Another Day Older and Deeper in Debt: Debt Limitation, the Broad Special Fund Doctrine, and WPPSS 4 and 5

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I. Introduction

In the late 1800's, most states imposed constitutional and statutory limitations upon the debt-incurring ability of state and local governments.[1] These restrictions were applied primarily in response to the financial debacles of the 1830's and early 1840's when governments engaged in heavy borrowing to finance internal improvements such as canals and railroads.[2] Soon after the limitations were imposed, however, it became evident that the measures were too rigid and did not allow local officials to provide for even a conservative level of improvements. Consequently, courts began to validate a number of devices whereby a city or other municipal corporation could evade debt limitations. The most important device to emerge was the Special Fund Doctrine.[3]

In its initial form, the Special Fund Doctrine was a simple concept consistent with the rationale underlying debt limitation. Briefly stated, the doctrine provided that an obligation which was to be repaid solely from a particular project financed was not debt subject to constitutional, statutory, or charter limitations.[4] In effect, the obligation became a "self-liquidating" project. However, as time passed and memories of the financial disasters of the 1880's grew dim, courts applied the Special Fund

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1. Bowmar, *The Anachronism Called Debt Limitation*, 52 Iowa L. Rev. 863 (1967).

2. Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond*, 63 Minn. L. Rev. 545 (1979); Bowmar, *supra* note 1, at 863.

3. Other devices include special assessments, separate taxing authorities, and sale-leaseback agreements. *See generally* Williams & Nehemkis, *Municipal Improvement As Affected by Constitutional Debt Limitations*, 37 Colum. L. Rev. 177 (1937).

4. *See* 56 Am. Jur. 2d *Municipal Corporations* § 654 (1971); Annot., 146 A.L.R. 328 (1943); Annot., 96 A.L.R. 1385, 1395 (1935); Annot., 72 A.L.R. 695 (1931).

Doctrine in a variety of situations which stretched, if not totally escaped, the concept of self-liquidation. To determine whether a special fund existed, it became necessary to ask whether a debt was payable out of tax monies rather than whether a debt was payable solely from the proceeds of the particular project financed. In a sense, the doctrine was transformed from an exception to the rule to the general rule itself. So long as the source of repayment was related to the project funded, the obligation was not debt unless tax dollars were subject to liability.

This broad special fund concept worked well in the early and mid-1900's. There were relatively few local government defaults,[5] and the federal government assumed a more active role in the construction of highways and other large projects. Courts had no incentive to restrict the scope of the doctrine because by expanding the sources of payment for any municipal debt, the risk to the investor decreased. As a consequence, the borrowing costs to the municipality were reduced.

However, with the Reagan administration's revival of federalism, more and more financial responsibility will likely be placed upon local governments. Moreover, population increases and the energy situation have imposed upon city officials the burdensome task of raising the tremendous amounts of capital required to build mass transit and alternate energy facilities.

The weakness of the Broad Special Fund Doctrine becomes evident when viewed in light of its application to an enormous debt such as construction of a multi-billion dollar power plant. Furthermore, the doctrine is directly at odds with the purposes underlying constitutional and statutory debt limitations. This article will present a brief history of debt limitation provisions. Next, it will discuss the history of the Special Fund Doctrine and will set forth criticisms of the Broad Special Fund Doctrine. The article will conclude by recommending a concept for a Narrow Special Fund Doctrine and by applying it to the construction of two nuclear power plants by the Washington Public Power Supply System (WPPSS)[6] in order to illustrate the recon-

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5. Bowmar, *supra* note 1, at 880.

6. The Washington Public Power Supply System (WPPSS) is a municipal corporation created by statute, WASH. REV. CODE § 43.52.250 (1981) and composed of 19 public utility districts and four city electric departments in Washington state. WPPSS is authorized to construct nuclear generating facilities, WASH. REV. CODE § 43.52.300 (1981), and, as late as December, 1981, was overseeing the simultaneous construction of five nuclear power plants in Washington. The WPPSS 4 and 5 project is utilized as an

ciliation of the conflicting goals of sound fiscal policy and practical flexibility.

II. History of Debt Limitation Provisions[7]

In the early 1800's, many states sold bonds backed by their general taxing power to finance improvements in transportation and other commercial projects.[8] The first such project was the Erie Canal, financed by the State of New York in the 1820's.[9] The canal was an enormous financial success as toll revenue quickly exceeded the interest payments on the debt.[10] More importantly, the canal established New York City as a leader in trade with the frontier, and raised land and farm prices in the state as well.[11] Other states looked with envy upon the benefits gained by commercial and agricultural interests in New York, and soon many other large scale public improvement projects were concocted.[12] Modeled after the Erie Canal, the projects were backed by the general credit and taxing power of each individual state. Unlike the canal, however, many of these projects were neither well-planned nor necessary.

With the advent of the financial panic of 1837, many of the speculative schemes produced little or no revenue although the indebtedness had been contracted and the proceeds spent.[13] When the tremendous debt service costs became due, state governments had no choice but to impose heavy taxes to pay the obligations. The taxpayer reaction was predictably bitter.[14]

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example here because of the large amount of money at risk (over 2.5 billion dollars in principal), the failure of the project, and the fact that the financing scheme relied upon the Special Fund Doctrine.

7. For a more detailed account of the events leading up to the imposition of debt limitations, see B. Ratchford, American State Debts (1941); H. Adams, Public Debts (1887); Secrist, *An Economic Analysis of the Constitutional Restrictions Upon Public Indebtedness in the United States*, 8 Bulletin of the University of Wisconsin, Economic and Political Science Series 1 (1914); A. J. Heins, Constitutional Restrictions Against State Debts (1963); and W. Scott, The Repudiation of State Debts (1894).

8. Gelfand, *supra* note 2, at 546.

9. *Id.*

10. A. J. Heins, *supra* note 7, at 3.

11. B. Ratchford, *supra* note 7, at 546.

12. A. J. Heins, *supra* note 7, at 4.

13. *Id.* at 7.

