutions indeed provide effective protection to private property rights against coercive redistribution by government, or have those constitutions been “captured” by interest groups seeking secure stalls at the public trough?

Constitutional Economics Versus Real Constitutions

Constitutional economics is an important outgrowth of the public choice revolution that extended economic analysis to the realm of democratic politics. Constitutions are the blueprints, the patterns of underlying constraints which are ostensibly designed to restrain the rent-seeking proclivities of political actors, and in so doing protect the freedom and property rights of taxpayers and voters.

The basic insight of public choice involves a recognition that politicians, like everyone else, are self-interested individuals who rationally seek to maximize their own well-being. Self-interested political actors seek to improve their chances for reelection (and sometimes their personal stock of wealth) by rewarding organized special interest groups with coercive wealth transfers. These special interest groups may constitute the majority of voters, or may only be a vociferous and politically adroit minority. Either way, such redistribution for political gain can damage the social fabric, and lower economic efficiency. Resources which would otherwise flow to productive investment are instead allocated to the pursuit of political wealth transfers. Hence, democratic political systems require a set of rules that protect individual rights to life, liberty, and property against the possible depredations of ambitious politicians and demanding special interests.

In theory, constitutions provide such a bulwark against rent-seeking activity. For example, Richard Wagner and James Gwartney (1988: 33) describe a constitution as “a treaty which promotes the substitution of wealth-creating trade for wealth-reducing plunder.” A constitution represents an agreement among members of a society to refrain from certain activities that tend to damage the society as a whole. In a broad sense, this agreement includes all social rules, formal and informal; but only agreements that are the outcome of a formal

process among all members of a society (or their elected representatives) are considered constitutions, and as such provide the basis for government activity.

Many scholars have argued that the U.S. Constitution is a model document along these lines. In spite of its flaws, the U.S. Constitution seems to demonstrate that formal constitutional constraints on government work much as constitutional economists predict. The document contains a variety of restrictions on the use of the political sector for rent seeking by special interests.

State constitutions have all been modeled on the U.S. Constitution to a considerable extent. Yet these constitutions receive little attention from scholars of constitutional economics. Thus, a rich source of empirical data pertaining to real-world constitutions has been strangely neglected. A close examination of these real-world documents suggests that actual constitutions fail to consistently serve as bulwarks of individual liberty. Rather, state constitutions often seem to serve as mechanisms for rent seeking.

State Constitutional Wealth Transfers

Every state constitution contains a Bill of Rights, or an equivalent list of protections guaranteed to citizens in relation to their state government. Many state constitutions also provide a variety of other protections to their citizens, for example by requiring state governments to avoid deficit spending, and limiting taxing and spending activities by government. These constitutional features have received extensive attention, and we merely acknowledge them here.³

Naturally, this is not to deny that such seemingly benign and even noble constitutional inclusions may be explicable in terms of the interest-group model of government. For instance, William Landes and Richard Posner (1975) note that the First Amendment had major wealth-enhancing effects for the newspaper and print industries, and speculate that the efforts of these beneficiaries may have played a crucial role in promoting that amendment. To the extent that all conceivable governmental actions have distributional effects on the flow of wealth, the investments by rent-seeking and rent-avoiding pressure groups may be ultimately responsible for even the most

³Throughout the following discussion specific clauses in state constitutions will be referred to by Article, Section, and Sub-Section. For instance, a specific reference might resemble the following: Texas (XVI, 20), which indicates the sixteenth Article, twentieth Section, in the current state constitution. Note, however, that certain state constitutions follow different formats, as will be noted. All cites to specific state constitutions are taken from Shore (1994).

wealth-enhancing, and incentive-compatible, measures, including those which take the form of constitutional inclusions.

No doubt state constitutions in some ways restrain state and local government.⁴ But state constitutions also provide a kind of constitutional enabling mechanism for a plethora of government interventions into the private lives and finances of citizens. Rather than merely restraining various potential governmental excesses, many features in state constitutions instead restrict the liberty of state residents through various kinds of coercive wealth transfers by state government. In this section, we review some of the major types of constitutional pork currently guaranteed by the constitutions of the states.

Takings

One of the governmental activities of gravest concern to constitutional economists are takings, the use of the power of eminent domain to forcibly appropriate resources for governmental use, albeit usually for just compensation judicially determined after the taking.

All states expressly authorize the use of the power of eminent domain by the state government, typically by the use of far more words than the pithy version in the U.S. Constitution. In fact, thirteen states go much further; their state constitutions allow the state to grant the power of eminent domain to persons or corporations.⁵ Richard Epstein (1985: 131–34) argues that the U.S. Constitution, properly interpreted, forbids government to zone private property. Nevertheless, the constitutions of two states—Louisiana (VI, 17) and Massachusetts (Amendment LI)—expressly authorize local government zoning laws, and the constitutions of two other states—Delaware (II, 25), and New Jersey (VI, 2)—authorize the use of zoning laws for purposes of “historical preservation.”

