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THE ORIGINS OF THE ARIZONA GIFT CLAUSE

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INTRODUCTION

At least forty-five state constitutions contain provisions barring the government from giving or lending public resources to private interests.[1] Typically called "Gift Clauses" (or "Anti-Gift Clauses"),[2] they are a legacy of the nineteenth century, when many state and local governments were plunged into economic and political ruin as a consequence of subsidizing private industry. Over time, these provisions have taken different paths in the legal precedent. In some states, courts have essentially eviscerated them by adopting a lackluster "rational basis" standard of review or something similar, which deprives Gift Clauses of their effectiveness.[3] But in other states—notably Arizona—courts have diligently enforced these provisions, establishing precedent that lets government spend money for

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[1] *See* Matthew D. Mitchell et al., Outlawing Favoritism: The Economics, History, and Law of Anti-Aid Provisions in State Constitutions 65–76 (Mar. 24, 2020) (All states except Alaska, Connecticut, Illinois, Kansas, and Vermont contain a Gift Clause provision. *See id*. However, some of these states have constitutional provisions that accomplish a similar result. *See, e.g.*, ALASKA CONST. art. IX, § 6 (barring the use of tax revenues or public credit for any use except public purpose); VT. CONST. ch. 1, art. 9 (requiring that the intent behind the tax revenue acts be to benefit the whole community).

[2] They have also been referred to as "anti-aid" provisions. *See, e.g.*, Mitchell, *supra* note 1, at 22–23.

[3] *See, e.g.*, White v. California, 105 Cal. Rptr. 2d 714, 723 (Ct. App. 2001) ("[M]oney spent for public purposes is not a gift[, and] . . . [t]he determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis." *see also*, Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 909 (2003) ("State legislatures and local governments have repeatedly sought to expand the scope of 'public purpose' and to slip the restraints of the tax and debt limits. Increasingly, these efforts have won the approval of state courts.").

the public good but prevents it from transferring taxpayer money or giving away other valuable benefits to private interests.

This Article examines the origins of the Arizona Constitution's Gift Clause and compares it with similar clauses in other state constitutions. Part I describes the philosophical and political concerns animating Gift Clauses. Parts II and III examine the history, focusing on the first and second waves of reform that led to the adoption of these clauses. Part IV discusses the origins of Arizona's Gift Clause specifically and draws conclusions relevant to today's Gift Clause doctrine.

I. THE GOALS OF THE GIFT CLAUSE

A. Governing for the Ruled, Not the Ruler

The Gift Clause, like other constitutional provisions, is designed to serve certain basic moral and political values. Indeed, it plays a central role in preserving the legitimacy of government itself.

Political legitimacy is a function of two things: political principle and public perception. As a matter of principle, government is legitimate if it serves certain morally justified functions. As a matter of perception, it is legitimate if the public sees it as operating in a manner that comports with shared attitudes about fairness and propriety. The most essential principle of legitimate government is that it must serve the common good rather than the private interest of the ruler(s).[4] As far back as Aristotle, political philosophers have agreed that this is the key distinction between a legitimate government and a mere gang of robbers.[5] Augustine, Cicero, Aquinas, and others argued that a state that extracts wealth from the people in order to benefit either the ruler or his cadre of supporters might resemble a government but is, in fact, a corrupt or criminal enterprise.[6]

By the time of the American Revolution, this had become a mainstay of Anglo-American political thought. The English Civil War and the Glorious Revolution cemented in the minds of English political thinkers that government, whether monarchical or republican, should serve the interests of the governed, not those of the ruling party or individual.[7]

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[4] As Cass Sunstein has put it, modern constitutions include many provisions that focus on "a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sustein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

[5] Aristotle, *Politics* 1279a, *in* Richard McKeon, ed., Basic Works of Aristotle 1185 (1941).

[6] *See, e.g.*, AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS 147–48 (R.W. Dyson ed., trans., 1998); Cicero, *Treatise on the Commonwealth* bk. 3, §§ 31, 32, *in* CICERO'S TUSCULAN DISPUTATIONS 425, 441 (C.D. Yonge trans., 1888); ST. THOMAS AQUINAS, SUMMA THEOLOGIÆ XXVIII, Q. 90, art. 2, at 9 (Thomas Gilpy trans., 1966)

[7] *See* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 299–302 (2012).

Early American political thinkers often likened government to a joint stock company or corporation. In this analogy, citizens are like investors, and representatives are like corporate managers entrusted with the fiduciary responsibility of serving their principals' best interests. Thus, Thomas Paine wrote that in creating a government, each person "deposits" his or her natural rights "in the common stock of society" and becomes—metaphorically—a joint stockholder: "Society *grants* [the citizen] nothing. Every man is a proprietor in society, and draws on the capital as a matter of right."[8] It follows that government has no legitimate role in taking wealth from the public and bestowing it upon private parties for their own profit, which would be a kind of embezzlement.

It was one of the American founders' principal objections to British rule that the crown often violated this principle, governing for the private benefit of the politically influential rather than for the safety and security of all.[9] After the Revolution, various forms of government intervention in the economy gave rise to fears that this dismal history would repeat itself. Thus, when Alexander Hamilton proposed to improve the state of manufacturing in the United States through the imposition of a tax regime to finance the debt and the establishment of a National Bank to subsidize certain enterprises, Thomas Jefferson and his allies objected that these devices would enrich private interest groups at the expense of taxpayers.[10] Indeed, Hamilton did not plan for the bank to make loans to

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[8] THOMAS PAINE, *Rights of Man Part I*, *in* THOMAS PAINE: COLLECTED WRITINGS 431, 465 (Eric Foner ed., 1995). The principle that every citizen is "a proprietor" in free government appears repeatedly in Paine's writings. *See, e.g.*, THOMAS PAINE, *Rights of Man Part II*, *in id.* at 541, 571. Other scholars have noted the significant relationship between the political philosophy underlying the Constitution and principles of early corporate law. *See, e.g.*, GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 5 (2010); Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 429–30 (2014).

[9] For example, the British government adopted trade regulations that prohibited colonists from importing goods such as wine, oil, or fruit directly from the producers of these products, and required that they be imported from British merchants instead—solely to enrich those British merchants. *See* Benjamin Franklin, *Causes of the American Discontents Before 1768* (1768), *reprinted in* BENJAMIN FRANKLIN: WRITINGS 612-13 (A. Leo Lemay, ed., 1987). Other regulations prohibited the colonists making hats, nails, or other items in the colonies—requiring instead that they ship raw materials to England, to be made into consumer goods and shipped back, all "for the purpose of supporting not men, but machines, in the island of Great Britain," as Thomas Jefferson wrote. Thomas Jefferson, *A Summary View of the Rights of British America* (1774), *reprinted in* THOMAS JEFFERSON: WRITINGS 110 (Merrill Peterson, ed., 1984); *see also* Franklin, *supra* at 613 (discussing prohibition on manufactures).

[10] *See generally* GREGORY MAY, JEFFERSON'S TREASURE: HOW ALBERT GALLATIN SAVED THE NEW NATION FROM DEBT 41–45, 61–85 (2018) (discussing the history behind Jefferson's opposition to Hamilton's tax plan and the events surrounding that opposition).

small farmers or entrepreneurs but only to large-scale merchants.[11] Consequently, its opponents feared that it would primarily redistribute wealth from ordinary citizens to wealthy insiders.

A few years later, similar concerns motivated opposition to the "protective tariffs" of Henry Clay's "American System," which disproportionately benefited mercantile interests at the expense of farmers,[12] as well as to schemes for "internal improvement"—*i.e.*, the construction of turnpikes, canals, and railroads at taxpayer expense, which often led to waste, mismanagement, or malfeasance, as discussed in more detail below. According to historian Edward Pessen, "[c]hicanery, corruption, incompetence, short sightedness, greed, opportunistic politics, among other things" left the nineteenth century's "economic graveyard . . . piled high with the bones of canal, turnpike, and railroad company failures."[13] But concerns about these projects focused not primarily on poor performance. Rather, debates over government financing of private development centered—and still center—around three interrelated concerns: rent seeking, knowledge problems, and moral objections to government economic planning.

B. Three Major Problems with Government Economic Planning

Rent seeking is the phenomenon whereby pressure groups invest resources in efforts to obtain valuable benefits from the government. It is a function of the profitability of government's exercise of power. If the winner of the lobbying game stands to reap $X worth of benefits—in the form, say, of a government grant—competitors seeking that benefit will invest up to $X in efforts to persuade government to exert that power on their behalf.[14] But while the rewards are concentrated on the winner, the costs of such redistribution are widespread—typically drawn from the taxpayers *en masse*. This means taxpayers' incentive to oppose the taking of their wealth is less than the incentive that potential recipients have to seek redistribution in their favor.[15] The recipients' effectiveness in

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[11] GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 99 (2009).

[12] MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 69–75 (1987).

[13] EDWARD PESSEN, JACKSONIAN AMERICA SOCIETY, PERSONALITY, AND POLITICS 124 (Unv. Ill. Press, rev. ed. 1985) (1978).

[14] James M. Buchanan et al., *Preface to* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY, at ix (James M. Buchanan et al. eds., 1980) (defining rent-seeking as "the resource-wasting activities of individuals in seeking transfers of wealth through the aegis of the state").

[15] Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 81 (1998) ("It is not cost-efficient, however, for a taxpayer to fight a particular piece of special-interest legislation. The costs

exploiting the government's redistribution power also tends to grow over time, because experienced lobbyists become increasingly skilled at obtaining benefits and thus become a class of privileged insiders. Taxpayers, by contrast, typically lack political skill and influence and remain outsiders—forced to pay the bills.[16] These factors tend to create a ratchet effect, so that government seizes more and more wealth from the public and distributes it to repeat winners, even if that redistribution is politically unpopular and economically wasteful. When left unchecked, this phenomenon transforms the state into a "rent seeking society"[17]—that is, a society governed by naked scrambles for power over others or privilege at others' expense, rather than by respect for others' rights.

The "knowledge problem" refers to the fact that the information necessary to organize economic behavior is simply too complicated and unwieldy for any single entity to manage or comprehend.[18] No corporation can confidently predict the consumer's needs a year from now, or a decade from now, or anticipate changes in circumstances that may suddenly alter the market. Moreover, production of goods and services is a matter of such extreme complexity that no single entity can coordinate all the factors of production needed to produce even a simple item.

In a famous essay, Leonard Read used the example of a pencil: to make one requires wood, graphite, rubber, and other materials, all of which must be artificially produced, so that to make a pencil from scratch would require control over the lumber industry, mining, the manufacture of rubber—and these, in turn, would require control over an even wider range of resources.[19] Coordinating the production and assembly of all these materials, even to create so simple an object as a pencil, is beyond any single entity's capacity. But if a private entity—which has a profit incentive—cannot determine what future consumers will need, then the government—which lacks that incentive—is even less likely to make the correct determination. Instead, when government presumes to decide

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are widely dispersed, thus fighting any one piece of legislation is likely to bring only a small benefit to a taxpayer through the elimination of that legislation's portion of his tax obligation. The economically rational taxpayer will have little incentive to combat any one piece of legislation.").

[16] *See generally* Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L., ETHICS & PUB. POL'Y 381, 393–99, 407–08 (2012) (discussing how the division of classes can create a society of "learned helplessness" and lead to an "increasing[] resistance to change").

[17] *See generally* ROBERT B. EKELUND, JR. & ROBERT D. TOLLISON, MERCANTILISM AS A RENT-SEEKING SOCIETY (1981) (using a rent-seeking-society framework to analyze mercantile England and internal regulation in France).

[18] Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945). The term "knowledge problem" originated in DON LAVOIE, NATIONAL ECONOMIC PLANNING: WHAT IS LEFT? (1985).

[19] LEONARD E. READ, I, PENCIL (Atlanta: Foundation for Economic Education, 2019) (1958).

which business should prevail—as opposed to letting consumers make that decision through their own bargaining and negotiation—it is more likely to lead to inefficiency and cronyism and to deter the innovations consumers actually want.

The moral objection is that government, being instituted for the advantage of all, should not exert its authority in ways that disproportionately benefit some at the expense of others. Doing so undermines the government's claim to impartiality and weakens its claim to legitimacy. In extreme instances, it violates the principle of equality on which the classical liberal political project depends, by coercively elevating the interests of some over those of others for reasons unrelated to merit. That would amount to taking from A and giving to B, a paradigmatic abuse of government authority.[20] In principle, there is no difference between a legislative enactment whereby funds are extracted from taxpayers and transferred to a select class of recipients for their own profit and an outright robbery.[21]

The classical liberal principles of the Constitution held that although extracting wealth from a person by force is an injustice, taxation can be purged of this moral objection, at least as much as practicable,[22] if it is approved by the people's elected representatives and is spent for the general welfare and not for the specific welfare of particular recipients.[23] As the nineteenth century wore on, disputes over publicly financed projects increasingly turned on this consideration, leading to the

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[20] *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (calling "a law that takes property from A[] and gives it to B" both "[a]n [act] . . . contrary to the great first principles of the social compact" and not "a rightful exercise of legislative authority") (emphasis omitted); Bowman v. Middleton, 1 S.C.L. (1 Bay) 252, 252 (S.C. Cts. Com. Pl. Gen. Sess. 1792) ("[T]o take away the freehold of one man, and vest it in another [is] . . . *ipso facto*, void. . . . [N]o length of time could give it validity, being originally founded on erroneous principles."); Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[T]he sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.").

[21] *See* Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. (20 Wall.) 655, 664 (1874) ("To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation.").

[22] Because government could never be *truly* consensual, of course, the injustice could never be wholly eliminated; classical liberals were never fully comfortable with the principle of tacit consent. *Compare* Letter from Thomas Jefferson to James Madison, Sept. 6, 1789, *in* 1 THE REPUBLIC OF LETTERS 631 (J. Norton Smith, ed., 1995) *with* Letter from James Madison to Thomas Jefferson, Feb. 4, 1790, *in id.* at 650. Thus, they tended to regard government as "even in its best state…a necessary evil." Thomas Paine, *Common Sense* (1776), *reprinted in*: THOMAS PAINE: COLLECTED WRITINGS, *supra* note 8, at 6.

[23] *See* Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 514–15 (1993) (discussing the role of consent in the constitutional scheme).

development of the "public purpose" limitation on taxation discussed below. This "public purpose" doctrine represented an effort to address the problems of government funding of development projects by barring special favors to private parties while allowing the state to finance improvements legitimately within its purview.[24] Similar efforts led over time to the adoption of constitutional Gift Clauses.[25] But to understand these, it is best to begin by examining the historical experience of taxpayer-funded development in the nineteenth century.

II. GIFT CLAUSE AND NINETEENTH-CENTURY GOVERNMENT SPECULATION

As political attention in nineteenth century America shifted toward projects for "internal improvements," the public became increasingly concerned about the ways in which public financing of economic development could unjustly and imprudently redistribute wealth. What followed were two waves of evolution in the fashioning of state constitutional prohibitions on subsidies to private enterprises. The first came, roughly speaking, between 1800 and the Civil War, as states banned *state legislatures* from devoting public resources to private undertakings. The second came after the war—and especially in the 1870s—as states expanded these prohibitions to encompass *local governments* as well.[26]

A. The First Wave of Gift Clauses

The most celebrated triumph of the early "internal improvements" movement was the Erie Canal. Built between 1817 and 1825 at the cost of about $7 million, this connection between the Great Lakes and New York City was immensely successful, driving down the costs of transportation tenfold and reducing a trip from Buffalo to Manhattan from thirty days to ten. Thus, it ended up paying for itself. Unfortunately, as economist Clifford Thies writes, it also "induced [other states] into ruinous follow-up projects" that did just the opposite.[27]

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[24] Economist James Buchanan, the foremost scholar of the rent-seeking problems mentioned herein, proposed as a solution to these problems that government impose a "generality" requirement, which would prevent government from concentrating the benefits of redistribution on a class of beneficiaries. This would prevent the ratchet phenomenon described above. *See, e.g.,* JAMES M. BUCHANAN & ROGER D. CONGLETON, POLITICS BY PRINCIPLE, NOT INTEREST (1998). The "public purpose" principle and the Gift Clause represent efforts to impose just such a generality requirement.

[25] *See generally* David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 277–82 (1963) (discussing the constitutional history of the Gift Clause).

[26] *See* Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 156-57 (1993).

[27] Clifford F. Thies, *The American Railroad Network During the Early 19th Century: Private Versus Public Enterprise*, 22 CATO J. 229, 232 (2002).

New York soon started building more canals, few of which made up for their costs, and other states did the same.[28] Pennsylvania's Mainline—a combination of railroads and canals—cost $14.6 million when it was completed in 1834, and it did not make enough to pay the bills; the deficit had to be made up with tax money.[29] The Mainline was an "engineering marvel," writes one historian—but it "never facilitated the interregional trade, never serviced its own debt, and never poured revenues into the coffers of the state."[30]

Ohio fared worse. Through the 1820s and 1830s, it constructed two dozen turnpikes, six railroads, and ten canals—most of these, writes Thies, "were merely unprofitable. Some were outright frauds."[31] Then came the Panic of 1837, a severe economic depression that lasted into the mid-1840s. By that time, Ohio was so deeply in debt that it faced the prospect of default. Ohioans began calling the law that financed canals the "Plunder Law."[32]

But instead of defaulting, the state chose to raise taxes to cover the shortfall, while simultaneously repealing the Plunder Law.[33] In 1851, it adopted a new constitution that forbade the state from "giv[ing] or loan[ing]" its "credit . . . in any manner . . . to, or in aid of, any individual association or corporation whatever."[34] As one delegate to the constitutional convention explained, people had previously thought it

> necessary to loan the credit of the state to those corporations, thereby giving to them a factitious value and giving them a factitious influence in the minds and over the affairs of the community. It is to do away with this evil . . . that we proposed . . . to strike at once at the foundation of the abuses, and not to give the credit of the state to any corporation whatever.[35]

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[28] *Id.* at 238.

[29] *Id.* at 238–39.

[30] JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES 85–86 (2001).

[31] Thies, *supra* note 27, at 241.

[32] HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820–1861, at 173 (1968); *see also* CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800–1890, at 136 (1960) ("With the exception of the loan to the Little Miami Railroad, which became a good investment after conversion into stock, the state had little show for its [enactment of the Plunder Law].").

[33] FRANCIS P. WEISENBURGER, *The Passing of the Frontier: 1825-1850*, *in* 3 THE HISTORY OF THE STATE OF OHIO 355 (Carl Wittke ed., 1941).

[34] OHIO CONST. art. VIII § 4 (1851).

