COMMENT

A NEW GENERATION OF STATE TAX AND EXPENDITURE LIMITATIONS

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Provisions restricting government spending have been common in state constitutions since the late nineteenth century.[1] For the most part, these constitutional controls on state finances have been of three basic types: 1) restrictions on the finances of local government;[2] 2) restricted financing of specific government programs;[3] and 3) limits on state government deficits.[4] Restrictions on local governments and specific programs were often responses to serious problems. For example, state constitutional limits on local government indebtedness followed closely on the heels of municipal bankruptcies in the 1870's.[5] The third type of control, limits on state deficits, simply precluded states from spending more money than they raised.[6] Today these old forms of budgetary restrictions are very much alive.[7]

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[1] *See, e.g.*, MINN. CONST. art XI, §§ 4–6 (adopted 1857); N.J. CONST. art IV, § 6, ¶ 4 (adopted 1844); *see generally* J. WRIGHT, TAX AND EXPENDITURE LIMITATION: A POLICY PERSPECTIVE 42 (1981)(many of these restrictions were prompted by financial panics and widespread corruption).

[2] *See, e.g.*, N.Y. CONST. of 1894, art. VIII, § 10; *see also* J. WRIGHT, *supra* note 1, at 41.

[3] *See, e.g.*, TEX. CONST. art. 7, §§ 11, 11a (1876, amended 1932)(providing a permanent fund for the University of Texas); *see also* E. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE 1870–1900, at 18 (1974)(education funding was least disturbed by economic crashes).

[4] *See, e.g.*, WIS. CONST. art. VIII, § 5 (adopted 1848); *see also* J. WRIGHT, *supra* note 1, at 41.

[5] *See, e.g.*, N.Y. CONST. of 1894, art. VIII, § 10; *see generally* E. GRIFFITH, *supra* note 3, at 20 (legislators thought the best way to ensure economical government was to make it impossible to incur large debts).

[6] *See, e.g*, MD. CONST. of 1864, art. III, § 34; MICH. CONST. of 1874, art. XIV, § 3; W. VA. CONST. art. X, § 4.

[7] *See, e.g.*, ALA. CONST. art. XI, § 213; ALASKA CONST. art. IX, §§ 8, 12; ARIZ. CONST. art. IX, § 5; CAL. CONST. art. XVI, § 1 (1849, amended 1908, 1956, 1960, 1962 & 1970); COLO. CONST. art. XI, § 3 (1876, amended 1922); FLA. CONST. art. VII, § 1;

A new generation of more sophisticated constitutional and statutory budgetary controls has emerged during the past eight years. Commonly referred to as "tax and expenditure limitations"[8] (TELs), these new controls are characterized as limits, rather than prohibitions, on increases in state taxing and spending.[9]

These limitations take a variety of forms. New restrictions on local property taxes, such as California's Proposition 13, are similar to the older limits on local taxation.[10] On the other hand, most modern TELs are new fiscal devices[11] which are primarily concerned with limiting the general growth of state government.[12] Traditional deficit limits allowed state government expenditures to increase to the extent that the governments could tax. In comparison, many modern TELs directly restrict the growth and freedom of state governments. For example, a 1978 Tennessee constitutional amendment prohibits growth in total state appropriations from exceeding the estimated rate of growth

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GA. CONST. art. VII, § 3 (1861, amended 1980); IDAHO CONST. art. VII, § 11; *id.* art. VIII, § 1 (1890, amended 1910); ILL. CONST. art. IX, § 9; IND. CONST. art. X, § 5; IOWA CONST. art. VII, § 2; KY. CONST. § 49; ME. CONST. art. IX, § 14 (1867, amended 1965, 1967, 1969, 1978 & 1982); MD. CONST. art. III, § 34; MINN. CONST. art. XI, §§ 4–5 (1857, amended 1924, 1928 & 1962), § 6 (1857, amended 1962); MO. CONST. art. X, § 20; MONT. CONST. art. VIII, §§ 8–9; NEV. CONST. art. 9, § 3 (1864, amended 1916 & 1934); N.J. CONST. art. IV, § 6, ¶ 4; N.M. CONST. art. IX, § 7; N.C. CONST. art. V, § 3 (1868, amended 1872 & 1880); OHIO CONST. art. VIII, § 1; OKLA. CONST. art. X, § 23 (1907, amended 1941, 1968 & 1975); OR. CONST. art. IX, §§ 2, 6; PA. CONST. art. VIII, § 7 (1874, amended 1918 & 1923), §§ 12, 13; R.I. CONST. art. XXXI, § 1; S.C. CONST. art. X, § 2; S.D. CONST. art. XIII, § 2; TENN. CONST. art. II, § 24 (1870, amended 1978); TEX. CONST. art. III, § 49; UTAH CONST. art. XIII, § 2 (1930, amended 1946, 1958, 1962, 1964 & 1968); VA. CONST. art. X, § 9 (1919, amended 1970); W. VA. CONST. art. X, § 4. *See generally* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 1982–83, at 98 (1984); COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1982–83, at 368 (1984) [hereinafter cited as BOOK OF THE STATES].

[8] Wright, *Tax and Expenditure Limitations*, in BOOK OF THE STATES, *supra* note 7, at 417.

[9] Lile, Soule & Wead, *Limiting State Taxes and Expenditures*, 51 STATE GOV'T 204, 204 (1978) ("TELs that have been enacted are limits on the rate of increases in government spending or collections rather than an attempt to totally freeze taxes and expenditures.").

[10] *Compare* CAL. CONST. art. XIIIA (limiting local property taxes) *with* N.Y. CONST. of 1894, art. VIII, § 10 (limiting local government indebtedness).

[11] *See, e.g.*, Gold, *Contingency Measures and Fiscal Limitations: The Real World Significance of Some Recent State Budget Innovations*, 37 NAT'L TAX J. 421, 421 (1984); Kenyon & Benker, *Fiscal Discipline: Lessons from the State Experience*, 37 NAT'L TAX J. 433, 433 (1984).