A form of property which is especially vulnerable to governmental depredations is land. Because the asset is immobile, government restrictions on the ability of free individuals to buy, sell, and use their land are particularly difficult to avoid or evade. Land cannot be transferred to another jurisdiction, or be readily concealed from governmental authorities. The point is that because of this almost unique vulnerability, constitutions might be expected to regulate governmental takings in this dimension especially closely.

⁴See Kincaid and Coleman (1992) for a catalogue of the various fiscal discipline mechanisms included in state constitutions.

⁵Alabama (I, 23), Colorado (II, 14), Florida (X, 6), Georgia (I, Section III, Paragraph II), Iowa (I, 18), Minnesota (XIII, 4), Missouri (I, 28), New Jersey (I, 20), New York (I, 7), Oklahoma (II, 23), Washington (I, 16), and Wyoming (I, 32). Nevada (8, 7) allows for the exercise of eminent domain at the behest of a private corporation.

Much of the American West is desert, and water is not naturally abundant throughout much of the region. Given this scarcity, rights to what water exists have been very important determinates of development, indeed to everyday life. If state constitutions represented attempts to regulate government, the protection of private water rights would probably be an important feature in such locales.

In the few state constitutions which explicitly mention water, the concern seems more along the lines of protecting government rights than the property rights of private citizens.⁶ Water rights, like land rights, are appropriated, attenuated, and even expropriated by some states' constitutions. For instance, the Alaska constitution reserves all waters, everywhere in the state, for common use (VIII, 13), and prohibits any exclusive right or special privilege (i.e., private property rights) to fish in the "natural waters of the state" (VIII, 15). California's constitution requires that "waste or unreasonable use or unreasonable method of use be prevented" (X, 2); "waste" and "reasonable" are left to the Legislature to define. That constitution also withholds from grant or sale to private persons or corporations all tidelands, in effect taking a vast amount of private real estate without any compensation (X, 3). Finally, California's constitution forbids private property owners from restricting access to navigable water across their property, attenuating their property rights, again without compensation (X, 4).

State constitutions have recently begun to restrict property rights for the ostensible purpose of "protecting the environment." These amendments do not include any reference to "just compensation" to the owners of private property whose rights are (implicitly, at least) abrogated. Consider, for example, the following provision contained in the current Illinois constitution (XI, 2):

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

This rather open-ended provision substantially undermines private property rights in the state of Illinois. While this impact is difficult to quantify, the provision effectively imposes a sweeping mandate on all private property holders in the state to produce a "healthful environment"; a requirement which could literally mean whatever a

⁶Most state constitutions, like the U.S. Constitution, do not expressly mention water rights. However, a number of federal court cases have interpreted the U.S. Constitution as permitting various limitations or infringements on property rights in water. See Epstein (1985: 67-73).

jury happened to think at a particular time. Hawaii's constitution (XI, 9) contains a similar provision.

But the Massachusetts constitution is, if anything, even more sweeping, and certainly more grandiose. Amendment XCVII to the Massachusetts constitution proclaims:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historical, and esthetic qualities of their environment.

This seems to imply the obligation on the part of private property holders to avoid most economic activities, given that virtually all production creates some pollution (which may, of course, be fully internalized by private markets), and probably conflicts with at least one individual's personal esthetic standards. Taken literally, the Massachusetts constitution would seem to grant all Massachusetts citizens a veto over any economic activity. Although the Illinois provision previously cited is probably more of a practical threat to private property rights, given its explicit reference to litigation opportunities, the Massachusetts constitution has even more radical anti-market implications in that it is not limited to considerations of mere health.⁷

Some state constitutions include provisions which simply forbid certain forms of economic development. The New York constitution (XIV, 1) provides for the state forest preserve "to be forever kept wild."

All of these constitutional provisions provide a legal basis for class action suits against private property owners who can be accused of generating some diffuse "harm to the environment" by employing the resources they own for productive purposes. Therefore, clauses which "protect the environment" only accomplish that end by restricting ownership rights and lowering the value of the associated property. By so doing, wealth is transferred from property owners to non-owner beneficiaries (or, to owners of already developed property from owners of as yet undeveloped property).

