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The Gift of Public Funds Bogeyman

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THE GIFT OF PUBLIC FUNDS BOGEYMAN

Noah Purcell* and Michelle Saperstein**

Abstract: Washington’s “gift of public funds” doctrine is frequently misunderstood in ways that impede innovative ideas aimed at remedying some of our state’s most intractable problems. This doctrine arises from article VIII, sections 5 and 7 of the Washington Constitution, which prohibit state and local governments from gifting assets or loaning credit. While the Washington State Supreme Court historically applied these provisions in restrictive and confusing ways, the Court’s modern jurisprudence recognizes that the doctrine is inapplicable to funding expended for any of the many “fundamental purposes” of government. Even where a government program does not fall under this broad category, governments need only demonstrate, subject to very deferential review, that there was some consideration for their expenditure and no donative intent. The provisions also include broad exceptions for funding to support the “poor and infirm.” A review of the modern doctrine, with all its exceptions and exclusions, shows there is almost nothing that a competent government agency in Washington would want to do that would violate the constitutional prohibition on gifting public funds if thoughtfully implemented. A proper understanding of the gift of public funds doctrine will permit public officials to make better assessments of legal risk for government programs.

INTRODUCTION.....	386
I. THE GIFT OF PUBLIC FUNDS RULE IN WASHINGTON’S CONSTITUTION	387
A. The Washington Constitutional Convention’s Adoption of Sections 5 and 7	387
B. The Washington State Supreme Court’s Early Application of the Gift and Loan Prohibitions.....	388
C. Modern Application of the Gift and Loan Prohibitions	392
II. THE VAST MAJORITY OF THINGS THAT GOVERNMENT AGENCIES DO (AND MIGHT WANT TO DO) FURTHER FUNDAMENTAL PURPOSES OF GOVERNMENT	397
III. MANY OTHER PROPOSED GOVERNMENT PROGRAMS WOULD PASS THE SECOND STEP OF THE SUPREME COURT’S TEST, OR WOULD QUALIFY AS SUPPORT FOR THE “POOR AND INFIRM”	400

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IV. OTHER LAWS ADDRESS CONCERNS ABOUT ABUSES AND CORRUPTION	402
CONCLUSION	403

INTRODUCTION

Over my twelve years as Washington’s Solicitor General, I have not seen any doctrine misapplied and misunderstood more often than the “gift of public funds” rule. I have heard countless times from local government officials, state employees, and lawyers working for public clients: “We’d really love to do ___, but we can’t because it would be an unconstitutional gift of public funds.” (I received just such an inquiry while drafting this paragraph.) Many creative, potentially impactful ideas and programs are never seriously considered due to fear of violating the gift of public funds rule. Yet virtually every time I have heard this concern raised, after I have looked into the matter and reviewed the case law, I have found no constitutional problem.

Ultimately, my experience analyzing this issue has led me to a clear conclusion: *There is almost nothing that a competent government agency in Washington would want to do that would violate the constitutional prohibition on gifting public funds if thoughtfully implemented.* Public officials and lawyers need to change their mindset about this doctrine and stop seeing it as a serious barrier to well-intentioned proposals. With thoughtful planning, government agencies should be able to address nearly any policy challenge without violating the gift of public funds rule.

This is a bold thesis, and some longtime public servants’ heads may have exploded upon reading it, so my co-author and I will spend the rest of this Article backing it up. But first, let me emphasize why I am making this claim: The gift of public funds rule is invoked all the time to torpedo innovative ideas and programs aimed at remedying some of Washington’s most intractable problems, from homelessness to the childcare crisis to combatting climate change. I do not mean to suggest that every one of these abandoned ideas was great, nor that public officials are raising this concern in bad faith; the doctrine can be confusing, and lawyers can be notoriously risk averse. But properly understood, 99% of the time the gift of public funds doctrine should not be an obstacle to public policies, programs, or grants aimed at solving social problems. In fact, in the last forty-five years, no appellate court in Washington has found *any* government program or grant to be an unconstitutional gift of public funds. My hope in writing this Article is to free public officials and lawyers to consider more creative approaches and focus on the legal and

policy constraints that they may actually face, rather than the gift of public funds bogeyman that is rarely a real limit.

This Article will first describe the history of the gift of public funds rule, then explain how the Washington State Supreme Court applies it currently. It will then explain why, under the modern doctrine, almost any program, policy, or project undertaken by a competent government agency can be implemented without creating a gift of public funds problem.

I. THE GIFT OF PUBLIC FUNDS RULE IN WASHINGTON'S CONSTITUTION

What is colloquially referred to as the “gift of public funds” rule is actually two separate constitutional provisions. Article VIII, section 5 provides: “The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.”¹ And article VIII, section 7 states:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.²

But for decades, Washington State's Supreme Court has interpreted these two provisions identically.³ We will first briefly describe the origin of the rule, how it was applied early on, and then the modern formulation of the rule.

A. *The Washington Constitutional Convention's Adoption of Sections 5 and 7*

Sections 5 and 7 of article VIII were adopted at the Washington Constitutional Convention in 1889.⁴ The gift and loan prohibitions were “[o]ne of the most highly debated issues of the convention.”⁵ The primary disagreement between delegates was whether to include an exception for

1. WASH. CONST. art. VIII, § 5.

2. WASH. CONST. art. VIII, § 7.

3. *CLEAN v. State*, 130 Wash. 2d 782, 797, 928 P.2d 1054, 1061 (1996).

4. *THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION* (Beverly Paulik Rosenow ed., 1999) (1889) (hereinafter *WASHINGTON CONSTITUTIONAL CONVENTION*).

