INTERPRETING STATE FISCAL CONSTITUTIONS: A MODEST PROPOSAL

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I. INTRODUCTION

How should a state supreme court interpret provisions of state constitutions that govern fiscal matters? For example, many state constitutions provide that if a local government imposes a fee that is more than a "reasonable" amount, then the fee is really a tax, and taxes are subject to special limitations.[1] We understand the gist of these provisions' concerns. If my city charges me an enormous amount for water service and then uses the extra money it raises for other governmental purposes, then the charge I paid for water is tantamount to a general tax. However, assuming there is no diversion of funds to some other use, how high is too high such that a charge for a government service becomes a tax?

At first glance, such questions about state fiscal constitutions seem both trivial and silly—which I believe explains why, up to this point, no one has given them much thought.[2] The question seems trivial because

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1. *See, e.g.*, CAL. CONST. art. XIIIA, § 3.

2. Most discussions of limitations on the revenue raising power in state constitutions relate to whether or not they are effective at limiting the size of government, with the rough consensus being that they are not. I review some of the evidence in David Gamage & Darien Shanske, *The Trouble with Tax Increase Limitations*, 6 ALB. GOV'T L. REV. 50,

the minutiae of how any one state distinguishes a tax from a fee seem unimportant. The question seems silly because obviously one should just interpret a fiscal constitutional provision the way one interprets any constitutional provision. Presumably, one starts with the plain meaning of the text and proceeds from there.[3]

Yet, the matter is important for at least four reasons. First, fiscal provisions in state constitutions abound.[4] Second, these provisions are extremely consequential, at least potentially.[5] For example, California's cap-and-trade program was in legal peril due to the state's fiscal constitution.[6] Additionally, storm-water drainage programs have been hamstrung in several states due to courts' interpretations of state fiscal constitutions.[7] State fiscal constitutions might also hinder other—possibly desirable—policy developments; such as increased use of publicly owned utilities[8] or simple reforms to the rate structures of public utilities in response to global warming.[9]

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51 (2013). To my knowledge, there has been one discussion of the doctrinal underpinnings of state fiscal constitutions. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907 (2003). Briffault's primary conclusion is descriptive and is that state court interpretations of their fiscal constitution are ad hoc, sometimes interpreting the limits strictly and sometimes loosely.

3. *See, e.g.*, Citizens for Fair REU Rates v. City of Redding, 233 Cal. App. 4th 402, 409 (Cal. Ct. App. 2015), *cert. granted*, 347 P.3d 89 (Cal. Apr. 29, 2015). And indeed, a form of textualism has increasingly become the dominant mode of analysis in state courts. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753–54 (2010).

4. *See generally* Briffault, *supra* note 2, at 909 (mentioning that "nearly all" state constitutions impose significant restrictions on borrowing and that a "considerable number" also limit taxation).

5. There is a general consensus that states and localities have been increasing their reliance on fees. *See, e.g.*, Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 376 (2004); Ross E. Coe, *Federalism's Vanguard: Local Government User Fees*, ST. TAX NOTES (Aug. 29, 2011), http://www.taxnotes.com/state-tax-today/user-fees/federalisms-vanguard-local-government-user-fees/2011/08/29/3281?highlight=federalism%27s%20vanguard.

6. On April 6, 2017, a divided panel of an appeals court in California ruled that California's cap-and-trade program did not impose a tax on the purchasers of emissions allowances. *See* Cal. Chamber of Commerce v. State Air Res. Bd., 216 Cal. Rptr. 3d 694, 699–700 (Cal. Ct. App. 2017).

7. *See* discussion beginning *infra* note 73 and accompanying text.

8. Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 272 (2017).

9. For instance, the increased use of rooftop solar is clearly a positive in the fight against global warming. To date, those with solar panels have benefited from "net metering," i.e., they have received a credit for the energy they provided back to the energy system. Yet, as the use of solar panels increases, at least two other related problems emerge. First, the net metering model might cause energy users with rooftop solar to pay too little for the fixed costs of the utility. Second, the energy users with solar panels who so benefit are likely to have higher incomes. *See* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63

Third, when fiscal matters are enshrined in a state's constitution, they are difficult to alter when circumstances change. To be clear, this speaks to why fiscal matters should not be in constitutions,[10] but that is a separate issue. Fiscal matters *are* in state constitutions, so the question becomes what is the principled way to interpret these provisions—provisions that govern the ordinary workings of public finance in an extraordinary way.

Finally, the question of how to interpret a fiscal provision in a state constitution is difficult and worthy of critical attention. We all understand that the phrase "equal protection of the laws" is not self-executing and requires interpretation. How to interpret such a provision is, of course, a major preoccupation of constitutional theory. Relying on the "plain meaning" of "equal" is part of everyone's analysis, but it is generally considered significantly more complicated than that. Similarly, the meaning of a "reasonable" fee is not at all obvious, especially in a complicated, real-world context.

Further, many of the usual exegetical tools are blunter when it comes to interpreting state fiscal constitutions. One reason for this is that many fiscal provisions are the product of voter initiative and hence their texts are particularly unclear. For instance, the text might introduce undefined technical terms.[11] Also, and for the same reason, the legislative history, such as there is, is likely to be of relatively little value.[12] Furthermore, along with new terms, these fiscal provisions will often use terms that have a long history in the common law of public finance.[13] When a common law term is inserted into the constitution,

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UCLA L. REV. 810, 864 (2016). Coping with these problems by adjusting the rates paid by those with rooftop solar could land a municipally owned utility in trouble under the kinds of interpretations of state fiscal constitutions that I will critique in this Article.

10. Susan P. Fino, *A Cure Worse than the Disease? Taxation and Finance Provisions in State Constitutions*, 34 RUTGERS L.J. 959, 1012 (2003).

11. For example, Proposition 13, added to the California Constitution by voter initiative, was a special supermajority voting rule for "special taxes," but the proposition did not define "special taxes", nor was "special taxes" a well defined term of art in preexisting common law. *See* JOSEPH R. GRODIN, DARIEN SHANSKE & MICHAEL B. SALERNO, THE CALIFORNIA STATE CONSTITUTION 376–78, 399 (G. Alan Tarr ed., 2d ed. 2016) (commentating on article XIIIA [Tax Limitation], section 4 of the California Constitution).

12. This is not to say that many courts will not attempt to conjure up a legislative history out of ballot materials anyway, just that ballot materials are less likely to provide detailed guidance than the results of the regular legislative process. *See generally* Jane S. Schacter, *The Pursuit of 'Popular Intent': Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 123 (1995).