Restricting Market Competition

Richard Epstein (1985) argues that governmental interference in labor markets is a violation of the "takings clause" of the U.S. Constitution. Although some legal scholars disagree with his analysis, it is certainly the case that the U.S. Constitution refrains from enshrining any governmental restrictions on the operation of free labor markets,

⁷Predictably, the Massachusetts constitution (Article of Amendment L) also permits government to "take" private property for purposes of "proper conservation."

with the possible exception of the clauses designed to restrict access to the Presidency and the Congress based on age.⁸

Labor markets are subject to a variety of restrictions in state constitutions. Nine constitutions mandate that laborers engaged in public work be required to work no longer than eight hours per day.⁹ Four states provide for a minimum wage law in their constitutions.¹⁰ Additionally, New York's constitution (I, 17) mandates that workers employed in "public work" be paid "prevailing wages"—i.e., union scale. Arizona (XVIII, 3) and Wyoming (19, 7) have constitutional clauses prohibiting employees from contractually waiving employer liability for injury. Nine state constitutions establish a mandatory system of workers' compensation financed by taxes on employers.¹¹ Arizona's constitution establishes that employers are automatically liable for all employee injuries, whatever the cause, in mining, smelting, manufacturing, railroads, street railroad transport, and "any other industry if the Legislature so decides" (XVIII, 4).

Governments throughout history have often interfered in markets for loanable funds for the purpose of coercively transferring wealth, either from lenders to debtors, from debtors to lenders, or most commonly from both to itself, and then to somebody else. This is one avenue of rent seeking that an economically efficient constitution would presumably restrict. And state constitutions do, in fact, often concern themselves with capital markets. Unfortunately, they also often protect rent seeking rather than free competition.

For example, the Alabama constitution requires that banks only be established for 20 years at a stretch (XIII, 251). The Oklahoma constitution forbids one bank from holding any interest in any other bank (IX, 41). California's constitution prohibits "usury," and limits legal interest rates to a maximum of 10 percent (XV, 1). The constitutions of Texas (XVI, 11) and three other states contain similar usury

⁸This refers to Article I, Sections 2 and 3 (age limits for membership in the House and Senate), and Article II, Section 1 (age limit for the presidency). Also worth mentioning is the requirement that federal judges maintain "good behavior" to remain on the bench (Article III, Section 1).

⁹Arizona (XVIII, 1), California (XIV, 2), Idaho (XIII, 2), New Mexico (XX, 19), New York (I, 17), Ohio (II, 37), Oklahoma (XXIII, 1), Utah (XVI, 6), and Wyoming (19, 2). New York's constitution imposes a ceiling of 40 hours per week per employee.

¹⁰California (XIV, 1), Nebraska (XV, 8), Ohio (II, 34), and Utah (XVI, 8). The Nebraska and Utah constitutions limit their minimum wage requirements to women and children.

¹¹Arizona (XVIII, 8), Arkansas (Amendment 26), California (XIV, 4), Louisiana (XII, 8, 1), Montana (II, 16), New York (I, 18), Ohio (II, 35), Texas (III, Section 60), and Vermont (Chapter 2, Section 70). In addition, the constitution of Kansas (7, 5) mandates state unemployment insurance.

restrictions.¹² Illinois constitutionally requires that branch banking can only be authorized by a three-fifths vote in each House of the Legislature (XIII, 8).¹³ The Texas constitution prohibits foreign banks from operating in that state (XVI, 16(a)).¹⁴

State constitutions often provide the legal basis for the state to regulate particular industries. The regulation of insurance, railroad, general transportation, and energy industries are especially common. These documents frequently authorize the state to control prices in these industries.

Railroads have been extensively regulated by state governments, including rate regulation, and a number of state constitutions list articles expressly authorizing or requiring such rate regulation. The constitutions of three states establish that legal maximum rates are to be set limiting charges by railroad companies.¹⁵ The constitutions of four other states authorize that railroad rates to be set by the state railroad commission (or another applicable commission).¹⁶ The constitutions of an additional 10 states expressly authorize the state Legislature to regulate railroad rates.¹⁷ Who can charge these controlled prices is also defined by some state constitutions. For example, the constitution of Mississippi (VII, 197) forbids foreign corporations to lease, operate, or obtain any interest in domestic railroads.

State constitutions do not limit themselves to controlling prices charged by railroads, however. Telephone company service rates are regulated by the constitutions of three states.¹⁸ Two state constitutions—New Mexico (XI, 10) and Oklahoma (IX, 18)—authorize government price controls over “Transmission Companies,” i.e., electricity generation, telegraph, and telephone companies as a group. Virginia (IX, 2) authorizes the state Corporation Commission to regulate rates charged by gas and electric companies.

¹²The other examples are: Arkansas (Amendment 60), where the legal ceiling is 5 percent over the Federal Discount Rate on general loans; Maryland (III, 57), setting the legal limit at 6 percent); and Oklahoma (XIV, 2), where the limit is 10 percent.

¹³Or a majority of those *elected* in both Houses, whichever is greater.

