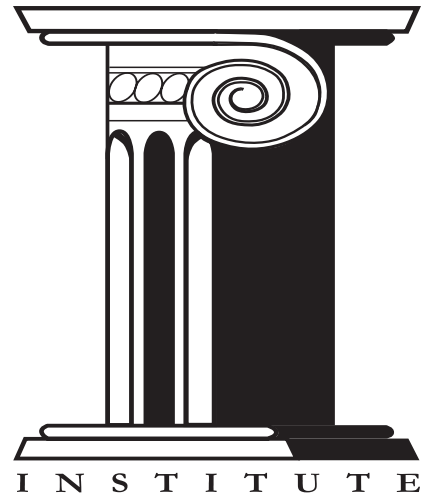


LIMITS



On Power and the Use of Coercion

TABOR Saved Colorado

by Barry Poulson

Colorado's tax and spending limits have imposed the most effective constraints on the growth of government in the country. But those tax and spending limits are under attack in Colorado, just as they once were in California. Do we really want to follow California's disastrous abandonment of fiscal discipline?

The Golden State's GANN Amendment, a precursor of TABOR, limited the growth of state revenue and spending to the sum of inflation and population growth. In the late 1980s, the California Legislature abandoned the GANN Amendment. The rest is history.

Over the last two decades

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without GANN, state spending in California increased much more rapidly than personal income. To sustain the higher level of spending, taxes were increased to one of the highest levels in the country. Despite the higher tax burden, the state incurred a structural deficit that required even higher levels of debt. California created one of the worst business-tax environments in the country. Business investment, jobs, and population left the state for other states with better tax climates. In short, California has experienced retardation in economic growth over the last 20 years.

Shortly after California abandoned the GANN Amendment, Colorado voters passed TABOR. It also limits the rate of growth of state revenue and spending to the sum of inflation and population growth.

The TABOR Amendment

has worked much the way it was intended, allowing Colorado citizens to decide how much government they want and are willing to pay for. If any jurisdiction wants to spend surplus revenue, or increase taxes or debt, it must have voter approval.

Many statewide ballot measures have been presented to Colorado voters since TABOR was enacted. Two of the six ballot measures seeking approval to spend surplus revenue were passed, and four were defeated. Eight ballot measures proposing tax increases were introduced, but only one of these measures passed. Of the four property tax measures introduced, two providing property tax relief to specific groups passed; two measures proposing property tax increases were defeated.

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TABOR Saved Colorado

by
Barry Poulson
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At the local level, however, many more spending or tax increases have been approved, usually because they were tied to specific local government programs to which the voters decided to give extra funds.

Critics often incorrectly argue that TABOR forced the state to cut spending. The reality is that state spending in Colorado has grown at roughly the rate of the private economy. From 1993 to 2007, real per capita state spending grew 28 percent, while per capita GDP grew 30 percent.

With an effective tax and spending limit in place, Colorado has been able to lower tax burdens, creating one of the best business-tax climates in the country. Over the period since TABOR was passed, Colorado has experienced one of the highest rates of economic growth in the nation, while California has experienced retardation in economic growth.

States that impose an effective tax and spending limit and pursue prudent fiscal policies create a better business-tax climate compared to states that pursue profligate fiscal policies in the absence of effective tax and spending limits. Critics who argue that state spending should not be constrained by tax and spending limits are really arguing that

government should grow more rapidly than the private sector.

Politicians and special interest groups routinely attack TABOR because it doesn't give them carte blanche authority to tax and spend. In Colorado, we are fortunate to have our TABOR amendment. It strengthens fiscal rules and policies conducive to economic growth and prosperity and prevents the kind of fiscal debacle occurring in California.

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LIMITS

Question of the Quarter:

Should Iowa adopt a
Taxpayer Bill of Rights?

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We may publish some
of your ideas in the
March 2010 issue
of LIMITS.

