DREXEL LAW REVIEW

THOMAS R. KLINE SCHOOL OF LAW

VOLUME 16 | 2024 | ISSUE 2

ARTICLE

THE ARIZONA GIFT CLAUSE IN THE TWENTY-FIRST CENTURY

Timothy Sandefur *

ABSTRACT

Most state constitutions include provisions forbidding the state or local governments from subsidizing private entities with public resources. These provisions were fashioned in the nineteenth century in the wake of financial disasters brought on by government investment in businesses such as railroads. Of all such provisions, Arizona's is the most robust: it forbids not only direct payments of taxpayer money to private recipients, but any type of aid "by subsidy or otherwise." This article examines how courts have interpreted that prohibition, and how they apply it today, and compares that precedent with other state courts' interpretations of their respective anti-subsidy provisions.

* Mr. Sandefur is the Vice President for Legal Affairs, Goldwater Institute, and holds the Barry Goldwater Chair in American Institutions at Arizona State University.

This Article relies in part on research by Jonathan Riches, Christina Sandefur, and Veronica Lucero.

TABLE OF CONTENTS

INTRODUCTION

Most state constitutions feature one or more provisions barring the government from subsidizing private enterprises with public resources.[1] These provisions, often called Gift Clauses or Anti-Aid Clauses,[2] are a legacy of the nineteenth century, during which state and local governments underwrote businesses—especially railroads—quite extensively.[3] This often led to financial catastrophe when those businesses failed,[4] and

1. For a comprehensive list, *see* Matthew D. Mitchell, Jonathan Riches, Veronica Thorson & Anne Philpot, Outlawing Favoritism: The Economics, History, and Law of Anti-Aid Provisions in State Constitutions 65–76 (2020) (Mercatus Center, Working Paper) (accessible at https://www.mercatus.org/system/files/mitchell-outlawing-favoritism-mercatus-working-paper-v3.pdf [https://perma.cc/2HA4-LA87]).

2. *Id*. This article uses the term "Gift Clause" to refer both to these types of anti-subsidy provisions generally and to specific provisions in state constitutions. A "Gift Clause" can sometimes consist of multiple overlapping constitutional provisions, as for example in Texas. *See* TEX. CONST. art III, §§ 50, 51, 52-a; *id*. art. XVI, § 6(a).

3. *See generally* Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 REGENT U. L. REV. 1, 43–51 (2024) [hereinafter Sandefur, *Origins*] (explaining the significance of the railroad fiascos in forming the first constitution in Arizona).

4. *See, e.g.*, William B. English, *Understanding the Costs of Sovereign Default: American State Debts in the 1840's*, 86 AM. ECOM. REV. 259, 262 (1996) (explaining eight states and one territory—Florida—defaulted on their debt); Cecil E. Ames, Federal Legislation on the Assumption of State

states then adopted safeguards against future subsidies.[5] Of all these safeguards, Arizona's is the most comprehensive. Its Gift Clause bars not only outright grants to private parties, but also other forms of subsidization.[6] Consequently, the legal precedent interpreting that Clause stands out as especially interesting when considering the constitutional controversies resulting from government support for private industry.[7] These precedents offer lessons that may prove valuable to other states as they apply their own Gift Clauses.

This Article examines Arizona's Gift Clause doctrine, with particular attention to (1) the legal tests used to determine what types of expenditures qualify as "gifts," (2) whether sales—as opposed to expenditures—of public resources can be unconstitutional subsidies, and (3) the degree to which tax exemptions qualify as illegal aid to private business. Part I explains how government subsidies to private businesses create a host of problems and introduces the test which Arizona courts enforce the state Constitution's ban on subsidies. Part II first examines direct transfers of government funds to private parties. Part II then addresses the most fundamental principle of government expenditures—the "public purpose" requirement—by examining how courts in states such as Illinois, Missouri, Florida, and Colorado have differentiated legitimate public purposes from illegitimate private purposes, and the potential shortcomings of the public purpose requirement. It also explores supplemental tests state courts have used to prevent government from contributing funds to private enterprises. Part III discusses gifts and loans of credit, exploring how courts have defined these terms and addressed subsidies that fall short of expenditures. Finally, Part IV examines other types of subsidies, such as the elimination of legal and financial liabilities and exemptions from taxation.

Debts: 1839 to 1843, at 1 (1910) (M.A. thesis, University of Kansas) (KU ScholarWorks) (explaining that, in 1843, the states were approximately $250 million in debt).

5. *See generally* Sandefur, *Origins*, *supra* note 3.

6. ARIZ. CONST. art. IX, § 7; *see* Sandefur, *Origins*, *supra* note 3, at 43.

7. *See infra* Part II.

I. THE PROBLEMS OF SUBSIDIES

Government subsidies to private businesses create a host of moral, political, and economic problems. They encourage rent-seeking,[8] implicate the knowledge problem,[9] and offend moral principles that require the government to legislate in the public interest, rather than the private interest of those who exercise political power.[10] When the government aids private firms with tax dollars, it encourages companies to invest their resources in lobbying for such benefits—the rent-seeking problem—which is economically inefficient, because doing so wastes capital businesses that could devote to improving services and reducing prices.[11] Such aid also rests on the fallacy that government officials can predict consumer preferences in the future and choose which businesses are worthy of investment today—something they cannot actually do.[12] Subsidies also create a dispiriting spectacle of government giving special privileges to private firms, who are often repeat-players in the lobbying business, instead of focusing on projects that promote general public goals.[13] This creates a moral hazard—firms overinvest in competing for an opportunity to exploit government's coercive powers for their own interest—and undermines the legitimacy

8. Rent-seeking refers to the phenomenon whereby private firms expend resources in effort to persuade government to legislate in ways that benefit them. *See* Gordon Tullock, *Rent Seeking*, *in* THE WORLD OF ECONOMICS 604, 604–05 (J. Eatwell et al. eds., 1991).

9. The "knowledge problem" is a term first used by DON LAVOIE, NATIONAL ECONOMIC PLANNING: WHAT IS LEFT? 52–53 (1985), to refer to the principle that central planners lack—and in principle *must* lack—the knowledge necessary to generate the politically or economically "correct" outcomes in society. This principle was most famously articulated in F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

10. *See* Sandefur, *Origins*, *supra* note 3, at 2.

11. *See* Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 228–34 (2012).

12. *See generally* LAVOIE, *supra* note 9, at 52 (explaining how the market is too complex for even advanced technology to predict what will happen); Hayek, *supra* note 9, at 519 (explaining how, even with all relevant information, society does not run on a strict mathematical formula and is, therefore, impossible to predict).

13. *See* Hasen, *supra* note 11, at 204.

of government, which is predicated on the provision of equal justice to the citizens.[14]

In 1912, Arizona adopted a state constitution that prohibits such subsidies in the most comprehensive terms.[15] Unfortunately, that hardly ended the problem—the government continued to subsidize a series of unsuccessful projects. For example, in 2008, officials in Eloy, Arizona, subsidized construction of an amusement park to be based on a "rock and roll" theme, which promoters claimed would compete as a tourist attraction with Universal Studios and Sea World.[16] The state approved creation of a special district to aid the venture to the tune of $800 million, in hopes that the park would open by 2012.[17] It never materialized.[18] In 2016, the privately owned St. Xavier University closed its Gilbert Campus doors after receiving some $36 million in subsidies from the town of Gilbert.[19] The scheme was supposed to have generated hundreds of millions of dollars in economic growth, but it never did; students simply did not sign up.[20] In 2016, officials in Pima County spent some $15 million in public

14. *See* Chris Tomlinson, *Developers Lobby for Moral Hazard, Picking Our Pockets*, HUSTON CHRON. (Dec. 12, 2017), https://www.houstonchronicle.com/business/columnists/tomlinson/article/Developers-lobby-for-moral-hazard-picking-out-12421619.php [https://perma.cc/WHR4-JMDW]; Declaration of Independence, 1 Stat. 1 (1776) (specifying the grounds of government legitimacy).

15. *See* ARIZ. CONST. art. IX, § 7.

16. Daniel Scarpinato, *Eloy Closer to Getting Rock 'N' Roll Theme Park*, TUCSON (Feb. 21, 2008), https://tucson.com/news/local/govt-and-politics/eloy-closer-to-getting-rock-n-roll-theme-park/article_6dd2d7c9-6185-54d6-a655-baa9994939bb.html [https://perma.cc/RF6H-FNFS].

17. *Id.*; Howard Fischer, *Senate OKs Taxing Powers for Rock 'N' Roll Park*, TUCSON (Mar. 20, 2008), https://tucson.com/news/local/article_f167930e-8e1a-5f9c-a98f-a1a9288cae9f.html [https://perma.cc/VXB7-N9MV].

18. *See* Kevin Reagan, *Theme Park Ideas that Never Happened in Pinal County*, CASA GRANDE DISPATCH, https://www.pinalcentral.com/casa_grande_dispatch/area_news/theme-park-ideas-that-never-happened-in-pinal-county/article_32136b56-e6e2-5d0f-8edd-bcd4842883b2.html [https://perma.cc/78V6-7AX9] (Oct. 18, 2019).

19. *See* Paul Maryniak, *Goldwater Institute Rips Gilbert's Xavier Deal as "Betrayal" of Taxpayers*, E. VALLEY TRIB., https://www.eastvalleytribune.com/arizona/goldwater-institute-rips-gilbert-s-xavier-deal-as-betrayal-of-taxpayers/article_0fbf9800-94bc-11e6-9fe9-9725a464cbb7.html [https://perma.cc/7LAC-Z3W8] (Oct. 24, 2016).

20. *See id.*; Sonja Haller, *Saint Xavier University to Close Gilbert Campus Less Than a Year After Opening*, ARIZ. REPUBLIC, https://www.azcentral.com/story/news/local/gilbert/2016/05/31/gilberts-saint-xavier-university-close/85207474/ [https://perma.cc/T6BU-YMQR] (June 1, 2016, 1:53 PM).

funds to construct facilities for a company that proposed to take passengers on rides to the stratosphere in specially modified high-altitude balloons.[21] "This country was built on public-private partnerships, dating back to the creation of our railroad network," the company's CEO claimed when seeking government aid.[22] She soon left the company, however, and the firm still has not managed to launch a passenger balloon.[23]

In all these cases, businesses with special access to the government obtained benefits that other, less politically influential businesses did not receive. Just as in the days of railroad subsidies, these schemes implicated the three primary objections to subsidization, and when they failed, taxpayers were left to shoulder the costs.

Still, although efforts to obtain public subsidies for private businesses are never-ending, Arizona courts have been unusually diligent about enforcing the constitutional prohibitions on such aid. In the twentieth century, they formulated a two-part analysis which asks whether a government expenditure (1) is for a public purpose, and (2) obtains a value for the government that is proportionate to what the government is spending.[24] This test—sometimes called the "*Wistuber* test"[25]—has been largely successful in vindicating the interests protected by the Gift Clause.[26]

---

21. Rodgers v. Huckelberry, No. 2 CA-CV 2021-0072, 2022 WL 14972042 at *1-2 (Ariz. Ct. App. Oct. 26, 2022); *see* Jeff Foust, *Arizona County to Build New Headquarters for World View*, SPACENEWS (Jan. 19, 2016), https://spacenews.com/arizona-county-to-build-new-headquarters-for-world-view/ [https://perma.cc/M64C-PL59].

22. Letter from Jayne Poynter, Chief Executive Officer, World View, to Eric Crown (May 25, 2016) (on file with the Goldwater Institute).

23. *See* Jeff Foust, *World View Reaches New Milestone in Stratollite Development*, SPACENEWS (June 6, 2019), https://spacenews.com/world-view-reaches-new-milestone-in-stratollite-development/ [https://perma.cc/X59S-HWYX]. In 2021, the company once again claimed to be preparing passenger balloons, but as this article went to press, it has not carried any passengers. Mike Wall, *World View to Start Flying Passengers on Stratospheric Balloon Rides in 2024*, SPACE, https://www.space.com/world-view-space-tourism-stratosphere-balloon [https://perma.cc/R8TY-T9XV] (Nov. 2, 2022).

24. *See* Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984).

25. Named after *id.*; *see also* Schires v. Carlat, 480 P.3d 639, 642–44 (Ariz. 2021).

26. *See, e.g.*, *Schires*, 480 P.3d at 642–47 (applying the *Wistuber* test).

The law of the Gift Clause does not, however, stop with the *Wistuber* test. Rather, it involves several other, sometimes complicated considerations, such as whether forms of aid other than outright expenditures are subject to the Clause, and what effect the Clause's emphatic, catch-all phrase "by subsidy or otherwise" may have. To fully grasp of the Clause's meaning, it is best to start at the beginning, with the text.

II. DONATIONS AND GRANTS

The archetypical example of an unconstitutional subsidy occurs when the government simply turns over taxpayer funds to a private entity *gratis*.[27] Life, however, is usually more complicated than that. Government often pays private entities to engage in undertakings that are (at least arguably) public, or gives public money to entities that are (at least arguably) public in nature, or gives private entities benefits that fall short of outright payments.[28] Courts have therefore been compelled to define such terms as "donation" and "grant," and to address situations in which funds are transferred to private parties for public reasons.[29] This section describes the legal definitions of "donation" and "grant," and the best-known legal doctrine for prohibiting gifts: the public purpose test.

A. *Direct Transfers*

In ordinary usage, "donate" and "grant" mean *gratis* payments,[30] although "grant" often means a gratuitous transfer with specific donative intent[31]—as when a charitable foundation gives a grant to an organization to pursue a specific

27. Turken v. Gordon, 224 P.3d 158, 160 (Ariz. 2010).

28. *Id.* at 163.

29. *See* City of Tempe v. Pilot Props., Inc., 527 P.2d 515, 521 (Ariz. Ct. App. 1974).

30. *Donate*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/donate [https://perma.cc/RYT9-WZZH]; *Grant*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/grant [https://perma.cc/YK4F-3G8F].

31. *Id.* (defining "grant" as "an amount of money given especially by the government to a person or organization for a special purpose").

project—whereas "donate" means a gratuitous transfer without such a particular motive.[32]

The 1910 edition of *Black's Law Dictionary*—which appeared the same year as Arizona's Constitutional Convention—defined "donation" as "[a] gift,"[33] which it further defined as "a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money."[34] It also pointed to the Latin word "donatio," which it defined as "[a] transfer of the title to property to one who receives it without paying for it."[35] The *Bouvier's Law Dictionary*, published two years after Arizona's statehood, defined "grant" by reference to "land grant,"[36] which it defined as "[a] legislative appropriation of a portion of the public domain either for charitable or eleemosynary purpose, or for the promotion of the construction of a railroad or other public work."[37] A donation or grant, therefore, was a conveyance of real or personal property without consideration, whether for some particular purpose ("grant") or not ("donation").

The most obvious instance of a donation or grant is the outright, condition-free transfer of public funds.[38] But under the principle that government may not do indirectly what it is forbidden to do directly, arrangements that accomplish an unconstitutional donation in *substance* are also prohibited, even if they do not take the *form* of direct payments, or are designed in a subtle or convoluted manner.[39] Thus, the Colorado Supreme

32. *See Donate*, CAMBRIDGE DICTIONARY, *supra* note 30 (defining "donate" as "to give money or goods to help a person or organization").

33. *Donation*, BLACK'S LAW DICTIONARY 392 (2d ed. 1910).

34. *Gift*, BLACK'S LAW DICTIONARY 540 (2d ed. 1910).

35. *Donatio*, BLACK'S LAW DICTIONARY 391 (2d ed. 1910); s*ee also Donatio*, 1 BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 924 (8th ed. 1914) (giving identical definition for "donatio").

36. *Grant*, 2 BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA, *supra* note 35, at 1379.

37. *Land Grant*, 2 *id*. at 1829.

38. *See, e.g.*, Mills v. Stewart, 247 P. 332, 334 (Mont. 1926) ("The term 'donation' employed in our Constitution is synonymous with the term 'gift' found in the Constitution of California, and [means] . . . 'An appropriation of money by the legislature for the relief of one who has no legal claim therefor.'" (citations omitted)).