¹⁴Banks intent on challenging the Federal Reserve note monopoly should be aware of the prohibition on the issuance of private money in the Nevada constitution (8, 6).

¹⁵Nebraska (X, 4), Oklahoma (IX, 18), and West Virginia (XI, 9).

¹⁶California (XII, 4), New Mexico (XI, 8), South Carolina (IX, 1), and Virginia (IX, 2). The South Carolina clause authorizes “appropriate regulation” to be applied to common carriers.

¹⁷Alabama (XII, Section 243), Arkansas (XVII, 10), Idaho (XI, 5), Mississippi (VII, 186), Missouri (XI, 9), Nebraska (X, 4), North Dakota (VII, 13), South Dakota (XVII, 15), Texas (X, 2), and Washington (XII, 18). Additionally, Nevada (IV, 20) allows County Commissioners to set rates.

¹⁸The states are California (XII; 3,6), New Mexico (XI, 10), and Virginia (IX, 2).

Four state constitutions authorize the regulation of rates charged by transportation companies.¹⁹ Seven state constitutions forbid price discrimination by transportation companies, defined as charging different rates to different customers, regardless of differences in costs associated with providing service to those customers.²⁰ California (XII, 3) also regulates the rates charged by warehouses.²¹ Finally, Hawaii's constitution prohibits the use of nuclear power within the state (XI, 8).²²

Direct Transfers

Restricting market competition is one means by which state constitutions can transfer wealth to privileged groups and individuals, restricting the property rights of some for the advantage of others. But some of these state "treaties" take the direct route, obligating state government to allocate funds to favored recipient groups.

Article I, Section 8 of the U.S. Constitution states "The Congress shall have Power to . . . provide for the common Defence," and reserves to the states only the appointment of the officers for, and the training of, state militias. Nevertheless, the states are quite active in providing veterans' benefits, and some state constitutions reflect this.

Georgia's constitution (VII, Paragraph V) grants disabled veterans exemption from property taxation. The constitution of the state of Texas (III, 49b) establishes a tax-financed Veteran's Land Fund, that buys land and then sells it at a discount to veterans. The Minnesota constitution (XIII, 8) authorizes a "veterans bonus" to be paid only to Vietnam and Vietnam-era veterans.

In fact, veterans have been favored with a virtual parade of state constitutional largesse: five states' constitutions currently provide for tax-financed bonus payments to be made to veterans generally,²³ and three states grant some form of state aid to veterans in their constitu-

¹⁹California (XII; 3,6), New Mexico (XI, 9), Oklahoma (IX, 18), and South Carolina (IX, 1). The New Mexico constitution establishes that the state Corporation Commission will set "interstate carrier rates." The South Carolina constitution establishes that "appropriate regulation" be applied to "common carriers."

²⁰Arkansas (XVII, 6), Arizona (XV, 12), California (XII, 4), Idaho (XI, 6), Missouri (XI, 12), Nebraska (X, 7), and Washington (XII, 15).

²¹Kentucky (Section 206) makes warehouses subject to control by the legislature.

²²This constitution, however, allows exceptions to this prohibition after a two-thirds vote in both legislative houses.

²³The state constitutions are: Maryland (III, 34), Michigan (X), New York (VII, 18), Oregon (XI-F(2)), and South Dakota (XIII, 18). The Louisiana state constitution of 1921 (revoked in 1974 when the current document was adopted) gave the proceeds of the state beer tax of 1948 to veterans (XVIII, 10-13).

tions.²⁴ Pennsylvania (III, 19) specifies that appropriations are to be made for the widows and orphans of veterans. Maine (IX, 14D) authorizes state government to insure loans to veterans. The Missouri constitution (IV, 19) requires that veterans be given preference in state jobs. The Montana constitution (II, 35) provides for veterans to receive “special consideration,” as determined by the Legislature. New Jersey (VIII, 3) provides a special tax deduction for veterans.

Some state constitutions direct that benefits be bestowed by the government to veterans of specific wars. For example, Ohio provides both a Korean War Bonus (VIII, 2d) and a Vietnam Conflict Compensation Fund (VIII, 2j). Similarly, West Virginia (Article XIV) includes a Korean Veterans Bonus Amendment, a Vietnam Veterans Bonus Amendment, and a Bonus Amendment directed at veterans of the Persian Gulf, Lebanon, Grenada, and Panama—regardless of financial status of the veterans in question.

Veterans are not the only recipients of constitutional guarantees to entitlements. Consider aid to college students, who tend to have higher than average family incomes as a group. Several state constitutions direct the state legislature to provide wealth transfers to college students and their (frequently affluent) families. Florida (VII, 15) and Maine (VIII, 2) authorize the issue of bonds to finance aid to college students. Ohio (VI, 5) offers guaranteed loans to residents attending colleges. Massachusetts, too (Article of Amendment CIII) provides for state aid to college students. None of these constitutional provisions establish any requirements based on financial status (i.e., they are not “means tested”) so that (at least according to the state constitution) the provision of state financial aid to wealthy college students would be perfectly legal.