[12] *See, e.g.*, Act of June 23, 1980, ch. 517, 1980 S.C. Acts 1507, 2202 (the General Assembly intends to adjust and control the growth of state government); WASH. REV. CODE ANN. § 43.135.010 (1983)(purpose of TEL is to limit rate of growth of state government); Lile, Soule & Wead, *supra* note 9, at 204–08; Gold, *supra* note 11, at 427.

of the state's economy.[13] Other TELs have placed more specific restrictions on legislative prerogatives by dictating where money may be spent. For example, in Delaware, a specific percentage of anticipated revenues must be appropriated into a reserve fund.[14]

Inasmuch as modern TELs provide for reductions in specific taxes or tax rates, they warrant their popular treatment as the primary weapons of the "Tax Revolt."[15] This label, however, fails to recognize that most TELs aim to replace annual legislative deliberations in budgetary affairs with single electoral decisions. Many proponents of modern TELs argue that the provisions not only limit tax burdens for particular groups, but also constrain irresponsible legislatures.[16]

Opponents of TELs offer wide ranging criticisms. Some critics characterize TELs as meaningless exercises designed solely to placate a disgruntled public.[17] Other commentators warn that TELs are too effective at foreclosing options that responsible legislatures may need to exercise.[18]

TELs exhibit a variety of purposes and features. This Comment establishes a scheme of classification of TELs based on their reasonable purposes. The Comment then describes existing TELs and focuses on the difficulties faced by three states—Hawaii, Colorado, and Michigan—in implementing their TEL provisions. The experiences of these and other states demonstrate that TELs are easily circumvented. Nonetheless, this Comment concludes that TELs can be positive instruments of budgetary control if they 1) are directed at expenditures, 2) are reasonably focused, 3) provide for flexibility in emergencies, and 4) are guaranteed by judicial enforcement.

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[13] TENN. CONST. art. II, § 24; TENN. CODE ANN. §§ 9-6-201 to -203 (Supp. 1984).

[14] DEL. CONST. art. VIII, § 6(b)-(d) (adopted 1980).

[15] *See* Kenyon & Benker, *supra* note 11, at 433.

[16] *See, e.g.*, Gold, *supra* note 11, at 427; Kenyon & Benker, *supra* note 11, at 443; Committee on State and Local Taxation, Real Property Div., *State and Local Property Taxation in Light of Proposition XIII and Similar Taxing Measures*, 15 REAL PROP., PROB. & TR. J. 501, 501 (1980).

[17] *See* Bails, *A Critique on the Effectiveness of Tax-Expenditure Limitations*, 38 PUB. CHOICE 129, 129 (1982); Lile, Soule & Wead, *supra* note 9, at 209. *Cf.* Bennett & DiLorenzo, *How the Government Evades Taxes*, 1982 POL'Y REV. 71, 76 ("For over three-quarters of a century, state and local governments have routinely evaded all restrictions on their financial independence by the simple expedient of moving large segments of the public sector 'off-budget' or to 'off-budget enterprises.'").

[18] *See, e.g.*, Hanson, *Effects on Metropolitan Growth: The Washington D.C. Area*, in TAX AND EXPENDITURE LIMITATIONS: HOW TO IMPLEMENT AND LIVE WITHIN THEM 203 (J. Rose ed. 1982) [hereinafter cited as TAX AND EXPENDITURE LIMITATIONS].

I. Classifying Tax and Expenditure Limitations

At present, nine states have modern TELs in their constitutions[19] and eleven states have statutory limitations.[20] Because these provisions often reflect particular political or accounting features of the individual states, any classification of TELs must be both general and tentative. Modern TELs can be classified into three categories:

1) TELs that attempt to limit specific types of taxation and spending, such as rollbacks in property tax rates.[21] Many of these TELs bear on local government finances.[22]
2) TELs that attempt to impose general limits on state government spending or taxation or both.[23] Unlike the first group, these TELs do not prescribe specific changes in the current tax and expenditure structure. Instead, they attempt to regulate the overall expansion of state government.
3) TELs that place restrictions on how a state may spend its money.[24] Such restrictions need not and usually do not limit tax levels.[25]

Several commentators have offered alternative TEL classification schemes that focus on specific features of individual TELs.[26] The categories suggested here are based primarily on the underlying purposes of the TELs. The purpose of the first

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[19] Alaska Const. art. IX, § 16; Ariz. Const. art. IX, § 20; Cal. Const. arts. XIIIa, XIIIb; Del. Const. art. VIII, § 6(b)–(d); Hawaii Const. art VII, § 9; Mich. Const. art. IX, §§ 25–33; Mo. Const. art X, §§ 18–24; Tenn. Const. art. VIII, § 24; Tex. Const. art II, § 22.

[20] Alaska Stat. § 37.07.020 (Supp. 1984); Colo. Rev. Stat. § 24-75-201.1 (Supp. 1983); Idaho Code §§ 67-6801 to -6803 (1980); La. Rev. Stat. Ann. §§ 47:5001 to :5010 (West Supp. 1983); Mont. Code Ann. § 17-8-106 (1983); Nev. Rev. Stat. § 353.213 (1983); Or. Rev. Stat. § 291.355 (1983); R.I. Gen. Laws § 35-3-7(5) (Supp. 1984); S.C. Code Ann. §§ 11-33-10 to -80 (Supp. 1983); Utah Code Ann. § 59-27-3 (Supp. 1983); Wash. Rev. Code Ann. §§ 43.135.010–.901 (1983); *see also* Kenyon & Benker, *supra* note 11, at 436–37.

[21] *See, e.g.*, Cal. Const. art. XIIIA; Idaho Code §§ 63-903, -923 (Supp. 1984); Mass. Gen. Laws Ann. ch. 59, § 20A (West Supp. 1983).

[22] *See, e.g.*, Cal. Const. art. XIIIA.

[23] *See, e.g.*, Ariz. Const. art. IX, § 17; Cal. Const. art. XIIIB; Mich. Const. art. IX, § 26; Tenn. Const. art. II, § 24; Tenn. Code Ann. § 9-6-201 to -203 (Supp. 1984).