39. *See* Colo. Cent. R.R. Co. v. Lea, 5 Colo. 192, 196 (1879).

Court ruled in 1879 that Boulder County violated that state's Gift Clause when it subscribed for $200,000 of stock in the Colorado Central Railroad (CCR), with the further promise of returning the stock upon the railroad's completion.[40] This, the court said, was "a donation by the county of Boulder to, and in aid of, the [CCR], of the 2,000 shares."[41] The clever device of buying stock with a promise to return it later upon satisfaction of conditions "[did] not make [the arrangement] any the less a donation within the intent of the inhibition."[42] Likewise, in *Taylor v. Commissioners of Ross County*, the Ohio Supreme Court ruled that a law whereby municipal governments could build railroads themselves—as government-owned and government-operated enterprises—was constitutional, but that an arrangement whereby the municipality immediately sold the completed railroad to private owners, violated the Gift Clause.[43] This, the court said, would be "accomplishing by indirection what it would be a plain violation of an express provision of the constitution to do directly," namely, giving public resources to a private entity.[44]

On the other hand, some types of aid to private parties are arguably not "donations." For example, tax exemptions[45] or the cancellation of existing debt,[46] which do not transfer something in the government's possession to the private recipient, are not easily described as "donations." Thus, unless some other constitutional prohibition applies (such as Arizona's bar on aid "by subsidy or otherwise"[47]), these valuable benefits might not transgress a constitutional ban on donations or grants to private

40. *Id.* at 193–96.

41. *Id.* at 196.

42. *Id.*

43. Taylor v. Comm'rs of Ross Cnty., 23 Ohio St. 22, 81–84 (1872).

44. *Id.* at 82–83.

45. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 616 (Mont. 2018) (Gustafson, J., concurring) (finding that state gift clause "prohibits more than appropriations," and includes "indirect payments" including tax credits), *rev'd and remanded*, 140 S. Ct. 2246 (2020).

46. People v. City of Chicago, 182 N.E. 419, 438 (Ill. 1932).

47. ARIZ. CONST. art. 9, § 7.

parties. These issues will be discussed more fully in Part IV below.

B. *Public Purpose*

1. *The most basic requirement of government expenditures*

Forbidding donations or grants is not as simple as it seems because it generates two related interpretive challenges whenever public resources are allegedly devoted to private parties: (1) not all private recipients are truly private, because they may be using the funds for a public undertaking, and (2) it would be a simple matter to disguise a gift as a purchase, such as by paying an exorbitant amount for something of little value, or by purporting to buy something that does not actually exist. A purely formalistic approach to the Gift Clause—which only bars government from giving what it *admits* to be gifts, or from giving resources to recipients that it concedes to be private—could easily be evaded. Such a formalistic approach would allow the government to, for example, buy a $100 asset from a private party for $10,000, or give money to a private recipient in exchange for its "contributions to society," or purport to hire a private firm to accomplish a public work and then fail to supervise the firm to ensure that the work is completed. In other words, a theory of the Gift Clause that focused only on the "surface indicia"[48] of the transaction would effectively transform the constitutional analysis into "a test of whether the legislature has a stupid staff."[49] Courts have therefore established more objective tests for giving real effect to the Gift Clause, rather than being misled by appearances.[50]

The first and most basic of these is the public purpose requirement, under which an expenditure must be for a purpose that

48. Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984)

49. Mutschler v. City of Phoenix, 129 P.3d 71, 77 (Ariz. Ct. App. 2006) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025 n.12 (1992)). *But see* Am. Precision Ammunition, L.L.C v. City of Min. Wells, No. 21-10558, 2024 WL 137035, at *3–4 (5th Cir. Jan. 12, 2024) (invalidating an agreement under the Gift Clause in which the city expressly labeled its expenditure a "gift.").

50. *See Wistuber*, 687 P.2d at 357.

benefits the public at large, rather than a private entity.[51] This test is rather vague, however, resting as it does on sometimes contentious determinations of what undertakings are sufficiently beneficial to society.[52] The public purpose test was already amorphous when it was first articulated in *Sharpless v. Mayor of Philadelphia* in 1853,[53] but has only become more so in the past century, as intellectual trends shifted toward "judicial restraint" so as to permit greater government intervention in the economy.[54] Today, some courts employ a "rational basis" form of analysis when assessing public purpose—a test so lenient that virtually no government action can fail it.[55] Arizona courts, however, have not done this.

The Arizona Supreme Court first weighed the meaning of the public purpose requirement in *City of Tombstone v. Macia*, a 1926 case challenging a city's power to issue bonds for the erection of a plant that generated electricity and also made ice for sale.[56] A taxpayer challenged the constitutionality of these bonds, arguing that the expenditure was not for a public purpose.[57] The court disagreed.[58] "'Public purpose' is a phrase perhaps incapable of definition," it said, "and better elucidated by examples."[59] On one hand, there are purposes so obviously public that they qualify as "strictly within the governmental or public

51. *Id.* at 356–57.

52. Shires v. Carlat, 480 P.3d 639, 643 (Ariz. 2021) ("What constitutes a 'public purpose' has proved elusive to define. . . . In general, however, a public purpose promotes the public welfare or enjoyment." (citations omitted)).

53. *See* Sharpless v. Mayor of Phila., 21 Pa. 147, 148 (1853).

54. The California Supreme Court remarked as early as *Egan v. City & County of San Francisco*, 133 P. 294, 295–96 (Cal. 1913), that "[t]he trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. . . . Generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public is to be included, within the legitimate domain of public purposes.". But the advent of judicial deference in the New Deal Era drastically expanded this range.

55. *See, e.g.*, White v. State, 105 Cal. Rptr. 2d 714, 720–23 (Cal. Ct. App. 2001) (applying rational basis to a gift clause challenge).

56. City of Tombstone v. Macia, 245 P. 677, 678 (Ariz. 1926).

57. *Id.* The city sold $25,000 in municipal bonds to the highest bidder, with the proceeds going to the construction of the plant. *Tombstone*, TUCSON CITIZEN, Mar. 3, 1925, at 3.

58. *Macia*, 245 P. at 683.

59. *Id.* at 679.

powers,"[60] such as the provision of police, schools, roads, sewers, and housing for government officers.[61] At the other extreme are undertakings so obviously private that they fall into the category of "proprietary effort."[62] These include subsidizing "a private enterprise in holding annual fairs," or "assisting a company to embark in the manufacture of linen fabrics," or "reliev[ing] individuals whose homes had been destroyed by an extensive fire."[63] In the middle of the spectrum are undertakings of "a mixed or doubtful nature," such as providing electricity that lights both public streets and also private homes, providing water from a publicly owned water supply to private businesses that use the water for profit-making purposes, or the construction of a canal system which is overseen by a private company that charges tolls.[64]

The real test, said the court, is whether the work is essentially public—"satisfy[ing] the need, or contribut[ing] to the convenience, of the people of the city at large"— or whether it is "undertaken merely for gain or for private objects."[65] In making that call, courts should attend to relevant social and industrial conditions, rather than following rigid formulas.[66] With those guidelines in mind, the *Macia* court concluded that the making and selling of ice was a public purpose, given the severity of Arizona's desert climate.[67] Moreover, the Tombstone ice plant generated electricity as well as making ice, and the parties

60. *Id.* at 680.

61. *See id.* at 679.

62. *Id.* at 680.

63. *Id.* at 679 (citing City of Eufala v. McNab, 67 Ala. 588 (1880) (annual fairs for private enterprise); Bissel v. City of Kankakee, 64 Ill. 249 (1872) (manufacture of linen fabrics); Coates v. Campbell, 35 N.W. 366 (Minn. 1887) (restoration of private homes)).

64. *Id.* at 679–80. The *Macia* court cited HOWARD S. ABBOTT, A TREATISE ON THE LAW OF PUBLIC SECURITIES 223 (1913), which contended that "[t]he proper functions of a state are to regulate and govern, and based upon sound reasons it is neither desirable nor legal that it engage in undertakings or transact that business which naturally and properly should be left to private enterprise."

65. *Macia*, 245 P. at 680 (quoting Sun Printing & Publ'g Ass'n v. City of New York, 40 N.Y.S. 607, 611 (App. Div. 1896)).

66. *See id.*; *cf.* Billings Sugar Co. v. Fish, 106 P. 565, 570 (Mont. 1910) ("[C]onstitutional questions . . . should be decided in the light of conditions existing in the particular state.").

67. *Macia*, 245 P. at 683.

admitted that supplying electricity was a public purpose.[68] Citizens could, of course, have used the electricity to make their own ice. It therefore struck the court as illogical to suggest that the government could not simply make ice and sell it.[69]

Although *Macia* appeared to take a relatively broad view of the meaning of "public purpose," that did not mean the government could transfer its resources to private entities simply because the recipients generated social benefits.[70] Only two years earlier, in *Day v. Buckeye Water Conservation and Drainage District*, the court observed that a contract whereby a state irrigation district paid for the renovation of canals owned by a private irrigation company, and paid off certain debts owned by that company, would violate the Gift Clause.[71] The expenditures were "inseparably united with a contract which provides for the purchase of stock in a private corporation with the funds of the [irrigation district] and its donation to individuals," wrote Justice Alfred Lockwood.[72]

Because Arizona's Gift Clause was copied verbatim from Montana's Constitution, Montana cases interpreting the Clause's language are helpful guides when interpreting the Arizona version.[73] Montana courts deliberated over the meaning of public purpose as early as 1916. *State ex. rel Evans v. Stewart* involved the constitutionality of a ballot initiative which provided financial assistance to struggling farmers.[74] It directed

68. *Id.* at 680.

69. *Id.* at 680–81. The court concluded that because the manufacturing of ice was a "public" purpose and did not fall within the category of "proprietary" undertakings. *Id.* at 683. It was therefore unnecessary to resolve whether the ice plant qualified as an "industrial concern" for purposes of the constitutional provision allowing local governments to engage in such concerns. *Id.* at 681.

70. *See id.* at 679.

71. Day v. Buckeye Water Conservation &Drainage Dist., 237 P. 636, 637–38 (Ariz. 1925).

72. *Id.* at 638. The justices concluded, however, that an irrigation district is not a political subdivision of the state, so the Gift Clause did not apply. *See id.* at 638–39. In 1940, Arizona amended its Constitution to exempt "[i]rrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts" from the Gift Clause. ARIZ. CONST. art. XIII, § 7.

73. Arizona courts have at times relied on Montana Gift Clause precedent to interpret the Arizona Gift Clause. *See, e.g.*, Turken v. Gordon, 224 P.3d 158, 162–63 (Ariz. 2010); *Day*, 237 P. at 638.

74. *See* State *ex rel.* Evans v. Stewart, 161 P. 309, 311 (Mont. 1916).

each county to deposit public money into a fund to provide mortgage loans, and made these counties guarantors of each loan, so that "[i]f the borrower fails to pay principal or interest, the county is ultimately liable for the loss or deficiency."[75] This constituted a loan of credit[76] and violated the public purpose requirement because "by this Act the county is compelled to raise by taxation money to extinguish the private debt of a delinquent borrower to the state."[77] To "liquidate the debt of a private individual" is not a public purpose.[78]

By contrast, only two years later, the same court upheld a poor-relief law in *State ex rel. Cryderman v. Weinrich*.[79] That statute provided funds to buy seed for farmers who suffered a series of crop failures.[80] The court concluded that this did not violate Montana's Gift Clause because that Clause aimed "to prevent the extension of [public] aid to either individuals or corporations for the purpose of fostering business enterprises, whether of a semipublic or private nature."[81] If an expenditure's "object is to foster private enterprises and the only benefit to be derived by the public is incidental and secondary," the court said, "then the [Gift Clause] appl[ies], and the credit or donation may not be granted." However, "if the primary object is to prevent a class of needy citizens from becoming a permanent public charge," then "the solution of such a question is primarily of public concern . . . and deference is due to any enactment of the legislature in the rational effort to solve it."[82] Yet in 1923, the same court found that a law granting money to World War I veterans violated the Gift Clause, in part because it did not

75. *Id.* at 314.

76. The concept of "loan of credit" is discussed in detail *infra*, Part III.

77. *Stewart*, 161 P. at 314.

78. *Id.* at 315.

79. *See* State *ex rel.* Cryderman v. Wienrich, 170 P. 942, 946 (Mont. 1918).

80. *Id.* at 943.

81. *Id.* at 945–46.

82. *Id.* at 946. *Contra* State *ex rel.* Griffith v. Osawkee Twp., 14 Kan. 418, 422 (1875) (rejecting judicial deference and holding that "the obligation of the state to help is limited to those who are *unable* to help themselves.")

serve a public purpose.[83] "'Public purpose,' as used in our Constitution is synonymous with 'governmental purposes,'" the court said, and since it was the federal government's responsibility to fund the military—not Montana's—the state's payment "amounts to a mere gratuity or donation, and the expenditure proposed, not being for a governmental purpose, cannot be considered as a public purpose."[84]

Montana courts recognized quite early that the line between public and private purposes may sometimes be hard to draw. They struggled between a rule of deference to the legislature in defining public purposes,[85] and the recognition that excessive deference would swiftly destroy the Gift Clause, because the legislature can plausibly define virtually anything as a public purpose. In *Thaanum v. Bynum Irrigation District*, for example, the Montana Supreme Court observed that the 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."[86]

Distinguishing between the two would appear to require a meaningful form of judicial scrutiny. Yet in *Weinrich*, the same court said that "a statute will not be declared unconstitutional unless its nullity is placed, in our judgment, beyond reasonable doubt."[87] More confusing still, the court declared in 1926 that courts considering what constitutes a public purpose

> must be governed largely by the course and usage of government, the objects for which appropriations have

83. State *ex rel.* Mills v. Dixon, 213 P. 227 (Mont. 1923), *overruled by* State *ex rel.* Graham v. Bd. of Exam'rs, 239 P.2d 283 (Mont. 1952).

84. *Id.* at 231 (citations omitted). Three years later, the court concluded that legislation appropriating money to settle a tort claim against the state was a public purpose. Mills v. Stewart, 247 P. 332, 336 (Mont. 1926); *accord* Fairfield v. Huntington, 205 P. 814, 818 (Ariz. 1922) (holding that "the appropriation in payment of appellee's [tort] claim" against the state "d[id] not constitute a donation").

85. *See Mills v. Stewart*, 247 P. at 335 (explaining that whether a purpose is public or private is a determination made by the legislature and "the courts will indulge every reasonable presumption in favor of legislative decision").

86. *Thaanum v. Bynum Irrigation District*, 232 P. 528, 530 (Mont. 1925).

87. State *ex rel.* Cryderman v. Weinrich, 170 P. 942, 944 (Mont. 1918) (citation omitted).

> been made through an extended course of legislative action, and what objects and purposes have been considered necessary to the support and for the proper use of government. Whatever lawfully pertains to them and is sanctioned by time and the acquiescence of the people will be held to belong to the public use.[88]

This rule of acquiescence was far too vague to ensure predictable and principled results. What constitutes "acquiescence," for example? If a minority of legislators vocally oppose an appropriation, but lose by one vote, does that qualify as "acquiescence"? What if the defeated opponents never file a lawsuit challenging the constitutionality of the expenditure? This might seem like acquiescence, but taxpayers rarely find it worthwhile to challenge the constitutionality of relatively small appropriations, even where blatantly unconstitutional, because they can expect little return on the time and resources that litigation requires.[89] It hardly seems fair to characterize this as "acquiescing" in the expenditure's lawfulness. If each person in a population of one million people is charged one dollar, and the resulting jackpot of one million dollars is then bestowed on one person, the recipient will have an incentive to invest up to one million dollars of her resources in seeking to defend or even extend that benefit. Meanwhile the taxpayers have lost only one dollar each, and will therefore have no meaningful incentive to invest more than that in a lawsuit to challenge the legality of the transfer.[90] A rule of acquiescence, however, would assume that the resulting silence proves that the citizenry supports the transfer in question. Thus, the acquiescence rule blinds itself to reality and creates a one-way ratchet allowing the legislature greater and greater leeway to give public funds to private entities; any time an expenditure actually is challenged, the court

88. *Mills v. Stewart*, 247 P. at 336 (citation omitted).

