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Public Purpose In Taxation

Let us suppose that an ordinary taxpayer should learn that his municipal government is proposing to spend a considerable sum in constructing and operating a municipal fuel yard and a municipal ice plant. If he is of an economical turn of mind and is bold enough to probe into the mysteries of the law he might ask his lawyer how this can be stopped. He will be met with the reply that sometimes an expenditure for a municipal fuel yard is constitutional and sometimes it is not, and that the same is true of a municipal ice plant. If he presses the inquiry further his lawyer will tell him that if these expenditures for municipal projects are to pass the judicial test of constitutionality they must be found by the courts to serve a public purpose. If they are found to serve a private purpose they will be declared unconstitutional for the reason that this would amount to a perversion of the taxing power. But what is public and what is private, and by what power do the courts have the last word, and why have they differed over fuel yards and ice plants, and how have they distinguished between the two? These are questions which quite naturally occur to our inquisitive taxpayer.

Let us return to this notion of public purpose. At the outset it may be noted that questions of how revenue is raised are excluded from our consideration. We are not concerned with problems of jurisdiction to tax, classification for taxation and taxation for regulation in its milder or extremer forms. All these, whether they have as their object revenue, regulation or both, raise other constitutional issues. They are all on the revenue raising side of the taxing power. The question of public purpose is not raised until the government starts, or proposes to start, spending.

It was to curb governmental expenditures that the doctrine of public purpose was first used in the state courts, during the first half of the last century. It was there said that the exercise of the taxing power for other than a public purpose was unconstitutional. The courts, both state and federal, have since then taken it upon themselves to declare that a given expenditure is or is not for a public purpose. The doctrine has become "settled," and seems to be gaining in importance in this period of increasing governmental activity and coincident expendi-
In eleven states the constitutions have codified the doctrine, usually in the proposition that "All taxes shall be levied and collected for public purposes only," and in recent years this doctrine has become a part of the due process clause of the Fourteenth Amendment and, vicariously, that of the Fifth Amendment. It has been held to be a deprivation of property without due process of law if public funds are spent for other than a public purpose.

In general the issue of public purpose is raised in two classes of cases: (1) those involving governmental aid to private individuals or corporations, (2) those involving the assumption by government of new functions. Our hypothetical taxpayer has the choice of a variety of procedural devices with which to challenge the validity of an expenditure on the ground that it is not for a public purpose. Thus, he may bring a bill in equity to enjoin a proposed expenditure, or to enjoin the levy of a particular tax or assessment, or to enjoin the issue of public

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1. The following represents the increase in governmental expenditure, federal, state, and local, between 1890 and 1923:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Expenditure (millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>$291</td>
</tr>
<tr>
<td>State</td>
<td>77</td>
</tr>
<tr>
<td>Local</td>
<td>487</td>
</tr>
</tbody>
</table>

II. Per capita expenditure:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>$4.61</td>
</tr>
<tr>
<td>State</td>
<td>1.22</td>
</tr>
<tr>
<td>Local</td>
<td>7.72</td>
</tr>
</tbody>
</table>

The total borrowing of state and local governments almost trebled between 1913 and 1923. In 1913 the total was $403,246,518. In 1923 it amounted to $1,063,119,823.

These figures and tables are taken from *Tax Burdens and Public Expenditures*, published by the National Industrial Conference Board, Inc., New York, 1925.

2. In nine states the constitutions provide that "All taxes shall be levied and collected for public purposes only": Ariz. Const. (1912) art. IX, § 1; Ky. Const. (1891) § 171; Minn. Const. (1857) art. IX, § 1, amend. of 1906; Mo. Const. (1875) art. X, § 3; Mont. Const. (1889) art. XII, § 11; N. D. Const. (1889) art. XI, § 176; Okla. Const. (1907) art. X, § 14; Okla. Bill of Rights, § 1; S. D. Const. (1889) art. XI, § 2, amend. of 1912; Tex. Const. (1876) art. VIII, § 3. In two states the constitutions provide that taxes may be levied for "the public service, in the necessary defence and support of the government . . . and the protection and preservation of the subjects thereof." Mass. Const. (1780) part II, c. I, § 1, art. IV; N. H. Const. (1912) part II, art. 5.

