LESSONS ON THE LIMITS OF CONSTITUTIONAL LANGUAGE FROM COLORADO: THE EROSION OF THE CONSTITUTION'S BAN ON BUSINESS SUBSIDIES

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My colleague, Richard Collins, and I have recently completed a study of the Colorado Constitution, one hundred and twenty-five years old this year.[1] We discussed each section, no simple task as the Colorado Constitution is one of the longest state constitutions in the United States. Our treatise is part of a series dedicated to the "rediscovery" of state constitutional law.[2] In this rediscovery, most scholars focus on the novel[3] substantive provisions sprinkled throughout state constitutions.[4] Our study of Colorado's experience also led to lessons on the limits of constitutional language, lessons more stark, perhaps, than those offered by our experience with the United States Constitution.

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1. DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION (forthcoming 2002) [hereinafter OESTERLE & COLLINS].

2. In the Foreword to our book the editor of the series, G. Alan Tarr, discusses the "unsuspected richness" of state constitutions. OESTERLE & COLLINS, *supra* note 1, at xxv.

3. "Novel" meaning they are not in the Federal Constitution, the document that has been the obsession of American scholars.

4. See for example, the words of Professor Tarr, writing about this rediscovery:

> When judges and scholars turned their attention to state constitutions, . . . [t]hey found not only provisions that paralleled the federal Bill of Rights, but also constitutional guarantees of the right to privacy and of gender equality, for example, that had no analogue in the U.S. Constitution. Careful examination of the text and history of state guarantees revealed important differences between even those provisions that most resembled federal guarantees and their federal counterparts. Looking beyond state declarations of rights, jurists and scholars discovered affirmative constitutional mandates to state governments to address such important policy concerns as education and housing.

OESTERLE & COLLINS, *supra* note 1, at xxv.

The Colorado Constitution's length is in obvious contrast to the much shorter Federal Constitution.[5] The Colorado Constitution, from its inception and with each new amendment, exhibits a tradition of including much more detail on substantive matters in its sections.

The length of the Colorado Constitution is attributable to two related phenomena. First, the delegates to the 1875–76 Colorado constitutional convention feared the excesses of a state legislature and were convinced that they could control their newly created Colorado General Assembly with particularized constitutional fetters. Second, the citizens of Colorado periodically become aroused when the state legislature disregards public views on important matters. During such times, a favorite tactic of the citizens is to reorient the legislature with numerous and detailed citizen-initiated constitutional amendments. Citizens have amended the Colorado Constitution a whopping 142 times, adopting just under half of the 283 amendments that have made the ballot.[6]

The question presented by the contrast, then, is whether the detail helps to make the document more effective or more problematic. Professor Collins and I have written earlier in this Law Review about the ambiguous role of citizen initiatives in ordering state affairs.[7] The present Article is an appraisal of

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5. In Volume One of the Colorado Revised Statutes, the Colorado Constitution takes up pages 29 to 643, 614 pages in total (this includes some annotation pages, however). The Federal Constitution takes up pages 5 to 22, 17 pages in total (without annotations). The Federal Constitution focuses on structure and procedure; the Colorado Constitution includes numerous substantive provisions. If one includes the substantive matters contained in the Bill of Rights in her definition of the original federal document (which are repeated in the state document), there is still a marked brevity and generality in the federal provisions as compared to the Colorado provisions.

6. OESTERLE & COLLINS, *supra* note 1, at xiii. The general assembly referred two-thirds of the amendments to the people, and Colorado private citizens initiated the remaining one-third. The citizen initiatives are much lengthier than the referenda. Moreover, the frequency of initiatives in comparison with referenda has grown substantially in recent years.

7. Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47 (1995). We found that while the initiative process works well for initiated legislation, it does not work well for initiated constitutional amendments. The amendment process encourages citizens to detailed regulatory language in the constitution. The language is crudely drafted, creating interpretative difficulties, conflicts in unintended ways with other current regulatory systems, and is inflexible to change. This suggests that initiatives are the opposite of the argument made in the text on drafters' language. Where drafters' language is not effective to further their intentions, initia-

the delegates' success in their initial drafting strategy of using constitutional language to rein in the state legislature. What we found, with one notable exception, was that over time sustained pressure from the General Assembly and acquiescence by the Colorado Supreme Court has eviscerated even the most heartfelt of the delegates' intentions. Specific language was only a transient barrier. The exception, and there is a real lesson here, was the delegates' creation of procedural requirements for the enactment of legislation; the substantive limits largely failed.

To illustrate the point, this Article focuses on what was perhaps the most contentious issue debated at the 1876 constitutional convention—government subsidies to business in general and railroads in particular. The delegates drafted a constitutional document that they thought would eliminate business subsidies in Colorado. A 1922 decision of the Colorado Supreme Court effectively nullified the ban. The decision did not rest on any relevant amendments to the delegates' language; there were none. Instead, the decision purported to interpret the original text.

Part I places the 1876 Colorado constitutional convention in context; Part II details the original constitutional provisions that banned business subsidies; Part III provides the contrast, describing the pervasiveness of business subsidies in Colorado today; and Part IV identifies the moment of constitutional transition, the Moffat Tunnel case of 1922.

I. A BRIEF HISTORY OF THE ORIGINS OF THE COLORADO CONSTITUTION

To understand the strength of purpose of the constitutional language detailed in Part II, one must first put the language in the context of the place and time in which it was drafted, the post-civil war era in the Colorado Territory.

Serious work on Colorado's constitution began when Congress passed an "1875 Enabling Act" authorizing the territorial governor of Colorado to call an election for thirty-nine delegates

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tives are too effective in furthering the intentions of proponents. The inconsistency may be temporal, however. The phenomenon observed in the text occurred over a longer period of time. Most major initiatives are relatively modern. With the passage of time we may also witness the frustration of the intentions of the proponents of initiatives.

to a constitutional convention.[8] Congress specified that a convention had to begin sixty days after such an election,[9] and that, if successful, the convention submit a state constitution to the people of the territory for ratification in July of 1876.[10] The proposed constitution could "make not civil or political distinction on account of race or color, except Indians not taxed," had to "tolerate all religious sentiment," had to "disclaim all title to unappropriated public land," and could not permit indiscriminate taxes on out-of-state citizens nor permit tax on federal property.[11] Upon ratification of a constitution by Colorado citizens, the Act made it the "duty" of the President to proclaim Colorado a state without further congressional action.[12]

The Convention opened in Denver on December 22, 1875, and concluded on March 14, 1876. On July 1, 1876, Coloradoans voted 15,443 to 4,039 for the new constitution. President Grant proclaimed Colorado a state on August 1, 1876.[13]

The Colorado Constitution was largely a cut-and-paste job. Much of the language of the constitution came from three recently adopted state constitutions—Illinois (1870), Pennsylvania (1873), and Missouri (1875).[14] Provisions unique to the Colorado version included a section banning employees' waivers of employers' liability, a section on the preservation of state forests, and, in the most significant addition, an entire article on mining and irrigation.[15]

The heavy reliance on language from other state constitutions did not mean that there were no conflicts at the convention. There were lively arguments on the regulation of railroads and other business corporations, whether to mention God

8. Enabling Act, 1 COLO. REV. STAT. (2001). Congress specified that the number of members to the convention be the same as the number of members elected at the time to both houses of the territorial legislature. *Id.* § 3. Interestingly, a majority of the governor of the territory, the chief justice of the territory, and the United States attorney for the territory created an apportionment plan among the counties of the territory based on the voting totals per county in the last territorial election for the territorial assembly. *Id.*

9. *Id.* § 4.

10. *Id.* § 5.

11. *Id.* § 4.

12. *Id.* § 5.

13. For an excellent history of the 1876 convention, see Donald Wayne Hensel, A History of the Colorado Constitution in the Nineteenth Century (1957) (unpublished thesis) (on file with author).

