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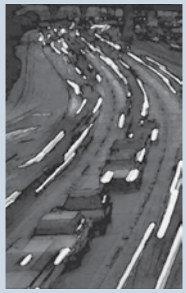

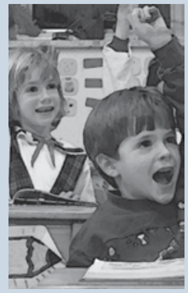

THE ATTACK ON COLORADO'S TABOR AND THE THREAT TO OTHER STATES

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Executive Summary

A lawsuit challenging the constitutionality of Colorado's Taxpayer's Bill of Rights (TABOR) has dire implications that extend far beyond the boundaries of Colorado. The theory of the lawsuit can be used to void well-founded safeguards in the constitutions of almost all other states.

In Independence Issue Paper 12-2012, Professor Rob Natelson, II's Senior Fellow in Constitutional Jurisprudence, debunked the lawsuit's claim that TABOR violates the requirement that each state have a "republican form of government." In this Issue Paper, Professor Natelson and Institute intern Zak Kessler demonstrate the practical implications of the lawsuit.

If the plaintiffs win, the result will be legal and practical chaos, not just in Colorado but across the country. This is because the theory of the lawsuit is that any fiscal restraints on a state legislature render that legislature less than "fully effective" and therefore "unrepublican." Special interests can employ this theory to destroy well-founded and long-standing safeguards against legislative fiscal abuse. Furthermore, they can use the same theory to attack the voter initiative and referendum process, and other constitutional limits on the power of state politicians.

The Attack on Colorado's TABOR and the Threat to Other States

What Is TABOR?

TABOR is an acronym for "Taxpayer's Bill of Rights." It was inserted into the Colorado Constitution in 1992 as a voter initiative. It is designated in the constitution as Article X, Section 10.[1]

TABOR safeguards both public solvency and individual taxpayers. It does so by restraining the fiscal powers of state and local legislative bodies. Specifically, TABOR

- imposes alternative conditions of either voter approval or two-thirds legislative support for tax increases and new taxes;[2]
- requires public votes to approve certain spending increases;[3] and
- requires public votes for most increases in debt, and for loosening of pre-existing restrictions on debt.[4]

In 2011, a group of present and former public officials filed a suit in the United States District Court for the District of Colorado. They argued that the Colorado Constitution's "Taxpayer Bill of Rights" (TABOR) violates the U.S. Constitution.

Voters in the state or any city, county, or district may suspend the need to vote for up to four years.[5] In addition, TABOR contains rules to ensure that elections on debt, taxes, and spending are conducted openly and fairly.

What Is the Legal Attack on TABOR?

In 2011, a group of present and former public officials filed a suit in the United States District Court for the District of Colorado. They argued that the Colorado Constitution's "Taxpayer Bill of Rights" (TABOR) violates the U.S. Constitution.[6] They later re-drafted their formal Complaint, so that their claims are now defined by a "Substituted Complaint." The gist of their suit is as follows:

- By restricting legislative fiscal powers, TABOR renders Colorado without a "fully effective legislature;"
- In order for a state to have a republican form of government, the state must have a "fully effective legislature;" and therefore
- TABOR causes Colorado to be out of compliance with the U.S. Constitution's requirement that each state have a "republican form of government."[7]

The "republican form of government" clause in the U.S. Constitution is Article IV, Section 4. It reads as follows:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.[8]

This provision is commonly called the Guarantee Clause.

The U.S. Supreme Court has long held that Congress, not the judiciary, is the appropriate venue to judge whether the Guarantee Clause has been violated.[9] Accordingly, federal courts generally refuse to hear claims that a state is unrepublican. They rule that such claims are "not justiciable." On July 30, 2012, however, the federal district judge hearing the case refused to follow these precedents. He held most of the case to be justiciable.[10] That holding is now being appealed.

Accordingly, federal courts generally refuse to hear claims that a state is un-republican. They rule that such claims are "not justiciable." On July 30, 2012, however, the federal district judge hearing the case refused to follow these precedents.

The plaintiffs' Substituted Complaint is, frankly, a very confused document. It relies heavily on the phrase "fully effective legislature." But the phase is the plaintiffs' own invention. It is unknown to the law. Yet in their Substituted Complaint they never define it.

