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State Lending of Credit—New Analysis of State Constitutional Prohibitions—Washington Higher Education Facilities Authority v. Gardner, 103 Wn. 2d 838, 699 P.2d 1240 (1985)

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STATE LENDING OF CREDIT—NEW ANALYSIS OF STATE CONSTITUTIONAL PROHIBITIONS—*Washington Higher Education Facilities Authority v. Gardner*, 103 Wn. 2d 838, 699 P.2d 1240 (1985)

I. INTRODUCTION

In *Washington Higher Education Facilities Authority (WHEFA) v. Gardner*,[1] the Washington Supreme Court held that the issuance of nonrecourse bonds by WHEFA to finance building construction at private higher education institutions was permissible under article 8, section 5 of the Washington Constitution.[2] The opinion rectifies earlier contrary decisions[3] by making clear that the issuance of nonrecourse bonds is not constitutionally prohibited.[4] The court, however, in reaching this conclusion, adopted a new literal interpretation of the constitutional language, which may restrict the court's future analysis of lending of credit issues by unnecessarily precluding policy considerations.[5] Although the court's analysis adequately supported its conclusion in *WHEFA*, in future cases the court should continue to consider additional extenuating policy factors regarding public purpose and retention of public control utilized in other recent opinions[6] but not specifically included in the express language of the constitution.

II. BACKGROUND

Article 8, section 5 of the Washington Constitution provides, "[t]he credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation."[7] A similar provision, article 8, section 7, applies more expansive prohibitions to lesser governmental entities:

> 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,

1. 103 Wn. 2d 838, 699 P.2d 1240 (1985).
2. *Id.* at 847, 699 P.2d at 1245.
3. Washington State Housing Fin. Comm'n v. O'Brien, 100 Wn. 2d 491, 671 P.2d 247 (1983); Washington Health Care Facilities Auth. v. Ray, 93 Wn. 2d 108, 605 P.2d 1260 (1980); Port of Longview v. Taxpayers of Longview, 85 Wn. 2d 216, 533 P.2d 129 (1974). *See infra* notes 15–31 and accompanying text.
4. *WHEFA*, 103 Wn. 2d at 847, 699 P.2d at 1245.
5. *See infra* notes 55–66 and accompanying text.
6. *See infra* notes 72–78 and accompanying text.
7. WASH. CONST. art. VIII, § 5.

association, company or corporation, except for the necessary support of the poor and infirm . . . ."[8]

The case history of these constitutional provisions has been the subject of much scholarly commentary.[9] The provisions were part of the original text of the Washington Constitution[10] and were intended by the framers to prevent the harmful "effects on the public purse of granting public subsidies to private commercial enterprises, primarily railroads,"[11] where the public had little control of the marketing of the bonds, or the construction or management of the facilities.[12]

A significant development in interpretation occurred when the court decided that despite obvious differences in language, section 5 and section 7 were to be interpreted identically, resulting in a major expansion of the terms of section 5.[13] Although section 7 applies only to lesser governmental units, the court nevertheless extended its prohibitions and exemptions to the State by incorporating them into section 5.[14]

8. *Id.*, § 7. Section 7 also prohibits these governmental units from becoming "directly or indirectly the owner of any stock in or bonds of any association, company or corporation." *Id.* This prohibition is extended to the State in WASH. CONST. art. XII, § 9: "[t]he state shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association or corporation."

9. *See* C. KIPPEN, ARTICLE VIII, SECTIONS 5 AND 7: AN EXAMINATION OF THE PROVISIONS, THEIR IMPACT AND THE PROSPECTS FOR CHANGE (1979); Reich, *Lending of Credit Reinterpreted: New Opportunities for Public and Private Sector Cooperation*, 19 GONZ. L. REV. 639 (1984); Spitzer, *An Analytical View of Recent "Lending of Credit" Decisions in Washington State*, 8 U. PUGET SOUND L. REV. 195 (1985); Note, *State Constitution—Debt Limitations—Municipality's Issuance of Revenue Bonds to Finance Private Pollution Control Facilities Violates State Constitution*, 50 WASH. L. REV. 440 (1975) [hereinafter cited as Note, *State Constitution*].