14. *Id.* at 220.

15. COLO. CONST. art. XV, § 15; *id.* art. XVIII, § 6; *id.* art. XVI §§ 1–8.

in the preamble, the public funding of parochial schools, and women's suffrage.[16] The resolution of these debates was often over what language from other constitutions should be left out, not what was used.

Reading the entire 1876 constitutional document in one sitting,[17] one cannot help but conclude that the delegates almost regretted the necessity of creating the state General Assembly at all. The delegates assiduously wrote section after section, interspersed throughout the document's various articles that attempted to curb the General Assembly's discretion. The delegates' sober view of the legislature was the product of the very poor performance of the Colorado territorial legislature,[18] and the influence-peddling scandals of the times infecting other states.[19] The controllers of large corporations, particularly railroads, had bribed and corrupted elected officials in several state legislatures to obtain government favors and protect local monopolies.[20]

The delegates took a three-fold approach to controlling the General Assembly. First, the delegates crafted procedures to prevent haste, corruption, and extravagance.[21] Legislative sessions were short; procedures for passing acts were cumbersome and technical;[22] legislation on separate matters could not be bundled.[23] Second, the delegates inserted a code of ethics for legislators into the document.[24] And third, the delegates tacked on a plethora of subject matter prohibitions and caps to limit the legislature's taxing authority and bonding capacity.[25]

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16. Hensel, *supra* note 13, at 134.

17. A rarity for lawyers and scholars, who focus on individual sections relevant to issues of the moment.

18. Hensel, *supra* note 13, at 58.

19. *Id.* at 317–19.

20. *Id.* at 281–326.

21. 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 725 (1907) [hereinafter PROCEEDINGS].

22. It took a minimum of six days to pass a bill; all bills had to be referred to committee; all bills had to wait ninety days to become effective. The governor was given a line-item veto power.

23. A bill could deal only with a single subject, all bills had to be general in application, and no substantive provisions could be in appropriation bills.

24. Legislators could not take bribes, vote on a bill in which they were interested parties, engage in log-rolling, have interests in contracts with the general assembly to provide for stationery, printing, paper or fuel, or engage in duels.

25. *See, e.g.*, COLO. CONST. art. XI, §§ 1–3.

In this last category, the delegates included several provisions that disabled (so they thought) the legislature from favoritism towards individual corporations or railroads,[26] and forbade the legislature from funding religious organizations or schools.[27] The provisions prohibiting favoritism toward corporations were intended to stop several government practices—cash grants to corporations, bonds for the benefit of corporations, loans to corporations, and guarantees of corporate debts—that we now refer to collectively as forms of government business subsidies. When the delegates did grudgingly empower the legislature with law-making authority, they often could not resist the temptation to direct the legislature on how it should exercise its authority, particularly in matters related to education, mining, and irrigation.[28]

When the delegates drafted an "Address to the People" at the conclusion of the convention to persuade Colorado citizens to ratify the constitution, the Address specifically argued that the document mitigated the problem of corruption in the legislatures.[29] In the Address, the delegates noted "especial effort was made to restrict the powers of the Legislative Department . . . ."[30] Of specific importance to this Essay's focus on business subsidies, the authors of the Address trumpeted the constitution's ban on local or special laws to favor any one corporation.[31] The authors also noted that the constitution "protect[s] the people from . . . the oppression consequent upon the voting of bonds and other kinds of indebtedness to corporations."[32]

The lesson to be learned from the use of the Colorado Constitution over its one hundred twenty-five years is that the delegates' efforts to control the state legislature were largely unsuccessful. The procedural rules dampening the legislature's ability to engage in bundling issues were a modest success.[33]

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26. *Id.* art. XV, § 2.

27. *Id.* art. IX, § 7.

28. *See, e.g.,* COLO. CONST. art. XVI, §§ 2, 8 (directing the general assembly to pass laws on specified matters that would otherwise be within its general legislative powers).

29. PROCEEDINGS, *supra* note 21, at 723.

30. *Id.*

31. *Id.* at 725.

32. *Id.* at 723.

33. The Colorado provisions make it very difficult to attach a "rider," a provision on a separate matter not necessarily supported by a majority, to otherwise popular bills in an effort to piggyback the rider on the popular vote behind the

The ethical code was unnecessary as criminal legislation both before and after the adoption of the constitution provided similar restrictions on legislator behavior. Moreover, the code's one significant addition to the normal criminal provisions, a ban on legislator "log-rolling," has not been observed.[34] Indeed it is hard to imagine legislative activity, particularly that dominated by political parties, without some kind of vote-trading. Finally, the substantive bars, limits, and caps have been avoided with such frequency that they are now only historical curiosities. It is this inexorable erosion that Professor Collins and I found in the research for our book and that is the subject of this Article.

II. THE DELEGATES' EFFORT TO STOP LEGISLATIVE SUBSIDIES TO PRIVATE BUSINESSES

The delegates' concluding "Address to the People" noted that nothing caused them "more anxiety and concern than the troublesome and vexed question pertaining to corporations."[35] There were more heated and closely decided votes in the con-

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original bill. This practice is common in the United States Congress and next to impossible in the Colorado General Assembly. The rider would violate the single subject rule. Moreover, the most effective bill on which to attach a rider is a budget bill, which must be passed by year-end. The deadline pressure on the budget bill maximizes the potential of success for riders. In Colorado, appropriations bills cannot contain substantive provisions. Finally, if a rider does slip through, the governor has the power to line-item veto the rider and sign the bill.

34. The Colorado Constitution declares that log-rolling, agreements among members of a legislative body to support each other's bills, is an act of bribery:

> If any member of the general assembly shall give his vote or influence for or against any measure or proposition pending in such general assembly, or offer, promise or assent so to do, upon condition that any other member will give or will promise or assent to give his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such general assembly, or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such general assembly, he shall be deemed guilty of bribery . . . .

COLO. CONST. art. V, § 40. There is no record of the sentence ever being enforced. Most recognize that some kind of vote trading is essential to a system that depends on political compromise to pass legislation. *See* Michael J. Waggoner, *Log-Rolling and Judicial Review*, 52 U. COLO. L. REV. 33 (1980). The criminal statute defining the crime of bribery forbids only influence accomplished through pecuniary benefit, the first sentence of Section 40. COLO. REV. STAT. § 18-8-302 (2001). There are no reported judicial opinions interpreting the second sentence.

35. PROCEEDINGS, *supra* note 21, at 728.

vention on the regulation of corporations and railroads than on any other topic.[36] The delegates sought to draft a constitution that nullified the leverage of railroads over the state and its local government units, yet did not discourage out-of-state investors from building rail lines in the state.

One can easily understand the significance of the matter in the context of the time. The new state would have little or no internal capital with which to build an infrastructure to support mining and agriculture, its major industries. Financiers from outside the state would have to capitalize railroads, irrigation projects, smelters, and banks. Yet the delegates were well aware of the bribery and influence-peddling scandals of the times.[37] Moreover, several territorial cities had become insolvent due to their attempts to finance local railroads.[38]

The delegates attempted to craft an accommodation of the two concerns. They hoped to encourage outside investment in the state by rejecting heavy government price and product controls. And they hoped to protect the integrity of state and local government by limiting their powers. In the Address the delegates noted that "[w]e have endeavored to take a middle ground, believing it to be more safe, and in the end that it will give more general satisfaction."[39] They also noted that some of their sister states had gone too far in placing legislative-type restrictions on corporate power in their constitutions.[40]

The delegates considered and rejected a provision giving the General Assembly the power to set railroad rates if the rates were "just and reasonable."[41] The delegates also considered and rejected a provision abolishing limited liability for

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36. *See, e.g.*, Hensel, *supra* note 13, at 138–50 (discussing the contested votes on the corporate provisions from contemporary newspaper articles).