This is not, however, meant to imply that government transfer programs directed toward the poor have been neglected in state constitutions. Several state constitutions explicitly establish government welfare programs. For example, the constitution of Oklahoma (XXV, 2) creates a Department of Public Welfare. Alaska also has a constitutional requirement for the Legislature to provide for public welfare programs (VII, 5). A variety of state constitutions contain clauses requiring state government to provide tax-financed public assistance in some form. Hawaii (IX, 3), and New York (XVII) authorize public assistance, and New York (XVIII) also authorizes the provision of low income housing by the state government. The constitution

²⁴The constitution of California (XVI, 6) authorizes the issuance of bonds to finance the purchase of farms and homesteads owned by veterans, as does the constitution of Oregon (XI-A, 1). Wisconsin (VIII, 10) provides for state financed veterans’ housing.

of Louisiana (XII, 8) provides that the Legislature may establish a system of social welfare, as does the constitution of North Carolina (XI, 4). Hawaii (IX, 5) provides for slum clearance and “rehabilitation.” Some constitutions impose obligations on lower levels of government. For example, Alabama (IV, 88) requires counties to maintain the poor.

While none of these state constitutions expressly authorize any particular funding for such welfare programs, the documents provide the named departments and agencies with a huge advantage in the political wars in state politics—constitutional protection, from legislative branch interference. Not only does the state constitution prevent the elected representatives from considering abolition of such programs, but it also provides further protection to welfare bureaucracies in the form of legal standing now available to disgruntled beneficiaries, who have a constitutional basis for suing the state in the event that the legislature reduces welfare allocations.

Senior citizens are another group who often benefit from state constitutional clauses. Many award various benefits to all residents over 65 without regard to the income or wealth of the prospective recipients. Florida (IV, 12) has established a Department of Elderly Affairs in its constitution. Hawaii (IX, 4) provides for the “economic security” of the elderly, and Kentucky (244A) provides for old-age assistance. Ohio (VIII, 14) authorizes low-interest loans for the elderly, and for owner-occupied single family housing. Oregon (XI-1 (2)) authorizes the state government to lend for multi-family housing for the elderly.

Farmers’ Pork

In Western democracies the agricultural sector of the economy is heavily subsidized by government. The bulk of these subsidies in the United States, at least in terms of value, are the various price support programs administered by the Department of Agriculture, and involve tens of billions of dollars of federal spending. But many state governments are also active on this front; farmers benefit from an extensive array of special privileges and subsidies enacted by state legislatures. In some farm states, significant wealth transfers to farmers have found their way into state constitutions.

Farmers as a group have been quite successful in securing these government wealth transfers to themselves by way of state constitutions. Naturally, most of these constitutional provisions benefit only a subset of farmers at the expense of consumers, taxpayers, and even other farmers. Consider some examples.

The South Dakota constitution makes possible state insurance for crop damage due to hail (XXI, 8), provides for state and county farm

loans (XXVIII, 1), and allows for state financing of grain elevators, warehouses, flouring mills, and packing houses (XXIX). North Dakota's constitution similarly provides for hail damage indemnification, to be financed by an acreage tax (X, 7), and provides for publicly owned and operated grain elevators (X, 19–20). The Texas constitution authorizes loan subsidies to farmers (III, 49f), and provides for state-subsidized bond insurance for private non-profit water supply corporations, commonly established by groups of farmers for purposes of irrigation (III, 49 D-5). Agricultural interests are also provided with a variety of special tax exemptions in some state constitutions (see below). Finally, Hawaii's constitution (XI, 3) directs that the State “shall promote and conserve agricultural lands,” in effect ordering the state government to restrict the development of farm lands for non-agricultural purposes.

The constitution of Alabama holds the (dubious) record for the most constitutional amendments in force. The current document includes 508 amendments, which run in the official printed copy from page 50 to page 472—422 pages of very fine print. Many of these amendments only apply to particular cities and counties. But those which apply state-wide are especially interesting.

Amendment 201 is for the “promotion of the cattle industry,” which provides for centralized research, education, advertising, and other services financed via means of a mandatory assessment—a device by which the majority of cattle owners can legally force the rest of cattle owners to help pay for programs which benefit the majority. This was merely the first of a number of similar amendments. Number 214 promotes poultry and poultry products; 315 promotes the soybean industry; 388 promotes the production and distribution of peanuts, milk, and cotton; all, like 201, are financed by earmarked taxes levied on farmers, albeit following a referendum. Amendments 327 and 400 are literally “pork barrel” transfers: both “promote” swine and swine products, again financed by taxes. Finally, Amendment 383 provides an indemnification program for peanut farmers—a group that also receives huge subsidies from the federal government—that reimburses them for crop losses due to freeze damage and *Aspergillus flavus* fungus.