10. *See generally* JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 675, 679–84 (B. Rosenow ed. 1962).

11. City of Marysville v. State, 101 Wn. 2d 50, 55, 676 P.2d 989, 992 (1984); *see also* Reich, *supra* note 9, at 641 (articles 5 and 7 were designed to prevent "excessive subsidies provided to railroads in the late nineteenth century"). For a discussion of the history of these provisions and similar provisions in other constitutions, see Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265 (1963); Comment, *State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations*, 108 U. PA. L. REV. 95 (1959); Note, *State Constitution*, *supra* note 9, at 446–47.

12. Reich, *supra* note 9, at 642.

13. Morgan v. Department of Social Sec., 14 Wn. 2d 156, 127 P.2d 686 (1942).

14. *Id.*; WASH. CONST. art. VIII, §§ 5, 7. Section 7 prohibits direct gifts of money or property, and loans of money or credit. It also contains an exemption for expenditures for the necessary support of the poor and infirm. *See generally* C. KIPPEN, *supra* note 9, at I-11.

The court has frequently reiterated this interpretation in recent years. *See WHEFA*, 103 Wn. 2d at 845, 699 P.2d at 1244; *In re* Marriage of Johnson, 96 Wn. 2d 255, 261 n.1, 634 P.2d 877, 880 n.1 (1981); Washington Health Care Facilities Auth. v. Ray, 93 Wn. 2d 108, 115, 605 P.2d 1260, 1264 (1980). *But see infra* notes 61–64 and accompanying text.

A "period of uncertainty"[15] in the analysis of sections 5 and 7 began with *Port of Longview v. Taxpayers of Longview,*[16] when the court first addressed the constitutionality of nonrecourse bonds. The decision greatly expanded the definition of "credit" in order to bring the proposed nonrecourse bonds within section 5.[17] The court stated that any benefit conferred by a governmental entity, including "[t]he loan of its name . . . 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."[18]

The court later followed and extended this already broad definition of "credit" in *Washington Health Care Facilities Authority v. Ray,* which also involved nonrecourse bonds.[19] In *Ray,* the court held that "a state or municipal corporation lends its credit whenever it allows its unique governmental status or authority to be utilized for the purpose of enabling a private corporation or individual to obtain property or money that it could not otherwise acquire for the same price."[20] The court only managed to find the scheme at issue permissible by utilizing the "poor and infirm" exception which the court found had been incorporated into section 5 from the language of section 7.[21]

The court reversed the trend of broadly construing the definition of credit in *In re Marriage of Johnson,*[22] decided only one year after *Ray.* In *Johnson,* the court held that state expenditure to enforce payment of child support did not violate section 5.[23] The plurality opinion stated that the state expenditure was in furtherance of a "recognized governmental function."[24] The court found such an exception necessary despite the lack of any textual support; otherwise, the application of section 5 to governmental programs "would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view."[25] The plurality also noted

15. Reich, *supra* note 9, at 647.

16. 85 Wn. 2d 216, 533 P.2d 128 (1974).

17. For a discussion of the extenuating factual circumstances in the *Port of Longview* decision that may have influenced the court in that case to reach a result-oriented conclusion, see Reich, *supra* note 9, at 648–49; and Note, *State Constitution, supra* note 9, at 468–72.

18. *Port of Longview,* 85 Wn. 2d at 227, 527 P.2d 263, 269 (quoting from State *ex rel* Beck v. York, 164 Neb. 223, 82 N.W.2d 269 (1957)).

19. 93 Wn. 2d 108, 605 P.2d 1260 (1980).

20. *Id.* at 113, 605 P.2d at 1263.

21. *Id.* at 115, 605 P.2d at 1264.

22. 96 Wn. 2d 255, 634 P.2d 877 (1981).

23. *Id.* at 267–68, 634 P.2d at 884.

24. *Id.* at 261, 264, 634 P.2d at 881, 882.

