Washington State Constitutional Limitations on Gifting of Funds to Private Enterprise: A Need for Reform

*David D. Martin**

I. INTRODUCTION

In the nineteenth century, economies of the eastern United States grew at a rapid rate as a result of railroad linkages between markets and producers.[1] Infrastructure, particularly railroads, was essential to economic development and was sought after with abandon. State governments were prompted to provide public credit and subsidies to private railroads to attract growth in undeveloped areas. However, economic growth could not always be sustained: Because railroad lines were sometimes abandoned, the solvency of financing governments was dangerously impaired due to the liabilities and obligations that had been incurred. In some cases, financing governments were driven to near bankruptcy.[2] This financial instability spawned a political reaction that restricted the financial activities of local and state

* J.D. Candidate 1997, Seattle University School of Law; B.A. 1993, University of Washington. I give special thanks to my fiancée, Aurora Almeda, for her support and inspiration during the writing process. I would also like to thank the following people for their help in editing this Comment: Professor Kellye Testy, Hugh Spitzer, and members of the Washington State Legislature Transportation Committee.

1. David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 277-79 (1963).

2. *Id.* at 278.

governments.[3] Often, state constitutions were amended to prohibit the granting of public financial aid to private enterprise.[4]

Washington was not immune from this political reaction and included in its constitution Article VIII, sections 5[5] and 7[6]. These sections prohibit the state and its political subdivisions from loaning state money or credit, and prevent the gifting of public money or property, to any private entity, unless necessary to support the poor and infirm. Nevertheless, a century later, many still view government mobilization of capital for private enterprise as a key component in community development and job preservation.[7] States and municipalities have adopted programs that authorize incentives and subsidies to selected industries as a means of inducing private corporations to operate within their borders.[8] Competition among individual states for private industry has again led to speculative financing policies and burdensome results for taxpayers.[9]

---

3. This period was described colorfully by the Montana Supreme Court in 1925:

> [The prohibition] represents the reaction of public opinion to the orgies of extravagant dissipation of public funds . . . in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprise apparently devoted to quasi public purposes, but actually engage in private business.

Nicholas J. Wallwork and Alice S. Wallwork, *Protecting Public Funds: A History of Enforcement of the Arizona Constitution's Prohibition Against Improper Private Benefit from Public Funds*, 25 ARIZ. ST. L.J. 349, 351 (1993) (quoting Thaanum v. Bynum Irrigation Dist., 232 P. 528, 530 (Mont. 1925)).

4. Pinsky, *supra* note 1, at 279. *See generally* Ralph Finlayson, *State Constitutional Prohibitions Against Use of Public Financial Resources in Aid of Private Enterprise*, 1 EMERGING ISSUES ST. CONST. L. 177 (1988).

5. WASH. CONST. art. VIII, § 5 reads: "Credit Not To Be Loaned[:] 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."

6. WASH. CONST. art. VIII, § 7 reads:

> Credit Not To Be Loaned[:] 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.

7. *See* NATIONAL COUNCIL FOR URBAN ECONOMIC DEVELOPMENT REPORT (publication forthcoming) [hereinafter ECONOMIC DEVELOPMENT REPORT].

8. *See id. See also Antitrust Implications of Sports Franchise Relocation: Testimony to House Judiciary Committee*, 104th Cong. (Feb. 3, 1996) (statement of Cleveland Mayor Michael White); Dale F. Rubin, *The Public Pays, the Corporation Profits: The Emasculation of the Public Purpose Doctrine and a Not-for Profit Solution*, 28 U. RICH. L. REV. 1311, 1311 (1994); Hal Lancaster, *Stadium Projects Are Proliferating Amid Debate Over Benefit to Cities*, WALL ST. J., Mar. 20, 1987 § 3, at 37.

9. *See supra* note 7. *See also* Charles W. Goldner, Jr., *State and Local Government Fiscal Responsibility: An Integrated Approach*, 26 WAKE FOREST L. REV. 925, 925-27 (1991); John A. Barnes, *The Economy 'Dreams of Fields' Help Spawn New Stadium Deals*, INV. BUS. DAILY, Jan.

In Washington, the courts traditionally interpreted Article VIII, sections 5 and 7, as prohibiting all state and local funding of private enterprise, and allowed only a few specific exceptions.[10] Over the last thirty years, however, the Washington State Supreme Court has broadened these formerly narrow exceptions to the point that few transactions are found unconstitutional. The court currently reviews a challenged gift transaction by asking whether the government expenditures carry out a fundamental governmental purpose, or whether they were made under the government's proprietary authority—as if it were a private entity.[11] If the governmental expenditures carry out a fundamental governmental purpose, no unconstitutional gifting occurs and the review ends. But if the court finds that expenditures are pursuant to the government's proprietary authority, the court examines a transaction for donative intent by the government and for consideration. If donative intent is found, the adequacy of the consideration exchanged is closely scrutinized.[12] If no donative intent is found, then the adequacy of consideration is not closely scrutinized, but is merely assessed under contract law for legal sufficiency.[13] The Washington State Supreme Court has never found donative intent and, thus, has never scrutinized the adequacy of the consideration exchanged. The result is that only the most unbalanced of transactions are prohibited.

This Comment argues that the donative intent analysis shields government proprietary transactions from proper review by seeking only prima facie evidence of consideration. The framers' intent was to protect the public purse from involvement in speculative private financing; they did not intend Article VIII, sections 5 and 7, to be a paper tiger.[14] The current standard compromises meaningful review for the sake of judicial efficiency and deference to the legislature.[15] The Washington State Supreme Court should closely examine the

---

16, 1996, at B1.

10. Jay A. Reich, *Lending of Credit Reinterpreted: New Opportunities for Public and Private Sector Cooperation*, 19 GONZ. L. REV. 639, 645-46 (1984).

11. *See* City of Tacoma v. Tacoma Taxpayers, 108 Wash. 2d 679, 695, 743 P.2d 793, 801 (1987).

12. *Id.* at 703, 743 P.2d at 805.

13. This test of consideration has been used in various forms since 1965, when the Washington State Supreme Court adopted it in State *ex rel.* O'Connell v. Port of Seattle, 65 Wash. 2d 801, 399 P.2d 623 (1965).

14. See *infra* notes 20 through 24 and accompanying text, describing the framers' intent.

15. Although the principles of efficiency and deference are worthwhile, in this instance the language of Article VIII, §§ 5 and 7, is plain and its historical basis has been established. *See* Reich, *supra* note 10; *see also* Hugh Spitzer, *An Analytical View of Recent "Lending of Credit" Decisions in Washington State*, 8 U. PUGET SOUND L. REV. 195 (1985).

consideration exchanged in order to comply with the framers' intent. Additionally, public policy, state economic interests, and case law all urge close judicial scrutiny. This Comment recommends that Washington adopt a new standard, similar to the standard used in at least two other states,[16] that reviews the transaction by engaging in an individualized balancing test to ensure that the consideration exchanged is reasonable. Without a new standard, concerned members of the public are effectively precluded from raising legal challenges to a wide range of transactions conducted by various government and administrative agencies, and the special purpose of the prohibitions in protecting public funds is subverted.

This Comment is divided into four parts. First, it traces the historical emergence of the current standard of constitutional analysis under Article VIII, sections 5 and 7. Second, the Comment discusses the court's constitutional analysis and its relation to the historical intent of the framers, and proposes a new standard of review. Third, the proposed and current standards are applied to two instances of modern public financial assistance to private enterprise: legislative financing of a thoroughbred racetrack, and a state agency's subsidy of intrastate freight rail. Finally, this Comment concludes that the proposed standard should be adopted.

II. THE HISTORY OF WASHINGTON STATE'S GIFT PROHIBITION

The current approach to examining public financial assistance to private enterprise is best analyzed by reference to its historical development. Since the Washington Constitution was ratified, Article VIII, sections 5 and 7, has been interpreted in a dichotomous manner. The courts, historically, either adhered to strict constitutional construction, or to an evolving standard of analysis by exception. Although the two methods are seemingly at odds, the Washington State Supreme Court has consistently applied this dichotomous approach. Such an approach has created a standard that is extremely accommodating to the needs of private enterprise. This section will trace the components of each constitutional prohibition and the court's various exceptions to those prohibitions in an effort to explain the reasons for, and the problems with, the current standard.[17] The

16. The test that will be adopted later in this Comment is the test currently used in Arizona. Kentucky uses a similar test. *See generally* Wallwork, *supra* note 3, at 366-68.

17. In the following sections, Article VIII, §§ 5 and 7 will be addressed in tandem, based on a court tradition of one provision encompassing and providing precedent for the other. "Despite differences in wording the court interprets article 8, sections 5 and 7 identically, construing them to contain similar prohibitions and exceptions." *Tacoma Taxpayers*, 108 Wash. 2d at 701, 743

history of the court's interpretation of each prohibition to be examined in this Comment can be loosely grouped into four sections: the inception of constitutional restrictions, the period of inconsistency, the period of confusion, and the period of clarity.

A. Washington State Constitutional Convention: The Framers' Intent

In 1889, Article VIII, sections 5 and 7, was adopted at the Washington constitutional convention.[18] In adopting sections 5 and 7, those attending the convention were primarily concerned with the "protection of [the] weak from the strong within," and the protection of taxpayers and the public purse from the consequence of corporate political clout.[19] The prohibitions contained the broadest language available from the models submitted to the convention.[20] The language was even understood to bar private entities from participating in quasi-public concerns such as transportation and energy utilities.[21] With such strong language, two distinct policies underlay the prohibitions: "The first is a fear of the unfortunate, vicious or disastrous results that might occur if public assets were used to subsidize private parties. The second is a fear of government's entanglement with private enterprise to the detriment of both the private recipient and the public donor."[22] The framers' intent and broad language formed the basic analytic framework from which Washington courts have analyzed cases ever since, although it was only a few decades before the court began to create exceptions within this framework.

P.2d at 804. *See also* Adams v. Univ. of Washington, 106 Wash. 2d 312, 722 P.2d 74 (1986); Morgan v. Dept. of Social Sec., 14 Wash. 2d 156, 127 P.2d 686 (1942). For a further discussion the tandem application of WASH. CONST. art. VIII, § 5 (actions of the state) and § 7 (actions of political subdivisions), see COLLIN KIPPEN, ARTICLE VIII, SECTIONS 5 AND 7: AN EXAMINATION OF THE PROVISIONS, THEIR IMPACT AND THE PROSPECTS FOR CHANGE, I-11 to I-18 (Seattle City Light 1979).

18. QUENTIN SMITH, JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 675 (B. Rosenow ed. 1962).

19. *Id.* at 682. *See also* City of Marysville v. State of Washington, 101 Wash. 2d 50, 54-56, 676 P.2d 989, 992-93 (1984); SMITH, *supra* note 18, at 675-84.

20. SMITH, *supra* note 18, at 675-84.

21. *Id.* at 680.

22. KIPPEN, *supra* note 17, at I-9.

B. Period of Inconsistency: Gifting of Public Funds

In the first half of the twentieth century, Washington courts analyzed public gifts under a literal reading of the constitutional prohibitions. However, the standard that began as specific in application gradually became inconsistent as courts began to incorporate various exceptions into the prohibitions.

Initially, a gift was defined as an act that would decrease the state's general fund and gratuitously benefit the recipients.[23] In 1914, in *Rands v. Clarke County*,[24] where one county constructed a bridge in conjunction with a county in an adjoining state, the court defined a gift broadly as money to, or in aid of, private enterprise. However, the court distinguished among types of private enterprises in both gifting of funds and lending of credit, holding those enterprises "whose functions are wholly public" are exempt.[25] This distinction marked the beginning of a course of opinions that strictly interpreted the language of the provisions, but provided exemptions for certain judicially defined public functions.[26] Soon after, in *Johns v. Wadsworth*,[27] the court prohibited county money from being used to assist a private corporation in promoting an agricultural fair. The court applied the same logic as in *Rands*, stating the gift provision "directly and unequivocally prohibits all gifts of money, property, or credit to, or in aid of, any corporation. . . ."[28] The court found no public purpose because the appropriation was to a private organization merely for a "public good," not for a wholly public purpose; a reasoning that prohibited even minor gifts from which the public might benefit indirectly.[29] Thus, for two decades exemptions for public appropriations that produced only incidental private benefits were not permitted.