89. *See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 81 (1998) ("It is not cost-efficient, however, for a taxpayer to fight a particular piece of special-interest legislation.").

90. *See id. See generally* Richard A. Epstein, *Standing and Spending—the Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 42–43 (2001) (describing incentives involved in taxpayers challenging illegal expenditures).

can point to previous appropriations as proof that the challenged one is justified by the public's previous acquiescence. Courts have traditionally refused to rely on legislative silence or acquiescence to resolve major questions.[91] That is because there are many reasons legislatures may fail to take action[92]—including logrolling or the desire to expand their own power beyond constitutional limits.[93] There are even more reasons why citizens might fail to act in the face of unconstitutional government expenditures. To interpret their silence as supporting a particular interpretation of the constitution can be misleading.

This danger crystalized in a 1939 Illinois Supreme Court decision, *People ex rel. Douglas v. Barrett*, which upheld the constitutionality of a $3,500 appropriation to the widow of a man elected to the legislature.[94] The state constitution specified that legislative members were entitled only to the compensation provided by existing statutes, and in fact, the man had not taken the oath of office when he died, so he was not even entitled to that.[95] Yet the Illinois Supreme Court, striking the most deferential note possible, declared that "[p]ayments to individuals in the nature of a gratuity yet having some features of a moral obligation to support them" are not gifts, because of public acquiescence: "[t]he people of this State, by not challenging the long line of statutes similar to the one here considered, have signified their approval of such enactments."[96] That rationale, of course,

91. *See, e.g.*, Jones v. Liberty Glass Co., 332 U.S. 524, 533–34 (1947) ("[L]egislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."); Sw. Paint & Varnish Co. v. Ariz. Dep't of Env't Quality, 976 P.2d 872, 876 (Ariz. 1999) ("We have squarely rejected the idea that silence is an expression of legislative intent."); State v. Wolf, 457 P.3d 218, 225 (Mont. 2020) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." (citation omitted)).

92. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90–108 (1988) (describing the problems with relying on inaction as a tool of legal interpretation).

93. *See, e.g.*, Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) (explaining why legislative inaction is a poor guide to legal interpretation).

94. People *ex rel.* Douglas v. Barrett, 19 N.E.2d 340, 341, 343 (Ill. 1939).

95. *Id.* at 341–43.

96. *Id.* at 342.

allowed lawmakers simply to dip into the public treasury and hand a payment to whatever individual they deemed worthy.

During the Great Depression, judicial attitudes toward government intervention in the economy moved toward greater deference to legislative authority.[97] The most notorious manifestation of this was the invention of the rational basis test,[98] but courts' understanding of what qualified as a public purpose in the context of the Gift Clause also became more indulgent toward the government.[99] Such deference it out of place with respect to public purpose, however, because it is always possible for legislators to characterize any subsidy, no matter how genuinely private, as beneficial to the public in some broad sense—and such claims will virtually always be plausible.[100] After all, subsidizing a private business might be said to benefit the public by generating economic growth, or improving the aesthetics of the town, or creating jobs, or preventing the loss of jobs, or, as in *Barrett*, satisfying a purported moral obligation.[101] As early as 1877, Michigan Chief Justice Thomas Cooley warned that the economic benefits of development cannot be enough to warrant a taking, because "every lawful business" will generate *some*

97. This history has been primarily discussed in the context of the federal courts. *See generally* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000) (describing the jurisprudential revolution of the New Deal era). But a similar process occurred at the state level in virtually every state, often lagging by several years. *See, e.g.,* Keith E. Wittington, *State Constitutional Law in the New Deal Period,* 67 RUTGERS U. L. REV. 1141 (2015) (finding that while state courts were less deferential than federal courts in the 1930s, they still tended not to invalidate restrictions on property rights or economic freedom).

98. *See, e.g.*, Nebbia v. New York, 291 U.S. 505, 537 (1934) ("If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . .").

99. *See, e.g.*, Peter J. Galie & Christopher Bopst, *Anything Goes: A History of New York's Gift and Loan Clauses*, 75 ALB. L. REV. 2005, 2057–68 (2012) (charting the history of New York's Gift Clause). Montana began employing the language of deference in Gift Clause cases in 1941, when it declared that "[w]hat is a public purpose is a question primarily for legislative determination, with which we will not interfere unless there has been a clear abuse of power." Willett v. State Bd. of Exam'rs, 115 P.2d 287, 289 (Mont. 1941).

100. In addition, as discussed in Section II.B.3 below, a "subsidy" simply means a transfer of resources to a private party *predicated on* the government's (rational) belief that the transfer will benefit the public. Thus, to forbid only subsidies that lack a rational connection to a public benefit would be to erase the ban on subsidies entirely.

101. *See* People *ex rel.* Douglas v. Barrett, 219 N.E.2d 340, 342 (Ill. 1939).

kind of economic improvement to the community.[102] Likewise, interpreting the Gift Clause as requiring nothing more than a legislative assertion of public benefit would effectively nullify the constitutional prohibition on subsidies.[103]

Legislatures were, indeed, quick to take advantage of Depression-era deference to channel public funds into private undertakings. In 1936, for example, Mississippi lawmakers adopted a program of government subsidies to private businesses, and simply inserted the phrase "public purpose" into the legislation to shield it from judicial review.[104] It worked: the state Supreme Court held that the subsidy legislation did not violate the Gift Clause because it "contemplates that the proposed industry shall be operated for the accomplishment of the purposes outlined therein."[105] That reasoning allowed the legislature to grant public resources to any private entity, as long as the grant included language requiring the recipient to continue operating its business.

Today, several states employ something akin to a rational basis test in Gift Clause cases. The Pennsylvania Constitution, for example—which, to be sure, expressly allows the government to provide "financial assistance" to "commercial enterprises"[106]—has been interpreted to mean that as long as an expenditure is "reasonably designed to combat a problem within the competence of the legislature and if the public will benefit from the project, then the [expenditure] is sufficiently public in nature to withstand constitutional challenge."[107] This extreme deference effectively allows the transfer of public resources to private entities whenever it is conceivable that lawmakers

102. Ryerson v. Brown, 35 Mich. 333, 338–39 (1877). The Arizona Supreme Court reiterated that point in 2021, when it noted that "[a] private business will usually, if not always, generate some economic impact and, consequently, permitting such impacts to justify public funding of private ventures would eviscerate the Gift Clause." Schires v. Carlat, 480 P.3d 639, 645 (Ariz. 2021).

103. *See* Mitchell et al., *supra* note 1, at 46–48.

104. *See id.* at 34–35.

105. Albritton v. City of Winona, 178 So. 799, 807 (Miss. 1938).

106. PA. CONST. art. IX, § 9.

107. Tosto v. Pa. Nursing Home Loan Agency, 331 A.2d 198, 202 (Pa. 1975) (quoting Basehore v. Hampden Indus. Dev. Auth., 248 A.2d 212, 217 (Pa. 1968)).

might believe such transfers will benefit the public—which is practically always the case, because any prospective business can be rationally considered as likely to increase employment or improve the economy generally.[108] The consequence of such deference, as scholar Brian Libgober has put it, is the "death of public purpose" as a meaningful constitutional constraint in most jurisdictions.[109]

Arizona courts have taken a different approach. While they give "significant" or "appropriate" deference[110] to the legislature, that deference has limits, and "determining whether governmental expenditures serve a public purpose [remains] ultimately the province of the judiciary."[111] Arizona courts have made clear that a transaction may be an unconstitutional gift "even though [it] has surface indicia of public purpose,"[112] and that the judiciary's responsibility for ensuring that a transaction actually does serve the public, and is not a subsidy in disguise, means courts must consider "[t]he reality of [a challenged]

108. Take, for example, *Blinson v. State*, 651 S.E.2d 268 (N.C. Ct. App. 2007), in which the government gave a subsidy to the Dell Computer company to keep a factory in Forsyth County. Employing judicial deference, the court upheld the subsidies because the legislature believed the company would "stimulate investment in the local economy and promote business resulting in the creation of a substantial number of jobs." *Id.* at 272. It was later revealed that the company only employed half of the 2,000 people it said it would hire. Chad Adams, *Dell Shuts NC Plant Despite $300 Million in Incentives*, HEARTLAND INST. (Dec. 14, 2009), https://www.heartland.org/news-opinion/news/dell-shuts-nc-plant-despite-300-million-in-incentives?source=policybot [https://perma.cc/93R5-5HAC]. The factory then closed entirely only two years after the *Blinson* ruling, leaving taxpayers with nothing. *See Dell to Close N.C. Plant, Eliminate 905 Jobs*, WRAL NEWS, https://www.wral.com/business/story/6156112/ [https://perma.cc/FVV7-XD6W] (Oct. 8, 2009, 7:45 AM).

109. Brian Libgober, *The Death of Public Purpose (and How to Prevent It)*, HARV. JOHN M. OLIN CTR. FOR LAW, ECON., AND BUS., Discussion Paper No. 63, 56 (2016), http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Libgober_63.pdf [https://perma.cc/GRR6-N7BR]; *see also* Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 914 (2003) ("Today, state constitutional 'public purpose' requirements are largely rhetorical."); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1064 (2007) (stating judicial deference in many states has now "effectively eviscerat[ed] constitutional prohibitions on debt in order to subsidize commercial and industrial enterprises").

110. Schires v. Carlat, 480 P.3d 639, 643 (Ariz. 2021) (citations omitted).

111. Turken v. Gordon, 224 P.3d 158, 162 (Ariz. 2010).

112. Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984).

transaction both in terms of purpose and consideration," and take "[a] panoptic view of the facts" in a Gift Clause case.[113]

"Panoptic," of course, means all-seeing, which is the opposite of the type of deference other states have adopted.[114] And that makes sense: only a meaningful judicial examination of the terms of a transaction—a review that not only compares the costs and benefits, but realistically examines the alleged goals of that transaction, to ensure that they actually benefit the public—can prevent courts from being distracted by the "surface indicia of public purpose"[115] and upholding expenditures that, although "apparently devoted to *quasi*-public purposes," are "actually [subsidizing] private business."[116]

2. *Distinguishing public from private purposes*

Courts have sometimes moved in the direction of deference out of concern for situations in which undertakings that are legitimately "public" in principle nevertheless result in concentrated benefits for private entities. In such circumstances, it can be hard to separate an expenditure's public and private aspects. For example, *Industrial Development Authority of Pinal County v. Nelson* concerned government funding of air pollution equipment that was installed on a private copper smelting facility.[117] Similarly, *Town of Gila Bend v. Walled Lake Door Company* involved a government expenditure to install a water line for fire control that would primarily benefit one business that had burned down and refused to rebuild unless such safeguards were provided.[118] In both cases, the Arizona Supreme Court

113. *Id.*

114. *Turken*, 224 P.3d at 168. This is not the language of deference, but the opposite: *panoptic* review requires *skeptical* and *fact-intensive* analysis, not just of consideration, but also of public purpose. Yet in *Cheatham v. DiCiccio,* 379 P.3d 211, 217 (Ariz. 2016), and in some other cases, the courts have at times used the word "panoptic" as a synonym for deference. *See, e.g.*, Schires v. Carlat, No. 1 CA-CV 18-0379, 2020 WL 390671, at *3 (Ariz. Ct. App. Jan. 23, 2020), *rev'd* 480 P.3d 639 (Ariz. 2021).

115. *See Wistuber*, 687 P.2d at 357.

116. Thaanum v. Bynum Irrigation Dist., 232 P. 528, 530 (Mont. 1925).

117. Indus. Dev. Auth. of Pinal Cnty. v. Nelson, 509 P.2d 705, 707 (Ariz. 1973).

118. Town of Gila Bend v. Walled Lake Door Co., 490 P.2d 551, 553 (Ariz. 1971).

concluded that if a private entity happens to derive a distinctive benefit from a government expenditure that is qualitatively public—as pollution control or fire-prevention certainly are—that does not make the undertaking an unconstitutional subsidy.[119]

That is obviously correct: a highway does not become a subsidy to, say, a private motel simply because it happens to be constructed near that motel, even if the highway results in more travelers staying there.[120] Yet, there are cases in which the opposite occurs: in which a government expenditure, purporting to be public in nature, is actually for the benefit of a particular private entity, or where the benefit to the private entity so outweighs the public benefit that the expenditure is in truth only nominally public.[121] Excessive deference on the public purpose inquiry renders courts blind to such abuses. Hence the Montana Supreme Court's warning, often repeated by Arizona courts, that judges in Gift Clause cases must determine whether an "enterprise[] *apparently* devoted to quasi-public purposes" is "*actually* engaged in private business."[122]

A subsidy to a private railroad, for example, cannot be justified by a promise on the railroad's part to build "a proper depot and station facilities" in exchange for the subsidy—even though the facilities benefit the public—because the subsidy is in reality a private benefit.[123] The construction of a pedestrian bridge that

119. *See Nelson*, 509 P.2d at 710–11 ("If there is a public purpose the loan or donation is not prohibited even though some organization derives special benefit from the project."); *Walled Lake Door Co.*, 490 P.2d at 555–56 ("Merely because an individual may indirectly benefit from a public expenditure does not create an illegal expenditure.").

120. *See* Wise v. First Nat'l Bank, 65 P.2d 1154, 1159–60 (Ariz. 1937) (holding that road construction is a public purpose even if it benefits private parties).

121. *See, e.g.*, Lord v. City & County of Denver, 143 P. 284, 295–96 (Colo. 1914) (holding that a railroad tunnel, though purportedly public, was actually a subsidy to a private firm); *cf.* Marchi v. Brackman, 299 P.2d 761, 766–67 (Mont. 1956) (remanding to trial court to determine whether reimbursement on a public project was excessive and therefore constituted a subsidy to private contractor).

122. Thaanum v. Bynum Irrigation Dist., 232 P. 528, 530 (Mont. 1925) (emphasis altered); *see also* Day v. Buckeye Water Conservation & Drainage Dist., 237 P. 636, 638 (Ariz. 1925) (quoting this language); Turken v. Gordon, 224 P.3d 158, 162 (Ariz. 2010) (same); City of Tempe v. Pilot Props., Inc., 527 P.2d 515, 519 (Ariz. Ct. App. 1974) (same).

123. S. Ry. Co. v. Hartshorne, 50 So. 139, 139 (Ala. 1909).

can only be used by a single private party is insufficiently public, even though providing infrastructure is typically a public purpose.[124] And legislation that appropriates money to compensate depositors for losses in failed financial institutions is an unconstitutional grant of private benefits, despite the legislature's assertion that this compensation will help restore confidence in banks.[125]

Most often, however, difficulties arise when government implements devices intended to help finance a private business's start-up costs or its acquisition of property, in hopes that the recipient's operations will benefit the public through the long-term operation of its business—by "creating jobs," improving the overall economy, eliminating "blight," etc. In such cases, courts must be especially vigilant to ensure that the public interest is actually being directly served, and that the government is not merely using public benefits as an excuse or a disguise for a private subsidy. In the Washington case of *Lassila v. City of Wenatchee*, for example, a municipality adopted an economic redevelopment plan, under which it would buy land for the express purpose of selling that property to a private party for purposes of operating a theater.[126] That was unconstitutional, said the state supreme court:

> Purchase of property by a municipality with an intent to resell it to a private party is prohibited . . . . At acquisition a municipality must at very least intend a public purpose to insure that a later sale to a private party does not violate the constitutional prohibition. A municipality is absolutely prohibited from acting as a financing conduit for private enterprise.127

This was a common-sense application of the Gift Clause's prohibition on the "loan" of public resources to private parties.

---

124. *See* Bd. of Trs. v. State *ex rel.* Tucker, 175 N.E. 618, 619 (Ohio Ct. App. 1930).