Moreover, the Substituted Complaint never explicitly tells us how many of the TABOR rules allegedly render the Colorado legislature less than "fully effective." Do they mean only the restrictions on taxes? Or do they also include the limits on spending or debt? In some places the Substituted Complaint cites only TABOR's limits on taxes.[11] Elsewhere, however, it complains of the spending limits.[12] In still other places, it claims a "fully effective legislature" must have power to "tax and appropriate."[13] Still elsewhere it says that the legislature must have power to "raise and appropriate."[14]

Despite the confusion, when you read the Substituted Complaint carefully, you understand what the plaintiffs are really claiming. They are claiming that *all* of TABOR's fiscal restrictions—including limits on taxing, spending, and debt—are unconstitutional.

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We know this for two reasons. First, the Substituted Complaint alleges that a fully effective legislature must have unfettered power to "raise and appropriate." Of course, to "appropriate" is to spend. And to "raise" encompasses both taxing and borrowing. Second, the Complaint's prayer for relief asks: "[f]or a DECLARATION that the TABOR AMENDMENT is facially unconstitutional and unconstitutional as applied." It also asks"[f]or a DECLARATION that the TABOR AMENDMENT is null and void."[15]

In other words, the plaintiffs want all of TABOR declared void. Their target is not limited to TABOR's limits on taxing. It includes the limits on spending and borrowing as well. It also includes TABOR's fiscal limits on local government, which impose only incidental restraints on state lawmakers. According to the plaintiffs, any and all of these restrictions violate the republican form.

This is a startling conclusion. Nearly every American state constitution restricts the fiscal powers of the legislature and/or of local governments. Similarly, the U.S. Constitution restricts the fiscal powers of Congress. According to the plaintiffs, all of these constitutions are "unrepublican."

Parts V and VI explain this point further. We first turn to the question of whether a "republican" government must feature a "fully effective legislature."

Must A State Must Have A "Fully Effective Legislature" To Be Republican?"

Independence Issue Paper 12-2012 is entitled *Do Citizen Votes on Taxes and Laws Violate the Constitution's Requirement of a "Republican Form of Government?"*[16] That Paper examines the claim that a "fully effective legislature" is necessary for republican government. The Paper concludes that the claim is frivolous. It is entirely without merit.

Issue Paper 12-2012 explains the meaning of the U.S. Constitution's term "republican form of government." It means a government that is (1) controlled, directly or indirectly, by its citizens, (2) has no king, and (3) honors the rule of law. A republic need not have a "fully effective" legislature—or any legislature at all. A republic may rely exclusively on citizen votes to enact laws. Historically, many republics have done just that.

Issue Paper 12-2012 also shows that this is obvious to who has examined how the Founding Generation used the words "republic" and "republican." Dictionaries of the time defined "republic" and "republican" to mean any popular government or any non-monarchy. Leading Founders labeled as "republics" many prior governments, such as that of ancient Athens, where citizens voted on all laws. Leading Founders discussed the direct voting process in those prior republics. And in their speeches and writings, they pointed out explicitly that in republics citizens could make laws directly as well as through representation.

But the plaintiffs apparently decided to bring this lawsuit—at a great waste of private and public resources—without bothering to investigate what the Founders thought about the matter.

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A court ruling that TABOR violates the republican form would be constitutionally absurd.

Yet as any lawyer knows, absurd court rulings do sometimes occur. When absurd decisions become part of our jurisprudence, they serve as precedents, and can wreak further mischief.

Even if an anti-TABOR ruling did not void the initiative and referendum process in general, it could wreak havoc in other ways. This is because the anti-TABOR ruling could serve as a reason for court challenges to other constitutional checks on legislative authority over finances.

For example, in at least 21 states, voters may bypass their legislatures with statutory initiatives, and in at least 18 states they may use constitutional initiatives.[17] Furthermore, 49 states empower voters to check their legislatures' constitutional amendment authority with mandatory referenda.[18] A court decision invalidating TABOR could be cited as a reason for challenging initiatives and referenda in all those states. The argument would be that such provisions render state legislatures less than "fully effective."

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Fiscal Restraints in a Republic—In General

State constitutions contain rules to safeguard the public treasury and the taxpayers against irresponsible financial practices. Some of these rules are traceable to before the American Founding. Others arose from the debt crisis of the 1840s, when some states defaulted because of excessive borrowing.[19] Still others are more modern: They were adopted in response to taxing and spending practices that were not only oppressive, but destructive to economic growth and good government.