37. In the "Address to the People," the delegates wrote: "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." PROCEEDINGS, *supra* note 21, at 728.

38. Citizens eager for train service voted for bonded indebtedness with little appreciation of the risk. The local government lent the bond proceeds to the roads. The railroads agreed to repay the funds from operating revenue. When many of the railroads failed, the railroad business was volatile and competitive, and the local governments found themselves without sufficient tax revenues to pay off the bonds. The County of Boulder held shares of worthless stock in the Colorado Central Railroad. *See* Hensel, *supra* note 13, at 156 (citing the DENV. DAILY TRIB., June 9, 1876).

39. PROCEEDINGS, *supra* note 21, at 728.

40. *Id.*

41. *See* Hensel, *supra* note 13, at 143–44.

corporate shareholders on corporate obligations.[42] The delegates also decided to omit specific provisions regulating banking.[43] Moreover, the delegates rejected provisions common in other states requiring corporations to file annual reports, to publish shareholder lists, or to provide cumulative voting rights for common shareholders.[44]

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.

The delegates believed that they could safeguard the state against corruption from business interests by banning directly the offensive conduct, legislative subsidies to individual business entities.[45] This belief was based on two rationales. First, if the General Assembly could not grant special favors or subsidies to businesses, the businesses would have no incentive to bribe legislators.[46] Second, if the state or municipalities could not grant favors to businesses, businesses looking to locate in or serve new areas could not extort funds from local governments anxious to have them.[47]

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42. *Id.* at 152.

43. *Id.* at 150–51.

44. *Id.*

45. In the "Address to the People," the delegates, after noting the problem of corporate corruption of state legislatures, see *supra* note 37, wrote: "Experience has shown that positive restrictions on the powers of *the Legislature* in relation to these matters are necessary." PROCEEDINGS, *supra* note 21, at 728 (emphasis added).

46. *See* PROCEEDINGS, *supra* note 21, at 729. "[W]e have prohibited the Legislature from lending the credit of the State in aid of any corporation, either by loan or becoming a subscriber to any stock, or a joint owner with any party, except in the case of forfeiture and escheats . . . ." *Id.* In the "Address to the People," the delegates also 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." *Id.* at 725.

47. *See* PROCEEDINGS, *supra* note 21, at 730 ("The same principles are applied to counties, cities, towns and school districts . . . .").

Thus, railroads could not demand funds from cities as a condition of the railroad building a line or spur into a city.[48] The railroads' leverage to extort funds was particularly strong when businesses could play one state or local government against another. Cities would get into bidding wars against each other. The delegates sought to stop the extortion: if the cities could not pay, there could be no bidding wars.

This was a heady gamble. The delegates decided that the state's favorable business conditions, open business climate, and level playing field approach would attract business capital even though the state would be disadvantaged vis-à-vis other states because it could not join in bargaining over state concessions. While the Colorado Constitution could protect local governments from bidding against each other, it could not protect Colorado from the bids of other states. The delegates apparently believed that the loss of some business to other states would be outweighed by the prospect of increased government integrity.

The delegates' attempt to stop government subsidies to private business appeared in numerous forms. By including much detail in the bans, overlapping provisions, and general catch-all phrases such as "directly or indirectly, in any manner"[49] or "for any amount, or for any purpose whatever,"[50] they thought that they had written language that would effectively tie the hands of the legislature. One should read all the pertinent provisions of the constitution together to get the full sense of the clarity and depth of the delegates' views on this matter.

(1) The General Assembly could not grant special charters to business:

> No charter of incorporation shall be granted, extended, changed or amended by special law . . . .[51]

(2) The General Assembly could not pass special legislation favoring any one business:

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48. For an example of such pressure, see the facts of Colorado Cent. R.R. v. Lea, 5 Colo. 192 (1879), describing the payments made by the City of Boulder to a railroad for the purpose of encouraging the railroad to lay tracks into the city.

49. *See* COLO. CONST. art. XI, § 1.

50. *Id.*

51. COLO. CONST. art. XV, § 2.

> The general assembly shall not pass local or special laws . . . granting to any corporation, association or individual the right to lay down railroad tracks . . . [or] any special or exclusive privilege, immunity or franchise whatever.[52]

(3) The General Assembly could not give special tax status or exemptions to corporations nor grant blanket exemptions to corporations:

> All taxes shall be uniform upon the same class of subjects . . . and shall be levied and collected under general laws . . . .[53] All laws exempting from taxation property other than hereinbefore mentioned, shall be void . . . .[54] The power to tax corporations and corporate property, real and personal, shall never be relinquished or suspended.[55]

(4) The General Assembly could not make gifts or grants to business:

> Neither the State nor any county, city, town, township or school district, shall make any donation or grant to, or in aid of . . . any corporation or company.[56]

(5) The General Assembly could not invest in corporate stock or otherwise enter into a joint venture with a corporation:

> Neither the State nor any county, city, town, township or school district, shall . . . become a subscriber to, or shareholder in, any corporation or company, or a joint owner with any person, company or corporation [except by escheat, forfeiture, donation or devise, execution on collateral, payment of penalty or fine, or default].[57]

(6) The General Assembly could not forgive any debts owed the state by a corporation:

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52. *Id.* art. V, § 25. The section, containing many other specific bans on special legislation, concludes with the requirement "[i]n all other cases, where a general law can be made applicable, no special law shall be enacted." *Id.*

53. *Id.* art. X, § 3.

54. *Id.* art. X, § 6. In the original exemptions the only business property mentioned was a ten year exemption for mines and mining claims that did not show a net profit or did not have surface improvements. *Id.*

55. *Id.* art. X, § 9.

56. *Id.* art. XI, § 2.

57. *Id.*

> No obligation or liability of any person, association, or corporation, held or owned by the State, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released or postponed, or in any way diminished by the general assembly, nor shall such liability or obligation be extinguished except by payment into the proper treasury.[58]

(7) The General Assembly could not authorize trustees, including those in charge of the state trust fund, to invest in bonds or stock of corporations:

> No act of the general assembly shall authorize the investment of trust funds by executors, administrators, guardians or other trustees, in the bonds or stock of any private corporation.[59]

(8) The General Assembly could not lend money to nor guarantee the debts of any business:

> Neither the State, nor any county, city, town, township or school district, shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to or in the aid of any person, company or corporation, public or private, for any amount or for any purpose whatever . . . .[60]

(9) The General Assembly could not assume the liability or other obligations of any business:

> Neither the State, nor any county, city, town, township or school district, shall . . . become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the State.[61]

(10) The General Assembly could not waive its right of eminent domain over corporate property:

> The right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchise of incorporated companies and

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58. *Id.* art. V, § 38 (repealed).
59. *Id.* art. V, § 36 (repealed).
60. *Id.* art. XI, § 1.
61. *Id.*

> subjecting them to public use, the same as the property of individuals . . . .[62]

(11) The General Assembly could not waive its right of police power over corporations and, in an extraordinary bit of language, was asked to put business on an equal footing with individuals in state regulations:

> [T]he police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manners as to infringe the equal rights of individuals or the general well-being of the State.[63]

(12) The General Assembly could not pass retrospective laws to benefit corporations:

> The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual, or association or individuals, retrospective in its operation . . . .[64]

Looking back on the delegates' language, their decision to bar all government subsidies to private businesses, "in whatever form," is unmistakable. They banned the most obvious subsidy, a cash grant, and the many substitutes of cash grants—loans and loan guarantees, tax breaks, debt forgiveness, and operating advantages (monopolies or privileges). It was a bold gamble. Some might say it was noble,[65] others might say that it was naïve.[66] Unfortunately, we have very limited data on how the delegates' decision played out in practice. The constitution's ban on business subsidies proved to be a very leaky vessel.

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62. *Id.* art. XV, § 8.