[35] 1 OHIO CONSTITUTIONAL CONVENTION, OFFICIAL REPORTS OF THE DEBATES AND PROCEEDINGS OF THE OHIO STATE CONVENTION, CALLED TO ALTER, REVISE OR AMEND THE CONSTITUTION OF THE STATE 135 (Columbus, Scott & Bascom 1851) (statement of Mr. Dorsey).

Other states had similar experiences, which led to the creation of the first anti-subsidy provisions in state constitutions, including provisions that forbade loans or gifts of taxpayer money to private enterprises. For example, in the years before the Panic of 1837, Illinois spent $10 million on a failed railroad scheme, and when the downturn came, the legislature borrowed more money to keep the project going.[36] "Money," wrote Governor Thomas Ford, "was as plenty as dirt."[37] Soon the state was $14 million in debt, and the projects were still not completed.[38] Ford and his allies managed to cut spending and reduce the state's red ink, and a year after his governorship ended, the state held a constitutional convention, in part to ensure that no such debacle would ever happen again. "We are in debt," cried one delegate, "the result of a ruinous and extravagant speculation in internal improvements."[39] The convention drafted a constitution, adopted in 1848, that prohibited the state from giving or lending its credit to any private business,[40] and commanded the legislature to "encourage internal improvements" by private means only.[41]

In fact, enthusiastic overinvestment in "internal improvements" during the early nineteenth century brought on nothing short of a nationwide financial disaster. By 1843, the states were some $250 million in debt,[42] and eight states and one territory (Florida) were driven into default.[43] Congress refused to bail them out. As one scholar put it, "[t]he years immediately following witnessed so violent a change in public sentiment, that they may be properly regarded as marking an epoch in the constitutional development of the states."[44] Within a few years, virtually every state added to its fundamental law some form of prohibition against government giving or lending its credit to private enterprises.

In fact, the first state Gift Clause was Rhode Island's. Its first constitution, adopted in 1843, included a provision barring the legislature from "pledg[ing] the faith of the state for the payment of the obligations of

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[36] THOMAS FORD, A HISTORY OF ILLINOIS: FROM ITS COMMENCEMENT AS A STATE IN 1818 TO 1847, at 124–29 (Unv. Chi. Press, 1995) (1854).

[37] *Id.* at 134.

[38] *Id.* at 193.

[39] 2 THE CONSTITUTIONAL DEBATES OF 1847, *in* 14 COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY 554 (Arthur Charles Cole ed., 1919) (statement of Mr. Pratt).

[40] ILL. CONST. of 1848 art. III § 38.

[41] *Id.* art. X, §§ 1, 5–6.

[42] Cecil E. Ames, Federal Legislation on the Assumption of State Debts: 1893 to 1843, at 1 (1910) (M.A. thesis, University of Kansas) (on file with the University of Kansas library).

[43] William B. English, *Understanding the Costs of Sovereign Default: American State Debts in the 1840s*, 86 AM. ECON. REV. 259, 259 (1996).

[44] HENRY C. ADAMS, PUBLIC DEBTS: AN ESSAY IN THE SCIENCE OF FINANCE 335 (New York, D. Appleton & Co. 1887).

others" without a vote of the people.[45] New Jersey followed suit a year later, phrasing its prohibition: "The credit of the state shall not be directly or indirectly loaned in any case."[46] Two years later, New York adopted a constitution promising that "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association or corporation."[47] By the end of the century, virtually every state constitution contained such a provision.

B. Sharpless*: Public Purpose, Public Use, and Private Gifts*

The adoption of these anti-subsidy clauses coincided with broader jurisprudential and constitutional developments concerning the propriety of government combining its taxing and spending powers in ways that redistributed property from public to private interests. In the abstract, taking property from A and giving it to B had long been viewed as a quintessential abuse of government authority—an instance of government exploiting its coercive power not for the general good but for the benefit of those who controlled the state. On the other hand, all government funded by taxation is to some extent a form of wealth redistribution.[48] Thus, how to apply the no-A-to-B principle in particular cases, and the exact contours of the broader principles of legitimacy whereby the state must not operate for the private profit of those wielding authority, became increasingly complicated questions as industrial development accelerated.

Was a railroad, for example, a private undertaking, or a public one? On one hand, it seemed analogous to a public turnpike—long considered a legitimate government enterprise.[49] On the other hand, railroads were

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[45] R.I. CONST. of 1842, art. IV, § 13. Before adopting this Constitution, Rhode Island had been governed under its 1663 royal charter. *Introduction to the Constitution of the State of Rhode Island*, STATE R.I. GEN. ASSEMB., http://webserver.rilin.state.ri.us/RiConstitution/constintro.html (last visited Oct. 8, 2023).

[46] N.J. CONST. of 1844, art. VI, § 3.

[47] N.Y. CONST. of 1846, art. VII, § 9; *see also* Clarke v. City of Rochester, 24 Barb. 466 (N.Y. Gen. Term 1857) (commenting on the reason for the addition and noting that "[p]robably no single sentiment was more pervading in the public mind shortly before the [constitutional] convention of 1846, or more contributed to the calling of the convention than a desire to impose some restraint upon the power of the Legislature to contract public debts. The country had just passed through a period of extreme financial embarrassment").

[48] *See* ANTHONY DE JASAY, JUSTICE AND ITS SURROUNDINGS 84–85, 87 (2002).

[49] *See, e.g.*, The Slaughter-House Cases, 83 U.S. (15 Wall.) 36, 88 (1873) (Field, J., dissenting) ("[E]xclusive grants for ferries, bridges, and turnpikes are sanctioned [because they are] . . . of a public character appertaining to the government. . . . It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to develop this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper without encroaching on the freedom of the just

controlled by private owners, who operated them for private profit. This tension animated many early eminent domain cases, and although most American courts concluded that railroads were public in nature, and thus that they qualified as a "public use" for eminent domain purposes, many expressed discomfort with this blend of public and private interests.[50] The consensus that emerged was that government must not use its taxing and spending powers (or its eminent domain powers) to benefit entities that were operated primarily for private profit—but that the participation of private, for-profit companies in the provision of public services could be constitutionally legitimate if sufficient government oversight existed to ensure that these firms did not pocket the rewards of government privilege. In modern economic jargon, these entities were regulated as public utilities to ensure that they did not reap monopoly profits.

That consensus is reflected not only in eminent domain cases but also in the legal doctrine known as the "public purpose" limitation on taxation. The landmark ruling[51] on this subject was the 1853 Pennsylvania Supreme Court decision *Sharpless v. Mayor of Philadelphia*,[52] in which taxpayers challenged the constitutionality of government buying stock in a private railroad. In his opinion for the majority, Chief Justice Jeremiah Black[53] concluded that the government could lend taxpayer money to a privately owned railroad because it was an essentially public institution.

Pennsylvania's Constitution had no Gift Clause at the time, so Black's analysis turned principally on broad questions of political and legal legitimacy, and his route to his conclusion was odd and confusing. His major premise was that, as a matter of political philosophy, states have absolute power except where a specific power is expressly revoked by the state's constitution. In a direct attack on the principles of classical liberalism, Black asserted that there are no implicit limits on the legitimate authority of a democratic majority. A half-century earlier, Chief Justice Samuel Chase had declared that "[a]n [act] of the Legislature (for

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rights of others. . . . [This] is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.").

[50] *Compare* Beekman v. Saratoga & Schenectady R.R., 3 Paige Ch. 45, 76 (N.Y. Ch. 1831) (holding railroad qualified as public use for eminent domain purposes), *with* Varick v. Smith, 5 Paige Ch. 137, 159 (N.Y. Ch. 1835) ("[T]ak[ing an individual's] private property and transfer[ing] it to another, where there [is] no foundation for a pretence [*sic*] that the public [is] to be benefited . . . [is] not within the general powers delegated by the people of the legislature.").

[51] *See generally* Ellis L. Waldron, Sharpless v. Philadelphia*: Jeremiah Black and the Parent Case on the Public Purpose of Taxation*, 1953 WIS. L. REV. 48 (1953) (identifying *Sharpless* as an important case in the public purpose of taxation discussion).

[52] 21 Pa. 147, 158 (1853).

[53] For a biography of Black, see WILLIAM NORWOOD BRIGANCE, JEREMIAH SULLIVAN BLACK, A DEFENDER OF THE CONSTITUTION AND THE TEN COMMANDMENTS (1934).

I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority,"[54] even if those great first principles were not expressly articulated in the constitution, but Black rejected this. The "spirit of our institutions," he believed, imposes *no* meaningful limits on the legislature,[55] and he expressly renounced the Lockean principles Chase enunciated, in favor of the view that the state possesses essentially unlimitable and absolute authority.[56] In Black's view, there was no reason the constitution's authors could not have created "a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat," had they chosen to.[57] But instead, they had magnanimously imposed certain limits on state power in the constitution. Except for those express limits, however, legislators retained a "vast field of power" that they could exercise at their own "discretion."[58]

After saying that, however, Black appeared to reverse course, acknowledging that there *are* implicit limits on state authority. For example, "a taking of *private* property for *private* use" would be unconstitutional, he admitted, even though nothing in the constitution expressly prohibited that.[59] Nor could the legislature, under the guise of its taxing power, compel a single individual to pay the state's entire tax burden, even though nothing in the constitution explicitly prohibited that either.[60] The state also could not "create a public debt, or . . . lay a tax, or . . . authorize any municipal corporation to do it, in order to raise funds for a mere private purpose," despite the lack of any explicit prohibitions on such things.[61] No express prohibitions were necessary, Black continued, because any statute attempting such things "would not be a *law*," but a mere decree or dictate, which the legislature has no lawful authority to adopt.[62] Likewise, the concept of *taxation* inherently limits what the legislature can do in a tax statute: "the theory of a republican government," he declared, implicitly holds "that taxes shall be laid equally, in proportion to the nature of property; and when collected, shall

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[54] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

[55] *Sharpless*, 21 Pa. at 161.

[56] *See* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 37–39 (2014) (exploring the philosophical debate over states' rights at issue in *Sharpless*).

[57] *Sharpless,* 21 Pa. at 160.

[58] *Id.* at 161.

[59] *Id.* at 167.

[60] *Id.* at 168.

[61] *Id.* at 168–69.

[62] *Id.* (emphasis added). This proposition—the basis of what is today called "substantive due process"—was not original to Black. Three decades earlier, it had been an essential part of Daniel Webster's legendary argument in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). *See* SANDEFUR, *supra* note 56, at 79–81.

be applied only to purposes in which the taxpayers shall have an equal interest."[63] Therefore, to use the taxing power to take property from a single individual or to spend revenues for the private benefit of a specific recipient would not actually be a *tax* at all. Government's taxing power

> depends on the ultimate use, purpose, and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it. A tax for a private purpose is unconstitutional, though it pass through the hands of public officers; and the people may be taxed for a public work, although it be under the direction of an individual or private corporation. The question then, is, whether the building of a railroad is a public or a private affair. If it be public it makes no difference that the corporation which has it in charge is private.[64]

Black's confused and self-contradictory discussion of constitutional first principles drew a powerful dissent from Justice Ellis Lewis. There was "no foundation whatever for the doctrine that the Legislature of the State possesses *all the powers of sovereignty not expressly withheld*," he declared.[65] "This notion is occasionally asserted by men who are not careful to distinguish between our FREE and LIMITED governments DERIVED FROM THE PEOPLE . . . and those absolute despotisms of the old world . . . ."[66] In the former, the courts' primary concern should be to interpret the law in ways "which shall best advance the object in view, and which shall tend most to preserve the rights of the people."[67] If the legislature could do whatever is not expressly forbidden, lawmakers might exercise the power of judicial review, or grant new trials after judgment, or take property for private use.[68]

Whatever the self-contradictions of Black's opinion, however, his ultimate conclusion was that the term "taxation" necessarily and inherently includes a generality principle: the word simply *means* a levy on the general public for expenditures that *benefit the public*.[69] Any

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[63] *Sharpless,* 21 Pa. at 168–69.

[64] *Id.* at 169.

[65] Ellis Lewis, *Sharpless v. Mayor of Philadelphia.*, 2 AM. L. REG. 85, 87 (1853) (dissenting opinion). At that time, the Pennsylvania Supreme Court did not publish dissenting opinions, so the two dissents in *Sharpless* were published in the *American Law Register* (which later became the *University of Pennsylvania Law Review*). Justice Lowrie's dissent is also found in the *American Law Register*. Walter Lowrie, *Sharpless v. Mayor of Philadelphia.*, 2 AM. L. REG. 27 (1853) (dissenting opinion).

[66] Lewis, *supra* note 65, at 88. Lewis attributed the idea that states may do whatever is not expressly prohibited to Justice William Tilghman. *See id.* (citing *Eaken v. Raub*, 12 Serg. & Rawle 330 (1825)).

[67] Lewis, *supra* note 65, at 88.

[68] *Id.* at 88–89.

[69] *See* Waldron, *supra* note 51, at 65.

purported tax that lacks these generality elements is not actually a tax at all, but some other form of compulsory payment—essentially, robbery—and is, therefore, *ultra vires*.

Black then proceeded to a third point: railroads are sufficiently public to fall within the scope of the state's legitimate taxing and spending authority because they are so "highly useful" that they are "entitled to a public patronage enforced by law."[70] After a paean to the benefits of railroads, he insisted that it was the role of the legislature, not the courts, to decide when a project reached that level of usefulness and therefore qualified as sufficiently public; only where there was "a palpable and clear absence of all possible interest perceptible by every mind at the first blush" could judges declare that the legislature had exceeded its authority.[71]

Although extremely broad in its formulation, Black's theory of deference regarding public purpose had at least two limits. He considered it relevant that the railroad would charge a "uniform, reasonable, stipulated" fee, as opposed to being free to charge whatever it liked.[72] He also found it relevant that eminent domain could be used for purposes of highway construction—and, by extension, railroad construction—because roads had long been considered sufficiently public to satisfy the public use requirement of eminent domain.[73] These considerations manifested the theory referred to above, that while government could not subsidize private enterprises, it could grant public resources or public powers to commercial entities, as long as these entities were regulated in ways that prevented them from reaping monopoly profits. As long as these limits were in place, courts would defer to legislative judgments about public purpose.

But Black phrased these limits so vaguely—and they so plainly contradicted the extreme language of deference he used elsewhere in the opinion—that readers came away from *Sharpless* thinking there were few, if any, meaningful limits on the legislature's power to fund private works with public money. As a result, the decision proved deeply unpopular. Efforts immediately began to amend the constitution to prohibit public financing of private enterprises, and in 1857, that amendment was approved—by an overwhelming popular vote of 90 percent.[74]

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[70] *See Sharpless*, 21 Pa. at 169–70 (stating that railroads are a "public highway for the public benefit" and that other useful means of transportation, like canals and bridges, have also been erected by the government and funded by taxes).

[71] *See id.* at 172.

[72] *Id.* at 169.

[73] *Id.*

[74] *See* LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860, at 123–25 (1948); *cf.* Hammett v. City of Philadelphia, 65 Pa. 146, 154 (1869)

Borrowing from other states' Gift Clauses, Pennsylvania's new provision barred the state from "in any manner or event" lending its credit to any person or corporation, becoming a stockholder in any business, or allowing any municipal government to "obtain money for" a private business.[75] Only a few years later, the Pennsylvania Supreme Court observed that "[t]he evils of these subscriptions [i.e., purchases of railroad stock with taxpayer money] by counties and municipal corporations were so aggravated, that it became necessary to interfere and prevent by a constitutional prohibition all future pledges of municipal faith and property for such purposes."[76]

The Pennsylvania experience is a perfect microcosm of the disputes that raged through state courts during this era, at a time when politically influential private firms often obtained special benefits from lawmakers at the expense of the taxpaying public. That problem was endemic throughout the century. In cities, it motivated agitation for public utility reform (protests against the "streetcar monopoly," for instance),[77] but it was equally problematic in the western territories. Mark Twain—whose brother served as the acting secretary of Nevada Territory in the 1870s—satirized the territorial legislature's liberality with private toll-road companies, for example:

> The legislature sat sixty days, and passed private toll-road franchises all the time. When they adjourned it was estimated that every citizen owned about three franchises, and it was believed that unless Congress gave the Territory another degree of longitude there would not be room enough to accommodate the toll-roads. The ends of them were hanging over the boundary line everywhere like a fringe.[78]

C. The "Great Barbecue" and Its Discontents

Historian Vernon Parrington later called this era "The Great Barbecue," because federal and state governments bestowed "rich gifts" on private parties—"in lands, tariffs, subsidies, favors of all sorts . . . when influential citizens made their wishes known to the reigning statesmen,

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(observing that *Sharpless* was "now practically unimportant, because it has been in effect reversed by the seventh section of the first amendment of the Constitution of 1857.").

[75] HARTZ, *supra* note 74, at 123–24. This Amendment, with significant alterations, remains in the Pennsylvania Constitution to this day. *Compare* PA. CONST. of 1838 art. XI, § 7 (1857), *with* PA. CONST. art. IX, § 9, *and id.* art. VIII, § 8 (featuring alterations including delegating authority to the General Assembly to provide financial aid or lease property when "necessary to the health, safety or welfare of the Commonwealth").

[76] Pa. R.R. v. City of Philadelphia, 47 Pa. 189, 193 (1864).

[77] *See, e.g.*, STEVEN L. PIOTT, THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST 55–71 (1985).

[78] MARK TWAIN, ROUGHING IT 172 (Harriet Elinor Smith & Edgar Marquess Branch eds., Univ. of Cal. Press 1995) (1872).

the sympathetic politicians were quick to turn the government into the fairy godmother the voters wanted it to be."[79] Naturally, courts were often forced to address the constitutionality of government efforts to hand out such subsidies—frequently, but not exclusively, to railroads—and to police the boundary between private and public benefit.[80]

The 1870s was a pivotal era for the development of this jurisprudence, and although the significant decisions during this period were not Gift Clause cases, they served as critical steps in the development of state constitutional prohibitions regarding subsidies. This decade marked the climax of disputes over federal handouts to railroads—the Crédit Mobilier scandal of 1872, for example, helped end Congress's generous cash and land payments to railroad corporations[81]—but disputes over subsidies to railroads were perhaps even more fevered at the state and local level. Such financial aid, wrote the scholar and diplomat James Bryce in 1888, "gave rise to endless lobbying and intrigue, first to secure them, then to keep them from being declared forfeited in respect to some breach of the conditions imposed . . . and [they] brought [corporate representatives] into intimate and often perilously delicate relations with leading politicians."[82] In many instances, subsidies led to litigation. Courts in Michigan and Wisconsin strongly resisted such expenditures, but courts in other states took the opposite view—often in heated language. The ensuing conflicts were ultimately resolved by state constitutional changes in the 1870s and 1880s.