13. *Cf.* Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 501 (2013) ("The *leitmotif* of Justice Scalia's prominent defense of textualism is how federal courts are not common law courts . . . . Such objections fall away for state courts,

what does it mean? Does it mean what it meant in the cases roughly contemporaneous with the passage of the voter initiative or does it mean that an entire process of common law reasoning is being incorporated? Or does this history not matter?

In brief, I will argue that the use of such terms should be interpreted as requiring courts both to look to the term's use in the common law before incorporation and also to engage in common law reasoning so as to develop the new constitutional provision. There are several reasons to adopt this approach. This approach is broadly consistent with at least a plain meaning of the constitutional provisions in question, consistent with the canon that codified common law terms are presumed to retain their common law meaning, and consistent with the canon that initiative proponents are presumed to be familiar with the law. The use of these two canons is appropriate because they encourage initiative proponents to become familiar with the law, and because they impel courts to interpret propositions so as to increase the overall predictability of the law, which is a key rule of law value.

Another reason that courts should look to the common law is that the incorporation of a body of common law precedent provides courts and litigants with greater resources to understand new provisions. It turns out that other states and the federal government have engaged with these issues, and have done so for a long time. Alas, only a few clear lessons emerge from this history, but they are hard won and valuable.

Finally, common law reasoning, as amorphous as it may be, also provides a well-understood method for thinking through how to apply static fiscal terms to changing conditions.

The matter can be approached another way. Many fiscal provisions in state constitutions seem to require state courts to subject the fees chosen by public entities to more intense *substantive* scrutiny. As will be explained below, accepting this invitation will lead to a jurisprudential morass and necessarily so given the nature of the enterprise that courts are being asked to second guess.

But this is not the only way for state courts to interpret these provisions. The interpretive framework I propose indicates that courts

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which are undisputedly common law courts. The Supreme Court's parsimonious understanding of federal common law may relieve federal textualists from considering the implications of general common law powers on statutory interpretation. State court jurists have no such dispensation."). Note that Pojanowski concludes that state courts, as common law courts, may have a legitimate role in expanding interpretations of statutes as opposed to narrowing interpretations. *Id.* at 531–32. This seems right and this Article's argument is broadly consistent, though the approach proposed here is not advocating a narrowing or broadening of these provisions.

should interpret provisions of fiscal constitutions to require them to subject public ratemaking to more intense *procedural* scrutiny, a kind of review familiar from administrative law. Such an approach is analytically superior and will, accordingly, lead to a more functional jurisprudence.

This approach does give real teeth to these provisions. As a matter of history, it has indeed been the case that the process for setting rates/fees by many local governments has not been nearly as sophisticated as the usual process by a public utility commission ("PUC") setting rates for private utilities.[14] To be sure, this is in many cases understandable given the resources of local governments; the proposal of this paper is *not* that all governments in a state governed by these kinds of provisions need to go through something like a full PUC-style ratemaking proceeding for all fees. But in states that have such provisions, governments have to do more, potentially much more than they are accustomed to, to justify their fees. Indeed, in many cases it could well be the case that a requirement to pursue a rigorous procedure would empower plaintiffs more than second-guessing the level of rates would. This is because a plaintiff would be able to successfully challenge a rate merely because it was imposed in an ad hoc way, without delving into a substantive analysis regarding the level of the fee.[15] At the end of the day, the key difference between a tax and a fee is that the government must undergo a reasonable process for ascertaining the size of the fee relative to the need. There is no requirement for any such process in connection with a tax.

Before proceeding with the argument, I want to be clear as to what I will be referring. This argument will be about fiscal provisions[16] of

14. See, for example, the process followed in the stormwater cases discussed *infra* Part VI with the full PUC ratemaking process. For that process, see, for example, JIM LAZAR, ELECTRICITY REGULATION IN THE US: A GUIDE 47–80 (2d ed. 2016); Boyd & Carlson, *supra* note 9, at 620–30.

15. Professor Evan Lee and Josephine Ellis make this observation in connection with administrative law at the federal level. They point out that plaintiffs who likely would not have Article III standing could still challenge a federal agency action on administrative grounds, such as the failure to submit an adequate Environmental Impact Statement. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 187–203 (2012).

16. Similar issues involving civil rights provisions have been discussed much more in the literature and, though the issues are similar, they are different. For instance, in most matters involving individual rights there will be a relevant federal constitutional provision to consider. Furthermore, I am concerned that the procedural approach advocated here is not sufficient to protect the civil rights of minority groups. *See generally* Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1684–86 (1998).

state constitutions that were enacted by means of direct democracy.[17] Specifically, the focus will be on those types of provisions that arguably require courts to submit the level of fees[18] that a government charges for a service to a rigorous substantive analysis.

II. HISTORY OF TAXES VERSUS FEES

The history of taxes versus fees jurisprudence is so long and varied that it is impossible to do the topic justice in this short Article. Fortunately, there are several recent surveys that go over the history of tax/fee jurisprudence and summarize the current state of play, both at the federal level and within the states.[19] Historically and currently, this issue has come up in many areas of the law, including: whether a government has the power to impose a given fee if that government has only the police power and not taxing power, whether a levy is a tax for purposes of the Tax Injunction Act, whether a fee is so large that it constitutes a taking, and whether a fee is really a tax for purposes of the rules that limit the imposition of taxes.[20]

As commentators have pointed out, the resulting decisions have looked at a hodgepodge of plausible factors,[21] such as: whether a service is being provided, the nature of the service provided, how the fee is measured, the uses to which the collected revenue will be put, and the voluntariness of the charge. A classic fee is levied to provide a specific service—and no more—which primarily benefits the fee payers. Fees are often levied for services that are voluntary, such as a building permit fee.

Leading commentators have emphasized particular factors as especially important. For example, Joseph Henchman emphasizes the

17. Products of ordinary legislation ought arguably be analyzed somewhat differently, especially if they are the result of extensive hearings, committee reports, etc.

18. And thus, I am not discussing provisions that impose new procedural rules or limit state expenditures by imposing some kind of formula.

19. *See generally* JOSEPH HENCHMAN, TAX FOUNDATION, HOW IS THE MONEY USED? FEDERAL AND STATE CASES DISTINGUISHING TAXES AND FEES (2013), https://files.taxfoundation.org/legacy/docs/TaxesandFeesBook.pdf (current survey); Jasper L. Cummings, Jr., *Meandering from Income to Consumption Taxes Via User Fees*, TAXANALYSTS: TAX NOTES, Aug. 2016, at 1241, http://www.taxnotes.com/tax-notes-today/user-fees/meandering-income-consumption-taxes-user-fees/2016/08/30/g82v [hereinafter Cummings, *Income to Consumption*]; Jasper L. Cummings, Jr., *User Fees Versus Taxes*, TAXANALYSTS: AUDIT + BEYOND, Oct. 2011, at 321, http://taxprof.typepad.com/files/62st0321.pdf [hereinafter Cummings, *User Fees Versus Taxes*] (historical survey).