5. *ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION* 162 (G. Alan Tarr ed., 2nd ed. 2013).

county governments to extend limited credit to private entities.⁶ Eastern Washington delegates hoped to subsidize railroad projects to transport crops without existing monopolies, reasoning that the people should be able to fund enterprises to “further their own good.”⁷ But a majority of delegates voted against the exception, suspicious of public money being diverted to railroads, which could “entangl[e] people in disastrous schemes.”⁸ Apprehension toward government financing of railroads was understandable: “many railroad lines were subsequently abandoned as unprofitable, leaving the local governments without recourse to recover their investments.”⁹

Aside from railroads, many delegates simply distrusted government partnerships with private parties or public money going into private pockets.¹⁰ Delegates rejected other proposed carve-outs, such as granting rights of way for shipping facilities or building and operating irrigation canals.¹¹ The sole exception to section 7’s strict prohibitions to which the delegates could agree—and only by a narrow margin of 30 to 27 votes—was to “support the poor and infirm.”¹²

B. The Washington State Supreme Court’s Early Application of the Gift and Loan Prohibitions

Though the framers adopted a near absolute prohibition on granting loans or gifts to private entities, the Washington State Supreme Court’s early application of article VIII’s gift and loan prohibitions was applied in confusing ways with unpredictable outcomes.¹³

In the past, the Court issued incongruous rulings about whether considerations of public purpose¹⁴ were relevant to a constitutional analysis of the gift and loan prohibitions. In 1912, the Court upheld a statute permitting the Port of Seattle to lease a private terminal property,

6. WASHINGTON CONSTITUTIONAL CONVENTION, *supra* note 4, at 675–84.

7. *Id.* at 681.

8. *Id.* at 682.

9. Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Taxpayers & Ratepayers of Snohomish Cnty., 78 Wash. 2d 724, 726, 479 P.2d 61, 63 (1971).

10. *See* WASHINGTON CONSTITUTIONAL CONVENTION, *supra* note 4, at 681–82.

11. *Id.* at 683–84.

12. *Id.* at 684.

13. This Article is not intended to canvass all of the Washington State Supreme Court’s article VIII, sections 5 and 7 jurisprudence, but simply to provide a general background for the modern gift of public funds test.

14. Note that we discuss “public purpose” here only in the context of the article VIII, section 5 and 7 jurisprudence, not the public purpose requirement in article VII, section 1 (“All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only.”).

holding that there was no section 7 violation because acquiring public structures was a “public purpose.”¹⁵ But two years later, the Court struck down an arrangement whereby Pierce County granted funds to a private association to host a county fair.¹⁶ The Court reasoned that while fairs served a “good purpose,” section 7 “makes no distinction between purposes[.]”¹⁷ Later, in *Gruen v. State Tax Commission*,¹⁸ the Court upheld a statute permitting a cigarette excise tax to provide bonuses to World War II veterans.¹⁹ The Court concluded there was no section 5 violation, in part because the payment was “for a public purpose,” namely, communicating to the public that the government would support future veterans.²⁰

The Court’s inconsistent application of article VIII’s gift and loan prohibitions continued into the 1960s and 1970s. In *Washington State Highway Commission v. Pacific Northwest Bell Telephone Co.*,²¹ the Court struck down a statute that directed the state highway commission to reimburse relocation costs for public utility facilities forced to move due to government highway projects.²² The Court rejected the State’s argument that even if the payment constituted a gift, it should be upheld on the basis that the “expenditure is in furtherance of a public purpose.”²³ The Court explained that while the utilities perform a “public service,” that service was not a “state purpose” because the utilities were owned by non-state entities.²⁴

Just ten years later, the Court upheld a joint-financing agreement between a county and private power companies to develop nuclear and other thermal power facilities.²⁵ The Court reasoned that section 7 did not “expressly prohibit public municipalities from entering into joint-ownership agreements with private enterprise.”²⁶ The Court justified joint projects based on “public need”:

15. *Paine v. Port of Seattle*, 70 Wash. 294, 322, 127 P. 580, 582 (1912).

16. *Johns v. Wadsworth*, 80 Wash. 352, 354, 141 P. 892, 893 (1914).

17. *Id.*

18. 35 Wash. 2d 1, 211 P.2d 651 (1949).

19. *Id.*

20. *Id.* at 31, 211 P. 2d at 668–69.

21. 59 Wash. 2d 216, 367 P.2d 605 (1961).

22. *Id.*

23. *Id.* at 224, 367 P.2d at 610 (emphasis omitted).

24. *Id.*

25. *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Taxpayers & Ratepayers of Snohomish Cnty.*, 78 Wash. 2d 724, 479 P.2d 61 (1971).

26. *Id.* at 729, 479 P.2d at 64.

The prohibitions of the [sic] article 8, section 7 were originally directed at the public financing of private industries whose development bore little relationship to the public interest. Since the adoption of Const. art. 8, § 7, the nature of municipal functions has changed drastically. New means for financing public works have been required for municipal corporations to fulfill their responsibilities.

In the present case, the public participants gain the direct benefit of a power source to meet their undisputed future needs. Public need, as a primary purpose behind joint projects must, of course, be recognized.²⁷

But shortly thereafter, the Court struck down a statute that permitted port districts to enter financing agreements with private companies that would allow the port districts, through issuing bonds, to assist with the costs of installing pollution control facilities.²⁸ The Court found that the agreements were a violation of section 7, “regardless of whether [they serve] a laudable public purpose,” noting that the framers elected to forgo a public purposes exception in section 7.²⁹

Other cases from the 1960s and 1970s further reflected the Court’s inconsistent interpretation of article VIII’s gift and loan prohibitions. As detailed below, in some cases, the Court applied a strict interpretation of the provisions against public capital and credit going to private entities. At other times, the Court analyzed the provisions with flexibility for government projects with a public purpose.

In *Miller v. City of Tacoma*,³⁰ the Court found no violation of section 7 in an urban renewal law that permitted the City to invoke eminent domain to acquire blighted areas and resell property to private persons because “the expenditure of public funds is for a public purpose.”³¹ But in *Lassila v. City of Wenatchee*,³² the Court invalidated the City’s business district redevelopment plans, which included acquiring property for a community center with the intention of selling a portion of it to a private party to

27. *Id.* (internal citation omitted).

