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CONSTITUTIONAL SPENDING CAPS

by

Wm. Craig Stubblebine

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When approached to think about "constitutional spending caps" for this conference, I noted that recent proposals tended to read more like "legislative statutes" than "constitutional amendments". It was agreed that I could pursue this line of thought, provided I ended with at least the outline of a proposal to impose tax-spending caps on state and local governments.

Constitutional Language

The first ten amendments of the U. S. Constitution are models of directness and spareness of language. Yet each has served to ground an extraordinary body of legislative implementation and judicial interpretation. The Twelfth Amendment in 1804 is the first to take up more than a few lines.

The Thirteenth Amendment in 1865 is the first to contain "implementation language": "Congress shall have power to enforce this article by appropriate legislation." Subsequently, the 14th, 15th, 19th, 23rd, 24th, and 26th amendments also have this language.

Surely such language is superfluous. Adding it to the Thirteenth and subsequent amendments would seem to suggest members of Congress believed, absent such language, that their powers to implement constitutional provisions either were non-existent or were impaired. Of course, there simply is no alternative to legislative bodies having inherent powers to implement the constitutional provisions under which it operates. Nor has anyone suggested otherwise.

The 1913 Sixteenth Amendment is a model of spareness. The impetus lay in Article I, Section 9, Paragraph 4:

> No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

This provision had been interpreted as barring the levying of a Federal income tax – although what it really seems to say is that implementation of a Federal income tax would have to provide a schedule of rates such that the residents of a state having, say, ten percent of the U. S. population would generate ten percent of the revenues yielded by the tax.

In any case, the Sixteenth Amendment provided simply that

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Think of all that has flowed from this direct and spare language.

In June 1978, California adopted Proposition 13, adding Article XIII A to the State Constitution. While long by comparison to the typical U. S. Constitutional amendment, it fit easily on a single page. While one might quibble here and there, its language is direct and spare. Today, after a series of amendments to the amendment, Article XIII A easily fills six pages. What once was model constitutional language now reads like the typical turgid legislative enactment. In place of a clear statement of coherent constitutional intent now stands a monument to disparate special provisions for disparate special interests.

A year later, California also adopted Proposition 4, adding Article XIII B to the State Constitution. It fit on three pages. And today, after amendments to the amendment, it now runs closer to five plus pages. Unlike Prop 13, these amendments substantially have gutted the intent of Prop 4.

I propose to use Propositions 13 and 4 to illustrate three current characteristics of the amendment process, at least in California. The first is the propensity to "define" terms imbedded in their language; the second is the propensity to restrict a legislature's inherent power and obligation to implement constitutional provisions; the third is the propensity to modify dramatically the original intent of an amendment by subsequent amendments.

Prop 13 contains a host of terms the meaning of which might or might not be regarded as obvious by the ordinary voter. I counted thirty, among which are "ad valorem", "real property", "full cash value", special assessments", "redemption charges", "valuation", "inflationary rate", "consumer price index", "transactions taxes", "qualified electors", "special taxes", and "tax year". Of these thirty, Prop 13 sought to define only one, "full cash value" [in Section 2 (a)] – though even here the purpose seems less to define and more to clarify the intent of the proposition.

Prop 4, being longer, contained some seventy terms which might or might not be regarded as obvious by the ordinary voter. Of these, an attempt was made to provide detailed definitions for seven, or approximately one in ten – versus one in thirty in Prop 13.

By contrast, the U. S. Constitution makes no attempt to define the terms used therein.

This difference may come from drafter distrust of legislators to faithfully implement constitutional provisions. Unlike U. S. Constitutional amendments, these California amendments have been developed and adopted outside the legislature. In consequence, drafters may reason that the amendment will have little or no legislative support. Few in the legislature can be expected to feel any commitment to implement an amendment constructively.

The consequence is more than a page of definitions. It leads drafters to incorporate into the amendment attempts to implement the amendment itself. Consider these two provisions from Prop 4:

> In the event that the financial responsibility of providing services is transferred in whole or in part, whether by annexation, incorporation or otherwise, from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount. [Section 3 (a)]
>
> In the event that the financial responsibility of providing services is transferred, in whole or in part, from an entity of government to a private entity, or the financial source for the provision of services is transferred, in whole or in part, from other revenues of an entity of government, to regulatory licenses, user charges or user fees, then for the year of such transfer the appropriations limit of such entity of government shall be decreased accordingly. [Section 3 (b)]

The clear intent of Prop 4 is limited stable growth of state and local governments from year to year. Each of these provisions is critical to realizing that intent without freezing fiscal responsibilities among governmental entities. In the best of all possible worlds, neither would have been part of the constitution; both would have been part of implementing legislation.

