

Public Subsidies to Private Corporations: Stop Violating the Florida Constitution!

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**James Madison Institute
Policy Report No. 19
August 1996**

EXECUTIVE SUMMARY

1. Over the past several years there has been a marked increase in Florida (and nationally) in the variety and amount of government subsidies going to private, for-profit businesses; that is, corporate welfare.
2. These inappropriate handouts of taxpayer funds—always justified in the name of economic development—have financed such private ventures in Florida as office parks, rental apartments, tourist and convention-oriented businesses, the relocation of manufacturing facilities, and sports teams and stadiums.
3. The state constitution contains a clear and unambiguous clause (Article 7 Section 10) that explicitly prohibits the use of public money for such private purposes.
4. A review of cases dating back more than 100 years shows that Florida courts traditionally upheld the various provisions of the state constitution designed to put limits on the power of government to spend tax dollars.
5. Since the *Linscott* case in 1983, however, abuses of government power and authority have all but been ignored by the Florida judiciary. In fact, Florida courts have exhibited a disturbing propensity to bow to what they have perceived as economic imperatives and to disregard explicit provisions of the state constitution.
6. The problem of public subsidies to private corporations cries out for a solution. In Florida, fortunately, there is a powerful tool at our disposal: the state constitution. Somehow, we need to get lawmakers and the judiciary to abide by the rule of law and to follow the dictates of that document.

Public Subsidies to Private Corporations: Stop Violating the Florida Constitution!

Consider the following hypothetical situations:

1. You are a law-abiding taxpaying citizen with no interest in professional sports. Your city council decides to incur debt in order to spend millions of dollars to persuade the wealthy owner of a professional sports team to locate in the city in which you live. You are informed that the price of a ticket to attend a game in which the team will be involved will be so high that you would not even be able to afford to go even if you wanted. Your children, who attend public schools, are not being properly educated because the schools are not adequately funded.

2. You are the owner of a small retail store and a believer in the free enterprise system where businesspeople rely on their individual drive and ingenuity to become successful. Your state legislature spends millions of taxpayer dollars to persuade the board of directors of a major corporation to construct a large retail franchise in your city that subsequently puts you out of business.

By now of course you realize that the above examples are not really hypothetical. They are situations that are in fact occurring repeatedly throughout the country. How can such public expenditures be justified? If you ask a legislator or petition the court for an explanation, the answer will be the same: the expenditures are legal because they are for a "public purpose."

But this response is simply wrong! The Public Purpose Doctrine, a common law concept, did not evolve to provide politicians an excuse to spend taxpayer dollars on whatever projects they might so choose. Furthermore, the Florida Constitution contains a clear

and unambiguous clause that explicitly prohibits the legislature from giving any aid to private individuals or businesses including professional sports teams and powerful corporations. In fact, the courts' misuse of the Public Purpose Doctrine has enabled government entities to spend public dollars on almost any private project in spite of Florida's specific constitutional prohibition.

Article 7 Section 10 of the Florida Constitution states, in part, as follows:

"Neither the State nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give or lend or use its taxing power or credit to aid any corporation, association, partnership or person; . . ."

Language of this type, commonly referred to as a Lending of Credit provision, is contained in the constitutions of at least 45 of the 50 states. As the language cited above from the Florida Constitution indicates, such provisions also apply to counties, cities and other political subdivisions. Some states, such as Arizona, Arkansas, and Louisiana, also prohibit direct grants to private enterprise.

LIMITING THE POWER OF GOVERNMENT

Lending of Credit provisions and the Public Purpose Doctrine were intended to limit the power of the legislature to spend tax dollars. This is an extremely important point. Governing bodies do not have unfettered discretion to spend public monies. An early Florida case (*Bailey v. City of Tampa*, 1926) asserted that the reason the aforementioned provision was inserted in the 1875 Florida Constitution was because of the massive debt incurred by cities to support railroad construction.