In *Curtis's Administrator v. Whipple*,[83] the Wisconsin Supreme Court ruled that a municipal government could not subsidize a private school

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[79] 3 VERNON LOUIS PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 23 (1930).

[80] *See, e.g.*, Com. Nat'l Bank v. City of Iola, 6 F. Cas. 221, 221 (C.C.D. Kan. 1873) ("[As to w]hether the legislature may thus compel or coerce the citizen to aid in the establishment of purely private enterprises or objects because these will or may incidentally promote the general good of the community or locality. . . . [N]o such principle has yet received judicial sanction. On the contrary, the principle has been declared unsound by courts of the highest respectability."), *aff'd* 154 U.S. 617 (1875); *Pa. R.R.*, 47 Pa. at 194 ("The simple question then is, can the city of Philadelphia devote its stocks, its money, or its credit, to the aid of a steamship company, directly or indirectly . . . . [I]t is . . . clear that the constitution expressly forbids the passage of any such act . . . ."); Brewer Brick Co. v. Brewer, 62 Me. 62, 71 (1873) ("[T]he legislature cannot constitutionally authorize towns to raise money by taxation to give or loan to individuals or corporations for private purposes.").

[81] *See* STEPHEN E. AMBROSE, NOTHING LIKE IT IN THE WORLD 373–77 (2000); Sean M. Kammer, *Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850–1903*, 35 L. & HIST. REV. 391, 403–04 (2017).

[82] 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 644 (MacMillian & Co. 3d ed. 1908) (1888). Bryce, who intended his book as an update of Tocqueville's *Democracy in America*, became Britain's ambassador to the United States in 1907. Morton Keller, *James Bryce and America*, WILSON Q., Autumn 1988, at 86, 86–88.

[83] 24 Wis. 350, 353–56 (1869).

with taxpayer money.[84] It was "obviously incompatible with the genius and institutions of a free people . . . as well as all judicial authority" to allow the government to tax the public to subsidize enterprises "carried on by private persons for private ends, or the purposes of mere individual gain and emolument," wrote Chief Justice Luther Dixon.[85] The school held a corporate charter from the legislature, but the court found that this was "a most frivolous pretext for giving to a corporation, where there is no certain and definite personal responsibility, money exacted from the tax payers."[86] Government could pay money to private entities in exchange for projects that gave "some direct advantage" to the public, "either by [the government's] being the owner or part owner of the property or thing to be created or obtained with the money," but only if the undertaking was a "matter[] of public concern."[87] It could not simply pay private businesses to operate.

A year later, the same court was asked to clarify whether the fact that a business qualified as a "public use" for purposes of eminent domain meant it was also a "public purpose" for purposes of receiving subsidies of tax dollars. Speaking again through Chief Justice Dixon, it answered no.[88] The public use requirement for eminent domain was *not* satisfied simply by "the general benefits and advantages accruing to the public at large from the creation and operation" of private companies,

> for if it did, then every enterprise or business prosecuted for private gain or emolument, and by which the public prosperity and welfare is also promoted, would be a public use, and, as such, would justify the exercise of the power of eminent domain in behalf of the persons and corporations so engaged.[89]

Instead, as far as eminent domain was concerned, the public use principle could only be satisfied if "the possession, occupation and enjoyment of the land" was vested in "the public, or public agencies,"[90] and any private firm benefiting from the use of eminent domain must "be kept under public

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[84] *Id.* Wisconsin's 1848 Constitution provided that "the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation." WIS. CONST. art. VIII, § 3. But in *Clark v. City of Janesville*, the court held that this provision only bound the state itself, not political subdivisions. 10 Wis. 136, 170–71 (1859).

[85] *Curtis's Adm'r*, 24 Wis. at 354.

[86] *Id.*

[87] *Id.* at 354–55.

[88] *See* Whiting v. Sheboygan & Fond du Lac R.R., 25 Wis. 167, 190–91 (1870) (asserting that there is a "distinction . . . between a public use which will authorize the exercise of the power of eminent domain, and one which will justify a resort to the power of taxation").

[89] *Id.* at 192.

[90] *Id.* at 195 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 531 (Boston, Little, Brown, & Co., 2d ed. 1871)).

control," meaning that it must be legally required to serve all customers and that its prices must be regulated to prevent it from reaping monopoly profits.[91]

Such regulatory oversight was *necessary* to prevent abuse of eminent domain. But it was not *sufficient* to justify the subsidizing of a business with taxpayer money under the "public purpose" principle of taxation. To hold otherwise would entitle the state to perpetually oversee the operations of every private firm that received such funds,[92] or would entitle any businesses regulated by the government to "apply to the legislature for an act to tax [its] neighbors . . . for [its] private aid and individual benefit."[93] Instead, if the government chose to subsidize a private railroad, it could only do so by actually purchasing stock and becoming a partial owner—not simply by subsidizing it and then imposing regulatory control on it. "[I]t is, in our judgment, upon this principle, and this alone, that the taxation in that class of cases can be sustained."[94]

Dixon's decisions relied heavily on the work of Michigan Chief Justice Thomas Cooley, the widely respected legal scholar whose treatise *Constitutional Limitations* was a standard text in the nineteenth century. His 1870 opinion in *People ex rel. Detroit & Howell Railroad v. Salem Township Board*[95]—which has been called the Michigan Supreme Court's "most renowned and controversial decision"[96]—found that it was unconstitutional for a municipality to pledge its credit to finance railroad construction.[97] "[T]here are certain limitations upon [the taxing] power," wrote Cooley, "inherent in the subject itself."[98] Taxation is for "raising revenue for public purposes only," and "when it is prostituted to objects in

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[91] *Id*. at 196–97 (emphasis omitted).

[92] *Cf. id.* at 201–02 (explaining that if the government controlled the railroads under eminent domain, the government would regulate the toll prices).

[93] *Id.* at 203–04.

[94] *Id.* at 186. Dixon's court was forced to address the issue again a year later. *See* Phillips v. Town of Albany, 28 Wis. 340 (1871). Upholding a municipal purchase of bonds in a railroad, Dixon expressed qualms about allowing governments to buy stock in private companies with taxpayer money. *See id*. at 357 ("[B]ut for past decisions holding valid the subscription and taxation to pay it, to which decisions we were required to adhere, the majority of this court would not hesitate to declare the subscription likewise void, and the tax to pay it wholly unauthorized."). He went on to say, "no stronger case for the application of the doctrine of *stare decisis* could be presented. It is upon this ground, and this alone, that we sustain the present subscription." *Id.*

[95] 20 Mich. 452 (1870).

[96] Paul Moreno, *The Verdict of History: The History of Michigan Jurisprudence Through its Significant Supreme Court Cases*, MICH. BAR J., Dec. 2008, at 1, 13.

[97] *Salem Twp.*, 20 Mich. at 485, 494. The Michigan Constitution in effect at the time prohibited only the state from giving or lending its credit to private entities, so this clause was not at issue in the case. MICH. CONST. of 1850 art. XIV, § 6.

[98] *Salem Twp.*, 20 Mich. at 473.

no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder."[99]

Cooley defined "public" broadly, including not only "erect[ing] the public buildings" and "discharg[ing] the public debts," but also "considerations of natural equity, gratitude and charity."[100] But taxing townspeople to benefit a privately owned railroad was unconstitutional. The railroad would be "exclusively private property, owned, controlled, and operated by a private corporation for the benefit of its own members,"[101] and the public benefit from its operations was only "secondary and incidental, like that which springs from the building of a grist-mill, the establishment of a factory, the opening of a public inn, or from any other private enterprise."[102] That was insufficient to satisfy the public purpose requirement, which only allowed government to use tax dollars for truly public undertakings. Although railroads were often analogized to public highways, in reality "they are private property," whose owners "carry on for their own benefit a [private] business" that was no more public than "a hotel," which also accommodated the public.[103] In addition to his constitutional interpretation, Cooley added a note of warning that reiterated the philosophical concerns referenced in Part I above: "when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger."[104]

D. Stockton & Visalia Railroad*: The Need for Further Reform*

Salem Township proved to be a leading case on the issue—but one that several other courts fiercely rejected.[105] A year after it was decided, the California Supreme Court took a different path in *Stockton & Visalia*

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[99] *Id.* at 474.

[100] *Id.* at 475–76.

[101] *Id.* at 476–77.

[102] *Id.*

[103] *Id.* at 478–79 (citing Weeks v. Milwaukee, 10 Wis. 242 (1860)). The Court in *Weeks* held it was unconstitutional for the government to subsidize a private hotel. 10 Wis. at 263–64.

[104] *Salem Twp.*, 20 Mich. at 487.

[105] The Texas Supreme Court emphatically opposed the *Salem Township* doctrine in *Harcourt v. Good*, 39 Tex. 455, 471–79 (1873), as did the Nebraska Supreme Court in *Hallenbeck v. Hahn*, 2 Neb. 377, 403–09 (1872). The federal district court in Michigan also strongly rejected the *Salem Township* decision in *Talcott v. Pine Grove Twp.*, 23 F. Cas. 652, 653 (C.C.W.D. Mich. 1872) (No. 13,735), and the Supreme Court did likewise when it affirmed the *Talcott* decision. 86 U.S. 666, 679 (1873). Only a year later, however, the Supreme Court effectively reversed itself and agreed with Cooley in *Loan Ass'n v. City of Topeka*, 87 U.S. (20 Wall.) 655, 664–65 (1874).

Railroad v. Common Council of Stockton,[106] when it upheld the constitutionality of a state law that compelled the city of Stockton to impose a tax and to donate $300,000 of the proceeds to a private railroad company, which would use the money to acquire land to lay tracks.[107]

Stockton & Visalia Railroad did not involve the Gift Clause of the California Constitution, adopted in 1849, because that clause did not apply to local governments.[108] Instead, the plaintiffs argued that the acquisition of their land by the railroad was neither a "public use" for eminent domain purposes nor a "public purpose" that would authorize the government to fund it with tax dollars. But Chief Justice William T. Wallace, in a long and emphatic opinion underscoring the principle of judicial restraint and echoing Justice Black's *Sharpless* decision, rejected the distinction adopted by the Wisconsin and Michigan courts between "public use" for eminent domain and "public purpose" for taxation.[109] He concluded that the railroad subsidy could be deemed invalid only if there was "absolutely no possibility that the proposed road . . . could in any degree promote the public welfare."[110]

Like *Sharpless*, the *Stockton & Visalia Railroad* ruling proved controversial. In fact, California Governor William Irwin said it "aroused" the "public mind" to a degree "as it hardly ever had been before, or has been since."[111] Only months after the decision was announced, both the Republican and Democratic parties condemned it at their respective statewide conventions. "[S]ubsidizing railway or other private corporations out of the public treasury," declared the Democrats in June 1871, was "an invasion to the rights of private property and a departure from sound maxims of government, and result in the bankruptcy of towns and counties."[112] Such subsidies "lead to gross abuses" and "violate the cardinal principles of Democracy, to wit: The Government is instituted for the welfare and security of the mass of the people and not for the

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[106] 41 Cal. 147 (1871).

[107] *Id.* at 200–01. Unlike many other subsidy laws, however, the city obtained no equity interest in the railroad in exchange for the money. As one scholar writes, "[t]he transfer of tax monies could be considered then a pure donation of public funds." Charles J. McClain, *Pioneers on the Bench: The California Supreme Court, 1849–1879*, *in* CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER: THE HISTORY OF THE CALIFORNIA SUPREME COURT 1, 40 (Harry N. Scheiber ed., 2016).

[108] *See* Pattison v. Bd. of Supervisors, 13 Cal. 175, 182–84 (1859) (asserting that prohibitions on the state are not applicable to counties and local government).

[109] *Stockton & Visalia R.R.*, 41 Cal. at 179–83.

[110] *Id.* at 178.

[111] William Irwin, Governor's Veto on Assembly Bill No. 177, H. Assemb., 22d Sess., at 738 (Cal. 1878).

[112] *The New Departure: Platform of the Democracy of California Adopted in State Convention, June 21, 1871*, SANTA CRUZ WKLY. SENTINEL, July 1, 1871, at 4.

aggrandisement [sic] of a favored few."[113] The party called for amending the constitution to overrule *Stockton & Visalia*.[114] A week later, the Republicans agreed. "[T]he subsidizing of railroads or other private corporations . . . by taxation of private property," they said, was "contrary to sound maxims of government, and productive of gross corruption and abuse, and a plain invasion of the rights of the citizen," and they joined Democrats in calling for a constitutional amendment to undo the decision.[115]

Perhaps unsurprisingly, the Stockton & Visalia Railroad (S&VR) proved a failure and a further drain on taxpayer money—a situation worsened by the Depression of 1873. The S&VR had been incorporated in 1869 in an effort to compete against the Central Pacific. To obtain the tax revenue necessary for the subsidy, the city annexed adjacent communities, which was controversial in part because much of that land was personally owned by Central Pacific owner Leland Stanford, who was thus essentially forced to finance his own competition. The City Council initially refused to adopt the tax the legislature had authorized, which is why the *Stockton & Visalia Railroad* case concerned a writ of mandate compelling it to do so. But only months after the court ruling, the S&VR changed course. Instead of constructing a 170-mile line north and south between Stockton and Visalia, it spent its funds to buy an existing fifteen mile east-west line between Stockton and the tiny town of Peters.[116] Given the company's failure to build the anticipated railroad, city officials refused to disburse the funds, so the railroad sued again.[117] That case ended in 1876 with another ruling in favor of the S&VR, but the citizens refused to back down. A town meeting adopted a resolution calling the company "a fraud" and promising to distribute flyers declaring,

> Caution! Whereas $300,000 Stockton City bonds have been wrested from the city of Stockton by the so-called Stockton and Visalia Railroad Company . . . [for] construction of a railroad from Stockton to Visalia, and for which bonds no consideration has been received (not one mile of railroad having been built), all persons are hereby cautioned against purchasing or negotiating said bonds . . . .[118]

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[113] *Id*.

[114] *Id*.

[115] *Platform Adopted by the Republican State Convention*, CHI. TRIB., July 6, 1871, at 3.

[116] Stockton & Visalia R.R. v. City of Stockton, 51 Cal. 328, 334–35 (1876). Stockton and Visalia Railroad later built about 20 more miles between Peters and Oakdale. GUY DUNSCOMB, A CENTURY OF SOUTHERN PACIFIC STEAM LOCOMOTIVES, 1862–1892, at 418 (1963).

[117] *Stockton & Visalia R.R.*, 51 Ca. at 334–35.

[118] *Stockton and the Visalia* Railroad, DAILY BEE, Oct. 17, 1876, at 2.

Eventually, the dispute settled when the city gave in and canceled the railroad's debts, which meant taxpayers were forced to bear the burden. Shortly afterwards, the Central Pacific bought what remained of the S&VR.[119] "[Y]ou voted a subsidy to the Stockton and Visalia road," California Governor Newton Booth told voters in 1873. "What have you got, except an endless litigation to make you pay for something that you did not get?"[120]

As noted, *Stockton & Visalia Railroad* did not involve California's Gift Clause, because that clause did not then apply to local governments.[121] On the contrary, California's 1849 Constitution contained one provision that entirely barred the *state* from giving or lending its credit to private companies,[122] and another making it the legislature's responsibility to pass laws "provid[ing] for the organization of cities . . . and to restrict their power of . . . loaning their credit, so as to prevent abuses."[123] But this language left the legislature free to allow local governments to devote tax money to local projects.

Eight years after *Stockton & Visalia Railroad*, however, the state held a new constitutional convention. It produced a constitution that banned both state *and* local gifts or loans—retaining the 1849 prohibition on state subsidies[124] but also expressly depriving the legislature of power to authorize local governments to "give or to lend" their credit "in aid of or to any person, association, or corporation . . . in any manner whatsoever," or to become stockholders in private corporations.[125]

By that time, the United States Supreme Court had entered the fray. In its 1874 decision, *Loan Association v. City of Topeka*, the Supreme

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[119] *See* GEORGE H. TINKHAM, HISTORY OF SAN JOAQUIN COUNTY, CALIFORNIA 251–52 (1923); GEORGE H. TINKHAM, A HISTORY OF STOCKTON FROM ITS ORGANIZATION UP TO THE PRESENT TIME 356 (W.M. Hinton & Co. 1880); Hubert Howe Bancroft, *History of California vol. VII*, *1860-1890 in* 24 THE WORKS OF HUBERT HOWE BANCROFT 588 & n.43 (San Francisco, History Co. 1890).

[120] Newton Booth, Speech at Stockton (Aug. 30, 1873), *in* NEWTON BOOTH OF CALIFORNIA: HIS SPEECHES AND ADDRESSES 196 (Lauren E. Crane ed., 1894).

[121] *See* Pattison v. Bd. of Supervisors, 13 Cal. 175, 182–84 (1859) (reasoning that "[t]he fact that the State could not take stock in the road does not show that the Legislature could not authorize the county . . . to take stock").

[122] CAL. CONST. of 1849, art. XI, § 10.

[123] *Id*. art. IV, § 37.

[124] *See* CAL. CONST. of 1879 art XII § 13; art. IV §31. Beginning in the 1960s, the California Constitution was amended in a series of updates that were intended to modernize its language and renumber some of its provisions. These revisions are typically held not to have changed the legal substance of those provisions. *See generally* CAL. CONST. REVISION COMMN., CONSTITUTION REVISION HISTORY AND PERSPECTIVE (1996), https://www.californiacityfinance.com/CCRChistory.pdf. Unless otherwise specified, this article cites to the original 1879 language.

[125] CAL. CONST. of 1879 art. IV § 31. This provision was adopted by the convention with virtually no dissent. *See* 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 820 (1880).

Court held that local governments could not spend taxpayer money to subsidize private companies, basing its decision on the time-honored principle that the use of public funds for private purposes is not within a legislature's power.[126] That case involved a Kansas statute allowing cities to invest taxpayer money in any "manufactories [or] such other enterprises as may tend to develop and improve such city."[127] The question of whether subsidies to private businesses are constitutional, wrote Justice Samuel Miller, was "not new," but had been "brought to the attention of the courts of almost every State."[128] Most of them had concluded that absent an express prohibition in their constitutions, subsidies for private businesses were lawful, as long as "the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by taxation."[129] Cases upholding railroad or canal subsidies had done so because railroads and canals were qualitatively public, and Miller did not dispute that there was merit to this argument, although he could not resist observing that the decisions upholding subsidies had typically led to "disastrous consequences."[130] The Kansas law, by contrast, essentially created a slush fund whereby public officials could spend taxpayer money to subsidize whatever business they considered worthwhile.

