Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare?

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I. INTRODUCTION

The Alvarez family and the rest of the sellout crowd attending the Mariners game cheered wildly as Ken Griffey, Jr. swung at the fastball, sending it flying out of the ballpark. This game meant a lot to Roberto Alvarez, it being his first ever at an outside, open-air professional baseball park in his forty-five years as a resident of King County.[1] He had planned to take his family to see this game for a long time, saving money by working overtime as a truck driver. However, between the cost of the concessions and the ticket prices, he seriously doubted that he would be able to buy his family a night out at a Mariners game again soon.[2] Nevertheless, he was enjoying this game in the new stadium, watching home runs being hit in the dimming lights of a beautiful Puget Sound sunset.

As a King County resident, Roberto should enjoy the game as well as the new stadium. After all, he has been paying for the stadium since 1995, when the Washington State Legislature passed the Stadium Act to ensure the continued viability of major league baseball as an

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1. The Alvarez family and Roberto Alvarez are fictional characters and are not intended to bear any resemblance to any persons either living or dead. Ken Griffey, Jr. is a major league baseball player who plays center field for the Seattle Mariners, a professional major league baseball team in Seattle, Washington. The new baseball stadium in Seattle opened in July 1999, and has been named Safeco Field.

2. According to Seattle Times sports writer Tom Fuller, baseball ticket prices in the new stadium range from $5-7 in the outfield bleachers, to $13-16 along the foul baselines, on up to $100-195 for seats behind home plate. Telephone Interview with Tom Fuller, November 29, 1998.

institution in Seattle.[3] The Stadium Act imposed an additional 0.017% sales and use tax on all King County residents for construction of a new baseball stadium for the Seattle Mariners.[4] Only weeks before the Act's passage, King County voters rejected the same proposed tax in a countywide referendum.[5] Nevertheless, following the Act's passage, the King County Council authorized the creation of a public facilities district to implement the tax, among other things. Soon thereafter the construction of the new Mariners stadium began.[6]

The Washington Legislature's passage of the Stadium Act in 1995 was the culmination of a series of financial development arrangements between state and local governments and private entities. Indeed, 1995 proved to be a remarkable year for such arrangements, as evidenced by much publicized deals like the Pacific Place parking

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3. Stadium Act, 1995–1996 Wash. Laws, 3rd Spec. Sess., ch. 1 et seq. declared as an emergency. Section 310 of the Stadium Act provides: "This Act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately." Stadium Act § 310 at 13.

4. The Stadium Act was first proposed by Representatives Van Leuven and Appelwick as Engrossed House Bill 2115, 3rd Spec. Sess. (Wash. 1995), which was adopted as the Stadium Act by Washington's legislature on October 17, 1995. *See* Stadium Act § 310 ch. 13. The Act provides legislative authority for the creation of a public facilities district to implement a sales and use tax of 0.017% in a county with a population of one million or more. The Act also allows the public facilities district to impose taxes on retail sales of food and beverages by restaurants, taverns, and bars, and to impose special sales taxes on car rentals. The state is further authorized to generate revenues for the stadium's construction through the sale of sports and stadium related license plates and lottery scratch tickets with sports themes. *See* Stadium Act §§ 101, 103, 104, 201, and 202.

5. This referendum was authorized by the Washington legislature and allowed King County to impose a tax for purposes of constructing a new stadium only upon voter approval. *See* Financing of Public Stadiums Used by Professional Sports Teams, 1995 Wash. Laws, 1st Spec. Sess., ch. 14, §§ 6 and 7 at 2381. The referendum was in response to Seattle Mariners management concerns about the continued financial viability of baseball in Seattle. Immediately following the voters' rejection of the referendum and tax, the Mariners threatened to put their team up for sale on October 30, 1995, unless King County provided them with a new retractable roof stadium, modeled closely after Toronto's Skydome. In response to this threat, Governor Mike Lowry called the legislature into a special session on October 11, 1995. This session discussed stadium financing, and led to the consideration and ultimate passage of Engrossed House Bill 2115, 3rd Spec. Sess., which was declared a legislative emergency. *See supra* note 4. Subsequent attempts to repeal the Stadium Act through the referendum process were rebutted due to the Act's emergent nature. *See* Citizens for Leaders with Ethics and Accountability Now (CLEAN) v. State, 130 Wash. 2d 782, 787-88, 812, 928 P.2d 1054, 1057, 1068 (1997). CLEAN is a Washington state nonprofit organization dedicated to promoting effective grassroots citizen educational campaigns. CLEAN Homepage (visited Nov. 15, 1998) <http://www.clean.org/>.

6. The King County Council enacted Ordinance 12000 on October 25, 1995, which created the Washington State Major League Baseball Stadium Public Facilities District to impose the three special sales and use taxes authorized under the Stadium Act. *See* King County v. Taxpayers of King County, 133 Wash. 2d 584, 590, 949 P.2d 1260, 1263 (1997); Citizens for More Important Things v. King County, 131 Wash. 2d 411, 932 P.2d 135 (1997) (holding that Ordinance 12000 did not violate state constitutional provisions against levying taxes for a public purpose).

garage in downtown Seattle and the River Park Square in downtown Spokane. Like the Mariners stadium, both of these projects were largely financed with public money lent to private corporate interests, despite a state constitutional ban on such loans.[7]

As part of a growing national trend, these public-private arrangements, often called "partnerships," are touted as benefiting the local economies they serve, while at the same time providing private companies and entities a necessary means of financing development projects that would otherwise be unfunded.[8] Yet, despite their assumed or actual benefits, these partnerships have recently come under increased public scrutiny, both nationally and in Washington.[9]

The increased public scrutiny in Washington primarily derives from the Washington Constitution's prohibition on government gifting of public funds or extending credit to corporations.[10] Because of such prohibitions, many public-private partnerships have developed creative procedural and substantive legal mechanisms to serve their financing needs while avoiding constitutional scrutiny.

Procedural mechanisms, such as creating public corporations for

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7. *See infra* note 10. For a discussion of the Nordstrom parking garage, see Barbara A. Serrano and Deborah Nelson, *City Overpaid Pine Street Developer*, SEATTLE TIMES, December 21, 1997, at A1. For a discussion of the Spokane Riverview Mall development, see Citizens for Leaders with Ethics and Accountability Now (CLEAN) v. Spokane, 133 Wash. 2d 455, 460, 947 P.2d 1169, 1171 (1997), *cert. denied* 119 S. Ct. 45 (1998).

8. *See, e.g.*, Dale F. Rubin, *Public Purpose in the Northwest: A Sinkhole of Judicial Interpretation*, 32 IDAHO L. REV. 417 (1996); Judith Welch Wagner, *Utopian Visions: Cooperation Without Conflicts in Public-Private Ventures*, 31 SANTA CLARA L. REV. 313 (1991); Tim W. Ferguson, *Do Fancy Shopping Malls Deserve Public Subsidies?*, FORBES, April 20, 1998, at 42; William Fulton, *Wonder Where All That Downtown Development Money Went? Look in the Parking Garage*, GOVERNING MAGAZINE, August 1998, at 25. These partnerships have little to do with traditional partnership law, and should not be considered partnerships in the legal sense of the term. *See generally* J. CRANE AND A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP, 189-95 (1968). Public-private partnerships are also not necessarily always clearly defined. For example, a form of constructive partnership develops whenever public funds are used to benefit private concerns, even if such benefit is incidental to the broader public purpose.

9. *See* Donald L. Barlett and James B. Steele, *Corporate Welfare*, TIME MAGAZINE, November 9, 1998, at 34; Dale F. Rubin, *Public Subsidies to Private Corporations and the Washington State Constitution*, WASHINGTON INSTITUTE FOR POLICY STUDIES, 1997 (visited March 13, 1998) <http://www.wips.org/rubin.htm>.

10. Two sections of article VIII of the Washington Constitution govern the restriction of government lending of public funds to corporations. Section 5 provides: "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation." WA. CONST. art. VIII, § 5.

§ 7 provides:

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

WA CONST. art. VIII, § 7.

channeling public funds to establish a public purpose for financing,[11] utilizing Federal Housing and Urban Development loans to avoid public scrutiny,[12] declaring development projects to be public emergencies to avoid the referendum process constitutionally guaranteed the public,[13] and granting a wide variety of tax subsidies to private corporations,[14] have effectively shut the taxpaying public out of the debate over how their tax dollars are spent, and spawned numerous lawsuits.[15]

Substantive mechanisms used by courts to determine the constitutional validity of development projects, such as whether public expenditures to private entities serve a fundamental governmental

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11. *See* WASH. REV. CODE § 35.21.730 (1998), which provides:

> [T]o improve the administration of authorized federal grants or programs, to improve governmental efficiency and services, or to improve the general living conditions in the urban areas of the state, any city, town, or county may by lawfully adopted ordinance or resolution:
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> (1) Transfer to any public corporation, commission or authority created hereunder, with or without consideration, any funds, real or personal property, property interests, or services;
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> . . .
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> (4) Create public corporations, commissions, and authorities to: Administer and execute federal grants or programs; receive and administer private funds, goods, or services for any lawful public purpose; and perform any lawful public purpose or public function. . . .

12. *See* 24 C.F.R. § 570.703 (1994) (enabling the Federal Housing and Urban Development Department (HUD) to make community block grants to local governments for purposes of economic development); *See also* WASH. REV. CODE § 42.17.310(r) (1998) (exempting from public disclosure "[f]inancial and commercial information and records supplied by businesses or individuals . . . during application for economic development loans or program services provided by any local agency.").

13. The Washington Constitution art. II, section 1 (amend. 72) affords the people the right to referendum and provides:

> The legislative authority of the state of Washington shall be vested in the legislature, . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act or law passed by the legislature.
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> . . .
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> (b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions. . . .

WA CONST. art. II, § 1.

14. Article VII, section 1 of the Washington Constitution provides that all taxes imposed "shall be levied and collected for public purposes only." WA. CONST. art. VII, § 1.

15. *See, e.g.*, CLEAN v. State, 130 Wash. 2d 782, 928 P.2d 1054 (1997); King County v. Taxpayers of King County, 133 Wash. 2d 584, 949 P.2d 260 (1997); Citizens for More Important Things v. King County, 131 Wash. 2d 411, 932 P.2d 135 (1997); CLEAN v. City of Spokane, 133 Wash. 2d 455, 947 P.2d 1169 (1997).

purpose and whether sufficient consideration exists in public exchanges of capital, only serve to further the public's nonparticipation.[16] Moreover, given the recent zeal of state and local governments for entering public-private financing arrangements, and the Washington Supreme Court's failure to adequately address the problems created by these arrangements, it is likely that more lawsuits will be brought in the future.[17] The result of state and local government use of such mechanisms raises an important question: What is the proper role of public-private development?

This Comment explores this question by examining the legal mechanisms used in public-private financing arrangements in light of three recent public-private development projects in Washington: the Mariners stadium in Seattle, the River Park Square development in Spokane, and the Pacific Place parking garage in Seattle. These projects utilized a combination of legal mechanisms that allowed state and local governments to foster economic development and benefit private entities by circumventing the constitutional ban on the gifting of funds, despite widespread public opposition to the development.

