Outlawing Favoritism

The Economics, History, and Law of Anti-Aid Provisions in State Constitutions

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Abstract

Since the early days of the republic, state and local governments have periodically embarked on widespread, large-scale attempts to spur economic growth through targeted economic development subsidies. Interestingly, the constitutions of nearly every state in the union contain provisions that, on plain reading, make these sorts of subsidies illegal. In this paper, we review the economics, history, and law of targeted economic development subsidies in the United States, focusing on these constitutional anti-aid provisions. This review demonstrates four things. First, subsidies do not work as advertised. In fact, the best evidence suggests that they undermine economic development, fiscal health, and good governance. Second, constitutional anti-aid provisions may be able to affect the size and scope of subsidies, reducing these negative effects. Third, the details matter; not all anti-aid provisions are effective. And fourth, as special interests work to undermine the effectiveness of anti-aid provisions, such provisions must be renewed and strengthened from time to time. We conclude with suggestions for strong constitutional anti-aid provisions.

JEL codes: H2, H7, K3, N0, N9

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I. Introduction

Policymakers are keenly interested in promoting economic growth, and targeted economic development incentives are an especially popular strategy.[1] These selective privileges are offered to particular firms or industries and can include targeted tax relief, targeted regulatory relief, cash subsidies, loans and loan guarantees, in-kind donations of land and other valuable goods and services, or some combination of the above. Governments can target particular firms in different ways. One tactic is to favor an entire industry through an industry-wide privilege. (An industry-wide tax privilege is particularly common.) Another approach is to favor firms that locate in certain regions or zones or even to create a zone specifically for the benefit of a particular firm. Another tactic is to target specific firms through discretionary funds, often called *deal-closing funds*, administered by governors or other policymakers. Finally, governments might target a firm by rewarding specific behaviors—for example, if the firm undertakes a certain size or variety of investment or hires a certain number of employees.

While targeted subsidies have a long history, recent high-profile cases have renewed debate about their efficacy.[2] In July 2017, for example, Wisconsin announced a 15-year $1.2 billion to $3.6 billion subsidy to Foxconn Technology Group to build a liquid crystal display plant in southeast Wisconsin. And in September of that year, Amazon announced plans for a second headquarters

[1] This is not the only strategy. Another tactic is to create an environment that is conducive to growth by, for example, ensuring some degree of economic freedom.
[2] David E. Pinsky, "State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach," *University of Pennsylvania Law Review* 111, no. 3 (1963): 266n4. Virginia subsidized woolen cloth producers with bounties of tobacco in 1661.

(HQ2), setting off a 238-city bidding war that culminated in the selection of New York City and Arlington, Virginia, and—ultimately—in the abandonment of the New York site.

Most policymakers believe that subsidies work. One recent survey of 110 mayors found that 84 percent of them believe that targeted incentives are good policy.[3] By one estimate, states and localities spend about $49 billion per year on targeted economic development subsidies.[4] This is about 30 percent of average state and local business tax collections. Moreover, as a share of industry contributions to GDP, incentives have tripled since 1990.[5]

The history of targeted subsidies suggests that they fail as an economic development strategy. Indeed, they seem more likely to invite corruption and government fiscal crisis than to promote sustainable growth. When these problems inevitably arise, state constitutional framers have responded with constitutional anti-aid provisions. By their plain language, these measures would seem to outlaw many of the subsidies that take place today. But as they are repeatedly challenged, these provisions tend to weaken and must periodically be renewed and strengthened.[6]

When properly structured, these provisions do seem to have an effect on the size and scope of subsidies. But the details matter. The most effective anti-aid provisions apply to both state and local governments and restrict aid in all its forms. Anti-aid provisions are also more

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[3] Richard Florida, "Analysis: Why Mayors Keep Trying to Woo Business with Tax Breaks," *MSN*, February 12, 2019.

[4] Timothy Bartik estimates that state and local business incentives totaled $45 billion in 2015. Assuming that this figure has not grown in real terms over the past four years, this is $48.95 billion in 2019 dollars. We may regard this number as somewhat speculative. States are not transparent about subsidies, and researchers do not always agree on what counts as a subsidy. Others have estimated that the amount may be about $32 billion a year (Thomas) or $70 billion (Good Jobs First). Bartik's estimate is not only the median but close to the average. Timothy Bartik, "A New Panel Database on Business Incentives for Economic Development Offered by State and Local Governments in the United States" (W. E. Upjohn Institute for Employment Research, Kalamazoo, MI, 2017); Kenneth P. Thomas, "The State of State and Local Subsidies to Business" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, October 21, 2019); Good Jobs First, "GASB Statement No. 77," accessed October 11, 2017, https://www.goodjobsfirst.org/gasb-statement-no-77.

[5] Bartik, "New Panel Database," 2–3.

[6] It is possible that the provisions were intentionally designed to break down. The late political economist Anthony de Jasay expresses this skeptical view succinctly: "Putting it at its simplest, majorities choose legislation that maximizes their gains from politics, and they learn to choose a constitution that maximizes the scope for such legislation." Anthony de Jasay, *Justice and Its Surroundings* (Indianapolis: Liberty Fund, 2002), 117.

effective if courts apply a number of important tests. The case law suggests that these provisions are strongest where courts require three conditions for public spending. First, expenditures must serve a broad public purpose with direct and nonspeculative public benefits. Second, the government must exercise sufficient and continuing control over all public expenditures. Third, the government must obtain valid consideration for its outlays. In this case, valid consideration is direct, ascertainable, contractually obligatory, and proportional.

In the next section, we show that, despite their longstanding popularity among public officials, the economic case for targeted subsidies is weak. In section III we review the history of targeted state and local subsidies in the United States, concentrating on constitutional efforts to limit them. In section IV, we present an overview of the current legal landscape for anti-aid provisions. In section V we offer recommendations for sound and effective provisions, and in section VI we discuss possible legislation and litigation strategies. In section VII we offer concluding remarks.

II. The Economics of a Targeted Subsidy

It is straightforward to identify the benefits of a targeted economic development subsidy. We can visit new and expanded facilities, count the number of employees they hire, and calculate their contributions to local GDP. Economists may even be able to estimate the multiplier effects associated with the subsidized activity, though this estimation is a rough science. That is, they can estimate the new demand for other products and services that is generated in an area when a new facility and its employees locate there. The economic development offices that dispense subsidies and the firms that receive them are wont to point to these sorts of benefits, and public debates over subsidies often center on these factors. Upon scrutiny, however, subsidies entail benefits that are much smaller than the boosters' oft-quoted estimates suggest. They also entail significant costs that the boosters often ignore. In this section, we briefly discuss why the benefits of subsidies are typically overstated and why the costs of subsidies are understated. We also discuss several difficult-to-measure costs that often go ignored. We conclude that, on net, a subsidy is more likely to undermine economic development than enhance it.[7]

A. The Overstated Benefits of Subsidies

When, in 2017, the state of Wisconsin offered up to $3.46 billion to Foxconn Technology Group to locate a plant in southeast Wisconsin, the company commissioned a study that concluded that the plant would add more than $62 billion to Wisconsin GDP over 15 years.[8] This would seem to be an extraordinary return on the taxpayers' investment. The $62 billion figure included about $39.9 billion in direct impact from the plant's production, as well as an additional $22.5 billion in indirect and induced economic impact, attributable to a multiplier effect. There is nothing wrong in assuming a multiplier effect: any new economic activity tends to create further activity. A new plant will create new demand for inputs, and its workers will create new demand for housing and other goods. However, this framing ignores the opportunity cost of the subsidy. At best, it should be viewed as an estimate of the gross benefits of the subsidy, not as an estimate of the net benefits. Even as an estimate of gross benefits, however, this figure is overstated.

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[7] For a longer discussion of the economics of a subsidy, see Matthew D. Mitchell, Michael D. Farren, Jeremy Horpedahl, and Olivia J. Gonzalez, "The Economics of a Targeted Economic Development Subsidy" (Mercatus Special Study, Mercatus Center at George Mason University, Arlington, VA, 2019). For a review of the empirical literature, see Matthew D. Mitchell, Jeremy Horpedahl, and Olivia J. Gonzalez, "Do Targeted Economic Development Incentives Work as Advertised?" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, forthcoming).

[8] EY Quantitative Economics and Statistics, "Quantifying Project Flying Eagle's Potential Economic Impacts in Wisconsin," *EY*, July 2017.

This is because the estimate implicitly assumes that the subsidy is the determinative factor when a subsidized firm decides where to locate. It rarely is. Consider that when multiple jurisdictions bid for a facility, companies often fail to pick the highest bidder. For example, when Foxconn chose Wisconsin, it was forgoing a larger subsidy from Michigan.[9] And when Amazon chose New York and Virginia for its HQ2 sites, it was forgoing larger offers from Dallas–Fort Worth, Maryland, New Jersey, and Ohio.[10] Firms are willing to forgo even very large incentives because other factors, such as labor costs, business logistics, and access to location-specific resources, tend to have a bigger effect on profit. For example, the costs of locally supplied labor are typically about 14 times larger than state and local business tax costs.[11] A mere 2 percent difference in wages can offset as much as a 40 percent difference in taxes.[12]

A recent review of 34 academic studies concluded that subsidies "probably tip somewhere between 2 percent and 25 percent of incented firms toward making a decision favoring the location providing the incentives."[13] These estimates are derived from past experiences, and it is possible that larger subsidies may increase the probability of tipping the balance. But the implicit assumption that a subsidy is decisive with 100 percent certainty is

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[9] Jason Stein, "Michigan Offered Foxconn $3.8B, Still Lost to Wisconsin," *Milwaukee Journal Sentinel*, October 19, 2017.

[10] The site in Arlington, Virginia, entailed $1.05 billion in subsidies, and the New York City site entailed $3 billion. The Cleveland, Ohio, location would have entailed $3.5 billion; Newark, New Jersey, $7 billion; and Maryland $8.5 billion.

[11] Timothy Bartik, *Who Benefits from State and Local Economic Development Policies?* (Kalamazoo, MI: W. E. Upjohn Institute, 1991), 61. These figures likely vary by sector. See James Papke, "Interjurisdictional Business Tax Cost Differentials: Convergence, Divergence and Significance," *Tax Notes* 9, no. 4 (1995): 1701–11.

[12] It is important to note that the local cost of living can vary by as much as a factor of two across the United States. Leah Beth Curran, Harold Wolman, Edward W. Hill, and Kimberly Furdell, "Economic Wellbeing and Where We Live: Accounting for Geographical Cost-of-Living Differences in the US," *Urban Studies* 43, no. 13 (December 1, 2006): 2443–66; G. Cornia, W. Testa, and F. Stocker, "State-Local Fiscal Incentives and Economic Development" (Urban and Regional Development Series Number 4, Academy of Contemporary Problems, Columbus, OH, 1978).

[13] Timothy J. Bartik, "'But For' Percentages for Economic Development Incentives: What Percentage Estimates Are Plausible Based on the Research Literature?" (working paper, W. E. Upjohn Institute for Employment Research, Kalamazoo, MI, 2018). For two other studies with similar results, see Dennis A. Rondinelli and William J. Burpitt, "Do Government Incentives Attract and Retain International Investment? A Study of Foreign-Owned Firms in North Carolina," *Policy Sciences* 33, no. 2 (2000): 181–205; Nathan Jensen, "Bargaining and the Effectiveness of Economic Development Incentives: An Evaluation of the Texas Chapter 313 Program," *Public Choice* 177, no. 1 (2018): 29–51.

simply not realistic. This should cause us to radically revise downward the expected gross benefits attributed to any given subsidy. If a bet pays $100 with a 25 percent probability of winning, it is only worth $25. Similarly, if a subsidized factory is expected to add, say, $1.5 billion to Wisconsin's economy over 15 years and if we believe that there is a 25 percent chance that the subsidy was decisive, then the expected value of the subsidy is $375 million, not $1.5 billion.[14]

B. The Often-Ignored Costs of Subsidies

While the gross benefits of a targeted economic development subsidy are typically overstated, the gross costs are typically ignored. In fact, the gross benefits are often presented as if they were the *net* benefits. Consider, again, the example of a subsidized plant that is expected to add $1.5 billion to Wisconsin's GDP over 15 years. Assume that the state offered this plant $150 million in subsidies. To obtain the net benefits of the subsidy, we must account for the economic cost of removing this $150 million from the economy in order to fund the subsidy. And just as the plant can be expected to have multiplier effects that spur other economic activity, so too would the money that funds the subsidy, if left in the hands of taxpayers. Worse, because taxes discourage the economic activities to which they apply, taxation entails additional costs that economists call deadweight losses.[15]

According to the range of estimates, if a state raises its taxes by 10 percent, then over the long run, economic activity will tend to decline by about 5 percent, with a plausible range

[14] $375 million is 25 percent of $1.5 billion. Note that we are not saying that the plant itself is worth $375 million. We are taking as given that it will add $1.5 billion to state GDP. Instead, we are saying that the expected gross contribution of the subsidy to that $1.5 billion is only $375 million. By way of analogy, if recovery from a certain disease is worth $150,000 to a patient but if there is only a 25 percent chance that a certain treatment caused the recovery to come about, then in an expectational sense, the treatment is worth $37,500, not $150,000.

[15] The exception is a "head tax," which is not applied to economic activity but is instead applied to all people, regardless of their economic activities.

between 1.5 percent and 8.5 percent.[16] If we apply this range to the higher taxes implied by a $150 million subsidy from the state of Wisconsin, the 15-year gross costs of the subsidy are likely to be about $1.25 billion, with a plausible range between $375 million and $2.1 billion.[17] In table 1, we combine the range of gross benefits and gross costs to yield a range of expected *net* benefits from such a subsidy. The range of gross costs encompasses low, average, and high deadweight losses. The range of gross benefits encompasses scenarios in which the subsidy determined the plant location with 2 percent, 25 percent, 50 percent, and 100 percent certainty. We regard the 100-percent-certainty scenario as unrealistic but present it for the sake of comparison.

The 12 numbers in the lower-right corner of the table indicate the wide range of possible net economic effects. Under the best scenario, the subsidy was decisive with 100 percent certainty and the deadweight loss from taxation is low. In this case, we estimate the subsidy will result in a net gain to the Wisconsin economy of $1.125 billion over 15 years. The worst scenario occurs when the subsidy was only decisive with 2 percent certainty and the deadweight loss from taxation is on the high end of the spectrum. In this case, we estimate the subsidy will result in a net loss of $2 billion over 15 years. In public debates over subsidies, the wide range of scenarios and the possibility of downside risk are rarely acknowledged.

Which of these scenarios is the most realistic? On the cost side, it is reasonable to use the best estimate of a $1.249 billion gross loss over 15 years. On the benefit side, we may never know whether a given subsidy was decisive. But, as we have already noted, the idea that a

[16] Timothy Bartik, *Who Benefits from Economic Development Incentives? How Incentive Effects on Local Incomes and the Income Distribution Vary with Different Assumptions about Incentive Policy and the Local Economy* (Kalamazoo, MI: W. E. Upjohn Institute for Employment Research, 2018), 10.

[17] A $150 million subsidy over 15 years implies that Wisconsin state taxes will be about 0.05 percent higher than otherwise. Applying the deadweight loss estimate implies that the Wisconsin economy will be about 0.023 percent smaller than otherwise. We assume that the full costs of taxation do not materialize for 7 years. Given the size of the Wisconsin economy, the cumulative effect over 15 years is about $1.25 billion. For more details on this calculation with application to the Foxconn subsidy, see Mitchell et al., "Targeted Economic Development Subsidy."

subsidy is decisive with 100 percent certainty is simply not realistic. And though the peer-reviewed evidence suggests that most subsidies are decisive with 2 to 25 percent probability, a 50 percent chance of decisiveness is not out of the question with larger subsidies. Thus, it seems reasonable to regard the highlighted cells of the table as the most realistic scenarios. Under none of these scenarios would this hypothetical subsidy be expected to yield net positive effects for the Wisconsin economy over the long run.

Table 1. Net Expected Value of Subsidies to a Project That Will Add $1.5 Billion to GDP

			Range of Expected Gross Benefits ($ millions)			
			100% Decisive	50% Decisive	25% Decisive	2% Decisive
			1,500	750	375	30
Range of Expected Gross Costs	Low DWL of Taxation	−375	1,125	375	0	−345
	Best Estimate of DWL of Taxation	−1,249	251	−499	−874	−1,219
	High DWL of Taxation	−2,123	−623	−1,373	−1,748	−2,093

Notes: The shaded values represent the most realistic range of estimates of the average net subsidy effect. The net subsidy equals the estimated gain from the subsidy minus the estimated loss from taxation. For details on methodology, see Matthew D. Mitchell, Michael D. Farren, Jeremy Horpedahl, and Olivia J. Gonzalez, “The Economics of a Targeted Economic Development Subsidy” (Mercatus Special Study, Mercatus Center at George Mason University, Arlington, VA, 2019).

C. The Difficult-to-Measure Costs of Subsidies

The range of scenarios reported in table 1 excludes additional difficult-to-quantify costs that can arise with a subsidy. For instance, subsidies may encourage too much of the subsidized activity. There is an optimal size to a factory floor, an optimal number of salespeople, and an optimal location for any plant.[18] With a subsidy, however, a firm externalizes some of its costs onto taxpayers, which can lead it to build a factory that is larger than optimal, to hire more salespeople than it should, or to build in a suboptimal location. Indeed, economists have long emphasized that communities prosper when they specialize based on their comparative advantage. That is, they should specialize in producing those products and services that they can produce at a lower opportunity cost than others.[19] But if a firm would not locate a certain facility in a location *but for* a subsidy, that is a strong indication that the firm *should not* locate the facility there. Adam Smith once noted that with enough greenhouses Scotland could produce wine, though only at 30 times the cost of comparable wine produced elsewhere.[20] By the same logic, Wisconsin could induce Dole to locate pineapple production on the shores of Lake Michigan. This, for obvious reasons, would not be a wise investment.

To compound the problem, a firm that would not locate in a certain area but for a subsidy is also likely to be especially sensitive to future subsidies offered by other jurisdictions that might lure it away.[21]

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[18] To put it in technical terms, the optimal scale is that at which marginal cost just equals marginal benefit. Any units of production beyond that point consume more value than they create.

[19] David Ricardo, *On the Principles of Political Economy, and Taxation* (n.p.: J. Murray, 1817).

[20] Adam Smith, *The Wealth of Nations* (n.p.: Simon & Brown, 1776), book 4, chap. 2, para. 15.

[21] Terry F. Buss, "The Case against Targeted Industry Strategies," *Economic Development Quarterly* 13 (July 25, 2016): 350.