20. *See* Cummings, *User Fees Versus Taxes*, *supra* note 19, at 325–30.

21. *See* sources discussed *supra* note 19.

importance of the *purpose* for which revenue is to be used,[22] while Jasper Cummings recommends focusing on the *power* that underwrites the imposition of the fee.[23] In neither case do the authors emphasize an autopsy as to the size of the fee, as this is not what the cases, state or federal, generally require.[24]

In this paper, my goal is not so much to draw out a different master factor or set of factors, but to draw out a methodology to apply to a particular set of state constitutional provisions. These are provisions that appear to direct courts to undertake an intensive analysis of what *level* of fee will pass constitutional muster. Here are three examples of provisions that seem to require courts to subject the level of a fee to intensive scrutiny, contrary to the preexisting practice.

The California Constitution currently says, in broad strokes, that governments can charge fees for services or products with a majority vote of the legislative body if "[the] charge [is] imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product."[25] If the service or product exceeds these limits, then it is a tax and can only be imposed if approved by a two-thirds vote of the electorate.[26]

The sense of the provision seems clear enough, and in fact the provision tracks what we would expect to see as a definition of "fee" after even our short summary of the common law of fees. Yet ambiguities abound. What does it mean for a service to be "direct," and what does it mean for a cost to be "reasonable"? Since this is a constitutional provision, there seems to be a good argument that the courts must look very carefully at the level of the fees chosen by the government.

Another example. Missouri's constitution reads: "Counties and other political subdivisions are hereby prohibited . . . from increasing the current levy of an existing tax, license or fees . . . without the approval of the required majority of the qualified voters of

22. HENCHMAN, *supra* note 19, at 5. For a compelling argument that how this money is spent should matter less when fees are imposed to mitigate an externality, see Erin Scharff, *Pigovian User Fees* (forthcoming).

23. Cummings, *Income to Consumption*, *supra* note 19, at 1241.

24. *Id.* at 1246.

25. CAL. CONST. art. XIIIC, § 1(e)(2). The provision is actually significantly more complicated, but the complications are not relevant to the question posed here. For further discussion, see GRODIN ET AL., *supra* note 11, at 375, 399–400. Note that this commentary was written by the author of this Article.

26. CAL. CONST. art. XIIIC, § 1(2)(d).

that . . . political subdivision voting thereon."[27] This language suggests that all fees would be subject to a vote, but the Missouri Supreme Court glossed fees in this section as meaning "that what is prohibited are fee increases that are taxes in everything but name. What is allowed are fee increases which are 'general and special revenues' but not a 'tax.'"[28] In other words, the court found that this limitation provision, known as the Hancock Amendment, committed Missouri courts to distinguish true fees from taxes. In articulating the criteria for doing so, the court drew upon five criteria that were derived from "its traditional distinction between 'true' user fees and taxes denominated as fees."[29]

Finally, article IX, section 31 of the Michigan Constitution, known as the Headlee Amendment, provides:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.[30]

The Michigan courts have concluded from this provision that fees, unlike taxes, do not require a special election.[31] Again, the tax-fee distinction predated this provision in Michigan law.

III. ANALYTIC CONTEXT

Before introducing my doctrinal proposal, I want to motivate it through providing additional analytic background as to the challenges courts face when evaluating the size of fees levied by a government. There is the obvious problem that courts lack expertise with the technical subjects likely to be at issue, but the issue runs deeper than that. Courts are asked to resolve many disputes that raise technical issues. There are, however, specific aspects of what the courts are being asked to adjudicate in connection with fees that are particularly problematic.

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27. MO. CONST. art. X, § 22(a).

28. Keller v. Marion Cty. Ambulance Dist., 820 S.W.2d 301, 303 (Mo. 1991) (footnote omitted).

29. *Id.* at 303; *see also* Zweig v. Metro. St. Louis Sewer Dist., 412 S.W.3d 223, 234 (Mo. 2013).

30. MICH. CONST. art. IX, § 31.

31. Bolt v. City of Lansing, 587 N.W.2d 264, 269 (Mich. 1998).

Our first stop will be to understand the basic economic rationale for fees. That rationale is that they function as prices, which is a good thing because the price signal lets users know that they are using a scarce resource or service.[32] Imagine funding water service with a broad-based income tax; such a funding mechanism does not include any means by which customers could be encouraged to consume *less* water.

Importantly, the connection between benefit and burden has a specific application to the assignment of taxing powers in a federation.[33] The benefit principle of taxation in general states that taxation should be proportional to the benefits received. Applied to the design of a federal system, the principle indicates that we should try to match up benefit and burden at each level of government. This is because, if there is a clear connection between services you care about and your money, which you of course care about, then you are more likely to participate in selecting and monitoring projects either through voice or exit.

If the benefit principle is not followed there can be big problems. A federal system, by definition, has multiple competing jurisdictions, but, since they are all within one nation-state, there are not trade or other barriers between these jurisdictions. Thus, if a jurisdiction is taxing and spending in a manner inconsistent with the benefit principle, then there can be very costly corrections. Why should I stay in a high tax jurisdiction if I am not receiving a corresponding benefit?

Thus, the theory of tax assignment argues that local governments should be assigned not just the power to impose fees, but also the power to impose property taxes and other taxes that adhere more closely to the benefit principle. Property taxes are thought to cohere to the benefit principle because local governments do many things that benefit property values—most particularly through providing local public schools, but also policing, zoning, etc.

The detour through the theory of tax assignment was necessary to illustrate that the quasi-commercial connection between benefit and burden is a common feature of both "taxes" and "fees," at least sometimes. Accordingly, courts often note that the two instruments lie on a continuum.[34] Thus, the first issue bedeviling courts looking to subject the level of fees to intense scrutiny is that, in a federal system,

32. *See generally* Richard M. Bird & Thomas Tsiopoulos, *User Charges for Public Services: Potentials and Problems*, 45 CAN. TAX J. 25 (1997).

33. For a classic analysis of this dichotomy, see Richard A. Musgrave, *Who Should Tax, Where, and What?*, *in* TAX ASSIGNMENT IN FEDERAL COUNTRIES 63, 73–74 (Charles E. McLure, Jr. ed., 1983).

34. *See, e.g.*, San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R., 967 F.2d 683, 685 (1st Cir. 1992).

local taxes often appear—and *should* appear—to be animated by the same economic principle.[35] We will call this the *continuum* problem.