The reason for this [the 1875 amendment] was that during the

years immediately preceding its adoption, the state and many of its counties, cities, and towns had by legislative enactment become stockholders or bondholders in, and had in other ways loaned their credit to, and had become interested in the organization and operation of, railroads, banks, and other commercial institutions. Many of these institutions were poorly managed, and either failed or became heavily involved, and, as a result, the state, counties, and cities interested in them became responsible for their debts and other obligations. These obligations fell ultimately on the taxpayers. Hence the amendment, the essence of which was to restrict the activities and functions of the state, county, and municipality to that of government, and forbid their engaging directly or indirectly in commercial enterprises for profit.¹

Early Florida cases also accorded due respect to the plain meaning of the constitutional provision. For example, in *State v. Town of Belleair*,² the town of Belleair sold bonds, the proceeds of which were to be used to construct streets for a private real estate development corporation. The court, citing Article 9 Section 7 of the 1885 Florida Constitution,³ determined that the issuance of the bonds was unconstitutional:

...if the primary object of the [bond] issue or its appropriation is to benefit the property of a corporation or chartered company, then the provisions of the Constitution are violated and the bonds are void in so far as they

are a charge against the municipality.⁴

More than 25 years later, the case of *State v. Clay County Development Authority*⁵ echoed the prophetic words of the *Town of Belleair* court. The *Clay* case involved an effort by the county development authority to issue revenue bonds, the proceeds of which were to be used to construct and equip an industrial plant for lease to a private corporation for a minimum of 25 years. The Florida Supreme Court, which held that the scheme was unconstitutional, stated:

The dominant and paramount purpose is to lend the credit of the county to a private corporation to finance a private enterprise for private profit which will be under the exclusive possession of such enterprise for more than twenty-five years. The only possible public purpose which it serves is to promote the general development of the area by furnishing employment to the residents of Clay County... If we approve the issuance of bonds by the public authorities of this State to build and finance private enterprises and put such enterprises in the exclusive possession and control of such leases as is proposed to be done here, in order to alleviate unemployment and to promote the economic development of the area, then there is no limit to the extent to which the credit of the State and its authorities may be extended to private interests. In such event the constitutional provision above quoted will become meaningless.⁶

Finally, in the case of *State v. Jacksonville Port Authority*,⁷ the court deemed unconstitutional a plan to issue bonds to construct a shipyard for use by a private company. In poignant language, the Court stated:

The question of whether the public welfare will be promoted by the issuance of public securities to finance or aid in the financing or the construction and operation of private enterprise as is presently being done in some states under specific constitutional or statutory provisions is not for this court to decide. Perhaps the modern trend of government encroachment on the free enterprise system is the wise road to follow. So long as the Constitution reads as it does now, it seems clear that we have no choice in the matter.⁸

Although the Florida Constitution was amended subsequent to the Jacksonville Port Authority case to permit public aid to construct port facilities, the adherence of the Court to the plain wording of the constitution was admirable.

In light of such strong judicial language, courts should be reluctant to approve aid to private corporations to the extent that exists today. But the courts in Florida have exhibited a disturbing propensity to bow to what they perceive as economic imperatives and to ignore the explicit meaning of the constitutional provision.

A case often cited by the proponents of corporate welfare is *Linscott v. Orange County Industrial Development Authority*.⁹ This 1983 case upheld the issuance of bonds to construct an insurance company regional headquarters. The judicial sleight of hand engaged in by the court to approve the constitutionality of the scheme is astonishing. Although Article 7 Section 10(c) of the Florida Constitution

specifically sets forth an exception to the constitutional prohibition against the public entity lending its credit in aid of a private corporation, the construction of a regional headquarters of a for-profit business is not included in that exception. Furthermore, the above cited case of *State v. Jacksonville Port Authority* stated:

The cases are legion in which this court has flatly refused to approve the issuance of public securities for the purpose of assisting in the establishment of industrial developments, housing projects, building apartment houses, baseball stadiums and projects of such nature, no matter how worthy the objectives might have been...¹⁰

Nevertheless, in an amazing example of wrong-headed judicial nitpicking, the *Linscott* court concluded that the revenue bonds were not pledges of the public credit and therefore the transaction was not covered by the constitutional provision.¹¹ The court also stated that, although port facilities and industrial and manufacturing plants were specifically included in the exception to the constitutional prohibition, public aid to other economic endeavors was not necessarily excluded in that exception.¹² In addition, the court stated that even though the transaction did not serve a paramount public purpose, it nevertheless was constitutional if it served *some* public purpose!¹³ Curiously, the *Linscott* case fails to mention *Orange County Industrial Development Authority v. State*,¹⁴ a Florida Supreme Court decision issued just 11 months earlier. It stated that, despite the insertion of Section 10(c) in the Florida Constitution, aid to a private corporation not included in the exception had to serve a paramount public purpose. (The *Linscott* case and the manner in which it misapplies the Public Purpose Doctrine is revisited later in this article.)

