

# The Anti-Donation Clause

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**WHAT IT DOES,  
WHAT IT DOES NOT DO, &  
THE RISKS OF LIVING WITHOUT IT**

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# What is it?

***“Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through H of this section.”***

**N.M. Const., art. IX, § 14.**

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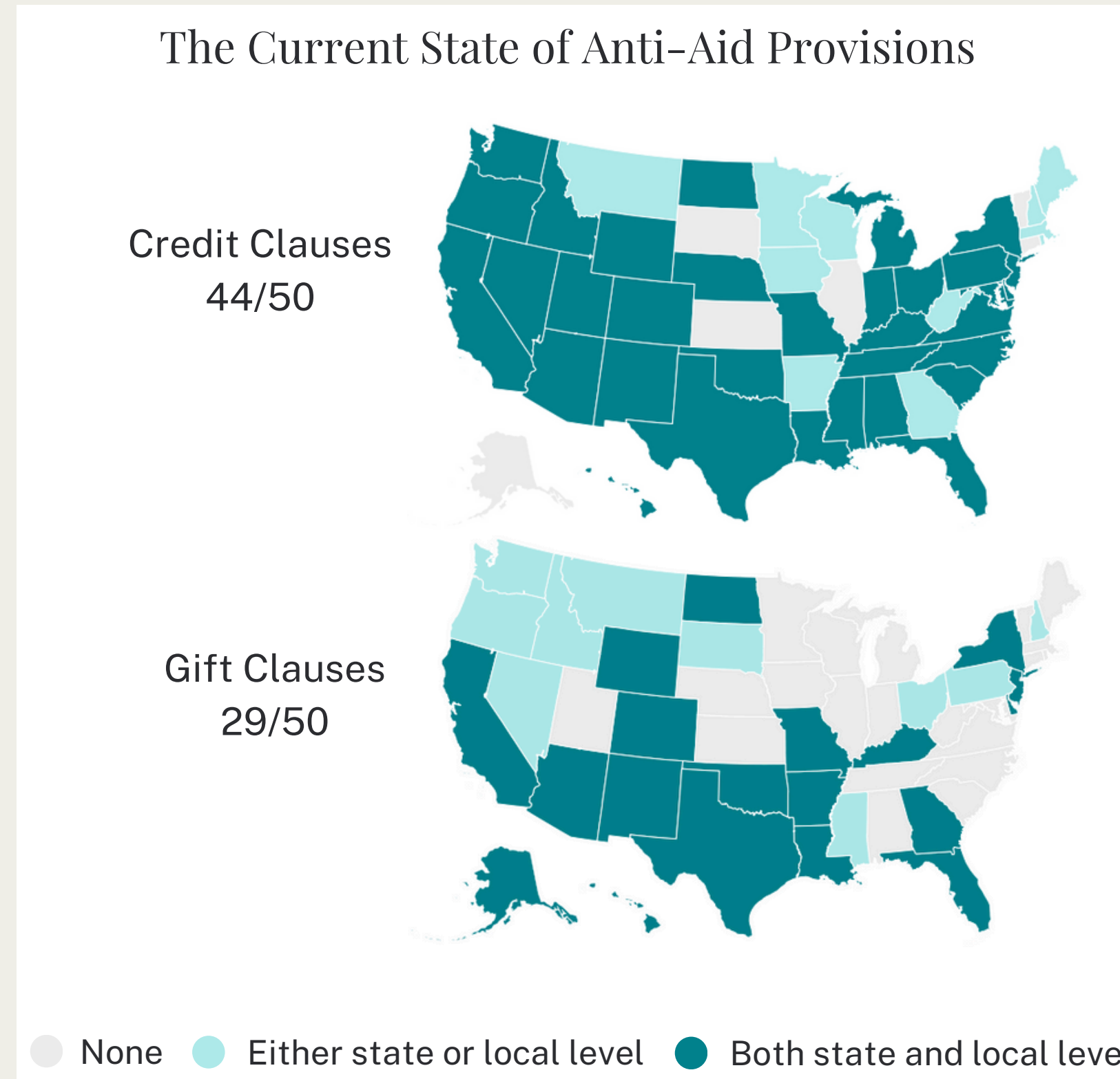
# What does it do?