3. "... nor shall and State deprive any person of life, liberty, or property, without due process of law." See Jones v. City of Portland (1917) 245 U. S. 217, 38 Sup. Ct. 112; Green v. Frazier (1920) 256 U. S. 233, 40 Sup. Ct. 499. These cases will be discussed in the final installment of this article, in March.
securities. Or, he may resist payment of a tax or assessment and seek to enjoin sale of his property for non-payment, or he may pay a tax or assessment under protest and sue to recover it back. If he is the holder of public securities and the government is proposing to repudiate its obligation he may bring suit to recover interest on the securities. Or, if the government refuses to issue securities or to transfer funds even though under a duty to do so he may bring a writ of mandamus and have the question adjudicated in court. In this way questions of public finance and of the scope of governmental activity are subjected to judicial scrutiny. The origin and development of the doctrine which makes this possible, together with a consideration of the treatment which these questions get in the courts, is the subject of the present inquiry.

I. ORIGINS OF THE DOCTRINE

For many years public money was spent in America without any judicial scrutiny of its purpose. However, in 1837 the Virginia court had before it the question of the validity of a municipal expenditure for a state canal project.\(^4\) The expenditure was allowed but not without a dissenting voice. The municipality was limited to expenditures of a corporate character, and, said the lone dissenter, to hold that a great canal project was a local purpose "would violate the 6th article of the bill of rights, by taking private property for public purposes without compensation."\(^5\)

Other than this dissent the only glimpses into the future are found in occasional arguments of counsel that municipal subscriptions to railroad, turnpike and canal companies were for a private purpose.\(^6\) To this argument the courts maintained an abysmal silence. But not so when it was argued that these subscriptions involved a taking of private property for a public use without compensation. This argument had a familiar ring and the courts deferred to counsel to the extent of pointing out the error of their way in supposing that the power of eminent domain had anything to do with the power of taxation.\(^7\)

In 1849 we find the Supreme Court of Pennsylvania stating that: "From the commencement of the government, our representative bodies

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\(^4\) Goddin v. Crump (1837) 35 Va. (8 Leigh.) 120.
\(^5\) Ibid. at 152.
\(^6\) Talbot v. Dent (1849) 48 Ky. (9 B. Monroe) 526; Slack v. Maysville Railroad (1852) 52 Ky. (13 B. Monroe) 1; Cincinnati Railroad v. Commissioners of Clinton County (1852) 1 Ohio St. 77; Cass v. Dillon (1853) 2 Ohio St. 607; Nichol v. Mayor of Nashville (1848) 28 Tenn. (9 Humph.) 251.
\(^7\) City of Bridgeport v. Housatonuc Railroad (1843) 15 Conn. 475; Shaw v. Dennis (1849) 10 Ill. (5 Gilman) 405; Thomas v. Leland (1840) 24 Wend. (N. Y.) 65.
have exerted the unchallenged power to levy taxes... for every purpose deemed by them legitimate." This may be taken to be a fair statement of the view prevailing up to the half-century mark.

A. GOVERNMENT SUBSIDIES: RAILROAD-AID

In the meantime forces were at work which had as a by-product the presentation to the courts, both state and federal, of questions of the utmost importance to the commercial development of the country. The years 1840 to 1890 roughly mark the period of construction of the great railroads of America.

Government aid to the railroads was the cry of the day. The railroads wanted land and money and the towns wanted the railroads. The advent of the railroad meant prosperity and to let the iron horse pass by meant inevitable decay. This formula, plus promises of large dividends, caught the popular imagination and from every public source, from Congress down to the humble township, land and money poured into the railroads. These aids took the form of subscriptions to railroad stock, outright gifts of lands and money, or gifts of municipal or state bonds. In time disillusionment followed and the municipalities found that dividends were scarce, that they had been played off against each other and were over their heads in debt with the alternatives of bankruptcy and repudiation. They resisted payment of their securities and carried their resistance into the highest courts. There they urged, among other things, that railroads were private corporations, and that they themselves had misbehaved badly in spending the public money to assist private corporations. Their conduct, they said, was unconstitutional for, was it not clear, that public money could only be spent for a public purpose. In this period of frenzied finance the doctrine of public purpose was advanced in an effort to repudiate millions of dollars worth of municipal and state bonds held by bona fide purchasers. Some courts listened, but the great majority turned a deaf ear.