28. *Port of Longview v. Taxpayers of Port of Longview*, 85 Wash. 2d 216, 225, 527 P.2d 263, 268 (1974).

29. *Id.* at 231, 527 P.2d at 271. In 1981, a constitutional amendment was added, article 32, section 1, permitting special revenue financing to ensure that certain nonrecourse industrial development bonds issued pursuant to Revised Code of Washington section 39.84 would be valid. WASH. CONST. art. XXXII, § 1; *see generally* WASH. REV. CODE § 39.84 (2024) (Industrial Development Revenue Bonds); *see also* *Wash. Econ. Dev. Fin. Auth. v. Grimm*, 119 Wash. 2d 738, 742, 837 P.2d 606 (1992).

30. 61 Wash. 2d 374, 378 P.2d 464 (1963).

31. *Id.* at 388, 378 P.2d at 473.

32. 89 Wash. 2d 804, 576 P.2d 54 (1978).

develop a theater.³³ The Court rejected the City’s argument that it anticipated a public benefit from the arrangement: “An expected future public benefit also does not negative an otherwise unconstitutional loan[,] . . . regardless of whether it may serve a laudable public purpose.”³⁴ The Court continued:

If Article 8, § 7 is too restrictive in its terms, that is a matter for the citizens of this state to correct through the amendatory process. It is not for this court to engraft an exception where none is expressed in the constitutional provision, no matter how desirable or expedient such an exception might seem.³⁵

Despite the *Lassila* Court’s strict application of section 7—and outright rejection of a public purpose exception—*Lassila* was the last time the Washington State Supreme Court found a violation of article VIII section 5 or 7. Just two years later, the Court upheld a city’s plan to purchase property with the intent to resell some of it to private parties in order to relocate a town and build the Bonneville Dam, in part because the project had a public purpose.³⁶

Beginning in the 1980s, the Court rejected an absolutist approach to sections 5 and 7 in favor of recognizing that programs designed to carry out fundamental government functions are not gifts or loans of public funds. The Court’s revised approach, as detailed below, reconciled the framers’ skepticism of public money in private pockets with the practical considerations of government fulfilling its key roles. Several cases from this era applied this idea without explicitly explaining how the Court was revising its doctrinal approach to gift of public funds issues.

For example, in *Johnson v. Johnson*,³⁷ the Court upheld a statute that permitted the Department of Social and Health Services to collect past due child support for children not receiving public assistance.³⁸ The Court held that section 5 was inapplicable because the public enforcement of child support was a governmental function:

Article 8, section 5 does not prevent the state from exercising a “recognized public governmental function.” Recognized

33. *Id.* at 806–09, 576 P.2d at 55–57.

34. *Id.* at 811, 576 P.2d at 58.

35. *Id.* at 812, 576 P.2d at 59 (quoting *State ex rel. O’Connell v. Port of Seattle*, 65 Wash. 2d 801, 806, 399 P.2d 623, 627 (1965)).

36. *United States v. Town of N. Bonneville*, 94 Wash. 2d 827, 829–30, 621 P.2d 127, 128–29 (1980). Here, the Court distinguished the case from *Port of Longview* and *Lassila* on two narrow grounds: (1) there was no identifiable recipient of the town’s loan of credit and (2) the plan, despite benefiting private parties, had a public purpose. *Id.* at 835–39, 621 P.2d at 131–33.

37. 96 Wash. 2d 255, 634 P.2d 877 (1981).

38. *Id.*

governmental functions are excepted because applying the constitutional debt limitations . . . “would destroy the efficiency of the agencies . . . to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view.”³⁹

Similarly, in *City of Seattle v. State*,⁴⁰ the Court upheld a city ordinance that provided public funding for city election candidates.⁴¹ The Court held that section 7 was inapplicable because the contributions were not gifts, but “entitlement[s]” to ensure fairer elections.⁴² The Court defined entitlements as a government function, as “assistance provided to the public, or a segment of the public, as cash or services, in carrying out a program to further an overriding public purpose or satisfy a moral obligation.”⁴³ The Court further explained that any “private benefit” was “incidental” because of the program’s “overriding public purpose.”⁴⁴ Soon thereafter, courts identified other governmental functions as fundamental purposes not limited by the gift and loan prohibitions, such as preventing and remedying unfair labor practices⁴⁵ and enforcing the Industrial Insurance Act.⁴⁶ But the Court did not explain its new approach in detail until the cases described in the next section.

C. *Modern Application of the Gift and Loan Prohibitions*

Nearly a century after the constitutional convention adopted article VIII, sections 5 and 7, the Washington State Supreme Court largely resolved its inconsistent jurisprudence regarding gift and loan prohibitions. In 1987, the Court expressly “narrowed” its application of the gift prohibition, holding that “[n]o unconstitutional gift of public property occurs when funds are expended as entitlement payments, made by the government in carrying out its *fundamental purposes*.”⁴⁷ The Court has since reaffirmed this key point many times: “If the government

39. *Id.* at 261–62, 634 P.2d at 881 (internal citations omitted).

40. 100 Wash. 2d 232, 668 P.2d 1266 (1983).

41. *Id.*

42. *Id.* at 242, 668 P.2d at 1271.

43. *Id.* at 241, 668 P.2d at 1270–71.

44. *Id.*

45. *See Pub. Emp. Rels. Comm’n v. City of Kennewick*, 99 Wash. 2d 832, 838, 664 P.2d 1240, 1243 (1983).

46. *See Dep’t of Lab. & Indus. v. Wendt*, 47 Wash. App. 427, 435, 735 P.2d 1334, 1339 (1987).

47. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wash. 2d 679, 702, 743 P.2d 793, 805 (1987) (emphasis added).

expends funds to carry out a fundamental governmental purpose, no unconstitutional gift occurs.”⁴⁸

In *City of Tacoma*,⁴⁹ the Court laid out what would become the modern two-factor test to assess constitutional challenges under sections 5 and 7: (1) Was the expenditure made for a “fundamental governmental purpose[]”? If so, no gift or loan has occurred; (2) If the expenditure does not further a fundamental government purpose, was there a transfer of property without consideration and with donative intent?⁵⁰ The Court further explained the second prong:

“Unless there is proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration.” Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency test, under which a bargained-for act or forbearance is considered sufficient consideration.⁵¹

Furthermore, courts will presume that government programs are constitutionally valid and direct the burden to overcome that presumption on challengers.⁵²

As further detailed in the next section, Washington courts have subsequently laid out a broad list of “fundamental government purposes” that encompass a wide range of government activities. The key point for now, however, is simply that if an expenditure is made to carry out a fundamental government purpose, then there is no gift of public funds.

A few examples help illustrate the point. First, the Washington State Supreme Court held in 1990 that “disposal of solid waste” is a fundamental purpose of government.⁵³ Because solid waste disposal is a fundamental government purpose, the gift of public funds doctrine does not meaningfully restrict how local governments provide this service. Local governments can offer it free to everyone; they can charge the full cost to everyone; they can subsidize some types of waste disposal but not others; they can subsidize waste disposal for some residents but not others; they can contract with a private company or nonprofit to collect

48. *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 39, 785 P.2d 447, 457 (1990); see also, e.g., *In re Recall of Burnham*, 194 Wash. 2d 68, 77, 448 P.3d 747, 752 (2019).

49. 108 Wash. 2d 679, 743 P.2d 793 (1987).

50. *Id.* at 702, 743 P.2d at 805; see also, e.g., *Burnham*, 194 Wash. 2d 68 at 77, 448 P.2d at 752 (“First, courts must ask whether the funds were expended to carry out a fundamental purpose of the government; only if a fundamental government purpose was not served do courts then inquire into donative intent and consideration.”).

51. *City of Tacoma*, 108 Wash. 2d at 703, 743 P.2d at 805 (internal citations omitted).

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

53. *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 39, 785 P.2d 447, 458 (1990).

waste; or they can collect waste themselves. A myriad of other laws limit how local governments can provide this service,⁵⁴ but the gift of public funds rule is essentially a non-issue here.

The same holds true for the provision of “day-care services,” which the Washington State Supreme Court identified as a fundamental purpose of government in *City of Tacoma* and *City of Seattle*.⁵⁵ Because providing day care services is a fundamental government purpose, under the gift of public funds rule, the state or local governments can choose to subsidize it for everyone, not to subsidize it at all, or anywhere in between. Again, while other statutory and constitutional restrictions might come into play, the gift of funds rule does not.

As a final example, consider public higher education, which Washington courts have also recognized as a fundamental purpose of government.⁵⁶ Because providing public higher education is a fundamental purpose of government, the State can choose to subsidize it for all students (even from wealthy families) as it currently does;⁵⁷ it can choose to provide additional subsidies for lower-income families (as it does through financial aid),⁵⁸ or it can subsidize it only for lower-income families. Any of these approaches would comply with the gift of public funds rule.

As these examples illustrate, after the adoption of the two-step test, section 5 and 7 challenges to government programs became much more predictable for, and more favorable to, state and local governments. Though the Court will continue to analyze what qualifies as a “fundamental purpose” of government, where a program falls within that category, the gift and loan analysis ends.

54. See, e.g., WASH. REV. CODE § 70A.205 (2024) (regulating how local governments conduct solid waste management).

55. *City of Tacoma*, 108 Wash. 2d at 702 n.15, 743 P.2d at 805 n.15; *City of Seattle v. State*, 100 Wash. 2d 232, 241, 668 P.2d 1266, 1271 (1983).

56. See, e.g., *Major Prods. Co. v. Nw. Harvest Prods., Inc.*, 96 Wash. App. 405, 410, 979 P.2d 905, 908 (1999) (Identifying higher education as a fundamental purpose of government excluded from the constitutional debt limitations of article VIII section 5.).

57. We refer here to the general public funding that Washington State provides to public colleges and universities, which has the effect of subsidizing all enrolled students. See *Higher Education, Budgeted Operating Expenditures*, WASH. STATE OFF. OF FIN. MGMT. (2025), <https://ofm.wa.gov/budget/agency-expenditure-monitoring/operating-budgeted-expenditures/minor-function/2-5> [<https://perma.cc/T48R-X8HE>]; *State Profile: Washington*, STATE HIGHER EDUC. FIN., <https://shef.sheeo.org/state-profile/washington/> [<https://perma.cc/9JAU-AUSR>].

58. See WASH. REV. CODE § 28B.92.060 (2024); WASH. REV. CODE § 28B.92.205 (2024).

Even in cases where no fundamental purpose of government is at issue, the second prong—whether there has been a transfer of property without consideration and with donative intent—has proven very forgiving.⁵⁹

For example, in *CLEAN v. State*, the Court upheld a statute creating the authority and funding for a public facilities district to build a major league baseball stadium to host the Seattle Mariners.⁶⁰ In applying the two-factor test, the Court first concluded that the development of a baseball stadium was not a fundamental purpose of state government.⁶¹ As to the second factor, the Court concluded that the statute did not amount to a gift of state funds nor a lending of state credit because the stadium would be owned and managed by the district and the Mariners would be required to pay “reasonable rent.”⁶² In a subsequent case, taxpayers argued that the lease agreement between the district and the Mariners showed donative intent and grossly inadequate return so in favor of the Mariners as to be “unconscionable.”⁶³ A sharp dissent pointed out that the Mariners’ \$700,000 in annual rent was dramatically below the market rate and only a nominal return on a bond debt of \$336,000,000.⁶⁴ The Court majority reasoned, however, that judicial inquiry into the adequacy of consideration would unduly interfere with the governmental power to contract.⁶⁵ It held that courts must apply only a legal sufficiency test to find, not comparative value, but “[a]nything which . . . support[s] a promise.”⁶⁶ The Court went on to explain its deference to government decision-making:

At its core, the Taxpayers’ argument is the District and the County made a bad deal. While that may or may not be true, “[t]he wisdom of the King County plan is not for the consideration of this court—its constitutionality is.” The Taxpayers have failed to demonstrate a constitutional infirmity under CONST. art. VIII, §§ 5 and 7.⁶⁷

59. See *King County v. Taxpayers of King Cnty.*, 133 Wash. 2d 584, 618, 949 P.2d 1260, 1277 (1997) (Sanders, J., dissenting) (“[The] majority of this court assert[s] the constitution is satisfied if there is *legally sufficient* consideration (a peppercorn will do) to support the enforceability of a promise.”).