63. *Id.*

64. *Id.* art. XV, § 12.

65. They would argue that corruption by big business is otherwise endemic and inherent.

66. They would argue that governments ought to be able to make an economic calculation of whether a subsidy would generate a positive return in increased tax revenues over time. An honest government could make a legitimate calculation on the value of subsidies in the best interests of its citizens. They would argue that we ought not assume that all government subsidies to business are the product of dishonesty. Bribery or corruption is illegal and ought to be prosecuted on its own merits.

III. DESPITE THE 1876 DELEGATES' INTENTIONS, BUSINESS SUBSIDIES ARE UBIQUITOUS TODAY

The state and local governments of Colorado have, for some time, routinely subsidized various businesses. The legislature's assumption of the power to do so is most evident in high-profile bidding contests between Denver and major cities in other parts of the country for new grand-scale business facilities. At issue in these contests is whether to grant location incentives and at what level, not whether the legislature has the inherent power to do so.

In the last decade, the governor of Colorado has bid for and lost contests to attract, among other business operations, the national airplane maintenance facility of United Airlines,[67] the corporate headquarters of Ziff-Davis Publishing,[68] a large research and development facility of Nike Corporation,[69] and the executive offices of Boeing Corporation.[70] Some of the bids had the full support of the General Assembly and others had more limited support. The state bid successfully for the headquarters of Sun Microsystems[71] and Boston Chicken.[72]

The governor's bids, often supported by county and city officials of the relevant locale, have typically included promises to forgive state and local taxes, agreements to finance new facilities with government bonds, to construct additional infrastructure—roads, utility hook-ups, schools, police and fire stations—with government funds, and of outright cash grants to pay for relocation costs and the training of new personnel.

The value of the location subsidies can be staggering. United Airlines asked for a $600 million package of financial incentives in the early 1990s. The Colorado package of incen-

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67. Editorial, *Boeing Flirts With Denver; The Issue: Jet Manufacturer May Move Headquarters Here; Our View: No Special Treatment Should Be Offered*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 24, 2001, at 52A.

68. Emily Narvaes, *Colorado Wooed, Disappointed Before*, DENV. POST, Mar. 22, 2001, at A-19.

69. *Id.*; Jeffrey Leib, *Nike Eyes Colorado; Several States Vie for Complex*, DENV. POST, Aug. 2, 1997, at D-01.

70. Jeffrey Leib, *Denver Perks May Have Reached $28 Million*, DENV. POST, May 11, 2001, at C-03.

71. Emily Narvaes, *Sun Microsystems Picked Colo. for Many Reasons, Executive Says*, DENV. POST, July 24, 1997, at C-01.

72. John Rebchook, *Boston Chicken Breaks Ground on Headquarters*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 12, 1994, at 65A.

tives was valued at well over $200 million.[73] The winning bidder, the City of Indianapolis, offered incentives valued at over $300 million.

Colorado's recently unsuccessful bid for the Boeing headquarters is rumored to have consisted of an offer close to $28 million in incentives.[74] If Boeing had located its headquarters in Denver, the company was to receive up to $5.8 million in tax rebates, another $5 million in aviation fuel-tax proceeds, up to $900,000 in enterprise zone credits, and $500,000 in workforce training funds from the city. Colorado also offered another $1.13 million in economic development and workforce training money. Denver also offered to build Boeing a hangar at the Denver International Airport (DIA). Boeing would have saved as much as $15 million over fifteen years or more. DIA was willing to issue tax-exempt bonds for constructing the hangar. DIA officials said the tax-exempt bonds would have offered a savings of two percentage points over market interest rates in financing the construction at the airport.

In several of the contests, the state lost when the legislature balked at supporting the governor's full package of incentives. There was no debate, however, over whether the legislature had the constitutional authority to offer an incentive package. The legislature correctly assumed that it did.

These high profile location bids are the tip of the iceberg.[75] The General Assembly of Colorado has put in place several standing programs that provide subsidies to targeted businesses. The best known is the Urban and Rural Enterprise Zone Act of 1986 that gives liberal tax credits to businesses that locate in areas designated by the state as "economically depressed."[76] Tax credits are available not only against income taxes[77] but also sales and use taxes,[78] property taxes,[79] and taxes collected on insurance premiums.[80] Colorado businesses liberally use the Act, and designated enterprise area zones are

73. Editorial, *supra* note 67, at 52A.

74. The facts come from Leib, *supra* note 70, at C-03.

75. *See, e.g.*, Emily Narvaes, *Two Firms Considering Colorado Could Bring 1,000 Jobs to State*, DENV. POST, July 17, 1998, at 1C (describing subsidies to T. Rowe Price and Gateway).

76. COLO. REV. STAT. §§ 39-30-101 to -109 (2001).

77. *Id.* §§ 39-30-103.5 to -105.5

78. *Id.* § 39-30-106.

79. *Id.* § 39-30-107.

80. *Id.* § 39-30-107.6.

numerous and cleverly plotted. Although the General Assembly originally intended Enterprise Zones for depressed rural areas, businesses found that through innovative boundary line configuration they could locate Enterprise Zones inside the metropolitan areas of Denver, Pueblo, and Colorado Springs.[81]

There are many other programs that enable officials to offer business subsidies. The failure of the Enterprise Zone Act to aid rural areas led to a second act, the Rural Technology Enterprise Zone Act of 1998, that provides tax credits to private businesses that invest in the infrastructure of the state's rural communities.[82] New in 2001 was a program to give tax credits to insurance companies that invest in Colorado high-tech businesses.[83] The state has a "Colorado Economic Development Fund" from which the governor, upon recommendation from the Colorado Development Commission, can make grants or loans to private entities to encourage economic development in the state.[84]

Many Colorado counties also have local development authorities that can offer tax breaks and grants or loans to local businesses.[85] "Urban Renewal Authorities" in all Colorado large cities fund shopping malls, "downtown developments," and "business improvement districts."[86] The authorities condemn land and issue bonds to finance facilities for private businesses.

Local governments in Colorado have also routinely partnered with private interests in creating and operating large business projects. The City of Denver has ownership interests in a ski resort, a railroad tunnel, a football stadium, a baseball stadium, and an international airport.[87] Each was built and is operated in effective partnership with substantial private interests.

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81. *See, e.g.*, Jeff Smith, *Internet Data Center Opens on Brighton Blvd.; 225,000 Square Foot, $70 Million Facility to Offer Array of Services*, ROCKY MTN. NEWS (Denver, Colo.), Sept. 21, 2001, at 2B.

82. COLO. REV. STAT. § 39-32-102 (2001).

83. *See* Dale A. Oesterle, *Tax Breaks for Venture Capital Funds*, BOULDER DAILY CAMERA (Boulder, Colo.), Sept. 3. 2001, at 4.

84. COLO. REV. STAT. § 24-46-106 (2001).

85. *See, e.g.*, Nancy Lofholm, *Delta Inviting to New Business; Incentives Help County Add Jobs*, DENV. POST, Sept. 10, 2001, at 6B.

86. COLO. REV. STAT. §§ 31-25-101 to -1228 (2001).

87. *See* OESTERLE & COLLINS, *supra* note 1, at 265–68.

