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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 24-0102

In the Supreme Court of Texas

JP Morgan Chase Bank, N.A.,

Petitioner,

v.

City of Corsicana and Navarro County,

Respondents.

On Review from the Court of Appeals
for the Tenth District of Texas

Response to Petition for Review

Identity of Parties and Counsel

Petitioner's statement of Parties and Counsel is correct except that R. Lowell Thompson is no longer Additional Counsel for Navarro County. He passed away in 2018.[1]

[1] Since J.P Morgan Chase Bank, N.A. acquired the rights of the Corsicana Industrial Foundation, Inc., Respondents refer to the parties collectively as "Petitioner" except when the context requires otherwise.

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Introduction

The only unsettled, unsettling, or provocative aspects of this case are Petitioner's arguments. The lower courts applied a decades-old test that is so well established that CLE articles and practice guides contain checklists for structuring economic-development agreements to comply with it. Unsurprisingly, when Petitioner touted as a point in its favor that it had negotiated a taxpayer-funded transaction that *lacked* all those protections, it lost.

Still, Petitioner decries the disruptive consequences of leaving the lower court's opinion undisturbed, prophesying the demise of all economic-development agreements in Texas. Not so. For decades, economic development has flourished through transactions structured to satisfy the taxpayer-protecting *TML* test. The opinion below applied the *TML* test as it's been understood and implemented for decades. One needn't guess about the consequences of leaving the opinion below in place. That reality already exists and is threatened only by Chase's attempt to change Texas law to reward its overreach.

Issues Presented

The Texas Constitution prohibits an investment of public funds with private individuals, associations, or corporations *except* when:

(1) The expenditure of public funds accomplishes a public purpose, rather than a benefit to private parties;

(2) The government retains sufficient control over the expenditure of funds to ensure that the public purpose is accomplished and to protect the public's investment; and

(3) The controls ensure the government receives a return benefit.

Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm'n., 74 S.W.3d 377, 384 (Tex. 2002) ("*TML* test").

On this legal landscape, the courts below correctly held that the Agreements violate the Texas Constitution because:

1. Section 52-a does not exempt economic-development transactions from the *TML* test. Instead, Section 52-a recognizes economic development as a public purpose subject to the test.

2. The transactions here lacked the taxpayer-protecting controls required by the Texas Constitution and implemented by the *TML* test.

3. Freedom of contract is not an exception to the *TML* test. It is the reason for it.

Statement of Facts

The Court of Appeals' opinion correctly stated the nature and background of the case. *Opinion*, pp. 2-7. Those facts provide good context for how this dispute developed and unfolded. But the Court can resolve this Petition by considering just a few uncontested facts.

Key among them are these. Petitioners, including Gander Mountain and J.P. Morgan Chase Bank (Chase), obtained a pledge of taxpayer dollars to repay a $10 million loan for a Gander Mountain building. 5.CR.911-16. That pledge was "absolute and unconditional…regardless of any cause or circumstance whatsoever…" 5.CR.911-12, 916-17; *Opinion*, p 24.

Gander Mountain ceased operating and providing any economic benefit in 2015 and then filed for bankruptcy. 2.CR.420, 424. After warning Gander Mountain of the constitutional implications of closing, the City and County ceased sales tax payments. 2.CR.420, 424, 428, 321-23; 6.CR.1052. Neither the City nor the County has received any sales tax generated by Gander Mountain since December 2015. 2.CR.428, 437. Still, after receiving more than $9 million on the $10 million note, Chase insists on collecting more from taxpayers. 5.CR.981.

Summary of Argument

First, Chase argues against an entrenched consensus that, unlike all other spending for public purposes, economic-development spending is exempt from the taxpayer protections found in the Texas Constitution and implemented by the *TML* test. Like every other authority that has considered it over the last thirty years, the lower courts rightly rejected Chase's argument. As history, text, and practice make clear, Section 52-a qualifies economic development as a public purpose. The second and third prongs of the *TML* test examine the transaction to ensure that taxpayers receive a return on their investment and that the public purpose is accomplished.

Second, the courts below correctly applied the *TML* test and held the Agreements lacked sufficient controls to protect taxpayers and ensure a return on their investment. For decades, Attorneys General, treatises, and practice guides have explained how to structure economic-development transactions to allow private profits while protecting taxpayers. But throughout this case, Chase has proudly championed the *lack* of clawbacks, performance metrics, or any of the controls routinely found in such transactions. Rather than condition taxpayer obligations on economic impact, this transaction obligated taxpayers absolutely and unconditionally to repay the construction loan for a building to be owned by a private company. The company had no obligation ever to occupy the building, employ workers, or pay ad valorum taxes. Meanwhile, the to-be-repaid loan could be (and was) renegotiated by others without input from or even notice to the City or County. The lower court correctly disregarded Chase's attempt to create the appearance of adequate controls when the obligations to pay were, by contract, absolute and unconditional.

Finally, freedom of contract is not an exception to the *TML* test. It is the reason for it. Economic development has flourished in Texas as transactions marry private profits and taxpayer protections.

Whatever guidance is needed can be provided in two cases already pending before this Court. For each of these reasons, the Court should deny the Petition for Review.

Argument & Authorities

Suppose a group of city officials were considering a transaction materially identical to the one in this case. And suppose, as often happens,[2] those officials sought guidance from the Attorney General. A condensed version might say:

> Dear General,
>
> To further the public purpose of economic development, the following transaction has been proposed.
>
> - Company will obtain a loan to build a building in our City.
> - The City will absolutely and unconditionally pledge to pay that loan with sales-tax revenues generated by Company and from sales tax generated by other existing and under-construction stores.
> - As to the loan, the City will have no input or control at any time as to the structure of the loan, its terms, refinancing, or amendment.
> - Company has no obligation ever to occupy or use the building. Once the building is constructed, the City unconditionally pledges to pay for it from tax revenues even if Company generates no sales or ad valorem taxes, employs no workers, or does no business. Once the loan is paid, Company will own the building.
>
> The City seeks your guidance on whether this transaction would violate the Texas Constitution. Specifically:

[2] *See, e.g.,* TEX. ATT'Y GEN. OP. JC-0582 *6 (2002); TEX. ATT'Y GEN. OP. GA-0528 (2016); TEX. ATT'Y GEN. OP. KP-0435 (March 7, 2023).

> A. Does Section 52-a exempt economic-development spending from the taxpayer controls required by the Texas Constitution and the *TML* test?
>
> B. If the *TML* test applies, does this transaction contain adequate controls to protect the pledge of taxpayer money and ensure a return on the public's investment?
>
> C. Do sophisticated parties currently have (or if not, need) the freedom to contract around the Texas Constitution?

Sincerely,

City Officials

***

Returning to our case, Subsections A-C below correspond with those questions (which are Chase's arguments here) and summarize why the lower court's answers were neither novel nor difficult. Subsection D then explains why review of this case is particularly unappealing given other pending cases.

A. The *TML* test applies.

Chase begins by staking out an audacious claim raised for the first time on appeal. At trial, Chase argued that the relevant transactions satisfied the *TML* test. 4.CR.635-36, 780-81, 820-22. But on appeal, against an ocean of authority and reason, Petitioner argues that the Texas Constitution singularly exempts economic-development grants from the *TML* test, whose taxpayer protections indisputably apply to all other public purposes. *Petition*, pp. 27-30.

Chase's argument: (1) contradicts decades of settled authority (from courts, Texas Attorneys General, and practitioners); (2) misunderstands the function of the *TML* test; and (3) is at odds with constitutional text.

1. <u>Chase argues against an entrenched consensus.</u>

The legal community has uniformly rejected Chase's argument that the *TML* test does not apply to spending for the public purpose of economic development.

Every Attorney General from Jim Mattox to Ken Paxton has torpedoed the suggestion that economic-development agreements are exempt from the taxpayer protections found in the *TML* test.[3] Most recently, AG Paxton confirmed that Chase's exemption argument has no basis in the text of "Section 52-a or in the relevant commentary." TEX. ATT'Y GEN OP. KP-0261 (2019) (citing TEX. ATT'Y GEN. OP. JM-1255 at 8-9 (1990) ("[T]here is no language in either Section 52-a nor in the relevant commentary to suggest the amendment was intended to change the requirement [of] sufficient controls to ensure that the public purpose be carried out.")).

[3] TEX. ATT'Y GEN. OP. JM-1255 (1990); TEX. ATT'Y GEN. OP. DM-185 (1992); TEX. ATT'Y GEN. OP. LO-96-035 (1996) ("...must retain some degree of control over the performance of the contract."); TEX. ATT'Y. GEN. OP. JC-0439 (2001) (noting need for "adequate control") (citing *Key v. Comm'rs Court of Marion Cty.*, 727 S.W.2d 667 (Tex. App.—Texarkana 1987, no writ)); TEX. ATT'Y. GEN. OP. GA-0033 (2003) (noting need for "adequate controls"); TEX. ATT'Y. GEN. OP. KP-0091 (2016) ("...a contractual agreement outlining the requirements of the receiving entity must comply with in exchange for the funds may provide sufficient control over the funds...").

Given the unwavering three-decade consensus of notably diverse Attorneys General, few litigants have even floated Chase's argument to courts; but those weighing in are, not surprisingly, in accord with the AG opinions. *See Ex parte City of Irving*, 343 S.W.3d 850, 854-55 (Tex. App.–Dallas 2011, orig. proc.) (confirming AG opinions, noting that §52-a created an exception to allow programs that foster economic growth serve a public purpose); *see also Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, 684 S.W.3d 819, 829 (Tex. App.—Austin 2022, pet. granted) (confirming same).

Also in lockstep are practitioners and legal thinkers. Across the board, they recognize the *TML* test as the relevant benchmark by which to judge the investment of tax dollars for economic development. *See* TML Development Handbook, p. 148 (2022), Tab 1 ("Article III, Section 52-a of the Texas Constitution sets up the constitutional framework for public funding of economic development efforts.");[4] Jeff Moore, Brown & Hoffmeister, LLP, *Chapter 380 of the Texas Local Government Code*, Moore, p.2 (2006), Tab 2 (outlining history and recognizing same); Mary Ann Powell, *The Give and Take of Development Agreements*, 11th Annual Local Government Seminar (January 29, 2015), p. 9, Tab 3 (same).

[4] A full copy is available at https://www.tml.org/DocumentCenter/View/1471/2022-Economic-Dev-HDBK- Final?bidId= (last visited June 26, 2024).

Not one authority supports Chase's attempt to change the law so it can recover millions more of taxpayer dollars. The opinion below does no more than apply the consensus so well established it is uniformly agreed upon by decades of AG opinions and recited as blackletter law in CLE handbooks.

2. Chase's argument misunderstands the nature of the *TML* test.

Chase misunderstands the nature of the *TML* test when it argues that Section 52-a exempts economic-development spending from it.

The *TML* test implements a core principle reinforced throughout the Texas Constitution. The Texas Constitution is "replete with provisions limiting the use of governmental resources" in connection with a private venture. TEX. ATT'Y GEN. OP. JM-1255 (1990) (citing TEX. CONST. ART. III, §§ 50, 51, 52(a); ART. VIII, § 3; ART. XI, § 3; ART. XVI, § 6). Those provisions unify around a key tenet: public money is for *public purposes*. Built on decades of authority and Texas' unusually robust textual taxpayer protections,[5] the *TML* test recognizes both the inevitably of and risk associated with one reality: to accomplish permissible public purposes, public money often must flow through profit-seeking private firms. *Tex. Mun.*

[5] *Outlawing Favoritism, The Economics, History and Law of Anti-Aid Provisions in State Constitutions,* Mitchell, Riches, Thorson and Philpot, Mercatus Working Paper, Mercatus Center at George Mason University p. 61 (2020), Tab 4 (explaining that taxpayer protections are part of the unique fabric of the Texas Constitution; Texas is 1 of only 9 states whose constitutions contain strong textual limitations on government expenditures, extensions of credit, and stock ownership).

League, 74 S.W.3d 383. When this happens, the *TML* test protects taxpayers by examining the transaction to ensure that private profits remain incidental to the only permissible use of public funds—the accomplishment of a public purpose. *Id*. at 384.

To satisfy the *TML* test, the government must do more than hope or predict that public money will achieve a public purpose. *Id*. Most relevant here, the *TML* test requires the government to retain sufficient "control over the funds to ensure that the public purpose is accomplished and to protect the public's investment." *Id.*[6] In other words, the *TML* test *begins* with the government articulating the public purpose allegedly served by sending public money to private enterprise. But the test does not stop there. Instead, the test asks whether the transaction is structured to ensure the public purpose is actually accomplished.

Once the *TML* test is understood, Chase's argument defeats itself. Section 52-a of the Texas Constitution authorizes spending for the public purpose of economic development. TEX. CONST. ART. III, § 52-a. And so economic development is a public purpose under the first prong of the *TML* test. TEX. ATT'Y GEN. OP. KP-0261 (2019). Making economic development a public purpose does not exempt it from a test that polices whether public purposes are achieved. Economic

[6] Although the terms "gift" and "grant" are often used in describing economic development activities, this Court has used the word "investment" to describe the public's contribution. *Tex. Mun. League*, 74 S.W.3d 384. And rightly so. The public isn't giving something away; it is contributing and expecting a return.

development grants still must "satisfy the other two prongs of the *Texas Municipal League* test…sufficient controls to ensure the accomplishment of a public purpose and receipt of a return benefit." *Id.* at 2. The Court should make short work of Chase's novel argument, which conflicts with plain text, purpose, and practice.

3. Chase's "notwithstanding" argument is atextual.

Section 52-a's first clause begins with "Notwithstanding any other provision of the Constitution." TEX. CONST. ART. III, § 52-a. Chase reads this language to mean that economic-development spending is exempt from any other constitutional restrictions, including the *TML* test. *Petition*, pp. 27-29. Has Chase discovered, with the "Notwithstanding" language, a textual basis missed by decades of legal thinkers?

No. The "notwithstanding" clause is followed by the authorization to spend for the "*public purpose*" of economic development. *Id* (emph. added). The *TML* test determines whether a transaction achieves one of the public purposes authorized by the Constitution.

Chase's argument is not just at odds with the only reasonable interpretation of the text of § 52-a, it ignores the context that confirms the interpretation shared by everyone but Chase. Before § 52-a, "economic development" was not a permissible public purpose. Bill Analysis for H.J.R. 1, 5 (1987) (the Joint Resolution that presented Article III, §52-a for the Legislature's consideration) ("Texas, however, will have difficulty in implementing these models of financing for economic development that have been successful elsewhere, until constitutional language that clarifies economic development as a public purpose is adopted.”).

The Amendment, by its text, did exactly what was needed—clarify that, notwithstanding other constitutional provisions implicating spending public money (of which there are many), economic development is a “public purpose” in Texas. *Id.* (emph. added) (“This resolution amends the constitution so as to allow the legislature to make loans and grants of public money for the public purpose of economic development, ***notwithstanding*** other provisions of the constitution.”); *see also In re The State of Texas*, No. 24-0325 (June 14, 2024 Opinion) (explaining same), Tab 5; *see also* TEX. ATT’Y GEN. OP. KP-0261.

In summary, nothing about economic development suggests that, as compared to other public purposes, its accomplishment was, or should be, unconstrained or elevated above taxpayer protections. Economic development grants aren’t exempt from the risk that “corporate greed [will find] local pride and ambition an open way to municipal revenues.” *Cleburne v. Gulf, C. & S. F. R. Co.*, 1 S.W. 342 (1886). That is why neither the text of 52-a, its history, nor any authority supports Chase’s view. The lower court’s opinion does exactly what everyone but Chase expected by applying the correct test.

B. The transaction lacked sufficient controls.

Chase next argues that, even if the *TML* test applies, the transaction here contained sufficient controls to protect taxpayers and ensure the transaction achieves the public purpose of economic development. *Petition*, pp. 30-35.

This argument, though technically not abandoned by Chase, surely does not warrant review. At trial, Chase argued that sufficient controls existed to satisfy the *TML* test. 4.CR.635-36, 780-81. On appeal, Chase shifted to argue that controls were not necessary and that the City and County must be bound by their absolute and unconditional obligations. This Court needn't grant review to confirm that absolute and unconditional obligations are the antithesis of the controls the *TML* test requires.

For decades, AG opinions, CLE papers, and seminars have explained the types of controls that allow private profits while protecting taxpayers, such as performance metrics, indexes, clawback provisions, or termination provisions. *See, e.g.*, TML Economic Development Handbook, 148, 162, Tab 1 (industry handbook nothing that "without these safeguards" the deal may fail "constitutional muster."). Because contracts lacking controls are unenforceable, firms contracting with the government should insist on them being included.[7]

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[7] *See* Powell, *The Give and Take of Development Agreements*, Tab 3.

But from the outset of this case, Chase has touted that the bargain it secured imposed "absolute and unconditional" obligations. 5.CR.911-12, 916-17, 893-95; 3.CR.427-28, 435-36. The Agreements contain no performance metrics, indexes, clawback provisions, or termination provisions. Respondents had to send taxpayer money "without abatement, diminution or deduction regardless of any cause or circumstances whatsoever." 5.CR.911-12, 916-17. The Agreements don't require Gander Mountain to ever open a retail store, much less continue to occupy the premises, sell anything, employ anyone, pay any taxes, or contribute to the economy in any way. *Id.* An earlier draft of the Agreements included a continuous-operations provision, which would end taxpayers' obligation to pay for a Gander Mountain building if Gander Mountain stopped participating in the economy. 2.CR.330. But even that single control was too much, and Petitioners negotiated it out of the Agreement. 2.CR.325-27; 5.CR.841, 891.

Chase halfheartedly lists provisions that it labels as controls, but none look anything like what the *TML* test requires. First, Chase argues that no further control was needed because the taxpayer money was earmarked *only* for the construction of the Gander Mountain building. *See Petition*, pp. 36-37. If the Constitution allowed public spending to "construct buildings for private companies," Chase would be correct. But of course, the "public purpose" to be accomplished is economic development, and controls are required to ensure that paying for the building will stimulate economic development. Next, as purported controls, Chase lists logistical provisions with words like "closed account"[8] to suggest meaningful constraints on the taxpayers' payments. But as the lower court noted, nothing about those provisions conditioned taxpayer obligations on anything related to economic development.

Thus, the lower courts correctly applied the relevant test, holding that the transaction lacked necessary controls and that continuing loan payments to a defunct business served no public purpose.

In sum, Chase advances little real argument about control. Its primary argument is that no control was necessary, and its policy argument is for freedom to contract controls out of the Agreement. Sandwiched between is the cursory suggestion that sufficient controls protect taxpayers when their money is: absolutely and unconditionally pledged to pay for a private business's construction loan, on whatever terms the business negotiates with the bank. The lower courts got it right and rejected Petitioner's argument.

[8] Ironically, the "closed account" was closed to Respondents. They had no control over it. 2.CR.352-53; 4.CR.656, 663.

C. The *TML* test protects Texas taxpayers against the freedom to contract with their money.

Chase claims the lower court's opinion, if undisturbed, will be the end of economic development in Texas. *See Petition*, p. 13. If, the argument goes, the *TML* test is applied to infringe upon freedom of contract, who will partner with local governments?

And yet, for more than three decades, economic development has thrived in Texas, with private firms finding profits in transactions that include the taxpayer protections required by the *TML* test. Indeed, the entire point of *TML* is to prevent transactions that lack taxpayer protections. Applying those accepted protections threatens no one; those entering economic development agreements are aware of and follow the well-publicized guidance. *See, e.g.,* TML Economic Development Handbook p. 148, Tab 1 (listing several performance measures and protections to ensure control).

With such widely known and agreed-upon ways of structuring constitutionally compliant deals, it's no wonder there are so few cases of private businesses falling out of step. Application of well-worn legal principles is not the end of the world as we know it; Chase just overreached. The opinion below merely confirms the structure that has been working for all except those who consider taxpayer protections to be a deal-breaker.

And Texas governmental programs mirror this reality too, embodying the second and third principles of the *TML* test. Consider the Texas Enterprise Fund, administered by the Governor's Office, which awards economic development grants. *Texas Enterprise Fund*, TEXAS ECONOMIC DEVELOPMENT & TOURISM, https://gov.texas.gov/business/page/texas-enterprise-fund (last visited June 12, 2024). Consistent with constitutional safeguards, the program places significant conditions on participants. The rules mimic the *TML* test factors and provide:

> …all TEF awardees must sign a grant contract with the state which legally obligates the company to fulfill, among other things, projected job creation and average wage commitments. No TEF funds are disbursed until after grantees sign a grant contract and meet their respective job and wage targets for each individual period (typically annually). Grantees are required to maintain these job and wage figures throughout the term of the contract. In the event a grantee fails to do so or fails to meet other terms of the grant contract, certain contract provisions allow the Governor's Office to demand repayment of previously disbursed grant funds in the form of clawbacks. *Id*.

Similarly, tax abatement agreements—perhaps the most commonly used economic development tool—also reflect this reality. A municipality may enter into an agreement to abate taxes when the owner of the property agrees to make certain improvements or repairs, typically in connection with a larger economic development initiative; but the agreement must contain certain provisions to protect the public's investment. TEX. TAX C. § 312.204; TEX. TAX C. § 312.205 (requiring agreements to "provide for recapturing property tax revenue lost as a result of the agreement if the owner of the property fails to make the improvements or repairs as provided by the agreement").

In short, from state to local government, public to private actors, the *TML* test is at the heart of economic-development law.

While the opinion below disrupts nothing, Chase's argument about elevating "freedom of contract" is dangerous. *Petition*, p. 31. It misunderstands the reason for the *TML* test and, candidly, is not even a superficially workable approach to government contracting.

When private parties contractually gamble with their own money, courts rightly ignore (with some limits not at issue here) what protections one side negotiated for, what purpose the contract serves, or whether one party negotiated a bad deal. Parties obligating themselves need not worry, generally speaking, about courts supervising their bargains.

But the *TML* test—along with countless other principles in every jurisdiction—exists because government officials aren't risking their own money. *See City of Terrell v. Dessaint*, 9 S.W. 593, 595 (1888) ("If an indebtedness of this character is to be permitted to be created in this manner, of what avail is the provisions of our fundamental and statutory laws, which are intended to protect our cities against the evils of a bankrupt treasury?").[9] They are committing the money of, not only present taxpayers, but also future taxpayers. *Economic Development Incentives must be "Necessary": A Framework for Evaluating the Constitutionality of Public aid for Private Development Projects*, Mulligan, 11 HARV. L. & POL'Y REV S13, S14 (2017) Tab 6 (explaining that governments find themselves in a "prisoners dilemma in which they have little choice but to offer a subsidy to the requesting business…").

While current officials can gamble or overpay for present benefits to satisfy their current constituents, they do not answer to future taxpayers who end up paying for benefits never experienced, based on terms negotiated by past officials. That is why the Texas Constitution requires safeguards when contracts commit future tax dollars. *See* TEX. CONST. ART. III, § 52, Interpretive Commentary; *see also Outlawing Favoritism, The Economics, History and Law of Anti-Aid Provisions in State Constitutions*, Tab 4.

Accordingly, the *TML* test's imposition on "freedom of contract," is not accidental, or even incidental. It's the entire point. The *TML* test is an established and welcome deterrent against those who seek to impose absolute and unconditional obligations on future taxpayers.

[9] *See also Appellees' Brief* (below), pp. 34-35 (outlining origin and history of protections in Texas).

D. The Court has other vehicles to address gift-clause issues.

This case is not one where this Court's review will impact Texas jurisprudence. Before this case, *TML* was universally applied to economic-development transactions. The lower court applied the test. And before this case, *TML* was universally understood to require sufficient controls, not an absolute and unconditional gift of taxpayer money. This Court needn't grant review to explain that everyone but Chase has been right for three decades.

This Court already has before it vehicles to address Chase's arguments. *Borgelt* provides an opportunity to clarify matters in the area; but nothing decided in that case will impact whether absolute obligations are controls. *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, No. 22-1149.

Similarly, the pending *Uplift Harris* case presents similar issues on which the Court may provide meaningful guidance. *In re The State of Texas*, No. 24-0325 (June 14, 2024 Opinion), Tab 5. The Court has already noted it is "skeptical" of arguments like Chase makes here. *Id*. pp. 9-10.

As the Court stated, the suggestion that Section 52-a serves as a constitutional trump card is one without any real support. *Id.* Under such a reading:

> nearly any direct gift of public money that will likely be spent by the recipient could qualify as "economic development"—on the theory that any boost in overall consumer spending is good for the economy. If this is right,

> then section 52-a comes close to repealing the Gift Clauses' ban on "gratuitous payments to individuals." *Tex. Mun. League*, 74 S.W.3d at 383. Such payments could nearly always be portrayed as good for the economy in some sense.

And the Court then noted:

> Without resolving the issue, we think it more likely that by authorizing "grants of public money . . . for the public purposes of development and diversification of the economy of the state," section 52-a removed doubt about the constitutionality of conventional economic-development grants, by which governments promote business growth and job creation through grant agreements designed to ensure that the recipient of public funds spends them in a way that has an economic benefit for the wider community. In other words, section 52-a appears designed to clarify that "development and diversification of the economy of the state" qualify as "public purposes."
>
> *Id*. pp. 9-10 (emph. added).

The Court is spot-on in noting that the argument defies plain text and history as well as decades of uniform authority and practice. *Id*. Each militates against further review.

Conclusion and Prayer

Denying this Petition sends exactly the right message to those who insist on structuring transactions to absolutely and unconditionally protect everyone but the taxpayers. Respondents ask this Court to deny review, as the taxpayers have paid enough already for a shuttered store.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with the Texas Rule of Appellate Procedure 9.4(i)(2)(D), the undersigned certifies that the number of words in this brief, including footnotes and text boxes, and excluding those matters listed in Rule 9.4(i)(1), is 4,411. This brief also complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionately spaced typeface using Microsoft Word 360 in 14-point font for the body and 12-point font for the footnotes.

/s/ Tyler Talbert
Tyler Talbert

Appendix

Tab 1

Texas Municipal League
Economic Development Handbook

2022 Editor

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Updated November 2022

A home rule city may grant public money from authorized sources to a Type A or Type B economic development corporation under a contract authorized by Section 380.002 of the Local Government Code. The Type A or Type B economic development corporation is required to use the money for "the development and diversification of the economy of the state, elimination of unemployment or underemployment in the state, and development and expansion of commerce in the state."[967]

To establish a loan or grant, or to offer discounted or free city services, a city must meet the requirements contained in the Texas Constitution and in applicable Texas statutes. Additionally, a city must review its city charter and any other local provisions that may limit the city's ability to provide such a grant or loan. A discussion of these issues follows.

Ensuring that a Public Purpose is Served by the Incentive

First, any expenditure in the form of a grant, loan or provision of city services at less than fair market value involves a donation of public property. Article III, Section 52-a of the Texas Constitution sets up the constitutional framework for public funding of economic development efforts. It provides that economic development is a public purpose. However, a city may not simply write out checks to interested businesses in order to promote economic development. The city should ensure that the public purpose of economic development will be pursued by the business. For example, if a city provides a grant or a loan to an industry, the city should enter into a binding contract with the funded industry that outlines what steps the business will take that justify the provision of public funding (creation of jobs, expansion of the tax base by construction or enhancement of the physical facilities, etc.). The city should include a recapture provision in the agreement so that if the business does not fulfill its promises, the city will have a right to seek reimbursement of the incentives that were provided. Any such agreement should also include tangible means for measuring whether the industry has met its obligations under the contract. Without these safeguards and a demonstrable benefit to the municipality, such incentives may not pass constitutional muster for serving a public purpose.[968]

Requirements Under the Local Government Code

Any grant or loan must also meet certain statutory requirements. Chapter 380 of the Local Government Code requires that in order for a city to provide a grant or a loan, it must "establish a program" to implement the incentive. The program may be administered by city personnel, by contract with the federal government, the state, or a political subdivision or by contract with any other entity. The applicable statutes do not indicate specifically how such a program is to be administered. It is safe to expect that the program should be planned and outlined in a written document that includes, at a minimum, the safeguards discussed above.

Additionally, any such grant or loan must meet the requirements under the budget law contained in Chapter 102 of the Local Government Code. Specifically, any economic development-related

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[967] Tex. Loc. Gov't Code § 380.002(b).

[968] *See* Tex. Att'y Gen. Op. No. GA-529 (2007) (City may fund housing project if it finds the project will promote economic development). *See also* Tex. Att'y Gen. LO-94-037 at 3, LO-97-061 at 4 (These two opinions do not concern the establishment of economic development programs under the authority of Local Government Code Chapter 380. However, their reasoning applies to any grant or loan of public money for economic development, regardless of the authority under which such a grant or loan is made.).

resources.[1043] It should be noted that the County Purchasing Act allows the county to exempt these program contracts from competitive bidding requirements.[1044]

The attorney general has concluded that Section 381.004 does not authorize a county to simply provide funds to existing non-county programs, even if those programs are directed at economic development. Rather, any program funded under this section must be initiated by the county and must be administered either by the county or by an entity under contract with the county.[1045] The commissioners court is authorized to make loans, grant public money, or provide county personnel and services to permissible Chapter 381 economic development programs.[1046]

Also, counties may form a county alliance corporation under state law through the Development Corporation Act.[1047] A county alliance corporation is simply a nonprofit corporation formed by a county alliance of two or more counties to pursue economic development.[1048] The corporation is governed by a board of directors who are appointed by and serve at the pleasure of the commissioners court of each county in the alliance.[1049] Unlike cities with economic development corporations, counties do not have the authority to levy a sales tax for economic development for the corporation's use.

County Ability to Provide Loans or Grants

Counties are constitutionally prohibited from granting "public money or anything of value in aid of, or to any individual, association or corporation whatsoever"[1050], unless the Legislature authorizes a county to undertake programs to provide for loans and grants of public money.[1051] The purpose of these programs can be for the: development and diversification of the state's economy, elimination of unemployment, stimulation of agricultural innovation, and development of transportation or commerce.

Chapter 381 of the Local Government Code allows counties to make loans or grant public monies for permissible Chapter 381 economic development programs.[1052] Like cities, counties must maintain sufficient control over the way these funds are spent. To ensure such control, a county would be well advised to execute a formal contract between the county and the entity that spends the funds, outlining the respective rights and duties under the agreement. Additionally, the county would want to include a recapture provision outlining how the county would be reimbursed for any incentives it provided if the funded entity is ultimately unable to meet its commitments.

1043 *Id.* § 381.004(c)(4).
1044 *Id.* § 262.024(a)(10).
1045 Tex. Att'y Gen. LO-98-007 (1998).
1046 Tex. Loc. Gov't Code § 381.004(h).
1047 *See id.* §§ 506.001 *et seq*.
1048 *Id.* §§ 506.001, .002.
1049 *Id.* §§ 506.051, .053.
1050 Tex. Const. art. III, § 52(a).
1051 Tex. Const. art. III, § 52-a.
1052 Tex. Loc. Gov't Code § 381.004(h).

Tab 2

Chapter 380 of the Texas Local Government Code

Texas City Attorneys Association
Riley Fletcher Basic Municipal Law Seminar
Lubbock, Texas
February 24, 2006

Prepared and Presented by:

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What are chapter 380 grants?

Chapter 380 is a reference to chapter 380 of the Texas Local Government Code. This chapter of the Texas Local Government Code authorizes Texas municipalities, both home-rule and general law municipalities to provide assistance for economic development. Texas cities may provide monies, loans, city personnel, and city services for promotion and encouragement of economic development.

What type of assistance may a city provide under chapter 380 of the Local Government Code for economic development?

Cities are authorized to "provide for the administration of one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality." Nonetheless, the programs must serve the purpose of promoting state or local economic development by stimulating business and commercial activity within the city, within the extraterritorial jurisdiction (or "ETJ") of the city, or an area annexed by the city for limited purposes.[1]

What constitutes serving a public purpose?

The Texas Constitutional requires all expenditures of municipal funds serve a "public purpose."[2] Accordingly, expenditures pursuant to chapter 380 programs must also serve a public purpose. Prior to 1987, Texas cities did not have constitutional authorization to provide economic assistance to businesses for economic development. In 1987, the Texas voters approved a constitutional amendment which provided that grants of monies for economic development may serve a "public purpose." Article III, section 52-a of the Texas Constitution authorizes "the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state . . . or the development or expansion of transportation or commerce in the state."[3] Further, any transaction providing public monies must contain sufficient controls "to insure that the public purpose [is] carried out."[4]

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[1] TEX. LOC. GOV'T CODE ANN. § 380.001(a) (as amended by Texas House Bill 918, 79th Legislature, Regular Session (2005) (effective date May 17, 2005)).

[2] TEX. CONST. art. III, § 52(a). *See also, Texas Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n,* 74 S.W.3d 377, 384 (Tex. 2002) ("A political subdivision's paying public money is not gratuitous, within meaning of state constitutional provision prohibiting gratuitous payments to individuals, associations, or corporations, if the political subdivision receives return consideration.").

[3] TEX. CONST. art. III, § 52-a.

[4] Tex. Att'y Gen. Op. No. JM-1255 (1990) at 8-9.

Is there a durational limitation on economic assistance provided under chapter 380 of the Texas Local Government Code?

Unlike tax abatements which are limited to ten (10) years,[5] chapter 380 of the Local Government Code does not contain a durational limitation. Consequently, some Texas cities have entered into 380 agreements which extend beyond ten (10) years. Whether your particular city has a durational limitation may be controlled by a home-rule city charter or other local provision.

Can you abate delinquent taxes under chapter 380 of the Local Government Code?

Article III, section 55 of the Texas Constitution provides that the legislature "shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any country or defined subdivision thereof." Consequently, in a Texas Attorney General opinion, the Attorney General concluded "section 380.001(a) of the Local Government Code does not authorize a municipality, as part of an economic development program, to agree to abate a taxpayer's delinquent taxes."[6]

Can a City provide a municipal sales tax rebate as a form of chapter 380 grant?

Many cities may condition the grant or loan of public monies based upon estimated sales tax revenue generated by the business prospect. In a recent Texas Attorney General opinion, the Attorney General considered whether recent legislative changes prevented Texas cities from providing chapter 380 grants in the form of a sales tax rebate.[7] The Attorney General concluded the "Local Government Code authorizes municipalities to refund or rebate municipal sales taxes and otherwise expend public funds for certain economic development purposes."[8] Further, the recent legislative change "does not invalidate existing tax rebate contracts, nor does it prohibit municipalities from executing new ones."[9]

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[5] TEX. TAX CODE ANN. § 312.204(a) (Vernon Supp. 2004-05).

[6] Tex. Att'y Gen. Op. No. LO-95-090 (1995).

[7] Tex. Att'y Gen. Op. No. GA-0071 (2003).

[8] Tex. Att'y Gen. Op. No. GA-0137 (2004) at 1.

[9] *Id.* at 4.

Can a City provide section 4A or 4B economic development corporations city funds for economic development?

A home-rule municipality may provide public money to a section 4A or section 4B corporation.[10] Nonetheless, the grant of public monies must be pursuant to a contract. Further, the development corporation must use the grant money for the "development and diversification of the economy of the state, elimination of unemployment or underemployment in the state, and development and expansion of commerce in the state."[11]

[10] TEX. LOC. GOV'T CODE ANN. § 380.002(b).

[11] *Id.*

Chapter 380 of the Texas Local Government Code

Section 380.001(a) as amended by Texas House Bill 918, 79th Legislature, Regular Session (2005) (effective date May 17, 2005)

§ 380.001. ECONOMIC DEVELOPMENT PROGRAMS.

(a) The governing body of a municipality may establish and provide for the administration of one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality. For purposes of this subsection, a municipality includes an area that:

(1) has been annexed by the municipality for limited purposes; or

(2) is in the extraterritorial jurisdiction of the municipality.

(b) The governing body may:

(1) administer a program by the use of municipal personnel;

(2) contract with the federal government, the state, a political subdivision of the state, a nonprofit organization, or any other entity for the administration of a program; and

(3) accept contributions, gifts, or other resources to develop and administer a program.

(c) Any city along the Texas-Mexico border with a population of more than 500,000 may establish not-for-profit corporations and cooperative associations for the purpose of creating and developing an intermodal transportation hub to stimulate economic development. Such intermodal hub may also function as an international intermodal transportation center and may be collocated with or near local, state, or federal facilities and facilities of Mexico in order to fulfill its purpose.

Added by Acts 1989, 71st Leg., ch. 555, § 1, eff. June 14, 1989. Amended by Acts 1999, 76th Leg., ch. 593, § 1, eff. Sept. 1, 1999.

§ 380.002. ECONOMIC DEVELOPMENT GRANTS BY CERTAIN MUNICIPALITIES.

(a) A home-rule municipality with a population of more than 100,000 may create programs for the grant of public money to any organization exempt from taxation under Section 501(a) of the Internal Revenue Code of 1986 as an organization described in Section 501(c)(3) of that code for the public purposes of development and diversification of the economy of the state, elimination of unemployment or underemployment in the state, and development or expansion of commerce in the state. The grants must be in furtherance of those public purposes and shall be used by the recipient as determined by the recipient's governing board for programs found by the municipality to be in furtherance of this section and under conditions prescribed by the municipality.