This Comment argues that while the public may ultimately benefit economically from public-private partnership development, the legal mechanisms used in public-private partnerships to skirt the constitution violate the public trust by (1) precluding the public from obtaining information regarding these projects; (2) denying the tax-paying public their right to participate in public choices and spending decisions that affect them; and (3) severely impinging on the public's state constitutional right to the referendum process. Furthermore, by allowing these mechanisms to exist, the Washington Supreme Court only furthers the violation of the public's trust, while simultaneously weakening the role of the judiciary as a guardian of the democratic process. Because of the court's complicity, the only way much-needed reform will be achieved is through a well-educated state legislature that is more responsive to the majority of its constituency.

This Comment begins Part II with a historical analysis of the rise of public-private partnerships in Washington and how that rise corresponded to the development of the Washington Constitution's prohibition of the gifting of public funds or lending of credit to corporations. Part II also includes an analysis of how the Washington Supreme Court has interpreted these constitutional provisions since

16. *See* City of Tacoma v. Taxpayers of City of Tacoma, 108 Wash. 2d 679, 743 P.2d 793 (1987); *see also* Adams v. University of Washington, 106 Wash. 2d 312, 722 P.2d 74 (1986).

17. At the time of this publication one suit is already pending. *See* CLEAN v. City of Seattle, No. 98-2-09656-0SEA, *trial pending* Nov. 15, 1999 (King County Sup. Ct. 1998).

their development.

Part III illustrates the modern mechanisms of public-private financing vis-à-vis Washington's constitutional prohibitions by examining three recent public-private partnership developments: the Seattle Mariners stadium development, the River Park Square parking garage development in Spokane, and the Pacific Place development in downtown Seattle. Case studies illustrate the role of the Washington Supreme Court in facilitating such arrangements and allowing the financing mechanisms used in the arrangements to exist, despite the apparent conflict with the state constitution.

Part IV suggests the proper role of public-private partnerships in Washington. Furthermore, this section discusses how this area of law could be reformed by eliminating the constitutional proscription on public funding, implementing greater procedural safeguards, limiting the use of public-private partnerships, adopting a corporate model, better defining, or eliminating emergency clauses.

II. BACKGROUND AND HISTORY OF PUBLIC-PRIVATE FINANCING ARRANGEMENTS IN WASHINGTON

The first public-private partnership arrangements in Washington began with the advent of the national railroad system in the late nineteenth century. Like many other states desiring railroad access for purposes of trade and transportation, Washington entered into agreements with private railroad corporations to subsidize railroad development with public funds.[18] Such subsidies often involved direct payments of cash and municipal bonds or loans of credit to railroad corporations.[19] Despite the public nature of the loans, the public had little control over the marketing of the loans or the allocation of their taxpaying dollars. Railroad corporations receiving loan proceeds often sold the bonds issued to them in eastern markets at below market prices.[20] Moreover, many railroad lines financed by public funds were never built, and those that were built were often abandoned in response to changing markets or radical financial mismanagement by railroad monopolies.[21] As a result, many states incurred substantial

18. David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 277-80 (1963).

19. *Id.*

20. *Id.*

21. The enormity of the extortion carried on by and through our railroads is hard to conceive . . . the evils that have grown up around the building and operation of our railroads cannot easily be uncovered. The injustice of discrimination in freight charges and transportation service, the wrong of charging those who are outside of the railroad cliques higher rates than those who are within them . . . is impossible to show in all its atrocity. . . .

WHARTON BAKER, THE NORTH AMERICAN REVIEW 717 (1906).

financial hardship, with some states approaching near bankruptcy.[22]

In reaction to Washington's own public indebtedness from railroad subsidies, and as a "protection from enemies without and the protection of weak from the strong within," Washington enacted article VIII, sections 5 and 7 at the Constitutional Convention of 1889.[23] These provisions severely curtailed the ability of state and local governments to lend or give money to private entities and prohibited the public ownership of stock.[24]

The framers of the constitution feared the potential negative impact on the public if assets were given or lent to private entities. Furthermore, the transfer of public assets to private entities was considered an improper function of government, if not a detriment to government and private industry in general.[25] Provisions similar to Washington's article VIII, sections 5 and 7 were included in many states' constitutions across the nation; and, eventually, the frenetic pace of public subsidies to railroads quieted.[26]

Ironically, many of the same concerns which gave rise to article VIII, sections 5 and 7 are expressed in the briefs of litigants opposed to public-private partnerships today. These modern concerns are a direct result of a gradual erosion of Washington's constitutional proscriptions over the past century. The following two sections examine this erosion.

A. Court's Strict Adherence to Framers' Intent

In the first half of this century, the Washington Supreme Court interpreted the language of sections 5 and 7 almost literally.[27] In *Seat-*

22. Pinsky, *supra* note 18, at 280-81.

23. Comments of delegate Buchanan at the Constitutional Convention of 1889, *printed in* Colin Kippen, *Article VIII, Sections 5 and 7: An Examination of the Provisions, Their Impact and the Prospects for Change*, SEATTLE CITY LIGHT, April 18, 1979, at I-8. For the text of the constitutional provisions please see *supra* note 10.

24. Article VII, Section 1, was enacted in 1930 and provides: "The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only . . . " WA. CONST. art. VII, § 1. This essentially set up the public purpose doctrine originally enacted in Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853); *see* Rubin, *supra* note 9.

25. Kippen, *supra* note 23, at I-9-10.

26. Pinsky, *supra* note 18, at 282-89; *see, e.g.*, OR. CONST. art XI, § 9; IDAHO CONST. art. VIII, § 4; CAL. CONST. art. XVI, § 6.

27. *See supra* note 10 (text of §§ 5 and 7). Sections 5 and 7 are frequently considered synonymous in Washington opinions, with courts construing the two sections to contain similar "prohibitions and exceptions" despite their different language. City of Tacoma v. Taxpayers of City of Tacoma , 108 Wash. 2d 679, 701, 743 P.2d 793, 804 (1987). *See also* Health Care Facilities v. Ray, 93 Wash. 2d 108, 115-16, 605 P.2d 1260, 1264 (1980); Kippen, *supra* note 23, at I-11-17.

tle and Lake Washington Waterway Co. v. Seattle Dock Co.,[28] one of the court's earlier cases involving public-private financing arrangements, the court upheld a state contract with a private dredging contractor to dredge a waterway and deposit the dredging material on state-owned tidal land.[29] The state's payment under the contract was made by attaching a lien to the state-owned property that would be paid off upon purchase of the property.[30] Interpreting the plain language definition of lending of credit as correlative to the incurring of a financial obligation or debt, the court found no lending of credit because the state incurred no debt in exercising a lien.[31]

Next, in *Johns v. Wadsworth*,[32] one of the court's first cases concerning section 5's ban on the public gifting of funds to private entities, the court invalidated a county's loan of public money to a private corporation for purposes of sponsoring an agricultural fair.[33] Interpreting the framers' intent literally, the court held that "all gifts of money, property, or credit to . . . any corporation" violates the gift provision of section 5.[34] Yet, as urban economies grew, so did the apparent need for public capital to finance urban development projects and transportation.[35]

Responding to these pressures, the Washington Supreme Court began to carve out exceptions to its otherwise strict interpretation of constitutional prohibitions against public subsidies where an enterprise could prove that its functions were public in nature.[36] The growth of public-private partnerships followed closely behind, encouraged by loosened constitutional constraints on their development.

Thus, in 1963, in *Miller v. City of Tacoma*,[37] the court rejected a challenge to the City of Tacoma's plan to redevelop blighted urban areas by purchasing blighted land through condemnation and reselling it to private development entities.[38] Although section 7 clearly pro-

28. 35 Wash. 503, 77 P. 845 (1904), *aff'd*, 195 U.S. 624.

29. *Id.*

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

31. *Id.*

32. 80 Wash. 352, 141 P. 892 (1914).

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

34. *Id.*

35. Kippen, *supra* note 23, at I-9.

36. *See* State v. Guaranty Trust Co. of Yakima, 20 Wash. 2d 588, 591-92, 148 P.2d 323, 325 (1942) (finding state funds used in support of needy persons in a nursing home to be a recognized public function exempt from constitutional restrictions); Rands v. Clark County, 79 Wash. 152, 157, 139 P. 1090, 1092 (1914) (finding that entities whose functions are public in nature are exempt); Paine v. Port of Seattle, 70 Wash. 294, 322-23, 126 P. 628, 635 (1912) (finding that a lease by the port to a private party was justified because the port retained power to regulate).

37. 61 Wash. 2d 374, 378 P.2d 464 (1963).

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

vides that no city shall give or lend its credit in any manner to any individual or company, the court found a broad public purpose exception to Washington's ban on the gifting of public funds.[39]

The court reasoned that any benefit conferred upon private interests by Tacoma in the resale of condemned property was incidental to the overall public purpose envisioned by Tacoma in its community development goals.[40] The court justified its position by stating that as "governmental activities increase with the growing complexity and integration of society, the concept of 'public use' naturally expands in proportion."[41] *Miller's* "incidental private benefit" analysis was a broad departure from the court's traditional view of article VIII's prohibitions and serves as an important substantive legal mechanism in avoiding constitutional proscription in modern public-private financing arrangements.[42]

This judicial erosion of section 7's ban on lending public credit to private entities continued in *Berglund v. City of Tacoma*.[43] In *Berglund*, the Washington Supreme Court found that a loan of credit by the City of Tacoma to a local improvement district for purposes of expanding water services outside of the city was not a violation of article VIII, section 7 because Tacoma would become the ultimate owner of the expanded water services.[44] In allowing Tacoma to make its loan to the district, the court effectively recognized an additional public purpose or control exception to section 7's prohibitions against the municipal lending of public credit to private entities.[45]

Anderson v. O'Brien[46] continued this broad interpretation and set the stage for the court's modern interpretation of article VIII's provisions.[47] In *Anderson*, the court again held that a state statute authorizing the gift of public funds to a local Native American tribe was

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39. *Id.*

40. *Id.*

41. *Id.* at 384-85, 378 P.2d at 470.

42. *See* discussion *infra* Part III.

43. 70 Wash. 2d 475, 423 P.2d 922 (1967).

44. *Id.* at 478, 423 P.2d at 925-26.

45. The *Berglund* opinion fits well within the purposes behind the enactment of section 7 despite its exception. By establishing that the City of Tacoma owned the property, the court effectively negated any risk of loss to public funds, while benefiting the city "rather than the property of private individuals." *See* Kippen, *supra* note 23 at IV-16; *see also* Gruen v. State Tax Comm'n, 35 Wash. 2d 1, 30-31, 211 P.2d 651, 668-69 (1949) (where the court found a public purpose exception for a tax imposed on cigarettes for purposes of retiring bonds which benefited veterans) (overruled by State *ex rel.* Fin. Comm'n v. Martin, 62 Wash. 2d 645, 384 P.2d 833 (1963)).

46. 84 Wash. 2d 64, 524 P.2d 390 (1974).

