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The State of Washington, like many other states, has in recent years undertaken to enforce detailed and stringent statutory requirements for the control of industrial pollution within its borders. In 1973, the State Department of Ecology ordered two private corporations operating in Washington, Weyerhaeuser and Kaiser, to install certain air pollution-control devices in their industrial plants. Pursuant to state

1. See, e.g., WASH. REV. CODE chs. 70.94 & 90.48 (Supp. 1973).
4. Weyerhaeuser operates a paper and cardboard products plant at Longview, Washington; Kaiser operates aluminum reduction plants at Tacoma, Washington and at Mead in Spokane County, Washington. The Department of Ecology entered orders for Kaiser and Weyerhaeuser to meet a schedule for the reduction of air pollutant emissions from their respective plants by 1974 and 1975, respectively. The facilities required in each case are complex. The estimated cost of the facilities at Kaiser's Mead plant is $16,200,000; at Kaiser's Tacoma plant $13,800,000; and at Weyerhaeuser's Longview plant $19,900,000. Trial Transcript at 20 & 37. Port of Longview v. Taxpayers, 84 Wn. 2d 475, 527 P.2d 263 (1974).
   In addition to any other powers which it may now have, each municipality shall have the following powers:
   (2) To lease, lease with option to purchase, sell or sell by installment sale, any or all of the facilities upon such terms and conditions as the governing body may deem advisable but which shall at least fully reimburse the municipality for all debt service on any bonds issued to finance the facilities and for all costs incurred by the municipality in financing and operating the facilities and as shall not conflict with the provisions of this chapter;
   (3) To issue revenue bonds for the purpose of defraying the cost of acquiring or improving any facility or facilities or for refunding any bonds issued for such purpose and to secure the payment of such bonds as provided in this chapter.
Section 5 of ch. 132, id. § 70.95A.040, specifically provides that the bonds may not give rise to any pecuniary liability on the part of the issuing municipal corporation:
(1) All bonds issued by a municipality under the authority of this chapter shall be secured solely by revenues derived from the lease or sale of the facility. Bonds and interest coupons issued under the authority of this chapter shall not constitute nor give rise to a pecuniary liability of the municipality or a charge against its general credit or taxing powers. Such limitation shall be plainly stated upon the face of each of such bonds.
See also ch. 132, §§ 6(2)-(3). WASH. REV. CODE §§ 70.95A.050(2), (4) (Supp. 1973).

Chapter 132 authorizes the lease of the facilities to the user corporation with rent in an amount sufficient to pay bond premiums, taxes on the facilities, amounts necessary to build and maintain reserves which the municipal corporation deems use-
and federal statutory schemes, Weyerhaeuser and Kaiser sought to use tax exempt industrial revenue bonds issued by the port authorities of Longview and Tacoma and by the County of Spokane to finance the construction of the pollution control facilities. The respective municipal corporations agreed to issue "no recourse" industrial revenue bonds to finance the projects. The transactions took the form of purchases by the municipal corporations from Kaiser and Weyerhaeuser of leasehold interests in the projects for sums equal to the

ful and maintenance and insurance on the facilities. Ch. 132, § 7, WASH. REV. CODE § 70.95A.060 (Supp. 1973). Bonds can be refunded upon agreement between the issuing body and the bondholders. The statute specifically states that the bond proceeds "shall be applied only for the purpose for which the bonds were issued." Ch. 132, § 8, WASH. REV. CODE § 70.95A.070 (Supp. 1973). The only exceptions are for use of accrued interest and unused proceeds to retire the principal debt owing. The cost of the facilities includes not only the cost of the facilities themselves but also "all expenses in connection with the authorization, sale and issuance of the bonds to finance such acquisition or improvements; and the interest on such bonds for a reasonable time prior to construction, during construction, and for a time not to exceed six months after completion of construction." Ch. 132, § 9, Wash. Rev. Code § 70.95A.080 (Supp. 1973). The conditions of the disposition of the facilities are left to the municipal corporation issuing the bonds. Finally, the municipal corporation or private user of the facility is permitted to request a certificate from the Department of Ecology stating that the facility was designed to abate, control or prevent pollution and to meet state and local standards for pollution control and abatement. Ch. 132, § 11, Wash. Rev. Code § 70.95A.100 (Supp. 1973). The statute also permits the issuing authority to specify the conditions under which the bonds are issued including the private revenues which may provide security on the bonds. In addition, the statute allows bondholders in case of default to pursue their remedies in rem against the properties securing the bonds. Issuing authorities may by agreement allow bondholders to proceed against the private revenues as well as force the municipal corporation through a writ of mandamus to pursue legal action against the private corporation. Ch. 132, § 6, Wash. Rev. Code § 70.95A.050 (Supp. 1973).

Ch. 132, § 6(5), WASH. REV. CODE § 70.95A.050(5) (Supp. 1973), authorizes the municipal corporation to "provide for the appointment of a private trustee or trustees for the protection of the holders of the bonds." The trustees can also be given the duty of distributing the proceeds of the bond issuance; collecting revenues from the facilities and paying the same to the bondholders; and paying the proceeds from the sale, insurance or condemnation of any facility to the bondholders. Id.

6. Int. Rev. Code of 1954, § 103 (c) provides in pertinent part:
Paragraph (1) [relating to the disqualification of industrial development bonds as tax free municipals] shall not apply to any obligation which is issued as part of an issue substantially all of the proceeds of which are to be used to provide . . .
(4) (F) air or water pollution control facilities . . . .

7. The term "municipal corporation" is used to refer to municipalities, counties and port districts.

8. No recourse bonds are those which are not in any manner secured by the credit or assets of the issuing public body. In case of default, the bondholders cannot look to the municipal corporation but must look to the security of the real borrower in interest and the revenue of the project. See Pinsky, State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach, 111 U. PA. L. REV. 265, 313-18 (1963).
proceeds from the sale of the bonds, together with a simultaneous sublease of the facilities to Kaiser and Weyerhaeuser for periodic rental payments. Kaiser and Weyerhaeuser each agreed to pay the municipal corporations a yearly sum for services performed as agent in the distribution of the rental payments to the bondholders. The lease-sublease agreements between the respective private and municipal corporations were in all cases conditioned on the continued exemption of bond interest from federal income tax and on the constitutionality of the state statute authorizing issuance of revenue bonds.

Taxpayers of Longview, Tacoma and Spokane alleged that these financing schemes, together with the underlying statute, violated Article VIII, Section 7 of the Washington State Constitution, which reads:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock or bonds of any association, company or corporation.

In the consolidated action, the trial court held that the lease-sublease arrangements were valid agreements, that the benefits flowing to the corporations as a result of the transactions emanated solely from the federal government, and that the bond issues in question were expressly authorized by Washington statute. The court upheld the constitutionality of the statute on the grounds that no giving of aid or credit by the municipal corporation was involved and that the issu-

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10. The sublease from the Port of Longview to Weyerhaeuser states that it may be terminated by the sublessee by paying to the sublessor in cash an amount equal to the remaining principal and accrued interest on the bonds if "[p]rior to the issuance of Bonds having an average life of five years or more, Sublessee determines, based upon any ruling of the Internal Revenue Service, the opinion of any court or advice of its counsel that the Lease or Sublease or any provision of either will result in significantly adverse tax consequences to Sublessee . . . ." Sublease from Port of Longview, Washington, to Weyerhaeuser Company, Art. III, § 3.2(d)(i), at 11. April 20, 1973 (copy on file at Washington Law Review); see Sublease from Port of Bellingham, Washington, to Georgia Pacific Corporation, Art. III, § 3.2(d)(vi) at 8-9, Mar. 23, 1973 (copy on file at Washington Law Review).

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The statutes authorizing the issuance of pollution control revenue bonds and the actions taken by the respective municipal corporations pursuant to those statutes violated Article VIII, Section 7 of the state constitution by permitting and effecting the lending of public credit for private purposes. *Port of Longview v. Taxpayers of Port of Longview*, 84 Wn. 2d 475, 527 P.2d 263 (1974).

*Port of Longview* is important for at least three reasons. First, the court has adopted a new construction of the constitutional provision prohibiting the lending of public credit, thereby overruling sub silentio numerous longstanding Washington decisions. Second, the decision renders it nearly impossible for the State of Washington or any of its subdivisions to issue no recourse revenue bonds for the benefit of private persons. Third, the decision virtually insures that the disappointed parties will offer proposals for a constitutional amendment in the near future.

This note will initially describe the federal scheme encouraging the issuance of tax-free municipal bonds, state constitutional prohibitions against the lending of public monies or credit generally, and particular Washington constitutional provisions and their treatment by the Washington court prior to *Port of Longview*. Second, the note will analyze the court's reasoning in *Port of Longview* with respect to revenue bond financing and the constitutional lending of credit provisions. Third, the note will identify and discuss the policy considerations at issue in the case. Fourth, the note will consider the scope of the holding in *Port of Longview* and examine certain probable ramifications of the decision. Finally, there will be proposed a state constitutional amendment authorizing bond financing for the benefit of private parties to serve public purposes.

I. BACKGROUND

A. The Federal Tax Exemption: Section 103

The federal statutory framework exempting from federal income tax the interest on certain state and municipal bonds is quite elementary. Internal Revenue Code [hereafter I.R.C.] Section 103(a) provides that, "gross income does not include interest on (1) the obliga-
tions of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia.” Although this section has had a turbulent history, it nonetheless exemplifies longstanding Congressional approval of special tax treatment for state and municipal improvement financing.

To ensure that the federal tax exemption in fact benefits public entities, I.R.C. Section 103(c) generally disallows the exemption in the case of industrial development bonds, which most often inure to the benefit of private enterprise. However, the federal statute carves out broad exceptions for publicly issued industrial development bonds which facilitate certain federally approved activities. Tax-exempt status is granted by Section 103(c) for interest received on industrial development bonds which finance: (1) residential family housing; (2) sports facilities; (3) convention or trade show facilities; (4) airports, docks, wharves, mass commuting facilities, parking facilities, or storage or training facilities connected with these; (5) electric or gas energy plants; sewage and solid waste treatment plants; (6) air and water pollution control facilities; (7) facilities to furnish water which are available on reasonable demand to the public; (8) industrial parks except for the buildings and structures actually to be used by the

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12. Section 103, providing for tax free interest upon municipal and other governmental obligations, had its origin in Int. Rev Code of 1939, ch. 1. § 22(b)(4), 53 Stat. 10. No substantive changes were made until after more than two decades of academic and legislative criticism of abuses arising from the use of the tax free interest feature for the benefit of financing industrial plants. Congress in the Revenue and Expenditure Control Act of 1968, § 107(a), 82 Stat. 266, amended § 103 to eliminate tax free interest benefits for all industrial development bonds not issued for exempt facilities. Despite continued criticism, in the Revenue Act of 1971. § 315(b). 85 Stat. 529, Congress extended the exemption for small industrial developments to facilities valued at less than $1,000,000. The previous limitation was $250,000. H.R. REP. No. 413, 91st Cong., 1st Sess. 173 (1969).