These constitutional safeguards appear in several different forms. Some are flat bans on particular practices. Thus, a constitution may bar a legislative body from imposing certain kinds of taxes. It may bar the legislature from exceeding a debt limit. It may prohibit the legislature from running a deficit—that is, incurring debt for current expenses.

Other restraints are less severe, because they are conditional. The legislature may be able to tax, spend, or borrow only if certain conditions are met. The condition may take the form of a stated rule, such as requiring a tax to be uniform or serve a particular purpose. Or the condition may be procedural—e.g., voter approval and/or approval by a legislative supermajority. For example, a state constitution may permit lawmakers to assess a tax only if a supermajority (say, 2/3) of each legislative chamber votes to do so. Or it may permit certain borrowing if the voters approve.

Other things being equal, the more options available for adopting a measure, the lighter the resulting restraint. A legislature subject to an unconditional ban is more fettered than one that can take an action approved by *both* a 2/3 vote *and* a popular majority. But the latter is less fettered than a legislature that needs *only* a 2/3 majority or *only* a popular vote. Still less fettered is the legislature that has the option of *either* a 2/3 vote *or* a popular majority.

In sum, constitutional fiscal limitations on legislatures run from most to least restrictive as follows:

- Flat bans on particular actions;
- Actions valid only if they meet several conditions, such as approval by *both* a supermajority *and* a popular vote;
- Actions valid only if they meet one condition, such as approval by a supermajority;
- Actions valid if they meet one of several alternatives, at the option of the legislature—such as approval by *either* a supermajority vote *or* a popular vote.

Interestingly, TABOR uses the lightest of these three options for most tax increases.

Fiscal restrictions on legislatures are not new. The U.S. Constitution contains several. It features at least one flat ban: Taxes on exports are prohibited.[20] It also features some conditional restraints: Indirect taxes are permitted only if uniform.[21] Direct taxes are permitted only if apportioned among the states.[22] (The Sixteenth Amendment dropped that requirement for the income tax.)[23] Revenue bills must originate in the House of Representatives, a more democratic body than the Senate.[24] And before 1936, taxes could be imposed only for enumerated purposes.[25] Even today, taxes may be assessed only to pay U.S. Government debts and to serve "general Welfare" purposes.[26] Yet everyone concedes that the U.S. Constitution created a republican government. That is the understanding behind the Pledge of Allegiance.[27]

The plaintiffs' anti-TABOR lawsuit does not imperil the fiscal restrictions in the U.S. Constitution. But it may well imperil analogous restrictions in the constitutions of the states.

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Fiscal Restraints in a Republic—Tax and Spending Limits in the States

Coloradans frequently speak as if TABOR were unique. This is far from the case. TABOR's taxing and spending rules (we are setting aside the debt rules for now) are part of a large class of safeguards called *TELs*: tax and expenditure limitations. TELs protect taxpayers against abuse. They also protect state economies against the damage inflicted by excessive government taxing and spending. Less well understood is that TELs protect state budgets, since unrestrained revenue increases may encourage even greater spending hikes, resulting in serial deficits.

Thirty-four states—2/3 of the 50—have TELs.[28] Perhaps the oldest is an Arkansas tax increase limit enacted in 1934.[29] Ohio and Rhode Island adopted new TELs in 2006.[30] At least 18 state TELs were enacted through referendum or initiative.[31]

To be sure, many TELs are statutes rather than in state constitutions. Therefore, the legislature can alter them. No doubt the anti-TABOR plaintiffs would argue that those TELs do not interfere with lawmakers' ability to be "fully effective." But many other states have constitutional TELs. Some of these are limited, but others, like TABOR, are quite comprehensive. A victory in the anti-TABOR case would induce advocates for government power to challenge TELs in every state that has them.

Following is a survey of constitutional TELs binding state lawmakers. Excluded are those that restrict only local officials. The latter are less subject to the argument that they restrict legislative "effectiveness."