That was unconstitutional. "There are limitations on such power which grow out of the essential nature of all free governments," wrote Miller.[131] A law that declared that "the homestead now owned by A. should no longer be his, but should henceforth be the property of B," would plainly be unconstitutional because it would not qualify as a law, but would be instead "a decree under legislative forms."[132] Likewise, a law that taxed some people's earnings and placed the proceeds in a fund for later distribution to recipients for their own private profit was "none the less a robbery because it is done under the forms of law and is called taxation."[133]

Loan Association was expressly limited so that it did not apply to railroad corporations.[134] And, like *Sharpless, Stockton & Visalia Railroad,* and other cases, it did not involve a Gift Clause. Those cases all concerned

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[126] 87 U.S. (20 Wall.) 655 (1874).

[127] *Id.* at 657.

[128] *Id.* at 660.

[129] *Id.* at 660–61.

[130] *Id.* at 661–62.

[131] *Id.* at 663.

[132] *Id.* at 663–64. As noted above, this reasoning was set out in *Sharpless* seventeen years before the *Loan Association* decision. *See supra* notes 59, 62, and accompanying text; *see also* COOLEY, *supra* note 90, at 490 (setting forth the same argument).

[133] *Loan Ass'n*, 87 U.S. (20 Wall.) at 664.

[134] *Id.* at 661–62.

constitutional provisions relating to *taxation* or to *due process of law*, rather than provisions that expressly forbade the giving or lending of public resources to private entities. Yet they indicated that public financing of for-profit businesses raised crucial questions of constitutionality and legitimacy. Those controversies, in turn, spurred constitutional reforms that included the adoption of new or expanded Gift Clauses. Thus, while the public purpose and public use doctrines are not identical in meaning to the Gift Clauses of state constitutions,[135] they demonstrate why many states considered it necessary to adopt additional safeguards against government devoting public revenue to private undertakings.

By the close of the nineteenth century, it had become firmly established that while government could spend tax money in ways that benefited private entities, it could only do so as long as the expenditure was for a *qualitatively* public purpose—which included railroads insofar as they were public highways. But government could not finance private enterprises, even if it were hoped that they would generate benefits for the public.[136] It is on that foundation that modern Gift Clauses were built.

III. THE SECOND WAVE

Sharpless in 1853, and *Stockton & Visalia Railroad* almost twenty years later, exemplify the historical pattern of constitutional reform aimed at reducing government entanglement with private enterprise. First, dreams of large returns spur political agitation for government to subsidize a private business. During this phase, concerns about financial risk are ignored or dismissed as defeatism; promises of profits spur lobbying efforts by private firms and ambitious investors; hopes of economic development, and the consequent political opportunities, lead politicians to approve loans, grants, or other financial aid to these firms. But then the subsidies lead to economically inefficient business practices, or even corruption. Eventually comes a reckoning: the people have spent their money and get no railroad. Angry taxpayers then seek redress, either through a lawsuit or, if that is unsuccessful, in demands for

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[135] Arthur P. Roy, Comment, *State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise—A Suggested Analysis,* 41 U. COLO. L. REV. 135, 139 (1969) ("To extend the public purpose doctrine to hold credit lending transactions constitutional is to render [Gift Clauses] nugatory."); *see also* Note, *State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations*, 108 U. PA. L. REV. 95, 100–01 (1959) (detailing distinction between public purpose and Gift Clause doctrines).

[136] JAMES M. GRAY, LIMITATIONS OF THE TAXING POWER § 200, at 140 (1906) ("It may now be said to be the prevailing law in the American states, that the public money cannot be given, or the public credit loaned, or taxation imposed in aid of any private commercial enterprise, however prominent in the enterprise may be the feature of the public benefit.").

stronger legal restrictions on subsidization that, it is hoped, will prevent a repeat. After the *Sharpless* decision, an overwhelming demand for reform led to new restrictions on *state* investment in internal improvements. Two decades later, the *Stockton & Visalia Railroad* decision led to similar demands for restrictions on *local* investment in internal improvements. This demand for local protections made up the second wave of Gift Clause reforms.

By the 1870s, intense disagreements between courts over the legality of municipal investments in private enterprises indicated a need for constitutional change. And, as noted above, the Crédit Mobilier scandal and the ensuing Panic of 1873[137] proved the spark that ushered this second wave. State constitutions had previously forbidden state legislatures, but not local governments, from giving or lending public resources to private businesses. The second wave, beginning in the 1870s, expanded and strengthened constitutional provisions to address this concern.

But second-wave reforms did not just expand the prohibition on subsidies to encompass local governments. They also tended to be *substantively* broader, forbidding not just loans of credit, but also donations, grants, or other types of aid that had not been itemized in the first wave of Gift Clauses. They also frequently included emphatic language, such as prohibitions on "directly or indirectly" subsidizing companies,[138] or forbidding subsidies for "any purpose whatsoever."[139]

A. Restricting Local Governments

By the mid-nineteenth century, courts in many states had declared that the original Gift Clauses prohibiting *state* aid did not bind local governments.[140] Although some people had argued that local

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[137] As historian Walter Borneman puts it, there were essentially two causes of the Panic of 1873. The first was that the Crédit Mobilier scandal made "all railroad stocks and bonds . . . suspect, and it made it very difficult to market them." WALTER BORNEMAN, IRON HORSES: AMERICA'S RACE TO BRING THE RAILROADS WEST 102 (2010). The second was the collapse of Jay Cooke and Company, a banking firm that had "bet an inordinate amount of its cash on the unmarketable securities of the Northern Pacific Railroad." *Id.*

[138] *See, e.g.*, N.H. CONST. pt. II, art. V ("[T]he general court shall not authorize any town to loan or give its money or credit, directly or indirectly, for the benefit of any corporation having for its object a dividend of profits, or in any way aid the same by taking its stock or bonds."). This language was added pursuant to an 1877 amendment. *See* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1308 (Benjamin Perley Poore, ed. 1877).

[139] *See, e.g.*, IDAHO CONST. art. VIII, § 4.

[140] *See, e.g.*, Prettyman v. Supervisors of Tazewell Cnty., 19 Ill. 406, 411 (1858); Police Jury v. Succession of McDonogh, 8 La. Ann. 341, 355–56 (1853); Cass v. Dillon, 2 Ohio St. 607, 614–15 (1853). In *Bushnell v. Town of Beloit*, the Wisconsin Supreme Court observed

governments, being creatures of the state, necessarily fell within the prohibitions aimed at states, courts typically rejected this argument.[141] That created an obvious loophole, which enabled state legislatures to simply permit or even compel local governments to invest public revenues in private enterprises—as in *Stockton & Visalia Railroad*. Thus, as bad investments piled up during the last quarter of the nineteenth century, many states closed this loophole by forbidding municipal as well as state governments from giving or lending taxpayer resources to businesses. Along with California, this included New York,[142] Illinois,[143] Tennessee,[144] Missouri,[145] and other states.[146]

The second wave of Gift Clauses also prohibited "donations." Most of the first-wave clauses had only prohibited "loans of credit"—that is, acts by which the government either undertook to lend money directly to a private entity or stood as a surety for a debt incurred by a private entity—

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that the state constitution barred the state, but not cities and counties, from devoting public money to private enterprises, but that,

> [p]robably, if the country had then had the experience of the last ten years, and seen the distress and financial ruin which towns, counties and cities have brought upon themselves by subscribing to the capital stock of rail road companies, and issuing their bonds therefor, a provision would have been incorporated in the constitution to prevent the evil.

10 Wis. 195, 224 (1860).

[141] *See, e.g.*, Walker v. City of Cincinnati, 21 Ohio St. 14, 46 (1871).

[142] The 1846 New York Constitution had banned the state from lending its credit to private entities. N.Y CONST. of 1846, art. VII, § 9. The 1894 Constitution retained this prohibition, N.Y. CONST. of 1894 art. VIII § 9) but added a similar prohibition for local governments. *ID.* art. VIII § 10).

[143] Illinois' second constitution barred only the state from giving its credit to any individual or corporation. ILL. CONST. of 1848, art. III, § 38. The state's 1870 Constitution retained this prohibition, ILL. CONST. of 1870, art. IV § 20, but it added a similar prohibition against local governments, *id*. sections separately submitted, para. 5.

[144] Tennessee's 1834 Constitution included no prohibition on gifts of public funds. TENN. CONST. of 1834, art. 2, § 29 (enumerating the legislature's powers of taxation without limiting gifts of public funds). Its 1870 version barred both state and local governments from subsidizing private industry. TENN. CONST. art II, §§ 29, 31.

[145] Missouri's 1820 Constitution contained no Gift Clause. MO. CONST. of 1820, art. VII (enumerating the legislature's power to allocate public funds to improvement projects for roadways and waterways). Its 1865 Constitution prohibited the lending of state credit to private entities. MO. CONST. of 1865, art. XI, § 13. In 1875, this was expanded to encompass local governments, as well. MO. CONST. of 1875, art. IV, § 45; *id*. art IX, § 6.

[146] The Nebraska Constitutional Convention of 1871, by contrast, did not include an updated Gift Clause in its final work, but instead submitted it to the voters as a separate provision. This provision was defeated along with the entire proposed constitution. *See* Hallenbeck v. Hahn, 2 Neb. 377, 423 (1872). In 1875, however, the state held another constitutional convention, which again chose a strong gift clause applicable to local governments, and, unlike its predecessor, it was adopted. NEB. CONST. art. XII, § 2.

but not necessarily *donations*.[147] Cities sometimes offered donations or lump-sum payments to railroad companies as incentives for them to run lines through those cities.[148] To some extent, this distinction between loans of credit and donations made sense, given that a one-time donation does not obligate the government's taxing power into the future, whereas a pledge of credit creates a debt of uncertain termination. Moreover, a one-time gift is complete when it occurs, whereas a pledge of credit in the form of a bond issue is a contract that could be enforced—perhaps decades later—by a private party which is thereby empowered to *force* a local government to impose a tax, as in *Stockton & Visalia Railroad*. These agreements offended notions of democratic sovereignty. On the other hand, a donation left the government with no meaningful control over the use of the funds and threatened to contradict the basis of government's legitimacy.[149]

The second wave of Gift Clauses, beginning in the 1870s, typically barred governments from giving gratuities as well as loans of credit.[150] So, for example, the 1850 Kentucky Constitution prohibited the state from giving or lending its credit to private entities but was silent with respect to local governments' ability to give or lend credit.[151] Its 1891 constitution, however, also prohibited the state from "mak[ing] donation[s] to any company, association, or corporation"[152] and extended this prohibition to local governments, too.[153]

Some states, during this second wave, added express exceptions to their Gift Clauses. Tennessee, for instance, specifically allowed local governments to give or lend taxpayer money to individuals and corporations if a supermajority of voters approved at a local election.[154]

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[147] *See, e.g.*, Bittinger v. Bell, 65 Ind. 445, 457, 459 (1879). Given the ambiguity between the terms "donation" and "loan of credit," some courts drew the distinction by determining that "the giving or loaning of the credit . . . occurs only when such giving or loaning results in the creation by the state of a legally enforceable obligation on its part to pay . . . ." State ex rel. Wisconsin Dev. Auth. v. Dammann, 280 N.W. 698, 715 (Wis. 1938). For more on this distinction, see *infra* notes 247–48, 250–51 and accompanying text.

[148] *See, e.g.,* Town of Concord v. Portsmouth Sav. Bank, 92 U.S. 625, 627–29 (1875) (permitting bonds issued as donations to incentivize the railroad being built through a town because the bonds were issued after a popular vote approved them in accordance with the state's constitution); Jussen v. Bd. of Comm'rs, 95 Ind. 567, 568–69, 78 (1884) (allowing the appropriation of public funds to a railroad on the condition it was built through a town because the petition for appropriation was in accordance with the applicable statute).

[149] *See* Pinsky, *supra* note 25, 284 (discussing a judicial preference for governments to employ non-donative aid like stock purchases because this type of aid allowed for continued public control over the funds rather than donations which surrendered public control).

[150] *See, e.g.*, GA. CONST. of 1877, art. VII, § 6; NEB. CONST. art. XIII, §§ 2, 3.

[151] KY. CONST. of 1850, art. II, § 33.

[152] KY. CONST. § 177.

[153] *See id*. § 179.

[154] TENN. CONST. art II, § 29.

Colorado's 1876 Constitution exempted debts contracted for supplying water to cities.[155] Minnesota's 1858 Gift Clause expressly exempted railroads.[156] Nebraska's 1875 Gift Clause did the opposite: it *only* prohibited local governments from donating money to railroads (or other "works of internal improvement"), but it allowed other types of subsidy.[157]

B. The Western Experience

Between the end of the Civil War and 1900, thirty-four of the forty-five states held constitutional conventions.[158] The work of these conventions—including those whose proposals were rejected—reveals the efforts by constitution-makers to restrict public aid to private enterprise as much as possible. This is particularly notable in the experience of western states that were then being formed out of territories. Four states were admitted to the union in 1889 (the Dakotas, Montana, and Washington) followed by two more in 1890 (Idaho and Wyoming), making this the most prolific state-making period since the Founding. Three more states—Utah, Oklahoma, and New Mexico—were admitted before Arizona attained statehood in 1912. For the delegates at Arizona's two constitutional conventions—in 1891 and 1910—these new constitutions provided the most up-to-date models on which to rely, and delegates at both conventions were quick to consult them. But the delegates also had to consult new federal restrictions on the territories.

1. Washington and Other Territories

The constitution that Arizonans ultimately ratified owed much to the one adopted by Washington in 1889, so its history is of particular interest.[159] Washington Territory held its first convention in 1878, which produced a draft constitution with a strong Gift Clause forbidding state and local governments from "mak[ing] any donation or grant to, or in aid of, or becom[ing] . . . a shareholder in, any corporation or company," or

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[155] COLO. CONST. art. XI, § 8 (repealed 1969).

[156] In 1858, Article IX, section 10 was amended to specifically exempt railroads from the Minnesota Constitution's general prohibition against extending state credit to individuals or corporations. *See State Constitutional Amendments Considered*, MINN. LEGIS., https://www.lrl.mn.gov/mngov/constitutionalamendments (last visited Oct. 26, 2023). This railroad exemption was removed two years later when Article IX, section 10 was amended in 1860—this version barred any further issuance of bonds in the name of "Minnesota State Railroad Bonds." *See id*. This section was subsequently amended and renumber yet again to its present form. MINN. CONST. art. XI, § 2.

[157] NEB. CONST. art. XIII, § 2. The Constitution also retained its existing prohibition on lending or giving the state's credit to any corporation. *Id.* art XIII, § 3.

[158] JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 8–9 (2006).

[159] Arizona courts have often looked to Washington's history and precedent when interpreting provisions of the Arizona constitution that were modeled on those of Washington. *See, e.g.*, Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n, 773 P.2d 455, 460 (Ariz. 1989); Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999).

"lend[ing] or pledg[ing] the credit or faith [of the state or local government] directly or indirectly, in aid of any person, company or corporation, for any amount or for any purpose whatever, or becom[ing] responsible for any debt, contract or liability of any person, company, or corporation, in or out of the state."[160] Although ratified by voters, this constitution never went into effect because Congress blocked statehood.

The same happened to Montana, South Dakota, and Arizona, all of which drafted constitutions that Congress rejected. But while they remained territories, Congress passed the Harrison Act of 1886[161] (discussed in detail in Section IV.A below), barring any territory "or any political or municipal corporation or sub-division of any such Territory" from "in any manner loan[ing] its credit to or [using] it for the benefit of any such company or association, or borrow[ing] any money for the use of any such company or association."[162] This legislation was motivated in part by incidents in which territorial governments—notably including Arizona—gave private companies special privileges, such as monopolies, subsidies, and tax exemptions.[163] With its passage, the Harrison Act's prohibitions against subsidies became part of the organic law of all existing territories (which, along with Montana, Washington, Arizona and the Dakotas, included what is now Idaho, Wyoming, Utah, Oklahoma, and New Mexico).

In 1889, Washington held a second convention, which retained much of the same language from its 1878 proposal but divided the Gift Clause into two clauses. One prohibited the state from "in any manner loan[ing] its credit" or "subscrib[ing] to or be[ing] interested in" any corporate stock;[164] the other provided that

> [n]o county, city, town, or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company, or corporation.[165]

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[160] WASH. CONST. of 1878, art. XII, §§ 8, 9 (not adopted).

[161] Ch. 818, 24 Stat. 170 (1886).

[162] *Id.* § 2.

[163] *See* CLARK C. SPENCE, TERRITORIAL POLITICS AND GOVERNMENT IN MONTANA 1864–1889, at 182-85 (1975) (discussing Montana's influence on the passage of the Harrison Act due to its favoring of private companies); *see also* William H. Lyon, *Arizona Territory and the Harrison Act of 1866*, 26 ARIZ. & W. 209, 216 (1984) (noting several territories, including Arizona, which became heavily indebted to finance railroad construction projects before the Harrison Act).

[164] WASH. CONST. art. XII, § 9.

[165] *Id.* art. VIII, § 7.

Thanks to active lobbying by railroad owners who insisted that reducing subsidies would hinder economic development,[166] this language was notably *less* protective of taxpayers than the 1878 proposal had been—lacking, for example, the emphatic language "for any amount or for any purpose whatever" that had appeared in the earlier version.

South Dakota, too, held constitutional conventions in 1883, in 1885, and in 1889. The 1883 proposal barred state and local governments from lending their credit or making donations to private entities, or from owning stock in any corporation.[167] The 1885 version retained these provisions,[168] as did the 1889 version.[169] North Dakota adopted the same language at its convention (which finished its work in August 1889), with one change: where the South Dakota version banned the state from engaging in "internal improvement[s],"[170] the North Dakota version allowed the state to engage in internal improvements if approved by a two-thirds vote of the people.[171] Wyoming's convention started its work in September 1889, and it used the same language as North Dakota[172] but added two other Gift Clauses: one that applied only to railroads[173] and another that applied to telegraph lines.[174]

In fact, 1889 was the most prolific year in American constitution-making; eight states held conventions—Washington, Wyoming, North and South Dakota, New Hampshire, Idaho, New Mexico, and Montana.[175] Mississippi and Kentucky held conventions a year later.[176] Almost all of these produced strong Gift Clauses barring both loans of credit and

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[166] NOAM MAGGOR, BRAHMIN CAPITALISM: FRONTIERS OF WEALTH AND POPULISM IN AMERICA'S FIRST GILDED AGE 171, 259 n.46 (2017).