Finally, the court, without citing any authority therefor, stated that the insertion of Section 10(c) in the 1968 Florida Constitution “. . . was to recognize constitutionally that the public interest was served by facilitating economic development . . .”¹⁵ The *Linscott* case was quoted extensively in the 1988 case of *State v. City of Panama City Beach*,¹⁶ which upheld the constitutionality of the issuance of investment revenue bonds to be invested with an investment institution in exchange for a guaranteed rate of return. Imagine, a government entity in the investment business!

In light of such dubious decisions by Florida courts, it is no wonder that governing bodies feel they have unlimited discretion to spend taxpayer funds.

THE PUBLIC PURPOSE DOCTRINE

A judicially created rule exists to limit the power of governing bodies to spend tax dollars. This rule, which has been read into the Florida Constitution, is referred to as the Public Purpose Doctrine. Its basic premise is simple: Public monies may only be spent for public purposes. As one might expect, a straightforward rule that was created to limit expenditures of tax dollars has been so distorted by the courts that it has become almost totally ineffective.

The Public Purpose Doctrine was initially pronounced in 1853 in the case of *Sharpless v. Mayor of Pennsylvania*.¹⁷ This case involved a taxpayer lawsuit against the City of Philadelphia intended to prohibit the city from issuing bonds, the proceeds of which would be used to purchase railroad stock. The taxpayer believed that incurring debt by the public entity to invest in private enterprise was not a public purpose. The court allowed the money to be used to purchase the stock but *only* because the court deemed the railroad performed a public function, namely the construction of an internal improvement that the public entity traditionally performed. The

court was emphatic, however, that public aid to private corporations not performing traditionally public sector projects was not for a public purpose:

But the right of eminent domain cannot be used for private purposes; and therefore if a railroad, canal, or turnpike, when made by a corporation, is a mere private enterprise, like the building of a tavern, store, mill, or blacksmith’s shop [the use of eminent domain is unconstitutional].¹⁸

Two subsequent cases—*Bay City v. The State Treasurer*,¹⁹ decided in 1871 by the eminent Michigan jurist Thomas Cooley, and *Loan Association v. Topeka*,²⁰ decided in 1874 by the United States Supreme Court—both placed a much more restrictive interpretation on the Public Purpose Doctrine than the *Sharpless* case. Justice Cooley, in the *Bay City v. The State Treasurer* case, (which also involved aid to railroads), struck down the scheme as not being for a public purpose because the plan involved the payment of public monies to a private corporation. Justice Cooley’s reason for denying the aid seems prophetic:

...these provisions in our constitution do preclude the state from loaning the public credit to private corporations, and from imposing taxation upon its citizens or any portion thereof in aid of the construction of railroads. So the people supposed when the constitution was adopted. Constitutions do not change with the varying tides of public opinion and desire; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instru-

ments ... to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever convenient. They must construe them as the people did in their adoption...²¹

Finally, the ruling of the United State Supreme Court in *Loan Association v. Topeka* should remove all doubt that public monies expended to aid private enterprise are not for a public purpose and are therefore unconstitutional. This case involved an effort by the city of Topeka, Kansas, to issue bonds payable to a private corporation to encourage the corporation to locate in the city. In deciding that the issuance of the bonds was not for a public purpose, the Supreme Court stated:

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor... No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the businessmen of the city or town.²²

Obviously, these landmark cases were decidedly against the idea of providing public aid to private corporations. How then have Florida courts applied the Public Purpose

Doctrine? Just as with the constitutional Lending of Credit provisions, Florida courts have exhibited judicial schizophrenia.

*State v. Town of North Miami*²³ invalidated a plan in which the city of North Miami proposed to issue certificates of indebtedness and to use the proceeds to purchase land and erect an industrial plant on it for private use. In an elegant summary of the rationale supporting the derivation of the Public Purpose Doctrine, the Florida Supreme Court stated:

Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter [w]hat such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.²⁴

Contrast this language with the above discussed statement in *Linscott* that, because of the adoption of the constitutional amendment providing for the public financing of manufacturing and industrial plants, ‘the paramount public test developed by case law under the Constitution of 1885 lost much of its viability.’²⁵ The *Linscott* case provides abso-

lutely no support for such a bold assertion. How can a court so easily dismiss a doctrine so ingrained in the “organic law” of Florida? Was the Linscott court asserting that the legislature has unfettered discretion to spend public funds as long as no lending of credit is involved? Has the Public Purpose Doctrine been abolished in Florida? And if not, how can it be used, in light of *Linscott*, to limit the power of the legislature to expend tax dollars?

