An Analytical View of Recent "Lending of Credit" Decisions in Washington State

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I. INTRODUCTION

Sections 5[1] and 7[2] of article VIII of the Washington State Constitution, concerning gifts or loans by the state and its subdivisions, have been a source of confusion to the courts and frustration to the sponsors of governmental programs. One recent Washington Supreme Court opinion referred to "[t]he presence of inconsistent analyses or exceptions" regarding article VIII, sections 5 and 7,[3] and another noted the "erratic decisions" and the "unjustified interpretation of the intent of the drafters" with respect to those constitutional provisions.[4]

The Washington Supreme Court and commentators recently have attempted to simplify or integrate the law concerning article VIII, sections 5 and 7, seeking to develop a single rule or formula for applying the two provisions—a flexible rule or formula that would enable the court to permit a wider range of

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

2. WASH. CONST. art VIII, § 7 provides:

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

3. Johnson v. Johnson, 96 Wash. 2d 255, 264, 634 P.2d 877, 882 (1981).

4. City of Marysville v. State, 101 Wash. 2d 50, 52, 676 P.2d 989, 990 (1984). For an excellent, in-depth analysis of the twists, turns, and contradictions of these constitutional provisions, see C. KIPPEN, ARTICLE VIII, SECTIONS 5 AND 7: AN EXAMINATION OF THE PROVISIONS, THEIR IMPACT AND THE PROSPECTS FOR CHANGE (1979).

government programs that might otherwise be barred.[5] Nevertheless, attempts to create a single rule or set of coherent rules for interpreting these problematical provisions are apt to fail. The constitutional language is complex, involving numerous elements, each of which must be present for the prohibition to apply.

Rather than a single formula governing the application of these provisions to every fact pattern, a uniform method of approach or analysis is required. That approach should permit the continued existence of a variety of rules that would apply to the different elements of the constitutional clauses in various factual situations. The method proposed in this Article would reduce sections 5 and 7 to their component parts, applying appropriate rules to each part while insisting that every part be present before either of the provisions would apply.

In addition to the problems created by attempts to find a single formula to resolve all government "lending of credit" cases,[6] a source of confusion in recent cases interpreting sections 5 and 7 has been the tendency of the court to attempt too much and to analyze more components of the constitutional provision in question than are necessary to resolve the case at bar.[7] This tendency leads either to troublesome dicta that return to haunt the court in later decisions, or to a confusion of theories resulting in opinions that cannot be reconciled to serve as useful guides for future interpretations.

This Article first presents an analytic framework for assessing government actions that present possible violations of article VIII, sections 5 and 7, and then analyzes five recent cases interpreting those provisions: *City of Marysville v. State*,[8] *City of Seattle v. State*,[9] *Johnson v. Johnson*,[10] *Public Employment Relations Commission v. City of Kennewick*,[11] and *Housing*

5. *See, e.g.*, Johnson v. Johnson, 96 Wash. 2d 255, 264-68, 634 P.2d 877, 882-84 (1981); Reich, *Lending of Credit Reinterpreted: New Opportunities for Public and Private Sector Cooperation*, 19 GONZ. L. REV. ___ (1985).

6. WASH. CONST. art. VIII, §§ 5 & 7 are known popularly as the "lending of credit" provisions of Washington's constitution, even though the majority of cases arising under those sections concern apparent gifts or loans of money rather than loans of credit. For an analysis of the narrow scope of the phrase "loan of credit," see *infra* the discussion accompanying notes 34-46.

7. *See infra* text accompanying notes 87-109.

8. 101 Wash. 2d 50, 676 P.2d 989 (1984).

9. 100 Wash. 2d 232, 668 P.2d 1266 (1983).

10. 96 Wash. 2d 255, 634 P.2d 877 (1981).

11. 99 Wash. 2d 832, 664 P.2d 1240 (1983).

Finance Commission v. O'Brien.[12] Other writers have provided excellent reviews of the long history of these constitutional provisions.[13] This study, therefore, focuses on the analytic strengths and weaknesses of a limited number of recent opinions and demonstrates that those decisions made on narrow grounds—relying on a precise analysis of the applicable provision—provide more guidance to judges and lawyers. Washington cases decided during the past ninety years also provide sufficient bases for judicial approval of a wide range of government activities and programs that many have feared would be prohibited. The key is not to develop new exceptions to avoid the language of article VIII, sections 5 and 7, such as the "risk of loss" theory that has appeared in some recent cases,[14] but rather to approach the constitutional language strictly and rigorously, presuming from the outset that proposed actions by legislative bodies are constitutional and placing the burden on those who would challenge the constitutionality of a proposed government action.[15] The court should then insist that each and every element of the applicable provision be present before a prohibition will apply. This approach, a conservative method relying principally on the text of the constitution itself, ultimately may yield more flexibility in practice than will new formulas that may not be easily applied as new situations arise.

II. Reducing the Provisions to Their Component Parts

The core of the method proposed here is, first, to divide the language of the applicable constitutional provision into discrete components and, then, to insist that each component be present for the provision to apply. Article VIII, section 7 provides the best example for this approach. Section 7 is the more detailed

12. 100 Wash. 2d 491, 671 P.2d 247 (1983).

13. *See* C. Kippen, *supra* note 4, at I-1 through I-20; Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. Pa. L. Rev. 265 (1963); Reich, *supra* note 5.

14. *See, e.g.*, Housing Finance Commission v. O'Brien, 100 Wash. 2d 491, 495-96, 671 P.2d 247, 249-50 (1983); Johnson v. Johnson, 96 Wash. 2d 255, 265-68, 634 P.2d 877, 882-84 (1981). *See infra* text accompanying notes 105-06 and 122-31.

15. *See* Public Employment Relations Comm'n v. City of Kennewick, 99 Wash. 2d 832, 836, 664 P.2d 1240, 1242 (1983) ("We have consistently held that a statute is presumed to be constitutionally valid and that the burden of overcoming that presumption is upon the party challenging that statute."). *See also* Johnson v. Johnson, 96 Wash. 2d 255, 258, 634 P.2d 877, 879 (1981) ("This court will sustain statutes whenever it can conceive any set of facts which support the statute's constitutionality.").

version of the prohibition, and the court has long held that article VIII, section 5 should be interpreted in a fashion similar to article VIII, section 7, although the language of the two provisions clearly differs.[16]

Article VIII, section 7 may be divided for analysis as follows:

(a) No county, city, town or other municipal corporation shall hereafter
(b) give
(c) any money, or property,
(d) or loan
(e) its
(f) money, or credit
(g) to or in aid of any individual, association, company or corporation,
(h) except for the necessary support of the poor and infirm,
(i) or become directly or indirectly the owner
(j) of any stock in or bonds of
(k) any association, company or corporation.