[167] S.D. CONST. of 1883 art. XII § 1; art. XII § 3 (not adopted).

[168] S.D. CONST. of 1885, art. XIII, § 1 (not adopted) ("Neither the state nor any county, township or municipality shall loan or give its credit or make donations to or in aid of any individual, association or corporation except for the necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, pay or become responsible for the debt or liability of any individual, association or corporation; provided that the state may assume or pay such debit or liability when incurred in time of war for the defense of the state. Nor shall the state engage in any work of internal improvement.").

[169] S.D. CONST. of 1889 art. XIII, § 1.

[170] *Id.*

[171] N.D. CONST. of 1889 art. XII, § 185. In 1918, both North and South Dakota amended their Constitutions to authorize the lending and giving of credit in aid of "internal improvements." Charles Kettleborough, *Legislative Notes and Reviews,* 13 AM. POL. SCI. REV. 429, 435 (1919).

[172] WYO. CONST. of 1889 art. XVI § 6.

[173] *Id.* art. III, § 39.

[174] *Id*. art. X, § 15.

[175] DINAN, *supra* note 158, at 8–9. New Mexico's convention, however, failed to produce a draft. Thomas C. Donnelly, *The Making of the New Mexico Constitution*, 11 N.M. Q. REV. 452, 457 (1941).

[176] DINAN, *supra* note 158, at 8–9.

donations and applying to both state and local governments. New Hampshire's 1889 constitutional convention forbade state and local governments from "loan[ing] or giv[ing] [their] money or credit, directly or indirectly, for the benefit of any corporation having for its object a dividend of profits"[177]—language that originated in the state's 1877 constitutional amendment.[178] Idaho's constitution barred the state from giving or lending the state's credit "in any manner" to any private entity, or "directly or indirectly" becoming a stockholder in a private firm,[179] and banned any local government entity from "lend[ing] or pledg[ing] the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation."[180] Mississippi's 1890 Constitution prohibited state and local governments from lending their credit to, or making any appropriation for, any corporation.[181] Kentucky's 1891 Constitution barred the state from pledging or lending its credit for any private entity, forbade state ownership of stock, expressly prohibited the state from building a railroad, and blocked the legislature from authorizing any local government to own stock or appropriate money for a private entity, with the sole exception of building bridges and roads.[182]

2. Montana's Gift Clause

Although the framers of Arizona's Constitution had these examples before them, they did not take their Gift Clause from Washington or from these other new states.[183] Instead, they copied the language of the 1889 Montana Constitution. To understand why, we should begin with the complicated history of the Treasure State's Gift Clause.

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[177] N.H. CONST. of 1889 pt. II, art. V ("[T]he general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stock or bonds.").

[178] *Id.*; *see also* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW HAMPSHIRE 262 (1877) (showing the 1876 convention's decision to amend the Constitution and add the language that the 1889 convention would choose to retain).

[179] IDAHO CONST. of 1889 art. VIII, § 2.

[180] *Id.* § 4.

[181] MISS. CONST. of 1890 art. VIII § 183; art. XIV §258. These provisions now appear in art. XIV, § 258; art. VII, § 183.

[182] KY. CONST. of 1891 §§ 177, 179. These provisions now appear in Sections 183 and 185.

[183] *Compare* ARIZ. CONST. art. IX, § 7, *with* WASH. CONST. art. XII, § 9, *and, e.g.*, IDAHO CONST. art. VIII, § 2, para. 1 (demonstrating that Arizona's clause is similar to, but not copied from, Washington or other new states like Idaho).

a. Montana's 1884 Constitution

Montana's 1884 draft Constitution[184] provided:

> Neither the State, nor any county, city, town, township, or school district, shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to or in aid of any person, company, or corporation, public or private, for any amount, or for any purpose whatever, or become responsible for any debt, contract, or liability of any person, company, or corporation, public or private, in or out of the State, except as otherwise provided in this Constitution . . . [or] make any donation, or grant to by subsidy or otherwise, or in aid of, or become a subscriber to, or a shareholder in, any corporation, or company, or a joint owner with any person, company, or corporation, public or private, in or out of the State, except as to such ownership as may accrue to the State by escheat . . . [etc.].[185]

Other provisions of this proposed constitution also barred state or local governments from "contract[ing] any debt or obligation in the construction of any railroad, nor giv[ing] or loan[ing] [their] credit to or in aid of the construction of the same."[186] As with Washington State, this constitution was ratified but never enacted because Congress rejected Montana's application for statehood. Montana remained a territory (and subject to the Harrison Act) until 1889, when it was made eligible for statehood and prepared a new draft constitution.

b. Montana's 1889 Constitution

Its 1889 Convention adopted a Gift Clause identical to the one proposed five years before.[187] Its language is typical of the second wave of

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[184] Montana had previously held an unauthorized constitutional convention in 1866. MICHAEL P. MALONE ET AL., MONTANA: A HISTORY OF TWO CENTURIES 101–02 (rev. ed. 1991). The draft constitution that the convention prepared was lost, however, and has never been found. *Id.* at 102. The proceedings of the 1884 convention were recorded, but have never been published, or even transcribed from the original shorthand notes. *See Montana Constitutional Convention (1884) Records: Overview of the Collection*, ARCHIVES W. (on file with the Montana Historical Society in Helena), https://archiveswest.orbiscascade.org/ark:/80444/xv56776 (last visited Aug. 5, 2023). The handwritten records can be viewed online at https://scholarworks.umt.edu/montanaconstitution/2/.

[185] MONT. CONST. of 1884, art. XIII, §§ 1–2 (not adopted).

[186] *Id.* art. IV, § 38.

[187] *Compare* MONT. CONST. of 1889, art. XIII, § 1 ("Neither the State, nor any county . . . shall ever give or loan its credit in aid of . . . any . . . corporation . . . ."), *and id.* art. V, § 38 (designating that the Legislature shall not permit the State to loan credit), *with* MONT. CONST. of 1884, art. XIII, § 1 (not adopted) ("Neither the State, nor any county . . . shall lend or pledge the credit or faith thereof . . . in aid of any . . . corporation . . . .").

anti-subsidy reform: it extended to state and local governments, it prohibited both donations and loans, and it included emphatic, categorical language ("directly or indirectly," "in any manner," "for any purpose whatever"). Also, like Montana's 1884 proposal, this version included the phrase "by subsidy or otherwise," the first constitution to do so. Although earlier state Gift Clauses had always implicitly prohibited subsidies—since these typically took the form of either donations or loans—the use of the actual word "subsidy" reflected Montana's experience with schemes to provide various forms of state aid to railroads, to encourage them to run lines through various locales.

Arguments about subsidizing railroad construction preoccupied Montanans throughout the 1870s, motivated in part by debate over whether Helena or Deer Lodge should become the capital upon statehood.[188] The people were divided into parties between those supporting a subsidy to the Northern Pacific (NP)—which, if completed in time, would make Deer Lodge more likely to be selected as the capital—and those advocating subsidies to the Utah & Northern (U&N), the completion of which would benefit Helena.[189] Others, of course, opposed any subsidies. Various means of inducing railroad construction were suggested—everything from bond issues to cash payments to tax exemptions.[190] This latter idea—and particularly a proposal to exempt the U&N from taxation for fifteen years[191]—was especially controversial.[192]

Tax exemptions were a common form of subsidy for railroads at the time. The most famous—or infamous—example was the Illinois Central Railroad (IC).[193] As noted above, Illinois had adopted a new Gift Clause in 1848, in the wake of its disastrous experiments with "internal improvements," which barred the state from giving credit to private

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[188] *See generally* SPENCE, *supra* note 163, at 116–22 (discussing where the railroad should be placed and discrepancies among geographic areas); ROBERT G. ATHEARN, UNION PACIFIC COUNTRY 241–63 (1971) (discussing political debates and meetings between those who wanted an east-west railroad line and north-south railroad line).

[189] *See* SPENCE, *supra* note 163, at 117.

[190] *See id.* at 125, 127 (describing tax exemptions and bond issues); *see also Current News*, AM. ENG'R, Nov. 5, 1885, at 192 (describing subsidy payments); *Current News*, AM. ENG'R, Oct. 22, 1885, at 170 (describing cash and subsidy payments).

[191] *See* Martin Barrett, *Holding up a Territorial Legislature*, *in* 8 CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA 93, 93–94 (1917).

[192] *See id.* For a comprehensive discussion of various efforts to subsidize railroads in the Montana Territory in this period, see generally Robert G. Athearn, *Railroad to a Far-off Country: The Utah & Northern*, 18 MONT. MAG. W. HIST., Autumn 1968, at 2 (discussing financial difficulties and subsidy payments in creating the railroad).

[193] "The Illinois Central Railroad has always occupied a unique position among the railroads of the country," wrote historian Howard Brownson, "[f]rom the inception of the project it had been primarily a government enterprise." HOWARD GRAY BROWNSON, HISTORY OF THE ILLINOIS CENTRAL RAILROAD TO 1870, at 157 (Ernest L. Bogart et al. eds., 1915).

businesses.[194] Therefore, when Illinois lawmakers wished to subsidize the IC's construction in the early 1850s, they found that the only way to do so was to exempt it from taxation for six years and to impose a drastically reduced tax rate after that.[195] Opposition to this special treatment churned throughout the nineteenth century and occupied much debate at the Illinois Constitutional Convention of 1869–1870.[196] The delegates ultimately resolved to let the IC keep its tax exemption,[197] but disputes over the exemption's legitimacy continued. "The Santa Fe and the Union Pacific, and others in [Kansas] paid millions of taxes to the municipalities and the education of the people there, while the Illinois Central was not paying a cent," cried one delegate at the 1906 conference of the National Association of Railway Commissioners. "[W]e want equitable distribution

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[194] *Id.* at 22; ILL. CONST. of 1848, art. III, § 38; *id.* art. X, §§ 1, 6.

[195] *See* W.H. Allen, *The Charter Tax of the Illinois Central Railroad*, 6 J. POL. ECON. 353, 353–54 (1898). "Prevented by the [state] constitution from giving the 'credit of the state to or in aid of any industrial association or corporation' . . . the legislature was practically compelled to choose compensation [*i.e.*, subsidization] in the form of a tax." *Id.* at 358 (quoting ILL. CONST. of 1848, art. III, § 38). In 1853, Illinois adopted a general tax exemption for a wide variety of enterprises. Claude W. Stimson, *Tax Exemptions in Illinois*, 10 TAX. MAG. 453, 455 (1932).

[196] "[W]hat is there in the case of that Central railroad to distinguish it from any other railroad in the State?" demanded delegate Henry Bromwell. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1244 (1870). "Why is it that counties along that line shall find their taxation commuted away from them, while those who are on the line of the Alton and St. Louis railroad, for instance, can levy their taxes upon that property . . . ? I can conceive of no reason whatever . . . ." *Id.* When it was proposed to add a provision in the Constitution reducing the Illinois Central's tax breaks, some objected that there was no need to put this in the Constitution, because the Legislature already had power to eliminate the exemption. *Id.* at 1243. "But consider for a moment the consequences of leaving [the tax exemption] in, in the hands of the Legislature," Bromwell replied. *Id.* at 1244.

> We then lay the foundation of a ring embracing some thirty-seven counties. They will stand here and unite at all times, ready to go hand in hand with any set who will get up schemes, such as canal projects, or other enterprises throughout the different parts of the State, and who will come to the representatives of these counties on the road, and say to them: "If you will go with us, we will go with you." . . . The members from the counties on the Central railroad would be as members generally are, afraid to refuse . . . . [T]he demoralization [that] would produce, the injury to the public legislation, the immense squandering of funds throughout the State upon such local enterprises, the rings formed which this would give the foundation for, would be absolutely worse than what I conceive to be the injustice we complain of here.

Id. at 1244–45. The Illinois Convention ultimately adopted a moderate restriction on tax exemptions. Stimson, *supra* note 195, at 457.

[197] The Convention, however, adopted a new second-wave Gift Clause forbidding local governments from subsidizing private businesses; it contained a specific exemption for a subsidy scheme that had been entered into only months before the Convention began its business. JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS 1818–1970, at 78 (1972).

of the taxes; man and man alike . . . ."[198] A year later, the Illinois Legislature passed a bill demanding an accounting from the IC covering the previous thirty years. It revealed that the company had paid no taxes for almost the previous half-century.[199] Yet in 1873, the United States Supreme Court ruled that the Contracts Clause made tax exemptions irrevocable.[200] That meant Illinois lawmakers could not repeal the exemption their predecessors had given the IC a quarter of a century earlier.

All of this was in the background when frontier Montanans drafted their constitutions in the 1880s. Delegates opposed to railroad subsidies considered them not only unfair but also foolhardy and unnecessary; the railroads, they argued, would build lines to and through Montana even without them.[201] Governor Benjamin Potts vocally opposed any subsidy. "We have a [county] and territorial debt now sufficient to keep our noses to the grindstone," he said,[202] and when such proposals were put to the voters, they were rejected.[203] "Those who opposed the subsidy on the ground that the road would enter Montana anyway were right," observes historian Robert Athearn.[204] The U&N opened its line into the territory in March 1880, and by the end of the year, Union Pacific President Sidney Dillon concluded that Montanans had turned unalterably against the idea of subsidizing railroads—and that this was probably a good thing, since government subsidies typically came with strings attached that would "perhaps injure us more than benefit us."[205]

Dillon was right that Montanans had turned decisively against giving public resources to railroads. "Our people don't take kindly to subsidy schemes," reported the *Sun River Sun* in October 1884.[206] The *Bozeman Weekly Chronicle* agreed. "The experience of all counties who have aided railroad enterprises by such methods has been bitter in the extreme," it argued a month later, when it condemned one county's effort to issue bonds to aid construction of a rail line.[207]

> Even the United States government, in its aid to the completion of the Union Pacific, has so far failed to secure anything in return, or to collect

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[198] PROCEEDINGS OF THE EIGHTEENTH ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF RAILWAY COMMISSIONERS 49 (1906) (statement of Mr. Robinson).

[199] State v. Ill. Cent. R.R., 92 N.E. 814, 823 (Ill. 1910).

[200] *See In re* Del. R.R. Tax, 85 U.S. (18 Wall.) 206, 225 (1873).

[201] *See* ATHEARN, *supra* note 188, at 258.

[202] SPENCE, *supra* note 163, at 120 (quoting Letter from Benjamin F. Potts to A. B. Nettleton (Oct. 1, 1872)).

[203] *See id.* at 121–22.

[204] ATHEARN, *supra* note 188, at 258.

[205] *Id.* at 258–60 (quoting Letter from Sidney Dillon to Samuel Word (Sept. 2, 1880)).

[206] SUN RIVER SUN, Oct. 2, 1884, at 5.

[207] *Railroad Subsidy*, BOZEMAN WKLY. CHRON., Nov. 26, 1884, at 2.

> the money subsidy. . . . We remember a case a few years ago . . . when we wanted to bond the Northern Pacific and the Utah Northern, one in three millions and the other a million and a half. We can now see how blind we were and how dreadful would have been the result.[208]

Not everyone was convinced. Delegates at the 1889 Convention debated a proposal to let the government subsidize irrigation ditches (as Colorado's Constitution did).[209] Yet after long and intense argument, it was effectively defeated.[210] In fact, not only did the 1889 convention essentially re-adopt the strong language prohibiting subsidies from the 1884 constitution, but it went further: it eliminated a provision in the 1884 version that allowed the Legislature to grant tax exemptions and replaced that with a provision that *forbade* tax exemptions.[211]

The 1884 version had provided that "[t]he Legislative Assembly may, in its discretion, exempt . . . from taxation other property in addition to that herein specified," as long as it did so "by [general] law."[212] This proposal sparked a lengthy debate, focused primarily on the question of tax exemptions for irrigation ditches, mines, and agricultural development.[213] "[A]rguments can be brought to bear [for] exempting any species of property," warned one opponent of a proposal to exempt irrigation companies from taxation.[214] "If you exempt this we can bring up the same arguments exempting stock."[215] Opponents of tax exemptions argued that they unjustly shift the tax burden onto those with less

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[208] *Id.*

[209] *See* PROCEEDINGS AND DEBATES OF THE [1889 MONTANA] CONSTITUTIONAL CONVENTION 551 (1921) [hereinafter 1889 MONTANA CONSTITUTIONAL CONVENTION].

[210] *See generally id.* at 551–66 (debating whether the state constitution should include a provision to allow government subsidized irrigation ditches). The convention did allow the Legislature to give local governments power to go into debt to build waterworks. MONT. CONST. of 1889, art. XIII, § 6.

[211] *Compare* MONT. CONST. of 1884, art XII, § 6 (not adopted) ("The Legislative Assembly may, in its discretion, exempt by law from taxation other property in addition to that herein specified."), *with* MONT. CONST. of 1889, art. XII, § 7 ("The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this State, or doing business therein, shall be subject to taxation . . . on real and personal property owned or used by them and not by this constitution exempted from taxation.").

[212] MONT. CONST. of 1884, art. XII, § 6 (not adopted).

[213] *See generally* 1889 MONTANA CONSTITUTIONAL CONVENTION, *supra* note 209, at 470–87, 490–514, 675–80 (arguing that the territory needs irrigation but questioning the state's power to implement tax exemptions and the potential business monopoly that could be held on water).

[214] *Id.* at 477.

[215] *Id.*

political and economic influence.[216] "It is breaking down the very fundamental principle of our government when you propose to make one man pay taxes and allow the other to go free," declared delegate James Callaway.[217] Moreover, the beneficiaries of such tax exemptions were often corporate owners headquartered in other states, meaning that tax exemptions encouraged what delegates called "landlordism."[218]

"[S]uch questions as these," said delegate Martin Maginnis,

> present themselves to a people in two aspects. First, the natural desire of immediate and speedy improvement, and secondly, the ultimate and fatal consequences . . . [A] policy which ends sometimes in fatal consequences and becomes a great burden and tyranny upon the people is more often lost sight of in the desire that we all have for quick and speedy improvement of the resources of our country.[219]

Delegate Charles Hartman agreed. Opposing a proposal to exempt mining companies, he objected in principle to aiding businesses with tax exemptions.