A Setback for Taxpayers and Economic Liberty

by John Hendrickson

Much of the media focus and attention of the 2009 off-year elections focused on the Gubernatorial races in Virginia and New Jersey and the District 23 Congressional race in New York. The Republican Party achieved some important victories in both Virginia and New Jersey, but on the state level taxpayers suffered a defeat when both Maine and Washington rejected TABOR (Taxpayer Bill of Rights) Amendments. The Initiative & Referendum Institute at the University of Southern California stated that election year 2009 was “a quiet year” in terms of ballot initiatives.¹ The major ballot measures consisted of the TABOR measures and a referendum on same-sex marriage in Maine, where voters repealed a law that permits gay marriage.²

The purpose of TABOR is to protect taxpayers from excessive taxation and government spending. A TABOR measure is designed to “restrict state and local government spending and require voter approval for any tax hikes or spending over the established caps.”³ In Maine, Question 4, which failed to pass (40-60), the TABOR measure would have stipulated “that government expenditures cannot increase faster than the combined annual rate of inflation plus population.”⁴ The Measure also would have required “that 80 percent of dollars beyond that

limit be devoted to tax relief, either through rebates or broad-based rate cuts, and 20 percent be devoted to a ‘rainy day fund’ to help bridge the gap in difficult times such as we face today.”⁵

In Washington, voters rejected Initiative 1033 (45-55).⁶ This measure would have held “the amount of tax dollars state and local governments can raise to the same inflation plus population growth formula.”⁷ In addition, “any revenues gathered beyond that limit would be used to reduce property tax levies in the state, but the voters could choose to provide all or part of those excesses to governments through referendums.”⁸

Both of these measures would have provided important checks on state and local governments in the interests of taxpayers. In an era of excessive government spending, high rates of taxation, and declining revenues due to the current economic recession, the TABOR measure is one instrument to provide taxpayers with stronger leverage over the fiscal behavior of state and local governments. The issue of tax and spending policies is not just about economics, but it is central to the idea of liberty. Economic liberty and property rights were at the core of the American Founding, and as Justice Antonin Scalia wrote:

The free market, which presupposes relatively broad economic freedom,

has historically been the cradle of broad political freedom, and in modern times the demise of economic freedom has been the grave of political freedom as well.”⁹

As President Calvin Coolidge stated in 1924:

Realizing the power to tax is the power to destroy, and that power to take a certain amount of property or of income is only another way of saying that for a certain proportion of his time a citizen must work for the government, the authority to impose a tax upon the people must be carefully guarded.¹⁰

In his Farewell Address to the nation, President George Washington stated that “no taxes can be devised which are not more or less inconvenient and unpleasant.”¹¹ Wages, or earned income, is a form of property that an individual works to earn, and as Senator Barry Goldwater wrote, “government does not have an unlimited claim on the earnings of individuals.”¹²

Excessive spending and taxation is not only a moral issue concerning liberty, but it is not sound economic policy.

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How Gun Litigation Can Restore Economic Liberties

by Robert A. Levy

A central mission of both the Cato Institute and the Institute for Justice (IJ) has been restoration of rights to earn an honest living, make binding contracts, and enjoy private property. Regrettably, courts have routinely rubber-stamped legislative restrictions on economic liberties. Who would have imagined, however, that the Second Amendment — the right to keep and bear arms — could provide the battlefield on which to reinvigorate judicial review of economic regulations? Yet that might be the outcome in *McDonald v. Chicago*, a challenge to Chicago's gun laws, in which Cato and IJ filed a joint brief with the U.S. Supreme Court. Here's the story: how gun rights and economic liberties intersect.

First, the bad news. In 1873, five years after ratification of the Fourteenth Amendment, the Supreme Court upheld a Louisiana law that required all butchering of animals in New Orleans to be done by one private corporation — owned, of course, by politically connected businessmen. Justice Samuel Miller, writing for a 5-4 majority in the Slaughterhouse Cases, ruled that the law was a valid public health measure and did not violate the right of butchers “to exercise their trade.” Along the way, the Court effectively erased the

Fourteenth Amendment's Privileges or Immunities Clause from the Constitution. According to Miller, that clause — “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens” — protected only rights of national citizenship, such as access to navigable waterways, not the right to earn a living in a marketplace free of state-chartered monopolies.

Without the Privileges or Immunities Clause, courts turned to other provisions of the Constitution — notably the Due Process Clause of the Fourteenth Amendment — to defend rights from government encroachment. But that doctrine, known as substantive due process, rests on shaky ground. Appellate judge Frank Easterbrook put it this way: “[We] have spent some time looking through the Constitution for the . . . ‘due substance’ clause [but the] word that follows ‘due’ is ‘process.’” In other words, the Due Process Clause is better suited to guaranteeing procedural rather than substantive rights.