The burden of all this finance fell, of course, upon the taxpayers and the first important case in the state courts, that of Sharpless v. The Mayor of Philadelphia in 1853, took the form of a taxpayer's bill. The object of this bill was to enjoin the mayor and aldermen of Philadelphia from subscribing to the stock of two railroads and from selling

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8 Commonwealth v. M'Williams (1849) 11 Pa. (1 Jones) 61, 71.
9 See REPLY, RAILROADS: RATES AND REGULATION (1923) c. I; JONES, PRINCIPLES OF RAILWAY TRANSPORTATION (1924) c. III.
10 See CLEVELAND & POWELL, RAILROAD FINANCE (1912) 30 et seq.; DAGGETT, HISTORY OF THE SOUTHERN PACIFIC (1922) 25 et seq.
11 Mayer, HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860 (1917) 563, 582; DAGGETT, op. cit. supra n. 10 at 40.
12 (1853) 21 Pa. 147.
bonds to the sum of $1,000,000 to finance the purchase. The defendants set up legislative authorization. The court dismissed the bill, two of the five justices dissenting. Chief Justice Black for the majority found himself in a dilemma. On the one hand, he pointed out that no less than $14,000,000 worth of railroad stock had been subscribed by cities and counties in the commonwealth. On the other hand, he pictured the financial ruin which must fall upon the cities and counties if this burden was to be sustained as constitutional. "But," added the Chief Justice naively, "All these considerations are entitled to no influence here. We are to deal with this strictly as a judicial question." The Chief Justice disclaims any power to declare the act unconstitutional merely because "it impairs the spirit of our institutions." There must be some express constitutional provision which is "clearly, palpably, plainly" violated. He then shifts ground and points out that the taxing power is granted "without any restriction whatever" but hastens to add that "I do not mean to assert that every act which the legislature may choose to call a tax law is constitutional." This is elucidated in unmistakable language. The legislature, we are told, has no constitutional right —

"to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. 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."

Here is the first clear-cut statement of the doctrine. Chief Justice Black finds its source implicit in the word "taxation." By definition he supplied the "express constitutional provision" which, we have been told, must be "clearly, palpably, plainly" violated before the act may be declared unconstitutional. Obviously this definition was supplied by Chief Justice Black. It is not to be found in the Constitution of the Commonwealth of Pennsylvania. The remainder of the opinion is devoted to showing that the expenditure here was for a public purpose.

The Chief Justice said, among other things, that the railroad enjoys the right of eminent domain and that this cannot be used for private purposes. It follows, he says, that the railroad through its enjoyment of the power of eminent domain has acquired a public status, and therefore may be aided by taxation. It would seem obvious that the grant to a railroad of the power of eminent domain does not involve any

13 Ibid. at 159.
14 Ibid. at 168.
15 Ibid. at 170.
expenditure of public money, and equally obvious that the grant of aid through the taxing power does involve such expenditure. Further, the fact that the state has given a railroad one bounty in the power of eminent domain, might well be a better reason against, than for, giving it another bounty through the taxing power.

The curious feature of Chief Justice Black's opinion is that he might so easily have reached his result without enunciating the doctrine of public purpose. In fact, his brethren, Justices Woodward and Knox, did just that. In their concurring opinions both of them were content to state that they could find no constitutional provision which had been clearly violated. It must always remain somewhat of a riddle why the Chief Justice did the pioneer work of setting up this new doctrine when he could so easily have followed the beaten path. To the technically minded the reference to public purpose might be dismissed as dicta. But whatever Chief Justice Black's utterance may be called the point that interests us is that while other portions of his opinion have gone unheeded, and perhaps unread, his enunciation of the doctrine of public purpose appears in the forefront of many later opinions with all the majesty of authority.

It would profit little to pursue the course of railroad-aid bonds through the courts. It has been estimated that in the period between 1860 and 1891 no less than three hundred cases came before the Supreme Court alone. In not all of these was the question of public purpose presented, for by 1873 we find Mr. Justice Strong making the statement that the question ought to be considered as settled. In the state courts railroad-aid bonds sailed a smooth course, and the reasoning of Sharpless v. The Mayor went unchallenged, except in the courts of Iowa, Wisconsin and Michigan.

In Michigan the figure of Judge Cooley stands out as the spokesman of the judicial protest against the validity of railroad-aid bonds. His is almost a lone voice, and it is a voice raised in the face of the pressure of the contrary decisions in eighteen out of twenty states which had passed on the question as well as the federal courts. Such judicial unanimity could not be lightly brushed aside. Judge Cooley's task involved a fresh approach and the abandonment of the major premise involved in the contrary decisions.

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16 See WARREN, THE SUPREME COURT IN THE UNITED STATES HISTORY (1922) 254.
17 Town of Queensbury v. Culver (1873) 86 U. S. (19 Wall.) 83.
18 Many cases are collected in 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 313 et seq.; 2 ibid. §§ 886, 897.
19 See GRAY, LIMITATIONS OF THE TAXING POWER (1906) 138.
20 See GRAY, op. cit. supra n. 19, 140.
The issue was presented to the court in 1870 in the case of People
v. Salem. It took the form of an application by the Detroit and
Howell Railroad for mandamus to compel the town of Salem to issue
to the applicants bonds authorized by the legislature and voted by the
town.