(b) A home-rule municipality may, under a contract with a development corporation created by the municipality under the Development Corporation Act of 1979 (Article 5190.6, Vernon's Texas Civil Statutes), grant public money to the corporation. The development corporation shall use the grant money for the development and diversification of the economy of the state, elimination of unemployment or underemployment in the state, and development and expansion of commerce in the state.

(c) The funds granted by the municipality under this section shall be derived from any source lawfully available to the municipality under its charter or other law, other than from the proceeds of bonds or other obligations of the municipality payable from ad valorem taxes.

Added by Acts 1991, 72nd Leg., ch. 16, § 13.06(a), eff. Aug. 26, 1991. Amended by Acts 1991, 72nd Leg., 1st C.S., ch. 4, § 25.02, eff. Aug. 22, 1991; Acts 2001, 77th Leg., ch. 56, § 1, eff. Sept. 1, 2001.

§ 380.003. APPLICATION FOR MATCHING FUNDS FROM FEDERAL GOVERNMENT.

A municipality may, as an agency of the state, provide matching funds for a federal program that requires local matching funds from a state agency to the extent state agencies that are eligible decline to participate or do not fully participate in the program.

Added by Acts 1995, 74th Leg., ch. 1051, § 1, eff. June 17, 1995.

✵Article III, Section 52-a of the Texas Constitution (as amended November 8, 2005)

Sec. 52-a. Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purpose, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state. Any bonds or other obligations of a county, municipality, or other political subdivision of the state that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section and that are payable from ad valorem taxes must be approved by a vote of the majority of the registered voters of the county, municipality, or political subdivision voting on the issue. A program created or a loan or grant made as provided by this section that is not secured by a pledge of ad valorem taxes or financed by the issuance of any bonds or other obligations payable from ad valorem taxes of the political subdivision does not constitute or create a debt for the purpose of any provision of this constitution. An enabling law enacted by the legislature in anticipation of the adoption of this amendment is not void because of its anticipatory character.

Tab 3

THE GIVE AND TAKE OF DEVELOPMENT AGREEMENTS

Olson & Olson LLP

11th Annual Local Government Seminar

January 29, 2015

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The Give and Take of Development Agreements

The purpose of this paper is to outline some of the ways local governments partner with the private sector. Many matters mentioned here are complex and may require detailed analysis in a given situation. The following is to assist local officials determine how best to proceed with the decision making process when dealing with a developer, business owner or landowner and when considering entering into a contractual relationship with them.

I. Development Agreements - Generally.

Development Agreement can mean any contract entered into between a governmental entity and a private one. Most often, development agreements are entered into by a local governmental entity and the landowner, developer or prospective business. Development agreements can create a mechanism for a community to ensure development occurs in a manner consistent with good planning and maximizes the benefits of a development in situations and in ways that the local entity would not otherwise be able to do, such as controlling the type and rate of growth in a city's extra territorial jurisdiction. Such an agreement can incent by rewarding certain types of development or the rate of a development, and at other times a development agreement can regulate or limit the type and way in which development occurs. Sometimes development agreements can do a combination of these.

Below are a few of the many statutory authorizations for development agreements available to local entities. Each has its own scope of authority. The listing is not exhaustive and is intended as a sampling. Sometimes a development agreement may be coupled with one or more other mechanisms to optimize the desired results of both parties, depending on the circumstances and complexity:

1. Subchapter G. Section 212.171 et seq Texas Local Government Code: Agreements under this subchapter are sometimes referred to as "Non-Annexation Agreements" or "ETJ Agreements."
2. Chapter 380 Texas Government Code: This is the statute adopted specifically to implement Texas Constitution Article III Section 52a[1] and is arguably the broadest and most flexible.

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[1] *See generally* testimony of Representative McCollugh, author of House Bill 3192, before the House Committee on Urban Affiars, 71st Leg. (May 15, 1989).

3. Section 43.0751 Texas Local Government Code: These are strategic partnership agreements entered into between a city and a conservation and reclamation district operating under Chapter 49 Texas Water Code, such as with a municipal utility district.

4. 212.071 Texas Local Government Code: Also sometimes known as development participation agreements, this section is an exception from following the competitive sealed bidding procedure for the construction of certain improvements constructed by a developer depending on the percentage paid by the city and the developer, and whether the improvement relates to oversizing.

5. Chapters 311 & 312 Tax Increment/Tax Abatement agreements. These create incentives to landowners directly tied to performance and can be combined with other types of development agreements.

6. Chapters 501-507 Texas Local Government Code: Economic development corporations may enter into performance agreements in accordance with the provisions of these statutes and pursuant to a corporation's articles, bylaws and election order.

7. Chapter 552 Texas Local Government Code: Utility systems agreements to provide water, sewer, gas, or electric service outside a city's boundaries.

8. Chapter 395 Texas Local Government Code: Impact fee agreements providing for the time and method of payment of impact fees.

9. 42.046 Texas Local Government Code: Planned unit development district agreements for territory that has been disannexed by a city previously annexed for limited purposes may designate an area within its extraterritorial jurisdiction as a planned unit development district.

10. Chapters 2267 and 2268 Texas Government Code: Created by the Texas legislature in 2011, these chapters create methods for public and private partnerships to form to provide "qualified facilities" for public use.

11. Chapter 431, subchapter D, Texas Transportation Code: Through formation of a local government corporation allows various transactions and agreements to occur with more flexibility.

12. Chapter 2303.5055 Texas Government Code: Through creation of an enterprise zone agreements can be entered into relating to refund, rebate or payment of tax proceeds for hotel projects.

13. Chapter 43 Texas Local Government Code: Annexation agreements.

II. Preparation.

a. Be prepared. Being prepared before an opportunity presents itself can be of great help. Before negotiating a development agreement, cities and other local entities should assess the needs of their community. This means understanding what they have to offer a prospective private partner, and also what they have that may detract a prospective private partner from developing, expanding or locating within its borders. The more prepared a community is, the bigger the role it will have in shaping its future and in controlling how a future developer or business will impact them. A business may be knowledgeable about its industry, but a local entity will know how to make it blend with an existing community in a way that can maximize the strengths of both parties.

How do you do this? Cities can prepare by doing one or more of the following:

- Comprehensive plans. Create or update comprehensive plans or elements of comprehensive plans such as thoroughfare plans, drainage plans, park plans, trail plans, etc.
- Market and other studies. Perform market studies or needs assessments, including those provided by outside vendors.
- Workshop. Have city council or assign a committee to identify priorities and opportunities. Even without going through the cost of adopting or updating formal plans and studies, cities can identify and prioritize their strengths and weaknesses. This helps a local community know what to offer and what its needs are when talking with a prospective private partner.
- Establish policies. Adopting policies or guidelines setting forth the criteria that should be met before a city enters into a particular type of development agreement can be helpful. For example, a policy may require a minimum increased value a business must bring to a city before the city will consider entering into a tax abatement agreement.

b. Cooperation. Since the late 1980s, many cities and economic development corporations have negotiated private-public partnerships. Competition for economic development can be fierce. Cities are committed to its citizens. So, too, are its neighbors with respect to their own citizenry. Ideally, communities should work together to create a holistic, complimentary approach to economic development for a "win win" result. The more cohesive and supportive the greater community is towards economic development, the better the result. Combined studies to better understand the relative advantages of each locale can be of tremendous value for all. This can be organized through umbrella organizations such as chambers of commerce, council of governments and similar regional organizations. For example, one community may have vast expanses of undeveloped property while another boasts a workforce that's in high demand.

c. Research. It may be recommended to research different opportunities and even hire or consult with a third party about the viability of a certain type of business or public amenity. If outsourcing, using someone who is familiar with your community, with current trends and who will respect your priorities and maintain open lines of communication is ideal. With respect to specific opportunities, incentives and desired outcomes, it may be beneficial to perform a cost benefit analysis.

d. Resources. Understanding the resources available to a local community beforehand is of great help. If city funds are involved, it will be necessary to identify which funds on hand to use and how much is available for the intended purpose. If not setting aside funds, the legal ability and feasibility of issuing debt needs to be addressed.[2] For example, home rule charters need to be reviewed, statutory authority of general law cities researched, necessity of election examined, etc. When issuing debt, certain loans of public funds may be unconstitutional without a sinking fund if secured by taxes. Avoiding double pledging of revenues or other funds vis a vis current debt obligations is important. Also, understanding the proper use of available funding sources such as hotel occupancy taxes, increased sales or ad valorem taxes attributable to development, enterprise zone funds and so on is necessary.

The Texas State Comptroller's office maintains a website found at www.texasahead.org that has useful information about various types of development agreements and their uses.

III. Negotiating the Development Agreement

a. Equal but different. There are lots of moving pieces to the puzzle when public entities partner with the private sector. Some of them are discussed below. It's important to understand that while equal, the negotiating strengths of a public-private partnership will be different from one involving

[2] *See* Op. Tex. Att'y Gen. No. DM-185 (1992).

only private parties. It may be recommended to go over the ground rules and expectations early so that later on in the negotiations a private party better understands what are some of the "non-negotiable" tenets. For example, accountability of public funds is a necessity to ensure the proper expenditure of public funds in a development agreement as discussed in more detail below. This is also when having an adopted policy to share with a prospective private partner can be helpful.

b. Terms of the Agreement. Understanding what a local community wants and has to offer, and understanding what the private entity wants and has to offer is paramount. Below are some of the most common considerations.

The City/Local entity potential wants:

-infill development
-construction of public improvements to previously undevelopable property
-creation or diversification of jobs
-higher end development from what would otherwise have been developed
-revitalizing a previously depressed area
- tax dollars into local economy
-implementation or furthering implementation of a master plan, such as a thoroughfare plan or master drainage plan
-community amenities, such as a park, convention center or entertainment district.

The Landowner/Developer/Business potential wants:

- land, such as within a business park
-consistency of local regulation of development
-reimbursement of permitting fees, or amounts representing certain collection of taxes.
-money (grant or loan)
-regulatory relief
-deferral of annexation
-infrastructure improvements

Understanding the perspective of the private partner is helpful. For example, when talking to a developer interested in infill development in an older established part of town, regulatory relief may be requested. The City cannot waive its regulatory requirements without legislative enactment. However, creation of overlay districts, planned developments and other approaches can also be discussed. In contrast, when talking to a developer interested in building on an outlying tract of land, presence of utilities may be a source of discussions for cost sharing arrangements addressing both current developer needs as well as oversizing for future development.

c. Additional Considerations. Most development agreements are of long duration spanning typically anywhere from five, ten even 45 years. Once negotiated, the implementation phase may last for years.

It's important for a local entity to choose a private partner carefully when entering into a long term relationship. Factors to take into consideration include the following:

1. Commitment to the Community. Does the business have a commitment to the community? Has the business joined the local chamber? Will its employees be living locally? Will this include upper management? Has the business expressed interest in sponsoring local causes? Does it matter in this instance?
2. Financial and Management Stability. Has the business entity demonstrated financial strength to the satisfaction of the city? Are certain precautions in place commensurate with the level of risk the city is undertaking to ensure proper expenditure of public funds? Is the entity stable or is it undergoing a significant change in management or corporate structure? Will it impact the local project? Can the agreement adequately address the possible scenarios?
3. Communication/Chemistry. Have the negotiations gone smoothly? Have conversations been friendly? difficult? honest? heated yet productive? Have the people with whom the city been dealing been reliable? Have the people on behalf of the private entity been given adequate authority to negotiate? Does the city get along well with its private partner? Is the private partner litigious?
4. History. What is the track record of the prospective private partner? Have they developed something similar elsewhere? Was it successful? By whose standards?

Virtually all private-public partnerships have their own unique makeup including particular strengths and weaknesses. It is not realistic to expect to get everything a local entity wants in a private partner or in the agreement itself. Nonetheless, it is important to understand what the strengths and weaknesses are and to determine the importance of each.

IV. Chapter 380 Texas Local Government Code.

a. Background. Historically cities have enjoyed relationships with private entities ranging from regulator to public partner. When talking about this paper's title "The Give and Take of Development Agreements," perhaps the most common "give" can be found in Chapter 380 Texas Local Government Code. It is under this chapter that cities are able to incent developers, landowners and businesses to perform in a way that is of most benefit to a community.

While the Texas Constitution generally prohibits granting public funds or lending public credit to private parties,[3] the parameters of the relationship was altered beginning in 1987 when Section 52a of Article III was added to read as follows:

§ 52-a. Assistance to encourage state economic development

Sec. 52-a. Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purpose, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state. Any bonds or other obligations of a county, municipality, or other political subdivision of the state that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section and that are payable from ad valorem taxes must be approved by a vote of the majority of the registered voters of the county, municipality, or political subdivision voting on the issue. A program created or a loan or grant made as provided by this section that is not secured by a pledge of ad valorem taxes or financed by the issuance of any bonds or other obligations payable from ad valorem taxes of the political subdivision does not constitute or create a debt for the purpose of any provision of this constitution [added in 2005]. An enabling law enacted by the legislature in anticipation of the adoption of this amendment is not void because of its anticipatory character.

[3] *See* Texas Constitution, Article III, Section 51, "The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever. . . "

Considered by itself, this constitutional amendment alone did not enable cities to lend credit or make grants to private entities. Rather, it authorized the Texas legislature to enact laws to enable cities to create their own economic development programs.

In the following legislative session, Chapter 380 of the Texas Local Government Code was adopted. This was the enabling legislation needed for Texas cities to develop their own economic development programs.[4] There is no laundry list of acceptable programs and acceptable forms of incentives. Rather, the Texas constitutional prohibition from making grants of monies to private corporations remains but through the above-described amendment economic development became a recognized public purpose.

Forms of acceptable incentives referenced generally in the statute include programs that grant or loan public funds and provide city personnel and services.

b. Public Purpose. Consistent with the Texas Constitutional provisions discussed above is the requirement that the expenditure of public funds be for a public purpose. The Texas Supreme Court set forth a public purpose test as follows:

(1) is the intent to accomplish a public purpose, rather than to benefit a private party;

(2) is there public control over the funds or property to ensure the public purpose is accomplished and to protect the public's investment; and

(3) will the City receive a sufficient return for the funds or property?[5]

In order to maintain the public purpose, controls over the use of public funds or resources must be addressed in a 380 agreement. For example, accounting for how public funds are spent is a requirement. For agreements spanning several years, annual certifications or other proof of performance may be required. Proof of employment levels or caliber of jobs created may be required. Most importantly, in the event a private partner does not meet its obligations to which the grant or loan of public funds relates, there must be recapture of such public funds. These contract provisions are commonly referred to as "clawbacks." As the Texas

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[4] *See generally* Texas Attorney General Op. DM-185 (1992).

[5] *Tex. Mun. League v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383-384 (Tex 2002).

Attorney General has noted, requiring "a contract or other arrangement sufficient to ensure that the funds are used for the purposes authorized, consistent with the constitutional restrictions on the expenditure of public funds"[6] is a requirement for any 380 agreement.

c. <u>Incentives.</u> The premise of a 380 agreement is that if the private entity performs in a certain manner, the local entity may provide incentives of public funds or resources, such as grants of money, loans, securing of loans, sale or lease of real property and so on. The program may provide for payments up front or for reimbursement upon performance.

Where use of public resources is provided in advance of performance on the part of the private partner, more and more stringent clawback provisions in the agreement may be required. If guaranteeing a loan of a developer, when and how to secure payment to avoid a scenario of developer default, city pays and city gets nothing out of the arrangement needs to be adequately addressed.

The statute does not specify the type of economic development program a city may adopt. However, there are limitations in place regarding the proper expenditure of public funds generally as discussed above from a Texas constitutional perspective, as well as other statutory limitations to consider. For example, Chapter 1502 Texas Government Code generally prohibits providing free utility services except to public schools and building and institutions operated by a city. There can be no abatement of ad valorem taxes outside of the statutory process under Chapter 312 Texas Tax Code. However, due to the flexibility of an agreement under Chapter 380, payments equal to the amount of ad valorem taxes can be negotiated.

There can be local restrictions as well regarding the ability of cities to enter into 380 agreements. Home rule cities need to check charter provisions for limitations, and general law cities may need to look at statutory authorization before adopting a 380 program or before entering into a particular agreement.

d. <u>Flexibility.</u> Compared to other development agreements, agreements under chapter 380 are comparatively flexible. For example, 380 agreements can be coupled with interlocal agreements to achieve a

[6] Tex. Att'y Gen. Op. No. JC-0362 (2001) at 6.

"synthetic TIRZ". Using a 380 agreement approach instead can sometimes achieve similar results with less process and less cost. Also, 380 agreements may be used in conjunction with other economic development tools and at other governmental levels such as in conjunction with the state's Enterprise Zone Program under Chapter 2303 Texas Government Code or in conjunction with an economic development sales tax 4A or 4B program. There are rules and requirements to be met with all such tools, and care should be given to consult with professionals when needed.

e. Considerations. As flexible as 380 agreements can be, there are still factors to consider when working out such an agreement. Below is a sampling, some of which has been mentioned earlier:

i. Necessity to maintain public use and purpose of public funds.
ii. Necessity of establishing a program for the making of loans or grants or use of public services.
iii. Necessity of accountability of public resources.
iv. Necessity of clawback provisions.
v. Prohibition against using public funds to pay undocumented workers and necessity of stating this contractually pursuant to Chapter 2264 Texas Government Code.
vi. Understanding funding sources, including from current funds versus debt.
vii. Understanding authority and limitations placed on authority to enter into agreement, whether for home rule cities or general law cities.
viii. Reimbursement versus immediate availability of public funds.
ix. Grant or loan.
x. Roughly proportional legal concepts vis a vis the 380 agreement.
xi. Public procurement requirements vis a vis the 380 agreement.
xii. Whether to use a 380 agreement in conjunction with other local development and economic development tools to achieve certain results.
xiii. Whether and if a city is able to partner with other public authorities.

V. Implementation of Project.

a. Generally. Once a development agreement has been approved by all the parties, the implementation phase starts. Understandably, there is a great sense of achievement upon final negotiation of a development agreement.

Implementation is the next phase. As mentioned earlier, private-public partnerships often last for many years, making the selection, negotiating and ongoing relationship important. How all phases of this relationship play out should be taken into consideration. Depending on the length of the agreement and the priorities of the respective parties, the specificity with which various topics are discussed will vary.

b. Enforcement. To ensure success, communities may want to consider designating staff or hiring outside services to manage a development agreement or project involving a development agreement. Depending on the complexity, it may be worthwhile to have both a contract manager and a construction manager to ensure adequate oversight and to address issues before problems arise.

There can be times, however, when you may have to deal with a 380 agreement that is not progressing to the satisfaction of one or both parties. For example, a company was to have completed public infrastructure by a certain timeframe or in a certain manner but failed to properly perform. What to do?

As a political subdivision tied to its geographical location, it may be in the best interests of the public partner to first attempt to mutually resolve such problems. For example, a delay because of unforeseen supply shortages may be fleeting. However, the pulling out of an equity partner associated with the landowner or developer may be quite serious. A failing project is not going to move and what happens in a community stays there.

Although neither party likes to think about problems with performance, a public entity should prepare for this possibility by having in place as many protections as is reasonable. Sometimes an escrow fund may be appropriate. Depending on the amount of risk, it may be necessary to have extensive provisions for recapture of public funds. What safeguards are available depends on the situation. When constructing public infrastructure there may be limitations on what can be required in certain situations. [7] Also, the private partner could respond by asserting a takings claim, estoppel or waiver of governmental immunity.

[7] *See* e.g. Tex. Letter Opinion 90-180 interpreting 212.901 Texas Local Government Code requiring surety to guarantee development does not also authorize requiring performance or payment bonds.

It is important to maintain good communications, conduct periodic checks and to perform periodic cost benefit analysis or outside audits to measure and keep abreast of a public-private agreement.

VI. **Conclusion.** There are many types of development agreements. It is outside the scope of this paper to discuss all facets of such agreements. Rather, it is designed to make the reader aware of some of the considerations, attributes and limitations of development agreements generally and specifically with respect to those under Chapter 380 of the Texas Local Government Code.

With adequate preparation, meaningful negotiations and a thoughtfully prepared agreement tailored for the situation at hand, the likelihood of a successful outcome is maximized. Great partnerships can bring great things to both the city and the private partner.

https://www.galvnews.com/news/article_14a1587d-2440-5d05-b3b3-e12822342e44.html

Cities often fail to oversee development agreements, expert says

By MATT DEGROOD The Daily News
Apr 2, 2021

A section of Pinnacle Park in League City is under construction Monday, March 5, 2018. The city and developer Pinnacle Fund Alliance struck a 380 agreement for the 100-acre Pinnacle Park, which is anchored by Cabela's.
JENNIFER REYNOLDS/ The Daily News

Some Galveston County experts still swear by an economic incentive called a 380 agreement, despite such deals generating controversy recently in both Hitchcock and League City,

Done correctly, 380 agreements are simple tools to recruit businesses to town that don't require handing out taxpayer money upfront and pay out only if businesses live up to their end of the deal, they argue.

Others, however, contend that in most cases such agreements go to companies that would have moved in anyway and that cities often don't ensure the firms meet terms beneficial to the public.

"I think the 10,000-foot view is that academics are starting to view incentives in general as not good economic development policy," said Nathan Jensen, a professor of government at the Universit Texas in Austin who studies economic development strategies.

Jensen, in a review of several 380 agreements signed in communities across Galveston County, found most were flawed — overly focused on drawing retail business, lacking in means to verify information from companies and vague about how companies were supposed to report financial numbers.

WELL-INTENDED

The 380 agreement is named after Chapter 380 of the Texas Local Government Code, according to the Texas Comptroller's Office. It provides cities the opportunity to offer businesses loans and grants to promote economic development and stimulate business or commercial activity.

It's among several tools city officials across Texas have to promote economic development, said David Hoover, League City's director of planning and development. Others include tax abatements, actual cash payments and reinvestment zones.

"There's nothing wrong with the tool itself," Hoover said. "The 380 is my favorite. But the tool is not what makes the deal. It is the people."

And in League City, several 380 agreements have stirred controversy in recent months.

"The road to hell is paved with good intentions," Mayor Pat Hallisey said about several of the recent agreements. "The 380 agreements have worked out to be one of those that started with good intentions but didn't work out."

SLOW GROWTH

The first of those League City agreements was for Pinnacle Park, a 100-acre mixed-use town center at Interstate 45 and Big League Dreams Parkway, which some city leaders said was not meeting performance expectations.

Developers behind Pinnacle Park and the city in 2015 reached an agreement wherein the city would reimburse Pinnacle Financial Fund with sales taxes collected based on square footage of the commercial center, which is anchored by outdoor gear retailer Cabela's.

Last year, city leaders complained Pinnacle Park was only about 90 percent developed, which was short of where they thought it would be by then, officials said.

A November review found the city has been making smaller payments to the developer because of slowed growth at Pinnacle Park.

Some residents took the fact that the developer was running behind schedule as evidence that the agreement was never good to begin with, they said.

Despite the slowdown, city officials fully support the project and believe freeway construction and other economic factors made it difficult to develop, officials said at the time.

LITIGATION

And a state appeals court in February sided against the city in a longstanding lawsuit over another 380 agreement it reached with a Mexican food restaurant, ruling sovereign immunity doesn't shield the city from litigation.

City leaders in December 2012 signed a 380 agreement with La Porte-based Jimmy Changas Inc., which stipulated the city would reimburse some percentage of sales tax revenues to the restaurant if the business met set conditions, according to records. The specific amount varied between 15 percent and 35 percent of sales tax revenues.

The rebates are tied to how much the restaurant makes. If the company generates $3 million to $4.5 million a year in revenues, it will receive a 15 percent rebate on its city sales tax. That would increase up to a 35 percent rebate if the restaurant generates more than $6 million in revenues.

The agreement was set to run from 2013 to 2017, according to a lawsuit the restaurant filed against the city in 2018.

Attorneys for Jimmy Changas first brought a lawsuit against the city in the 10th District Court in 2018, asserting city leaders reneged on the 380 agreement and hadn't made any reimbursement payments, despite the business meeting all the requirements laid out in the paperwork, court records show.

The filing sought between $200,000 and $1 million from the city for damages, according to court records.

But lawyers for the city argued the business hadn't met all conditions, and they filed a counterclaim against Jimmy Changas, records show.

Attorneys then tried to end Jimmy Changas' case by filing a plea to the jurisdiction, seeking for a judge to dismiss the case.

AND MORE LITIGATION

Elsewhere in the county, Hitchcock administrators recently sued an Addison-based company over a 380 agreement after learning the community would have to repay more than $3 million over 29 years for it.

The deal was typical of those cities ink in pursuit of economic development. The company's investment would generate more sales tax and maybe some jobs for the city, and the city would kick back some of the increased tax revenue to offset the firm's expenses. A win-win.

Except the warehouse never was built, no jobs ever created or increased sales tax ever generated, the city and state of Texas assert. Yet company officials filed for reimbursements anyway and received them for years after the agreement was signed, court documents assert.

The city now owes the Texas Comptroller's Office more than $3 million, an amount equal to more than 57 percent of its entire annual budget that will take 29 years to pay off, City Manager Marie Gelles said.

OVER THEIR HEADS

The issue with such agreements across Texas is that most cities lack the wherewithal and knowledge to enforce the specific terms, Jensen said.

"Lots of cities don't have a rigorous process," Jensen said. "And usually big companies are good at negotiating."

Jensen reviewed paperwork for 380 agreements signed in the past five years in League City, Santa Fe, La Marque and Galveston.

"The Cabela's one is especially problematic," Jensen said. "This is signed with a developer, not with the company. There are estimates of jobs, but there seems to be no job reporting or clawbacks if they don't make these jobs. These could be minimum- wage jobs."

Hoover argued that Pinnacle Park, or Cabela's agreement, was actually an example of a 380 agreement done relatively well.

It stipulated how many buildings and how much construction had to occur over a specific period, as well as the amount of sales tax it had to generate, Hoover said. If it didn't hit all of those, then the developer wouldn't get 100 percent of the agreement, but a percentage.

Jensen also criticized the 380 agreement to bring a Walmart to La Marque, arguing it wasn't a smart idea to use them to entice retail, he said. Those are typically businesses that would come regardless, and retail is running into economic issues with more people opting to use online retailers, like Amazon, rather than shop in-person.

Officials with La Marque didn't respond to a request for comment about 380 agreements by Thursday afternoon.

A good 380 agreement should also allow a city to perform an independent audit to verify information provided by a developer or business, such as how many jobs were created, Jensen said. The agreements Jensen reviewed didn't do that, he said.

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Matt deGrood

Reporter

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Sunnyvale 4B Development Corporation

Business Incentive Plan

Policy Statement

Sunnyvale 4B Development Corporation is committed to the promotion and retention of high quality and unique business development in all areas of Sunnyvale, and to an ongoing improvement in the quality of life for its citizens. Insofar as the enhancement and expansion of the local economy generally serve these objectives, the 4B Corporation will, on a case-by-case basis, consider providing business incentives to stimulate economic development in Sunnyvale. The 4B Corporation will consider providing business incentives in accordance with the procedures and criteria outlined in this document and as permitted by and in accordance with state law. Incentive agreements will be considered for new businesses, for the expansion of existing businesses, and for the modernization of existing facilities and structures. Nothing herein shall imply or suggest that the 4B Corporation is obligated to provide a business incentive to any applicant. Applications for incentives shall be filed with the 4B Corporation and copies will be coordinated with the Town Manager, appropriate Town Departments, and the 4B Board of Directors. The 4B Corporation will consider applications on a case-by-case basis. This policy establishes that all business incentives and agreements shall be governed by applicable state statutes relating to economic development. All economic incentives approved under this policy shall be reviewed at least every two years for compliance with the conditions of the incentive program.

Scope

The Town and the 4B Corporation are authorized to offer economic development incentives under various state laws, including chapter 380 of the Texas Local Government Code and the Texas Development Corporation Act (the "Act"), now codified in Title 12 of the Texas Occupations Code. A variety of other economic development tools may also be available through the Town.

Chapter 380 permits Texas municipalities to create programs that promote local economic development. This legislation permits, on a case by case basis, the Town to evaluate and, where appropriate, to offer certain economic development incentives. Incentives may include loans or grants of public money, as well as other Town services, to businesses and entities that the Town determines will promote local economic development and stimulate business and commercial activity in the Town in return for specific and verifiable commitments and results from such businesses or entities to cause specific infrastructure or other public benefits or amenities to be made or invested in the Town.

The Act allows municipalities to create nonprofit development corporations, and fund them with a special sales tax. Sunnyvale 4B Development Corporation was created under the Act. These corporations promote the creation of new and expanded industry and manufacturing activity within the municipality and its vicinity. The Town receives and distributes sales tax proceeds to the 4B Corporation, which uses the money for economic development projects as defined by the Act. Any activities of a development corporation must always be in furtherance of and attributable to a "project."

Except in certain specific instances, 4B Corporation projects involving incentives to business enterprises must result in the "creation or retention of primary jobs." The term primary job means a job that is:

1. available at a company for which a majority of the company's products or services are ultimately exported to regional, statewide, national or international markets infusing new dollars into the local economy; and

2. included in one of the North American Industry Classification System (NAICS) sector codes recognized by the Act. These include:

NAICS Sector	Number Description
221	Utilities
331-339	Manufacturing
42	Wholesale Trade
48-49	Transportation and Warehousing
51 (excluding 512131 and 512132)	Information (excluding movie theaters and drive-in theaters)
523-525	Securities, Commodity Contracts, and Other Financial Investments and Related Activities; Insurance Carriers and Related Activities; Funds, Trusts, and Other Financial Vehicles
5413, 5415, 5416, 5417, 5419	Scientific Research and Development Services
551	Management of Companies and Enterprises
56142	Telephone Call Centers

Eligible Section 4B Projects

The 4B Corporation will consider spending sales tax proceeds on land, buildings, equipment, facilities, expenditures, targeted infrastructure, or improvements for the creation or retention of primary jobs, which are found by the 4B Board of Directors to be required or suitable for the development, retention, or expansion of:

- manufacturing and industrial facilities
- research and development facilities
- transportation facilities (including airports, ports, mass commuting facilities and parking facilities)
- distribution centers
- sewage or solid waste disposal facilities
- recycling facilities
- air or water pollution control facilities
- facilities for furnishing water to the public
- distribution centers
- small warehouse facilities capable of serving as decentralized storage and distribution centers
- primary job training facilities for use by institutions of higher education
- regional or national corporate headquarters facilities; and
- projects which promote or develop new or expanded business enterprises including projects that provide public safety facilities, streets and roads, drainage and related improvements, demolition of existing structures, or generally municipally-owned improvements

Additionally, the 4B Corporation may fund the acquisition of land, buildings, equipment, facilities, and improvements found by the board of directors to promote or develop new or expanded business enterprises that create or retain primary jobs, including projects that provide:

- Public safety facilities
- Streets and roads
- Drainage and related improvements
- Demolition of existing substandard or inefficient structures
- General municipally-owned improvements

The 4B Corporation will consider any improvements or facilities that are related to any of those projects and any other projects that the board, in its discretion, determines will promote or develop new or expanded business enterprises or will create or retain primary jobs.

Eligible Projects Which Are Not Required to Create or Retain Primary Jobs

The 4B Corporation of the Town of Sunnyvale will consider funding projects that do not create or retain primary jobs if the project is related to:

- Job training - Certain job training required or suitable for the promotion or development and expansion of business enterprises;
- Certain targeted infrastructure improvements which promote or develop new or expanded business enterprises - limited to streets and roads, rail spurs, water and sewer utilities and electric utilities, gas utilities, drainage, site improvements and related improvements, and telecommunications and internet improvements;
- Land, buildings, equipment facilities, improvements and expenditures required or suitable for a career center, provided the area benefited is not located in the taxing jurisdiction of a junior college district;
- Professional and amateur sports and athletic facilities; entertainment, tourist, convention facilities; public parks and related open space improvements; and related store, restaurant, concession, automobile parking facilities, roads, streets, and water and sewer facilities;
- Affordable housing;
- Water supply facility or water conservation program (this use must be approved by a majority of the City's voters in an election held for that purpose);
- Development, improvement, expansion or maintenance of facilities relating to the operation of commuter rail, light rail or motor buses; and
- Certain airport facilities

Definitions

Clawback- That provision in a Performance Agreement which states how and to what extent any incentive payments from public funds must be repaid if the stated Performance Standards are not met.

Current Payroll- The company's total expenditure for all employees for the month immediately preceding this application multiplied by 12.

Employee Benefit- Incentives offered to employees and paid for by the employer such as hospitalization, vacation, etc. If an employee pays 30% of the cost, or more, it should not be considered a "benefit" for purposes of this application.

Full Time Job- The employment of a person for a minimum of 35 hours per week and offering that person all those benefits adopted by company policy for Full Time Employees. Major stockholders or immediate family members should not be included in this number when considering "New Full-Time Jobs Created."

Hourly Wage- The gross amount paid to the employee for each hour worked not including the Employer's portion of FICA or FWH. Benefits should not be included in this figure, but should be listed separately under the compensation per employee section of the application.

Job Classification Code- The North American Industry Classification System (NAICS) classifies all jobs in all industries. Those job classification codes which are acceptable under state law for assistance are listed under the scope section of this document.

Part-Time Job – A person working less than 35 hours per week. Major stockholders or immediate family members should not be included in this category when completing the application under New Part-Time Jobs Created.

Performance Agreement- a written document designed to protect the interest of local taxpayers by putting a businesses' job creation or capital investment commitments in writing and by linking the payment of any financial incentive to the business fulfilling its written commitments (i.e. clawbacks).

Project- means land, building, equipment, facilities, expenditures, and improvements included in the definition of "project" under the Act.

Primary Job- A job that is (1) available at a company for which a majority of the products or services of that company are ultimately exported to regional, statewide, national, or international markets, infusing new dollars into the local economy; and (2)included in an acceptable sector of the North American Industry Classification System (NAICS).

Ineligible Types of Businesses

The 4B Corporation may determine on a case-by-case basis to exclude business activities that they do not believe benefit the health, safety, and welfare of the community or do not meet the 4B Corporation's objectives .

Application Procedure

1. Applicant shall submit a completed application form and provide documentation required by the application. Information submitted to the 4B Corporation may be considered public information and subject to disclosure under the Public Information Act.
2. Submit 10 copies to the Town of Sunnyvale.
3. Copies will be distributed within 5 business days by the Town of Sunnyvale to the 4B Board, Town Manager, to appropriate Town of Sunnyvale department heads for review and comments.

4. The applicant will come before the 4B Board's regular meeting to present the plan and answer questions. The 4B Board will publish notice and hold a public hearing, if appropriate.

5. 4B will review the application and approve the request in whole or in part, or as modified, deny the request or request additional information.

6. 4B will make a recommendation to the Town Council.

7. Council will review application, applicant may appear before the council for a presentation and questions, council will call public hearings if required by law, and council will have final approval.

8. After council approval the applicant will be required to enter into a performance agreement between the applicant and the 4B Corporation as provided by the 4B Corporation.

Criteria for Approving Incentive Requests

In determining whether to offer an incentive using 4B Corporation funds, the project should demonstrate one or more of the following for the benefit of the town:

1. An increase in the Town's Sales Tax revenues
2. An increase in the Town's Ad Valorem Tax revenues or overall appraised valuation
3. An increase in employment in the Town of Sunnyvale.
4. An increase in the Town of Sunnyvale's overall quality of life that will promote economic development.
5. Improvements to the Town's streets, drainage, water, and/or wastewater infrastructure that will facilitate economic growth.

If a project has a direct, positive effect on those items discussed in the guidelines above, the 4B Corporation board will evaluate each project on a number of differing criteria to determine the level of investment, if any. These guidelines are not retroactive to any project. Criteria to be considered may include:

1. Total capital investment in the project including acquisitions, site improvements, building cost and equipment;
2. Number, type, quality, and wage level of jobs created;
3. Other site-specific issues which may have ancillary benefits to the Town of Sunnyvale;
4. Grants provided by other local, regional, or economic development entities;
5. The economic and financial feasibility of the project, including the financial strength and viability of the applicant;
6. Other factors deemed relevant by the 4B Corporation Board of the Town of Sunnyvale.

Key to determining the amount of the incentive is of course the anticipated economic development benefit to the Town of Sunnyvale.