[24] *See, e.g.*, Del. Const. art. VIII, § 6(b); Mich. Const. art. IX, § 30.

[25] *See* Del. Const. art. VIII, § 6(b); Mich. Const. art. IX, § 30.

[26] *See, e.g.*, J. Wright, *supra* note 1, at 7 (identifying different features of TELs); Lile, Soule & Wead, *supra* note 9, at 205–09 (also identifying variant purposes behind TELs).

category of TELs is to curb taxes of a particular kind. Limiting one kind of tax may inhibit, but does not prevent, rapid government growth. Of course, a multitude of such restrictions will indirectly achieve the same end as a general limit on state revenues.

The second category of TELs, general limits on taxing or spending, most clearly limits the growth of state government. It does not, however, contain an implicit choice as to relative tax burdens. This type of TEL represents the desire to limit growth.

The purpose behind the third type of TELs is to limit state government choice in the spending of undedicated funds. For example, Michigan's requirement that a certain percentage of state funds be paid to local government[27] is the result of a desire to fix the relative sizes of these governmental units. Delaware's requirement that monies be paid to a reserve fund[28] reflects a belief that government should plan for lower revenue periods.

A. *Group I: Limitations Imposed on Specific Taxes*

In 1978, California voters passed Proposition 13, an initiative intended to limit local property taxes.[29] Proposition 13 reduced assessed property values to the assessment levels for fiscal year 1975–1976, and also limited annual valuation increases to 2%.[30] Following its enactment,[31] local revenues declined by 12%.[32] Proposition 13 included another "Group One" restriction stipulating that no new ad valorem, sales, or transaction taxes would be levied on local property.[33] This provision ensured that the general goal of property tax relief would not be undermined by new tax proposals.

Other states have also imposed limits on specific types of taxes. In 1980, Massachusetts passed Proposition 2½, which set

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[27] *See* MICH. CONST. art. IX, § 30.

[28] *See* DEL. CONST. art. VIII, § 6(b).

[29] CAL CONST. art. XIIIA. *See generally* Strauss, Mikels & Hagman, *Description of Propositions 13 and 4*, in TAX AND EXPENDITURE LIMITATIONS, *supra* note 18, at 19.

[30] CAL. CONST. art. XIIIA. *See generally* Vaughn, *What Should States Do About the Fiscal Limitation Movement?* in STATE TAXATION POLICY 127 (M. Barker ed. 1983).

[31] *See* CAL. CONST. art. XIIIA, § 5 (The "article shall take effect for the tax year beginning on July 1 following passage of this amendment.").

[32] *See* GOVERNMENT RELATIONS DEP'T OF SECURITY PACIFIC NAT'L BANK, TAXES AND OTHER REVENUE OF STATE AND LOCAL GOVERNMENT IN CALIFORNIA, at A-2 (1984) [hereinafter cited as STATE AND LOCAL REVENUE IN CALIFORNIA].

[33] *See* CAL. CONST. art. XIIIA, § 3.

a property tax ceiling of $25 for every $1,000 worth of property.[34] In 1978, Idaho cut property taxes by lowering the effective tax rate.[35]

Under specific tax limits such as Proposition 13, state governments are not necessarily forced to spend less money. In California's case, the state government shared some of its surplus with local governments in a comprehensive "bailout plan."[36] Local governments depended upon the state for an increasing share of support, creating a new intergovernmental relationship. The Proposition 13 experience demonstrates that, although a tax limitation targeted toward controlling a specific tax may succeed in narrow terms, it may still fail if its goal is to limit generally the size or growth of government.[37]

Despite Proposition 13's popular prominence as an opening shot in the battle for tax and expenditure limitations,[38] the property tax aspects of Proposition 13 do not exert direct or general control over the state budget. Single tax limitations are relatively simple and may be aimed more directly at easing the tax burdens of specific groups; the other categories of TELs appear to be informed by a clearer desire to control the growth of state government.

B. *Group II: General Limits on the Growth of Spending and Taxation*

The first constitutional TEL limiting growth in revenue or spending was passed in Tennessee in 1978.[39] Under this provi-

[34] *See* MASS. GEN. LAWS ANN. ch. 59, § 20A (West Supp. 1983). *See generally* Angiolillo-Bent, *Effects of Massachusetts Proposition 2½ on Property Tax Administration and Reform*, in TAX AND EXPENDITURE LIMITATIONS, *supra* note 18, at 167, 171.

[35] IDAHO CODE §§ 63-903, -923 (Supp. 1984); *see also* "Tax Revolt Update," Fiscal Letter (Jan.–Feb. 1984, at 1, 6)(issued by National Conference of State Legislatures, 1125 Seventeenth St., Suite 1500, Denver, Colo. 80202).

[36] *See* Strauss, Mikels & Hagman, *supra* note 29, at 45. Local government revenue from state government rose 35% between 1977–1978 and 1978–1979 and 51% between 1977–1978 and 1979–1980. STATE AND LOCAL REVENUE IN CALIFORNIA, *supra* note 32, at A-10.

[37] *See* Lile, Soule & Wead, *supra* note 9, at 209. For example, government can continue to grow if it depends on user fees for services it provides, thereby becoming a "privatized" provider of services while remaining a government. *See* Hagman, *Statutory and Judicial "Loopholing" of California TELs through BHAPs*, 6 URB. L. & POL'Y 133 (1983) (BHAPs, or benefit based or harm avoidance payment schemes, are sources of revenues not subject to TELs.).

[38] *See* Vaughn, *supra* note 30, at 126; J. WRIGHT, *supra* note 1, at 6; Gold, *supra* note 11, at 422.