13. See J. CHOMMIE, FEDERAL INCOME TAXATION 72 (1973); Early, Financing Pollution Control Facilities through Industrial Development Bonds, 27 TAX LAW. 85, 91 (1973); Comment, The Limited Tax Exempt Status of Industrial Development Bonds under Subsection 103(c) of the Internal Revenue Code, 85 HARV. L. REV. 1649 (1972). For an in-depth analysis of the effectiveness of industrial development bonds as an economic stimulant versus the tax cost of these bonds, see Surrey, Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance, 84 HARV. L. REV. 352, 371-80 (1971). Surrey points out that in 1969 the federal revenue loss generated by the tax exempt feature on municipal bonds was $2.63 billion while the consequent interest savings to public issuing bodies was estimated at only $1.86 billion. Id. at 372 n.27. Although it cannot be doubted on the basis of these figures that the tax exemption is an inefficient means to encourage certain kinds of investment, there is currently no serious move to repeal the tax provision.

industries; and (9) industrial development, where the total amount of the project does not exceed $5,000,000 for any single private person in one political subdivision.\footnote{15} Thus, interest on bonds for developments which have a public use in the nature of or related to utilities, or which serve, through the nonproductive investment of certain individuals and corporations, a specific Congressionally approved purpose, are generally tax exempt.

To determine whether a given bond measure is an obligation of a public entity so as to exempt interest thereon from taxation under Section 103, the federal government does not require that the bond truly be an obligation of the issuing governmental unit, but merely that the governmental unit make a legislative determination of the bond purpose and actually issue the bond.\footnote{16} The Treasury Department takes the position that the issuing municipal corporation is merely a conduit through which the bond proceeds pass to the private corporations and the premiums pass to the bond purchasers.\footnote{17} It merely makes the benefits available to the other parties. The private corporation is treated as the real issuer of the bonds and borrower of the funds. It is permitted all of the interest, depreciation and other deductions available

\footnote{15. I.R.C. §§ 103(c)(4)-(6).}

\footnote{16. The Treasury Department has deferred to the legislative intent of state governments and municipal corporations. Treas. Reg. § 1.103-1(b) (1956) states: “Obligations issued by or on behalf of any State or local governmental unit by constituted authorities empowered to issue such obligations are the obligations of such a unit.”}

\footnote{The Service states that the following treatment will be given to the asset and the corporation if its four-part test, see note 18 infra, indicates a lease transaction:}

1. the corporation will be considered the purchaser and original user of the facility;
2. the corporation is entitled to the I.R.C. § 38 investment credit on qualifying parts of the project;
3. the corporation must consider as income any premium of discount on the bonds;
4. the corporation is not entitled to any rent reductions;
5. the corporation is entitled to deductions for all ordinary and necessary expenses paid or incurred in the operation of the project, including the trustees fees;
6. the corporation is entitled to the deductions for state and local taxes;
7. the corporation is entitled to all interest deductions with respect to that part of the rent attributable to the bond premiums;

\footnote{17. The conduit theory is implicit in Rev. Rul. 134, 1973-1 Cum. Bull. 60. Since only the party making the expense may deduct it, the Internal Revenue Service (IRS) has recognized that the private corporation is the real issuer of the bonds and therefore entitled to deduct its reimbursement expenses paid (as rent) to the municipal corporation.}
to the financed party\textsuperscript{18} and is required to amortize the cost of issuing the bonds over the life of the project.\textsuperscript{19} The bond purchasers are granted tax free treatment on the bond interest.

\textbf{B. State Constitutional Prohibitions Generally}

The Washington constitutional provision found violated by the pollution control bonding statute at issue in \textit{Port of Longview} is similar to those in most states.\textsuperscript{20} While the language varies from state to state, it has a common origin. In the 19th century, municipal corporations issued bonds, guaranteed by the full faith and credit of the municipality, to finance railroad construction. If the railroad failed, as many did, the municipal corporations were liable on the bonds. To end such unwise use of public funds, constitutional provisions were introduced in most states which completely banned or severely restricted the right of the state or its subdivisions to give money or property, or to lend money or credit, to or for the benefit of private individuals or corporations.\textsuperscript{21}

A survey of the various state constitutional provisions reveals that five general approaches have been utilized to limit a municipality's power to lend public credit. Some state constitutions absolutely prohibit the lending of credit or money to or for the aid of any private

\textsuperscript{18} Rev. Rul. 590, 1968-2 \textit{Cum. Bull.} 66. The Internal Revenue Service provides for a four-part test to determine whether the transaction is a lease rather than a financing arrangement. First, for the transaction to be treated as a financing agreement, the corporation must be obligated to repay the principal and interest in the form of basic rent. In addition, the operation, maintenance and finance expenses may be added on as additional rent. Second, in case of default, casualty or condemnation, the corporation must have rights parallel to those of the mortgagor. Third, there must be express or implied intent that title should pass to the corporation. Fourth, the political subdivision shall have assumed no risk of loss with respect to the project, nor have opportunity for gain. \textit{Id.}

\textsuperscript{19} Rev. Rul. 134, 1973-1 \textit{Cum. Bull.} 60. These expenses must be capitalized because, although they are ordinary expenses made in the ordinary course of a trade or business, they produce benefits which extend beyond the taxable year. Some payments made without legal obligation under such a lease-sublease arrangement may be expensed by the corporation. Rev. Rul. 517, 1973-2 \textit{Cum. Bull.} 37.

\textsuperscript{20} The Washington constitutional prohibitions against gifts and lending of public property, monies and credit are derived from N.Y. Const. art. VII, § 9 (1846) which stated: "The credit of the State shall not, in any manner, be given or loaned to any individual, association or corporation," N.Y. Constitutional Convention Committee, Problems Relating to Taxation and Finance 106, 112 (1938).

\textsuperscript{21} See State \textit{ex rel.} Graham v. Olympia, 80 Wn. 2d 672, 675, 497 P.2d 924, 926 (1972); Pinsky, \textit{supra} note 8, at 277-84; J. Wash. State Constitutional Convention 680 (1889).
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person,\textsuperscript{22} while a number of other states have limited the lending of credit to the service of a "public purpose."\textsuperscript{23} Some states permit the lending of public credit only for projects approved by a certain percentage of the constituency,\textsuperscript{24} whereas some states simply have no constitutional provision relating to the lending of public credit.\textsuperscript{25} Finally, many states have amended their constitutions in the face of judicial hostility to industrial development bonds and now permit legislatures to enact laws enabling the state and/or local government to issue no recourse revenue bonds.\textsuperscript{26} As of this writing, only one state constitution other than Washington's has been construed to forbid the issuance of pollution control bonds.\textsuperscript{27}

I. The majority rule

In approximately 38 states having constitutional provisions similar to Article VIII, Section 7 of the Washington State Constitution, courts have upheld industrial development or pollution control bonding legislation, generally on one of two bases. First, courts have reasoned that the public purpose served by the encouragement of employment, expansion of the tax base and abatement of pollution is sufficient to

\textsuperscript{22} These states have utilized two methods to forbid lending of public monies or credit. Some have an absolute prohibition couched in language similar to that of the New York Constitution. See, e.g., IOWA CONST. art. VII, \S\ 1. Other states forbid the legislature to authorize the lending of credit or monies by the state (see, e.g., N.C. CONST. art. 5, \S\ 4; TEX. CONST. art. 3, \S\ 52b) or by political subdivisions (see, e.g., Mo. CONST. art. 3, \S\S\ 39(1), (2)).

\textsuperscript{23} See, e.g., ILL. CONST. art. 8, \S\ 1(a); People ex rel. City of Salem v. McMackin, 53 Ill. 2d 347, 291 N.E.2d 807 (1972); N.J. CONST. art. 8, \S\S\ 2–3, Roe v. Kervick, 42 N.J. 191, 199 A.2d 834 (1964); MONT. CONST. art. 8, \S\ 5, Fickes v. Missoula Co., 155 Mont. 258, 470 P.2d 287 (1970).

\textsuperscript{24} For example, Mo. CONST. art. 6, \S\ 27, provides: [A]ny city or incorporated town or village of this state by vote of 4/7ths of the qualified electors voting thereon, may issue . . . revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any of the following: . . . (2) plants to be leased . . . to private persons for manufacturing and industrial development purposes.

See also LA. CONST. art. XIV, \S\ 14b(2)–(3); ME. CONST. art. IX, \S\S\ 8–A & 14–A.

\textsuperscript{25} Vermont has never had a constitutional proscription against lending public monies or credit; Connecticut has been without one since 1965. See CONN. CONST. art. X, \S\ 3 (1877).

\textsuperscript{26} See note 43 infra.

\textsuperscript{27} In Stanley v. Department of Conservation & Development, 284 N.C. 15, 199 S.E.2d 641 (1973), the North Carolina Supreme Court held that a statute authorizing pollution control bonding was violative of the constitutional public purpose requirement. In dicta, the court suggested that the activity amounted to an unconstitutional lending of public monies and credit. 199 S.E.2d at 657.
remove the legislation from the scope of the constitutional proscription. These courts read into the lending of credit provision an exception for public purpose even where private persons might be benefited.\textsuperscript{28}

Second, courts have reasoned that there can be no lending of public credit without the incurring of public liability. These courts, however, have restricted the meaning of "public funds" and "public credit" to sums raised under or guaranteed by the taxing power of the public body.\textsuperscript{29} In four states with constitutional provisions nearly identical to Washington's, reviewing courts have limited the lending of credit proscription to cases in which public taxing power directly or indirectly guaranteed the bonds;\textsuperscript{30} those courts have expressed the view that rev-


\textsuperscript{30} In Iowa, Wyoming, Utah and Nevada the constitutional provisions are parallel to those in Washington and have been construed by the respective courts as not...
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Revenue bonds are not debts of the issuing political subdivisions. Such definitions of credit are consistent with the historical and ordinary meaning of the term.

Historically, the term "credit" in the typical constitutional lending of credit clause referred to a surety relationship between the public body and the railroad or other business which was primarily liable on the incurred debt. Specifically rejected was the notion that the mere donation of the name, status and "good office" of the public body to private persons by way of bond issuance could constitute a lending of public credit. Also rejected were the propositions that the public body could be liable on the revenue bonds if the private corporation defaulted, or that the potential liability of the public body for negligent issuance of the bonds was a lending of public credit within the meaning of the constitutional proscriptions. Courts adopting this majority rule have described the role of the issuing public body not as that of lender or obligor, but as that of trustee for the benefit of bondholders, or as conduit between the bondholders and the private borrowers.