In the 1930s and 1940s, the court's interpretation shifted further from a strict construction of the gifting provisions to allowing the distribution of funds for certain government programs.[30] Throughout

---

23. *See, e.g.*, Rands v. Clarke County, 79 Wash. 152, 139 P. 1090 (1914).

24. 79 Wash. 152, 139 P. 1090 (1914).

25. *Id.* at 157, 139 P. at 1092. Further, the court viewed a wholly public purpose as involving the federal or state government or some branch thereof. *Id. See also* Lancey v. King County, 15 Wash. 9, 45 P. 645, 646-47 (1896). The "public purpose" exception has been the source of much comment in American legal history. *See generally* Reich, *supra* note 10, at 641-43.

26. *See generally* Miller v. City of Tacoma, 61 Wash. 2d 374, 378 P.2d 464 (1963).

27. 80 Wash. 352, 141 P. 892 (1914).

28. *Id.* at 354, 141 P. at 893.

29. Washington Natural Gas Co. v. Public Util. Dist. No. 1, 77 Wash. 2d 94, 101-03, 459 P.2d 633, 637-39 (1969).

30. *See* Reich, *supra* note 10, at 643.

this period, the courts seemed disinclined to interfere in fundamental governmental activities and attempted to reconcile the exemptions they granted with the framers' intent.[31] For example, in *State ex. rel. Washington Navigation Co. v. Pierce County*,[32] the court disallowed subsidies granted by a county to a private company for ferry service because the county failed to retain public control over future service operations. The court emphasized, however, that a different result would be warranted if the public had retained control over the ferries, and the Legislature had authorized the leasing of the ferries to private operators.[33] In *State v. Guaranty Trust Co. of Yakima*,[34] the court upheld state attempts to recover funeral payments made to a deceased citizen on the ground that the estate was large enough to defray costs.[35] The court commented that as a matter of strict constitutional construction, state funds or credit could not be used to aid private persons, but support of needy persons was a recognized public governmental function, and therefore justified an exception to the gift provisions.[36] Thus, courts during this period provided exemptions for appropriations with public control and recognized governmental functions, thereby narrowing the prohibition for the sake of government while simultaneously advocating strict construction of the constitutional provisions.

The following decades mirrored this broadening trend of gift analysis, expanding the categories of exemptions while announcing a strict constitutional construction. In *Washington State Highway Comm'n v. Pacific Northwest Bell Tel. Co.*,[37] the court held that a statute that required payment of removal and relocation costs to private utilities built on state rights of way was unconstitutional. Although a public purpose was found, it did not alter the payment's status as a prohibited gift.[38] The performance of private utility services did not

---

31. A period different from the history of the founders where even quasi public control was seen as restricted.

32. 184 Wash. 414, 425, 51 P.2d 407, 411 (1935).

33. *See, e.g.*, Paine v. Port of Seattle, 70 Wash. 294, 126 P. 628 (1912) (lease by port to private party upheld because port reserved power to regulate wharfage charges).

34. 20 Wash. 2d 588, 591, 148 P.2d 323, 325 (1942).

35. *See also Morgan*, 14 Wash. 2d at 156, 127 P.2d at 686 (pension payments to benefit persons without resources and income is not a gift).

36. *See* Rauch v. Chapman, 16 Wash. 568, 575 (1897) (In regards to the debt limitation provision, a recognized governmental function is excepted because "[debt limitations] would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view.").

37. 59 Wash. 2d 216, 367 P.2d 605 (1961).

38. *Id.* at 224, 367 P.2d at 610.

constitute a state purpose, where such facilities were owned and operated by the state, but instead unlawfully benefited a private enterprise.[39] In addition, the court continued to define a gift as an appropriation that decreased the state general fund while gratuitously benefiting the recipient.[40] Alternatively, in *Miller v. City of Tacoma*,[41] the court held that the acquisition and redevelopment of blighted urban areas, and subsequent resale to private interests, constituted a public purpose justifying public expenditure.[42] In *Miller*, the court determined that the public purpose was the true basis of the program in that any benefits to unknown, unforeseeable purchasers were purely incidental.[43] This resulted in changing the requirements of a public purpose toward exemptions; and the court's analysis of a public purpose became more subjective. "[W]hether the 'contemplated use be really public' is solely a judicial question and ultimately must be decided by this court."[44] Thus, at the close of this period the court broke new ground. Transactions with private benefits, not primarily for the public interest, were now being allowed, narrowing the scope of the prohibitions.

C. *Period of Confusion*

The movement to allow private benefits accelerated radically two years after *Miller* with the advent of consideration analysis in *State ex rel. O'Connell v. Port of Seattle*.[45] In *O'Connell*, expenditures made by the Port for the purpose of promotional hosting of shippers and other private individuals were held to be an unconstitutional gift.[46] The court brought new elements to the prohibition by adopting a contract model for engaging in gift analysis. The shift again redefined what constitutes a gift by moving from the previous conceptions of gift as a loss to the state treasury and benefit to a private recipient, to the conception of a gift as "[a] voluntary transfer of personal property without consideration. . . . A parting by owner with property without

39. *Id.*

40. *Id.*

41. 61 Wash. 2d 374, 378 P.2d 464, 467 (1963).

42. *Id.* at 382-83, 378 P.2d at 469-70.

43. *Id.* at 387-88, 378 P.2d at 472-73.

44. *Id.* at 383, 378 P.2d at 470 (quoting Hogue v. Port of Seattle, 54 Wash. 2d 799, 817, 341 P.2d 171, 189 (1959)). *See also* Scott Paper Co. v. Anacortes, 90 Wash. 2d 19, 33, 578 P.2d 1292, 1300 (1978) (no legislative attempt to define a gift for the constitutional provision would be meaningful because construction of the constitution is a judicial function).

45. 65 Wash. 2d 801, 804-06, 399 P.2d 623, 625-26 (1965).

46. *Id.* at 806, 399 P.2d at 626.

pecuniary consideration."[47] Under this analysis, the court required a "corresponding legal obligation of any kind" imposed on persons hosted by the Port in order for the expenditure to be constitutional.[48]

Two crucial policies in defining "gifts" arose from this definition. First, to constitute a gift, a transfer of government funds to a private enterprise must be without consideration. Second, to constitute a gift, the governmental unit performing the transfer must possess the intention to give a gift.[49] Further, in applying a contract model the court adopted a passive approach, determining whether the consideration which flowed to the public supported the transaction. No longer would the court perform an in-depth examination for decreases in the general fund, but instead it would apply common rules of legal consideration.[50] At the same time, the court continued to apply its dichotomous approach between strict construction review and exception analysis. While the court reasoned that promotional activities serve a public purpose, the court also engaged in a literal reading of the constitutional provisions to determine purposes for which private entities may be given public money or property. Even with this broad constitutional interpretation, government actions serving a business proprietary function were still viewed as facially unconstitutional. In *O'Connell*, the court moved further away from a literal reading of the gift provision standard by adopting an exemption for appropriations supported by valid consideration and by applying a judicial finding of public purpose.[51] In retrospect, consideration analysis signaled the beginning of the end for the dichotomy in interpretation. Private benefit theory was established, which made the framers' method of prohibiting public gifting obsolete.

The new consideration standard was confusing in application, and raised concerns over the framers' intent and the plain language of the provision. During the 1970s and 1980s, the court's gift analysis

---

47. *Id.* at 804, 399 P.2d at 625 (quoting Black's Law Dictionary 817 (4th ed. 1957)).

48. *Id.*

49. For further explanation of voluntariness, see State *ex rel.* Madden v. Public Util. Dist. No. 1, 83 Wash. 2d 219, 223, 517 P.2d 585, 588 (1973) (no intent to give a gift because no opportunity to exercise volitional capacity) and *Scott Paper Co.*, 90 Wash. 2d at 32-33, 578 P.2d at 1299-1300 (adequate consideration at the time of transaction and thus no intent to give a gift).

50. *See, e.g.*, cases cited *supra* note 62.

51. Even with the shift, the court was satisfied with the language constraints of the gift prohibition, stating that

> [i]f Article 8, § 7, is too restrictive in its terms, that is a matter for the citizens of this state to correct through the amendatory process. It is not for this court to engraft an exception where none is expressed in the constitutional provision, no matter how desirable or expedient such an exception might seem.

O'Connell, 65 Wash. 2d at 806, 399 P.2d at 626-27.

wavered between applying strict constitutional construction and granting exemptions.[52] Because several commentators have examined this period closely, this discussion will be limited.[53]

Anderson v. O'Brien[54] exemplifies how the court analyzed public gifting during this period. In *Anderson*, an Indian tribe used public funds to construct buildings; the buildings were subsequently leased to private firms. The funds were invested to combat public problems attendant to unemployment in the tribal community. The court held that private benefit did not render the public program unconstitutional, for the private benefit was incidental to the public purpose of resolving unemployment.[55] The appropriation was not a gift, but an expenditure of public money in return for which the public received valid consideration. The court's decision marked an expansion in the definition of what constitutes consideration in public-private transactions. This rationale barred transactions in which the private benefit was more than incidental. In *Louthan v. King County*,[56] the court upheld the sale of general obligation bonds which financed the purchase of development rights for open space lands. The court again redefined the meaning of a gift, identifying a two-prong test that required intention to give a gift (donative intent), and lack of "valuable" consideration.[57] This test eventually became the model for the court's current analysis.

In cases that followed, the court applied an ever-broadening definition of consideration. For example, in *In re Marriage of Johnson*,[58] a statute which allowed the Department of Social and Health Services to collect past-due child support for children who did not receive public assistance was ruled exempt from the gift provision. The court found that the expenditure furthered a recognized governmental function accomplished by a private benefit.[59] The court also ruled that the benefit returned to the public served as valid consideration for the public expenditure.[60] Commentators criticized the *Johnson* logic as unreasonably general; if consideration can be merely some public benefit in return for public expenditure, then any public

52. *See, e.g.*, Anderson v. O'Brien, 84 Wash. 2d 64, 524 P.2d 390 (1974).
53. *See* Spitzer, *supra* note 15; Reich, *supra* note 10.
54. 84 Wash. 2d 64, 524 P.2d 390 (1974).
55. *Id.* at 70-71, 524 P.2d at 395.
56. 94 Wash. 2d 422, 617 P.2d 977 (1980).
57. *Id.* at 428, 617 P.2d at 981.
58. 96 Wash. 2d 255, 634 P.2d 877 (1981).
59. *Id.* at 261-64, 634 P.2d at 880-82.
60. *Id.* at 262, 634 P.2d at 881 (citing *Northwest Bell*, 59 Wash. 2d at 227, 367 P.2d at 612).

benefit which otherwise would be labeled a gift would be constitutional.[61] Due to this criticism, this approach was never applied again. Later cases further demonstrate a hard look approach to the adequacy of consideration in acts conferring public benefit, but not for actions under the government's proprietary function.[62]

Since the 1940s, the court has often appeared dissatisfied with the language of the gift provision as it was written by the framers. Its dissatisfaction, however, remained within the prohibition framework envisioned by the framers, even when it did not closely follow prohibition language. After *O'Connell*, as the following sections will show, the court's adherence to its prior analytical framework became a mere formality.

D. Lending of Public Credit: A Parallel History

The Washington State Supreme Court mirrored the gift provision's constitutional analysis dichotomy in interpreting lending of public credit provisions, but with greater variance in application. The framers intended to prohibit public loans in the ordinary and popular sense, between a lender and a borrower, where the security of funds was questioned.[63] Lending of credit was first defined as "[t]he correlative of a *debt*; . . . that which was incoming or due *to* one."[64] The provision was typically applied where the state or its political subdivision acted as a surety to private enterprise, loaned government status to private enterprise, acted as a financing conduit for private purposes, or allowed private risk taking in the government's name.[65] Thus, the nature of the nineteenth century credit schemes and the above definition suggest that the lending of credit prohibition was meant to stop activities that jeopardized public assets.

In the early 1900s, the court first considered the lending of credit prohibition in *Seattle and Lake Washington Waterway Co. v. Seattle Dock Co.*[66] The state contracted with a private developer to dredge a waterway and deposit the material on state land. Payment was made

---

61. *See* Spitzer, *supra* note 15, at 209-12.