125. *See* Haman v. Marsh, 467 N.W.2d 836, 843, 849–52 (Neb. 1991).

126. *See* Lassila v. City of Wenatchee, 576 P.2d 54, 56 (Wash. 1978).

127. *Id.* at 58 (citations omitted).

A similar, but more complicated, situation was presented in *Port of Longview v. Taxpayers of Longview*.[128] There, the Washington Supreme Court found that the public purpose requirement was violated when the city adopted a complicated scheme to construct pollution control facilities for a private business.[129] The city bought property from the company to finance the construction, and then, once the facilities were completed, sublet them back to the company, which made periodic payments to the city to repay the construction costs.[130] At the end of the lease period, the business obtained ownership of the facility.[131] The court found that "stripped of all its lease-sublease terminology, the municipality is simply borrowing money in its own name in the form of a municipal bond issue and loaning that same money to a private corporation."[132] It made no difference that "the ultimate source of the funds [was] a commercial bank and the credit which the bank-bond purchaser relie[d] upon [was] not that of the issuing municipality but that of the ultimate borrower, the private corporation."[133] The city "had no intention of asserting a possessory interest in the leased facilities[,] . . . received nothing of value by virtue of these transactions to which they were not already by law entitled," and received "no separate value" from the facilities.[134] The arrangement was therefore "clearly a loan" because the city "pays out money in exchange for the right to receive future repayment, together with interest," and this violated Washington's Gift Clause, regardless of the fact that the facilities were for pollution control and therefore beneficial to the public.[135]

As noted above, many courts began taking a more indulgent view during the mid-twentieth century of what qualified as a

128. Port of Longview v. Taxpayers of Port of Longview, 527 P.2d 263 (Wash. 1974).

129. *Id.* at 264–66.

130. *Id.* at 265.

131. *Id.*

132. *Id.* at 266.

133. *Id.* at 270.

134. *Id.* at 267–68.

135. *Id.* at 268 (quoting State *ex rel.* O'Connell v. Pub. Util. Dist., 484 P.2d 393, 396 (Wash. 1971)).

"public purpose."[136] In some states, this trend has reached such an extreme that their Gift Clauses no longer function as a restraint on government.[137] Arizona courts have never gone that far,[138] but their partial embrace of judicial deference in the Gift Clause context has resulted in some self-contradictions. For example, the state Supreme Court recently tried to distinguish the public purpose prong of the *Wistuber* test—on which judges must "give *significant* [though not total] deference to the judgment of elected officials"—from the consideration prong, where it said deference is not proper.[139] However, this seemingly simple dichotomy fell apart when the court went on to say that a grant to a private entity cannot be made constitutional by the fact that the recipient will spend it in a way that benefits the economy generally: "[P]rivate business will usually, if not always, generate some economic impact and, consequently, permitting such impacts to justify public funding of private ventures would eviscerate the Gift Clause."[140] That is certainly true, yet the court placed this remark in the portion of the opinion devoted to the *consideration* analysis, when this factor clearly falls within the *public purpose* inquiry.[141]

Such confusion occurs because the public purpose and consideration prongs are not as conceptually distinct as the court implied.[142] A better way to conceptualize the consideration inquiry is as a *supplement* to the public purpose analysis—one test among several for determining whether an expenditure is for a

136. *See, e.g.*, City of Glendale v. White, 194 P.2d 435, 439 (Ariz. 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.").

137. *See e.g.*, Peter J. Galie & Christopher Bopst, *Anything Goes: A History of New York's Gift and Loan Clauses*, 75 ALB. L. REV. 2005, 2006–07 (2012) (arguing New York's gift and loan clauses have been "circumvented or diluted" during the twentieth century); Libgober, *supra* note 109, at 56 ("It [is] established that the [public purpose] doctrine is no longer an effective constraint on government."); Briffault, *supra* note 109, at 914–15 (arguing that "state constitutional 'public purpose' requirements are largely rhetorical").

138. *See* Arizona Ctr. for L. in Pub. Int. v. Hassell, 837 P.2d 158, 169 (Ariz. Ct. App. 1991) (courts should "not act merely as a rubber stamp for agency or legislative action").

139. Schires v. Carlat, 480 P.3d 639, 643, 646 (Ariz. 2021) (emphasis added).

140. *Id.* at 645.

141. *See id.* at 644–46 (explaining the consideration prong).

142. *See id.* at 644.

private or public purpose. Most courts—including Arizona's—have resisted formulating a single test for distinguishing public from private purposes, but they have observed that one "essential" element of a public purpose is that it "affect[s] the inhabitants as a community and not merely as individuals."[143] In other words, if the benefits the private party receives are of a public *nature*—if they affect the recipient on the level of citizenship or membership in the community, rather than on a pecuniary or self-interested level—then whatever private benefits the recipient enjoys will not make the transaction an unconstitutional gift.[144] The reverse is also true: if the benefits of the transaction redound to the recipient on the level of its individual interests, rather than being directed toward the public realm, the legislation will fail the public purpose test, no matter what its disguise.[145]

Naturally, this conceptualization depends on a clear differentiation between public and private ends—a philosophical boundary that has suffered much erosion in the past century.[146]

---

143. Stanley v. Jeffries, 284 P. 134, 138 (Mont. 1929). This phrase originated in *Lowell v. City of Boston*, 111 Mass. 454, 470 (1873), in which the court sought to distinguish between the general police power—often expressed with phrases such as "public purpose"—and the narrower power of eminent domain, which is subject to the "public use" limitation. The police power, the court said,

> is a much broader and less specific ground of exercise of power than 'public use' and 'public service.' The former expresses the ultimate purpose, or result sought to be attained by all forms of exercise of legislative power over property. The latter imply a direct relation between the primary object of an appropriation and the public enjoyment. The circumstances may be such that the use or service intended to be secured will practically affect only a small portion of the inhabitants or lands of the Commonwealth. The essential point is, that it affects them as a community, and not merely as individuals.

Id. This distinction parallels the distinction in nuisance law between the type of private injury that forms the grounds of a private nuisance lawsuit, and the "interference with a right common to the general public" remediable by a public nuisance lawsuit. Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship, 430 P.3d 362, 365 (Ariz. 2018) (citations omitted).

144. *See, e.g.*, Indus. Dev. Auth. of Pinal Cnty. v. Nelson, 509 P.2d 705, 709 (Ariz. 1973); Town of Gila Bend v. Walled Lake Door Co., 490 P.2d 551, 555 (Ariz. 1971).

145. *See, e.g.*, City of Tombstone v. Macia, 245 P. 677 (Ariz. 1926); *Schires*, 480 P.3d at 646.

146. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1428 (1982) (describing this history). One particularly clear example of this erosion is to be found in the Court of Appeals' discussion of public purpose in *Rodgers v. Huckelberry*, No. 2 CA-CV 2021-0072, 2022 WL 14972042, at *3–4 (Ariz. Ct. App. Oct. 26, 2022), in which the court held that the subsidization of a private business was a public purpose due to "the anticipated

Perhaps the most useful formulation was offered by the Tennessee Supreme Court: for an undertaking to be sufficiently "public," there must be "a continuing or fixed use [that] will accrue to the public, including a reasonable degree of regulation or control, independent of the will of the private party who is the beneficiary of this exercise of sovereign power."[147] This means that where government funds are transferred to a private entity, the government must retain sufficient "control" over the recipient as to ensure that "the affairs of business contemplated primarily for the public benefit and not for private profit" are actually accomplished.[148]

Although Arizona courts have never set a bright-line distinction between public and private in the Gift Clause context, the Court of Appeals in one eminent domain case sought to explain what types of undertakings are sufficiently public to permit the taking of private property.[149] In doing so, it offered an analysis that can help guide the public purpose inquiry in the Gift Clause context, too. Publicness, it said, depends on "many factors," such as whether the title to the property would ultimately be held by a private or a public entity; whether any private parties would use or lease it; whether it would be devoted to profit-generating enterprises, or provide needed public services; what degree of control the government would retain over the land after condemnation, and so forth.[150] Although "public use" in

overall economic impact and job creation," and because the state legislature had passed a statute authorizing counties to spend money for economic development purposes. *Id.* at *11. Of course, all private businesses will have *some* overall economic impact and create jobs, and, as the *Schires* court observed, "permitting such impacts to justify public funding of private ventures would eviscerate the Gift Clause." 480 P.3d at 645. Nor can the legislature's enactment of a statute have any relevance to the meaning of the Constitution's language—particularly given that a county can certainly spend money for economic development purposes in ways that do not cross the line into unconstitutional gifts.

147. Ferrell v. Doak, 275 S.W. 29, 29 (Tenn. 1925).

148. *Id.* at 30; *see* discussion *infra* Section II.C.

149. Bailey v. Myers, 76 P.3d 898, 900–04 (Ariz. Ct. App. 2003).

150. *Id.* at 904. Another helpful guide appears in *Schwartz v. Jordan*, 311 P.2d 845, 847 (Ariz. 1957): "A 'public purpose' has for one of its objectives the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of public employees or officers who are exercising the sovereign powers of the state in the promotion of public purposes or public business."

eminent domain is not identical with the broader concept of public purpose,[151] these factors can help articulate the difference between genuinely public undertakings and those that have only the "surface indicia of public purpose."[152]

3. *Public purpose: necessary but not sufficient*

The foregoing suggests that the public purpose inquiry is necessary but not sufficient to give effect to most Gift Clauses, especially where courts employ a deferential form of review such as the rational basis test. This is for four reasons.

First, government is required to govern in the public rather than the private interest in *everything* it does.[153] Thus, if the Gift Clause requires nothing more than that the government spend money only in the public interest, the Clause would become redundant surplusage—a mere repetition of the rule that government must legislate for the "general welfare" or the "common good."[154] Worse, such a requirement would be so vague as to be robbed of any real effect. The history behind the Gift Clause shows that it was designed to impose stricter limits than that.[155]

---

151. *See* Turken v. Gordon, 224 P.3d 158, 165 n.5 (Ariz. 2010).

152. Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984).

153. This is a requirement of the Due Process of Law Clause. *See* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 73–74 (2014).

154. *Cf.* Brutus VI, *in* 1 THE DEBATE ON THE CONSTITUTION 618–19 (Bernard Bailyn ed., 1993):

> 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.

155. *See generally* Sandefur, *Origins*, *supra* note 3 (examining the history and motivations behind state gift clauses).

Second, the Gift Clause reflects the public's concern that the political process can be distorted by the influence of private actors who use the rhetoric of public benefit while actually pursuing their own interest—or of public officials who, though acting in good faith, fail to recognize the difference between private profit and public benefit. It is not unusual for public officials to persuade themselves that, as the old saying has it, "what is good for General Motors is good for America,"[156] and thus to blind themselves to the distinctions between public and private benefit, or to the fact that more is at stake in public policy than increasing material wealth. This makes a deferential standard of judicial review particularly unsuitable in Gift Clause jurisprudence. Judicial deference is typically predicated on the assumption that the political process can be relied upon to resolve the controversy at issue.[157] But it was precisely because the public determined that the political process was *insufficient*, and needed supplementation, that Gift Clauses were created.[158] These Clauses are meant to add restrictions on top of the preexisting rules governing the legislative process, to prevent that process from resulting in one particular type of outcome: a gift of public resources. As one scholar puts it, "the public fear of corporate influence corrupting the political process," was what gave rise to Gift Clauses, and that means "phrases such as 'judicial deference,' 'rational basis,' and 'a legitimate legislative purpose,' to the extent that they compel the court to increase the legislature's power to enact statutes that benefit private entities,

156. This phrase has become a slogan for disregarding the difference between private profit and public benefit, and is usually attributed to Charles Wilson, CEO of General Motors, whom President Eisenhower named Secretary of Defense. *Id.* But in fairness to Wilson, that was not really what he said. Asked at his confirmation hearings about potential conflicts of interest, his answer was, "I cannot conceive of one because for years I thought what was good for our country was good for General Motors, and vice versa." Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 75 n.63 (1992).

157. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1981) (arguing for a new system of judicial review to be consistent with underlying assumptions of democracy).

158. *See generally* Sandefur, *Origins*, *supra* note 3, at 7, 11–12.

have no place in special legislation or uniformity analysis."[159] In short, deference contradicts the premises on which these clauses were written, and would transform them into a mere anti-bribery rule at best, which would again make them redundant of existing law.

Third, Gift Clauses are not aimed merely at prohibiting illegitimate government *ends*, but also at barring certain *means*: they go beyond requiring the government to serve the public interest; they *also* prohibit, for example, gifts or loans of state credit *even when these serve some public interest*.[160] The New York Court of Appeals recognized this in an insightful 1921 decision, which observed that:

> [w]hether the purpose is a public one . . . is no longer the sole test as to the proper use of the state's credit. Such a purpose may not be served in one particular way. However important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of credit to an individual or to a corporation. It will not do to say . . . that because the purpose is public, the means adopted cannot be called a gift or a loan. To do so would be to make meaningless the [constitutional] provision . . . . Gifts of credit to railroads served an important public purpose. That purpose was distinctly before the legislatures that made them. Yet they were still gifts and so were prohibited.[161]

---

159. Dale F. Rubin, *Public Aid to Professional Sports Teams—A Constitutional Disgrace, The Battle to Revive Judicial Rulings and State Constitutional Enactments Prohibiting Public Subsidies to Private Corporations*, 30 U. TOL. L. REV. 393, 412 (1999).

160. *See, e.g.*, Johns v. Wadsworth, 141 P. 892, 893 (Wash. 1914) ("If the framers of the Constitution had intended only to prohibit counties from giving money or loaning credit for other than corporate or public purposes, they would doubtless have said so in direct words. That agricultural fairs serve a good purpose is not questioned, but the Constitution makes no distinction between purposes, but directly and unequivocally prohibits all gifts of money, property, or credit to, or in aid of, any corporation . . . .").

161. People v. Westchester Cnty. Nat'l. Bank, 132 N.E. 241, 244 (N.Y. 1921). The court further stated:

> [The Constitution's language is] not to be brushed aside. . . [but is] to be fairly construed to obtain the object for which [it was] intended. . . . [G]reat expenditures may

Arizona courts have agreed, explaining in 1974 that

> [a] donation of public property to a private corporation for a purpose that is deemed by the city fathers to be for the public good . . . falls squarely within the prohibition of our constitution . . . . "[T]he constitution makes no distinction as between 'donations,' whether they be for a good cause or a questionable one. It prohibits them all."162

Finally, banning only subsidies that no rational person would believe capable of serving the public interest commits a fallacy because "subsidies," by definition, exist only in situations where public officials *do* think a public interest will be accomplished by providing aid to the recipient. "Subsidy" simply *means* payment to a private entity motivated by the government's belief that the recipient entity is "likely to be of benefit to the public."[163] Since the belief that a public benefit will be served by the expenditure is *part of the definition* of "subsidy," it would be fallacious to hold that the expenditure cannot be a subsidy if the government thought it would serve a public benefit. On the contrary, such a belief would tend to prove that the expenditure *is* a subsidy.[164] So such a test would be irreconcilable with the plain text of the Gift Clause. To put it another way,

---

> be lightly authorized if payment is postponed. To place the burden upon our children is easy. Nor do we scrutinize so closely the expenditures to be made if that be done. We all recognize this tendency in private life. We incur a future obligation cheerfully, where we would hesitate had we to pay the cash. It is true in public matters. The pressure which will come when the obligation matures is ignored. Conscious of this human weakness, to guard against public bankruptcy the people thought it wise to limit the legislative power. The courts must see to it that their intentions are not frustrated or evaded. And this is true even if the action questioned seems to be approved by the voters. One of the chief objects of the Constitution is the protection of minorities against the hasty acts of the majority.

Id.

162. City of Tempe v. Pilot Props., Inc., 527 P.2d 515, 521 (Ariz. Ct. App. 1974) (quoting State *ex rel*. Sena v. Trujillo, 129 P.2d 329, 333 (N.M. 1942)).