Colorado

Part I of this Paper summarized the provisions of TABOR. Most of its restrictions, although sweeping, are only conditional in nature.[32] In other words, they give the legislature more flexibility than a flat ban would give. Under TABOR, a state or local legislative body may enact a tax increase if approved *either* by the voters *or* (if an emergency tax) by a 2/3 vote of legislators.[33] Spending increases beyond the constitutional cap[34] may be enacted on voter approval, as may increases in debt.[35] Furthermore, the state or local legislative body may seek from the voters a moratorium on those requirements.[36]

Alaska

Alaska's constitutional TEL became effective in 1982.[37] It requires that the growth in appropriations from the treasury in any fiscal year not exceed the rate of growth in population and inflation.[38] Expenditures and population during 1981 form the benchmark for spending growth.[39] In several specific instances, such as appropriations to the Alaska permanent fund, the legislature may break the limit—but only if it follows itemized steps[40] These include (1) approval and signature by the governor or veto override by a 3/4 majority of the legislature, *plus* (2) approval by a majority of voters.[41]

Note that Alaska's TEL is comprehensive. Also, its conditions are *more* difficult to meet than those of TABOR: *both* a popular vote *and* gubernatorial signature or 3/4 override. (The comparable percentage in Colorado is 2/3.)[42] If Colorado is violating the Guarantee Clause, then Alaska is also.

Florida

The Florida constitution contains several valuable protections against excessive taxing and spending. It prohibits the state legislature from raising revenue in any fiscal year beyond a stated limit. The limit is the amount of revenue "for the prior fiscal year plus an adjustment for growth."[43] The "growth" adjustment is pegged to the rise in Floridians' personal income.[44] The Florida constitution requires the legislature to return to the taxpayers any amounts received in excess of the limit.[45]

The legislature may exceed the review cap only if 2/3 of the members of each house vote for a bill meeting several required conditions. Specifically, the bill must contain no other subject and must state the exact amount it is expected to raise. The final vote cannot take place until the legislature has observed a 72-hour cooling off period after the third reading.[46] Unlike the Colorado legislature, the Florida legislature does not have the alternative of avoiding the 2/3 requirement by seeking voter approval instead.[47]

In other words, the rules in the Florida TEL are at least as restrictive as those in TABOR. If TABOR is unrepublican, then so is the Florida TEL.

Michigan

In Michigan a majority of voters must approval all revenue increases.[48] Moreover, Michiganders must approve any change in the cap on the total taxes may be imposed on them.[49] The revenue limit is adjusted annually based upon a growth formula. The calculation is the greater of the increase in Michigan personal income over the prior year or over the prior three years.[50] In any year where revenue exceeds this limit by more than one percent, state must return the excess revenue to taxpayers on a pro rata basis.[51]

The legislature may exceed Michigan's revenue limit with voter approval or by declaring a state of emergency by a 2/3 vote of both houses.[52] Michigan's constitution grants taxpayers standing to sue in the state court of appeals to enforce these limits.[53]

In other words, the Michigan constitution contains a TEL very much akin to TABOR. If TABOR is invalid, then Michigan's TEL also is vulnerable.

Missouri

The Missouri constitution requires that all tax increases be approved by a majority of state voters.[54] That instrument also imposes strict limits on revenue increases in any fiscal year.[55] Specifically, state revenues may not exceed a limit calculated by taking the limit from the prior fiscal year and raising it by a formula using the greater of (1) the year-over-year average increase in Missouri personal income or (2) the average increase in Missouri personal income over the prior three years.[56] The state must return pro rata to the taxpayers any revenue collected in excess of one percent over the limit.[57] There is a flat ban (not conditional as in Colorado) on the legislature spending money from existing taxes in excess of the constitutional revenue limit.[58]

The voters have the right to approve or reject new taxes or fees or hikes in taxes and fees that would raise revenue in excess of the constitutional spending limit.[59] Voters may sue in the state supreme court to enforce these rules.[60] During a declared state of emergency, the legislature may exceed the revenue limit without first seeking voter approval. But this requires a 2/3 vote of the members of both houses.[61]

Thus, the Missouri TEL is comparable to, and in some ways more strict than, that of Colorado. If TABOR is invalid, so also are the analogous provisions in Missouri.

Nevada

Nevada's constitution also offers safeguards against fiscal excess.[62] The legislature may not "create[], generate[], or increase[]" revenue without clearing one of two constitutional hurdles:[63] Either the legislation must secure the affirmative vote of 2/3 of both houses[64] or, upon a majority vote of both houses, the voters must approve the measure at a mandatory referendum.[65]

In effect, Nevada's TEL is similar to TABOR. A principal difference is one of form: In TABOR, a public vote is the first option, with the alternative (in many cases) by a 2/3 legislative vote.[66] Nevada sets forth the options in reverse order.

TABOR and the Nevada constitutional TEL are similar enough that a court decision invalidating TABOR on Guarantee Clause grounds will lead dissatisfied folk to challenge the Nevada TEL.