Subsidies can also give a firm an anticompetitive advantage, allowing it to ignore customers or to be lax with cost containment, a phenomenon known as x-inefficiency.[22] Furthermore, subsidies tend to lock in inefficient technologies and business practices, making markets and workers less adaptable to change. When governments dispense subsidies, firms expend resources seeking these privileges, a socially wasteful phenomenon known as rent-seeking.[23] Subsidies can also lead to the misallocation of talent as they encourage entrepreneurs to develop new and different ways of obtaining privilege rather than new and different ways of pleasing customers and economizing on resources.[24]

Beyond these economic concerns, there are philosophical and social problems with subsidies. They tend to favor the wealthy and well connected at the expense of the poor and unknown.[25] Moreover, they may be associated with perverse cultural attitudes toward markets. Recent research, for example, finds that leaders of privileged firms are more likely to think the US market is too free, that government should have a more active role in the economy, that favoritism is compatible with free markets, and that government privilege or knowledge of influential policymakers is the most important factor in business success.[26]

Even if a subsidy did not entail any of the problems we have discussed, it would still at best be a zero-sum game—that is, when one state lures a firm with a subsidy, its gain is offset by

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[22] Harvey Leibenstein, "Allocative Efficiency vs. 'X-Efficiency,'" *American Economic Review* 56, no. 3 (June 1, 1966): 392–415; Matthew Mitchell, *The Pathology of Privilege: The Economic Consequences of Government Favoritism* (Arlington, VA: Mercatus Center at George Mason University, 2012).

[23] Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft," *Economic Inquiry* 5, no. 3 (June 1, 1967): 224–32; Matthew D. Mitchell, "Rent Seeking at 52: An Introduction to a Special Issue of *Public Choice*," *Public Choice* 181, no. 1 (October 1, 2019): 1–4.

[24] William J. Baumol, "Entrepreneurship: Productive, Unproductive, and Destructive," *Journal of Political Economy* 98, no. 5 (October 1, 1990): 893–921; Kevin M. Murphy, Andrei Shleifer, and Robert W. Vishny, "The Allocation of Talent: Implications for Growth," *Quarterly Journal of Economics* 106, no. 2 (May 1, 1991): 503–30.

[25] Daniel Aobdia, Allison Koester, and Reining Petacchi, "Political Connections and Government Subsidies: State-Level Evidence," *SSRN Electronic Journal*, March 2018, available at https://www.bsg.ox.ac.uk/sites/default/files/inline-files/Petacchi_0.pdf.

[26] Matthew D. Mitchell with Scott Eastman and Tamara Winter, "A Culture of Favoritism" (Mercatus Special Study, Mercatus Center at George Mason University, Arlington, VA, March 27, 2019).

another's loss. This has led many to conclude that state subsidies are akin to a mutually destructive arms race or to a prisoner's dilemma (a term borrowed from game theory). In these sorts of situations, it is individually rational for people to pursue certain actions even though they lead to outcomes that make everyone—including themselves—worse off.[27]

The theoretical case against subsidies is supported by the empirical record. Since 1990 there have been more than 100 academic studies of targeted subsidies.[28] Most of these studies evaluate subsidies in light of their effects on the privileged firms, regions, or industries. But subsidies are rarely sold as a means to boost the well-being of these narrowly targeted interest groups. Instead, subsidies are typically sold as a means to benefit the communities that pay for them.[29] Among those studies that evaluate subsidies in light of their effects on these broader communities, the vast majority find little to no support for subsidies.[30]

[27] Chris Farrell, "The Economic War among the States: An Overview," *The Region*, June 1, 1996; Melvin L. Burstein and Arthur J. Rolnick, "Congress Should End the Economic War among the States," *The Region*, January 1, 1995, 3–20; Matthew Schaefer, "State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response," *New Mexico Law Review* 28, no. 2 (1998): 303–42; Stephen Ellis and Cynthia Rogers, "Local Economic Development as a Prisoners' Dilemma: The Role of Business Climate," *Review of Regional Studies* 30, no. 3 (2000): 315–30; Daniel J. Wilson, "Beggar Thy Neighbor? The In-State, Out-of-State, and Aggregate Effects of R&D Tax Credits," *Review of Economics and Statistics* 91, no. 2 (May 2009): 431–36; Nathan M. Jensen, Edmund Malesky, Mariana Medina, and Ugur Ozdemir, "Pass the Bucks: Credit, Blame, and the Global Competition for Investment," *International Studies Quarterly* 58, no. 3 (September 1, 2014): 433–47; Nathan M. Jensen, Edmund J. Malesky, and Matthew Walsh, "Competing for Global Capital or Local Voters? The Politics of Business Location Incentives," *Public Choice* 164, no. 3–4 (September 1, 2015): 331–56; Nathan Jensen and Edmund J. Malesky, *Incentives to Pander: How Politicians Use Corporate Welfare for Political Gain* (New York: Cambridge University Press, 2018).
[28] Mitchell, Horpedahl, and Gonzalez, "Work as Advertised."
[29] See Mitchell, Horpedahl, and Gonzalez, "Work as Advertised," for more details. But note that from Alexander Hamilton to Donald Trump, policymakers who advocate for subsidies almost universally speak of the benefits to the broader community.
[30] Again, see Mitchell, Horpedahl, and Gonzalez, "Work as Advertised." Among those studies that evaluate subsidies for their effects on the broader community, about two-thirds find either mixed or insignificant effects. Just 16 percent find positive effects, while 20 percent find negative effects for the broader community.

Yet despite the economic case against subsidies, they persist. Public choice models explain why.[31] Subsidies confer highly visible benefits on concentrated, politically organized special interests, while their costs are less obvious and spread across diffuse, politically unorganized taxpayers, consumers, and small businesses.[32] This pattern of concentrated benefits and diffuse costs explains the persistence of many inefficient policies.[33] The problem is compounded by the fact that voters are often ignorant or confused about the technical aspects of economic development policy.[34] As a result, political leaders may misclassify costs as benefits and believe that a project is more valuable because it involves a large investment or requires a large workforce.[35]

Given the persistence and prevalence of targeted subsidies despite the economic case against them, institutional constraints—such as state anti-aid provisions—are needed to limit their use.

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[31] Public choice is the economic study of political markets. For an overview, see Randy T. Simmons, *Beyond Politics: The Roots of Government Failure* (Oakland, CA: Independent Institute, 2011); Matthew D. Mitchell and Peter J. Boettke, *Applied Mainline Economics: Bridging the Gap between Theory and Public Policy*, 1st ed. (Arlington, VA: Mercatus Center at George Mason University, 2017).

[32] As the economists Robert Ekelund and Robert Tollison have put it, "The undergirding principle of the interest-group approach is nonetheless organizational costs. The theory begins and ends with this principle. Organized groups gain political wealth transfers at the expense of unorganized or less-well-organized groups." Robert B. Ekelund Jr. and Robert D. Tollison, "The Interest-Group Theory of Government," in *The Elgar Companion to Public Choice*, ed. William F. Shughart Jr. and Laura Razzolini, 357–78 (Cheltenham, UK: Edward Elgar, 2001).

[33] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 2nd ed. (Cambridge, MA: Harvard University Press, 1965); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 40th anniv. ed. (New York: W. W. Norton, 1969); Peter Schuck, *Why Government Fails So Often: And How It Can Do Better* (Princeton, NJ: Princeton University Press, 2014).

[34] Because their votes are unlikely to make a difference in any election, voters tend to be rationally ignorant about policy and its effects. Worse, they have little incentive to spend time thinking about public policy, causing irrational notions to persist. Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957); Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*, new ed. (Princeton, NJ: Princeton University Press, 2008).

[35] Barry R. Weingast, Kenneth A. Shepsle, and Christopher Johnsen, "The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics," *Journal of Political Economy* 89, no. 4 (August 1, 1981): 642–64.

III. The History of Subsidies and Anti-Aid Provisions in State Constitutions

The history of subsidies and the evolution of public aid restrictions in state constitutions demonstrate that subsidies pose a threat to economic development, fiscal health, and good governance. They also show that anti-aid provisions can restrain the size and scope of subsidies, but the details matter, and periodically these provisions must be strengthened.

The first wave of restraints emerged in the 1840s. Ill-conceived and mismanaged infrastructure projects created large state debts in the 1830s, and following the panic of 1837, these burdens became unsustainable, sending eight states and one territory into default.[36] The states requested a federal bailout but were denied. In the years that followed, many states adopted constitutional fiscal reforms, including restrictions on public spending for private projects. These reforms worked for a time. But as the panic faded from memory in the Reconstruction era, localities—which were often not restrained by constitutional limits—boosted their own funding for railroads and other private projects.[37] After another fiscal crisis in 1873, a second wave of anti-aid reforms closed the locality loophole.[38] Then, starting in the Great Depression, both courts and legislatures began once again to permit public spending for private projects so long as lawmakers or judges could construct some semiplausible rationale that spending would eventually benefit the public at large.[39]

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[36] Jonathan Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (Cambridge: Cambridge University Press, 2006), 72–74; John Joseph Wallis, "American Government Finance in the Long Run: 1790 to 1990," *Journal of Economic Perspectives* 14, no. 1 (2000): 61–62.
[37] G. Alan Tarr, *Understanding State Constitutions* (Princeton, NJ: Princeton University Press, 1998), 114.
[38] Tarr, *Understanding State Constitutions*, 114.
[39] See, generally, James T. Bennett, *Corporate Welfare: Crony Capitalism That Enriches the Rich* (New Brunswick, NJ: Transaction, 2015), 79–121.

A. The Long History of Favoritism

Governments have favored particular firms, industries, and interests for centuries. And for almost as long, economists have been critical of the practice.[40] At the time of the American founding, what Adam Smith dubbed "mercantilism" had dominated European economic policy for nearly three centuries. Like modern-day economic development strategies, mercantilism aimed to promote certain firms or industries through subsidies, tax privileges, and regulatory protections, and this European practice had been transplanted into the colonies. In 1661, for example, Virginia began subsidizing woolen cloth producers with bounties of tobacco.[41] And during the Washington administration, Secretary of the Treasury Alexander Hamilton famously called for the systematic promotion of manufacturing through tariffs and subsidies.[42]

Yet despite its long and entrenched practice, early US policymakers showed ambivalence toward mercantilism, especially at the national level. Hamilton's plan was rejected by Congress in 1791, and when it later resurfaced as Henry Clay's "American system," that too was largely rejected. Thus, for the first several decades of the republic, neither the states nor the federal government was active in promoting particular firms or industries.[43]

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[40] For an early critique, see Adam Smith's *Wealth of Nations*. For more recent critiques, see Douglass C. North, John Joseph Wallis, and Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History*, 1st ed. (Cambridge: Cambridge University Press, 2009); Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, 1st ed. (New York: Crown Business, 2012).

[41] Pinsky, "State Constitutional Limitations," 266n4.

[42] Alexander Hamilton, "Report on the Subject of Manufactures," in *The Industrial and Commercial Correspondence of Alexander Hamilton Anticipating His Report on Manufactures* (Chicago: A. W. Shaw, 1928 [1791]).

[43] Some of this opposition likely arose from the unique circumstances of the American founding. The much-reviled Tea Act of 1773, for example, was a mercantilist tax privilege for the East India Tea Company, a British government-chartered firm that already enjoyed several regulatory privileges. The founding era also coincided with the birth of classical economics, which rejected the earlier mercantilist theories.

B. Public Spending on Private Ventures

Beginning in the 1820s, state spending changed in both size and scope. First, states—especially those in the South—began to invest in private banks.[44] Then, following the rejection at the national level of John Quincy Adams's proposals to spend heavily on "internal improvements" (a plan modeled after Henry Clay's proposed American system), a number of states began to take it upon themselves to fund infrastructure projects.

The success of the publicly funded Erie Canal, which was completed in 1825, provided further impetus. It inspired two decades of state-supported railroads, turnpikes, and canals across the nation.[45] State governments hoped to stimulate their economies through investment in private firms, especially as interstate competition for economic development escalated.[46] During this era, "railroad promoters encouraged towns to bid against each other for influence in locating the railroads."[47] And towns obliged because railroads were believed to have "great potential for public benefit"[48] and to be "critical for economic development since the existence of the railroad would attract other economic enterprise."[49] Given the Jacksonian era's disdain for national spending on such projects, it was the states that took the lead.[50] But, as Columbia Law School's Richard Briffault has put it, "Many of these projects blurred public and private lines, with states investing in private firms, or providing grants, loans and loan guarantees to private companies."[51]

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[44] Wallis, "American Government Finance," 67; Rodden, *Hamilton's Paradox*, 58.
[45] Richard Briffault, "Disfavored Constitution: State Fiscal Limits and State Constitutional Law," *Rutgers Law Journal* 34, no. 4 (Summer 2003): 911.
[46] Briffault, "Disfavored Constitution, " 911.
[47] Brian Libgober, "The Death of Public Purpose (And How to Prevent It)" (Harvard Law School Discussion Paper, Cambridge, MA, March 2016), 13.
[48] Nicholas J. Houpt, "Shopping for State Constitutions: Gift Clauses as Obstacles to State Encouragement of Carbon Sequestration," *Columbia Journal of Environmental Law* 36 (2011): 381.
[49] Schaefer, "State Investment Attraction," 342.
[50] See, for example, Jackson's famous veto of the Maysville Road. The president not only noted that the project was "purely local" but also warned of "artful expedients to shift upon the Government the losses of unsuccessful private speculation." Andrew Jackson, "Veto Message," American Presidency Project (website), May 27, 1830.
[51] Briffault, "Disfavored Constitution," 911.

Though the political appetite for locally funded infrastructure spending was high, the appetite for taxes to pay for this spending was low. Early on, states had relied on property taxes.[52] As they began earning income on private projects, however, confidence in infrastructure investments grew, and some states reduced or eliminated their property taxes. By 1835, Alabama, Georgia, Maryland, Massachusetts, New York, Rhode Island, Pennsylvania, and South Carolina had all eliminated their state property taxes.[53] Direct taxation—including property, poll, and income taxation—had all but disappeared.[54] In its place, the main sources of state revenue became sales of public lands, returns on private investments, and proceeds from issuing bank charters.[55] The economic historian John Joseph Wallis has termed this the era of "taxless finance."[56] Reminiscent of modern loan guarantees, under taxless finance, taxpayers took a loss on such a project as a canal, a road, or a bank only if it failed.[57] And evidently, policymakers everywhere convinced themselves that failure was impossible. As a delegate to the Maryland Reform Convention reflected two decades later, "Every man dreamed he was about to reach a new *El Dorado*. Taxation was to exist no longer—public debt was to become an obsolete idea."[58]

State debt did not become an obsolete idea. In fact, it grew substantially. At the beginning of the 1820s, most states had little or no debt.[59] But between 1836 and 1839, the states incurred more debt than they had in their entire previous history.[60] Between 1810 and 1840, state debt per

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52 Wallis, "American Government Finance," 67.
53 Wallis, 67.
54 Rodden, *Hamilton's Paradox*, 57.
55 Rodden, 57.
56 John Joseph Wallis, "Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852," *Journal of Economic History* 65, no. 1 (2005): 213.
57 Wallis, "Constitutions, Corporations, and Corruption," 213.
58 Quoted in Carter Goodrich, "The Revulsion against Internal Improvements," *Journal of Economic History* 10, no. 2 (1950): 153.
59 Rodden, *Hamilton's Paradox*, 57.
60 Rodden, 58.

capita rose 144 percent.[61] Since the federal government paid off its debts entirely in 1835 (a feat that would never again be repeated) and thus stopped issuing bonds, foreign investors eagerly snatched up state bonds, not always recognizing the distinction between the federal and state governments.[62] By the late 1830s, state debt had soared to eight times all federal and local debts combined.[63] In 1830, Arkansas, Florida, Illinois, Indiana, Michigan, and Mississippi had no debt at all. But a decade later, their combined general obligation debt was more than $44 million (in current dollars).[64] As collateral against these debts, the states relied on the safety net provided by the federal government's implied support and the option of resuming property tax collection.[65]

Because these ventures permitted private actors to gamble with public money—in other words, they privatized gains and socialized losses—there was a strong incentive to pursue risky projects. As the Rutgers University law professor David Pinsky has put it,

> There was practically no public control over the planning of the railroad project[s] or over the actual expenditures of publicly contributed funds. These functions were completely delegated to private corporate officials. To phrase it more dramatically, but no less accurately, there was a total abdication of public responsibility. Not infrequently, railroad planning was so speculatively conceived and incompetently executed that the proposed line was never completed. Waste and dishonesty in the expenditure of funds led to corporate insolvency and abandonment of routes.[66]

The unsustainable nature of these public investments in private ventures was laid bare by the panic of 1837 and the significant recession that lasted from 1839 to 1843.[67] As the economy contracted, infrastructure projects across the country—marked, as Richard Briffault has put it,

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[61] Wallis, "American Government Finance," 61, 65.
[62] Horace Secrist, "An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," *Bulletin of the University of Wisconsin, Economics and Political Science Series* 8, no. 1 (1914): 17.
[63] Wallis, "American Government Finance," 62.
[64] Dale F. Rubin, "Constitutional Aid Limitation Provisions and the Public Purpose Doctrine," *Saint Louis University Public Law Review* 12 (1993): 156.
[65] The federal government had bailed out state Revolutionary War debts in 1790 and again repaid some state debts following the War of 1812. Then, in 1836, Congress agreed to pay $1.5 million in debts incurred by the District of Columbia. Many believe that these actions caused creditors to assume that the federal government would always bail out state governments. Rodden, *Hamilton's Paradox*, 55–60; Thomas J. Sargent, "Nobel Lecture: United States Then, Europe Now," *Journal of Political Economy* 120, no. 1 (February 2012): 15.
[66] Pinsky, "State Constitutional Limitations," 280.
[67] Rodden, *Hamilton's Paradox*, 58.

“by waste, overbuilding, and mismanagement”—failed to generate expected revenues.[68] By 1842, eight states and one territory had defaulted.[69] Four states—Arkansas, Florida, Michigan, and Mississippi—repudiated nearly $14 million in debt.[70] Out of these circumstances, the first wave of state constitutional anti-aid provisions was born.

C. First Wave of Anti-Aid Clauses: Restraining the States

As state fiscal positions eroded, support for federal assumption of state debts grew, especially among politicians representing the most heavily indebted states. The appropriately named William Cost Johnson, a representative from Maryland, headed a committee that ultimately recommended federal assumption of the state debts.[71] First and foremost, the committee argued, a bailout was justified by the precedents set in the federal bailouts following the Revolutionary War, the War of 1812, and the bailout of the District of Columbia in 1836.[72] The committee’s proposal, however, was met with stiff resistance, especially among representatives from the handful of states that had not incurred massive debts. Ultimately, the assumption proposal was tabled.