25. *Id.* at 262, 634 P.2d at 881 (quoting Rauch v. Chapman, 16 Wash. 568, 575, 48 P. 253, 255 (1897)).

that the State retained full control of the use of the funds and of the extent of state liability.[26] The plurality also announced in dicta that no lending of credit would be found where there was no risk of loss of state funds. Risk of loss was defined in the traditional borrower-lender sense as a state assumption of the obligations of private parties, unlike the expansive definition created in *Port of Longview.*[27]

Recently, the court continued the new approach by holding that nonrecourse bonds issued to help finance home mortgages were permissible under section 5.[28] In *Washington State Housing Finance Commission v. O'Brien,*[29] however, the court failed to conclude expressly that nonrecourse bonds do not constitute a loan of credit, but instead reviewed a variety of factors: presence of safeguards that retain public control, legitimacy of the public purpose, lack of risk of loss, and adequacy of consideration for the benefit conferred.[30] In doing so, the court greatly confused the analysis of section 5 issues by failing to indicate which factors were essential to its determination that section 5 was not violated.[31]

The final decision of importance prior to *WHEFA* was *City of Marysville v. State,*[32] in which the court, following the reasoning of *Johnson,* held that the importance of the "legitimate public purpose" to be served may validate a scheme which would otherwise violate the constitutional prohibitions.[33] The court implicitly overruled the overbroad definitions of "credit" found in *Port of Longview* and *Ray.*[34] The *Marysville* opinion, however, did not involve nonrecourse bonds.[35] It was not until the *WHEFA*

26. *Johnson,* 96 Wn. 2d at 268, 634 P.2d at 884.

27. *Id.* at 267, 634 P.2d at 883.

28. Washington State Housing Fin. Comm'n v. O'Brien, 100 Wn. 2d 491, 493, 671 P.2d 247, 248 (1983).

29. *Id.*

30. *Id.* at 497–99, 671 P.2d at 250–52.

31. As one commentator noted, the *O'Brien* case "analyzed the facts of the case as if state funds were being used. The court thus arguably affirmed *sub silentio* that part of its *Ray* decision that had broadened the definition of 'credit' beyond the historical notion of a correllative [sic] of debt. . . . The central problem of the *O'Brien* case and its holding is that it is difficult to apply." Reich, *supra* note 9, at 657.

32. 101 Wn. 2d 50, 676 P.2d 989 (1984).

33. *Id.* at 57, 676 P.2d at 993.

34. *Id.* at 52, 676 P.2d at 990. The statement in *Marysville* acquires added significance from the fact that it was written by Justice Utter, who had authored both *Port of Longview* and *Ray. See* Reich, *supra* note 9, at 653.

The dissent in *WHEFA* based its argument in part on *Ray.* In light of the questionable precedential value of the case, the reliance upon *Ray* by the dissent in *WHEFA* only weakened its arguments. *WHEFA,* 103 Wn. 2d at 851, 699 P.2d at 1247 (Goodloe, J., dissenting).

35. The *Marysville* opinion involved the payment of retroactive pension benefits to employees of a private golf course purchased by the city of Marysville. Under the provisions of the Public Employees' Retirement System, the city was required to contribute to the retirement fund a service credit for the employees' previous service at the course. In addition to utilizing its legitimate public purpose

opinion that the court directly reconsidered the threshold issue of whether the issuance of nonrecourse bonds constituted a loan of state credit.

III. THE *WHEFA* DECISION

The Washington Higher Education Facilities Authority[36] proposed to issue bonds for the benefit of Seattle University and Pacific Lutheran University.[37] The Authority was to issue the bonds in its own name, then create a trust fund from the proceeds, and loan the proceeds to the universities.[38]

Numerous features of the plan specified that no state liability could be incurred. Both the trust indentures and the bonds were to bear disclaimers of any obligation by the State or the Authority. All debt service and costs would be paid by the universities. No costs would accrue to the State. The bonds would be secured only by obligation of the universities. The Authority itself receives no money from the State; rather it derives its support from the benefitted higher education institutions.[39]

Two members of the board of the Authority, including the state governor, refused to sign the resolutions authorizing issuance of the bonds, asserting doubts as to their constitutionality under article 8, section 5. The Authority brought an action under the original jurisdiction of the state supreme court for a writ of mandamus to compel the nonsigning members of the board to sign the resolutions.[40]

After holding that the bond issuance would not violate federal or state constitutional religious restrictions,[41] the court addressed the issue of whether this scheme violated the constitutional prohibition against the loan

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exception, however, the court muddied its own analysis by also holding that the employees had provided consideration for the payments, thus removing any donative elements from the transfer. *Marysville,* 101 Wn. 2d at 58, 676 P.2d at 993. The court thus implied both that section 5 would apply but for the exception, and that section 5 did not apply because no donative transfer had occurred. *See infra* note 74.