Of course, there may be an alternative, and complementary, explanation. U. S. Constitutional amendments, at least to date, emerge from a long process of consideration by both houses of Congress. This process creates a detailed legislative history. Since

this legislative history is available to courts in weighing the constitutionality of subsequent legislation, it also serves to restrain the Congress in implementing amendments.

Amendments that have been developed and adopted outside the legislature have no legislative history to guide courts in weighing the constitutionality of legislative implementation. In consequence, drafters may reason that the amendment itself must provide detailed language to restrain the legislature as it implements the amendment.

In California, at least, this need not be the case. Drafters may use the ballot pamphlet to illuminate their proposed amendment in substantial detail. This could be in the form of the Congressional "colloquy" or "q & a"; it could be in the form of implementing language (such as that contained in Prop 4's Section 3 (a) and (b); it could be in the form of fulsome explanation of intent. If an amendment is adopted, there is no reason courts should not use the ballot pamphlet as a guide to the constitutionality of legislative implementation.

The expansion of the adopted Articles XIII A and XIII B by amendments to the amendments has been noted above, as has the distortion of the original amendments by subsequent amendments. The process which facilitates adoption of non-legislative amendments also facilitates adoption of subsequent amendments, whether sponsored by the legislature or by non-legislative interests.

The coalition, formed to secure adoption of the original amendment and which must stay in place to protect the amendment from inappropriate legislative implementation or subsequent distortion, instead disintegrates. The coalition members individually turn to new interests or new coalitions form to corrupt the original amendment.

Other than prohibition[1], the U. S. Constitution has been immune from subsequent distortion, largely because the amendment process itself is a high hurdle. In addition, because they emerge from the Congress, amendments have super majority support of legislators.

I know of no way to prevent this California phenomenon. Entrusting the amendment process solely to the legislature almost certainly would have precluded the submission of either Prop 13 or Prop 4 to the voters. The higher the hurdle, the less likely are citizen initiatives to be successful. One cannot have it both ways – that is, facilitate the adoption of "good" amendments and make difficult adoption of "bad" amendments.

It may be that this is the best of all possible worlds. Voters finally rebel against legislative inability to constrain spending government taxing and spending. Revenue / spending caps are adopted imposing constraint. Interests finding their benefits reduced or denied form coalitions to corrupt the constraints. Taxing and spending again rises until voters finally rebel. And the cycle goes on and on.

Constitutional Subject

There is, of course, an issue far larger than the language of amendments. Do either Article XIII A or Article XIII B belong in a constitution? Do the issues addressed therein rise to the level of "constitutionality"?

Adoption of Article XIII A modified the California fiscal landscape in several important ways. First, it engineered a significant reduction in property tax revenues from, if my memory serves me correctly, an average of about 2 percent of assessed valuations to an average of about 1 percent. Second, it imposed super-majority voting rules on the levying or changing of certain taxes. Third, it inaugurated a new real property assessment procedure. Fourth, it engineered an extraordinary shift in fiscal control from local governments to state government.

The first, the reduction of property tax revenues, easily was within the competence of state and local governments under existing constitutional and statutory provisions. The second, imposing super majority voting rules in the Legislature, surely required a constitutional amendment; the Legislature probably was competent to impose similar requirements on local governments under extant provisions. All the same, one suspects that no one would have bothered to expend much in the way of resources to impose these majorities. As such, their imposition largely was a free ride.

The third surely did require amending then existing constitutional standards setting forth procedures for assessing real property for taxing purposes. Article XIII, Section 1(a) provided that, "All property . . . shall be assessed at the same percentage of fair market value." Since this is neither the time nor the setting for arguing the merits of the Prop 13 provision, I am content merely to note that this provision represents an extraordinary improvement in property taxation. It is one which deserves imitation in all jurisdictions.