47. *Id.* at 66, 524 P.2d at 393.

within the public purpose exception to article VIII section 5.[48] The funds authorized by the statute were made for the purpose of constructing buildings to lease to private manufacturing firms.[49] Reiterating its opinion in *Miller*, the court reasoned that where a private corporation's functions are "wholly public" there is no constitutional violation of section 5, despite the incidental benefit to the private sector.[50]

Essentially, *Anderson* found that the public appropriations were not outright gifts within the purview of section 5 because they were public expenditures for which the public received consideration in the form of public benefits.[51] Furthermore, *Anderson* reinforced what would become another modern mechanism of public financing that benefits private concerns: the use of a quasi-public agency to manage the financing program. This allowed the public to retain adequate control over the program while evading the constitutional proscription of sections 5 and 7.[52]

As will be seen in the next section, the combination of *Anderson's* consideration analysis, *Miller's* "incidental private benefit" analysis, and the court's acceptance of the use of public agencies as finance managers set the modern stage for the court's determination of whether a public appropriation was violative of article VIII, sections 5 and 7. These more flexible approaches to the question of whether the use of public money benefited the public facilitated the increased development of public-private entities, and legitimized their existence despite their proscription under Washington's constitution.

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48. *Id.*

49. *Id.* at 68, 524 P.2d at 393.

50. *Id.* Under the court's analysis, "wholly public" referred to the types of construction authorized under the statute, which included sewers, roads, bridges, waste material sites, and water distribution facilities. The court also made reference to article VII, section 1 of the Washington Constitution, which provides that all taxes "shall be levied and collected for public purposes only. . . ." *Id.*; see *supra* note 14.

51. The consideration the public received was the elimination of unemployment problems on Native American reservations which the statute was targeted towards ameliorating. *Id.* at 70, 524 P.2d at 394. The incidental private benefit received by the private building contractors was essential to achieving the broader public purpose, and thus an acceptable exception to Washington's constitutional prohibitions.

52. The creation of public or quasi-public entities was licensed by the United States Supreme Court in Berman v. Parker, 348 U.S. 26 (1954). *See also* United States v. Town of North Bonneville, 94 Wash. 2d 827, 835, 621 P.2d 127, 131 (1980); *Miller*, 61 Wash. 2d 374, 388-89, 378 P.2d 464, 473 (1963). The creation of public or quasi-public authorities as development conduits would become an often-used tool in the creation of public-private financing. If the development is controlled by a public entity, there can be no argument that it is within the public, and not the private interest. Setting up a quasi-public authority is within the scope of a local government's power under chapter 35.21 of the Revised Code of Washington.

B. Modern View

Washington's modern legitimization of public-private partnerships began in 1986 with the Washington Supreme Court's opinion in *Adams v. University of Washington*.[53] *Adams* involved a group of female University of Washington employees who sued the state to enforce the state's equal pay statute.[54] The female employees were paid less than their male counterparts for performing similar work. The employees claimed that the difference paid to the males was an unconstitutional gift of public funds under article VIII, section 5.[55]

In holding unanimously that no public gift of funds occurred, the court established the foundation of modern article VIII interpretation: whether an unconstitutional gift occurred depended on whether there was a decrease in the state general fund and a lack of sufficient "consideration."[56] The consideration in question was couched in contract terms as an "act or forbearance which has been bargained for."[57] The court viewed this consideration in terms of the public's exchange of its tax dollars, in the form of government spending, for the public's receipt of a benefit.[58]

Thus, if the public did not receive anything in exchange for the government's use of public tax dollars, the government would be violating article VIII. The existence of consideration provided the court with evidence that no gift existed because "a gift is a transfer of property without consideration and with donative intent."[59] *Adams* laid down the rule that unless gift elements such as donative intent or a grossly inadequate return were proven by the challengers to a use of public funds, the court would not inquire into the adequacy or amount of consideration.[60] The court found sufficient consideration because the physically superior skills of the male employees were used on

53. 106 Wash. 2d 312, 722 P.2d 74 (1986).

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

55. *Id.* at 326-27, 722 P.2d at 82. Both the men and the women were employed as printers in the Department of Printing at the University of Washington.

56. *Id.* at 327-28, 722 P.2d at 82-83. *See also* Louthan v. King County, 94 Wash. 2d 422, 428-29, 617 P.2d 977, 981 (1980) (holding that a bond measure through which King County raised money to obtain development rights on private land was not a gift because such rights were consideration for payments).

57. 106 Wash. 2d at 327, 722 P.2d at 82 (citing Huberdeau v. Desmariais, 79 Wash. 2d 432, 439-40, 486 P.2d 1074 (1971)).

58. *Id.*

59. *Id.* (citing General Tel. Co. of the Northwest, Inc. v. Bothell, 105 Wash. 2d 579, 587-88, 716 P.2d 879 (1986)).

60. 106 Wash. 2d at 327, 722 P.2d at 82-83. *See also* City of Bellevue v. State, 92 Wash. 2d 717, 721, 600 P.2d 1268, 1270 (1979) (holding that reimbursement of Bellevue city employees for tips paid is not a violation of section 5 because such reimbursement constituted consideration for services rendered and no donative intent was present).

occasion to justify the state's payment of higher wages.[61]

The significance of the *Adams* consideration test was that any public expenditure could potentially be seen as enough to justify a declaration of constitutional validity if there was any finding of consideration, whether the expenditure directly benefited private entities or not. Furthermore, since the court failed to address tax consequences in its public donation analysis, a public donation could occur through the use of taxpayer money without depleting the state's general fund at all, by the receipt of nominal consideration. Thus, the court ignored its previous one hundred years of strict constitutional interpretation and specific historical exceptions to the patent ban on the gifting of public funds to private entities.

The *Adams* model of article VIII interpretation was further solidified one year later in *City of Tacoma v. Taxpayers of City of Tacoma*.[62] *Taxpayers* involved a City of Tacoma electricity conservation program in which the city paid ratepayers to install approved equipment to lessen city energy consumption.[63] Finding that the city's program did not violate the constitutional ban on government's gifting of public funds to private individuals, the court utilized a two-part test derived from past opinions and the *Adams* consideration analysis.

As a threshold question, the court asked whether Tacoma's program served a fundamental government purpose.[64] If a fundamental government purpose existed, no further test was necessary as there was an exception to article VIII's prohibitions. If no government purpose existed, the court asked whether there was sufficient consideration for Tacoma's payment. If sufficient consideration did not exist, the question became whether there was any donative intent evidencing a gift.[65]

In holding that Tacoma's interest was merely proprietary, the court reasoned that Tacoma's expenditure was exchanged for sufficient consideration because Tacoma gained the benefit of saving energy in exchange for the use of its public expenditure.[66] Furthermore, as part of its consideration analysis, the court reiterated the incidental private benefit analysis of *Miller*, stating: "Where the public receives sufficient consideration, and benefit to an individual is

61. 106 Wash. 2d at 327-28, 722 P.2d at 83.

62. 108 Wash. 2d 679, 743 P.2d 793 (1987).

63. *Id.* at 682-84, 743 P.2d at 795-96.

64. *Id.* at 702, 743 P.2d at 805. *See also In re* Marriage of Johnson, 96 Wash. 2d 255, 261-62, 634 P.2d 877, 881 (1981) (first establishing that expenditures made for a recognized governmental function by means of a private benefit were exempt from article VIII's prohibitions).

65. 108 Wash. 2d at 703, 743 P.2d at 805-06 (citing Adams v. University of Washington, 106 Wash. 2d 312, 327, 722 P.2d 74, 82).

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

only incidental to and in aid of the public benefit, no unconstitutional gift has occurred."[67] In its analysis, the court focused on the sufficiency of consideration as opposed to the actual value of such consideration, finding that a measurement of the adequacy of consideration would intrude upon a government's power to make its own legislative judgments.[68]

Taxpayers' new analysis of whether a public expenditure to a private entity violates article VIII, sections 5 and 7 created a very important substantive legal mechanism for public-private partnerships to utilize in circumventing the Washington Constitution. Under the court's analysis of consideration, state and local governments have a great discretion in creating public-private partnerships, which would otherwise be unconstitutional under the plain language of sections 5 and 7.[69] For example, a state or local government may establish the existence of sufficient consideration, while at the same time, obfuscating that there may be facts indicative of a grossly inadequate return, which would give rise to a donative intent.[70]

Nowhere can this better be seen than in three recent public-private financing arrangements: the Seattle Mariners' Safeco Field, the River Park Square parking garage development in Spokane, and the Pacific Place parking garage development in downtown Seattle. In each of these cases, the Washington Supreme Court continues its consistent erosion of Washington's constitutional prohibitions by using the same substantive legal mechanisms developed from *Berglund* through *Taxpayers*. The following section will show that the court's development of exceptions to the constitutional prohibitions has all but eliminated the effect of the prohibitions and created an environment highly conducive to future development of public-private partnerships in Washington.

III. CASE STUDIES: HOW TO AVOID THE CONSTITUTION IN PUBLIC-PRIVATE FINANCING ARRANGEMENTS

While not intended to be an instructional guide to local and state governments or interested developers, the following cases illustrate arguments public and private actors used in forming the financial agreements supporting their partnerships. Indeed, if Safeco Field is

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

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

69. For an in-depth discussion of the issue of sufficiency of consideration versus adequacy of consideration see David D. Martin, *Washington State Constitutional Limitations on Gifting of Funds to Private Enterprises: A Need for Reform*, 20 SEATTLE U. L. REV. 199 (1996).

70. *See* King County v. Taxpayers of King County, 133 Wash. 2d 584, 632-33, 949 P.2d 1260, 1284 (1997) (Sanders, J. dissenting).

any indication, the future of public-private financial arrangements is almost certain to prosper, unconstrained by sections 5 and 7.

A. A New Stadium, But At What Cost?

If one drives along Interstate Five just south of downtown Seattle, one can see both the old and new homes of the Seattle Mariners baseball team. The old home is the Kingdome, which still hosts the Seattle Seahawks football team and numerous recreational conventions.[71] The Mariners' new home is Safeco Field, a new baseball stadium built with state of the art technology, specifically designed as a home field for the Seattle Mariners to keep them in Seattle.[72]

As previously mentioned, the stadium's construction was implemented by the passage of the Stadium Act in October of 1995.[73] The Act authorized the creation of a public facilities district in a county of one million people or more and empowered the district to "acquire, construct, own, remodel, maintain, equip, reequip, repair, and operate a baseball stadium."[74] To finance the stadium's construction, the district was authorized to implement a tax supplement to King County's sales and use tax, as well as a new tax on the food service industry in King County.[75] To generate additional revenue, the district was authorized to levy a tax on admission charges to stadium events and sell special sports and stadium related automobile license plates.[76]

In addition to the public tax revenue, the Stadium Act allowed the district to issue bonds "in an amount determined to be necessary by the [district]" to finance the construction of the stadium.[77] As part of the Act, the Seattle Mariners were required to contribute forty-five

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71. The Mariners new stadium opened on July 15, 1999. Furthermore, the Kingdome itself is slated for eventual demolition, to be replaced by a new football stadium for the Seattle Seahawks, whose owners also threatened to leave Seattle unless a new stadium was built. *See* Brower v. State, 137 Wash. 2d 44, 49, 969 P.2d 42, 47 (1998).