60. *CLEAN v. State*, 130 Wash. 2d 782, 799–800, 928 P.2d 1054, 1062 (1996).

61. *Id.* at 798, 928 P.2d at 1062.

62. *Id.* at 798–800, 928 P.2d at 1062–63.

63. *King County*, 133 Wash. 2d at 599, 949 P.2d at 1267.

64. *Id.* at 634, 949 P.2d at 1285.

65. *Id.* at 597, 949 P.2d at 1267.

66. *Id.*

67. *Id.* at 601, 949 P.2d at 1269 (internal citations omitted).

Similarly in *CLEAN v. City of Spokane*, the Court upheld an ordinance permitting Spokane to partner with a private developer to renovate a mall parking garage.⁶⁸ Though the Court concluded that it was “highly questionable” that the parking garage project served a “fundamental purpose,” the Court held that the City would receive adequate consideration by eventually taking ownership of the parking garage.⁶⁹ The Court again acknowledged its deference on matters of consideration: “Although Appellants may view the transaction as an unwise use of public funds that unduly benefits the Developers, the wisdom of the plan is not for this court to consider.”⁷⁰

Given courts’ deference to legislative decision-making on the issue of consideration, state and local governments can successfully defend projects with the receipt of some benefit.⁷¹ This is true even if the value may be difficult to quantify.⁷²

Courts have also recognized that there is no gift of funds where resources are exchanged between government entities.⁷³ So, for example, a local government can transfer property or funds to another local government agency or the State without implicating the gift of public funds rule.

While the modern two-factor test is itself very favorable to a state or local government’s defense against section 5 and 7 challenges, additional protection can still be found in the framers’ sole explicit exception to the

68. *CLEAN v. City of Spokane*, 133 Wash. 2d 455, 462–75, 947 P.2d 1169, 1171–79 (1997).

69. *Id.* at 469–70, P.2d at 1176.

70. *Id.* at 470, P.2d at 1176.

71. Though Washington appellate courts have not found an article VIII, section 5 or 7 violation since *Lassila* in 1978, the gift and loan prohibitions will continue to remain a check on negligent government action. *Lassila v. City of Wenatchee*, 89 Wash. 2d 804, 810–12, 576 P.2d 54, 57–9 (1978); see *Pierce County v. Wash. Shellfish, Inc.*, No. 31380–4–II, 2005 WL 536097 at *6–7 (Wash. Ct. App. Mar. 15, 2005), *rev. denied*, 155 Wash. 2d 1020, 124 P.3d 659 (Table) (2005) (remanding to trial court to make findings on consideration where County failed to evaluate the value of natural resources on property leased to shellfish harvesting company).

72. See *Louthan v. King County*, 94 Wash. 2d 422, 428–29, 617 P.2d 977, 981 (1980) (obtaining development rights to preserve open space is sufficient consideration); *Friends of N. Spokane Cnty. Parks v. Spokane County*, 184 Wash. App. 105, 134, 336 P.3d 632, 645 (2014) (traffic relief is sufficient consideration for permitting private road construction through a public park); *Eugster v. City of Spokane*, 139 Wash. App. 21, 32, 156 P.3d 912, 918 (2007) (avoiding cost of litigation by entering into a settlement agreement is sufficient consideration).

73. See *City of Marysville v. State*, 101 Wash. 2d 50, 55, 676 P.2d 989, 992 (1984) (“[The framers] were not concerned about the nonspeculative transfer of money from one nonprofit government agency to another.”); *Anderson v. O’Brien*, 84 Wash. 2d 64, 66, 524 P.2d 390, 393 (1974); *Rands v. Clarke County*, 79 Wash. 152, 157, 139 P. 1090, 1092 (1914) (gift and loan provisions inapplicable to transfers to entities whose functions are “wholly public.”); *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 81 Wash. 2d 551, 561, 503 P.2d 86, 93 (1972) (government may transfer assets and liabilities from one political subdivision to another).

gift and loan prohibitions: the support of the poor and infirm. As perhaps tacit proof of the provision's breadth (and preclusive effect on litigation), there are few appellate cases that explore the exception.⁷⁴ Such cases simply provide that for an expenditure to fall within this category, beneficiaries of government measures must actually need assistance and meet the requirements of the specific legislative enactment.⁷⁵ Case law also clarifies that the provision should be read in the disjunctive—that government measures may address individuals who are either “poor” or “infirm.”⁷⁶ As we will discuss in greater detail in Part III below, this enduring exception provides a broad scope of authority for government entities.

The modern two-factor test, alongside the original poor and infirm exception, provides government entities with the flexibility to enact a wide-range of public programs in addition to offering predictability and protection when defending against article VIII, section 5 and 7 challenges.

II. THE VAST MAJORITY OF THINGS THAT GOVERNMENT AGENCIES DO (AND MIGHT WANT TO DO) FURTHER FUNDAMENTAL PURPOSES OF GOVERNMENT

At the same time that the Washington State Supreme Court was clarifying the test for how to determine whether an expenditure is a gift of public funds, it also provided expansive examples of what count as fundamental purposes of government. The list has only grown since then. Today, the lion's share of existing and proposed government programs clearly qualify as furthering fundamental purposes of government.