Oklahoma

The Oklahoma constitution requires that bills designed to raise revenue "originate in the House of Representatives" and cannot "be passed during the five last days of the session."[67] In addition, revenue measures must be approved either by the electorate or by 3/4 of lawmakers.[68] Oklahoma's TEL is thus stricter than those of Nevada and Colorado. They require only a 2/3 supermajority to avoid a public vote.[69]

South Dakota

The South Dakota constitution also limits the legislature's ability to raise taxes.[70] A hike in tax rates requires either an affirmative vote of the people or a 2/3 majority in each legislative chamber.[71] Similarly, the legislature may not impose new taxes without an affirmative vote of the citizens or approval by 2/3 of each chamber.[72] The South Dakota approach is, therefore, much like that of Nevada, and therefore somewhat similar to TABOR.

More Limited TELs

The foregoing TELs are, like TABOR, all fairly comprehensive. Many other states impose narrower, but still important, restrictions on legislative fiscal authority.

Three examples may suffice:

- The Texas constitution prohibits the growth of undedicated state tax revenues at a rate faster than the economy. The legislature may avoid this limit in an "emergency," but that requires more than business as usual. Rather, it requires "a resolution approved by a record vote of a majority of the members of each house."[73]
- The Montana Constitution provides that "The rate of a general statewide sales tax or use tax may not exceed 4%."[74] The Montana constitution thereby takes off the table a lucrative and common source of revenue: 35 states and the District of Columbia now have state sales tax rates (in addition to local rates) in excess of four percent.[75] This provision is a flat ban, not subject to waiver by supermajorities or popular votes.
- The Kentucky constitution guarantees citizens the right to approve or reject any change in classification of property for tax purposes or tax rates.[76] The legislature must submit any measure purporting to change the tax rates or classifications of taxable property to a public vote. Alternatively, the people may by petition submit the measure to referendum.[77] Upon a qualifying petition, the measure is placed on the ballot. It does become effective unless a majority of voters approve.[78]

Obviously, all of these measures restrict the "effectiveness" of state legislatures in exercising their fiscal authority. A victory for the anti-TABOR may induce big government advocates to challenge them all.

Summary Comment on TELs

If a federal court voids Colorado's TABOR on Guarantee Clause grounds, the opportunities for legal havoc will be obvious to any special-interest lawyer. At severe risk would be the TELs of seven other states: Alaska, Florida, Michigan, Missouri, Nevada, Oklahoma, and South Dakota. The more limited TELs of states like Texas, Montana, and Kentucky might be vulnerable as well.

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Fiscal Restraints in a Republic—State Debt Limits.

As observed in Part II of this Issue Paper, the plaintiffs in the anti-TABOR suit seek to void the Taxpayer Bill of Rights as a whole. Their apparent position is that all TABOR's fiscal limits are impermissible restrictions on the "effectiveness" of the state legislature. That includes limits on debt as well as caps on taxes and spending. Indeed, their suit would be incoherent otherwise: Taxing, spending, and debt are all closely intertwined fiscal powers. All were historically prerogatives of the

British Parliament, the legislative body that inspired American legislatures.

State constitutional safeguards against excessive debt are even more prevalent than constitutional safeguards against excessive taxing and spending. Debt limits were a response to irresponsible state borrowing, and subsequent defaults, during the 19th century.

Like TELs, debt limits may consist of flat bans or conditions. Following is a representative sample, listed from most to least restrictive. The recitation may seem tedious. But reading it gives you a sense of how widespread, and well-founded, constitutional limits on legislative fiscal powers are. It also gives you a sense of how bizarre, and potentially disastrous, the anti-TABOR lawsuit really is.

Flat bans

The Arizona constitution limits state general obligation debt to a total of $350,000.[79] There is a flat ban on more. The Indiana constitution prohibits general obligation state debt except to repel invasion or suppress insurrection.[80]

The Oregon charter prohibits the legislature from incurring debt in excess of $50,000, except for enumerated purposes, with specific conditions for each purpose.[81] For example, debt issued for road construction is limited to an amount that may not "exceed one percent of the true cash value of all the property of the state taxed on an ad valorem basis."[82] There is a blanket exception for debt issued to respond to war or rebellion.[83]

Nearly all states have flat bans on debt to cover current spending—that is, they have balanced budget requirements.[84] The Colorado constitution prohibits appropriations from exceeding revenues.[85] The Montana constitution prohibits issuance of debt to cover any budget deficit.[86]

Of course, according to the theory of the TABOR plaintiffs, such provisions are "unrepublican." They impair the fiscal "effectiveness" of the legislature.