[39] *See* TENN. CONST. art. II, § 24; S. GOLD, STATE TAX AND SPENDING LIMITATIONS: PAPER TIGERS OR SLUMBERING GIANTS? 6, 9 (National Conference of State Legislatures, Legislative Finance Paper No. 33, 1983).

sion, "the rate of growth of appropriations from state tax revenues" may not exceed "the estimated rate of growth of the state's economy as determined by law."[40] Implementing statutes have tied the estimated rate of growth to an econometric model based on personal income.[41]

During the next few years, Arizona,[42] Hawaii,[43] Michigan,[44] Missouri,[45] and Texas[46] followed with constitutional limitations tying general fund or undedicated[47] spending growth to some measure of economic growth. Even though the precise methods vary, the effects of the several provisions are similar because economic growth is defined as growth in personal income.[48] Several other states using statutory TELs also link spending or revenue growth to personal income.[49]

California also places a general constitutional limit on spending growth, but ties the allowable increase to population growth and inflation.[50] This limitation applies to only 60% of the state budget once exemptions for federal funding, insurance funds, and debt service are taken into account.[51] Alaska follows California's approach in a constitutional provision.[52] Nevada has copied it in statutory form.[53]

A final means of limiting the growth of state budgets has been established by statute in Rhode Island[54] and Colorado.[55] In these states, spending growth is limited to a fixed percentage: 7% for

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[40] TENN. CONST. art. II, § 24.

[41] TENN. CODE ANN. § 9-6-201, -203 (Supp. 1984). The University of Tennessee maintains the economic model. *See id.*

[42] ARIZ. CONST. art. IX, § 17 (adopted 1978).

[43] HAWAII CONST. art. VII, § 9 (adopted 1978).

[44] MICH. CONST. art. IX, §§ 26, 28 (adopted 1978).

[45] MO. CONST. art. X, §§ 18, 22 (adopted 1980).

[46] TEX. CONST. art. VIII, § 22 (adopted 1978).

[47] *See id.* (stating Texas constitutional restrictions on permissible rate of growth of undedicated revenues).

[48] *See, e.g.*, ARIZ. CONST art. IX, § 17; TENN. CODE ANN. §§ 9-6-201 to -203 (Supp. 1984); *see also* Wright, *supra* note 8, at 418.

[49] IDAHO CODE §§ 67-6801 to -6803 (1980); MONT. CODE ANN. § 17-8-106 (1983); OR. REV. STAT. § 291.355 (1983); UTAH CODE ANN. § 59-27-3 (1983).

[50] CAL. CONST. art. XIIIB, § 1.

[51] REPORT OF THE LEGISLATIVE ANALYST OF CALIFORNIA, 1983–84, at 37 (1984) (on file at HARV. J. ON LEGIS.); J. WRIGHT, *supra* note 1, at 36.

[52] ALASKA CONST. art. IX, § 16.

[53] NEV. REV. STAT. § 353.213 (1983); *see also* "An Early Analysis of State Expenditure and Revenue Limitations," Fiscal Letter (May–June 1983, at 3) (issued by the National Conference of State Legislatures, 1125 Seventeenth St., Suite 1500, Denver, Colo. 80202).

[54] R.I. GEN. LAWS § 35-3-7(5) (Supp. 1984).

[55] COLO. REV. STAT. § 24-75-201.1 (Supp. 1983).

Colorado and 8% for Rhode Island.[56] Because of its simplicity, this method presents relatively few implementation difficulties.[57] It does not, however, respond effectively to rapid economic changes. Rising inflation and population growth could make it impossible to maintain existing levels of services under such a limit. Rapidly increasing wealth could produce artificially low tax rates.

Colorado's 7% statutory limit on annual expenditure growth came on the heels of unsuccessful proposals to change the constitution in 1976 and 1978.[58] The present limitation led to one-time tax rebates in 1980 and 1981 as components of general tax reduction bills.[59] The enacted bills included tax base reductions, such as an exemption of food from the state sales tax.[60] A major reason for the bills was a desire to avoid exceeding the limitation.[61]

While the limitation has reduced spending growth, it has also been circumvented, or at least weakened, by a number of measures. According to one independent analysis, in the first four years since enactment, appropriations increased by 50%, whereas the limit should only have permitted an increase of 31%.[62] This statistical inconsistency can be partially explained by the statute's exclusion of special funds used for tax relief, water projects, and highways.[63] For Colorado, the highway and water project exceptions are particularly important because the state is still engaged in developing its infrastructure.[64] The tax relief exception, however, has been interpreted so liberally as to become a means of avoiding the limit. For example, some state funding of schools has been treated as "tax relief" on the rationale that the money would otherwise have to come from local tax levies.[65] Overall, this exception allowed the state to spend an extra $143,000,000 during the fiscal year 1982.[66]

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[56] *Id.*; R.I. GEN. LAWS § 35-3-7(5) (Supp. 1984).

[57] *See infra* text accompanying notes 76–89.

[58] Sloan, *Spending Limitation Amendment: Defeat in Colorado*, 52 STATE GOV'T 8 (1979).

[59] COLO. REV. STAT. § 39-22-104(3)(b) (1982); S. GOLD *supra* note 39, at 6.

[60] COLO. REV. STAT. § 39-26-102, -203 (1982).

[61] Telephone interview with Douglas G. Brown, Dir. of Colo. Legislative Drafting Office (Oct. 11, 1984).

[62] S. GOLD, *supra* note 39, at 6.

[63] COLO. REV. STAT. § 24-75-201.1 (Supp. 1983).

[64] R. LAMM & M. MCCARTHY, THE ANGRY WEST: A VULNERABLE LAND AND ITS FUTURE 86–89 (1982).

[65] S. GOLD, *supra* note 39, at 6.

[66] *Id.*

Colorado further increased its total expenditures beyond the limit by granting agencies a "cash fund spending authority" in lieu of an appropriation.[67] Under such an authority, agencies can credit against appropriations any fees expected to be collected for services rendered.[68] The critical difference between an appropriation and an authority is that an authority allows the agency to spend only what it actually earns in fees during the fiscal year, while an appropriation limits the agency to a specific annual amount.[69]

This practice may or may not violate the spirit behind the limitation. If the limitation is designed to protect taxpayers, this practice may do little more than make these fee-supported agencies into the public analogs of private service providers. In this sense, the use of fees may be said to "privatize" the agencies, moving the burden from the general public to those benefiting from the service.

