

Constitutional Highlights

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Wisconsin Constitution PUBLIC PURPOSE DOCTRINE

The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. Brodhead v. Milwaukee, 19 Wis. 624 (1865).

History and purpose of the doctrine

The public purpose doctrine generally requires that state and local governments that exercise their taxing and spending powers do so for a public purpose, and not one that only benefits private interests. It also provides that taxes must be spent at the level at which they are raised — in other words, a statewide tax must be raised and spent for the benefit of the entire state. Wisconsin courts have invalidated laws and other actions that violated these principles.

A number of states in the early- to mid-19th century established explicit constitutional provisions prohibiting governments from acting in furtherance of private purposes. For example, a provision requiring a supermajority for bills that appropriate money for local or private purposes was added to New York's constitution in 1821. The provision was a reaction to scandals over the chartering of banks in New York, an issue that also plagued Wisconsin and doomed its first attempt at drafting a constitution in 1847. In Wisconsin, concerns about public debts incurred to pay for internal improvements led to a prohibition on such debts in article VIII, section 10, of the Wisconsin Constitution. The public purpose doctrine in Wisconsin, however, emerged separately from constitutional provisions as a distinct, *judicial* check on the legislature, in part as a response to legislative aid to railroads during the early years of Wisconsin's statehood.

The origins of the doctrine appear to date back to suits in which parties argued that taxation for certain purposes was akin to a taking of private property without just compensation, which is prohibited by the U.S. Constitution and some state constitutions, including that of Wisconsin. Courts in a number of cases in the mid-19th century were receptive to these arguments. In *People v. Mayor of Brooklyn*, 4 N.Y. 419 (1851), the New York Court of Appeals wrote that “[t]he right of taxation and the right of eminent domain rest substantially on the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for *public* use.... Taxation exacts money, or services, from individuals, as and for their respective shares of contribution to any *public* [burden]” (emphasis added). Similarly, in *Cheaney v. Hooser*, 48 Ky. 330 (1848), the Kentucky Court of Appeals addressed whether a tax imposed upon a landowner following an expansion of a town’s limits could be considered a taking of private property without just compensation. The court concluded that while the takings clause does place limits on the power of taxation, courts should only void such a tax in the most obvious, extreme cases. A case more often cited for establishing the doctrine is *Sharpless v. Mayor & Citizens of Philadelphia*, 21 Pa. 147 (1853), in which the Supreme Court of Pennsylvania rejected the argument equating taxation with a taking of private property. The court nonetheless found a limitation on the power of taxation, writing: “Taxation is a mode of raising revenue for *public purposes*. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder” (emphasis added).

The first apparent Wisconsin case finding a public purpose doctrine was *Soens v. Racine*, 10 Wis. 271 (1860), in which a city of Racine resident brought suit protesting a tax to pay for breakwaters and other protections on Lake Michigan. The resident argued that such a tax was a taking of private property for a public use without just compensation. While declining to characterize taxation as a taking of private property, Justice Dixon, writing for the Wisconsin Supreme Court, nonetheless declared that “[t]he legislature [is] not authorized to provide for the levying of taxes for merely private or individual ends,” though he cited no constitutional authority for this statement. Since the *Soens* case, the doctrine has variously been attributed to a number of different provisions in the Wisconsin and U.S. constitutions and has often been discussed in conjunction with challenges under other, related constitutional provisions. (See, for example, *State ex rel. La Follette v. Reuter*, 36 Wis. 2d 96 (1967) and *Libertarian Party v. State*, 199 Wis. 2d 790 (1996), reframing various article VIII constitutional objections as public purpose doctrine arguments.)

More recent cases have explicitly declined to attribute the doctrine to any specific constitutional provision, though it can easily be, and has been, occasionally confused with other constitutional provisions. It is nonetheless regarded as well-settled law, limiting not only the state legislature but local governments as well. Moreover, while early cases discussed the doctrine as a limitation on taxing power, the doctrine is today more often raised and addressed as a limitation on how governments appropriate funds or use public property.