Multiple conditions required

The Michigan legislature is prohibited from issuing debt without securing approval of 2/3 of the members of both houses *and* a majority of voters.[87] When the legislature submits the issue to the electorate, the ballot must state specifically the amount of debt to be issued, the debt's specific purpose, and the way the debt will be repaid.[88] California also imposes multiple conditions for debt.[89] As explained below, so, to an extent, does Louisiana.

Voter approval alone (with or without flat bans)

The Iowa constitution is similar to that of Colorado in requiring voter approval of all issuance of public debt.[90] Iowa further mandates that all debt be paid for with specific taxes allocated to pay for them. Debt must be repaid within twenty years of issuance.[91] The taxes authorized to pay for public debt may not be used for any other purpose.[92]

The Missouri rules are similar: No new general obligation debt in excess of $1,000,000 may be issued without direct voter approval.[93] The proposal must specifically explain the "amount, purpose, and terms of the liability."[94] But there is a flat ban on bonds exceeding 25 years in duration.[95]

Florida's charter prohibits the legislature from issuing debt or raising taxes to pay debt service without the consent of a majority of voters.[96] Florida also has flat bans on incurring general obligation debt of more than "fifty percent of the total tax revenues of the state for the two preceding years," excluding funds held in trust.[97] Only debt issued specifically to fund capital projects is exempted from the voter approval requirement.[98]

Nebraska also has a mix of flat bans and voter approval requirements. The constitution limits debt to specified purposes in specified amounts.[99] The legislature may incur debt in excess of $100,000 only to repel invasion, suppress rebellion, or protect the citizens from similar emergencies.[100] The legislature may incur unlimited debt for construction of highways, water works, and higher education facilities. But any debt for these three categories must be approved by 3/5 of Nebraska's unicameral legislature.[101]

The constitution of Wyoming contains an analogous mix of flat bans and voter approval requirements.[102]

Supermajority alone (with or without flat bans or other mandatory conditions)

Some states permit exemption from limits only if a legislative supermajority approves. For example, the Ohio constitution caps general obligation shortfall debt to a maximum of $750,000.[103] The constitution further limits the types of projects and spending for which future long term debt is issued.[104] And in no event may the Legislature issue public debt above a the amount where the debt service payments in any fiscal year that exceed "five percent of the total estimated revenues of the state for the General Revenue Fund and from net state lottery proceeds."[105]

However, the legislature may overcome the last limit on a 3/5 vote.[106]

In Louisiana, the constitution limits the total amount of debt by requiring that total debt service in a fiscal year be no greater than 6% of general fund revenue.[107] The legislature may exceed the cap by a special bill approved by 2/3 of the members of both houses.[108] In fact, all debt issuance must be approved by 2/3 of the members of both houses of the legislature. Moreover, debt generally is limited to public defense and capital improvements.[109]

In addition, the Louisiana legislature must, after 2/3 of the members of both houses approve, submit to the people for majority approval any bill that creates state debt for a purpose not enumerated in the constitution[110]—a double condition.

Alternative conditions

Montana's constitution prohibits the legislature from issuing debt without either voter approval or a vote of 2/3 of the legislators in both houses.[111] In South Carolina, the legislature may not issue general obligation debt without meeting conditions that vary with the purpose of the debt.[112] For example, additional highway bonds cannot be issued if total annual debt service would exceed 15% of revenues derived from the same general source.[113] Either 2/3 of the legislature or the voters must approve unrestricted general obligation debt.[114] Total outstanding general obligation debt may not exceed an amount that would cause total debt service to exceed 5% of total state revenue.[115]

Summary on State Debt Restrictions

State constitutional limits on creation of state debt are particularly severe. There are numerous flat bans. Where the restrictions are conditional, there is often only one escape hatch with no alternatives. Often both a supermajority and a popular vote are necessary.

By the logic of the plaintiffs' argument against TABOR, all these provisions are unrepublican, and therefore unconstitutional.

> ***If a state legislature must be free from significant fiscal restraint, then the constitution of almost every state will be vulnerable. Special interests will sue everywhere, claiming that limitations on lawmakers' fiscal discretion are "unrepublican."***

Conclusion

The consequences of an anti-TABOR judgment in the plaintiffs' case would be particularly dire.