**The Anti-Donation Clause is really two constraints on the use of future and current funds:**

- **Credit Clause.** Prohibits the State and local governments from pledging their credit in favor of a private enterprise by, e.g., (i) guaranteeing the repayment of a private company's loans or (ii) issuing bonds to raise funds for a private company
- **Gift Clause.** Prohibits the State and local governments from giving subsidies to private companies, nonprofit corporations, and individuals by, e.g., (i) paying for a capital expenditure (building or equipment), (ii) assuming or discharging a company's debt or liability or (iii) directly transferring money or assets without consideration



Anti-aid provisions (including credit clauses and gift clauses) are common, present in 45 state constitutions<sup>[1]</sup>



# What does it *not* do – judicially recognized exceptions

- **Contracts.** Does not prevent the government from entering contracts with companies or nonprofit organizations that provide goods or services in exchange for public funds.<sup>[2]</sup>
- **Revenue bond financing.** Does not prevent the government from entering into a revenue bond financing arrangement, whereby the government issues revenue bonds, constructs a building using the bond proceeds, leases the building to a private company, and uses the company's lease payments to pay the bond obligations.<sup>[3]</sup>
- **Government is donee.** Does not prevent one government agency from giving value to another government agency.<sup>[4]</sup>
- **Compensation.** Does not prevent the government from paying compensation for some injury that the government caused.<sup>[5]</sup>



# What does it *not* do - textual exceptions

- **Sick or indigent.** Does not prevent the government from making provision for the aid of sick or indigent persons. N.M. Const. art. IX, § 14(A).
- **LEDA.** Does not prevent the government from aiding businesses through the Local Economic Development Act. N.M. Const. art. IX, § 14(D).
- **Affordable housing.** Does not prevent the government from providing for affordable housing under enabling legislation. N.M. Const. art. IX, § 14(E)-(F).
- **Certain scholarships.** Does not prevent the government from providing scholarships for veterans or for medical or nursing students. N.M. Const. art. IX, § 14(B)-(C), (G).
- **Infrastructure.** Does not prevent the government from providing infrastructure for residential purposes, including internet, energy, and water, under enabling legislation. N.M. Const. art. IX, § 14(H).



# Why do we have it?

- **State constitutional history.** The Anti-Donation Clause was part of the original 1912 Constitution, and a version of it was present in every draft constitution that was presented to the voters including the 1889 constitution, the 1872 constitution, and the 1850 constitution, reflecting constitutional responses to the financial crises of the early 19th century.<sup>[6, 7]</sup>
- **Distrust theory.** Constitutions protect those interests that the public does not trust the operation of ordinary democratic politics to guarantee -- for example, the guarantees of speech, arms, and equal protection. Anti-subsidy provisions are another example of distrust theory. So, for example, the state constitution reflects a distrust that municipal councilors should be able to issue municipal bonds and use the bond proceeds to subsidize a business venture.

**General domain.** Anti-subsidy provisions -- both gift clauses and credit clauses -- are not just about railroads.



# What are the risks of repealing it?

- **Government picking “winners.”** Absent the Anti-Donation Clause, state and local governments might provide an array of subsidies -- e.g., bond proceeds, appropriated funds, refundable tax credits -- to business ventures that do not provide a commensurate public benefit.
- **Pressure on ethics and disclosure laws.** The competition for unconstrained subsidies will pressure state laws limiting gifts, *quid pro quo* offers, conflicts of interest, and requiring financial disclosures. Note that many of these laws do not exist at the local level, and many elected state and local officials have business and nonprofit affiliations.
- **Risks of governments subsidizing nonprofits at scale.** Unfettered subsidies to nonprofits (for land, capital expenses, operating expenses) would allow appropriating government bodies to sidestep/replace government agencies with nonprofits, which are not accountable to the democratic public and are not subject to the state laws regarding disclosure, procurement, and conflicts of interest. The opportunity costs are investments in government capacity.



# Closing thoughts about amendments

- **Remember the Anti-Donation Clause is both a gift clause and a credit clause.** A repeal of the credit clause is not necessary to provide nongovernmental entities (whether for profit or nonprofit) with direct subsidies for operations or capital from current (and not future) revenue.
- **Repealing Anti-Donation Clause would not allow direct appropriations to nonprofits (or other private entities).** Repealing the Anti-Donation Clause would not allow the Legislature to make capital or junior appropriations directly to nonprofits. It is not the Anti-Donation Clause but Article IV, Section 31 that requires the Legislature to appropriate to entities “under the absolute control of the state.”
- **Transactions with nonprofits (or other private entities).** Even with the Anti-Donation Clause, government agencies may still (i) expend appropriated funds on services contracts with nonprofits; and (ii) expend capital outlay appropriation for government buildings and lease those structures to nonprofits on favorable terms (so long as the contract is not a sham or disguised gift).