How courts interpret the doctrine

Although there are many examples of courts striking down legislative acts under the public purpose doctrine, the general rule is that courts will: 1) generally defer to legislative determinations that a public purpose exists; and 2) only look at whether the underlying act demonstrates a public purpose, and not who or what will ultimately benefit. The Wisconsin Supreme Court has at times described the doctrine as “fluid,” and recent precedent demonstrates a trend toward increasing deference to legislative determinations of a public purpose.

In *State ex rel. Wisconsin Development Authority v. Dammann*, 228 Wis. 147 (1938), the Wisconsin Supreme Court described the standard for the public purpose doctrine as requiring a purpose that was direct and not remote, but also affording the legislature wide discretion. While sustaining the use of public funds for municipal power districts, the *Dammann* court held that the use of funds to assist municipalities to acquire power plants was not a statewide public purpose.

In *State ex rel. American Legion 1941 Convention Corp. v. Smith*, 235 Wis. 443 (1940), the state treasurer refused to honor an appropriation for an American Legion convention in Milwaukee on the grounds that it violated the public purpose doctrine and benefited only one city. Citing the patriotic mission of the American Legion, and World War II then pending, the Wisconsin Supreme Court ruled that providing state funds to *hold* the convention, which drew visitors from around the state, was a valid public purpose. The court, however, struck down a provision allowing the use of state funds to assist in *bringing* the convention to Milwaukee.

In *Sigma Tau Gamma Fraternity House Corp. v. Menomonie*, 93 Wis. 2d 392 (1980), plaintiffs argued that the tax incremental financing law violated the public purpose doctrine because it redirected tax revenue from taxing authorities to municipalities. The court upheld the law because the revenue would be used for a public purpose within the limits of taxing authorities.

Davis v. Grover, 166 Wis. 2d 501 (1992), concerned the Milwaukee Parental Choice Program, which provides public funding for certain pupils to attend private schools. Citing provisions requiring reports on the program to the legislature and requiring program audits, as well as provisions allowing for parental choice about whether to participate in the program, the Wisconsin Supreme Court held that the program satisfied the public purpose doctrine.

Strategies for reconciling legislation with the doctrine

The Wisconsin Supreme Court has in recent years shown an increasing willingness to uphold laws against challenges that the laws lack a public purpose. In the most recent supreme court case addressing the public purpose doctrine, *Town of Beloit v. Rock County*, 2003 WI 8, a 5-2 court majority upheld the use of town property for private development over the dissent’s objection that the town’s stated justifications, such as job creation and increasing the tax base, were mere “buzzwords” and not supported in the factual record. In *Libertarian Party v. State*, 199 Wis. 2d 790 (1996), the supreme court addressed a law that led to the financing of a new Milwaukee Brewers stadium, but which

was broadly written to allow for statewide application. In upholding the law, the court refused to look at the ultimate beneficiaries or results of the law, instead viewing the law and the purpose as set out by the legislature. Similarly, in *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201 (1969), the supreme court examined the stated purpose — a need for doctors in the state — of an appropriation to the Marquette School of Medicine and not to the fact that the law benefited a private entity. In *Buse v. Smith*, 74 Wis. 2d 550 (1976), however, the supreme court struck down a law that contemplated a transfer of tax revenues from one school district to another, writing that “the state cannot compel one school district to levy and collect a tax for the direct benefit of other school districts, or for the sole benefit of the state.” With these precedents in mind, a number of strategies might be employed to reconcile legislation with the public purpose doctrine:

1. If a provision has a purpose that could be viewed as private or local, it could be rewritten to provide for statewide application, or to apply to a class that is theoretically open to additional members. For more on this approach, see *Constitutional Highlights: Title of Private Bills*, 2001, Vol. 1.
2. Provisions conferring benefits to private or local entities could have safeguards or conditions added to ensure that the public will ultimately receive a benefit and will retain some control over the transfer of the benefit. Courts have often cited such controls as reasons for upholding the state and local governmental actions under the public purpose doctrine.
3. Rather than simply directing a benefit, a bill draft could be structured to incorporate or otherwise state the purpose for which the enactment or appropriation is made. Intent statements may occasionally be useful to communicate the purpose of an enactment, although such statements can have unintended consequences and should be used sparingly.



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