Yet, this is not just a case of fuzziness in intermediate cases—say a relatively broad fee versus a relatively narrow tax. No fee is perfect; fees are only average prices and not perfectly calibrated to the user. Even when use is metered, as for water, people are not usually charged more because of the length of pipes to their particular home etc., but nevertheless the pipes and treatment plant are expenses that must be paid. Indeed, in many cases involving fees, the service to be provided is only possible on the basis of enormous prior and continuing capital investment. If a government only charged each customer the marginal cost for providing a service, then the service would not be provided for long because the capital stock could not be maintained. Thus, there is no safe end of the continuum if courts are to choose to go down the rabbit hole of matching cost and service. A seemingly easy case of a user fee versus a tax, say for water use, thus becomes devilishly complicated—and inherently somewhat arbitrary—when one takes into account how to pay for what the economics literature calls "joint costs," such as the cost of the pipes, pumping plant, etc.[36] We will call this the problem of *allocating capital costs.*

Furthermore, and more profoundly, in some cases the economically rational setting of fees will resemble redistributive taxation.[37] Here is why. Suppose one is successfully running a major utility, and one is covering one's fixed costs and making one's profits with a given rate schedule. That schedule, however, sets prices too high for poorer people to have access to the service. Yet, in many cases providing additional service is almost costless—imagine providing cable, phone, or water services where the only additional cost is the water itself. Thus, one

35. But local taxes and fees certainly have different procedural requirements. A local tax need not be assessed as precisely and therefore likely will not be. Hence, this is the Archimedean point of which courts can take advantage.

36. For the classic discussion of this complicated problem, see ALFRED E. KAHN, THE ECONOMICS OF REGULATION 77–83 (1988). As Kahn puts it, "[t]he cost allocation formulae actually employed may achieve only a rough, rule-of-thumb approximation to the actual costs for which each product or service is responsible, but those costs have objective reality." *Id.* at 78; *see also* William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1637–43 (2014). It should go without saying that the discussion of the challenges posed by ratemaking that follow are, in fact, dramatic simplifications. See discussion *supra* note 9 on the challenges posed by rooftop solar, for one example.

37. The classic analysis remains Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 24 (1971) ("In practice an internal subsidy is not always easy to distinguish from certain familiar profit-maximizing practices. A monopolist may be able to maximize profit by setting different markups on different sales, depending on the elasticities of demand of particular customers or groups of customers. Like the internal subsidy, this practice involves a departure from cost-based pricing.").

would, for respectable market reasons, charge some users more and some less. This is price discrimination and something we are very familiar with from, for example, airline pricing. The problem for a court is that price discrimination can also look like redistributive taxation. We will call this the *price discrimination* problem.

It should be noted that it is also often the case that the price discrimination issue cuts the other way, imposing a higher burden on lower income users.[38] It has also long been a core goal of rate setting to mitigate this kind of price discrimination. Thus, a rate schedule that provides for lower rates for poorer users *can* be a result of a redistributive policy decision by a government entity or a decision motivated by cold economic rationality.

Another issue involves the benefit of setting a price for a scarce resource; in general, we want users to use less of many of the resources that are in dispute in these cases, such as water and electricity. The last drop of water going through the system arguably costs no more than the first, and yet it would be very odd indeed if the water system could not be managed so as to avoid this eventuality. In addition to a concern with the overall conservation of resources, we might also be concerned about electricity pricing during peak hours lest the whole system fail. One problem posed by conservation/peak pricing is that the marginal cost of providing electricity on a hot summer day does not necessarily go up,[39] but the overall cost to the system surely does. The *conservation* problem is therefore arguably an offshoot of the capital cost problem.[40]

The conservation problem points to another challenge, namely that even a fair rate that keeps a service functioning well and fairly, might still dramatically underprice the resource because of externalities.[41] This is easiest to see in connection with the pollution caused by energy production. Let us focus narrowly on the people who live near a power plant and are particularly adversely affected. Of course, justice concerns indicate that they should be compensated by the rest of us who enjoy cheaper power, but it is not only a matter of justice. The whole point of an externality is that this plant is imposing a real cost that the market does not have a simple way of imposing onto the party creating the cost. Thus, imposing a surcharge on a utility to compensate residents living

38. Jim Rossi, *Carbon Taxation by Regulation*, 102 MINN. L. REV. (forthcoming 2018) (manuscript at 39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937783.

39. To be sure, marginal costs might go up if additional older power plants are brought on line to meet the demand. Of course, it seems reasonable for regulators to seek to avoid such an expensive and likely dirty expedient.

40. Rossi, *supra* note 38 (manuscript at 38).

41. *Id.* (manuscript at 40–41).

near power plants could be characterized as redistributive, but it could also be characterized as a necessary correction so that energy can be priced accurately. This is the *externality* problem.

There are lots of other related problems. For instance, as should be clear, rate regulation is in part about the distribution of resources and hence is inherently political,[42] and thus to invite courts into the substantive process of reviewing rates is to invite them into an inherently political process where they will incur illegitimacy costs.[43]

Observe as well how these various problems interact such that only imperfect approximations are possible. Imposing a surcharge to compensate for externalities imposed on some communities is also relatively regressive and thus seems to burden one disadvantaged group to aid another. Or, consider that pricing structures ought to both encourage conservation and recoup the costs that the system needs to keep going. Courts, accordingly, are usually quite deferential in assessing the level of rates that emerge from a ratemaking process that attempts to balance all of these competing imperatives. But courts were not always so wary of leaping into the ratemaking business.[44]

IV. A TELLING MISADVENTURE

At this point we have identified many analytic challenges awaiting a court that aims to assess whether a given level of fees is "too high" for constitutional purposes. The proposal of this paper seeks to help courts avoid these pitfalls. As further motivation for embracing my proposed approach, I will briefly consider the (now) little-known story of the U.S. Supreme Court's misadventures with constitutionalizing rate levels.

Starting toward the end of the nineteenth century, there was an ongoing conflict between states and railroads about the regulation of railroad rates. The states wanted to limit rates and the railroads countered that being forced to provide a service at inadequate rates

42. Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031, 2043–44 (1989) (arguing that the best explanation for withdrawal of the Supreme Court from second-guessing rates was its sense of institutional (in)competence).

43. Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1387 (1997) ("[Illegitimacy costs] are costs that a court suffers when, in context, it acts in ways that appear inappropriate for a court—actions that have a social meaning inappropriate for a court. The easiest example here is (from our present perspective) *Lochnerizing*—where the court seems to weigh competing political interests within the economic sphere, and override the same judgment by a legislature.").