Each of the above eleven components plays a different role whenever a court must decide whether the prohibition applies to a government activity. This subdivision of the provision into its component parts is consistent with the court's frequent determination that the prohibition did not apply because a single component was missing.[17]

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16. The court consistently has construed the language of WASH. CONST. art. VIII, § 5 (applying to actions by the state) and WASH. CONST. art. VIII, § 7 (applying to actions by municipal corporations) to contain similar prohibitions and exceptions, despite the clear difference in wording between the two provisions. *See, e.g.*, Health Care Facilities Auth. v. Ray, 93 Wash. 2d 108, 115, 605 P.2d 1260, 1264 (1980). *See also* C. KIPPEN, *supra* note 4, at I-11 through I-18 (critical analysis of the two provisions' merger).

WASH. CONST. art. XII, § 9 has on occasion been construed similarly to the other prohibitory sections discussed here. WASH. CONST. art. XII, § 9 provides: "The 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."

17. *See, e.g.*, Louthan v. King County, 94 Wash. 2d 422, 617 P.2d 977 (1980) (gift component missing); Anderson v. O'Brien, 84 Wash. 2d 64, 524 P.2d 390 (1974) (individual, association, company, or corporation component missing); State *ex rel.* Graham v. City of Olympia, 80 Wash. 2d 672, 497 P.2d 924 (1972) (loan of money component absent); Gruen v. State Tax Comm'n, 35 Wash. 2d 1, 211 P.2d 651 (1949) (loan of credit component missing), *overruled*, State *ex rel.* Washington State Fin. Comm'n v. Martin, 62 Wash. 2d 645, 384 P.2d 833 (1963).

A. "Gifts"

The court's traditional approach is exemplified by its analyses of whether or not a "gift" has been present. Many decisions have held that money or property was not "given" when adequate consideration supported the exchange. Component (b), above, therefore was absent, and the constitutional prohibition did not apply.[18] A recent, typical example is *Louthan v. King County*,[19] in which the court approved county payments to landowners for the purchase of development rights to certain open spaces and farm lands so that those properties would not be developed. The court noted that "[f]or purposes of Const. art. 8, § 7, a gift is a transfer of property without consideration and with donative intent. Receipt of valuable consideration assures that a transaction is not a gift."[20] The court then held that development rights are valuable, and because "the County acquires a valuable right for the funds it expends, there is no merit in the contention that the expenditure of the funds for development rights is in reality a gift."[21] *Louthan* is an uncomplicated, tightly reasoned case from a long line of cases in which the court has found that article VIII, sections 5 or 7 were not violated because a single component of the prohibitory language—the gift element—was absent.[22]

In other cases, the court has found no gift or loan when a public entity was carrying out a "recognized public governmental function" and the benefit to private individuals or corporations therefore was incidental to the implementation of that basic governmental function. For example, in companion cases,[23]

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18. *See e.g.*, Scott Paper Co. v. City of Anacortes, 90 Wash. 2d 19, 32-33, 578 P.2d 1292, 1300 (1978) (sale of water by city at less than cost not a gift); State *ex rel.* Gorton v. Port of Walla Walla, 81 Wash. 2d 872, 876, 505 P.2d 796, 798 (1973) (price paid by port for land was reasonable, therefore no gift); Washington Natural Gas v. PUD No. 1, 77 Wash. 2d 94, 103, 459 P.2d 633, 638 (1969) (contracts to install underground utility systems at district's expense not a gift); Aldrich v. State Employees' Retirement System, 49 Wash. 2d 831, 833-34, 307 P.2d 270, 271-72 (1957) (pension for public employee not a gift); Bakenhus v. City of Seattle, 48 Wash. 2d 695, 698, 296 P.2d 536, 538-39 (1956) (pensions for public employees not a gift but deferred compensation); Rands v. Clarke County, 79 Wash. 152, 158-59, 139 P. 1090, 1092-93 (1914) (bridge built in conjunction with Oregon county not a gift to that county).

19. 94 Wash. 2d 422, 617 P.2d 977 (1980).

20. *Id.* at 428, 617 P.2d at 981.

21. *Id.*

22. *See supra* note 17 and accompanying text.

23. State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 82 Wash. 2d 265, 510 P.2d 233 (1973); Seaboard Surety Co. v. Ralph Williams' N.W. Chrysler Plymouth, Inc.,

a car dealer challenged the restitution remedy provided by the state's consumer protection act[24] on the theory that such restitution is a gift to those who receive recompense. In each action the dealer also challenged the Attorney General's representation of wronged individuals on the ground that such representation is a gift to the persons who receive representation in remedying violations of that law. In *Seaboard Surety Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*,[25] the court found that the restitution remedy to the wronged individual was "only incidental to and in aid of the relief asked on behalf of the public."[26] In *State v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*,[27] the court expressly stated that the public provision of legal services for misled consumers was based on the need for "protection of the public from unlawful business practices which is the primary purpose of this action initiated by the State Attorney General."[28] The court stated further that "[a]id to individuals is not absolutely prohibited under our law but is only improper where public money is used solely for private purposes."[29]

B. "Loans of Money"

The Washington Supreme Court has determined that a "loan of money or credit" did not exist when debt in its ordinary sense had not been created. In *State ex rel. Graham v. City of Olympia*,[30] the court held that deposits of city funds in interest-bearing accounts did not constitute a "loan" of public money, stating:

> In the interpreting of our constitution the language employed must be taken and understood in its natural, ordinary, general, and popular sense. . . . In the ordinary and popular sense, a

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81 Wash. 2d 740, 540 P.2d 1139 (1973).

24. WASH. REV. CODE §§ 19.86.010-.920 (1983).

25. 81 Wash. 2d 740, 504 P.2d 1139 (1973).

26. *Id.* at 746, 504 P.2d at 1143.

27. 82 Wash. 2d 265, 510 P.2d 233 (1973).

28. *Id.* at 277, 510 P.2d at 241. *See also* Johnson v. Johnson, 96 Wash. 2d 255, 268, 634 P.2d 877, 884 (1981) (state collection of child support payments merely a public service to participants); State *ex rel.* Graham v. City of Olympia, 80 Wash. 2d 672, 687, 497 P.2d 924, 932 (1972) (Hale, J., concurring) (benefit to bank only incidental when public funds placed in time deposit); Morgan v. Department of Social Sec., 14 Wash. 2d 156, 169, 127 P.2d 686, 692-93 (1942) (aid to poor is a recognized public governmental function).