62. In subsequent case law, the court inquired beyond consideration and into valuations of its sufficiency and fairness. That evolution expanded the scope of the gift prohibition and limited transfers of public funds to private individuals. *See, e.g.*, *Washington Natural Gas*, 77 Wash. 2d at 101-04, 459 P.2d at 637-39; State *ex rel.* Gorton v. Port of Walla Walla, 81 Wash. 2d 872, 880, 505 P. 2d 796, 801 (1973).

63. KIPPEN, *supra* note 17, at IV-12.

64. *Johnson*, 96 Wash. 2d at 267, 634 P.2d at 883 (quoting Black's Law Dictionary 891 (1891)).

65. *See* KIPPEN, *supra* note 17.

66. 35 Wash. 503, 77 P. 845 (1904), *aff'd*, 195 U.S. 624 (1904).

by attaching a lien to the deposit site, payable when the deposit property was sold. The court found no lending of public credit because no state debt incurred from the lien-sale.[67] The court adhered to the framers' intent by prohibiting public guarantees of private debts. However, just as with the gift provision, the court created an exception, which was later termed "risk of loss."[68] This limited exception allowed lending of public credit if there was no risk of negative impact on the public purse.[69]

The court continued to parallel gift prohibition analysis when interpreting the public lending provisions into the 1940s. In *Gruen v. State Tax Commission*,[70] taxpayers challenged an excise tax on cigarettes for retiring bonds, supported by state credit, that were sold to create a bonus for war veterans. The bonus scheme was upheld because the veterans were not debtors, and sustained no liability to the bondholders.[71] The court reasoned that "[t]he state recognizes the . . . [veteran] as in the nature of a creditor, to whom the state proposes to pay its recognized obligation."[72] There was no 'risk of loss,' and a public purpose exception was realized through selling bonds which directly benefited veterans. At the same time, however, the court adopted a new definition for lending credit which extended the framers' intent to forbid suretyship of private enterprise.[73] In *Berglund v. City of Tacoma*,[74] the city established a fund to guarantee warrants that were issued to finance a Local Improvement District (LID). The purpose of the project was to extend water services to locations outside the city. If default occurred, the fund would be subrogated to warrant holders including a lien on property in the LID. The court validated the loan of credit because the city eventually would become the owner

---

67. *Id.* at 515, 77 P. at 848.

68. Reich, *supra* note 10, at 644-45.

69. *See Johnson*, 96 Wash. 2d at 267, 634 P.2d at 833 (citing State *ex rel.* Graham v. Olympia, 80 Wash. 2d 672, 676-77, 497 P.2d 924 (1972)).

70. 35 Wash. 2d 1, 211 P.2d 651 (1949) (*overruled by* State *ex rel.* Fin. Comm'n v. Martin, 62 Wash. 2d 645, 384 P.2d 833 (1963)).

71. *Gruen*, 35 Wash. 2d at 30, 211 P.2d at 668.

72. *Id.* (quoting Grout v. Kendall, 192 N.W. 529, 533 (Iowa 1923)).

73. The court in *Gruen* adopted an Iowa court's definition of a loan of credit:

> [The prohibition against the lending of credit] withheld from the constitutional authorities of the state *all power or function or suretyship*. It forbade the incurring of obligations by the indirect method of secondary liability. This is the field and the full scope of the section. It does not purport to deal with the creation of primary indebtedness for any purpose whatever.

Grout, 192 N.W. at 531.

74. 70 Wash. 2d 475, 423 P.2d 922 (1967).

of the water system expansion.[75] This ruling loosened the prohibition on sureties by allowing indirect and contingent liability for public funds and by recognizing a public control exception to the provisions regulating the lending of credit.[76]

The Washington Supreme Court's enforcement of lending of credit prohibitions continued until the "period of confusion," which began in the 1970s and continued through the mid-1980s. During this period, the court integrated its literal reading of the lending of credit prohibitions with exceptions utilized as factors for review.[77] For example, in applying the public purpose exception the court announced a literal reading of the provision, but subsequently used the public purpose exception as a test to determine constitutionality.[78] The court required the government to intend a public purpose that not only satisfied the constitutional prohibition, but also was more than salutory, to validate the action.[79]

During this period the court also redefined credit, while muddling the definition in a series of decisions with alternatively broad and limiting language that never expressly overruled previous decisions. Further, this period also mirrored gift analysis by invoking the framers' intentions regarding the scope of the lending of credit provision.

Initially, the scope of the lending of credit prohibition was broadened greatly. In *Port of Longview v. Longview Taxpayers*,[80] the court held lending of credit to include nonrecourse industrial revenue bonds. Loaning the name of a governmental entity in order to benefit a private project was considered a loan of public credit, even though general liability was lacking.[81] In *Washington Health Care Facilities v. Ray*,[82] the lending of credit prohibition was further expanded to include private use of government status. The court held that a governmental entity lends its credit when it allows a private enterprise

---

75. *Id.* at 480-81, 423 P.2d at 925-26.

76. *Id.* at 481, 423 P.2d at 925.

77. *See, e.g.*, Lassila v. City of Wenatchee, 89 Wash. 2d 804, 810-12, 576 P.2d 54, 57-59 (1978).

78. *Id.* at 810-11, 576 P.2d at 58-59.

79. *Id.* at 811-12, 576 P.2d at 58-59.

80. 85 Wash. 2d 216, 533 P.2d 128 (1974). The lending of credit definition was expanded here to include industrial revenue bonds, a concept not previously considered by the court. *See also* letter from Hugh Spitzer to David Martin (Mar. 22, 1996) (on file with the *Seattle University Law Review*).

81. *Port of Longview*, 85 Wash. 2d at 231, 533 P.2d at 129.

82. 93 Wash. 2d 108, 605 P.2d 1260 (1980).

to use the government status to obtain property or money which would not otherwise be obtainable at the same price.[83]

Subsequent decisions, however, restricted the provision's scope by endorsing several exceptions that validated actions previously defined as unconstitutional loans of state credit.[84] For example, in *Higher Educ. Facilities Auth. v. Gardner*,[85] the state utilized its tax exempt status to authorize bonds which benefited universities with ties to religious institutions. The court upheld the bond issuance because the use of the state's tax exempt status was not a loan of credit.[86] Decisions like this, where the court both integrated and separated literal and exception analysis under the guise of the framers' intent, made this period of interpretation of the lending of credit provision confusing, a pattern loosely followed by the court throughout the history of the lending of credit provisions. The trend of inconsistent decisions in both gift and lending of credit cases, however, ended with the onset of what can be labeled as a "period of clarity."

E. Period of Clarity - Current Test

In 1986, the Washington State Supreme Court ended some of the past confusion by cementing the gift prohibition's requirements and stating the possible exceptions. In *Adams v. University of Washington*,[87] the court focused on the consideration analysis as required under the gift provisions. In *Adams*, a class of male journeypersons were paid higher wages by the University than a class of female nonjourneypersons although the two groups performed substantially similar work.[88] The class of workers argued that there was no economic justification to pay higher wages for nonjourneyperson work, and therefore no consideration validating the transaction.[89] In a unanimous opinion, the court held that no gifting of public funds

---

83. *Id.* at 113-14, 605 P.2d at 1262-63.

84. *See, e.g., Johnson*, 96 Wash. 2d at 261-64, 634 P.2d at 880-82; Washington State House Fin. Comm'n v. O'Brien, 100 Wash. 2d 491, 498-500, 671 P.2d 247, 251-52 (1983); *City of Marysville*, 101 Wash. 2d at 50, 676 P.2d at 989.

85. 103 Wash. 2d 838, 699 P.2d 1240 (1985).

86. *Id.* at 847, 699 P.2d at 1245. The court analyzed the issuance by separating the language of the lending of credit provisions into elements, and applying the language, an analysis one commentator found to imply a shift to a literal interpretation of provision language in evaluating future lending of credit schemes. *See* Spitzer, *supra* note 15, at 197.

87. 106 Wash. 2d 312, 722 P.2d 74 (1986). This case is a consolidation of previously discussed decision and is used to show the direction of court decisions, not as a sign of a key law-making decision.

88. *Id.* at 313, 722 P.2d at 75.

89. *Id.* at 326, 722 P.2d at 82.

occurred.[90] The University received consideration because the unique skills possessed by male journeypersons were used on occasion.

The opinion in *Adams* refined the definition of a gift. An unconstitutional gift was defined as "a decrease in the state general fund and a gratuitous benefit to a recipient. . . . The key factor . . . [being] lack of consideration."[91] The court limited its gift analysis to a definition of consideration established by previous cases: "Unless there is proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration."[92] The formula applied separate standards of consideration to different transactions. For transactions not intended as gifts, the court required bargained-for consideration.[93] For transactions the government intended as gifts, the court applied an adequacy standard.[94] Under this formula, a gift was found if either donative intent or a lack of consideration was evident in the transaction.[95] The court ruled that the University received consideration sufficient to support a promise because male journeypersons were used on occasion.[96]

The *Adams* court made clear that the bargained-for standard of consideration, not an adequacy standard, was the proper mode of review for the gifting provisions, stating that "[i]f this court were to examine the adequacy of wages paid to state employees, it would intrude upon the freedom of contract, establish a burdensome precedent for future court calendars, and go beyond its proper

---

90. *Id.* at 327-28, 722 P.2d at 82-83.

91. *Id.* at 327, 722 P.2d at 82. In the view of the court this is an expansion of the "risk of loss" philosophy.

92. *Id.* (citing *Scott Paper Co.*, 90 Wash. 2d at 32-33, 578 P.2d at 1299-1300). *See also* City of Bellevue v. State, 92 Wash. 2d 717, 720-21, 600 P.2d 1268, 1269-70 (1979) (utilizing a similar definition of donative intent).

93. *Adams*, 106 Wash. 2d at 327, 722 P.2d at 82.

94. *Id.* Here, consideration sufficient to support a promise was viewed in its traditional form: "Any act or forbearance which has been bargained for is consideration sufficient to support a promise." *Id.* (citing Huberdeau v. Desmoris, 79 Wash. 2d 432, 439-40, 486 P.2d 1074, 1078 (1971)).

95. *Adams*, 106 Wash. 2d at 327, 722 P.2d at 82. The court's definition of a gift arises from *City of Bellevue*, 92 Wash. 2d at 720-21, 600 P.2d at 1269-70 (tips are not gifts within the meaning of the prohibition). In *City of Bellevue*, the court stated:

> a gift is a voluntary transfer of property without consideration. There is no claim that the tips concept embodied in article 8, section 7 was meant to be interpreted in any manner different from the usual and ordinary meaning of gift. Therefore, inherent in that concept is the necessity of a donative intent. . . . [If] intent to give a gift is lacking the elements of a gift are not present and article 8, § 7 does not apply.

Id. at 720, 600 P.2d at 1269 (quoting *Scott Paper Co.*, 90 Wash. 2d at 33, 578 P.2d at 1300).

96. *Adams*, 106 Wash. 2d at 327, 722 P.2d at 82.

function."[97] The court, however, made no reference to what an adequate level of consideration would be if donative intent were found. More importantly, the court made no reference to the framers' intent regarding the gift prohibitions. By limiting consideration analysis to formal contract rules, the court disregarded the dichotomous approach for determining donative intent applied in gift cases for one hundred years. No definitive distinction remained between allowing exceptions and applying strict construction interpretation, because only a valid contract was needed.

One year later, in *City of Tacoma v. Tacoma Taxpayers*,[98] the court reaffirmed the link between donative intent and consideration. A municipal energy conservation ordinance authorized issuing revenue bonds and other finances to pay for installing energy conservation devices in commercial and residential structures. The ordinance was designed to "acquire" electricity by conservation, with rate payers having no obligation to pay for the devices received. The Superior Court of Pierce County found the ordinance unconstitutional, even though the ordinance was subject only to review on the sufficiency of the consideration exchanged.[99] The trial court determined that the purchase of energy conservation was authorized by statute and equivalent to purchasing electricity. However, the court reasoned that because the amount of money the city would save was unpredictable, the consideration was inadequate because it was not measurable or lasting.[100] In assessing the inadequacy of the consideration exchanged, the trial court conducted an analysis of the statistical assumptions underlying the ordinance and examined the relative economic adequacy of the consideration exchanged.[101] Thus, in *Tacoma Taxpayers*, the court moved from the established requirements of finding legally sufficient consideration, and into a review of the adequacy of consideration exchanged.