163. *Subsidy*, BLACK'S LAW DICTIONARY 1117 (2d ed. 1910); *see also Pilot Props., Inc.*, 527 P.2d at 521 (defining subsidy as "a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public" (citation omitted)).

164. *See Pilot Props., Inc.* 527 P.2d at 521.

a ban on "subsidies" cannot be synonymous with a public purpose requirement standing by itself, because a ban on subsidies forbids financial aid to private parties particularly where legislators *do* claim that the aid will promote a public goal.[165]

C. *Public Oversight and Control*

Another reason the public purpose requirement is inadequate is that the legislature might evade the Clause by giving public resources to an entity that is nominally public but actually private, or to an entity that is allegedly engaged in some public undertaking, but which is not required to do so.[166] To avert the danger that a recipient of public funds might not employ them to serve the public purpose for which they were granted, many courts have required that a payment be accompanied by government controls over the recipient's use of the resources—controls adequate to ensure that the recipient will not reap monopoly profits from its privileged position and that whatever public goal the legislature had in mind when forming the transaction is actually carried out.[167]

---

165. Analogously, the Arizona Constitution provides that "[n]o bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted." ARIZ. CONST. art. II, § 25. No court would interpret this as *allowing* an ex post facto law, as long as it served the public welfare.

166. In *Utah Power & Light Co. v. Campbell*, 703 P.2d 714, 715, 718 (Idaho 1985), the Idaho Supreme Court explained this with an apt quotation from that state's constitutional convention: "It is supposed that we may desire in our town to have water works," said Delegate Willis Sweet, "and let us suppose it will cost $50,000. If a capitalist comes in and says 'I will put $25,000 into the enterprise' and the people of our town will put $25,000 into the enterprise, it seems to me practicable and desirable that the people should be permitted to make the investment of $25,000 in that enterprise. On the other hand we do want to prohibit authority to vote $25,000 to this capitalist and absolutely giving him the money." *Id.* at 718 (quoting 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889 at 635 (I.W. Hart, ed., 1912) (remarks of Delegate Sweet)).

167. *See, e.g.*, State *ex rel.* Rich v. Idaho Power Co., 346 P.2d 596, 622 (Idaho 1959) (holding a payment to utility companies for relocation expenses unconstitutional where the state retained no control over recipients to ensure they spent the funds for that purpose); State *ex rel.* Wash. Nav. Co. v. Pierce Cnty., 51 P.2d 407, 411 (Wash. 1935) (invalidating a contract with ferry service because government retained no control over operation of the company or its equipment); Detroit Museum of Art v. Engel, 153 N.W. 700, 703 (Mich. 1915) (holding a donation to Detroit Museum of Art invalid because although "[t]he object and purpose . . . is a public purpose in the sense that it is being conducted for the public benefit, but it is not a public purpose within the meaning of our taxing laws, unless it is managed and controlled by the public");

This supervision and control requirement allows government to *buy* goods or services from private parties without crossing the line into a donation or gratuity.[168] Some means of supervision, however, is necessary to ensure that those goods or services are in fact furnished, lest the expenditure become a gratuitous transfer.[169] Thus in *Harrington v. Atteberry*, the New Mexico Supreme Court found it unconstitutional for the state to appropriate money for the operation of a county fair which was run entirely by a private company without state supervision.[170] It rejected the idea that public purpose was the sole test of constitutionality, because if it were, "the Legislature might appropriate money to a railroad corporation to be expended in advertising the resources of the state, which the Legislature might declare to be a public purpose."[171] That would be absurd, the court said: "To be within the terms of the constitutional provision, the state must have complete control over the corporation, so that the corporation is then but a subordinate governmental agency."[172]

Similarly, in *Cramer v. Montana State Board of Food Distributors*, the Montana Supreme Court struck down a law by which the

---

Washingtonian Home of Chi. v. City of Chicago, 41 N.E. 893, 895 (Ill. 1895) (invalidating a grant to an alcohol treatment facility because "no State control over the institution is provided for . . . . Indeed, no provision whatever is made for an inspection or visitation of the institution in [sic] behalf of the State or by any State officer, but the entire supervision and control seem, under the charter, to be entrusted to private individuals. No officer or manager of the corporation is elected by the people or appointed by the State. The institution owes no duty to the public or the State"). Shortly before this Article went to press, the Texas Court of Appeals reiterated the importance of the control requirement, noting that it is only satisfied if the public possesses "rights and remedies" against the recipient of public funds, in the event that the recipient "fail[s] to . . . fulfill the public purposes" justifying the grant. Corsicana Indus. Found., Inc. v. City of Corsicana, No. 10-17-00316-CV, 2024 WL 118969, at *10 (Tex. App. Jan. 11, 2024).

168. State v. Nw. Mut. Ins. Co., 340 P.2d 200, 201 (Ariz. 1959) (Gift Clause allows government to "acquir[e] goods and services required to furnish and sustain governmental functions").

169. *See, e.g.*, Alter v. City of Cincinnati, 46 N.E. 69, 70 (Ohio 1897) (explaining why "[t]he whole ownership and control must be in the public" in order to prevent "'the union of public and private capital or credit in any enterprise'" (citation omitted)). *Contra In re.* Application of N.J. Dist. Water Supply Comm'n, 417 A.2d 1095, 1116 (N.J. Super. Ct. App. Div. 1980) (refusing to apply the supervision requirement because "New Jersey cases construing [the Gift Clause] have refused to give [it] a literal reading such as would tie the hands of government").

170. Harrington v. Atteberry, 153 P. 1041, 1045 (N.M. 1915).

171. *Id.*

172. *Id.*

state collected a license fee from food retailers, and then turned the money over to a private corporation made up of retailers.[173] That corporation was instructed to use the money to enforce food safety rules and engage in scientific research, so the state argued that the scheme served a public purpose.[174] The court said no, however, because the corporation was not "under the control of the state [or] in the nature of a municipal corporation."[175] This raised the risk that the entity could exploit its monopoly position for private gain. *Cramer* stumbled into formalism, however, by concluding that the Gift Clause's restrictions are concerned "not [with] the use to which moneys may be put, but to the nature or capacity of the recipient. It specifies 'individual, association or corporation.'"[176] This suggested that the Clause barred the state from devoting resources to publicly owned, publicly controlled corporations, which was clearly incorrect.[177] Constitutional prohibitions are leveled against things, not names,[178] and a *per se* prohibition against putting public moneys toward any "corporation," as opposed to a substantive prohibition on the transfer of public resources to the purposes of a private entity, is misguided. The court took a wiser course in *Sjostrum v. State Highway Commission*, when it held that public funding of a bridge for the use of a single railroad violated the Gift Clause.[179] The legislature adopted a resolution

173. Cramer v. Mont. State Bd. of Food Distribs., 129 P.2d 96, 97 (Mont. 1942).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Cramer* was accordingly overruled in *Jones v. Burns*, 357 P.2d 22, 34 (1960). The Montana Supreme Court, however, had observed decades before *Cramer* that "[t]he mere fact that the money raised will go to individuals will not condemn the Act in question, since the test is not as to who receives the money, but, Is the purpose for which it is to be expended a public purpose? . . . The true test is whether the work to be done is essentially public and for the general good of the inhabitants . . . rather than merely for gain or for private objects." Stanley v. Jeffries, 284 P. 134, 138 (Mont. 1929) (citations omitted).

178. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1867) ("The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name."); *see also* State *ex rel.* Stuart v. Dist. Ct. of Eighteenth Jud. Dist. in & for Hill Cnty., 251 P. 137, 142 (Mont. 1926) ("The law is not to be hoodwinked by colorable pretenses. It looks at truth and reality, through whatever disguise it may assume." (quoting Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 129 (1842)).

179. Sjostrum v. State Highway Comm'n, 228 P.2d 238, 241 (Mont. 1951).

declaring that the bridge, which had been built by the railroad company, was a public road; this authorized the state to spend money on its maintenance.[180] But the court looked beyond mere formal labels and applied a panoptic view: in reality, the bridge had never been part of Montana's transportation system, and the government held no title to it.[181] Also, the bridge "always [had] been regulated, supervised and controlled by the railway company," not by any public entity.[182] That lack of supervision meant the bridge was private, notwithstanding the "ingenious device" of declaring it public by fiat.[183]

Likewise, in *Lord v. City & County of Denver*, the Colorado Supreme Court found it unconstitutional for the government to fund construction of a railroad tunnel for the benefit of the Denver & Salt Lake Railroad ("D&SL").[184] The government's contract with the D&SL specified that the tunnel was "subject to the city's use for conveying water and electricity," and that the city would regulate the rates that the D&SL could charge other railroad companies for using the tunnel.[185] The court nevertheless found that the agreement was really a subsidy to the D&SL.[186] The city had no actual plans to use the tunnel to carry water for public purposes, and had taken no steps toward conveying electricity through it.[187] Nor did the contract actually *require* the D&SL to permit the conveyance of water or electricity.[188] What's more, the court found that the city "certainly . . . would not undertake the construction of a tunnel at an expense to the city, of three millions of dollars, in the face of the common knowledge that electric current may be as easily conveyed over the

180. *Id.* at 239, 240–41.
181. *Id.* at 240.
182. *Id.* at 239.
183. *Id.* at 241.
184. Lord v. City & County of Denver, 143 P. 284, 295 (Colo. 1914).
185. *Id.* at 286.
186. *Id.* at 291.
187. *Id.* at 290.
188. *Id.*

mountains as through a tunnel, and at a comparatively insignificant expense."[189]

True, the city could regulate how much the D&SL charged other companies to use the tunnel, but "[i]t does not appear that any other railroad company desires or ever will desire, to avail itself of any such privilege, if it be a privilege. And if so, then under the agreement, it must be by a future contract with the [D&SL] alone, and upon terms dictated by that corporation."[190] Thus, applying a realistic standard of review, the court found the contract to be "a flagrant violation" of the Gift Clause.[191] The provisions relating to water, electricity, and the regulation of the rates that the D&SL charged other firms created only an illusion of public oversight; they "were inserted, not for the accomplishment of a legitimate municipal purpose, but rather in an effort to evade the constitutional prohibition" on subsidizing private companies.[192]

Arizona courts have followed the oversight rule, too. In *Kromko v. Arizona Board of Regents*, the state Supreme Court upheld against a Gift Clause challenge a lease of government-owned land to a nonprofit corporation that operated a hospital, because the hospital's operations were made "subject to the control and supervision of public officials."[193] This eliminated the concern that a private entity would exploit the public for its own welfare.[194] Likewise, in *Walled Lake Door*—in which the government paid to construct a water line for fire suppression—the court held this to be a public purpose, despite the fact that it would benefit a private business, because "ownership and control over the water line are to remain in the Town."[195]

Obviously, if what cannot be done directly cannot be done indirectly, public ownership and control must be genuine, not illusory. Courts have therefore applied non-deferential scrutiny

189. *Id.*
190. *Id.* at 291.
191. *Id.*
192. *Id.*
193. Kromko v. Ariz. Bd. of Regents, 718 P.2d 478, 480–81 (Ariz. 1986).
194. *See id.* at 480.
195. Town of Gila Bend v. Walled Lake Door Co., 490 P.2d 551, 555 (Ariz. 1971).

to agreements challenged under the Gift Clause, to ensure that government supervision is meaningful enough to guarantee that the recipient of public funds will devote them to a public purpose. For example, in *City of West Palm Beach v. State*, the Florida Supreme Court found an agreement invalid whereby a city paid $7.5 million to build a civic center, which it then leased to a corporation, with the lease payments recouping the government's investment.[196] Expressly declining to defer to the government, the court examined the contract and found that it "surrender[ed] control of the civic center to the corporation, allowing it to make such changes and impose such conditions on its use as it may deem fit and proper."[197] That meant there was insufficient public control over the recipient of public assets to ensure that the expenditure was genuinely public in nature.[198]

What kinds of public control are required? Government oversight over the disposition of public resources must be genuine, rather than a formalistic device, if this requirement is to prevent the devotion of public resources to private ends. Some contractual arrangements, however, create a façade of public supervision without the substance. This often takes the form of the government subsidizing a private venture in stages (or "performance thresholds") through a contract that purports to require the business to meet certain "goals" in order to receive portions of the total payment.

In *Schires v. Carlat*, for example, a city subsidized a college and a real estate developer by paying the developer to renovate its property for the college's use; the college was then required to enroll a certain number of students within certain time periods to receive payment.[199] The city argued that the contract satisfied the public oversight requirement because these requirements served as "performance thresholds" that ensured the recipients of public funds were meeting their contractual obligations.[200]

196. City of West Palm Beach v. State, 113 So. 2d 374, 376–77 (Fla. 1959).

197. *Id.* at 377.

198. *See id.*

199. Schires v. Carlat, 480 P.3d 639, 642 (Ariz. 2021).

200. *See id.*

The Arizona Supreme Court was unpersuaded. The *substance* of those obligations was not *qualitatively* public; they consisted largely of illusory or valueless promises (such as a promise to "to participate in 'economic development activities'") or of promises by the private parties "to engage in their respective private businesses," which were, of course, not public purposes.[201] That meant the "performance thresholds" were no different than paying a restaurant to serve a certain number of meals to paying customers in a certain time period, or paying a railroad based on how many miles of track it laid.[202] In sum, a "performance threshold" mechanism might satisfy the control requirement if the purpose being pursued is genuinely public, but it cannot *substitute* for the public purpose requirement, or render a transaction constitutional that does not serve a truly public purpose.[203]

When a government gives funding to a private entity in order to carry out a public purpose, it is essentially hiring or buying services from that entity.[204] Its control over the recipient must therefore be strict enough to render it effectively a government-operated or government-owned enterprise. As the Montana Supreme Court put it, "[i]f the instrumentality is not under the control of the state, neither is its expenditure of funds. Accordingly, gifts to such instrumentalities, even for ostensibly public purposes, are forbidden by the provision."[205]

---

201. *Id.* at 645.

202. *See id.* (using restaurant example). While education might be a public purpose, this did not justify the subsidy to the university, which was a private, religious college that was not required to provide reduced tuition to residents, was not required to accept local residents as students, and did not offer general education, but only three specialized program in digital arts and website design. *See* Plaintiffs' Reply in Support of Motion for Summary Judgment at 4–5, Schires v. Carlat, 480 P.3d 639 (Ariz. 2021).

203. *See* Christina Sandefur & Jay S. Kramer, *The Implications of* Schires v. Carlat, ARIZ. ATT'Y, Oct. 2021, at 34, 36 (explaining that performance thresholds can "only constitute valid consideration if they are bargained-for goods and services that the developer is contractually obligated to provide to the public").

204. *See id.* at 34–35.

205. Veterans' Welfare Comm'n v. Dep't of Mont., 379 P.2d 107, 111 (Mont. 1963); *see also* Behnke v. N.J. Highway Auth., 95 A.2d 606, 608 (N.J. Super. Ct. Ch. Div. 1953) (explaining that controls must be sufficient to make recipient "an instrumentality exercising public and essential governmental functions").

D. *Adequate Consideration: "Give" and "Get"*

Another reason public purpose is necessary but not sufficient for the constitutionality of an expenditure is that if it were, the legislature could evade the Gift Clause simply by overpaying. It could purport to buy a $50,000 garbage truck for $500,000—which in substance would be a gift of (at least) $450,000 to the seller—but then escape judicial review by arguing that a garbage truck is for a public purpose.[206] To close this loophole, Arizona courts have formulated a second part of the Gift Clause analysis: not only must an expenditure serve a public purpose, but judges must also determine whether the expenditure obtains a *proportionate consideration* in return.[207] More simply, judges "focus[] on what the public is giving and getting from an arrangement and then ask[] whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture in violation of the Gift Clause."[208]

"Consideration" for Gift Clause purposes is not the same concept as "consideration" for contract law purposes.[209] In ordinary contract law, courts do not inquire as to whether the consideration one party gives is proportionate to the consideration the other party gives.[210] That is because a private contract involves no public resources, and therefore implicates no concerns about government officials' fiduciary duties toward taxpayers. Private parties are free to give gifts because the money in question is their own.[211] But public resources are a public trust, and officials are not at liberty to give them away.[212] Thus, courts in Gift

206. *See* Turken v. Gordon, 224 P.3d 158, 163 (Ariz. 2010).

207. Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984); Schires v. Carlat, 480 P.3d 639, 644 (Ariz. 2021).

208. *Schires*, 480 P.3d at 644.

209. *Turken*, 224 P.3d at 165–66.

210. *Id.* at 165; *see, e.g.*, Aerojet-Gen. Corp. v. Transp. Indem. Co., 948 P.2d 909, 932 (Cal. 1997) (holding that a freely negotiated contract between private parties "establishe[s] what [is] 'fair' and 'just' *inter se*").

211. *See Turken*, 224 P.3d at 165 (observing that the lack of fiduciary duties towards taxpayers in private contracts "leav[es] such issues to the marketplace").

212. *Cf.* Proctor v. Hunt, 29 P.2d 1058, 1059 (Ariz. 1934) ("It is, of course, 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.").

Clause cases require not only that there be consideration (a requirement for any contract) but also that the *amount* of the consideration in question be proportionate.[213] This means that transactions that might satisfy the consideration requirement of ordinary contract law can still fail the constitutional test.

In *Schires,* the city argued that its subsidy to the university was not a gratuitous payment because the recipient was expected to provide an "economic impact" to the city; the recipient also promised to participate in certain development meetings with the city.[214] The court found that these things could not qualify as consideration for Gift Clause purposes because they were too abstract to have any objective market value and, therefore, counted as zero for the proportionality test.[215] Most significantly, the *Schires* court held that judges should *not* defer to the government on the question of proportionality, but should exercise their independent judgment when comparing the objective market values of what the government spends and what it receives.[216] Because this comparison of values is objective, and is not a matter of policy considerations, judicial deference to the political branches is not appropriate.[217]

What degree of return must the government get for its payment in order to qualify as proportionate? Arizona courts have never answered this question. In *Turken v. Gordon*, the state Supreme Court found an unconstitutional subsidy where the city paid $97.4 million for the non-exclusive use of some 3,100 parking spaces.[218] The justices characterized this extreme overpayment as "grossly disproportionate to the objective value of what

213. *See Schires,* 480 P.3d at 644.

214. *Id.* at 646.

215. *Id.* at 645–46. Also, the recipient had not contractually promised any particular economic impact. *Id.* Strangely, the City argued that the fact that these promises lacked any objective market value meant that the taxpayers could *not* prove a disproportion between the payment and the benefit. *Id.* The court rejected this as fallacious, stating that "the City may not avoid scrutiny of a contractual obligation's value by providing insufficient detail to permit valuation." *Id.* at 646.

216. *Id.*

217. *Id.*

218. Turken v. Gordon, 224 P.3d 158, 166 (Ariz. 2010).

[the recipient of the funds] has promised to provide,"[219] and some have interpreted the phrase "grossly disproportionate" as meaning that an overpayment will not violate the Gift Clause as long as it falls short of "gross." For example, in *Rodgers v. Huckelberry*, a case involving a county's subsidy to a private business, the trial court concluded that a disproportionality between "give" and "get" does not cross the constitutional line unless it is "flagrant and shameful."[220] That court upheld an arrangement whereby a county received (according to the court) a value of approximately 84 cents on the dollar in return for its payment.[221]

That interpretation, however, places too much weight on the word "gross." Neither *Schires*, *Turken*, nor any other case has held that the disproportionality between a government expenditure and the value received in return must be radical, extreme, or conscience-shocking for the transaction to be unconstitutional. Instead, *Turken* simply remarked that the values in that particular case were grossly disproportionate, which they indeed were.[222] It never implied that an overpayment is constitutional as long as it falls short of being "flagrant."[223]

What lies behind the fallacy that only drastic disproportionalities are unconstitutional is an intuitive sense that *some* discrepancy between "give" and "get" is inevitable in any transaction, and that asking judges to compare the market values of every government expenditure risks paralyzing legitimate

219. *Id.*

220. Rodgers v. Huckleberry, No. C20161761, 2021 Ariz. Super LEXIS 58, at *20–21 (Ariz. Super. Ct., Feb. 22, 2021) (using the definition of "gross" in Black's Law Dictionary—"[o]ut of measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness or negligence"—to aid in determining what "grossly disproportionate" means).

221. *See id.* The Court of Appeals reversed, but did not address the question of the degree of disproportionality or the meaning of "gross." *See* Rodgers v. Huckelberry, No. 2 CA-CV 2021-0072, 2022 WL 14972042, at *4–5 (Ariz. Ct. App. Oct. 26, 2022).

222. *Turken*, 224 P.3d at 166.

223. Indeed, in *Wistuber v. Paradise Valley Unified School District*, 687 P.2d 354, 358 (Ariz. 1984), the court said only that a "disproportionality of consideration" would violate the Gift Clause and never used the word "gross."

decision-making about expenditures. But this intuition is misleading for three reasons.

First, the proportionality analysis is a test for determining *whether there is a gift*, not for determining *how big a gift is constitutional*.[224] The comparison of "give" and "get" aims at deciding whether something that purports to be a purchase is actually a subsidy; it is *not* a tool for determining whether that subsidy crosses some numerical threshold. Courts applying the consideration prong of the *Wistuber* test are not asking whether the "delta" between the expenditure and the return exceeds some monetary limit; instead, they are seeking to determine whether the government is overpaying in such a fashion that the government is effectively giving away public money. If the answer is yes, then that overpayment is unconstitutional, regardless of the amount.[225]

Second, there is no *de minimis* exception to the Gift Clause. On the contrary, it is written in the most comprehensive and emphatic terms.[226] To interpret it as allowing the government to receive 84 cents on the dollar—which in the case of a $100 million contract would be a $16 million gratuity to the recipient—would allow the government far too much latitude to give away taxpayer money. That would amount to rewriting the Gift Clause in a manner that would prohibit only "excessive" or "extreme" gifts—reminiscent of the passage in *Animal Farm* in which the beasts awaken to discover that the commandment "No animal shall drink alcohol" has been amended to read, "No animal shall drink alcohol *to excess*."[227]

Third, *all* gratuitous payments are "grossly disproportionate" by definition, because the difference between zero and any

224. *See Turken*, 224 P.3d at 166; Schires v. Carlat, 480 P.3d 639, 644 (Ariz. 2021).

225. *Cf.* State *ex rel*. O'Connell v. Port of Seattle, 399 P.2d 623, 624, 627 (Wash. 1965) (holding the Gift Clause prohibited the State from providing "free meals and refreshments" to private parties); State *ex rel.* Wash. Nav. Co. v. Pierce County 51 P.2d 407, 410 (Wash. 1935) (holding subsidies of approximately $125,000 per contract to private company violated Gift Clause); Lyman v. Adorno, 52 A.2d 702, 704–05 (Conn. 1947) ("[T]he magnitude of the sum involved [cannot] enter into our consideration; the same issue of constitutionality would be presented if only a relatively small amount of the public funds of the state [were involved].").

226. Sandefur, *Origins*, *supra* note 3, at 38–40.

227. GEORGE ORWELL, ANIMAL FARM 113 (Signet 1996) (1946).

amount is always infinite. Thus *any* gratuitous expenditure must be grossly disproportionate, no matter the nominal amounts involved. Imagine a $100 million construction contract that includes, hidden among its provisions, a clause whereby the government gives the contractor a $250,000 Ferrari as an outright gratuity. That would obviously be an unconstitutional gift—yet a quarter-million dollar sports car would be only 1/400th the value of the contract; a relatively tiny figure. Assuming the contractor completes the project and provides the government with $100 million in value in exchange for the payment, the Ferrari would not be "flagrant"; it would be a mere 2.5%. Yet it would obviously be an unconstitutional gift, because *any* payment in exchange for nothing is, by definition, infinitely disproportionate to the value received (which is zero)—and therefore a gift. And, again, the Gift Clause does not say small gifts are constitutional. It forbids gifts entirely.

This does not mean government officials have no discretion when making purchases, or that the market values on the "give" and the "get" side of the comparison must match with literal exactitude. After all, no economic transaction ever occurs unless the contracting parties place different subjective values on the things being exchanged, because then there would be no gains from trade.[228] A discrepancy between "give" and "get" is not a gift, however, if it merely reflects the difference in utility between buyer and seller that generates such gains. That difference in utility is inherent in all voluntary transactions. On the other hand, if the government does not "receive a quid pro quo" for its payment, the excess payment is a gratuity no matter what its amount.[229]

---

228. *See* JAMES D. GWARTNEY, RICHARD L. STROUP, DWIGHT R. LEE, TAWNI H. FERRARINI & JOESPH P. CALHOUN, COMMON SENSE ECONOMICS: WHAT EVERYONE SHOULD KNOW ABOUT WEALTH AND PROSPERITY 14–17 (3d ed. 2016) (explaining gains from trade).

229. *See* Yeazell v. Copins, 402 P.2d 541, 543 (Ariz. 1965) ("The state may not give away public property or funds; it must receive a quid pro quo which, simply stated, means that it can enter into contracts for goods, materials, property and services."). *But see* City of Bellevue v. State, 600 P.2d 1268, 1270–71 (Wash. 1979) (holding, over two dissents, that the state did not violate the Gift Clause by reimbursing employees for tips left at restaurants, because tips are not actually gratuities but are payments for services rendered).

The Gift Clause's proportionality requirement is a manifestation of the fiduciary relationship or public trust relationship that underlies this entire area of the law.[230] Based on the fundamental principle that government, to be legitimate, must pursue the public good rather than enriching itself off of taxpayers, the state's responsibility with respect to public monies has long been regarded as a kind of trust,[231] a principle that has also long served as the basis of taxpayers' standing to sue over the waste of public funds.[232] Since government is acting as the agent for the public, it must act as a fiduciary or trustee would when spending a principal's money or the assets of a trust. Trust law imposes a duty of prudence, requiring trustees to exercise care, skill, caution, and diligence to achieve the trust's objectives.[233]

---

230. County of Cass v. Kloker, 239 Ill. App. 301, 305 (1925) ("The adage, 'a public office is a public trust' is the foundation of the law supporting the action in this case."). In *Arizona Ctr. for L. in Pub. Int. v. Hassell*, 837 P.2d 158, 170 (Ariz. Ct. App. 1991), the court recognized the overlap of the Gift Clause and the common law public trust doctrine. The latter doctrine—articulated in case law only twenty years before Arizona statehood in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 452–53 (1892)—holds that a state's resources are not held in fee by the legislature, but are "held in trust for the people of the State," which means "[t]he State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers."

231. Arizona courts have often invoked the "public trust" doctrine as overlapping with or analogous to the government's obligations under the Gift Clause. *See, e.g.*, *Hassell*, 837 P.3d at 170; San Carlos Apache Tribe v. Superior Ct. *ex rel.* County of Maricopa, 972 P.2d 179, 199 (Ariz. 1999) (applying both the public trust doctrine and the gift clause in analysis); Butler *ex rel.* Peshlakai v. Brewer, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *4–5 (Ariz. Ct. App. Mar. 14, 2013) (enforcing the gift clause through the public trust doctrine). It would be more accurate to say, however, that the Gift Clause subsumes the public trust doctrine, because the Clause forbids the certain kinds of allocations of public resources (which are covered by the doctrine) to private parties, but also forbids other types of subsidies.

232. *See, e.g.*, Farrell v. Oliver, 226 S.W. 529, 530 (Ark. 1921) ("[A] remedy is afforded in equity to tax payers to prevent misapplication of public funds on the theory that the tax payers are the equitable owners of public funds."); Fergus v. Russel, 110 N.E. 130, 135–36 (Ill. 1915) ("[T]ax-payers may resort to a court of equity to prevent the misapplication of public funds, and . . . this right is based upon the tax-payers' equitable ownership of such funds . . . . '[I]n equity the money in the State treasury is the money of the people of the State . . . .' '[E]very taxpayer has an equitable right to see that the money so unlawfully retained shall be paid to the State Treasurer for the use of the State.'" (citations omitted); Ethington v. Wright, 189 P.2d 209, 212 (Ariz. 1948) (explaining trust principles underlying taxpayers' right to sue for waste).

233. RESTATEMENT (THIRD) OF TRUSTS § 77 (AM. L. INST. 2007); UNIF. TR. CODE § 804 (UNIF. L. COMM'N 2000) ("A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying his standard, the trustee shall exercise reasonable care, skill, and caution."); *see also In re* Sleeth, 244 P.3d 1169, 1173–74 (Ariz. Ct. App. 2010) (describing fiduciary duties of a conservator).

Trusts may also include explicit restrictions on the spending of trust funds.[234] Analogously, the Gift Clause allows public officials the kind of discretion a trustee would enjoy when spending trust resources, subject to a restriction on giving away assets or subsidizing private entities with those assets. By contrast, the type of "close enough is good enough" rule offered by those who think an overpayment is valid as long as it is less than "flagrant" would undermine the entire purpose of the Gift Clause. It would also conflict with the *Schires* court's refusal to defer to legislative judgment in the consideration analysis.[235]

Similar concerns govern the adjudication of cases in which government sells or leases things, instead of buying them. In *Arizona Center for Law in the Public Interest v. Hassell*, the Supreme Court found that the state violated the Clause when it sold state-owned riverbed land to private owners at cut-rate prices.[236] Likewise, in *City of Tempe v. Pilot Properties*, the Court of Appeals remanded to the trial court to consider the constitutionality of a city's decision to lease land for 99 years for $1 to a Major League Baseball team.[237] The city argued that the lease was for a public purpose because "bringing major league baseball to Tempe [would have] attendant economic and recreational benefits,"[238] but the court rejected this, finding that "if the consideration received by the city for the . . . lease is 'so inequitable and unreasonable that it amounts to an abuse of discretion,' a gift or donation by way of a subsidy has been bestowed on [the private company]."[239] It seems obvious that enabling a private business to profit by using government facilities or other public resources for free or for greatly reduced rates is the

234. *See* Trent S. Kiziah, *The Trustee's Duty to Diversify: An Examination of the Developing Case Law*, 36 AM. COLL. TR. & EST. COUNS. L.J. 357, 390–91 (2010) (discussing cases in which the trustees' spending power was restricted).

235. Schires v. Carlat, 480 P.3d 639, 646 (Ariz. 2021) ("[D]eferring to the public entity under the second prong is not 'appropriate,' as the inquiry is an objective one and does not involve subjective policy decisions.").

236. Ariz. Ctr. for L. in the Pub. Int. v. Hassell, 837 P.2d 158 (Ariz. Ct. App. 1991).

237. City of Tempe v. Pilot Properties, 527 P.2d 515 (Ariz. Ct. App. 1974).

238. *Id.* at 519.

239. *Id.* at 522.

equivalent of a subsidy.[240] Thus, courts apply the same two-part analysis (public purpose and consideration) to a *sale or lease* of public resources that they apply to an *expenditure* of public resources.

In *Rodgers v. Huckelberry*, county officials used taxpayer resources to fund construction of a facility tailor-made for the use of a private business.[241] The business would then repay the county for that construction through monthly payments, denominated "lease" payments, over the course of twenty years.[242] The contract further provided that at the end of that twenty-year period, the business could buy the facilities—which would then be worth about $14 million—for a ten-dollar payment.[243] The county argued that the total of the "lease" payments combined with the $10 would approximately equal the county's payments to build the facilities, and therefore that no gift occurred.[244] But the Court of Appeals found that if the payments were truly "lease" payments, they could not count toward the acquisition of title, and therefore that the proper comparison under the *Wistuber* test was between, on one hand, the $14 million value of the building at the expiration of twenty years, and, on the other hand, the $10 acquisition cost at that time.[245] Obviously, the difference between $14 million and $10 is "grossly disproportionate."[246] Consequently, the arrangement was unconstitutional.[247] *Rodgers* reinforces the *Hassell* principle that the *sale* of public resources *to* private entities, no less than the *purchase* of goods or services *from* private entities, is subject to

240. *See, e.g.*, United States *ex rel.* Rodriguez v. Weekly Publ'ns, Inc., 68 F. Supp. 767, 770 (S.D.N.Y. 1946) (allowing businesses to send things through the mail for "extremely low postal rates" was "a huge subsidy"). *But see* Neptune Swimming Found. v. City of Scottsdale, No. 1 CA-CV 21-0053, 2023 WL 2418546, at *6 (Ariz. Ct. App. Mar. 9, 2023), *rev. granted*, CV-23-0076-PR, at *1 (Ariz. Sept. 12, 2023) (holding that objective market value for public resources was not established by the highest offer of a willing buyer).