Clever tax lawyers discovered in the 1960s how to enable a state government to grant *federal* income tax exemptions to state businesses using so-called industrial revenue bonds.[88] Colorado immediately jumped on the bandwagon. The General Assembly passed the City and Municipality Development Revenue Bond Act in 1967.[89] Under the 1967 Act, Colorado cities and counties could issue tax-free bonds, use the proceeds to build or buy a commercial facility (such as a factory), and lease the factory, long-term, to a Colorado business. The city or county could then dedicate the rental payments from the facility to the repayment obligation on the bonds. In essence, private businesses repaid the bonds that were issued at tax-free rates. Cities and counties soon became the owners of McDonalds restaurants, feed plants, and various other commercial businesses. The usefulness of revenue bonds declined in 1986 when the U.S. Congress restricted the exemption on interest of state revenue bonds to bonds used to finance a few specialized projects (including airports and sports stadiums).[90]

IV. HOW THE GENERAL ASSEMBLY OBTAINED THE CONSTITUTIONAL POWER TO GRANT BUSINESS SUBSIDIES WITHOUT AN AUTHORIZING CONSTITUTIONAL AMENDMENT

The wisdom of business subsidies aside, the question remains: How did the General Assembly get the power to grant specific business incentives and subsidies? No constitutional amendment granted the General Assembly the power.[91] The power came through court authorization.

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88. The federal government had long exempted from federal income tax the interest on state bonds. States discovered that they could use the tax-free bonds to fund private development projects as well as traditional government operations. If the business itself had issued corporate bonds, the interest would be taxable to investors who would demand a higher interest rate to offset the taxes. For a description of the use of revenue bonds, see the facts of Allardice v. Adams County, 476 P.2d 982 (Colo. 1970).

89. COLO. REV. STAT. §§ 29-3-101 to -123 (2001).

90. I.R.C. §§ 103(b)(1), 144(c) (2000) (as amended in 1986).

91. The major exception is the constitutional amendment giving the general assembly the power to levy an income tax. COLO. CONST. art. X, § 16. The amendment did not contain the limits that the delegates had put on the property tax in the original document. One could argue that the absence of a limit on exceptions meant that the general assembly is now authorized to grant tax credits and deductions to the state income tax that it could not have granted under the property tax. The distinction seems to have been lost, however, as the general assembly, in the Urban and Rural Enterprise Zone Act, grants property tax relief as

Private business concerns exerted consistent, persistent political pressure on Colorado's elected officials. Sympathetic elected officials got clever (or devious, depending on one's point of view) and designed various technical ways around the constitutional language. After a period of refusals, the Colorado Supreme Court, facing a politically charged, high profile effort, let down its guard and permitted Denver to subsidize a railroad tunnel. This successful legal contrivance evolved into an accepted procedure for subsidies, and the accepted procedures evolved into a predominant practice of subsidies, despite the 1876 delegates' clear intent to the contrary.

It is a sobering lesson on the vulnerability of detailed, resolute constitutional language in the face of tireless political pressure. All that remains of the original ban is a series of legal moves that municipal attorneys must learn and follow, and for which cities and counties must pay higher legal bills. The policy reversal is worth telling in some detail.

A. The Early Court Enforced the Ban

In the early years after adoption of the Colorado Constitution, the Colorado Supreme Court held the line on the ban on business subsidies, protecting Colorado cities and counties from the railroads (and themselves) by enforcing the constitutional prohibitions.

In 1877, for example, one year after the adoption of the Colorado Constitution, the County of Boulder sought to subsidize a local rail line and the Colorado Supreme Court interceded.[92] Boulder County held stock in the Colorado Central R.R. that it had purchased prior to statehood in 1872. The County agreed to donate the stock to the railroad if the railroad would run an extension of its line from Longmont to Cheyenne, where the line would connect with the transcontinental Union Pacific.[93] The Colorado Supreme Court, in *Colorado Central Railroad v. Lea*, nullified the transaction citing Article X, Section 2, quoted in Part II, above.[94]

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well as tax credits on income tax. COLO. REV. STAT. § 39-3-107.5(1) (2001) (local government may pay or give credits equal to local property tax increases due to development).

92. Colorado Cent. R.R. v. Lea, 5 Colo. 192 (1879).

93. *Id.*

94. *Id.*

Two of the three justices had been delegates at the 1876 convention, and they knew what the language in the constitution meant—governments could not subsidize private businesses, especially railroads.[95] The court did state, however, that it knew the extension would be of "great benefit" to Boulder County and that it enforced the constitution with some reluctance. The court wrote that it had to enforce the framers' intentions "whether wise[] or not . . . ."[96] Evidence of the framers' wisdom came later as the Colorado Central built the extension to Cheyenne even though Boulder County's gift failed.

In the early years of statehood the ban on business subsidies appears to have been observed and enforced. Evidence of this appeared in a 1883 statement by the new governor of Colorado, James B. Grant. He said that the people of Colorado owed a "lasting obligation[] to the fathers of the . . . constitution" for freeing local governments from the influence of railroad lobbying.[97] By the end of the century, however, things had changed, and the railroads of the state, largely consolidated under robber baron Jay Gould by that time, had substantial influence in the General Assembly.[98] The General Assembly did not get into the practice of granting outright subsidies to businesses until the Supreme Court validated them in the 1920s.

B. The Court Opens the Floodgates in 1922

The breach in the constitutional barrier to business subsidies came in 1922 when the Colorado Supreme Court relented to Denver's efforts to subsidize a railroad tunnel, the Moffat

95. Wilber Stone and William Beck were Justices of the Supreme Court in 1879 and had served as delegates at the 1876 convention. Justice Beck, who was the delegate from Boulder County, did not take part in the case, no doubt because of his Boulder County connections. *See* Hensel, *supra* note 13, at 405, 419, 421. Other delegates were also members of the early court. Henry C. Thatcher, was a member of the court from 1876 to 1878 and died in office. Ebenezer T. Wells also joined the court in 1876, but resigned soon thereafter. *Id.*

There is a parallel line of cases under the definition of a "uniform tax" in COLO. CONST. art. X, § 3. An early court, consisting of two delegates to the convention, held that special assessments for street improvements were invalid because they were not a uniform tax. Palmer v. Way, 6 Colo. 106 (1881). Eleven years later the court, with no delegates serving, reversed itself, releasing assessments from the uniformity requirement. City of Denver v. Knowles, 17 Colo. 204 (1892).

96. *Colorado Cent. R.R.*, 5 Colo. at 196.

97. Inaugural Address, 1883 House Journal 1218–19.

98. Hensel, *supra* note 13, at 315–16.

Tunnel, under the Continental Divide a few miles due west of the city.[99] A discussion of the history of the Moffat Tunnel is necessary to an understanding of the political pressures acting on the Colorado Supreme Court in the 1922 case.

In the opening years of the twentieth century, the Denver business community believed that the city, to thrive as a commercial center, needed a railroad link west over or through the Rocky Mountains, through the lucrative mining fields of the Western Slope and on to Salt Lake City. In Salt Lake City, the line could intersect with the country's first transcontinental line, the Union Pacific, providing a connection to San Francisco to the west and Chicago to the east. Without the link to the transcontinental line, business leaders feared that the Denver economy would stagnate in the face of competition from cities both north (Cheyenne, Wyoming) and south (Pueblo, Colorado) that were on or had a direct link to the main lines.

Denver's business leaders initially supported a thinly-capitalized, narrow gauge railroad, the Moffat Railroad.[100] The Moffat line scaled a pass west of the city (Rollins Pass) and laid track to some of the western slope mining communities, where it stalled. The Moffat Railroad would not do. Its grade was steep, the curves numerous, and the winter weather treacherous. Denver officials decided that the city's survival depended on a tunnel under James Peak in Grand County.

The Moffat Railroad was barely solvent and could not finance a tunnel. The General Assembly, dominated by Denver business people, passed an act in 1912 authorizing the governor to issue bonds for the construction of a James Peak tunnel. The General Assembly referred the act to the Colorado voters and the voters rejected it, two to one.[101]

In 1913, Denver's leaders successfully amended Denver's city charter to authorize the city to issue bonds to pay for two-thirds of the cost of the tunnel. The Moffat Railroad agreed to pay the principal and interest on the bonds. Once the bonds were retired, the railroad would take legal title to and posses-

99. For the history of the Moffat Tunnel, see generally EDGAR C. MCMECHEN, THE MOFFAT TUNNEL OF COLORADO (1927).

100. For the history of the Moffat Railroad over Rollins Pass, see generally EDWARD T. BOLLINGER, RAILS THAT CLIMB: A NARRATIVE HISTORY OF THE MOFFAT ROAD (1979).