14. The citizens of that part of the state in which I reside are particularly tenacious upon the subject of public debt and taxation. They have been taxed, and re-taxed and over-taxed, year after year . . . . And sir, we ask now, that debt-contracting, loan-laws, and money-squandering may forever be put an end to—that the whole system may be dug up by the roots and no single sprout

Moreover, in some states, the magnitude of the debts incurred exceeded the taxpayer's ability to meet these obligations. Thus, many states were forced to repudiate or suspend payment on their loans.[15] Between 1840 and 1850, in response to heavy political pressure from angry citizens, 19 states[16] amended their constitutions to include restrictions on legislative borrowing.[17] These provisions were largely copied by new states which subsequently entered the Union.[18]

In the years following the Civil War, interest in internal improvements, especially railroads, was revived. Local governments, generally unregulated by the original debt limitations, assumed an entrepreneurial role similar to that played by the states in the 1840's.[19] Because of the great economic and social advantages to be gained by securing a railroad line, many cities granted extravagant subsidies to railroads in the form of land grants, extensions of public credit, and public investment in railroad stock.[20] As with the Erie Canal, most of these subsidies were financed through bond sales backed by the general taxing power of the municipal government.

> ever be permitted to ever be hung up around the necks of the people of this state again . . . . Leave no sprout to germinate into "plunder laws" and taxation—secure the public treasury against all such drains, burdens, waste, and plundering systems, so that one can at least rest secure in the future, and as if there was a "good time coming" when our taxes would be lessened, and we finally be relieved of the intolerable debt and taxation which now hangs upon us.

REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR REVISION OF THE CONSTITUTION FOR THE STATE OF OHIO 1850-1, at 469 (1851).

15. Mississippi, Florida, Arkansas and Michigan repudiated debts totalling nearly $14 million. Five additional states defaulted on loan payments. *See* A. J. HEINS, *supra* note 7 at 8.

16. Bowmar, *supra* note 1, at 863.

17. A typical debt provision is one enacted by Rhode Island in 1842:

> The general assembly shall have no power, hereafter, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war, or in case of insurrection or invasion; nor shall they in any case, without such consent, pledge the faith of the state for the payment of the obligations of others.

R.I. CONST. art. IV, § 13 (repealed June 28, 1951).

18. Bowmar, *supra* note 1, at 863; *see, e.g.*, Wormington v. Pierce, 22 Or. 606, 612, 30 P. 450, 451 (1892).

19. Comment, *Legal Limitations on Public Inducement to Industrial Location*, 59 COLUM. L. REV. 618, 620 (1959) [hereinafter cited as *Legal Limitations*]; Bowmar, *supra* note 1, at 864; Gelfand, *supra* note 2, at 547; Williams & Nehemkis, *supra* note 3, at 177-79.

20. Bowmar, *supra* note 1, at 864; Gelfand, *supra* note 2, at 547; Williams & Nehemkis, *supra* note 3, at 177-79.

Contemporaneously, under the name of "public improvement," heavy, ill-considered expenditures were made for streets, sewers, waterworks, and many other projects.[21] The result was that by 1880 municipal debt had reached the sum of $728,000,000.[22] The excessiveness of the amount is illustrated when compared with a municipal debt in 1840 of scarcely $20,000,000.[23] Amid the financial panic of 1873, many cities defaulted on their debt payments.[24] The states reacted by imposing constitutional debt limitations on local governmental units similar to the "pay as you go" policy of state restrictions.[25] Additional limitations were applied in the wake of a new wave of municipal defaults which coincided with the panic and depression of 1893.[26]

The constitutional debt restrictions were generally of three types: (1) local units were forbidden to lend credit to or acquire stock in private corporations; (2) the amount of municipal debt was limited to a specified percentage of assessed value of property subject to tax;[27] and, (3) the amount of indebtedness incurred in any one year was limited to the income and revenue for that year.[28] These types of restrictions generally prevail today with a debt-to-property ratio being the most common type.[29] In addition, some states delegate the form and amount of the limitations to the legislature or city charters.[30] Most states exempt restrictions in situations where local voter approval has been given to a debt, although generally more than a mere majority is required. It is generally agreed that the primary purpose of the ceilings was to promote sound fiscal policy by preventing in advance the imposition of an excessive tax

21. Williams & Nehemkis, *supra* note 3, at 179.

22. *Id.* at 180.

23. *Id.*

24. Secrist, *supra* note 7, at 59-60. It has been estimated that 13 to 20 percent of municipal bonds were in default during the years 1873-79. Gelfand, *supra* note 2, at 547.

25. Gelfand, *supra* note 2, at 547.

26. *Id.*

27. *See* 15 E. McQuillin, The Law of Municipal Corporations § 41.08 (3rd ed. 1970).

28. *Id.* at § 41.10.

29. *See* Bowers, *Limitations On Municipal Indebtedness*, 5 Vand. L. Rev. 37 (1951).

30. *E.g.*, article XI, § 5 of the Oregon Constitution states that "Acts of the Legislative Assembly, incorporating towns, and cities, shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit."

burden.[31]

When the taxpayers finally moved to enact debt limitations, they imposed excessively confining restrictions. One commentator explained that the debt provisions were apparently based upon the premise that strict standards would provide the surest protection and that the limits permitted enough room for local governments to provide for future needs.[32] However, both of these assumptions soon proved to be faulty. The limitation provisions were simply too rigid to accommodate the compelling demands of government. Pressures created by the public's desire for expanded services such as sewage disposal, garbage collection, parking lots, utilities, and other services served to convince individual courts that strict compliance with the limitations would impose substantial hardships.[33] Confronted by these practical realities, the courts approved a number of devices which enabled state and local officials to evade debt limitations.[34] The most commonly used of these devices today is the special fund.

III. The Special Fund Doctrine

The Special Fund Doctrine was first created by analogy to an earlier evasive device, the special assessment. Under the special assessment theory, obligations were issued by a city to cover the cost of an improvement and were payable solely from charges upon the property directly benefited.[35] Special assessment improvements were generally of a non-income producing nature, such as a street, sewer, or sidewalk. Courts were sympathetic to the use of the device. The procedure imposed no general tax burden on the public as a whole and was therefore con-

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31. The reasoning behind the restrictions is variously denominated as a desire to promote the common good and welfare; to provide the minority with a means of checking an improvident majority; to install the city on a pay as you go basis; to prevent the present administration from imposing too great a burden on its successors and on the taxpayers at large; to prevent the pledging of more than a certain part of the taxpayers' property for debt; to check the proneness of a municipality to incur indebtedness, especially where the burden can be cast on posterity; to serve as a limit to taxation and for protection of the taxpayers; to maintain municipal solvency; and to protect persons and their property from an abuse of corporate credit and its consequent burdensome, perhaps ruinous taxation.

Bowers, *supra* note 29, at 41 (*See* citations therein).

32. Bowmar, *supra* note 1, at 867.

33. *See* Bowers, *supra* note 29, at 44.

34. *See generally* Williams & Nehemkis, *supra* note 3.