This is not, however, meant to suggest that the constitutional pork is all on the farm. The Arkansas constitution authorizes cities to raise tax revenues in order to aid private industries (Amendment 18).

Tax Privileges

Many writers on constitutional tax limitations implicitly assume that those limits will be general in their applicability. Such a view is consistent with the model of the state constitution as a set of regulations

that restrain governmental misbehavior. Since one of the major devices by which government extracts resources from the private economy is taxation, it makes sense for the state constitution to establish restrictions on the ability of government to raise tax revenue. In fact, a number of states have included general tax (and typically, expenditure) limitations of one sort or another in their state constitutions.

However, many state constitutions contain tax limitations and exemptions highly specific to particular industries or occupations. These measures are clearly designed to help a narrowly defined interest group, and usually cause competitive disadvantage to firms and individuals not offered that particular tax break.

Consider the following examples. The Texas constitution exempts all farm products from commodity taxation (VIII, 19), and exempts all farm and husbandry implements from *ad valorem* taxation (VIII, 19a). The constitution of Arkansas authorizes the state to grant selective tax exemptions from property taxation in order to “encourage industry” (Amendment 27).

Other groups and industries are also beneficiaries of state constitutional tax exemption privileges. The Arkansas constitution allows the General Assembly to exempt capital invested in mines and manufacturing enterprises (X, 3), and capital invested in cotton textile mills (Amendment 12), from taxation. Washington’s constitution exempts retirees from all property taxes (VII, 10). The constitution of the state of New Jersey allows the legislature to grant property tax deductions to all senior citizens (VIII, 4). Special tax deductions for senior citizens are also permitted by the constitution of New Jersey (VIII, 4).

Tax Disabilities

While constitutional tax loopholes and special privileges are more common, a few state constitutions impose discriminatory levies on certain groups or property interests. Minnesota’s constitution contains several clauses allowing the state to impose selectively higher taxes on disfavored groups. The legislature is expressly allowed to tax aircraft overflying the state “on a more onerous basis than other personal property” (X, 5); to impose a tax on firms or individuals mining ores within the state based on the value of the ore extracted, over and above other applicable taxes (X, 3); and the state is allowed to impose a “forest yield tax” on timber cutting in order to “encourage forestation” (X, 2).

State Constitutional Temperance

The prohibition of alcoholic beverages receives little attention from modern scholars of constitutions, probably for the simple reason that

the Eighteenth Amendment to the U.S. Constitution establishing national prohibition was repealed in 1933. Subsequently, all states which had adopted their own prohibition amendments repealed them. However, constitutional alcohol prohibition did not die, but mutated into a different form.

The constitution of South Carolina (VIII-A, 1) does not mandate alcohol prohibition, but authorizes the legislature to prohibit the manufacture and sale of alcoholic beverages if it so chooses. The constitutions of six states (including Texas) authorize local governments to enact ordinances prohibiting the manufacture or sale of liquor within their jurisdictions.²⁵ The West Virginia constitution (VI, 46) forbids the sale of liquor by the drink in saloons or in any other public place. Article XVI, Section 6 of the Maryland constitution forbids repealing or even subjecting to a voter referendum any state laws or constitutional amendments prohibiting the manufacture or sale of liquor. In addition, a further nine state constitutions authorize or require the regulation of liquor traffic in some way, shape or form.²⁶

Of course, some state constitutions impose various restrictions on the liquor trade short of outright prohibition. For example, the Oklahoma constitution prohibits open saloons,²⁷ forbids the advertising of alcoholic beverages, and orders package stores to remain closed on Sundays, election days, and most major holidays (XXVIII, Sections 4–6). Oregon (I, 39) authorizes the state to license the selling of liquor by the glass. The constitutions of South Carolina (VIII-A, 1) and Texas (XVI, 20) grant the state a monopoly in the sale of liquor. Meanwhile, California's constitution (XX, 22) forbids that state's government from manufacturing or selling liquor. Many of these provisions serve to either protect identifiable groups of politically influential beneficiaries from competition in the liquor market, or else to establish a monopoly by the state government in the provision of liquor—a lucrative source of government revenue in some states.

However, there is at least one state constitution that explicitly protects the freedom to consume alcoholic beverages. The constitution of New Mexico (XX, 13) provides that the use of sacramental wines shall never be prohibited.