Tab 4

Outlawing Favoritism

The Economics, History, and Law of Anti-Aid Provisions in State Constitutions

Matthew D. Mitchell,
Jonathan Riches, Veronica Thorson,
and Anne Philpot

MERCATUS WORKING PAPER

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Abstract

Since the early days of the republic, state and local governments have periodically embarked on widespread, large-scale attempts to spur economic growth through targeted economic development subsidies. Interestingly, the constitutions of nearly every state in the union contain provisions that, on plain reading, make these sorts of subsidies illegal. In this paper, we review the economics, history, and law of targeted economic development subsidies in the United States, focusing on these constitutional anti-aid provisions. This review demonstrates four things. First, subsidies do not work as advertised. In fact, the best evidence suggests that they undermine economic development, fiscal health, and good governance. Second, constitutional anti-aid provisions may be able to affect the size and scope of subsidies, reducing these negative effects. Third, the details matter; not all anti-aid provisions are effective. And fourth, as special interests work to undermine the effectiveness of anti-aid provisions, such provisions must be renewed and strengthened from time to time. We conclude with suggestions for strong constitutional anti-aid provisions.

JEL codes: H2, H7, K3, N0, N9

Keywords: gift clauses, anti-aid clauses, targeted economic development subsidies

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Outlawing Favoritism

The Economics, History, and Law of Anti-Aid Provisions in State Constitutions

Matthew D. Mitchell, Jonathan Riches, Veronica Thorson, and Anne Philpot

I. Introduction

Policymakers are keenly interested in promoting economic growth, and targeted economic development incentives are an especially popular strategy.[1] These selective privileges are offered to particular firms or industries and can include targeted tax relief, targeted regulatory relief, cash subsidies, loans and loan guarantees, in-kind donations of land and other valuable goods and services, or some combination of the above. Governments can target particular firms in different ways. One tactic is to favor an entire industry through an industry-wide privilege. (An industry-wide tax privilege is particularly common.) Another approach is to favor firms that locate in certain regions or zones or even to create a zone specifically for the benefit of a particular firm. Another tactic is to target specific firms through discretionary funds, often called *deal-closing funds*, administered by governors or other policymakers. Finally, governments might target a firm by rewarding specific behaviors—for example, if the firm undertakes a certain size or variety of investment or hires a certain number of employees.

While targeted subsidies have a long history, recent high-profile cases have renewed debate about their efficacy.[2] In July 2017, for example, Wisconsin announced a 15-year $1.2 billion to $3.6 billion subsidy to Foxconn Technology Group to build a liquid crystal display plant in southeast Wisconsin. And in September of that year, Amazon announced plans for a second headquarters

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[1] This is not the only strategy. Another tactic is to create an environment that is conducive to growth by, for example, ensuring some degree of economic freedom.
[2] David E. Pinsky, "State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach," *University of Pennsylvania Law Review* 111, no. 3 (1963): 266n4. Virginia subsidized woolen cloth producers with bounties of tobacco in 1661.

(HQ2), setting off a 238-city bidding war that culminated in the selection of New York City and Arlington, Virginia, and—ultimately—in the abandonment of the New York site.

Most policymakers believe that subsidies work. One recent survey of 110 mayors found that 84 percent of them believe that targeted incentives are good policy.[3] By one estimate, states and localities spend about $49 billion per year on targeted economic development subsidies.[4] This is about 30 percent of average state and local business tax collections. Moreover, as a share of industry contributions to GDP, incentives have tripled since 1990.[5]

The history of targeted subsidies suggests that they fail as an economic development strategy. Indeed, they seem more likely to invite corruption and government fiscal crisis than to promote sustainable growth. When these problems inevitably arise, state constitutional framers have responded with constitutional anti-aid provisions. By their plain language, these measures would seem to outlaw many of the subsidies that take place today. But as they are repeatedly challenged, these provisions tend to weaken and must periodically be renewed and strengthened.[6]

When properly structured, these provisions do seem to have an effect on the size and scope of subsidies. But the details matter. The most effective anti-aid provisions apply to both state and local governments and restrict aid in all its forms. Anti-aid provisions are also more

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[3] Richard Florida, "Analysis: Why Mayors Keep Trying to Woo Business with Tax Breaks," *MSN*, February 12, 2019.

[4] Timothy Bartik estimates that state and local business incentives totaled $45 billion in 2015. Assuming that this figure has not grown in real terms over the past four years, this is $48.95 billion in 2019 dollars. We may regard this number as somewhat speculative. States are not transparent about subsidies, and researchers do not always agree on what counts as a subsidy. Others have estimated that the amount may be about $32 billion a year (Thomas) or $70 billion (Good Jobs First). Bartik's estimate is not only the median but close to the average. Timothy Bartik, "A New Panel Database on Business Incentives for Economic Development Offered by State and Local Governments in the United States" (W. E. Upjohn Institute for Employment Research, Kalamazoo, MI, 2017); Kenneth P. Thomas, "The State of State and Local Subsidies to Business" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, October 21, 2019); Good Jobs First, "GASB Statement No. 77," accessed October 11, 2017, https://www.goodjobsfirst.org/gasb-statement-no-77.

[5] Bartik, "New Panel Database," 2–3.

[6] It is possible that the provisions were intentionally designed to break down. The late political economist Anthony de Jasay expresses this skeptical view succinctly: "Putting it at its simplest, majorities choose legislation that maximizes their gains from politics, and they learn to choose a constitution that maximizes the scope for such legislation." Anthony de Jasay, *Justice and Its Surroundings* (Indianapolis: Liberty Fund, 2002), 117.

effective if courts apply a number of important tests. The case law suggests that these provisions are strongest where courts require three conditions for public spending. First, expenditures must serve a broad public purpose with direct and nonspeculative public benefits. Second, the government must exercise sufficient and continuing control over all public expenditures. Third, the government must obtain valid consideration for its outlays. In this case, valid consideration is direct, ascertainable, contractually obligatory, and proportional.

In the next section, we show that, despite their longstanding popularity among public officials, the economic case for targeted subsidies is weak. In section III we review the history of targeted state and local subsidies in the United States, concentrating on constitutional efforts to limit them. In section IV, we present an overview of the current legal landscape for anti-aid provisions. In section V we offer recommendations for sound and effective provisions, and in section VI we discuss possible legislation and litigation strategies. In section VII we offer concluding remarks.

II. The Economics of a Targeted Subsidy

It is straightforward to identify the benefits of a targeted economic development subsidy. We can visit new and expanded facilities, count the number of employees they hire, and calculate their contributions to local GDP. Economists may even be able to estimate the multiplier effects associated with the subsidized activity, though this estimation is a rough science. That is, they can estimate the new demand for other products and services that is generated in an area when a new facility and its employees locate there. The economic development offices that dispense subsidies and the firms that receive them are wont to point to these sorts of benefits, and public debates over subsidies often center on these factors. Upon scrutiny, however, subsidies entail benefits that are much smaller than the boosters' oft-quoted estimates suggest. They also entail significant costs that the boosters often ignore. In this section, we briefly discuss why the benefits of subsidies are typically overstated and why the costs of subsidies are understated. We also discuss several difficult-to-measure costs that often go ignored. We conclude that, on net, a subsidy is more likely to undermine economic development than enhance it.[7]

A. The Overstated Benefits of Subsidies

When, in 2017, the state of Wisconsin offered up to $3.46 billion to Foxconn Technology Group to locate a plant in southeast Wisconsin, the company commissioned a study that concluded that the plant would add more than $62 billion to Wisconsin GDP over 15 years.[8] This would seem to be an extraordinary return on the taxpayers' investment. The $62 billion figure included about $39.9 billion in direct impact from the plant's production, as well as an additional $22.5 billion in indirect and induced economic impact, attributable to a multiplier effect. There is nothing wrong in assuming a multiplier effect: any new economic activity tends to create further activity. A new plant will create new demand for inputs, and its workers will create new demand for housing and other goods. However, this framing ignores the opportunity cost of the subsidy. At best, it should be viewed as an estimate of the gross benefits of the subsidy, not as an estimate of the net benefits. Even as an estimate of gross benefits, however, this figure is overstated.

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[7] For a longer discussion of the economics of a subsidy, see Matthew D. Mitchell, Michael D. Farren, Jeremy Horpedahl, and Olivia J. Gonzalez, "The Economics of a Targeted Economic Development Subsidy" (Mercatus Special Study, Mercatus Center at George Mason University, Arlington, VA, 2019). For a review of the empirical literature, see Matthew D. Mitchell, Jeremy Horpedahl, and Olivia J. Gonzalez, "Do Targeted Economic Development Incentives Work as Advertised?" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, forthcoming).

[8] EY Quantitative Economics and Statistics, "Quantifying Project Flying Eagle's Potential Economic Impacts in Wisconsin," *EY*, July 2017.

This is because the estimate implicitly assumes that the subsidy is the determinative factor when a subsidized firm decides where to locate. It rarely is. Consider that when multiple jurisdictions bid for a facility, companies often fail to pick the highest bidder. For example, when Foxconn chose Wisconsin, it was forgoing a larger subsidy from Michigan.[9] And when Amazon chose New York and Virginia for its HQ2 sites, it was forgoing larger offers from Dallas–Fort Worth, Maryland, New Jersey, and Ohio.[10] Firms are willing to forgo even very large incentives because other factors, such as labor costs, business logistics, and access to location-specific resources, tend to have a bigger effect on profit. For example, the costs of locally supplied labor are typically about 14 times larger than state and local business tax costs.[11] A mere 2 percent difference in wages can offset as much as a 40 percent difference in taxes.[12]

A recent review of 34 academic studies concluded that subsidies "probably tip somewhere between 2 percent and 25 percent of incented firms toward making a decision favoring the location providing the incentives."[13] These estimates are derived from past experiences, and it is possible that larger subsidies may increase the probability of tipping the balance. But the implicit assumption that a subsidy is decisive with 100 percent certainty is

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[9] Jason Stein, "Michigan Offered Foxconn $3.8B, Still Lost to Wisconsin," *Milwaukee Journal Sentinel*, October 19, 2017.

[10] The site in Arlington, Virginia, entailed $1.05 billion in subsidies, and the New York City site entailed $3 billion. The Cleveland, Ohio, location would have entailed $3.5 billion; Newark, New Jersey, $7 billion; and Maryland $8.5 billion.

[11] Timothy Bartik, *Who Benefits from State and Local Economic Development Policies?* (Kalamazoo, MI: W. E. Upjohn Institute, 1991), 61. These figures likely vary by sector. See James Papke, "Interjurisdictional Business Tax Cost Differentials: Convergence, Divergence and Significance," *Tax Notes* 9, no. 4 (1995): 1701–11.

[12] It is important to note that the local cost of living can vary by as much as a factor of two across the United States. Leah Beth Curran, Harold Wolman, Edward W. Hill, and Kimberly Furdell, "Economic Wellbeing and Where We Live: Accounting for Geographical Cost-of-Living Differences in the US," *Urban Studies* 43, no. 13 (December 1, 2006): 2443–66; G. Cornia, W. Testa, and F. Stocker, "State-Local Fiscal Incentives and Economic Development" (Urban and Regional Development Series Number 4, Academy of Contemporary Problems, Columbus, OH, 1978).

[13] Timothy J. Bartik, "'But For' Percentages for Economic Development Incentives: What Percentage Estimates Are Plausible Based on the Research Literature?" (working paper, W. E. Upjohn Institute for Employment Research, Kalamazoo, MI, 2018). For two other studies with similar results, see Dennis A. Rondinelli and William J. Burpitt, "Do Government Incentives Attract and Retain International Investment? A Study of Foreign-Owned Firms in North Carolina," *Policy Sciences* 33, no. 2 (2000): 181–205; Nathan Jensen, "Bargaining and the Effectiveness of Economic Development Incentives: An Evaluation of the Texas Chapter 313 Program," *Public Choice* 177, no. 1 (2018): 29–51.

simply not realistic. This should cause us to radically revise downward the expected gross benefits attributed to any given subsidy. If a bet pays $100 with a 25 percent probability of winning, it is only worth $25. Similarly, if a subsidized factory is expected to add, say, $1.5 billion to Wisconsin's economy over 15 years and if we believe that there is a 25 percent chance that the subsidy was decisive, then the expected value of the subsidy is $375 million, not $1.5 billion.[14]

B. The Often-Ignored Costs of Subsidies

While the gross benefits of a targeted economic development subsidy are typically overstated, the gross costs are typically ignored. In fact, the gross benefits are often presented as if they were the *net* benefits. Consider, again, the example of a subsidized plant that is expected to add $1.5 billion to Wisconsin's GDP over 15 years. Assume that the state offered this plant $150 million in subsidies. To obtain the net benefits of the subsidy, we must account for the economic cost of removing this $150 million from the economy in order to fund the subsidy. And just as the plant can be expected to have multiplier effects that spur other economic activity, so too would the money that funds the subsidy, if left in the hands of taxpayers. Worse, because taxes discourage the economic activities to which they apply, taxation entails additional costs that economists call deadweight losses.[15]

According to the range of estimates, if a state raises its taxes by 10 percent, then over the long run, economic activity will tend to decline by about 5 percent, with a plausible range

[14] $375 million is 25 percent of $1.5 billion. Note that we are not saying that the plant itself is worth $375 million. We are taking as given that it will add $1.5 billion to state GDP. Instead, we are saying that the expected gross contribution of the subsidy to that $1.5 billion is only $375 million. By way of analogy, if recovery from a certain disease is worth $150,000 to a patient but if there is only a 25 percent chance that a certain treatment caused the recovery to come about, then in an expectational sense, the treatment is worth $37,500, not $150,000.

[15] The exception is a "head tax," which is not applied to economic activity but is instead applied to all people, regardless of their economic activities.

between 1.5 percent and 8.5 percent.[16] If we apply this range to the higher taxes implied by a $150 million subsidy from the state of Wisconsin, the 15-year gross costs of the subsidy are likely to be about $1.25 billion, with a plausible range between $375 million and $2.1 billion.[17] In table 1, we combine the range of gross benefits and gross costs to yield a range of expected *net* benefits from such a subsidy. The range of gross costs encompasses low, average, and high deadweight losses. The range of gross benefits encompasses scenarios in which the subsidy determined the plant location with 2 percent, 25 percent, 50 percent, and 100 percent certainty. We regard the 100-percent-certainty scenario as unrealistic but present it for the sake of comparison.

The 12 numbers in the lower-right corner of the table indicate the wide range of possible net economic effects. Under the best scenario, the subsidy was decisive with 100 percent certainty and the deadweight loss from taxation is low. In this case, we estimate the subsidy will result in a net gain to the Wisconsin economy of $1.125 billion over 15 years. The worst scenario occurs when the subsidy was only decisive with 2 percent certainty and the deadweight loss from taxation is on the high end of the spectrum. In this case, we estimate the subsidy will result in a net loss of $2 billion over 15 years. In public debates over subsidies, the wide range of scenarios and the possibility of downside risk are rarely acknowledged.

Which of these scenarios is the most realistic? On the cost side, it is reasonable to use the best estimate of a $1.249 billion gross loss over 15 years. On the benefit side, we may never know whether a given subsidy was decisive. But, as we have already noted, the idea that a

[16] Timothy Bartik, *Who Benefits from Economic Development Incentives? How Incentive Effects on Local Incomes and the Income Distribution Vary with Different Assumptions about Incentive Policy and the Local Economy* (Kalamazoo, MI: W. E. Upjohn Institute for Employment Research, 2018), 10.

[17] A $150 million subsidy over 15 years implies that Wisconsin state taxes will be about 0.05 percent higher than otherwise. Applying the deadweight loss estimate implies that the Wisconsin economy will be about 0.023 percent smaller than otherwise. We assume that the full costs of taxation do not materialize for 7 years. Given the size of the Wisconsin economy, the cumulative effect over 15 years is about $1.25 billion. For more details on this calculation with application to the Foxconn subsidy, see Mitchell et al., "Targeted Economic Development Subsidy."

subsidy is decisive with 100 percent certainty is simply not realistic. And though the peer-reviewed evidence suggests that most subsidies are decisive with 2 to 25 percent probability, a 50 percent chance of decisiveness is not out of the question with larger subsidies. Thus, it seems reasonable to regard the highlighted cells of the table as the most realistic scenarios. Under none of these scenarios would this hypothetical subsidy be expected to yield net positive effects for the Wisconsin economy over the long run.

Table 1. Net Expected Value of Subsidies to a Project That Will Add $1.5 Billion to GDP

			Range of Expected Gross Benefits ($ millions)			
			100% Decisive 1,500	50% Decisive 750	25% Decisive 375	2% Decisive 30
Range of Expected Gross Costs	Low DWL of Taxation	−375	1,125	375	0	−345
	Best Estimate of DWL of Taxation	−1,249	251	−499	−874	−1,219
	High DWL of Taxation	−2,123	−623	−1,373	−1,748	−2,093

Notes: The shaded values represent the most realistic range of estimates of the average net subsidy effect. The net subsidy equals the estimated gain from the subsidy minus the estimated loss from taxation. For details on methodology, see Matthew D. Mitchell, Michael D. Farren, Jeremy Horpedahl, and Olivia J. Gonzalez, "The Economics of a Targeted Economic Development Subsidy" (Mercatus Special Study, Mercatus Center at George Mason University, Arlington, VA, 2019).

C. The Difficult-to-Measure Costs of Subsidies

The range of scenarios reported in table 1 excludes additional difficult-to-quantify costs that can arise with a subsidy. For instance, subsidies may encourage too much of the subsidized activity. There is an optimal size to a factory floor, an optimal number of salespeople, and an optimal location for any plant.[18] With a subsidy, however, a firm externalizes some of its costs onto taxpayers, which can lead it to build a factory that is larger than optimal, to hire more salespeople than it should, or to build in a suboptimal location. Indeed, economists have long emphasized that communities prosper when they specialize based on their comparative advantage. That is, they should specialize in producing those products and services that they can produce at a lower opportunity cost than others.[19] But if a firm would not locate a certain facility in a location *but for* a subsidy, that is a strong indication that the firm *should not* locate the facility there. Adam Smith once noted that with enough greenhouses Scotland could produce wine, though only at 30 times the cost of comparable wine produced elsewhere.[20] By the same logic, Wisconsin could induce Dole to locate pineapple production on the shores of Lake Michigan. This, for obvious reasons, would not be a wise investment.

To compound the problem, a firm that would not locate in a certain area but for a subsidy is also likely to be especially sensitive to future subsidies offered by other jurisdictions that might lure it away.[21]

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[18] To put it in technical terms, the optimal scale is that at which marginal cost just equals marginal benefit. Any units of production beyond that point consume more value than they create.

[19] David Ricardo, *On the Principles of Political Economy, and Taxation* (n.p.: J. Murray, 1817).

[20] Adam Smith, *The Wealth of Nations* (n.p.: Simon & Brown, 1776), book 4, chap. 2, para. 15.

[21] Terry F. Buss, "The Case against Targeted Industry Strategies," *Economic Development Quarterly* 13 (July 25, 2016): 350.

Subsidies can also give a firm an anticompetitive advantage, allowing it to ignore customers or to be lax with cost containment, a phenomenon known as x-inefficiency.[22] Furthermore, subsidies tend to lock in inefficient technologies and business practices, making markets and workers less adaptable to change. When governments dispense subsidies, firms expend resources seeking these privileges, a socially wasteful phenomenon known as rent-seeking.[23] Subsidies can also lead to the misallocation of talent as they encourage entrepreneurs to develop new and different ways of obtaining privilege rather than new and different ways of pleasing customers and economizing on resources.[24]

Beyond these economic concerns, there are philosophical and social problems with subsidies. They tend to favor the wealthy and well connected at the expense of the poor and unknown.[25] Moreover, they may be associated with perverse cultural attitudes toward markets. Recent research, for example, finds that leaders of privileged firms are more likely to think the US market is too free, that government should have a more active role in the economy, that favoritism is compatible with free markets, and that government privilege or knowledge of influential policymakers is the most important factor in business success.[26]

Even if a subsidy did not entail any of the problems we have discussed, it would still at best be a zero-sum game—that is, when one state lures a firm with a subsidy, its gain is offset by

[22] Harvey Leibenstein, "Allocative Efficiency vs. 'X-Efficiency,'" *American Economic Review* 56, no. 3 (June 1, 1966): 392–415; Matthew Mitchell, *The Pathology of Privilege: The Economic Consequences of Government Favoritism* (Arlington, VA: Mercatus Center at George Mason University, 2012).

[23] Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft," *Economic Inquiry* 5, no. 3 (June 1, 1967): 224–32; Matthew D. Mitchell, "Rent Seeking at 52: An Introduction to a Special Issue of *Public Choice*," *Public Choice* 181, no. 1 (October 1, 2019): 1–4.

[24] William J. Baumol, "Entrepreneurship: Productive, Unproductive, and Destructive," *Journal of Political Economy* 98, no. 5 (October 1, 1990): 893–921; Kevin M. Murphy, Andrei Shleifer, and Robert W. Vishny, "The Allocation of Talent: Implications for Growth," *Quarterly Journal of Economics* 106, no. 2 (May 1, 1991): 503–30.

[25] Daniel Aobdia, Allison Koester, and Reining Petacchi, "Political Connections and Government Subsidies: State-Level Evidence," *SSRN Electronic Journal*, March 2018, available at https://www.bsg.ox.ac.uk/sites/default/files/inline-files/Petacchi_0.pdf.

[26] Matthew D. Mitchell with Scott Eastman and Tamara Winter, "A Culture of Favoritism" (Mercatus Special Study, Mercatus Center at George Mason University, Arlington, VA, March 27, 2019).

another's loss. This has led many to conclude that state subsidies are akin to a mutually destructive arms race or to a prisoner's dilemma (a term borrowed from game theory). In these sorts of situations, it is individually rational for people to pursue certain actions even though they lead to outcomes that make everyone—including themselves—worse off.[27]

The theoretical case against subsidies is supported by the empirical record. Since 1990 there have been more than 100 academic studies of targeted subsidies.[28] Most of these studies evaluate subsidies in light of their effects on the privileged firms, regions, or industries. But subsidies are rarely sold as a means to boost the well-being of these narrowly targeted interest groups. Instead, subsidies are typically sold as a means to benefit the communities that pay for them.[29] Among those studies that evaluate subsidies in light of their effects on these broader communities, the vast majority find little to no support for subsidies.[30]

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[27] Chris Farrell, "The Economic War among the States: An Overview," *The Region*, June 1, 1996; Melvin L. Burstein and Arthur J. Rolnick, "Congress Should End the Economic War among the States," *The Region*, January 1, 1995, 3–20; Matthew Schaefer, "State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response," *New Mexico Law Review* 28, no. 2 (1998): 303–42; Stephen Ellis and Cynthia Rogers, "Local Economic Development as a Prisoners' Dilemma: The Role of Business Climate," *Review of Regional Studies* 30, no. 3 (2000): 315–30; Daniel J. Wilson, "Beggar Thy Neighbor? The In-State, Out-of-State, and Aggregate Effects of R&D Tax Credits," *Review of Economics and Statistics* 91, no. 2 (May 2009): 431–36; Nathan M. Jensen, Edmund Malesky, Mariana Medina, and Ugur Ozdemir, "Pass the Bucks: Credit, Blame, and the Global Competition for Investment," *International Studies Quarterly* 58, no. 3 (September 1, 2014): 433–47; Nathan M. Jensen, Edmund J. Malesky, and Matthew Walsh, "Competing for Global Capital or Local Voters? The Politics of Business Location Incentives," *Public Choice* 164, no. 3–4 (September 1, 2015): 331–56; Nathan Jensen and Edmund J. Malesky, *Incentives to Pander: How Politicians Use Corporate Welfare for Political Gain* (New York: Cambridge University Press, 2018).

[28] Mitchell, Horpedahl, and Gonzalez, "Work as Advertised."

[29] See Mitchell, Horpedahl, and Gonzalez, "Work as Advertised," for more details. But note that from Alexander Hamilton to Donald Trump, policymakers who advocate for subsidies almost universally speak of the benefits to the broader community.

[30] Again, see Mitchell, Horpedahl, and Gonzalez, "Work as Advertised." Among those studies that evaluate subsidies for their effects on the broader community, about two-thirds find either mixed or insignificant effects. Just 16 percent find positive effects, while 20 percent find negative effects for the broader community.

Yet despite the economic case against subsidies, they persist. Public choice models explain why.[31] Subsidies confer highly visible benefits on concentrated, politically organized special interests, while their costs are less obvious and spread across diffuse, politically unorganized taxpayers, consumers, and small businesses.[32] This pattern of concentrated benefits and diffuse costs explains the persistence of many inefficient policies.[33] The problem is compounded by the fact that voters are often ignorant or confused about the technical aspects of economic development policy.[34] As a result, political leaders may misclassify costs as benefits and believe that a project is more valuable because it involves a large investment or requires a large workforce.[35]

Given the persistence and prevalence of targeted subsidies despite the economic case against them, institutional constraints—such as state anti-aid provisions—are needed to limit their use.

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[31] Public choice is the economic study of political markets. For an overview, see Randy T. Simmons, *Beyond Politics: The Roots of Government Failure* (Oakland, CA: Independent Institute, 2011); Matthew D. Mitchell and Peter J. Boettke, *Applied Mainline Economics: Bridging the Gap between Theory and Public Policy*, 1st ed. (Arlington, VA: Mercatus Center at George Mason University, 2017).

[32] As the economists Robert Ekelund and Robert Tollison have put it, "The undergirding principle of the interest-group approach is nonetheless organizational costs. The theory begins and ends with this principle. Organized groups gain political wealth transfers at the expense of unorganized or less-well-organized groups." Robert B. Ekelund Jr. and Robert D. Tollison, "The Interest-Group Theory of Government," in *The Elgar Companion to Public Choice*, ed. William F. Shughart Jr. and Laura Razzolini, 357–78 (Cheltenham, UK: Edward Elgar, 2001).

[33] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 2nd ed. (Cambridge, MA: Harvard University Press, 1965); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 40th anniv. ed. (New York: W. W. Norton, 1969); Peter Schuck, *Why Government Fails So Often: And How It Can Do Better* (Princeton, NJ: Princeton University Press, 2014).

[34] Because their votes are unlikely to make a difference in any election, voters tend to be rationally ignorant about policy and its effects. Worse, they have little incentive to spend time thinking about public policy, causing irrational notions to persist. Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957); Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*, new ed. (Princeton, NJ: Princeton University Press, 2008).

[35] Barry R. Weingast, Kenneth A. Shepsle, and Christopher Johnsen, "The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics," *Journal of Political Economy* 89, no. 4 (August 1, 1981): 642–64.

III. The History of Subsidies and Anti-Aid Provisions in State Constitutions

The history of subsidies and the evolution of public aid restrictions in state constitutions demonstrate that subsidies pose a threat to economic development, fiscal health, and good governance. They also show that anti-aid provisions can restrain the size and scope of subsidies, but the details matter, and periodically these provisions must be strengthened.

The first wave of restraints emerged in the 1840s. Ill-conceived and mismanaged infrastructure projects created large state debts in the 1830s, and following the panic of 1837, these burdens became unsustainable, sending eight states and one territory into default.[36] The states requested a federal bailout but were denied. In the years that followed, many states adopted constitutional fiscal reforms, including restrictions on public spending for private projects. These reforms worked for a time. But as the panic faded from memory in the Reconstruction era, localities—which were often not restrained by constitutional limits—boosted their own funding for railroads and other private projects.[37] After another fiscal crisis in 1873, a second wave of anti-aid reforms closed the locality loophole.[38] Then, starting in the Great Depression, both courts and legislatures began once again to permit public spending for private projects so long as lawmakers or judges could construct some semiplausible rationale that spending would eventually benefit the public at large.[39]

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[36] Jonathan Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (Cambridge: Cambridge University Press, 2006), 72–74; John Joseph Wallis, "American Government Finance in the Long Run: 1790 to 1990," *Journal of Economic Perspectives* 14, no. 1 (2000): 61–62.
[37] G. Alan Tarr, *Understanding State Constitutions* (Princeton, NJ: Princeton University Press, 1998), 114.
[38] Tarr, *Understanding State Constitutions*, 114.
[39] See, generally, James T. Bennett, *Corporate Welfare: Crony Capitalism That Enriches the Rich* (New Brunswick, NJ: Transaction, 2015), 79–121.

A. The Long History of Favoritism

Governments have favored particular firms, industries, and interests for centuries. And for almost as long, economists have been critical of the practice.[40] At the time of the American founding, what Adam Smith dubbed "mercantilism" had dominated European economic policy for nearly three centuries. Like modern-day economic development strategies, mercantilism aimed to promote certain firms or industries through subsidies, tax privileges, and regulatory protections, and this European practice had been transplanted into the colonies. In 1661, for example, Virginia began subsidizing woolen cloth producers with bounties of tobacco.[41] And during the Washington administration, Secretary of the Treasury Alexander Hamilton famously called for the systematic promotion of manufacturing through tariffs and subsidies.[42]

Yet despite its long and entrenched practice, early US policymakers showed ambivalence toward mercantilism, especially at the national level. Hamilton's plan was rejected by Congress in 1791, and when it later resurfaced as Henry Clay's "American system," that too was largely rejected. Thus, for the first several decades of the republic, neither the states nor the federal government was active in promoting particular firms or industries.[43]

[40] For an early critique, see Adam Smith's *Wealth of Nations*. For more recent critiques, see Douglass C. North, John Joseph Wallis, and Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History*, 1st ed. (Cambridge: Cambridge University Press, 2009); Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, 1st ed. (New York: Crown Business, 2012).

[41] Pinsky, "State Constitutional Limitations," 266n4.

[42] Alexander Hamilton, "Report on the Subject of Manufactures," in *The Industrial and Commercial Correspondence of Alexander Hamilton Anticipating His Report on Manufactures* (Chicago: A. W. Shaw, 1928 [1791]).

[43] Some of this opposition likely arose from the unique circumstances of the American founding. The much-reviled Tea Act of 1773, for example, was a mercantilist tax privilege for the East India Tea Company, a British government-chartered firm that already enjoyed several regulatory privileges. The founding era also coincided with the birth of classical economics, which rejected the earlier mercantilist theories.

B. Public Spending on Private Ventures

Beginning in the 1820s, state spending changed in both size and scope. First, states—especially those in the South—began to invest in private banks.[44] Then, following the rejection at the national level of John Quincy Adams's proposals to spend heavily on "internal improvements" (a plan modeled after Henry Clay's proposed American system), a number of states began to take it upon themselves to fund infrastructure projects.

The success of the publicly funded Erie Canal, which was completed in 1825, provided further impetus. It inspired two decades of state-supported railroads, turnpikes, and canals across the nation.[45] State governments hoped to stimulate their economies through investment in private firms, especially as interstate competition for economic development escalated.[46] During this era, "railroad promoters encouraged towns to bid against each other for influence in locating the railroads."[47] And towns obliged because railroads were believed to have "great potential for public benefit"[48] and to be "critical for economic development since the existence of the railroad would attract other economic enterprise."[49] Given the Jacksonian era's disdain for national spending on such projects, it was the states that took the lead.[50] But, as Columbia Law School's Richard Briffault has put it, "Many of these projects blurred public and private lines, with states investing in private firms, or providing grants, loans and loan guarantees to private companies."[51]

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[44] Wallis, "American Government Finance," 67; Rodden, *Hamilton's Paradox*, 58.
[45] Richard Briffault, "Disfavored Constitution: State Fiscal Limits and State Constitutional Law," *Rutgers Law Journal* 34, no. 4 (Summer 2003): 911.
[46] Briffault, "Disfavored Constitution, " 911.
[47] Brian Libgober, "The Death of Public Purpose (And How to Prevent It)" (Harvard Law School Discussion Paper, Cambridge, MA, March 2016), 13.
[48] Nicholas J. Houpt, "Shopping for State Constitutions: Gift Clauses as Obstacles to State Encouragement of Carbon Sequestration," *Columbia Journal of Environmental Law* 36 (2011): 381.
[49] Schaefer, "State Investment Attraction," 342.
[50] See, for example, Jackson's famous veto of the Maysville Road. The president not only noted that the project was "purely local" but also warned of "artful expedients to shift upon the Government the losses of unsuccessful private speculation." Andrew Jackson, "Veto Message," American Presidency Project (website), May 27, 1830.
[51] Briffault, "Disfavored Constitution," 911.

Though the political appetite for locally funded infrastructure spending was high, the appetite for taxes to pay for this spending was low. Early on, states had relied on property taxes.[52] As they began earning income on private projects, however, confidence in infrastructure investments grew, and some states reduced or eliminated their property taxes. By 1835, Alabama, Georgia, Maryland, Massachusetts, New York, Rhode Island, Pennsylvania, and South Carolina had all eliminated their state property taxes.[53] Direct taxation—including property, poll, and income taxation—had all but disappeared.[54] In its place, the main sources of state revenue became sales of public lands, returns on private investments, and proceeds from issuing bank charters.[55] The economic historian John Joseph Wallis has termed this the era of "taxless finance."[56] Reminiscent of modern loan guarantees, under taxless finance, taxpayers took a loss on such a project as a canal, a road, or a bank only if it failed.[57] And evidently, policymakers everywhere convinced themselves that failure was impossible. As a delegate to the Maryland Reform Convention reflected two decades later, "Every man dreamed he was about to reach a new *El Dorado*. Taxation was to exist no longer—public debt was to become an obsolete idea."[58]

State debt did not become an obsolete idea. In fact, it grew substantially. At the beginning of the 1820s, most states had little or no debt.[59] But between 1836 and 1839, the states incurred more debt than they had in their entire previous history.[60] Between 1810 and 1840, state debt per

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[52] Wallis, "American Government Finance," 67.
[53] Wallis, 67.
[54] Rodden, *Hamilton's Paradox*, 57.
[55] Rodden, 57.
[56] John Joseph Wallis, "Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852," *Journal of Economic History* 65, no. 1 (2005): 213.
[57] Wallis, "Constitutions, Corporations, and Corruption," 213.
[58] Quoted in Carter Goodrich, "The Revulsion against Internal Improvements," *Journal of Economic History* 10, no. 2 (1950): 153.
[59] Rodden, *Hamilton's Paradox*, 57.
[60] Rodden, 58.

capita rose 144 percent.[61] Since the federal government paid off its debts entirely in 1835 (a feat that would never again be repeated) and thus stopped issuing bonds, foreign investors eagerly snatched up state bonds, not always recognizing the distinction between the federal and state governments.[62] By the late 1830s, state debt had soared to eight times all federal and local debts combined.[63] In 1830, Arkansas, Florida, Illinois, Indiana, Michigan, and Mississippi had no debt at all. But a decade later, their combined general obligation debt was more than $44 million (in current dollars).[64] As collateral against these debts, the states relied on the safety net provided by the federal government's implied support and the option of resuming property tax collection.[65]

Because these ventures permitted private actors to gamble with public money—in other words, they privatized gains and socialized losses—there was a strong incentive to pursue risky projects. As the Rutgers University law professor David Pinsky has put it,

> There was practically no public control over the planning of the railroad project[s] or over the actual expenditures of publicly contributed funds. These functions were completely delegated to private corporate officials. To phrase it more dramatically, but no less accurately, there was a total abdication of public responsibility. Not infrequently, railroad planning was so speculatively conceived and incompetently executed that the proposed line was never completed. Waste and dishonesty in the expenditure of funds led to corporate insolvency and abandonment of routes.[66]

The unsustainable nature of these public investments in private ventures was laid bare by the panic of 1837 and the significant recession that lasted from 1839 to 1843.[67] As the economy contracted, infrastructure projects across the country—marked, as Richard Briffault has put it,

[61] Wallis, "American Government Finance," 61, 65.
[62] Horace Secrist, "An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," *Bulletin of the University of Wisconsin, Economics and Political Science Series* 8, no. 1 (1914): 17.
[63] Wallis, "American Government Finance," 62.
[64] Dale F. Rubin, "Constitutional Aid Limitation Provisions and the Public Purpose Doctrine," *Saint Louis University Public Law Review* 12 (1993): 156.
[65] The federal government had bailed out state Revolutionary War debts in 1790 and again repaid some state debts following the War of 1812. Then, in 1836, Congress agreed to pay $1.5 million in debts incurred by the District of Columbia. Many believe that these actions caused creditors to assume that the federal government would always bail out state governments. Rodden, *Hamilton's Paradox*, 55–60; Thomas J. Sargent, "Nobel Lecture: United States Then, Europe Now," *Journal of Political Economy* 120, no. 1 (February 2012): 15.
[66] Pinsky, "State Constitutional Limitations," 280.
[67] Rodden, *Hamilton's Paradox*, 58.

"by waste, overbuilding, and mismanagement"—failed to generate expected revenues.[68] By 1842, eight states and one territory had defaulted.[69] Four states—Arkansas, Florida, Michigan, and Mississippi—repudiated nearly $14 million in debt.[70] Out of these circumstances, the first wave of state constitutional anti-aid provisions was born.

C. First Wave of Anti-Aid Clauses: Restraining the States

As state fiscal positions eroded, support for federal assumption of state debts grew, especially among politicians representing the most heavily indebted states. The appropriately named William Cost Johnson, a representative from Maryland, headed a committee that ultimately recommended federal assumption of the state debts.[71] First and foremost, the committee argued, a bailout was justified by the precedents set in the federal bailouts following the Revolutionary War, the War of 1812, and the bailout of the District of Columbia in 1836.[72] The committee's proposal, however, was met with stiff resistance, especially among representatives from the handful of states that had not incurred massive debts. Ultimately, the assumption proposal was tabled.