44. *See infra* Part IV.

amounted to a taking.[45] It was not disputed that states could impose *some* limit on rates; the question was just what the limit could be. Eventually, in the case of *Smyth v. Ames*,[46] the Supreme Court articulated a multipart test for assessing whether permitted rates were constitutional.[47]

Given the high stakes, lots of litigation about this test ensued,[48] along with voluminous scholarly commentary.[49] By the end of decades of cases and commentary, it is safe to say that the general consensus was that this area of jurisprudence was a failure. As our discussion in the last section would indicate, a big part of the explanation was that the Court was endeavoring to do something that it was not in a position to do well.[50]

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45. Strictly speaking, the violation was of substantive due process by analogy to the Takings Clause. *See, e.g.*, Smyth v. Ames, 169 U.S. 466, 522–23 (1898), *overruled by* Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am., 315 U.S. 575 (1942). *See generally* Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984).

46. 169 U.S. 466.

47. The heart of the test:

> We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.

Id. at 546–47. As Richard Pierce has noted, "The central test created by the Court in *Smyth v. Ames* instructed regulators to 'consider' in some unspecified manner four inconsistent methods of valuing investments for ratemaking purposes." Pierce, *supra* note 42, at 2045.

48. Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. U. L. REV. 453, 466, 489 (1998) ("[D]ecisions overturning utility rate orders, where the old Court probably struck down more rulings than it upheld, comprised over one-third of the successful substantive due process challenges during the years 1902–1932." (footnote omitted)).

49. *See, e.g.*, CASSIUS M. CLAY, REGULATION OF PUBLIC UTILITIES: A CRUCIAL PROBLEM IN CONSTITUTIONAL GOVERNMENT 51 (1932) ("Most impartial observers would probably agree that the chief trouble with the prevailing system of public utility regulation is the unscientific groove into which it has fallen because of the judicial approach to the subject."); Robert L. Hale, *The "Physical Value" Fallacy in Rate Cases*, 30 YALE L.J. 710, 717 (1921).

50. Of course, this was also a different Court, one more comfortable with state regulation.

Further, there was also a general awareness, including by more and more members of the Court,[51] that there was a circularity problem: gauging a fair return for the investors in a railroad (or other utility) required, in part, assessing the value of the railroad, but the value of the railroad was necessarily bound up with assessing what level of rates the railroad would be able to charge.[52] Faced with circularity and intractability, the Supreme Court eventually retreated in *Federal Power Commission v. Hope Natural Gas Co.*[53] The current rule is:

> It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.[54]

There is an important backstory to the Court's trajectory. When the Court began its review of rates for constitutional adequacy at the end of the nineteenth century, it did so at a moment when the state law limitations on rates that the Court was reviewing were often not the product of expert regulation.[55] One plausible reading of the Court's retreat in *Hope* was that it was willing to do so only when it became convinced that state regulators were up to the job, at least relatively.

What might state courts learn from this example? The first lesson is that conceptual traps are waiting for them just as they did the Supreme Court. This means that the state courts will likely face case after case, without any coalescing around a workable analytic frame. Happily,

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51. *See, e.g.*, Missouri *ex rel.* Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo., 262 U.S. 276, 292–93 (1923) (Brandeis, J., concurring).

52. I did not include circularity in the list of challenges in Part III because it is not a direct challenge in the case of evaluating a rate set by a government, which is not trying to make a profit based on its investment. That said, the circularity problem is relevant when a court looks to assess the reasonableness of a local utility's rates relative to that of a private competitor.

53. 320 U.S. 591 (1944).

54. *Id.* at 602.

55. Justice Brandeis noted the progress already in 1923. *See Bell*, 262 U.S. at 309 (Brandeis, J., concurring).

states do generally follow the *Hope* rule (or an analogue) in reviewing rate regulation.[56]

The second lesson is that there is a clear off-ramp before reaching the morass, namely looking to make sure that adequate procedural safeguards are in place. Indeed, modern administrative law owes much to Thomas Cooley's critical take on the Supreme Court's insistence in the late nineteenth century that it would subject the result of agency analysis to essentially de novo review.[57]

A third lesson is to note that *Hope* is federal constitutional common law and is part of the body of law that *should* influence how state courts interpret their fiscal constitutions.

The fourth lesson is that if courts do not apply something like the *Hope* rule to regulation of local government fees, then a very odd asymmetry will be created. Private utilities will be able to charge rates that can take into account all of the complexities outlined above—and also be permitted a fair rate of return—while utilities run by governments will have their rates second-guessed and, worse, struck down for trying to do the exact same thing (without even trying to earn a profit).

V. THE PROPOSAL

The proposed approach to interpreting provisions in state fiscal constitutions that are designed to limit the level of fees is as follows. The first step is to presume, as courts generally do, that proponents of an initiative are aware of the law.[58] This includes the common law of rate regulation and public finance more generally, especially if common

56. *See, e.g.*, 20th Century Ins. Co. v. Garamendi, 878 P.2d 566, 616–17 (Cal. 1994) (en banc) (applying *Hope* in the context of California's takings clause).

57. Paul D. Carrington, *Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic*, 83 IOWA L. REV. 363, 384–86 (1998) ("Cooley . . . argued that ratemaking decisions, like jury determinations of negligence, were too oriented to specific circumstances to admit of treatment as questions of law to be decided de novo by a traditional court. . . . Cooley proposed a procedure to protect disputants that he described as 'administrative due process of law.' He urged that Commission decisions resulting from such a process ought with respect to its findings of fact be as final as jury determinations . . . . The essential features of administrative due process are to afford affected parties notice of prospective agency action and an opportunity to be heard, basing the rulemaking action on the record of evidence submitted to it and on which interested parties might comment. The concept was embodied in the Administrative Procedure Act of 1946." (footnotes omitted)).

58. *See, e.g.*, *In re* Harris, 775 P.2d 1057, 1060 (Cal. 1989) (en banc) ("[T]he voters who enact [an initiative] may be deemed to be aware of the judicial construction of the law that served as its source.").

law terms are used in the constitutional provisions.[59] This body of law indicates that courts give expert regulators wide latitude in setting "reasonable" rates. The proponents of these fiscal provisions should not be presumed to have overturned decades of sensible precedent unless they clearly say so.

As this is the key step, we should linger over it for a moment.[60] There are many canons of construction and they are often contradictory.[61] We need to understand *why* we should apply the canon that proponents are aware of the law and in particular the background common law of public finance. There is one primary reason, with multiple offshoots, why this is the correct canon. It is the right canon because it promotes the norm of continuity and predictability, which is crucial for the rule of law.[62]

There are several reasons why continuity as a value should be of particular importance here. First, as courts have long held in different contexts, there is reason to be particularly concerned with the stability

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59. It is worth noting that this canon makes Justice Scalia's select list of canons. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 320–21 (2012) ("[Canon] 53: Canon of Imputed Common-Law Meaning."). *But see* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (book review). Eskridge critiques Scalia's analysis of canons on several grounds, including that the canons can be cherry-picked to reach the ends a judge was already inclined to reach. I agree with this critique, but Eskridge does not doubt that this canon about the common law (and other related ones) are important for the rule of law. His argument is just that they are not absolute and it is in choosing when to apply the canon that "value-laden" choices will be made. *Id.* at 555–56. That is correct, which is why I am articulating the values that I conclude support the application of this canon here.