2. The minority rule

The Port of Longview court relied upon the decisions of only three other state courts to reject the majority rule set forth above. The Nebraska, Ohio and Idaho courts have struck down industrial development bonding schemes as violative of constitutional provisions similar to Washington's Article VIII, Section 7, finding a loan of credit because public bond issuance was beneficial to the private borrower.

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applying to industrial development bonds or pollution control bonds. See notes 28 & 29 supra. In Allen v. Tooele Co., 21 Utah 2d, 383, 445 P.2d 994, 995 (1968), the court stated: "The County could be deemed to 'lend its credit' . . . only . . . if the County might in some eventuality be required to pay the obligation." 31. See, e.g., Reed v. City of Cheyenne, 429 P.2d 69, 72 (Wyo. 1967) (revenue bonds); Uhls v. State ex rel. City of Cheyenne, 429 P.2d 74, 87 (Wyo. 1967) (pollution control bonds).

32. Green v. City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5, 15 (1964); Pinsky, supra note 8, at 277-78.

33. Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80, 84 (1950).


35. See Pinsky, supra note 8, at 314.


37. Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643 (1895); State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 197 N.E.2d 328 (1964); State ex rel. Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957). Recently, the North Carolina Su-
Both the Nebraska and Idaho decisions can and should be considered aberrant: Nebraska, because that state's supreme court indicated that liability might be imposed on the public body in the event of default despite the "no recourse" nature of the bond, and Idaho, because it is the only state in the union which has thus far refused to distinguish between the general fund liability of general obligation bonds and the special liability incurred by such obligations as revenue bonds, special assessment bonds and the like. Moreover, both Nebraska and Idaho have amended their constitutions to permit industrial development and pollution control bonding legislation. The Ohio court, in State ex rel. Saxbe v. Brand, relied extensively upon a constitutional clause, without counterpart in Washington, which limited public debt to the aggregate of both "direct and contingent" debts.
3. Constitutional amendments removing the lending of credit restriction

Constitutional amendments in many states now permit revenue bond or general obligation bond financing for pollution control and industrial development. Three methods have been employed: (1) the lending of credit proscription has simply been removed; (2) a specific constitutional exemption to the proscription has been adopted for certain no recourse revenue bonds; and (3) general obligation bond financing amendments with voting requirements and financing or debt limitation provisions have been adopted.

Each of these amendment schemes has inherent weaknesses. Complete removal of all constitutional limitations upon public assistance to private persons provides little guidance as to whether other general

does not support a finding that credit has been loaned. See note 59 infra.


44. Connecticut removed its lending of credit proscription in 1965. See note 43 supra.

45. These provisions vary in scope. E.g., Fla. Const. art. VII, § 10(c), provides: [T]he issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities or (2) ... for industrial or manufacturing plants to the extent that the interest thereon is tax exempt from income taxes under the then existing laws of the United States, when ... the revenue bonds are payable solely from the revenue derived from the sale, operation or leasing of the projects.

46. In Louisiana, for example, the amendment provides for the issuance of recourse industrial development bonds. It is more specific than Florida’s with respect to terms of the bonds and the amount authorized. The issuance of bonds by any municipal corporation is subject to the consent of its electorate. La. Const. art. XIV, § 14(b.2)–(b.3). Interestingly, the Louisiana court has held that no recourse industrial development revenue bonds do not fall within the voting requirement of art. XIV, § 14(b.2) because such bonds cannot become obligations of the state. Police Jury v. Taxpayers, 278 So. 2d 474 (La. 1973); Northeast Shoe Co. v. Industrial & Recreational Fin. Approval Bd., 223 A.2d 423, 425 (Me. 1966).

N.Y. Const. art. VII, § 8(3) exempts certain financing from the general prohibition against lending of public funds or credit:

Nothing in this constitution contained shall prevent the legislature from authorizing the loan of the money of the state to a public corporation to be organized for the purposes of making loans to non-profit corporations to finance construction of new [industry], ... provided, however that any loan ... shall not exceed forty percentum of the cost ... .

Thus, New York permits recourse bonds issued by the state, but limits the percentage investment on any project. See also Neb. Const. art. XIII, §§ 1–3; Ore. Const. art. XI, § 10; Va. Const. art. VII, § 10.
constitutional provisions apply. Moreover, where credit of the public entity guarantees the primary corporate obligation, municipal bond ratings undoubtedly are affected and bond premiums rise.\textsuperscript{47}

On the other hand, restrictive provisions permitting no recourse revenue bonds only for those activities specifically exempted by Section 103 appear too narrow in scope. Such provisions do not determine the constitutionality of such popular schemes as issuing no recourse bonds to build hospitals, assisting college students,\textsuperscript{48} or granting tax credits for the construction of nonproductive facilities.\textsuperscript{49} By restricting the state to a limited array of federally-approved revenue bond programs, these narrow constitutional provisions preclude state experimentation with alternative methods to aid in the financing of private activities which the state finds desirable.\textsuperscript{50}

Where states have permitted general obligation bond financing of economic development or pollution control with requirements of voter approval, legislative approval, debt limitation or scope of financing limitation, attempts have been made to exclude industrial revenue bonds from the scope of the provisions. Courts have generally been convinced that since industrial revenue bonds are not secured by public funds, the constitutional strictures pertaining to general obligation bond financing are not applicable.\textsuperscript{51}

These state constitutional amendments described above obviously suggest a popular desire to limit judicial review of the constitutionality of certain revenue and/or general obligation bond financing. Yet, the existing amendment schemes, even within their applicable scope, fail to adequately address the multitude of legal issues attending public debt financing. A proposal for a constitutional amendment which attempts to do so is offered in Part V, below.

\textsuperscript{47} This is true because the secondary security for the bond is that of the issuing public entity. \textit{See} letter from Thomas J. Dowd, Vice President, Seattle-Northwest Securities Corp., to author, Jan. 6, 1975, on file with Washington Law Review.
\textsuperscript{48} \textit{See} Parts IV-B & C infra.
\textsuperscript{51} The experience in Louisiana is illustrative. \textit{See} note 46 \textit{supra}. 

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C. The Washington Court's Treatment of Article VIII, Section 7, Prior to Port of Longview.

The Washington court adopted prior to *Port of Longview* a four point approach to application of the state's constitutional proscription against the lending of public money or credit. Under this approach, the court has: (1) suggested that whenever monies raised by the taxing power enter the public treasury, such monies become public funds within the meaning of Article VIII, Section 7; (2) applied the same test to determine the presence of indebtedness within the meaning of constitutional debt limitations as it uses to determine whether credit has been extended; (3) held that debt limitations do not apply to revenue bonds which may be retired solely from the proceeds of the project financed; and (4) developed, in rudimentary form, a trust theory to interpret the duties and obligations of the public entities with respect to the retirement of special fund bonds.

1. The public treasury test

In *Yakima v. Huza*, voters sought by initiative to have a certain municipal tax removed and prior collections returned directly to the taxpayers or distributed to them in the form of credit against future taxes. The Washington court held that even if the municipal ordinance authorizing the collection of the funds were repealed *ab initio*, the monies already collected remained public funds. Repayment of those funds would constitute a prohibited gift of public funds, and a tax credit based upon those funds would constitute a prohibited lending of municipal credit. Broadly applied, *Yakima v. Huza* stands for the proposition that once funds enter the public treasury they cannot lose their public character.

2. Test for public indebtedness and lending of public credit

In *Seattle & Lake v. Seattle Dock Co.*, the court adopted a common test for the presence of public debt and public credit, reasoning that the *sine qua non* for a loan of state credit was state lia-

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52. 67 Wn. 2d 351, 407 P.2d 815 (1965).
53. Id. at 359, 407 P.2d at 820.
54. 35 Wash. 503, 77 P. 845 (1904).
bility on the debt. The court reviewed a statute which provided that navigational waterways could be dredged by private contractors and that the state would secure payment of the dredging costs by encumbering adjacent state tideland and shorelands. Appellants, who purchased state lands subject to contractors' liens arising out of agreements made pursuant to the statute, argued that Article VIII, Sections 35 and 5 of the Washington State Constitution were violated since the state in effect loaned its credit for the benefit of the contractors. In rejecting that argument, the court stated:

The lands were to be appraised and not sold for less than the appraised price, but the purchasers of these lands were required to take notice of the lien created by the cost of filling the same, and were bound to pay for the improvements. So that no aid or credit was given by the state directly or indirectly to the contractor. . . . The state was not even liable to discharge the lien. . . . While it may have been an advantage to the contractor . . . to be able to purchase at the appraised price . . ., we fail to see that the credit of the state was thereby loaned or in any manner given to the contractor . . . .

55. WASH. CONST., art. VIII, § 3 (1889) provided:
Except the debt specified in sections one and two of this article, no debts shall hereafter be contracted by, or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people.

Compare amends. 48 & 60, the latter being the current version of art. VIII, § 3.

56. WASH. CONST., art. VIII, § 5, provides: "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation."

57. 35 Wash. at 514, 77 P. at 848. The court applied the same test to plaintiff's complaint that the authorization of special indebtedness provision was violated and found no indebtedness within the meaning of the provision. Id. at 515, 77 P. at 848.

It is incontrovertible that the Seattle Dock court's construction of Article VIII, §§ 3 and 5 applies equally to Article VIII, § 1, limiting state indebtedness, and Article VIII, § 7, proscribing the lending of municipal money or credit. The court in State ex rel. Capitol Comm. v. Clausen, 134 Wash. 196, 235 P. 364 (1925), applied the same test to determine the presence of indebtedness for the purpose of the Article 8, § 1 debt limitation and the Article 8, § 3 authorization of debt requirement. Clausen has been followed consistently. See, e.g., Wittler v. Yelle, 65 Wn. 2d 660.
The court employed similar reasoning in *First National Bank v. Pasco*,\(^5\) in which it ruled that with respect to no recourse revenue or special fund bonds, the risk of forfeiture falls upon the bondholder, not the issuing municipality. Thus, for purposes of the debt limitation and lending of public monies or credit proscriptions, it appears that no recourse issuances cannot give rise to either public indebtedness\(^6\) or extension of public credit.\(^7\)

3. *The special fund doctrine*

The Washington court has generally applied the special fund doctrine to both debt limitation provisions and restrictions on the lending of public credit. In *State ex rel. Finance Commission v. Martin*,\(^6\) the court held the constitutional provisions relating to indebtedness inapplicable when a special fund exists, *i.e.*, where revenues by which a project is financed are derived exclusively from operation of the project and where the state does not undertake to provide any part of

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\(^{59}\) The Washington court has historically limited the liability of the issuing public corporation with respect to revenue bonds. It is certain that contingent liability such as would arise from a failure of the municipality to pay the collected bond retirement funds to the bondholders does not give rise either to indebtedness or credit. See Berglund v. City of Tacoma, 70 Wn. 2d 475, 481, 423 P.2d 922, 925 (1967).