Unable to shift their debts onto federal taxpayers, states were left to clean up their own messes. And one important consequence was that citizens and local leaders mobilized to prevent future messes. One approach, spearheaded by Rhode Island in 1842, was to adopt a

[68] Briffault, "Disfavored Constitution," 911.
[69] The defaulting states were Arkansas, Illinois, Indiana, Louisiana, Maryland, Michigan, Mississippi, Pennsylvania, and the territory of Florida. Rodden, *Hamilton's Paradox*, 59.
[70] Benjamin Ulysses Ratchford, *American State Debts* (Durham, NC: Duke University Press, 1941), 114. As Joshua Bates, the umpire of the Anglo-American claims convention of 1853, put it, "It is to be hoped that sooner or later the people of Florida will discover that honesty is the best policy; and that no State can be called respectable that does not honorably fulfill its engagements" (111).
[71] Rodden, *Hamilton's Paradox*, 60.
[72] Rodden, 60.

constitutional amendment limiting debt accumulation.[73] By 1857, almost every state in the union had such a provision.[74] Another approach was to limit internal improvements.[75]

Since the state debt crisis was brought on by government-granted privileges to private companies, a number of these reforms specifically targeted such privileges. Many states, for example, adopted general incorporation clauses. These forbade the special incorporation of individual firms by government charters, which often entailed privileges and incentives.[76] Others sought to curb corruption by forbidding bank employees to serve in the legislature.[77] Several states adopted antimonopoly clauses, forbidding government-created monopolies.[78] And some adopted equality guarantees, which eliminated grants of special privilege.[79] All of these reforms were meant to realize the aspirations for impartial government that were already a part of 18th-century state constitutions.[80] Pennsylvania's 1776 constitution, for example, had already asserted that "government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men."[81]

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[73] Rubin, "Constitutional Aid Limitation Provisions," 156.
[74] Secrist, "Economic Analysis," 54.
[75] These provisions are beyond the scope of this article. For those interested, see Pinsky, "State Constitutional Limitations," 281; Goodrich, "Revulsion against Internal Improvements."
[76] Tarr, *Understanding State Constitutions*, 112.
[77] See the Virginia Constitution of 1851, for example. Tarr, 112.
[78] Tarr, 111; Steven G. Calabresi and Larissa C. Leibowitz, "Monopolies and the Constitution: A History of Crony Capitalism," *Harvard Journal of Law and Public Policy* 36, no. 3 (June 22, 2013): 1067.
[79] Tarr, *Understanding State Constitutions*, 111; Robert F. Williams, "Equality Guarantees in State Constitutional Law (Symposium: The Emergence of State Constitutional Law)," *Texas Law Review* 62, no. 6 & 7 (March/April 1985): 1195.
[80] Tarr, *Understanding State Constitutions*, 111.
[81] Pennsylvania Constitution of 1776, Declaration of Rights, art. 5, 1776.

A particularly important strategy—the focus of this study—was to adopt constitutional limitations on public aid to private entities.[82] As the law professor Dale Rubin has put it, "The impetus for the adoption of both state and local constitutional aid limitation provisions was the untrammeled and indiscriminate borrowing by governmental entities and the ruthless profiteering by private corporations and individuals."[83]

Moreover, the aim of public aid limitations was, as one delegate to the Ohio conventions of 1850 and 1851 put it, "to see the State Government brought back to its simple and appropriate functions, [leaving] railroad, canal, turnpike and other corporate associations, to get along on their own credit, without any connection or partnership with the State whatever."[84] And as Josiah Scott of the Ohio Supreme Court put it, these provisions aimed to prohibit the union of public and private capital: "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."[85]

Despite their early adoption by a few states in the 1840s, it took more than a decade for a majority of states to adopt anti-aid provisions.[86] These provisions generally took three forms. The most common was a *credit clause*. It forbade the government to loan its credit to a private individual, association, or corporation. A variant of this clause first appeared in the Rhode Island Constitution of 1842, requiring electoral approval for such deals. Shortly thereafter, New Jersey (1844) and New York (1846) adopted their own credit clauses, but these forbade the lending of

[82] These approaches were not mutually exclusive. Rhode Island's debt clause read, "The general assembly shall have no power hereafter, without the express consent of the people, to incur state debt to an amount exceeding 50,000 dollars, except in time of war, or in case of insurrection; Nor shall they in any case, without such consent, pledge the faith of the state for the payment of the obligations of others." Rhode Island Constitution of 1842, art. 4, sec. 13, 1842.
[83] Rubin, "Constitutional Aid Limitation Provisions," 156.
[84] Quoted in Kermit L. Hall and Peter Karsten, *The Magic Mirror: Law in American History*, 2nd ed. (New York: Oxford University Press, 2008), 103–4.
[85] Josiah Scott, Walker v. City of Cincinnati, 21 Ohio St. 14 (1871).
[86] Rubin, "Constitutional Aid Limitation Provisions," 144n5.

credit with or without electoral approval.[87] The second type of anti-aid provision was a *stock clause*, which forbade the government from becoming a stockholder in any corporation. This was pioneered by Iowa in 1846.[88] The final provision was a *gift clause*, which forbade the government from granting loans or donations to any individual, association, or corporation. This provision first appeared in Pennsylvania's 1873 constitution.[89]

The spread of anti-aid provisions was by no means uniform. Some states adopted just one provision, some two, and others all three. Moreover, especially in their earliest iterations, public anti-aid provisions did not necessarily apply to substate governments, such as counties, cities, or school districts.[90] Despite these variations, however, by 1900 some form of public aid limitation had been adopted by a large majority of states.[91] Even those that had withstood the panic of 1837 without defaulting adopted these provisions to avoid the fate of their neighbors.[92]

The case for anti-aid provisions was both moral and practical. During the 1850 and 1851 debates at Indiana's constitutional convention, Representative A. F. Morrison offered both types of arguments. On moral grounds, he asserted, "There is no justice in the principle that the property or the money of the people should be taken to make profits for corporations." And on the practical side, he articulated the public choice concerns as well as any modern economist might. Publicly supported internal improvements, he said, were "a system of oppression inflicted by the representatives of the people . . . by means of a regular system of log rolling. . . . It is well known how these schemes are got along in the Legislature. Corporations are always well

[87] Pinsky, "State Constitutional Limitations," 278n70.
[88] Pinsky, 278n71.
[89] Pinsky, 279n77.
[90] Pinsky, "State Constitutional Limitations," 280.
[91] Pinsky, 280.
[92] Tarr, *Understanding State Constitutions*, 112.

represented there, and the people have no knowledge of what is going on until they are entrapped by them."[93]

In the decades following the advent of these anti-aid provisions, state aid to private corporations did not end altogether, but it was sharply curtailed.[94] As Wallis has put it, "The tide of events had turned against state activity."[95] Following the adoption of these provisions, there was a dramatic change in state and local fiscal policy; states reduced their reliance on debt finance, and more activity shifted from state to local governments.[96] In 1841, the states' share of all government debt was 86.4 percent, but by 1902, it was 7.0 percent.[97]

D. Second Wave: Restraining Localities

The first wave of anti-aid provisions did not always apply to localities.[98] Consequently, as states curtailed their direct support of private interests, localities ramped it up. In many cases local governments began to take on the sorts of risks that states had once assumed. Sometimes states abetted this local circumvention of anti-aid provisions. The constitutional scholar Alan Tarr writes, "From 1866 to 1873, legislatures approved over eight hundred proposals to grant local aid to railroad companies. New York, Illinois, and Missouri together authorized over $70 million worth of aid."[99]

As with the state aid that had preceded it, much of this local aid was financed through government borrowing or government guarantees of private debt. Thus, as the states' share of all government debt was declining, localities' share rose, going from 11.4 percent in 1841 to

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[93] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana, 1850–1851* (Indianapolis: A. H. Brown, 1850), 651–52.
[94] Wallis, "American Government Finance," 70.
[95] Wallis, 70.
[96] Wallis, 66–70.
[97] Wallis, 66.
[98] Houpt, "Shopping for State Constitutions," 381; Pinsky, "State Constitutional Limitations," 278–80.
[99] Tarr, *Understanding State Constitutions*, 114.

57.1 percent in 1902.[100] Similarly, while local government revenue per capita had been about 40 percent greater than state revenue per capita in 1840, by 1902 it was 260 percent greater.[101]

As before, the precarious fiscal position of governments—this time, local governments—was laid bare by a national economic contraction. As the panic of 1873 gave way to a deep and lasting economic depression, property values plummeted, and railroads began to default on their debts. By 1874, about 25 percent of all railroad bonds were in default.[102] Next, the municipalities that had guaranteed many of these debts began to default on their own obligations en masse. It is estimated that roughly 20 percent of all municipal debt obligations were defaulted on in the 1870s.[103]

These defaults prompted a second wave of constitutional reforms, this one extending anti-aid provisions to local governments.[104] While a few states (Indiana in 1851, Nevada in 1864, Georgia in 1868, and Illinois in 1870) had already extended their anti-aid provisions to localities, the municipal debt crisis of the 1870s prompted more than a dozen more states to do so over the course of the next decade and a half.[105]

As Colorado acquired statehood in the midst of this economic crisis, its 1876 constitution and its convention are worth noting.[106] In their Address to the People, the delegates there asserted that no other issue had caused "more anxiety and concern than the troublesome and

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[100] Wallis, "American Government Finance," 66.
[101] Wallis, 70.
[102] John A. Dove, "Financial Markets, Fiscal Constraints, and Municipal Debt: Lessons and Evidence from the Panic of 1873," *Journal of Institutional Economics* 10, no. 1 (2014): 76.
[103] C. H. Chatters, *Municipal Debt Defaults: Their Prevention and Adjustment* (Chicago: Public Administration Service, 1933); A. M. Hillhouse, *Municipal Bonds: A Century of Experience* (New York: Prentice-Hall, 1936); Dove, "Financial Markets, Fiscal Constraints."
[104] Tarr, *Understanding State Constitutions*, 114; Briffault, "Disfavored Constitution," 912.
[105] Credit and stock clauses were applied to local governments by Arkansas, New York, and Pennsylvania in 1874; Alabama, Florida, and Missouri in 1875; Colorado and Texas in 1876; Connecticut and New Hampshire in 1877; Maine in 1878; California in 1879; and Montana and Washington in 1889. Dove, "Financial Markets, Fiscal Constraints," 77.
[106] See, generally, Dale A. Oesterle, "Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies," *University of Colorado Law Review* 73, no. 2 (2002): 587–617.

vexed question pertaining to corporations."[107] On the one hand, the territory had little internal capital or infrastructure, and the delegates were eager to encourage economic development. On the other hand, they were acutely aware of the corruption and fiscal ruin that had plagued those states that encouraged development through subsidies. They were also aware that several of their own territorial cities had grown insolvent through bad deals with railroads.[108] Writing in the Address to the People, the delegates worried that "the Legislatures of other States have, in most cases, been found unequal to the task of preventing abuses and protecting the people from the grasping and monopolizing tendencies of railroads and other corporations."[109]

The delegates considered a number of proposals to directly rein in corporations. For example, they considered granting the general assembly the authority to set railroad rates, to abolish limited liability, to regulate banking, to require annual reporting, and to require the publication of shareholder lists.[110] Each of these proposals was rejected. Dale Oesterle, a professor at the University of Colorado School of Law, writes, "Instead of a long list of specific regulations and minute requirements, the delegates decided they could encourage businesses to locate in the state by offering those businesses what was at the time substantial organizational and operating freedom. To nullify the incentives for bribery and corruption of the state legislature, the delegates relied on restrictions on the state legislature itself."[111]

As the delegates asserted in their address, "Experience has shown that positive restrictions on the powers of the Legislature in relation to these matters are necessary."[112] With that, they adopted credit and stock clauses and extended these provisions to local

[107] Timothy O'Connor, "The Address to the People Issued by the Convention," in *Proceedings of the Constitutional Convention Held in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado* (Denver: Colorado Secretary of State, 1907), 728.
[108] Oesterle, "Lessons on the Limits," 594.
[109] O'Connor, "Address to the People," 728.
[110] Oesterle, "Lessons on the Limits," 594–95.
[111] Oesterle, 595.
[112] O'Connor, "Address to the People," 728.

governments.[113] Various other provisions of the constitution strengthened these provisions. Laws, for example, had to be general in their application and could not target specific groups for special treatment.[114] In support of these safeguards, the delegates wrote, "The evils of local and special legislation being enormous, the passage of any law not general in its provisions is prohibited—thus saving the State from expenses usually incurred in passing and publishing laws secured by combinations to advance private interests and to create dangerous monopolies."[115]

The second wave of anti-aid provisions was more successful than the first wave, adopted after state defaults in the early 1840s. With the municipal fiscal crisis fresh in mind and with the framers' intentions abundantly clear, courts were active over the next half century in policing governments that overstepped the bounds established by anti-aid clauses, certainly more active than they would come to be as the 20th century wore on. Importantly, early courts understood that the framers of these provisions intended them to limit public aid to private interests regardless of the aid's purpose.[116]

Colorado provides an illustrative example. The first case to consider that state's anti-aid provision was *Colorado Central R.R. v. Lea* in 1879.[117] There, the court—three members of which were delegates to the Colorado Constitutional Convention—was asked to decide whether

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113 Oesterle, "Lessons on the Limits," 595n47.
114 Oesterle, 591n23.
115 O'Connor, "Address to the People," 725.
116 See, for example, Adams v. Jackson Elec. Ry., Light & Power Co., 30 So. 58, 59 (Miss. 1901) (invalidating expenditure with no discussion of public purpose); State ex rel. Bd. of Control of St. Louis Sch. & Museum of Fine Arts v. City of St. Louis, 115 S.W. 534, 548 (Mo. 1908) (invalidating expenditure despite claim of public purpose and discussing history of provisions); Wyscaver v. Adkins, 37 Ohio St. 80 (1881) (striking down a statute authorizing a township to raise $20,000 to make a private railway and finding that the state's anti-aid clause "forbids the union of public and private capital or credit in any enterprise whatever"); Counterman v. Dublin Township, 38 Ohio St. 515 (1882); Taylor v. Comm'rs of Ross County, 23 Ohio St. 22 (1872); Pleasant Township v. Aetna Life Ins. Co., 138 U.S. 67, 11 S. Ct. 215, 34 U.S. (L. ed.) 864 (1891); Alter v. Cincinnati, 56 Ohio St. 47 (1897); State v. City of St. Louis, 115 S.W. 534 (1908) (invalidating a statute that permitted St. Louis to levy a tax that benefited a private corporation, the St. Louis School and Museum of Fine Arts); Garland v. Board of Revenue of Montgomery County, 6 So. 402 (1889) (invalidating a municipal proposal to build a bridge for a railroad); Mayor of Jersey City v. North Jersey St. Ry. Co., 73 A. 609 (1909) (holding that failure to collect licensing fee from railroad for 30 years was a violation of the state's anti-aid clause).
117 Colorado Central R.R. v. Lea, 5 Colo. 192 (1879).

Boulder County commissioners violated the state's anti-aid clause when they called an election asking voters to subscribe $200,000 to the capital stock of the Colorado Central Railroad. The county maintained that this was permitted since it believed the subscription to be in the public's interest. In ruling the county's actions invalid, the court asserted, "If the existence of a public benefit is to give such an agreement the character of a sale of the stock and take it out of the constitutional provision, then the prohibition is utterly nugatory and valueless; as such consideration would exist in every probable case."[118] The court further asserted that the intention of the anti-aid provision was clear:

> It was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new State, all public aid to railroad companies, whether by donation, grant or subscription, *no matter what might be the public benefit and advantages flowing from the construction of such roads*. I understand the framers of the Constitution and the people who adopted it, to have intended by this provision the declaration of *a broad policy of prohibition*, forbidding State, county and municipal aid to railroad *and other companies* in any of the modes specified.[119]

As we showed in section II, targeted economic development incentives are generally not, in fact, in the public interest. Nevertheless, the policymakers that craft these policies are almost universally under the impression that they are.

Courts were, however, by no means universally rigorous in policing state and local violations of anti-aid provisions.[120] Over time, legislatures devised ways to circumvent these rules while courts invented new doctrines that have in many places vitiated these provisions. Nevertheless, the case history of this period shows that—for a time—in geographically and

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[118] *Colorado Central R. R.*, 5 Colo. 192.

[119] *Colorado Central R. R.*, 5 Colo. 192, 196 (emphasis added). See also Lord v. City & County of Denver, 58 Colo. 1, 16 (1914) ("Indeed, it would seem that language could not make plainer the intent of the framers of the [Colorado] Constitution to utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever.").

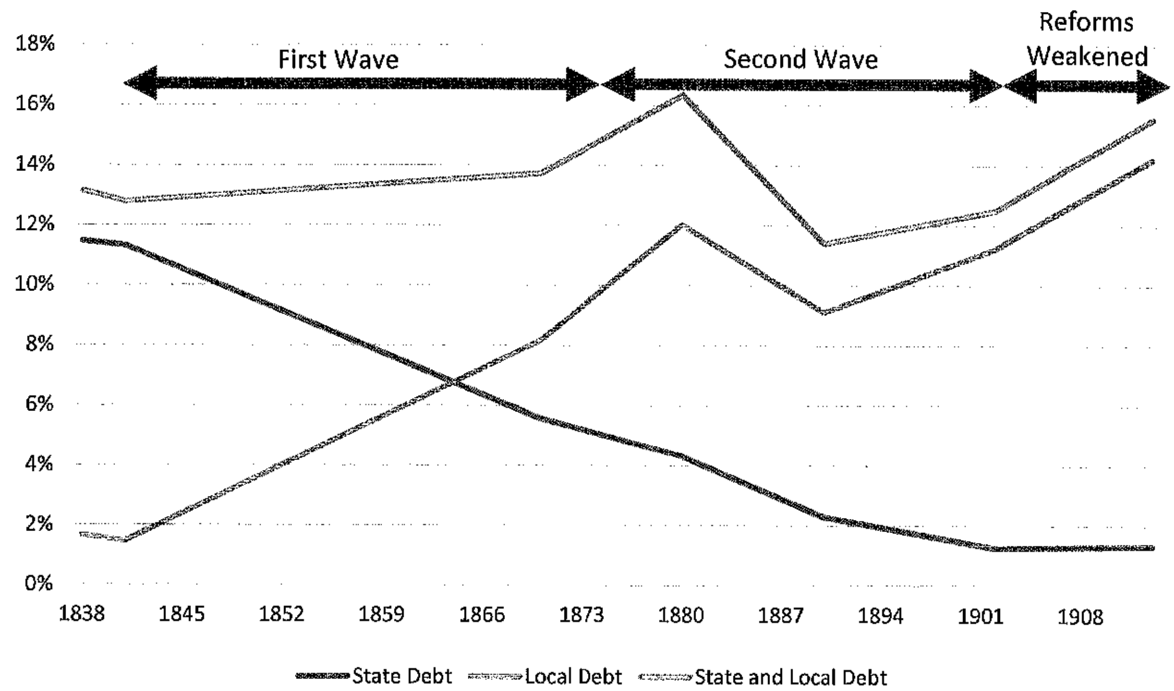
[120] Rubin, "Constitutional Aid Limitation Provisions," 161.

politically diverse regions of the country, courts were willing to stop the elected branches when they transgressed constitutional anti-aid provisions.[121]

What was the result? While it is impossible to determine a causal relationship or to disentangle the effects of these provisions from those of other reforms adopted at this time, the adoption of anti-aid provisions did coincide with improved policy. First, the financial footing of government grew stronger. Figure 1 shows state, local, and combined state and local debt as a share of national income from 1838 through 1913. Immediately following the first wave of reforms, state debts as a share of national income began to fall. Given the local loophole, however, local debt as a share of income rose. Following the second wave of reforms, local debt as a share of GDP also began to fall and then leveled off. By the end of the 19th century, combined state and local debt stood as a smaller share of national income than at any previous point since the crisis of the early 1840s. Second, as their fiscal positions improved, municipalities found themselves facing lower borrowing costs. The economist John Dove analyzed the prices of bonds issued by dozens of US cities in the latter decades of the 19th century.[122] He found that among those cities that had defaulted in the crisis of the 1870s, those that subsequently adopted either a credit or a stock clause faced borrowing costs that were between 170 and 249 basis points lower.[123] Finally, as state and local governments curtailed their use of targeted economic development subsidies, the US economy entered a period of prolonged and robust economic expansion.[124]

[121] Rubin, 161.
[122] Dove, "Financial Markets, Fiscal Constraints."
[123] His analysis is based on an ordinary least squares (OLS) regression that includes a large set of control variables that account for other socioeconomic factors that might affect borrowing costs. Dove, 92.
[124] Christina D. Romer, "Is the Stabilization of the Postwar Economy a Figment of the Data?," *American Economic Review* 76, no. 3 (1986): 314–34.

Figure 1. Government Debt as a Share of National Income



Sources: Debt figures are reported in John Joseph Wallis, "American Government Finance in the Long Run: 1790 to 1990," *Journal of Economic Perspectives* 14, no. 1 (2000). National income figures are from US Department of Commerce, Bureau of the Census, *Historical Statistics of the United States 1789–1945: A Supplement to the Statistical Abstract of the United States*, Washington, DC, June 1949, 14. National income figures are not available for every year, and some data are interpolated.

In the next section we will discuss the ways in which these clauses have been weakened, distorted, or ignored. Even so, empirical research suggests that these laws continue to affect the size and scope of subsidies and have a positive effect on state economies. Well into the latter half of the 20th century, for example, researchers were finding that these constitutional prohibitions were having an influence on the types of incentives offered by governments, making gifts of land and money the least-used varieties of subsidy.[125] More recently, the economist Carlianne Patrick

[125] John C. Gray and Dean A. Spina, "State and Local Industrial Location Incentives—a Well-Stocked Candy Store," *Journal of Corporate Law* 5 (1980): 528.

has developed an index measuring the strength of constitutional aid limits.[126] She finds that those places with weaker limits—and therefore more subsidies to private businesses—experience significantly lower levels of rural employment in the medium term. In subsequent work, she has found that states with weaker anti-aid provisions tend to subsidize capital, causing firms to substitute such capital as computers and robots for labor. She finds that this decreases employment density and causes an employment shift from labor-intensive to capital-intensive industries.[127]

E. The Weakening of Anti-Aid Provisions

Courts have weakened constitutional anti-aid provisions over the past century.[128] They did so, in large measure, by turning the judicially created Public Purpose Doctrine on its head. The doctrine dates back to an 1853 case called *Sharpless v. Mayor of Philadelphia*,[129] which was decided two decades before an anti-aid provision restricting municipalities' abilities to offer subsidies was added to the Pennsylvania Constitution.[130] In the 1840s and 1850s, the Pennsylvania legislature had authorized the city of Philadelphia to use borrowed money to buy

[126] Carlianne Patrick, "Does Increasing Available Non-Tax Economic Development Incentives Result in More Jobs?," *National Tax Journal* 67, no. 2 (June 2014): 351–86.
[127] Carlianne Patrick, "Jobless Capital? The Role of Capital Subsidies" (working paper, W. E. Upjohn Institute for Employment Research, Kalamazoo, MI, January 1, 2015).
[128] State legislatures have also done much to circumvent constitutional restrictions and provide public resources for private purposes. Though it is beyond the scope of the current analysis, state legislatures frequently circumvent anti-aid clauses through the creation of revenue bonds, moral obligation bonds, and special districts. Governments typically issue revenue bonds to finance the purchase of property that they then lease to private firms. Unlike a general obligation bond, a revenue bond is not backed by government credit or taxing authority; the bond is only secured by the property and by the rental payments from the firm, sparing taxpayers the risk and making it similar in function to a private bond. Because of this, these bonds have not been found to run afoul of state credit clauses. Federal taxpayers do bear a cost, however, because the interest on revenue bonds is exempt from federal income taxation. Moreover, many states exempt the projects financed through these bonds from state and local property taxes because they deem the property to be owned by the public and not by the private entity that occupies it. See Rubin, "Constitutional Aid Limitation Provisions," 161; Gray and Spina, "State and Local," 533–37.
[129] Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853).
[130] Dove, "Financial Markets, Fiscal Constraints," 77.

shares in two private railroads.[131] A Philadelphia taxpayer named William P. Sharpless brought suit claiming that the state had no authority to use the public taxing power to support a private interest.

At least in principle, the Pennsylvania Supreme Court agreed. The court asserted, "It is said that this is a taking of *private* property for *private* use. If this be so, it is palpably unconstitutional." Though the constitution had no "express inhibition" against such legislation, the court concluded that the assembly had no authority "to take one man's property and give it to another."[132] Thus was born the Public Purpose Doctrine: the state may only tax to fund projects that are in the public interest; projects that benefit private interests are forbidden. In 1874, the US Supreme Court issued its first ruling regarding the Public Purpose Doctrine, finding that state legislatures may confer to municipalities the right to levy taxes, but only if those taxes serve a public purpose.[133] By 1917, the Court had incorporated the doctrine into the 14th Amendment.[134]

On its face, the Public Purpose Doctrine would seem to complement state constitutional anti-aid provisions. Like these provisions, it prohibits the expenditure of public resources in service of private interests. In practice, however, it has come to thwart anti-aid provisions for two reasons. First, from the beginning, courts have shown an extraordinary tendency to construe "public purpose" in as broad a light as possible. Even in *Sharpless* itself, the court did *not* side with the taxpayer. Instead, the court concluded that, even though the railroad was private, the railroad subsidy nevertheless served a public purpose: "It cannot be denied that a railroad company is a private corporation. But the right to tax depends on the ultimate use, purpose, and

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[131] Howard Gillman, Mark A. Graber, and Keith E. Whittington, *American Constitutionalism*, vol. 1, *Structures of Government, Supplementary Material* (New York: Oxford University Press, 2013), 1.
[132] *Sharpless*, 21 Pa. at 167.
[133] Loan Association v. Topeka, 87 U.S. (20 Wall.) (1874).
[134] Jones v. City of Portland, 245 U.S. 217 (1917).

object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it."[135]

In other words, the court concluded that the government could buy shares in a private corporation so long as the goal was to serve a public purpose. Second, decades later, courts would come to see the Public Purpose Doctrine as an *exception* to anti-aid provisions rather than as a *complement* to them. In the 1918 case of *Georgia v. Cincinnati Southern Railway*, for example, the US Supreme Court held that Georgia could grant a right-of-way to a railroad despite the state constitution's bar against "any donation or gratuity in favor of any person, corporation or association."[136] As the Court put it, "A conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the constitution intended to prevent."[137] Similar conclusions were reached in a number of state court decisions.[138]

In all of these cases, courts found that the judicially created Public Purpose Doctrine was an exception to the rules stated in constitutional anti-aid provisions.[139] They saw the Public Purpose Doctrine as a justification to provide public aid to private enterprise so long as the expenditure served some public or quasi-public purpose. This interpretation is at odds with the doctrine's initial articulation as a *restraint* on government expenditures, requiring all public projects to serve purely public purposes. It is also at odds with the plain language of anti-aid provisions, which forbid government aid to private firms or individuals regardless of the aid's purpose.

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[135] *Sharpless*, 21 Pa. at 169.
[136] Georgia v. Cincinnati Southern Railway, 248 U.S. 26 (1874).
[137] *Cincinnati Southern Railway*, 248 U.S. at 30.
[138] City of Oakland v. Garrison, 228 P. 433 (Cal. 1924); Alameda County v. Janssen, 106 P.2d 11 (Cal. 1940); Brazoria County v. Perry, 537 S.W.2d 89 (Tex. 1976); City of Charlottesville v. Dehaan, 323 S.E.2d 131 (Va. 1984); Hayes v. State Property and Buildings Comm'n, 731 S.W.2d 797 (Ky. 1987); City of Aurora v. Public Utilities Comm'n, 785 P.2d 1280 (Colo. 1990).
[139] For a fuller discussion, see Rubin, "Constitutional Aid Limitation Provisions."

Another problem with this interpretation is that the Public Purpose Doctrine was first adumbrated in *Sharpless* in 1853, decades before most states adopted their constitutional anti-aid provisions. As Rubin puts it, "Since most of the aid limitation provisions were adopted *after* the Public Purpose Doctrine was judicially enunciated, the courts could not have conceived the doctrine either as an exception or as a doctrine devised to preempt such limitations."[140]

In the landmark *Munn* decision of 1876, the US Supreme Court held that the government could regulate economic arrangements that were "affected with a public interest."[141] Following this decision, state constitutions written in the decades that followed, and legislation enacted during this period, began using "public interest" phraseology.[142]

Government involvement with and regulation of private enterprise increased dramatically during the crisis of the Great Depression. Economists, legal theorists, and policymakers challenged long-held beliefs about the proper role of government in the private economy.[143] This sea change was supported by several US Supreme Court cases during the New Deal era. For example, in *Nebbia v. People of New York*, the Court upheld price-fixing for milk and articulated for the first time the "rational basis" test, which provides extraordinary deference to government involvement in private economic activity.[144] These decisions illustrate the changing dynamic between the state and the private market, and they provided judicial blessing for government decision-making involving private enterprise.

Aware that courts saw the Public Purpose Doctrine as an exception to anti-aid provisions, state legislatures were careful to include the words "public purpose" in their subsidy legislation.

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[140] Rubin, "Constitutional Aid Limitation Provisions," 166 (emphasis in original).
[141] Munn v. People of State of Illinois, 94 U.S. 113, 126, 24 L. Ed. 77 (1876).
[142] Timothy Sandefur, "A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of 'Public Use,'" *Southwestern University Law Review* 32 (2003): 648–51.
[143] Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, 25th anniv. ed. (Oakland, CA: Independent Institute, 1987); Price Fishback, *Government and the American Economy: A New History* (Chicago: University Of Chicago Press, 2007).
[144] 291 U.S. 502, 525; 54 S. Ct. 505, 511; 78 L. Ed. 940 (1934).

This practice dates back to Mississippi's famous 1936 Balance Agriculture with Industry (BAWI) program, which is widely considered to mark the beginning of the modern era of targeted economic development subsidies. The BAWI program permitted local governments to hold bond elections to purchase land, build factories, and rent these facilities to private manufactuers at low cost.[145] In the preamble to the act, legislators wrote that the "general welfare of its citizens demand, as a public purpose, the development within Mississippi of industrial and manufacturing enterprises."[146] As the economist James Bennet has put it, "By invoking those magic words, those constitutional talismans *general welfare* and *public purpose*, this act, which plainly violated the state charter of the Magnolia State, became kosher."[147] When the BAWI program came before the Mississippi Supreme Court, a majority of justices found it did not violate the state's anti-aid provision, because "in all its parts it contemplates that the proposed industry shall be operated for the accomplishment of the purposes outlined therein."[148] In his blistering dissent, Justice Anderson said the decision "drove a steam shovel through our constitution."[149] The US Supreme Court dismissed an appeal of the case and thus, in the words of two scholars, "closed the door on federal court review of the basic principles underlying industrial development bond financing."[150]

The evolution of anti-aid provisions in many states progressed from strict enforcement of the provisions after they were first adopted to subsequent approval of subsidies for low-income housing (or "slum clearance") programs and other support for the poor, then to approval of

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[145] Peter K. Eisinger, *Rise of the Entrepreneurial State*, La Follette Public Policy Series: State and Local Economic Development Policy in the United States (Madison: University of Wisconsin Press, 1989); Bennett, *Corporate Welfare*, 80.
[146] Quoted in James C. Cobb, *The Selling of the South: The Southern Crusade for Industrial Development, 1936–1980* (Baton Rouge: Louisiana State University Press, 1982), 14.
[147] Bennett, *Corporate Welfare*, 83.
[148] Albritton v. City of Winona, 178 So. 799 (Miss. 1938).
[149] 178 So. at 812 (Anderson, J., dissenting).
[150] Gray and Spina, "State and Local," 538.

industrial manufacturing projects, and finally to approval of all manner of economic development schemes.[151]

In time, courts came to take what Richard Briffault has described as "a posture of extreme deference to state legislatures, finding that a broad range of goals fall under the rubric of public purpose, and that legislative determinations that a spending, loan, or tax incentive program will promote the public purpose are to be accepted as long as they are 'not . . . irrational.'"[152]

In so doing, they forgot or ignored the initial aim of the provisions—namely, as the Arizona Supreme Court put it, "to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises."[153] The purpose of these provisions is no less relevant today, especially in the context of prolific public aid to private businesses for the so-called public purpose of economic development (despite the fact that the public is no better off for it).[154]

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[151] See, for example, Humphrey v. City of Phoenix, 55 Ariz. 374 (1940) (upholding revenue bonds to finance a slum clearance project); In re Constitutionality of ORS 456.720, 272 Or. 398 (1975) (same); Opinion to the Governor, 112 R.I. 151, 155–56 (1973) ("The elimination of overcrowded, unsanitary and dangerous dwelling accommodations and the assisting in making available decent, safe and sanitary housing for people whose income would make such an acquisition impossible unquestionably serves a public purpose."); Utah Hous. Fin. Agency v. Smart, 561 P.2d 1052, 1054 (Utah 1977) ("It cannot be said that the finding of the legislature that a public purpose is served by increasing the availability of financing for construction, purchase, and rehabilitation of low and moderate income housing, is incorrect or unreasonable on its face."); Suber v. Alaska State Bond Comm., 414 P.2d 546, 552 (Alaska 1966) (public purpose for relief and support of the poor); Wright v. City of Palmer, 468 P.2d 326, 330–31 (Alaska 1985) (public purpose for improvement program to encourage industrial development); Carruthers v. Port of Astoria, 249 Or. 329, 336 (1968) (listing several cases in which revenue bonds for industrial development were upheld as a public purpose); Maready v. City of Winston-Salem, 342 N.C. 708, 725 (1996) (listing 46 states that have upheld economic development as a public purpose).

[152] Briffault, "Disfavored Constitution," 914, quoting Delogu v. State, 720 A.2d 1153 (Me. 1998).

[153] Wistuber v. Paradise Valley Unified Sch. Dist., 141 Ariz. 346, 349 (1984). See also Bannon v. Port of Palm Beach District, 246 So. 2d 737, 741 (Fla. 1971) (to "protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited"); Idaho Falls Consolidated Hospitals v. Bingham County Board of Commissioners, 102 Idaho 838 (1982) (apparent that framers "were primarily concerned about private interests gaining advantage at the expense of the taxpayer"); Lawrence v. Schellstede, 348 P.2d 1078, 1081–82 (Okla. 1960) (to prevent the investment of public funds in private enterprises).

[154] See section II above.

Following the BAWI program and the courts' acceptance of it, other southern states initiated their own targeted economic development programs, and in the years following World War II, the practice became all but universal. Figure 2 shows the proliferation of such programs in the 1960s and 1970s. Even when courts did not defer to legislative judgments and did find subsidies unconstitutional, state legislators reacted by amending their constitutions in order to once again permit subsidies. For example, in 1987, Texas amended its constitution to read as follows: "Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state."[155] In some cases, courts appealed to such extraconstitutional considerations as interstate economic competition as a rationale for upholding subsidies.[156] As North Carolina's Justice Robert Orr stated in a 1996 dissent, the judicial philosophy in these cases seems to boil down to "everybody's doing it."[157]

Briffault reports, "By the end of the [20th] century virtually every state supreme court had upheld at least some economic development programs that involved direct assistance—including cash grants, low-interest loans, and tax breaks—to individual firms."[158] Nevertheless, there remains some variation in the strength of anti-aid provisions and in the extent to which they are honored. (It is because of this variation that economists have been able to estimate the effects of these provisions.) Moreover, recent legal developments suggest that some courts may be beginning to take these provisions seriously again.