Unable to shift their debts onto federal taxpayers, states were left to clean up their own messes. And one important consequence was that citizens and local leaders mobilized to prevent future messes. One approach, spearheaded by Rhode Island in 1842, was to adopt a

[68] Briffault, “Disfavored Constitution,” 911.
[69] The defaulting states were Arkansas, Illinois, Indiana, Louisiana, Maryland, Michigan, Mississippi, Pennsylvania, and the territory of Florida. Rodden, *Hamilton’s Paradox*, 59.
[70] Benjamin Ulysses Ratchford, *American State Debts* (Durham, NC: Duke University Press, 1941), 114. As Joshua Bates, the umpire of the Anglo-American claims convention of 1853, put it, “It is to be hoped that sooner or later the people of Florida will discover that honesty is the best policy; and that no State can be called respectable that does not honorably fulfill its engagements” (111).
[71] Rodden, *Hamilton’s Paradox*, 60.
[72] Rodden, 60.

constitutional amendment limiting debt accumulation.[73] By 1857, almost every state in the union had such a provision.[74] Another approach was to limit internal improvements.[75]

Since the state debt crisis was brought on by government-granted privileges to private companies, a number of these reforms specifically targeted such privileges. Many states, for example, adopted general incorporation clauses. These forbade the special incorporation of individual firms by government charters, which often entailed privileges and incentives.[76] Others sought to curb corruption by forbidding bank employees to serve in the legislature.[77] Several states adopted antimonopoly clauses, forbidding government-created monopolies.[78] And some adopted equality guarantees, which eliminated grants of special privilege.[79] All of these reforms were meant to realize the aspirations for impartial government that were already a part of 18th-century state constitutions.[80] Pennsylvania's 1776 constitution, for example, had already asserted that "government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men."[81]

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[73] Rubin, "Constitutional Aid Limitation Provisions," 156.
[74] Secrist, "Economic Analysis," 54.
[75] These provisions are beyond the scope of this article. For those interested, see Pinsky, "State Constitutional Limitations," 281; Goodrich, "Revulsion against Internal Improvements."
[76] Tarr, *Understanding State Constitutions*, 112.
[77] See the Virginia Constitution of 1851, for example. Tarr, 112.
[78] Tarr, 111; Steven G. Calabresi and Larissa C. Leibowitz, "Monopolies and the Constitution: A History of Crony Capitalism," *Harvard Journal of Law and Public Policy* 36, no. 3 (June 22, 2013): 1067.
[79] Tarr, *Understanding State Constitutions*, 111; Robert F. Williams, "Equality Guarantees in State Constitutional Law (Symposium: The Emergence of State Constitutional Law)," *Texas Law Review* 62, no. 6 & 7 (March/April 1985): 1195.
[80] Tarr, *Understanding State Constitutions*, 111.
[81] Pennsylvania Constitution of 1776, Declaration of Rights, art. 5, 1776.

A particularly important strategy—the focus of this study—was to adopt constitutional limitations on public aid to private entities.[82] As the law professor Dale Rubin has put it, "The impetus for the adoption of both state and local constitutional aid limitation provisions was the untrammeled and indiscriminate borrowing by governmental entities and the ruthless profiteering by private corporations and individuals."[83]

Moreover, the aim of public aid limitations was, as one delegate to the Ohio conventions of 1850 and 1851 put it, "to see the State Government brought back to its simple and appropriate functions, [leaving] railroad, canal, turnpike and other corporate associations, to get along on their own credit, without any connection or partnership with the State whatever."[84] And as Josiah Scott of the Ohio Supreme Court put it, these provisions aimed to prohibit the union of public and private capital: "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."[85]

Despite their early adoption by a few states in the 1840s, it took more than a decade for a majority of states to adopt anti-aid provisions.[86] These provisions generally took three forms. The most common was a *credit clause*. It forbade the government to loan its credit to a private individual, association, or corporation. A variant of this clause first appeared in the Rhode Island Constitution of 1842, requiring electoral approval for such deals. Shortly thereafter, New Jersey (1844) and New York (1846) adopted their own credit clauses, but these forbade the lending of

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[82] These approaches were not mutually exclusive. Rhode Island's debt clause read, "The general assembly shall have no power hereafter, without the express consent of the people, to incur state debt to an amount exceeding 50,000 dollars, except in time of war, or in case of insurrection; Nor shall they in any case, without such consent, pledge the faith of the state for the payment of the obligations of others." Rhode Island Constitution of 1842, art. 4, sec. 13, 1842.

[83] Rubin, "Constitutional Aid Limitation Provisions," 156.

[84] Quoted in Kermit L. Hall and Peter Karsten, *The Magic Mirror: Law in American History*, 2nd ed. (New York: Oxford University Press, 2008), 103–4.

[85] Josiah Scott, Walker v. City of Cincinnati, 21 Ohio St. 14 (1871).

[86] Rubin, "Constitutional Aid Limitation Provisions," 144n5.

credit with or without electoral approval.[87] The second type of anti-aid provision was a *stock clause*, which forbade the government from becoming a stockholder in any corporation. This was pioneered by Iowa in 1846.[88] The final provision was a *gift clause*, which forbade the government from granting loans or donations to any individual, association, or corporation. This provision first appeared in Pennsylvania's 1873 constitution.[89]

The spread of anti-aid provisions was by no means uniform. Some states adopted just one provision, some two, and others all three. Moreover, especially in their earliest iterations, public anti-aid provisions did not necessarily apply to substate governments, such as counties, cities, or school districts.[90] Despite these variations, however, by 1900 some form of public aid limitation had been adopted by a large majority of states.[91] Even those that had withstood the panic of 1837 without defaulting adopted these provisions to avoid the fate of their neighbors.[92]

The case for anti-aid provisions was both moral and practical. During the 1850 and 1851 debates at Indiana's constitutional convention, Representative A. F. Morrison offered both types of arguments. On moral grounds, he asserted, "There is no justice in the principle that the property or the money of the people should be taken to make profits for corporations." And on the practical side, he articulated the public choice concerns as well as any modern economist might. Publicly supported internal improvements, he said, were "a system of oppression inflicted by the representatives of the people . . . by means of a regular system of log rolling. . . . It is well known how these schemes are got along in the Legislature. Corporations are always well

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[87] Pinsky, "State Constitutional Limitations," 278n70.
[88] Pinsky, 278n71.
[89] Pinsky, 279n77.
[90] Pinsky, "State Constitutional Limitations," 280.
[91] Pinsky, 280.
[92] Tarr, *Understanding State Constitutions*, 112.

represented there, and the people have no knowledge of what is going on until they are entrapped by them."[93]

In the decades following the advent of these anti-aid provisions, state aid to private corporations did not end altogether, but it was sharply curtailed.[94] As Wallis has put it, "The tide of events had turned against state activity."[95] Following the adoption of these provisions, there was a dramatic change in state and local fiscal policy; states reduced their reliance on debt finance, and more activity shifted from state to local governments.[96] In 1841, the states' share of all government debt was 86.4 percent, but by 1902, it was 7.0 percent.[97]

D. Second Wave: Restraining Localities

The first wave of anti-aid provisions did not always apply to localities.[98] Consequently, as states curtailed their direct support of private interests, localities ramped it up. In many cases local governments began to take on the sorts of risks that states had once assumed. Sometimes states abetted this local circumvention of anti-aid provisions. The constitutional scholar Alan Tarr writes, "From 1866 to 1873, legislatures approved over eight hundred proposals to grant local aid to railroad companies. New York, Illinois, and Missouri together authorized over $70 million worth of aid."[99]

As with the state aid that had preceded it, much of this local aid was financed through government borrowing or government guarantees of private debt. Thus, as the states' share of all government debt was declining, localities' share rose, going from 11.4 percent in 1841 to

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[93] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana, 1850–1851* (Indianapolis: A. H. Brown, 1850), 651–52.
[94] Wallis, "American Government Finance," 70.
[95] Wallis, 70.
[96] Wallis, 66–70.
[97] Wallis, 66.
[98] Houpt, "Shopping for State Constitutions," 381; Pinsky, "State Constitutional Limitations," 278–80.
[99] Tarr, *Understanding State Constitutions*, 114.

57.1 percent in 1902.[100] Similarly, while local government revenue per capita had been about 40 percent greater than state revenue per capita in 1840, by 1902 it was 260 percent greater.[101]

As before, the precarious fiscal position of governments—this time, local governments—was laid bare by a national economic contraction. As the panic of 1873 gave way to a deep and lasting economic depression, property values plummeted, and railroads began to default on their debts. By 1874, about 25 percent of all railroad bonds were in default.[102] Next, the municipalities that had guaranteed many of these debts began to default on their own obligations en masse. It is estimated that roughly 20 percent of all municipal debt obligations were defaulted on in the 1870s.[103]

These defaults prompted a second wave of constitutional reforms, this one extending anti-aid provisions to local governments.[104] While a few states (Indiana in 1851, Nevada in 1864, Georgia in 1868, and Illinois in 1870) had already extended their anti-aid provisions to localities, the municipal debt crisis of the 1870s prompted more than a dozen more states to do so over the course of the next decade and a half.[105]

As Colorado acquired statehood in the midst of this economic crisis, its 1876 constitution and its convention are worth noting.[106] In their Address to the People, the delegates there asserted that no other issue had caused "more anxiety and concern than the troublesome and

[100] Wallis, "American Government Finance," 66.
[101] Wallis, 70.
[102] John A. Dove, "Financial Markets, Fiscal Constraints, and Municipal Debt: Lessons and Evidence from the Panic of 1873," *Journal of Institutional Economics* 10, no. 1 (2014): 76.
[103] C. H. Chatters, *Municipal Debt Defaults: Their Prevention and Adjustment* (Chicago: Public Administration Service, 1933); A. M. Hillhouse, *Municipal Bonds: A Century of Experience* (New York: Prentice-Hall, 1936); Dove, "Financial Markets, Fiscal Constraints."
[104] Tarr, *Understanding State Constitutions*, 114; Briffault, "Disfavored Constitution," 912.
[105] Credit and stock clauses were applied to local governments by Arkansas, New York, and Pennsylvania in 1874; Alabama, Florida, and Missouri in 1875; Colorado and Texas in 1876; Connecticut and New Hampshire in 1877; Maine in 1878; California in 1879; and Montana and Washington in 1889. Dove, "Financial Markets, Fiscal Constraints," 77.
[106] See, generally, Dale A. Oesterle, "Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies," *University of Colorado Law Review* 73, no. 2 (2002): 587–617.

vexed question pertaining to corporations."[107] On the one hand, the territory had little internal capital or infrastructure, and the delegates were eager to encourage economic development. On the other hand, they were acutely aware of the corruption and fiscal ruin that had plagued those states that encouraged development through subsidies. They were also aware that several of their own territorial cities had grown insolvent through bad deals with railroads.[108] Writing in the Address to the People, the delegates worried that "the Legislatures of other States have, in most cases, been found unequal to the task of preventing abuses and protecting the people from the grasping and monopolizing tendencies of railroads and other corporations."[109]

The delegates considered a number of proposals to directly rein in corporations. For example, they considered granting the general assembly the authority to set railroad rates, to abolish limited liability, to regulate banking, to require annual reporting, and to require the publication of shareholder lists.[110] Each of these proposals was rejected. Dale Oesterle, a professor at the University of Colorado School of Law, writes, "Instead of a long list of specific regulations and minute requirements, the delegates decided they could encourage businesses to locate in the state by offering those businesses what was at the time substantial organizational and operating freedom. To nullify the incentives for bribery and corruption of the state legislature, the delegates relied on restrictions on the state legislature itself."[111]

As the delegates asserted in their address, "Experience has shown that positive restrictions on the powers of the Legislature in relation to these matters are necessary."[112] With that, they adopted credit and stock clauses and extended these provisions to local

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[107] Timothy O'Connor, "The Address to the People Issued by the Convention," in *Proceedings of the Constitutional Convention Held in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado* (Denver: Colorado Secretary of State, 1907), 728.
[108] Oesterle, "Lessons on the Limits," 594.
[109] O'Connor, "Address to the People," 728.
[110] Oesterle, "Lessons on the Limits," 594–95.
[111] Oesterle, 595.
[112] O'Connor, "Address to the People," 728.

governments.[113] Various other provisions of the constitution strengthened these provisions. Laws, for example, had to be general in their application and could not target specific groups for special treatment.[114] In support of these safeguards, the delegates wrote, "The evils of local and special legislation being enormous, the passage of any law not general in its provisions is prohibited—thus saving the State from expenses usually incurred in passing and publishing laws secured by combinations to advance private interests and to create dangerous monopolies."[115]

The second wave of anti-aid provisions was more successful than the first wave, adopted after state defaults in the early 1840s. With the municipal fiscal crisis fresh in mind and with the framers' intentions abundantly clear, courts were active over the next half century in policing governments that overstepped the bounds established by anti-aid clauses, certainly more active than they would come to be as the 20th century wore on. Importantly, early courts understood that the framers of these provisions intended them to limit public aid to private interests regardless of the aid's purpose.[116]

Colorado provides an illustrative example. The first case to consider that state's anti-aid provision was *Colorado Central R.R. v. Lea* in 1879.[117] There, the court—three members of which were delegates to the Colorado Constitutional Convention—was asked to decide whether

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[113] Oesterle, "Lessons on the Limits," 595n47.
[114] Oesterle, 591n23.
[115] O'Connor, "Address to the People," 725.
[116] See, for example, Adams v. Jackson Elec. Ry., Light & Power Co., 30 So. 58, 59 (Miss. 1901) (invalidating expenditure with no discussion of public purpose); State ex rel. Bd. of Control of St. Louis Sch. & Museum of Fine Arts v. City of St. Louis, 115 S.W. 534, 548 (Mo. 1908) (invalidating expenditure despite claim of public purpose and discussing history of provisions); Wyscaver v. Adkins, 37 Ohio St. 80 (1881) (striking down a statute authorizing a township to raise $20,000 to make a private railway and finding that the state's anti-aid clause "forbids the union of public and private capital or credit in any enterprise whatever"); Counterman v. Dublin Township, 38 Ohio St. 515 (1882); Taylor v. Comm'rs of Ross County, 23 Ohio St. 22 (1872); Pleasant Township v. Aetna Life Ins. Co., 138 U.S. 67, 11 S. Ct. 215, 34 U.S. (L. ed.) 864 (1891); Alter v. Cincinnati, 56 Ohio St. 47 (1897); State v. City of St. Louis, 115 S.W. 534 (1908) (invalidating a statute that permitted St. Louis to levy a tax that benefited a private corporation, the St. Louis School and Museum of Fine Arts); Garland v. Board of Revenue of Montgomery County, 6 So. 402 (1889) (invalidating a municipal proposal to build a bridge for a railroad); Mayor of Jersey City v. North Jersey St. Ry. Co., 73 A. 609 (1909) (holding that failure to collect licensing fee from railroad for 30 years was a violation of the state's anti-aid clause).
[117] Colorado Central R.R. v. Lea, 5 Colo. 192 (1879).

Boulder County commissioners violated the state's anti-aid clause when they called an election asking voters to subscribe $200,000 to the capital stock of the Colorado Central Railroad. The county maintained that this was permitted since it believed the subscription to be in the public's interest. In ruling the county's actions invalid, the court asserted, "If the existence of a public benefit is to give such an agreement the character of a sale of the stock and take it out of the constitutional provision, then the prohibition is utterly nugatory and valueless; as such consideration would exist in every probable case."[118] The court further asserted that the intention of the anti-aid provision was clear:

> It 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*. I understand the framers of the Constitution and the people who adopted it, to have intended by this provision the declaration of *a broad policy of prohibition*, forbidding State, county and municipal aid to railroad *and other companies* in any of the modes specified.[119]

As we showed in section II, targeted economic development incentives are generally not, in fact, in the public interest. Nevertheless, the policymakers that craft these policies are almost universally under the impression that they are.

Courts were, however, by no means universally rigorous in policing state and local violations of anti-aid provisions.[120] Over time, legislatures devised ways to circumvent these rules while courts invented new doctrines that have in many places vitiated these provisions. Nevertheless, the case history of this period shows that—for a time—in geographically and

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[118] *Colorado Central R. R.*, 5 Colo. 192.
[119] *Colorado Central R. R.*, 5 Colo. 192, 196 (emphasis added). See also Lord v. City & County of Denver, 58 Colo. 1, 16 (1914) ("Indeed, it would seem that language could not make plainer the intent of the framers of the [Colorado] Constitution to utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever.").
[120] Rubin, "Constitutional Aid Limitation Provisions," 161.

politically diverse regions of the country, courts were willing to stop the elected branches when they transgressed constitutional anti-aid provisions.[121]

What was the result? While it is impossible to determine a causal relationship or to disentangle the effects of these provisions from those of other reforms adopted at this time, the adoption of anti-aid provisions did coincide with improved policy. First, the financial footing of government grew stronger. Figure 1 shows state, local, and combined state and local debt as a share of national income from 1838 through 1913. Immediately following the first wave of reforms, state debts as a share of national income began to fall. Given the local loophole, however, local debt as a share of income rose. Following the second wave of reforms, local debt as a share of GDP also began to fall and then leveled off. By the end of the 19th century, combined state and local debt stood as a smaller share of national income than at any previous point since the crisis of the early 1840s. Second, as their fiscal positions improved, municipalities found themselves facing lower borrowing costs. The economist John Dove analyzed the prices of bonds issued by dozens of US cities in the latter decades of the 19th century.[122] He found that among those cities that had defaulted in the crisis of the 1870s, those that subsequently adopted either a credit or a stock clause faced borrowing costs that were between 170 and 249 basis points lower.[123] Finally, as state and local governments curtailed their use of targeted economic development subsidies, the US economy entered a period of prolonged and robust economic expansion.[124]

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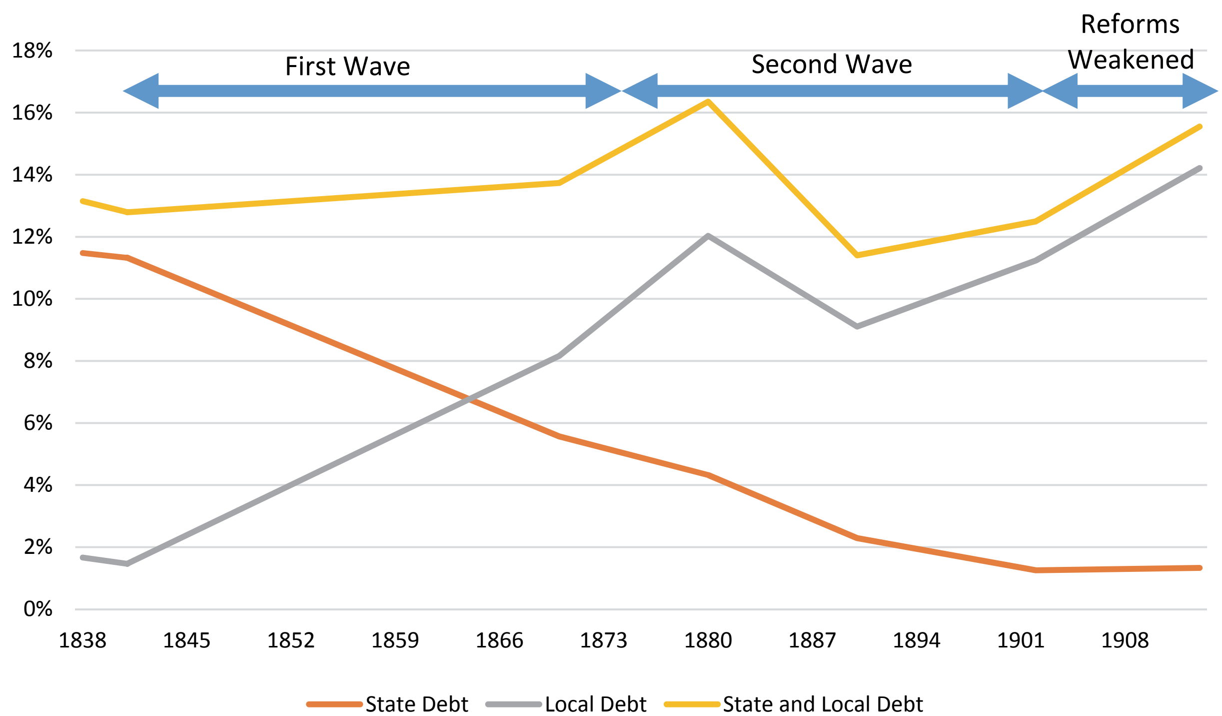
[121] Rubin, 161.
[122] Dove, “Financial Markets, Fiscal Constraints.”
[123] His analysis is based on an ordinary least squares (OLS) regression that includes a large set of control variables that account for other socioeconomic factors that might affect borrowing costs. Dove, 92.
[124] Christina D. Romer, “Is the Stabilization of the Postwar Economy a Figment of the Data?,” *American Economic Review* 76, no. 3 (1986): 314–34.