72. The Safeco insurance company bought the rights to name the new stadium Safeco Field in 1998. *See supra* notes 4 and 5.

73. Stadium Act, 1995–1996 Wash. Laws, 3rd Spec. Sess., ch. 1 §§ 201(1) at 4, 201(4)(b) at 5. *See supra* notes 4 and 5.

74. *Id.*

75. *Id.*

76. *Id.*

77. Stadium Act § 201(3). The District requested a total of $336 million in limited tax general obligation bonds for the stadium's construction on January 2, 1997. The King County Council approved the request on January 6, 1997. *See Taxpayers of King County*, 133 Wash. 2d at 591, 949 P.2d at 1263-64. The ultimate construction and operation of the baseball stadium was also contingent on a major league baseball team's contracting to play at least ninety percent of its home games in the stadium. *See* Stadium Act § 201(4)(a). Notwithstanding the language of the Act, the Act and the construction of a new baseball stadium were clearly designed for the Seattle Mariners, and no other major league baseball team.

million dollars for purposes of paying for preconstruction costs.[78] To seal the final aspects of their public-private partnership, the district and the Seattle Mariners were also required to enter into an agreement in which a portion of the profits generated by the Seattle Mariners during their play season would be shared with the district to retire the bonds issued.[79]

Three days after the passage of the Stadium Act, several parties opposed to the stadium's construction made an attempt to file a petition for referendum with Washington's Secretary of State, Ralph Munro.[80] A petition for referendum would have referred the issue of whether the Stadium Act should be upheld back to the people of King County for a general popular vote. Judging from the pre-Stadium Act referendum where the public rejected King County's tax plan to finance the construction of the stadium, it is quite possible that the Act would have been similarly struck down.[81] Instead, Ralph Munro declined to accept the petition, on the basis that the Stadium Act's emergency clause exempted it from the referendum process.[82] Three days later, *CLEAN v. State* was filed, the first of three lawsuits against the construction of the stadium.[83]

The plaintiffs in *CLEAN v. State* asserted that the Stadium Act

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78. Stadium Act § 201(4)(b). At the time of publication, the Mariners have paid their required $45 million, but the team faces an estimated $100 million in cost overruns for which it is likely also responsible as part of its lease agreement with King County. The Mariners have demanded that King County pay an additional $60 million of these cost overruns. King County has thus far refused and has rejected mediation over the issue. *See* Michele Matassa Flores, *Are Mariners Guessing High on Tax Dollars?*, SEATTLE TIMES, June 27, 1999 at A1.

79. Stadium Act § 201(4)(c) at 5.

80. *See CLEAN*, 130 Wash. 2d 782, 791, 928 P.2d 1054, 1058 (1997). Article II, section 1(b) of Washington's constitution provides: "The second power [in addition to the legislative powers reserved] by the people is the referendum, [which] may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety . . ."; WA. CONST. art. II, § 1(b). Referenda are begun by gathering signatures which are then presented to the Secretary of State. The Secretary then endorses the referendum and the issue is put on the next ballot for public vote. The referendum process plays an important role in checking the power of the legislature and reinforcing grass roots political movements. For example, referenda have been held on issues of acquiring public property, appointing game commissioners, rezoning property, ratifying federal prohibition, issuing bonds to alleviate statewide poverty, and increasing fuel taxes. *See* State ex rel. Humiston v. Meyers, 61 Wash. 2d 772, 777, 380 P.2d 735, 738 (1963). However, under the provisions of article II, section 1 of Washington's constitution, the people's right to referendum is exempted by laws passed by the legislature for the *immediate preservation of the public peace, health or safety*, or for support of the state government and its existing institutions. WA. CONST., art. II, § 1(b) (emphasis added).

81. *See supra* note 5.

82. 130 Wash. 2d at 791, 928 P.2d at 1058.

83. 130 Wash. 2d at 791, 928 P.2d at 1058-59. *See also* Citizens for More Important Things v. King County, 131 Wash. 2d 411, 932 P.2d 135 (1997), King County v. Taxpayers of King County, 133 Wash. 2d 584, 949 P.2d 1260 (1997).

violated the Washington Constitution, article VIII, sections 5 and 7, article II, sections 1 and 28, and article VII, section 1.[84] The plaintiffs first argued that under article VIII's provisions King County's issuance of bonds, as well as the tax imposed by the public facilities district, were violations of the prohibitions against the public lending of credit to a private corporation such as the Seattle Mariners.[85]

Additionally, the plaintiffs argued that financing the stadium construction through the imposition of a tax was not a public purpose under the provisions of article VII, section 1 and was unconstitutional.[86] A concurrent argument under article II, section 28 was also made. The plaintiffs claimed that the Stadium Act was therefore special legislation under which no tax could be levied.[87] Finally, the plaintiffs argued that their right to referendum under article II section 1 was violated because the construction of the stadium was not an emergency.[88]

1. The Majority View: Legislative Deference and Constitutional Erosion

All of the plaintiffs' claims were rejected by the Washington Supreme Court. First addressing the plaintiffs' article VII, section 1 claim that the stadium did not constitute a public purpose, the majority found that "the construction of a major league baseball stadium in King County confers a benefit of reasonably general character to a significant part of King County. . . ."[89] Moreover, the majority found that the benefit the Seattle Mariners may enjoy as the principle tenant of the publicly held building was incidental to the broader public purpose the stadium provided.[90]

The court then turned to the plaintiffs' claims under article VIII, sections 5 and 7. In its rejection of these claims, the majority utilized the two-prong consideration test set forth in *Taxpayers*.[91] Finding that the construction of a baseball stadium did not serve a fundamental

84. Article II, section 1 provides that "[t]he legislature is prohibited from enacting any private or special laws . . . (5) [f]or assessment or collection of taxes, or . . . (6) [f]or granting corporate powers or privileges. WA CONST., art. VII, § 1. Article VII section 1 provides that "the power of taxation shall never be suspended . . . or contracted away." WA CONST., art. VII, § 1.

85. *See CLEAN*, 130 Wash. 2d at 791-92, 928 P.2d at 1058-59.

86. *See id.* at 792, 928 P.2d at 1059.

87. *See* 130 Wash. 2d at 801, 928 P.2d at 1063.

88. *Id.* at 803, 928 P.2d at 1065.

89. *Id.* at 796, 928 P.2d at 1060.

90. *Id.* at 796, 928 P.2d at 1061. *See also* United States v. Town of North Bonneville, 94 Wash. 2d 827, 834, 621 P.2d 127, 130 (1980) (holding that the fact that private ends are incidentally advanced is immaterial to determining whether legislation serves a public purpose).

91. *See also* Adams v. University of Washington, 106 Wash. 2d 312, 327, 722 P.2d 74, 82 (1986).

governmental purpose, the court analyzed whether there was any donative intent, on the part of the state or King County in financing the construction and operation of the stadium.[92] The court found no donative intent and stated that sufficient consideration existed through the Seattle Mariners' payment of rent for using the stadium.[93] The court justified its position by rationalizing that the district would wholly own the stadium upon its completion.[94] Nonetheless, the majority acknowledged article VIII, sections 5 and 7 when it suggested that article VIII's constraints could be implicated if the Mariners were to enter an agreement with the district to pay only nominal rent.[95]

The court had greater difficulty in determining whether the plaintiffs were correct in their assertion that their constitutionally protected rights to referendum under article II, section 1 were violated by the Stadium Act's proclamation of emergency.[96] The plaintiffs claimed that their right to referendum should be reinstated because the construction and ultimate operation of a new baseball stadium for the Seattle Mariners was not an emergency.[97] While the court rightfully conceded that the emergent nature of constructing a new baseball stadium was questionable, the court again granted deference to the Washington Legislature's declaration of an emergency.[98]

The court justified this deference by stating:

> We are satisfied that the Legislature acted to maintain major league baseball in this state in the face of a clear and present danger that . . . the Seattle Mariners, would depart . . . if prompt action was not taken to assure that a new publicly owned stadium would be developed in King County. The specter of this loss was a circumstance that the Legislature reasonably could believe would result in a loss of jobs, tax revenue, [and] recreational opportunities, while at the same time diminishing the quality of life for a substantial number of the state's citizens.[99]

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92. CLEAN v. State, 130 Wash. 2d 782, 798-99, 928 P.2d 1054, 1062 (1997).

93. *Id.*

94. *Id.* at 801, 928 P.2d at 1063.

95. *Id.* at 800, 928 P.2d at 1062.

96. Stadium Act, 1995–1996 Wash. Laws, 3rd. Spec. Sess., ch. 1, § 310 at 13.

97. 130 Wash. 2d at 787, 928 P.2d at 1056.

98. The court stated that it would have to agree with CLEAN that "the prospect of losing a major league baseball franchise cannot be said to be an emergency of apocalyptic dimensions," yet the legislature

> was faced with a real emergency in the sense that the public purpose they sought to achieve would be unattainable if the Mariners franchise was sold to investors from another area before the legislature could assure the owners of that franchise that a new baseball stadium would be developed in King County.

130 Wash. 2d at 809, 928 P.2d at 1067.

99. *Id.* at 808-09, 928 P.2d at 1067. *See also* 130 Wash. 2d at 813-19, 928 P.2d at 1070-72

The court's justification of Safeco Field's construction as a clear and present danger which would diminish the quality of life of a large number of state citizens is unwarranted. While the loss of the Mariners would potentially leave many baseball fans disappointed, disappointment alone should not qualify as an "emergency" preempting the majority of citizens from exercising their right to vote in a referendum.

The detrimental economic effect of the loss of the Mariners on local area vendors and restaurateurs is similarly unavailing as an argument justifying an emergency. The baseball season only lasts six months of the year, leaving vendors and restaurateurs an extra six months in which they must obtain income from other sources. Given the location of the Kingdome in a popular tourist area and the existence of several other professional sports teams in the Seattle and King County areas, there are sufficient alternative economic opportunities to recoup any loss that might occur if the Mariners were to leave.

Moreover, denying a majority of citizens their constitutional right to a referendum due to the special economic concerns of a minority legislative interest group does a disservice to the role of the court as a guardian of democratic process.[100] While baseball is fun and pleases a broad constituency, people nonetheless should have a right to decide whether they want their tax dollars spent on it.

2. The Dissent: Small but Vocal

In recognizing the fallacy in the majority's justification of an emergency, Justices Guy and Sanders attacked the majority's position on the referendum issue in a strongly worded dissent. As Justice Guy wrote, "We have a duty to test the emergency clause against the backdrop of the constitutional right of referendum. We are not free to rubber-stamp an emergency clause when there are no facts recited in the legislation . . . which would support the existence of an emergency."[101]

Justice Sanders followed suit by quoting Justice Marshall in *McCulloch v. Maryland*:[102] "We must never forget that it is a Constitution we are expounding,"[103] reemphasizing the need to interpret

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(Talmadge, J., concurring). Justice Talmadge made much of judicial deference to the legislature's right to enact legislation as it sees fit. Focusing on the separation of powers between the judiciary and the legislature, Talmadge asserts that the court "must be cognizant of the separation of powers and the appropriate role of each branch of . . . government." 130 Wash. 2d at 817, 928 P.2d at 1071 (citing Hamilton v. Martin, 173 Wash. 249, 23 P.2d 1 (1933)).