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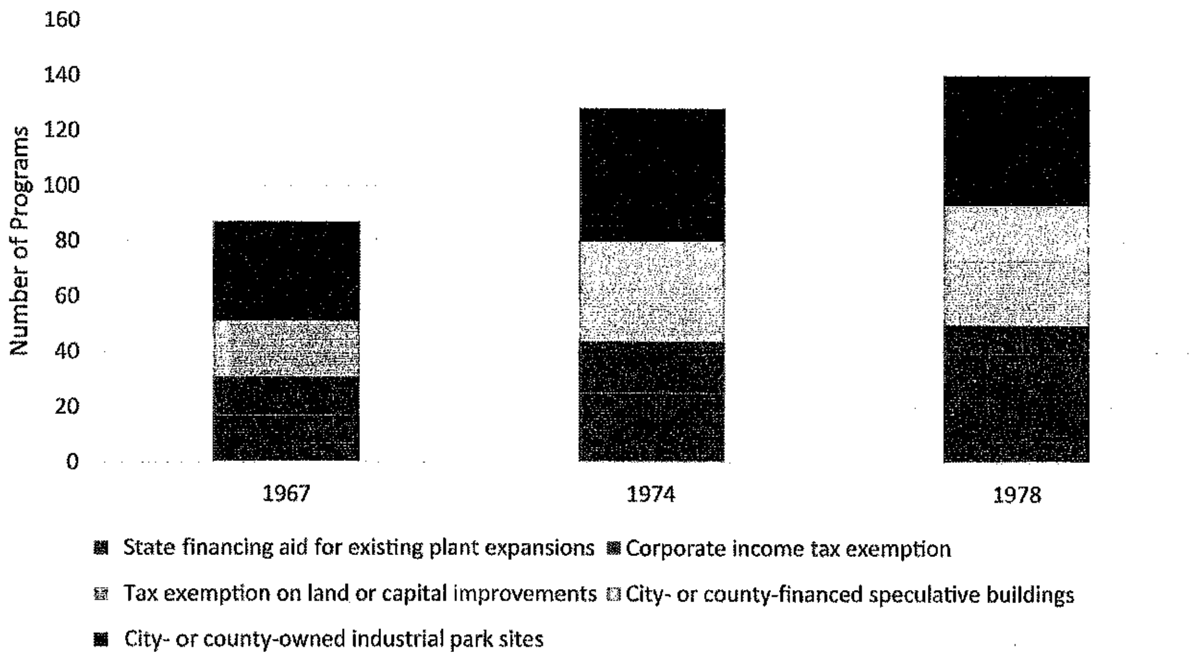
[155] Tex. Const. art. 3, sec. 52-a (1987).
[156] For a thorough discussion of this and citations, see Schaefer, *State Investment Attraction.*
[157] *Maready*, 342 N.C. at 739 (Orr, J., dissenting).
[158] Briffault, "Disfavored Constitution," 913.

Figure 2. Growth in the Number of States Offering Incentives



Source: "The Fifty Legislative Climates," an annual survey of the states published in the November–December issue of *Industrial Development* for the years 1967, 1974, and 1978, reprinted in H. McKinley Conway, *Legislative Climates for Economic Development* (Atlanta: Conway Publications, 1979), A-3 to A-5, A-99 to A-101, A-255 to A-257.

IV. The Current State of Anti-Aid Provisions

Currently 49 state constitutions place some type of limit on government use of public funds to promote private interests.[159] In 45 states, these measures take the form of traditional anti-aid provisions, or clauses, that prohibit public financing of private entities.[160]

A. Three Varieties of Anti-Aid Provisions

These anti-aid provisions take three forms: (1) loans and credit, or credit clauses; (2) stock subscriptions and joint ownership, or stock clauses; or (3) appropriations, donations, grants,

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[159] Kansas is the only state that does not have a public aid limitation anywhere in its constitution.
[160] The exceptions are Alaska, Connecticut, Illinois, Kansas, and Vermont. South Dakota has a state credit clause, but it permits lending of credit with a supermajority of the legislature.

gifts, and subsidies, or gift clauses.[161] Figure 3 shows the present status. Currently 44 states have some variety of credit clause, prohibiting government bodies from lending money or credit for nonpublic uses; 32 states currently have a stock clause prohibiting stock subscription in and joint ownership of private ventures. And 29 states have a gift clause, generally prohibiting expenditures of public money for which the government body fails to receive anything valuable (i.e., consideration) in exchange, rendering the expenditure a mere gratuity.

Because individual anti-aid provisions are, as Pinsky puts it, a product of "specific evils which had manifested themselves" in the different states during the industrial expansion of the 19th century, some state constitutions forbid only one form of public aid, while others forbid two or all three.[162] Likewise, some anti-aid provisions apply to the state, others apply to political subdivisions of the state, and some provisions apply to both levels of government. In addition, some anti-aid limitations are contained within a single clause, while others are found in two or more separate clauses. For a list of states and their respective anti-aid provisions, see table A1 in the appendix.

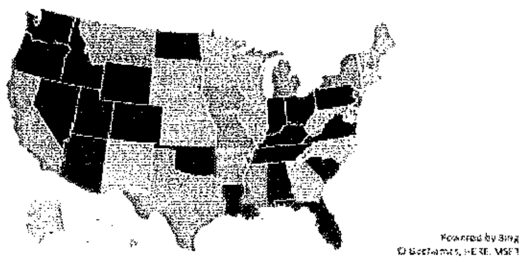
[161] In his seminal law review article on the history of anti-aid provisions, David E. Pinsky uses the term "current appropriations" clause rather than "gift clause" to describe this category of anti-aid provisions. Pinsky, "State Constitutional Limitations," 265–327, 280. While Pinsky's term is more accurate because it encompasses states that prohibit "appropriating money" or "raising money" for private entities in addition to those that prohibit donations, grants, gifts, and subsidies, this paper uses the latter term.

[162] Pinsky, "State Constitutional Limitations," 280.

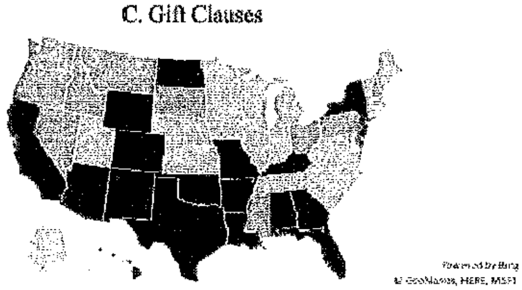
Figure 3. The Current State of Anti-Aid Provisions

A. Credit Clauses

B. Stock Clauses



C. Gift Clauses



■ Both Levels of Government ■ One Level of Government ▒ None

Source: Authors' research. See appendix for details.

Nine state constitutions expressly prohibit both levels of government from aiding private entities in any of the three forms discussed above.[163] For example, Arizona's anti-aid provision says the following:

> Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.[164]

Arizona's anti-aid clause is textually stronger than provisions in most other states because it applies to both levels of government, prohibits all three forms of aid, and allows only two exceptions, both related to legitimate government functions.[165] Most of the other nine constitutions that apply to both levels of government and prohibit all three forms of aid also contain textual exceptions (e.g., Oklahoma and Wyoming permit support for economic development).[166]

In comparison, anti-aid provisions in 36 states also have various textual exceptions and either fail to address both levels of government or fail to limit all three forms of public aid. Other provisions contain few exceptions, apply to both levels of government, and prohibit more than one form of public aid. Logically, those that contain fewer textual exceptions, address more varieties of aid, and apply to both levels of government tend to be stronger. Most anti-aid provisions fall somewhere in between. For example, New Mexico's anti-aid provision states,

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[163] These are Arizona, Colorado, Florida, Kentucky, Louisiana, Montana, North Dakota, Oklahoma, and Wyoming.
[164] Ariz. Const. art. 9, § 7. The exception at the end of the clause is meant to permit state investment of public funds, such as pension funds or rainy day funds. Ideally, these funds will have their own statutory restraints that require the fund managers to be fiduciaries so that investments are made in the public's interest and not in anyone's private interest.
[165] However, Arizona amended its constitution in 1940 to exempt "irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts" from the anti-aid provision. See Ariz. Const. art. 13, § 7.
[166] Okla. Const. art. 10, § 15(B); Wyo. Const. art. 16, § 12.

"Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section."[167]

Subsections A through G contain several exceptions, including the care and maintenance of sick and indigent persons, scholarships for Vietnam veterans who attend public universities, loans for students of the healing arts, support of new or expanding businesses for job creation, affordable housing, and scholarships for war veterans who have exhausted federal aid and who attend public universities. Consequently, although New Mexico's anti-aid provision applies to both levels of government and prohibits both loans and donations (but not stocks or joint ownership), the provision is weakened by textual exceptions. Nevertheless, New Mexico's provision is relatively strong compared to states with bare-bones provisions.

For example, the anti-aid provisions in seven states merely prohibit state loans, presumably allowing public aid in the form of donations or stock subscriptions at the state level and public aid in any form at the municipal level.[168] Thus, textual exceptions aside, bare-bones provisions tend to be weaker because they leave the door open for alternate forms of public aid. Wisconsin's anti-aid provision is illustrative; it provides that "the credit of the state shall never be given, or loaned, in aid of any individual, association, or corporation."[169] Because it only applies to credit, direct subsidies and grants do not implicate Wisconsin's anti-aid clause, and

[167] N.M. Const. art. 9, § 14.
[168] Maine, Massachusetts, Minnesota, Nebraska, Rhode Island, West Virginia, and Wisconsin. However, in Nebraska, courts have extended the provision to political subdivisions. State ex rel. Beck v. City of York, 164 Neb. 223, 224–25, 82 N.W.2d 269, 271 (1957).
[169] Wis. Const. art. 8, § 3.

concluding otherwise, as the Wisconsin Supreme Court has noted, "would put in jeopardy many of [its] current state subsidies."[170]

B. Public Purpose Clauses

In addition to the 45 state constitutions with traditional anti-aid provisions, 17 state constitutions have *public purpose* provisions and four have *private emolument* provisions that theoretically restrict the use of public aid for private purposes.[171] The public purpose provisions typically appear in the section of a given constitution that governs taxation and, among other limitations, usually restrict taxation for public purposes only. These provisions (*public purpose clauses* or *tax clauses*) do not expressly apply to government expenditures in aid of private entities, but they nevertheless indirectly forbid the use of taxation for such purposes.[172] We list these in the right-hand column of table A1 in the appendix, calling them public purpose clauses.

Alaska, Connecticut, Illinois, and Vermont only have public purpose and private emoluments provisions and have no traditional anti-aid clauses.[173] For example, the Alaska Constitution provides that "no tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."[174] Similarly, the Illinois Constitution provides that "public funds, property or credit shall be used

[170] Libertarian Party of Wisconsin v. State, 199 Wis. 2d 790, 821–22 (1996). Other courts may interpret their state credit clauses to encompass gifts, however. Compare Oxnard Beet Sugar Co. v. State, 73 Neb. 57 (1905) (gifts held to be within scope of credit clause) with Melvin v. Board of County Comm'rs, 199 Md. 402 (1952) (local unit may use its credit to obtain funds which are then given to private institutions). The text of a given anti-aid provision does not necessarily correspond to its judicial interpretation.

[171] See table A1 in the appendix.

[172] See, for example, Ariz. Const. art. 9, § 1 (stating that "all taxes . . . shall be levied and collected for public purposes only"). These are the same types of provisions discussed above in reference to the Alaska and Illinois Constitutions.

[173] As previously noted, South Dakota's credit clause is not like most anti-aid provisions in that it can be overridden by two-thirds of the legislature.

[174] Alaska Const. art. 9, § 6.

only for public purposes."[175] Vermont's constitution provides that "government is, or ought to be, instituted for the common benefit, protection, and security of the people . . . and not for the particular emolument or advantage of any single person."[176] A related provision states that "previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected."[177] Although Vermont courts have construed both provisions as a general prohibition on the use of public funds for nonpublic purposes, there have been no successful legal challenges to public subsidies in that state.[178]

Not surprisingly, the public purpose and private emoluments provisions are among the weakest limitations on public aid, both textually and as interpreted by courts. This is generally true because the vague language of these provisions invites government officials to test and expand the boundaries of the text while simultaneously providing no definable borders for courts to enforce. The public purpose limitation is especially emblematic of this problem for a few reasons. First, because courts have declared that *public purpose* cannot be defined precisely and evolves to meet changing societal needs,[179] they have upheld a variety of expenditures for

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[175] Ill. Const. § 20. Similar "public purpose" limitations also appear in the constitutions of states with traditional anti-aid provisions (e.g., Arizona, Kentucky, Louisiana, Montana, North Carolina, Ohio, Texas, and Washington).
[176] Vt. Const. chap. 1, art. 7.
[177] Vt. Const. chap. 1, art. 9.
[178] See Bennington v. Park, 50 Vt. 178, 192–93 (1877).
[179] In a seminal Alaska case, for example, the court stated that public purpose "represents a concept which is not capable of precise definition . . . and will change as changing conditions create changing public needs." Dearmond v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962). Yet in a later opinion, the court stated that the test to determine public purpose "should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant portion of the public, as distinguished from a remote and theoretical benefit." Opinion of the Justices, 348 So.2d 1051, 1053 (Alaska 1980). See also note 193, providing examples of the many other courts that cite the evolutionary nature of public purpose as a justification for broad interpretation.

questionable purposes.[180] Of course, it *is* possible to precisely define *public purpose*, and many courts have done so.[181] And while society and technology do change and advance, the principles that spurred anti-aid provisions are immutable and ever applicable.

Second, courts generally defer to government officials' determination that a given expenditure serves a public purpose and often refuse to overturn an expenditure unless officials have unquestionably abused their discretion.[182] Because the "abuse of discretion" legal standard is such a high bar, however, government officials can merely state that an expenditure serves the public—even in the face of evidence to the contrary—to circumvent a public purpose or private emoluments provision.[183] And since officials naturally seek to expand rather than limit their own powers, deferring to their discretion means that judicial interpretation of public purpose will always be expanding, in turn creating a legal universe in which upholding public aid becomes the general rule rather than the exception. In fact, this is precisely what has happened in states with public purpose and private emolument provisions. For example, in South Dakota, courts invalidated three government acts in the early 20th century but have upheld all other acts challenged since 1932.[184] Unfortunately, this has also happened, to varying degrees, in the 45

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[180] See, for example, Lake Otis Clinic, Inc. v. State, 650 P.2d 388, 394 (Alaska 1982) (public purpose for state reimbursement to guarantor who paid off construction loan of private hospital); Wright v. City of Palmer, 468 P.2d 326, 330–31 (Alaska 1985) (public purpose for general obligation bonds to construct facility for lease to private corporation because it would help boost the city's failing economy); Empress Casino Joliet Corp. v. Giannoulias, 231 Ill. 2d 62, 65 (2008) (public purpose for tax on riverboat casinos, the proceeds of which were given to horseracing tracks, because tax was meant to stimulate economic activity).

[181] See, for example, Idaho Water Resources Bd. v. Kramer, 97 Idaho 535 (1976) (defining public purpose as "an activity that serves to benefit the community as a whole and which is directly related to the functions of government"); City of Tombstone v. Macia, 30 Ariz. 218, 224 (1926) (stating that true test for public purpose is "that the work should be *essentially* public, and for the general good of *all the inhabitants* of the city . . . undertaken [not] merely for gain or for private objects . . . but the purpose must be *primarily* to satisfy the need, or contribute to the convenience, of the people of the city at large") (emphasis added).

[182] See, for example, Clem v. City of Yakton, 160 N.W.2d 125,131 (S.D. 1968).

[183] See, for example, *Empress Casino Joliet Corp.*, 231 Ill. 2d at 65 (upholding tax on riverboat casinos to be given to horseracing tracks).

[184] Mackey v. Reeves, 175 N.W.2d 359 (S.D. 1919); White Eagle Oil & Ref. Co. v. Gunderson, 205 N.W. 614 (S.D. 1925); In re Opinion of the Justices, 240 N.W. 600 (S.D. 1932).

states with traditional anti-aid provisions, even though only a few of these contain textual public purpose exceptions within the anti-aid provisions themselves.[185]

As discussed above, many state constitutions have public purpose provisions in addition to their anti-aid provisions. Arizona's public purpose clause provides that "all taxes . . . shall be levied and collected for public purposes only."[186] Because litigants in Arizona often challenged subsidies under both the public purpose provision and the anti-aid provision, the public purpose requirement of the former was gradually grafted onto the latter. This combination took the form of a judicially created two-prong test to evaluate the legality of expenditures that benefit private entities.[187] Thus, to satisfy Arizona's gift clause today, an expenditure of taxpayer money that benefits a private entity must (1) serve a public purpose *and* (2) garner adequate return consideration for the public.

Consequently, in Arizona, public purpose became a requirement of the anti-aid provision (the weaker of the two elements) rather than an exception to it. But in other states, public purpose works the opposite way: courts view it as an *exception* to the prohibition on public aid, which means that an expenditure will be upheld if it is said to serve a public purpose, even if it otherwise violates the anti-aid provision. In these states, the constitutional public purpose requirement has been turned on its head, in much the same way as the judicially created Public Purpose Doctrine was turned on its head. States that treat public purpose as a constitutional requirement rather than as an exception will necessarily have stronger anti-aid jurisprudence. Moreover, in states that lack any public purpose clauses in their constitutions, courts may have

[185] See, for example, Haw. Const. art. 7, § 4; N.C. Const. art. 5, §§ 3–4.
[186] Ariz. Const. art. 9, § 1.
[187] Turken v. Gordon, 223 Ariz. 342, 346 (2010).

adopted the public purpose exception to anti-aid restrictions based on the doctrine first articulated in *Sharpless v. Mayor of Pennsylvania.*[188]

Anti-aid provisions were intended to protect the public fisc regardless of whatever benefits might result from aid to private ventures, that is, regardless of the perceived purpose of the aid—public or otherwise. And yet, by one court's estimation, "Forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives" on the basis of public purpose.[189] Of course, public aid for the purpose of economic development is exactly what states sought to prohibit when they adopted anti-aid provisions in the first place. It is ironic that courts have used the notion of public purpose to eviscerate these provisions when, in fact, states enacted these very same provisions to prohibit public aid *despite their perceived public purpose.*

The future efficacy of anti-aid provisions appears least promising in states that have public purpose exceptions. When public purpose is treated as an exception to an anti-aid provision rather than as a requirement, courts regard expenditures as constitutional on the sole basis that government officials deem them to benefit the public in some manner. Of course, that

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[188] 21 Pa. 147 (1853). Regardless of how the Public Purpose Doctrine entered anti-aid jurisprudence in each state, its analysis evolved similarly. That is, courts declared that (1) public purpose is incapable of definition and changes to meet changing societal needs and that (2) courts will defer to the discretion of government officials and will not invalidate an expenditure unless government officials have abused their discretion. See, for example, City of Glendale v. White, 67 Ariz. 231, 236, 194 P.2d 435, 439 (1948) ("The question of what is a public purpose is a changing question, changing to suit industrial inventions and developments and to meet new social conditions.") (internal citation omitted); Cheatham v. DiCiccio, 240 Ariz. 314, 320, 321, 379 P.3d 211, 217 (2016) ("For Gift Clause purposes, a public purpose is lacking only in those rare cases in which the governmental body's discretion has been unquestionably abused.") (internal quotation marks and citations omitted); Visina v. Freeman, 252 Minn. 177, 184 (1958) (public purpose "not capable of a precise definition"); R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 337 (Minn. 1978) (legislative determination of public purpose entitled to deference and overruled only if "manifestly arbitrary or unreasonable"); McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835, 838 (1951) ("What is a public use is not capable of absolute definition. A public use changes with changing conditions of society. . . ."); Bazell v. City of Cincinnati, 13 Ohio St.2d 63, 68 (1968) (legislative determination of public purpose "will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable"); Opinion to the Governor, 112 R.I. 151, 155, 308 A.2d 809, 811 (1973) ("There is no fixed static definition of 'public purpose.' It is a concept which expands with the march of time. It changes with the changing conditions of our society.").

[189] *Maready*, 342 N.C. at 725.

renders the provision essentially nugatory, since officials can virtually always be expected to claim that their decisions are intended to benefit the public.[190] Given the history of anti-aid provisions, whether public aid is thought to serve a public purpose should not determine its constitutionality. Because courts have ignored or misunderstood this basic principle, however, there are few limitations on public aid in states where the assertion of a public purpose alone satisfies the anti-aid provision. Compounding the expanding definition of public purpose is judicial deference to the discretion of government officials, who are constantly finding new ways to appropriate taxpayer money for private interests.

C. A Recent Revival of Anti-Aid Provisions

Despite being weakened by textual exceptions and gutted by judicial interpretation, anti-aid provisions have recovered some of their former strength in a few states, and this jurisprudence provides hope for resuscitating failed provisions in other states. For example, Arizona's seminal gift clause case, *Turken v. Gordon*, clarified that the assertion of public purpose alone cannot justify an expenditure of public money that benefits private interests; instead, the government must receive something sufficiently valuable in return for the expenditure (i.e., it

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[190] As the antifederalist Brutus articulated in his sixth essay,

> It is as absurd to say, that the power of Congress is limited by these general expressions, "to provide for the common safety, and general welfare," as it would be to say, that it would be limited, had the constitution said they should have power to lay taxes, &c. at will and pleasure. Were this authority given, it might be said, that under it the legislature could not do injustice, or pursue any measures, but such as were calculated to promote the public good, and happiness. For every man, rulers as well as others, are bound by the immutable laws of God and reason, always to will what is right. It is certainly right and fit, that the governors of every people should provide for the common defence and general welfare; every government, therefore, in the world, even the greatest despot, is limited in the exercise of his power. But however just this reasoning may be, it would be found, in practice, a most pitiful restriction. The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves.

Herbert J. Storing, ed, *The Complete Anti-Federalist*, 7 vols. (Chicago: University of Chicago Press, 1981), document 8.

must obtain consideration).[191] If the government receives consideration that is "grossly disproportionate" to what it spent, the expenditure is an illegal subsidy. In other words, if the government spends a lot of money but gets very little (or nothing) in return, the expenditure is illegal.

Even better, the court found that *indirect* benefits—such as anticipated tax revenue and employment opportunities for city residents—are not valid consideration if private entities are not contractually required to provide these benefits.[192] Thus, in Arizona, public expenditures for economic development are unconstitutional unless the government receives valuable and direct (arising from the private entity's obligation) consideration in return for the expenditure. Before the *Turken* case, government bodies had successfully argued that indirect public benefits resulting from an expenditure suffice to justify public aid to private interests.[193] As discussed in section II above, this argument is especially problematic given the tendency of policymakers to rely on the indirect gross multipliers associated with new economic activity, which they often overestimate, while ignoring the negative effects of the taxes that pay for these subsidies. *Turken*'s rejection of that overly lax theory illustrates that it is possible—with strategically litigated cases—to realign anti-aid jurisprudence with the intended purpose of these provisions. In short, it is possible to prevent the application of public money to private purposes.

Other states with relatively strong anti-aid provisions also require that government bodies receive a fair return for an expenditure of public funds. In Oklahoma, economic development is considered a public purpose only if the government receives adequate consideration for the

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[191] Turken v. Gordon, 223 Ariz. 342, 348 (2010) (holding that consideration cannot be "grossly disproportionate to what is received in return").
[192] *Turken*, 350.
[193] *Turken*, 351–52.

expenditure and there is accountability or control over the expenditure.[194] And in Mississippi, the state supreme court recently, and without discussing public purpose, held that a city cannot lawfully pay the attorney fees of a mayoral candidate in an election contest because the expenditure lacked consideration and was therefore a donation or gratuity to the candidate.[195]

These examples, together with other strategies, may pave a path toward resuscitating anti-aid provisions in states with weaker jurisprudence. States with anti-aid provisions that include gift clauses offer the greatest protections against economic development subsidies—especially those in which public purpose is one of several requirements rather than an exception. Still, much work is required to realize the potential of such provisions. For a list of states that require (or except) public purpose and consideration, see table A1.

V. Toward a Model Anti-Aid Clause

The framers of the states' anti-aid provisions understood basic principles that are axiomatic in our republic: public dollars should be spent only for public purposes, and when public dollars *are* spent, the government should maintain control over those expenditures and receive adequate consideration for them. Absent these requirements, public expenditures can easily result in the allocation of taxpayer funds to private, special interests. Despite this near-universal recognition by the framers of the state constitutions, courts throughout the country have drained these clauses of their efficacy by disregarding their plain language and their well-documented intent. Courts have also read exceptions into them.

In this section we review various tests laid out by state courts to identify criteria that should be satisfied for anti-aid jurisprudence to achieve its purpose. In so doing, we provide a

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194 Burkhardt v. City of Enid, 771 P.2d 608, 611 (Okla. 1989).
195 McAdams v. Perkins, 204 So. 3d 1257, 1265 (Miss. 2016).

road map for an ideal anti-aid policy. In those states where courts have not already adopted these tests, state legislatures can strengthen their anti-aid clauses by explicitly requiring courts to do so. To prevent the enrichment of private interests at public expense, three criteria should be satisfied for every expenditure of public funds:

1) The public expenditure should be primarily for a public purpose.
2) The government should maintain sufficient control over the expenditure to ensure its public purpose is accomplished.
3) The public should receive direct, ascertainable, obligatory, and proportional consideration for every outlay of public resources.

As noted, these requirements should apply to both the state government and political subdivisions and should apply to all three varieties of aid (gifts, stock purchases, and extensions of credit). Additional safeguards can also be put in place to, for example, ensure that the provisions are as widely applicable as possible by applying to revenue bonds, industrial development bonds, and special districts.

A. The Primary Purpose of Every Government Expenditure Should Be to Serve a Public Purpose, Not to Benefit a Private Entity or Individual

Because the primary purpose of an anti-aid clause is to avoid the application of public resources for private purposes, a reasonable test for any government expenditure is that it *primarily* serves the public interest rather than the particular private interests of any individual, association, or corporation. As the Arizona Supreme Court has observed, it is "a core Gift Clause principle" that "public funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual."[196] Indeed, that is the entire purpose of the anti-aid clause. Or, as the Florida Supreme Court has put it, the clause serves "to protect public monies . . . [and] to keep the State out of private business."[197]

This is true of an expenditure that *primarily* benefits private interests, even if that expenditure also serves *some* public purpose. This is important because *any* expenditure might be said to serve a public purpose in *some* plausible way. Indeed, public choice research has found that successful special interest pleading frequently coincides with some semiplausible public interest story.[198] As the Arizona Supreme Court recognized, the anti-aid clause "was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to *quasi-public purposes*, but actually engaged in private business."[199] An anti-aid clause "may be violated by a transaction even though th[e] transaction has *surface indicia* of public purpose" but in reality does not serve the public. What should matter is "the reality of the transaction," not its mere appearance or the government's unsubstantiated assertions.[200]

Accordingly, the first test under the anti-aid clause is whether the expenditure carries out a legitimate government purpose.[201] That means all public expenditures must serve a "benefit to the community as a whole" and "at the same time be directly related to the function of

[196] *Turken*, 223 Ariz. at 347–48, para. 19–20 (citing Kromko v. Arizona Bd. of Regents, 149 Ariz. 319, 321 [1986]). See also Proctor v. Hunt, 43 Ariz. 198, 201 (1934): It is "axiomatic" that "money raised by public taxation is to be collected for public purposes only, and can only legally be spent for such purposes and not for the private or personal benefit of any individual."
[197] Brautigam v. White, 64 So. 2d 781 (1953).
[198] Bruce Yandle, "Bootleggers and Baptists: The Education of a Regulatory Economist," *AEI Journal on Government and Society*, May/June 1983, 12–16; Adam Smith and Bruce Yandle, *Bootleggers and Baptists: How Economic Forces and Moral Persuasion Interact to Shape Regulatory Politics* (Washington, DC: Cato Institute, 2014); Matthew D. Mitchell and Peter J. Boettke, *Applied Mainline Economics: Bridging the Gap between Theory and Public Policy* (Arlington, VA: Mercatus Center at George Mason University, 2017), 76–77.
[199] *Turken*, 223 Ariz. 342, 346, para. 10 (citations omitted) (emphasis added).
[200] *Wistuber*, 141 Ariz. at 349 (emphasis added).
[201] See City of Tacoma v. Tacoma Taxpayers, 108 Wash. 2d 679, 695 (1987).

government."[202] Expenditures on genuine public goods or on generally accessible private goods would be permitted.[203] Thus, among other things, the state would be free to spend on the court system, public safety, public roads, public buildings, and parks (all public goods), as well as on education and social safety net programs (generally accessible private goods). Expenditures on private goods that are exclusively available to narrow beneficiaries, however, would not be permitted. The state would not be allowed to spend public money on private firms.

One paramount consideration should be whether, as the Alabama Supreme Court has put it, the expenditure "confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit."[204] For example, since the primary and overwhelming beneficiaries of subsidized jobs are the workers themselves, and since subsidized workers are a small minority of the public, subsidized employment should not count as a public benefit. On the other hand, because anyone who qualifies for public assistance may obtain it and because large numbers of citizens do qualify, social safety net programs may well be evaluated differently by the courts.

Second, public expenditures must serve direct public purposes, not speculative purposes. Some have argued that economic development subsidies advance a public purpose. But as we noted in section II above, the possibility that government aid to private business will produce net beneficial results for the communities that pay for these subsidies is speculative at best. In most cases, it seems that the investment would have been made without the subsidy.[205] Moreover, while subsidy proponents point to the indirect benefits of subsidies, they almost never

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202 Davidson Bros. v. D. Katz & Sons, Inc., 121 N.J. 196, 217 (1990) (internal quotations omitted).
203 In economics, a public good has two characteristics. First, it is "nonrivalrous," which means that one person's use of the good does not diminish another's. Second, it is "nonexcludable," which means that once the good is provided, others cannot be denied its use. Paul Samuelson, "The Pure Theory of Public Expenditure," *Review of Economics and Statistics* 36, no. 4 (November 1954): 387–89; James M. Buchanan, "An Economic Theory of Clubs," *Economica* 32, no. 125 (1965): 1–14.
204 In re Opinion of the Justices, 348 So. 2d 1051, 1053 (Ala. 1980) (internal citations omitted).
205 Bartik, "'But For' Percentages."

acknowledge the economic costs of the taxes that fund those subsidies. Nor do they consider the other "unseen" costs, such as rent-seeking losses and anticompetitive effects.[206] Government entities, therefore, should not engage in expenditures that *primarily* rather than *incidentally* benefit a private entity.

B. The Government Must Exercise Sufficient and Continuing Control over All Government Expenditures

Like the framers of the US Constitution, the framers of the various anti-aid clauses recognized that internal and external controls were indispensable to establishing sound government that respects the integrity of the public fisc and the taxpaying public.[207] As the New Jersey Supreme Court recognized in that state's seminal gift clause case, "When the State once enters upon business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger."[208] One way to mitigate the danger of such special interest abuse is to enforce the constitutional requirement that government control the expenditure of public funds. Government control over public expenditures is necessary because the government cannot ensure that a public purpose is accomplished for an outlay of resources unless it exercises sufficient oversight.

Some courts have sought to clarify what precisely the control requirement means. In *Kromko v. Arizona Bd. of Regents*, the Arizona Supreme Court carefully examined a lease contract between the governing board of the state's public universities and a nonprofit

[206] Frédéric Bastiat, "That Which Is Seen, and That Which Is Not Seen," in *The Bastiat Collection*, 2nd ed. (Auburn, AL: Ludwig von Mises Institute, 1850), 1–48.
[207] "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." James Madison, "Federalist No. 51," in *The Federalist Papers*, ed. Charles R. Kesler (New York: Signet Classics, 2003), 51.
[208] Roe v. Kervick, 42 N.J. 191, 207 (1964) (citation omitted).

corporation that had agreed to operate a university hospital.[209] The court found that the private entity was a functional alter ego of the university's governing board, because the board retained significant and continuing control over the entity's operations. Among other things, the internal organization of the nonprofit required approval of the governing board, the board retained the right to approve any business transactions the nonprofit made, and the nonprofit was required to make financial and other status reports to the board. Most significantly, no earnings of the nonprofit could be distributed to its members, directors, or officers. This, according to the court, meant that the nonprofit corporation's activities were "subject to the control and supervision of public officials. Hence, we believe the fear of private gain or exploitation of public funds envisioned by the drafters of our constitution is absent."[210]

Likewise, in *Hutcheson v. Atherton*, the New Mexico Supreme Court struck down a county's issuance of $250,000 worth of bonds on behalf of a nonprofit because the organization was "not a subordinate governmental agency."[211] It held that New Mexico's gift clause prohibits any appropriation of funds "to any person, corporation, association, institution, or community not under the absolute control of the state."[212] Thus, public money that is spent for or lent to a private entity must be "assigned to bringing the public purpose to fruition," and the private entity's "business activity" must be "*so strictly pointed* in that direction, that for practical purposes [the private entity] represents the *controlled means* by which the government accomplishes a proper objective."[213] *Kromko* and *Atherton* thus make clear that the type of "control" required means the

[209] *Kromko*, 149 Ariz. 319, 321 (1986).
[210] *Kromko*, 149 Ariz. at 321.
[211] Hutcheson v. Atherton, 99 P.2d 462 (N.M. 1940).
[212] Harrington v. Atteberry, 153 P.2d 1041, 1042 (N.M. 1915).
[213] New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 604 (2007) (citations omitted) (emphasis added).

government must maintain sufficient authority over public expenditures to ensure they are used for a public rather than private purpose.

C. Government Expenditures Must Be Supported by Consideration That Is Direct, Ascertainable, Contractually Obligatory, and Proportionate to the Cost

Government expenditures must also be in exchange for valid consideration—meaning a fair exchange of public money for some benefit enjoyed by the state or the public. This requirement is supported by common sense. By definition, a *gift* is a gratuity that is not given in exchange for return consideration. Moreover, it would be easy to disguise an unconstitutional gift as a constitutional appropriation by distributing funds in exchange for illusory or purely abstract consideration (e.g., the government could pay a company in "exchange" for doing nothing at all). As the Arizona Supreme Court explained in *Turken*, "When a public entity purchases something from a private entity, the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract."[214]

Gift clause jurisprudence in several states uses four essential factors in weighing consideration. Consideration received by the government in exchange for public money should be (1) direct, (2) ascertainable, (3) contractually obligatory, and (4) proportional.

First, consideration must be direct and not speculative.[215] The advocates of subsidies often claim that expenditures will yield many purported indirect public benefits. But this

[214] *Turken*, 223 Ariz. at 348. See also Avery v. State, 295 Ga. 630, 633 (2014) (there is no gift clause violation "when the state receives a substantial benefit in exchange for the use of public property"); Hawks v. Bland, 156 Okla. 48 (1932) (defining an unlawful gift as a "gratuitous transfer of property of the state voluntarily and without consideration").
[215] See, for example, *Turken*, 223 Ariz. at 350, para. 33 ("anticipated indirect benefits . . . when not bargained for as part of the contracting party's promised performance . . . are not consideration under contract law" or the gift clause).

argument ignores the evidence that most subsidized investments would have occurred without the subsidy.[216] The indirect-benefit justification also ignores the significant costs associated with the taxation that funds subsidies.[217] Subsidies take from people who would have otherwise invested that money somewhere else, so that the apparent economic activity spurred by subsidies is really just transferred economic activity—transferred from what consumers want to what they have been forced to buy.[218] What is more, if the consideration is not direct, or *obligatory*, nothing will ensure that any public benefits are ever realized.

Second, courts have also required that consideration be *ascertainable*, meaning that it "must be unimagined, substantive and verifiable."[219] In other words, there must be clear obligations imposed on the recipient of public aid that can be measured and readily evaluated. If, for example, a government entity purchases a product or procures a service, it should measure the fair market value of those expenditures, through the procurement process or otherwise, to ensure taxpayers receive proportional value that is not speculative.

Third, anti-aid clauses should require contractual *obligation* to ensure that the public's business will in fact be effectuated by the public expenditure. That is, a recipient of public expenditures must contractually obligate itself to perform a duty to the public.[220] Absent obligation on the part of the private party, there is nothing to ensure that the public's business will be done or that the private entity will not receive a gratuity. As the Arizona Supreme Court

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[216] Bartik, "'But For' Percentages"; Dennis A. Rondinelli and William J. Burpitt, "Do Government Incentives Attract and Retain International Investment? A Study of Foreign-Owned Firms in North Carolina," *Policy Sciences* 33, no. 2 (2000): 181–205; Nathan Jensen, "Bargaining and the Effectiveness of Economic Development Incentives: An Evaluation of the Texas Chapter 313 Program," *Public Choice* 177, no. 1 (2018): 29–51.
[217] Again, see section II above, especially table 1 and the discussion surrounding it.
[218] Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft," *Economic Inquiry* 5, no. 3 (June 1, 1967): 224–32; Matthew D. Mitchell, "Rent Seeking at 52: An Introduction to a Special Issue of *Public Choice*," *Public Choice* 181, no. 1 (October 1, 2019): 1–4.
[219] Wilentz v. Hendrickson, 133 N.J. Eq. 447, 33 A.2d 366 (Ch. 1943); City of E. Orange v. Bd. of Water Comm'rs, 79 N.J. Super. 363, 372, 191 A.2d 749, 754 (App. Div.), aff'd, 41 N.J. 6, 194 A.2d 459 (1963).
[220] Key v. Comm'rs Ct. of Marion Co., 727 S.W.2d 667, 669 (Tex. App. 1987) (emphasis added).

put it, only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" can count as consideration.[221]

The contractual obligation principle is in this regard directly in line with general principles of contract law. All contracts, to be enforceable, must represent some genuine exchange of consideration. The reason for requiring contractual obligation is straightforward: absent obligation, there is no guarantee the public will receive anything for its expenditure. This is true even if the public entity and a private party share the same purpose.

A Texas case illustrates the point well. In *Key v. Commissioners Court of Marion County*,[222] a citizen challenged the transfer of a "Christmas Candlelight Tour," a winding path of Christmas light Nativity and holiday scenes, from the Marion County Historical Commission (a public entity) to the Historic Jefferson Foundation (a private organization) as a subsidy in violation of the gift clause. The commission argued that the transfer did not amount to a gift because the private nonprofit organization shared "the same stated goals as the commission," including historical preservation.[223] The court rejected that argument, holding instead that "contractual obligation" was necessary to establish consideration. Or, as the court wrote, "Had the Historic Jefferson Foundation *obligated* itself contractually to perform a function beneficial to the public, this obligation might be deemed consideration."[224] But because no such obligation existed in the contract itself, the transfer was not an exchange but a gratuity to the private organization.