\(^{60}\) The court has drawn a fine distinction between the presence of credit and the presence of a current exchange. In O'Connell v. Public Util. Dist. No. 1, 79 Wn. 2d 237, 484 P.2d 393 (1971), the Public Utility District (PUD) agreed to accept the assignments of installment contracts arising from the sale of electrical equipment to PUD electrical customers. The court held that the additional electrical usage generated by the extra equipment was insufficient consideration to remove the transaction from the lending of credit proscription. The court reasoned that respondent had presently expended public money and that the payment was in exchange for the right to receive future repayment with interest. On the other hand, in Washington Natural Gas v. Public Util. Dist. No. 1, 77 Wn. 2d 94, 459 P.2d 633 (1971), the court held that rebates from public funds given by the PUD to builders for constructing all electric homes involved no lending of credit since the extra electrical usage generated by the homes was adequate consideration for the rebate. Query whether there is any real difference between the cases? In *O'Connell* the PUD at least had a chance for repayment of the amount extended to the vendors while in *Washington Natural Gas*, the PUD recouped the rebate from the future projected electrical usage.

the fund or to guarantee the fund from revenues generated under its
general taxing power.\textsuperscript{62} Since the Martin court relied on Comfort v. Tacoma\textsuperscript{63} and Winston v. Spokane,\textsuperscript{64} cases construing the lending of credit provisions, as supportive of the special fund doctrine, it appears that the doctrine applies equally to both debt limitation and lending of credit provisions. Thus, Washington precedent suggests that if the issuance of a bond by a public entity is retireable from the income generated by the project and if no public liability is thereby created, the special fund doctrine removes the bond from the scope of the lending of public monies or credit proscriptions.

4. \textit{The trust fund theory}

The Washington court has utilized trust principles to analyze the
duties of a public entity engaged in activities such as Local Improve-
ment District (LID) financing. Thus, in Keyes v. City of Tacoma,\textsuperscript{65} the court stated that where LID assessments on real property are the sole basis for the retirement of the LID bonds, the funds collected are trust funds; the city is the trustee and the bondholder, the cestui que trust.

The trust fund theory applied in Keyes may be harmonized with the public treasury theory enunciated in Yakima v. Huza,\textsuperscript{66} simply by recognizing the factual distinction between the cases. In Keyes, the special assessment funds at issue were payable solely to the bondholders; thus the court's conclusion was quite proper that the city, despite its possession of the funds, was but the trustee on behalf of the bondholders as beneficial owners. Contrariwise, in Huza, the funds generated by the general taxing measure under dispute were obviously public from the moment of collection. Thus, under either theory, the nature of the funds is determined not solely from the fact of possession, but also from the type of activity generating the revenue.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{62} Id. at 661, 384 P.2d at 842.
\item \textsuperscript{63} 142 Wash. 249, 252 P. 929 (1927).
\item \textsuperscript{64} 12 Wash. 524, 41 P. 888 (1895).
\item \textsuperscript{65} 12 Wn. 2d 54, 120 P.2d 533 (1941). For a general discussion of the trust fund doctrine in the private corporate setting, see Ellis & Sayre, \textit{Trust-Fund Doctrine Revisited}, 24 WASH. L. REV. 44 (Part I), 134 (Part II) (1949).
\item \textsuperscript{66} 67 Wn. 2d 351, 407 P.2d 815 (1965).
\item \textsuperscript{67} “But the true test of its [the special fund doctrine's] application here is not what comes out of the funds but what goes into it.” State \textit{ex rel. Finance Comm'n v. Martin}. 62 Wn. 2d at 661, 384 P.2d at 842.
\end{itemize}
D. Amendment 45

Although the Port of Longview court did apply parts of the four point approach developed to interpret the state's constitutional proscription against the lending of public money or credit, the court did not even consider whether amendment 45 of the Washington State Constitution should apply to the bonds issued by the Ports of Tacoma and Longview. Amendment 45 provides:

The use of public funds by port districts in such manner as may be prescribed by the legislature for industrial development or trade promotion and promotional hosting shall be deemed a public use for a public purpose, and shall not be deemed a gift within the provisions of section 7 of this Article.

Since the court insisted that the bond proceeds were public funds within the scope of the constitutional lending of monies and credit provisions, it is important to appraise the court's failure to regard Amendment 45 as an exemption from the general lending of public monies and credit proscriptions.

The court may have reached the conclusion that Amendment 45 was inapplicable for either of two reasons. First, it may have reasoned that although Amendment 45 removes the proscription against gifts of public funds to private persons with respect to certain port district expenditures, it does not specifically remove the proscription against lending of public monies or credit. Such a technical construction of a constitutional provision, however, contravenes every principle of constitutional construction set forth by the Washington court. A reasonable and logical interpretation of Amendment 45 suggests that if cer-

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68. *State ex rel. Linn v. Superior Court*, 20 Wn. 2d 138, 143, 146 P.2d 543, 546 (1944) ("Constitutional provisions should be interpreted so as to give effect to the manifest purpose for which they were adopted.") See also *Gruen v. Tax Comm'n*, 35 Wn. 2d 1, 211 P.2d 651 (1949).

In *State ex rel. Graham v. City of Olympia*, 80 Wn. 2d 672, 676, 497 P.2d 924, 926 (1972), the court stated:

In the interpreting of our constitution the language employed must be taken and understood in its natural, ordinary, general and popular sense . . . . In the ordinary and popular sense, a loan of money or credit is at once understood to mean a transaction creating the customary relation of borrower and lender. See also *State ex rel. O'Connell v. Public Util. Dist. No. 1*, 79 Wn. 2d 237, 484 P.2d 393 (1971); *State ex rel. State Capitol Comm'n v. Lister*, 91 Wash. 9, 156 P. 858 (1916).
tain gifts are permitted, a fortiori lending of public credit should be permitted in the same context. 69

Second, the court may have reasoned that pollution control facilities do not per se serve “industrial development” purposes since they are nonproductive facilities required by law. Such an analysis is inconsistent with the broad construction given the term “industrial development” by the I.R.C. and Treasury Department, 70 by other states dealing with similar constitutional challenges, 71 by the constitutional history of Amendment 45 and by the the court’s rule of construction that language in constitutional provisions is to be given its natural, ordinary and popular meaning. 72 Since today pollution control equipment is an integral part of every industrial plant producing pollutant “by-products,” financing of such equipment would seem to fit within the general meaning of industrial development. Thus, if one assumes, as did the Port of Longview court, that the financing by the Ports of Tacoma and Longview constituted lending of public credit, it seems

69. It is submitted that the court purposely avoided gift reasoning. First, were it to apply gift analysis, the transaction would fit squarely within Amendment 45 which pertains to gifts. Second, only gifts of property or monies, rather than of the name, status or “good office” of the municipality, are prohibited by Article 8, § 7, of the state constitution. All of the cases which have thus far been decided under this constitutional prohibition apply it to money or tangible property. See, e.g., State ex rel. O’Connell v. Port of Seattle, 65 Wn. 2d 801, 399 P.2d 623 (1965); State ex rel. Wash. Navigation Co. v. Pierce County, 184 Wash. 414, 51 P.2d 407 (1935). In addition, the language in Johns v. Wadsworth, 80 Wash. 352, 354, 141 P. 892 (1914) (relied upon by the Port of Longview court), describes the gift provision in such a manner that property must be something with a calculable value. Finally, decisions from other states, see, e.g., Green v. City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5 (1964), have limited the term “gift” to its common sense meaning. The Port of Longview court may have employed the lending of credit concept to avoid these difficulties.


71. In State ex rel. Brennan v. Bowman, 89 Nev. 330, 512 P.2d 1321 (1973), the Nevada Supreme Court included air pollution control equipment within the meaning of the County Economic Development Revenue Bond Law designed to encourage industry to locate in Nevada. See NEV. CONST. art. 8, §§ 9-10; NEV. REV. STAT. §§ 244.9191–9219 (1967). The Oregon Supreme Court, in Carruthers v. Port of Astoria, 249 Ore. 329, 438 P.2d 723 (1968), construed OR. REV. STAT. § 777.560 (1955) which states that ports can “provide . . . funds . . . for industrial uses and purposes . . . and issue and sell revenue bonds . . .” without the bonds becoming a general obligation of the port, to contemplate the entire financing of an aluminum reduction plant, including pollution control equipment required by law. See also Police Jury v. Taxpayers, 278 So. 2d 474, 476 (La. 1973); Fickes v. Missoula Co., 155 Mont. 258, 470 P.2d 287, 289 & 294 (1970).

72. See note 68 supra.
inescapable that Amendment 45 exempts the ports from the constitutional lending of public monies and credit proscription. The court, however, managed to avoid the inescapable.

II. THE REASONING OF THE PORT OF LONGVIEW COURT

Although the court properly analyzed the lease-sublease agreements in *Port of Longview* as financing arrangements, it mistakenly employed this reasoning to justify the conclusion that public credit had been extended. The court reached its result by reasoning that the bond proceeds became public funds upon passing through the public treasury, and that public credit was extended despite the absence of public liability because the actions of the public bodies bestowed benefits upon the private corporations, and arguably detrimentally affected future public financing opportunities by some incalculable measure. The court also offered some rather questionable analysis of bond market economics while in the same breath, it disavowed any reliance upon such analysis.

A. Analysis of the Financing Transactions

The court's analysis of the agreements to finance the pollution control facilities as in fact security agreements, even though couched in terms of lease-sublease, was quite proper. The lease-sublease disguise was apparently constructed to avoid any "real or imagined . . . state constitutional problems." The financing arrangements served three basic purposes of the private corporations: (1) to provide them with full use and ownership of the financed pollution control facilities; (2) to provide them with the advantageous bond premium rates; and (3) to give them the federal and state tax deductions and credits available to them as the facility owners. Since, as is characteristic under a financing arrangement, the corporations contemplated ownership of

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73. Of course, if one properly assumes that the funds generated by no recourse bond issuance such as that in *Port of Longview* are not "public" at all, then neither Amendment 45 nor any of the provisions of Article 8 are applicable. *See Part II infra.*

74. 84 Wn. 2d at 482, 527 P.2d at 267.