36. The Authority was created by the Washington Higher Education Facilities Authority—Private Nonprofit Educational Institutions Act, WASH. REV. CODE §§ 28B.07.010–.920 (1983).

37. *WHEFA,* 103 Wn. 2d at 841, 699 P.2d at 1242.

38. *Id.*

39. *Id.*

40. *Id.* at 841–42, 699 P.2d at 1242.

41. *Id.* at 843–44, 699 P.2d at 1243. This Note does not focus on the merits of the court's analysis of the constitutional religious issues involved, but rather addresses only the court's analysis of the constitutional lending of credit issues. *See generally* Conklin and Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court,* 8 U. PUGET SOUND L. REV. 411 (1985); Comment, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions,* 71 VA. L. REV. 625 (1985).

of state credit. The court reviewed the prior interpretations of these provisions in the *Port of Longview*[42] and *Ray*[43] opinions and the subsequent contrary views in the *Johnson*[44] and *O'Brien*[45] opinions. The court then sidestepped all the prior methods of analysis, in favor of a simpler alternative analysis. The court identified four components to section 5, which must all be satisfied before an action will violate the section: "(1) credit (2) of the state (3) shall not be given or loaned to or used in aid of (4) any individual, association, company or corporation."[46] Since the State did not expend or provide for future expense of any state money in the *WHEFA* scheme, no debt was created, and so the attempt to apply article 8, section 5 failed upon the application of the first component.[47]

IV. ANALYSIS

After more than a decade of confusion, the Washington court properly concluded that nonrecourse bonds do not violate the constitution, thereby aligning Washington law with virtually every other state with a similar lending of credit provision.[48] The opinion thus clarified the analysis for future lending of credit cases in determining what actually constitutes "credit." The opinion did not specify, however, the proper analysis to be applied where a loan of credit is found, but implied that the court will look only to the literal words of the provision to evaluate any future schemes. Future analysis should not ignore the recent decisions which justifiably include interpretation of the intent of the framers as an important part of this area of constitutional analysis. The court should compare proposed schemes with those intended to be prohibited by the framers, focusing on the importance of the public purpose served, and the extent of public control retained over the funds.

A. Effect on Issuance of Nonrecourse Bonds

The reasoning used by the court indicates that the court is now fully convinced that article 8, section 5 will no longer be used to prohibit

42. 85 Wn. 2d 216, 533 P.2d 128 (1974).
43. 93 Wn. 2d 108, 605 P.2d 1260 (1980).
44. 96 Wn. 2d 255, 634 P.2d 877 (1981).
45. 100 Wn. 2d 491, 671 P.2d 247 (1983).
46. *WHEFA*, 103 Wn. 2d at 847, 699 P.2d at 1245. The court relied on Spitzer, *supra* note 9, as the origin of its literalistic treatment of the language of the provisions. *WHEFA*, 103 Wn. 2d at 847, 699 P.2d at 1245.
47. *WHEFA*, 103 Wn. 2d at 847, 699 P.2d of 1245.
48. *Id.* at 848, 699 P.2d at 1245; Note, *State Constitution*, *supra* note 9, at 447–49.

issuance of nonrecourse bonds.[49] For the purpose of determining the existence of credit, the court was correct to abandon the consideration of legitimacy of public function, or other unnecessary factors that have arisen since *Port of Longview*. Instead, the court properly focused on the narrow issue of whether any credit was loaned. The court succinctly set forth the factors which must be considered under the first prong of its definitional test in ascertaining the existence of a loan,[50] and these factors should aid future courts in similar decisions.