²⁵The state constitutions are: Delaware (XIII, 1,2,3), Florida (VIII, 5), Kansas (XV, 10(a)(c)), Kentucky (61), Michigan (IV, 40), and Texas (XVI, 20).

²⁶The state constitutions which provide for the regulation of liquor traffic are: California (XX, 22), Colorado (XXII, 1), Idaho (III, 26), Kansas (XV, 10(b)), Michigan (IV, 40), South Carolina (VIII-A, 1), Texas (XVI, 20), West Virginia (VI, 46), and Wyoming (19, 10). Of course, every other state also regulates the liquor trade, but in most cases the regulation relies on statutory, rather than constitutional, authorization.

²⁷In towns with a population exceeding 200 persons, and outside wineries.

The Constitutional Lottery

Thirty-three states operate state lotteries (Clotfelter and Cook 1990: 106), which are becoming increasingly popular at the state level. This fact should not, however, be taken to suggest that state constitutions protect the freedom to gamble. In fact, 16 state constitutions prohibit lotteries altogether.²⁸ Thirteen state constitutions grant the State a legal monopoly over lotteries.²⁹

Meanwhile, gambling, of any sort, by “any person holding an office of honor, trust, or profit” in government must result in the offender being fired from his job, according to the constitution of South Carolina (XVII, S8).

The Constitution as Laboratory

State politicians like to refer to the 50 states as the “laboratory of federalism.”³⁰ State constitutions certainly showcase some peculiar experiments.

Consider the diverse array of “language” clauses in state constitutions. The constitutions of Arizona (XXVIII, 1), Colorado (II, 30a), and Florida (II, 9) make English the official language of the state. Nebraska (I, 27) goes further and requires that all schools (specifically including private, denominational, and parochial) teach lessons in English. Meanwhile, New Mexico (XII, 8) requires the Legislature to appropriate funds to make teachers fluent in both English and Spanish; and the constitution of Hawaii (XV, 4) establishes both English and Hawaiian as official languages.

There has been considerable controversy surrounding the “speech codes” and restrictions on “hate speech” put in effect on many college campuses. Many critics argue that such codes are incompatible with the First Amendment to the U.S. Constitution. Many might be sur-

²⁸Or prohibit all forms of gambling, lotteries included. The constitutions which prohibit lotteries are: Alabama (IV, 65), Arkansas (XIX, 14), Colorado (XVIII, 2), Idaho (prohibits all gambling; III, 20), Kentucky (226), Louisiana (XII, 6 (B)), Minnesota (XIII, 5), Mississippi (4, 98), Nebraska (I, 24); Nevada (4, 24), North Dakota (forbids all gambling; XI, 25), South Carolina (XVII, 7), Tennessee (XI, 5), Texas (III, 47), Utah (VI, 27), Washington (II, 24). This last constitution allows for the relaxation of the prohibition only following a 60 percent vote in both legislative houses, or a 60 percent vote by the electorate in a referendum.

²⁹Delaware (II, 17), Florida (X, 15), Kansas (15, 3b), Maryland (III, 36), Michigan (XIII, 5), Montana (III, 9), New Jersey (IV, Section VII, 2), New York (I, 9), Oregon (XV, 4), Rhode Island (VI, 15), South Dakota (III, 25), West Virginia (VI, 36), and Wisconsin (IV, 24). New Jersey’s constitution tightly restricts gambling outside of Atlantic City, to which it grants a special dispensation.

³⁰This phrase was made popular by former Governor Terry Sanford. See Sanford (1968).

prised to discover that one state currently has what amounts to a “constitutional” speech code. The constitution of Illinois contains a clause (I, 20) condemning “communications that portray criminality, depravity, or lack of virtue, or that incite violence, hatred, abuse or hostility towards a person or group of persons by reason of . . . religious, racial, ethnic, national or religious affiliation,” which, if enforced, would leave little popular entertainment or opinion press left.

There are many other miscellaneous examples of odd inclusions in state constitutions, a few of which are worth brief mention. The constitutions of five states still prohibit polygamy.³¹ The Oklahoma constitution (XX, 2) contains legal flash standards for kerosene.³² Article III, Section 7 in the West Virginia constitution authorizes the state government to outlaw obscenity. Five state constitutions forbid atheists from holding public office.³³ The constitution of Wyoming (19, 3) requires that only U.S. citizens can work in state, county, or municipal employment. The Massachusetts constitution (LXI) makes voting compulsory. These (and many other) curious constitutional clauses probably have minimal economic impact in today’s world, yet are indicative of the failure of at least some state constitutions to restrict themselves to the regulation of government in the general interest.