75. Findings of Fact and Conclusions of Law § VI, *Port of Longview*. As owners and lessors, the private corporations also qualify for a credit against the state sales, use and business and occupation taxes. *See* WASH. REV. CODE § 82.34.050 (1967).
the facility rather than a leasehold, the court was undoubtedly correct in analyzing the transaction as a financing arrangement regardless of the language in the arrangement.\textsuperscript{76}

A simple determination, however, that the underlying arrangement was a financing arrangement \textit{sub nom.} lease-sublease leaves the analysis incomplete. The presence of a financing arrangement presupposes a debtor-creditor relationship. The creditor provides the funds, risks financial injury in case of default and possesses cognizable rights as a bankruptcy creditor. The debtor utilizes the funds provided by the creditor and is also liable on the obligations. In \textit{Port of Longview}, the "real" creditors were the bondholders since the municipal corporation's right of enforcement was limited to its rights under the lease-sublease agreement. Since only the private corporations were liable on the bonds in the event of default, and only the private corporations could be made the subjects of bankruptcy actions, they must be considered the "real" debtors.\textsuperscript{77} The municipal corporation, at the behest of the real parties in interest, merely made the transaction possible by physically issuing the bonds with the resulting tax-free interest attributes and transferring the proceeds and premiums to the respective parties.

The above analysis comports with the "conduit theory" applied by the Treasury Department to bonding schemes similar to those examined in \textit{Port of Longview}.\textsuperscript{78} Unfortunately, the \textit{Port of Longview} court relied upon Treasury Department analysis only to find that what were in form lease-sublease arrangements were in substance security agreements. The court failed to proceed through the analysis to iden-


\textsuperscript{77} Annual Review and Investment Lists, 1975 \textit{Moody's Bond Survey} 1796–97. This note reasons that the instrument is treated as an unsecured debenture of the private corporation since such treatment would be accorded the instrument under the Bankruptcy Act. Interview with Thomas J. Dowd, Vice President, Seattle-Northwest Securities Corp., in Seattle, Jan. 6, 1975. \textit{See also} Transcript of Oral Argument at 18. \textit{Port of Longview}, copy on file with Washington Law Review. (The transcript of oral argument is an unofficial document, prepared from a tape recording of oral argument before the supreme court. The original tape recording is on file with the supreme court clerk. The clerk does not provide official transcripts from the tape recordings.) A financing arrangement exists if the private corporation has the actual burden of repayment, pays the actual operating and financing expenses, has the rights of a mortgagor in event of default, casualty or condemnation, obtains legal title permanently at some point and assumes with the bondholders all risk of loss and opportunity for gain on the project. \textit{See note 18 supra.}

\textsuperscript{78} \textit{See} notes 17–19 and accompanying text \textit{supra.}
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tify properly the relationship of parties. The court's conclusion that the municipal corporations were the "real" debtors in the subject transactions seems clearly infirm.

B. Special or General Fund?

The court evidently disagreed with the Treasury Department's position that the public issuing body is a mere conduit through which the bond proceeds and tax benefits pass to the real borrowers, the private corporations. The court instead adopted the fiction that any funds passing through the public treasury become ipso instante public funds in the state constitutional sense and reasoned that the municipal corporations were the actual borrowers of the bond proceeds; they in turn loaned the proceeds, now public funds, to the private corporations to finance pollution control equipment.

This analysis represents a broad extension of the definition of public funds and directly contradicts both the trust fund analysis of Keyes v. City of Tacoma, and the special fund analysis of State ex rel. Finance Comm'n v. Martin. Just as the monies collected on LID assessments in Keyes were trust funds rather than public funds, where, as in Port of Longview, the municipal corporation is bound under the terms of the bond, the ordinance and the underlying financing instruments to turn over all bond proceeds to the private corporations, such proceeds should be considered trust funds while in the possession of the municipal corporation. Similarly, if the special fund doctrine described in Martin is applicable "where all moneys in the fund are de-

80. During oral argument one justice stated: "[A]t some point in time it changes its status and becomes something else . . . isn't there a point in time at which this is municipal money before it gets into the hands of the corporation or goes into a special fund?" Transcript of Oral Argument, supra note 77, at 23.
81. The court stated: The money which is raised by the municipal bond issues and which ultimately is used by the private corporations to acquire, construct, and install their pollution control facilities is the municipality's money. Counsel for respondents conceded this in oral argument. The bonds were issued by the municipal corporation, and the proceeds from their sale came into the municipal treasury.
82. 12 Wn. 2d 54, 120 P.2d 533 (1941). See Part I–C–4 supra.
rived from revenues produced from the object created by the bonds," it seems beyond dispute that the same reasoning applies where, as in *Port of Longview*, repayment funds for revenue bonds are derived exclusively from private revenues, without recourse to any other funds.

The court's apparent rejection in *Port of Longview* of the trust fund analysis and the special fund doctrine as applied to the proceeds of the pollution control revenue bond casts substantial doubt upon the continued vitality of these doctrines in Washington. It appears that the court's public treasury analysis is not limited to situations in which the actual borrower is a private entity, but rather extends to instances in which the actual borrower is a public entity, *i.e.*, all special purpose revenue bond schemes formerly immune from the constitutional public debt limitations or voter approval requirements. The foreseeable consequences of this not unreasonable interpretation should prompt the court to clarify, if not reconsider, its public treasury analysis so as to insure the vitality of the trust fund analysis and the special fund doctrine.

C. The Benefit-Detriment Theory of Public Credit

The *Port of Longview* court expanded the definition of "extension of public credit" to include any transaction in which one party receives an obvious benefit made available by a public entity which may suffer some detriment. By physically issuing the pollution control bonds in their respective public names, the municipal corporations in *Port of Longview* made available to the private corporations certain favorable credit terms unobtainable through any other source. The court apparently considered it inconsequential that the actual source of the benefit was the federal Department of the Treasury. The court

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84. 62 Wn. 2d at 659, 384 P.2d at 841, citing Winston v. Spokane, 12 Wash. 524, 41 P. 888 (1895).
85. *E.g.*, local improvement district bonds.
86. *E.g.*, special school levy bonds.
87. 84 Wn. 2d at 488–89, 527 P.2d at 270–71.
88. 84 Wn. 2d at 485, 489, 527 P.2d at 268, 270. The court's description of the possibility of some detrimental economic impact is little more than that: "To the extent that these transactions affect the state's ability to carry out its other functions, it is a loan of the state's credit in a very real sense." *Id.* at 486, 527 P.2d at 269. Does this mean that if, for the sake of argument, a $20,000,000 bond issue caused a public body to lose $100,000 in future interest, the bond issue was a loan of the state's

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also considered the bond issuance potentially detrimental to the issuing municipalities since in the event of default, the credit rating of the municipal corporations might somehow be impaired, thus increasing the premium rate paid by those municipalities for future issuances.

The adoption of the benefit-detriment theory is both attractive and dangerous. The theory provides the court a useful tool with which to implement its own policy decisions regarding public assistance to private persons; on the other hand, the theory contradicts both the special fund doctrine and the trust fund theory: If the court decides that a public body has in fact assisted a private person, under the benefit-detriment theory, it need not even determine whether public liability has in fact been incurred or public funds in the traditional sense have in fact been loaned or expended. If this is a correct statement of the effect of *Port of Longview*, it overrules the court's recent decision in *State ex rel. Graham v. City of Olympia*, in which the court upheld the constitutionality of a statute authorizing the time deposit of municipal funds in banks, mutual savings banks and savings and loan associations. The court held that Article VIII, Section 7, does not prohibit ordinary deposits or time deposits because "[t]he protection

credit "to the extent" of $100,000? Or does it mean, as the opinion in its entirety suggests, that if in any particular respect the municipality's future financing ability is possibly impaired, regardless of the net economic effect, the bonding scheme is totally invalid? Could not the private corporation under the former interpretation simply pay the municipality $100,000 and thereby remove the detriment? Under either interpretation, the court's statement begs the question, since it depends upon facts which are, to the knowledge of this author, nonexistent.

Moreover, the court refused to consider the potential economic benefit to the public bodies, thereby failing to analyze the net effect of the public issuance upon the public fisc. See *State ex rel. Beck v. City of York*, 164 Neb. 223, 82 N.W.2d 269 (1957) (where the Nebraska court recognized the economic benefit). *Beck*, relied on by the *Port of Longview* court, also rested solely on the assertion that "[t]he loan of its name by a city to bring about a benefit to a private project, even though general liability does not exist, is nothing short of a loan of its credit." 82 N.W.2d at 272. The *Beck* court did note that some administrative burdens would be cast upon the public body issuing the bonds, id. at 271-72, but the *Port of Longview* court could not cogently offer this reasoning, since the public bodies in that case received compensation for their services. See note 9 and accompanying text *supra*.

It should be noted that the court's finding of a security agreement precluded a gift, rather than loan, analysis. See text accompanying notes 68 & 69 *supra*.

89. Transcript of Oral Argument, *supra* note 77, at 23; see text accompanying note 101 *infra*.

90. 80 Wn. 2d 672, 497 P.2d 924 (1972). Such an interpretation of *Port of Longview* would also lead to the conclusion that *Seattle Dock* has been overruled. See notes 54-57 and accompanying text *supra*.
against loss of public deposits . . . is . . . complete and absolute.”

Thus, although the court found that the private banking institutions were in fact benefited by the deposits, the court went on to find that in fact there was no detriment to the public fisc and that there was no loan.

Since the Port of Longview court did not identify the quantum of benefit necessary to invoke the benefit-detriment test, the decision has an in terroram effect upon all special fund revenue bonding which tends to benefit private persons other than “the poor and infirm.” It appears that the new test restricts the special fund doctrine and the trust fund theory to situations in which both public means and public ends are involved and where the benefit to private persons is both incidental and de minimis.

D. Bond Market Economics

The court analyzed three facets of the economics of pollution control bond financing. First, it adopted a highly theoretical view of the natural impact of pollution control or industrial development bond issuance upon municipal general obligation bond premium rates. Second, it found potential detriment to municipal financing by describing a hypothetical and unrealistic impact of revenue bond default upon the local municipal general obligation bond market. Third, it disregarded evidence indicating that economic expansion would result from completion of pollution control facilities.

1. Washington and the national bond market

The court fallaciously reasoned that an analysis which may have some merit with respect to the national bond market has immediate application to the Washington municipal bond market. It theorized that if there were an increase in the issuance of pollution control bonds, the spread between interest rates on municipal and private corporate bonds would shrink since “higher tax-exempt municipal bond premiums must be offered in order to find a sufficiently large municipal bond purchasing market adequate to finance such state and

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91. 80 Wn. 2d at 681, 497 P.2d at 929.
local needs . . . .93 Thus, higher premiums must be offered to attract taxpayers in lower tax brackets.94 With respect to the national market, this position has found support among some experts in the tax field.95

The court's thesis is subject to attack on three points. First, even with respect to the national market, the data collected thus far is admittedly inconclusive because of the bond analyst's inability to determine the influence of such factors as inflation, the policy of the federal tax system and structural changes in the bond market itself upon industrial development and pollution control bond purchases.96 In fact, statistics indicate that since 1968 municipal corporations have enjoyed a greater spread between municipal general obligation bonds and corporate bonds after pollution control bond issuance than before.97

Second, the bond market is not unified. Just as there is a gradation of risk among municipal bonds—from pollution control bonds as the least secure, to industrial development bonds and special fund revenue bonds, and finally to general obligation bonds as the most secure—with

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*Id.* This table includes both general obligation bonds and industrial development and pollution control bonds as exempt bonds. However, the analysis remains the same.