The first would be constitutional chaos. If a state legislature must be free from significant fiscal restraint, then the constitution of almost every state will be vulnerable. Special interests will sue everywhere, claiming that limitations on lawmakers' fiscal discretion are "unrepublican." They will cite the anti-TABOR holding as precedent. To the extent these lawsuits are successful, valuable safeguards for states and their citizens will be lost.

Another consequence will be increased attack on the initiative and referendum process. Again, the basis for the attack will be that the Guarantee Clause requires that each legislature be "fully effective"—that is, omnipotent.

Finally, an anti-TABOR ruling would open the gates for a generalized assault on American federalism. In each state, dissatisfied interest groups will challenge aspects of state governance they find distasteful. This will imperil the right of citizens to structure their own state's internal institutions as they deem best. As more and more lawyers spin more and more theories about what institutions are, or aren't, sufficiently "republican," the destruction will spread beyond fiscal rules and beyond initiative and referendum. It may swamp American federalism itself, and with it each state's independent standing as a sovereign "laboratory of democracy."

INDEPENDENCE INSTITUTE is a non-profit, non-partisan Colorado think tank. It is governed by a statewide board of trustees and holds a 501(c)(3) tax exemption from the IRS. Its public policy research focuses on economic growth, education reform, local government effectiveness, and constitutional rights.

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ADDITIONAL RESOURCES can be found at: http://www.i2i.org/.

Endnotes

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Zakary Kessler, who served for three semesters as Professor Natelson's intern at the Independence Institute, will receive his J.D. from the University of Colorado Law School in 2013.

[1] Colo. Const. art. X, § 20.

[2] *Id.* at §20 (4)(a), (6)(a).

[3] *Id.* at §20 (7)(d).

[4] *Id.* at §20 (1), (4)(b)

[5] *Id.* at §20 (3)(a).

[6] Kerr v. Hickenlooper, 2012 WL 3089865 (D. Colo. 2012), *amended and supplemented*, 2012 WL 4359076 (D. Colo. 2012).

[7] Substituted Complaint, p. 4, ¶ 7.

[8] U.S. Const. art. IV, § 4.

[9] Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Luther v. Borden, 48 U.S. 1 (1849).

[10] Kerr v. Hickenlooper, Order Granting in Part and Denying in Part Motion to Dismiss, July 30, 2012 (D. Colo. 2012), Civil Action No. 11-cv-01350-WJM-BNB.

[11] *See, e.g.*, Substituted Complaint, ¶¶ 6, 7, 75.

[12] Substituted Complaint ¶ 79.

[13] *Id.*, at ¶¶ 44 and 61.

[14] *Id.*, at ¶¶ 3, 7, 65 & 72.

[15] Substituted Complaint, Prayers for Relief, ¶¶ 1 & 2.

[16] The paper is by Robert G. Natelson, one of the co-authors of this Issue Paper. It is available at http://constitution.i2i.org/files/2012/10/IP_12_2012_b.pdf.

[17] *State-by-State List of Initiative and Referendum Provisions*, Initiative and Referendum Inst., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited November 21, 2012).

[18] There is some provision for constitutional referendum in 49 states. *Id. ("Every* state except Delaware requires a popular vote to approve constitutional amendments.").

[19] On the state debt crisis, see, e.g., John Joseph Wallis, Richard E. Sylla, and Arthur Grinath III, *Land, Debt, and Taxes: Origins of the U.S. State Default Crisis*, 1839 to 1842, http://www.frbatlanta.org/documents/cenfis/eventscf/11sov_debt_Wallis.pdf.

[20] U.S. Const. art. I, § 2, cl. 3 & art. I, §9, cl. 5.

[21] *Id.*, art. I, § 8, cl. 1.

[22] *Id.*, art. I, § 2, cl. 3 & art. I, §9, cl. 4.

[23] *Id.*, amend. XVI.

[24] *Id.*, art. I, §7, cl. 1.

[25] Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kan. L. Rev. 1 (2003).

[26] U.S. Const. art. I, § 8, cl. 1. *See also* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239 (2007).

[27] 4 U.S.C. § 4 (2006).

[28] *See* Nat'l Ass'n of State Budget Officers, Budget Process in the States 46-47 (2008), *available at* http://www.nasbo.org/sites/default/files/BP_2008.pdf; Bert Waisanen, Nat'l Conference of State Legis., State Taxing and Expenditure Limits (2010), *available at* http://www.ncsl.org/issues-research/budget/state-tax-and-expenditure-limits-2010.aspx#typesoflimts; Matthew Mitchell, TEL IT LIKE IT IS: Do State Tax and Expenditure Limits Actually Limit Spending? 27-33 (2010), *available at* http://mercatus.org/sites/default/files/publication/TEL%20It%20Like%20It%20Is.Mitchell.12.6.10.pdf.