It was argued, as it had always been argued, that railroads were
public highways because they enjoyed the power of eminent domain
and were subject to state regulation. From this major premise it had
always been easy to deduce that railroads were proper objects of public
bounty. But Judge Cooley attacked the premise in words that deserve
to be quoted in full. He said:

"Reasoning by analogy from one of the sovereign powers of govern-
ment to another, is exceedingly liable to deceive and mislead. An object
may be public in one sense and for one purpose, when in a general sense
and for other purposes, it would be idle and misleading to apply the same
term. All governmental powers exist for public purposes, but they are not
necessarily to be exercised under the same conditions of public interest."

And further:

"... each of these powers has its own peculiar and appropriate sphere,
and the object which is public for the demands of one is not necessarily
of a character to permit the exercise of another." (Italics his.)

Here is a clear recognition that the fact that a railroad enjoys the
power of eminent domain in order to secure a right of way is no reason
why it must be given public money to finance construction on that right
of way. Here is also a recognition that the notion of public purpose
varies according to the power which it limits. Railroads, then, may be
public for one purpose, and private for another purpose. Their status
is not fixed once and for all by the grant of eminent domain nor even
by subjection to regulation. They may still be found to be private when
the issue of state aid is before the court. The decision will thus depend
upon considerations other than logic.

From this new major premise the conclusion followed easily. But
Judge Cooley was not able to convince all his brethren and Judge
Graves voiced a dissent. It seemed quite anomalous to him that at one
moment a railroad might be public and at another moment private.
Once its character became fixed it was immutable, and to hold other-
wise was unjustifiable sleight of hand.

The question of the wisdom of the decision must be resolved in the
light of the times. It is enough to point out that in the great majority

21 (1870) 20 Mich. 452.
22 Ibid. at 477, 478.
of the states constitutional amendments were adopted which prohibited or limited state and municipal aid to railroads and other industries.23

B. GOVERNMENT SUBSIDIES: AID TO OTHER INDUSTRIES AND PERSONS

The railroads were not the only enterprises that clamored for public funds. Industries were equally importunate. Often, as with the railroads, particular industries held aloof from a town unless the municipal authorities were willing to offer a pecuniary inducement to their entry. This situation gave rise to the expenditure of municipal funds to support existing industries and as bait to new ones. In a period of industrial growth these expenditures might well have been found to be a constitutional use of public funds. But as a rule the courts, both state and federal, have held these bounties to be for a private purpose and therefore unconstitutional. In reaching this result the courts have distinguished the railroad cases.

Before turning to these cases, it may be well to note an influential Massachusetts case. This curious decision brings into sharp relief the relation between the immediate private benefit and the ultimate public gain which is involved in government subsidies. This is the case of Lowell v. Boston.24 Following the Boston fire of 1872, the legislature of Massachusetts authorized the city of Boston to issue bonds to an amount not exceeding $20,000,000 for the purpose of making loans to individuals for rebuilding in the burned area. The court enjoined the issue of the bonds. For the first time an express constitutional sanction for the action of the court might be found,25 though there is no indication that the court placed any great reliance upon it. The court fol-

23 In general, it may be said that state constitutional provisions limiting the power of the states and municipalities to grant aid have taken two forms: (1) limitations of amount, (2) limitations of purpose. Under the latter they are forbidden to lend the public credit or make any donation to any private corporation or association to subscribe to the stock of the same. See on the whole subject, Gray, loc. cit. supra n. 20 et seq.; Secrist, An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States (1914-1917) 8 UNIV. OF WISC. BULL. (No. 637) 54 et seq., 21 et seq.; 1 BULLETINS FOR THE CONSTITUTIONAL CONVENTION (Mass. 1917-1918) 525 et seq., 553 et seq.

24 (1873) 111 Mass. 454. In Feldman v. City Council (1884) 23 S. C. 57, the same result was reached in regard to bonds issued following the Charleston, South Carolina, fire. In Kinney v. City of Astoria (1923) 108 Ore. 514, 217 Pac. 840, the Oregon court upheld a legislative grant to the City of Astoria of all state taxes, collected within the city limits, to be used in rebuilding public property destroyed by the disastrous fire of 1922. The destroyed public property was valued at $1,500,000. The total loss to the city was $11,000,000. The case of Lowell v. Boston, supra, was distinguished.