On review, the Washington Supreme Court assumed jurisdiction, found the trial court's analysis inconsistent with *Adams*, and upheld the conservation ordinance.[102] In reviewing the gifting issue, the court

---

97. *Id.*

98. 108 Wash. 2d 679, 743 P.2d 793 (1987). For possible reasons why the court reviewed the standard again in 1987, see Department of Labor and Indus. v. Wendt, 47 Wash. App. 427, 735 P.2d 1334 (1987). The *Wendt* opinion is a haphazard analysis of the gift provision; the court may have been sending a message to lower courts to follow its language.

99. *Tacoma Taxpayers*, 108 Wash. 2d at 681, 743 P.2d at 794.

100. *Id.* at 684, 743 P.2d at 795-96.

101. *Id.*

102. *See id.* The Superior Court decision was appealed to Division II of the Washington State Court of Appeals. The taxpayers challenged the municipal and constitutional authority, and

emphasized the constitutionality of an amendment to the credit prohibition that allowed municipal utilities to offer loan financing to residential owners who installed conservation equipment, finding no preclusion against the direct purchase of conservation.[103]

The court next addressed the gift prohibition within the context of the framers' intent. The court stated, "[i]n recent years we have narrowed out application of the gift prohibition in an attempt to limit its scope to the evils the framers sought to prevent."[104] Moving beyond *Adams* and elaborating on past concerns of public purpose and the recognized governmental function exception, the court defined a gift by distinguishing transactions where funds are expended as entitlement payments[105] in furtherance of government purposes from expenditures not used for government purposes.

Expenditures not used for government purposes—those made in furtherance of government's proprietary function—were examined under the gift test: if donative intent is proven, the adequacy of the consideration is closely scrutinized; if donative intent is not proven then the consideration is not scrutinized for adequacy, but is assessed for legal sufficiency.[106] This modified the *Adams* test to focus on matters of donative intent, or direct evidence of a gift intention, in the first prong, while eliminating gross inadequacy of exchange, or indirect evidence of a gift, in the second prong.[107] This modification further narrowed the test by removing from the analysis transactions where there was no direct evidence of a gift intention.

Tacoma Taxpayers solidified the two-step analysis, where no specific gift determination is found.[108] If the government spends money to carry out an entitlement, no unconstitutional gift will be found.[109] If expenditures are made pursuant to the government's proprietary authority, the court will focus on consideration and donative intent to determine if a gift has been made.[110] Moreover, gift exceptions will be permitted where there is incidental benefit. The *Tacoma Taxpayers* court stated that "[w]here the public receives

---

cross-appealed to the Supreme Court. *Id.* at 684, 743 P.2d at 796.

103. *Id.* at 687-90, 743 P.2d at 797-99.

104. *Id.* at 702, 743 P.2d at 805.

105. Examples of entitlement payments include fare free bus zones and relocation assistance payments to those displaced by condemnation. *See* KIPPEN, *supra* note 17, at I-14 to I-18.

106. *Tacoma Taxpayers*, 108 Wash. 2d at 703, 743 P.2d at 805.

107. *Id.*

108. *See id.*

109. *Id.* at 705, 743 P.2d at 806.

110. *Id.* at 702-703, 743 P.2d at 805 (citing General Tel. Co. v. City of Bothell, 105 Wash. 2d 579, 587, 716 P.2d 879, 884 (1986)).

sufficient consideration, and benefit to an individual is only incidental to and in aid of the public benefit, no unconstitutional gift has occurred."[111]

In *Tacoma Taxpayers*, the court found actions taken under the municipal energy conservation ordinance to serve a business proprietary function rather than a governmental function, and thus analyzed the transaction as an expenditure not used for government purposes.[112] Finding no donative intent or gross inadequacy in the exchange, the court examined whether the bargained-for consideration was legally sufficient. The city ordinance was found to provide measurable savings in the first year of use.[113] The actual savings were not viewed as a generalized public benefit, but as sufficiently definite to provide consideration.[114]

The court also addressed the trial court's determination of future benefits stating, "[t]he inability to predict the actual savings over the long run and the specific concerns listed by the trial court, seem inherent in any prediction of long-term cost effectiveness. The Legislature has already indicated its willingness to rely on predictions of future cost effectiveness."[115] Thus, the court recognized that predictions of future benefit, if quantifiable, constitute sufficient consideration.

The majority opinion in *Tacoma Taxpayers*, however, was only carried by a single vote.[116] The dissent raised two criticisms of the gift test, arguing that the plain language of the constitutional provisions controlled while the protection of public money is paramount.[117] First, the dissent argued that the established means of constitutional interpretation dictated that where the language of the constitution is clear, words should be given their plain meaning. This would mean prohibiting all gifts and loans of money in aid of individuals.[118] Finding that there should be no exception, the dissent characterized the program as prohibited by the constitution.[119] Second, the dissent assailed the gift test, rejecting "the majority's inference that the constitutionality of Tacoma's conservation program can only be

111. *Tacoma Taxpayers*, 108 Wash. 2d at 705, 743 P.2d at 806.

112. *Id.* at 694, 743 P.2d at 801 (citing State v. O'Connell, 83 Wash. 2d 797, 834, 523 P.2d 872, 898 (1974)).

113. *Tacoma Taxpayers*, 108 Wash. 2d at 703-04, 743 P.2d at 805-06.

114. *Id.* at 704, 743 P.2d at 806.

115. *Id.*

116. *Id.* at 705, 743 P.2d at 806.

117. *Id.* at 706-07, 743 P.2d at 807 (Goodloe, J., dissenting).

118. *Id.* at 706, 743 P.2d at 807.

119. *Id.* at 706-07, 743 P.2d at 807.

decided by an after-the-fact assessment of cost effectiveness,"[120] an assessment precluded by the current test unless donative intent is found.

In addressing the program's statutory authority, the court argued that the preconditions and safeguards instituted by the city to protect public funds were illusory because consideration was contingent on market forces.[121] While program recipients received conservation benefits in return for no compensation, recipients also were not penalized for increasing energy consumption.

The free-market nature of the transaction was not a concern for the majority which reasoned that all business ventures are subject to market forces, and all ventures have the same protection with disincentives to investment in measures that are improperly installed and not cost effective.[122] The dissent emphasized that the court was only validating speculation that was reminiscent of the century old financing schemes that the prohibitions were designed to prevent. The dissents' reasoning in *Tacoma* demonstrates that a test for legally sufficient consideration treats government entities as any other individual or corporation, by allowing transactions that are speculative or fiscally irresponsible.

The flaws in the *Tacoma Taxpayers* majority's reasoning, however, go beyond the surface. Specifically, gaps exist between the language of the gift test and its application. Although precluded from making a cost-effective analysis without donative intent or insufficient consideration, the majority directly referenced this type of test, stating that "[u]nless demonstrated as cost effective, Tacoma's direct purchase program would run afoul of the Article 8, section 7 gift prohibition."[123] The statement was made in contrasting loans of public funds, where preset conditions assure cost effectiveness, with the conservation direct purchase program, where outside factors could dictate cost effectiveness.

The faulty nature of the *Adams/Tacoma Taxpayers* test is that it is not broad enough to serve the public interest in public-private financing programs. When reviewing a major project like a municipality's direct purchase of energy conservation which involves large amounts of public funds and affects many citizens, the test is too narrow to review all of the components of the program. The financing

120. *Id.* at 708, 743 P.2d at 808.
121. *Id.* at 707-08, 743 P.2d at 807-08.
122. *Id.* at 690, 743 P.2d at 798.
123. *Id.*

program is not adequately reviewed to determine if it is an unconstitutional gift because limited portions designated as its consideration are forwarded, which allows the transaction to bypass review. Accordingly, review is unsatisfactory in cases where no donative intent is found, where large inadequacy in exchange exist, and where there is merely artificial consideration. A test so narrow is arbitrary and contingent on a court's nonlegal interest in the transactions to break its confines.[124]

Through the language of the provisions, the framers sought to prevent many of the transactions that are allowed by the current test. Under this limited review, the government, under the guise of public policy, is allowed to act with little judicial constraint on its fiscal powers. Notably, this has resulted in past programs like railroad bonds, and in current stadium proposals.[125] The courts have taken on a role that should be left to the Legislature, a point raised, ironically, in *O'Connell* (the beginning of consideration analysis):

> If Art 8, § 7, is too restrictive in its terms, that is a matter for the citizens of this state to correct through the amendatory process. It is not for this court to engraft an exception where none is expressed in the constitutional provision, no matter how desirable or expedient such an exception might seem.[126]

As it currently stands, however, the courts have cemented the gift test requirement, but have compromised good policy by overstepping their constitutional mandate.

The decisions following *Adams* and *Tacoma Taxpayers* mirror both decisions in logic and result.[127] The court has failed to invalidate any government transaction because of insufficient consideration. Therefore, no transaction has been investigated for adequacy of consideration. The following section will further discuss problems in the current test, and will propose an alternate test that analyzes the adequacy of consideration.

---

124. *See* Pinsky, *supra* note 1, at 307-08.

125. *See* Barnes, *supra* note 9, at B1.

126. *O'Connell*, 65 Wash. 2d at 806, 399 P.2d at 626.

127. *See, e.g.*, Hadley v. Department of Labor and Indus., 116 Wash. 2d 897, 810 P.2d 500 (1991); Citizens for Clean Air v. City of Spokane, 114 Wash. 2d 20, 785 P.2d 447 (1990); Washington Pub. Util. Dist. Util. System v. Public Util. Dist. No. 1 of Clallam County, 112 Wash. 2d 1, 771 P.2d 701 (1989); Northlake Marine Works v. City of Seattle, 70 Wash. App. 491, 857 P.2d 283 (1993); Brigade v. Economic Dev. Bd. for Tacoma-Pierce County, 61 Wash. App. 615, 811 P.2d 697 (1991).

III. PROBLEMS AND SOLUTIONS FOR THE *ADAMS/TACOMA TAXPAYERS* TEST

The *Adams/Tacoma Taxpayers* test ended the dichotomous tradition of the courts' analysis of prohibition cases, and provided government with proprietary rights restrained only by passive contract law. That dichotomous tradition, however, avoided five problems of law and public policy inherent in the current test: (1) a liberal legal test; (2) offense of the framers' intent; (3) the plain language of the prohibitions; (4) the bypass of constitutional procedure; and (5) encouragement of speculative financing.

As noted, the primary factor for determining gifts under *Adams/Tacoma Taxpayers* is the presence of donative intent, a requirement that courts have not realistically enforced. The other requirement, consideration, has been found insufficient only once.[128] In addition to each requirement's limited enforcement, case law demonstrates that each element is malleable in certain applications.[129] The current test, in addition to disregarding established historical exceptions, has resulted in prohibiting only the most unbalanced of transactions.

The current test claims to adhere to the framers' intent as the basis for its analysis,[130] but has ironically opened state and local treasuries to extensive public-private financing that has not been seen since the railroad bond era.[131] Transactions once in contravention of the gift prohibition are now found constitutional. Such an ineffective test offends the framers' intent to protect the public purse and prevent speculation with its contents.

Further, the plain language of the prohibition is intended to compel state and local governments to restrict their financing practices.[132] No exceptions are provided except for the poor and infirm, and there is no allowance for transactions that benefit the government.

---

128. *See O'Connell*, 65 Wash. 2d at 806, 399 P.2d at 626.

129. *See, e.g., id.*

130. *See Tacoma Taxpayers*, 108 Wash. 2d at 701-02, 743 P.2d at 804-05.

131. *See* WASH. REV. CODE §§ 47.76.010-.350 (1994). The statute authorization to solicit privately financed transportation improvements in Washington State. Projects are owned by the private sector during construction, turned over to the state, and leased back for operation for up to fifty years. The private developer is authorized to impose tolls or user fees to recover its investment and allow a reasonable rate of return on investment. *Id.; see also* WASHINGTON STATE TRANSPORTATION COMMISSION, SUBCOMMITTEE ON PUBLIC-PRIVATE PARTNERSHIPS WORKING PAPERS, WASHINGTON STATE TRANSPORTATION POLICY PLAN (1992).