93. 84 Wn. 2d at 488, 527 P.2d at 270.
94. Contrary to the trial court's belief, pollution control bonds are designed to sell at a 25% incremental tax bracket rather than at a 50% bracket. This is to provide a broader market for this particular type of bond. At this rate, the spread, i.e., the difference between the exempt bond and a taxable bond of the same rating, is about 2%. Trial Transcript at 69-70, *Port of Longview.* Neither the New York Times nor the Wall Street Journal articles cited by the court are on point. The *Times* article deals with the high cost of municipal credit occasioned by the "tight" money policy of the Federal Reserve Bank. *Climbing Interest Rates,* N.Y. Times, July 10, 1974, at 47, col. 6. The other deals with the impact of industrial development bonds and pollution control bonds on the national bond market upon which Washington bond sales have little impact. Leger, *More Companies Sell Tax-Exempt Bonds For Pollution Control, Saving Millions,* Wall Street Journal, July 8, 1974, at 24, col. 1.
96. Surrey, *supra* note 50, at 85.
97. Pond, *supra* note 49, at 21. Pond offers the following table from his study of 523 issues between 1971 and 1974. The percentages reflect the difference (spread) between the interest rates of an average exempt bond and an average taxable bond with identical rating. (The rating represents the measure of the "credit-worthiness" of the security on the bonds.)
each type of bond paying a respectively lower interest rate, so there is a specific market for each type of bond. Trust departments must buy general obligation bonds to fulfill fiduciary investment obligations; insurance companies and banks may take greater risks and invest in revenue bonds.\textsuperscript{98} Mutual funds, banks investing long-term deposits and high income taxpayers take the greatest risk and invest in industrial development bonds and pollution control bonds.\textsuperscript{99}

Third, there is general agreement among bond market analysts that the market for municipal general obligation bonds is unaffected by the issuance of industrial development bonds or pollution control bonds in Washington.\textsuperscript{100} Washington’s share of the bond market is relatively insignificant. In addition, since the market for the bonds is national, the premium rate on Washington bonds is affected by the issuance of general obligation, industrial development and pollution control bonds in other states. Finally, on the local level, industrial development, urbanization, level of unemployment and other local factors determine the opportunities for and limitations of municipal financing. Thus, there is reason to discount the application of the national analysis to the local bond market.

2. Impact of default on municipal bond credit rating

The \textit{Port of Longview} court apparently did not believe that public credit would be unaffected by the issuance of pollution control bonds. The statements of one Justice during oral argument are revealing:\textsuperscript{101}

[Justice:] Let us admit that the default might be remote but if there is a default might that not financially injure the port district’s ability to issue other bonds.

[Counsel for the Respondents:] The finding of the trial court and the testimony of the experts, your honor . . .

[Justice:] That is a . . . conclusion of law. I have some doubts as to whether it is valid or not.

In Washington, default on no recourse pollution control bonds or

\textsuperscript{98} Trial Transcript at 55, \textit{Port of Longview}.
\textsuperscript{99} \textit{Id.} at 50-51, 55, 71-72 (testimony of Mr. Roger Mehle, expert witness on municipal bonds).
\textsuperscript{100} \textit{Id.} at 66-68; see Letter from Thomas J. Dowd, Vice President Seattle-Northwest Securities Corp., to author. Jan. 6, 1974, on file with Washington Law Review.
\textsuperscript{101} Transcript of Oral Argument, \textit{supra} note 77, at 19.
industrial development bonds has no impact on general obligation bond rates. Since in Washington no recourse statements in statutes, ordinances and bond issues will be given effect against the bondholder, pollution control bonds such as those in Port of Longview are effectively secured only by the credit of the private corporations actually using the facilities and paying the bond premiums. Default on the bonds affects only the bond rating of the private corporations.

3. The court's disregard of beneficial economic impact

Not only did the Port of Longview court misapply analysis of the national bond market, but it also refused to consider the beneficial economic effects of the legislation which it declared unconstitutional. The court apparently was unconvinced that the construction of the facilities would have any positive impact upon the availability of employment. Yet, municipal bond issuances clearly aid the job market by making possible the financing of pollution control facilities for older and marginal plants which may otherwise be forced to shut down because they fail to comply with state pollution control requirements. Moreover, improved facilities clearly have a positive effect upon local real property tax revenues, for the availability of municipal bond

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102. See First National Bank v. Pasco, 131 Wash. 28, 228 P. 838 (1924) (statutory limitation of liability to special assessment fund given effect).

103. Trial Transcript at 50–51, 66–67, Port of Longview (testimony of Mr. Roger Mehle, expert witness on municipal bonds). For example, if the town of Cle Elum, Washington, issued general obligation bonds to finance a swimming pool for its high school, the bonds would have the lowest class rating or would be unratable because the city has a low credit rating. On the other hand, if the town issued industrial development bonds for Weyerhaeuser on the same day, these bonds would have a class A rating of a middle grade industrial because Weyerhaeuser enjoys such a rating on its debt financing. See id. at 71 (testimony of Mr. Mehle) & 92 (testimony of Mr. C. F. Anderson, expert witness on municipal bonds).

104. See id. at 65–66 (Carter hypothetical to Mehle). Despite the language in State ex rel. Beck v. York, 164 Neb. 223, 82 N.W.2d 269, 272 (1957), relied on by the Washington court, that "either the credit of the city has been extended or [the bond] purchasers are victims of a base delusion," pollution control bonds in fact are sold in large denominations to trust department, banks, insurance companies, mutual funds and high income taxpayers who are fully cognizant of the inherent risks and benefits of purchase. See Findings of Fact and Conclusions of Law, supra note 9, at § XII.

105. In oral argument, the supreme court balanced the reduction in employment generated by the Weyerhaeuser facility against the increase in employment at the two Kaiser facilities, concluding that the statistical results were inconclusive. Transcript of Oral Argument, supra note 77, at 15, 16.

106. On November 5, 1974, Simpson Timber Company announced that it intended to close its insulating board plant in Shelton, Washington, for economic and environmental reasons. Seattle Post-Intelligencer, Nov. 5, 1974, at C6, col. 3.
financing offers competitive financing rates which tend to attract new industry.\textsuperscript{107} Finally, authorization of such federally tax exempt financing in Washington removes the competitive disadvantage suffered by Washington taxpayers whose federal tax dollars would otherwise effectively support the federal tax exemption for pollution control facilities in almost all other states but their own.\textsuperscript{108} It is reasonable to predict that the foregoing beneficial effects would in turn cumulatively "stimulate the economy and provide many additional jobs,"\textsuperscript{109} thus producing the "economic ripple effect" recently found so praiseworthy by the Washington court in \textit{Anderson v. O'Brien}.\textsuperscript{110} Such benefits have been regarded as sufficient to constitute a public purpose,\textsuperscript{111} and to remove the transaction from the constitutional proscription against lending of public monies and credit.\textsuperscript{112}

By ignoring economic factors of substantial bearing, ostensibly relying upon largely unrealistic economic factors and abusing the law-fact dichotomy beyond reason, the \textit{Port of Longview} court adopted an unduly cavalier approach to the case at bar. The insult is not abated, but rather aggravated, by the court's parting statement:\textsuperscript{113}

Our function is not to weigh the economic impact of the transactions. The loan of money or credit by a municipality to a private corporation is a violation of our state constitution regardless of whether or not it serves a laudable public purpose.

The court leaves one feeling that visceral reaction has been given free reign and reasoned judgment forsaken.

\textbf{III. POLICY DETERMINATIONS}

It is unfortunate that the court in \textit{Port of Longview} did not set forth the policy determinations upon which its decision was grounded. An examination of the cases cited with favor by the court provides only an indication of the nature of these determinations. Generally, the

\begin{footnotes}
\item[107] See, e.g., State ex rel. Hammermill Paper Co. v. LaPlante, 58 Wisc. 2d 32, 205 N.W.2d 784, 796–99 (1973).
\item[108] See note 121 infra.
\item[110] Id.
\item[111] Id.
\item[113] 84 Wn. 2d at 490, 527 P.2d at 271.
\end{footnotes}
court was concerned with the impropriety of assisting "big business" and high income taxpayers at the expense of smaller businesses and low-to-middle income taxpayers. In addition, the decision evinces a judicial distrust of local governmental action. Finally, the court was certainly aware that environmental concerns would not be furthered by a "pro-bonding" decision. The reasoning and result in *Port of Longview* raise the fundamental question whether the court should effectuate such policy determinations traditionally left to legislative bodies.

A. Aid of Big Business

Although the court's opinion does not explicate its predisposition against large corporate enterprise, such a bias surfaced a number of times during oral argument. Persistently, the court pressed the respondents as to whether industrial development of pollution control bonding schemes were actually available to small as well as large businesses.\(^\text{114}\) The court undoubtedly found its suspicions substantiated by the rather bald assertions of the courts upon which it relied.\(^\text{115}\)

The *Port of Longview* court also expressed suspicion at oral argument that Washington taxpayers would be "gouged" for the sake of the private corporations.\(^\text{116}\) Although not cited in *Port of Longview*, the North Carolina court in *Stanley v. Department of Conservation and Development*\(^\text{117}\) also suggested that tax free bonding would injure state taxpayers. The *Stanley* court reasoned that the applicant businesses could in any event afford the cost of pollution control facilities, distinguishing situations, such as the issuance of revenue bonds to

\(^{114}\) It was indicated at oral argument that the financial arrangements utilized by Kaiser and Weyerhaeuser would also be available to smaller corporations and other businesses. Transcript of Oral Argument, *supra* note 77, at 10–12.

\(^{115}\) In *State ex rel. Beck v. York*, 164 Neb. 223, 82 N.W.2d 269, 273 (1957), the Nebraska Supreme Court expressed this fear:

> To permit such encroachments upon the prohibitions of the [state] constitution would bring about, as experience and history here demonstrated, the ultimate destruction of the private enterprise system.

The Idaho court in *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767, 775 (1960), implied that a decision in favor of the bonds would constitute the favoring of some industries at the expense of others and would act to encourage "socialism." *See also* *Stanley v. Department of Conservation & Development*, 284 N.C. 15, 199 S.E.2d 641, 657 (1973).


finance low income housing, which could not otherwise attract private investment. Pollution control was viewed as merely another cost of doing business. Adopting the Surrey analysis as applied to the bond market, the court reasoned that the cost to the taxpayers in the form of higher bond premiums could not be justified by the relative advantage which would be enjoyed by a few favored corporations.