101. 1911 Colo. Laws 627–46. The governor did not sign the act within the required thirty days and under the provisions of the Colorado Constitution, art. V, § 1, this automatically placed the matter before the voters.

sion of the tunnel. In *Lord v. City & County of Denver*, a divided Colorado Supreme Court, citing *Colorado Central R..R. v. Lea*, the 1877 Boulder County case noted above, invalidated the charter amendment as a violation of Article XI, Sections 1 and 2 of the Colorado Constitution.[102] The city, the court held, was illegally pledging its full faith and credit on bonds to the aid and benefit of a private corporation and was also illegally entering into a joint venture with a private corporation.[103]

Indefatigable supporters of the James Peak tunnel then sought to amend the state constitution in 1919 to authorize the use of state funds to finance three railroad tunnels (the James Peak tunnel and tunnels through Monarch Pass and Cumbres Pass).[104] By combining the James Peak tunnel with tunnels that would aid cities in the north and south, the Denver advocates hoped to coax citizens of Colorado into a favorable vote. It came close: state voters rejected the proposition by only ten thousand votes, although it passed three to one in Denver.[105]

When the limping Moffat Railroad applied for receivership in 1921, James Peak tunnel supporters were desperate. The owners of the railroad were going to dismantle and junk the city's only potential western railroad connection. Denver's business interests convinced the General Assembly to try one last gambit. Lawyers, parsing the language of the Colorado Supreme Court's 1914 opinion, had found that the court had seemingly offered a way around the constraints of Section 2. The court in the 1914 opinion, *Lord v. City & County of Denver*, had distinguished an opinion from the Ohio Supreme Court holding in favor of a business subsidy by noting that in the Ohio case the government had full title to the project at issue.[106] Perhaps, the lawyers reasoned, if Denver alone owned the James Peak tunnel, Denver could issue bonds to finance the tunnel's construction.

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102. Lord v. City & County of Denver, 143 P. 284 (Colo. 1914).

103. *Id.*

104. *See* Moffat Tunnel Improvement Dist. v. Denver & S.L. Ry. Co., 45 F.2d 715, 723 (10th Cir. 1930) (detailing the history of the Moffat Tunnel).

105. *See* ROBERT ATHEARN, THE DENVER AND RIO GRANDE WESTERN RAILROAD 267 (1977).

106. *Lord*, 143 P. at 295 ("The question presented here is entirely different from that where a city undertakes to construct such a tunnel, with such necessary and good faith purpose, with its own funds, and to be so exclusively owned by the city.").

Called to a special session by the governor in 1922, the General Assembly hastily created a Moffat Tunnel Improvement District. The General Assembly gave the district power to issue bonds and to levy special property tax assessments in order to build a tunnel. The district could lease the tunnel, once constructed, to the railroads. The Colorado Supreme Court in *Milheim v. Moffat Tunnel Improvement District* declared the act to be constitutional.[107] Since the district would own and operate the tunnel, it was not a "joint owner" with a private business.[108] The railroad's gain from the below-market rental obligation in the lease was not a "grant in aid" or a "gift" to the railroad.[109] And, in establishing the long-term capital lease at bargain rates, the state did not "lend or pledge [its] credit or faith . . . directly or indirectly, in any manner to or in the aid of" the railroad.[110]

By reading the language of the constitutional bans literally and narrowly, the General Assembly could, in effect, give financing support to a railroad. Thus began the use of long-term "leases," which are in effect ownership-sharing arrangements, to avoid the ban on joint ownership. Moreover, a government could use a lease to give the equivalent of a cash grant to a local business if the rent was set at below-market rates for the development project.

As for the tunnel, the district completed it in 1928, named it the Moffat Tunnel, and promptly leased it exclusively to the Denver and Salt Lake Railway Company, a successor to the old Moffat Railroad. The railroad's rental payments under the lease covered less than forty percent of the amount owed on the bonds.[111] Moreover, the Denver and Salt Lake, always a shaky

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107. Milheim v. Moffat Tunnel Improvement Dist., 211 P. 649 (Colo. 1922), *aff'd*, 262 U.S. 710 (1923).

108. *Id.*

109. The lone dissenter, Justice Gabbert, in the 1914 case, *Lord v. City and County of Denver*, had argued that since a lease from a city to a railroad was without a doubt constitutional and the 1913 Denver plan was factually indistinguishable from a lease arrangement, then the 1913 Denver plan was constitutional. *Lord*, 143 P. at 297 (Gabbert, J., dissenting). He was correct on the practical equivalence of the approaches. Turning his argument on its head, one could plausibly claim that the practical equivalence of the approaches means that under a reading of the constitutional language that gives meaning to the clear intent of the delegates, both should be unconstitutional.

110. COLO. CONST. art. XI, § 1.

111. The supporters claimed that the bond issue would not exceed $6.7 million. The original bond issue turned out to be $15.5 million. Moreover, as debts

company, soon defaulted on the rent.[112] The Denver and Rio Grande Western, the competitive railroad out of Pueblo, bought the Denver and Salt Lake in 1930, and for a time dragged its feet in building a connection off the western terminus of the line to the Rio Grande's main line that ran to Salt Lake City, the so-called Dotsero Cut-Off.[113] Political pressure forced the Rio Grande to finish the Dotsero Cut-Off in 1934, using a $3.8 million loan from a federal agency, the Reconstruction Finance Corporation (RFC). Denver finally had a railroad connection west, in the middle of the depression.[114]

C. *Residual Limits to Government Subsidies Continue to Erode*

The 1922 *Moffat Tunnel* case did seem to retain some limits, however, on government subsidies. The court rejected an implied public purpose exception and also seemed to prohibit any option on or reversion of legal title to private parties in the initial financing agreement. Both limits have been eroded by later court opinions.

The Colorado Supreme Court, in the 1922 *Moffat Tunnel* case, did not rest its holding on a judicially created "public purpose exception."[115] It was too soon to reverse the express language in the 1914 *Lord* opinion that stridently rejected such an exception:

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mounted, the authority had to issue several subsequent rounds of bonds. By 1960, the tunnel authority's total bill for principal repayments and interest payments, past and presently owed, had grown to $45 million. *See* ATHEARN, *supra* note 105, at 267.

112. ATHEARN, *supra* note 105, at 282 (the railroad owed $200,000 in back rent two years after the tunnel opened). There were several disputes over the lease, as the District attempted unsuccessfully to increase the rent when the Denver and Rio Grande Western bought a controlling interest in the Denver and Salt Lake Railway Company in 1930. *Id.* at 289–90. The Rio Grande was itself in trouble and filed for bankruptcy in 1935, the same year that the tunnel was connected to its line to Salt Lake City. *Id.* at 305.

113. The history of the Dotsero Cut-Off is in ATHEARN, *supra* note 105, at 274–99.

114. Within six months the Rio Grande was insolvent; the company turned over control of the old Moffat Railroad with its lease of the tunnel to the RFC for an additional loan of $3.1 million. *See* ATHEARN, *supra* note 105, at 303–04. Ten years later the federal government turned the successor to the Moffat Railroad over to the anemic Denver and Rio Grande Western.