29. 82 Wash. 2d at 277, 510 P.2d at 241.

30. 80 Wash. 2d 672, 497 P.2d 924 (1972).

> loan of money or credit is at once understood to mean a transaction creating the customary relation of borrower and lender. People take their money to banks, mutual savings banks, or savings and loan associations for deposit, and the institutions accept the money as *deposits*, and not as *loans*. It is doubtful that anyone ever takes money to a banking institution for deposit under the impression that the transaction is to constitute a "loan," in the ordinary and popular sense of that word.[31]

In a consistent decision reaching the opposite result, the court in *State ex rel. O'Connell v. PUD No. 1*[32] struck down a public utility district's purchase of installment sales contracts that electrical-product vendors had made with their customers. The court held that the article VIII, section 7 prohibition applied because there had been an indirect "loan" in the ordinary sense, that is, "an advancement of money or other personal property to a person . . . whereby the person to whom the advancement is made binds himself to repay it at some future time, together with [interest]."[33] In both *Graham* and *O'Connell*, the court focused on the language of the constitutional prohibition: was there a "loan" or not? If there was a "loan" and if the other elements of the prohibition were present, then the transaction was barred. If there was no "loan," even the presence of all the other necessary components still would not trigger the prohibition.

C. "Loans of Credit"

The court's rules defining a "loan of credit" have not been as logical and consistent as those governing the definition of "gifts" and "loans of money." Presumably, the constitution's framers intended a difference between lending "money" and lending "credit," or they would not have used both terms. However, the convention journal yields no clues about the framers' thoughts on the difference between "loans" and "credit."[34] The first and possibly the best definition equates a loan of credit with a public guarantee of private obligations.[35] The supreme

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31. *Id.* at 676, 497 P.2d at 926 (emphasis in original).

32. 79 Wash. 2d 237, 484 P.2d 393 (1971).

33. *Id.* at 241, 484 P.2d at 396 (quoting Hafer v. Spaeth, 22 Wash. 2d 378, 384, 156 P.2d 408, 411 (1945)).

34. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 675-84 (B. Rosenow ed. 1962) [hereinafter cited as JOURNAL].

35. Gruen v. State Tax Comm'n, 35 Wash. 2d 1, 30-31, 211 P.2d 651, 668 (1949),

court utilized this definition in *Gruen v. State Tax Commission*,[36] upholding the state's imposition of a cigarette excise tax to retire veterans' bonus bonds. The court reasoned that by imposing the tax the government had not attempted to act as surety for any third party; instead, the state had issued the bonds in order to make benefit payments directly to veterans.[37] Quoting from an Iowa case, the court stated:

> The section does not, in terms, purport to deal with the creation of primary indebtedness by the state for any purpose whatsoever. The prohibition is that the state shall not lend its *credit* to any other being whatever, and that it shall 'never assume' the debts or liabilities of any other being whatsoever. . . . [I]s there a distinction to be observed between a loan of credit and the power of the constituted authorities of the state to create a primary indebtedness to subserve some public purpose or in response to some moral obligation?[38]

The supreme court in *Gruen* answered the Iowa court's rhetorical question affirmatively.[39]

A different definition of a "loan of credit" was provided in *Port of Longview v. Taxpayers of the Port of Longview*,[40] in which the court barred loans by two ports and one county to private corporations for the financing of pollution control equipment. The corporations had promised to make payments on a schedule fixed to provide those governments with funds to pay debt service on tax-exempt bonds issued to accomplish the initial financing.[41] The transactions had been structured as leases,[42] but the court had little trouble finding them to be loans of

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overruled, State *ex rel.* Washington State Fin. Comm'n v. Martin, 62 Wash. 2d 645, 384 P.2d 833 (1963). See Berglund v. City of Tacoma, 70 Wash. 2d 475, 423 P.2d 922 (1967), and the court of appeals decision in State *ex rel.* O'Connell v. PUD No. 1, 2 Wash. App. 366, 469 P.2d 922 (1970), for further development of the definition of "loans of credit" in terms of suretyship. *See also* C. KIPPEN, *supra* note 4, at IV-12 through IV-23.

36. 35 Wash. 2d 1, 211 P.2d 651 (1949).

37. *Id.* at 51, 211 P.2d at 679.

38. *Id.* at 29, 211 P.2d at 667-68 (quoting Grout v. Kendall, 195 Iowa 467, 472, 192 N.W. 529, 531 (1923)).

39. *Id.* at 30, 211 P.2d at 668.

40. 85 Wash. 2d 216, 533 P.2d 128 (1974). The opinion cited at 533 P.2d 128 contains only the court's modified holding. The opinion cited at 85 Wash. 2d 216 contains the complete opinion and the court's original holding. Parallel page citations to this case are found at 527 P.2d 263 (1974).

41. *Port of Longview*, 85 Wash. 2d at 220, 527 P.2d at 265.

42. *Id.*

money.[43] Although no surety arrangement existed, the *Port of Longview* court also characterized the arrangements as loans of credit because the bonds were payable solely from the corporations' "lease" payments and because public money was not pledged to repay those obligations.[44] The court held that the mere giving of a government's name and tax-exempt status to the bonds lowered the cost of funds to the corporations and thus constituted a "lending of credit."[45] The court could have reached the *Port of Longview* result by a more narrowly circumscribed analysis, finding the leases to be, in effect, loans of money. Alternatively, the court might have held that the grant of tax-exempt status on the bonds was a gift supported by inadequate consideration. Instead, the court broadened the definition of a "loan of credit" to include a transaction in which no suretyship existed.[46]

D. "In Aid of Any Individual, Association, Company or Corporation"

Although the court's specific formulation of the rules defining "gifts," "loans of money," and "loans of credit" can be criticized and debated, the cases discussed above illustrate that in construing article VIII, sections 5 and 7 the court has often concentrated on limited elements of those constitutional prohibitions. The court's rules for defining "gifts," "loans," and "credit" necessarily have differed because those terms connote different concepts. No single rule or formula could possibly encompass all three concepts. Furthermore, even when one of these elements has been found, the court must determine that the other components of the prohibition also exist.[47] For example, decisions have held that a pure government grant or gift to another government entity (or an Indian tribe) is not a gift "to or in aid of any individual, association, company or corporation," and that the constitutional prohibition therefore does not apply.[48] Even when the

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43. *Id.* at 222-23, 527 P.2d at 266.

44. *Id.* at 222, 527 P.2d at 266.

45. *Id.* at 227, 527 P.2d at 269.

46. This broadened definition of a "loan of credit" to encompass the "loan of its name" by a municipality was reiterated in Health Care Facilities Auth. v. Ray, 93 Wash. 2d 108, 113-14, 605 P.2d 1260, 1263 (1980).