60. Arguably, the argument that follows is using a, er, cannon to shoot a fly because all of the courts surveyed do in fact use the common law to help interpret their constitutions. *See, e.g.*, the discussions of the Michigan and Missouri courts *supra* notes 27–31 and accompanying text. Thus, the argument should perhaps be not that the courts should apply the common law, but that they should apply it *well*. Though this is one construction, it seems to me that what these courts are doing is starting from the common law and then taking the fact of constitutionalization as a reason to intensify their analysis beyond what the common law would require—erroneously.

61. This point about canons is famously—notoriously—demonstrated in Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). Note that Llewellyn does not therefore advocate nihilism as to the canons, but instead argues that what is needed is "sense of the situation." *Id.* at 396–401.

62. The classic argument for the continuity canons is David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992). All the arguments that follow have antecedents in Shapiro's article. Note that I am arguing that this canon should be *chosen*, but a decent fallback argument is that it should merely be *picked*. That is, even if some other canons might be better, picking one simple canon and sticking to it has its own advantages for the rule of law. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 140–41 (2000).

of the revenue function of the state.[63] Second, and essentially the converse point, the levies in question can be substantial and citizens have an interest in understanding their obligations as soon as possible. Third, fiscal provisions are likely to touch on technical matters, as we have seen is the case with setting fees. The broader body of law helps handle these matters. Fourth, fiscal provisions that are the result of direct democracy are very unlikely to sweat these difficult details. Fifth, as is the case in many of the provisions in question, the provisions are likely to adopt whole terms and provisions that already have legal significance. Sixth, as is also the case for many of the provisions in question, the proponents of the provisions specifically disclaimed that the changes they were advocating would dramatically change the ordinary ability of governments to function.[64] Thus it is particularly appropriate to understand terms with preexisting sense as retaining their traditional sense, at least presumptively. Seventh, clear application of this canon encourages proponents and citizens to learn the law.[65]

It is also important to note that application of this canon is *not* grounded in any concern with the operation of direct democracy that would justify a narrower interpretation of provisions put into state constitutions by its means.[66] Neither would this canon interpret a provision more narrowly if it represents a clear abrogation of preexisting law.[67]

The second step in the argument is to argue that partial codification/constitutionalization of common law concepts is to be interpreted by state courts, which are common law courts, using

63. *See, e.g.*, McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 37 (1990).

64. For instance, the proponents of California's most recent fiscal limitation provision (Proposition 26) ended their ballot argument with this striking passage, "Stop Hidden Taxes. Preserve our Environmental Protection Laws." OFFICE OF CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 2, 2010: OFFICIAL VOTER INFORMATION GUIDE 61 (2010).

65. Thus, I do not think the argument that proponents are not actually aware of the law in many cases is persuasive. *Contra* Stephen H. Sutro, Comment, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 951–54 (1993). The approach advocated for here encourages education while promoting the rule of law, while also not standing in the way of citizens changing the law as they wish.

66. For important versions of such an argument, see Schacter, *supra* note 12, at 108–12; *see also* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1503–08 (1990); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 482–85. I am not necessarily disagreeing with these powerful arguments, just noting that they do not ground the argument here.

67. Frickey, *supra* note 66, at 508.

common law methodology.[68] Strictly speaking, this second step follows from the first because it is part of the background law of which proponents are presumed to be aware.

The third step is to remember that the common law is practical and will seek to avoid getting entangled in analytic traps that will undermine the whole enterprise that the court is engaging in assessing. The common law process seeks to find sensible rules, one at a time. Returning to our analytic background, it would not make sense to develop a rule for reviewing fees that makes it very difficult for governments to cover the capital costs of capital-intensive enterprises providing basic services.[69]

It should be noted that state courts can arrive at the administrative/procedural approach I advocate for without appeal to the common law of public finance. For instance, Professor Chris Elmendorf and I have recently noted that there has been a—still somewhat inchoate—procedural turn in cases involving the right to education under state constitutions.[70] These provisions of state constitutions neither explicitly nor via the common law instruct state courts to assess the procedural adequacy of state approaches to their education system. Nevertheless, courts have adopted what we call a "reasonableness framework" methodology because it provides an analytically tractable approach to assess the constitutionality of state educational systems. That is, courts are not well situated to assess the right level of

68. *See* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 54 (2010), http://www.yalelawjournal.org/forum/the-costs-of-consensus-in-statutory-construction ("It is routine for courts—appropriately, we think—to treat common law statutes as a type of authorization for fine-tuning over time rather than as a directive to follow their language or specific intent in a cabined manner. Indeed, substantive and textual canons that encourage courts to render statutes consistent with common law meanings seem particularly appropriate in this class of statutes, as do interpretive directions to interpret statutes 'liberally.'"); Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 198 (2004) ("As to delegating statutes of the type adopting common law, the legislature delegates to the courts the continued exercise of the function they always performed: the continued development of the common law doctrine in the light of the policies that always drove its development, without regard for the particular words chosen by the legislature to summarize the development.").

69. Not to seem excessively Panglossian or Posnerian, but the notion that common law courts tend to close in on efficient solutions seems particularly plausible in cases about economic matters.

70. Christopher S. Elmendorf & Darien Shanske, *Solving "Problems No One Has Solved": Courts, Causal Inference, and the Right to Education*, 2018 U. ILL. L. REV. (forthcoming 2018) (manuscript at 19–25), https://ssrn.com/abstract=2886754.

education funding, nor the right mix of educational programs,[71] but courts are reasonably well situated to assess whether states are taking their duty to provide an adequate education seriously. Thus, by analogy with these state education cases, state courts could simply make new common law and adopt a procedural approach just because it makes sense.

If courts avail themselves of neither rationale and instead plunge into second-guessing the level of rates, as the Court did in *Smyth*,[72] then there will be feedback. In the case of *Smyth*, that feedback was a long series of confused cases because the Court was never able to give satisfactory guidance. That is likely to happen to state supreme courts as well. In the alternative, the results of choosing the wrong rule could be pragmatically absurd, such as undermining the ability to fund basic services or the necessity to privatize municipal services because only private utilities are able to sustain themselves. Again, the common law of public finance has already been down this road and this law forms the background of these constitutional provisions, and so there is no need to proceed to apply the incremental, practical logic of the common law to avoid this result, as the sensible rule has already been delivered.