241. Rodgers v. Huckelberry, No. 2 CA-CV 2021-0072, 2022 WL 14972042, at *1–2 (Ariz. Ct. App. Oct. 26, 2022).

242. *Id.*

243. *Id.* at *4.

244. *Id.* at *5.

245. *Id.* at *16–17.

246. *Id.* at *12.

247. *Id.*

analysis under the Gift Clause, for both public purpose and proportionality.[248]

III. GIVING OR LENDING CREDIT

In addition to forbidding gifts of assets from the government to private interests, the Gift Clause also forbids the government from giving or lending credit to private parties.[249] To give or lend credit means to become lender to, or a surety for, another.[250] To *give* credit means to allow a private entity to borrow directly from the government, whereas to *lend* credit means a situation in which the government lets a private entity use the government's credit or reputation in its dealings with third parties—to let a company borrow money on the government's credit card, so to speak.[251]

It seems obvious that a gift or loan of credit occurs when the government lends public resources directly to a private entity.[252] In *Newell v. People ex rel. Phelps*, the New York Court of

---

248. *Id.* at *14 n.8 ("Although Gift Clause jurisprudence often equates the 'give' with government 'expenditure,' the proper measure in this case is the value of the lease and purchase option conveyed by Pima County, rather than the funds it expended on land acquisition and construction." (citation omitted)).

249. ARIZ. CONST. art. IX § 7.

250. *Credit*, BLACK'S LAW DICTIONARY (1891) (defining "credit" as "[t]he correlative of a *debt*; that is, a debt considered from the creditor's stand point, or that which is incoming or due *to* one." (emphasis in original)).

251. *See* Grout v. Kendall, 192 N.W. 529, 531 (Iowa 1923). However, in *Galloway v. Jenkins*, 63 N.C. 147, 156 (1869), the North Carolina Supreme Court held that it was a violation of the Gift Clause for the state to purchase stock in a private railroad. The defendants argued that the expenditure was not a *gift* because the government obtained stock in return, and therefore it was a purchase rather than a gratuitous payment. *Id.* at 154. The court nevertheless concluded that this constituted a loan of credit: "'To give,' is sometimes used to convey the idea of a gratuity, but it has a much broader meaning. . . . What did you *give* for your house and lot? I will *give* you a thousand dollars for it, provided you will *give* me six months credit. This is obviously the sense in which the word is used." *Id*. at 154–55 (emphasis in original). Examining the purpose behind the Clause, the court found that the word "give" was

> used in connection with the word lend, which imports a gratuity, and is introduced, lest the word "give" might be confined to cases where a consideration passed, and to cover the whole ground, so as to show that the credit of the State was not to be used in any way, either for a consideration or as a gratuity. The General Assembly shall have no power to give the credit of the State to this corporation, by making a subscription for its stock, is one sense.

Id. at 155.

252. One potential source of confusion arises with respect to the interaction of the *Wistuber* test and loans of government resources. In a loan situation, the proportionality test—comparing

Appeals considered whether that state's Gift Clause was violated when state officials—seeking to renovate the Erie Canal—borrowed money to complete the project and then devoted the increased revenues from the use of state-owned property to pay off that loan.[253] The state's attorneys argued that this did not create a debt against the state itself because it established a segregated fund to pay off the loan, and consequently that the arrangement did not violate the Gift Clause.[254] The court considered this argument sophistical: "[i]f this does not make a complete and perfect obligation, I am at a loss to conceive what would," declared Judge Alexander Johnson.[255]

Some courts, however, have held that a loan of credit only occurs where the government stands as a surety for a private party's loan from a private lender—and consequently, that a constitutional prohibition on giving or lending the state's *credit* leaves the state free to lend its *own* public resources to private entities. For instance, in *Utah Technology Finance Corporation v. Wilkinson*, the state created a fund to lend start-up capital to small businesses.[256] The court upheld this, on the grounds that Utah's Gift Clause only forbids state and local governments from "lend[ing] their credit or . . . subscrib[ing] to stock or bonds in aid of any private . . . undertaking."[257] Because the state was "mak[ing] direct loans," and not "becom[ing] a surety or guarantor of the debts of the fledgling businesses," no loan of public credit was occurring.[258]

"give" and "get"—is useless, because creditors always expect to receive back the entire value of their principal in any loan situation, meaning that the "give" and "get" are inherently equivalent. This anomaly is explained by the fact that the proportionality test is intended to detect when a purported *purchase* is actually a subsidy; it is *not* a test for determining whether a subsidy is constitutional or not.

253. Newell v. People *ex rel.* Phelps, 7 N.Y. 9 (1852).

254. *Id.* at 65.

255. *Id.* at 105.

256. Utah Tech. Fin. Corp. v. Wilkinson, 723 P.2d 406 (Utah 1986).

257. *Id.* at 409; UTAH CONST. art. VI, § 29(1). This provision originally appeared in article VI section 31 but was renumbered pursuant to a constitutional amendment in 1972. *Utah Tech. Fin. Corp.*, 723 P.2d at 409 n.2.

258. *Utah Tech. Fin. Corp.*, 723 P.2d at 412.

That conclusion seems to conflict with the principle that the government may not accomplish indirectly what it is forbidden to accomplish directly. A loan of the government assets places taxpayer at risk of having to pay the cost of default no less than does a situation in which the government stands as surety for a private entity's borrowing. Little wonder that one commentator has described *Wilkinson* as rendering the Gift Clause "practically meaningless as [a] constraint[] on government conduct."[259]

In a similar vein, some courts have found that a loan of credit only exists where the government itself is made liable for the debt of another—which means government aid is constitutional as long as it purports to impose no obligation on the government. For example, the Michigan Supreme Court held in *City of Gaylord v. Beckett* that no unconstitutional loan of credit occurred when the government financed a business through "self-liquidating" revenue bonds—meaning bonds the government issued to raise funds for purchasing land which the government then leased to the private entity (which repaid the government through lease payments).[260]

That theory rests on what the Nebraska Supreme Court has called a "fallac[y]," because however such revenue bonds might be denominated, the government is still "the payer of [such] bonds and it is primarily liable for their payment."[261] The bonds may foreswear the holder's right to recover in the event of default—meaning the government is exempt from penalty if the borrower fails to pay—but "the fact that the means of payment is limited does not make it any less [a public pledge of credit]."[262] Or, as the Idaho Supreme Court put it, "the credit of the municipality is extended in aid of the project, regardless of

259. John Martinez, *Getting Back the Public's Money: The Anti-Favoritism Norm in American Property Law*, 58 BUFF. L. REV. 619, 657 (2010).

260. City of Gaylord v. Beckett, 144 N.W.2d 460, 464 (Mich. 1966). The bonds also recited that they created no obligation on the part of the government. *See id.*; *see also* Uhls v. State *ex rel.* City of Cheyenne, 429 P.2d 74, 78–84 (Wyo. 1967) (examining many precedents on the question before concluding that revenue bonds that created no obligation on the government's part were not loans of credit).

261. State *ex rel.* Beck v. City of York, 82 N.W.2d 269, 272 (Neb. 1957).

262. *Id.*

the limitations placed upon the remedy of the purchaser [of revenue bonds]," because "one of the prime purposes of having the necessary bonds issued by and in the name of a municipality is to make them more readily salable on the market."[263] The fact that the government uses its reputation to sell such bonds shows that they are, in reality, uses of government credit, regardless of whether the fine print disclaims certain legal remedies on the part of the bondholder.[264] As one Arizona court noted, in rejecting the argument that revenue bonds are exempt from Gift Clause scrutiny, such bonds attract buyers precisely because they make use of the government's "unique ability as a public agency to borrow money at a lower rate of interest than a private party would have to pay in the open credit market."[265] To conclude that they are not a loan of state credit is to put form above substance. It amounts to saying that because a contract limits one party's right to recover, it is no contract at all.

But there is a larger reason why the idea that revenue bonds fall outside the reach of the Gift Clause is unpersuasive: the revenues raised by the sale of such bonds are *themselves* public revenues, and the expenditure of those revenues is subject to constitutional limits even if the bonds themselves are not, at least in states where Gift Clauses forbid donations, gifts, subsidies, etc.[266] For example, in 1916, the Montana Supreme Court held that the sale of bonds to raise a fund to aid a private business was unconstitutional, despite "the fact that the fund is to be recouped as used," because "whether used or not, it stands as an appropriation and an assurance for the benefit of the individuals who may become lenders under the act."[267] Given that Arizona's Gift Clause is significantly more protective than Utah's

263. Village of Moyie Springs v. Aurora Mfg. Co., 353 P.2d 767, 772 (Idaho 1960).

264. *See id.* at 273 ("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." (emphasis added) (quoting *Beck*, 82 N.W.2d at 272)).

265. State *ex rel*. Corbin v. Sup. Ct., 767 P.2d 30, 31, 33 (Ariz. Ct. App. 1988).

266. *See* City of Phoenix v. Sup. Ct., 514 P.2d 454, 456–57 (Ariz. 1973) ("[T]he fact that such bond funds are not subject to the debt limitation does not mean that the funds are not public. To the contrary, . . . the funds from revenue bonds must be expended for a public purpose.").

267. Hill v. Rae, 158 P. 826, 831 (Mont. 1916).

or Michigan's—banning not only loans of credit but also other forms of donation, grant, or subsidy, whether direct or indirect—the theories of *Beckett* and *Wilkinson* are inapplicable to Arizona law.[268] Unlike those states, "the gift clause of the Arizona Constitution explicitly limits governmental freedom to dispose of public resources," including the proceeds of revenue bonds.[269] As to loans of government's own resources, Arizona courts have never permitted this,[270] and this, too, would violate the catch-all prohibition on aid "by subsidy or otherwise."[271]

IV. "BY SUBSIDY OR OTHERWISE"

Arizona's Constitution forbids the government from providing aid to private enterprises "by subsidy or otherwise."[272] This comprehensive language has never been directly interpreted by Arizona courts, given that most Gift Clause decisions have rested upon other parts of the Clause. But it is at least clear that this phrase, along with the emphatic phrase "shall ever," forbids the government from *indirectly* aiding private enterprises or providing them with financial aid, even aid that falls short of a direct transfer or expenditure.[273]

---

268. Similarly, the Idaho Supreme Court rejected reliance on precedents upholding revenue-bond schemes against Gift Clause challenges in part because of "differences in the constitutional provisions involved." *Aurora Mfg. Co.*, 353 P.2d at 772.

269. Ariz. Ctr. for L. in Pub. Int. v. Hassell, 837 P.2d 158, 166 (Ariz. Ct. App. 1991).

270. The only Arizona case to address the question of government's loan of its own resources is *Valley National Bank of Phoenix v. First National Bank of Holbrook*, 320 P.2d 689 (Ariz. 1958), which involved the government's deposit of its own funds into a bank account. The court appeared to assume that a loan of public funds would violate the Gift Clause but concluded that no unconstitutional loan had occurred because a bank deposit is not a loan at all. *Id.* at 694. The court reasoned that "a deposit is for the benefit of the depositor and a loan is for the benefit of the borrower," and a loan only exists where "the money must remain for a fixed period [of time]," whereas in a deposit situation, the owner may demand the return of the deposit at any time. *Id.*

271. ARIZ. CONST. art. IX, § 7.

272. *Id.*

273. *Cf.* State *ex rel.* Cryderman v. Wienrich, 170 P. 942, 944 (Mont. 1918) (noting under Montana's Gift Clause, "[p]ublic authorities may not do by indirection what they cannot do directly"); Lord v. City & County of Denver, 143 P. 284, 293 (Colo. 1914) (noting emphatic language in the Gift Clause is intended to bar indirect as well as direct aid); *cf.* Cook Cnty. v. Chicago Indus. Sch. for Girls, 18 N.E. 183, 197 (1888) (describing the phrase "shall ever" as "so emphatic that it cannot fail to challenge the attention.").

A. *Eliminating Liabilities*

Perhaps the most common example of an indirect subsidy is the forgiving of a private party's debts, or the paying of a private party's creditors. For example, in *Town of Adel v. Woodall*, the Georgia Supreme Court found it unconstitutional for the legislature to reimburse citizens for their payments of money to a private company.[274] In *Texas & New Orleans Railroad Co. v. Galveston County*, a Texas court found that a county's promise to indemnify a railroad against any liability for negligence for 999 years was an unconstitutional subsidy.[275] And in *Rowlands v. State Loan Board*, the Arizona Supreme Court found it unconstitutional for the state to forgive interest due on certain loans, noting that "[w]hen a mortgagee forgives the interest for no other reason than the inability of the mortgagor to pay it, it is a donation, a pure and simple gratuity," in violation of the Gift Clause.[276] A subtler version of this scheme occurred in *Puterbaugh v. Gila County*.[277] There, a county improperly reimbursed an official's per diem expenses, and then, when a lawsuit was filed to recoup the money from that official, the legislature passed a law stripping the court of jurisdiction to hear the case.[278] The court said that this qualified as a gift because "when any person receives from the state or county treasury money to which he is not entitled as a matter of law . . . , he immediately becomes indebted to the state or county in the amount which he has thus illegally received," so for the state "to release [that person] from the debt" was "clearly a donation."[279]

Another commonplace form of aid to private enterprise that the "by subsidy or otherwise" provision was designed to forbid is tax exemption. Some states have held that such exemptions

274. Town of Adel v. Woodall, 50 S.E. 481, 483 (Ga. 1905).

275. Tex. & N. Orleans Ry. Co. v. Galveston County, 161 S.W.2d 530, 532 (Tex. Ct. App. 1942), *aff'd*, 169 S.W.2d 713 (Tex. 1943).

276. Rowlands v. State Loan Bd., 207 P. 359, 361 (Ariz. 1922). *But see* Biles v. Robey, 30 P.2d 841, 845 (Ariz. 1934) (statute forgiving "interest" on overdue taxes is not a subsidy because although labeled "interest," it is actually a penalty, which the state may forgive).

277. *See* Puterbaugh v. Gila County, 46 P.2d 1064 (Ariz. 1935).

278. *Id.* at 1065.

279. *Id.* at 1067.

do not offend the Gift Clause because they do not involve expenditures.[280] But Arizona courts have recognized that for government to eliminate a private party's debts—including tax obligations—is still a kind of subsidy, even though these are not expenditures. This makes sense because any reduction in liabilities is equivalent to an increase in assets.[281] So the cancellation of taxes due—or their repayment by the state—has been held to be a form of subsidy, both in Arizona[282] and elsewhere.[283]

In *Maricopa County v. State*[284] and *Pimalco, Inc. v. Maricopa County*,[285] the Arizona Court of Appeals held that tax rebates are subject to Gift Clause scrutiny.[286] *Maricopa County v. State* concerned a law whereby taxpayers whose property had been denied an agricultural property tax classification could nevertheless retroactively obtain such a classification (thereby reducing their tax liability)—a process which had not previously been allowed.[287] The county—which naturally lost revenue as a result of such retroactive reclassification—challenged the statute as a violation of the Gift Clause, and the court agreed: laws "that annul closed taxing transactions in order to confer tax benefits retroactively" are effectively expenditures—since they require payment out of the treasury—and must satisfy the Gift Clause's requirements.[288] Similarly, *Pimalco* involved a statute that exempted from taxation any possessory interest in land held in trust for an Indian tribe.[289] The county challenged the constitutionality of this exemption insofar as it operated retroactively.[290] The court applied Gift Clause analysis to this, also, although it

280. *See, e.g.*, People *ex rel.* 1170 Fifth Ave. Corp. v. Goldfogle, 173 N.E. 685, 685 (N.Y. 1930).