Figure 1. Government Debt as a Share of National Income



Sources: Debt figures are reported in John Joseph Wallis, "American Government Finance in the Long Run: 1790 to 1990," *Journal of Economic Perspectives* 14, no. 1 (2000). National income figures are from US Department of Commerce, Bureau of the Census, *Historical Statistics of the United States 1789–1945: A Supplement to the Statistical Abstract of the United States*, Washington, DC, June 1949, 14. National income figures are not available for every year, and some data are interpolated.

In the next section we will discuss the ways in which these clauses have been weakened, distorted, or ignored. Even so, empirical research suggests that these laws continue to affect the size and scope of subsidies and have a positive effect on state economies. Well into the latter half of the 20th century, for example, researchers were finding that these constitutional prohibitions were having an influence on the types of incentives offered by governments, making gifts of land and money the least-used varieties of subsidy.[125] More recently, the economist Carlianne Patrick

[125] John C. Gray and Dean A. Spina, "State and Local Industrial Location Incentives—a Well-Stocked Candy Store," *Journal of Corporate Law* 5 (1980): 528.

has developed an index measuring the strength of constitutional aid limits.[126] She finds that those places with weaker limits—and therefore more subsidies to private businesses—experience significantly lower levels of rural employment in the medium term. In subsequent work, she has found that states with weaker anti-aid provisions tend to subsidize capital, causing firms to substitute such capital as computers and robots for labor. She finds that this decreases employment density and causes an employment shift from labor-intensive to capital-intensive industries.[127]

E. The Weakening of Anti-Aid Provisions

Courts have weakened constitutional anti-aid provisions over the past century.[128] They did so, in large measure, by turning the judicially created Public Purpose Doctrine on its head. The doctrine dates back to an 1853 case called *Sharpless v. Mayor of Philadelphia*,[129] which was decided two decades before an anti-aid provision restricting municipalities' abilities to offer subsidies was added to the Pennsylvania Constitution.[130] In the 1840s and 1850s, the Pennsylvania legislature had authorized the city of Philadelphia to use borrowed money to buy

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[126] Carlianne Patrick, "Does Increasing Available Non-Tax Economic Development Incentives Result in More Jobs?," *National Tax Journal* 67, no. 2 (June 2014): 351–86.
[127] Carlianne Patrick, "Jobless Capital? The Role of Capital Subsidies" (working paper, W. E. Upjohn Institute for Employment Research, Kalamazoo, MI, January 1, 2015).
[128] State legislatures have also done much to circumvent constitutional restrictions and provide public resources for private purposes. Though it is beyond the scope of the current analysis, state legislatures frequently circumvent anti-aid clauses through the creation of revenue bonds, moral obligation bonds, and special districts. Governments typically issue revenue bonds to finance the purchase of property that they then lease to private firms. Unlike a general obligation bond, a revenue bond is not backed by government credit or taxing authority; the bond is only secured by the property and by the rental payments from the firm, sparing taxpayers the risk and making it similar in function to a private bond. Because of this, these bonds have not been found to run afoul of state credit clauses. Federal taxpayers do bear a cost, however, because the interest on revenue bonds is exempt from federal income taxation. Moreover, many states exempt the projects financed through these bonds from state and local property taxes because they deem the property to be owned by the public and not by the private entity that occupies it. See Rubin, "Constitutional Aid Limitation Provisions," 161; Gray and Spina, "State and Local," 533–37.
[129] Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853).
[130] Dove, "Financial Markets, Fiscal Constraints," 77.

shares in two private railroads.[131] A Philadelphia taxpayer named William P. Sharpless brought suit claiming that the state had no authority to use the public taxing power to support a private interest.

At least in principle, the Pennsylvania Supreme Court agreed. The court asserted, "It is said that this is a taking of *private* property for *private* use. If this be so, it is palpably unconstitutional." Though the constitution had no "express inhibition" against such legislation, the court concluded that the assembly had no authority "to take one man's property and give it to another."[132] Thus was born the Public Purpose Doctrine: the state may only tax to fund projects that are in the public interest; projects that benefit private interests are forbidden. In 1874, the US Supreme Court issued its first ruling regarding the Public Purpose Doctrine, finding that state legislatures may confer to municipalities the right to levy taxes, but only if those taxes serve a public purpose.[133] By 1917, the Court had incorporated the doctrine into the 14th Amendment.[134]

On its face, the Public Purpose Doctrine would seem to complement state constitutional anti-aid provisions. Like these provisions, it prohibits the expenditure of public resources in service of private interests. In practice, however, it has come to thwart anti-aid provisions for two reasons. First, from the beginning, courts have shown an extraordinary tendency to construe "public purpose" in as broad a light as possible. Even in *Sharpless* itself, the court did *not* side with the taxpayer. Instead, the court concluded that, even though the railroad was private, the railroad subsidy nevertheless served a public purpose: "It cannot be denied that a railroad company is a private corporation. But the right to tax depends on the ultimate use, purpose, and

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[131] Howard Gillman, Mark A. Graber, and Keith E. Whittington, *American Constitutionalism*, vol. 1, *Structures of Government, Supplementary Material* (New York: Oxford University Press, 2013), 1.
[132] *Sharpless*, 21 Pa. at 167.
[133] Loan Association v. Topeka, 87 U.S. (20 Wall.) (1874).
[134] Jones v. City of Portland, 245 U.S. 217 (1917).

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."[135]

In other words, the court concluded that the government could buy shares in a private corporation so long as the goal was to serve a public purpose. Second, decades later, courts would come to see the Public Purpose Doctrine as an *exception* to anti-aid provisions rather than as a *complement* to them. In the 1918 case of *Georgia v. Cincinnati Southern Railway*, for example, the US Supreme Court held that Georgia could grant a right-of-way to a railroad despite the state constitution's bar against "any donation or gratuity in favor of any person, corporation or association."[136] As the Court put it, "A conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the constitution intended to prevent."[137] Similar conclusions were reached in a number of state court decisions.[138]

In all of these cases, courts found that the judicially created Public Purpose Doctrine was an exception to the rules stated in constitutional anti-aid provisions.[139] They saw the Public Purpose Doctrine as a justification to provide public aid to private enterprise so long as the expenditure served some public or quasi-public purpose. This interpretation is at odds with the doctrine's initial articulation as a *restraint* on government expenditures, requiring all public projects to serve purely public purposes. It is also at odds with the plain language of anti-aid provisions, which forbid government aid to private firms or individuals regardless of the aid's purpose.

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[135] *Sharpless*, 21 Pa. at 169.
[136] Georgia v. Cincinnati Southern Railway, 248 U.S. 26 (1874).
[137] *Cincinnati Southern Railway*, 248 U.S. at 30.
[138] City of Oakland v. Garrison, 228 P. 433 (Cal. 1924); Alameda County v. Janssen, 106 P.2d 11 (Cal. 1940); Brazoria County v. Perry, 537 S.W.2d 89 (Tex. 1976); City of Charlottesville v. Dehaan, 323 S.E.2d 131 (Va. 1984); Hayes v. State Property and Buildings Comm'n, 731 S.W.2d 797 (Ky. 1987); City of Aurora v. Public Utilities Comm'n, 785 P.2d 1280 (Colo. 1990).
[139] For a fuller discussion, see Rubin, "Constitutional Aid Limitation Provisions."

Another problem with this interpretation is that the Public Purpose Doctrine was first adumbrated in *Sharpless* in 1853, decades before most states adopted their constitutional anti-aid provisions. As Rubin puts it, "Since most of the aid limitation provisions were adopted *after* the Public Purpose Doctrine was judicially enunciated, the courts could not have conceived the doctrine either as an exception or as a doctrine devised to preempt such limitations."[140]

In the landmark *Munn* decision of 1876, the US Supreme Court held that the government could regulate economic arrangements that were "affected with a public interest."[141] Following this decision, state constitutions written in the decades that followed, and legislation enacted during this period, began using "public interest" phraseology.[142]

Government involvement with and regulation of private enterprise increased dramatically during the crisis of the Great Depression. Economists, legal theorists, and policymakers challenged long-held beliefs about the proper role of government in the private economy.[143] This sea change was supported by several US Supreme Court cases during the New Deal era. For example, in *Nebbia v. People of New York*, the Court upheld price-fixing for milk and articulated for the first time the "rational basis" test, which provides extraordinary deference to government involvement in private economic activity.[144] These decisions illustrate the changing dynamic between the state and the private market, and they provided judicial blessing for government decision-making involving private enterprise.

Aware that courts saw the Public Purpose Doctrine as an exception to anti-aid provisions, state legislatures were careful to include the words "public purpose" in their subsidy legislation.

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[140] Rubin, "Constitutional Aid Limitation Provisions," 166 (emphasis in original).
[141] Munn v. People of State of Illinois, 94 U.S. 113, 126, 24 L. Ed. 77 (1876).
[142] Timothy Sandefur, "A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of 'Public Use,'" *Southwestern University Law Review* 32 (2003): 648–51.
[143] Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, 25th anniv. ed. (Oakland, CA: Independent Institute, 1987); Price Fishback, *Government and the American Economy: A New History* (Chicago: University Of Chicago Press, 2007).
[144] 291 U.S. 502, 525; 54 S. Ct. 505, 511; 78 L. Ed. 940 (1934).

This practice dates back to Mississippi's famous 1936 Balance Agriculture with Industry (BAWI) program, which is widely considered to mark the beginning of the modern era of targeted economic development subsidies. The BAWI program permitted local governments to hold bond elections to purchase land, build factories, and rent these facilities to private manufacturers at low cost.[145] In the preamble to the act, legislators wrote that the "general welfare of its citizens demand, as a public purpose, the development within Mississippi of industrial and manufacturing enterprises."[146] As the economist James Bennet has put it, "By invoking those magic words, those constitutional talismans *general welfare* and *public purpose*, this act, which plainly violated the state charter of the Magnolia State, became kosher."[147] When the BAWI program came before the Mississippi Supreme Court, a majority of justices found it did not violate the state's anti-aid provision, because "in all its parts it contemplates that the proposed industry shall be operated for the accomplishment of the purposes outlined therein."[148] In his blistering dissent, Justice Anderson said the decision "drove a steam shovel through our constitution."[149] The US Supreme Court dismissed an appeal of the case and thus, in the words of two scholars, "closed the door on federal court review of the basic principles underlying industrial development bond financing."[150]

The evolution of anti-aid provisions in many states progressed from strict enforcement of the provisions after they were first adopted to subsequent approval of subsidies for low-income housing (or "slum clearance") programs and other support for the poor, then to approval of

[145] Peter K. Eisinger, *Rise of the Entrepreneurial State*, La Follette Public Policy Series: State and Local Economic Development Policy in the United States (Madison: University of Wisconsin Press, 1989); Bennett, *Corporate Welfare*, 80.
[146] Quoted in James C. Cobb, *The Selling of the South: The Southern Crusade for Industrial Development, 1936–1980* (Baton Rouge: Louisiana State University Press, 1982), 14.
[147] Bennett, *Corporate Welfare*, 83.
[148] Albritton v. City of Winona, 178 So. 799 (Miss. 1938).
[149] 178 So. at 812 (Anderson, J., dissenting).
[150] Gray and Spina, "State and Local," 538.

industrial manufacturing projects, and finally to approval of all manner of economic development schemes.[151]

In time, courts came to take what Richard Briffault has described as "a posture of extreme deference to state legislatures, finding that a broad range of goals fall under the rubric of public purpose, and that legislative determinations that a spending, loan, or tax incentive program will promote the public purpose are to be accepted as long as they are 'not . . . irrational.'"[152]

In so doing, they forgot or ignored the initial aim of the provisions—namely, as the Arizona Supreme Court put it, "to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises."[153] The purpose of these provisions is no less relevant today, especially in the context of prolific public aid to private businesses for the so-called public purpose of economic development (despite the fact that the public is no better off for it).[154]

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[151] See, for example, Humphrey v. City of Phoenix, 55 Ariz. 374 (1940) (upholding revenue bonds to finance a slum clearance project); In re Constitutionality of ORS 456.720, 272 Or. 398 (1975) (same); Opinion to the Governor, 112 R.I. 151, 155–56 (1973) ("The elimination of overcrowded, unsanitary and dangerous dwelling accommodations and the assisting in making available decent, safe and sanitary housing for people whose income would make such an acquisition impossible unquestionably serves a public purpose."); Utah Hous. Fin. Agency v. Smart, 561 P.2d 1052, 1054 (Utah 1977) ("It cannot be said that the finding of the legislature that a public purpose is served by increasing the availability of financing for construction, purchase, and rehabilitation of low and moderate income housing, is incorrect or unreasonable on its face."); Suber v. Alaska State Bond Comm., 414 P.2d 546, 552 (Alaska 1966) (public purpose for relief and support of the poor); Wright v. City of Palmer, 468 P.2d 326, 330–31 (Alaska 1985) (public purpose for improvement program to encourage industrial development); Carruthers v. Port of Astoria, 249 Or. 329, 336 (1968) (listing several cases in which revenue bonds for industrial development were upheld as a public purpose); Maready v. City of Winston-Salem, 342 N.C. 708, 725 (1996) (listing 46 states that have upheld economic development as a public purpose).
[152] Briffault, "Disfavored Constitution," 914, quoting Delogu v. State, 720 A.2d 1153 (Me. 1998).
[153] Wistuber v. Paradise Valley Unified Sch. Dist., 141 Ariz. 346, 349 (1984). See also Bannon v. Port of Palm Beach District, 246 So. 2d 737, 741 (Fla. 1971) (to "protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited"); Idaho Falls Consolidated Hospitals v. Bingham County Board of Commissioners, 102 Idaho 838 (1982) (apparent that framers "were primarily concerned about private interests gaining advantage at the expense of the taxpayer"); Lawrence v. Schellstede, 348 P.2d 1078, 1081–82 (Okla. 1960) (to prevent the investment of public funds in private enterprises).
[154] See section II above.

Following the BAWI program and the courts' acceptance of it, other southern states initiated their own targeted economic development programs, and in the years following World War II, the practice became all but universal. Figure 2 shows the proliferation of such programs in the 1960s and 1970s. Even when courts did not defer to legislative judgments and did find subsidies unconstitutional, state legislators reacted by amending their constitutions in order to once again permit subsidies. For example, in 1987, Texas amended its constitution to read as follows: "Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state."[155] In some cases, courts appealed to such extraconstitutional considerations as interstate economic competition as a rationale for upholding subsidies.[156] As North Carolina's Justice Robert Orr stated in a 1996 dissent, the judicial philosophy in these cases seems to boil down to "everybody's doing it."[157]

Briffault reports, "By the end of the [20th] century virtually every state supreme court had upheld at least some economic development programs that involved direct assistance—including cash grants, low-interest loans, and tax breaks—to individual firms."[158] Nevertheless, there remains some variation in the strength of anti-aid provisions and in the extent to which they are honored. (It is because of this variation that economists have been able to estimate the effects of these provisions.) Moreover, recent legal developments suggest that some courts may be beginning to take these provisions seriously again.

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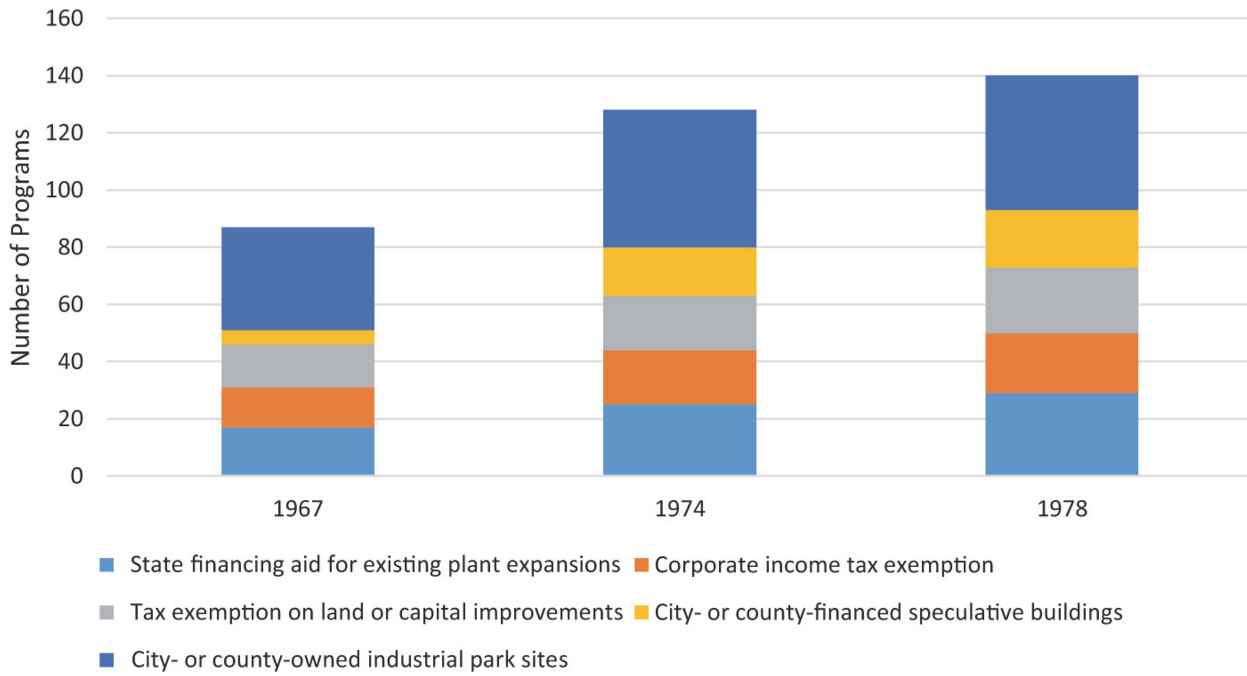
[155] Tex. Const. art. 3, sec. 52-a (1987).
[156] For a thorough discussion of this and citations, see Schaefer, *State Investment Attraction*.
[157] *Maready*, 342 N.C. at 739 (Orr, J., dissenting).
[158] Briffault, "Disfavored Constitution," 913.