Finally, the extraordinary shift in fiscal control might or might not have been within the extant competence of the Legislature. However, surely it would not have happened absent the out-pouring of support for an amendment which just happened to contain those fateful words, "apportioned according to law to the districts within the counties." Those fateful words neither were necessary for, nor central to, Prop 13's property tax constraints. To this day, it is not clear, at least to me, whether either the drafters or the electorate intended to engineer the shift in fiscal control which has occurred.

Others[2] have argued cogently for a return of fiscal autonomy to California local governments. I too believe that such a return would be good for Californians. Local government fiscal autonomy can be restored by the straightforward and simple expedient of the State taking over all property tax revenues and yielding to local governments a flat-rate tax on personal incomes. During fiscal 1999-2000, the essentially flat-rate property

tax generated revenues of $26.2 billion and the progressive income tax generated revenues of $39.6 billion.

In this exchange, the State would gain control of a relatively stable revenue source and local governments would have the autonomy to determine their revenues from the income tax. It was the practicality of local governments administering a local property tax in an era when notions of "taxable income" were unknown that has left us with the legacy of the "*local* property tax".

With ability to administer income taxes, the opportunity to inaugurate a "*local* income tax" exists. The local income tax base would be allocated among local governments according to the primary residency of the taxpayer. Each local government would decide the rate appropriate for its citizens. The total tax rate to which an individual would be subjected would be the sum of the rates imposed by the various local governments in which the taxpayer resides: county, city, school district, and special districts – in the same way that property owners were taxed prior to Prop 13. Just as there were property tax rate limits prior to Prop 13, there could be local income tax rate limits.[3]

The important point here is restitution of a substantial measure of local fiscal autonomy. Taxpayers, state government, and local governments all would benefit from this tax base swap. Having engineered the shift of fiscal control by constitutional amendment, now is the time to engineer a shift back to local fiscal control. Until this is done, California government finances will continue to be in turmoil.

By contrast, adoption of Article XIII B initially seemed to do little to modify the California fiscal landscape. Prop 13 had reduced state and local tax revenues dramatically. Spending rarely threatened to exceed Prop 4 limits. Considered as a percent of California Personal Incomes (SPI), state and local government tax revenues were substantially the same in fiscal 1957-58 and fiscal 1999-00.[4] Of course, in response to Prop 13, there has been a major shift away from local property taxes toward State income taxes.

The goal of Prop 4 was to constrain the growth of state and local government and taxing and spending, to "smooth" year-to-year variations in spending, and to initiate a dialogue between citizen-taxpayers and their governments. The first part was to be achieved by limiting the year-to-year growth in dollar spending. The second part was to be achieved by establishing various bond, emergency, and fiscal stabilization funds. The third part was to be achieved by providing for voter-approved changes in spending limits.

At first blush, there is nothing in "Gann" which required immortalizing in the Constitution. The Legislature was competent to constrain its own spending and to provide appropriate stabilization funds. The Legislature also was competent to impose Gann on California local governments.

At the same time, there was nothing in the political environment of the late 1970s to suggest that the California Legislature would have chosen to enact statutes dealing with the non-constitutional aspects of either Prop 13 or Prop 4. There was, it seems to me, a strong case to be made for the electorate resorting to the initiative process to enact these restraints on state and local governments. The choice then was, and is now, between an initiative constitutional amendment or an initiative statute or both simultaneously.

The assessment provision and Legislative voting rule of Prop 13 required constitutional amendment. Can one fault drafters on practical grounds for not choosing to do those in an initiative amendment and the tax rate and local government voting rules in an initiative statute? To do so would require running two separate signature campaigns and two proposition campaigns, each complicated by having to explain how amendment and statute are linked.

By contrast, the content of Prop 4 well may have gone forward as a single initiative statute. To be sure, this would not have protected it from vitiation by subsequent initiative statutes or constitutional amendments. But, at least, the California Constitution would have been spared the current Article XIII B.

For the Future

Unfortunately, Article XIII B now is in the Constitution. The first step, then, is a proposition which would repeal Article XIII B in its entirety. The second step would be submitting to the electorate an initiative statute capturing the spirit and intent of the original Article XIII B. That is, a measure to constrain the growth of state and local government taxing and spending (Sec. 2), to "smooth" year-to-year variations in spending (Sec. 4), and to initiate a dialogue between citizen-taxpayers and their governments (Sec. 2(d)).

Either an initiative statute or a new Article XIII B could be comprised of the provisions in Exhibit 1.