If, on the other hand, the limitation seeks to limit the role of state government, the practice merely supplements tax-supported growth with fee-supported growth and permits circumvention of the statute's purpose. Colorado's experience suggests that if restricting growth is the goal of a TEL, expenditure or revenue limitations should include earned and spent fees as well as taxes or general fund appropriations.

As illustrated by the "cash fund spending authority" example, TELs may have secondary effects on budgetary practices and political conflict. Because TELs are often cast in terms of "usual" government finances,[70] legislatures can avoid their requirements through unusual routes, such as creative bookkeeping or new financial instruments. These practices, in turn, can lead to confrontations between branches of government. In Colorado, the legislature made a policy of stipulating the source of funds for "cash fund spending authorities." The governor began

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[67] COLO. REV. STAT. § 24-75-202 to -203 (Supp. 1983).

[68] *Id.*

[69] *Id.*; *see also* Colorado Gen. Assembly v. Lamm, Nos. 82 CV 9345, 82 CV 5005, 81 CV 10058, slip op. at 5–6 (Colo. Dist. Ct. Jan. 17, 1984), *appeal docketed*, No. 84 SA 79 (Colo. Feb. 16, 1984). The district court noted:

> The agency may receive . . . general fund monies and/or the authority to retain and spend revenues generated by its own activities up to a legislatively determined maximum amount. It is self-apparent that the actual revenues earned by . . . the agency may be less than, equal to, or more than the cash funds appropriation.

Id.

[70] *See* Bennett & DiLorenzo, *supra* note 17, at 76.

vetoing these stipulations,[71] claiming that the power to decide the source of monies for nonappropriations spending authorities was an executive matter.[72] The Colorado legislature obtained a lower court ruling that the matter was within the legislature's authority;[73] the court did not address the issue whether such a designation had implications for the state's TEL.[74] The governor has appealed, and the matter is now before the state supreme court.[75]

For states using a variable figure instead of a fixed percentage, reliance on a "base year" for calculating tax rates is a weakness of TELs. To push the limit upward, legislators can "pad" base year budgets through such means as making appropriations that are not funded in that year.[76] Another avenue to push the limit upward is to redefine state accounts in the base year. Michigan[77] and Missouri[78] use a formula that calculates permissible annual revenue increases as a percentage of the state personal income from the preceding year. For Michigan, a 10% figure was derived from the 1978–1979 state revenue as a percentage of 1977 state personal income.[79]

In Missouri, the percentage was calculated using 1980–1981 state revenues as a percentage of 1979 state personal income.[80] In defining state revenues for 1980–1981, Missouri Governor Christopher Bond included the state's $416,000,000 surplus from 1979–1980 as part of the state's "revenues" for the next year.[81]

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[71] Colorado Gen. Assembly v. Lamm, Nos. 82 CV 9345, 82 CV 5005, 81 CV 10058, slip op. at 8 (Colo. Dist. Ct. Jan. 17, 1984), *appeal docketed*, No. 84 SA 79 (Colo. Feb. 16, 1984).

[72] Brief for Appellant at 7, Colorado Gen. Assembly v. Lamm, No. 84 SA 79, (Colo. 1984)(on file at HARV. J. ON LEGIS.).

[73] Colorado Gen. Assembly v. Lamm, Nos. 82 CV 9345, 82 CV 5005, 81 CV 10058, slip op. at 8 (Colo. Dist. Ct. Jan. 17, 1984), *appeal docketed*, No. 84 SA 79 (Colo. Feb. 16, 1984).

[74] The court understood the cash fund authority to be an appropriation, but not under the TEL's accounting. *See* Colorado Gen. Assembly v. Lamm, Nos. 82 CV 9345, 82 CV 5005, 81 CV 10058, slip op. at 16 (Colo. Dist. Ct. Jan. 17, 1984), *appeal docketed*, No. 84 SA 79 (Colo. Feb. 16, 1984).

[75] Colorado Gen. Assembly v. Lamm, No. 84 SA 79 (Colo. Feb. 16, 1984).

[76] S. GOLD, *supra* note 39, at 5, states, "One device employed in California to establish a high ceiling was to appropriate more than $500 million in FY 1980 for transportation programs not requiring funding that year. This appropriation raised the base from which future limitations were calculated."

[77] MICH. CONST. art. IX, §§ 26, 28.

[78] MO. CONST. art. 10, § 18.

[79] MICH. CONST. art. IX, § 30.

[80] MO. CONST. art. 10, § 18.

[81] *See* Beuchner v. Bond, 650 S.W.2d 611, 615 (Mo. 1983) (en banc) (unspent revenues from prior years cannot be included in "total state revenues"); Robertson & Kincheloe, *Missouri's Tax Limitation Amendment: Ad Astra Per Aspera*, 52 UMKC L. REV. 1, 4 (1983).

Because "state revenues" were enlarged as a percentage of state income, the state's revenue ceiling effectively moved upward and perhaps weakened the intended effect of the limitation. This experience suggests that TELs should define revenue periods more precisely.

Many constitutional and most statutory TELs have override provisions.[82] In Arizona, two-thirds of the membership in each house of the legislature can override the limit.[83] The same two-thirds can override the Michigan and Missouri limitations,[84] with the additional requirement that the governor request the legislature to declare an "emergency" requiring the additional revenues. In California, even if the provision is overridden, the extra above-limit expenditures must be offset by the below-limit expenditure levels for the three following years.[85]

In 1980, Hawaii amended its constitution to tie the rate of growth in general fund expenditures to "the estimated rate of growth of the State's economy as provided by law."[86] The limit initially set general fund expenditures at the percentage of personal income in the base fiscal year of 1978–1979.[87] The limitation may be overridden by a two-thirds vote of both houses so long as the vote states the dollar amount, the rate by which the ceiling will be exceeded, and its supporting reasons.[88] A second provision requires a tax rebate whenever the general fund has a closing surplus exceeding 5% for two successive years.[89]

With appropriations limited and revenues not similarly en-

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[82] *See, e.g.*, ARIZ. CONST. art. IX, § 17(3); CAL. CONST. art. XIIIB, § 3(c); HAWAII CONST. art. VII, § 9; MICH. CONST. art. IX, § 27; MO. CONST. art. X, § 19; MONT. CODE ANN. § 17-8-106(2) (1983); NEV. REV. STAT. § 353.213, ¶ 4 (1983); *see also* S. GOLD, *supra* note 39, at 4.