Fast forward to the New Deal. That's when use of substantive due process to secure economic liberties came to a crashing halt. A mere footnote in *United States v. Carolene Products* (1938) did much of the damage. *Carolene* validated a ban on interstate

shipment of “filled milk” — a healthful variety of evaporated milk that threatened vested interests in the dairy industry. The Court, in its infamous footnote four, declared that only those rights specifically enumerated in the Bill of Rights, plus selected rights associated with the political process (e.g., voting) or with protection of minorities, would be judicially safeguarded. The innumerable remainder of our rights, including the right to pursue an honest occupation, would be vindicated or not, at the pleasure of the Legislature. Essentially, no legislative infringement of economic liberties, however egregious, would be subject to meaningful constitutional review by the courts.

That's roughly where things stood until June of last year, when the Supreme Court in *District of Columbia v. Heller* overturned Washington, D.C.'s gun ban on constitutional grounds. And that brings us to the good news.

Because *Heller* affirmed that individuals, not just militia members, have a right to bear arms, the Court will now have to decide whether the Second Amendment can be enforced against state governments. Washington, D.C., is not a state; it is a federal enclave where Congress exercises plenary legislative power. Until the Fourteenth Amend-

ment was ratified, the Bill of Rights applied only to the federal government, not to states. Indeed, in two post-ratification cases — *United States v. Cruikshank* (1875) and *Presser v. Illinois* (1886) — the Supreme Court reiterated that the Second Amendment did not bind to the states. But then, beginning in 1897, in a series of so-called incorporation cases, the Court held that the Due Process Clause of the Fourteenth Amendment was intended to “incorporate” most of the Bill of Rights in order to hold state governments accountable for violations. Interestingly, however, the Court has never ruled that the Second Amendment has been incorporated.

We should know fairly soon where the Supreme Court stands. In *McDonald v. Chicago*, the U.S. Court of Appeals for the Seventh Circuit denied incorporation of the Second Amendment, stating that *Cruikshank* and *Presser* govern unless and until the Supreme Court holds otherwise. Two months earlier, in *Nordyke v. King*, a three-judge panel of the Ninth Circuit had unanimously ruled that the Supreme Court’s incorporation cases superseded *Cruikshank* and *Presser*. Therefore, said the panel, the Second Amendment applied to the states through the Due Process Clause. The Ninth Circuit decision will be reconsidered, however, by a larger contingent of 11 judges.

In the end, the Second Amendment will very likely

constrain state governments as well as the national government. The dual criteria under substantive due process are whether the right is implicit in our Anglo-American system of ordered liberty or deeply rooted in our nation’s history and tradition. The Second Amendment surely qualifies. Perhaps the more interesting question is whether the Court will expand its selective incorporation via the Due Process Clause or overturn *Slaughter-House*, as Cato and IJ argue in their brief, and declare that the right to keep and bear arms is one of the privileges or immunities of U.S. citizenship that — along with many other liberties, ultimately including economic liberties — may not be abridged by the states.

Justice Clarence Thomas, for one, has declared that he would be open to reevaluating the meaning of the Privileges or Immunities Clause “in an appropriate case.” *McDonald v. Chicago* may be that case. Harvard law professor Laurence Tribe, a liberal icon, writes that “the *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause.” Yale law professor Akhil Amar agrees: “Virtually no serious modern scholar — left, right, and center — thinks that [*Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment.”

It’s time for the Supreme Court to restore full status to economic liberty. The Constitution demands no less.

Robert A. Levy is Chairman of the Cato Institute and was co-council to the plaintiffs in the District of Columbia v. Heller.

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and Happy New Year
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A Setback for Taxpayers and Economic Liberty

by John Hendrickson
(continued from page 3)

The federal government, along with most state and local governments, are feeling the consequences of excessive government spending and declining revenues because of the current recession. Iowa is one of many states that are currently facing a fiscal crisis due to reckless spending. The national economic situation with 10 percent unemployment and slow business recovery does not help the situation, and any attempt to raise taxes at any level of government would lead to further economic decline.

With the defeat of TABOR in this election, liberals have celebrated a victory for bigger government.¹³ Liberals may claim a victory with the defeat of these measures, while leveling their unjust criticism of conservatives and libertarians of being anti-government, but the debate is far from over.