47. *See supra* note 17 and accompanying text.

48. *See, e.g.*, Anderson v. O'Brien, 84 Wash. 2d 64, 67, 524 P.2d 390, 393 (1974) (state assistance to an Indian tribe); State *ex rel.* Washington Toll Bridge Auth. v. Yelle, 56 Wash. 2d 86, 104, 351 P.2d 493, 505 (1960) (loan of credit to a state agency); Rands v. Clarke County, 79 Wash. 152, 157, 139 P. 1090, 1092 (1914) (building of bridge in con-

court has found a "gift" or "loan" to a private individual, however, the exception "for the necessary support of the poor and infirm" may permit the otherwise barred transaction.[49]

The analytical reduction of article VIII, sections 5 and 7 into discrete components has a long history.[50] With some exceptions, whenever the court has rigorously insisted that each element of the prohibition be present and has been careful in its definition of terms such as "gift,"[51] "loan of money,"[52] "loan of credit,"[53] "stock in or bonds of,"[54] and "individual, association, company or corporation,"[55] the cases appear to have been easier to decide and much easier to apply. Furthermore, as the next section shows, if the court adheres to the traditional approach of analyzing the language of the constitution and drawing conclusions about the prohibitions in article VIII, sections 5 and 7 principally from the language itself, the court will have significant flexibility in its decisions on proposed government projects and actions.

III. Five Recent Cases

This section examines in detail five recent cases involving article VIII, sections 5 and 7, in order to demonstrate that the more successful opinions focus on the language of the applicable constitutional provision itself and insist that each element of the

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junction with Oregon county); Lancey v. King County, 15 Wash. 9, 11, 45 P. 645, 646 (1896) (condemnation of land for ship canal to be built by the state and the federal government).

49. *See, e.g.*, Health Care Facilities Auth. v. Ray, 93 Wash. 2d 108, 605 P.2d 1260 (1980) (bond proceeds for the benefit of health care facilities contributed aid to the infirm); Morgan v. Department of Social Sec., 14 Wash. 2d 156, 127 P.2d 686 (1942) (old-age pension held to aid the poor and infirm); State *ex rel.* Schmidt v. Sullivan, 190 Wash. 600, 69 P.2d 828 (1937) (funds for indigent blind persons within poor and infirm exception).

50. See *supra* note 17 for cases in which the court found no violation on the basis that one discrete component of the applicable constitutional provision was absent. See also *infra* notes 56-69 and accompanying text for a discussion of City of Marysville v. State, 101 Wash. 2d 50, 676 P.2d 989 (1984), in which the court analyzed a governmental action that was challenged under Wash. Const. art. VIII, § 7, by dividing the constitutional provision into its component parts.

51. *See supra* notes 18-29 and accompanying text.

52. *See supra* notes 30-33 and accompanying text.

53. *See supra* notes 34-46 and accompanying text.

54. *See* State *ex rel.* Graham v. City of Olympia, 80 Wash. 2d 672, 683-85, 497 P.2d 924, 930-31 (1972) (court found that the deposit of public funds into an interest-bearing account in a savings and loan association did not violate the ban on municipal ownership of corporate stock). *See supra* text accompanying notes 30-31.

55. *See supra* notes 47-49 and accompanying text.

prohibition be present. The cases that attempt to discuss more elements of the prohibition than are necessary to solve the specific situation before the court, or that contain unnecessary dicta, tend to be confusing and provide only limited guidance for future decisions by government agencies and the courts.

A. City of Marysville v. State

In *City of Marysville v. State*,[56] the city of Marysville, a participating employer in the Public Employees' Retirement System (PERS), had purchased a privately owned golf course in 1971.[57] Three employees of the golf course at the time of purchase continued to work at the course, now as city employees and members of PERS.[58] The state administrators of PERS determined that under state law[59] the three employees were each entitled to a credit for their previous service when the course had been private.[60] PERS billed the city for a contribution to the retirement system based on the employees' length of service, including service at the facility when it was privately owned.[61] The city refused to pay into PERS for the time corresponding to the employees' private employment, claiming that such payment would be an unconstitutional gift to private individuals.[62]

The court's opinion was concise and tightly reasoned. First, it held that a payment by the city of Marysville to the state PERS system was not a gift "to or in aid of any individual, association, company or corporation" prohibited by the constitution, under the long-standing rule that "the plain terms of Article 8, Section 7 do not encompass payments between public entities."[63] Next, the opinion focused on the extra years of credit that the employees received through the PERS system for work performed for the private employer.[64] The decision noted:

> [A] pension granted to a public employee is not a gratuity but is deferred compensation for services rendered . . . . The only question, then, is whether the fact that the amount of contri-

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56. 101 Wash. 2d 50, 676 P.2d 989 (1984).
57. *Id.* at 51, 676 P.2d at 990.
58. *Id.*
59. WASH. REV. CODE ANN. § 41.40.160(2) (1972).
60. *Marysville*, 101 Wash. 2d at 51, 676 P.2d at 990.
61. *Id.*
62. *Id.*
63. *Id.* at 56, 676 P.2d at 992-93.
64. *Id.* at 56-57, 676 P.2d at 993.

> butions is calculated with reference to how long the subject employees worked for [the golf course] before it was purchased by the City makes the contributions "gratuitous" because such services had already been rendered.[65]

The court easily disposed of this attack by quoting from the statutory language providing for such credits in order to retain trained personnel.[66] The court then stated:

> [I]t is obvious that the Legislature intended such credit to be a constitutional inducement to experienced private employees to stay on the job after their companies were acquired by public entities rather than an unconstitutional gratuity to such employees. The subject employees provided ample consideration for the pension benefits when they remained at [the golf course] after its acquisition by the City.[67]

Thus, in *Marysville*, the court applied two traditional rules: first, a "gift" from one public entity to another is not a gift "to or in aid of any individual, association, company or corporation" and, second, no "gift" exists when adequate consideration supports the exchange.

In a concurring opinion, the late Justice Rosellini correctly noted that the majority opinion had included an unnecessary historical review of the framers' purposes for including article VIII, sections 5 and 7 in the constitution.[68] He asserted that the majority's discussion of nineteenth-century fears of public "risk of loss" from investment in private business schemes was not needed because a decision in favor of PERS could have been reached solely on the basis of whether or not there had been adequate consideration for the grant of service credit to the employees.[69] Nonetheless, despite its short historical voyage to the constitutional convention, *Marysville* remains a straightforward, limited opinion that focused on the language of the prohibition itself, found some of the necessary elements missing, and held, therefore, that the prohibition did not apply.