The Court's decision in *City of Tacoma v. Taxpayers of City of Tacoma* provides the broadest list of programs that qualify as furthering fundamental purposes of government. The Court there explained that “[n]o unconstitutional gift of public property occurs when funds are expended as entitlement payments, made by the government in carrying out its fundamental purposes.”⁷⁷ The Court went on: “Examples of entitlement payments include: payments for day-care services, vaccinations, fare-free bus zones, crime victim compensation, and relocation assistance payments to people or businesses displaced by

74. See *Morgan v. Dep't of Soc. Sec.*, 14 Wash. 2d 156, 127 P.2d 686 (1942); *State v. Guar. Tr. Co. of Yakima*, 20 Wash. 2d 588, 148 P.2d 323 (1944); *Wash. Health Care Facilities v. Ray*, 93 Wash. 2d 108, 116, 605 P.2d 1260, 1264 (1980).

75. *Morgan*, 14 Wash. 2d at 169, 127 P.2d at 692; *Guar. Tr. Co. of Yakima*, 20 Wash. 2d at 591–93, 148 P.2d at 325.

76. *Wash. Health Care Facilities*, 93 Wash. 2d at 116, 605 P.2d at 1264.

77. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wash. 2d 679, 702, 743 P.2d 793, 805 (1987).

condemnation.”⁷⁸ The Court emphasized that “[a]lthough many of these ‘entitlement’ payments involve private benefit, the ‘overriding public purpose’ makes any private benefit ‘incidental.’”⁷⁹

As this expansive list indicates, “fundamental purposes of government” cover a wide swath of activity, not just obvious things like providing education, transportation, or police and fire services. Many other cases confirm this expansive view. Washington courts have identified such fundamental governmental purposes as the prevention and remediation of unfair labor practices,⁸⁰ operating elections,⁸¹ appointment and defense of guardians ad litem,⁸² deterring criminal behavior and enforcing criminal laws,⁸³ and acquiring real property.⁸⁴

Washington courts have also recognized that many additional fundamental government purposes exist by connecting such purposes to other categories of government action. For example, courts have linked fundamental government purposes to the police power, an expansive doctrine encompassing measures “tending to promote the health, peace, morals, education, good order and welfare of the people.”⁸⁵ Citing the police power doctrine, courts have identified that fundamental government purposes can range from flood control to assisting drivers locked out of their cars.⁸⁶ Courts have also suggested that a fundamental government purpose can exist where governments expend money to comply with statutory obligations.⁸⁷

While some of the cases recognizing fundamental government purposes predate the Court’s current two-step approach that makes this finding dispositive, there is no reason to think that courts would overturn

78. *Id.* at 702 n.15, 743 P.2d at 805 (citing *City of Seattle v. State*, 100 Wash. 2d 232, 242, 668 P.2d 1266, 1271 (1983)).

79. *Id.* (quoting *City of Seattle*, 100 Wash. 2d at 241, 668 P.2d at 1270–71).

80. *Pub. Emp. Rels. Comm’n v. City of Kennewick*, 99 Wash. 2d 832, 838, 664 P.2d 1240, 1243 (1983).

81. *Brower v. State*, 137 Wash. 2d 44, 62, 969 P.2d 42, 52 (1998).

82. *West v. Osborne*, 108 Wash. App. 764, 771, 34 P.3d 816, 820 (2001), *rev. denied*, 145 Wash. 2d 1012, 37 P.3d 292 (Table) (2001).

83. *Landfried v. Spokane County*, No. CV-09-360-EFS, 2011 WL 1584328, at *9 (E.D. Wash. Apr. 27, 2011).

84. *In re Recall of Burnham*, 194 Wash. 2d 68, 71, 448 P.3d 747, 749 (2019).

85. *Covell v. City of Seattle*, 127 Wash. 2d 874, 881, 905 P.2d 324, 328 (1995), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wash. 2d 682, 451 P.3d 694 (2019).

86. *Citizens Protecting Res. v. Yakima County*, 152 Wash. App. 914, 916, 219 P.3d 730, 731 (2009), *rev. denied*, 168 Wash. 2d 1024, 228 P.3d 18 (Table) (flood control); *Hudson v. City of Wenatchee*, 94 Wash. App. 990, 995–96, 974 P.2d 342, 345–46 (1999) (car assistance).

87. *Spokane & E. Law v. Bd. of Trs. of Spokane Cnty. L. Libr.*, No. 57200-8-I, 2006 WL 2988890, at *4 (Wash. Ct. App Oct. 16, 2006), *rev. denied*, 159 Wash. 2d 1014, 154 P.3d 919 (Table) (2007) (fundamental government purpose to maintain a library as required by statute).

the earlier conclusion about the nature of the governmental purpose. For example, in *Washington State Housing Finance Commission v. O'Brien*, the Court recognized that ensuring adequate “private housing and the health of the state’s economy” were longstanding “concerns of state government,” and were clear public purposes.⁸⁸ This finding was not dispositive at the time, and the Court went on to analyze donative intent and what safeguards existed in the program at issue. But the underlying conclusion that ensuring an adequate housing supply is a fundamental purpose of government appears undisturbed.⁸⁹

In short, case law over the last forty years makes clear that fundamental government purposes include the overwhelming majority of things that state and local governments currently do and might wish to do. Even in areas where there is no specific case on point, it is often fairly obvious that many programs would qualify as fundamental purposes of government. For example, while no specific case addresses the prevention and management of wildfires as a fundamental purpose of government, that obligation has been a longstanding function of state government and is required by numerous statutes.⁹⁰ It is hard to see why flood control would be a fundamental purpose of government,⁹¹ but wildfire prevention would not. The same holds for things like addressing homelessness,⁹² protecting the public from discrimination,⁹³ and countless other areas of longstanding government action.

88. Wash. State Hous. Fin. Comm’n v. O’Brien, 100 Wash. 2d 491, 496, 671 P.2d 247, 250 (1983).

89. See, e.g., Wash. State Hous. Fin. Comm’n v. Nat’l Homebuyers Fund, Inc., 193 Wash. 2d 704, 719, 445 P.3d 533, 541 (2019) (“Decent housing for the people of our state is a most important public concern.”) (quoting WASH. REV. CODE § 43.180.010 (2024)).