35. *See* Bowers, *supra* note 29, at 47; Bowmar, *supra* note 1, at 873-74.

sistent with the theory of debt limitation. In effect, a governmental unit served merely as a conduit for funds to pass from users of the improvement to the financiers of the project. Thus, all risk of loss fell upon the bond holders.

With the special assessment precedent firmly established, the Supreme Court of Washington was apparently the first to extend the conduit idea one step further to encompass a special fund. In the case of *Winston v. City of Spokane*,[36] the Washington Supreme Court held that obligations created to complete a system of waterworks did not constitute debt within the meaning of the state constitutional debt limitations. The obligations were payable solely from a fund consisting of revenues derived from the waterworks. The court noted that in no event would the city be required to make payment on the debt out of its general funds. Failure to create the fund was deemed the only possible liability for the city; thus, the transaction was considered equivalent to an issue of warrants payable out of a fund created by an assessment upon property benefited by a local improvement.[37]

In *Winston*, the Washington court implicitly defined the word "debt," within the context of its constitutional prohibitions, to mean the general credit or general revenues of a city. At that time, municipal revenue consisted almost exclusively of tax receipts.[38] The *Winston* court found the obligation acceptable because repayment on the debt was limited to a fund fed solely by income from the completed project. The project thus was self-liquidating, and the taxpayers of Spokane were insulated from risk of loss on the project. Since public revenues were protected, the obligation was held not to be "debt" within the scope of the constitutional ceilings.

Although many other states considering the matter soon agreed that a self-liquidating special fund was not debt, a split of authority arose as to just how self-supporting a special fund had to be. The restrictions placed upon the doctrine by individ-

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36. 12 Wash. 524, 41 P. 888 (1895).

37. The general credit of the city is in no manner pledged except for the performance of its duty in the creation of such special fund. The transaction, therefore, is no more the incurring of an indebtedness on the part of the city than is the issue of warrants payable out of a special fund created by an assessment upon the property to be benefited by a local improvement.

12 Wash. at 527, 41 P. at 889.

38. Gelfand, *supra* note 2, at 549; *see also* Bowmar, *supra* note 1, at 867.

ual courts separated the various states into two schools of thought: those favoring the narrow special fund and those supporting a broad special fund.[39] The distinguishing factor between the two concerned what revenues could properly be included within the special fund.

The State of Illinois in 1902 was one of the first to recognize the restricted or narrow special fund in the leading case of *City of Joliet v. Alexander*.[40] In *Alexander*, the city proposed by ordinance to sell fund certificates to finance the construction of an extension to the existing system of waterworks. The ordinance provided that a mortgage would be placed on the entire waterworks system, and in addition, required the city to deposit all water revenues into a special fund. The fund was to be solely liable for repayment of the certificates. In holding that the plan created debt and was therefore invalid, the Illinois Supreme Court noted that the special fund would be fed by *existing* property of the city in the form of established revenues. Thus,

> [t]his is not a case where there is no obligation of the city except performance of a duty in the creation and management of a fund, and where the waterworks, upon paying for themselves, will become the property of the city. The reasoning in *Winston v. Spokane*, 41 Pac. Rep. 88, cannot be applied to a case like this and could only apply to property or a fund which the city never had, or the property is to be paid for by its own earnings without imposing any further liability on the city.[41]

The view expressed in *City of Joliet v. Alexander* reflected a relatively strict interpretation of constitutional language. States adhering to the Narrow Special Fund Doctrine insisted that if a municipal obligation was to be judicially exempted from constitutional or charter debt limitations, the obligation must be completely self-liquidating. Thus, for example, if a city or a state wished to create a special fund to finance additions to an existing system of waterworks, the special fund had to be limited to only those revenues directly allocable to the additions.

The narrow special fund concept was initially accepted by a large number of jurisdictions, most notably California[42] and

39. *See* Bowers, *supra* note 29, at 48-49; Williams & Nehemkis, *supra* note 3, at 188-97. *See also* citations, *supra* note 4.

40. 194 Ill. 457, 62 N.E. 861 (1902).

41. *Id.* at 464, 62 N.E. at 863.

42. Garrett v. Swanton, 216 Cal. 220, 13 P.2d 725 (1932), *rev'd sub nom.* City of Oxnard v. Dale, 45 Cal. 2d 729, 290 P.2d 859 (1955).

Utah.[43] However, as time went by, nearly every one of these states rejected their former position in favor of the more flexible broad special fund concept.[44] The trend continues presently; today the vast majority of states follow, either implicitly or expressly, the Broad Special Fund Doctrine.[45]

IV. Criticism of the Broad Special Fund Doctrine

In contrast to the narrow special fund, the broad special fund concept reflects a relatively loose interpretation of constitutional debt provisions. The Broad Special Fund Doctrine essentially provides that an obligation, if it is to be repaid solely out of revenues related to the project financed, will not be considered debt subject to limitations unless the bondholders have a potential legal claim upon tax monies.[46] The key question to ask in determining the existence of a qualified broad special fund is whether tax dollars are subject to liability on the debt.

An illustration of how a broad special fund differs from a narrow special fund may be shown by a simple example. Suppose a city wishes to finance the construction of a new electrical generating plant because of a projected demand in the immediate future far in excess of the capacity of its existing plant. If the city were to sell bonds and agree to make payments thereon solely out of the revenues it derived from the operation of its *entire* electrical system, the plan would be considered debt under the narrow special fund concept, but not under a Broad Special Fund Doctrine analysis.

The financing plan would not qualify as a narrow special fund because the sources of repayment on the obligation included presently-existing revenues. These revenues are attributable not to the plan financed, but to the generator already owned by the city. Therefore, the financing plan is not completely self-liquidating as required by the narrow Special Fund Doctrine.[47] On the other hand, under the Broad Special Fund

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43. Fjeldsted v. Ogden City, 83 Utah 278, 28 P.2d 144 (1933).

44. City of Oxnard v. Dale, 45 Cal. 2d 729, 290 P.2d 859 (1955); Ward v. City of Chicago, 342 Ill. 167, 173 N.E. 810 (1930).

45. Williams & Nehemkis, *supra* note 3, at 209-11. *See also* citations, *supra* note 4.

46. Butler v. City of Ashland, 113 Or. 174, 232 P. 655 (1925); Frank v. City of Cody, 572 P.2d 1106 (Wyo. 1977); Board of Comm'rs v. All Taxpayers, 360 So. 2d 863 (La. 1978); State *ex rel* Grimes County Taxpayers Ass'n v. Texas Mun. Power Agency, 565 S.W.2d 258 (Tex. 1978); Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982).