Unfortunately, many state constitutional experiments are more than merely eccentric, and expand the coercive power of government in radically new directions, or at least contain that potential. State socialism is alive and well in state constitutions.³⁴

Take, for example, the constitution of Hawaii, that requires the state government to “manage” state population growth and development (IX, 6) and authorizes that government to acquire property for the express purpose of “controlling” population, economic growth and development (XI, 4). Ohio (VIII, 13) provides for state-guaranteed loans for industrial development, and for state government support to research and develop coal-related technology (VIII, 15). Oregon (XI-J, 1) provides for “small scale” state-subsidized energy loans. South Dakota (XIV; 10, 12, and 14) provides for state cement, electric power, and coal-mining enterprises. The Illinois constitution (XIII, 7)

³¹Arizona (20, Second), Idaho (I, 4), New Mexico (XXI, 1), Oklahoma (I, 2), and Utah (III, Ordinance).

³²The standards are: for illuminating purposes, 115 degrees Fahrenheit, and a specific gravity of 40 degrees Baume’.

³³Arkansas (XIX, 1), Mississippi (14, 265), North Carolina (VI, 8), South Carolina (XVII, 4), and Tennessee (IX, 2).

³⁴We need, however, to keep these various constitutional escapades in proper perspective. The potential for grievous consequences following from ill-considered inclusions in the U.S., or other national Constitutions, is hugely greater.

authorizes the General Assembly to establish government-owned and -operated public transportation. The South Carolina constitution (VIII, 16) permits local governments to acquire and operate utilities. Rather than regulating government, these constitutional clauses expand the power of governments to regulate private market exchange.

Why So Much Constitutional Pork?

Clearly, then, many state constitutions contain features which mandate, or at least enable, a huge variety of coercive wealth transfers to favored individuals or groups. Unlike the U.S. Constitution, it is common for state constitutions to include specific restrictions on particular markets, or specific transfers to particular individuals or groups. The state constitutions in general represent yet another mechanism by which rent-seeking interest groups can achieve transfers for their members. We need to examine possible reasons for this pattern of constitutional behavior.

One reason for the wealth of political "pork barrel" in state constitutions is that these state documents are typically significantly easier to amend than is the U.S. Constitution. The U.S. Constitution requires a two-thirds vote in both Houses of Congress to approve a prospective constitutional amendment, followed by the ratification by three-fourths of the states. In contrast, the amendment of state constitutions is generally less restrictive. Twenty-four states only require a majority vote in the Legislature, either preceded or followed by a majority vote of the electorate, according to the Council of State Governments (1994: 21). Only one state (New Hampshire) requires a super-majority (two-thirds vote) by the electorate, while Delaware does not even require that constitutional amendments be put to a vote (outside the legislature) at all. Moreover, many states provide alternative mechanisms for amending their constitutions. Eighteen states permit constitutional amendment by popular initiative, all by majority vote on the amendment in question (Council of State Governments 1994: 23). And, of course, the constitutions of 41 states make provision for constitutional conventions, although this approach only leads to a tiny percentage of the total amendments adopted.³⁵

At the same time, wealth transfers which find their way into the state constitution will generally be significantly more durable than the acts passed by the legislature. The legislative branch is essentially only restricted by the need for a majority vote in support of a particular

³⁵*Council of State Governments* (1994: 2). Between 1986 and 1993, a total of 708 amendments were adopted to state constitutions. Only 8, or 1.12 percent, came about by way of constitutional conventions.

measure. Even the states with the most lenient amendment mechanisms require either two votes (one in the legislature, and one by the electorate [New Hampshire excepted]), or a popular vote preceded by an initiative petition (a kind of vote). This enhanced durability increases the value to interest groups of affected government transfers. Placing a mandate or requirement supporting a legislated program into the constitution makes that program more secure, less vulnerable to shifting political winds.

Conclusion

Constitutions have an important role to play in regulating government. The U.S. Constitution, for example, is often (and properly) held up as a shining example of a carefully designed and effectively enforced constitution that has succeeded in restraining governmental excesses and guaranteeing a prosperous commonwealth. While far from perfect, the U.S. Constitution has served the main purpose intended by the Founding Fathers extremely well.

A close examination of the constitutions of the several states reveals a less attractive picture. While adopting the major structural characteristics of the U.S. Constitution, state constitutions (as a group) have become encrusted with pork of almost every variety imaginable. Special interest groups have succeeded in insinuating favorable clauses and amendments into these state documents. In some cases, these constitutional favors to special interests have come to account for most of the length of the current document.

The intention here is not to belittle the significance of constitutional constraints on government. Indeed, regulating government via constitution is not only possible, but has played a major role in U.S. history. Nevertheless, a review of current state constitutions serves to inject a healthy note of skepticism into the enterprise of regulating government by means of the constitution. While constitutions can, in theory, function as effective constraints on government failure, under real world conditions these documents have often become merely another avenue for rent seeking by special interest groups.

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