If the Public Purpose Doctrine has any meaning in Florida, the responsibility to interpret the doctrine is a judicial responsibility. And, if the Florida judiciary would give proper respect to the considerable and well thought out case precedent, the Public Purpose Doctrine would still have teeth in it and would properly serve its function to limit the power of the governing body to spend tax dollars.²⁶

The courts misuse the Public Purpose Doctrine one other way. Article 7 Section 10, in very plain language, prohibits the governing body from aiding private corporations. Nevertheless, Florida courts have ruled that there is no prohibition against paying public funds to private persons or institutions as long as a public purpose is being served. In *Oneill v. Burns*, the Florida Legislature appropriated \$50,000 to the Junior Chamber International.²⁷ The Court, while acknowledging that the appropriation constituted a lending of credit in violation of Article IX Section 10 (of the 1885 Florida Constitution), nevertheless stated that the expenditure would be allowed if it were for a public purpose.²⁸ Thus the Public Purpose Doctrine is being used by the courts as a way to avoid the prohibition clearly set forth in Florida's constitutional Lending of Credit provision. Needless to say, the constitution does not contain a public purpose exception to the Lending of Credit provision.

The total responsibility for the many outrageous subsidies extended by public entities to private corporations does not rest solely with irresponsible Florida court rulings.

A large share of the burden should be borne equally by irresponsible public officials. They enact legislation authorizing the corporate giveaways! But, as former U.S. Senator Sam Ervin said: “[E]very Congressman is bound by his oath to support the Constitution, and to determine to the best of his ability whether proposed legislation is constitutional when he casts his vote in respect to it.”²⁹ The same can be said of state and local public officials with respect to the Florida constitutional Lending of Credit provisions.

Furthermore, in response to legislative protestations that public officials only do what the courts allow, heed the words of Andrew Jackson, spoken more than 150 years ago:

If the opinion of the Supreme Court covered the whole ground of this act [referring to the act to recharter the U.S. Bank], it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme court judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is

independent of both. The authority of the Supreme Court must not therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.³⁰

CONCLUSION

History provides the context for the reasons limitations must be imposed on governing bodies with respect to the expenditure of public monies. What is currently happening in our country and in Florida in connection with public subsidies to private corporations cries out for a solution. In Florida, fortunately, we have a powerful tool at our disposal: the state constitution! All we need do is read it and follow its dictates.

ENDNOTES

1. *Bailey v. City of Tampa et. al.* 111 So. 119 (1926)
2. 170 So. 434 (1936)
3. Article 9 Section 7 provides that no tax shall be levied for the benefit of any chartered company of the state, nor for paying interest on any bonds issued by such chartered companies, or by counties, or by corporations . . .
4. *Town of Belleair* 170 So. 434, at 437.
5. *State v. County Development Authority* 140 So. 576 (1962)
6. *Ibid.* at 580,581
7. 204 So2d 881 (1967)
8. *Ibid.* at 882, 883
9. 443 So.2d 97 (1983)
10. *State v. Jacksonville Port Authority* 204 So2d 881, 883 (1967)
11. *Linscott* at 443 So2d 97, 100
12. *Ibid.* at p. 100, 101
13. *Ibid.* at p. 101
14. 427 So.2d 174 (1983)
15. *Ibid.* at p.100
16. 529 So2d 250 (1988)
17. *Sharpless v. Mayor of Pennsylvania* 21 Pa. 147 (1953)
18. *Ibid.* at 170
19. 23 Mich. 499 (1871)
20. 87 U.S. (20 Wall) 655 (1874)
21. *Ibid.* at 505

22. *Loan Association v. Topeka* 87 U.S. at 665

23. 59 So.2d 779 (1952)

24. *Ibid.* at p. 785

25. *Linscott* supra at 443 So.2d 97, 101

26. To the extent that Florida courts still observe the Public Purpose Doctrine, it does not appear that these courts employ the test of public benefit to justify whether an expenditure is for a public purpose. Obviously, if such a public benefit test were used, it would render the public purpose limitation ineffectual since the public entity can always point to some "public" benefit derived from a public expenditure.

27. 198 So.2d 1 (1967)

28. *Ibid.* at p. 4

29. P. Schuck, *The Judiciary Committees* 175 (1975) (quoting Senator Sam Ervin).

30. *A Compilation of the Messages and Papers of the Presidents 1144-45* (James D. Richardson ed. 1897-1925).