[83] ARIZ. CONST. art. IX, § 17(3).

[84] MICH. CONST. art. IX, § 27; MO. CONST. art. X, § 19.

[85] CAL. CONST. art. XIIIB, § 3(c).

[86] HAWAII CONST. art. VII, § 9.

[87] Implemented by HAWAII REV. STAT. §§ 37-91 to -94, -111 to -113 (1980), which provided that the Act should take effect on July 1, 1980. Hence, 1981–1982 was the first fiscal year in which the legislature was bound by the ceiling. *See* Letter from Corinne Watanake, Dep'ty Att'y Gen. of Hawaii to State Sen. Mamoru Yamasaki (April 28, 1981) (rendering opinion on the effective ceiling date). Nonetheless, the legislative and executive branches had tried to honor the ceiling since November of 1978, when it was added to the state constitution. *See* Letter from Richard F. Kahle Jr., Ass't Dir. for Research, Hawaii Legislative Reference Bureau to Justin Hughes (Oct. 12, 1984) (on file at HARV. J. ON LEGIS.). HAWAII REV. STAT. § 37-91 was renewed and amended by the General Fund Expenditure Ceiling Act of 1984, ch. 183, 1984 Hawaii Sess. Laws 313. The amendments only clarified and codified practices used under the original statute. Telephone interview with Richard F. Kahle, Ass't Dir. for Research, Hawaii Legislative Reference Bureau (Oct. 12, 1984) [hereinafter cited as Kahle Interview].

[88] HAWAII CONST. art. VII, § 9.

[89] HAWAII CONST. art. VII, § 6.

cumbered, the general fund has grown faster than appropriations. Hence, the state has had to make tax rebates for the past five years.[90] Because ceilings are calculated from the previous year's ceiling and not the year's actual appropriations, if the state exceeds the limit in any given year, it has increasing difficulty in falling within the limit in subsequent years.[91]

Together these two provisions have curbed spending in Hawaii. The 1983 budget may be the first to exceed the limit.[92] With the limit so close and some estimates putting the state over its spending ceiling, dissident legislators requested an opinion from the Hawaii Attorney General on the question of whether the constitution had been violated.[93] Controversy centered around the notice issue: if the ceiling had been surpassed, the constitution required the legislature to state adequately and explicitly the reasons for its actions. In an advisory opinion, the Attorney General decided that the discussion in the legislature constituted adequate notice.[94] A group of legislators threatened further legal action, but this opposition eventually dissipated.[95]

Attempts to circumvent the expenditure limitation through such devices as special funds and exempt budget lines have not succeeded in Hawaii.[96] Nonetheless, a current proposal to allocate general fund appropriations to a new reserve fund may frustrate at least the TEL's tax rebate provision.[97]

C. *Group III: Limitations That Restrict How A State May Spend Its Money*

The distinctive characteristic of Group III TELs is that they stipulate "where" the state government allocates its revenues.

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[90] S. Gold, *supra* note 39, at 6.

[91] Legislative Auditor of the State of Hawaii, Study of the State of Hawaii's Expenditure Ceiling, No. 82-5, at 15 (1982) [hereinafter cited as Hawaii Expenditure Ceiling Study].

[92] Kahle Interview, *supra* note 87.

[93] *See* Letter from Charleen Aina, Dep'ty Att'y Gen. of Hawaii, to State Sen. Benjamin Cayetano (June 16, 1983) (expressing opinion of the Hawaii Department of the Attorney General) (on file at Harv. J. on Legis.).

[94] *Id.*

[95] Kahle Interview, *supra* note 87.

[96] Apparently "special fund appropriations . . . to circumvent the general fund ceiling" were not in place as of March, 1982. *See* Hawaii Expenditure Ceiling Study, *supra* note 91, at 16. According to the Chairman of the Hawaii House Finance Committee, none had been passed as of October, 1984. Telephone interview with Ken Kibayu, Chairman of the Hawaii House Finance Committee (Oct. 24, 1984).

[97] H.R. 360, 12th Leg., 1983 Sess. (passed by the Hawaii House of Representatives only) would eliminate some of the surplus funds and so avoid the required rebate. Money moving from the general fund into the emergency reserve fund would still count against the expenditure ceiling. *Id.*

Group III TELs are unique because they direct money in a specific way toward a specific purpose. This concern over budget priorities is not found in the other TELs.

Delaware's TEL limits general fund appropriations to a maximum of 98% of estimated general fund revenue for that year.[98] Revenues exceeding this limit are channeled into a reserve account that can accumulate up to 5% of estimated general fund revenues.[99] When the reserve account surpasses 5%, excess revenues are transferred to an unencumbered fund for use in the next fiscal year.[100] This type of TEL may, in a certain sense, be the least "selfish" restriction for a polity to impose; it is aimed solely at "fiscal housekeeping."[101]

Michigan's 1978 constitutional amendment includes a TEL provision, section 30 of Article IX,[102] that has posed tremendous problems.[103] Section 30 provides that the proportion of state spending paid to all units of local government may not fall below the proportion in the fiscal year 1978–1979.[104] In this base year, local governments received 41.6% of the Michigan budget.[105] Section 29 of Article IX prohibits the state from forcing new responsibilities upon local governments without covering the added costs.[106] Together these provisions assure a steady stream of income to local governments for programs over which they enjoy relative autonomy.

Whatever its intent, section 30 has created numerous compliance difficulties. Indeed, the economic downturn of 1981, with its attendant demands on the state's countercyclical programs, may have pushed Michigan's budget into an undeclared and officially unrecognized violation of the state constitution.[107]

In recent sessions, the Michigan legislature has considered a

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[98] DEL. CONST. art. VIII, § 6(b).

[99] *Id.* § 6(d).

