

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Taxing and Spending Power

Washington State Housing Finance Commission v. O'Brien, 100 Wn.2d 491 (WA 1983)

The Washington state constitution, like many state constitutions, includes specific limits on the power of the government to borrow money or to pledge governmental resources to support private entities. The 1889 constitution provides that "the credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation." Such provisions reflected the fear of state financing of railroads and other ventures that had been intended to develop the economy but in many cases had bankrupted the government and generated high tax burdens.

After the deep recession of 1981-82, the state legislature created a state commission to subsidize home buying in the state. With high interest rates and slowed economic growth, the housing market was stagnant. The government's home mortgage program floated tax-exempt government bonds to provide funds with which to purchase home mortgages. Revenue generated from the mortgages was used to repay the bonds. Since there were constitutional doubts about this legislative scheme, the chair of the commission declined to sign commission's first resolutions launching the program. The commission as an agency then filed a petition with the state supreme court asking the court to declare the statute constitutional and to issue a writ of mandamus requiring the chair to complete the certification of the commission's directives. The court accepted the case and in a 5-4 decision upheld the statute and granted the petition, concluding that the mortgage program did not violate the lending of credit constitutional provision.

What are the challenges with distinguishing between permissible and impermissible uses of government credit in a modern state? How do the justices use historical evidence in constructing their argument? How does the court assess the text and purpose of this constitutional provision? Why does the court adopt a form of rationality review here? What forms of credit would the majority disallow? If the state constructed a similar scheme to bail out state-chartered banks in financial difficulty or current homeowners unable to make their mortgage payments, would it be constitutionally valid given the majority's approach?

DIMMICK, J.

Does the authority granted by the Legislature to the Washington State Housing Finance Commission violate the Washington State Constitution which prohibits lending of the state's credit? We find that it does not.

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Although the course of decisions under the Washington Constitution's lending of credit prohibition has not been smooth, this court has firmly rejected, as violations of the clause, any legislative appropriation of tax revenues at the solicitation of private enterprise to aid or subsidize private commercial ventures. . . . At the time of our constitutional convention, fear of powerful corporate entities was uppermost in the minds of the convention members. The disastrous consequences to taxpayers as a result of corporate political clout were well known. . . . The concern of the constitutional convention was "protection of [the] weak from the strong within." . . . The constitutional framers believed that government was not instituted to confiscate private property through taxation to enhance corporate

profit. . . . Nor did they consider it proper for the State to put taxpayers at undeterminable risk by pledging future tax revenues for private benefit.

In the past we did not distinguish whether tax revenues or the state's status was used to confer a benefit. . . . Recently, however, we have focused primarily on the risk that the state program posed to the public treasury or taxpayer. *In re Marriage of Johnson* (WA 1981). In doing so, we recognized that the constitutional convention did not intend to hinder state government from carrying out its essential function to secure the health and welfare of the state's citizens. . . . Certainly, the lending of credit clause was not intended to insulate taxpayers from all risk and debt accruing from the public decisions of their governing representatives. Risk flowing from public ventures legitimately undertaken is inherent in our form of government. The difficulty underlying the lending of credit decisions is making the distinction between proper risk to the taxpayer from public decisionmaking, and improper risk to taxpayers due to abdication of public control over the state's assets or status to private commercial decisionmaking.

The "risk of loss" approach requires us to evaluate whether the state program "has safeguards absent in the schemes of the nineteenth century." . . . The safeguards must ensure that "the public controls both the use of the State conferred 'asset' and the extent of its liability." . . . The State must also retain the means to effectuate the project's public objective. Because these safeguards are central to the lending of credit clause, we now extend the same inquiry to state projects financed by nonrecourse revenue bonds.

We are satisfied that the Commission's authority meets these criteria. The primary purpose of the Commission's program is not to enhance the private sector's profit at the taxpayer's expense, but rather to make decent housing available statewide. In determining legislative motive, we give great weight to the statutory declaration of purpose. . . . While a legislative declaration does not conclusively establish its legitimacy, we accept the declaration unless it is shown to be arbitrary or unreasonable. . . .

. . . .
The adequacy of private housing and the health of the state's economy have traditionally been concerns of state government. . . . The range of remedies available to meet these state problems must necessarily be wide. We leave the wisdom of a chosen remedy in the legislative arena. . . .