132. *See* City of Seattle v. State, 100 Wash. 2d 232, 252-56, 668 P.2d 1266, 1275-78 (1983) (Rossellini, J., dissenting).

However, the current test ignores the plain language of the prohibition and exceptions, not restrictions, are the norm.

The current test also bypasses constitutional procedure, by accomplishing the goals of previously proposed amendments that failed to pass.[133] From 1961 to 1977, thirty-six amendments of the prohibitions were proposed, but only three were passed.[134] These amendments are as important as the prohibitions themselves because they reflect public concerns that policy makers have viewed as justifying governmental assistance to private entities.[135] However, bypassing the established constitutional process through judicial means is inappropriate.[136] Thus, the *Adams/Tacoma Taxpayers* test is problematic in legal application because it ignores the framers' intent and removes from the populace a choice over its representatives' financing practices and its economic future.

Finally, the test encourages a judicially-approved public policy of providing public financing for private enterprise. There is clear evidence, however, that such an economic policy is destructive: Governments tend to compete for private enterprise, buying jobs for citizens by providing questionable incentives for corporations to remain or relocate to the state.[137] For example, government entities battle over the tradition and prestige a professional sports franchise brings to a city when providing publicly supported stadiums.[138] The winner is required to build a limited-use sport facility at enormous cost with little extrinsic return.[139] Economists have urged states to abandon "the war to steal business from one another," and to compete on the basis of real advantages (schools, location, roads).[140] If the constitution is not utilized to prevent the State of Washington or its subdivisions from engaging in special financing practices, government is likely

---

133. *Id.* *See generally* KIPPEN, *supra* note 21, at IX 1 to IX 19.

134. *See* KIPPEN, *supra* note 17, at E1 to E46; interview with Dan Grimm, Washington State Treasurer (July 20, 1995).

135. LOCAL GOVERNMENT DEBT FINANCING DESKBOOK 12, at 15 (1986). *See generally* ROBERT S. AMDURSKY AND CLAYTON P. GILLETTE, MUNICIPAL DEBT FINANCE LAW THEORY AND PRACTICE (1992).

136. *See Adams*, 106 Wash. 2d at 312, 722 P.2d at 74.

137. *See* ECONOMIC DEVELOPMENT REPORT *supra* note 7.

138. *See* Barnes, *supra* note 9, at B1. The real advantages between the localities of TV market share, fan support and loyalty, and fan knowledge play little part—all that matters is stadium generated revenue.

139. Although sports teams may provide intrinsic value to a community, it is difficult to quantify. I am a baseball and football fan, but how do I measure the feeling I get from having those teams affiliated with the city I live in?

140. *See* Barnes, *supra* note 9, at B1.

to breach the public trust,[141] while the populace is unnecessarily put at risk of financial hardship.

The solution to *Adams/Tacoma Taxpayers* lies in applying a weighing formula that accomplishes several important goals. These goals include providing an analysis of the transaction, taking a comprehensive view of the transaction, and performing a qualitative comparison of the benefits and problems. Further, a proper test does not require a complex analysis when rational decisions can be made based on a simple formula without costly decision making. However, when a decision is likely to result in far-reaching consequences, a rigorous, detailed examination is required. Thus, the solution is not merely to 'weigh' the government's interest, but rather to specifically ask whether the nature of the interest is within the contemplation of the language of Article VIII, sections 5 and 7.

A three-part test accomplishes the necessary improvements: (1) whether the consideration received by the government is measurable; (2) whether the consideration received by the government is lasting; and (3) whether that consideration is adequate. Such a test, drawn partially from that used in other states,[142] would fall under the "nonentitlements and proprietary transactions" section of the current two-part test. Accordingly, if a transaction is not an entitlement, the three questions would be asked to determine whether a gift had taken place.

The first two parts of the test arise from the trial court decision that was overruled in *Tacoma Taxpayers*. Questions were posed to determine the project's long-term cost-effectiveness. Here, the questions serve the same purpose; measurable consideration would not be sustained by a finding of generalized public benefits. Quantifiable exchange would be necessary.[143] Though government is well-suited to make decisions to provide general public benefits (a source of continual discussion with the court and commentators), using this basis to justify transactions unsupported by consideration has been criticized; "if . . . the 'public benefit achieved from such activities is the "consideration" for the funds expended,' logically *any* public benefit from what would otherwise be a gift to a private individual or entity

141. A fundamental precept of good government is that public funds must be used for public interests. *See generally* THE FEDERALIST NO. 7 (Alexander Hamilton), and THE FEDERALIST NO. 10 (James Madison).

142. For the purposes of this Comment, the other states that will be used for analysis are Arizona and Kentucky.

143. *See generally* Spitzer, *supra* note 15.

would be constitutionally acceptable."[144] Moreover, viewing generalized public benefits as consideration was criticized ninety years ago:

> [Merely] because a private individual or a corporation uses public funds or property for a "public purpose" is not sufficient, in and of itself to remove that use from the [gift and credit] provisions . . . . to hold otherwise and say that a "public purpose" was the only criterion by which the validity of an appropriation of public funds is to be measured, there would be hardly any limit upon the right of the state, county, city, or school districts to appropriate moneys to a private corporation.[145]

Thus, concrete exchange is required to pass this proper review of the transaction.

The second part of the test, which requires lasting consideration, promotes informed decision-making by demanding benefits to be calculated or quantified on a long-term basis.[146] A review of the statistical assumptions underlying the transaction also prevents undue speculation and the diversion of tax revenues from proper governmental programs. This requirement is utilized in the state of Kentucky,[147] where gift and debt provisions "prohibit any 'transactions which might result in future liabilities against the general resources of the state. . . .'"[148] In Kentucky, the power to financially obligate future generations exists only if subject to decisions of future legislative appropriation and limited revenue schemes.[149] Measurable and lasting consideration properly serves as an important procedural safeguard when reviewing possible gift transactions with private enterprise.

The third part, whether there is adequate consideration, is the most important part of this analysis. Adequate consideration was established in the Arizona courts under gift and credit prohibitions

---

144. Spitzer, *supra* note 15, at 210 (quoting *Johnson*, 96 Wash. 2d at 262, 634 P.2d at 881). *See Citizens for Clean Air*, 114 Wash. 2d at 39, 785 P.2d at 447.

145. Wallwork, *supra* note 3, at 367 (quoting City of Tempe v. Pilot Properties, Inc., 527 P.2d 515, 521 (Ariz. Ct. App. 1974) (quoting Harrington v. Atteberry, 153 P. 1041, 1042 (N.M. 1916)); *see also* Spitzer, *supra* note 15, at 209-12.

146. The rational under both prongs is simple: if a transaction is to be examined under a weighing formula, there needs to be some criteria by which the transaction is to be measured.

147. *See* KY. CONST. §§ 177-78.

148. City of Shelbyville *ex rel.* Shelbyville Mun. Water and Sewer Comm'n v. Commonwealth Natural Resources and Envtl. Protection Cabinet, 706 S.W.2d 426 (Ky. Ct. App. 1986) (quoting McGuffey v. Hall, 557 S.W.2d 401, 411 (Ky. 1977)).

149. *See* Hayes v. State Property and Buildings Comm'n, 731 S.W.2d 797 (Ky. 1987). *See generally* Justice Donald C. Wintersheimer, *State Constitutional Law*, 20 NO. KY. L. REV. 591 (1993).

similar to those in Washington.[150] The Arizona gift prohibition has been more widely litigated than similar provisions in other states.[151] Further, Arizona recognizes that a use of public funds must ensure the return of an adequate public benefit.[152] The Arizona gift analysis will be adopted here to serve the same purpose.

The Arizona test examines whether the consideration received by the state in return for an expenditure of public funds to private entities is equitable and reasonable to ensure adequate compensation for the public.[153] This determination is made by analyzing at the fair market value of the benefit given to the private entity, the value of the benefits bestowed on the government by the private entity, and other material factors attaching to the consideration exchanged.[154] The Arizona Supreme Court described the adequate consideration process as an inquiry into the sufficiency of the consideration exchanged:

> The reality of the transaction both in terms of purpose and consideration must be considered. A panoptic view of the facts of each transaction is required. . . . The public benefit to be obtained from the private entity as consideration for the payment or conveyance from a public body must constitute a 'valuable consideration' but the Constitution may still be violated if the value to be received by the public is far exceeded by the consideration being paid by the public.[155]

Thus, under the adequate consideration test, courts must balance consideration received by the public against that received by the private entity; equity and reasonableness must be found in order for the challenged expenditure to be allowed.

---

150. *Compare* WASH. CONST. art. VIII, §§ 5 and 7, *with* ARIZ. CONST. art. IX, § 7. Ironically, the controlling case in Arizona's constitutional analysis of gifts resulted from City of Tempe v. Pilot Properties, Inc., 527 P.2d 515 (Ariz. Ct. App. 1974), which involved the lease of city land for a spring training camp for the Seattle Pilots baseball team. There, the question was whether $1.00 a year, plus a promise to build a spring training camp for the Seattle Pilots, to revert to the city in thirty years, constituted valid consideration for a donation of city land.

151. *See* Wallwork, *supra* note 3, at 353.

152. *Id.*

153. *Id.* at 363.

154. *Pilot Properties*, 527 P.2d at 522. In *Pilot Properties*, the trial court was instructed to determine the fair market value of the property which was leased, to judge the value of having a new stadium in the city, and to judge the value of the stadium after it reverts to the city. *See generally* Scott Meyer, Wistuber v. Paradise Valley Unified School District: *Arizona Adopts an "Equitable and Reasonable Consideration" Test to Identify Gifts of Public Funds to Private Entities*, 27 ARIZ. L. REV. 579 (1985).

155. Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984) (citing State v. Northwestern Mut. Ins. Co., 340 P.2d 200, 202 (Ariz. 1959)); *accord* Kromko v. Arizona Bd. of Regents, 718 P.2d 478 (Ariz. 1986).

The requirement of adequate consideration is not a bright-line rule, but sets a higher standard of consideration than *Adams/Tacoma Taxpayers*. Adequate consideration would require Washington courts, especially at the trial court level, to closely scrutinize proprietary transactions, and balance the costs and benefits to the state or locality. Further, courts would use comparable valuations during the balancing process because all consideration must be measurable and lasting. Thus, the simple framework of the adequate consideration test raises procedural safeguards in gift analysis beyond *Adams/Tacoma Taxpayers*, and provides courts with the dichotomy in review that has worked in the past.

In the end, however, any move from contract law in analyzing gifts is likely to be labeled an interference with the government's ability to contract.[156] However, if the public is protected by the Washington Constitution only to the extent already provided by the common law, the gift provision is meaningless. The gift prohibition was incorporated into the state's constitution so that public funds and the public credit would not benefit private interests. Further, in reviewing gift transactions, the court's goal should not be to maximize the state's freedom of contract; rather, the court should strive to protect the state from losses, thus serving its constitutionally mandated role. Therefore, to avoid the substantive and procedural problems inherent in the current test, and to enforce the language of the prohibition, a form of adequacy analysis should be adopted.

IV. CASE STUDIES: THE *ADAMS/TACOMA TAXPAYERS* TEST V. ADEQUACY OF CONSIDERATION

This section demonstrates how adequacy analysis operates by applying it to current examples of public financing of private enterprise, and by comparing it with the *Adams/Tacoma Taxpayers* test. The case study examples used are legislative appropriations to promote a thoroughbred race track and state appropriations for the purchase of railroad freight grain cars for private short line railroads. These examples were chosen because each demonstrates the range of issues involved in assessing transactions for gifts, and represents present and past forms of public financing. The studies are not proposing legal challenges, but are used solely to analyze gift prohibition issues that flow from them. In the following section, a brief background of each example will be provided, which includes the various forms of

156. *See generally* Spitzer, *supra* note 15.

financing. This section will then discusses the gift issues that each project raises, and analyze how they would be addressed under each test.

A. Auburn Thoroughbred Race Track

Reviewing state support of "Emerald Downs," a fifty million-dollar private thoroughbred race track in Auburn, Washington, under the proposed test analysis, shows that adequacy analysis is consistent with the legacy of the gift prohibition. This section will demonstrate that requiring measurable and lasting consideration prevents undue speculation in government financing policy.