115. Milheim v. Moffat Tunnel Improvement Dist., 211 P. 649 (Colo. 1922), *aff'd*, 262 U.S. 710 (1923).

> That the construction of the proposed line of railroad would be of great benefit to the county and its citizens; that it would give them increased and superior facilities for traffic and commerce with both the Atlantic and Pacific seaboards, do not make it any the less a donation within the intent of the inhibition.
>
> These and similar considerations of public benefit and advantage, had constituted for years, under our territorial government, the basis of appeals for and grants of county and municipal aid to railroad companies, and 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.
>
> If the existence of a public benefit is . . . take it out of the constitutional prohibition, then the prohibition is utterly nugatory and valueless, as such consideration would exist in every probable case.[116]

By 1955, enough time had passed so that the Colorado Supreme Court could imply an exception to the language of Section 2, allowing public payments to private companies if the expenditures further a "valid public purpose."[117] Under this exception Denver came to own Bears Stadium, which it refurbished and renamed Mile High Stadium.[118] Moreover, the

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116. Lord v. City & County of Denver, 143 P. 284, 289 (Colo. 1914) (quoting Colorado Cent. R.R. v. Lea, 5 Colo. 192 (1879)).

117. McNichols v. City & County of Denver, 280 P.2d 1096, 1099 (Colo. 1955).

118. Ginsbery v. City & County of Denver, 436 P.2d 685 (Colo. 1968). The state created a stadium district to finance the purchase and renovation of Bears Stadium used by the Denver Broncos football team and AAA baseball Bears. The voters rejected the project. Denver solicited donations, bought the stadium from the Bears owner, and issued bonds to finance renovations. The bonds were repaid by collecting rent from the teams, concession profits, and parking fees. The Colorado Supreme Court held that the city's activities had a valid public purpose and that the bonds were not "debt."

court declared in 1970 that it would defer to the General Assembly's declaration of a public purpose.[119] The result is that the court has granted the General Assembly a blank check power for avoiding the ban on subsidies in Section 2. The section has indeed become, in the court's language, "utterly nugatory and valueless."[120]

The limit on granting a title option to any private party when a city or county finances a project is found in the 1914 *Lord* opinion. The 1914 court mentions with disapproval the reversion of title in the railroad tunnel to the Moffat Railroad once the government bonds were retired.[121] For some time after the 1922 *Moffat Tunnel* case, municipal attorneys were unwilling to test the 1914 language. This meant that attorneys cautioned cities and counties against using two types of otherwise common covenants in municipal bonds. One covenant makes the revenue producing property behind revenue bonds collateral on the bonds. That is, if the rental payments do not support repayment on the bonds, the investors can claim the underlying property.[122] The second covenant gives the lessee the option to purchase the underlying property by paying off the bonds. The Colorado Supreme Court legitimized both covenants in a 1970 case asking for a declaratory judgment on whether Adams County could issue bonds with such covenants to raise funds to build an agricultural feed plant for Ralston Purina.[123] Both clauses are now in routine use.[124]

D. Do the State Debt Limitations in Article XI, Section 3 Provide a Fallback Limit on Government Finance for Private Development Projects?

Not discussed in either the 1922 or 1914 Moffat Tunnel cases was the role of the Constitution's state debt limitations contained in Article XI, Section 3:

> The State shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenue, erect

119. Allardice v. Adams County, 476 P.2d 982, 989 (Colo. 1970).

120. *See supra* note 116 and accompanying text.

121. *Lord*, 143 P. at 289.

122. Note the absence of such a right in the bonds in Ginsberg v. City & County of Denver, 436 P.2d 685 (Colo. 1968).

123. *Allardice*, 476 P.2d at 982.

124. *See* COLO. REV. STAT. §§ 29-3-112, -115 (2001).

> public buildings for the use of the state, suppress insurrection, defend the state, or, in the time of ward, assist in the defending the United States . . . and the aggregate amount of such debt [for deficiencies of revenue] shall not . . . . exceed one hundred thousand dollars. . . and the aggregate amount of such debt [for the erection of public buildings] shall not exceed the sum of fifty thousand dollars [unless the voters of the state approve an aggregate amount of up to three mills on the dollar] . . . .[125]

The Moffat Tunnel Improvement District, a state agency, issued bonds that far exceeded the state's constitutional debt limits, and all without a vote. The issue was not reached in either the 1922 or 1914 cases regarding the district.[126]

It was not until the 1930s, when the Colorado Supreme Court created the "special fund" exception to Section 3,[127] that attorneys came to understand how to reconcile the section with the court's approval of the Tunnel Improvement District bonds. The Moffat Tunnel Improvement District bonds were not "debt by loan in any form" as that term is used in Section 3. The court defined the word "debt" in the section very narrowly. The court decided to exclude from the concept of debt those government obligations that are not paid out of general revenues.

Applied to the Moffat Tunnel Improvement District bonds, for example, the bonds were not "debt" because they were not repaid out of the general revenues of the state. The District bonds were to be repaid using funds generated by the rental revenues from the tunnel and, to the extent that there was a deficiency, a special property tax assessment on the value added to taxpayers' property adjacent to the tunnel within the district.[128] The rental revenues and the special assessments

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125. The approval is required under COLO. CONST. art. XI, § 5.

126. More important to the 1922 court was whether the special tax assessment powers of the Moffat Tunnel Improvement District violated the Due Process and Equal Protection Clauses of the United States Constitution. The Colorado Supreme Court said no. The issue went on appeal to the Supreme Court of the United States, which affirmed. Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710 (1923).

127. This doctrine grew out of dicta in *In re* Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6, 31 P.2d 325, 330–31 (Colo. 1933). The doctrine found its first application in Johnson v. MacDonald, 49 P.2d 1017 (Colo. 1935) (validating "revenue anticipation warrants" funded out of dedicated excise taxes on motor fuel and license and registration fees on automobiles).

128. If the rental revenues alone pay off the bonds, the bonds are now known as "revenue bonds." If a special tax assessment alone pays off the bonds,

created a "special fund" that, without the tunnel, would not otherwise have been available to supplement the state's general revenue fund.

In crafting a narrow definition of debt in Section 3, the court gave no weight to the "in any form" qualifying phrase. The qualifier was the delegates' attempt at instructing the courts to use a broad definitional approach to the concept of debt that focused on the functional characteristics of a contract, not on what the parties formally named the transaction. In common financial parlance, which has not changed since 1876, debt is characterized by an agreement to pay a fixed sum at a time certain in the future.[129] The payment usually has two components, the repayment of an amount loaned, the principal, and the payment of a periodic fixed interest rate as a fee for the borrowed use of the principal. If either the interest or the principal is not paid when due the debt is in default.

The Moffat Tunnel Improvement District bonds fit within this common notion of what debt is. The financial concept of debt does not depend on the revenue source for the debt payment, it depends on the nature of the repayment obligation itself—a fixed sum at a time certain.[130] By narrowing the traditional concept of debt and approving the issuance of government bonds such as those used by the Improvement District, the Supreme Court freed the state from the debt limitations in the 1876 Constitution and gave considerable financial flexibility to the state and municipal authorities.

The irony of the court's distinction is that in practice the difference between revenue bonds and general obligation bonds is much narrower than is first evident. Municipalities that issue revenue bonds benefit from the belief of many investors that the municipality will stand voluntarily behind the bonds if there is insufficient revenue from the underlying project. The investor belief is based on the importance to any municipality of maintaining a favorable credit rating. A municipality with a high credit rating saves interest charges on all bond issuances.

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the bonds are now known as "special tax bonds." *See, e.g.*, VICTOR L. HARPER, HANDBOOK OF INVESTMENT PRODUCTS AND SERVICE 147 (1986).

129. *See* JOHN DOWNES & JORDAN ELLIOT GOODMAN, DICTIONARY OF FINANCE AND INVESTMENT TERMS 90 (1985).

130. There are several close analogies. A fixed repayment obligation that is repaid exclusively out of income is an "income bond"; it is debt. *Id.* at 176. Similarly, a non-recourse note, a note that upon default gives the holder only the right to limited, specific collateral, is debt. *Id.* at 260.