Figure 2. Growth in the Number of States Offering Incentives



Source: "The Fifty Legislative Climates," an annual survey of the states published in the November–December issue of *Industrial Development* for the years 1967, 1974, and 1978, reprinted in H. McKinley Conway, *Legislative Climates for Economic Development* (Atlanta: Conway Publications, 1979), A-3 to A-5, A-99 to A-101, A-255 to A-257.

IV. The Current State of Anti-Aid Provisions

Currently 49 state constitutions place some type of limit on government use of public funds to promote private interests.[159] In 45 states, these measures take the form of traditional anti-aid provisions, or clauses, that prohibit public financing of private entities.[160]

A. Three Varieties of Anti-Aid Provisions

These anti-aid provisions take three forms: (1) loans and credit, or credit clauses; (2) stock subscriptions and joint ownership, or stock clauses; or (3) appropriations, donations, grants,

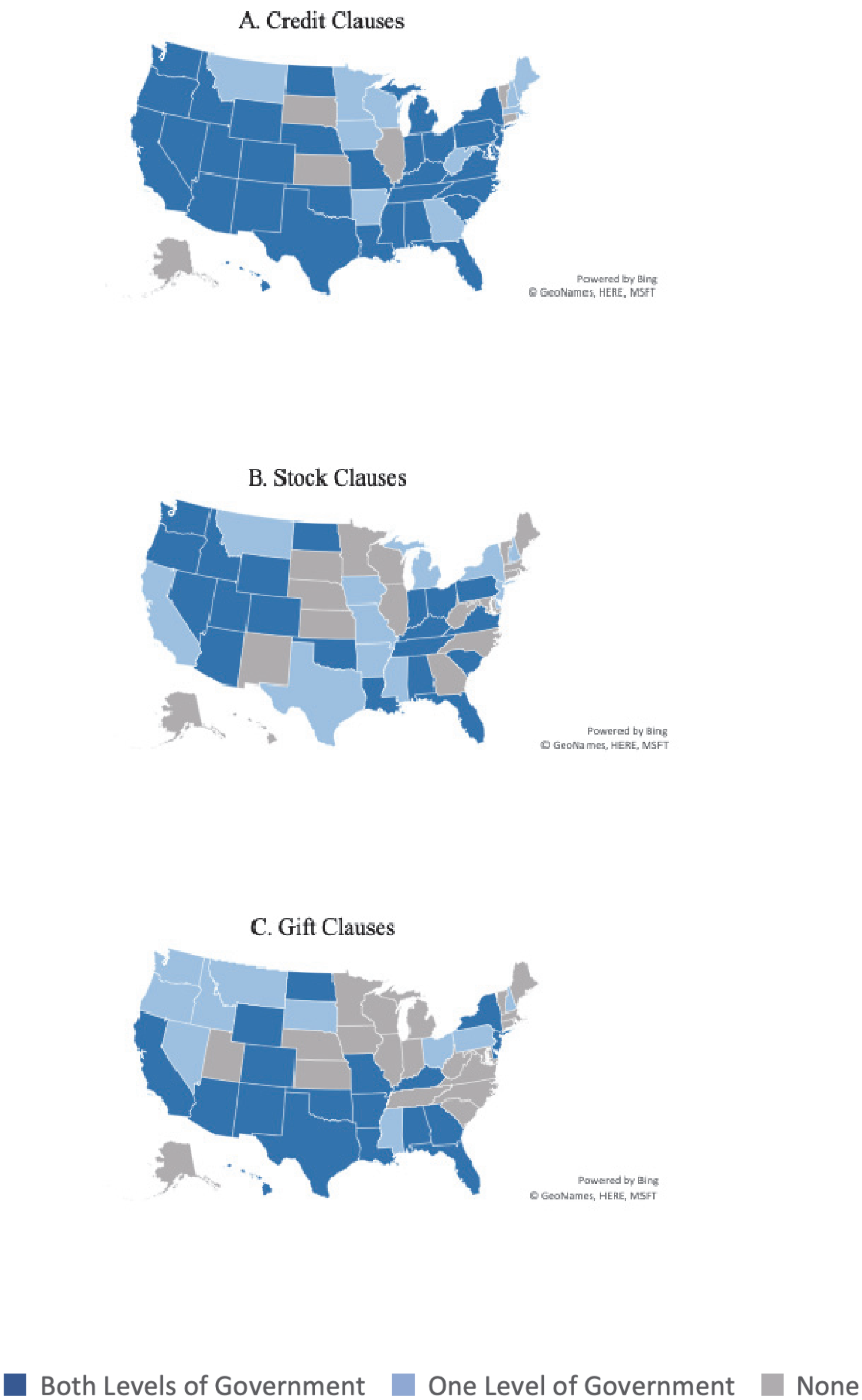
[159] Kansas is the only state that does not have a public aid limitation anywhere in its constitution.
[160] The exceptions are Alaska, Connecticut, Illinois, Kansas, and Vermont. South Dakota has a state credit clause, but it permits lending of credit with a supermajority of the legislature.

gifts, and subsidies, or gift clauses.[161] Figure 3 shows the present status. Currently 44 states have some variety of credit clause, prohibiting government bodies from lending money or credit for nonpublic uses; 32 states currently have a stock clause prohibiting stock subscription in and joint ownership of private ventures. And 29 states have a gift clause, generally prohibiting expenditures of public money for which the government body fails to receive anything valuable (i.e., consideration) in exchange, rendering the expenditure a mere gratuity.

Because individual anti-aid provisions are, as Pinsky puts it, a product of "specific evils which had manifested themselves" in the different states during the industrial expansion of the 19th century, some state constitutions forbid only one form of public aid, while others forbid two or all three.[162] Likewise, some anti-aid provisions apply to the state, others apply to political subdivisions of the state, and some provisions apply to both levels of government. In addition, some anti-aid limitations are contained within a single clause, while others are found in two or more separate clauses. For a list of states and their respective anti-aid provisions, see table A1 in the appendix.

[161] In his seminal law review article on the history of anti-aid provisions, David E. Pinsky uses the term "current appropriations" clause rather than "gift clause" to describe this category of anti-aid provisions. Pinsky, "State Constitutional Limitations," 265–327, 280. While Pinsky's term is more accurate because it encompasses states that prohibit "appropriating money" or "raising money" for private entities in addition to those that prohibit donations, grants, gifts, and subsidies, this paper uses the latter term.
[162] Pinsky, "State Constitutional Limitations," 280.

Figure 3. The Current State of Anti-Aid Provisions



Source: Authors' research. See appendix for details.

Nine state constitutions expressly prohibit both levels of government from aiding private entities in any of the three forms discussed above.[163] For example, Arizona's anti-aid provision says the following:

> Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the 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 shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.[164]

Arizona's anti-aid clause is textually stronger than provisions in most other states because it applies to both levels of government, prohibits all three forms of aid, and allows only two exceptions, both related to legitimate government functions.[165] Most of the other nine constitutions that apply to both levels of government and prohibit all three forms of aid also contain textual exceptions (e.g., Oklahoma and Wyoming permit support for economic development).[166]

In comparison, anti-aid provisions in 36 states also have various textual exceptions and either fail to address both levels of government or fail to limit all three forms of public aid. Other provisions contain few exceptions, apply to both levels of government, and prohibit more than one form of public aid. Logically, those that contain fewer textual exceptions, address more varieties of aid, and apply to both levels of government tend to be stronger. Most anti-aid provisions fall somewhere in between. For example, New Mexico's anti-aid provision states,

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[163] These are Arizona, Colorado, Florida, Kentucky, Louisiana, Montana, North Dakota, Oklahoma, and Wyoming.
[164] Ariz. Const. art. 9, § 7. The exception at the end of the clause is meant to permit state investment of public funds, such as pension funds or rainy day funds. Ideally, these funds will have their own statutory restraints that require the fund managers to be fiduciaries so that investments are made in the public's interest and not in anyone's private interest.
[165] However, Arizona amended its constitution in 1940 to exempt "irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts" from the anti-aid provision. See Ariz. Const. art. 13, § 7.
[166] Okla. Const. art. 10, § 15(B); Wyo. Const. art. 16, § 12.

“Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section.”[167]

Subsections A through G contain several exceptions, including the care and maintenance of sick and indigent persons, scholarships for Vietnam veterans who attend public universities, loans for students of the healing arts, support of new or expanding businesses for job creation, affordable housing, and scholarships for war veterans who have exhausted federal aid and who attend public universities. Consequently, although New Mexico’s anti-aid provision applies to both levels of government and prohibits both loans and donations (but not stocks or joint ownership), the provision is weakened by textual exceptions. Nevertheless, New Mexico’s provision is relatively strong compared to states with bare-bones provisions.

For example, the anti-aid provisions in seven states merely prohibit state loans, presumably allowing public aid in the form of donations or stock subscriptions at the state level and public aid in any form at the municipal level.[168] Thus, textual exceptions aside, bare-bones provisions tend to be weaker because they leave the door open for alternate forms of public aid. Wisconsin’s anti-aid provision is illustrative; it provides that “the credit of the state shall never be given, or loaned, in aid of any individual, association, or corporation.”[169] Because it only applies to credit, direct subsidies and grants do not implicate Wisconsin’s anti-aid clause, and

[167] N.M. Const. art. 9, § 14.
[168] Maine, Massachusetts, Minnesota, Nebraska, Rhode Island, West Virginia, and Wisconsin. However, in Nebraska, courts have extended the provision to political subdivisions. State ex rel. Beck v. City of York, 164 Neb. 223, 224–25, 82 N.W.2d 269, 271 (1957).
[169] Wis. Const. art. 8, § 3.

concluding otherwise, as the Wisconsin Supreme Court has noted, "would put in jeopardy many of [its] current state subsidies."[170]

B. Public Purpose Clauses

In addition to the 45 state constitutions with traditional anti-aid provisions, 17 state constitutions have *public purpose* provisions and four have *private emolument* provisions that theoretically restrict the use of public aid for private purposes.[171] The public purpose provisions typically appear in the section of a given constitution that governs taxation and, among other limitations, usually restrict taxation for public purposes only. These provisions (*public purpose clauses* or *tax clauses*) do not expressly apply to government expenditures in aid of private entities, but they nevertheless indirectly forbid the use of taxation for such purposes.[172] We list these in the right-hand column of table A1 in the appendix, calling them public purpose clauses.

Alaska, Connecticut, Illinois, and Vermont only have public purpose and private emoluments provisions and have no traditional anti-aid clauses.[173] For example, the Alaska Constitution provides that "no tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."[174] Similarly, the Illinois Constitution provides that "public funds, property or credit shall be used

[170] Libertarian Party of Wisconsin v. State, 199 Wis. 2d 790, 821–22 (1996). Other courts may interpret their state credit clauses to encompass gifts, however. Compare Oxnard Beet Sugar Co. v. State, 73 Neb. 57 (1905) (gifts held to be within scope of credit clause) with Melvin v. Board of County Comm'rs, 199 Md. 402 (1952) (local unit may use its credit to obtain funds which are then given to private institutions). The text of a given anti-aid provision does not necessarily correspond to its judicial interpretation.
[171] See table A1 in the appendix.
[172] See, for example, Ariz. Const. art. 9, § 1 (stating that "all taxes . . . shall be levied and collected for public purposes only"). These are the same types of provisions discussed above in reference to the Alaska and Illinois Constitutions.
[173] As previously noted, South Dakota's credit clause is not like most anti-aid provisions in that it can be overridden by two-thirds of the legislature.
[174] Alaska Const. art. 9, § 6.

only for public purposes."[175] Vermont's constitution provides that "government is, or ought to be, instituted for the common benefit, protection, and security of the people . . . and not for the particular emolument or advantage of any single person."[176] A related provision states that "previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected."[177] Although Vermont courts have construed both provisions as a general prohibition on the use of public funds for nonpublic purposes, there have been no successful legal challenges to public subsidies in that state.[178]

Not surprisingly, the public purpose and private emoluments provisions are among the weakest limitations on public aid, both textually and as interpreted by courts. This is generally true because the vague language of these provisions invites government officials to test and expand the boundaries of the text while simultaneously providing no definable borders for courts to enforce. The public purpose limitation is especially emblematic of this problem for a few reasons. First, because courts have declared that *public purpose* cannot be defined precisely and evolves to meet changing societal needs,[179] they have upheld a variety of expenditures for

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[175] Ill. Const. § 20. Similar "public purpose" limitations also appear in the constitutions of states with traditional anti-aid provisions (e.g., Arizona, Kentucky, Louisiana, Montana, North Carolina, Ohio, Texas, and Washington).
[176] Vt. Const. chap. 1, art. 7.
[177] Vt. Const. chap. 1, art. 9.
[178] See Bennington v. Park, 50 Vt. 178, 192–93 (1877).
[179] In a seminal Alaska case, for example, the court stated that public purpose "represents a concept which is not capable of precise definition . . . and will change as changing conditions create changing public needs." Dearmond v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962). Yet in a later opinion, the court stated that the test to determine public purpose "should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant portion of the public, as distinguished from a remote and theoretical benefit." Opinion of the Justices, 348 So.2d 1051, 1053 (Alaska 1980). See also note 193, providing examples of the many other courts that cite the evolutionary nature of public purpose as a justification for broad interpretation.

questionable purposes.[180] Of course, it *is* possible to precisely define *public purpose*, and many courts have done so.[181] And while society and technology do change and advance, the principles that spurred anti-aid provisions are immutable and ever applicable.

Second, courts generally defer to government officials' determination that a given expenditure serves a public purpose and often refuse to overturn an expenditure unless officials have unquestionably abused their discretion.[182] Because the "abuse of discretion" legal standard is such a high bar, however, government officials can merely state that an expenditure serves the public—even in the face of evidence to the contrary—to circumvent a public purpose or private emoluments provision.[183] And since officials naturally seek to expand rather than limit their own powers, deferring to their discretion means that judicial interpretation of public purpose will always be expanding, in turn creating a legal universe in which upholding public aid becomes the general rule rather than the exception. In fact, this is precisely what has happened in states with public purpose and private emolument provisions. For example, in South Dakota, courts invalidated three government acts in the early 20th century but have upheld all other acts challenged since 1932.[184] Unfortunately, this has also happened, to varying degrees, in the 45

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[180] See, for example, Lake Otis Clinic, Inc. v. State, 650 P.2d 388, 394 (Alaska 1982) (public purpose for state reimbursement to guarantor who paid off construction loan of private hospital); Wright v. City of Palmer, 468 P.2d 326, 330–31 (Alaska 1985) (public purpose for general obligation bonds to construct facility for lease to private corporation because it would help boost the city's failing economy); Empress Casino Joliet Corp. v. Giannoulias, 231 Ill. 2d 62, 65 (2008) (public purpose for tax on riverboat casinos, the proceeds of which were given to horseracing tracks, because tax was meant to stimulate economic activity).

[181] See, for example, Idaho Water Resources Bd. v. Kramer, 97 Idaho 535 (1976) (defining public purpose as "an activity that serves to benefit the community as a whole and which is directly related to the functions of government"); City of Tombstone v. Macia, 30 Ariz. 218, 224 (1926) (stating that true test for public purpose is "that the work should be *essentially* public, and for the general good of *all the inhabitants* of the city . . . undertaken [not] merely for gain or for private objects . . . but the purpose must be *primarily* to satisfy the need, or contribute to the convenience, of the people of the city at large") (emphasis added).

[182] See, for example, Clem v. City of Yakton, 160 N.W.2d 125,131 (S.D. 1968).

[183] See, for example, *Empress Casino Joliet Corp.*, 231 Ill. 2d at 65 (upholding tax on riverboat casinos to be given to horseracing tracks).

[184] Mackey v. Reeves, 175 N.W.2d 359 (S.D. 1919); White Eagle Oil & Ref. Co. v. Gunderson, 205 N.W. 614 (S.D. 1925); In re Opinion of the Justices, 240 N.W. 600 (S.D. 1932).

states with traditional anti-aid provisions, even though only a few of these contain textual public purpose exceptions within the anti-aid provisions themselves.[185]

As discussed above, many state constitutions have public purpose provisions in addition to their anti-aid provisions. Arizona's public purpose clause provides that "all taxes . . . shall be levied and collected for public purposes only."[186] Because litigants in Arizona often challenged subsidies under both the public purpose provision and the anti-aid provision, the public purpose requirement of the former was gradually grafted onto the latter. This combination took the form of a judicially created two-prong test to evaluate the legality of expenditures that benefit private entities.[187] Thus, to satisfy Arizona's gift clause today, an expenditure of taxpayer money that benefits a private entity must (1) serve a public purpose *and* (2) garner adequate return consideration for the public.

Consequently, in Arizona, public purpose became a requirement of the anti-aid provision (the weaker of the two elements) rather than an exception to it. But in other states, public purpose works the opposite way: courts view it as an *exception* to the prohibition on public aid, which means that an expenditure will be upheld if it is said to serve a public purpose, even if it otherwise violates the anti-aid provision. In these states, the constitutional public purpose requirement has been turned on its head, in much the same way as the judicially created Public Purpose Doctrine was turned on its head. States that treat public purpose as a constitutional requirement rather than as an exception will necessarily have stronger anti-aid jurisprudence. Moreover, in states that lack any public purpose clauses in their constitutions, courts may have

[185] See, for example, Haw. Const. art. 7, § 4; N.C. Const. art. 5, §§ 3–4.
[186] Ariz. Const. art. 9, § 1.
[187] Turken v. Gordon, 223 Ariz. 342, 346 (2010).

adopted the public purpose exception to anti-aid restrictions based on the doctrine first articulated in *Sharpless v. Mayor of Pennsylvania*.[188]

Anti-aid provisions were intended to protect the public fisc regardless of whatever benefits might result from aid to private ventures, that is, regardless of the perceived purpose of the aid—public or otherwise. And yet, by one court's estimation, "Forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives" on the basis of public purpose.[189] Of course, public aid for the purpose of economic development is exactly what states sought to prohibit when they adopted anti-aid provisions in the first place. It is ironic that courts have used the notion of public purpose to eviscerate these provisions when, in fact, states enacted these very same provisions to prohibit public aid *despite their perceived public purpose*.