47. City of Joliet v. Alexander, 194 Ill. at 464, 62 N.E. at 863.

Doctrine, the very same financing scheme would not be "debt" within the scope of the limitation provisions. The plan does not commit or implicate tax monies in repayment of the bond; therefore, the fund created would qualify as a bona fide "special fund" under the broad view.

Although many states originally embraced the narrow special fund idea, several factors lead to the general acceptance of the Broad Special Fund Doctrine. Chief among these was the apparent intention expressed in the debt limitations themselves of protecting local *taxpayers* from excessive *taxation.* Given that most debt provisions were originally phrased in terms of tax revenues or assessed value of property subject to tax,[48] it is not surprising that courts tended to focus primarily on tax monies in construing the scope of the ceilings. Moreover, it appears that when confronted with a particular financing scheme that was potentially self-liquidating, and at the same time with the fact that there had been few recent defaults,[49] courts were inclined to approve projects which were unquestionably desirable and necessary.[50]

One additional factor which may have prompted the general adoption of the broad special fund concerns the necessity of allocation and segregation of revenue which lies at the heart of the narrow doctrine.[51] A leading article on the subject noted

48. *E.g.*, UTAH CONST. art. XIV, § 4; IOWA CONST. art. XI, § 3.

49. Bowmar, *supra* note 1, at 880.

50. For an example of just how far a court will go to uphold politically desirable projects, see Board of Comm'rs v. All Taxpayers, 360 So. 2d 863 (La. 1978)(court upheld utility plan to issue revenue bonds payable from revenues of entire municipal utility system despite statutory language that the bonds be payable "solely from the revenues derived from the operation of the public project constructed or acquired with the proceeds of such revenue bonds."). Compare this with the Louisiana Court of Appeals decision in the same case, 355 So. 2d 578 (La. 1978)(repayment plan constituted a possible charge upon the other revenues of city).

51. As a leading article on the subject notes:

> But there is usually a more pragmatic argument against the doctrine: the segregation of earnings to a part of a utility system is impractical. The generating equipment of a light system is a separate integral unit; only when a complete new generating plant has been installed has it been found possible to segregate the earnings. That situation is exceptional. In the normal situation, it is impossible to segregate the earnings of a pole, a stretch of pipe, an additional dam. Although many courts have talked readily of the segregation of the earnings of an addition or extension, as opposed to the replacement involved in *Bell v. City of Fayette* (325 Mo. 75, 28 S.W.2d 356 (1930)), not a single illustration has been found where such segregation has been achieved to the satisfaction of a court. In the one instance found in which municipal officials were courageous enough to attempt such segregation in order to satisfy a court which adhered

that, at least in 1937, the segregation and allocation of earnings of each part of a utility system was thought to be impractical if not impossible.[52] The difficulty was particularly obvious when special fund financing was analyzed in reference to an individual telephone "pole, a stretch of pipe, [or] an additional dam."[52.1]

In discussing the narrow versus broad special fund question, one additional point is worth mentioning: a surprisingly large number of states have apparently not recognized that both a broad *and* a narrow Special Fund Doctrine exist. Writing in 1937, two collaborating authors found that at least eight states had applied the Special Fund Doctrine in a fact situation which was within the broad fund category, yet had never expressly rejected the narrow fund theory.[53] The State of Oregon is a case in point. In *Butler v. City of Ashland*,[54] the Oregon Supreme Court held that contractual liabilities incurred for the purchase of 600 acre-feet of water did not constitute debt within the provisions of Article XI, Section 5 of the State Constitution of Oregon. The city issued "Certificates of Indebtedness" which provided that obligations were to be payable solely from revenues of the water department and would not constitute a general obligation of the city. Because the special fund created apparently consisted of the total water revenues,[55] rather than just those revenues attributable to the sale of the 600 acre-feet of water, the plan would be classified as a broad special fund.

In upholding the financing scheme, the court quoted with approval two potentially contradictory[56] passages from McQuillin:

> A municipality does not create an indebtedness by obtaining property to be paid for wholly out of the income of the

> to the restricted special fund theory, the court found the theory of the apportionment unreasonable. Segregation is at best theoretical, and if the courts assume the role of final arbiter in this realm of conjecture, the requirement becomes impossible. There is little assurance that municipal officials will guess correctly.

Williams & Nehemkis, *supra* note 3, at 196 (citation added). *See also* Kosel, *Municipal Debt Limitation in California*, 7 GOLDEN GATE L. REV. 641, 658 (1977).

52. Williams & Nehemkis, *supra* note 3, at 196.

52.1 *Id.*

53. *Id.* at 210.

54. 113 Or. 174, 232 P. 655 (1925).

55. *Id.* at 180, 232 P. at 657.

56. The two quotations are potentially contradictory in that the first refers to a "wholly" self-liquidating debt (i.e., a narrow special fund) while the second passage could include either a narrow or a broad fund.

> property.[57]

and

> If an obligation is payable out of a special fund only, and the municipality is not otherwise liable, it is generally held that there is no indebtedness, subject to certain exceptions hereinafter noticed in this connection.[58]

In contrast to *Butler*, the court in *Morris v. City of Salem*[59] addressed the Special Fund Doctrine in terms of a narrow, rather than a broad special fund. In *Morris*, a Salem taxpayer sought to enjoin the city from entering into and performing a contract for the purchase and installation of parking meters. Under the contract, the city's sole source of payment on the liability consisted of a fund created by the deposit of 50 percent of the meter receipts. No other sources of city revenue were obligated. The Oregon Supreme Court upheld the plan and in doing so set forth the "general rule" regarding the Oregon Special Fund Doctrine.[60]

As the Oregon case examples illustrate, the broad fund concept has often been applied or extended without a conscious weighing of the relative strengths and weaknesses of the doctrine. Perhaps the major weakness of the broad special fund concerns the emphasis the doctrine places upon protecting taxpayers without extending the safeguards to other sources of public revenue. Since the effect of the Special Fund Doctrine is to remove the obligation from the protections of the debt ceilings, this concentration upon taxation is valid only if the exclusive intent of the debt provisions is to protect tax revenues.

Early courts adopting the broad fund theory appear to have indeed taken the view that the limits were intended to protect local taxpayers from excessive taxation. Given that most debt provisions were originally phrased in terms of tax revenues or assessed value of property subject to tax,[61] it is not surprising

57. 113 Or. at 182, 232 P. at 657 (citing 5 McQuillin, Municipal Corporations, 4725, § 2230).

58. 113 Or. at 183, 232 P. at 657 (citing 5 McQuillin, Municipal Corporations 4722, 4723, § 2228).