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

66. *Id.* at 58, 676 P.2d at 993.

67. *Id.*

68. *Id.* at 59-62, 676 P.2d at 994-96 (Rosellini, J., concurring).

69. *Id.* at 59-60, 676 P.2d at 994 (Rosellini, J., concurring).

B. City of Seattle v. State

City of Seattle v. State,[70] another recent case construing article VIII, section 7, concerned a Seattle ordinance[71] that authorized the partial public financing of election campaigns for city office when the candidates voluntarily agreed to limit the amount of private contributions to their races.[72] Although the *Seattle* court did not explicitly analyze the language of article VIII, section 7, the decision implicitly followed three traditional rules in finding the constitutional prohibition inapplicable.

First, the court noted the city's recognition of political candidates' dependency on campaign contributions from private interests[73] and the danger of electing public officials beholden to narrow interest groups.[74] Without expressly referring to the traditional rule that no gift is present if there is adequate consideration, the opinion fully described the elements of the mutual agreement by which a candidate would receive public campaign funds in return for limiting his or her acceptance of private political donations.[75] The court observed that "if a candidate agrees to the spending limit, public funds will displace rather than merely supplement private funds, thus reducing the candidate's reliance on private contributions."[76]

Next, the court reasoned:

> [P]ublic campaign funds may be used *only for direct campaign purposes*. Such funds never leave the public arena; they never go into the private pockets of the candidate for his own personal purposes. The candidate holds the funds in a fiduciary capacity and can spend only to further the objectives of the ordinance. When the campaign is over, all public funds not spent for those limited purposes must be returned to the City.[77]

In other words, the court held that there was no public gift of money to any individual because the funds never left the public sector. The city's campaign contributions were spent for public purposes, and the candidates expended those funds solely as

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70. 100 Wash. 2d 232, 668 P.2d 1266 (1983).
71. SEATTLE, WASH., MUNICIPAL CODE §§ 2.04.400-.480 (1980).
72. *Seattle*, 100 Wash. 2d at 235, 668 P.2d at 1267.
73. *Id.* at 235, 668 P.2d at 1267.
74. *Id.* at 236, 668 P.2d at 1268.
75. *Id.* at 239-40, 668 P.2d at 1270.
76. *Id.*
77. *Id.* at 240-41, 668 P.2d at 1270 (emphasis in original).

"trustees" of the public purse. The money never became private in character; thus the constitutional bar against gifts "in aid of any individual" was not triggered and the prohibition did not apply.

This creative twist on a traditional rule was in essence the reverse of a principle laid out in *Health Care Facilities Authority v. Spellman*,[78] in which the court held that the loan of proceeds of bonds issued by a public entity to finance capital acquisitions by religiously based hospitals was not a violation of the constitution's ban on expenditure of public money for religious purposes.[79] In that case, the money involved had flowed from the private bond market through accounts in a private trustee bank to the private, nonprofit hospital, and thus had never become *public* in character.[80] In *Health Care Facilities Authority v. Spellman*, the court held that the prohibition against use of public funds for religious purposes was inapplicable because the money never became public,[81] while in *City of Seattle v. State*, the court found that the ban on use of public money for private purposes had not been violated because the funds involved retained their public character throughout the transaction and hence were never used in aid of private individuals.[82]

The third basis for the court's holding in *City of Seattle v. State* was related to the rule that no gift of a municipality's money occurs when funds are expended for a recognized governmental function.[83] The court phrased this rule in terms of "entitlements," which it defined as "a form of assistance provided to the public, or a segment of the public, as cash or services, in carrying out a program to further an overriding public purpose or satisfy a moral obligation."[84] The opinion compared Seattle's public campaign contributions to government-provided day care services, vaccinations to control disease, fare-free bus zones to reduce traffic congestion, crime victim compensation, and several other forms of payments made by the government in carry-

78. 96 Wash. 2d 68, 633 P.2d 866 (1981).

79. WASH. CONST. art. I, § 11 states, in part: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

80. 96 Wash. 2d at 72-75, 633 P.2d at 868-69.

81. *Id.* at 72-76, 633 P.2d at 868-70.

82. *Seattle*, 100 Wash. 2d at 240-41, 668 P.2d at 1270.

83. *Id.* at 240, 633 P.2d at 1270.

84. *Id.* at 241, 633 P.2d at 1270.

ing out its fundamental purposes.[85] To the extent that private candidates might benefit from public expenditures on their campaigns, those benefits were found to be incidental to the public benefit of preserving the electoral process from control by special interest groups.[86]

The court in *City of Seattle v. State* need not have relied on three separate arguments to determine that the article VIII, section 7 prohibition was inapplicable. The lack of any one of the elements of the prohibition would have sufficed to block application of the provision. Nevertheless, each of the court's rationales was relevant to the case at bar. The court's development of each rationale will be useful to judges, lawyers, and public officials in future determinations of whether specific government programs are in accord with the constitution.

C. Johnson v. Johnson

Unlike the two cases discussed above, *Johnson v. Johnson*[87] could have been determined swiftly on the ground that a single element of the prohibition was lacking. Instead, the opinion attempted too much, inserting many more theories than were necessary to decide the case. In *Johnson*, the court reviewed a Department of Social and Health Services (DSHS) program established by statute[88] to facilitate the collection of past-due child support for children not receiving public assistance.[89] Mr. and Mrs. Johnson had been divorced, with Mrs. Johnson retaining custody of their youngest child.[90] Mr. Johnson was ordered to pay child support, and when he failed to do so, DSHS proceeded with a statutory action to collect the money owed Mrs. Johnson.[91] Mr. Johnson's suit alleged, among other things, that state action to collect the private debt on behalf of a nonindigent person violated article VIII, section 5 because it was a gift of public money for a private purpose.[92]

The plurality opinion first correctly observed that the bur-

85. *Id.* at 241-42, 633 P.2d at 1271.

86. *Id.* at 242-44, 633 P.2d at 1271-72.

87. 96 Wash. 2d 255, 634 P.2d 877 (1981).

88. The child support collection program involved in Johnson v. Johnson had been authorized by WASH. REV. CODE § 74.20.040 (1983).

89. 96 Wash. 2d at 257, 634 P.2d at 878.

90. *Id.*

91. *Id.*

92. *Id.* at 258, 634 P.2d at 879.

den was on Mr. Johnson to demonstrate that the statute involved was constitutionally invalid, stating that the court would sustain the statute if it could conceive "any set of facts which support the statute's constitutionality."[93] The opinion then reasoned, among other things, that governmental enforcement of a child's fundamental right to support constituted a "recognized public function," and thus no gift to an individual was involved.[94]

The opinion easily could have ended at this point, once the court had found the lack of any public gift to a private person. Nevertheless, in both the plurality[95] and concurring[96] opinions, the court launched into a confusing history of article VIII, sections 5 and 7 and attempted to draw in several theories applicable to other elements of the prohibition but not specifically relevant to the matter at hand.