The future efficacy of anti-aid provisions appears least promising in states that have public purpose exceptions. When public purpose is treated as an exception to an anti-aid provision rather than as a requirement, courts regard expenditures as constitutional on the sole basis that government officials deem them to benefit the public in some manner. Of course, that

[188] 21 Pa. 147 (1853). Regardless of how the Public Purpose Doctrine entered anti-aid jurisprudence in each state, its analysis evolved similarly. That is, courts declared that (1) public purpose is incapable of definition and changes to meet changing societal needs and that (2) courts will defer to the discretion of government officials and will not invalidate an expenditure unless government officials have abused their discretion. See, for example, City of Glendale v. White, 67 Ariz. 231, 236, 194 P.2d 435, 439 (1948) ("The question of what is a public purpose is a changing question, changing to suit industrial inventions and developments and to meet new social conditions.") (internal citation omitted); Cheatham v. DiCiccio, 240 Ariz. 314, 320, 321, 379 P.3d 211, 217 (2016) ("For Gift Clause purposes, a public purpose is lacking only in those rare cases in which the governmental body's discretion has been unquestionably abused.") (internal quotation marks and citations omitted); Visina v. Freeman, 252 Minn. 177, 184 (1958) (public purpose "not capable of a precise definition"); R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 337 (Minn. 1978) (legislative determination of public purpose entitled to deference and overruled only if "manifestly arbitrary or unreasonable"); McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835, 838 (1951) ("What is a public use is not capable of absolute definition. A public use changes with changing conditions of society. . . ."); Bazell v. City of Cincinnati, 13 Ohio St.2d 63, 68 (1968) (legislative determination of public purpose "will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable"); Opinion to the Governor, 112 R.I. 151, 155, 308 A.2d 809, 811 (1973) ("There is no fixed static definition of 'public purpose.' It is a concept which expands with the march of time. It changes with the changing conditions of our society.").
[189] *Maready*, 342 N.C. at 725.

renders the provision essentially nugatory, since officials can virtually always be expected to claim that their decisions are intended to benefit the public.[190] Given the history of anti-aid provisions, whether public aid is thought to serve a public purpose should not determine its constitutionality. Because courts have ignored or misunderstood this basic principle, however, there are few limitations on public aid in states where the assertion of a public purpose alone satisfies the anti-aid provision. Compounding the expanding definition of public purpose is judicial deference to the discretion of government officials, who are constantly finding new ways to appropriate taxpayer money for private interests.

C. A Recent Revival of Anti-Aid Provisions

Despite being weakened by textual exceptions and gutted by judicial interpretation, anti-aid provisions have recovered some of their former strength in a few states, and this jurisprudence provides hope for resuscitating failed provisions in other states. For example, Arizona's seminal gift clause case, *Turken v. Gordon*, clarified that the assertion of public purpose alone cannot justify an expenditure of public money that benefits private interests; instead, the government must receive something sufficiently valuable in return for the expenditure (i.e., it

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[190] As the antifederalist Brutus articulated in his sixth essay,

> It is as absurd to say, that the power of Congress is limited by these general expressions, "to provide for the common safety, and general welfare," as it would be to say, that it would be limited, had the constitution said they should have power to lay taxes, &c. at will and pleasure. Were this authority given, it might be said, that under it the legislature could not do injustice, or pursue any measures, but such as were calculated to promote the public good, and happiness. For every man, rulers as well as others, are bound by the immutable laws of God and reason, always to will what is right. It is certainly right and fit, that the governors of every people should provide for the common defence and general welfare; every government, therefore, in the world, even the greatest despot, is limited in the exercise of his power. But however just this reasoning may be, it would be found, in practice, a most pitiful restriction. The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves.

Herbert J. Storing, ed, *The Complete Anti-Federalist*, 7 vols. (Chicago: University of Chicago Press, 1981), document 8.

must obtain consideration).[191] If the government receives consideration that is “grossly disproportionate” to what it spent, the expenditure is an illegal subsidy. In other words, if the government spends a lot of money but gets very little (or nothing) in return, the expenditure is illegal.

Even better, the court found that *indirect* benefits—such as anticipated tax revenue and employment opportunities for city residents—are not valid consideration if private entities are not contractually required to provide these benefits.[192] Thus, in Arizona, public expenditures for economic development are unconstitutional unless the government receives valuable and direct (arising from the private entity’s obligation) consideration in return for the expenditure. Before the *Turken* case, government bodies had successfully argued that indirect public benefits resulting from an expenditure suffice to justify public aid to private interests.[193] As discussed in section II above, this argument is especially problematic given the tendency of policymakers to rely on the indirect gross multipliers associated with new economic activity, which they often overestimate, while ignoring the negative effects of the taxes that pay for these subsidies. *Turken*’s rejection of that overly lax theory illustrates that it is possible—with strategically litigated cases—to realign anti-aid jurisprudence with the intended purpose of these provisions. In short, it is possible to prevent the application of public money to private purposes.

Other states with relatively strong anti-aid provisions also require that government bodies receive a fair return for an expenditure of public funds. In Oklahoma, economic development is considered a public purpose only if the government receives adequate consideration for the

[191] Turken v. Gordon, 223 Ariz. 342, 348 (2010) (holding that consideration cannot be “grossly disproportionate to what is received in return”).
[192] *Turken*, 350.
[193] *Turken*, 351–52.

expenditure and there is accountability or control over the expenditure.[194] And in Mississippi, the state supreme court recently, and without discussing public purpose, held that a city cannot lawfully pay the attorney fees of a mayoral candidate in an election contest because the expenditure lacked consideration and was therefore a donation or gratuity to the candidate.[195]

These examples, together with other strategies, may pave a path toward resuscitating anti-aid provisions in states with weaker jurisprudence. States with anti-aid provisions that include gift clauses offer the greatest protections against economic development subsidies—especially those in which public purpose is one of several requirements rather than an exception. Still, much work is required to realize the potential of such provisions. For a list of states that require (or except) public purpose and consideration, see table A1.

V. Toward a Model Anti-Aid Clause

The framers of the states' anti-aid provisions understood basic principles that are axiomatic in our republic: public dollars should be spent only for public purposes, and when public dollars *are* spent, the government should maintain control over those expenditures and receive adequate consideration for them. Absent these requirements, public expenditures can easily result in the allocation of taxpayer funds to private, special interests. Despite this near-universal recognition by the framers of the state constitutions, courts throughout the country have drained these clauses of their efficacy by disregarding their plain language and their well-documented intent. Courts have also read exceptions into them.

In this section we review various tests laid out by state courts to identify criteria that should be satisfied for anti-aid jurisprudence to achieve its purpose. In so doing, we provide a

[194] Burkhardt v. City of Enid, 771 P.2d 608, 611 (Okla. 1989).
[195] McAdams v. Perkins, 204 So. 3d 1257, 1265 (Miss. 2016).

road map for an ideal anti-aid policy. In those states where courts have not already adopted these tests, state legislatures can strengthen their anti-aid clauses by explicitly requiring courts to do so. To prevent the enrichment of private interests at public expense, three criteria should be satisfied for every expenditure of public funds:

1) The public expenditure should be primarily for a public purpose.
2) The government should maintain sufficient control over the expenditure to ensure its public purpose is accomplished.
3) The public should receive direct, ascertainable, obligatory, and proportional consideration for every outlay of public resources.

As noted, these requirements should apply to both the state government and political subdivisions and should apply to all three varieties of aid (gifts, stock purchases, and extensions of credit). Additional safeguards can also be put in place to, for example, ensure that the provisions are as widely applicable as possible by applying to revenue bonds, industrial development bonds, and special districts.

A. The Primary Purpose of Every Government Expenditure Should Be to Serve a Public Purpose, Not to Benefit a Private Entity or Individual

Because the primary purpose of an anti-aid clause is to avoid the application of public resources for private purposes, a reasonable test for any government expenditure is that it *primarily* serves the public interest rather than the particular private interests of any individual, association, or corporation. As the Arizona Supreme Court has observed, it is “a core Gift Clause principle” that “public funds are to be expended only for ‘public purposes’ and cannot be used to foster or promote the purely private or personal interests of any individual."[196] Indeed, that is the entire purpose of the anti-aid clause. Or, as the Florida Supreme Court has put it, the clause serves "to protect public monies . . . [and] to keep the State out of private business."[197]

This is true of an expenditure that *primarily* benefits private interests, even if that expenditure also serves *some* public purpose. This is important because *any* expenditure might be said to serve a public purpose in *some* plausible way. Indeed, public choice research has found that successful special interest pleading frequently coincides with some semiplausible public interest story.[198] As the Arizona Supreme Court recognized, the anti-aid clause "was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to *quasi-public purposes*, but actually engaged in private business."[199] An anti-aid clause "may be violated by a transaction even though th[e] transaction has *surface indicia* of public purpose" but in reality does not serve the public. What should matter is "the reality of the transaction," not its mere appearance or the government's unsubstantiated assertions.[200]

Accordingly, the first test under the anti-aid clause is whether the expenditure carries out a legitimate government purpose.[201] That means all public expenditures must serve a "benefit to the community as a whole" and "at the same time be directly related to the function of

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[196] *Turken*, 223 Ariz. at 347–48, para. 19–20 (citing Kromko v. Arizona Bd. of Regents, 149 Ariz. 319, 321 [1986]). See also Proctor v. Hunt, 43 Ariz. 198, 201 (1934): It is "axiomatic" that "money raised by public taxation is to be collected for public purposes only, and can only legally be spent for such purposes and not for the private or personal benefit of any individual."
[197] Brautigam v. White, 64 So. 2d 781 (1953).
[198] Bruce Yandle, "Bootleggers and Baptists: The Education of a Regulatory Economist," *AEI Journal on Government and Society*, May/June 1983, 12–16; Adam Smith and Bruce Yandle, *Bootleggers and Baptists: How Economic Forces and Moral Persuasion Interact to Shape Regulatory Politics* (Washington, DC: Cato Institute, 2014); Matthew D. Mitchell and Peter J. Boettke, *Applied Mainline Economics: Bridging the Gap between Theory and Public Policy* (Arlington, VA: Mercatus Center at George Mason University, 2017), 76–77.
[199] *Turken*, 223 Ariz. 342, 346, para. 10 (citations omitted) (emphasis added).
[200] *Wistuber*, 141 Ariz. at 349 (emphasis added).
[201] See City of Tacoma v. Tacoma Taxpayers, 108 Wash. 2d 679, 695 (1987).

government."[202] Expenditures on genuine public goods or on generally accessible private goods would be permitted.[203] Thus, among other things, the state would be free to spend on the court system, public safety, public roads, public buildings, and parks (all public goods), as well as on education and social safety net programs (generally accessible private goods). Expenditures on private goods that are exclusively available to narrow beneficiaries, however, would not be permitted. The state would not be allowed to spend public money on private firms.

One paramount consideration should be whether, as the Alabama Supreme Court has put it, the expenditure "confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit."[204] For example, since the primary and overwhelming beneficiaries of subsidized jobs are the workers themselves, and since subsidized workers are a small minority of the public, subsidized employment should not count as a public benefit. On the other hand, because anyone who qualifies for public assistance may obtain it and because large numbers of citizens do qualify, social safety net programs may well be evaluated differently by the courts.

Second, public expenditures must serve direct public purposes, not speculative purposes. Some have argued that economic development subsidies advance a public purpose. But as we noted in section II above, the possibility that government aid to private business will produce net beneficial results for the communities that pay for these subsidies is speculative at best. In most cases, it seems that the investment would have been made without the subsidy.[205] Moreover, while subsidy proponents point to the indirect benefits of subsidies, they almost never

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202 Davidson Bros. v. D. Katz & Sons, Inc., 121 N.J. 196, 217 (1990) (internal quotations omitted).

203 In economics, a public good has two characteristics. First, it is "nonrivalrous," which means that one person's use of the good does not diminish another's. Second, it is "nonexcludable," which means that once the good is provided, others cannot be denied its use. Paul Samuelson, "The Pure Theory of Public Expenditure," *Review of Economics and Statistics* 36, no. 4 (November 1954): 387–89; James M. Buchanan, "An Economic Theory of Clubs," *Economica* 32, no. 125 (1965): 1–14.

204 In re Opinion of the Justices, 348 So. 2d 1051, 1053 (Ala. 1980) (internal citations omitted).

205 Bartik, "'But For' Percentages."

acknowledge the economic costs of the taxes that fund those subsidies. Nor do they consider the other "unseen" costs, such as rent-seeking losses and anticompetitive effects.[206] Government entities, therefore, should not engage in expenditures that *primarily* rather than *incidentally* benefit a private entity.

B. The Government Must Exercise Sufficient and Continuing Control over All Government Expenditures

Like the framers of the US Constitution, the framers of the various anti-aid clauses recognized that internal and external controls were indispensable to establishing sound government that respects the integrity of the public fisc and the taxpaying public.[207] As the New Jersey Supreme Court recognized in that state's seminal gift clause case, "When the State once enters upon 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."[208] One way to mitigate the danger of such special interest abuse is to enforce the constitutional requirement that government control the expenditure of public funds. Government control over public expenditures is necessary because the government cannot ensure that a public purpose is accomplished for an outlay of resources unless it exercises sufficient oversight.

Some courts have sought to clarify what precisely the control requirement means. In *Kromko v. Arizona Bd. of Regents*, the Arizona Supreme Court carefully examined a lease contract between the governing board of the state's public universities and a nonprofit

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206 Frédéric Bastiat, "That Which Is Seen, and That Which Is Not Seen," in *The Bastiat Collection*, 2nd ed. (Auburn, AL: Ludwig von Mises Institute, 1850), 1–48.

207 "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." James Madison, "Federalist No. 51," in *The Federalist Papers*, ed. Charles R. Kesler (New York: Signet Classics, 2003), 51.

208 Roe v. Kervick, 42 N.J. 191, 207 (1964) (citation omitted).

corporation that had agreed to operate a university hospital.[209] The court found that the private entity was a functional alter ego of the university's governing board, because the board retained significant and continuing control over the entity's operations. Among other things, the internal organization of the nonprofit required approval of the governing board, the board retained the right to approve any business transactions the nonprofit made, and the nonprofit was required to make financial and other status reports to the board. Most significantly, no earnings of the nonprofit could be distributed to its members, directors, or officers. This, according to the court, meant that the nonprofit corporation's activities were "subject to the control and supervision of public officials. Hence, we believe the fear of private gain or exploitation of public funds envisioned by the drafters of our constitution is absent."[210]

Likewise, in *Hutcheson v. Atherton*, the New Mexico Supreme Court struck down a county's issuance of $250,000 worth of bonds on behalf of a nonprofit because the organization was "not a subordinate governmental agency."[211] It held that New Mexico's gift clause prohibits any appropriation of funds "to any person, corporation, association, institution, or community not under the absolute control of the state."[212] Thus, public money that is spent for or lent to a private entity must be "assigned to bringing the public purpose to fruition," and the private entity's "business activity" must be "*so strictly pointed* in that direction, that for practical purposes [the private entity] represents the *controlled means* by which the government accomplishes a proper objective."[213] *Kromko* and *Atherton* thus make clear that the type of "control" required means the

[209] *Kromko*, 149 Ariz. 319, 321 (1986).
[210] *Kromko*, 149 Ariz. at 321.
[211] Hutcheson v. Atherton, 99 P.2d 462 (N.M. 1940).
[212] Harrington v. Atteberry, 153 P.2d 1041, 1042 (N.M. 1915).
[213] New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 604 (2007) (citations omitted) (emphasis added).

government must maintain sufficient authority over public expenditures to ensure they are used for a public rather than private purpose.

C. Government Expenditures Must Be Supported by Consideration That Is Direct, Ascertainable, Contractually Obligatory, and Proportionate to the Cost

Government expenditures must also be in exchange for valid consideration—meaning a fair exchange of public money for some benefit enjoyed by the state or the public. This requirement is supported by common sense. By definition, a *gift* is a gratuity that is not given in exchange for return consideration. Moreover, it would be easy to disguise an unconstitutional gift as a constitutional appropriation by distributing funds in exchange for illusory or purely abstract consideration (e.g., the government could pay a company in "exchange" for doing nothing at all). As the Arizona Supreme Court explained in *Turken*, "When a public entity purchases something from a private entity, the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract."[214]

Gift clause jurisprudence in several states uses four essential factors in weighing consideration. Consideration received by the government in exchange for public money should be (1) direct, (2) ascertainable, (3) contractually obligatory, and (4) proportional.

First, consideration must be direct and not speculative.[215] The advocates of subsidies often claim that expenditures will yield many purported indirect public benefits. But this

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[214] *Turken*, 223 Ariz. at 348. See also Avery v. State, 295 Ga. 630, 633 (2014) (there is no gift clause violation "when the state receives a substantial benefit in exchange for the use of public property"); Hawks v. Bland, 156 Okla. 48 (1932) (defining an unlawful gift as a "gratuitous transfer of property of the state voluntarily and without consideration").

[215] See, for example, *Turken*, 223 Ariz. at 350, para. 33 ("anticipated indirect benefits . . . when not bargained for as part of the contracting party's promised performance . . . are not consideration under contract law" or the gift clause).

argument ignores the evidence that most subsidized investments would have occurred without the subsidy.[216] The indirect-benefit justification also ignores the significant costs associated with the taxation that funds subsidies.[217] Subsidies take from people who would have otherwise invested that money somewhere else, so that the apparent economic activity spurred by subsidies is really just transferred economic activity—transferred from what consumers want to what they have been forced to buy.[218] What is more, if the consideration is not direct, or *obligatory*, nothing will ensure that any public benefits are ever realized.

Second, courts have also required that consideration be *ascertainable*, meaning that it "must be unimagined, substantive and verifiable."[219] In other words, there must be clear obligations imposed on the recipient of public aid that can be measured and readily evaluated. If, for example, a government entity purchases a product or procures a service, it should measure the fair market value of those expenditures, through the procurement process or otherwise, to ensure taxpayers receive proportional value that is not speculative.