The Port of Longview court also objected to favoritism of high income taxpayers. The court cited with approval language from a House Ways and Means Committee report complaining that the benefits of tax free municipal bond interest rates were unnecessarily high to attract the high income taxpayer and that this resulted in a federal revenue loss of $1.8 billion annually. Although the national problem obviously continues regardless of whether Washington municipalities issue pollution control bonds, the restriction of municipal bond issuance in Washington to general obligation bonds and revenue bonds for public purposes only would undoubtedly in some small measure contract the availability of the bonds, shrink the premiums and decrease the surplus benefit to high income taxpayers. It is somewhat strange, however, to find a lone state court vainly attempting to combat the advantageous financial position of the wealthy out-of-state bond-purchasers.

B. Distrust of Local Government

The Port of Longview decision may also be partially explained by the court's apparent distrust of local government. All three governmental bodies issuing the bonds did so without consulting their constituents; the decisions were made by persons such as port officials

118. See note 95 and accompanying text supra.
119. 199 S.E.2d at 656-57.
121. Forty-eight other states are now permitted to issue (and 32 states are issuing) pollution control bonds. Thus, the economic benefits of this financing gravitates to these states; since the industrial market is national, industry is unlikely to come into Washington where it must pay higher costs to do business. Cf. People ex rel. City of Salem v. McMackin, 53 Ill. 2d 347, 291 N.E.2d 807, 813 (1972). At the same time, Washington will effectively continue to pay an extra share of the federal taxes used to subsidize the special interest exemption utilized by these other states. Cf. Surrey, supra note 50, at 94-95. Clearly, the Washington court cannot control this situation; control, if any, must be left to Congress.
who, the court had reason to fear, were predisposed in favor of big business. The Washington court recently has shown a strong inclination in other contexts to review critically the decisions of local officials and to invalidate those decisions upon the slightest showing of misdealing. It may well be that this inclination was at work in *Port of Longview*.

C. *The Economy vs. the Environment*

The court's decision also may reflect a predilection for environmental protection, at the expense of economic development. The Washington court has treated the right to a healthy environment as fundamental and has liberally construed recent Washington legislation designed to protect the environment. Conjunctively, the court has strongly favored citizen participation in governmental actions affecting the environment. Although at first blush *Port of Longview* appears antienvironmental, in fact it is consistent with the court's penchant for environmental protection: The court was undoubtedly aware that Washington's statutory pollution control requirements would be enforced whether or not favorable financing was available to private parties, and thus the financing schemes at issue served only economic purposes. In addition, the court was no doubt well aware of the impact that *Port of Longview* would have on future financing of oil


125. See Leschi Improvement Council v. Washington State Highway Comm'n, 84 Wn. 2d 271, 525 P.2d 774 (1974). It is conceivable that the *Port of Longview* court imposed considerations of environmental protection and citizen participation sub silentio on the municipal corporations which approved the bonds; the bond approval involved no public input and no environmental impact statement. Thus, although an environmental impact statement was completed for the facilities, it is arguable that a statement for the bond financing should have been prepared prior to the issuance of the bonds. See Note, 49 WASH. L. REV. 939 (1974).

126. See notes 117-19 and accompanying text *supra*. 

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port facilities and atomic generating plants. How easy it must have appeared to discourage both projects without mention.

IV. RAMIFICATIONS OF PORT OF LONGVIEW

By its broad interpretation of the "loan its money, or credit" clause of Article VIII, Section 7, the Port of Longview court sweeps within the ambit of that constitutional provision nearly all financial transactions, other than ordinary payroll and contract payments, involving the issuance of a public obligation. Hence, those attempting to restrict the reach of Article VIII, Section 7, will in the future undoubtedly argue that the extension of credit at issue benefits "public," rather than "private," enterprise. Thus, the court will be called upon to construe the "to or in aid of any individual, association, company or corporation" language of Article VIII, Section 7, to determine the constitutionality of particular extensions of credit. Yet this allows the court to apply what could become in essence a public purpose test: the court will be at liberty to decide both what the "benefits" are, and whether the beneficiary is or is not "public." For example, the court will decide whether a financing arrangement which is intended primarily to benefit the public, but which secondarily aids certain private enterprise, is an unconstitutional extension of credit.

The nearly unlimited scope of judicial review is readily discernible; Port of Longview may prohibit the lending of public credit in any case in which the public has provided directly or indirectly some benefit to a private person.

The assertion of judicial power by the Washington court, despite all good intent, seems particularly improper in Port of Longview. The general presumption of constitutionality of legislation is even stronger in the economic context; in reviewing legislation dealing

127. See Leger, More Companies Sell Tax-Exempt Bonds For Pollution Control, Saving Millions, Wall Street Journal, July 8, 1974, at 24. col. 1. cited, Port of Longview, 84 Wn. 2d at 488 n.3, 527 P.2d at 270 n.3.

128. In State ex rel. Graham v. City of Olympia, 80 Wn. 2d 672, 497 P.2d 924 (1972), discussed in text accompanying notes 90-91 supra, the court found constitutional the purchase of time deposits by a municipality, suggesting that: "The primary purpose was not to aid the banking institutions, but to benefit the city . . . ." Id. at 677. 497 P.2d at 927.

129. Pinsky, supra note 8, at 318.

130. Hemphill v. Washington State Tax Comm'n, 65 Wn. 2d 889, 891. 400 P.2d
with economic issues, the Washington court has traditionally deferred to legislative fact-finding, unless, aided only by facts of which a court can take judicial notice, it can be said that the legislative declaration on its face is obviously false. Moreover, courts will not construct hypothetical situations suggesting unconstitutionality, absent "compelling countervailing considerations in the public interest." And where the legislature has made a declaration of public policy, the Washington court has repeatedly expressed its disinclination to disregard it.

When these principles are applied in the public financing arena, the impropriety of the wide-ranging, policy-oriented judicial review exhibited by the Port of Longview court becomes apparent. In Van Diest v. Yakima County, the court, reviewing the constitutionality of certain emergency fund expenditures, refused to consider whether those expenditures would cause the public body to "become seriously


131. In State v. J-R Distributors, Inc., 82 Wn. 2d 584, 603, 512 P.2d 1049, 1061 (1973), the court stated: "[I]f any state of facts reasonably can be conceived that will sustain [the legislation], there is a presumption that such facts exist." Similarly, in Clark v. Dwyer, 56 Wn. 2d 425, 431, 353 P.2d 941, 945 (1960), the court suggested: "Where possible, it will be presumed that the legislature has affirmatively determined any special facts requisite to the validity of the enactment, even though no legislative finding of fact appears in the statute."


Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty. The court may " . . . resort to encyclopedias, authoritative works upon the subject, reports of committees, scientific bodies and any source of information that is generally considered accurate and reliable . . . ."

In light of this standard, the Port of Longview court's reliance on newspaper articles, particularly in a case of such financial complexity, is highly questionable. See 84 Wn. 2d at 488 n.3, 527 P.2d at 270 n.3.

133. The Port of Longview court found only that "this form of financing cannot be said to have no impact on the state's ability to finance its other governmental obligations." 84 Wn. 2d at 486, 527 P.2d at 269. This is equivalent to a finding of only potential impact which, it is submitted, suggests that the court must have hypothesized situations resulting in detriment to the public fisc.

134. In re Jackson, 6 Wash. App. 962, 965 n.1, 497 P.2d 259, 261 n.1 (1972). Note that the Port of Longview court expressly disavowed any reliance on a public policy test. 84 Wn. 2d at 490, 527 P.2d at 271.

135. See WASH. REV. CODE § 70.95A.010 (Supp. 1973).


handicapped in carrying on its ordinary governmental functions."[138] The court opined: "Such a condition is obviously possible, but that presents a problem which is, in the first instance, administrative, and in the second, legislative. Clearly, it is not a judicial problem."[139] Clearly, the Port of Longview court would disagree.

Although the Port of Longview court purported "not to weigh the economic impact of the transactions,"[140] this statement is belied by the court's earlier economic discussion accompanying its finding of potential detriment to the public fisc.[141] Of course only by engaging in economic analysis can the court accurately determine the financial consequences of a particular public aid or loan scheme. Nonetheless, it is submitted that the court should adhere to the wisdom expressed in Van Diest, by refusing to gainsay legislative determinations absent conclusive findings to the contrary. Accordingly, in Port of Longview, only a finding of actual, rather than potential, endangerment of public funds would have been sufficient to support a finding of unconstitutionality.[142] The court's hypothetical findings, based upon sources of questionable reliability,[143] fail to adequately support reversal on constitutional grounds.

In a more immediate context, the Port of Longview decision raises broad questions touching many areas of governmental action. For example, the state tax credit to industry for installing pollution control equipment[144] invites a lending of money or credit analysis; the Aid to Higher Education Act[145] has already succumbed to reasoning similar

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138. Id. at 415, 65 P.2d at 1082.
139. Id. Compare Washington Kelpers Ass'n v. State, 81 Wn. 2d 410, 423, 502 P.2d 1170, 1177 (1972), in which the court stated: "But even assuming that the statute might have some material [economic] impact, this factor is for consideration during the legislative process, and has no relevance to the constitutionality of the enactment."
140. 84 Wn. 2d at 490, 527 P.2d at 271.
141. Id. at 486, 527 P.2d at 269.
142. State ex rel. Graham v. City of Olympia, 80 Wn. 2d 672, 497 P.2d 924 (1972) is instructive. In that case, the court refused to find actual threat to public funds by purchase of time deposits with public funds because of the "complete and absolute" insurance of the Federal Deposit Insurance Corporation. Id. at 681, 497 P.2d at 929. The court distinguished Aberdeen v. Nat'l Surety Co., 151 Wash. 55, 275 P. 62 (1929), because the time deposits held unconstitutional in that case were not "protected . . . at all times." 80 Wn. 2d at 683. 497 P.2d at 930. In each case, the court properly supported its conclusion with precise, factual determinations.
143. See note 132 supra.
144. WASH. REV. CODE § 82.34.050 (Supp. 1973).
Municipal Credit

to that in *Port of Longview*;\(^{146}\) and the Washington Health Care Facilities Act\(^{147}\) apparently falls within the scope of the decision.

### A. State Tax Credit for Pollution Control Facilities

The Washington State Legislature recently enacted a law permitting certain businesses to apply 2 percent of the installation cost of pollution control facilities against annual sales, use and business and occupation tax liability to a maximum of 50 percent of the installation cost.\(^{148}\) Since such businesses are already legally bound to install the pollution control equipment,\(^{149}\) the tax credit appears to be a gift of public money or property within the meaning of Article VIII, Section 7, of the state constitution.

Alternatively, the court might view the transaction as a lending of credit rather than a gift. Under the benefit-detriment analysis adopted by the court,\(^{150}\) the corporations have received an unearned benefit from the state in the form of the tax credit; the state has suffered an obvious detriment, a loss of revenue. Thus, credit has been unconstitutionally extended. Although the *Port of Longview* court did not rule on the constitutionality of the state tax credit statute\(^{151}\) because the issue was not properly raised, it is clear that the statute is vulnerable to constitutional attack.