# References

1. Matthew D. Mitchell, Robin Currie, and Nita Ghei, *A Summary of of the History and Effects of Anti-Aid Provisions in State Constitutions* (George Mason University Policy Brief).
2. See *White v. Board of Educ. of Silver City*, 1938-NMSC-009, ¶ 31 (rejecting challenge because board of education “will get value received for every dollar put into the enterprise” of a bond issue to build a school to join state and local schools); *City of Gallup v. N.M. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 9 (rejecting an anti-donation claim because, under agreement, state would receive title to 640 acres in Red Rock State Park, \$1.5M for construction, and maintenance and operation of the park for the life of lease contract with Gallup) ; *Pierce v. State*, 1996-NMSC-001, ¶ 29 n.12 (rejecting challenge to statutorily conferred pension benefits because benefits are not a gratuity); *Treloar v. County of Chaves*, 2001-NMCA-074, ¶ 32 (rejecting challenge to severance benefits because “severance pay is deemed to be in the nature of wages that have been earned”); *State ex rel. Office of State Eng’r, et al. v. Lewis, et al.*, 2007-NMCA-008, ¶ 51 (rejecting challenge to Pecos River rights settlement because, in exchange for funds, State received land and water rights, as well as settlement of claims in suit); cf. *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (Browning, J.) (“The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration – money exchanged for real product. . . The Court does not believe it should evaluate whether the agreement was a good or bad deal under the Anti-Donation Clause, but merely check for adequate consideration.”).
3. See *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶¶ 36-37 (rejecting challenge to revenue bond issuance to finance industrial facility to be leased to private corporation); *State ex rel. State Park and Recreation Comm’n v. N.M. State Auth.*, 1966-NMSC-033, ¶ 49 (rejecting challenge to revenue bond issuance to finance boat dock at Bluewater Lake to be leased to private concessionaire); *Kennecott Copper Corp. v. Town of Hurley*, 1973-NMSC-032, ¶¶ 1-3 (rejecting challenge to industrial revenue bond issuance to acquire property to be leased to private corporation); cf. *Hotels of Distinction West, Inc. v. City of Albuquerque*, 1988-NMSC-047, ¶ 5 (rejecting challenge to development agreement whereby federal grant funds were used to finance construction of hotel to be leased to private corporation).
4. See *White v. Board of Educ. of Silver City*, 1938-NMSC-009, ¶¶ 28, 33 (rejecting challenge to a bond issue for school that would combine state school with local school, because state was not “public corporation” with the meaning of the Anti-Donation Clause); *Wiggs v. City of Albuquerque*, 1952-NMSC-013, ¶ 20 (rejecting challenge to Albuquerque bond issue to finance and build auditorium to be used by UNM); *City of Gallup v. N.M. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 11 (rejecting challenge to agreement between State and Gallup to create, finance and maintain Red Rock State Park).
5. See *State ex rel. City of Albuquerque v. Lavender*, 1961-NMSC-096, ¶¶ 22-23 (holding that when Legislature exercises police power to authorize relocation of utility’s property, reimbursement of costs is not unconstitutional donation); *State ex rel. N.M. Water Quality Control Comm’n v. City of Hobbs*, 1974-NMSC-064, ¶¶ 11-13 (holding court-ordered remedies for civil wrongs committed by state or political subdivision not unconstitutional donations); *Battaglini v. Town of Red River*, 1983-NMSC-067, ¶ 10 (holding payment of just compensation to owners of removed signs not unconstitutional donation); *City of Albuquerque v. N.M. Pub. Reg. Comm’n*, 2003-NMSC-028, ¶ 27 (rejecting anti-donation challenge to PRC’s approval of tariff that would have allowed PNM to recover relocation costs caused by local governments).
6. *New Mexico State Constitution Papers*, University of New Mexico, Special Collections, Zimmerman Library
7. See Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, Rutgers L. J. 34:4 (2003).



# Thank you!

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