90. See, e.g., WASH. REV. CODE § 76.04 (2023) (which includes statutes related to “forest protection” such as fire prevention mechanisms and wildfire response); WASH. REV. CODE § 76.06.200 (2021) (requiring the Department of Natural Resources to establish a forest health assessment and treatment framework); WASH. REV. CODE § 79.10.520 (2017) (requiring the Department of Natural Resources to prioritize forest health treatments to reduce wildfire hazards and losses); WASH. REV. CODE § 43.30.580 (2024) (requiring the Department of Natural Resources to maintain statewide wildfire hazard and risk maps).

91. Citizens Protecting Res. v. Yakima County, 152 Wash. App. 914, 916, 219 P.3d 730, 731 (2009), rev. denied, 168 Wash. 2d 1024, 228 P.3d 18 (Table) (2010).

92. Cf. Wash. State Hous. Fin. Comm’n, 193 Wash. 2d at 719, 445 P.3d at 541 (“Decent housing for the people of our state is a most important public concern.”) (quoting WASH. REV. CODE § 43.180.010 (2024)).

93. Cf. Pub. Emp. Rels. Comm’n v. City of Kennewick, 99 Wash. 2d 832, 838, 664 P.2d 1240, 1243 (1983) (addressing state action to remedy unfair labor practices and holding that “In bringing an enforcement action pursuant to RCW 41.56.190, the Commission was merely protecting the interests of the public in requiring a public employer to comply with the law.”); WASH. REV. CODE § 49.60.010 (2020) (explaining that the Washington Law Against Discrimination is “an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights”).

Some more recent areas of state and local government action might initially seem like closer calls. For example, climate change was not even a recognized problem until the last few decades, so combatting climate change has only more recently become a government priority. But, combatting such an encroaching threat seems like an indisputable fundamental government purpose.⁹⁴ Nothing in the case law suggests that fundamental purposes of government are limited to things that were significant problems in 1889, and it is difficult to imagine the Washington State Supreme Court imposing such a rule going forward.⁹⁵

III. MANY OTHER PROPOSED GOVERNMENT PROGRAMS WOULD PASS THE SECOND STEP OF THE SUPREME COURT'S TEST, OR WOULD QUALIFY AS SUPPORT FOR THE "POOR AND INFIRM"

Even if a program does not serve a fundamental government purpose, or if it is debatable whether it does so, additional layers of protection are available that make it exceedingly unlikely that a government program will run afoul of gift of public funds rules.

To begin with, even as to programs that further no fundamental government purpose, there is no gift of public funds unless the government agency has "donative intent" or receives a "grossly inadequate" return.⁹⁶ These standards are extremely forgiving, which helps explain why no Washington appellate court has found a gift of public funds in nearly fifty years, even for programs like a baseball stadium or a private parking garage, that did not further fundamental purposes of government.⁹⁷ An additional layer of legal protection is available to government agencies for any program aimed at helping the "poor and infirm." As explained above in section I.C, Washington courts interpret these terms in the disjunctive, so any program aimed at helping either the "poor" or the "infirm" cannot be a gift of public funds.⁹⁸ And

94. See, e.g., WASH. REV. CODE § 70A.65.005 (2021) ("The legislature finds that climate change is one of the greatest challenges facing our state and the world today, an existential crisis with major negative impacts on environmental and human health."); *Okeson v. City of Seattle*, 159 Wash. 2d 436, 439, 150 P.3d 556, 558 (2007) (referring to combating global warming as a government purpose).

95. See, e.g., *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wash. 2d 476, 517, 585 P.2d 71, 94 (1978) (holding that our state Constitution was "not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness").

96. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wash. 2d 679, 702–03, 743 P.2d 793, 805 (1987).

97. See *CLEAN v. State*, 130 Wash. 2d 782, 795–96, 928 P.2d 1054, 1060–61 (1996) (baseball stadium); *CLEAN v. City of Spokane*, 133 Wash. 2d 455, 469–70, 947 P.2d 1169, 1176 (1997) (parking garage).

98. *Wash. Health Care Facilities v. Ray*, 93 Wash. 2d 108, 116, 605 P.2d 1260, 1264 (1980).

courts give extremely broad deference to government agencies in interpreting these terms and defining the beneficiaries, as explained above.

Because of the breadth of this exception and the deference given to government agencies in applying them, whole swaths of government action run no meaningful risk of violating the gift of public funds rules. For example, virtually any public health program, from free mental health counseling to subsidized health insurance to providing addiction recovery treatment, would qualify as support for the “infirm,” and thus be categorically exempt from gift of public funds rules. Similarly, virtually any sort of subsidized program with reasonable income limitations⁹⁹—from subsidized housing to childcare to utilities—would qualify as support for the poor. It is crucial to recognize that many of these types of programs would also qualify as furthering fundamental government purposes, so in such cases they need not be limited to the “poor and infirm.” For example, because Washington State’s Supreme Court has recognized that providing daycare services is a fundamental purpose of government,¹⁰⁰ government agencies can subsidize such services even for wealthy individuals if they so choose. But to the extent a government agency (and its lawyers) fear that a particular program might fall outside the category of fundamental government purposes, they can choose to limit the program to those they deem poor and infirm—categories that they have broad authority to define—as an additional layer of protection.

In short, even where no fundamental government purpose is at issue (or the question is debatable), it is highly unlikely that a government agency would run afoul of the gift of public funds doctrine. To the extent that government agencies want additional layers of legal protection, they can specify some measure of consideration that they are receiving in exchange for the benefit they are providing (the consideration need not necessarily be monetary),¹⁰¹ or they can specify that the beneficiaries are poor or infirm (categories that they have broad authority to define).