> [I]f you extend a preference to anyone [*sic*] of these industries you tend to correspondingly injure the other industries. . . . [This] is not a Constitution for the mining industry, it is not a constitution for the agricultural industry, nor for the stock industry but for the great people of this great State.[220]

Although Hartman thought his opinion had little chance of prevailing, in the end, it won out. "If such exemption . . . is allowed, I cannot see why it should not apply to other corporations in the Territory whose work redounds to the benefit and advantage of this Territory," said delegate Paris Gibson.[221] "I cannot see, if that principle is correct, why the Northern Pacific Railroad Company and the Montana division of the

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[216] *See, e.g.*, *id.* at 485–86 ("[E]xemption [must] be made up by taxation upon citizens.") (statement of Mr. Marshall); *cf.* Franklin St. Soc'y v. Manchester, 60 N.H. 342, 345 (1880) ("Every [tax] exemption is an indirect tax upon other property . . . ."); State v. City of Hudson, 42 N.W.2d 546, 550 (Minn. 1950) ("[E]xemption or immunity from taxation involves the imposition upon other property of a proportionate additional tax burden . . . ."); Recreation Ctrs. v. Maricopa Cnty., 782 P.2d 1174, 1177 (Ariz. 1989) ("Legislative tax exemptions that force other taxpayers to bear increased tax burdens must foster legitimate social goals and comply with constitutional provisions.").

[217] 1889 MONTANA CONSTITUTIONAL CONVENTION, *supra* note 209, at 567 (statement of Mr. Callaway).

[218] *Id.* at 498 (statement of Mr. Maginnis); *see also id.* at 478 (statement of Mr. Collins) ("The parties who own the water [effectively] own the land, and there should be no policy adopted in this constitution that will favor that class of people.").

[219] *Id.* at 498 (statement of Mr. Maginnis).

[220] *Id.* at 502 (statement of Mr. Hartman).

[221] *Id.* at 503 (statement of Mr. Gibson).

Manitoba Railroad Company should not be subject to this same exemption."[222] Over the next several days, a consensus was reached. "If you have got to coddle and fondle and caress these great capitalists in order to get them to come out here and invest their money," said Hartman,

> then . . . we don't want these enterprises, for home capital will produce them . . . . [I]t is not the duty of this convention to say that any man, any occupation, any industry shall have one preference over another. There is but one thing to do, and that is to put all classes, all men, all industries, upon the same plane, and whatever you assume to do otherwise you are deriding the principles of [the] Republican form of government—equal burdens and equal taxation for all.[223]

The exemption proposal was ultimately rejected.[224]

c. Montana's Comprehensive and Emphatic Language: "Shall Ever" and "by Subsidy or Otherwise"

The result of these debates was that Montana's final 1889 Constitution included a Gift Clause designed to encompass, as broadly as language allowed, *any and all* forms of government aid to private enterprise. It provided:

> Neither the State, nor any county, city, town, municipality, nor other subdivision of the State shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a share holder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership a[s] may accrue to the State by operation or provision of law.[225]

This language was as comprehensive as it could possibly be. It was adapted from the wording of the proposed 1884 constitution, but was stronger—consciously omitting the sentence in the earlier version that

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[222] *Id.*

[223] *Id.* at 677 (statement of Mr. Hartman).

[224] The final version of the exemption provision provided exemptions for government property, public libraries, agricultural and horticultural societies, schools, churches, hospitals, charities, and cemeteries "not used or held for private or corporate profit." *See* MONT. CONST. of 1889, art. XII, § 2.

[225] *Id.* art. XIII, § 1. The Convention also adopted a separate provision forbidding the state and local governments from "contract[ing] any debt or obligation in the construction of any railroad" or "giv[ing] or loan[ing] its credit to or in aid of the construction of the same." *Id.* art. V, § 38.

allowed the legislature to exempt businesses from taxation.[226] And in its emphatic phrases ("shall ever" or "by subsidy or otherwise"), it reflected trends of the time, echoing language from the Arkansas Constitution of 1874 and the Colorado Constitution of 1876,[227] among others.[228]

Arkansas, like some other states, had sought emphatic language in its Gift Clause to make clear that no exceptions were to be permitted. It settled on the slightly unusual phrase "shall ever" when it declared, "[n]either the State nor any city, county, town or other municipality in this State *shall ever* lend its credit for any purpose whatever; nor shall any county, city or town or municipality ever issue any interest bearing evidences of indebtedness, except such bonds as may be authorized by law."[229] Other constitutions of the period used phrases such as "shall never,"[230] or "shall not, in any manner,"[231] or even "shall have no power . . . in any manner whatsoever,"[232] but it is revealing that before this period, this negative "shall ever" grammar had typically been reserved for bills of rights guarantees that specified individual freedoms, as opposed to provisions, such as the Gift Clause, that focused on limiting legislative power. For example, California's 1849 Constitution pledged that "[n]o bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed,"[233] and Texas's 1866 Constitution promised that "no law shall ever be passed curtailing the liberty of speech or of the press."[234] Still, some uses of "shall ever" had appeared in provisions that did not specify individual rights; the 1875 Alabama Constitution, for instance,

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[226] *Compare id.* art. XIII, § 1 (omitting the clause that allowed tax exemption), *with* MONT. CONST. of 1884, art. XIII, § 1 (not adopted) (permitting tax exemptions). Indeed, it expressly made mines taxable, MONT. CONST. of 1889, art. XII, § 3, forbade the "release[]" or "discharge[]" of any persons or property from "their . . . proportionate share of State taxes," *id.* art. XII, § 6, barred the state from ever "relinquish[ing] or suspend[ing]" its "power to tax corporations or corporate property," *id.* art. XII, § 7, and specified that railroad property, and "all matters and things . . . capable of private ownership," were subject to taxation, *id.* art. XII, §§ 16–17.

[227] *Compare* MONT. CONST. of 1889, art. V, § 39, *and id.* art. XI, § 6, *with* ARK. CONST. art. XVI, § 1, *and* MONT. CONST. of 1884, art. XIII, §§ 1–2 (not adopted). Colorado's 1876 Convention kept no record of debates, but did keep a record of proceedings, and what became the Gift Clause was introduced on January 4, 1876, by delegate William Kennedy and a day later by delegate George Boyles. PROCEEDINGS OF THE [1875 COLORADO] CONSTITUTIONAL CONVENTION 41, 45–46 (1907). It went through extensive changes, each version becoming stronger. *See id.* at 88, 158, 186, 273, 289–90, 434, 440, 517, 562. The unusual use of the word "ever" indicates that the Colorado Convention was inspired at least in part by the 1874 Arkansas Constitution.

[228] *See, e.g.*, ALA. CONST. of 1875, art. I, § 30; ILL. CONST. of 1870, art. VIII, § 3.

[229] ARK. CONST. art. XVI, § 1 (emphasis added).

[230] *E.g.*, NEB. CONST. art. XIII, § 3. This Constitution was written in 1875.

[231] *E.g.*, IDAHO CONST. art. VIII, § 2. This was written in 1889.

[232] *E.g.*, MO. CONST. of 1875, art. IV, § 45.

[233] CAL. CONST. of 1849, art. I, § 16.

[234] TEX. CONST. of 1866, art. I, § 5.

promised that "no title of nobility, or hereditary distinction . . . shall ever be granted."[235] In any event, the use of the emphatic "shall ever" in the Arkansas and Montana Constitutions indicated that their Gift Clauses were meant to be as absolute as any constitutional promise could be.

In fact, only a year before the Montana convention, the Illinois Supreme Court had remarked on the comprehensiveness of the phrase "shall ever" in a Gift Clause lawsuit. *Cook County. v. Chicago Industrial School for Girls*[236] involved a subsidy aiding a church-operated school. The Illinois Constitution provided that "[n]either the general assembly, nor any county . . . shall ever make any appropriation . . . to help support or sustain any school . . . controlled by any church."[237] The words "shall ever," the court said, are "comprehensive enough to embrace all appropriations and payments."[238] Indeed, the phrase was:

> so emphatic that it cannot fail to challenge attention. Any scheme, even though hallowed by the blessing of the church, that surges against the will of the people as crystallized into their organic law, must break in pieces as breaks the foam of the sea against the rock on the shore.[239]

Another model for the emphatic and comprehensive phrasing of Montana's Gift Clause was Colorado's 1876 Constitution, which devoted a full article to public debt; one section prohibited loans of credit to private entities, and another prohibited donations.[240] The first section barred state and local governments from "lend[ing] or pledg[ing] the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount or for any purpose whatever."[241] The second provided that:

> [n]either the State nor any county, city, town, township or school district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in, any corporation or company, or a joint owner with any person, company or corporation, public or private, in or out of the State, except as to such ownership as may accrue to the State by escheat, or by forfeiture, by operation or provision of law . . . .[242]

Such wording justified the Colorado Supreme Court in later characterizing the state's Gift Clause as "broader in scope, and more

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[235] ALA. CONST. of 1875, art. I, § 30. Even this phrase, however, appeared within the article labeled "Declaration of Rights." *Id.* art I.

[236] 18 N.E. 183 (Ill. 1888).

[237] ILL. CONST. of 1870, art. VIII, § 3.

[238] *Chi. Indus. Sch. for Girls*, 18 N.E. at 197.

[239] *Id.* at 193.

[240] COLO. CONST. art. XI, §§ 1–2.

[241] *Id.* art. XI, § 1.

[242] *Id.* art. XI, § 2.

specific in the matter of restriction, than any similar constitutional provision" at the time.[243] Colorado's strong language[244] proved influential on subsequent constitutional conventions. Portions of its language can also be found in the constitutions of Wyoming,[245] Idaho,[246] New Mexico,[247] and, of course, Arizona.

That Montana's 1889 version was even stronger than Colorado's is revealed not only by its emphatic language but also by its specific terms. To give or lend credit meant to undertake some form of debt on behalf of another.[248] To *give* credit meant to allow a private entity to borrow directly from the government, whereas to *lend* credit meant a situation in which government served as a surety for a debt—that is, where the government allowed a private entity to use its credit with respect to third parties.[249] It

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[243] Lord v. City & Cnty. of Denver, 143 P. 284, 288 (Colo. 1914).

[244] Colorado's Gift Clause, in fact, was the product of a state in financial crisis. When it was adopted, the state was already deeply in debt, largely as a result of investment in boondoggle railroad projects, *see* Roy, *supra* note 135, at 137, and it was put into effect almost immediately, in a case involving a subsidy by Boulder County to the Colorado Central Railroad. Colo. Cent. R.R. v. Lea, 5 Colo. 192 (1879). Prior to statehood, voters in that county decided to invest $200,000 of taxpayer money in the railroad. *Id.* at 192. After adoption of the state Constitution, however, a lawsuit was initiated challenging the constitutionality of the arrangement, and the Colorado Supreme Court found it invalid. *Id.* at 195, 197. Although the county argued that the railroad "would be of great benefit to the county and its citizens," that consideration "[did] not make it any the less a donation within the intent of the inhibition," said the court. *Id.* at 196. "[I]t was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new State, all public aid to railroad companies, whether by donation, grant or subscription, no matter what might be the public benefit and advantages flowing from the construction of such roads." *Id.*

[245] *See* WYO. CONST. art. XVI, § 6. This was written in 1889.

[246] *See* IDAHO CONST. art. XII, § 4.

[247] *See* N.M. CONST. art. IX, § 14. This was written in 1910.

[248] For a discussion of how the Arizona Gift Clause was drafted to be a more comprehensive clause, see *infra* Section IV.C.

[249] *See* Grout v. Kendall, 192 N.W. 529, 531 (Iowa 1923). However, in *Galloway v. Jenkins*, the North Carolina Supreme Court held that it was a violation of the Gift Clause for the state to purchase stock in a private railroad. 63 N.C. 147, 153–55 (1869). The defendants argued that the expenditure was not a *gift* because the government obtained stock in return, and therefore, it was a purchase, as opposed to a gratuitous payment. *Id.* at 154–55. The court, however, concluded that this constituted a loan of credit. *Id.* "'To give,' is sometimes used to convey the idea of a gratuity," said the court, "but it has a much broader meaning. . . . What did you *give* for your house and lot? I will *give* you a thousand dollars for it—provided you will *give* me six months credit. This is obviously the sense in which the word is used." *Id.* Examining the purpose behind the Clause, the court concluded that the word "give" was

> used in connection with the word *lend*, which imports a gratuity, and is introduced, lest the word 'give' might be confined to cases where a consideration passed, and to cover the whole ground; so as to show that the credit of the State was not to be used in any way, either for a consideration or as a gratuity. The

had been common practice, for example, for municipal governments to exchange municipal bonds for a company's stock, enabling the company to sell the bonds to raise money, thereby creating municipal debt.[250] This constituted one form of a loan of credit. As the Ohio Supreme Court explained, the prohibition against giving or lending credit prohibited the government from, among other things, "participat[ing]" in a private undertaking "in such manner as to incur pecuniary expense or liability."[251]

"Donation" meant a gratuity given for no consideration in return.[252] It was synonymous with "gift."[253] It was not necessarily synonymous with "grant," however, which was sometimes used as a generic term for any real estate transfer.[254] "Subsidy" meant "[a] grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for state aid, because likely to be of benefit to the public."[255]

But if these words left any room for doubt, the phrase "by subsidy or otherwise"—alongside the emphatic clauses such as "directly or indirectly"—eliminated it.[256] When adopted by Montana in 1889, these phrases were true innovations, not used in any Gift Clause before. They manifested an effort to eliminate whatever wiggle room defenders of subsidies might have resorted to in order to rationalize the subsidization of private projects.

Such wiggle room was a significant concern at the time. In 1875, for example, the Alabama Supreme Court held that it did not violate that state's Gift Clause[257] for the state to forgive a corporation's debt to the

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> General Assembly shall have no power to give the credit of the State to this corporation, by making a subscription for its stock, is one sense.

Id. at 155.

[250] *See, e.g.*, Walker v. City of Cincinnati, 21 Ohio St. 14, 53–55 (1871).

[251] *Id.* at 54.

[252] *See, e.g.*, Ind. N. & S. Ry. Co. v. City of Attica, 56 Ind. 476, 486–87 (1877).

[253] *Donation*, BLACK'S LAW DICTIONARY 389 (1st ed. 1891).

[254] *Grant*, BLACK'S LAW DICTIONARY 547 (1st ed. 1891).

[255] *Subsidy*, BLACK'S LAW DICTIONARY 1132 (1st ed. 1891).

[256] MONT. CONST. of 1889, art. XIII, § 1; *see, e.g.*, *id.* art. XI, § 8.

[257] At that time, Alabama's Gift Clause read,

> The General Assembly shall not borrow or raise money on the credit of this State, except for purposes of military defense against actual or threatened invasion, rebellion or insurrection, without the concurrence of two-thirds of the members of each house; nor shall the debts or liabilities of any corporation, person or persons, or other States be guarantied, nor any money, credit or other thing be loaned or given away, except by a like concurrence of each house; and the votes shall, in each case, be taken by the yeas and nays and be entered on the journals.

ALA. CONST. of 1868, art. IV, § 32. In 1875, a new constitution was adopted which contained stronger language; it prohibited the state from "engag[ing] in works of internal improvement,

government.[258] It reasoned that the prohibition on giving or lending credit was meant "to restrain the power of the general assembly to loan or give away the moneys, credits, or other things of the State," and that the forgiving of a debt was merely the "abandonment of a right or claim," rather than a gift.[259] The emphases and catch-all clauses in Montana's Constitution were designed to close any such loophole. Because the forgiving of a debt is the equivalent of a grant of assets,[260] the elimination of a debt would constitute an "indirect" gift, and would thus be barred by the expansive language of Montana's Gift Clause.[261]

IV. ARIZONA'S GIFT CLAUSE

As the history indicates, when delegates at Arizona's 1910 Constitutional Convention chose to borrow Montana's Gift Clause, they were selecting the strongest constitutional language yet written forbidding government aid to private industry—language that applied both to the state and to all local governments, that employed emphatic, catch-all terminology banning indirect aid, and that included none of the exceptions found in some other constitutions of the time. That choice, however, came more than twenty years after Montana's Constitution was written, and during those two decades, Arizona experienced still more lamentable examples of the problems with subsidies to private industry.

A. The Railroad Fiascos and the 1891 Constitution

Arizona held its first constitutional convention in 1891, only three years after Montana's. That heavily partisan meeting was dominated by Democrats, and Republicans largely refused to participate, which helped doom the proposed constitution's chances.[262] Yet its text—and the

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nor lend[ing] [its] money or its credit in aid of such . . . or lend[ing] [its] money or its credit to any individual, association, or corporation," ALA. CONST. of 1875, art. IV, § 54, or from authorizing any local government to "lend its credit, or grant public money or thing of value, in aid of, or to any individual, association, or corporation whatsoever" *id.* § 55; *see also* ALA. CONST. of 1901, art. XII, § 246 ("No railroad, canal, or other transportation company in existence at the time of the ratification of this Constitution, shall have the benefit of any future legislation by general or special laws other than in execution of a trust created by law or by contract . . . .").

[258] State v. Mills, 52 Ala. 484, 485, 487–88 (1875).

[259] *Id.* at 487–88.

[260] *See* United States v. Kirby Lumber Co., 284 U.S. 1, 2 (1931) (holding that discharge of indebtedness counts as income.)..

[261] *See also* Hill v. Rae, 158 P. 826, 831 (Mont. 1916) (showing that the law appropriating $20,000 for a guarantee fund on behalf of needy farmers violated the Gift Clause because it established a state fund as "an assurance for the benefit of the individuals who may become lenders under the act" and was, therefore, a gift or loan of credit).

[262] *See generally* Mark E. Pry, *Statehood Politics and Territorial Development: The Arizona Constitution of 1891*, 35 J. ARIZ. HIST. 397 (1994) (outlining the various partisan

differences between it and the language adopted by Arizona's second constitutional convention in 1910—sheds light on the reasons for the language Arizonans finally settled on.

The 1891 draft constitution contained a Gift Clause that was far more lenient than that which the state ultimately adopted. It prohibited the legislature from "pass[ing] any law authorizing the State, or any county in the State or municipal corporation, to contract any debt or obligation in aid of any private enterprise, nor to give or loan its credit to or in aid of the same," but it also contained an exception:

> neither the State nor any political subdivision thereof shall be prohibited from loaning its credit or giving aid to the construction and maintainance [*sic*] of railroad[s], toll roads, street railways, canals, reservoirs, water works, sewers or bridges; provided that the proposition to lend such aid shall first be submitted to a vote . . . and two-thirds of those voting shall vote in favor thereof.[263]

This language reflected a compromise between delegates who believed subsidies for railroads were essential for building up the country and those who objected to them as unjust and unwise.