Our discussion of legislative motive does not imply that a finding of public purpose validates an otherwise impermissible lending of credit. . . . But state aid to a circumscribed class of the public, in furtherance of legitimate state objectives, may provide the necessary "consideration" for the aid. . . . We review the legislative purpose to confirm that the statutory objective is to benefit a deserving class of the public.

Nor should we be understood as taking upon ourselves the business of determining who belongs in the benefited class. . . . Our only task is to assess the reasonableness of that determination.

. . . .
Accordingly, we conclude that the purpose of the mortgage loan program is to benefit a class of citizens reasonably determined to require public aid to meet their housing needs, and not to benefit a specific private enterprise. Because such a purpose is well within the legitimate purview of state government, it does not conflict with the lending of credit prohibition.

We further find that the Legislature has enacted safeguards that retain public control over the extent of risk to the taxpayers and effectuation of the program's public purpose. In reviewing the statutory safeguards, our function is not to weigh the economic risk but only to ascertain that risk to the State remains within public control and is not abdicated to the private sector. . . . The bonds, although issued in the Commission's name, must contain a recital that they are not state obligations. Any obligation arising from the sale of bonds or the program is an obligation only of the Commission's special fund.

. . . .
We therefore grant the writ of mandamus and order the chairman and secretary to sign the Commission's resolutions.

JUSTICE ROSELLINI, joined by JUSTICE STAFFORD, JUSTICE BRACHTENBACH, and JUSTICE DORE, dissenting.

I read the majority opinion as providing that the Washington State Constitution does not prohibit lending of the State's credit when it supports a statutory objective to benefit a deserving class of the public. I disagree.

Both article 8, section 5 and article 12, section 9 of the Washington State Constitution provide that the credit of the State shall not, in any manner, be given or loaned to, or in aid of any private individual, association or corporation.

It is clear that the State or a municipality lends its credit whenever it allows its unique governmental status or authority to be utilized for the purpose of enabling a private corporation or individual to obtain property or money which it could not otherwise acquire for the same price.

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That the loan of credit serves a laudable public purpose does not validate an otherwise unconstitutional loan or gift of state or municipal credit. *Lassila v. Wenatchee* (WA 1978). . . .

. . . . In *Port of Longview v. Taxpayers of Port of Longview* (WA 1974), this court approvingly adopted the following language of the Nebraska Supreme Court: . . . "The loan of its name by a city to bring about a benefit to a private project, even though general liability does not exist, is nothing short of a loan of its credit"

The Nebraska Constitution was subsequently amended to specifically permit the kinds of financial arrangements found by [that court] to be violative of the ban against loan of credit. The Washington Constitution has also been amended to permit nonrecourse revenue bonds and obligations to be used to finance industrial development projects.

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. . . . [T]he statute in *In re Marriage of Johnson* (WA 1981) undoubtedly falls within the well-established principle that the constitution permits the expenditure of state funds for the performance of recognized governmental services as law enforcement, fire protection or consumer protection. . . .

....
The critical distinction between [cases such as *Johnson*] and those finding a violation of the lending of credit prohibition is that of performing a governmental service, on one hand, and a transfer to private parties of a governmental power or prerogative, on the other. Here, instead of providing a recognized governmental service to the people, the State would be directly (and not merely incidentally) subsidizing private home buyers by acting to pass on to them its own unique ability under the Internal Revenue Code to issue tax exempt bonds and, thereby, to borrow money at lower interest rates than would otherwise be available to those home buyers in the private sector.

The Legislature, in enacting the housing financing act, could have avoided the constitutional prohibition by limiting eligibility for assistance to those persons with such low incomes and limited assets as to be undeniably poor or needy. Or it could have dealt with the matter as it did with industrial development financing -- by proposing to the voters a further constitutional amendment.

Instead, however, it did neither. Rather, without an accompanying constitutional amendment, the Legislature left it to the Housing Finance Commission to set eligibility standards, with income to be only one of the factors to be considered by the Commission in doing so.

I would remain with our well-reasoned, established precedent and hold that the authority granted by the Legislature to the Washington State Housing Finance Commission violates the prohibition against lending of State credit.