[29] *See* Nat'l Ass'n of State Budget Officers *supra*.

[30] *Id.*

[31] *Id.*

[32] Several sources have examined TABOR's operation and effect. *See* Michael J. New & Stephen Slivinski, CATO Institute, Dispelling the Myths The Truth About TABOR and Referendum C (2005), *available at* http://www.cato.org/pubs/bp/bp95.pdf; Barry W. Poulson, Independence Institute, Tax and Spending Limits: Theory, Analysis, and Policy (2004), *available at* http://tax.i2i.org/files/2011/02/IB-2004-E.pdf.

[33] *Id.* at §20(4), (6).

[34] The maximum allowable increase in annual spending for all levels of state government, regardless of whether a particular program is administered locally, is set at the prior year's spending plus an adjustment for inflation and increase in population. Colo. Const. art. X, § 20(7)(a)-(c). All revenues in excess of these limits must be refunded to taxpayers, unless the voters approve a measure allowing the state to keep the excess. *Id.* at § 20(7)(d).

[35] *Id*. at §20(4)(b).

[36] Id. at §20(3)(a).

[37] Alaska Const. art. IX, § 16.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Colo. Const. art. IV, §11; art. 20, §6(a).

[43] Fla. Const. art. VII, § 1(e).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Mich. Const. art. 9, §§ 25-32.

[49] *Id.* at § 26.

[50] *Id.*

[51] *Id.*

[52] *Id.* at § 27.

[53] *Id.* at § 32.

[54] Mo. Const. art. X, § 16.

[55] *Id.* at § 18(a).

[56] *Id.*

[57] *Id.* at § 18(b).

[58] *Id.* at § 20.

[59] *Id.* at § 18(e).

[60] *Id.*

[61] *Id.* at § 19.

[62] Nev. Const. art. IV, § 18(2)-(3).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Colo. Const. art. X § 20(6)-(7).

[67] Okla. Const. art. V, § 33(A)-(C).

[68] *Id.*

[69] *Id.* § 33(D).

[70] S.D. Const. art.XI, § 13.

[71] *Id.*

[72] *Id.* at § 14.

[73] Tex. Const. art. VIII, §22.

[74] Mont. Const. art. VIII, §16.

[75] Sales Tax Institute, State Sales Tax Rates, at http://www.salestaxinstitute.com/resources/rates (last accessed Dec. 7, 2012).

[76] Ky. Const. § 171.

[77] *Id.*

[78] *Id.*

[79] Ariz. Const. art. IX, § 5.

[80] Ind. Const. art. X, § 5.

[81] Or. Const. art. XI, § 7.

[82] *Id.*

[83] *Id.*

[84] *See* Nat'l Ass'n of State Budget Officers, Budget Process in the States 46-47 (2008), *available at* http://www.nasbo.org/sites/default/files/BP_2008.pdf.

[85] Colo. Const. art. X, § 16.

[86] Mont. Const. art. VIII, § 8.

[87] Mich. Const. art. IX, § 15.

[88] *Id.*

[89] Calif. Const. art. XVI, §1.

[90] Iowa Const. art. VII, § 5.

[91] *Id.*

[92] *Id.*

[93] Mo. Const. art. III, § 37.

[94] *Id.*

[95] *Id.*

[96] Fla. Const. art. VII, § 11(a).

[97] *Id.*

[98] *Id.* at § 11(d).

[99] Neb. Const. art. VIII, § 1.

[100] *Id.*

[101] *Id.*

[102] Wyo. Const. art. XVI, §§ 1-2.

[103] Ohio Const. art. VIII, § 1-17.

[104] *Id.* at §§ 2(a)-(r).

[105] Ohio Const. art. VIII, § 17.

[106] *Id.*

[107] La. Const. art. VII, § 6(F).

[108] *Id.*

[109] *Id.* at § 6(A).

[110] *Id.* at § 6(D).

[111] Mont. Const. art. VIII, § 8.

[112] S.C. Const. art. X, § 13(6).

[113] *Id.* at § 13(6)(a).

[114] *Id.* at § 13(5).

[115] *Id.* at § 13(6)(c).