The *WHEFA* approach to defining credit is more consistent with the literal terms of the constitution. Prior courts erred in attempting to apply analysis of purpose and safeguards to the preliminary objective question of whether any credit at all is involved in the proposed scheme.[51] As the court in an earlier opinion stated, "section 5 should prohibit only those activities which jeopardize state assets."[52] A determination at the outset that no credit is present completely eliminates the need to consider section 5 as a barrier. The history of awkward analysis since *Port of Longview* has shown the conceptual inaccuracies and difficulties of the opposing viewpoint.[53]

The court's conclusion also reduces the economic uncertainty caused by the prior unpredictable treatment of nonrecourse bonds. Permitting widespread use of the nonrecourse bond procedure allows the State to encourage valuable development at no expense to the State.[54]

B. Effect on Other Loan of Credit Schemes

The *WHEFA* decision implied that the historical intent considerations that have been used by the court in earlier decisions may now be irrelevant.

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49. The court's statement that no violation of sections 5 and 7 occurs where no debt is created effectively permits all issues of nonrecourse bonds in the future, since the bonds by definition create no state liablility. *See generally* Note, *State Constitution, supra* note 9, at 443–46.

50. *WHEFA*, 103 Wn. 2d at 848, 699 P.2d at 1245. The factors the court reviewed to confirm that no state debt was created were:

(1) No money comes from the public treasury.

(2) The bond proceeds never enter the public treasury.

(3) Repayments of the bonds do not pass through the public treasury.

(4) The bonds are not state debts.

(5) Although bond sales are enabled by a public body, the money is not acquired either for or from the general public.

Id. (citing Washington Health Care Facilities Auth. v. Spellman, 96 Wn. 2d 68, 633 P.2d 866 (1981)).

51. *See, e.g.*, Washington State Housing Fin. Comm'n v. O'Brien, 100 Wn. 2d 491, 495–98, 671 P.2d 247, 250–51 (1983).

52. *In re* Marriage of Johnson, 96 Wn. 2d 255, 267, 634 P.2d 877, 883 (1981).

53. *See supra* text accompanying notes 15–31.

54. *See* Reich, *supra* note 9, at 658–61. Additionally, this use of state tax-exempt status has been foreseen and encouraged by Congress. Congress permits the use of state tax-exempt bond status for numerous types of private development projects. *See generally* Note, *State Constitution, supra* note 9, at 443–46.

The court instead indicated that its future analysis would look only to the literal application of the provision's components.[55] If this approach were adopted for all future lending of credit questions, it could create serious shortcomings and lack of needed flexibility in the court's analysis of future lending of credit schemes.

The court's dissection of the express language of section 5 into its four components does not provide a fully adequate framework for analysis. The use of only the four components would require courts to invalidate schemes merely because some measure of benefit flows from the State to an "individual, association, company or corporation."[56] Courts would be forced to invalidate schemes which are harmless, or provide significant public benefits.[57] Literal interpretation of the language of sections 5 and 7 has been used, for example, to invalidate a plan for the state payment of burial expenses for indigents,[58] a program to distribute energy conservation materials,[59] and a proposal to donate an old bus to a school for the retarded.[60]

A second effect of the *WHEFA* decision is that the court, in isolating only four factors for its analysis of section 5 issues, may have limited the ability to use provisions from section 7 as aids to its analysis of section 5.[61] The separation may have both positive and negative effects. The analysis of the two provisions would be greatly simplified, thus preventing the recognizably strained analytical acrobatics that have occurred in such opinions as *Ray*[62] and *O'Brien*.[63] The separation of the two would also result in the validity of a greater number of state programs, since section 5 contains fewer prohibitions than section 7. Although the long history of joint interpretation may make it doubtful that the court will quickly jump to the separate interpretation of the two sections, the implication of *WHEFA*, and the dicta in certain earlier opinions,[64] is that the court may

55. *WHEFA*, 103 Wn. 2d at 847, 699 P.2d at 1245.

56. WASH. CONST. art. VIII, § 5.

57. *See* Reich, *supra* note 9, at 661:

> Private benefit is a predictable and often essential attribute of public programs undertaken primarily to serve public purposes. The fact that a private entity may receive some benefit from the legitimate exercise of the legislative authority should not necessarily implicate the constitutional prohibitions against the lending of public credit.