For example, the court stated that the public benefit from state collection of child support payments was "consideration" for the funds expended.[97] This reference to the "consideration" rule was unnecessary and baffling. As noted above,[98] the concept of consideration is relevant only when a transfer from the government to a private person would otherwise be a gift. When the public agency is carrying out a recognized governmental function and the benefit to an individual is merely incidental, no consideration is required because no transfer has occurred that might be viewed as a gift.[99]

Indeed, if as stated in *Johnson*, the "public benefit achieved from such activities is the 'consideration' for the funds expended,"[100] logically *any* public benefit from what would otherwise be a gift to a private individual or entity would be constitutionally acceptable. For example, increased employment from government investment in the stock of local high-technology corporations might be held adequate "public benefit" and "consideration" for what would otherwise be barred. Similarly, municipal investment in the stocks and bonds of private railroads

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93. *Id.*

94. *Id.* at 263-64, 634 P.2d at 882.

95. *Id.* at 264-67, 634 P.2d at 882-84.

96. *Id.* at 268-73, 634 P.2d at 884-87 (Dore, J., concurring in part, dissenting in part).

97. *Id.* at 262, 634 P.2d at 881.

98. *See supra* notes 18-22 and accompanying text.

99. *Johnson*, 96 Wash. 2d at 263-64, 634 P.2d at 882.

100. *Id.* at 262, 634 P.2d at 881.

logically could provide "consideration" under such an analysis because economic benefits to the state could result. Yet, the framers meant to bar this very form of government investment regardless of the resulting public benefit.[101] Thus, the insertion of the "consideration" theory into the court's opinion in *Johnson* was both unnecessary for the decision and potentially confusing to those attempting to apply it.

Similarly, the court discussed the article VIII, section 5 exemption of activities in support of the poor and infirm.[102] Yet the facts of the case made it clear that Mrs. Johnson and her daughter were neither poor nor infirm.[103] Thus, the reference to the line of cases concerning aid to low-income and ill citizens served only to confuse matters further.

The court also complicated its plurality opinion by including a lengthy examination of what it called the "risk of loss" approach to article VIII, sections 5 and 7.[104] The opinion noted that the framers included these provisions to avoid the risk of losing public money on privately owned or controlled ventures and stated that, because no public funds were at risk in the child support program, article VIII, section 5 was not violated.[105] In this discussion, the opinion clearly set up a straw man. When governments spend money for accepted public purposes, such as financial aid to children, day care services, vaccinations, free bus zones, or assistance to victims of crime, the concept of "risk" of public funds is inapposite. Although the court's opinion in *Johnson* was a scholarly attempt to review the wide and apparently conflicting range of principles concerning article VIII, sections 5 and 7, the inclusion of so many different rules and the effort to apply them all to the instant case served more to confuse than to clarify the law. Perhaps because of the inclusion of so many rules, the plurality opinion received the support of only three justices.[106] Three others concurred in the result,[107] two concurred in part and dissented in part,[108] and one justice dissented.[109] One

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101. *See* JOURNAL, *supra* note 34, at 675, 679-84.

102. 96 Wash. 2d at 262, 634 P.2d at 881.

103. *Id.* at 257, 634 P.2d at 879.

104. *Id.* at 265-68, 634 P.2d at 882-84. *See also supra* note 14 and accompanying text.

105. *Id.* at 267-68, 634 P.2d at 884.

106. Justice Utter wrote the opinion, with Justices Dolliver and Williams concurring.

107. Justices Stafford, Hicks, and Dimmick.

108. Justices Dore and Rosellini.

109. Chief Justice Brachtenbach.

suspects that if the opinion had been restricted to a discussion of the "recognized public governmental function" of child support enforcement, it would have garnered more general support among the members of the court and would also have been more useful to lawyers, courts, and government officials.

D. Public Employment Relations Commission v. City of Kennewick

Public Employment Relations Commission v. City of Kennewick[110] followed the principal rules applied in *Johnson*,[111] without including much more than was necessary to decide the case. *Kennewick* involved two janitors who worked at Kennewick City Hall under a collective bargaining agreement between the city and the International Union of Operating Engineers.[112] When one of the janitorial positions became vacant, the city filled it by subcontracting that portion of the work to a private firm.[113] The city manager refused to reverse the action after a union complaint.[114] The labor organization then filed an unfair labor practice charge with the Public Employment Relations Commission, as provided in the Public Employees' Collective Bargaining Act.[115] The commission ruled in favor of the union, but the city refused to comply with the commission's order on the ground, among others, that the enforcement of the order would constitute a use of public funds for the labor organization's private benefit in violation of article VIII, section 5.[116]

In a unanimous opinion, the court neatly disposed of the city's argument, first ruling that the party challenging the relevant statute had the burden of overcoming the presumption of constitutionality[117] and then finding that the legislative goal of peaceful employment relations was a "recognized public governmental function."[118] The court noted, as it had in previous opinions, that "[p]rivate parties may indeed benefit incidentally as a result of the exercise of that important function; however, as

110. 99 Wash. 2d 832, 664 P.2d 1240 (1983).
111. *See supra* text accompanying notes 87-109.
112. *Kennewick*, 99 Wash. 2d at 834, 664 P.2d at 1241.
113. *Id.*
114. *Id.*
115. WASH. REV. CODE § 41.56.170 (1983).
116. *Kennewick*, 99 Wash. 2d at 835, 664 P.2d at 1241.
117. *Id.* at 836, 664 P.2d at 1242.
118. *Id.* at 837-38, 664 P.2d at 1243.

long as the private benefit is incidental to the public purpose served, the legislation is not unconstitutional."[119] The court referred in passing to the public governmental function as "consideration" for the state's expenditure[120] and also recited the concept from *Johnson* that the government activity did not subject any of the state's assets to risk of loss.[121] Neither of these two latter references was necessary to the court's decision, but they were brief and did not detract significantly from an otherwise simple and straightforward analysis that focused on whether a gift of public funds had been made for private benefit. The clarity and simplicity of the *Kennewick* opinion may well have been a factor in garnering the court's full support, and the tight reasoning of the opinion made it easy for judges, lawyers, and government officials to understand and apply in future matters.