281. *See, e.g.*, United States v. Kirby Lumber Co., 284 U.S. 1, 2–3 (1931).

282. *See, e.g.*, Duke v. Yavapai County, 211 P. 862, 864 (Ariz. 1923).

283. *See, e.g.*, City of Ojai v. Chaffee, 140 P.2d 116, 120 (Cal. Ct. App. 1943); Eyers Woolen Co. v. Town of Gilsum, 146 A. 511, 515–16 (N.H. 1929); City of Bayonne v. Palmer, 217 A.2d 141, 160–61 (N.J. Super. Ct. Ch. Div. 1966) (citing cases).

284. Maricopa County v. State, 928 P.2d 699 (Ariz. Ct. App. 1996).

285. Pimalco, Inc. v. Maricopa County, 937 P.2d 1198 (Ariz. Ct. App. 1997).

286. *See Maricopa County*, 928 P.2d at 702–06; *Pimalco*, 937 P.2d at 1208.

287. *See Maricopa County*, 928 P.2d at 702.

288. *Id.* at 704.

289. 937 P.2d at 1200.

290. *Id.* at 1207.

ultimately upheld the exemption on the grounds that it served a public purpose and the amount of the refunds was proportionate to the public benefit.[291]

Both cases took care to distinguish retrospective laws that eliminate *existing* tax obligations from laws that simply cut taxes prospectively, or offer tax credits or deductions or incentives for future activities.[292] That makes sense: it would be absurd to hold that laws that cut taxes qualify as unconstitutional gifts—that would deprive the legislature of its sovereign authority to set taxes, and contradict the principle that a transaction does not violate the public purpose requirement just because private parties benefit from it. Both cases were instead concerned with the elimination of already existing tax bills.[293] Yet their logic does suggest that transactions where the government targets *particular* recipients for exemptions from taxes for which they would otherwise be liable, with the intent of subsidizing their private operations, *can* qualify as unconstitutional gifts. This issue has recently arisen in cases involving the Government Property Lease Excise Tax ("GPLET").

B. *Tax Exemption Subsidies Through Title-Transfer*

Arizona's GPLET statute[294] was originally adopted to resolve an anomaly created by a provision of the state Constitution that exempts government-owned property from taxation.[295] Because government-owned property is not taxed, businesses operating on property owned by the government were effectively going untaxed. The legislature therefore passed the GPLET statute to

---

291. *See id.* at 1208–09.

292. *See id.*; *Maricopa County*, 928 P.2d at 704.

293. *Pimalco*, 937 P.2d at 1208; *Maricopa County*, 928 P.2d at 704. The same reasoning, however, would probably not apply to so-called *refundable* tax credits, where the recipient is credited against future taxation, but is also given a direct payment (the "refund") equivalent to the amount is left over after the tax is paid off. *See, e.g.*, Lily L. Batchelder, Fred T. Goldberg, Jr., & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 33 (2006) (defining refundable tax credit and noting that "it is paid in cash when a tax unit has no . . . tax liability to offset."). Such a direct payment would qualify as an expenditure subject to the ordinary Gift Clause analysis. *Maricopa County*, 928 P.2d at 704.

294. ARIZ. REV. STAT. §§ 42-6201–10.

295. *See* ARIZ. CONST. art. IX, § 2(1).

allow the government to tax these businesses. That statute imposes an excise tax (as opposed to a property tax) on the lease of government property to private parties.[296] Importantly, that excise tax is set at a rate substantially below what a property tax would be, resulting in a substantial discount.[297] It also includes several exemptions or "abatements."[298] If one of these applies, the private entity is not taxed at all.

This creates an opportunity for exploitation through a clever device whereby a municipal government contracts with a private business to take title to that business's land, and then lease the land back to the business, often at rates significantly below the market lease rate.[299] Such an arrangement also typically leaves the private business with all substantive rights of ownership, notwithstanding the ownership being nominally transferred to the municipality.[300] This title-transfer scheme allows the property to be officially deemed "government-owned" for purposes of the GPLET statute, so that the property is taxed at the excise rate instead of the property tax rate the business would otherwise have had to pay, even though actual use and enjoyment of the property remains with the private party.[301] And, if an "abatement" applies, the beneficiary of the title-transfer scheme is not taxed at all.[302] Yet the transfer of title is a ruse, because the private business retains all beneficial aspects of ownership.

---

296. Robert Clark, Note, *The Government Lease Excise Tax: Challenging the Excise-Property Tax Distinction*, 29 ARIZ. STATE L.J. 871, 880 (1997) ("The primary purpose of the tax on possessory interests . . . was not to generate revenue, but to maintain the integrity of the tax rolls and prevent the disadvantaging of private-sector lessors.").

297. *See id.* at 887; *see also GPLET Average Property Tax Rates*, ARIZ. DEP'T OF REVENUE, https://azdor.gov/business/government-property-lease-excise-tax-gplet/gplet-average-property-tax-rates [https://perma.cc/5EKE-RS3M] (providing an example of the current property tax rates with the excise tax applied).

298. ARIZ. REV. STAT. §§ 42-6208, 42-6209.

299. *See, e.g.*, Englehorn v. Stanton, No. CV 2017-001742, 2020 WL 7487658, at *5 (Ariz. Super. Ct. June 19, 2020).

300. *See id.*

301. *See id.* at *7–8.

302. In *Rodgers v. Huckelberry*, for example, the County and the private business agreed that the property qualified as "aviation" related property under Section 42-6208(5) and was therefore exempt from the GPLET tax—meaning the business paid no tax. *See* Rodgers v. Huckleberry, No. C20161761, 2021 Ariz. Super. LEXIS 58, at *2–3 (Ariz.Super. Ct. Feb. 22, 2021).

Conveyances of this sort have been found illegal in other states,[303] but Arizona appellate courts have yet to address the question. If they do so, they should find GPLET title-transfer schemes unconstitutional under the Gift Clause, if not an abuse of the GPLET statute itself. That statute was intended to place government-owned property *on* the tax rolls.[304] Title-transfer schemes, however, enable local governments to take *privately* owned land *off* the tax rolls—for the purpose of subsidizing private businesses.

In one recent case, the Maricopa County Superior Court found that such an arrangement violated the Gift Clause.[305] That case involved a deal whereby the city of Phoenix contracted with a developer to acquire the developer's land and lease it back to the developer for 25 years.[306] The purpose of the arrangement was to exempt the developer from more than $4 million in property taxes it otherwise would have owed.[307] The city exercised no actual rights of ownership, however, so that its holding of title was purely nominal, and the developer retained all substantive rights of ownership.[308] Employing the type of "panoptic" review required by Gift Clause precedent,[309] the superior court added this GPLET exemption subsidy to other financial aid the city was providing, and concluded that the developer was receiving between $14.2 million and $21.2 million in public benefits.[310] In return, the developer was providing the city with about $5.8 million in benefits.[311] Given the

303. *See, e.g.*, Great Oak Bldg. & Loan Ass'n v. Rosenheim, 19 A.2d 95, 96 (Pa. 1941) ("An owner of real estate cannot transfer the registered title to another, retaining the beneficial interest to himself and thereby escape liability for taxes.").

304. *See* 1996 Ariz. Sess. Laws 349 (explaining that the GPLET law was intended to "make whole the taxing jurisdictions that depended on the revenues under the prior law").

305. *Englehorn*, 2020 WL 7487658 at *3, *7.

306. *Id.* at *1–2.

307. *Id.* at *6.

308. *Id.* at *2–3, *5.

309. *Id.* at *5.

310. *Id.* at *6.

311. *Id.* at *5.

disproportionality of this exchange, the court found the arrangement was an unconstitutional subsidy.[312]

Defenders of GPLET subsidies have sometimes argued that arrangements like these cannot qualify as subsidies because the government is not "giving" anything to the recipient. The argument goes like this: the Gift Clause only applies where government transfers something it possesses, but in a tax exemption case, no tax is collected in the first place; thus nothing is being *given* to the private party.[313] This argument implicitly makes the erroneous assumption that the Clause only applies to expenditures. But it applies to all forms of gift, "by subsidy or otherwise," including the elimination of liabilities.

---

312. *Id.* at *7. The City chose not to appeal. It swiftly thereafter entered an almost identical title-transfer arrangement with another developer, which is currently being challenged in *Paulin v. City of Phoenix*. *Stopping the City of Phoenix's Taxpayer-Funded $7 Million Government Giveaway*, GOLDWATER INST., https://www.goldwaterinstitute.org/case/paulin-v-city-of-phoenix/ [https://perma.cc/FZN8-KTEZ]. In *Rodgers v. Huckleberry,* the Pima County Superior Court upheld a similar GPLET title-transfer arrangement, concluding that GPLET tax exemptions—at least when they result from a contract between a county and a private entity—are categorically exempt from Gift Clause scrutiny. *See* Rodgers v. Huckleberry, No. C20161761, 2021 Ariz. Super. LEXIS 58, at *56–57 (Ariz. Super. Ct. Feb. 22, 2021). It gave two reasons: first, such tax exemptions "stem[] from operation of Arizona law," and therefore cannot qualify as a benefit extended by the County—and, second, tax revenues are "indirect" benefits not subject to consideration analysis. *Id.* at *55–56. This ruling was illogical. First, *all* tax exemptions exist by operation of law, including those at issue in *Maricopa County v. State,* 928 P.2d 699, 703–04 (Ariz. Ct. App. 1996), and *Pimalco, Inc. v. Maricopa County*, 937 P.2d 1198, 1207–08 (Ariz. Ct. App. 1996), which were held to be subject to Gift Clause scrutiny. The Clause forbids indirect as well as direct subsidies and makes no distinction between benefits extended by the state itself and those extended by a county through a contractual device that exploits the "operation of Arizona law." Second, the notion that a valuable tax exemption is an "indirect" benefit stems from a misreading of *Schires v. Carlat.* 480 P.3d 639, 644–45 (Ariz. 2021). . That case said anticipated tax *revenue* flowing from the successful operation of a subsidized business is an indirect benefit, insusceptible of measurement and consequently excluded from the consideration analysis. *Id.* Such anticipated revenue, after all, depends on the actions of third parties (customers must choose to buy from that business before the government can realize tax revenue from that business), which is why it is indirect and cannot be estimated ahead of time. *See id.* But a GPLET tax exemption *is* objectively measurable; in *Rodgers,* it amounted to some $4 million over the life of the contract. 2021 Ariz. Super. LEXIS 58, at *55. And it is *direct*, because it is enjoyed by the recipient without any intercessory action by a third party: the recipient gets it from the government. Although the court of appeals reversed the superior court's ruling, it did not address this question. *See* Rodgers v. Huckelberry, No. 2 CA-CV 2021-0072, 2022 WL 14972042, at *2 n.4 (Ariz. Ct. App. 2022).

313. *See* Complaint at 1, Paulin v. City of Phoenix, No. CV2022-005658 (Ariz. Super. Ct. May 4, 2022).

The argument that GPLET title-transfer schemes are constitutional typically relies on the proposition that "[o]ne cannot make a gift of something that one does not own," a statement drawn from *Kotterman v. Killian*, a case which upheld the constitutionality of a law that gave taxpayers a credit against their taxes if they donated money to a private school scholarship fund.[314] But that argument ignores the context. The *Kotterman* court said that the money in question never entered the state's treasury to begin with, but was instead given directly by the taxpayer to the school—and therefore was never the government's property; consequently it could not have been a gift of public resources.[315] But the tax exemption in a title-transfer scheme *does* belong to the government. It is a valuable benefit that government entities enjoy as a consequence of Arizona law,[316] which, after all, is why the title must change hands for such a GPLET arrangement to succeed, whereas no transfer of title occurred under the statute at issue in *Kotterman*. Also, the taxpayers in *Kotterman* actually received no financial benefit as a consequence of the statute: they still had to pay the same amount out of pocket. The statute merely let them choose whether to pay those funds to a scholarship organization or to the Department of Revenue. In a title-transfer GPLET scheme, by contrast, the private beneficiary is relieved entirely of the liability it otherwise would bear; it keeps the money it would have had to turn over in the form of taxes. It therefore receives

---

314. Kotterman v. Killian, 972 P.2d 606, 621 (Ariz. 1999).

315. *See id.* at 618:

> For us to agree that a tax credit constitutes public money would require a finding that state ownership [of the taxed funds] springs into existence at the point where taxable income is first determined, if not before. The tax on that amount would then instantly become public money. We believe that such a conclusion is both artificial and premature. It is far more reasonable to say that funds remain in the taxpayer's ownership at least until final calculation of the amount actually owed to the government, and upon which the state has a legal claim.

(footnotes omitted).

316. The situation is therefore analogous to the revenue bonds at issue in *State* ex rel. *Corbin v. Superior Court. of Arizona.* 767 P.2d 30, 33 (Ariz. Ct. App. 1988). The fact that this benefit exists solely as a function of law does not mean they cannot qualify as the kind of assets covered by the Gift Clause. Patents, too, exist solely as a function of law. *See* 35 U.S.C. § 101.

the kind of "valuable advantage[]" to which the Gift Clause applies.[317]

Finally, the theory that tax exemptions are not owned by the government and cannot therefore be gifts ignores the Gift Clause's catch-all language, which forbids the government from aiding private businesses "by subsidy or otherwise." This broad terminology, which was written with tax-exemption subsidies specifically in mind,[318] makes clear that *any* financial assistance to private enterprises is forbidden, whatever their technical form.

Arizona appellate courts have not yet addressed the constitutionality of GPLET title-transfer schemes.[319] If and when they do, they should find that structuring a tax exemption for a particular business via contract is a form of subsidy barred by the Constitution. The Gift Clause was written to forbid aid to private businesses, specifically including tax exemptions. To let local governments extend such exemptions through the indirect device of a title-transfer is to disregard both the text and history of the Clause.[320]

CONCLUSION

The Gift Clauses of state constitutions reflect the lessons learned through many regrettable historical experiences with government aid to private enterprise.[321] Arizona's founders chose to adopt the strongest prohibitions on government aid to

317. Indus. Dev. Auth. v. Nelson, 509 P.2d 705, 709 (Ariz. 1973).

318. *See* Sandefur, *Origins, supra* note 3, at 52, 54–55.

319. In *State v. Arizona Bd. of Regents*, 507 P.3d 500, 504 (Ariz. 2022), the Attorney General challenged a similar arrangement as a violation, not of the Gift Clause, but of the Evasion Clause (ARIZ. CONST. art. IX, § 2(12). The court found that he lacked standing, finding that "there is no enforcement action the Attorney General can take, because there is no tax to enforce." *Ariz. Bd. of Regents*, 507 P.3d at 504. As with the phrase in *Kotterman,* this sentence is susceptible of misunderstanding. In *Arizona Board of Regents*, unlike in a title-transfer GPLET transaction, the property in question was owned by the government to begin with, which is why there was no tax to enforce. It was not transferred to the government by the private owner for the purposes of avoiding a tax burden as in a title-transfer GPLET transaction.

320. Such arrangements, of course, also implicate the Evasion Clause, and the Constitution's prohibition on the surrender of the taxing power,which are beyond the scope of this article. *See* ARIZ. CONST. art. IX, §§ 1, 2(12).

321. *See* Sandefur, *Origins, supra* note 3.

private enterprise ever written. Although courts have, since then, struggled to give meaning to the Clause, they have settled on a two-part analysis requiring courts to weigh whether an expenditure serves a public purpose and whether the government receives proportionate consideration in exchange for it. But Arizona courts have also recognized that prohibited gifts can take forms other than outright expenditures. Faithful application of the state's fundamental law requires courts to diligently enforce the Clause's broader prohibition on aid "by subsidy or otherwise"—meaning, in any form, whether direct or indirect.