99. *See State v. Guar. Tr. Co. of Yakima*, 20 Wash. 2d 588, 592, 148 P.2d 323, 325 (1944) (“The lawmaking power of the state has the authority, within reasonable limitations, to declare what shall be deemed a resource or income[.]”).

100. *City of Tacoma*, 108 Wash. 2d at 702 n.15, 743 P.2d at 805; *City of Seattle v. State*, 100 Wash. 2d 232, 242, 668 P.2d 1266, 1271 (1983).

101. *See, e.g., Louthan v. King County*, 94 Wash. 2d 422, 428–29, 617 P.2d 977, 981 (1980) (obtaining development rights to preserve open space is sufficient consideration); *Friends of N. Spokane Cnty. Parks v. Spokane County*, 184 Wash. App. 105, 134, 336 P.3d 632, 645 (2014) (traffic relief is sufficient consideration for permitting private road construction through a public park); *Eugster v. City of Spokane*, 139 Wash. App. 21, 32, 156 P.3d 912, 918 (2007) (avoiding cost of litigation by entering into a settlement agreement is sufficient consideration).

IV. OTHER LAWS ADDRESS CONCERNS ABOUT ABUSES AND CORRUPTION

Some readers may fear that this accurate but more permissive interpretation of the gift of funds rules will open the door to corruption, but that concern is misguided on two levels.

First, many other laws restrict public corruption. Washington's Ethics in Public Service Act forbids government officials and employees from using their position for "personal gain or private advantage" and enumerates an extensive array of limitations and prohibitions.¹⁰² The legislature drafted this chapter to cast a wide net for potential government misconduct and wholly proscribed "[a]ctivities incompatible with public duties:"

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties.¹⁰³

The chapter limits activities that might create even the appearance of impropriety, such as officials or employees receiving gifts or "[anything] of economic value," making certain investments, holding outside employment or affiliations, soliciting benefits, assisting others with transactions, or using government property.¹⁰⁴ In addition to drafting the chapter broadly, the legislature further directed the courts to construe the chapter "liberally to effectuate its purposes and policy."¹⁰⁵

Numerous other statutes impose restrictions and penalties to prevent public corruption.¹⁰⁶ Robust government accountability statutes ensure compliance with these types of laws.¹⁰⁷ These statutes, in addition to other general laws and regulations, provide extensive substantive guardrails to

102. WASH. REV. CODE § 42.52.900 (1994); Engrossed Substitute S.B. 6111, 53rd Leg., Reg. Sess. (Wash. 1994).

103. WASH. REV. CODE § 42.52.020(1) (1994).

104. *Id.* § 42.52.

105. *Id.* § 42.52.901.

106. *See* WASH. REV. CODE § 42.20 (2012) (criminal provisions for the misconduct of public officers); WASH. REV. CODE § 42.23 (2023) (code of conduct for municipal officers); WASH. REV. CODE § 36.18 (2023) (outlining fees for county officers and penalty for taking illegal fees); WASH. REV. CODE § 29B (2024) and WASH. REV. CODE § 42.17A (2024) (campaign disclosure and contribution); WASH. REV. CODE § 29A.84 (2024) (crimes and penalties for officials' election violations); WASH. REV. CODE § 9A.68 (2011) (bribery and corrupt influence); WASH. REV. CODE § 9A.80 (2011) (abuse of office).

107. *See* WASH. REV. CODE § 42.30 (2024) (Open Public Meetings Act); WASH. REV. CODE § 42.56 (2024) (Public Records Act); WASH. REV. CODE § 42.40 (2017) and § 42.41 (1995) (whistleblower protections).

prevent, discover, and respond to government misconduct. Whereas article VIII, sections 5 and 7 violations can invalidate government action or programs, violations of anti-corruption provisions subject individuals to discipline, termination/removal from office, civil penalties, and/or prosecution.¹⁰⁸

Second, the gift of public funds rule has only a minimal impact on limiting what we now think of as public corruption in the first place. The gift and loan prohibitions were designed to prevent the flow of government resources out of the public domain, not to address the corruptive influence of private money flowing the other direction.¹⁰⁹ It is quite possible to engage in bribery within a program compliant with gift of public fund rules. For example, imagine a road construction project authorized by a local government. Providing transportation is a fundamental purpose of government, so the overall program is not a gift of public funds. Now imagine that an employee administering the program receives two bids, for the exact same cost. One bidder pays the employee a bribe to choose their contract. If the employee chooses that company, there is obvious corruption and the employee definitely broke the law, but there is still no unconstitutional gift of public funds because the expenditure itself is to further a fundamental purpose of government.

By the same token, a program may be tremendously wasteful or ineffective, but still not a gift of public funds. Choosing to build a bus stop that few people will use, or to fund an educational curriculum that has no evidence of success, is not a gift of public funds, even though it may be incompetent. When an expenditure is made to further a fundamental purpose of government, the check on government waste is electoral accountability and media scrutiny, not the gift of public funds rule.

In short, an arsenal of alternative anti-corruption provisions, combined with the inapplicability of the gift and loan prohibitions to many areas of government action, suggest that other tools are far more important than sections 5 and 7 to combatting the misuse of public funds.

CONCLUSION

Our hope in writing this Article is to spark a significant change in how Washington public officials (and their lawyers) view the gift of public funds doctrine. While these provisions in Washington's Constitution are important to understand and still provide some limited guardrails, the reality is that exceedingly few proposed government programs run the risk of violating the gift of funds rules, so long as they are thoughtfully

108. *See supra* note 106 and accompanying text.

109. *See supra* section I.A.

implemented. Public officials should stop allowing this doctrine to serve as a roadblock to programs aimed at solving urgent social problems, from homelessness to the mental health crisis to the lack of affordable childcare. Restricting such programs is never the role these provisions were intended to play, and under the Washington State Supreme Court's approach for the last four decades, that is not the role they do play. With a clearer understanding of how these provisions actually operate today, we hope that public officials will be more willing to propose and implement innovative programs to address our state's most pressing needs.