E. State Housing Finance Commission v. O'Brien

The final case examined here is *State Housing Finance Commission v. O'Brien*,[122] in which the Washington Supreme Court upheld the constitutionality of a statutorily authorized program under which a state agency issued nonrecourse revenue bonds and loaned the proceeds of those bonds to first-time, moderate-income home buyers and to the builders or purchasers of mixed-income rental housing projects.[123]

The majority first related in detail the legislature's findings concerning the impact of a severe economic recession on the ability of low- and middle-income families to afford housing and the impact of that recession on the state's economy in general.[124] The court stated that "[t]he adequacy of private housing and the health of the state's economy have traditionally been concerns of state government"[125] and asserted that any private sector benefits from the commission's program should be seen either as incidental benefits or as compensation for necessary work performed.[126] However, the core of the opinion addressed

119. *Id.* at 838, 664 P.2d at 1243.
120. *Id.* at 837-38, 664 P.2d at 1243.
121. *Id.* at 839, 664 P.2d at 1243.
122. 100 Wash. 2d 491, 671 P.2d 247 (1983).
123. *Id.* at 493, 671 P.2d at 248-49.
124. *Id.* at 493, 671 P.2d at 248.
125. *Id.* at 496, 671 P.2d at 250.
126. *Id.* at 496-97, 671 P.2d at 250-51.

the issue whether the State Housing Finance Commission's loan programs posed any "risk of loss" to the state.[127] The court recited the framers' desire to protect the public purse from investment in uncertain private ventures[128] and stated that the risk of loss approach required the court to evaluate whether the program had "safeguards absent in the schemes of the nineteenth century."[129] The court then found that the risk of loss to the public was minimal because of extensive safeguards that the court said were built into the legislation governing the commission: program funds were derived entirely from the private bond market rather than from state appropriation; the funds never entered the state treasury but were held in special trust accounts; the bonds, although issued in the commission's name, contained a recital that they were not state obligations.[130] Furthermore, potential impact on the state's credit rating was minimized by limits on the total permitted volume of commission bonds and by the fact that the commission had sought a court decision on the relevant statute's constitutionality to avoid a later challenge to the validity of the bonds.[131]

O'Brien was decided on a five-to-four vote.[132] The dissent relied principally on language in *Port of Longview v. Taxpayers of the Port of Longview*[133] and *Washington Health Care Facilities Authority v. Ray*[134] to the effect that the use of the state's name and ability to confer tax-exempt status on bonds was a "lending of credit" under article VIII, section 5.[135] The minority also distinguished *Johnson v. Johnson*[136] and *Public Employ-*

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127. *Id.* at 498-500, 671 P.2d at 251-52.

128. *Id.* at 494, 671 P.2d at 249.

129. *Id.* at 495, 671 P.2d at 250.

130. *Id.* at 498, 671 P.2d at 251.

131. *Id.* at 498-99, 671 P.2d at 251-52. The court referred specifically to Chemical Bank v. Washington Pub. Power Supply Sys., 99 Wash. 2d 772, 666 P.2d 329 (1983), and to the negative impact on the state's credit rating of successful challenges to the validity of bonds issued by public entities. The court reasoned that the risk of loss to the state from lending its name to the commission's bonds had been minimized by the fact that the validity of the bond issue was tested before the obligations were sold in the financial markets.

132. Chief Justice Williams and Justices Utter, Dolliver, and Pearson concurred with Justice Dimmick's opinion, while Justices Stafford, Brachtenbach, and Dore concurred with Justice Rosellini's dissenting opinion.

133. 85 Wash. 2d 216, 533 P.2d 128 (1974).

134. 93 Wash. 2d 108, 605 P.2d 1260 (1980).

135. 100 Wash. 2d at 502-05, 671 P.2d at 253-55 (Rosellini, J., dissenting).

136. 96 Wash. 2d 255, 634 P.2d 877 (1981).

ment Relations Commission v. City of Kennewick[137] by stating that those cases involved expenditures for recognized governmental services and functions, and that the subsidization of private home buyers and developers was not a recognized function of the state.[138]

Yet, the dissent in *O'Brien* did not focus on what is possibly the weakest part of the majority's logic: the assertion that, because the framers were concerned about risks of loss to the state, there was no loan of money or credit if it could be shown that no risk of loss was present.[139] This reasoning has a serious flaw: no matter how many safeguards are present to minimize the risk of loss to the state, a loan, albeit a very safe one, can still exist.

If the existence of strong safeguards against losses to the state mean that no loan or gift has occurred, then might not the state lend tax funds or general obligation bond proceeds to private individuals and corporations whenever those loans are fully guaranteed by the federal government or by insurance companies whose claims-paying ability is unassailable? If a wholly secure loan is not a "loan" by the court's reasoning, what would keep the state or municipalities from lending tax funds to private railroads when there are: (1) legislative findings of the need to aid the transportation industry; (2) safeguards over the use of the money loaned; (3) federal guarantees, private insurance, or letters of credit from strong financial institutions to secure repayment of the loans; and (4) test cases to validate the proposed transaction? In other words, the central logic of the majority opinion in *O'Brien* could lead to the validation of transactions that clearly were not meant to be permitted either by the framers or by today's court. This weakness in the majority opinion not only may have caused a sharply divided court, but also produced an opinion that will make analysis of future legislative programs difficult.

In *O'Brien*, the court could have applied a different analytical approach based purely on a conservative and demanding reading of article VIII, sections 5 and 7. Such an approach would have found that one or more of the elements of the constitutional provision were absent when applied to the housing finance

137. 99 Wash. 2d 832, 664 P.2d 1240 (1983).

138. *See generally supra* notes 34-46 and accompanying text.

139. 100 Wash. 2d at 500-07, 671 P.2d at 252-56 (Rosellini, J., dissenting).

programs, and that the prohibitions thus would not apply.

The court could have determined that the money or credit being loaned in connection with the State Housing Finance Commission's program was not, in the language of article VIII, section 5, the money or credit "of the state"—and in the language of article VIII, section 7, not "its money, or credit." The State Housing Finance Commission's legislation had been carefully drafted to conform to the court's rules, set forth in *Health Care Facilities Authority v. Spellman*,[140] for determining when bond proceeds loaned to a private religious institution constituted "public money." Although the constitutional provision involved in *Health Care Facilities Authority v. Spellman* was different from that in *O'Brien*, the *O'Brien* opinion could have found them sufficiently similar to apply the same rules when: (1) no money came from the public treasury for the loans; (2) the bond proceeds never entered the public treasury; (3) repayment of the bonds did not pass through the public treasury; (4) the bonds were not a debt of the state; and (5) money for the loans was not acquired from or for the taxpayers at large; there was no lending of "public money" and therefore the applicable constitutional provision did not bar the transaction.[141] Under this analysis, *O'Brien* would have been distinguishable from *Port of Longview*[142] because the bond proceeds involved in *Port of Longview* were placed in the public treasury, and debt service on those bonds was provided by lease payments paid by private entities into the public treasury.[143]

If the court had held in *O'Brien* that the money or credit being loaned was not the money or credit of the state, then the only remaining significant action that the state was taking was giving tax-exempt status to the bonds providing the money loaned. The court observed in *Port of Longview* and in *Health Care Facilities Authority v. Ray* that a tax exemption is valuable because it reduces borrowing costs.[144] In the same opinions, however, the court inaccurately described the government action making the bonds tax-exempt as a "lending of credit," despite

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140. 96 Wash. 2d 68, 72-75, 633 P.2d 866, 868-69 (1981).