Of course, each of those provisions would require substantial elaboration in the ballot pamphlet in order that the Legislature have guidance as to the intent of each provision and as to what would constitute a "strengthening" of the initiative statute – as opposed to a "weakening". Alternatively, if the ballot pamphlet is deemed impotent as a "legislative history", then additional elaboration would have to be added within the statute or amendment. However, this is neither the time nor the place to proceed with that elaboration.

In addition to those in Exhibit 1, drafters may wish to incorporate other provisions as well.[5]

EXHIBIT 1

Prototype Spending Cap

Sec. 1. For every year, each entity of state and local government shall have a maximum spending limit. No entity may authorize an appropriation which would cause its spending to exceed its spending limit.

Sec. 2. (a) From year-to-year, the spending limit of each entity of state and local government may be adjusted for changes in the entity's population and the state's average per capita personal income.

(b) In addition to adjustments for population and per capita personal income, the spending limit of each entity of state and local government may be adjusted for any transfers of fiscal responsibility between entities, provided the sum of the limits of the two entities after the transfer is no higher than before.

(c) The spending limit of an entity of government shall be decreased by the amount of any transfer of revenue responsibility to a private entity.

(d) The electors of any new or existing entity of government may adjust the spending limit of that entity beyond the adjustments provided above.

Sec. 3. (a) Subventions from one entity of government to another do not constitute spending by the subventing entity.

(b) Refunds of government revenues do not constitute spending subject to limitation.

Sec. 4. (a) Each entity of government may establish fiscal stabilization funds such that contributions to do not, and withdrawals from do, constitute spending subject to limitation.

(b) Each entity of government may establish contingency, emergency, reserve, sinking, trust, or similar funds such that contributions to do, and withdrawals from do not, constitute spending subject to limitation.

Timing

Finally, I would reflect on what seems an anomaly. The ideal time for inaugurating tax-spending limits is during a period of fiscal stability – that is, during a period when government finances are in a state of "equilibrium": the economy is beset by neither sharp nor significant expansion or contraction, public revenues substantially equal public expenditures, and the public sector seems to be under no significant pressures to expand or contract.

Yet interest in adopting tax-spending limits seems to quicken when spending is "out-of-control" and there is deep division between those who would cut spending and those who would increase taxes. Whatever the cure, it will prove painful to someone – and that someone is likely to feel he is being abused by his government.

While I have not checked the data in detail, it is my strong impression that, had the original Gann limits been observed, neither the state nor local governments would have suffered a fiscal crisis. Especially at the level of state government, the splurge of spending which accompanied the surge of revenues at the end of the 1990s would not have taken place. In consequence, the onset of the recent recession would not have exposed the state to the winds of fiscal crisis which swept Gray Davis from office. The amendments of the early 1990s effectively gutted the Gann limits and set the stage for the fiscal crisis in which the State now finds itself.

No spending limit can cure an existing fiscal crisis. What tax-spending limits can offer is hope of avoiding a future crisis.

Of course, the fundamental issues remain: how much to tax and to spend, what to tax and on what to spend. With a distribution of citizen preferences, some will find the level of spending inadequate, others will find the burden of taxation excessive. In a well-functioning democracy, almost no one will like the results of the budgeting process. But the result will represent a balancing of competing interests and pressures.

Can the process of reaching that balance be improved? Perhaps, perhaps not.

ENDNOTES

1. The 18th Amendment of 1919 was repealed by the 21st amendment of 1933.

2. Kotkin and Hertzberg, "op-ed", Los Angeles Times, p. M2, September 7, 2003.

3. Restoration of local fiscal autonomy could resurrect "*Serrano v. Priest*" issues. If so, they can be dealt with by some form of "power equalizing".

4. Eleven percent (11 %).

5. One or more of the following may be considered desirable additions to an initiative statute or initiative constitutional amendment:

   A. If on the first day of a fiscal year, a budget for an entity has not been signed into law, the budget for the prior year shall become law adjusted as appropriate for changes in the entity's population.

   B. The state shall reimburse the additional costs borne by an entity of local government for any new program or higher level of service mandated by the state.

   C. Any resident taxpayer shall have standing to petition courts of competent jurisdiction to enforce any provision of this Article.

   D. If any portion of this Article shall be declared invalid or unconstitutional, the remaining portions shall remain in full force and effect.