58. Washington v. Guaranty Trust Co., 20 Wn. 2d 588, 148 P.2d 323 (1944).

59. 1978 Opinion Att'y Gen. No. 13, at 4.

60. City of Seattle Opinion No. 5249 (1967). See C. KIPPEN, *supra* note 9, at V-2 to V-10, for an extensive list of programs found constitutionally invalid.

61. *See supra* notes 13–14 and accompanying text.

62. 93 Wn. 2d 108, 605 P.2d 1260 (1980).

63. 100 Wn. 2d 491, 671 P.2d 247 (1983). The confusion brought about by the treatment of the two differing provisions as identical has been acknowledged. *See, e.g.*, Washington Health Care Facilities Auth. v. Ray, 93 Wn. 2d 108, 116–17, 605 P.2d 1260, 1264 (1980) (Dolliver, J., concurring).

64. In *In re* Marriage of Johnson, 96 Wn. 2d 255, 262, 634 P.2d 877, 881 (1981), the court appeared

begin to attribute significance to the differences in wording between the two sections.

The negative result of such an approach, however, would be that conduct which the constitutional framers may have actually intended to prohibit, for example, direct gifts by the State to private individuals, may no longer come under the prohibitions of section 5. Under the terms of section 5, only lending or giving of *credit* is prohibited, with prohibitions against gifts of money or property added only through the traditional interpolation of section 7 into section 5.[65] The intent of the framers was to prohibit all gifts,[66] but if the two provisions are separated, section 5 would provide only limited prohibitions against gifts. Until such time as the court resolves this issue, cautious litigants using section 5 cannot assume that the prohibitions and exceptions of section 7 automatically apply to state conduct regulated under section 5.

V. PROPOSED FRAMEWORK FOR ANALYSIS OF LENDING OF CREDIT SCHEMES

A possible approach to future section 5 analysis involves the use of a six-step framework that would provide adequate consideration to both the letter and the intent of the constitution.[67] Four of the factors are those identified by the *WHEFA* court in its dissection of the language of section 5. First, the court should consider the nature of the res transferred, or "simply [ask] whether the bonding scheme constitutes creation of a public debt (credit)."[68] Second, the court should consider the nature of the party making the transfer, since the language of section 5 requires that the credit loaned be that of the State itself.[69] Third, consideration should be given to the nature of the exchange, i.e., whether it is a gift, a loan, or a bargained exchange supported by consideration, corresponding to the "shall not in

to retract from its earlier interpolation of section 7 language into section 5. The court identified a "poor and infirm" exception from section 5, but rather than treating it as an interpolation from section 7, the court merely stated, "[a]id to the poor and infirm is one example of a governmental function, and hence it has been excepted from the section 5 prohibition." *Id.* Thus, the court separated the exception from its origins in section 7, thereby indicating that the two sections need not be interpreted together. *See* Washington Health Care Facilities Auth. v. Ray, 93 Wn. 2d 108, 115, 605 P.2d 1260, 1264 (1980); Morgan v. Department of Social Sec., 14 Wn. 2d 156, 127 P.2d 686 (1942).

65. *See supra* notes 13–14 and accompanying text.

66. During the Washington constitutional convention, one delegate moved to amend section 5 to cover donations. The motion lost, with two members expressing their opinion that the words "in any manner be given" would be sufficient. JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 675 (B. Rosenow ed. 1962).

67. C. KIPPEN, *supra* note 9, at I-19.

68. *WHEFA*, 103 Wn. 2d at 846, 699 P.2d at 1245.