In other words, even if a public agency shares a common interest, custom, or practice or has the best intentions, those things are not consideration in the absence of contractual

[221] Turken v. Gordon, 224 P.3d 158, 165, para. 31 (Ariz. 2010) (emphasis added).
[222] *Key*, 727 S.W.2d 667.
[223] *Key*, 727 S.W.2d at 669.
[224] *Key*, 727 S.W.2d at 669.

obligation. They are, instead, illusory promises. To ensure the public's business is done, and to prevent a private party from discontinuing performance at will, contractual obligation is a necessary requirement for valid consideration under the anti-aid clause.

Fourth, anti-aid clauses should require propotional consideration. In this regard, consideration analysis under anti-aid provisions is different from judicial analysis under traditional contract law. Namely, under contract law, courts rarely, if ever, question the proportionality of consideration. A private contracting party is free to offer anything, no matter how small, as valid consideration because the private parties are "free to contract as they [please]," so the agreement reached "establishe[s] what [is] 'fair' and 'just' inter se."[225] In other words, value is subjective, so the only way to know that one has obtained a just and fair exchange is to allow the exchange to take place on terms that are acceptable to both private parties. In the public context, however, taxpayers have no genuine choice in the contract, so the only way to ensure that they obtain value in excess of their financial sacrifice is to require proportionality.

Thus, consideration in anti-aid cases requires an examination of the proportionality of what is exchanged. Proportionality means there must be a balanced exchange of value for value. As the Arizona Supreme Court explained, "When a public entity purchases something from a private entity, the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract."[226] This, of course, makes sense. If we are trying to ascertain whether the public has given an unlawful subsidy, we must evaluate what was given and what was received.

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[225] Aerojet-Gen. Corp. v. Transp. Indem. Co., 17 Cal. 4th 38, 75 (1997).
[226] *Turken*, 223 Ariz. at 348, para. 22.

When the city of Phoenix, for example, gave $94.7 million dollars to a private developer of a mixed-use development for the exclusive use of 200 parking spaces for drivers participating in a municipal commuting program, the government payment was "grossly disproportionate" to what was received in return, thus violating Arizona's anti-aid provision.[227] Thus, if what the public entity gives is disproportionate to what it receives in return, there is insufficient consideration and the anti-aid provision has been violated.

VI. Litigation and Legislative Solutions in Moving Toward a Model Anti-Aid Clause

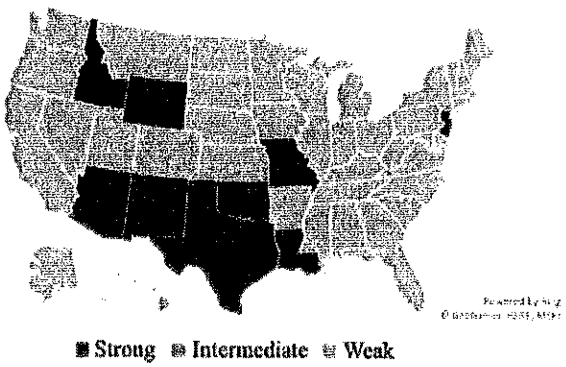
It is possible to move toward an effective anti-aid climate through strategic litigation, legislative reforms, or a combination of both. A successful strategy will depend on a particular state's anti-aid clause jurisprudence, judicial climate, and legislative composition.

Litigation is most viable when it is based on the strength of a given state's anti-aid clause language, the case law interpreting it, and the composition of its courts. Anti-aid clause challenges are most likely to be successful in states with plain language that is strong and direct and in which the courts have shown some willingness to enforce its protections. Challeneges are more likely to be successful when courts use multifactor tests, such as a primary public purpose test, a requirement for continuing government control, and an adequate consideration analysis. The appendix summarizes the current state of anti-aid clause jurisprudence in the states. States in which both a public purpose and a consideration requirement exist, and for which there is no blanket exception for expenditures that alone serve a public purpose, are the most viable

[227] *Turken*, 223 Ariz. at 348.

candidates for legal challenges.[228] Figure 4 shows the legal environment for anti-aid clause challenges based on these factors.

Figure 4. The Legal Environment for Anti-Aid Challenges



Notes: "Strong" indicates these states have anti-aid clauses with strong textual limitations that apply to government expenditures, extensions of credit, and stock ownership at the state and local level. The case law also requires a public purpose for all expenditures and adequate consideration for them with few, if any, exemptions or limitations. "Intermediate" indicates these states have anti-aid clauses with good textual limitations on government expenditures, extensions of credit, and stock ownership. But they may not apply to all levels of government, or they may have certain exceptions that would affect an anti-aid challenge. The case law suggests that challenges to some government expenditures would be feasible."Weak" indicates these states have no anti-aid clauses, have anti-aid clauses that lack textual limitations on government aid to private parties, have clauses with numerous exceptions, have clauses that apply only to one level of government, or have case law that fails to require a public purpose and adequate consideration for all aid.

Source: Authors' research. See appendix for details.

Litigants will be more successful if they identify cases in which one or more of these requirements is demonstrably lacking. For example, when a particular government expenditure is significantly disproportionate to the value received in return, an anti-aid clause challenge is more likely to succeed. As outlined above, taxpayers in Phoenix, Arizona, successfully challenged a nearly $100 million subsidy to a private developer in exchange for 200 parking spots for a

[228] Litigants should also be cognizant of procedural and standing issues in each state. Some states have broad taxpayer standing for taxpayers to challenge unlawful government expenditures. See, for example, Ethington v. Wright, 66 Ariz. 382, 386, 189 P.2d 209, 212 (1948) ("It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds."). Other states may have more limited forms of taxpayer standing, in which case, litigation may be brought only by a party that is otherwise harmed by the subsidy.

municipal transit program. At $500,000 per parking spot, it was simply impossible for the government to justify its claim that the city was receiving proportional consideration for the public expenditure.[229] (Of course, the government had claimed that the indirect benefits of the project—for example, increased tax revenue and employment opportunities—were also consideration, not just the parking spaces in isolation. The court, however, rejected this claim.) Likewise, when the government transfers nearly all control over government resources to a private entity, a challenge is viable. Loans and direct subsidies for large, private infrastructure projects and donations to nonprofit entities serving quasi-public purposes have resulted in successful anti-aid clause challenges. Of course, there will be other factors to weigh when considering whether an anti-aid clause challenge is likely to be successful, such as state standing doctrines and the composition of the courts.

Legislative reforms can also be pursued separate from or concurrent with judicial challenges. Although government subsidies and economic development projects often find bipartisan support, some legislative reforms, particularly in circumstances in which large subsidies have created negative press, are possible. Ideal legislative reforms should not target specific industries or individual expenditures. Broad-based anti-aid measures are more efficient and equitable. Counterintuitively, broad-based reforms may be more likely to succeed because if many privileges can be eliminated at once, it will be possible to substantially lower tax rates.[230] Ideally, these reforms will ensure that anti-aid provisions apply to all levels of government and all three varieties of aid. Moreover, they will require courts to apply the three tests outlined in the previous section.

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[229] *Turken*, 223 Ariz. at 348.

[230] Matthew Mitchell, "Overcoming the Special Interests That Have Ruined Our Tax Code," in *For Your Own Good: Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century*, ed. Adam Hoffer and Todd Nesbit (Arlington, VA: Mercatus Center at George Mason University, 2018), 327–50.

VII. Conclusion

Economic development subsidies do not work as advertised. Both economic theory and experience suggest that, on net, subsidies are more likely to undermine a region's economic development than to enhance it. There are a number of reasons for this outcome. Among other things, firms tend to collect subsidies for doing what they would have done anyway, subsidies involve significant opportunity costs, and subsidies invite a host of economic problems including rent-seeking losses and anticompetitive effects. Time and again, state and local governments have experimented with economic development subsidies only to find that they undermine fiscal health and good governance.

Despite the problems with subsidies, the incentive for policymakers to dispense them is strong. As a result, state policymakers have periodically attempted to bind their own hands by outlawing subsidies through various constitutional anti-aid provisions. We have endeavored to describe the history and current state of these provisions. Our review shows that anti-aid provisions can affect the size and scope of subsidies, reducing their negative economic and social effects. But the details matter, and some varieties of these provisions are stronger than others. Moreover, these provisions must be strengthened periodically.

The strongest anti-aid provisions apply to both state and local governments and restrict government extensions of credit, stock puchases, and gifts. These provisions will be more effective if the courts apply three tests. First, they should require public expenditures to primarly serve public purposes. Second, they should require the government to maintain sufficient control over expenditures to ensure their public purpose is accomplished. And third, they should ensure that the public has received direct, ascertainable, obligatory, and proportional consideration in return for its expense. Anti-aid clause litigation is most likely to be successful in states where these tests, or some portions of them, are applied. And in states where courts do not currently apply these tests, legislators can strengthen statutory restraints by requiring that all public expenditures satisfy these criteria.

Appendix. The Current State of Anti-Aid Clauses

Table A1. Anti-Aid Clauses in US State Constitutions, 2019

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation[231]
AL	Ala. Const. art. 4, §§ 93, 94	State Local	State[232] Local	State Local	*Slawson v. Alabama Forestry Comm'n*, 631 So. 2d 953, 956 (Ala. 1994)	—	*Bd. of Revenue & Rd. Comm'rs of Mobile County v. Puckett*, 227 Ala. 374, 376, 149 So. 850, 851 (1933)	Economic development[233]	—
AK	—	—	—	—	*Dearmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 722 (Alaska 1962)	—	—	—	Public Purpose Alaska Const. art. IX, § 6
AZ	Ariz. Const. art. 9, § 7	State Local	State Local	State Local	—	*Turken v. Gordon*, 223 Ariz. 342, 348 para. 21–22, 224 P.3d 158, 164 (2010)	*Turken v. Gordon*, 223 Ariz. 342, 348 para. 22, 224 P.3d 158, 164 (2010)	Improvement districts[234]	Public Purpose art. IX, § 1
AR	Ark. Const. art. 12, § 5; art. 16, § 1	Local	Local	State Local	*Chapman v. Bevilacqua*, 344 Ark. 262, 271–73, 42 S.W.3d 378, 384–85 (2001); *65th Ctr., Inc. v. Copeland*, 308 Ark. 456, 467, 825 S.W.2d 574, 580 (1992)	—	*City of Fort Smith v. Bates*, 260 Ark. 777, 781, 544 S.W.2d 525, 527 (1976)	Economic development	—

(continued on next page)

[231] Provisions that limit the purposes for which taxes may be levied but that do not use the phrase "public purpose" are not included here.
[232] That the state shall not "be interested in any private or corporate enterprise" may imply both a stock and gift clause. Ala. Const. art. 4, § 93.
[233] Ala. Const. art. 4, § 94.01.
[234] Ariz. Const. art. 13, § 7.

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
CA	Calif. Const. art. 16, §§ 6, 17	State Local	State	State Local	*Page v. MiraCosta Cmty. Coll. Dist.*, 180 Cal. App. 4th 471, 495, 102 Cal. Rptr. 3d 902, 921 (2009)	—	*California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 59, 111 Cal. Rptr. 433, 441 (Ct. App. 1973)	Aid to US war veterans	—
CO	Colo. Const. art. 11, §§ 1–2a	State Local	State Local	State Local	*McNichols v. City & County of Denver*, 131 Colo. 246, 252, 280 P.2d 1096, 1099 (1955)	—	*Save Cheyenne v. City of Colorado Springs*, 425 P.3d 1174, 1182, cert. denied, 18SC199, 2018 WL 4561381 (Colo. Sept. 24, 2018)	Student loan program	—
CT	—	—	—	—	*Chotkowski v. State*, 240 Conn. 246, 263–64, 690 A.2d 368, 378 (1997)	—	—	—	Emoluments Conn. Const. art. I, § 1
DE	Del. Const. art. 8, §§ 4, 8	State Local	Local	State Local	*Opinion of the Justices*, 54 Del. 366, 177 A.2d 205 (1962)	—	—	State exception with ¾ legislature	—
FL	Fla. Const. art. 7, § 10	State Local	State Local	State Local	*Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 48 So. 3d 811, 822 (Fla. 2010)	—	—	Local revenue bonds for industrial or manufacturing plants	—
GA	Ga. Const. art. 3, § 6, para. 6; art. 9, § 2, para. 8	Local	—	State Local	*Avery v. State*, 295 Ga. 630, 633–34, 761 S.E.2d 56, 60 (2014)	—	*Haggard v. Bd. of Regents of Univ. Sys. of Georgia*, 257 Ga. 524, 526, 360 S.E.2d 566, 567 (1987)	Compensation for innocent victims of crime	Public Purpose art. VII, § 1, ¶ III
HI	Haw. Const. art. 7, § 4	State Local	—	State Local	Textual exception	—	—	Public purpose	Public Purpose within anti-aid provision[235]

(continued on next page)

[235] The anti-aid provision and public purpose limitation are combined in one clause: "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose." Haw. Const. art. 7, § 4.

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
ID	Idaho Const. art. 8, §§ 2, 4; art. 12, § 4	State Local	State Local	Local	—	*Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 955, 703 P.2d 714, 719 (1985)	*Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 703 P.2d 714 (1985)	Environmental pollution control[236]	—
IL	—	—	—	—	—	Textual requirement	*Vill. of Oak Lawn v. Faber*, 378 Ill. App. 3d 458, 468, 880 N.E.2d 659, 668 (2007)	—	Public Purpose Ill. Const. art. VIII, § 1[237]
IN	Ind. Const. art. 10, § 6; art. 11, § 12	State Local	State Local	—	—	—	—	Public employee retirement fund	—
IA	Iowa Const. art. 3, § 31; art. 7, § 1; art. 8, § 3	State	State	—	—	*Star Equip., Ltd. v. State, Iowa Dept. of Transp.*, 843 N.W.2d 446, 459–60 (Iowa 2014)	—[238]	2/3 vote of legislature to authorize expenditure for private purpose	—[239]
KS	—[240]	—	—	—	—	—	—	—	—

(continued on next page)

[236] Idaho Const. art. 8, § 3A.
[237] "Public funds, property or credit shall be used only for public purposes." Ill. Const. art. 8, § 1.
[238] A requirement of consideration usually pertains to gift clauses, and the Iowa Constitution does not have a gift clause. Nevertheless, the Iowa Supreme Court has clarified that a public purpose alone will not satisfy the anti-aid provisions. Star Equip., Ltd. v. State, Iowa Dept. of Transp., 843 N.W.2d 446, 459–60 (Iowa 2014).
[239] But see Iowa Const. art. 3, § 31 ("No public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two thirds of the members elected to each branch of the general assembly.").
[240] Even though the Kansas Constitution does not have an anti-aid provision or a public purpose limitation, "the general proposition of law recognized by [Kansas] cases is that the transfer of public property cannot be made without compensation when no public benefit would result from the gift." Ullrich v. Bd. of County Comm'rs of Thomas County, 234 Kan. 782, 788, 676 P.2d 127, 132 (1984).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
KY	Ky. Const. §§ 177, 179	State Local	State Local	State Local	*Dannheiser v. City of Henderson*, 4 S.W.3d 542, 545 (Ky. 1999)	—	—	Local exception for constructing or maintaining bridges, turnpike roads, or gravel roads	Public Purpose § 171
LA	La. Const. art. 7, pt. 1, § 14	State Local	State Local	State Local	—[241]	La. Atty. Gen. Op. No. 15-0137 (Dec. 28, 2015)	La. Atty. Gen. Op. No. 15-0137 (Dec. 28, 2015); *Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Prop. Owners, Citizens of City of Gonzales*, 2005–2298 (La. 9/6/06), 938 So. 2d 11[242]	14 exceptions listed in section 14(b)	Public Purpose art. VII, pt. I, § 1
ME	Me. Const. art. 9, § 14	State	—	—	—	*Common Cause v. State*, 455 A.2d 1, 27 (Me. 1983)	—	4 exceptions listed in sections 14-A through 14-D	—
MD	Md. Const. art. 3, §§ 34, 54	State County	—	—	*City of Frostburg v. Jenkins*, 215 Md. 9, 15, 136 A.2d 852, 855 (1957)	—	—	Local exception when authorized by legislature	—
MA	Mass. Const. amend. art. 52, § 1	State	—	—	—	*Opinion of the Justices*, 359 Mass. 769, 268 N.E.2d 149 (1971)	—	2/3 vote of legislature	—

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[241] Section 14(c) of the anti-aid provision permits cooperative endeavors with private parties for "a public purpose," but this is not construed as a textual exception. La. Const. art. 7, pt. 1, § 14(C); La. Atty. Gen. Op. No. 09-0212 (Dec. 22, 2009).

[242] The court does not use the term "consideration," but the constitution "is violated when public funds or property are gratuitously alienated." Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Prop. Owners, Citizens of City of Gonzales, 2005–2298 (La. 9/6/06), 938 So. 2d 11, 23–24. See also Jurisich v. Hopson Marine Serv. Co., Inc., 619 So. 2d 1111, 1115 (La. Ct. App. 1993). Moreover, there must be "a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for [an] expenditure or transfer of public funds." La. Atty. Gen. Op. No. 15-0137 (Dec. 28, 2015).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
MI	Mich. Const. art. 4, § 30; art. 7, § 26; art. 9, §§ 18–19	State City	State	—	City textual exception for credit when authorized by law for a public purpose	*Sch. Dist. of City of Pontiac v. City of Auburn Hills*, 185 Mich. App. 25, 27–28, 460 N.W.2d 258, 259 (1990)	*Kaplan v. City of Huntington Woods*, 357 Mich. 612, 99 N.W.2d 514 (1959)[243]	2/3 vote of legislature to appropriate money for private purpose	—[244]
MN	Minn. Const. art. 11, § 2	State	—	—	*Minnesota Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319 (Minn. 1984)	—	—	—	Public Purpose art. X, § 1
MS	Miss. Const. art. 4 § 66; art. 7, § 183; art. 14, § 258	State Local	Local	State	—[245]	—	*Tunica County v. Town of Tunica*, 227 So. 3d 1007, 1018 (Miss. 2017)	2/3 vote of legislature to authorize a gratuity	—
MO	Mo. Const. art. 3, §§ 38(a), 39; art. 6, §§ 23, 25	State Local	Local	State Local	*Fust v. Attorney Gen. for the State of Mo.*, 947 S.W.2d 424, 429–30 (Mo. 1997)[246]	*Curchin v. Missouri Indus. Dev. Bd.*, 722 S.W.2d 930, 934–35 (Mo. 1987)	*St. Charles City-County Library Dist. v. St. Charles Library Bldg. Corp.*, 627 S.W.2d 64, 70 (Mo. Ct. App. 1981)	Aid in public calamity and 8 other exceptions	Public Purpose art. X, § 3

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[243] Construing article 10, section 12, of the 1908 constitution, which is identical to article 9, section 18 of the current constitution.

[244] Although the Michigan Constitution does not have a general public purpose clause, it does provide that cities and villages may "levy other [than ad valorem] taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law." Mich. Const. art. 7, § 21.

[245] Although the courts have occasionally implied that public purpose is an exception, public purpose is not consistently cited as an element of anti-aid jurisprudence. See, for example, Craig v. Mercy Hosp.-St. Mem'l, 209 Miss. 427, 448–49, 45 So. 2d 809, 818, error overruled, 209 Miss. 427, 47 So. 2d 867 (1950).

[246] But see Curchin v. Missouri Indus. Dev. Bd., 722 S.W.2d 930, 934–35 (Mo. 1987) (stating that grants with a primarily private effect have been held unconstitutional "despite the possible beneficial impact upon the economy of the locality and of the state").

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
MT	Mont. Const. art. 5, § 11; art. 8, § 13	State	State	State[247]	—	*Hollow v. State*, 222 Mont. 478, 485, 723 P.2d 227, 232 (1986); *White v. State*, 233 Mont. 81, 93, 759 P.2d 971, 978 (1988)	—[248]	Entities under control of the state	Public Purpose art. VIII, § 1
NE	Neb. Const. art. 13, § 3	State Local[249]	—	—	—	—[250]	*Haman v. Marsh*, 237 Neb. 699, 720–21, 467 N.W.2d 836, 851 (1991)	Residents seeking adult or post–high school education	—
NV	Nev. Const. art. 8, §§ 9–10	State Local	State Local	State	*Employers Ins. Co. of Nevada v. State Bd. of Examiners*, 117 Nev. 249, 259, 21 P.3d 628, 634 (2001)	1995 Nev. Op. Atty. Gen. 25 (1995); *Lawrence v. Clark County*, 127 Nev. 390, 399, 254 P.3d 606, 612 (2011)[251]	Maybe[252]	Corporations formed for educational or charitable purposes; local exception for railroads	—
NH	N.H. Const. pt. 2, art. 5	Town	Town	Town	*Anderson v. McCann*, 124 N.H. 249, 251, 469 A.2d 1311, 1313 (1983)	*Anderson v. McCann*, 124 N.H. 249, 251, 469 A.2d 1311, 1313 (1983)	Maybe[253]	—	Emoluments Pt. 1, art. X

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[247] "Because the Montana courts had construed that state's gift clause to permit any expenditures made for a public purpose, the framers of the revised Montana Constitution omitted the clause as unnecessary in light of other constitutional provisions limiting public expenditures to public purposes. Montana Legislature, Montana Constitutional Convention 1971–1972, at 583 (1979)." *Turken*, 223 Ariz. at 347.

[248] But the courts strictly construe the requirement of government "control."

[249] Extended to political subdivisions by court. State ex rel. Beck v. City of York, 164 Neb. 223, 224–25, 82 N.W.2d 269, 271 (1957).

[250] Public purpose is not "required" because the "prohibition against the pledge of the state's credit does not hinge on whether the legislation achieves a 'public purpose,' when the pledge benefits a private individual, association, or corporation." Haman v. Marsh, 237 Neb. 699, 722, 467 N.W.2d 836, 852 (1991).

[251] Implies that public purpose is required.

[252] See Lawrence v. Clark County, 127 Nev. 390, 254 P.3d 606 (2011) (inferring that Nevada courts ensure the state receives a valuable benefit and holding that consideration is required for disposal of property under both the gift clause and the public trust doctrine).

[253] In re Opinion of the Justices, 88 N.H. 484, 190 A. 425, 428 (1937).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
NJ	N.J. Const. art. 8, §§ 2, para. 1, 3, para. 2–3	State Local	Local	State Local	—	*Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834 (1964)	*Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834 (1964); *City of E. Orange v. Bd. of Water Comm'rs*, 79 N.J. Super. 363, 371, 191 A.2d 749, 753 (App. Div.), aff'd, 41 N.J. 6, 194 A.2d 459 (1963)	—	—
NM	N.M. Const. art. 9, § 14	State Local	—	State Local	—	—	*State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, para. 48–51, 141 N.M. 1, 15–16, 150 P.3d 375, 389–90	7 exceptions listed in sections 14(A) through 14(D), including "creating new job opportunities"	—
NY	N.Y. Const. art. 7, § 8; art. 8, § 1	State Local	Local	State Local	*Bordeleau v. State*, 18 N.Y.3d 305, 317, 960 N.E.2d 917 (2011)	*People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 195–97, 861 N.Y.S.2d 627, 640–41 (2008)	*Grand Realty Co. v. City of White Plains*, 125 A.D.2d 639, 639–40, 510 N.Y.S.2d 172 (1986); *Inc. Vill. of Sag Harbor v. Chelberg & Battle Post #388 of the Am. Legion, Inc.*, 12 A.D.2d 520, 521, 207 N.Y.S.2d 464, 465 (1960)	Several	—
NC	N.C. Const. art. 5, §§ 3–4	State Local	—	—	Local textual exception but only if approved by voter majority	—	*N.C. State Ports Auth. v. First-Citizens Bank & Tr. Co.*, 242 N.C. 416, 424, 88 S.E.2d 109, 114 (1955)	State and local exception for credit approved by voter majority	Public Purpose art. V, § 2

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State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
ND	N.D. Const. art. 10, § 18	State Local	State Local	State Local	*Paving Dist. 476 Group v. City of Minot*, 2017 ND 176, para. 26, 898 N.W.2d 418, 426; *Haugland v. City of Bismarck*, 818 N.W.2d 660 (N.D. 2012)	*Paving Dist. 476 Group v. City of Minot*, 2017 ND 176, para. 26, 898 N.W.2d 418, 426; *Haugland v. City of Bismarck*, 818 N.W.2d 660 (N.D. 2012)	—	Engagement in any industry, enterprise or business	—
OH	Ohio Const. art. 8, §§ 4, 6	State Local	State Local	Local	1999 Ohio Op. Atty. Gen. No. 99-049, 1999 WL 75668[254]	—	1999 Ohio Op. Atty. Gen. No. 99-049, 1999 WL 75668[255]	Economic development[256]	—
OK	Okla. Const. art. 10, §§ 15, 17	State Local	State Local	State Local	—	*In re Oklahoma Development Finance Authority*, 89 P.3d 1075 (Okla. 2004)[257]	*Orthopedic Hosp. of Oklahoma v. Oklahoma State Dept. of Health*, 118 P.3d 216, 222, 2005 OK CIV APP 43, para. 10–12 (Okla. Civ. App. Div. 1, 2005)	State exception for economic development[258]	Public Purpose art. 10, § 14
OR	Or. Const. art. 11, §§ 5–7, 9	State Local	State Local	Local	*Miles v. City of Eugene*, 451 P.2d 59, 61–62, 252 Or. 528, 532–33 (1969); *Carruthers v. Port of Astoria*, 438 P.2d 725, 730–31, 249 Or. 329, 341 (1968)	*Miles v. City of Eugene*, 451 P.2d 59, 61–62, 252 Or. 528, 532–33 (1969); *Carruthers v. Port of Astoria*, 438 P.2d 725, 730–31, 249 Or. 329, 341 (1968)	—	Local exception for affordable housing	—

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[254] Accord State ex rel. Taft v. Campanella, 368 N.E.2d 76, 84–85 (Ohio App. 1977).
[255] Accord C.I.V.I.C. Group v. Warren, 723 N.E.2d 106, 109–10 (Ohio 2000); Citizens Word v. Canfield Twp., 787 N.E.2d 104, 108 (Ohio App. 7 Dist., 2003).
[256] Ohio Const. art. 8, § 13. Article 8 also includes several other exceptions to section 13.
[257] The public purpose requirement appears to stem from the public purpose clause rather than from the anti-aid provision.
[258] Via the Oklahoma Center for the Advancement of Science and Technology. Okla. Const. art. 10, § 15(B).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
PA	Pa. Const. art. 8, § 8; art. 9 § 9	State Local	State Local	Local	*Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 205, 460 Pa. 1, 15–16 (1975)	*Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 205, 460 Pa. 1, 15–16 (1975)	—[259]	Public service, industrial, or commercial enterprises necessary to the health, safety or welfare of the Commonwealth	—
RI	R.I. Const. art. 6, §§ 11,[260] 16	State	—	—[261]	—	*In re Advisory Opinion to Governor (DEPCO)*, 593 A.2d 943 (R.I. 1991)	—[262]	2/3 vote of legislature to appropriate money for a private purpose	—

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[259] But see Harbold v. City of Reading, 49 A.2d 817, 820–21 (Pa. 1946) (observing that unconstitutional expenditure lacked consideration and public purpose).
[260] Section 11 requires a two-thirds vote by the legislature to appropriate money for a private purpose.
[261] Article 6, section 11, requires a two-thirds vote by the legislature to appropriate money for a private purpose and therefore may be construed as a state and local gift clause. R.I. Const. art. 6, § 11.
[262] Even though there is no consideration requirement, courts examine whether there is a pledge of credit based on criteria other than public purpose alone. See, for example, Opinion to the Governor, 308 A.2d 809, 812 (R.I. 1973) (whether legislation was an unconstitutional pledge of credit turned on whether corporate bonds were an obligation of the state rather than on public purpose alone); Kennedy v. State, 654 A.2d 708, 713 (R.I. 1995) (deciding that legislation required a two-thirds vote for private appropriations even though it was rationally related to a legitimate public purpose for equal protection purposes).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
SC	S.C. Const. art. 10, § 11	State Local	State Local	—	—	—[263]	—[264]	Public pensions	—[265]
SD	S.D. Const. art. 13, § 1[266]	—[267]	—[268]	State	—[269]	—	—[270]	Extension of credit to the people upon real estate security	<u>Public Purpose</u> art. XI, § 2

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[263] Litigants have challenged government actions as lacking a public purpose in addition to pledging the state's credit, but the latter does not turn on whether a public purpose exists. Therefore, public purpose does not appear to be a requirement of or an exception to the credit and stock clauses. See, for example, State ex rel. Medlock v. South Carolina State Family Farm Development Authority, 306 S.E.2d 605, 608–09 (S.C. 1983) (deciding credit issue apart from public purpose question); Carll v. South Carolina Jobs-Economic Development Authority, 327 S.E.2d 331, 334–35 (S.C. 1985) (same); Brashier v. South Carolina Dept. of Transp., 490 S.E.2d 8, 12–13 (S.C. 1997) (deciding credit issue with no analysis of public purpose whatsoever); South Carolina Farm Bureau Marketing Ass'n v. South Carolina State Ports Authority, 293 S.E.2d 854, 856–57 (S.C. 1982) (deciding credit issue even after plaintiff conceded public purpose).

[264] Although there does not appear to be a consideration requirement, courts consider other criteria. See, for example, South Carolina Farm Bureau Marketing Ass'n v. South Carolina State Ports Authority, 293 S.E.2d 854, 857 (S.C. 1982) (credit clause holding based on whether challenged action was primarily for the benefit of the state and farmers rather than the private association); Carll v. South Carolina Jobs-Economic Development Authority, 327 S.E.2d 331, 335 (S.C. 1985) (credit clause holding based on whether the act imposed any pecuniary liability on the state).

[265] Article 10, section 5, provides that "any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied" and therefore may be construed as a public purpose clause. S.C. Const. art. 10, § 5.

[266] This section permits the state to lend its credit for "developing the resources and improving the economic facilities" of the state, but only when subject to control by the state. Further, it disallows the appropriation of money for these purposes except by a two-thirds vote of the legislature. S.D. Const. art. 13, § 1. This section originally forbade the state from making any "donations to or in aid of any individual, association, or corporation, except for the necessary support of the poor." Cutting v. Taylor, 51 N.W. 949, 950 (S.D. 1892). The original version was more typical of an anti-aid provision. The current version permits aid under certain circumstances and therefore does not fit the typical mold of an anti-aid provision. Nevertheless, because it limits appropriations by requiring a two-thirds vote, it should be construed as an anti-aid provision.

[267] But see S.D. Const. art. 13, § 1. State credit only permitted upon 2/3 vote of legislature.

[268] But see Matter of Advisory Opinion Concerning the Const. of H.B. 1255, H.B. 1132, and H.J.R. 1004, 456 N.W.2d 546, 550 (S.D. 1990) (stating that "the people of South Dakota have explicitly withdrawn the state's authority to be an owner of capital stock of corporations").

[269] But separately required under public purpose clause. See Matter of Advisory Opinion Concerning the Const. of H.B. 1255, H.B. 1132, and H.J.R. 1004, 456 N.W.2d 546, 547–48 (S.D. 1990).

[270] But four other criteria must be met. 456 N.W.2d at 548.

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
TN	Tenn. Const. art. 2, §§ 29, 31	State Local	State Local [271]	—	*West v. Tennessee Housing Development Agency*, 512 S.W.2d 275, 283–84 (Tenn. 1974)	*West v. Tennessee Housing Development Agency*, 512 S.W.2d 275, 283–84 (Tenn. 1974)	—	3/4 voter majority	—
TX	Tex. Const. art. 3, §§ 50–52; art. 11, § 3; art. 16, § 6	State Local	Local	State Local	—	*Edgewood Independent School Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995)	*Pasadena Police Officers Ass'n v. City of Pasadena*, 497 S.W.2d 388, 392–93 (Tex. Civ. App. 1973); Tex. Atty. Gen. Op. JM-551 (Tex. A.G.), 1986 WL 219397	Economic development,[272] among many others	Public Purpose art. VIII, § 3
UT	Utah Const. art. 6, § 29	State Local	State Local	—	—	*Utah Housing Finance Agency v. Smart*, 561 P.2d 1052 (1977)	—	Equity interest as consideration for intellectual property	—
VT	—	—	—	—	—	*Gross v. Gates*, 109 Vt. 156 (1937)	—	—	Public Purpose Vt. Const. chap. I, art. 9 Emoluments chap. I, art. 7
VA	Va. Const. art. 10, § 10	State Local	State Local	—	—	*City of Charlottesville v. DeHaan*, 323 S.E.2d 131, 138 (Va. 1984)	—[273]	Industrial development	Emoluments art. 1, § 4

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[271] With a three-quarters vote.
[272] Tex. Const. art. 3, § 52-a.
[273] But the transaction must be for the benefit of the government in some manner, and the presence of public purpose alone does not render certain transactions constitutional. City of Charlottesville v. DeHaan, 323 S.E.2d 131, 137–38 (Va. 1984) (citing Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968) and listing the benefits to be received by the government).

State	Anti-Aid Provision	Credit Clause	Stock Clause	Gift Clause	Public Purpose Exception	Public Purpose Requirement	Consideration Requirement	Sample Textual Exceptions	Other Limitation
WA	Wash. Const. art. 8, §§ 5, 7; art. 12, § 9	State Local	State Local	Local	*Peterson v. Department of Revenue*, 443 P.3d 818 (Wash. App. Div. 1, 2019)[274]	—	*King County v. Taxpayers of King County*, 949 P.2d 1260, 1267	Necessary support of the poor and infirm	Public Purpose art 7, § 1
WV	W.Va. Const. art. 10, § 6	State	—	—	Textual exception;[275] *State ex rel. WV Citizens Actions Group v. EV Econ. Dev. Grant Comm.*, 213 W. Va. 255 (2003)	—	—[276]	Public purposes[277]	—
WI	Wisc. Const. art. 13, § 3	State	—	—	Textual exception[278]	*Libertarian Party of Wisconsin v. State*, 546 N.W.2d 424, 438 (Wis. 1996)	—[279]	Veterans' housing loans[280]	—
WY	Wyo. Const. art. 16, § 6[281]	State Local	State Local	State Local	—	Honorable Philip A. Nicholas Honorable Frank Philp, 2007 WL 1748388, at *8	*Frank v. City of Cody*, 572 P.2d 1106, 1114 (Wyo. 1977)	Economic development[282]	Local Public Purpose art. 13, § 3

[274] Courts use the term "fundamental government purpose." Peterson v. Department of Revenue, 443 P.3d 818 (Wash. App. Div. 1, 2019).
[275] W.V. Const. art. 10, § 6a (allowing appropriations for public purposes).
[276] But see State ex rel. State Bldg. Commission v. Casey, 160 W.Va. 50 (1977) (holding that providing space to corporation in a government building to be used without cost is a grant of credit in violation of the constitution).
[277] 160 W.Va. 50.
[278] Wisc. Const. art. 8, § 7.
[279] But see Libertarian Party of Wisconsin v. State, 546 N.W.2d 424, 439 (Wis. 1996) ("It is our conclusion that the giving or loaning of the credit of the state which it was intended to prohibit . . . occurs only when such giving or loaning results in the creation by the state of a legally enforceable obligation on its part to pay to one party an obligation incurred or to be incurred in favor of that party by another party.") (citation omitted).
[280] Wisc. Const. art. 13, §7.
[281] See also Wyo. Const. art. 3, § 36 ("No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.").
[282] Wyo. Const. art. 16, § 12.

Tab 5

Supreme Court of Texas

No. 24-0325

In re The State of Texas,
Relator

On Petition for Writ of Mandamus

JUSTICE BLACKLOCK delivered the opinion of the Court.

Harris County intends to use federal funds to "provide no-strings-attached $500 monthly cash payments to 1,928 Harris County residents for 18 months."[1] Recipients would be chosen by lottery from among applicants with income below 200% of the federal poverty line who live in certain zip codes, among other criteria. Harris County has identified roughly 55,000 eligible applicants, which means the likelihood of any particular entrant succeeding in the lottery is roughly 3.5%.

The State of Texas contends this arrangement is unconstitutional in multiple ways, including that it violates the Texas Constitution's bar on "gratuitous payments to individuals." *Tex. Mun. League*

[1] *Frequently Asked Questions*, UPLIFT HARRIS, https://uplift.harriscountytx.gov/FAQs (as of May 22, 2024). A screenshot of this statement appears in the record, but the website has since been altered.

Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n, 74 S.W.3d 377, 383 (Tex. 2002); TEX. CONST. art. III, § 52(a). The State sued the County, seeking an injunction blocking implementation of the proposed program, which the County calls "Uplift Harris." The State immediately sought a temporary injunction, which the district court denied. The State appealed the denial of the temporary injunction and asked the court of appeals for a Rule 29.3 order staying payments under the Uplift Harris program while its temporary-injunction appeal proceeds. *See* TEX. R. APP. P. 29.3 (authorizing "temporary orders necessary to preserve the parties' rights"). The court of appeals denied that request, and the State sought mandamus relief in this Court.

The State's mandamus petition asks this Court to require the court of appeals to issue a Rule 29.3 order staying all Uplift Harris payments while the State's temporary-injunction appeal proceeds. Together with its mandamus petition, the State filed a motion for temporary relief pursuant to Rule 52.10, seeking an immediate stay of Uplift-Harris payments. *See id.* 52.10(b) (authorizing an appellate court to "grant any just relief pending the court's action on the [mandamus] petition"). We administratively stayed[2] the payments, without regard to the merits, pending our consideration of the State's

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[2] "Administrative stays do not typically reflect the court's consideration of the merits of the stay application. Rather, they 'freeze legal proceedings until the court can rule on a party's request for expedited relief.'" *United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring in denial of applications to vacate stay) (quoting Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1942 (2022)).

motion for temporary relief. *See id.* That motion, which Harris County opposes, is now before this Court. For the following reasons, the motion is granted, and all payments under the Uplift Harris program are prohibited pending further order of this Court.

The State's appeal of the denial of a temporary injunction remains pending in the court of appeals, which we expect will proceed expeditiously to a decision. That decision can, if desired, be appealed to this Court. The State's mandamus petition will remain pending in this Court while its appeal proceeds below.

* * *

In a mandamus proceeding in the Supreme Court or a court of appeals, "[t]he relator may file a motion to stay any underlying proceeding or for any other temporary relief pending the court's action on the petition." TEX. R. APP. P. 52.10(a). Whether in response to such a motion by the relator, in response to a motion by any other party, or "on its own initiative," the court may "grant any just relief pending the court's action on the petition." *Id.* 52.10(b). Absent a contrary order, relief ordered under Rule 52.10 remains in effect "until the case is finally decided." *Id.*

In an appeal—as opposed to a mandamus proceeding—the closest analogue to Rule 52.10 is Rule 29.3, which authorizes a court of appeals to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." *Id.* 29.3. When a court of appeals grants or denies a motion for temporary relief under Rule 29.3, the rules provide no direct mechanism for immediate appeal of that ruling to this Court. As we have recognized in past cases, however, a party may seek mandamus relief in this Court challenging a court of appeals' decision on Rule 29.3 temporary relief. *See, e.g.*, *In re State*, No. 21-0873, 2021 WL 4785741 (Tex. Oct. 14, 2021). In so doing, the party may request immediate temporary relief under Rule 52.10. *Id*. In this way, when time is of the essence, a party may ask this Court to intervene to determine the parties' rights during the pendency of the underlying appeal.

When considering such a request in the past, we have described our exercise of authority under Rule 52.10 as a way to "preserve the status quo" while the appeal proceeds. *Id*. at *1. While "preservation of the status quo" has long been a valid consideration when courts are asked to issue temporary relief, the terminology is not without its drawbacks. Identifying the status quo is not always a straightforward undertaking, after all. In this case, for instance, Harris County claims the status quo is its previously unchallenged freedom to implement the Uplift Harris program as it sees fit. From that perspective, the State's motion seeks to alter the status quo. On the other hand, the State claims the status quo is that the funds have not yet been disbursed. If that is right, then the State's motion seeks to preserve the status quo. Such debates about how to define the status quo can descend quickly into lawyerly word-play, offering little help to a court tasked with providing "just relief." TEX. R. APP. P. 52.10(b).

Rather than describe the purpose of relief under Rule 52.10 as "preservation of the status quo," we find Rule 29.3's analogous formulation more helpful. An appellate court asked to decide whether to stay a lower court's ruling pending appeal or to stay a party's actions while an appeal proceeds should seek "to preserve the parties' rights until disposition of the appeal." *Id.* 29.3. The equitable authority we exercise today, under Rule 52.10, serves the same purpose—preservation of the parties' rights while the appeal proceeds. A stay pending appeal is, of course, a kind of injunction, so the familiar considerations governing injunctive relief in other contexts will generally apply in this context as well. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 65.011 (listing requisites for writs of injunction); *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 792 (Tex. 2020) (listing requisites for permanent injunctive relief).

To begin with, an appellate court can hardly endeavor to preserve the parties' rights pending appeal without making a preliminary inquiry into what those rights are. Thus, the likely merits of the parties' respective legal positions are always an important consideration when a court is asked to issue an order determining the parties' legal rights pending appeal. There is little justice in allowing a party who will very likely lose on the merits to interfere with the legal rights of the opposing party during the appeal, if this can be avoided. Likewise, it may often be unjust to require a party who is very likely to succeed on the merits to wait for the lengthy appellate process to play out before exercising his legal rights.

Consideration of the merits of the parties' legal positions commonly informs a court's assessment of the advisability of injunctive relief. *See* TEX. CIV. PRAC. & REM. CODE § 65.011(1) (asking whether "the applicant is entitled to the relief demanded"); *Pike*, 610 S.W.3d at 792 (requiring showing of "a wrongful act"). The relevance of the merits to requests for injunctive relief does not vanish when courts must rule expeditiously. To the contrary, trial courts asked to issue temporary injunctions or temporary restraining orders commonly must consider the likely merits of the parties' positions. *See Abbott v. Harris County*, 672 S.W.3d 1, 8 (Tex. 2023) (temporary injunction); *In re Abbott*, 628 S.W.3d 288, 291 (Tex. 2021) (temporary restraining order). In a similar way, appellate courts asked to issue temporary relief pending appeal should make a preliminary inquiry into the likely merits of the parties' legal positions. The merits need not—and often should not—be definitively determined at this preliminary stage, but "just relief" that "preserve[s] the parties' rights" cannot be afforded without some consideration of the merits.

Another essential consideration attendant on any request for injunctive relief, including in this posture, is the injury that will befall either party depending on the court's decision. As in the underlying temporary-injunction context, the applicant for a stay pending appeal should be expected to show that he will suffer irreparable harm if relief is not granted. Courts must likewise consider the harm that other parties or the public will suffer if relief is granted—as well as any potential injury to non-parties caused by granting or denying relief. The equitable balancing of these harms is a required aspect of a court's effort to preserve the parties' rights pending appeal. *See Huynh v. Blanchard*, ___ S.W.3d ___, 2024 WL 2869423, at *24–25 (Tex. June 7, 2024).

While the likely merits and the balance of harms are two required considerations in every case in this posture, we do not foreclose consideration of other matters, depending on the circumstances. A stay pending appeal is a creature of equity, and a court asked to issue one may take into account other case-specific equitable considerations that bear on its exercise of discretion.[3]

* * *

Applying this standard here, we conclude that the State's motion for temporary relief should be granted. Although we make no definitive statement about the merits, the State has raised serious doubt about the constitutionality of the Uplift Harris program, and this potential violation of the Texas Constitution could not be remedied or undone if payments were to commence while the underlying appeal proceeds.

Article III, section 52(a) of the Texas Constitution provides that "the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." The Constitution contains other similar statements. *See* TEX. CONST. art. III, §§ 50 (prohibiting the giving or lending of credit of the State to persons and entities), 51 (prohibiting grants of public money to individuals and others); *id.* art. XI, § 3 (prohibiting local governments from making "any appropriation or donation" to private entities); *id.* art. XVI, § 6(a) (prohibiting any "appropriation for private or individual purposes").

[3] "The principles governing courts of equity govern injunction proceedings if not in conflict with this chapter or other law." TEX. CIV. PRAC. & REM. CODE § 65.001; *see also In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136, 138 (Tex. 2004) (noting that mandamus review is "largely controlled by equitable principles" and hence it "resists categorization," requires "flexibility that is the remedy's principal virtue," and includes considerations that "implicate both public and private interests"); *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002) (noting that courts exercising equity jurisdiction must "among other things, balance competing equities").

Under this Court's precedent interpreting these provisions, a government in Texas that desires to dole out public funds must, among other things, "retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment." *Tex. Mun. League*, 74 S.W.3d at 384.

The record indicates that Uplift Harris has advertised a "no strings attached" stipend to those lucky enough to win its lottery. It appears there will be no public control over the funds after they are disbursed. It likewise appears there will be no monitoring of the recipients' day-to-day purchases, so it is unlikely the County will know how recipients spend the money and whether any legitimate public purpose was achieved thereby. The application states that funds must not be used for terrorism, fraud, or other nefarious activities, but we are given no indication that the County intends to, or even could, meaningfully enforce these restrictions or truly monitor the recipients' expenditures. Indeed, a County official testified that the program is not designed "to monitor what people do with the things they buy."

This is quite unlike a food-stamp program, a housing voucher, or a medical-care program, in which the public funds can only be directed to their intended purpose. It appears that, for all practical purposes, there truly are "no strings attached," and we are directed to no precedent indicating that a government in Texas may make such payments without running afoul of our Constitution's restrictions. At this preliminary stage, the State has raised serious doubt that the Uplift

Harris program can satisfy the "public control" requirement of this Court's Gift Clause precedent.

The County argues, in the alternative, that the Uplift Harris program qualifies as "economic development" and is therefore separately authorized by article III, section 52-a of the Texas Constitution—even if the program otherwise violates the Gift Clauses. Under section 52-a, "the legislature may provide for the creation of programs and the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state." TEX. CONST. art. III, § 52-a. We have not previously decided a case involving section 52-a. Without foreclosing further development of the County's argument, we are skeptical of the County's position at this preliminary stage.

Under the County's permissive reading of section 52-a, nearly any direct gift of public money that will likely be spent by the recipient could qualify as "economic development"—on the theory that any boost in overall consumer spending is good for the economy. If this is right, then section 52-a comes close to repealing the Gift Clauses' ban on "gratuitous payments to individuals." *Tex. Mun. League*, 74 S.W.3d at 383. Such payments could nearly always be portrayed as good for the economy in some sense.

Without resolving the issue, we think it more likely that by authorizing "grants of public money . . . for the public purposes of development and diversification of the economy of the state," section 52-a removed doubt about the constitutionality of conventional economic-development grants, by which governments promote business growth and job creation through grant agreements designed to ensure that the recipient of public funds spends them in a way that has an economic benefit for the wider community. In other words, section 52-a appears designed to clarify that "development and diversification of the economy of the state" qualify as "public purposes." We remain skeptical of the County's argument that a program of unmonitored, "no strings attached" cash payments to individuals serves "the public purposes of development and diversification of the economy of the state" as envisioned by section 52-a.

Turning to the balance of harms, we have recognized that "*ultra vires* conduct" by local officials "automatically results in harm to the sovereign as a matter of law." *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020). Indeed, the violation of duly enacted state law by local government officials "clearly inflicts irreparable harm on the State." *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet. denied) (quoting *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018)). We have likewise recognized that the State has a "justiciable interest in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law," and that "[a]s a sovereign entity, the State has an intrinsic right to . . . enforce its own laws." *Hollins*, 620 S.W.3d at 410 (quoting *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926) and *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015)).[4]

The harm alleged here is irreparable in an additional sense as well. Once the funds are distributed to individuals, they cannot feasibly

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[4] To the extent the County challenges the State's standing to bring this suit, our recognition in *Hollins* and elsewhere that the State has a justiciable

be recouped if it is later determined they were paid in violation of the Texas Constitution. The parties do not seem to disagree on this reality.

As for injury to other parties, the County itself will suffer no cognizable injury unless its legal rights are incorrectly circumscribed during the pendency of the appeal. The County is not harmed by being required to follow the Texas Constitution. Again, it remains possible the County will ultimately succeed on the merits. But we must judge the likely harm to the County's legal rights in light of our preliminary assessment of the merits, which does not favor the County.

As for harm to the public, in general the citizens of Harris County are not harmed by requiring the County to abide by the Texas Constitution. A very small percentage of Harris County citizens will temporarily be denied receipt of the disputed payments if a stay is granted. But if those payments would have been illegal, then the temporary denial of them is not a harm that can tip the scales in the County's favor. Requiring the government to follow the law benefits everyone. Temporarily preventing expenditure of these funds while the State's appeal proceeds ensures public funds are not irrecoverably spent in violation of the Texas Constitution. Whether Harris County's proposal would actually violate the Texas Constitution remains an open question at this early stage of the litigation.

* * *

For these reasons, the State's Rule 52.10 motion is granted. Harris County is ordered to refrain from distributing funds under the

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interest in assuring that its political subdivisions comply with Texas law sufficiently establishes the State's standing at this juncture.

Uplift Harris program until further order of this Court.[5] The court of appeals should proceed to decide the temporary-injunction appeal now pending before it. The State's petition for writ of mandamus remains pending in this Court.

James D. Blacklock
Justice

OPINION DELIVERED: June 14, 2024

[5] The County states that, under federal requirements, it must spend the funds by September 30, 2026, but it must "commit" funds to Uplift Harris by December 31, 2024. The precise nature of what constitutes "committing" funds is not entirely clear, but the State does not ask us to prevent the County from earmarking or assigning federal funds to the program. Today's stay prevents the County from disbursing the funds to individual recipients or to third-party intermediaries until further order of this Court.

Tab 6

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Essay

C. Tyler Mulligan[a1]

ECONOMIC DEVELOPMENT INCENTIVES MUST BE "NECESSARY": A FRAMEWORK FOR EVALUATING THE CONSTITUTIONALITY OF PUBLIC AID FOR PRIVATE DEVELOPMENT PROJECTS

A familiar scene unfolds in communities across the country. A for-profit company approaches a local government and seeks a discretionary[1] economic development incentive--often in the form of a direct subsidy such as a cash grant--for the company's proposed development project in the community. The project may involve redevelopment of a historic building on Main Street; perhaps construction of a new retail center off the highway; or maybe job creation at a manufacturing facility. When the company requests a direct public subsidy for the project, a crucial constitutional question must be answered: Would the subsidy be an unlawful gift under the state constitution?

A potentially overlooked factor in determining whether a public subsidy for private enterprise amounts to an unconstitutional gift is the concept of "necessity."[2] In other words, is the subsidy "necessary" to achieve the desired public end? If the subsidy is not necessary to achieve the public's objective, then the public is probably not receiving valid consideration for its subsidy payment.[3] In that case, the subsidy essentially amounts to an unconstitutional gift to the recipient. But how can courts and legislative bodies determine whether "necessity" exists when a private enterprise requests public aid, in the form of an economic development incentive or subsidy, for construction of a facility?

***S14** A threshold determination is whether jurisdictions are competing with each other over the location of the facility. Businesses have become proficient in using competitive facility location decisions to extract subsidies from state and local governments.[4] In these competitive situations, necessity is a foregone conclusion. Governments find themselves in a "prisoner's dilemma" in which they have little choice but to offer a subsidy to the requesting business, and the causation between the provision of public aid and the resultant location decision is easily demonstrated.[5] In such *competitive* scenarios, the presence of "necessity" or "but for" causation cannot seriously be questioned. Case law pertaining to business location subsidies has, for the most part, involved competitive situations like these; thus courts have generally assumed necessity exists and have deferred to legislative decisions about the appropriateness of subsidies.[6] In this permissive legal environment, business location subsidies have proliferated. Nationwide, state and local governments pour upwards of $70 billion annually into this effort.[7]

However, business location subsidies have become so ubiquitous that businesses are requesting subsidies even when location competition is absent and the subsidies arguably are not "necessary." Examples of these *noncompetitive* scenarios include commercial and residential development projects in which the financial feasibility of a project is based upon local market demand and other local conditions.[8] When local conditions are important to feasibility, the project owner cannot reasonably claim that ***S15** locations are interchangeable such that the project could be relocated to any one of several jurisdictions without altering feasibility. In these noncompetitive situations, any court that takes constitutional gift analysis seriously should scrutinize the necessity of the requested subsidy.

To that end, this article proposes an analytical framework for conducting an evaluation of necessity as a component of constitutional gift analysis. Part I provides an overview of state constitutional law pertaining to gifts and public aid to private enterprises. It highlights the distinction in case law between competitive and noncompetitive scenarios and concludes that more robust judicial scrutiny of necessity is required in noncompetitive situations.

Part II proposes an analytical framework that divides subsidy-seeking projects into two categories, competitive and noncompetitive, and treats each category differently. Section A of Part II deals with competitive scenarios and acknowledges that, in case law, the necessity of a subsidy is taken for granted when competition is present. In other words, necessity for public aid to a project can be assumed when the project involves a legitimate location competition.[9] However, competition should be verified, so a disclosure rule is recommended that would compel subsidy-seeking businesses to make disclosures about project financials and reveal all competing locations under consideration. Section B addresses noncompetitive contexts where the necessity of public aid cannot be presumed. It proposes a simple framework, based on principles found in real estate development literature, for courts to employ in determining necessity in noncompetitive situations.

The article concludes by describing how the proposed framework has already been applied by the author for development projects and has proven to be both practical and effective. Courts are advised to enforce constitutional public aid provisions by implementing the proposed necessity framework when evaluating the constitutionality of public aid in noncompetitive situations.

Part I: A Distinction in Gift Clause Case Law--Competitive versus Noncompetitive

Most state gift clauses (also referred to as public purpose clauses and aid limitation clauses) across the nation are over a century old and tend to be variations on a theme.[10] In general, these constitutional clauses require government "spending or lending ***S16** [to] be for a public purpose"; "bar the gift or loan of state credit except for a public purpose"; and "ban direct state investment in business corporation obligations."[11] The clauses were designed to prohibit governments from assuming financial risks flowing from private decision making--in other words, from placing public funds under private control.[12]

However, over the past century, courts have chipped away at these gift clauses by allowing exceptions when public aid to private enterprise promotes certain public purposes.[13] Court-approved public purpose exceptions include redevelopment in blighted areas, affordable housing for low-income persons, and incentives for competitive business location decisions.[14] When a public purpose exception applies, courts have generally deferred to legislative determinations about whether sufficient public benefit is obtained in consideration for public aid.

Many commentators have focused on the public purpose exception for business location decisions, claiming that it exemplifies the hollowing out of gift clause provisions to the point that gift clauses no longer impose meaningful limits on public purpose.[15] Such critiques of the exception for business location incentives tend to focus on one particular component of gift analysis that courts have ceded to legislative bodies: the evaluation of whether the public benefit received in consideration for a subsidy is adequate.[16] Some courts have set a startlingly low bar, verifying only that the legislature's articulated public benefit rationale is not irrational.[17] These permissive courts may be hesitant to wade into "arcane" agreements[18] and to review economic ***S17** analysis[19] that is "often misunderstood and used inappropriately."[20] With such complexity and subjectivity involved in determinations of public benefit, it is perhaps understandable why some state courts have concluded that such public benefit review is "beyond their capacity, and that the means for pursuing economic development as well as the determination that economic development is a legitimate public end is a political question, not a judicial one."[21]

However, there are countervailing considerations that suggest courts should take a more active role in public benefit analysis. Courts may be better than legislative bodies at conducting evaluations of public benefit considering the "weakness of the state legislative institution."[22] At least one commentator has articulated a more active role for courts in weighing public benefits.[23] The Arizona Supreme Court, en banc, asserted its authority in this area by forbidding legislative bodies from considering one particular form of public benefit. The court explicitly rejected the notion that paying taxes to a jurisdiction is sufficient consideration for receiving a subsidy from that jurisdiction, thereby altering the calculus for future legislative determinations of public benefit.[24] Although public benefit determinations are not the focus of this article, it is helpful to understand that assessment of public benefit--rather than assessment of necessity--has been a central theme in the debate over public aid for private enterprise.[25]

Arguments over the judiciary's role in assessing the public benefit of location subsidies reflect a general pessimism about the ability of either legislative or judicial institutions to undertake the evaluation. However, that pessimism rests on an assumption that is true only in a limited subset of cases. That is, it assumes that the difficulty in ***S18** evaluating the public benefit of location subsidies is due to the presence of interstate competition.[26] Indeed, in case law where courts have deferred to the legislature on public aid to private enterprise, opinions have pointed to interstate competition as an important reason for carving out a business location exception and giving legislatures more latitude.[27]

Thus, the assumed context for deferring to the legislature is one of competition between governments, in which the "but for" causation or "necessity" of the public aid can readily be assumed because governments find themselves in a "prisoner's dilemma."[28] In these competitive situations, it is unlikely that a location subsidy is wholly unnecessary or reliant on invalid past consideration[29] (an example of the latter is a business that seeks a subsidy but has already decided where it will locate).[30] It may therefore be rational for courts to defer to legislative bodies in a competitive context, ***S19** where courts can be reasonably confident that subsidies are exchanged for valid consideration, because the business would not have located in the jurisdiction "but for" the subsidy.[31] The fact that necessity is clear in these situations may help explain why, today, virtually all state courts have upheld some form of business location subsidies.[32]

However, not all subsidy cases involve location competition, and in those noncompetitive situations, the rationale for judicial deference to legislative bodies evaporates. Noncompetitive scenarios are different from competitive scenarios in important ways and should not be treated the same under the law. A typical noncompetitive situation involves a developer (or redeveloper) of buildings designed for commercial or residential purposes (or both), with arguably no element of location competition, who nonetheless requests direct subsidies. Absent competition, necessity cannot be assumed. Indeed, as Part II demonstrates, the necessity of public aid in a noncompetitive scenario is both debatable and highly contextual. Accordingly, in noncompetitive situations, courts (and legislative bodies) should presume that necessity and "but for" causation are questionable,[33] and should proceed to undertake the necessity analysis proposed in this article.[34]

On what basis can courts raise the issue of necessity in situations in which competition is disputable or lacking? The emphasis on competition within the body of case law and legal scholarship provides courts with the opening they need. By recognizing the role of location competition in justifying public purpose exceptions to gift clauses,[35] the absence of such competition in a particular case can provide the rationale for imposing greater judicial oversight.

***S20** Fortunately, competition tests are not unprecedented in law.[36] Legislatively enacted business location subsidy programs have long mandated such a determination.[37] Even better, no arcane or complex tests are required in order to determine the existence of competition, though greater transparency would be helpful, as discussed in Part II.

It is reasonable to conclude that courts are capable of distinguishing between competitive and noncompetitive scenarios and establishing different analytical frameworks for each. A bifurcated approach to gift analysis is therefore possible: state courts can defer to legislative bodies in competitive situations, but take a more active role when competition is absent. In the latter noncompetitive scenarios, a different analytical framework should be applied, with necessity playing a central role as explained in the next Part.

Part II: A Bifurcated Approach - The Role of Necessity in Competitive and Noncompetitive Scenarios

Part I reviewed gift clause case law and explained that interstate competition was an important reason given by courts for creating a public purpose exception for business location subsidies. The presence of genuine competition served as a proxy for necessity, and in such competitive scenarios, courts were comfortable deferring to legislative determinations about public benefit. When competition is absent, however, the rationale for the public purpose exception is weakened, and courts can no longer assume that public aid to the enterprise is necessary. If necessity is absent, then a subsidy likely amounts to a gift. Accordingly, to give effect to constitutional gift clauses, courts should make a necessity determination for all discretionary development subsidies, but the test may look different depending on whether the context is competitive or noncompetitive.

In its simplest form, a necessity determination involves a public body determining whether the requested subsidy is necessary to cause the project to go forward in the community. Necessity determinations are not new to the arena of business location subsidies. These determinations have appeared in case law, legislation, and executive branch regulations.[38]

***S21** This Part explores how necessity can be evaluated depending on whether a project involves location competition. Section A addresses necessity in a competitive context and reveals the importance of transparency in conducting effective evaluations of necessity. A disclosure rule is proposed to facilitate an accurate determination. As already noted, necessity can largely be assumed in competitive situations, but a more probing approach must be used when competition is absent. To that end, Section B sets forth a framework, based on principles found in real estate development literature, for testing necessity of development subsidies in a noncompetitive context.

Section A: Testing Necessity in a Competitive Context--and a Disclosure Rule

Part I's review of constitutional gift law explored the role of necessity in the context of location competition. As Part I explained, much of the case law pertaining to public aid of private enterprises deals with competitive situations. In those cases, necessity can practically be assumed away,[39] because as courts have noted, governments have little choice but to provide the requested subsidy or lose the project "to other ***S22** states."[40] As a result, the chance that a competitive location subsidy is unnecessary or relies on invalid past consideration is low.[41]

Courts make the final determination on whether competition is present,[42] but they are informed by initial determinations by executive or legislative bodies. One court, for example, referred to determinations made by local governments that subsidies were necessary to make the projects at issue go forward in the community[43]--an uncontroversial presumption in the face of interstate competition.[44]

However, courts should not defer to determinations by other public bodies about the presence or absence of competition unless there is a reasonable basis for the conclusion. In order to accurately assess whether a business subsidy involves a competitive situation or not--and ultimately, whether a subsidy is necessary--courts (and executive or legislative bodies making initial determinations) need information about the project to be subsidized. The need for this information forms the basis for implementing a disclosure rule.

As an example of a possible disclosure rule, any company requesting a discretionary subsidy could be required to provide pertinent information publicly to every solicited government unit in advance of approval of any incentive, including: (a) important details about the amount of the company's proposed investment in the facility and how the project will be financed,

(b) the anticipated timing of the company's investment in the facility and associated job creation, (c) the company's internal location selection process and criteria, and (d) the specific location of every site under consideration for the project.[45]

Disclosure of this kind would allow a court (or executive or legislative body) to check the validity of the location competition. For example, officials could review the different locations being considered by a subsidy-seeking business and could compare those locations with the business' internal selection process and criteria to determine whether the other locations were legitimate competitors. Due to the fact that business location decisions often involve interstate competition, an effective disclosure rule would need to be enacted at the federal level and enforced nationwide. Legal standing could be granted to affected governments and taxpayers to file suit in federal court to ensure that disclosure occurs.

***S23** This would, of course, represent a significant shift in practice, since most incentive negotiations today occur under a cloak of secrecy.[46] Establishing a disclosure requirement is justified on the basis that a company seeking public resources should accept a public process. If a company wants its site-selection process to remain proprietary and confidential (not public), then it should forego publicly funded incentives. In addition, transparency would enable each government unit to assess competitor governments and contemplate intergovernmental cooperative arrangements, which would be enforceable thanks to the disclosure requirement.

Importantly for this article's framework, a disclosure rule would help governments distinguish between competitive and noncompetitive situations. Faced with a questionable claim that a project involves location competition, a disclosure rule would ensure that governments receive information to support (or refute) the claim. Courts, likewise, should delve into evidence about competition and establish a precedent for extensive discovery as part of any constitutional review by the judiciary, regardless of whether a disclosure rule is enacted legislatively.[47]

Section B: Testing the Necessity of Public Aid in a Noncompetitive Context

Recall that noncompetitive scenarios involve developers (or redevelopers) of buildings designed for commercial or residential purposes that are seeking incentives for development projects, even though no reasonable claim can be made about location competition. In the absence of competition, as explained in this Section, a subsidy probably is not "necessary"--and to the extent that a subsidy for private enterprise is unnecessary, it amounts to an unconstitutional gift regardless of the public benefit.[48] This Section provides a framework for evaluating the necessity of public aid for private enterprise in noncompetitive situations.

To set the stage for this Section, an example is helpful. Suppose a developer proposes to construct a mixed use project that will include residential and commercial components. Assume that, *without* a subsidy, the developer can obtain sufficient financing to construct the project one half mile away from the town's most central and desirable location, Main Street. However, *with* a subsidy, the developer could afford to construct the project directly on Main Street by acquiring more desirable and expensive land and applying interior and exterior finishes that would make the project more appealing as compared to other residential and commercial space in the community. In this scenario, the project can go forward in the community without subsidy, but it cannot ***S24** go forward in the more exceptional form proposed by the developer unless some subsidy is provided. As described, the project does not involve location competition (between jurisdictions) nor is it being pursued for some other public purpose, so the rationale for public aid is weak or nonexistent.[49]

Recall, however, that a project in a noncompetitive context might still be eligible for public aid in pursuit of public purposes such as elimination of blight or construction of affordable housing for low-income persons.[50] In these situations, even though the project context is not competitive, a subsidy may nonetheless be necessary and permissible in order to accomplish the desired public purpose. Taking the example of the mixed use project described above, a public subsidy might be necessary to induce the developer to locate the project in a government-designated blighted area (where lower rents strain the project's feasibility) rather than on a prime piece of real estate on Main Street (where rents are higher). Or a subsidy may be required to enable the developer to construct residential units that are affordable to low-income members of the community. The constitutional question is whether the subsidy provided is unnecessary and therefore amounts to an unconstitutional gift.

An effective necessity test will help governments to minimize the amount of public subsidy required to accomplish the desired end. In the case of a development project in a noncompetitive context, basic methods of real estate development finance can be applied to determine the effect of a subsidy on the project's financial feasibility. A project achieves financial feasibility, as that term is used by development professionals, when the project earns adequate returns to support the minimum investment of private capital needed to finance construction of the project.[51] As a financial and practical matter, feasibility--and therefore necessity--is knowable.

Exactly how might a court employ principles of real estate development finance to test an assertion that a subsidy is "necessary" in a noncompetitive context? Trial courts would need to ask probing questions about the financial feasibility of the project, and ***S25** appellate courts would require detailed findings from lower courts to substantiate any determination of necessity. The disclosure rule proposed earlier should be helpful in this regard. Fortunately, there is no need to invent a new analytical framework--courts should simply mirror the analysis that would be conducted by a reasonable development professional faced with the same question.[52]

What does that analysis look like? Some public officials employ a crude "gap" analysis. This method makes basic assumptions about the availability of private debt and equity to finance a development project and then calculates the difference between the total project costs and the assumed availability of private capital. The difference is then presented as a static financing "gap" that must be filled by a public sector contribution.[53]

There are at least two problems with utilizing a static "gap" to evaluate necessity. First, it fails to capture what is actually a dynamic and fluid analysis of interdependent capital sources such as equity and debt. Each assumption about a particular capital source affects the other sources and, ultimately, affects investor returns on a project.[54] In reality, gaps are not static, and it is misleading to represent them as such. Thus, gap analysis is wholly inadequate in approximating the analysis of a prudent investor. Second, even if the existence of a so-called "gap" is assumed, it does not help a local government evaluate and compare different legal means of addressing that gap. After all, a gap can be addressed through options ranging from leases to loans to grants, but gap analysis fails to help governments determine the appropriateness or necessity of each of the available options.

This article provides a more effective framework than gap analysis for constitutional gift determinations. The proposed analytical framework takes a project through a staged, sequential analysis of six general public aid options: (1) analysis and verification of assumptions; (2) public lease of space for public use in the private project; (3) construction or acquisition of public facilities on the site of the private project; (4) market rate public loan to private project with adequate security and risk-adjusted interest rate; (5) subsidized public loan to private project, which could involve inadequate security or an interest rate that fails to fully reflect the public's risk; and (6) equity investment or grant. The options were categorized and ordered by integrating a key legal principle with real estate development finance principles.

The key legal principle is that greater public control over public funds and facilities is favored in constitutional gift analysis. Accordingly, any legal framework for ***S26** evaluating aid to a noncompetitive project should consider the level of public control.[55] In the framework proposed here, options that retain greater public control over funds and facilities are prioritized over options that surrender public control.

There are two development finance principles in operation in the framework. The first finance principle is that financial feasibility of a private project can be improved by arranging for prelease or presale of some portion of the private project.[56] In the context of public aid, the public could enter into a presale arrangement in which the government agrees to buy a portion of the private project at a reasonable price (no subsidy) to be used as a publicly owned and operated facility for a public use. A typical example of this sort of public-private partnership is development of a hotel and convention center, in which the private developer constructs the hotel and convention center together, and the public sector agrees to purchase the convention center (but not the hotel) from the developer when construction is complete. In the example, the public would exercise control over the convention center through ownership, which is more control than the public would exercise if it subsidized the convention center and left it in private hands. Another option would leave the convention center under private ownership, but the public would exercise control through a long term lease for space. Under the framework proposed in this article, public ownership or a long term lease would be favored over a scenario in which a public subsidy was provided without public control over the facility.

The second finance principle is that developers, when arranging financing for a development project, typically seek to replace expensive investor equity with less expensive debt whenever possible.[57] Applying this principle in the context of public aid, governments should consider offering loans, which improve project feasibility by reducing the amount of expensive investor equity required for the project, before considering a grant of any kind. In addition, when public aid takes the form of a loan, it provides more public control than a grant (a loan is secured and paid back with interest) and therefore is favored in the proposed framework.

The principles described above were applied to the six options, which were prioritized and then split into two stages: Stage 1 contains the first four options, none of which involves a direct subsidy to the private project, and Stage 2 contains the final two options, each of which involves some direct subsidy to the private project. Table 1 summarizes the framework and the level of public control over facilities and funds.

TABLE 1. FRAMEWORK FOR DETERMINING NECESSITY OF PUBLIC AID IN A NONCOMPETITIVE CONTEXT		
STAGE 1: NO DIRECT PUBLIC SUBSIDY, GREATER PUBLIC CONTROL		
OPTIONS (IN SEQUENCE)	**PUBLIC CONTROL--FACILITY**	**PUBLIC CONTROL--FINANCIAL**
1. Analysis and verification of assumptions	**Not applicable**	**Full**: Analysis directed by public and conducted for public benefit
2. Public lease of space in project	**High**: Public lease and control over space, private ownership	**High**: Public funds pay rent for public space only as needed
3. Construction or acquisition of public facility on the site of the private project	**High**: Private construction but public ownership/ control of the public facility	**High**: Public funds used only to acquire publicly owned and controlled facility

4. Market-rate public loan to private project, adequate security and risk-adjusted interest rate	**Low**: Privately owned project; public granted security interest in the project	**Medium**: Public funds loaned to private project but terms include adequate security and risk-adjusted interest rate

STAGE 2: DIRECT PUBLIC SUBSIDY PROVIDED, LESS PUBLIC CONTROL		
OPTIONS (IN SEQUENCE)	**PUBLIC CONTROL--FACILITY**	**PUBLIC CONTROL--FINANCIAL**
1. Subsidized public loan to private project, security inadequate and/or interest rate fails to reflect public's risk	**Low**: Privately owned project; public granted security interest in the project	**Low**: Public funds loaned to private project but loan is not backed by adequate security and/or fails to earn risk-adjusted return
2. Equity investment or grant	**Minimal**: Little or no public control over facility (perhaps some contractual restrictions on development or use)	**Minimal**: No public control over public funds (perhaps some contractual restrictions on development and reporting). Risk-adjusted return may or may not be earned.

***S27** Putting the framework into practice is straightforward. For any particular project, the court or other public body tests each option in sequential order before proceeding to the next one. Thus, options described in Stage 1 are tested in sequential order to determine the effect on feasibility of the private project. If any of those options, individually or in combination, make the project financially feasible, then Stage 2 is not even attempted because Stage 2 options cannot be "necessary" to make the project go forward in the community and are therefore unconstitutional gifts. If no Stage 1 option or combination of Stage 1 options makes the project feasible, then Stage 2 options are attempted in sequential order: a subsidized loan is attempted before making an outright grant, because a grant cannot be "necessary" if a loan--which retains more public control over public funds than a grant--would achieve project feasibility. Thus, as noted previously, the necessity of any subsidy is knowable because feasibility is knowable.

Each stage and its sequentially ordered options are described in greater detail below.

Stage 1: Improve Project Feasibility without Direct Subsidy

In Stage 1, the government initially completes its own financial feasibility analysis of the project to determine independently whether the project is feasible for ***S28** private investors without any direct subsidies.[58] This action benefits the private developer as well, because it validates (or corrects) the developer's assumptions and sets expectations for negotiating any future public-private partnership related to the project. The government entity expends minimal resources in conducting this analysis and retains control over its funds and facilities, so it is the most obvious first step.

If feasibility analysis reveals that the project is not feasible on its own to achieve legitimate public purposes, then it would be appropriate to test other Stage 1 options that involve no direct subsidy to the developer. It is important for government officials to recognize that public aid to private enterprises need not take the form of a direct subsidy. As illustrated by the options in Stage 1, there are a number of meaningful ways for public participation to enhance project feasibility without directly subsidizing the project. Sometimes mere government cooperation can improve feasibility for a development project.[59] To the extent that any exchange with the private sector is contemplated in Stage 1--such as a lease or a loan--the exchange occurs at fair market value. However, each subsequent option within Stage 1 represents less public control over public facilities and funds, thereby increasing the public's exposure to private risk and decision-making.[60]

A court need only evaluate whether the options described in Stage 1 were attempted, preferably in sequence. Evidence of compliance with this staged analysis could be submitted by the private developer and tested by experts who could support or refute any claims about the effect of Stage 1 options on project feasibility.

Stage 1 options are described in greater detail below.