100. For a good discussion of the judiciary's role as a guardian of democratic process see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

101. *CLEAN*, 130 Wash. 2d 782, 821, 928 P.2d 1054, 1073 (1997).

102. 17 U.S. (4 Wheat.) 316 (1819).

103. 130 Wash. 2d at 821, 928 P.2d at 1073 (citing *McCullough*, 17 U.S. at 407).

Washington's constitutional provisions as they appear in the text. Justice Sanders attacked the emergency clause mainly because the taxes imposed under the Stadium Act were not to be imposed until January 1, while under regular, nonemergent legislation, the taxes would have been imposed on January 15 anyway, thus rebutting the need for any emergent immediacy.[104]

As the sole defender of the constitutional prohibitions on the lending of public funds, Justice Sanders would prove to be a voice of dissent in two additional cases brought against the Stadium Act following *CLEAN, Citizens for More Important Things v. King County*,[105] and *King County v. Taxpayers of King County*.[106] In these cases, the court upheld aspects of the Act's funding provisions as constitutional.

In *Citizens*, a public interest group challenged the Act's authorization of the taxes funding the stadium construction as void for want of a lawful purpose.[107] The challengers viewed the tax as unlawful because it was used to finance the preconstruction costs of building the stadium when it was not certain whether the Mariners would commit to the provisions of the Stadium Act, which would authorize the stadium's construction.[108]

The *Citizens'* majority reiterated its previous position in *CLEAN*, and rejected the challengers on the basis that they had no legal authority to support their contention that the preconstruction costs could not be financed through the Stadium Act's authorized tax.[109] Justice Sanders' dissent in *Citizens* focused on the fact that the taxes authorized by the Act and implemented through a King County ordinance were authorized for the actual construction of the stadium but not for preconstruction costs.[110] Thus, the majority was supporting the Act by inferring nonexistent legislative authority to allow for payment of preconstruction costs where the Act dictated payment only for actual costs.

In *Taxpayers*, King County sought to fend off additional legal challenges by bringing an action for declaratory relief to prove that the

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104. *Id.* at 823, 928 P.2d at 1074.

105. 131 Wash. 2d 411, 932 P.2d 135 (1997).

106. 133 Wash. 2d 584, 949 P.2d 1260 (1997). In addition to these cases, Justice Sanders has proved to be the Washington Supreme Court's sole voice of reason in post-*CLEAN v. State* challenges to public-private partnerships. *See, e.g., Brower*, 137 Wash. 2d 44, 80, 969 P.2d 42, 62 (1998) (again critiquing the majority's deference to legislative declarations of emergency in a challenge to the construction of a new football stadium for the Seattle Seahawks).

107. *See* 131 Wash. 2d at 417, 932 P.2d at 138.

108. *Id.* At the time of writing, the Mariners are in a dispute with King County over the "actual costs" of the stadium. *See supra* note 78.

109. *Id.* at 417-18, 932 P.2d at 138.

110. *Id.*

bonds issued through the district pursuant to the Stadium Act were valid.[111] Justice Talmadge, writing for the majority, found the bonds valid and reiterated the court's holding in *CLEAN*. He rejected a further claim under article VIII, sections 5 and 7 which sought to overturn the Stadium Act as unconstitutional.[112] The court again focused on the incidental benefit analysis, claiming that any benefit to the Seattle Mariners as a private organization was merely incidental to broader public purposes.[113]

In his dissenting opinion, Justice Sanders challenged the majority's findings, stating that the action brought by King County was in clear violation of article VIII, sections 5 and 7.[114] Justice Sanders characterized King County's action as one which would "finally, permanently, and absolutely deny each of the million plus county taxpayers any lawful defense or democratic remedy against imposition of $336 [million] in additional public debt."[115] Justice Sanders also analyzed the consideration test set forth first in *Taxpayers*,[116] finding that the sufficiency of consideration test set forth by the majority did not preclude the possibility that a gift might have occurred.[117] Because the consideration was not examined for the actual amount exchanged, Justice Sanders found strong inferences of donative intent on the part of the State which would otherwise violate sections 5 and 7.[118]

Justice Sanders' dissents in the three cases illustrate the complete erosion of the constitutional prohibition against the public gifting of funds if the court continues down its current path. While Justice Sanders' dissenting voice in the three legal challenges to the Stadium Act highlighted both possible flaws in the majority's analysis as well as his own disapproval of the majority opinion, ultimately the Stadium Act survived its challenges. However, the challenges brought against the Act, including Justice Sanders' dissents, illustrate at least three legal mechanisms used by both the legislature and the court to benefit public-private partnership arrangements while at the same time circumventing Washington's constitutional ban on the gifting of public funds to private organizations.

The first mechanism illustrated is the creation of a municipal corporation, or "public facilities district" as it is termed under the Sta-

111. 133 Wash. 2d at 592, 949 P.2d at 1264.
112. *Id.* at 589, 949 P.2d at 1263.
113. *Id.* at 596, 949 P.2d at 1267.
114. *Id.* at 614, 949 P.2d at 1275.
115. *Id.*
116. *See also Adams*, 106 Wash. 2d 312, 327, 722 P.2d 74, 82 (1986).
117. *See* 133 Wash. 2d at 625, 949 P.2d at 1280.
118. *Id.*

dium Act.[119] As seen in *Anderson v. O'Brien*,[120] by creating a public entity, such as the public facilities district, to control the financing aspects of the stadium's construction, the State is able to confer a benefit to a private organization without running into a wall of constitutional proscription.[121] At the same time, by channeling money into a public entity such as a municipal corporation or public facilities district, the government is able to avoid obvious public purpose violations. The municipal corporation is a public entity, and the channeling of funds through a public entity yields a strong inference of public purpose which successfully avoids constitutional scrutiny by the court.[122] Thus, when used as a legislative device, the public corporation appears to exist for a public purpose. The end result is an effective device used to implement public-private financial initiatives that appear to benefit only the public.

The problem with creating a public entity to legitimize the public purpose of a governmental expenditure is that it completely obfuscates the potential for private benefit prohibited by sections 5 and 7. It is as if the government can simply apply a label and legitimize what would otherwise be proscribed by constitutional prohibition. The end result, however, is a unique tool that will only create broader public-private arrangements and further distance the public from effective control over how its tax dollars are spent.

The second mechanism illustrated by *CLEAN* is the court's consistent invocation of a public purpose analysis to determine whether gifting or lending of public funds has taken place. This mechanism is also frequently used by public-private partnerships in assorted development projects. The effect of the court's and legislature's public purpose analysis is that any benefit received by private entities, such as the Seattle Mariners, is merely incidental to the broader public benefit received by the public through governmental financial aid.

The creation of a new baseball stadium does serve a very beneficial public purpose. It is difficult to reject new opportunities for job creation or increased economic benefit to a growing region. Yet, the new Seattle Mariners stadium will only benefit that sector of the econ-

119. For a good discussion of business improvement districts/municipal corporations, see David J. Kennedy, Note, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 YALE L. & POL'Y REV. 283 (1996).

120. 84 Wash. 2d 64, 524 P.2d 390 (1974).

121. *See* 84 Wash. 2d at 68, 524 P.2d at 392. *See also* WASH. REV. CODE § 35.21.730 (1998) (authorizing the creation of public corporations, commissions, and authorities to administer any lawful public purpose or function).

122. This still does not mean that governments or municipal corporations can act as financing conduits to private entities. *See* Lassila v. City of Wenatchee, 89 Wash. 2d 804, 811-12, 576 P.2d 54, 58 (1978).

omy that sufficiently supports or otherwise relies upon major league baseball as a major income source. There are certainly many residents of King County like Roberto Alvarez who are not served by the new stadium, because they are either uninterested in baseball, or lack the means to attend baseball games.

Finally, whether baseball or other sports stadiums serve a public purpose as good investments is also open to wide debate.[123] The Mariners are overbudget on their part of the construction arrangement, which could translate into higher ticket prices, and preclude even more people from attending games.[124] The citizens certainly are not receiving the benefit of their bargain as a function of a public purpose if they cannot afford to attend a baseball game, even if they had been allowed to vote on the matter.

While not used to directly circumvent the constitutional ban on governmental gifting of public funds, the third and most potentially powerful mechanism illustrated by *CLEAN* to benefit public-private partnerships is the legislature's use of emergency clauses. Emergency clauses benefit public-private arrangements by severely limiting the opportunity of citizens opposed to certain legislation to challenge it through a constitutionally protected referendum process. Because the citizens' right to referendum is precluded by declarations of emergency, the only avenue of redress available to citizens is the courts.[125]

Yet, as *CLEAN* showed, the court grants strong deference to legislative declarations of emergency.[126] Thus, due to the judiciary's desire to abstain from activism, it is unlikely that citizens can successfully bring an adequate claim against undesirable or questionable legislation. In essence, the people's voice in affairs of their own government is cut off from the possibility of debate. Given that the voters

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123. *See* Pamela Edwards, Note, *How Much Does That $8.00 Yankee Ticket Really Cost? An Analysis of Local Governments' Expenditure of Public Funds to Maintain, Improve or Acquire an Athletic Stadium for the Use of Professional Sports Teams*, 18 FORDHAM URB. L.J. 695, 698-99 (1991) (stating that at least one economist had found no correlation between sports stadiums and local long term economic growth); Kenneth L. Shropshire, *Putting the Pursuit into Perspective: The Value of Sports*, A.L.I., SC47-ALI-ABA 525 (1998) (stating that sports, albeit an important aspect of a city, are not a financial savior for troubled cities); Hal Lancaster, *Stadium Projects Are Proliferating Amid Debate Over Benefit to Cities*, THE WALL STREET JOURNAL, Friday, March 20, 1987, § 3 at 37.

124. Interview with Tom Fuller, SEATTLE TIMES sportswriter (January 5, 1999). *See also* Flores, *supra* note 78. The latest estimated cost of the stadium is $518 million. King Five News report (KING-TV television broadcast, April 6, 1999). The Stadium Act provides for $336 million of this cost.

125. *See supra* note 80.

126. Justice Sanders takes great issue with this in his dissent, finding that whether an emergency exists is a judicial question. *See CLEAN*, 130 Wash. 2d 782, 830, 928 P.2d 1054, 1077 (1999) (citing State *ex rel.* McLeod v. Reeves, 22 Wash. 2d 672, 674, 157 P.2d 718, 720 (1945) (holding that whether an emergency exists is ultimately a judicial question)).

of King County rejected the imposition of a tax to construct a new baseball stadium once, who is to say they would not do the same again if they had a chance?

Assuming, as does the majority in *CLEAN v. State*, that the stadium's construction was not violative of sections 5 and 7, it is clear that the majority's support of the Stadium Act's emergency clause violated the people's right to govern themselves, thus highlighting a current area of government process that definitely needs reform.[127] Without such reform, citizens will continue to be forced into needless litigation to enforce their public choices. This is unacceptable given Washington's existing referendum clause, which already functions as a voice of the people. Unfortunately, as the next two case studies illustrate, the use of emergency clauses to exempt referendums is a growing and widespread trend.