59. 179 Or. 666, 174 P.2d 192 (1946).

60. "The general rule is that the purchase of property by a city, to be paid for solely out of income to be derived from the property purchased, does not create a debt or liability in violation of constitutional, statutory or charter limitations." 179 Or. at 676, 174 P.2d at 197.

61. *E.g.*, Utah Const. art. XIV, § 4; Iowa Const. art. XI, § 3.

that courts tend to focus primarily on tax monies in construing the scope of the ceilings. However, this fact does not necessarily indicate that the constitutional framers regarded the word taxes as the sole evil to be remedied. Arguably, what the authors were seeking to achieve was the protection of all citizens from unwise and irresponsible government spending.[62] That the provisions were couched in terms of taxation can be explained simply by reference to the historical period in which debt limitation arose. In the 1850's, the broad range of local taxes and user charges available today did not exist. Besides real estate taxes and state grants, the only other sources of local government revenues were funds generated by individual capital projects. These projects were in turn backed by the local real estate taxing power. Thus, it is not surprising that debt ceilings were initially framed in terms of taxes. At the time, such language was the most logical and direct means of achieving sound fiscal policy.[63]

In light of the times, which were characterized by unnecessary and unwise public spending, it appears that constitutional and charter provisions restricting municipal debt were the product of a general "spirit of economy," rather than a special concern with taxation. Charles H. Carey, in his works on the Oregon constitutional convention of 1857, commented along these same lines and noted that the limitations upon public indebtedness were but one of many economic vehicles popular with citizens and constitutional authors of the day.[64]

Putting aside the question of intent, there would seem to be no justification today for continuing a distinction between "tax" revenues and "other" revenues. In this context, other revenues refer principally to funds generated through the operation of a

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62. *See* Carruthers v. Port of Astoria, 249 Or. 329, 337, 438 P.2d 725, 728 (1968); Bowmar, *supra* note 1, at 867; *Legal Limitations, supra* note 19, at 654.

63. Gelfand, *supra* note 2, at 549; Bowmar, *supra* note 1, at 867.

64. The constitution as framed by the convention and accepted by the people proved to be well adapted to the requirements of the new state. While perhaps it was a little tight in places, on the whole it was a model instrument for just such a state and just such a people. The pioneers, none of whom was wealthy, and many of whom had known the pinch of hard times and had suffered from scarcity of the comforts of life, rather approved of the spirit of economy that pervaded the various articles and sections. They liked the restrictions upon public indebtedness and the prohibitions upon the use of public credit . . . . These, and many other economies, characterized the constitution and made it acceptable.

THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE OREGON CONSTITUTIONAL CONVENTION OF 1857, at 55-56 (C. H. Carey ed. 1926).

utility owned by the municipality. Utility revenues consist primarily of user fees which are paid by individual ratepayers pursuant to their monthly electric, gas, or water utility bills.

There are four factors which weigh heavily against distinguishing between user fees (i.e., other revenue) and taxes: taxpayers and ratepayers are essentially the same people; user fees, such as electricity and other necessities, are largely unavoidable;[65] in cases where the project fails or is never constructed, user fees may be charged to persons who receive nothing in return; and as a practical matter, a local government will likely be compelled by nonlegal pressures to bail out a defaulting special fund obligation.[66]

Several commentators have noted the obvious fact that nearly every taxpayer is also a ratepayer.[67] In light of the current state of municipal finance, one might venture to say that user fees are tantamount to a property tax. One writer states that the purpose once served by a special tax is now accomplished by a rate.[68] The writer observes that there are differences: for example, a rate is billed monthly rather than annually and a rate is billed to the consumer based upon his use rather than a calculation of property values.[69] Nonetheless, a rate is arguably little more than a streamlined, more fairly apportioned tax.[70]

It appears that courts have yet to explicitly repudiate the distinction between user fees and taxes. However, at least two state supreme court dissenting justices express reservation over

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65. *See generally* Kosel, *supra* note 51, at 658; Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982); Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1970).

66. Kosel, *supra* note 51, at 659.

67. Bowmar, *supra* note 1, at 880; Durisch, *Publicly Owned Utilities and the Problems of Municipal Debt Limits*, 31 MICH. L. REV. 503, 505-07 (1933).

68. The municipal ownership of utilities is common, as is the bond financing of such services. The purpose once served by a special tax is now served by a rate. There are differences: the rate is billed monthly instead of annually; hence it is more collectable and makes for a perpetually liquid account. Also (significant in metropolitan areas where the commuter population is large), the rate is billed to the consumer instead of the rate payer; hence it is apportioned to the user in exact ratio to his use. In basic function, however, the rate is merely an improved, streamlined, more collectible, more fairly apportioned tax.

Virtue, *The Public Use of Private Capital: A Discussion of Problems Related to Municipal Bond Financing*, 35 VA. L. REV. 285, 294 (1949).

69. *Id.*

70. *Id.*

the matter.[71] In *Johnson v. Piedmont Municipal Power Agency*,[72] the South Carolina Supreme Court upheld a legislative act which enabled municipalities in South Carolina to unite in a joint agency and finance the construction or acquisition of a nuclear generating plant through the issuance of bonds payable by the entire revenues of each utility system. Under the terms of the statute, a municipality could obligate itself to pay the joint agency even if the project never produced any energy. Justice Littlejohn, writing for the dissent, forcefully argued that the substance and not the form of the financing arrangement should prevail:

> As mentioned above, PMPA would not be authorized to impose an ad valorem tax against property owners to repay the debt; thus, these bonds cannot be general obligation bonds in the usual sense. . . . However, these bonds do pledge the equivalent of the taxing power. The issuers of typical general obligation bonds say in effect to the bond holder, "we will tax the property owners if need be to repay the debt." Here, the issuer of the bonds (PMPA) effectively says, "we will assess the electric power users (i.e., rate payers) if need be to repay the debt." I submit that both cases would usually involve basically the same people. There is little difference between pledging full faith and credit of the taxpayers and pledging the full faith and credit of electric user—each involves captive payors. A taxpayer must pay the tax or have his property sold; the rate payer must pay the rate charge or either (1) discontinue the use of electricity, or (2) move out of town . . . . Inasmuch as the act and the contracts authorize the municipalities to collect money from its electric customers whether or not the project ever generates any electricity, thereby charging the customers for power never received, I think the bonds lose their identity as revenue-producing or special source bonds and must be treated as general obligation bonds.[73]

In *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*,[74] the Supreme Court of Iowa rejected a taxpayer's suit challenging the constitutionality of a statute enabling a special

71. Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1978) (Littlejohn, J., dissenting); Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1970) (Becker, J., dissenting). *See also* Chemical Bank v. WPPSS, 99 Wash. 2d 772 (1983), (Dore, J., concurring).