Third, anti-aid clauses should require contractual *obligation* to ensure that the public's business will in fact be effectuated by the public expenditure. That is, a recipient of public expenditures must contractually obligate itself to perform a duty to the public.[220] Absent obligation on the part of the private party, there is nothing to ensure that the public's business will be done or that the private entity will not receive a gratuity. As the Arizona Supreme Court

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[216] Bartik, "'But For' Percentages"; Dennis A. Rondinelli and William J. Burpitt, "Do Government Incentives Attract and Retain International Investment? A Study of Foreign-Owned Firms in North Carolina," *Policy Sciences* 33, no. 2 (2000): 181–205; Nathan Jensen, "Bargaining and the Effectiveness of Economic Development Incentives: An Evaluation of the Texas Chapter 313 Program," *Public Choice* 177, no. 1 (2018): 29–51.
[217] Again, see section II above, especially table 1 and the discussion surrounding it.
[218] Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft," *Economic Inquiry* 5, no. 3 (June 1, 1967): 224–32; Matthew D. Mitchell, "Rent Seeking at 52: An Introduction to a Special Issue of *Public Choice*," *Public Choice* 181, no. 1 (October 1, 2019): 1–4.
[219] Wilentz v. Hendrickson, 133 N.J. Eq. 447, 33 A.2d 366 (Ch. 1943); City of E. Orange v. Bd. of Water Comm'rs, 79 N.J. Super. 363, 372, 191 A.2d 749, 754 (App. Div.), aff'd, 41 N.J. 6, 194 A.2d 459 (1963).
[220] Key v. Comm'rs Ct. of Marion Co., 727 S.W.2d 667, 669 (Tex. App. 1987) (emphasis added).

put it, only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" can count as consideration.[221]

The contractual obligation principle is in this regard directly in line with general principles of contract law. All contracts, to be enforceable, must represent some genuine exchange of consideration. The reason for requiring contractual obligation is straightforward: absent obligation, there is no guarantee the public will receive anything for its expenditure. This is true even if the public entity and a private party share the same purpose.

A Texas case illustrates the point well. In *Key v. Commissioners Court of Marion County*,[222] a citizen challenged the transfer of a "Christmas Candlelight Tour," a winding path of Christmas light Nativity and holiday scenes, from the Marion County Historical Commission (a public entity) to the Historic Jefferson Foundation (a private organization) as a subsidy in violation of the gift clause. The commission argued that the transfer did not amount to a gift because the private nonprofit organization shared "the same stated goals as the commission," including historical preservation.[223] The court rejected that argument, holding instead that "contractual obligation" was necessary to establish consideration. Or, as the court wrote, "Had the Historic Jefferson Foundation *obligated* itself contractually to perform a function beneficial to the public, this obligation might be deemed consideration."[224] But because no such obligation existed in the contract itself, the transfer was not an exchange but a gratuity to the private organization.

In other words, even if a public agency shares a common interest, custom, or practice or has the best intentions, those things are not consideration in the absence of contractual

[221] Turken v. Gordon, 224 P.3d 158, 165, para. 31 (Ariz. 2010) (emphasis added).
[222] *Key*, 727 S.W.2d 667.
[223] *Key*, 727 S.W.2d at 669.
[224] *Key*, 727 S.W.2d at 669.

obligation. They are, instead, illusory promises. To ensure the public's business is done, and to prevent a private party from discontinuing performance at will, contractual obligation is a necessary requirement for valid consideration under the anti-aid clause.

Fourth, anti-aid clauses should require proportional consideration. In this regard, consideration analysis under anti-aid provisions is different from judicial analysis under traditional contract law. Namely, under contract law, courts rarely, if ever, question the proportionality of consideration. A private contracting party is free to offer anything, no matter how small, as valid consideration because the private parties are "free to contract as they [please]," so the agreement reached "establishe[s] what [is] 'fair' and 'just' inter se."[225] In other words, value is subjective, so the only way to know that one has obtained a just and fair exchange is to allow the exchange to take place on terms that are acceptable to both private parties. In the public context, however, taxpayers have no genuine choice in the contract, so the only way to ensure that they obtain value in excess of their financial sacrifice is to require proportionality.

Thus, consideration in anti-aid cases requires an examination of the proportionality of what is exchanged. Proportionality means there must be a balanced exchange of value for value. As the Arizona Supreme Court explained, "When a public entity purchases something from a private entity, the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract."[226] This, of course, makes sense. If we are trying to ascertain whether the public has given an unlawful subsidy, we must evaluate what was given and what was received.

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225 Aerojet-Gen. Corp. v. Transp. Indem. Co., 17 Cal. 4th 38, 75 (1997).
226 *Turken*, 223 Ariz. at 348, para. 22.

When the city of Phoenix, for example, gave $94.7 million dollars to a private developer of a mixed-use development for the exclusive use of 200 parking spaces for drivers participating in a municipal commuting program, the government payment was "grossly disproportionate" to what was received in return, thus violating Arizona's anti-aid provision.[227] Thus, if what the public entity gives is disproportionate to what it receives in return, there is insufficient consideration and the anti-aid provision has been violated.

VI. Litigation and Legislative Solutions in Moving Toward a Model Anti-Aid Clause

It is possible to move toward an effective anti-aid climate through strategic litigation, legislative reforms, or a combination of both. A successful strategy will depend on a particular state's anti-aid clause jurisprudence, judicial climate, and legislative composition.

Litigation is most viable when it is based on the strength of a given state's anti-aid clause language, the case law interpreting it, and the composition of its courts. Anti-aid clause challenges are most likely to be successful in states with plain language that is strong and direct and in which the courts have shown some willingness to enforce its protections. Challenges are more likely to be successful when courts use multifactor tests, such as a primary public purpose test, a requirement for continuing government control, and an adequate consideration analysis. The appendix summarizes the current state of anti-aid clause jurisprudence in the states. States in which both a public purpose and a consideration requirement exist, and for which there is no blanket exception for expenditures that alone serve a public purpose, are the most viable

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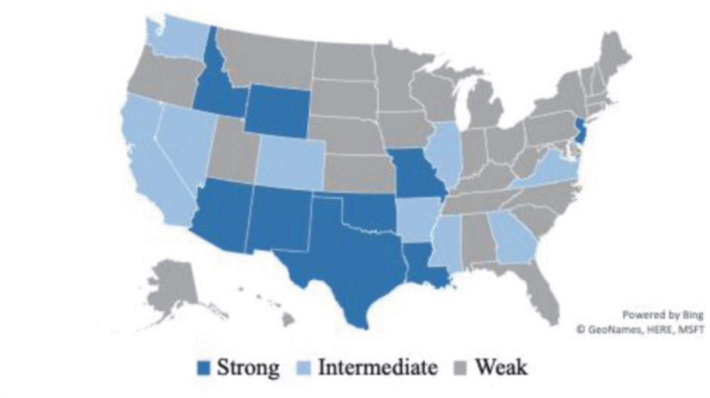
[227] *Turken*, 223 Ariz. at 348.

candidates for legal challenges.[228] Figure 4 shows the legal environment for anti-aid clause challenges based on these factors.

Figure 4. The Legal Environment for Anti-Aid Challenges



Notes: "Strong" indicates these states have anti-aid clauses with strong textual limitations that apply to government expenditures, extensions of credit, and stock ownership at the state and local level. The case law also requires a public purpose for all expenditures and adequate consideration for them with few, if any, exemptions or limitations. "Intermediate" indicates these states have anti-aid clauses with good textual limitations on government expenditures, extensions of credit, and stock ownership. But they may not apply to all levels of government, or they may have certain exceptions that would affect an anti-aid challenge. The case law suggests that challenges to some government expenditures would be feasible."Weak" indicates these states have no anti-aid clauses, have anti-aid clauses that lack textual limitations on government aid to private parties, have clauses with numerous exceptions, have clauses that apply only to one level of government, or have case law that fails to require a public purpose and adequate consideration for all aid.

Source: Authors' research. See appendix for details.

Litigants will be more successful if they identify cases in which one or more of these requirements is demonstrably lacking. For example, when a particular government expenditure is significantly disproportionate to the value received in return, an anti-aid clause challenge is more likely to succeed. As outlined above, taxpayers in Phoenix, Arizona, successfully challenged a nearly $100 million subsidy to a private developer in exchange for 200 parking spots for a

[228] Litigants should also be cognizant of procedural and standing issues in each state. Some states have broad taxpayer standing for taxpayers to challenge unlawful government expenditures. See, for example, Ethington v. Wright, 66 Ariz. 382, 386, 189 P.2d 209, 212 (1948) ("It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds."). Other states may have more limited forms of taxpayer standing, in which case, litigation may be brought only by a party that is otherwise harmed by the subsidy.

municipal transit program. At $500,000 per parking spot, it was simply impossible for the government to justify its claim that the city was receiving proportional consideration for the public expenditure.[229] (Of course, the government had claimed that the indirect benefits of the project—for example, increased tax revenue and employment opportunities—were also consideration, not just the parking spaces in isolation. The court, however, rejected this claim.) Likewise, when the government transfers nearly all control over government resources to a private entity, a challenge is viable. Loans and direct subsidies for large, private infrastructure projects and donations to nonprofit entities serving quasi-public purposes have resulted in successful anti-aid clause challenges. Of course, there will be other factors to weigh when considering whether an anti-aid clause challenge is likely to be successful, such as state standing doctrines and the composition of the courts.

Legislative reforms can also be pursued separate from or concurrent with judicial challenges. Although government subsidies and economic development projects often find bipartisan support, some legislative reforms, particularly in circumstances in which large subsidies have created negative press, are possible. Ideal legislative reforms should not target specific industries or individual expenditures. Broad-based anti-aid measures are more efficient and equitable. Counterintuitively, broad-based reforms may be more likely to succeed because if many privileges can be eliminated at once, it will be possible to substantially lower tax rates.[230] Ideally, these reforms will ensure that anti-aid provisions apply to all levels of government and all three varieties of aid. Moreover, they will require courts to apply the three tests outlined in the previous section.

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[229] *Turken*, 223 Ariz. at 348.
[230] Matthew Mitchell, "Overcoming the Special Interests That Have Ruined Our Tax Code," in *For Your Own Good: Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century*, ed. Adam Hoffer and Todd Nesbit (Arlington, VA: Mercatus Center at George Mason University, 2018), 327–50.

VII. Conclusion

Economic development subsidies do not work as advertised. Both economic theory and experience suggest that, on net, subsidies are more likely to undermine a region's economic development than to enhance it. There are a number of reasons for this outcome. Among other things, firms tend to collect subsidies for doing what they would have done anyway, subsidies involve significant opportunity costs, and subsidies invite a host of economic problems including rent-seeking losses and anticompetitive effects. Time and again, state and local governments have experimented with economic development subsidies only to find that they undermine fiscal health and good governance.

Despite the problems with subsidies, the incentive for policymakers to dispense them is strong. As a result, state policymakers have periodically attempted to bind their own hands by outlawing subsidies through various constitutional anti-aid provisions. We have endeavored to describe the history and current state of these provisions. Our review shows that anti-aid provisions can affect the size and scope of subsidies, reducing their negative economic and social effects. But the details matter, and some varieties of these provisions are stronger than others. Moreover, these provisions must be strengthened periodically.

The strongest anti-aid provisions apply to both state and local governments and restrict government extensions of credit, stock puchases, and gifts. These provisions will be more effective if the courts apply three tests. First, they should require public expenditures to primarly serve public purposes. Second, they should require the government to maintain sufficient control over expenditures to ensure their public purpose is accomplished. And third, they should ensure that the public has received direct, ascertainable, obligatory, and proportional consideration in return for its expense. Anti-aid clause litigation is most likely to be successful in states where these tests, or some portions of them, are applied. And in states where courts do not currently apply these tests, legislators can strengthen statutory restraints by requiring that all public expenditures satisfy these criteria.

Appendix. The Current State of Anti-Aid Clauses

Table A1. Anti-Aid Clauses in US State Constitutions, 2019

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation[231]
AL	Ala. Const. art. 4, §§ 93, 94	State Local	State[232] Local	State Local	*Slawson v. Alabama Forestry Comm'n*, 631 So. 2d 953, 956 (Ala. 1994)	—	*Bd. of Revenue & Rd. Comm'rs of Mobile County v. Puckett*, 227 Ala. 374, 376, 149 So. 850, 851 (1933)	Economic development[233]	—
AK	—	—	—	—	*Dearmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 722 (Alaska 1962)	—	—	—	Public Purpose Alaska Const. art. IX, § 6
AZ	Ariz. Const. art. 9, § 7	State Local	State Local	State Local	—	*Turken v. Gordon*, 223 Ariz. 342, 348 para. 21–22, 224 P.3d 158, 164 (2010)	*Turken v. Gordon*, 223 Ariz. 342, 348 para. 22, 224 P.3d 158, 164 (2010)	Improvement districts[234]	Public Purpose art. IX, § 1
AR	Ark. Const. art. 12, § 5; art. 16, § 1	Local	Local	State Local	*Chapman v. Bevilacqua*, 344 Ark. 262, 271–73, 42 S.W.3d 378, 384–85 (2001); *65th Ctr., Inc. v. Copeland*, 308 Ark. 456, 467, 825 S.W.2d 574, 580 (1992)	—	*City of Fort Smith v. Bates*, 260 Ark. 777, 781, 544 S.W.2d 525, 527 (1976)	Economic development	—

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[231] Provisions that limit the purposes for which taxes may be levied but that do not use the phrase "public purpose" are not included here.
[232] That the state shall not "be interested in any private or corporate enterprise" may imply both a stock and gift clause. Ala. Const. art. 4, § 93.
[233] Ala. Const. art. 4, § 94.01.
[234] Ariz. Const. art. 13, § 7.

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
CA	Calif. Const. art. 16, §§ 6, 17	State Local	State	State Local	*Page v. MiraCosta Cmty. Coll. Dist.*, 180 Cal. App. 4th 471, 495, 102 Cal. Rptr. 3d 902, 921 (2009)	—	*California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 59, 111 Cal. Rptr. 433, 441 (Ct. App. 1973)	Aid to US war veterans	—
CO	Colo. Const. art. 11, §§ 1–2a	State Local	State Local	State Local	*McNichols v. City & County of Denver*, 131 Colo. 246, 252, 280 P.2d 1096, 1099 (1955)	—	*Save Cheyenne v. City of Colorado Springs*, 425 P.3d 1174, 1182, cert. denied, 18SC199, 2018 WL 4561381 (Colo. Sept. 24, 2018)	Student loan program	—
CT	—	—	—	—	*Chotkowski v. State*, 240 Conn. 246, 263–64, 690 A.2d 368, 378 (1997)	—	—	—	Emoluments Conn. Const. art. I, § 1
DE	Del. Const. art. 8, §§ 4, 8	State Local	Local	State Local	*Opinion of the Justices*, 54 Del. 366, 177 A.2d 205 (1962)	—	—	State exception with ¾ legislature	—
FL	Fla. Const. art. 7, § 10	State Local	State Local	State Local	*Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 48 So. 3d 811, 822 (Fla. 2010)	—	—	Local revenue bonds for industrial or manufacturing plants	—
GA	Ga. Const. art. 3, § 6, para. 6; art. 9, § 2, para. 8	Local	—	State Local	*Avery v. State*, 295 Ga. 630, 633–34, 761 S.E.2d 56, 60 (2014)	—	*Haggard v. Bd. of Regents of Univ. Sys. of Georgia*, 257 Ga. 524, 526, 360 S.E.2d 566, 567 (1987)	Compensation for innocent victims of crime	Public Purpose art. VII, § 1, ¶ III
HI	Haw. Const. art. 7, § 4	State Local	—	State Local	Textual exception	—	—	Public purpose	Public Purpose within anti-aid provision[235]

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[235] The anti-aid provision and public purpose limitation are combined in one clause: "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose." Haw. Const. art. 7, § 4.

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
ID	Idaho Const. art. 8, §§ 2, 4; art. 12, § 4	State Local	State Local	Local	—	*Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 955, 703 P.2d 714, 719 (1985)	*Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 703 P.2d 714 (1985)	Environmental pollution control[236]	—
IL	—	—	—	—	—	Textual requirement	*Vill. of Oak Lawn v. Faber*, 378 Ill. App. 3d 458, 468, 880 N.E.2d 659, 668 (2007)	—	Public Purpose Ill. Const. art. VIII, § 1[237]
IN	Ind. Const. art. 10, § 6; art. 11, § 12	State Local	State Local	—	—	—	—	Public employee retirement fund	—
IA	Iowa Const. art. 3, § 31; art. 7, § 1; art. 8, § 3	State	State	—	—	*Star Equip., Ltd. v. State, Iowa Dept. of Transp.*, 843 N.W.2d 446, 459–60 (Iowa 2014)	—[238]	2/3 vote of legislature to authorize expenditure for private purpose	—[239]
KS	—[240]	—	—	—	—	—	—	—	—

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[236] Idaho Const. art. 8, § 3A.
[237] "Public funds, property or credit shall be used only for public purposes." Ill. Const. art. 8, § 1.
[238] A requirement of consideration usually pertains to gift clauses, and the Iowa Constitution does not have a gift clause. Nevertheless, the Iowa Supreme Court has clarified that a public purpose alone will not satisfy the anti-aid provisions. Star Equip., Ltd. v. State, Iowa Dept. of Transp., 843 N.W.2d 446, 459–60 (Iowa 2014).
[239] But see Iowa Const. art. 3, § 31 ("No public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two thirds of the members elected to each branch of the general assembly.").
[240] Even though the Kansas Constitution does not have an anti-aid provision or a public purpose limitation, "the general proposition of law recognized by [Kansas] cases is that the transfer of public property cannot be made without compensation when no public benefit would result from the gift." Ullrich v. Bd. of County Comm'rs of Thomas County, 234 Kan. 782, 788, 676 P.2d 127, 132 (1984).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
KY	Ky. Const. §§ 177, 179	State Local	State Local	State Local	*Dannheiser v. City of Henderson*, 4 S.W.3d 542, 545 (Ky. 1999)	—	—	Local exception for constructing or maintaining bridges, turnpike roads, or gravel roads	Public Purpose § 171
LA	La. Const. art. 7, pt. 1, § 14	State Local	State Local	State Local	—[241]	La. Atty. Gen. Op. No. 15-0137 (Dec. 28, 2015)	La. Atty. Gen. Op. No. 15-0137 (Dec. 28, 2015); *Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Prop. Owners, Citizens of City of Gonzales*, 2005–2298 (La. 9/6/06), 938 So. 2d 11[242]	14 exceptions listed in section 14(b)	Public Purpose art. VII, pt. I, § 1
ME	Me. Const. art. 9, § 14	State	—	—	—	*Common Cause v. State*, 455 A.2d 1, 27 (Me. 1983)	—	4 exceptions listed in sections 14-A through 14-D	—
MD	Md. Const. art. 3, §§ 34, 54	State County	—	—	*City of Frostburg v. Jenkins*, 215 Md. 9, 15, 136 A.2d 852, 855 (1957)	—	—	Local exception when authorized by legislature	—
MA	Mass. Const. amend. art. 52, § 1	State	—	—	—	*Opinion of the Justices*, 359 Mass. 769, 268 N.E.2d 149 (1971)	—	2/3 vote of legislature	—

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[241] Section 14(c) of the anti-aid provision permits cooperative endeavors with private parties for "a public purpose," but this is not construed as a textual exception. La. Const. art. 7, pt. 1, § 14(C); La. Atty. Gen. Op. No. 09-0212 (Dec. 22, 2009).