Thus, municipalities may have no legal obligation to repay the bonds from general revenues but have a strong incentive to voluntarily do so anyway, if necessary, to maintain a favorable credit rating.[131]

Municipal lawyers also learned in 1977 that the Improvement District bonds qualified for a second exemption from Section 3.[132] The drafters of the 1876 constitution applied their prohibitions in Section 3, as they had done in several of the other Sections in Article XI, to a list of all known forms of state government units—"Neither the State, nor any county, city, town, township or school district, shall . . . ." It is hard to escape the conclusion that the drafters intended their list to include all state and government units. New forms of government units evolved, however—special improvement districts and other independent state entities. The Colorado Supreme Court held that Section 3 does not apply to these new types of independent state entities. The court held that whenever the entity borrowing money is a public entity independent of the state, as the Moffat Tunnel Improvement District was, the limits of Section 3 do not apply. The court not only had to overlook the import of the drafters' list, it also had to struggle to hold that such independent agencies are not the "State," nor are they "special commissions," "private corporations," "counties," "cities," or "municipal corporations" within other pertinent constitutional provisions.[133]

In defense of the court's decision, one can say, however, that this approach put Colorado in the mainstream of states that routinely use revenue bonds and special tax bonds. The downside, that the state's constitution is not sufficiently respected, may worry only secluded academics.

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131. Here one could look to the language in Article XI, Section 1 that is overlooked in all the cases on revenue bonds. In Section 1, the State cannot "lend or pledge the credit or faith thereof, directly or *indirectly*, in any manner to or in the aid of any person, company or corporation . . . ." COLO. CONST. art. XI, § 1 (emphasis added).

132. *In re* Interrogatories by Colorado State Senate (Senate Resolution No. 13) Concerning House Bill No. 1247 Fifty-First General Assembly, 566 P.2d 350 (Colo. 1977) (Colorado Housing Finance Authority).

133. Special commissions and private corporations cannot be given the power to tax. COLO. CONST. art. V, § 35. Private corporations cannot be created by special act. *Id.* art. XV, § 1. Cities and towns also operate under constitutional debt limits. *Id.* art. XI, § 8. The general assembly cannot impose taxes for the purposes of any county, city, or municipal corporation but may vest in those governments the power to tax. *Id.* art. V, § 7.

E. There is Nothing Left of the Ban on Subsidies Other Than Technical Formalities

Through this line of cases, any substantial residual effect of the delegates' ban on business subsidies was effectively nullified. All that is necessary is good lawyering to employ the proper fictions.

It is hard to reconcile the 1876 delegates' intentions with the governor's behavior in his efforts to attract a United Airlines maintenance facility in 1991. United Airlines held an auction among the cities of Chicago, Indianapolis, and Denver for government subsidies. The governor called a special session of the legislature, which passed two acts. They first established a Colorado Business Incentive Fund authorizing the governor to pay $150 million on inter-governmental agreements aimed at attracting qualifying businesses.[134] The qualifications were tailored so that only one project could satisfy them, United Airline's facility. The second act funded the subsidy out of state excise taxes on airport facilities.[135]

The declared purpose of the Colorado Business Incentive Fund is to subsidize the "development of new business and the expansion of existing businesses in the state."[136] The governor, on the advice of the Colorado Development Commission, can offer a qualifying business entity up to $150 million. A qualifying business must establish a new business facility that will operate for over thirty years and employ three thousand workers at the new facility. The average salary must be at least $45,000. Moreover, within ten years, the firm must employ two thousand workers elsewhere in Colorado at an average salary of $22,000. So far only the United Airline's maintenance facility, with its high percentage of skilled workers, has had the potential to meet the statute's required salary averages.

The Colorado Supreme Court validated both acts in an advisory opinion.[137] The court suggested that the "public purpose" exception might apply but did not reach the question.[138] It did

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134. COLO. REV. STAT. §§ 24-46.5-101 to -103 (2001).

135. *See In re* Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P.2d 875 (Colo. 1991) (describing the legislation from the First Extraordinary Session in 1991).

136. COLO. REV. STAT. § 24-46.5-101 (2001).

137. *In re* Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P.2d 875 (Colo. 1991).

138. *Id.* at 903.

not need to, it said.[139] The court held that it would presume that the state was transferring money to a local government, not directly to a private corporation, so Section 2 did not come into play. In a veiled response to the obvious rebuttal that Section 2 also prohibited counties from giving money to private corporations, the court noted in a footnote that Denver would have to follow the established fictions in doling out the funds.[140] The court identified expressly the source of those fictions as the 1922 *Moffat Tunnel* case. If Denver built the maintenance facility and rented it to United, the scheme would pass constitutional muster. In the end, Denver lost the bid to Indianapolis. The Business Incentive Fund law is still on the books, a relic of the governor's excess.

In the case of United Airlines, a private transportation company played one major city against another. This was exactly what the framers wanted to avoid and thought they had preempted. The modern practice came without a pertinent constitutional amendment to the framers' 1876 language; the constitutional language has proven to be toothless. How did it happen? Political pressure. Shoehorned openings in the constitutional language[141] allowed the legislature to use technical compliance to frustrate the obvious purpose of the sections. And a compliant Colorado Supreme Court also helped.

CONCLUSION

The history of the State of Colorado illustrates that the debate over whether government subsidies to private businesses are appropriate has a long pedigree. There are two issues. First is the decision whether in an individual case the government investments (usually in the form of forgone taxes) will pay sufficient returns (again usually in the form of subsequent increases in tax revenue), if any.[142] The second issue is

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139. *Id.*

140. *Id.* at 883 n.2.

141. It is interesting to speculate on the language the 1876 delegates could have used had they foreseen the Moffat Tunnel case and its progeny. They could, for example, have added to Article XI, Section 1 a prohibition on leases of government property to private corporations for less than fair market value. The delegates could also have added to Article XI, Section 3 a definition of debt that includes all contracts that have any public entity as an obligor.

142. One could also argue that the government should not rest its decision on pure finances, such as rates of return in tax dollars, but should also include

whether elected state government officials are able to make accurate determinations in individual cases.

On the second question one can have several layers of suspicion. One can doubt the financial expertise and judgment of elected officials to make risk/return calculations. One can also expect that elected officials will respond to concentrated political pressure from affected parties and worry, therefore, about the impact of disparate political influence on the integrity of the financial calculations. And finally, one can worry about incentives for illegal collusion between elected officials and private parties, acts of bribery or secret involvement of officials in affected private businesses, and other forms of corruption.

The delegates at the 1876 Convention added up all these factors and decided to disable completely the state legislature from offering business subsidies.[143] They wrote prohibitive language in the strongest form they could muster and put it in multiple places in the state constitution. It worked for a time, fifty years, and then was not only defeated, but was turned upside down by the Colorado Supreme Court. In 1922 the language no longer banned; it enabled.

The only vestige of the drafters' decision is in the artificial forms and contrivances that modern municipal lawyers use to avoid the import of the 1876 language. The drafters' good intentions now serve only to provide fees for specialized, politically connected lawyers. Merrill Lynch and First Data Corporation recently moved large operations to Colorado and state officials did not offer either business substantial subsidies.[144] The weather, scenery, and worker pool attracted both companies. Perhaps one could hear a very faint whisper of approval in the wind from the 1876 delegates.

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some non-financial aspects of citizen welfare. The increase in self-image offered by being gainfully employed in a job of one's choosing, for example.

143. It was a "Cold Turkey" policy for drunks.

144. Steve Caulk, *$1 Million in Incentives Available for Merrill Lynch*, ROCKY MTN. NEWS (Denver, Colo.), June 15, 1994, at 59A; Aldo Svaldi, *Douglas County Lands First Data Headquarters; Move a Coup for Metro Area*, DENV. POST, May 10, 2001, at 1A. Ironically the state's success in luring a large Merrill Lynch facility here in 1989 without subsidies has not stopped the state from offering the firm new incentives for additional operations. *Id.*