B. *A New Parking Garage for Nordstrom with Spokane's Tax Dollars*

The use of legislative emergency clauses to facilitate the development of public-private partnerships can also occur on a local level. In early 1995, a group of private developers entered into discussions with the City of Spokane regarding the renovation and expansion of a mall parking garage.[128] The renovation and redevelopment of the mall, called River Park Square, was to include a new Nordstrom store to replace the existing one, and was designed to "improve cultural and recreational opportunities in downtown Spokane."[129]

The City of Spokane agreed to the developers' plan, and it was agreed that upon completion of the development, the developers would sell the mall parking garage to the Spokane Downtown Foundation (Foundation), a nonprofit municipal corporation similar to the public facilities district in *CLEAN v. State*.[130] To generate revenue for the development, the plan called for the Foundation to issue tax-exempt bonds on behalf of the city. These bonds would be repaid through parking garage revenues.[131] In turn, the Foundation would lease its interest in the garage to the Spokane Public Development Authority.[132]

To obtain additional financing for the project, the City of Spo-

127. *See infra* Section III.

128. *See* CLEAN v. City of Spokane, 133 Wash. 2d 455, 460, 947 P.2d 1169, 1171 (1997).

129. *Id.* at 460, 947 P.2d at 1172. Nordstrom is a national retail chain based in Seattle, Washington.

130. *Id. See also* 130 Wash. 2d at 790, 928 P.2d at 1058.

131. 133 Wash. 2d at 460-61, 947 P.2d at 1172.

132. *Id.* The Spokane Public Development Authority is another municipal corporation authorized under WASH. REV. CODE § 53.21.730 (1998).

kane applied for an Economic Development Grant (EDI) and a Section 108 guaranteed development loan issued by the United States Department of Housing and Urban Development (HUD).[133] HUD then awarded the city a one million dollar EDI grant.[134] Following the Spokane City Council's approval of an emergency ordinance authorizing support for the garage on January 27, 1997, the development was underway.[135]

Three days after the City Council's endorsement of the River Park Square project, a group called "Priorities First" presented the Spokane City Clerk with a referendum petition to overturn the ordinance.[136] Priorities First had collected over 8000 signatures for its petition.[137] Despite the widespread support for overturning the ordinance, the City of Spokane declined to honor the petition because of the emergent nature of the ordinance.[138] Soon thereafter, Citizens for Leaders with Accountability and Ethics Now, the same group who had first filed suit against the Stadium Act, filed suit against the City of Spokane.[139]

CLEAN claimed, among other things, that the ordinance passed by the Spokane City Council violated: (1) Washington Constitution article VII, section 1's public purpose doctrine;[140] (2) article VIII, sections 5 and 7's ban on public gifting or lending of credit to private entities;[141] (3) section 83 of the Spokane City Charter, which provides for referendum except in cases of emergency;[142] and (4) Section 35.21.730 of the Revised Code of Washington, which allows Washington cities to create public corporations.[143]

The Washington Supreme Court rejected all of CLEAN's claims as invalid. Largely relying upon its previous opinion in *CLEAN v. State*, the court found that the River Park Square development would

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133. 133 Wash. 2d at 461, 947 P.2d at 1172. EDI grants are authorized by HUD under 24 C.F.R. § 570.204, and provide for economic development grants for neighborhood revitalization and community economic development projects which increase economic opportunity. 24 C.F.R. § 570.204 (a)(1) and (a)(2) (1999). Section 108 HUD loans are normally granted for purposes of economic redevelopment in areas of "spot blight," or economically marginalized communities.

134. 133 Wash. 2d at 461, 947 P.2d at 1172.

135. *Id.*

136. CLEAN v. City of Spokane, 133 Wash. 2d at 461, 947 P.2d at 1172.

137. *Id.*

138. *Id.*

139. *Id.*

140. WA. CONST. art. VII, § 1.

141. WA. CONST. art. VII, §§ 5 and 7.

142. Spokane City Charter section 83 allows for referendum when the requisite number of signatures are obtained prior to the date when any ordinance shall take effect.

143. WASH. REV. CODE § 35.21.730 (1998).

serve an adequate public purpose by "thwarting the economic decline" of downtown Spokane.[144] Writing for the majority, Justice Dolliver reiterated the court's position first set forth in *O'Brien* that, "Where it is debatable as to whether or not an expenditure is for a public purpose, we will defer to the judgment of the legislature."[145] In deferring to the judgment of the Spokane City Council, the court rejected CLEAN's article VII, section 1 claims.

Second, the court rejected CLEAN's challenge to the River Park Square under article VIII, sections 5 and 7, relying on *CLEAN v. State*. The court found that because the parking facility would ultimately belong to the city, there was no unconstitutional lending of credit.[146] Furthermore, the court found that the consideration received for the city's participation in the project was legally sufficient to meet the test set forth in *Taxpayers*.[147] Thus, there was no unconstitutional gift of public funds.[148]

Similarly, analyzing CLEAN's claims against the Spokane City Council's proclamation of an emergency, the court found that Spokane's referendum provisions were nearly identical to those examined in *CLEAN v. State*, and thus rejected CLEAN's referendum challenge.[149] The court conceded that there was a lack of proof that Nordstrom would leave Spokane if a new mall were not built, but stated that under *CLEAN v. State* it was required to defer to the judgment of the Spokane City Council in its declaration of an emergency.[150]

Finally, the court did not accept CLEAN's claims that the City of Spokane had exceeded its authority under section 35.21.730 of the RCW by allowing the Public Development Authority to operate the parking garage. The court found that the Public Development Authority was consistent with section 35.21.730 of the RCW because it (1) facilitated the "administration of authorized federal grants," (2) improved "governmental efficiency and services," and (3) improved the general living conditions in the Spokane area.[151] The court sum-

144. 133 Wash. 2d at 468, 947 P.2d at 1175.

145. *Id.* (citing Anderson v. O'Brien, 84 Wash. 2d 64, 524 P.2d 390 (1974)).

146. *Id.* at 469, 947 P.2d at 1176.

147. *Id.*

148. *Id.* at 470, 947 P.2d at 1176.

149. *Id.* at 471, 947 P.2d at 1177.

150. 133 Wash. 2d at 472, 477, 947 P.2d at 1177, 1179. Justice Madsen concurred in the opinion, but found that the new method of reading the Washington Constitution following *CLEAN v. State* is unfortunate: "After CLEAN, this Court no longer conducts an independent analysis of whether a law is necessary for the immediate preservation of the public peace, health, or safety within the meaning of Const. art. XI, sec. 1(b). The emergency exception is now coextensive with the police powers." *Id.*

151. *Id.* at 473, 947 P.2d at 1178; *see also* WASH. REV. CODE § 35.21.730 (1998).

marily dismissed the claims as "meritless."[152]

In an eloquent dissent, Chief Justice Durham strongly disagreed with the majority's opinion concerning the validity of the Spokane City Council's declaration of emergency. Analyzing the history of emergency clauses in Washington, Justice Durham found that the court defers to legislative declarations of emergency only when the legislature declares facts that constitute an emergency in an ordinance.[153] This contrasts starkly with the majority's interpretation under *CLEAN v. State*, which found it necessary to defer to the legislature based on a legislative declaration of emergency despite the nonexistence of facts in the ordinance which constitute an emergency.[154] Finding that the court has never given effect to an assertion of emergency on its face, Justice Durham stated that because the Spokane City Council's declaration of emergency was not based in fact, deference to the council as a legislative body was inappropriate.[155]

Like the construction of a baseball stadium in Seattle, the redevelopment of River Park Square illustrates how a local government can use mechanisms such as court complicity, public corporations, and legislative emergency clauses to finance public development. These mechanisms benefit private concerns and create a constructive public-private partnership arrangement. Although the Spokane City Council did not directly lend or gift any public money to a private corporation, a parking garage that is to be constructed right next to a major retail establishment will benefit that retail establishment, even if only incidentally. While this in itself may not qualify as a constitutional violation, it raises questions of accountability and gives rise to an inference of a public-private partnership even if one does not formally exist.

The larger problem with the Spokane City Council's expenditures is that the people are again denied a right to control or otherwise have a voice in the affairs of developments which affect them. Even if none of the public funds expended benefited Nordstrom in the River Park Square project, eight thousand of Spokane's residents were nevertheless denied their constitutionally prescribed right to control how their city was developed. Thus, the concept of public benefit advocated by the city contrasts with the concept of electoral democracy that the Spokane City Council is designed to represent. The end result is that Spokane's citizens must go to court to enforce what should be a

152. 133 Wash. 2d at 473, 947 P.2d at 1178.

153. *Id.* at 478, 947 P.2d at 1180.

154. *See id.* at 472, 947 P.2d at 1177. The court stated, "*CLEAN v. State* requires this court to defer to the City Council's emergency declaration unless it is 'obviously false and a palpable attempt at dissimulation.'" *Id.*

155. *Id.* at 489, 947 P.2d at 1185.

democratic choice and are rejected by a court unwilling to enforce the democratic process.

By endorsing the Spokane City Council's declaration of emergency, the Washington Supreme Court furthered the development of public-private arrangements. As a result, citizens are denied their right to participate in development through the referendum process, and the gap between the citizens of Spokane and their politically accountable representatives is increased. Economic development is a good thing, but why have a system of participatory democracy when one cannot use it? The next case study takes a closer look at this question, where the public did not even know about a development project until it was under construction.

C. *Another Parking Garage for the Retailers at the Public's Expense*

As evidenced in *CLEAN v. Spokane*, as cities grow, the need for parking garages often increases. To meet this need, municipalities will go to great lengths to create new development to serve their economic visions for the city. In 1992, Frederick and Nelson, a long-time retailer in the city of Seattle, went out of business, leaving an empty building which took up a city block on the corner of 5th and Pine.[156] As the building lay vacant, the crime rate around the building increased, parking rates increased, and panhandlers proliferated, turning the area into a depressed slum.[157]

At least, that is how the City of Seattle portrayed the area surrounding the old Frederick and Nelson building when the City was approached by a private developer called Pine Street Development in late 1993.[158] Jeff Rhodes, the founder of Pine Street Development, presented a plan where Nordstrom, a major retailer with a store across the street from the old Frederick and Nelson building, would move into the empty Frederick and Nelson building and convert its current site into additional retail and office space.[159] This store swap was part of a broader retail development which included the construction of a high-rise retail mall and an adjacent underground parking garage.[160]

The idea behind the redevelopment was to revitalize Seattle's

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156. Peter Lewis, *Probe Stalls Rice's Possible HUD Nomination*, SEATTLE TIMES, December 13, 1996, at A1.

157. Barbara A. Serrano and Deborah Nelson, *City Overpaid Pine Street Developer—Mayor Says Hefty Price for Parking Garage Was Justified Because It Sealed Deal for Frederick and Nelson Building*, SEATTLE TIMES, December 21, 1997, at A1.