69. *Id.* at 847, 699 P.2d at 1245; C. KIPPEN, *supra* note 9, at I-19.

any manner be given or loaned to, or in aid of" clause of section 5.[70] The fourth factor to be considered is the nature of the party receiving the transfer, i.e., whether the recipient is an "individual, association, company or corporation."[71]

The final two factors do not correspond to any express language in section 5, or even section 7. Courts have, however, considered these factors in the past.[72] The court must consider the nature of the purpose to be served by the scheme and whether that scheme serves a sufficiently important purpose to counterbalance any private benefit that might be involved.[73] Public purpose must be considered as a factor able to override private benefit, since every expenditure of or risk to public funds will always provide some quantum of benefit to private entities.[74]

Finally, as a sixth factor, the court should consider whether the scheme includes sufficient controls upon the res in the recipient's hands to minimize the risk of loss of public funds.[75] These two factors, importance of public purpose and extent of public control, should be considered in tandem—a strong showing of public purpose could satisfy the test, even though retained controls were weak, or very stringent supervisory controls could make up for a less than compelling public purpose. In fact, this is the method by which the court has appeared to utilize these factors.[76] These final two factors should serve to bridge the gap between the overbroad

70. WASH. CONST. art. VIII, § 5.

71. *Id.*

72. City of Marysville v. State, 101 Wn. 2d 50, 57–58, 676 P.2d 989, 993–94 (1984); Washington State Housing Fin. Comm'n v. O'Brien, 100 Wn. 2d 491, 497–99, 671 P.2d 247, 250–52 (1983); *In re* Marriage of Johnson, 96 Wn. 2d 255, 634 P.2d 877 (1981); *see supra* notes 1–35 and accompanying text.

73. *See* Reich, *supra* note 9, at 651–52: "The purpose of government is to serve a 'public' which is comprised of 'private' persons, many of whom are neither poor nor infirm. Whenever a municipality constructs a road, sewer or water system, it provides benefit to private parties."

74. *Id.* at 661; *see supra* note 57.

This overt analysis of public purpose is preferable to the contrived methods of analysis which have been used. For example, some courts have treated fulfillment of a significant public purpose as constituting a substitute for consideration, removing the scheme from the definition of "gift." *See, e.g., O'Brien*, 100 Wn. 2d at 497, 671 P.2d at 251 ("state aid to a circumscribed class of the public, in furtherance of legitimate state objectives, may provide the necessary 'consideration' for the aid"); *Johnson*, 96 Wn. 2d at 262, 634 P.2d at 881 ("[t]he public benefit achieved from such activities is the 'consideration' for the funds expended"). Using public purpose as a substitute for consideration has a major analytical weakness, since traditional contract law principles do not allow a court to review the adequacy of consideration. J. CALAMARI & J. PERILLO, CONTRACTS § 4–3, at 136 (1977). If even a remote or insignificant public benefit were present, the court would be forced to find consideration that would remove the scheme from section 5. This would clearly be contrary to the intent of the framers of this section, since even the railroad schemes which the section was designed to prohibit provided some measure of public benefit by providing improved transportation facilities.

75. C. KIPPEN, *supra* note 9, at I-19.

76. *See supra* note 72 and cases cited therein.

prohibitions of the section and the specific goals of the framers in shaping the section.[77]

The *WHEFA* court was correct not to consider these factors in deciding the threshold question of whether there was an actual loan involved, but the court should include these factors later in its analysis of the constitutionality of future schemes. Consideration of these factors is necessary in order to give full effect to the policies underlying the provisions without unduly restricting or expanding the range of permissible schemes under section 5. Use of the literal language of the provisions alone necessarily leads to the rejection of desirable schemes that utilize loans of credit in ways that would have been acceptable to the constitutional framers.[78] Overt consideration of these factors serves to bring the court's implicit analysis of policy into the open and provide predictable standards for determining which programs will be acceptable.

VI. CONCLUSION

The court's simplified, literal analysis of section 5 suited its purpose in deciding that nonrecourse bonds are not constitutionally prohibited. But future opinions must look beyond the literal language to give due consideration to the historical intent behind the provision. A careful application of the literal requirements of the language of the section, tempered by consideration of historical intent and the extenuating circumstances of substantial public purpose and retention of public control of the funds, will both clarify the analysis in this long-muddied area and fulfill the letter and the underlying policy of the constitution.

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77. *See supra* notes 11–12, 57–60 and accompanying text.

78. As one commentator wrote, "[t]he fact that a contractor earns a profit by constructing a public jail does not render the project unconstitutional." Reich, *supra* note 9, at 659.