When Longacres Park, the only horse racing facility in Western Washington, closed in 1992, popular demand encouraged the state government to sponsor the opening of a new thoroughbred race track.[157] The closure of Longacres crippled the horse racing industry in Washington, leaving many unemployed. Thoroughbred racing in Western Washington was a $400-million-a-year industry, which employed 15,000 people, and utilized 25,000 acres of land for breeding.[158] Just one year after closure, industry revenues dropped by $80-million, hundreds of jobs were lost, breeding acreage fell thirty-eight percent, and Washington Thoroughbred Breeders Association membership fell from 1,200 to 800.[159] In response, the state resolved to support thoroughbred racing and authorized several assistance programs including the following three which will be examined in detail: a fund to support the horse racing industry,[160] a deferral of business taxes,[161] and a four million dollar appropriation providing infrastructure improvements to support a new racetrack.[162]

The first support program authorized by the state created the Washington Thoroughbred Racing Fund (racetrack account).[163] Under the program, nonprofit licensees of race meets paid a percentage

---

157. S.S. 5281, 54th Leg., Reg. Sess. (Wash. 1995) (enacted).

158. Don Hannula, *Time to Go to Whip on Auburn Horse Track*, SEATTLE TIMES, Jan. 19, 1995, at B8.

159. *Id.*

160. WASH. REV. CODE § 67.16.105 (1996); *see also* S.S. 5281, 54th Leg., Reg. Sess. (Wash. 1995) (enacted).

161. S.S. 5281, 54th Leg., Reg. Sess. (Wash. 1995) (enacted).

162. TERRENE G. PAANANEN, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION (WSDOT) NORTH WEST REGION, DRAFT ISSUES-ISSUES PAPER: AUBURN THOROUGHBRED RACE TRACK AND STATE FUNDING (1995).

163. *See* WASH. REV. CODE § 67.16.105(4) (1996).

of their daily gross receipts for each day of racing.[164] Funds from the account could only be spent after legislative appropriation, in order to protect the state's interest in the long-term development of thoroughbred racing. Further, money was not appropriated until a determination[165] was made that an applicant for a new race track could construct a facility, fund the operation, and satisfy all permit requirements for construction.[166]

The second program provided tax deferrals for a new thoroughbred race track facility.[167] Under this program, taxes for retail sales,[168] use taxes,[169] and taxes on all material, equipment, and labor used to construct and equip the new race track facility were deferred interest free for a five year period. The facility merely was required to repay the deferred taxes over a ten year period while interest was never charged.[170]

Through the third program, the Legislature committed four million dollars from the Washington State Department of Transportation (WSDOT) budget to improve the infrastructure supporting the Auburn Thoroughbred Race Track.[171] Over one-half of the funds were earmarked for construction of an arterial leading into the race track facility.[172] In addition, while the arterial initially would be owned by the developer of the race track, ownership would revert to the government when a sufficient traffic need was demonstrated.[173]

---

164. WASH. REV. CODE § 67.16.105 required payment to the Washington Horse Racing Commission (WHRC) 2.5% in 1991 and 1.25% in 1993.

165. Under WASH. REV. CODE § 67.16.105, determinations are to be made by the WHRC.

166. Currently no expenditures have been made from the fund, but for the purposes of this comment it will be assumed there have been.

167. *See* S.S. 5281, 54th Leg., Reg. Sess. (Wash. 1995) (enacted).

168. *Id.* In Washington, the retail sales tax is imposed on sales of most articles of tangible personal property, construction including labor, repair of tangible personal property, and certain services. The tax is imposed by both the state and the local governments.

169. In Washington, the state use tax applies to items used in the state, the acquisition of which was not subject to the retail sales tax, including purchases in other states, purchases from sellers who do not collect Washington sales tax and items produced for use by the producer. The tax is imposed by both the state and the local governments.

170. *Id.* The program was only to apply to a "new thoroughbred race track facility," located in Western Washington.

171. PAANANEN, *supra* note 162, at 3.

172. *Id.* The arterial would serve traffic needs to the facility and the movement of equipment and animals within the facility. At the present time, this project is held up in discussions between the developer and the Legislative Transportation Committee. As a result, this payment plan has not been actualized.

173. *Id.* The developer would build the arterial, but payment would be routed through WSDOT or the City of Auburn.

Each form of financing used for the Auburn race track was common in form and function, each transaction raises a gift prohibition issue. Specifically, conditional support of a private enterprise to construct a private asset constitutes a direct use of public funds for private purposes. The deferral of taxes which results is providing interest-free money to a private enterprise realistically can be viewed as a public subsidy of that private enterprise.[174] And constructing roads for both private and public purposes, with initial private road ownership, can be characterized as an indirect public subsidy of private enterprise.

1. Applying the Test

Application of the proposed adequate consideration test to determine the constitutionality of each of these support programs first requires assessing each program for measurable consideration. In each, the consideration is measurable to some degree, including the receipt of certain generalized public benefits. In the first program, measurable consideration results from the racetrack's construction and the resultant economic impact: job preservation for persons in the horse racing industry; job creation for corporations in the horse racing industry; future taxes generated from the facility; and any subsequent economic growth in King or Pierce Counties due to the operation of the race track.[175]

Finding measurable consideration, however, specifically requires quantifying the proposed economic benefits derived from the race track support program. It is not enough to say that certain economic results will occur; concrete evidence is necessary. This includes calculating the number of jobs that were both preserved and created, and documenting any development that would not have occurred but for the race track. In this program, no such measurements were performed. Without this specific information regarding the benefits of the program, the race track program would be precluded due to the absence of measurable consideration. Additionally, even if this information was available, the measurable consideration analysis would not allow consideration of the "emotional" benefits resulting from the racetrack program, including appeasing those who enjoy horse racing

---

174. On its face, a tax deferral is a public subsidy, but court decisions have approved such financing without questioning its gift characteristics. *Cf.* Budget Rent-a-Car v. Department of Revenue, 81 Wash. 2d 171, 500 P.2d 764 (1972); Overton v. Economic Assistance Auth. 96 Wash. 2d 552, 637 P.2d 652 (1981).

175. *See* S.S. 5281, 54th Leg., Reg. Sess. (Wash. 1995) (enacted).

and supporting the state's horse racing tradition. Because such concerns are emotional and abstract they are not measurable.[176] "Tradition" is not measurable because emphasis would be placed on the value of the transmission from generation to generation of knowledge, customs, and practices in horse racing.

In the tax deferral program, there is measurable consideration under the proposed analysis. Measurable consideration would be found in the increased likelihood that the racetrack would generate sufficient revenue to survive the first ten years of operation, thus preserving state interests. Additionally, in the third program, consideration for the private-public arterial is found in the alleviation of future traffic congestion.

Once it is determined that measurable consideration exists, the second step requires assessing the programs to determine if that consideration is lasting. While there is little doubt that the arterial will alleviate traffic congestion for a number of years to satisfy this requirement,[177] other portions of the program would not pass this inquiry. Economic impacts due to the race track account and the tax deferment program are not supported by lasting consideration.[178] Without lasting consideration, the programs would be struck under the gift prohibition analysis. Even if satisfactory forecasts were available, the economic impact due to both programs remains uncertain. Although risk is inherent in the gaming industry, risk is compounded in this case because Emerald Downs' future economic survival is not certain due to the severe impact other forms of wagering will have on horse racing.[179] The racetrack must compete for gambling dollars with both the state lottery and the casinos located on Indian reservations.[180] Notably, even under the lasting consideration analysis, additional questions of risk would not be addressed because the government must only substantiate the consideration claimed, not

176. *See* Spitzer, *supra* note 15.

177. See PAANANEN, *supra* note 162, at 3.

178. No fiscal note was attached to the legislation.

179. "The University of Kentucky's Department of Equine Administration has studied the relationship between thoroughbred racing and other forms of wagering . . . [finding] that the lottery has a negative impact of 15 to 20 percent on racing, and casinos have a negative impact of thirty percent." Alex Fryer, *Competition Raises Odds for New Racetrack*, PUGET SOUND BUS. J., Apr. 9, 1993, § 1.

180. The racetrack is situated next to one casino, the Mukleshoot, with eleven others situated throughout the state. Twelve Washington tribes currently operate eleven casinos in Washington, with several more predicted in the future.

investigate its merits.[181] Thus, application of the first two prongs of consideration analysis shows in which of the support programs, consideration is measurable and lasting, instead of illusory.

2. Adequacy of Consideration

The support programs would subsequently be assessed to determine the adequacy of the consideration which has been exchanged. Such an assessment of the racetrack account and tax deferment program is difficult because no figures exist which help to substantiate the benefits.[182] For purposes of this Comment's analysis, assumptions will be made concerning the benefits bestowed and received. It will be assumed that the entire racetrack account of one million dollars was spent in support of Emerald Downs, and that the benefits conferred on the private race track by the tax deferment are approximately two million dollars.[183] The Comment will further assume that the state will receive revitalization of a large industry, new jobs, the preservation of jobs, and increased development. On its face, the state benefits appear disproportionate to the private concerns. The state pays only three million dollars and is assured of the survival of a large industry which employs thousands. Thus, state dollars buy jobs, generate business for local corporations, and encourage the development of property near the race track. The two programs appear to achieve an equitable and reasonable, if not disproportionate, benefit to the State of Washington.

However, the proportionality of return shifts drastically when the arterial is assessed for adequate consideration.[184] While the state will receive alleviation of traffic, alleviation would occur primarily on King County roads, which are not maintained by the state. Accordingly, this is a benefit directed more to King County than to the State of Washington. Further, while the state would be assured of efficient customer access to the facility, the private enterprise will gain much more from this benefit than will the state.

Although the state would eventually receive ownership of the arterial, such ownership is of little value because the state paid for the construction of the arterial. Therefore, the balance is disproportional

---

181. As noted in the discussion of *Tacoma Taxpayers*, the trial court demanded additional predictions beyond the first year of the program because long-term savings were claimed. Without information demonstrating long-term savings, such savings were found speculative and the program struck down.

182. No fiscal note was attached to the legislation.

183. This estimate would be accurate in the first year, but would vary thereafter.

184. *See* PAANANEN, *supra* note 162, at 3.

because the state receives little if any benefit, but must expend two million dollars for a road that in reality only directly benefits private enterprise. Thus, under the proposed test, the program would be unconstitutional because no equitable and reasonable return is gained by the state.

The race track demonstrates that adequate consideration analysis serves courts by requiring litigants to substantiate any claim of consideration. Notably, the racetrack program generated benefits that are likely to mislead courts when quantifying the value of consideration that has been exchanged. A requirement of measurable and lasting consideration removes unsubstantiated claims and ensures a standard of review that is free of artificially inflated benefits. Further, by insisting upon the substantiation of claims, adequacy analysis is simplified and is more accurate. Unfortunately, this level of scrutiny is absent from the current *Adams/Tacoma Taxpayers* test.

3. Application of *Adams/Tacoma Taxpayers*

Under the *Adams/Tacoma Taxpayers* test, the constitutionality of the support programs is reviewed by first looking for donative intent. There is no donative intent evident in the race track programs. The race track programs all possessed basic legislative reasoning which recognized the need for developing a thoroughbred race track, while ensuring the successful operation of such a track.[185] Money in the race track account was to be spent only after legislative appropriation for the following purposes: benefits and support for the interim continuation of thoroughbred racing; capital construction of a new race track facility; programs enhancing the general welfare and safety; and advancement of the Washington thoroughbred racing industry.[186] Further, tax deferral and road construction both possessed a legislative direction which could not be regarded as donative intent. The Legislature supported the tax deferral in order to benefit the general welfare of the state.[187] Moreover, the appropriation for road construction was intended to improve infrastructure that supports the race track and the city of Auburn.[188] Finally, the acts were all deemed "necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public

185. See notes 160-62, *supra*, for the legislative reasoning behind the support programs.
186. WASH. REV. CODE § 67.16.250 (1996).
187. *Id.*
188. *See* PAANANEN, *supra* note 162, at 3.

institutions . . . ."[189] In each instance, however, an argument exists that while the race track benefits the state as a whole, the benefits received by the facility developers and owners is so great that a gift intention existed.