72. 277 S.C. 345, 287 S.E.2d 476 (1982).

73. *Id.* at 362-63, 287 S.E.2d at 485 (Littlejohn, J., dissenting).

74. 179 N.W.2d 449 (Iowa 1970).

agency to issue bonds payable from garbage disposal revenues. The dissenting justice, however, thought that the Special Fund Doctrine did not apply.

> To me at least the distinction is this. Where the service is to be rendered by the taxing unit to substantially all of the people and is considered so important that its financing must be implemented by involuntary payments by the taxpayers in the form of taxation, tax liens, or equivalent (collected like taxes), the revenue derived from the furnishing of such service is government revenue which will not give rise to the special fund theory. Where the service to be performed by the taxing unit is such that it may be accepted or rejected by the people and is not so important as to necessarily invoke the tax collection powers (or equivalent), then the income derived from such service is independent revenue which may qualify for the Special Fund Doctrine.[75]

The *Johnson* dissent keyed on the fact that the nuclear power plants PMPA sought to purchase might never be built or produce electricity. In cases where payment is unrelated to any direct benefit received, or in fact where nothing is received, one of the primary distinguishing factors between ratepayers and taxpayers disappears. As noted in the *Goreham* dissent, the distinction is further reduced where the service rendered by the local government takes the form of a necessity and therefore is virtually unavoidable.

In other contexts, the courts have found detriment to the taxpayers of the city when revenues derived from a utility were appropriated.[76] The California Supreme Court held in *Mines v. Del Valle* that the fact that public funds were derived from a public utility rather than raised by direct taxation was immaterial. The inevitable result would be a detriment to the taxpayers of the city.[77]

Assuming arguendo that there is indeed a valid distinction between taxes and user fees, it is doubtful whether a local unit's general revenues are ever truly insulated from liability for a special fund obligation. In the event that revenues from the fund are inadequate, a number of practical and political factors may

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75. *Id.* at 464 (Becker, J., dissenting).

76. *See* City of Bessemer v. Personnel Bd. for Jefferson County, 240 Ala. 411, 199 So. 2d 815 (1941); Porter v. Tiffany, 11 Or. App. 542, 502 P.2d 1385 (1972).

77. Mines v. Del Valle, 201 Cal. 273, 279-80, 257 P. 530, 534 (1927), *overruled*, Stanson v. Mott, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

compel a government to assume the debt in spite of the fact that no legal obligation exists.[78] Foremost among these considerations is the fact that the default of a special fund obligation may impair a municipality's credit rating for several decades.[79] Given the constantly growing reliance of municipalities upon private capital, the success of a special fund obligation may be vital to the financial stability of the parent municipality.[80] Additionally, given that a special fund obligation is regarded as nondebt, special fund liabilities are not taken into account in calculating the financial strength of a community.[81] Thus, a municipality may be led to overextend itself based upon an erroneous assessment of the strength of local resources.

Admittedly, many of the criticisms directed toward the Broad Special Fund Doctrine above would be equally applicable to an attack on the self-sustaining/liquidating concept in general. That is neither the intent of this article, nor suggested as a desirable path to follow. The Special Fund Doctrine is indeed a necessary and valuable tool when used with caution. The doctrine allows flexibility in meeting the practical needs of local government. It also drastically reduces the inequities which result from one generation paying for a project benefiting the next.[82] Likewise, the doctrine efficiently allocates the burden of an improvement among those currently receiving benefits. Moreover, in its purest form, the doctrine is consistent with a policy of debt limitation.

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78. Special funds are special largely because the government designates them as such. This accounting procedure may have little functional significance. The sponsoring government, to preserve its good name in financial circles, may have to assume special fund obligations should the fund prove inadequate. Also, a special fund's creditors, pursuing their remedies may coerce payment from the general fund, for the foreclosure of a mortgage securing special fund obligations can be as onerous to the government as the foreclosure of a mortgage securing general obligations. And if foreclosure is unavailable, the holders of defaulted bonds may compel an increase of rates payable to the special fund. This, in turn, may induce the rate payers to exercise their political power to force the government into assuming the debt or making periodic additional payments to preserve the existing rates.

Morris, *Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234, 264 (1958).

79. H. C. SHERWOOD, HOW CORPORATE AND MUNICIPAL DEBT IS RATED: AN INSIDE LOOK AT STANDARD & POOR'S RATING SYSTEM 118 (1976).

80. Virtue, *supra* note 68, at 294-95.

81. Virtue, *supra* note 68, at 293-94.

82. Gelfand, *supra* note 2, at 549-51.

V. Recommendation for a Narrow Special Fund Doctrine

Despite the benefits which the Special Fund Doctrine may provide, the social policies inherent in constitutional, statutory, and charter debt limitations are of equal significance.[83] In reviewing the logic underlying the Broad Special Fund Doctrine, the objective must be to determine whether the courts are maintaining a proper balance between the conflicting goals of public protection and practical necessity. In light of the discussion above and the case example which follows, it is submitted that the Broad Special Fund Doctrine goes too far in the direction of flexibility and seriously neglects the policy of debt limitation. It is the primary recommendation of this article that the Broad Special Fund Doctrine be abolished or, at the very least, substantially modified.

A more balanced approach would appear to lie in the use of a Narrow Special Fund Doctrine. The narrow fund theory provides the benefits of flexibility and efficiency of allocation inherent in the Special Fund Doctrine while at the same time maintaining a closer rein on municipal debt. The doctrine would be applicable to all sources of public revenue and not simply those raised by taxation, thereby extending to ratepayers the protections currently afforded only to taxpayers. More importantly, because a narrow special fund requires that an obligation be "payable *solely* out of the proceeds of the *particular* project financed," or be subjected to the debt ceilings, the narrow doctrine would protect against situations where citizens are forced to repay the costs of speculative projects which are either never completed or unnecessary.

Admittedly, there are hurdles to overcome before the restricted special fund will be widely accepted. As courts and commentators have noted,[84] there are perceived impracticalities in allocating and segregating revenues between existing plans and improvements thereto. But these difficulties may be easily remedied. While it may indeed be impossible to determine the exact revenue attributable to an individual electric pole or bus, special fund financing would normally not be used to purchase

83. Although many commentators have criticized debt ceilings, Bowmar, *supra* note 1, and some have even called for their repeal, *Legal Limitations*, *supra* note 19, at 645, this writer recognizes the need for such provisions. Indeed, in light of recent events in New York City, Cleveland and the Pacific Northwest, it is hardly persuasive to argue that the marketplace and the wisdom of local officials will prevent excessive debt.