By that time, Arizonans had already been trying tax exemptions for a while. A decade earlier, hoping to connect the territorial capital of Prescott with the newly constructed Atlantic and Pacific Railroad, lawmakers incorporated the Prescott & 35th Parallel Railroad (P&35P), which they then exempted from taxes for six years.[264] Eastern financiers were skeptical that such a railroad would break even, so in 1883, the legislature passed a subsidy bill, empowering Yavapai County to spend $200,000 to underwrite the P&35P. But scandal involving its managers, and an economic downturn in 1884, led to the project's failure.[265] Taxpayers had paid—and got no railroad.

In 1885, Prescott boosters tried again. They bribed legislators to adopt a bill whereby Yavapai County would subsidize construction of the Prescott & Arizona Central (P&AC) at between $3,000 and $4,000 per mile to connect Chino Station (now Chino Valley) and Prescott, payable in ten-mile increments, on the condition that the recipient of the funds complete construction by 1887.[266] A group of railroad promoters began to compete for the subsidies—sometimes violently—and the projected costs for the

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debated during the convention; "Arizonans were divided on the wisdom of organizing a drive for admission, and few were optimistic that Congress would grant their request").

[263] ARIZ. CONST. of 1891, art. IV, § 39 (not adopted).

[264] Robert L. Spude, *A Shoestring Railroad: The Prescott & Arizona Central 1886–1893*, 17 ARIZ. & W. 221, 223 (1975).

[265] *Id.* at 224.

[266] *Id.* at 227. The legislature offered $3,000 per mile for narrow gauge and $4,000 per mile for standard gauge. *Id.*

railroad began to mount. Meanwhile, citizens not included in the line began to complain; Flagstaff residents, for example, would be forced to shoulder the costs of the construction subsidies but would not benefit from the completed rail line.[267]

When Eastern lenders learned that Arizonans were not united behind the project, they grew reluctant to support the P&AC, so the P&AC's leader, Tom Bullock, persuaded Yavapai County officials to invest another $75,000 of public funds as a sign of public support.[268] But construction continued to lag. Not until December 31, 1886, was the train completed to Prescott—and even then, the rolling stock was borrowed, and in poor condition.[269] A "textbook story of inefficiency,"[270] the P&AC's hastily built tracks (often the discarded rails of other railroads) required frequent repair.[271] Floods repeatedly washed out tracks and stranded engines.[272] Staff abused their authority, building pig pens on company property and halting train traffic to hold poker games.[273] Financial analysts determined in 1888 that the P&AC was essentially bankrupt.[274] It never made significant progress toward its further goal of connecting to Phoenix. An 1893 flood destroyed the tracks once more, and that, plus competition from more competently run railroads, spelled the end of the P&AC. "[T]he citizens of Prescott found that its benefits had been elusive," writes one historian, "[a]ll gain had been offset by stock losses, default on bond interest, and increased taxes for subsidy obligations."[275]

There were similar problems at the other end of the Arizona Territory. In February 1883, the legislature took up consideration of a bill "to promote the construction of a railroad by a company called the Arizona Narrow Gauge Railroad [ANGRR]" between Tucson and Globe.[276] It would become one of the Old West's great financial scandals.[277] Because there was insufficient market demand to support a railroad, "the [ANGRR]

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[267] *Id.* at 227, 229–31.

[268] *Id.* at 232.

[269] *Id.* at 236–37.

[270] Marshall Trimble, *Tom Bullock's Railroad*, TRUE W. MAG. (Mar. 11, 2020), https://truewestmagazine.com/tom-bullocks-railroad/.

[271] JAY J. WAGONER, ARIZONA TERRITORY 1863–1912: A POLITICAL HISTORY 216–17 (1970); Spude, *supra* note 264, at 239.

[272] Spude, *supra* note 264, at 241.

[273] *Id.*

[274] *Id.* at 242.

[275] *Id.* at 243.

[276] *Telegraph, Pacific Coast*, ARIZ. WKLY. CITIZEN, Feb. 11, 1883, at 1; HOWARD A. HUBBARD, A CHAPTER IN EARLY ARIZONA TRANSPORTATION HISTORY: THE ARIZONA NARROW GAUGE RAILROAD COMPANY 37 (1934).

[277] *See generally* HUBBARD, *supra* note 276, at 31–38 (showing the timeline of the financial decisions).

depended exclusively upon county subsidies."[278] To aid construction, the Legislature exempted it from taxation while it was being built,[279] and ordered Pima County to issue $200,000 in bonds to the public at seven percent interest, which it would exchange for stock in the ANGRR.[280] The County's initial investment would provide the ANGRR with $50,000 worth of bonds, followed by another $50,000 for each five miles of track laid.[281]

Promoters and newspaper editors predicted vast returns on investment, but as one historian puts it, the ANGRR became "a catastrophic venture."[282] After three years, only ten miles of track had been laid, and the road had not gone past the Pima County line. The ANGRR was rewarded for its failure with another $150,000 in county bonds.[283] But builders halted their work again in 1884. Two years later, they resumed, only to cease once more in 1887 after completing ten miles of track.[284] When the County sought to sell the railroad bonds, the only bid it could find was for twenty-five cents on the dollar.[285] Subsequent efforts to complete the project failed, and the ANGRR was never finished. Years of complicated litigation ensued between creditors, eventually resulting in rulings by the U.S. Supreme Court upholding the validity of Pima County's bonds and forcing the County to pay off.[286] The ANGRR would become infamous as the "Railroad to Nowhere" and would lead to embarrassing hearings before the Senate Committee on Territories when Arizona applied for statehood.[287] Indeed, litigation over the outstanding bonds would be one principal reason that statehood was delayed.[288]

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[278] *Id*. at 26.

[279] *The Narrow Gauge Railroad Bill*, ARIZ. WKLY. CITIZEN, Feb. 11, 1883, at 2.

[280] Nicholas J. Wallwork & Alice S. Wallwork, *Protecting Public Funds: A History of Enforcement of the Arizona Constitution's Prohibition Against Improper Private Benefit from Public Funds*, 25 ARIZ. STATE L.J. 349, 355 (1993). This Article is much indebted to Nicholas J. Wallwork and Alice S. Wallwork's research.

[281] WAGONER, *supra* note 271, at 369.

[282] *Id.*

[283] *See* 1 DAVID F. MYRICK, RAILROADS OF ARIZONA 259, 261 (1975).

[284] *Id*. at 260–61.

[285] *Id*. at 261.

[286] Vail v. Territory of Ariz., 207 U.S. 201, 204–05 (1907). Congress, however, eventually bailed Pima and other counties out by giving Arizona land it could sell to cover the debt. WAGONER, *supra* note 271, at 371.

[287] MYRICK, *supra* note 283, at 258; *Statehood: Hearing on S. 5916 Before the S. Comm. on Territories*, 61st Cong. 9–12 (1910).

[288] *See* HUBBARD, *supra* note 276, at 54–60. As Hubbard puts it, "[t]he tendency for frontier communities to subsidize transportation enterprises had resulted so disastrously in the [1840s and 1870s] that many states during the seventies had included clauses in their constitutions forbidding the use of state credit in support of private corporations," but "the movement that had wrought such havoc to state public finance [in the 1830s and 1840s] . . . was just . . . reaching the territories" in the 1880s. *Id.* at 26–27.

By 1885, the Arizona legislature's spending spree had attracted attention in the nation's capital. Indiana Senator and future president Benjamin Harrison, chairman of the Senate's Committee on the Territories, led a charge against waste and corruption in territorial governments, pointing out that the thirteenth session of the Arizona Territorial Legislature—which convened in January 1885 and came to be nicknamed "the Thieving Thirteenth"[289]—had almost doubled the territory's indebtedness in a single session, and spent hundreds of thousands of dollars, far beyond what Congress had budgeted.[290] The situation was so extreme that a grand jury was convened in 1885, which concluded that the Arizona Territory suffered from severe financial malfeasance.[291] "Will not future generations," asked one newspaper after reviewing the record of the Thieving Thirteenth, "reasonably arrive at the conclusion that the Arizonions [*sic*] of the present day were wont to enact their laws while drunk[?]"[292] When the Senate demanded answers, the new territorial governor, Conrad Zulick, wrote that "the enormous increase of the debt by bonds and appropriations may be properly characterized as useless and extravagant legislation, a wanton misappropriation of public funds to purposes from which the people receive no corresponding benefit."[293]

Congress had enacted a law in 1867 forbidding territorial legislatures from "grant[ing] private charters or especial [*sic*] privileges" to private businesses,[294] and five years later, it amended that law to clarify that territorial legislatures could incorporate private companies for mining, manufacturing, railroad construction, and other purposes, pursuant to "*general* incorporation laws."[295] These federal statutes were intended to prevent territorial lawmakers from granting special financial benefits to particular companies.

But Arizona's subsidization of railroads did not necessarily violate those laws. Thus, in 1886, Congress adopted the far stricter Harrison Act,[296] which forbade the territories from "pass[ing] local or special laws" in a number of expressly enumerated situations.[297] These included granting divorces, changing county seats, and, relevant here, "[g]ranting

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289 *See* WAGONER, *supra* note 271, at 205, 208–09, 238–39.

290 Lyon, *supra* note 163, at 212.

291 *Id.* at 212–13.

292 *The Disgusting Thirteenth*, CLIFTON CLARION, June 24, 1885, at 2.

293 *Arizona's Debt*, ALTON DEMOCRAT, Jan. 15, 1886, at 1.

294 Act of Mar. 2, 1867, ch. 150, § 1, 14 Stat. 426, 426.

295 Act of June 10, 1872, ch. 434, 17 Stat. 390 (emphasis added).

296 Harrison Act, ch. 818, 24 Stat. 170 (1886). The Harrison Act was also sometimes called the Springer Act. *See, e.g.*, Atchison, Topeka & Santa Fe Ry. Co. v. Lopez, 151 P. 308, 308, 310 (N.M. 1915).

297 §1, 24 Stat. at 170.

to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose," or "[g]ranting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever."[298] The Act also limited territorial indebtedness and provided that no territory or political subdivision "shall hereafter make any subscription to the capital stock of any . . . company . . . or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association."[299]

This was, in effect, a federal Gift Clause for the territories. A decade later, the territorial Supreme Court struck down a law rewarding with $3,000 the first person to successfully dig a well in any county, because that law both exceeded the Harrison Act's debt limitation and constituted "a special privilege," as opposed to a law for public purposes.[300] Anyone digging such a well would own it as private property, the court noted, and "the public [acquired] no property interest" in it.[301] Thus the law "requires the payment of the public money to the person who obtains such well, without anything being given by him in return."[302]

Arizona's bitter experiences with railroad subsidies did not sour everyone on the idea, however, and hopes still remained for connecting Prescott with a major rail artery. Since the Harrison Act did not expressly bar territories from subsidizing railroad companies through tax exemptions, the legislature adopted a law in 1891 that exempted "all railroads built without subsidies" from taxes for a period of twenty years.[303] The exemption was offered only to completed railroads, as long as they built fifty miles of track per year, ran at least one train per day, and satisfied other requirements.[304] The hope, yet again, was that Prescott would be connected to a major rail artery. The *Arizona Republican* cheered the tax exemption law as essential for the state's development. "[N]ot a county within the Territory would lose a dollar and in the dim future would loom up no grim shape of unpaid subsidy bonds," it promised.[305] But the *Arizona Weekly Journal-Miner* was fiercely opposed. "The anathemas that will in future be heaped upon the present legislature, if it should pass

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[298] *Id.* It is worth noting the use of the emphatic "whatever."

[299] *Id.* § 2.

[300] McRae v. Cnty. of Cochise, 44 P. 299, 300–01 (Ariz. 1896).

[301] *Id.*

[302] *Id.* at 301. This was an early version of the "consideration" requirement of today's Gift Clause jurisprudence. *See generally* Schires v. Carlat, 480 P.3d 639, 644–47 (Ariz. 2021) (explaining the consideration requirement).

[303] REPORT OF THE ACTING GOVERNOR OF ARIZONA, H.R. REP. NO. 52-41, §1, at 289 (1891).

[304] *Id.* §§ 2–3.

[305] *Railroad Exemption*, ARIZ. REPUBLICAN, Mar. 11, 1891, at 2.

the twenty years' exemption bill for railroads," it predicted, "would, if members could realize it now, make them hesitate before passing such a law."[306] Tax exemptions were "generally considered as a better way of granting aid to railroads than a subsidy," it admitted, "but people will not consent to a twenty years' exemption, if they have to do without railroads."[307] And the editor wryly observed that if tax exemption was such a good idea, "[w]hy not make the exemption perpetual?"[308] By June, the *Journal-Miner* was pointing out that the Prescott railroad had failed to materialize,[309] and, as noted above, that railroad—although eventually completed—was plagued by mismanagement and was abandoned by 1893.

Thus, when delegates convened for the 1891 Constitutional Convention, the question of railroad subsidies was a hot topic. A proposal to ban all subsidies to railroads drew impassioned protests from some delegates.[310] "The Harrison [A]ct is wrong," declared delegate William Herring. "[W]e want to get [out] from under it. It is almost a crime . . . . [W]e have got to have railroads, canals, toll roads, etc., and we have to bear these burdens. There is a diseased sentiment about new states going into debt, which has no foundation."[311] When another delegate offered a compromise that would forbid some subsidies but would allow them for railroads and other internal improvements if approved by a supermajority popular vote, that proposal was approved.[312] Echoing the North Dakota Constitution of 1889,[313] that provision allowed the state to "loan[] its credit or giv[e] aid to the construction and maintainance [*sic*] of railroad, toll

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306 *All Sorts of Items*, ARIZ. WKLY. J.-MINER, Feb. 18, 1891, at 1.

307 *Wednesday's Edition*, ARIZ. WKLY. J.-MINER, Jan. 28, 1891, at 3.

308 *Editorial Notes*, ARIZ. WKLY. J.-MINER, Feb. 18, 1891, at 2.

309 Editorial, *Not a Fight Against Mr. Bullock*, ARIZ. WKLY. J.-MINER, June 17, 1891, at 2.

310 *See* Pry, *supra* note 262, at 410. These included William Barnes, who insisted that subsidies "go hand in hand with prosperity." *Id.* Barnes had the unusual distinction of also having served as a delegate at the Illinois Constitutional Convention of 1870. *See Death Record*, OMAHA DAILY BEE, Nov. 13, 1904, at 2.

311 ARIZ. DAILY STAR, Sept. 22, 1891, at 2 (quoting delegate William Herring). Originally from New York, Herring moved to Tombstone, Arizona, in the 1880s, where he served as attorney for the Earp brothers during the events leading up to the Gunfight at the O.K. Corral. *See* STEVEN LUBET, MURDER IN TOMBSTONE: THE FORGOTTEN TRIAL OF WYATT EARP 210 (2004). He eventually became Attorney General for the Territory.

The debates at the 1891 Convention were not officially recorded, but newspaper reports of the time indicated that some delegates spoke against exemptions and other subsidies. *See also The Legislative Report*, ARIZ. REPUBLICAN, Sept. 18, 1891, at 1 (reporting that delegate Barnes opposed a proposal to deny subsidies to railroads, which the delegates took under further consideration). In 1916, historian James McClintock took a different view of the Harrison Act, calling it "the best safeguard ever known by the lean treasury of Arizona." 2 JAMES H. MCCLINTOCK, ARIZONA: PREHISTORIC—ABORIGINAL, PIONEER—MODERN 340 (1916).

312 *Railroads*, ARIZ. SILVER BELT, Sept. 26, 1891, at 2; Pry, *supra* note 262, at 411.

313 N.D. CONST. art. XII, § 185.

roads, street railways, canals, reservoirs, water works, sewers, or bridges," as long as two-thirds of the voters in "the political subdivision affected thereby" voted for it.[314] But although Arizona voters ratified the proposed constitution that December, Congress chose not to act on it, and Arizona remained a territory.

In 1905, the territorial Supreme Court upheld the legality of tax exemptions for railroads against the argument that they violated the Harrison Act. In *Bennett v. Nichols*, it ruled that "territorial governments possess the power to grant exemptions from taxation," and that the challenged law was not a special law because it did not confer benefits on a specific or narrow class of beneficiaries.[315] By that time, however, territorial lawmakers had settled upon a new industry to subsidize: beet sugar. In February 1901, legislation was introduced to exempt beet sugar factories from taxation,[316] and a beet-sugar firm sought an outright donation of 1,500 acres of public land,[317] and $40,000 from Maricopa County,[318] in order to start operations. As with railroads in earlier years, newspapers applauded the idea.[319] But, again echoing the railroad experience, pro-subsidy forces were disappointed. A vast beet sugar plant was built in Glendale, which finally began operations on August 11, 1906, but it ceased operations on September 11, 1906. It reopened under new management in March 1908, and closed again the following July. In 1909, it again reopened and managed to operate for several seasons in a row, but it closed for good in 1913, having never been profitable.[320]

By the opening of the new century, many had soured on the idea of government aid to private industries. "[I]t may now be said to be the prevailing law in the American states," wrote one tax law expert in 1906, "that the public money cannot be given, or the public credit loaned, or taxation imposed in aid of any private commercial enterprise, however prominent in the enterprise may be the feature of the public benefit."[321]

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[314] ARIZ. CONST. of 1891, art. IV, § 39 (not adopted).

[315] 80 P. 392, 394–95 (Ariz. 1905); *see also A Threatened Suit*, ARIZ. REPUBLICAN, Oct. 18, 1903, at 10 (explaining the procedural history and underlying dispute of the case).

[316] *The Other Business*, ARIZ. REPUBLICAN, Feb. 8, 1901, at 1.

[317] *The Sugar-Beet Subsidy*, ARIZ. REPUBLICAN, Sept. 27, 1901, at 2.

[318] *See Ex-Governor Murphy Here*, ARIZ. DAILY STAR, Apr. 22, 1903, at 1 (reporting Phoenix and Maricopa County donated $40,000 to a beet-sugar firm in 1903).

[319] *See, e.g.*, *Editorial Notes*, ARIZ. WKLY. J.-MINER, May 15, 1901, at 2; *Want a Thousand Farmers*, ARIZ. REPUBLICAN, July 1, 1901, at 6; *The Beet-Sugar Factory*, ARIZ. REPUBLICAN, Nov. 21, 1901, at 2.

[320] Kathleen Noon, Industry Came to Glendale: History of the Beet Sugar Factory §§ 5–9 (2000) (paper presented at the Arizona History Convention), *available at* https://www.molokane.org/molokan/Locations/Americas/Arizona/Noon.htm.

[321] JAMES M. GRAY, LIMITATIONS OF THE TAXING POWER § 200, at 140 (1906).