It could be further argued that the programs were intended to benefit private enterprise; specific statutory language is not needed to show a gift intention because only two horse racing associations proposed developing a racetrack in western Washington during this time. However, speculation on a program's true intentions is not enough to achieve donative intent. Instead, it is apparent that donative intent is found only where there is the proverbial "smoking gun."[190] Therefore, because nothing describes these programs as gifts which gratuitously support the racing industry, the smoking gun will not be found.

Because donative intent will not be found, the second prong of *Adams/Tacoma Taxpayers* examines the transaction for legal consideration. Assuming all money from the racetrack account was appropriated for capital construction, and the facility was constructed with the benefit of the tax deferment, the state would be the party receiving the majority of the consideration. Claims of job preservation, creation, and development would be accepted by the reviewing court, even though no realistic quantifying or substantiation would have occurred. Further, the appeasement of citizen concerns, coupled with the continuation of the horse racing tradition would be viewed as generalized public benefits. These would be consideration given in return for the arterial because of promises that the race track is attractive to customers, and because of the alleviation of traffic.

However, problems arise when such generalized benefits are considered to be evidence of legal consideration. Traditionally, the court only allowed generalized public benefits to serve as consideration if measurable results occurred which primarily supported the public interest.[191] Here, however, even if the consideration was insufficient,

---

189. S.S. 5281, 54th Leg., Reg. Sess. (Wash. 1995) (enacted).

190. The problem in determining any form of government intent was summarized by the U.S. Supreme Court in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp. 429 U.S. 252, 265 (1977):

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

191. *See, e.g., Lancey*, 15 Wash. at 9, 45 P. at 646-47.

allowable exceptions to the gift prohibition would support the constitutionality of the race track program. Both the racetrack account and tax deferment program could be sanctioned under the public purpose exception to the gift prohibition. Here, the Legislature intended both acts to serve the general welfare of the state, because the loss of the industry is contrary to general state interests.

4. Comparing the Two Tests

The most glaring difference between adequate consideration analysis and the *Adams/Tacoma Taxpayers* test lies in the degree of scrutiny. Under the proposed test, problems are found when the state is forced to quantify the benefits it receives. Investigating the consideration received reveals that the absence of longevity fails to support the appropriations made by the state. Under *Adams/Tacoma Taxpayers*, however, no problems are found because courts are not forced to question the validity of the programs' underlying claims of consideration. Problems lie not only in what the *Adams/Tacoma Taxpayers* test fails to examine, but also in what the test subsequently allows to serve as generalized public benefits. Such recognition of artificial consideration inflates the value of the benefits that are received from the racetrack support programs, and denies the public the corresponding benefits to which the state is entitled.

B. Washington State Department of Transportation Agriculture/ Rail Grain Train Project

The second example of public financing of private enterprise is the Washington State Department of Transportation (WSDOT) Agriculture/Rail (Ag/Rail) rehabilitation project for freight rail cars. This example similarly illustrates that balancing costs and benefits under the adequacy analysis makes the government more accountable for its appropriations. Further, this example shows that adequacy analysis is not unduly burdensome to judicial decision making.

The Ag/Rail assistance program was established by the Washington State Executive branch and administered by the Washington State Energy Office (WSEO).[192] Ag/Rail purchased railroad grain hopper

192. In the late 1980s and early 1990s, the Executive Branch of Washington State received funds from the federal Department of Energy (DOE) for several legal settlements involving oil companies who overcharged consumers during price controls in the 1970s. The federal government distributed the settlement funds to states' Executive Branches as restitution damages to promote energy conservation services (Petrol Violation Escrow Fund). In response to the oil settlement funds, the Executive Branch of Washington State created "Power Washington," a committee of political organizations and state agencies, to place the funds with state energy

cars for short line railroads in eastern Washington. The project sought to preserve rail services for farmers and to promote energy conservation.[193]

In 1993, the first Ag/Rail railroad rehabilitation project began when the WSDOT Freight Rail Program[194] received complaints from grain shippers in southeastern Washington concerning access to grain cars.[195] WSDOT commissioned a consultant, Freight Services Incorporated (FSI), to study the local short-lines: the Blue Mountain Railroad in Walla Walla and Columbia Counties, and the Palouse River Railroad in Whitman County.[196] FSI determined there was a

---

projects. The Washington State Energy Office (WSEO) was assigned to administer the settlement funds. Power Washington established the Agricultural Rail Assistance Program (Ag/Rail), which was a project funded from the Stripper Well Oil Rebate fund (resulting from the Exxon settlement in the 1970s). The fund sought to provide restitution to oil consuming farmers, help preserve freight rail services for farmers, and energy conservation. DENNIS HAMBLET, WSDOT GRAIN TRAIN SUMMARY, 3-4 (WSDOT Rail Branch 1994-5). *See also* letter from Frank M. Stewart, Deputy Assistant Sec. Washington State Dept. of Energy to David W. Sjoding, Assistant Director Administration and Finance State of Washington (Aug. 26, 1993); telephone interview with Gene Schlatter, Senior Fiscal Analyst of the Washington State Legislative Transportation Committee (July 14, 1995); telephone interview with John Doyle, WSDOT Programming and Geographic Services Deputy Assistant Secretary (June 20, 1995); telephone interview with David Sjoding (June 19, 1995); KATRINA PRICE, WASHINGTON STATE AUDITOR GRAIN TRAIN REPORT (1995); telephone interview with VanDeursen and Constras (Washington State Auditors); DAVID MARTIN, AGRICULTURE RAIL GRAIN TRAIN PROJECT (Legislative Transportation Committee, 1-3, (Sept. 1995) (information on file with the *Seattle University Law Review*).

193. See sources listed *supra* note 192.

194. In 1983, the Washington State Legislature enacted RCW 47.76 (Rail Freight Service) and created the Rail Freight Program. The statute was enacted to preserve and plan the state freight rail system. In 1990 and 1991 the statute was modified to provide fiscal and policy guidelines for state freight rail programs. *See* WASH. REV. CODE §§ 47.76.240 and 47.76.250 (1996).

195. Grain shippers complained that a rail car shortage existed nationwide and was exacerbated by natural disasters. The shortfall created logistical problems for growers who were forced to use alternative (and more expensive) modes of transportation to move their products. *See* letter from Robert Abbey, Manager Touchet Valley Grain Growers Inc., to Jeff Schultz of the WSDOT Rail Branch (Aug. 3, 1993); letter from Tom Jeffries, Manager St. John Grain Growers, to Jeff Schultz of the WSDOT Rail Branch (Aug. 3, 1993); letter from Robert J. Holmes, Whitman County Growers, to Jeff Schultz of the WSDOT Rail Branch (Aug. 3, 1993); letter from Tom Druffel, General Manager Crites Moscow Growers, to Jeff Schultz of the WSDOT Rail Branch (Aug. 13, 1993); letter from Bruce Bond, Walla Walla Grain Growers, to Jeff Schultz of the WSDOT Rail Branch (Aug. 17, 1993) (letter on file with the *Seattle University Law Review*).

196. E. WILLIAM ANDERSON, A REVIEW OF EASTERN WASHINGTON GRAIN CAR SUPPLY, IMPACTS ON SHIPPING, AND NEED FOR GOVERNMENTAL INTERVENTION (prepared for WSDOT by Freight Services Incorporated (FSI)) (1993). The initial railroad rehabilitation project proposed for the Ag/Rail Stripper Oil Settlement Fund was track improvement at the Port of Royal Slope. The project, however, was discontinued as the rail line was embargoed out of service by the larger Washington Central Railroad. *See* letter from John Doyle, WSDOT Programming and Geographic Services Deputy Assistant Secretary, to David Sjoding, Assistant

grain car shortage and forecast the impact this shortage would have on grain shippers, railroads, and secondary roads (from increased trucking) in negative terms.[197] Alternatively, the study found direct economic benefits would result if additional grain cars were introduced to the region.[198] Consequently, FSI recommended the purchase of grain cars by the state in order to supplement the southeast region's private short line railroad industry.[199]

In 1993, WSDOT proposed adding thirty-five reconditioned grain cars to the Blue Mountain Railroad and the Palouse River Railroad.[200] The WSEO approved the "grain train" project, and WSDOT bought twenty-nine grain cars for $730,000.[201]

The WSDOT, Port of Walla Walla, Palouse Blue Mountain Shippers Association, and the Blue Mountain Railroad reached an operating agreement for the grain cars.[202] The agreement specified

---

Director Washington State Energy Office (Sept. 18, 1991) (letters on file with the *Seattle University Law Review*).

197. ANDERSON, *supra* note 196, at 1-50.

198. ANDERSON, *supra* note 196, at 2. The initial FSI review of grain car supplies found probable benefits to grain shippers for $80,000 in annual transportation savings to BMRR and PRRR for $135,000 in additional revenue, to Union Pacific for $540,000. *See also* telephone interview with FSI consultant E.I. Anderson (June 21, 1995). The FSI figures were based on interviews and some hard data. The WSDOT, however, initially predicted benefits to grain shippers of $314,969 and an impact on state and local roads (due to increased truck traffic) would cost $500,000. WSDOT Newsletter, 1 (Nov. 1, 1994) (citing FSI Independent Analysis); KEN CASAVANT/LENZI PROCEDURE FOR PREDICTING AND ESTIMATING THE IMPACT OF RAIL LINE ABANDONMENTS ON WASHINGTON ROADS (1989); KEN CASAVANT, AN ECONOMIC EVALUATION OF A MULTIMODAL TRANSPORTATION SYSTEM: GRAIN TRANSPORTATION IN EASTERN WASHINGTON (1993). That figure was updated to $357,000 in the WSEO proposal with the incorporation of additional variables. *See* WSDOT PROPOSAL TO THE WSDOE FOR GRAIN TRAIN PROJECT (1993). On December 19, 1994, grain shipper savings were modified to $139,000, after WSDOT obtained hard data from the program. WSDOT FREIGHT RAIL DIVISION PROJECTIONS AND ADJUSTMENTS (Dec. 19, 1994). *See also* letter from James Slakey, WSDOT Director of Public Transportation and Rail to Washington State Senator Eugene Prince (Dec. 19, 1994) (information on file with the *Seattle University Law Review*).

199. ANDERSON, *supra* note 196, at 16.

200. *See* WSDOT PROPOSAL, *supra* note 198. The WSDOT submitted an application with the WSEO for $730,000 of Ag/Rail money. The WSEO approved the "grain train" project, and allocated monies from the Stripper Well Oil Settlement fund. *See* telephone interview with Katrina Price, Washington State Auditor for Grain Train Report (on file with the *Seattle University Law Review*).

201. In December 1993, the Washington State Transportation Commission approved the grain train purchase as a pilot project, but requested an evaluation after twelve months of service. Soon thereafter, on January 18, 1994, WSDOT secured a Limited Purchase Authority from the Department of General Administration. *See* letter from Ted Bove, Don Johnson, and Pat Kohler of Washington State Department of General Administration to WSDOT (Jan. 28, 1994) (on file with the *Seattle University Law Review*).

202. *See* GRAIN CAR OPERATING AGREEMENT, RR-175 (June 15, 1994); GRAIN CAR OPERATING AGREEMENT, RR-0175, amend. 1 (Nov. 21, 1994).

that the State would retain ownership of the grain cars, and that WSDOT's promotional graphics would be displayed on the cars.[203] Further, the State agreed not to charge rent for the use of the cars.[204] The Port agreed to manage an account for the deposit of revenues generated by car use and to reimburse the Blue Mountain Railroad for car maintenance and expenses through this account.[205] The railroads agreed to manage and operate the cars between grain elevators in eastern Washington and grain export terminals in western Washington. In addition, the railroad agreed that the Port's account would not be used for maintenance without permission from the Port.[206] Finally, shippers agreed to use these state-owned grain cars, except where Union Pacific cars had been used. By 1995, twenty-three grain cars were placed in service, while three were damaged and repaired during this period.[207] Thus, there exists a potential gift issue because state freight rail cars are used by private enterprise rent-free and maintenance-free, while gaining revenue from the state based on transport.

1. Applying the Test

Examining the freight rail program under the proposed test shows that the consideration exchanged was measurable and lasting. Studies were conducted of the benefits that would accrue and the duration such benefits would last. Here, WSDOT bought grain cars for the railroads, while the railroads incurred no financial obligations toward WSDOT, or any other party, for the use or maintenance of the grain cars. Further, the purpose of WSDOT's purchase appears to be for directing funds to Blue Mountain and Palouse River railroads in order

---

203. GRAIN CAR OPERATING AGREEMENT, RR-175, *supra* note 202, at 3; GRAIN CAR OPERATING AGREEMENT, RR-0175, amend. 1, *supra* note 202, at 1.