158. *Id.*

159. Nordstrom's original store was situated diagonally across an intersection from the larger Frederick and Nelson building. Nordstrom reopened its flagship store in the fall of 1998.

160. Serrano and Nelson, *supra* note 157.

downtown retail core and provide increased economic stimulus through retail spending and job creation. As a key player in Seattle's downtown retail economy, Nordstrom played an integral role in the redevelopment design envisioned by both Pine Street Development and the City of Seattle.[161] The central problem was that the 700,000 square foot Frederick and Nelson building was in need of extensive renovation before any redevelopment could occur and Nordstrom could move in.[162]

The redevelopment plan called for Pine Street Development to outlay approximately $400 million to buy the abandoned Frederick and Nelson building, renovate it, and swap it with Nordstrom's smaller store across the street.[163] Nordstrom would assist with renovation costs.[164] Although the City of Seattle supported the project, Pine Street Development insisted on the construction of a new parking garage to service the downtown retail core.[165] Facing a huge financial obstacle to the redevelopment without the parking garage, the City of Seattle began a series of complicated financial maneuvers to secure capital to meet Pine Street Development's vision.[166]

First, like the City of Spokane and the River Park Square development, in 1994, the City of Seattle applied for a $24.2 million subsidized Section 108 loan from HUD.[167] Declaring the Frederick and Nelson building to be "spot blight," HUD granted the city its loan. The City then disbursed the funds through Pine Street Development, beginning the redevelopment process.[168]

However, the HUD loan to the City proved insufficient to meet the financial needs of the redevelopment and the construction of a new parking garage.[169] Pine Street Development recruited a nonprofit firm called Community Development Properties to obtain more financing.[170] Community Development Properties would own the parking

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* The parking garage was crucial to the design of the development plan. Under the plan, Seattle was to fund the costs of the parking garage. If no parking garage were built, Pine Street Development would pull out. *Id.*

166. Serrano and Nelson, *supra* note 157.

167. *Id. See also supra* note 133.

168. Lewis, *supra* note 156, at A1. There is speculation that the mischaracterization of the Frederick's building as "spot blight" may have ultimately led the denial of Seattle Mayor Norm Rice's consideration for nomination to the position of HUD Secretary. The White House had planned a possible nomination of Mr. Rice to the position upon the resignation of Secretary Henry Cisneros in 1994. *Id.*

169. Serrano and Nelson, *supra* note 156.

170. *Id.*

garage land during construction, which, when combined with its non-profit status, allowed it to receive a tax-exempt loan from the Washington State Housing Finance Commission (HFC).[171] HFC disbursed such loans to charities to benefit low income or economically depressed housing markets.[172] While HFC does not lend the money itself, it arranges for such loans through institutional lenders.[173]

The final plan called for Pine Street Development to construct the new parking garage using funds granted it by the City of Seattle and HFC. Upon completion of the garage, it would be sold back to the City by Community Development Properties for $73 million.[174] In 1995, the Seattle City Council approved the $73 million sales price for the garage without holding public hearings.[175]

While some Seattle City Council members expressed initial disapproval over the price, public disapproval was realized when it was discovered that the actual price tag of the parking garage was only $50 million.[176] After an investigation by the State Attorney General and the State Auditor, it was determined that the City did nothing wrong in paying an extra $23 million for what would become a public parking garage.[177] There has been no explanation to date regarding the excess payment of the $23 million.

While downtown Seattle stands to receive much economic benefit from the redevelopment of the Frederick and Nelson building and the addition of the adjacent new Pacific Place Mall's parking garage, the public was largely uninformed about the process involved in using public money to construct a parking garage that serves private interests.[178] Most of the public did not learn about the deal until a December 21, 1996 Seattle Times article.[179] Thus, like the Seattle Mariners stadium construction and the redevelopment of Spokane's River Park

171. *Id.*

172. *Id.*

173. *Id.* HFC is prohibited from making loans under article VII, sections 5 and 7 of the Washington Constitution.

174. Serrano and Nelson, *supra* note 157.

175. Susan Byrnes, *City Ethics Panel Rejects Appeal on Garage Deal*, SEATTLE TIMES, March 5, 1998, at A1 (detailing the Seattle Ethics and Elections Commission's investigation, which found that the city did not hold a public hearing before voting in 1995 to pay $73 million for the parking garage).

176. Serrano and Nelson, *supra* note 157.

177. Barbara A. Serrano, *Seattle Absolved in Parking Garage Deal—No Wrongdoing State Auditor Says Today*, SEATTLE TIMES, June 17, 1998, at A1.

178. While the City stands to gain from increased property taxes, business license fees, and parking revenues, private interests such as Nordstrom, Pine Street Development, and the other retailers of the Pacific Place Mall are the primary beneficiaries of the parking garage's construction.

179. *See* Serrano and Nelson *supra* note 157.

Square, the public was effectively denied a voice regarding development by the Seattle City Council and Pine Street Development.

On April 16, 1998, CLEAN filed a suit in King County Superior Court against the City of Seattle, alleging that the City violated state law by failing to hold required hearings before agreeing to pay $73 million for a parking garage.[180] Even though this is still a pending case that has not created precedent, the case highlights citizens' concerns over the development of public-private partnerships and the lack of public participation in that process of development. If *CLEAN v. State* and *CLEAN v. City of Spokane* are any example, the Washington Supreme Court in the foreseeable *CLEAN v. City of Seattle* will quite likely again find an adequate governmental purpose, and sufficient consideration in the form of a public benefit, to exempt Seattle from any constitutional violations.

The denial of citizen input into affairs that directly affect them raises the question of how much we as a society want our elected leaders freely spending our tax dollars. More importantly, preventing citizens from taking action, either through the legislature or the judiciary, impinges on the democratic process while substituting private (and often corporate) concerns for those of the citizenry. While corporate lobbying is nothing new, citizens should have the opportunity to contest a corporate development they do not support when that development involves the use of public money and affects citizens' lives. Clearly, reform in the area of public-private arrangements is needed. Options for this reform are examined in the following section.

IV. ANALYSIS: THE PROPER ROLE OF PUBLIC-PRIVATE PARTNERSHIPS AND OPTIONS FOR REFORM

Economic development is often advanced as a reason for creating public-private partnerships. Economic development is arguably beneficial to society. Indeed, if one looks at how downtown Seattle has changed over the past ten years, it appears that the economy is booming.[181] One can even now park at night in the new Pacific Place garage for $2.00 and shop at Nordstrom's flagship store.

Yet, despite the boons that public-private partnerships provide, as long as citizens' input is consistently shut out of economic devel-

180. CLEAN. v. City of Seattle, No. 98-2-09656-0SEA, *trial pending* Nov. 15, 1999 (King County Sup. Ct. 1998); *see also* Steven Goldsmith, *Citizens Group Sues Over Pine Street Garage Funding*, SEATTLE POST-INTELLIGENCER, January 17, 1998, at B2.

181. The Pacific Place Mall development has led to the introduction of many influential out-of-state retailers, created a boon for the local downtown restaurant industry, and spurred retail and service oriented job creation. *See* Norm Rice and Jan Drago, *Public Funding for Garage Is a Wise City Investment*, SEATTLE TIMES, December 25, 1997, at B5.

opment projects, questions will remain as to what the proper role of public-private partnerships should be. Critics of public-private partnerships are quick to point out that partnerships breed marginalization, raise antitrust issues, and cause massive information costs to the public.[182] Yet, because of their success across the nation in recent years, public-private partnerships are likely to proliferate in the future. A balance needs to be struck defining a better role for public-private partnerships. This balance should allow the public greater participation concerning how public money is spent, and promote the economic development that private industry can provide with public assistance. This Comment examines at least five possible options to redefine that role.

A. Eliminate the Constitutional Proscriptions on Public Funding of Private Entities

The first option would be to completely legitimize public-private partnerships by amending the Washington Constitution to eliminate article VIII, sections 5 and 7. While this sounds extreme, and raises many of the concerns voiced in the creation of article VIII, it is not so difficult to imagine. Currently, governments use the mechanisms described in this article to achieve the same ends as if the constitutional proscription were nonexistent. Eliminating the constitutional prohibitions would eliminate the need for substantive legal mechanisms, such as emergency clauses, to sidestep those prohibitions.

Furthermore, eliminating the constitutional proscriptions on governmental gifting of funds would eliminate much of the ineffective litigation surrounding these issues. Litigation focuses on the end result of public-private arrangements, not the means by which they are developed. By eliminating the proscriptions on both the ends and the means of public-private partnerships, citizens would be forced to voice their opinions through the electoral process. Controlled by citizens through the electoral process, the government would be free to make rational decisions regarding public development. Whether the government benefited private interests would not matter.

The biggest problem with this suggestion involves the fears that gave rise to the constitutional ban on public gifting in the first place. Recent widespread voter apathy has led to a decrease in voter control over government. Thus, it is unlikely that citizens would adequately control public spending by legislators even though the legislature is the people's agent. It is possible that we would revert to the lending

182. *See* Pinsky, *supra* note 18.

gone awry situation of late nineteenth century America's railroads.[183] Moreover, given state and municipal legislative bodies' frequent use of emergency clauses, and the modern Washington Supreme Court's deference to the legislature, litigation is the only way the electorate can challenge legislation. The constitutional proscriptions on public lending to private entities create a cause of action for litigants, despite the lack of success experienced by challengers in recent litigation. Eliminating the constitutional provisions would effectively eliminate all opportunities for citizens to challenge public spending, even if those challenges often fall on deaf ears.

Another answer may lie in substituting greater procedural protections for constitutional prohibitions. This might encompass implementing a legislative watchdog agency to mandate acceptable public-private arrangements, or implementing a referendum review process in which every potential public-private partnership is put to a public vote. When combined with greater procedural safeguards, the elimination of the constitutional prohibitions gains credibility. Moreover, implementing procedural safeguards through legislative enactment as a substitute to constitutional proscriptions may be a possible avenue of reform itself.

B. Implement Greater Procedural Safeguards

At least two possibilities exist that can increase procedural safeguards, whether or not the constitutional ban on the gifting of public funds is eliminated. The first is creating a legislative or elected agency to oversee the creation of public-private partnerships.[184] This could perhaps involve an application procedure where both public and private parties to a transaction would have to apply for a permit or license to enter into a partnership arrangement. The application would then be subject to review and dismissal if certain citizen-established criteria were not satisfied.[185]

The second possibility is to allow for a citizens' vote on every application or transaction involving public-private partnerships. Such a vote could be limited to the citizens directly affected by the partner-

183. *See generally* BARKER, *supra* note 21.

184. *See* N.C. GEN. STAT. §§ 159-3, -51, -149 (Supp. 1990) (establishing a state-level government agency/commission to review borrowing proposals of municipalities and counties).