[242] The court does not use the term "consideration," but the constitution "is violated when public funds or property are gratuitously alienated." Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Prop. Owners, Citizens of City of Gonzales, 2005–2298 (La. 9/6/06), 938 So. 2d 11, 23–24. See also Jurisich v. Hopson Marine Serv. Co., Inc., 619 So. 2d 1111, 1115 (La. Ct. App. 1993). Moreover, there must be "a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for [an] expenditure or transfer of public funds." La. Atty. Gen. Op. No. 15-0137 (Dec. 28, 2015).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
MI	Mich. Const. art. 4, § 30; art. 7, § 26; art. 9, §§ 18–19	State City	State	—	City textual exception for credit when authorized by law for a public purpose	*Sch. Dist. of City of Pontiac v. City of Auburn Hills*, 185 Mich. App. 25, 27–28, 460 N.W.2d 258, 259 (1990)	*Kaplan v. City of Huntington Woods*, 357 Mich. 612, 99 N.W.2d 514 (1959)[243]	2/3 vote of legislature to appropriate money for private purpose	—[244]
MN	Minn. Const. art. 11, § 2	State	—	—	*Minnesota Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319 (Minn. 1984)	—	—	—	<u>Public Purpose</u> art. X, § 1
MS	Miss. Const. art. 4 § 66; art. 7, § 183; art. 14, § 258	State Local	Local	State	—[245]	—	*Tunica County v. Town of Tunica*, 227 So. 3d 1007, 1018 (Miss. 2017)	2/3 vote of legislature to authorize a gratuity	—
MO	Mo. Const. art. 3, §§ 38(a), 39; art. 6, §§ 23, 25	State Local	Local	State Local	*Fust v. Attorney Gen. for the State of Mo.*, 947 S.W.2d 424, 429–30 (Mo. 1997)[246]	*Curchin v. Missouri Indus. Dev. Bd.*, 722 S.W.2d 930, 934–35 (Mo. 1987)	*St. Charles City-County Library Dist. v. St. Charles Library Bldg. Corp.*, 627 S.W.2d 64, 70 (Mo. Ct. App. 1981)	Aid in public calamity and 8 other exceptions	<u>Public Purpose</u> art. X, § 3

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[243] Construing article 10, section 12, of the 1908 constitution, which is identical to article 9, section 18 of the current constitution.
[244] Although the Michigan Constitution does not have a general public purpose clause, it does provide that cities and villages may "levy other [than ad valorem] taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law." Mich. Const. art. 7, § 21.
[245] Although the courts have occasionally implied that public purpose is an exception, public purpose is not consistently cited as an element of anti-aid jurisprudence. See, for example, Craig v. Mercy Hosp.-St. Mem'l, 209 Miss. 427, 448–49, 45 So. 2d 809, 818, error overruled, 209 Miss. 427, 47 So. 2d 867 (1950).
[246] But see Curchin v. Missouri Indus. Dev. Bd., 722 S.W.2d 930, 934–35 (Mo. 1987) (stating that grants with a primarily private effect have been held unconstitutional "despite the possible beneficial impact upon the economy of the locality and of the state").

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
MT	Mont. Const. art. 5, § 11; art. 8, § 13	State	State	State[247]	—	*Hollow v. State*, 222 Mont. 478, 485, 723 P.2d 227, 232 (1986); *White v. State*, 233 Mont. 81, 93, 759 P.2d 971, 978 (1988)	—[248]	Entities under control of the state	Public Purpose art. VIII, § 1
NE	Neb. Const. art. 13, § 3	State Local[249]	—	—	—	—[250]	*Haman v. Marsh*, 237 Neb. 699, 720–21, 467 N.W.2d 836, 851 (1991)	Residents seeking adult or post–high school education	—
NV	Nev. Const. art. 8, §§ 9–10	State Local	State Local	State	*Employers Ins. Co. of Nevada v. State Bd. of Examiners*, 117 Nev. 249, 259, 21 P.3d 628, 634 (2001)	1995 Nev. Op. Atty. Gen. 25 (1995); *Lawrence v. Clark County*, 127 Nev. 390, 399, 254 P.3d 606, 612 (2011)[251]	Maybe[252]	Corporations formed for educational or charitable purposes; local exception for railroads	—
NH	N.H. Const. pt. 2, art. 5	Town	Town	Town	*Anderson v. McCann*, 124 N.H. 249, 251, 469 A.2d 1311, 1313 (1983)	*Anderson v. McCann*, 124 N.H. 249, 251, 469 A.2d 1311, 1313 (1983)	Maybe[253]	—	Emoluments Pt. 1, art. X

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247 "Because the Montana courts had construed that state's gift clause to permit any expenditures made for a public purpose, the framers of the revised Montana Constitution omitted the clause as unnecessary in light of other constitutional provisions limiting public expenditures to public purposes. Montana Legislature, Montana Constitutional Convention 1971–1972, at 583 (1979)." *Turken*, 223 Ariz. at 347.

248 But the courts strictly construe the requirement of government "control."

249 Extended to political subdivisions by court. State ex rel. Beck v. City of York, 164 Neb. 223, 224–25, 82 N.W.2d 269, 271 (1957).

250 Public purpose is not "required" because the "prohibition against the pledge of the state's credit does not hinge on whether the legislation achieves a 'public purpose,' when the pledge benefits a private individual, association, or corporation." Haman v. Marsh, 237 Neb. 699, 722, 467 N.W.2d 836, 852 (1991).

251 Implies that public purpose is required.

252 See Lawrence v. Clark County, 127 Nev. 390, 254 P.3d 606 (2011) (inferring that Nevada courts ensure the state receives a valuable benefit and holding that consideration is required for disposal of property under both the gift clause and the public trust doctrine).

253 In re Opinion of the Justices, 88 N.H. 484, 190 A. 425, 428 (1937).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
NJ	N.J. Const. art. 8, §§ 2, para. 1, 3, para. 2–3	State Local	Local	State Local	—	*Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834 (1964)	*Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834 (1964); *City of E. Orange v. Bd. of Water Comm'rs*, 79 N.J. Super. 363, 371, 191 A.2d 749, 753 (App. Div.), aff'd, 41 N.J. 6, 194 A.2d 459 (1963)	—	—
NM	N.M. Const. art. 9, § 14	State Local	—	State Local	—	—	*State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, para. 48–51, 141 N.M. 1, 15–16, 150 P.3d 375, 389–90	7 exceptions listed in sections 14(A) through 14(D), including "creating new job opportunities"	—
NY	N.Y. Const. art. 7, § 8; art. 8, § 1	State Local	Local	State Local	*Bordeleau v. State*, 18 N.Y.3d 305, 317, 960 N.E.2d 917 (2011)	*People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 195–97, 861 N.Y.S.2d 627, 640–41 (2008)	*Grand Realty Co. v. City of White Plains*, 125 A.D.2d 639, 639–40, 510 N.Y.S.2d 172 (1986); *Inc. Vill. of Sag Harbor v. Chelberg & Battle Post #388 of the Am. Legion, Inc.*, 12 A.D.2d 520, 521, 207 N.Y.S.2d 464, 465 (1960)	Several	—
NC	N.C. Const. art. 5, §§ 3–4	State Local	—	—	Local textual exception but only if approved by voter majority	—	*N.C. State Ports Auth. v. First-Citizens Bank & Tr. Co.*, 242 N.C. 416, 424, 88 S.E.2d 109, 114 (1955)	State and local exception for credit approved by voter majority	<u>Public Purpose</u> art. V, § 2

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State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
ND	N.D. Const. art. 10, § 18	State Local	State Local	State Local	*Paving Dist. 476 Group v. City of Minot*, 2017 ND 176, para. 26, 898 N.W.2d 418, 426*;* *Haugland v. City of Bismarck*, 818 N.W.2d 660 (N.D. 2012)	*Paving Dist. 476 Group v. City of Minot*, 2017 ND 176, para. 26, 898 N.W.2d 418, 426*;* *Haugland v. City of Bismarck*, 818 N.W.2d 660 (N.D. 2012)	—	Engagement in any industry, enterprise or business	—
OH	Ohio Const. art. 8, §§ 4, 6	State Local	State Local	Local	1999 Ohio Op. Atty. Gen. No. 99-049, 1999 WL 75668[254]	—	1999 Ohio Op. Atty. Gen. No. 99-049, 1999 WL 75668[255]	Economic development[256]	—
OK	Okla. Const. art. 10, §§ 15, 17	State Local	State Local	State Local	—	*In re Oklahoma Development Finance Authority*, 89 P.3d 1075 (Okla. 2004)[257]	*Orthopedic Hosp. of Oklahoma v. Oklahoma State Dept. of Health*, 118 P.3d 216, 222, 2005 OK CIV APP 43, para. 10–12 (Okla. Civ. App. Div. 1, 2005)	State exception for economic development[258]	Public Purpose art. 10, § 14
OR	Or. Const. art. 11, §§ 5–7, 9	State Local	State Local	Local	*Miles v. City of Eugene*, 451 P.2d 59, 61–62, 252 Or. 528, 532–33 (1969); *Carruthers v. Port of Astoria*, 438 P.2d 725, 730–31, 249 Or. 329, 341 (1968)	*Miles v. City of Eugene*, 451 P.2d 59, 61–62, 252 Or. 528, 532–33 (1969); *Carruthers v. Port of Astoria*, 438 P.2d 725, 730–31, 249 Or. 329, 341 (1968)	—	Local exception for affordable housing	—

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[254] Accord State ex rel. Taft v. Campanella, 368 N.E.2d 76, 84–85 (Ohio App. 1977).
[255] Accord C.I.V.I.C. Group v. Warren, 723 N.E.2d 106, 109–10 (Ohio 2000); Citizens Word v. Canfield Twp., 787 N.E.2d 104, 108 (Ohio App. 7 Dist., 2003).
[256] Ohio Const. art. 8, § 13. Article 8 also includes several other exceptions to section 13.
[257] The public purpose requirement appears to stem from the public purpose clause rather than from the anti-aid provision.
[258] Via the Oklahoma Center for the Advancement of Science and Technology. Okla. Const. art. 10, § 15(B).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
PA	Pa. Const. art. 8, § 8; art. 9 § 9	State Local	State Local	Local	*Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 205, 460 Pa. 1, 15–16 (1975)	*Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 205, 460 Pa. 1, 15–16 (1975)	—[259]	Public service, industrial, or commercial enterprises necessary to the health, safety or welfare of the Commonwealth	—
RI	R.I. Const. art. 6, §§ 11,[260] 16	State	—	—[261]	—	*In re Advisory Opinion to Governor (DEPCO)*, 593 A.2d 943 (R.I. 1991)	—[262]	2/3 vote of legislature to appropriate money for a private purpose	—

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[259] But see Harbold v. City of Reading, 49 A.2d 817, 820–21 (Pa. 1946) (observing that unconstitutional expenditure lacked consideration and public purpose).
[260] Section 11 requires a two-thirds vote by the legislature to appropriate money for a private purpose.
[261] Article 6, section 11, requires a two-thirds vote by the legislature to appropriate money for a private purpose and therefore may be construed as a state and local gift clause. R.I. Const. art. 6, § 11.
[262] Even though there is no consideration requirement, courts examine whether there is a pledge of credit based on criteria other than public purpose alone. See, for example, Opinion to the Governor, 308 A.2d 809, 812 (R.I. 1973) (whether legislation was an unconstitutional pledge of credit turned on whether corporate bonds were an obligation of the state rather than on public purpose alone); Kennedy v. State, 654 A.2d 708, 713 (R.I. 1995) (deciding that legislation required a two-thirds vote for private appropriations even though it was rationally related to a legitimate public purpose for equal protection purposes).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
SC	S.C. Const. art. 10, § 11	State Local	State Local	—	—	—[263]	—[264]	Public pensions	—[265]
SD	S.D. Const. art. 13, § 1[266]	—[267]	—[268]	State	—[269]	—	—[270]	Extension of credit to the people upon real estate security	Public Purpose art. XI, § 2

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[263] Litigants have challenged government actions as lacking a public purpose in addition to pledging the state's credit, but the latter does not turn on whether a public purpose exists. Therefore, public purpose does not appear to be a requirement of or an exception to the credit and stock clauses. See, for example, State ex rel. Medlock v. South Carolina State Family Farm Development Authority, 306 S.E.2d 605, 608–09 (S.C. 1983) (deciding credit issue apart from public purpose question); Carll v. South Carolina Jobs-Economic Development Authority, 327 S.E.2d 331, 334–35 (S.C. 1985) (same); Brashier v. South Carolina Dept. of Transp., 490 S.E.2d 8, 12–13 (S.C. 1997) (deciding credit issue with no analysis of public purpose whatsoever); South Carolina Farm Bureau Marketing Ass'n v. South Carolina State Ports Authority, 293 S.E.2d 854, 856–57 (S.C. 1982) (deciding credit issue even after plaintiff conceded public purpose).

[264] Although there does not appear to be a consideration requirement, courts consider other criteria. See, for example, South Carolina Farm Bureau Marketing Ass'n v. South Carolina State Ports Authority, 293 S.E.2d 854, 857 (S.C. 1982) (credit clause holding based on whether challenged action was primarily for the benefit of the state and farmers rather than the private association); Carll v. South Carolina Jobs-Economic Development Authority, 327 S.E.2d 331, 335 (S.C. 1985) (credit clause holding based on whether the act imposed any pecuniary liability on the state).

[265] Article 10, section 5, provides that "any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied" and therefore may be construed as a public purpose clause. S.C. Const. art. 10, § 5.

[266] This section permits the state to lend its credit for "developing the resources and improving the economic facilities" of the state, but only when subject to control by the state. Further, it disallows the appropriation of money for these purposes except by a two-thirds vote of the legislature. S.D. Const. art. 13, § 1. This section originally forbade the state from making any "donations to or in aid of any individual, association, or corporation, except for the necessary support of the poor." Cutting v. Taylor, 51 N.W. 949, 950 (S.D. 1892). The original version was more typical of an anti-aid provision. The current version permits aid under certain circumstances and therefore does not fit the typical mold of an anti-aid provision. Nevertheless, because it limits appropriations by requiring a two-thirds vote, it should be construed as an anti-aid provision.

[267] But see S.D. Const. art. 13, § 1. State credit only permitted upon 2/3 vote of legislature.

[268] But see Matter of Advisory Opinion Concerning the Const. of H.B. 1255, H.B. 1132, and H.J.R. 1004, 456 N.W.2d 546, 550 (S.D. 1990) (stating that "the people of South Dakota have explicitly withdrawn the state's authority to be an owner of capital stock of corporations").

[269] But separately required under public purpose clause. See Matter of Advisory Opinion Concerning the Const. of H.B. 1255, H.B. 1132, and H.J.R. 1004, 456 N.W.2d 546, 547–48 (S.D. 1990).

[270] But four other criteria must be met. 456 N.W.2d at 548.

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
TN	Tenn. Const. art. 2, §§ 29, 31	State Local	State Local [271]	—	*West v. Tennessee Housing Development Agency*, 512 S.W.2d 275, 283–84 (Tenn. 1974)	*West v. Tennessee Housing Development Agency*, 512 S.W.2d 275, 283–84 (Tenn. 1974)	—	3/4 voter majority	—
TX	Tex. Const. art. 3, §§ 50–52; art. 11, § 3; art. 16, § 6	State Local	Local	State Local	—	*Edgewood Independent School Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995)	*Pasadena Police Officers Ass'n v. City of Pasadena*, 497 S.W.2d 388, 392–93 (Tex. Civ. App. 1973); Tex. Atty. Gen. Op. JM-551 (Tex. A.G.), 1986 WL 219397	Economic development,[272] among many others	Public Purpose art. VIII, § 3
UT	Utah Const. art. 6, § 29	State Local	State Local	—	—	*Utah Housing Finance Agency v. Smart*, 561 P.2d 1052 (1977)	—	Equity interest as consideration for intellectual property	—
VT	—	—	—	—	—	*Gross v. Gates*, 109 Vt. 156 (1937)	—	—	Public Purpose Vt. Const. chap. I, art. 9 Emoluments chap. I, art. 7
VA	Va. Const. art. 10, § 10	State Local	State Local	—	—	*City of Charlottesville v. DeHaan*, 323 S.E.2d 131, 138 (Va. 1984)	—[273]	Industrial development	Emoluments art. 1, § 4

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[271] With a three-quarters vote.
[272] Tex. Const. art. 3, § 52-a.
[273] But the transaction must be for the benefit of the government in some manner, and the presence of public purpose alone does not render certain transactions constitutional. City of Charlottesville v. DeHaan, 323 S.E.2d 131, 137–38 (Va. 1984) (citing Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968) and listing the benefits to be received by the government).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
WA	Wash. Const. art. 8, §§ 5, 7; art. 12, § 9	State Local	State Local	Local	*Peterson v. Department of Revenue*, 443 P.3d 818 (Wash. App. Div. 1, 2019)[274]	—	*King County v. Taxpayers of King County*, 949 P.2d 1260, 1267	Necessary support of the poor and infirm	Public Purpose art 7, § 1
WV	W.Va. Const. art. 10, § 6	State	—	—	Textual exception;[275] *State ex rel. WV Citizens Actions Group v. EV Econ. Dev. Grant Comm.*, 213 W. Va. 255 (2003)	—	—[276]	Public purposes[277]	—
WI	Wisc. Const. art. 13, § 3	State	—	—	Textual exception[278]	*Libertarian Party of Wisconsin v. State*, 546 N.W.2d 424, 438 (Wis. 1996)	—[279]	Veterans' housing loans[280]	—
WY	Wyo. Const. art. 16, § 6[281]	State Local	State Local	State Local	—	Honorable Philip A. Nicholas Honorable Frank Philp, 2007 WL 1748388, at *8	*Frank v. City of Cody*, 572 P.2d 1106, 1114 (Wyo. 1977)	Economic development[282]	Local Public Purpose art. 13, § 3

[274] Courts use the term "fundamental government purpose." Peterson v. Department of Revenue, 443 P.3d 818 (Wash. App. Div. 1, 2019).
[275] W.V. Const. art. 10, § 6a (allowing appropriations for public purposes).
[276] But see State ex rel. State Bldg. Commission v. Casey, 160 W.Va. 50 (1977) (holding that providing space to corporation in a government building to be used without cost is a grant of credit in violation of the constitution).
[277] 160 W.Va. 50.
[278] Wisc. Const. art. 8, § 7.
[279] But see Libertarian Party of Wisconsin v. State, 546 N.W.2d 424, 439 (Wis. 1996) ("It is our conclusion that the giving or loaning of the credit of the state which it was intended to prohibit . . . occurs only when such giving or loaning results in the creation by the state of a legally enforceable obligation on its part to pay to one party an obligation incurred or to be incurred in favor of that party by another party.") (citation omitted).
[280] Wisc. Const. art. 13, §7.
[281] See also Wyo. Const. art. 3, § 36 ("No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.").
[282] Wyo. Const. art. 16, § 12.