204. GRAIN CAR OPERATING AGREEMENT, RR-0175, *supra* note 202, at 3. According to WSDOT Freight Rail Manager, Dennis Hamblet, not charging rent for use of grain cars is a common trade practice. Revenue is instead generated from a system of tariffs imposed when railcars travel on foreign rail lines. *See* telephone interview with Dennis Hamblet (June 22, 1995) (on file with the *Seattle University Law Review*). However, the FSI report stated that "it is not unreasonable to require the direct beneficiaries of the cars to pay some cost of ownership." ANDERSON, *supra* note 196, at 13.

205. The account was known as the "Grain Car Revolving Fund," and was managed per RCW 36.29.020 and RCW 53.36.050. GRAIN CAR OPERATING AGREEMENT, RR-175, *supra* note 202, at 2.

206. The railroad was not to receive profits from grain car repair and maintenance, but to earn revenue based on transportation of products. GRAIN CAR OPERATING AGREEMENT, amend. 1, *supra* note 202, at 3.

207. Currently, the utilization of grain cars exceeds original performance expectation, with the program producing enough revenue to purchase more grain cars. *See* telephone interview with Dennis Hamblet, *supra* note 204.

to preserve service to farmers in the regions. The Blue Mountain and Palouse River Railroads were estimated by Freight Services Incorporated to benefit by $135,000 annually from an increase in general car supply, while Union Pacific would benefit $540,000 annually,[208] and the Palouse Blue Mountain Shippers Association would save its members $80,000 in shipping costs.[209] The public received $500,000 in savings through benefits to WSDOT and general benefits to state transportation and the economy.[210] WSDOT knew of these figures before proposing the plan to WSDOE. Further, the contract between WSDOT and the railroads stated that "[i]t is the intent of AGREEMENT to provide cars to the RAILROAD with which the RAILROAD will earn revenues based on transportation."[211] WSDOT also stated the purpose of the grain train project was to "[p]reserve the viability of light density rail lines as one part of Washington's freight transportation system, as directed by the Washington State Legislature."[212] Thus, all necessary data was present to determine the reasonableness of the consideration.

However, this transaction is not limited to named parties, because of the broad secondary effects.[213] The freight rail program impacted other state industries, particularly the trucking industry. When WSDOT contracted with the railroads, revenue was removed from the trucking industry because a cheaper alternative became available. Some estimate the trucking industry's losses amount to $400,000 annually.[214] However, because consideration would only be measured as between the state and railroads, all these other parties would not be considered. Thus, there was a quantifiable result that was ignored by the gift prohibition even though the costs of the project outweigh the benefits.

---

208. *See* ANDERSON, *supra* note 196, at 2. This figure is based on an increase in revenue from 800 additional carloads of grain shipped to the Portland/Vancouver area, and an agreement between Union Pacific and the short lines as to an 80% to 20% split of revenue. *See* telephone interview with E.I. Anderson, *supra* note 198.

209. Even if Union Pacific is not included in a weighing of the benefit's direction, it would not make the railroads and farmers benefit incidental to the public's benefit. Other indicators beside economic show that the state intended to benefit private parties before the public as a whole.

210. *See* HAMBLET, *supra* note 192, at 1.

211. GRAIN CAR OPERATING AGREEMENT, RR-0175, *supra* note 202, at 3.

212. *See* HAMBLET, *supra* note 192, at 1.

213. *See* HAMBLET, *supra* note 192. *See also* Letter from James Slakey, *supra* note 198.

214. *See* Letter from Washington State Senator Eugene Prince to Jeff Doyle, General Council Legislative Transportation Committee (Dec. 19, 1994).

2. Adequacy of Consideration

Under adequacy analysis, the consideration is insufficient because the benefits gained by private parties unreasonably outweigh the benefits enjoyed by the public. In the proposal, railroads were only one group of beneficiaries; other benefits were specifically designated for the farmers. "A deprivation fund was established to eventually replace the cars, but no interest on the invested capital would be collected so that the economics would flow to the shippers."[215] The private benefit is illustrated by the WSDOT grain car report, which stressed the car fleet would "provide farmers with significant additional savings flowing from lowered car acquisition costs passed on the railroad." Thus, the fact that WSDOT even stated to WSDOE that it intended to provide for injured farmers is conclusive evidence that the program violates the gifting prohibition.

Once the consideration is found to be both measurable and lasting, the balancing test for adequacy analysis is applied. The FSI study states that the railroads would benefit by $675,000 in additional revenue if grain cars were purchased, while grain shippers and farmers would save $139,000 in annual transportation costs.[216] This resulted in a benefit of $814,000 to private parties, while the State gained $500,000.[217] Obviously, the benefit is proportionately larger for the private parties, is directed only to private parties, and also harms other state interests, particularly the trucking industry. Here, the costs borne by the State illustrates that there is too great a burden on the public interest with a corresponding gain to private interests.[218] Because WSDOT's purchase of grain cars does not sufficiently benefit the State, it is an unreasonable gift.

The freight rail program demonstrates that balancing public and private interests to determine the adequacy of consideration exchanged is not difficult when all forms of consideration are substantiated. Further, the program demonstrates that adequate consideration analysis serves to protect the public purse. A court that takes a panoptic view

---

215. WSDOT PROPOSAL, *supra* note 198.

216. WSDOT FREIGHT RAIL PROJECTIONS, *supra* note 198.

217. *Id.*

218. As a side note, it would be important to determine what WSDOT really intended for the settlement money. Did WSDOT want to preserve light density rail in Columbia and Whitman counties? Surely, the answer is yes, it is their mandate. Further, did WSDOT want to assist farmers in those counties through the settlement moneys? The answer again is yes, without such a goal WSDOT could not have received money from the fund. Thus, what WSDOT's intentions were are unclear, however, evidence tends to support its mandate over the farmers settlement monies.

of the freight rail program would find that the consideration received by the public is far exceeded by the benefits paid out by the public. Thus, review for adequate consideration ensures reasonable transactions while preventing government speculation when using public funds. Unfortunately, this higher level of scrutiny would not be applied under the *Adams/Tacoma Taxpayers* test.

3. Application of the *Adams/Tacoma Taxpayers* Test

As previously explained, the *Adams/Tacoma Taxpayers* test first assesses the transaction for donative intent. According to the WSDOT the objective of the project was to preserve the viability of light density rail lines, reduce road maintenance costs, and conserve energy. These are not items which typically constitute donative intent because the Legislature's objective on its face was the furtherance of public policy. However, the WSDOT Rail Freight Program also stated that the purpose of the expenditure was providing financial support to the Blue Mountain and Palouse River railroads.[219] Without the expenditure, it was likely that both railroads would go out of business; funding the program fulfilled the Legislature's statutory mandate of providing essential rail service. Still, donative intent would probably not be found because these objectives were pursued as a state mandate, not for gifting purposes. Thus, while donative intent is evident merely from the language of the mandate the Rail Freight Program, it does not reach the level of the necessary smoking gun.

Alternatively, donative intent is evident if a secondary definition test looking for "grossly inadequate return" is applied. As stated previously "grossly inadequate return" results when the transaction is so unbalanced that it constitutes a gift. In the present matter, the grain cars were provided to the railroads without charging rent and without demanding compensation for the grain cars. The return to the state was quantifiable due to the fulfillment of a legislative mandate. If it could be shown that WSDOT acted *ultra vires*, or that the fulfillment of its mandate could not be accomplished through such an expenditure, then donative intent is evident. Thus, if a free rental qualifies as a gift, then there is donative intent.

However, assuming that no donative intent was found, the next step requires searching for legal consideration. The return that WSDOT received for the transaction was a reduction of road maintenance cost by $100,000 annually, and the prevention of

219. *See* telephone interview with Dennis Hamblet, *supra* note 204. *See also* ANDERSON, *supra* note 196, at 13.

structural impact on highways and local roads of increased traffic from truck, which would have totaled $400,000 annually. Moreover, the increase in freight rail further reduced road congestion, increased road safety, and enabled the state to save money in road maintenance gaining other less tangible benefits.[220] WSDOT also believed the program would help preserve the viability of light density rail in the region, the energy efficient movement of goods, and allow Washington grain prices to remain competitive. The benefits are sufficient consideration, and certain returns are quantifiable. The exchange also meets the required standards of legal consideration because the promises were not illusory.

4. Comparing the Two Tests

The application of the current test raises serious concerns. First, the State's return is a generalized public benefit so that it is not supported by consideration. In the present case, the return is to a specified small group, not the public as a whole. The transaction does save money for southeastern Washington by removing the road maintenance burden from WSDOT, and does help maintain competitive grain prices through efficient transportation.[221] Additionally, the public benefit is economic, WSDOT gains by reducing liabilities, and the state economy gains by increasing efficiency. Such an economic benefit, however, if taken to its logical end, seemingly produces an unconstitutional transaction. For example, if the State were to provide Boeing with electricity, without a return of consideration, for the purpose of supporting Boeing, which would secondarily increase state revenue, most citizens would object.

Under the present test, even if no consideration is evident, the transaction would still be upheld under the court's government function exception. Here, WSDOT's mandate under RCW 47.76 is to maintain essential rail service. In each case WSDOT performed this government function by purchasing grain cars to be used by the railroads. Further, WSDOT maintained an essential rail service and helped injured oil consumers. Thus the furtherance of a recognized governmental function occurred.

The grain train program demonstrates that when the consideration exchanged is measurable and lasting, balancing costs and benefits under an adequacy analysis is not difficult. Moreover, such an analysis

---

220. *See* HAMBLET, *supra* note 192.

221. *See* letters from grain producers in southeast Washington addressed to WSDOT, *supra* note 195.

forces the government to develop programs that are supported by a corresponding benefit. Under the current test, however, WSDOT's program is constitutional because the evident donative intent is ignored and the consideration exchanged will be viewed as sufficient. Thus, as in the race track example, the present test fails to address the illusory nature of the consideration supporting the program, while allowing generalized public benefits to serve as legal consideration.

V. CONCLUSION

The history of the gift prohibition and the problems inherent in the present application point to a need for reconstructing the test that is applied. As it currently stands, the gift prohibition is not entirely dead, but clearly is subject to a waning application. The State and its subdivisions are not prohibited from entering into transactions that unduly benefit private enterprise. The case studies and the language of *Adams/Tacoma* test demonstrate how the requirements of donative intent and sufficient consideration allow lawyers to devise methods which avoid the gift prohibition and bypass the few remaining substantive requirements. Thus, the current test is a paper tiger, malleable to the constitutional needs of practically any proprietary transaction entered into by state and local governments. However, a porous gift prohibition was not what the framers' intended and not what case law has dictated until recently. The gift prohibition was enacted for public policy and economic reasons, and some measures should be taken by the judiciary to ensure Washington courts respect those principles.

The test of adequate consideration, plus the requirement that the consideration be measurable and lasting, would provide courts with an efficient and effective mechanism to renew the gift prohibition. In the above case studies, and in Arizona, the requirement of adequate consideration provided numerous benefits over the current analysis for donative intent and sufficient consideration. Here, government proprietary transactions are no longer masked from proper review because courts only seek prima facie evidence of consideration. Instead, under adequate consideration analysis, government transactions that best benefit the public will be pursued, because the consideration exchanged will be subject to an individualized balancing analysis. Adequate consideration also respects the intentions of the framers, prevents government involvement in speculative private financing, requires the state and its subdivisions to receive equitable returns from their proprietary transactions, and does not allow for returns containing only illusory consideration. The equitable nature of

the adequate consideration test preserves the public purse, which not only constrains the government in risk-taking, but also makes government more responsible.

Historically, Washington citizens have demanded responsibility from the government at all levels. From Initiative 601 to the Growth Management Act, Washington has improved the lives of its citizens by seeking rational public policies. In order to continue this important tradition, the Washington State Supreme Court should take the initiative to revisit Article VIII, sections 5 and 7, and once again restrict the state and local government from the speculative attractions of private enterprise."