The TABOR debate is just one element in the battle of ideas between conservatives and progressives. Conservatives believe that government has a role, but that role should be limited by the Constitution. The conservatives also believe that free-enterprise and the free-market system is the best prescription for economic policy. For the conservative,

sound economic policy is found in keeping taxes low, reducing government spending, balancing budgets, and reducing regulations. “You can’t create jobs by taxing one group and giving to another — you can only redistribute existing wealth. To create wealth, you had to cut tax rates, not raise them,” wrote economic historian Burton Folsom Jr. in describing the constitutional view of economic policy.¹⁴

In order to achieve sound economic policy and recovery, both state and national policymakers must provide incentives for the private sector to grow. Only in the private sector can the 10 percent unemployment be reversed, and only reduced spending, taxation, and regulation will encourage entrepreneurial growth. The TABOR measure is not anti-government, but allows citizens the responsibility to control their state government spending and levels of taxation.

TABOR is both a sound policy, as well as a moral issue that supports economic liberty, which is the basis of a free society. In this current recession and fiscal crisis, the solution resides in the moral idea of returning back to Constitutional principles based on reducing spending and taxes, which in the end will unleash the entrepreneurial spirit that has guided the United States.

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A Call for Renewed Faith in the Constitution

by John Hendrickson

“When America ceases to remember his greatness, America will be no longer great,” stated Calvin Coolidge, referring to Alexander Hamilton, who served as our nation’s first Secretary of the Treasury and established the American capitalistic economic system.¹ Hamilton’s economic program placed the United States on the road to becoming an economic power and the principle behind his program was the idea of economic liberty protected by the Constitution. The principle of economic liberty is at the heart of our constitutional republic, but progressivism — which originated in the late 19th century — has sought to redefine economic liberty.

“The Framers of the Constitution and Bill of Rights believed that respect for private property was closely linked to political liberty,” wrote constitutional legal scholar James W. Ely Jr.² Progressivism, whether in the form of the New Deal, Great Society, or President Barack Obama’s attempt to renew America through a second Great Society, has eradicated economic liberty through big government, excessive regulation, high taxation, and a push for new economic rights, such as universal health care.

The current economic and financial crisis the nation faces is one reason why the nation must see a return to Constitutional, limited government. The

nation currently faces a national debt of \$12 trillion, a deficit of \$1.5 trillion, a budget over \$3 trillion, and a crisis in entitlement programs. “Social Security and Medicare face a combined unfunded obligation of \$43 trillion over the next 75 years.”³ If these entitlements are not reformed, the federal budget would be consumed and the “costs would require more than doubling income tax rates,” which would cripple the economy.⁴

The solution to the economic and fiscal crisis and 10 percent unemployment can be found in returning to the Constitution. The growth of government over time is closely associated with the progressive view of the Constitution. “The Constitution is not to be treated as an instrument of political expediency,” wrote General Douglas MacArthur.⁵ MacArthur continues:

Every move that is made to circumvent its spirit, every move that is made to over-centralize political power, every move that is made to curtail and suppress individual liberty is reaction in its most extreme form. For the Framers of the Constitution were the most liberal thinkers of all ages and the Charter they produced out of the liberal revolution of their time has never been and

is not now surpassed in liberal thought.⁶

“The object and practice of liberty lies in the limitation of governmental power,” noted MacArthur.⁷

Professor Walter E. Williams wrote that Article 1, Section 8 of the Constitution lists the enumerated powers of Congress and that “three-quarters of what Congress taxes us and spends our money for today is nowhere to be found on that list.”⁸ “To cite just a few examples, there is no constitutional authority for Congress to subsidize farms, bail out banks, or manage car companies,” noted Williams.⁹ Our government has clearly drifted away from the Constitution with the birth and growth of the administrative state.

“The fundamental and ultimate issue at stake is liberty itself — liberty versus the creeping socialization in every domestic field,” wrote MacArthur.¹⁰ The nation must return to Constitutional, limited government and the principle of economic liberty, but as former Secretary of the Treasury Ogden Mills wrote: “The fate of nations is determined more by the character of the people than by the character of the government. In fact, in the long run, the character of the government is determined by the character of the people.”¹¹

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A Call for Renewed Faith in the Constitution

**By John Hendrickson
(continued from page 7)**

The solution to our present troubles is not only to return to Constitutional government, but also to renew our national commitment to the Constitution.

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