185. It also might involve implementing a review process combined with the Open Public Meetings Act. The Open Public Meetings Act, as codified in WASH. REV. CODE § 42.30 provides that all meetings of a governing body where action is taken be open and accessible to the public. WASH. REV. CODE § 42.30 (1998). Setting up a partnership review process, combined with the requirements of the Open Public Meetings Act, would ensure public access and information dissemination on the merits of the proposed partnership arrangement.

ship. This scenario would be very similar to a school levy or other local bond measure, allowing citizens an active opportunity to voice their opposition to, or support for, a public-private transaction that directly affects them.[186]

The problem with the first suggestion is that it sacrifices efficiency. Citizens of an elected representational government expect their representatives to make such decisions for them. Forcing the creation of another administrative agency could potentially cost more in terms of efficiency than it would be worth. Moreover, this option would not eliminate the substantive legal mechanisms used to uphold the constitutionality of transactions in the *CLEAN* cases. If an oversight agency found a public-private transaction valid while citizens did not, the citizens would be barred from challenging the transaction due to the same substantive legal mechanisms used in the *CLEAN* cases to circumvent Washington's constitution. Because of the court's current deference to the legislature, the creation of a legislative oversight agency would do little to bolster citizen input on governmental decisions.

Similarly, forcing the citizenry to vote on every public-private arrangement would strip legislatures and local city councils of their authority to perform functions they are constitutionally required to perform. The sheer number of potential public-private partnerships that would proliferate if this system were created could create enormous inefficiencies in government administration, as government and private entities would be forced to begin campaigns for their partnership arrangements. Special interest lobbying groups for both private industry and the government would lead campaigns for their particular development project. Such delegation of power to private hands might lead to abuses of power, or at least a great potential for campaign abuse.

Still, the challengers of recent public-private partnerships have illustrated through their litigation that the lack of process and the accountability of political leaders cause the most concern. In creating a procedure by which citizens could voice their political opinions, the above suggested procedural protections could make people feel better about a substantive result with which they ultimately may disagree. Democracy is premised on the exercise of political voice, and would be

186. Perhaps in response to the widespread voter dissatisfaction after *CLEAN v. State*, the Washington Legislature recently adopted this proposal, allowing the voters to voice their approval on the construction of a new stadium for the Seattle Seahawks. While the stadium referendum passed by a margin of 51%, the Legislature still utilized an emergency clause in its legislation, prompting a challenge which was defeated at the Washington Supreme Court level. *See* Brower v. State, 137 Wash. 2d 44, 969 P.2d 42 (1998).

better served as to public-private partnerships if the people were given a voice through enacted procedural safeguards.

Furthermore, if a legislative agency were elected or the people had the opportunity to accept or reject specific public-private partnership arrangements, the people would have a right to be heard, a situation that does not seem to exist currently if the Seattle Nordstrom's parking garage project is any indication. If public-private partnerships are here to stay because of the erosion of Washington's constitutional proscriptions against them, then greater protection for the citizens affected by them is required. The next section explores another option that embraces partnerships but limits their function.

C. Accept Public-Private Partnerships but Limit Their Use

A third possibility to better define the role of public-private partnerships is to legislatively acknowledge a limited use of public-private partnerships for clearly defined public concerns. This could be accomplished by limiting the types of private entities with which governments could enter into arrangements.[187] This option might be combined with either or both of the previous suggestions. It could also stand as an independent option for reform.

Given that public-private partnerships provide economic and social benefit to the areas that they affect, this suggestion is the most pragmatic. Such a limitation could be defined by projects that involve traditional functions of government activity, such as public works projects. Under this scenario, public funds could be legally permitted to benefit private entities so long as the public funds were used to build roads, sewers, or municipal health buildings instead of financing parking garages and baseball stadiums.

The biggest problem with this method of reform is that the court's use of substantive legal mechanisms, such as incidental private benefit and public purpose analysis, can easily escape any prohibitions against entering into proscribed types of relationships. For example, assume that it were forbidden for a governmental unit to enter into an agreement with a private entity to build a parking garage because it is not a traditional governmental function. The construction of a parking garage could likely still be upheld as constitutional if the argument for its construction were framed as serving a public purpose that is rationally related to the government, while only incidentally benefiting a private entity. Even by creating specifically proscribed types of public-private relationships, the public would still be faced with the same

187. *See* Robin Paul Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 128 (1987).

obstacles in *CLEAN v. State* and *CLEAN v. Spokane* if the public-private development were challenged.

The ultimate success of this avenue of reform would depend on educating the legislature on the constitutional limitations of the gifting of funds. Success would also depend on the judiciary, as the judiciary consistently grants deference to the legislature. Thus, to be successful, the judiciary would have to rework all of the substantive legal mechanisms currently used to circumvent the constitution, and play a more active role as a constitutional watchdog. Considering that the judiciary has spent the greater part of a century carving out exceptions to Washington's constitution, it is unlikely that discarding precedent would be so easily accomplished.

D. Adopt a Corporate Model

A fourth and possibly better solution to the role of public-private partnerships combines some of the aspects of the three previous suggestions by legislatively structuring public-private partnerships on a corporate model.[188] After all, the partnerships already use municipal corporations as tools to circumvent the constitution. Why not treat the public-private relationship as a corporation itself, viewing the citizenry as shareholders, and the state or local officials, combined with their private partners, as directors or officers? Corporations operate to achieve maximum profit for their shareholders. A municipality or local government should operate to achieve maximum benefit to its citizens.

Furthermore, corporations are required to follow specific procedures, such as registering with state authorities and disclosing full financial information. The registration and disclosure requirements would provide greater state control, greater public input, and greater communication of information to the public. Unfortunately, this type of control mechanism is absent from recent discourse surrounding public-private partnerships.

As directors are elected by the shareholders and are directly accountable to them for profits and transgressions, a model based on corporate law would ensure the shareholding public the right to vote for their directors (partnerships).[189] Similarly, just as corporate direc-

188. For an excellent overview of the modern corporation see WILLIAM A. KLEIN & JOHN C. COFFEE, BUSINESS ORGANIZATION AND FINANCE (1996). Although not as flexible as a partnership, a corporate model would better ensure the public's control of a public-private relationship because of the disclosure and regulatory requirements imposed upon corporations.

189. This model would ensure the public's right to vote on the directors at the corporation's inception. The Model Business Code adopted by Washington currently allows the incorporators to choose directors in the articles of incorporation given to the Secretary of State. *See*

tors are required to give full disclosure of all transactions affecting the financial viability of their companies, structuring public-private partnerships on a corporate model would encourage full disclosure by city or state officials to their citizen shareholders. Nondisclosure, such as that which occurred in the Pacific Place parking garage deal, would invite lawsuits for breach of duty against the city or state implementing the directives.

The drawback to structuring public-private partnerships on a model of corporate accountability is that it would be very difficult to implement, and even more difficult to sell to either the public or the government. Implementing a corporate structure would involve the creation of a larger bureaucracy and perhaps increase costs to the taxpaying public.[190]

This raises a question of how to run the corporations? One possibility would be to implement licensing qualification programs under which public-private partnerships must register with the state like a corporation. This would ensure oversight into the affairs of the partnerships. While this might prevent the use of HUD loans to finance shopping mall parking garages, the increased bureaucracy might also discourage private entities from wanting any dealings with the government.[191]

However, the chief benefit of using corporate law as a model is that it would eliminate the substantive legal devices used to circumvent constitutional provisions. If the shareholding public did not authorize the formation of the corporation's existence, it would not exist. Whether or not a model for public-private partnerships is used is insignificant to the reform that is definitely needed in the area of legislative emergency clauses.

E. Eliminate or Better Define Emergency Clauses

Emergency clauses have been a boon to the development of public-private partnerships. As the *CLEAN* cases show, a legislative declaration of emergency virtually eliminates public legal challenge to

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WASH. REV. CODE § 23B.02.020 (1998).

190. Implementing a corporate model could prove very costly to the public in the long run, as any legal defense by the "corporation" would likely be paid out of public coffers with taxpayer (shareholder) money.

191. An additional caveat necessary for successful implementation of this scenario would be to require the weakening or disclaiming of the business judgment rule, which protects directors from liability by giving them almost unlimited corporate discretion relating to business affairs. *See* KLEIN & COFFEE, *supra* note 188. If the business judgment rule were not eliminated with respect to public-private partnerships, then the partnerships would be free to enter into agreements under their own terms, free from citizen control, as is currently happening in Washington.

the legislation. Arguably, this is inconsistent with the goals of the referendum and democratic processes. Indeed, the police power of the state is sacrosanct, but so is the citizens' right to referendum under the Washington Constitution. The successful implementation of any of the previous suggestions for reform necessitates strong legislative and judicial reform.

One option for reform is to define in clear and unequivocal language what constitutes an emergency. Another option is to prevent an emergency clause from inclusion in public-private partnership legislation. While complete removal of legislative emergency clauses is an additional option, it is unrealistic to argue for their complete elimination. An actual need for the emergency clause exists in true emergencies such as war, plague, severe economic depression, or social unrest.

Defining what constitutes an emergency for purposes of emergency clauses and limiting the use of the clauses any time a public-private partnership is involved would invoke much legislative wrangling. Emergency clauses could easily be enacted for situations of true emergency such as natural disaster, war, or truly severe market depression. Threats of the Mariners leaving town or Nordstrom not setting up shop in a newly refurbished mall would not qualify as emergencies, and the people would therefore be allowed to voice their opinion through the constitutionally protected referendum process, as the referendum process was designed to function. The elimination of emergency clauses in public-private legislation would also ensure the citizens their right to referendum.

Unfortunately, whether the legislature would be bold enough to limit the use of a clause with which it has had so much political success is questionable. In addition, whether the judiciary would be bold enough to stop deferring to the legislature on issues of emergency when those issues are clearly not emergencies is similarly questionable. Ultimately, it is the taxpaying public that suffers from both the legislature's abuse of emergency clauses and the judiciary's consistent deference to the legislature.

V. CONCLUSION

This Comment has explored the relationship of public and private interests in economic development through an analysis of mechanisms used by recent public-private partnerships to achieve economic development. Beginning in Part II, this Comment analyzed the historical development of Washington's constitutional prohibitions on the public gifting or lending of funds to private entities. As the economy grew throughout the beginning and middle parts of this century,

so did the need for increased public-private economic ventures.

Part II also highlighted how the Washington Supreme Court responded to this increased need by carving out exceptions to the constitutional prohibitions. In recent years, these prohibitions have been all but nullified by the judiciary's consistent use of substantive legal mechanisms to circumvent the constitution while continuing to promote public-private arrangements. The most recent manifestations of this constitutional erosion were evidenced in Part III by an examination of three Washington public-private partnership developments: Safeco Field in Seattle, the River Park Square parking garage in Spokane, and the Pacific Place parking garage development in Seattle.

These case studies show that the use of substantive legal mechanisms by state and local governments, in conjunction with judicial interpretation, precluded the public from obtaining information regarding how their tax moneys were spent, denied the public a right to participate in public spending decisions that affected them, and severely impinged on the public's constitutional right to referendum. The end result of public-private use of these devices precludes the public's voice in affairs of their own communities, and fosters an atmosphere of mistrust between citizens and their elected representatives. Part IV provided suggestions for possible areas of reform for public-private partnerships, and how both the legislature and judiciary could achieve these reforms.

Ultimately, public-private partnerships are here to stay and should be embraced as a beneficial tool of economic development. However, if their viability is to continue, reforms such as those outlined in Part III should be considered.