84. *See supra* note 51.

improvements of such a small magnitude.[85] In cases involving larger improvements, such as the addition of a new generator, acceptable accounting methods will likely be found.

In any event, a strict and exact allocation of revenues is not mandated by history nor likely to be an appropriate task for the courts to perform. The historical setting from which the debt ceilings arose, where the benefits received from improvements were grossly disproportionate to their cost, suggests that the original drafters were concerned primarily with preventing significant cost subsidies between the project financed and other sources of public revenue. Therefore, it is reasonable that courts today defer to the judgment of municipal officials, and limit their inquiry to whether the improvement bears a reasonable relationship to the revenue allocated to it.

The potential defects in the broad special fund theory can perhaps best be understood by examining an illustration which takes the logic and rules of the broad doctrine to the extreme. The recent financial disasters surrounding the construction of two nuclear power plants by the Washington Public Power Supply System (WPPSS) provide a perfect case example. Unfortunately, an account of the historical setting and contractual details of the project, while most interesting, would be both lengthy and irrelevant to the present discussion. Nonetheless, the following paragraphs set forth an accurate, albeit abbreviated, review of the relevant facts.

In 1976, eighty-eight municipal utilities and public utility districts (PUD) in six states[86] entered into contracts with the WPPSS to finance the construction of two nuclear power plants commonly referred to as "WPPSS 4 and 5." By the terms of the contracts (the Participants' Agreement), each utility agreed to pay a specified percentage of the supply system's annual budget (including payment on WPPSS bond obligations) in return for an identical portion of the project's capability.[87] The consideration received by each participant was phrased in terms of capability rather than electricity, and each participant agreed to make payment under the contract regardless of whether any electricity was ever produced.[88] Additionally, the agreement pro-

85. Note, *Constitutional Restrictions Upon Municipal Indebtedness*, 66 Utah L. Rev. 462, 477 (1966).

86. Oregon, Washington, Idaho, Montana, Nevada, and Wyoming.

87. Participants' Agreement §§ 1(a), 1(b), 1(v) and 5.

88. Participants' Agreement § 6(d).

vided that ownership in the constructed facilities was to vest in WPPSS[89] and contained a covenant whereby each participant agreed to maintain electric rates sufficient to meet its obligation under the contract.[90]

Although the contract did not encompass the projected cost of construction, there was apparently some consensus at the time that the two plants could be built for approximately 2.5 billion dollars.[91] However, the contract neither states this approximate figure nor places a maximum limitation upon the liability of each participant.

Apparently to avoid city charter and state constitutional debt limitations, the contract sought to evoke the Broad Special Fund Doctrine. Each Participant Agreement provided that a municipal utility or PUD was not required to make any payments on the contract "except from the revenues derived by such participant from the ownership and operation of its electric utility properties . . . ."[92] Absent any further considerations,[93] this clause would indeed create a valid broad special fund in a majority of states because payment on the contract was limited to a fund consisting solely of electrical revenues.[94] Therefore, the Participants' Agreement would not constitute debt and would be beyond the reach of any debt limitation provisions based upon the rationale that neither the general funds nor tax monies of

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89. Participants' Agreement §§ 1(v), 5.

90. Participants' Agreement § 6(c), page 18.

91. Plaintiff's Brief at 56, Defazio v. WPPSS, Lane County Cir. Ct. Case No. 16-81-11344 (Or. 1981) [hereinafter cited as Plaintiff's Brief].

92. Participants' Agreement § 6(c), page 18.

93. The WPPSS contracts also contained three other possible problem areas. In 6(c) of the Participants' Agreement, each participant agreed to maintain electric rates sufficient to make payments under the contract. This might be looked upon as an impermissible delegation of rate-making authority. *See* Annot. 146 A.L.R. 328, 341 (1943); Annot. 96 A.L.R. 1385, 1390 (1935); Annot., 72 A.L.R. 687, 692 (1931); and especially Batchelder v. City of Hood River, 63 Or. 472, 128 P. 439 (1912). The agreement also provided that WPPSS, rather than the participants, would be the legal owner of the constructed facilities. Participants' Agreement §§ 1(v), 5. With regard to revenue bonds, some courts have held that the municipality must own the system encumbered in order for the bonds to be valid. *See* 15 E. McQuillin, The Law of Municipal Corporations, § 43.34 (3d ed. 1970); Rev. Rul. 54-41 and Rev. Proc. 82-26. A final difficulty with the contracts concerns the unlimited and unspecified amount of potential liability of each participant. Participants' Agreement §§ 1(a), 1(b) and 5. Although the creation of an unlimited obligation would appear to conflict with public policy, there are apparently no cases directly on point. *See generally*, T & N Orr Co. v. County of Galveston, 169 S.W.2d 713, 714-15 (Tex. Civ. App. 1943); Levinson v. County of Bucks, 435 Pa. 62, 66, 254 A.2d 633, 636 (1969).

94. *See* Board of Comm'rs v. All Taxpayers, 360 So. 2d 863 (La. 1978). *See also* citations, *supra* note 46.

the local governments were liable for payment.

Unfortunately for the ratepayers of the various participants, the WPPSS 4 and 5 power plants were not completed and will never produce electricity. Because of tremendous cost escalations, licensing delays, alleged mismanagement, and a stable or falling demand for electricity, the construction of the project was terminated in 1982.[95] Although work on both plants was only 16 and 24 percent complete,[96] the total expenses incurred by WPPSS on the two plants exceeded 2.25 billion dollars.[97] Thus, the total liability of the 88 participants for the principal, interest and carrying charges on the WPPSS bonds will be in excess of seven billion dollars.[98] Under the terms of the contract, the participants must pay this enormous sum regardless of whether they ever receive a single watt of electricity.[99]

Not surprisingly, there has been a great deal of litigation over the validity of the Participants' Agreement.[100] However, assuming for present purposes that the contracts will be upheld, the broad special fund financing in this case will produce substantial adverse effects on the citizens of participating municipalities. Foremost among these will be significant rate increases. For example, the city of Canby, Oregon will have an estimated immediate increase in rates of 100 percent.[101] Moreover, the increase of electricity costs will likely discourage new businesses from settling in the area or may force present companies to relocate. This in turn could potentially further increase the rate.