141. *Id.* at 72-76, 633 P.2d at 868-70. *See supra* notes 78-81 and accompanying text.

142. 85 Wash. 2d 216, 533 P.2d 128 (1974). See *supra* note 40 for an explanation of the parallel citations to this case.

143. *Id.* at 222, 527 P.2d at 266.

144. *Id.* at 230-31, 527 P.2d at 271; Health Care Facilities Auth. v. Ray, 93 Wash. 2d 108, 114, 605 P.2d 1260, 1263 (1980).

the fact that the government was not serving as a surety on the loans—the action traditionally defined as a loan of credit.[145]

Instead, the government's action conferring tax-exempt status on the bonds should be analyzed as a possible gift of something of value, which would be barred by article VIII, sections 5 or 7 were there not adequate consideration in return. In the State Housing Finance Commission's programs, for example, the provision of safe and sanitary housing for first-time home buyers and low-income persons, in compliance with the commission's strict guidelines, would provide sufficient consideration for the state's transfer of low-interest financing to the housing industry. Hence, there would be an inducement to the mortgage lending and construction industries to take actions that they would not take were it not for the lower interest rates provided on the loans. This is in marked contrast to the circumstances in *Port of Longview*, in which the pollution control facilities funded by the government agencies were an existing obligation that the private companies were required to construct regardless of the agencies' granting of low-cost funds through the use of tax-exempt bonds.[146]

The strict public controls over the use of the State Housing Finance Commission's bond proceeds should not have been interpreted in *O'Brien* to mean that no gift or loan existed, but rather that there existed clearly delineated elements of a bargain that the users of the funds had to fulfill as part of the consideration for obtaining low-interest money for housing purposes. Indeed, the lengthy "risk of loss" rationale in the majority's opinion should have been used only to measure the value of the government's side of the bargain; if the state had little risk of loss, it needed less consideration for its grant of tax-exempt status on the bonds. "Risk of loss" should be seen primarily as an historical description of the original policy basis for article VIII, sections 5 and 7, and not as a substitute for the text of the prohibitions themselves. That text specifies the framers' solution to a perceived danger. Although historical inquiry is useful in determining the meaning of a constitutional phrase, such inquiry should not justify changes of meaning from one thing to its opposite when the words are relatively clear. The term "loan" has not changed substantially in the past century, and the State

145. *See supra* notes 34-39 and accompanying text.

146. *Port of Longview*, 85 Wash. 2d at 218, 527 P.2d at 264.

Housing Finance Commission clearly made loans. The key is that the loans were not of state money or credit. If there had been loans of state money or credit, the framers would have intended to bar them regardless of the degree of risk.

An alternative and equally defensible rationale that the court could have applied in *O'Brien* is simply that the provision of housing is a "recognized public governmental function" and that government loans to aid in the provision of housing for citizens are not fundamentally different from day care services, vaccinations, fare-free bus zones, crime victim compensation, or public support of electoral campaigns, all of which the court in *City of Seattle v. State* suggested were permissible.[147] Benefits accruing to individuals or businesses in connection with the commission's housing finance programs thus would be viewed as incidental to the underlying governmental function of providing decent, safe, and sanitary housing, a function that the legislature specifically found to be an obligation of the state when it enacted the commission's enabling legislation.[148] This approach, relying solely on the "recognized public governmental function" rule to determine the absence of a gift or loan, might not have swayed the four dissenting members of the court. Nevertheless, if the majority had chosen to rely on that rule, its opinion would have been simpler, more straightforward, and easier to apply to future legislative programs.

IV. CONCLUSION

When viewed as a whole, the Washington Supreme Court's opinions construing article VIII, sections 5 and 7 are neither as inconsistent nor as erratic as some have contended.[149] Many of the opinions are logical and easy to apply to future questions because they focus simply on one or another of the elements of the constitutional provision and reject application of the provision when a single element is missing. Article VIII, sections 5

147. 100 Wash. 2d 232, 241-42, 668 P.2d 1266, 1271 (1983). *See supra* notes 83-86 and accompanying text.

148. WASH. REV. CODE § 43.180.010 (1983).

149. *See, e.g.*, City of Marysville v. State, 101 Wash. 2d 50, 52, 676 P.2d 989, 990 (1984) ("In [an earlier case], a plurality of this court examined our earlier erratic decisions and concluded most of them were an unjustified interpretation of the intent of the drafters of article 8, sections 5 and 7 of the constitution."); Johnson v. Johnson, 96 Wash. 2d 255, 264, 634 P.2d 877, 882 (1981) ("The presence of inconsistent analyses or exceptions suggest [sic] the approach may have outlived its relevance or was improvidently fashioned.").

and 7 are occasionally difficult to apply because there are so many components involved. It is not always easy to discern which element—and therefore which rule or rules—should be the subject of analysis. Nevertheless, if the courts and lawyers critically analyze each proposed governmental action and methodically determine whether each and every element of the applicable constitutional prohibition is present, relatively few government proposals will be found to violate article VIII, section 5 or 7.

Existing rules governing interpretation of the elements of article VIII, sections 5 and 7 provide ample bases for judicial findings that no loans or gifts exist, that there is adequate consideration, that a loan or gift is not in aid of a private party, or that the money or credit involved is not public in nature. The rules concerning each of these elements are easy to apply when one first specifies which element should be analyzed. Inconsistent analyses or erratic decisions indeed have occurred from time to time, but principally because the court attempted to apply more rules than were necessary, or because opinions included unnecessary dicta to distinguish cases or problems that were not relevant. The best approach to article VIII, sections 5 and 7, and the one that ultimately will yield the most flexibility in determining the constitutionality of legislative programs, is the more conservative approach of reducing the textual provisions to their component parts, using the straightest and narrowest path necessary to decide the case before the court, and avoiding discussion of those factors unnecessary for reaching a decision.