[100] *Id.* § 6(b).

[101] *Id.* § 6(c), (d).

[102] MICH. CONST. art. IX, § 30.

[103] *See generally* Michigan Senate Fiscal Agency, Five Major Problems Associated with Section 30 (1982) (internal document on file at HARV. J. ON LEGIS.). *See also* Gold, *supra* note 11, at 424 (1984).

[104] *See* MICH. CONST. art. IX, § 30. Although a unique provision, the ratio of central state spending to payments to local governments is frequently studied for emerging trends in intergovernmental relations. *See* BOOK OF THE STATES, *supra* note 7, at 349–50.

[105] S. GOLD, *supra* note 39, at 8; *see also* Michigan Senate Fiscal Agency, *supra* note 103, at 1.

[106] MICH. CONST. art. IX, § 29.

[107] There was a $19,300,000 shortfall in section 30 payments in fiscal year 1981–82 and a $76,000,000 shortfall in 1982–83.

variety of bills proposed by the Governor that would liberally interpret section 30.[108] Some bills would have resolved general uncertainties in favor of permitting greater expenditures;[109] others are more blatant attempts to avoid the purpose of section 30.[110]

The recently passed Public Act 229 of 1983[111] provides a good example of the difficulty involved in determining whether the intent of the provision has been honored. Stated simply, Public Act 229 provides that a state expenditure in support of county mental health facilities, no matter what the form, will be calculated as a local expenditure for purposes of the ratio.[112] Normally, the state funds these hospitals through contracts with local mental health boards, which provide state required levels of services while enjoying considerable local autonomy. The bill was prompted by direct state financing for mental health facilities in a few counties that would not assume control of the facilities. The law causes a $50,000,000 "shift" in section 30 accounting: $50,000,000 that formerly was considered a central state expenditure is now considered a local expenditure, even though there has been no shift in program responsibility or state budget lines.[113]

To the extent that section 30 was intended to guarantee minimum funding to local programs, Public Act 229 honors its intent. It seems fair that, when the state handles a normally local expense, it should be included in the local government portion of the ratio. On the other hand, if the proponents of section 30 sought to decentralize government, strict construction would require that these expenditures be attributed to the state.

The state's reserve fund provides another example of the uncertainties involved with implementing TELs. Since 1977, Michigan has had a "Counter-Cyclical Budget and Economic Stabilization Fund," which cushions the state during economic downturns.[114] If this money is considered a central expenditure when appropriated, which has been the practice since the pas-

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[108] Act of July 30, 1984, ch. 229, 1984 Mich. Pub. Acts 739; S. 313, 314, 315, 476, 82d Leg., Reg. Sess. (Mich. 1983).

[109] Act of July 30, 1984, ch. 229, 1984 Mich. Pub. Acts 739.

[110] S. 313, 314, 82d Leg., Reg. Sess. (Mich. 1983).

[111] Act of July 30, 1984, ch. 229, 1984 Mich. Pub. Acts 739.

[112] Michigan Senate Fiscal Agency, Fiscal Note on S.B. 476 (Revised) 1 (1984) (on file at HARV. J. ON LEGIS.).

[113] *Id.* at 2.

[114] MICH. COMP. LAWS §§ 21.401 - .412 (1979).

sage of section 30,[115] care must be taken not to count it as an expenditure when it is actually spent.

Senate Bill 315, which failed to pass the Committee on Finance, is instructive of the accounting problems associated with TELs. It proposed that money appropriated to the fund not be counted in the ratio upon its appropriation;[116] presumably, the money would be counted when spent. The bill may have been motivated by short-term problems in meeting the ratio in 1983; it was abandoned in the late summer of 1984.[117] Such a shift might have required excessive allocations to local governments when the state could least afford it. Critics of the bill also pointed out that, because past appropriations had already been counted as central spending, passage of the proposal would have logically required a retroactive recalculation of the ratio.[118]

Opposition to the bill may also have been motivated by the fact that the present practice allows interest earned by the money in the fund to escape the constitutional ratio requirement; Michigan's state government can thereafter spend the earned interest without being required to share it with local governments.[119]

Senate Bills 313 and 314[120] embody a more explicit attempt to avoid section 30. The bills would have shifted state contributions to teachers' retirement funds from the state side of the ratio to the local side by funneling the money through local school districts.[121] In place of direct appropriations from the state, monies destined for the retirement fund would be distributed to local and intermediate school districts.[122] These local governmental units would then be obliged to contribute an equal amount to the pension fund within one working day.[123] At first blush, this arrangement seems to be a blatant subterfuge to avoid the TEL requirement. On the other hand, there is no reason why pension payments for teachers who work for local school districts should not be considered "local" expenditures.

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[115] Michigan Senate Fiscal Agency, Accounting for Budget Stabilization Fund Transfers in Meeting the Requirements of Article 9, Section 30, at 1 (1979) (on file at HARV. J. ON LEGIS.).

[116] S. 315, 82d Leg., Reg. Sess. (Mich. 1983).

[117] Telephone interview with Ted Ferris, Dir. of the Mich. Sen. Fiscal Agency (Oct. 10, 1984).

[118] *Id.*

[119] *Id.*

[120] S. 313, 314, 82d Leg., Reg. Sess. (Mich. 1983).

[121] *Id.*

[122] S. 314, 82d Leg., Reg. Sess. (Mich. 1983).

[123] *Id.*

II. Conclusion

As budgetary devices, TELs are inherently blunt instruments; they can be both ineffective and dangerous. When TEL provisions are circumvented, they are ineffective and the polity functions much as it would have without the provisions, save for the added inefficiency associated with such evasion. When TELs are too strict, they may hamstring needed government action, as the effect of Michigan's Section 30 on economic stabilization programs indicates. At this point, the TEL may become dangerous by preventing or stalling urgently needed government action.