In any event, regardless of whether the WPPSS obligation is referred to as a special fund obligation, a tax, or a tax equivalent, the ratepayers of the Pacific Northwest will be responsible for retiring seven billion dollars worth of debt and interest. The situation serves to illustrate a point that cannot be over emphasized—a project meeting all the requirements of a

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95. *See supra* note 91, Plaintiff's Brief at 6.

96. Chemical Bank v. WPPSS, 99 Wash. 2d 772, 776 (1983).

97. *Id.*

98. *Id.*

99. Participants' Agreement §§ 1(v), 5.

100. DeFazio v. WPPSS, Lane County Cir. Ct. Case No. 16-81-11344 (Or. 1981); Asson v. City of Burley, Supreme Ct. Case No. 14719 (Idaho 1982); Chemical Bank v. WPPSS, 99 Wash. 2d 772 (1983); City of Springfield v. WPPSS, U. S. Dist. Ct. Case No. 82-1387 (D. Or. 1982); City of Springfield v. WPPSS, Lane County Cir. Ct. Case No. 16-82-04068 (Or. 1982); Chemical Bank v. City of Bandon, U. S. Dist. Ct. Case No. 83-126 (D. Or. 1983).

101. *See supra* note 91, Plaintiff's Brief at 9.

special fund doctrine effectively circumvents all the protections and limitations of constitutional, statutory, and charter debt provisions. As one commentator put it: "Where are you when you are around the debt limitation? 'Another day older, and deeper in debt.' "[102]

For the WPPSS contracts to comply with the Narrow Special Fund Doctrine, the sources of repayment on the agreement would have to be limited to the revenues generated by the nuclear power plants themselves (WPPSS 4 and 5) and not extend to the entire electrical revenues of the system.[103] Thus, under a narrow theory, the risks that a project will never be completed or never produce revenue are upon the bondholder. Admittedly, this fact will decrease the certainty of repayment of the bonds and involve a higher interest rate than bonds for the same project issued under a broad fund doctrine. However, this extra cost would seem to be relatively inexpensive insurance against a future WPPSS disaster and would appear to be an expense mandated by many state constitutions.

When the broad view is pushed to its logical extreme, as where a financing scheme calls for unlimited liability, a rate covenant and payment of the debt regardless of whether the project ever produces revenue, the conceptual weaknesses of the Broad Special Fund Doctrine emerge. Particularly troublesome is the notion that the broad view places the risk of loss of municipal construction projects upon the ratepayer/taxpayer, rather than the bondholder. Such a course is arguably inconsistent with the original intent of constitutional authors of insulating citizens from the burdens of speculative, ill-advised expenditures.

If the WPPSS agreements do indeed lie within the bounds

102. Virtue, *supra* note 68, at 295.

103. Justice Dore of the Washington Supreme Court adopted a narrow fund analysis in his concurrence in Chemical Bank v. WPPSS, 99 Wash. 2d at 804-05, in reaching the conclusion that the Washington municipal and public utility district participants are not responsible for payment on the WPPSS 4 and 5 revenue bonds. Justice Dore noted that the Participants' Agreement must be read in light of the statutory framework governing WPPSS, including the debt limitation found in art. VIII § 6 of the Washington State Constitution. *Id.* at 801 and 805. Justice Dore emphasized that the Special Fund Doctrine must be analyzed in terms of the purpose of the constitutional provisions. Finally, he noted "risk to the taxpaying public" as a consideration and stated his test for a valid special fund as follows: "[d]oes the device employed create the evil the constitutional limitation was designed to avoid? If such is the case, there is 'debt' for constitutional analysis purposes." *Id.* at 804 and 806. The majority, however, found the participants free from liability on other grounds. *Id.* at 797-99. *See infra* note 106.

of current law,[104] one may wonder nonetheless whether it is wise to uphold a body of case law which permits financial debacles of this scale to occur. One alternative available is the adoption of a Narrow Special Fund Doctrine, which would provide most of the inherent advantages of the broad view while at the same time fully shielding taxpayers from all risk of loss. Admittedly, acceptance of a narrow doctrine would entail a significant shift in municipal bond law and would potentially invalidate many municipal projects. However, the initial impact of a changeover could be substantially lessened simply by applying the new theory to a test case, such as any of the WPPSS suits, and then applying it prospectively to all projects which are finalized subsequent to the decision. In this manner, the funding for existing projects would not be affected.[105]

In any event, the WPPSS lawsuits provide an excellent opportunity for courts in the Pacific Northwest to reevaluate this judicial creation known as the Broad Special Fund Doctrine.[106] Regardless of the ultimate decision reached, if the question is approached through a conscious analysis of the tradeoff between interest rates and public protection, and with due

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104. The author doubts whether the WPPSS contracts are valid under existing Broad Special Fund case law.

105. The prospective application doctrine has been utilized largely in the criminal law field. However, the United States Supreme Court, in Cipriano v. City of Houma, 395 U.S. 701 (1969), applied the theory to a municipal matter. There the court struck down a Louisiana law providing that only property taxpayers could vote in revenue bond elections. The Court noted that:

> significant hardships would be imposed on cities, bond holders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.

395 U.S. at 706. *See also* Harvey Aluminum v. School Dist. No. 9, 248 Or. 167, 433 P.2d 247 (1967); County of Linn v. Rozelle, 150 Or. 245, 162 P.2d 177 (1945); Haines v. Anaconda Aluminum, 87 Wash. 2d 28, 549 P.2d 13 (1976); Annot., 10 A.L.R. 3d 1371 (1966).

106. Unfortunately, unlike Justice Dore, the majority in Chemical Bank v. WPPSS, 99 Wash. 2d at 797 entirely avoided entering into the broad special fund-narrow special fund debate. Instead, Justice Brachtenbach, in his majority opinion, held that the Washington municipal and PUD participants lacked authority to enter into the agreement. The key to the court's analysis rests in its holding that the participants: (1) did not purchase electrical power; (2) effectively unconditionally guaranteed the WPPSS bonds; (3) did not retain sufficient control over or ownership interest in the power plants; (4) failed to follow the statutory requirements of WASH. REV. CODE ch. 43.52 to properly create a joint operating agency; and, (5) failed to follow the statutory requirements of the Washington Nuclear, Thermal, Electric Generating Power Facilities—Joint Development Act, WASH. REV. CODE ch. 54.44. Therefore, the act of entering into the Participants' Agreement was ultra vires which rendered the contractual obligations void.

regard for the original purposes of debt limitation, municipal officials, bond markets, and ratepayers may be spared the prospect of similar occurrences in the future.