### B. Aid to Higher Education Act

In *State Higher Education Assistance Authority v. Graham*,\(^{152}\) decided after *Port of Longview*, the court found the State Higher Education Assistance Act\(^{153}\) violative of Article VIII, Section 5, of the state

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148. WASH. REV. CODE § 82.34.050 (Supp. 1973).
150. Under Yakima v. Huza, 67 Wn. 2d 351, 407 P.2d 815 (1965), the fact that a credit rather than money is provided changes the reasoning only slightly. See text accompanying note 52 supra.
152. 84 Wn. 2d 813, 529 P.2d 1051 (1974).
constitution. The Act established a public corporation to provide loan assistance to college students, which included the purchase of federally insured student bank loans with the understanding that the lending banks would then issue additional student loans. The program was funded by private donations, earnings from student loans purchased and a small amount of public operating funds. The court held that all funds collected by the Loan Authority, a state instrumentality, were public and that the purchase of student loans with public funds constituted an unconstitutional lending of credit despite the federal guarantee of the loans.

Although *Port of Longview* was not mentioned, the *Graham* court’s reasoning with respect to the creation of public funds appears to be an extension of the *Port of Longview* analysis. In addition, the *Graham* court implicitly construed the “poor and infirm” language of Article VIII, Section 7, of the state constitution to refer only to individuals in actual need of assistance. This reasoning indicates that the court does not intend to limit *Port of Longview* only to those cases in which public benefits are bestowed primarily upon the wealthy and big business.

C. Washington Health Care Facilities Authority

In 1974, the Washington legislature adopted a Health Care Facilities Act providing for the financing of private hospitals. The Act empowers a Health Care Facilities Authority to issue no recourse revenue bonds and special fund refund bonds for the construction and leasing of hospital facilities with or without an option to purchase. The bond proceeds are specifically labeled trust funds. The intent of the Act is to provide assistance to group health and other plans in order to curb the rising costs of hospital care.

154. 84 Wn. 2d at 818, 529 P.2d at 1054.
155. Although the *Graham* court recognized that the act in question was “designed by its terms to aid any disadvantaged and needy student.” 84 Wn. 2d at 815, 529 P.2d at 1052, it nevertheless found:

This transaction is even more clearly a loan of credit than was the transaction we held violative of the constitution in *State ex rel. O’Connell* . . . . Although that case involved Const. art. 8, § 7, the principles involved are identical.

*Id.* at 818, P.2d at 1054. Apparently, then, the “disadvantaged and needy” character of the beneficiaries did not bring them within the “poor and infirm” exception of Article VIII, § 7, which is implicit in *id.* § 5.

157. *Id.* §§ 7 & 8.
The vitality of the Health Care Facilities Act is jeopardized, however, by the *Port of Longview* decision. Despite the trust fund language of the Act, both *Port of Longview* and *Graham* may dictate that these health care funds are public by virtue of their passage through a public treasury. If public funds are loaned to private persons, even if for a public purpose, a prohibited lending of public monies or credit may be found. Moreover, because the issuance of health care bonds has the same detrimental impact on future public financing as that condemned by the *Port of Longview* court, the court would likely find the Health Care Facilities Act unconstitutional on the same reasoning as applied in *Port of Longview* and *Graham*.

**D. Conclusion**

In *Anderson v. O'Brien*, six members of the court upheld disbursements of state funds to a federally recognized Indian tribe for the purpose of developing and constructing an industrial site and building to be leased to private manufacturing firms in order to stimulate job opportunities and reduce unemployment among the tribe. The court held that the tribe was "an entity with wholly public functions" and, therefore, a proper recipient of state funds under the State Economic Assistance Act of 1972 and Article VIII, Section 5, of the state constitution. The court proceeded to a public purpose analysis of the transaction under Article VII, Section 1 (amendment 14), stating:

Stimulation of investment and job opportunity for relief of unemployment and poverty are proper public purposes within this constitutional provision. Where it is debatable as to whether or not an expenditure is for a public purpose, we will defer to the judgment of the legislature.

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158. See note 154 and accompanying text supra; Part I–C–1 supra.
159. The group health plans, their member physicians and beneficiaries, are clearly private persons who receive a benefit under the Act as a result of state action in the form of lower hospital costs. Letter from Mr. John Riley, Counsel for King County Group Health, Inc., to Malachy R. Murphy, Dec. 5, 1974, on file with the Washington Law Review.
160. 84 Wn. 2d at 490, 527 P.2d at 271.
161. 84 Wn. 2d at 818, 529 P.2d at 1054.
162. 84 Wn. 2d 64, 524 P.2d 390 (1974).
163. WASH. REV. CODE ch. 43.31A (Supp. 1973).
164. The provision reads in part:
   All taxes shall be uniform upon the same class of property within the territorial limits of the authority laying the tax and shall be levied and collected for public purposes only.
165. 84 Wn. 2d at 70, 524 P.2d at 294–95.
Thus the public purpose test was satisfied.

Some of the transactions noted above which fall within the sweep of *Port of Longview* arguably may be defended on the basis of *Anderson*. *Anderson* indicates the permissibility of extending public credit or aid to otherwise “private” enterprises, with “wholly public functions.” The Indian tribe in *Anderson* was neither a truly private nor public enterprise. The court recognized that the tribe was a sovereign entity under federal law. If the court had considered only the status of the tribe as an entity, the extension of aid or credit to the tribe would likely have been unconstitutional since the tribe was not a clearly public entity such as the federal or state government, or subdivisions thereof.\(^\text{166}\) Rather, the court concentrated on the “public functions” of the tribe.

Accordingly, *Anderson* may be read to permit the extension of credit or aid to entities such as a Loan Authority, as in *Graham* (absent the aid to sectarian schools).\(^\text{167}\) In addition, it may be reasoned that a group health plan serves a “wholly public function” of overseeing the health care of the population. Nonetheless, *Anderson* will not provide relief from *Port of Longview* for enterprises such as Weyerhaeuser or Kaiser. Given the improbability of a rehearing in *Port of Longview*\(^\text{168}\) (to say nothing of a reversal upon rehearing), the only practicable solution to the problems presented by that decision is to amend the Washington Constitution to permit certain kinds of public financing in aid of private persons.

V. A PROPOSED CONSTITUTIONAL AMENDMENT

Consideration of the strengths and weaknesses of the constitutional amendments adopted in other states to permit public assistance for financing industrial development provides guidance in drafting a constitutional amendment in Washington.\(^\text{169}\) Such consideration suggests

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166. *Id.* at 67, 524 P.2d at 393 (citations omitted).

167. It is submitted that *Anderson* was not applied in *Graham* due to the court’s refusal to permit even indirect public aid to sectarian institutions, despite the public nature of their activities. The *Graham* court failed to consider the real benefit to students and to the public generally under the loan program.

168. A study compiled by the Washington Supreme Court Clerk’s office reveals that during the last two years 87 petitions for rehearing were filed but only one was granted. Telephone interview with William M. Lowry, Clerk of the Court, Olympia, Wash., Jan. 3, 1975.

169. See Part I-B supra.
the need for a balance: The amendment should be written so as to permit bond issuance for any legislatively approved projects for which no public liability arises, *i.e.*, no recourse revenue bonds; and, more stringent controls should be imposed for transactions in which the state or a municipality is obligated on the bond, *i.e.*, general obligation or recourse bonds. In the latter instance, voter authorization of the lending of aid or credit should be required. The amendment proposed below attempts to accommodate both needs. In addition, it permits limited tax credits and subsidies for legislatively approved private projects which provide broad benefits to the general population and result in losses to the persons who must implement the projects. The proposed amendment reads:

Notwithstanding the limitations and prohibitions applicable to gifts of state or municipal money or property, or to loans of state or municipal money or credit, the legislature may:

(1) Authorize the state or any subdivision thereof or any municipal corporation to issue revenue bonds to finance or refinance the cost of any project or program deemed by the legislature to be for a public purpose, and such issuance shall not be subject to the limitations upon state or municipal indebtedness or to the requirement of approval by the constituents of the state or municipal corporation: *Provided*, That such revenue bonds may be secured solely by the income derived from the project or the private person(s) whose project is financed by the proceeds of such bonds: *Provided further*, That such bonds may never become an obligation of the state, its subdivisions, or any municipal corporation within the state in the event of default upon the bonds;

(2) Authorize the state or any subdivision thereof or any municipal corporation to issue bonds secured by the full faith and credit of the issuing body: *Provided*, That the purposes for which such bonds are issued are public purposes: *Provided further*, That the limitations upon state and municipal corporate indebtedness and the requirement that state and municipal indebtedness be approved by a vote of the constituents of the issuing body shall apply; and

(3) Provide economic relief in the form of grants, loans or credits to any private person within the state who has been required by state legislative action to expend funds to further public purposes as determined by the legislature: *Provided*, That such relief shall not be a special privilege or immunity.

Adoption of the proposed amendment would align Washington with the majority of other states which have recently interpreted or amended their constitutions to permit public assistance for financing
certain industrial development. Authorization in Washington of financing which takes advantage of available federal tax benefits would remove the economic disadvantages suffered by Washington taxpayers, municipalities and private industrial concerns attempting to comply with the stringent federal and state statutory requirements for control of industrial pollution within the state's borders. Under the proposed amendment, pollution control facilities could be financed by public offerings subject to the same restraints imposed upon any development affecting environmental quality: citizen input and requisite environmental analysis, not stifling and inadequate judicial reasoning. In addition, the proposed amendment places Washington in a position to attract and retain desirable industries, to assist in providing financial aid to its student population, and to assist in providing health care facilities for its general population.

The Washington court has produced in *Port of Longview* an opinion which misinterprets and misapplies the law, denies the general presumption of constitutionality afforded economic legislation and provides only minimal guidance to prospective litigants. Although the court's presumed objectives of preserving environmental quality and restricting the power of the "municipal-industrial complex" may be praiseworthy, it is submitted that such wide-ranging, policy-oriented considerations are inherently matters for legislative and popular determination. The proposed amendment recognizes the need for such legislative and popular control in the contexts of state and municipal financing.

*Leslie A. Powers*

ADDENDUM: After the final editing of this note, the Washington Supreme Court denied petition for rehearing in *Port of Longview*. The court, however, also modified its prior opinion to hold, *inter alia*, that the statute at issue in *Port of Longview* was unconstitutional, not on its face but as applied, notwithstanding Amendment 45. 85 Wn. 2d _____, _____ P.2d _____ (1975). Portions of the note, especially Parts I-D, II & IV *supra*, should be reviewed in light of the court's modification.