Subsidy by tax exemption had also become increasingly unpopular.[322] Arizona Governor Oakes Murphy was already sounding skeptical about them by 1893. "In my judgment encouragement of this kind should be granted, properly limited, wherever a majority of the taxpayers desire it," he told the territorial legislature.[323] "[B]ut I deem it unwise to exempt for too long a time, or without requiring the approval of the taxpayers . . . ."[324] That was two years before the Santa Fe, Prescott, & Phoenix (SFP&P) railroad connected Phoenix and Congress. Its manager, Frank Murphy, was the governor's brother, and he used that political influence to gain special tax treatment—leading some of the territory's newspapers (those not already loyal to Frank) to label the SFP&P "the Taxless Toot."[325] The *Prescott Courier* was emphatic: "tax exemption of rich corporations[,] while the struggling poor have to pay taxes[,] is a blot upon the civilization of the century," it declared.[326] "[T]he exemption of the rich and powerful must be stamped out, or equal rights under the stars and stripes becomes a mockery and a farce."[327]

Six years later, Governor Murphy confessed that there was "no good reason why [railroads'] valuation for the purposes of taxation should not be increased."[328] Tax exemptions forced the less well-off to shoulder more than their share of taxes. "[I]f all the property in the Territory subject to taxation were assessed at a proper valuation," he declared, "the people who now bear the burdens of government—which are unequally distributed—would pay less than they do under present conditions."[329] The Prescott *Weekly Journal-Miner* agreed. "The whole 'bloomin' lot of these bills and every other bill providing for tax exemption should be knocked out," proclaimed an 1889 editorial.[330] "Tax exemption is wrong in principle and should be discouraged."[331]

B. The Constitutional Convention of 1910

With that backdrop, Arizona Territory held its second constitutional convention in 1910. The debates at the convention were sloppily recorded

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[322] *See, e.g.*, *About Tax Exemption*, ARIZ. WKLY. J.-MINER, Feb. 22, 1899, at 2 (expressing "oppos[ition] to tax exemption").

[323] 1893 ARIZ. GOVERNOR BIENNIAL REP. TO 17TH LEGIS. ASSEMB. 16.

[324] *Id*.

[325] Robert L. Spude, *Frank Morrill Murphy, 1854–1917: Mining and Railroad Mogul and Developer of the American Southwest*, *in* MINING TYCOONS IN THE AGE OF THE EMPIRE, 1870–1940, at 151, 154 (Raymond E. Dumett ed., 2009).

[326] *Courier's Confession*, ARIZ. WKLY. J.-MINER, Sept. 29, 1897, at 2.

[327] *Id*.

[328] 1899 ARIZ. GOVERNOR BIENNIAL REP. TO 20TH LEGIS. ASSEMB. 7.

[329] *Id*. at 6–7.

[330] *Editorial Notes,* ARIZ. WKLY. J.-MINER, Feb. 22, 1899, at 2.

[331] *Id*.

at times, and the delegates did much of their work in committee, which makes it difficult sometimes to reconstruct their thought processes. Yet, it is clear that while some delegates chafed at the Harrison Act, and some may have thought business subsidies were justified at times, they also opposed outright payments, loans, or subscriptions for stock, and no delegate at the convention spoke in favor of business subsidies.[332] Moreover, they eventually adopted the most comprehensive prohibition on aid to private industries then available—rejecting alternative proposals that would have permitted tax-exemption subsidies.

The Gift Clause began as Proposition 106, which provided, among other things, that "[t]he credit of the State shall not in any manner, be given or loaned to, or in aid of, any individual, association, company or corporation"—language borrowed from the Washington State Constitution.[333] Proposition 106 also declared that "[t]he power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."[334] But it would have allowed the legislature to permit "cities, towns and villages . . . to make local improvements by special assessment, or by special taxation of property benefitted," and, although it limited the indebtedness of local governments, it did not expressly bar them from subsidizing private businesses.[335]

Proposition 106 was referred to committee,[336] which three weeks later recommended a substitute version.[337] This Substitute Proposition 106 eliminated the Washington State language ("[t]he credit of the State shall not in any manner, be given or loaned to, or in aid of, any individual, association, company or corporation") and instead proposed the Montana language ("[n]either the state, nor . . . [any] subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by

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[332] *See generally* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 469–77, 479, 860–61 (John S. Goff ed., 1991) [hereinafter RECORDS OF 1910] (exemplifying how the delegates discussed the possibility of subsidies and tax exemptions only for entities not used or held for profit). There was a lengthy debate over issuing a tax exemption to the Young Men's Christian Association and Young Women's Christian Association, *id*. at 469–77, 479, but this proposal was defeated, *id*. at 860–61.

[333] *Compare id*. at 1262 (showing that Proposition No. 106's ban on state loans to private entities mirrored the Washington Constitution's language), *with* WASH. CONST. art. VIII, § 5 (providing that "[t]he credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation").

[334] RECORDS OF 1910, *supra* note 332, at 1261.

[335] *Id*. at 1261–62.

[336] *Id*. at 86. The Committee on Public Debt, Revenue, and Taxation was the largest of the Convention's committees. JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 11 (2013).

[337] RECORDS OF 1910, *supra* note 332, at 405, 1263.

subsidy or otherwise to any . . .") which would ultimately be adopted.[338] But this substitute also added a new provision—one that *was* borrowed from Washington's Constitution. It declared that "[t]he power of taxation shall never be surrendered, suspended, or contracted away."[339] This sentence—not found in Montana's 1889 Constitution[340]—was a slightly broader restriction on tax exemptions than the original Proposition 106 had offered: it would have applied only to "corporate property."

Substitute Proposition 106 also included an additional provision prohibiting any tax "or appropriation of public money . . . in aid of . . . any railroad or other private corporations,"[341] and although it retained the language allowing local governments to impose assessments for local improvements,[342] it also specified certain tax exemptions: a homestead exemption for widows, as well as for property belonging to the government, churches, schools, universities, libraries, hospitals, and cemeteries "if not used or held for . . . profit"—which was again language copied from the Montana Constitution.[343] This Substitute Proposition 106 was intended to merge the original Proposition 106 with another

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[338] *Id*. at 864. *Compare id*. at 1262 (showing that Proposition No. 106 borrowed language from the Washington Constitution's ban on state loans to private entities), *and* WASH. CONST. art. VIII, § 5 (providing a general prohibition on lending public money to private entities), *with* RECORDS OF 1910, *supra* note 332, at 1265 (showing that Substitute Proposition No. 106 adopted the 1889 Montana Constitution's language in its ban on state loans to private entities), *and* MONT. CONST. of 1889, art. XIII, § 1 (exemplifying a relatively stronger and more comprehensive ban on government money being used to support private entities).

[339] *Compare* RECORDS OF 1910*, supra* note 332, at 1263 (examining Substitute Proposition No. 106), *with* WASH. CONST. art. VII, § 1. Convention president George Hunt, later Governor of Arizona, explained afterward that this provision was inspired primarily by a memorial submitted to the Arizona Constitutional Convention by the International Tax Association. *See* Switzer v. City of Phoenix, 341 P.2d 427, 430–31 (Ariz. 1959); *see also Constitutional Restraints on the Taxing Power: A Memorial Submitted for the Consideration of the Constitutional Conventions of New Mexico and Arizona on Behalf of the International Tax Association*, *in* STATE AND LOCAL TAXATION: FIFTH ANNUAL CONFERENCE UNDER THE AUSPICES OF THE NATIONAL TAX ASSOCIATION: ADDRESSES AND PROCEEDINGS 453 (Nat'l Tax Ass'n, 1912) (containing the original memorial by the International Tax Association recommending the provision).

[340] Montana's 1972 constitutional convention, however, added this provision to the state's new Constitution. *See* MONT. CONST. art. VIII, § 2; *see also* LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 168–69 (2011) (discussing the origin of this provision).

[341] RECORDS OF 1910, *supra* note 332, at 1266.

[342] *Id*. at 1265.

[343] *Compare id.* at 1263 (borrowing language from the 1889 Montana Constitution to exempt certain types of non-private property from taxation), *with* MONT. CONST. of 1889, art. XII, § 2 (enumerating specific non-profit entities qualified for tax exemptions).

proposition (Proposition 126), which required that all taxes be levied under general and uniform laws.[344]

Discussion of the merits of Substitute Proposition 106 was lengthy, but records of it are imperfect.[345] The only alteration the delegates made to the Montana "give or loan its credit" language was a minor grammatical correction.[346] Likewise, the provision banning appropriations for railroads or other corporations was adopted with minor changes.[347] Later, when the Convention debated the final wording of the article on taxation—which had originated in Substitute Proposition 106—a brief exchange over the provision (borrowed from Washington) that "the power of taxation shall never be surrendered," indicated the Convention's attitude toward subsidies, including tax-exemption subsidies. Delegate Homer Wood, apparently confusing the original Proposition 106 with Substitute Proposition 106, suggested removing language that required taxation of all non-exempt property. This was redundant, he thought. Delegate Michael Cunniff objected. The phrase "the power of taxation shall never be surrendered, suspended or contracted away" was "extremely valuable and important," he insisted.[348] Delegate Everett Ellinwood—a member of the committee that had drafted the wording—agreed. "I do not approve of exempting or permitting the legislature to exempt railroads from taxation," he said, "which is the only class of property which would be exempt under this. If you have this clause in, the railroads cannot claim exemption, and I think it should remain."[349] Wood withdrew his motion,[350] and the provision banning the government from making contracts that exempted property from taxation remained in the final constitution.[351]

A separate provision of the 1910 constitution also sheds light on the comprehensiveness of Arizona's final Gift Clause. Alongside the Montana language banning aid to private entities "by subsidy or otherwise," the delegates also adopted a separate clause forbidding the state from funding

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[344] RECORDS OF 1910, *supra* note 332, at 1320; *see also id.* at 489 (concluding that Substitute Proposition No. 106 encompassed Proposition No. 126).

[345] For example, at some point on November 19, 1910, during debate over Substitute Proposition No. 106, either delegate Francis Jones or Everett Ellinwood appear to have changed the subject slightly toward discussion of tax exemptions, but their remarks have been lost. *Id.* at 464, 467. Ellinwood was a member of the committee that drafted the substitute proposition. *See id.* at 21–22 (noting delegate Everett Ellinwood was on the Public Debt, Revenue, and Taxation committee).

[346] *Id.* at 483. *Compare id.* at 1265 (showing the result of Substitute Proposition No. 106's minor modifications), *with* MONT. CONST. of 1889, art. V, § 38 (dictating that the state may not contract for debt "nor give or loan its credit to or in aid of" railroad construction).

[347] RECORDS OF 1910, *supra* note 332, at 483; *see also id.* at 1266.

[348] *Id.* at 854.

[349] *Id.*

[350] *Id.*

[351] *See* ARIZ. CONST. art. IX, § 1.

religious institutions with tax money: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."[352] The language of this provision echoes the Gift Clause—particularly the phrase "in aid of"—yet it is less comprehensive than the Gift Clause. It bans taxes and appropriations, but does *not* use the term "subsidy," and includes no catch-all term such as "otherwise." As the Arizona Supreme Court observed in 1999, the language of the provision banning aid to religious institutions "indicates that the framers opposed *direct* public funding of religion," but reveals "no evidence of a similar concern for *indirect* benefits" with respect to religious institutions.[353] The Gift Clause, by contrast, employed broader language which indicates that the framers *did* intend to ban indirect as well as direct aid to private businesses.

C. The Triumph of the Gift Clause

What this history shows is that when Arizona's Constitution was approved by Congress in 1912, it contained the strongest prohibition ever devised against government subsidies to private businesses.[354] When offered the opportunity to adopt Washington State's Gift Clause, with its relatively lenient language—that "[t]he credit of the State shall not in any manner be given or loaned to, or in aid of, any individual, association, company or corporation"—the Convention rejected it,[355] and chose instead to copy Montana's Clause, which was then the strictest anti-subsidy rule available—a rule written by delegates who sought to prohibit both direct and indirect aid, and who had explicitly rejected a proposal to allow tax-exemption subsidies. Yet Arizona's framers also added to Montana's language another provision borrowed from Washington, and not found in Montana's Constitution, that forbade the state from surrendering, suspending, or contracting away its taxing power.[356] And, of course, they declined to re-adopt the 1891 Arizona Constitution's language, which would have allowed local governments to subsidize certain types of

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[352] *Id.* §§ 7, 10.

[353] Kotterman v. Killian, 972 P.2d 606, 619 (Ariz. 1999) (emphasis added).

[354] *Cf.* ARK. CONST. of 1874, art. XVI, § 5 (allowing tax exemptions for various public properties).

[355] WASH. CONST. art. VIII, § 5. As the Arizona Court of Appeals observed in a different context, the Convention's choice to remove an exception to a constitutional provision "suggest[s] an advertent effort" to broaden that provision's effect. Wade v. Greenlee Cnty., 844 P.2d 629, 631 (Ariz. Ct. App. 1992).

[356] *Compare* ARIZ. CONST. art. IX, § 1 (mirroring the Washington Constitution's prohibition on forfeiting taxing power and its promise to tax property of the same class uniformly while stopping short of defining "property"), *with* WASH. CONST. art. VII, § 1 (providing Washington's definition of "property" and detailing exceptions to the provision that property of the same class is uniformly taxed).

development.[357] The wording they eventually settled upon was stronger than the prohibition on aid to religious institutions—meaning that the Clause sought to separate government and private business even more emphatically than the separation of church and state.

Simply put, Arizona's Gift Clause was the most comprehensive ban on government aid to private enterprise ever fashioned. It still allowed the government to construct infrastructure or engage in internal improvements—an amendment adopted immediately after statehood allowed state and local governments to "engage in industrial pursuits"[358]—but it was permitted to do so only where it managed and controlled the enterprise in question.[359] Thus, when Arizona became a state, its constitution drew as clear a line as could be drawn forbidding the government from aiding private industry with public resources.

CONCLUSION

Arizona's Gift Clause reflects an effort to address the three persistent concerns with government interaction in private enterprise: rent-seeking, knowledge problems, and the injustice of transferring wealth through political favoritism rather than through consumers' own choices. It also reflects historical developments throughout state and national history—particularly the two waves of reform that first restricted state aid to private businesses and then later limited local subsidies. The Arizona Gift Clause's most notable elements are as follows.

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[357] *See* ARIZ. CONST. of 1891, art. VI, § 12 (not adopted).

[358] ARIZ. CONST. art. II § 34 (1912). This provision, not part of the 1910 Constitution, was added by ballot initiative in 1912.

[359] City of Tucson v. Sims, 4 P.2d 673, 675 (Ariz. 1931) (quoting Milligan v. Miles City, 153 P. 276, 278 (Mont. 1915)). Courts distinguished between "proprietary" and "governmental function[s]"—a distinction that parallels today's distinction between "market participant" and "sovereign." *See, e.g.*, City of Phoenix v. Wright, 80 P.2d 390, 392 (Ariz. 1938) (citing cases). The 1910 Constitution was understood to permit only the latter functions—what under territorial law had frequently been called "rightful subjects of legislation," as opposed to effectively private undertakings. *See, e.g.*, McRae v. Cnty. of Cochise, 44 P. 299, 300–01 (Ariz. 1896); Clayton v. State, 297 P. 1037, 1041 (Ariz. 1931). The "rightful subjects" doctrine limited municipal government authority to operations within their own geographical limits. *Clayton*, 297 P. at 1041. The 1912 "industrial pursuits" provision therefore empowered cities to own and operate such "industrial" entities as an ice-making facility. *See* City of Tombstone v. Macia, 245 P. 677, 681–82 (Ariz. 1926). But it was crucial to the distinction between a permissible "industrial pursuit" and an unconstitutional "gift" of public resources that in the former case, the government owned and operated the entity, whereas in the latter, it simply subsidized a privately managed firm.

A. It Followed Montana's in Forbidding All Forms of Subsidy

The phrase "by subsidy or otherwise"—which in 1912 appeared only in the constitutions of Montana[360] and Arizona—was employed as a catch-all phrase to totally forbid government from giving any type of financial aid to businesses, whether by direct payment or by any indirect means. The 1912 Arizona Constitution also omitted language that appeared in the proposed 1891 Constitution that would have allowed subsidies to railroads, canals, and other undertakings, if two-thirds of the voters approved.[361]

B. It followed Montana's and Washington's in Barring Subsidy Through Tax-Exemption

Like Montana's 1889 Constitution, the 1912 Arizona Constitution omitted language that had appeared in Montana's proposed 1884 Constitution, which would have allowed the legislature to exempt property from taxation.[362] Arizona went further, in fact, and incorporated language from the Washington Constitution (which did not appear in Montana's) forbidding the state from contracting away or surrendering its power to tax. This reinforces the point that favorable tax treatment is also constitutionally forbidden in Arizona.

C. It Included Emphatic Language

Like some other second-wave Gift Clauses, the Arizona/Montana provision included emphatic language: neither the state nor cities "shall ever" give or lend public resources to private parties. The "shall ever" phrase paralleled other constitutional promises, such as the pledges never to adopt ex post facto laws[363] or laws requiring religious tests for public office.[364]

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[360] In 1973, Montana adopted a new constitution which eliminated the original Gift Clause (on which Arizona's was based). Although the current Montana Constitution forbids appropriations to private entities, *see* MONT. CONST. art. V, § 11(5), as well as special legislation when a general act is applicable, *id.* § 12, it contains little protection against government subsidies. This change was done largely on the recommendation of a 1971 report which argued that the original Gift Clause was too confining. ROGER A. BARBER, MONTANA CONSTITUTIONAL CONVENTION STUDIES NO. 15: TAXATION AND FINANCE 18 (1971). As a consequence, Arizona is the only state whose constitution includes the "by subsidy or otherwise" provision.

[361] *See* ARIZ CONST. of 1891, art. IV, § 39 (not adopted).

[362] *See* MONT. CONST. of 1884, art. XII, § 6 (not adopted).

[363] ARIZ. CONST. art. I, § 25.

[364] *Id.* art. II, § 12.

D. It Included "Second-Wave" Comprehensive Language

The Arizona Gift Clause included other second-wave language: prohibiting both state and local governments from engaging in subsidies, and banning the "giv[ing] or loan[ing] [of the government's] credit," as well as "donation[s] or grant[s]."[365] Moreover, it included a catch-all prohibition against aid being granted "by subsidy *or otherwise*," terms not even found in the provision banning the subsidization of churches.[366]

These elements make Arizona's constitutional prohibition on subsidies the strongest in the United States.

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[365] *Id.* art. IX, § 7.

[366] *Id.* (emphasis added).