> **1. Project Analysis and Verification of Assumptions**. Are the assumptions being made by the developer or retailer reasonable? Key assumptions include the cost of capital provided by lenders and investors, the cost of construction, the strength of demand for the project in the market, and the net operating income of the project upon completion.[61] In the author's experience assisting government officials, there have been several instances in which for-profit developers have made overly conservative assumptions in their pro forma financials and then used those overly conservative assumptions to argue (mistakenly) that the project requires local government subsidy to be financially feasible. Assumptions can be verified by neutral third-party development experts.[62]

> ***S29** **2. Public Lease of Space in the Private Project**. Could the government lease space in the private development project for government use at an objectively fair price, without a subsidy or gift?[63] With a government pre-lease in hand, the project will look more appealing to banks[64] and may be able to secure a greater amount of low-cost debt as compared to high-cost equity,[65] thus improving the project's feasibility without the need for any direct subsidy.[66] This assumes that the government can put the leased space to good use for legitimate public purposes.[67]

> **3. Construction or Co-location of Public Facilities on the Site**. Could the government turn some portion of the private project into a publicly owned facility?[68] For example, a government could acquire some of the undeveloped land around a project and own it as a public park. The acquisition of unused land from the private project at fair market value (no subsidy) injects capital into the private project, eliminates some of the private owner's capital expenditures and ongoing operating expenses associated with the land--and, importantly, does not ***S30** involve a gift. In another example, public parking could be constructed and parking spaces leased to the private project at the fair market rate,[69] thereby reducing the amount of expensive up-front capital required for the private developer to construct its own private parking.[70] Again, this improves the financial feasibility of the project without providing a direct subsidy or gift.[71] An additional benefit to this approach is that the government retains the property it owns and can sell or reuse it for other purposes at the conclusion of the useful life of the project.

4. **Market-Rate Loan (Adequate Security and Risk-adjusted Interest Rate)**. Developers typically seek to maximize the amount of low-cost debt capital in development projects, because loans--even loans with relatively high interest rates--are still less expensive than equity, thereby reducing the overall cost of capital for the project.[72] Thus, a government can improve the feasibility of a development project simply by providing a loan at an appropriate risk-adjusted rate of interest.[73] The meaning of "appropriate risk-adjusted" interest rate is that the loan carries terms that would be expected for comparable loans in the market, including a market rate of interest and appropriate security in the form of a deed of trust or lien on the project.[74] The interest rate can be high, as appropriate, to compensate for the level of risk accepted by the government in providing the loan.[75] In the author's experience, a loan from a foundation or local government--even at a relatively high interest rate--can be sufficient to make a development project feasible.[76] If feasibility can be achieved through an unsubsidized loan, then an outright grant cannot be "necessary." Thus, so long as making a loan is a ***S31** legally permissible activity for governments,[77] a loan can provide an elegant solution for project feasibility without passing along an unnecessary subsidy to the private enterprise.

Stage 2: Minimize Any Subsidy to a "Necessary" Level (If No Feasibility after Stage 1)

If any of the options provided in Stage 1, alone or in combination, make a project feasible, then a grant or direct subsidy cannot be "necessary"-- that is, direct subsidy above what is necessary for feasibility must be an unconstitutional gift regardless of the project's perceived benefit.[78] However, after employing all of the options in the first stage, the most challenging projects may still require some direct subsidy in order to achieve feasibility.

In such cases, some governments consider offering direct subsidies to make projects feasible in noncompetitive situations. If such subsidies are authorized in pursuit of a public purpose,[79] the level of subsidy nonetheless should be minimized[80] and should be roughly proportional to the public benefit received[81] from the project in order to avoid making an unconstitutional gift. To that end, the following options should be evaluated in sequential order.

1. **Subsidized Loan (Security Inadequate and/or Interest Rate Does Not Reflect Level of Risk)**. A subsidized loan typically involves a lower-than-market interest rate or deferred interest and principal payments with a balloon payment upon sale. Such loans contain an implicit grant--the grant component buys down the interest rate or reduces the debt service payments during the term of the loan. Ideally, the grant component of the loan should be treated as a form of equity investment in the project, entitling the government to some additional risk-adjusted return in the event the project achieves profitability. There are two important points related to a subsidized loan. First, governments should be wary of lowering the cost of their capital (such as a low interest rate on a government-provided loan). When a government offers capital at a subsidized rate, the rational developer will elect to replace expensive private capital with the subsidized public capital, even if reliance on public capital is not necessary. The government should instead make its capital more expensive, in order to motivate the developer to seek alternative (private) sources of capital and to reduce its reliance on public sources. Second, it ***S32** should be obvious that courts and legislative bodies should only rarely, if ever, find it necessary to move beyond this option. After all, one can envision an extremely developer-favorable loan that defers all interest and principal payments to a balloon payment due when the project is sold or refinanced. Such a loan will, in most cases, make a project feasible, because it not only replaces expensive equity, but it also involves no payments during the term of the loan, so it behaves nearly identically to a grant in that it does no harm to the project's operating income nor to the project's ability to obtain other financing.

2. **Equity Investment (or Grant as a Last Resort)**. Finally, if all of the above measures have been applied and none achieves feasibility for a private project, then perhaps a direct equity investment is indeed “necessary” to make the project go forward as proposed. A number of state constitutions explicitly prohibit equity investments,[82] but if permitted, such investments (or grants) should be made on the same basis as other investors; that is, the investment in the project should earn a return if the project is profitable. As a leading real estate development text notes, “Investment of public dollars requires a return for risk taking *apart from increased collection of property taxes*, based on some form of ... profit participation in future project revenues.”[83] Indeed, this notion of public return apart from tax revenue is reflected in case law. Arizona's Supreme Court, en banc, explicitly rejected the notion that payment of taxes alone could serve as consideration for a subsidy.[84]

Practical Considerations and Conclusion

In general, each successive option outlined in the framework above involves a deeper level of public participation--that is, subsidy or risk or both--than is required for the preceding option. If one of the first options makes a private project feasible, then consideration of subsequent options is neither appropriate nor “necessary.” Courts could use the framework to determine the necessity of any form of public aid to private enterprise in a noncompetitive situation. So, for example, a grant would not be deemed ***S33** necessary unless it could be shown that each of the preceding options was employed, sequentially, before resorting to the grant.

If a government attempts all of the options and nonetheless arrives at the final one--using public funds to make a grant or to invest directly in a private development project--then officials should begin to question whether the project makes sense to pursue at all. If a project requires direct public subsidy, then is it truly feasible and self-sustaining? This last question is more a policy issue than a legal matter, but the process leading to the policy answer is the same as that needed to answer the legal question.

Finally, the necessity framework proposed in this article is not merely a theoretical concept. This approach has already been tested and employed for projects seeking public aid from state and local governments. At the School of Government at the University of North Carolina at Chapel Hill,[85] students in a graduate level course taught by the author apply this legal framework when helping local governments understand their options for improving the feasibility of development projects. In one project in a rural area, for example, a graduate student team applied the framework to the redevelopment of a historic landmark and found that feasibility could be achieved through a market rate loan (Option 4 in Stage 1 of the framework).[86]

Similarly, in a university program launched by the author called the Development Finance Initiative (DFI), development professionals apply the same framework to test public aid options for state and local governments on larger, more complicated development projects.[87] In one successfully financed project, DFI proposed the development program and conducted financial feasibility analysis for a public-private partnership for construction of public parking as part of a larger private mixed use development in an urban downtown. DFI applied the framework and found that feasibility for the project could be achieved simply through the acquisition of public parking from the developer. Thus, the project was shown to be feasible using Option 3 of Stage 1 of the framework.[88] In that case, Stage 2 subsidies would have been unnecessary, constitutionally questionable forms of public aid.

In an even more complex project involving the master development of an 800-acre site in a rural region, DFI applied the framework to a project where some officials believed that private development would be possible only if it were subsidized. However, DFI conducted feasibility analysis (Option 1) and determined that financial feasibility for private development was achieved through a combination of public leases (Option 2), ***S34** acquisition of public facilities (Option 3), and market-rate loans (Option 4)--all within Stage 1 of the framework where no direct subsidy is provided to private enterprise.[89] Once again, the framework proved to be practical and effective in recognizing that Stage 2 subsidies would have been unnecessary and therefore constitutionally suspect forms of public aid.

If the straightforward legal framework proposed in this article can be employed by students and development professionals alike, it should be possible for courts to employ it as well. Courts would not be required to perform the financial analysis themselves. They would simply ensure that executive or legislative bodies followed the framework in any particular instance of public aid to private enterprise and that the determination of necessity was credible.

Courts could exercise some flexibility in how they implement the framework. For example, the framework could be boiled down to a more simplistic formulation: (1) necessity must be present for discretionary public aid to private enterprises, and a determination of public benefit has no bearing on the determination of necessity; (2) so long as public aid is limited to Stage 1 (unsubsidized) options, courts could (and arguably should) defer to the executive or legislative body regarding which Stage 1 options are utilized, how they are combined, and the precise parameters of each; and (3) regardless of public benefit, public aid in the form of a grant cannot be necessary if a loan can be offered instead, and as already explained, a loan almost always achieves feasibility for a project. Accordingly, it is highly unlikely that grants are necessary in a noncompetitive context. Consistent application of this framework by courts should, in turn, impose some discipline on for-profit companies and government officials engaged in public aid negotiations for development projects.

Of course, this article's approach requires some astuteness on the part of state courts, which must ask the right questions and make appropriate findings to support the determination of necessity. Are state courts willing to play this important role? In many states, that question is as yet unanswered.

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Footnotes

a1 Albert and Gladys Hall Coates Distinguished Term Associate Professor of Public Law and Government, School of Government at the University of North Carolina at Chapel Hill. *See C. Tyler Mulligan*, UNC School of Government (2016), https://www.sog.unc.edu/about/faculty-and-staff/c-tyler-mulligan [https://perma.cc/Y4UK-WJ4Y] (providing a biography of the author).

1 The incentive is discretionary because it must be approved as an exclusive benefit to that company alone, as opposed to an incentive that is provided automatically to all companies within a certain class. As examples of the latter, a local government might provide small business counseling services to all small businesses in the community, or a reduced water rate might be available to all business customers that use a certain volume of water. Those benefits are offered on a general basis, not exclusively to one company on a discretionary basis. General benefits available to all businesses are not the focus of this article.

2 *See infra* Part II; *see also* C. Tyler Mulligan, *Economic Development Incentives and North Carolina Local Governments: A Framework for Analysis*, 91 N.C. L. Rev. 2021, 2050-52 (2013) (describing the "necessity" or "but for" determination undertaken for economic development subsidies in North Carolina).

3 *Id.*

4 Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 947 (2003) ("Moreover, corporations have proven adept at playing competing localities against each other in order to extract

government payments or tax exemptions."); *see, e.g.*, Jeff Bennett & Cameron McWhirter, *Volvo to Build First U.S. Car Plant in South Carolina,* Wall St. J., May 11, 2015, http://www.wsj.com/articles/volvo-car-corp-to-build-plant-inberkeleycounty-sc-1431340237 [https://perma.cc/GBG7-UF75].

5 Matthew Schaefer, *State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response*, 28 N.M. L. Rev. 303, 311-12 (1998) ("The prisoner's dilemma is typically described as follows: Two prisoners are separately interrogated by the authorities, who attempt to extract confessions from each implicating the other. If both are silent, each will go free. If both confess, each will get a moderate sentence. If one confesses and the other does not, the former will get a light sentence and the latter a heavy sentence. Accordingly, both prisoners would be best off if each remains silent, but each fears the other will confess. To avoid the danger of the heavy sentence that would follow from the other's confession, each confesses and incurs a moderate sentence. The prisoners are unable to reach their preferred outcome (total silence) because they are unable to communicate and reach a binding agreement. How does the prisoner's dilemma apply to the situation of state subsidy wars? ... A state that idly sits by while other states offer investment attraction subsidies will have a heavy sentence placed upon it as mobile capital and tax revenues accompanying the capital flow to those other states."); *see also* Mulligan, *supra* note 2, at 2090 (comparing competitive incentives to a "prisoner's dilemma").

6 *See infra* Part I.

7 Marcia Clemmit, *Attracting Jobs: Do Tax Breaks for Business Spur Employment?*, CQ Researcher, Mar. 2, 2012, http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2012030200&type=hitlist&num=0 [https://perma.cc/KP4X-NC4U].

8 Bert Caldwell, *Cabela's Baits the Hook, and States Are Biting*, The Spokesman Rev., Sept. 10, 2006, http://www.spokesman.com/stories/2006/sep/10/cabelas-baits-the-hook-and-states-are-biting/ [https://perma.cc/2GSA-98TG] ("What sets Cabela's apart from other businesses is the way it has wrapped its whole approach to brick-and-mortar retailing around its ability to get site concessions.").

9 *See, e.g.*, Common Cause v. State, 455 A.2d 1, 19 n.23 (Me. 1983) ("Getting [the company] to locate ... in Portland was a prime objective of the state and city in the negotiations. We cannot say that provision for a subsidy was unnecessary in order to achieve that objective.").

10 David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. Pa. L. Rev. 265, 280 (1963) ("At the turn of the century, some form of public aid limitation had been incorporated in the constitutions of a large majority of the states. For better or for worse, they are still with us, virtually unchanged .... The constitutional movement of the nineteenth century was an extremely pragmatic one; each change in each state was a direct reaction to the specific evils which had manifested themselves in that and perhaps neighboring jurisdictions. Some constitutions therefore contain only a credit clause, others join to it a stock clause, and still others have all three. The potential for diversity is further intensified by the fact that any or all of these restrictions may apply only to the state, to counties, to cities and towns, or to a specified combination of these."); Briffault, *supra* note 4, at 912 ("Initially, these provisions applied only to the activities of state governments. As a result, they were sometimes circumvented by state legislation authorizing local governments to provide assistance to private firms ... and in the late nineteenth century, many states amended their constitutions to apply the public purpose and aid limitations to local governments.").

11 Briffault, *supra* note 4, at 911-12.

12 Pinsky, *supra* note 10, at 283-84.

13 Briffault, *supra* note 4, at 914-15 ("Today, state constitutional 'public purpose' requirements are largely rhetorical. State legislatures define what public purposes are and receive great deference when they determine that a particular program promotes the public purpose. State constitutional provisions articulate the truism that public spending must be for a public purpose. But they do not provide a judicially enforceable constraint on state or local government.").

14 *See, e.g.*, Mulligan, *supra* note 2, at 2104-05.

15 *See supra* note 13.

16 Briffault, *supra* note 4, at 946 ("With many economic development programs little more than giveaways of tax breaks or low-interest loans to private firms, courts could more strictly scrutinize the fit between the public end and the means chosen, or the balance between the public and private benefits, particularly for measures that provide significant private gains but only speculative public ones. But this would involve difficult empirical questions of assessing the benefits from a program and calculating how likely they are to occur. In many cases a more difficult question would be deciding whether to classify a particular benefit as public or private, or what is the proper balance between public and private benefits.").

17 *Id.* at 914 (characterizing some courts as deferring to legislative determinations "that a spending, loan, or tax incentive program will promote the public purpose are to be accepted as long as they are 'not ... irrational.'")

18 *Id.* at 940.

19 One commentator discussed the application of economic multipliers and suggested that a reasonable distinction could be made by courts between basic activities that produce "an inflow of income from the export of goods to other areas," such as manufacturing, and derivative activities that result in "a net flow of income away from the area." Pinsky, *supra* note 10, at 308-09.

20 Jonathan Q. Morgan, *Analyzing the Benefits and Costs of Economic Development Projects*, 7 Community & Econ. Dev. Bull. 6 (2010), http://sogpubs.unc.edu//electronicversions/pdfs/cedb7.pdf [https://perma.cc/6ZXQ-JHQ9] ("One of the major concerns about economic impact analysis is that multipliers are often misunderstood and used inappropriately.").

21 Briffault, *supra* note 4, at 946-47.

22 *See* Pinsky, *supra* note 10, at 309; *see also* Dale A. Oesterle, *Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies*, 73 U. Colo. L. Rev. 587, 617 (2002) ("One can doubt the financial expertise and judgment of elected officials to make risk/return calculations.").

23 Briffault, *supra* note 4, at 946 ("Even with judicial deference to the legislative definition of economic development as public purpose, courts could in theory play a role in determining whether a particular economic development program actually advances its stated public purpose ... [and] could strictly scrutinize the fit between the public end and the means chosen, or the balance between the public and private benefits, particularly for measures that provide significant private gains but only speculative public ones.").

24 Turken v. Gordon, 224 P.3d 158, 166 (Ariz. 2010) (opining that the duty "to pay taxes arises from law applicable to all, not out of contract," and therefore tax payments could not serve as consideration flowing to the City under a parking agreement with developer).

25 Even if one rejects the notion that courts should take a more active role in assessing public benefit, that conclusion has no bearing on whether courts should nonetheless evaluate the *necessity* of business subsidies, as this article proposes.

26 *See* Pinsky, *supra* note 10, at 275 ("However, since state programs are initiated and implemented in a context of interstate competition to attract new industries, it is difficult for any state to objectively draw a line between adequate and excessive allocation of public funds and credit for industrial financing.").

27 In a leading state supreme court case, the majority expressed concern about capturing economic development "which might otherwise be lost to other states." Maready v. City of Winston-Salem, 467 S.E.2d 615, 627 (N.C. 1996). A lower court picked up on the treatment of interstate competition and addressed it as a factual determination--it is either present or it is not. *See* Haugh v. Cty. of Durham, 702 S.E.2d 814, 823 (N.C. Ct. App. 2010); *see also* Linscott v. Orange Cty. Indus. Dev. Auth., 443 So. 2d 97, 99-100 (Fla. 1983) (noting that the state's posture on revenue bonds placed it "at a competitive disadvantage with other states"); Hayes v. State Prop. & Bldgs. Comm'n, 731 S.W.2d 797, 798 (Ky. 1987) (noting that "Kentucky was involved in a fierce competition with many of the other states of this nation regarding the location of a major automotive manufacturing plant"); Basehore v. Hampden Indus. Dev. Auth., 248 A.2d 212, 218 (Pa. 1968) ("There is another important factor to consider. Industrial development authorities are so prevelant [sic] throughout the country that Pennsylvania is at a competitive disadvantage in attracting industry to this state should we declare this act unconstitutional."); Mayor & Members of City Council v. Indus. Dev. Auth., 275 S.E.2d 888, 890 (Va. 1981) ("The General Assembly has rejected these arguments and determined that this type [of] authority is necessary to promote the economy of the Commonwealth, and enable it to compete with other states which utilize this 'tool' to attract industry and promote their economic growth."); State *ex rel.* Hammermill Paper Co. v. La Plante, 205 N.W.2d 784, 798-99 (Wis. 1973) ("The development of such programs will also place Wisconsin upon a competitive basis with neighboring states that heretofore have approved similar legislation." (footnotes omitted)).

28 *See supra* notes 2-5 and accompanying text.

29 The generally accepted rule in contract law is that past consideration is not valid consideration. *See, e.g.*, Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1012 (10th Cir. 2002) (applying Utah law, which says that "[g]enerally, past services cannot serve as consideration for a subsequent promise"); Smith v. Recrion Corp., 541 P.2d 663, 665 (Nev. 1975) ("Past consideration is the legal equivalent to no consideration."); *see also* Arthur L. Corbin, Corbin on Contracts § 9.1 ("Happenings of the past, not bargained for by a promisor, are far less likely to be held to make an informal promise enforceable than are those for which the promisor bargains.").

30 Mulligan, *supra* note 2, at 2050 ("An example where consideration would be absent is a company seeking incentives to locate in a local government's jurisdiction after the company has already committed to locate there. Following such a commitment, the local government cannot accept the company's promise to locate in the jurisdiction as valid consideration for an incentive payment, because the company has already committed to locate in the jurisdiction. Such an incentive would amount to a constitutionally impermissible gift: the constitution does not allow the government to pay an entity to do something that the entity has already committed to do.").

31 Mulligan, *supra* note 2, at 2098 ("The company has stated explicitly that the incentives package will be a determinative factor in its location decision. A company making [this] incentive request will have no difficulty certifying that 'but for' the incentive, the company would not have located its facility in the local government's jurisdiction.").

32 Briffault, *supra* note 4, at 913 ("During the closing decades of the twentieth century, state courts increasingly expanded the scope of permissible public purposes, so that by the end of the century virtually every state supreme court had upheld at least some economic development programs that involved direct assistance--including cash grants, low-interest loans, and tax breaks--to individual firms.").

33 Mulligan, *supra* note 2, at 2098-99 ("The developer has selected the location, expended resources on pre-development of the project (such as site assemblage, market research, and design, among others), and courted investors for the project based on the characteristics of the local population--not on the basis of incentives .... The best that the developer in [a noncompetitive] scenario could say is that 'but for' the incentive that subsidizes the purchase of land and construction of the commercial buildings, the project could not go forward *in its proposed form*. That is a weak, if not entirely ineffectual, 'but for' argument, and it is fundamentally different from the 'but for' determination [in a competitive context] where the incentives were offered to induce companies to locate in one jurisdiction rather than another."); *see also* Briffault, *supra* note 4, at 913-14 ("Some courts have continued to police economic development programs, invalidating some--such as those aimed at aiding non-industrial activities like hotels and restaurants.").

34 *See infra* Part II.B.

35 *See supra* note 27.

36 *See, e.g., Haugh*, 702 S.E.2d at 823 (finding that interstate competition was present because the company's "consideration was relocating to and outfitting a partially completed facility in Durham or moving to readily available facilities with readily available equipment in California").

37 *See, e.g.,* Nev. Rev. Stat. Ann. § 704.7876 (requiring an attestation "that but for the incentive provided pursuant to the Program, the applicant would not have located or intended to locate the business in this State").

38 For example, in North Carolina, "necessity" determinations are found in all three: case law, statutes, and executive branch regulations. *See* Maready v. City of Winston-Salem, 467 S.E.2d 615, 619 (N.C. 1996) (describing typical procedures for approval of incentives to include a determination that "participation by local government is necessary to cause a project to go forward in the community"); N.C. Gen. Stat. § 143B-437.52(a)(4) (2011) (requiring that any grant issued through the Job Development Investment Grant program be "necessary for the completion of the project in this State"); *id.* § 143B437.02(h)(5)(F) (requiring that site development performed using funds from the Site Infrastructure Development Fund be "necessary for the completion of the project in this State"); N.C. Dept. of Commerce, Guidelines and Procedures for Commitment of Funds from the One North Carolina Fund § 6.1 (2004) http://www.thrivenc.com/node/985/one-north-carolina-fund-guidelines [https://perma.cc/BS3X-FWJN] (establishing the "Threshold Statutory Criteria for Awarding Funds" in Section 6.1 as being "used in connection with projects for which participation by the state government is needed for the project to go forward or be undertaken in the state"). For examples of legislation in other states, see Mass. Gen. Laws Ann. ch. 23A, § 3C (requiring coordinating council to find, among other things, that "a duly authorized representative of the controlling business has certified to the [council] that the controlling business would not have undertaken the proposed project but for the EDIP tax credits and local tax incentives available to it pursuant to this chapter"); N.J. Stat. Ann. § 52:27D-489d (providing that in deciding whether to approve a local incentive grant agreement, the Local Finance Board shall consider, among other factors, "the need for the redevelopment incentive grant agreement to the viability of the redevelopment project").

But cf. Common Cause v. State, 455 A.2d 1, 19 n.23 (Me. 1983) (rejecting party's argument based in contract law that public subsidy to induce a shipbuilder to locate a new operation in the state and invest in port facility was a fictitious contract because the facility improvements would have been undertaken by any good manager; finding that locating the operation in the State was a "prime objective" of the State and therefore court "cannot say that provision for a subsidy was unnecessary in order to achieve that objective"); *see also* Delogu v. State, 720 A.2d 1153, 1155 (Me. 1998) (citing *Common Cause* for the proposition that "public purpose is not determined ... by the economic need of the recipient of the aid"). Such "necessity" or "but for" determinations are also common preconditions for approval of tax increment financing (TIF) arrangements. *See* Craig L. Johnson & Kennith A. Kiriz, *A Review of State Tax Increment Financing Laws*, *in* Tax Increment Financing and Economic Development: Uses, Structures, and Impact 39 (Craig L. Johnson & Joyce Y. Man eds., 2001) (indicating at the time of writing that 14 states had a "but for" test and that some other states had a related test for tax increment financing and stating that "determining whether development would have occurred is an extremely difficult matter"); Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. Chi. L. Rev. 65, 77 (2010) (citing cases where courts have rejected TIF proposals but suggesting that "but for" test rarely presents meaningful obstacle for projects). TIF programs are legislatively enacted and provide financing for publicly owned projects (see Option 3 in the proposed framework, *infra*) but typically do not provide direct subsidy to private enterprise.

39 *See supra* notes 27-29 and accompanying text.

40 *Maready*, 467 S.E.2d at 627.

41 This conclusions assumes, as case law does, that a promise by a business to locate its jobs and capital investment in one state rather than another is valid consideration for payment of a location subsidy. *See supra* notes 16-21 and accompanying text.

42 *See supra* note 36.

43 *Maready*, 467 S.E.2d at 619 ("[a] determination is made that participation by local government is necessary to cause a project to go forward in the community").

44 *Id.* at 627.

45 The name of the company is one piece of information that would not be necessary to reveal and has been intentionally omitted from this listing. The company could remain anonymous and communicate to governments through a third party.

46 Jonathan Q. Morgan, *Using Economic Development Incentives: For Better or for Worse*, Popular Gov't, Winter 2009, at 16 (noting the "secretive nature" of incentive negotiations and explaining that companies require confidentiality "to protect trade secrets and avoid tipping their hand to competitors").

47 *See, e.g.*, *Haugh*, 702 S.E.2d at 821-23 (N.C. Ct. App. 2010) (closely examining the factual circumstances pertaining to competition and then upholding the location incentives at bar because they were consistent with case law on interstate competition); *see also* Mulligan, *supra* note 2, at 2068.

48 *See* Turken v. Gordon, 224 P.3d 158, 164 (Ariz. 2010) ("When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause.").

49 In this situation, a determination that a subsidy is unconstitutional would be expected in a state such as North Carolina where competition and necessity are incorporated into the constitutional rationale for business subsidies. *See supra* notes 27 and 47. However, the subsidy might survive a challenge in a state where the judiciary has largely abdicated its role in enforcing public aid clauses. *See, e.g.*, State *ex rel.* Brown v. City of Warr Acres, 946 P.2d 1140, 1145 (1997) (applying public purpose exception to public aid clauses without questioning legislative determination of public benefit and without requiring competitive conditions or necessity).

50 *See supra* note 14 and accompanying text. Even in the context of affordable housing, necessity plays a role. *See In re* Housing Bonds, 296 S.E.2d 281, 285-87 (N.C. 1982) (finding a public purpose in issuance of bonds for affordable housing that occurs "*only*" when decent housing is not otherwise available because "private enterprise is unable to meet the need").

51 To attract sufficient private investment to allow a project to proceed, a development project's pro forma financials must demonstrate that the project can achieve a minimum rate of return. Richard B. Peiser & David Hamilton, Professional Real Estate Development: The ULI Guide to the Business 168 (3d ed. 2012) (describing feasibility analysis as "the one lenders require to ensure that the project will live up to its performance expectations"). Typical return expectations for private real estate development projects are regularly reported in publications such as the quarterly Real Estate Research Corporation (RERC) Report.

52 This article's proposed framework could be viewed as similar to a "prudent investor" standard. *See* Neb. Const. art. XI, § 1 (requiring municipalities to invest public endowment funds "in the manner required of a prudent investor who shall act with care, skill, and diligence under the prevailing circumstance").

53 Mike E. Miles et al., Real Estate Development: Principles and Process 340 (4th ed. 2007).

54 Peiser & Hamilton, *supra* note 51, at 22 (explaining that feasibility analysis involves an "iterative process in which the developer obtains more and more precise information in each iteration" through five stages of analysis).

55 This framework compares different degrees of public control of facilities and financing in much the same way as Pinsky describes in his analysis of different forms of public aid for private enterprise. *See generally* Pinsky, *supra* note 10, at 280-89 (describing the

evolution of case law regarding public aid of private enterprises and concluding that a key principle in determining whether public purposes are served is the degree of public control over projects and financing).

56 Stephen P. Peca, Real Estate Development and Investment: A Comprehensive Approach 120-21 (2009) (explaining that arranging for presale of a portion of a project can satisfy common preconditions for debt financing).

57 Miles et al., *supra* note 53, at 227 (using an example to illustrate how an investor group sought to "maximize" permanent debt financing because doing so would "provide the cheapest overall financing").

58 *See supra* notes 51-54 and accompanying text regarding financial feasibility analysis.

59 Examples of government cooperation include making public streetscape improvements or timing the construction of nearby public parking to coincide with private development.

60 Pinsky, *supra* note 10, at 281 ("Adequate protection of the public financial interest necessitates public control consonant with public financial risk.").

61 For a detailed description of how to perform feasibility analysis, *see* Miles et al., *supra* note 53, at 177-187.

62 If assistance from a third party development expert is not available or affordable, then governments should review the *pro forma* financials that were provided to prospective lenders and investors by the developer. Financials provided to lenders and investors tend to contain more optimistic assumptions about project feasibility, because developers use them to "sell" investors and lenders on the project in order to secure debt or equity investments. Development experts can assist legislative bodies (or reviewing courts) with evaluating financial documents. The author launched a program called the Development Finance Initiative (DFI) at the University of North Carolina to provide such development and finance expertise to local governments. *See* Practical Considerations and Conclusions, *infra.*

63 Ampt v. City of Cincinnati, 1896 WL 541, at *4 (Ohio Cir. Ct. July 1896), *modified sub nom.* Alter v. City of Cincinnati, 46 N.E. 69 (Ohio 1897) ("While if a constructing party would build the works, it would have to furnish the money until such favorable time as the city might find in which to buy the plant. Whatever aid the constructing party would derive from this arrangement would only be such as it might derive from its profits, if any, from the building and leasing of the works. There could be no more aid in this than is given to every party who constructs a street or any other improvement for the city."). *But cf.* Gallo v. Twp. Comm. of Weehawken, 437 A.2d 738, 742 (Law. Div. 1981) ("Under settled principles, therefore, the guarantee of the bonds by Weehawken under the guise of a lease is declared illegal.").

64 Miles et al., *supra* note 53, at 206 (explaining the value of creditworthy tenants to developers but also noting that "creditworthy tenants know the value they bring to a real estate development and they negotiate lower rents"); Peca, *supra* note 56, at 120 ("A common condition precedent [for a construction loan] is the prelease or presale of space in the building."); *cf. id.* at 126 (indicating that pre-leasing requirements are relaxed when markets are at or near their peak and banks are competing to make loans to projects).

65 Peiser & Hamilton, *supra* note 51, at 202 ("Equity is the most expensive source of funding because equity investors receive returns only after other lenders have been repaid."). Equity investors can demand risk-adjusted annual returns in excess of 10% over the interest rate of a standard bank loan depending on the level of risk associated with a particular equity investment.

66 Turken v. Gordon, 224 P.3d 158, 167 (Ariz. 2010) (articulating the principle that payment for lease or purchase of public space, if it far exceeds the value of the leased or purchased space, "quite likely violates the Gift Clause").

67 *Id.* at 164 ("No party questions that payments by the City under the Parking Agreement would serve a public purpose. The parties agree that providing parking is a legitimate public purpose and that the City could have erected a parking structure of its own without violating the Gift Clause.").

68 Citizens Word v. Canfield Twp., 787 N.E.2d 104, 108 (Ohio Ct. App. 2003) ("We hold that a governmental entity can improve its own property regardless of whether it will benefit a private developer."); Wilmington Parking Auth. v. Ranken, 105 A.2d 614, 628 (Del. 1954) ("The evil forbidden by the Constitution is not the investment of municipal funds in a public project operated solely by the municipality or other public body. 'It forbids the union of public and private capital or credit in any enterprise whatever.' And the history of the adoption of these or similar constitutional provisions in the various states, following widespread default on railroad securities guaranteed by municipalities, shows that the provision was not intended to prevent a municipality from devoting funds to its own public improvements." (citations omitted)).

69 Chun King Sales, Inc. v. St. Louis Cty., 98 N.W.2d 194 (Minn. 1959) (analyzing tax exemption of public property leased to a private entity).

70 Peiser & Hamilton, *supra* note 51, at 195 (explaining that, for private developers, "[r]ecovering the full cost of parking can be challenging").

71 Peca, *supra* note 56, at 120-21 (explaining that arranging for presale of a portion of a project can satisfy common preconditions for debt financing).

72 Miles et al., *supra* note 53, at 227 (using an example to illustrate how an investor group sought to "maximize" permanent debt financing because doing so would "provide the cheapest overall financing").

73 *Id.* at 222 (noting that when the internal rate of return (return for an equity investor) of a project exceeds the interest rate on debt, the use of debt reduces the amount of equity required and magnifies investment returns to the equity investor).

74 Miles et al., *supra* note 53, at 204-05 (explaining that lenders and equity investors consider the "riskiness" of any loans or investments they make and "price" the expected return accordingly).

75 *Id.* If the borrower provides security to the government lender that is anything other than the primary (or first) lien on the project--for example, if the government lien is subordinated to some other lender's lien-- then the government is accepting higher risk than the primary lender, and the government's higher risk should translate into a higher interest rate for the government-provided loan.

76 *See* Miles et al., *supra* note 53, at 227-228 (describing how one project maximized debt to improve returns); Andrew Trump, *How a Local Government Loan Can Make a Revitalization Project Possible*, UNC Sch. of Gov't, Community and Economic Development in North Carolina and Beyond (Sept. 4, 2015), http://ced.sog.unc.edu/how-a-local-government-loan-can-make-a-revitalizationprojectpossible/ [https://perma.cc/P8H9-EFJA] (describing how a mezzanine loan improved project feasibility).

77 Port of Longview v. Taxpayers of Port of Longview, Cowlitz Cty., 527 P.2d 263, 271 (Wash. 1974) ("The loan of money or credit by a municipality to a private corporation is a violation of our state constitution regardless of whether or not it serves a laudable public purpose.").

78 *See supra* notes 1622-31 and accompanying explanation in Part I about the difference between public benefit analysis and necessity; *see also* Turken v. Gordon, 224 P.3d 158, 167 (Ariz. 2010) ("We find it difficult to believe that the 3,180 parking places have a

value anywhere near the payment potentially required under the Agreement. The Agreement therefore quite likely violates the Gift Clause.").

79 *See supra* note 14 and accompany text.

80 *See Turken*, 224 P.3d at 166 ("The potential for a subsidy is heightened when, as occurred here, a public entity enters into the contract without the benefit of competitive proposals.").

81 *Id.* at 164 ("When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause."); *see also supra* note 78 and accompanying text.

82 *See, e.g.*, S.C. Const. art. X, § 11 ("Neither the State nor any of its political subdivisions shall become joint owner of or stockholder in any company, association, or corporation."); Nebraska League of Sav. & Loan Ass'ns v. Mathes, 266 N.W.2d 720, 721-22 (1978) ("Article XI, section 1, of the Nebraska Constitution, provides: 'No city, county, town, precinct, municipality, or other sub-division of the state, shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of any railroad, or private corporation, or association.' That section of the Constitution was adopted in 1875 and has remained unchanged since that date. Approximately 40 states have similar constitutional provisions. In general, such provisions were designed to prevent the use of public funds to aid in the construction of railways, canals, and similar undertakings. The intent was to keep states and political subdivisions out of private business."); *see also* Briffault, *supra* note 4, at 915 n. 42 ("One nineteenth-century restriction that may have survived the twentieth-century expansion of public purpose is the prohibition on state investment in business corporations."). *But cf.* 2008 Neb. Laws 6 (amending Article XI to authorize investment of public endowment funds).

83 Miles et al., *supra* note 53, at 340 (emphasis added).

84 Turken v. Gordon, 224 P.3d 158, 166 (Ariz. 2010) (opining that the duty "to pay taxes arises from law applicable to all, not out of contract," and therefore tax payments could not serve as consideration flowing to the City under a parking agreement with developer).

85 Visit the school's website at https://www.sog.unc.edu/ [https://perma.cc/V4Y2-3BSB].

86 *See, e.g.*, Trump, *supra* note 76 (describing how a graduate student team used the framework to identify local government options for improving feasibility of a key development project in a small town).

87 *See Development Finance Initiative,* UNC Sch. of Gov't, Community and Economic Development in North Carolina and Beyond (2009), http://ced.sog.unc.edu/category/development-finance-initiative/ [https://perma.cc/8H5M-DP52].

88 Information about this project, which was located in Wilmington, North Carolina, along with other DFI project examples, is available at https://www.sog.unc.edu/resources/microsites/development-finance-initiative/wilmington-north-carolina-water-street-parking-deck [https://perma.cc/H78H-C6A9].

89 For an example of the framework being employed for an 800-acre master development project for the State of North Carolina, *see* C. Tyler Mulligan et al., [Re]Imagining Broughton: A Reuse Study of Historic Broughton Campus 20 (2016), http://sog.unc.edu/dfi/broughton [https://perma.cc/839N-V7EV] (applying a protocol for evaluating public aid options based on the framework proposed in this article).

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