VI. APPLICATION

Recently two state supreme courts have fumbled in interpreting their fiscal constitutions in connection with the same basic issue: storm-water charges.[73] Storms bring lots of water and sometimes this water overwhelms sewer systems, which causes many problems, including environmental ones, as the overflowing water can release pollutants into lakes and rivers—often in violation of federal law.[74] We can see right away how and why storm-water charges are going to be challenging for a court to assess. Clearly managing the drainage of storm-water is important for the overall sewage system, even leaving aside that failing to do so can get the whole system sanctioned by the

71. I should note here that I am not implicitly arguing that courts should forego substantive review of state educational systems, but I do think that the much easier case is the one for procedural review.

72. *See supra* text accompanying notes 45–47.

73. Bolt v. City of Lansing, 587 N.W.2d 264 (Mich. 1998); Zweig v. Metro. St. Louis Sewer Dist., 412 S.W.3d 223 (Mo. 2013) (en banc).

74. *See Bolt*, 587 N.W.2d at 266–67. The California Supreme Court also has a pending storm-water charge case, though it does not appear to raise exactly the same issue. Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd., 186 Cal. Rptr. 3d 212 (Ct. App. 2015), *cert. granted*, 352 P.3d 418 (Cal. July 22, 2015).

federal government. Yet this is a system-wide capital cost that is not going to be easy to attribute to individual users. Furthermore, a big part of the problem caused by storm-water is that it creates an externality borne by others—hence the federal law!

Viewing storm-water charges in light of the analytic difficulties and the history of common sense deference to regulators, it would seem like the correct answer is for the courts to scrutinize the *process* by which the fees were determined but to review the substance with a light touch. In *Bolt*, the case from Michigan, for example, the fees were only meant to cover *half* the cost of the storm-water management project, and so there was no real argument that the fees would somehow be used for other general purposes.[75] Furthermore, though the fee was flat for smaller residential parcels, it was levied in proportion to a parcel's "impervious area" because of the connection between impervious area and storm-water drainage problems.[76] Thus, fee payers were given some incentive to change the built environment so as to reduce the need for the fee.

I would submit that after ascertaining such facts that the courts should have concluded that the fees were permissible. Though far less than a full ratemaking proceeding, the agencies undertook significant analysis of the costs and came up with reasonable solutions to allocate these costs. In fact, both fees were struck down and for basically the same reason, namely that there was not a *direct* connection between the fee and the service provided.[77] The Missouri Supreme Court put the heart of its reasoning particularly clearly:

> To illustrate this distinction, assume that a political subdivision imposes a charge on property owners to build and operate a swimming pool. If the political subdivision also decides to charge an admission fee to those who actually use this pool, no voter approval is required under section 22(a) [the Hancock Amendment] because that charge is a genuine user fee, imposed only when a specific service (i.e., access to the pool) actually is rendered to a particular recipient in an individualized transaction. The first charge is not a user fee, however, because it is not charged in exchange for an individual's use of that service. Instead, it is charged to ensure the *availability* of that service for the entire community. The political subdivision was

75. 587 N.W.2d at 266–67.

76. *Id.* at 267. The charge in Missouri used a similar methodology. *See Zweig*, 412 S.W.3d at 230.

77. *Bolt*, 587 N.W.2d at 271; *Zweig*, 412 S.W.3d at 240–41.

> levying a tax when it imposed the first charge, therefore, and prior voter approval is required under section 22(a).[78]

There are multiple confusions embedded in this passage. First, the court separated those who pay for the pool and those who use it, but it is not accurate to characterize the storm-water charges at issue as imposed on some group of people *other* than the users of the service. The correct analogy would be to suppose that a government attempts to finance a swimming pool—a capital project—by charging user charges sufficient to cover the cost of building the pool to begin with. With the correct analogy in place, we can now see that the deeper confusion the court has is with the idea of using fees to pay for capital costs at all. The reasoning of the court suggests that any such fees are not true fees and must be subject to a vote. As we have seen, such an interpretation of a proper fee flies in the face both of the economic analysis of fees and the common law background of fee jurisprudence, which jurisprudence, appropriately, permits governments to levy fees that can sustain a complex and capital-intensive enterprise.

So what should have happened in these cases? By analogy with the review of ratemaking and other administrative action, the courts should have looked to review the procedural approach taken by the governments. These fees were to cover the cost of certain capital projects. Relevant questions would have been: How certain were these costs? Assuming that these costs were realistic, then what other alternatives were explored so as to make certain that these were the lowest cost projects? Was the process leading to a decision open to a wide variety of stakeholders? How did the government respond to comments from these stakeholders? Et cetera. Once the court satisfied itself that a rigorous procedure had been adopted and followed, then only a minor consideration of the actual size of the fee would have been necessary.[79] For instance, if the resulting fee were many times larger than fees charged by comparable entities, then this certainly should have raised a question. Assuming the resulting fee was roughly in line with what other public—and perhaps private—utilities were charging, then the inquiry should have been at an end.

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78. *Zweig*, 412 S.W.3d at 232; *see also Bolt*, 587 N.W.2d at 270–71 (using similar reasoning to *Zweig* but noting, and citing much earlier precedent, that somehow capital costs can be included).

79. This is not to say that the courts should refrain from also considering the other criteria to which courts and commentators regularly point. For instance, if the revenue from the fees were to be used for general governmental purposes rather than for storm-water management, then this would have been a bad—possibly fatal—fact.

To date, the California courts have not stumbled as badly as the courts in Missouri and Michigan.[80] On the one hand, this might seem surprising because some of the language of the California provisions—for instance, the emphasis on "direct"—would seem to be a particular invitation to fall into the trap that tripped up the courts in Missouri and Michigan. On the other hand, the language in the California Constitution contains clear borrowing of common law concepts, such as "reasonable." And other aspects of the new provisions seem to emphasize a procedural approach to limiting government expenditures.[81] Furthermore, the proponents of the California provision often disclaimed disrupting existing fees.[82]

That all said, the California courts, including the California Supreme Court, are being invited to make similar errors concerning wastewater discharge fees[83] and groundwater pumping charges.[84] The groundwater issue is directly analogous to the storm-water issue. When water users pump out groundwater, they are depleting a finite resource. Even worse, when there is not enough groundwater, there can be saltwater intrusion that can ruin the water that does remain. Accordingly, a water district sought to charge replenishment fees. As with storm-water charges, this charge poses analytic challenges because it cannot be simply tied to using a certain volume of water. All the same, this is a charge that is essential to maintaining the overall system[85] and the common law of ratemaking would presumably permit a private utility to impose such a charge.