The dominant experience of Group I TELs is that they succeed in reducing (if only temporarily) the growth of government by immediately denying the state one of its revenue sources. In the long run, however, Group I TELs do not prevent the state from raising other taxes or from imposing fees, and so governmental growth continues.[124] "Single issue" TELs focusing on one tax may provide an incentive to shift expenditures from one unit of government to another, as in moving programs from local to state governments when local property taxes are curbed. Although these changes may have little impact on governmental size, efficiency or equity may be affected.[125]

If a TEL is intended to limit the future growth of government, it is best directed at expenditures. Revenue limitations have more immediate appeal to voters because they can be presented as direct controls on taxes. Nonetheless, expenditure limitations hit more directly at government size and necessarily reduce the need for tax monies: there is no point in collecting added revenues if they cannot be spent. At the opposite extreme, state revenue structures have historically been relatively inelastic; in other words, revenues tend to limit themselves. Revenues in-

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[124] *See* Hagman, *supra* note 37, at 133. Hagman argues that:

> For a variety of reasons, local governments are now particularly desirous of finding sources of revenue which are not subject to the TELs. These sources include benefit-based or harm-avoidance payment schemes (BHAPs), various special forms of "taxes," user charges and exactions, which can be imposed on developers and consumers so that public lands, public works and other public goods need not be provided by general taxes.

Id.

[125] "To the extent they stimulated the utilization of BHAPs, the post TELs situation might be regarded as better both in terms of efficiency and equity." Hagman, *supra* note 37, at 134; *see also* Vaughn, *supra* note 30, at 130 ("Many areas will switch to fees and charges, which could, if properly used, increase efficiency.").

crease dramatically when the state decides to increase them (through new taxes); such increases, of course, follow only when the state increases its willingness and ability to spend the income. In this regard, an expenditure limitation more directly limits the size of government. Finally, an expenditure limitation coupled with a required rebate when a state surplus exceeds reasonable limitations has the features of both a tax and expenditure limitation. The expenditure limit and required surplus rebate act as a revenue limit along with the costs associated with providing the rebates.

Whatever the form of limitation, a TEL must aim toward a golden mean between overspecificity and ambiguous generality. Certain revenues and expenditures should not be counted in TELs unless the motivation is to control the size of government at *all* costs. For example, federal funds flowing to and through the state accounts should not be counted under a TEL; a large increase in such funds might push the state over its TEL. Because federal funds might be targeted toward specific programs, these externally determined expenditures might force the state to change its own spending priorities. A TEL that forces a state to refuse available federal funds may do a great injustice to the people of the state.

Similarly, earmarked funds probably should not be limited; if the intent of these TELs is to curb the yearly expenditures of state legislatures, then long established earmarked funds, often supported by special user groups (as with truck taxes for highways), are not intended targets. Self-supporting government authorities are another area that should be outside TELs, unless the intended goal is to reduce the public sector as a portion of the economy.

Colorado's experience demonstrates that general fund expenditures can easily be moved out from under a limitation through exceptions, redefinitions, and special budget lines. Thus, a TEL might wisely include language requiring that items presently in the general fund remain in the fund for purposes of calculating the limitation. Another approach would be to allow items (or "successor" items) presently in the general fund to be moved from that fund only with supramajoritarian approval.

Another lesson to be learned from present TELs is that "minor" details can make a TEL unwieldy, inappropriate, or ineffective. For example, the use of single base years has permitted legislatures implementing the TELs to weaken the limitations

by "padding" the base year. A TEL would be more effective if it incorporated a period of several years as a base, making it more difficult for the limitation to be weakened by a unique base year. Specific issues such as whether fees and cash authorities are part of limited expenditures or revenues must also be resolved.

Finally, the ultimate measure of a TEL's effectiveness is its abililty to be enforced by the courts. Such a review could invalidate either the TEL itself or legislative and executive maneuvers designed to avoid the limitation. As an example of the former, a TEL applicable to *all* state spending could easily be declared unconstitutional. If a TEL covering all expenditures began to endanger pension or state bond payments, it might run afoul of the contracts clause of the United States Constitution.[126]

Although implementing statutes may independently violate the constitutional TEL, state citizens may have difficulty showing the injury necessary to gain standing to bring suit for the enforcement of TELs. Currently, a few states, such as Michigan[127] and Missouri,[128] explicitly grant taxpayers standing to seek judicial enforcement of the TEL. In Missouri, this provision has cleared the way for the state courts to hear several cases and provide judicial interpretation of the state TEL and its terms.[129] Even if the standing doctrine poses no barrier, state executives and legislators might have difficulty bringing suits against other branches of government because of the justiciability problems raised by the "political question" doctrine.[130]

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[126] U.S. CONST. art. 1, § 10, cl. 1. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-6, at 467–73 (1978).

[127] MICH. CONST. art. IX, § 32.

[128] MO. CONST. art. XI, § 23.

[129] *See* Buechner v. Bond, 650 S.W.2d 611 (Mo. 1983) (en banc) (unspent revenues from prior years cannot be included in "total state revenues"); Roberts v. McNary, 636 S.W.2d 332 (Mo. 1982) (en banc) (upholding taxpayer suits and ability of courts to enjoin violations); Boone County Court v. State, 631 S.W.2d 321 (Mo. 1982) (en banc) (interpreting section prohibiting the state from imposing new activities on local government without funding).

[130] The "political question" doctrine was used by Governor Lamm in his legal dispute with the Colorado legislature. Opening Brief for Appellant, at 9, Colorado General Assembly v. Lamm, No. 84 SA 79 (Colo. Feb. 16, 1984); Reply Brief for Appellant, at 5, Colorado General Assembly v. Lamm, No. 84 SA 79 (Colo. Feb. 16, 1984). *See also* Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065, 1075–77 (1983) (concluding that judicial review of a proposed federal balanced budget amendment would violate article III). For a general discussion of the political question doctrine, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 214–41 (2d ed. 1973). *See also* P. STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION (1974).

In addition to clearing the way for judicial enforcement, a good TEL should still allow some room for legislative interpretation. Of necessity, legislatures must decide how to implement constitutional TELs. The resulting paradox is that TELs must limit the legislature's discretion while simultaneously providing it with enough flexibility to respond to crises and new circumstances without doing violence to the TEL itself.