The currently pending cases are complicated and the California Supreme Court might not reach these issues, but it will someday and hopefully it will avoid running aground like the courts in Missouri and Michigan. Indeed, in dicta, the court has suggested that it understands

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80. *But see* Citizens for Fair REU Rates v. City of Redding, 182 Cal. Rptr. 3d 722, 726 (Ct. App. 2015), *cert. granted*, 347 P.3d 89 (Cal. Apr. 29, 2015) (finding utility rates exceed "reasonable cost" when a utility makes a payment in lieu of taxes into the city's general fund). The California Supreme Court will have a chance to correct this decision. Citizens for Fair REU Rates v. City of Redding, 347 P.3d 89 (Cal. Apr. 29, 2015). Note that the Missouri Supreme Court upheld a similar action by a local government. Arbor Inv. Co., LLC v. City of Hermann, 341 S.W.3d 673 (Mo. 2011) (en banc).

81. CAL. CONST. art. XIIIA, § 3(d).

82. *See supra* note 64.

83. Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd., 186 Cal. Rptr. 3d 212 (Ct. App. 2015), *cert. granted*, 352 P.3d 418 (Cal. July 22, 2015).

84. City of San Buenaventura v. United Water Conservation Dist., 185 Cal. Rptr. 3d 207 (Ct. App. 2015), *cert. granted*, 351 P.3d 328 (Cal. June 24, 2015).

85. On the scope of the problem in California generally, see Caitrin Chappelle et. al., *Just the Facts: Groundwater in California*, PUB. POL'Y INST. CAL. (May 2017), http://www.ppic.org/content/pubs/jtf/JTF_GroundwaterJTF.pdf.

the provisions of California's fiscal constitution governing local government fees as analogous to the role of the PUC in regulating the fees of private utilities.[86] It remains to be seen whether the court fully unpacks the implication of this correct analogy, which, to be clear, is that local government fees should ultimately be subject to procedural review, but not full, PUC-style review.

Note that Missouri-Michigan type interpretations of California law are likely already affecting public finance decisions in California even without a controlling court decision to that effect. After each round of new fiscal provisions is added to the state constitution, the California League of Cities has published an incredibly helpful guide to help local officials implement the law.[87] After the last proposition added further limitations in 2010, the applicable guide explains that a fee remains a fee and does not become a tax so long as the "fee . . . covers the cost of providing a benefit or privilege to a fee payer [and] does not also include a subsidy to cover free or discounted services to other persons."[88]

Given the word "direct" in the key language of the California provision and precedents such as those in Missouri and Michigan, this is sound advice. Local governments are not looking to impose unconstitutional fees. Yet, per the argument of this Article, this analysis is unsound. It could be the height of economic rationality to give discounted tickets to those riders who would not ride without the discount. After all, the bus is going anyway and so if there are empty seats, then it is essentially costless to fill them. Again, there is no doubt that giving discount passes also satisfies redistributive goals, but there is no sensible way for a court to disentangle what is "really" going on in a situation like this.

This example from the California guide also helps counter an objection to the effect that in all these cases the government wins—or should win. I think this is an artifact of the cases. Governments do not want to be sued by their constituents and do not want fees for essential

86. *See* Monterey Peninsula Water Mgmt. Dist. v. Pub. Util. Comm'n, 364 P.3d 404, 405 (Cal. 2016) (finding that the California PUC could not regulate the rates of a special district, despite acknowledging the concerns of the PUC as to the rates imposed by the district). The court added that:

> We do, however, emphasize that PUC regulation is not the only mechanism for addressing questions about the amount of the user fee or the efficiency of the District's mitigation work. If Cal-Am customers believe that the District is charging excessive and disproportionate fees, they can bring a legal action challenging the District's activities.

Id. at 409.

87. LEAGUE OF CAL. CITIES, PROPOSITION 26 IMPLEMENTATION GUIDE (2011), https://www.cacities.org/Prop26Guide.

88. *Id.* at 16.

services to be struck down. The notion that most local governments are run by empire builders looking to guild their kingdoms in every possible way is implausible.[89] Thus the cases that come to state supreme courts tend to represent fact patterns where governments did things right and did them for important reasons. This is not always the case,[90] but I think it explains why applying a sensible methodology to actually litigated cases results in the government winning much of the time. Beneath the surface, this methodology also serves to filter out many more government proposals that would not pass muster.

VII. CONCLUSION

Analyses of state court jurisprudence still often begin with the observation that the attention paid to state courts is very small relative to the attention paid to the federal courts. Yet there is also little doubt that very substantial intellectual firepower has now been directed toward thinking about state courts for many decades. However, the substance of the decisions analyzed has almost never been on the fiscal provisions of state constitutions, which is understandable for many reasons. Basic civil rights have priority, and it is striking that in our federation the set of basic rights can change depending on where one is. That is a lot to think about. Further, the decisions on fiscal matters also relate to differing textual provisions. It seems less problematic for the states to arrive at a series of ad hoc decisions about taxes and fees, often seemingly in response to local politics, than it does for the courts to do so about the freedom of expression.

In this Article, I have endeavored to show why the interpretation of fiscal provisions is worth the attention. These provisions are important for many reasons, including the protection of civil rights. All rights are

89. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920 (2005) ("In sum, rampant government empire-building would seem to require government officials who care about the interests of the institutions in which they are situated more than their own self-interest or the interests of the citizens they represent. Democratic governments are unlikely to generate such officials.").

90. For example, a California special district imposed a special benefit assessment that almost surely would have failed under the old common law rules and yet was somehow hoped would pass muster under the stricter rules added to the California Constitution. The district rightly lost, though the California Supreme Court erred in deciding the case on the basis of the constitution rather than the common law. *See* Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara Cty. Open Space Auth., 187 P.3d 37, 54 (Cal. 2008). On the importance of deciding cases on the common law rather than on the basis of the constitution, at least some of the time, see Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

positive to the extent that there must be a government to enforce them;[91] poorly drafted fiscal limitations in the hands of careless courts can undermine the ability of governments to do their jobs. Of course, we need to accept what we cannot change, but this is something that can be changed. A generally more effective interpretive approach is possible for fiscal provisions of state constitutions, one that fully vindicates the victory that proponents of fiscal limitations have won in getting a provision into the constitution, while also advancing the public goods of continuity and predictability.

The approach I am advocating involves using longstanding canons of interpretation that courts are clearly already inclined to use in explicating their fiscal constitutions. That is, and as we have seen, courts do tend to look to their common laws to interpret their fiscal constitutions. Nevertheless, courts in many instances have missed what would seem to be one of the main lessons of the common law of fees, which is that: courts are not well suited to make fine distinctions as to the level of fees, but they are quite up to the task of assessing the adequacy of the procedure used to set fees. This is really a very pedestrian insight in the end, but courts need to keep this insight in mind lest the courts' interpretation of a state's fiscal constitution, and not the constitution itself, become a major hindrance to the basic functioning of the state's system of public finance.

91. *See generally* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 35–48 (2000).

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