25 Mass. Const. (1780) part II, c. 1, § 1, art. IV, provides that the power of taxation may be exercised "for the public service, in the necessary defence and support of the government . . . and the protection and preservation of the subjects thereof."
lowed in the path of earlier decisions and identified the notion of "public service" with that of "public use" in eminent domain. This identity was established to show that under the Massachusetts decisions the power of eminent domain might be exerted only for use by the public. From the premise of identity it followed that the same thing must be true of the power of taxation. It is clear that the money was intended for use by private individuals for the purpose of rebuilding private dwellings and business houses. The benefit to the public was said to be merely incidental.

When the court sets up the category of direct and substantial or indirect and incidental public benefits the final decision will depend on the judgment of the court as to which social values shall prevail. In the railroad-aid cases the public funds went immediately into the coffers of the railroad companies. Does this mean that the benefit to the private companies is direct and substantial and the benefit to the public is indirect and incidental? The courts avoided this with the formula that railroads, though privately owned, and operated for private profit, were "public" corporations.

Let us turn now to two typical cases of municipal aid to industries other than railroads. In 1871 the legislature of Maine authorized the town of Jay to loan $10,000 to the firm of Hutchins & Lane on condition that it should locate a steam sawmill, a box factory and one run of stones for grinding meal in the town. A vote of the town authorized the issue of bonds for this purpose. Ten taxpayers brought a bill in equity to enjoin the issue. The Supreme Court of Maine granted a perpetual injunction on the ground that the loan was for the benefit of private individuals. Chief Justice Appleton recognized that the

26 Mass. Const. (1780) part I, art. X: "And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." This identification of taxation and eminent domain appears frequently. See Chief Justice Black in Sharpless v. The Mayor, supra n. 12; also Mr. Justice Gray in Cole v. La Grange (1885) 113 U.S. 1, 5 Sup. Ct. 416; Commercial National Bank v. City of Iola (C. C. D. Kan. 1873) 2 Dill. 353, Fed. Cas. No. 3,061; In re Opinion of the Justices (1910) 204 Mass. 607, 91 N. E. 405; Laughlin v. City of Portland (1914) 111 Me. 486, 90 Atl. 318; McBain, American City Progress and the Law (1917) c. 5; Judson, Taxation (1903) § 351; McGhee, Due Process of Law (1906) 229.

It has been earnestly insisted that there is no such relation—In re Opinion of the Justices (1919) 118 Me. 503, 523, 106 Atl. 865, 875; Cooley, Taxation (3d ed. 1903); Lewis, Eminent Domain (3d ed. 1909) § 4; Dillon, Municipal Corporations (5th ed. 1911) § 1353; Fox, Constitutional Checks Upon Municipal Enterprise (1891) 5 Harv. L. Rev. 30. In the majority of cases the question is not raised.

27 Allen v. Inhabitants of Jay (1872) 60 Me. 124; the same court in an advisory opinion, Opinion of the Justices (1871) 58 Me. 590, had declared against the constitutional authority of the legislature to empower towns to assist individuals in establishing or carrying on manufacturing enterprises within the town limits.
establishment of this industry would be of "benefit" to the town. The industry would bring new opportunities of employment, more capital, increased bank deposits, increased trade, increased taxable property. In fact, it might be the very life of the town.

Had this method of treatment been adopted as the test of constitutionality a different result might have been reached, but the court made no such inquiry and condemned all such expenditures of public money. Chief Justice Appleton could not see beyond a direct benefit to private individuals. It was as though the municipal authorities had accumulated a fund by taxation and then distributed it per capita or among favored individuals in the community. This, said the Chief Justice, "is communism incipient, if not perfected."

In other states the courts took substantially the same view. Whether this view was influenced by public opinion expressed in constitutional amendments prohibiting or limiting the use of public credit in aid of private enterprises is a matter of speculation.

The other case which it is proposed to discuss is that of Loan Association v. Topeka. The city of Topeka, under authority of an act of the legislature of Kansas in 1872, issued $100,000 worth of bonds as a donation to the King Wrought Iron Bridge Manufacturing and Iron Works Company on condition that it should establish its factory in that city. The Citizens' Savings and Loan Association of Cleveland, a holder for value of some of these bonds, brought suit against the city for interest in the circuit court for the district of Kansas. The court sustained a demurrer to the complaint and gave judgment for the city. This was affirmed on writ of error to the Supreme Court.

Mr. Justice Miller dealt with the question solely on the ground of public purpose. He pointed out that the railroad-aid cases had all recognized the doctrine of public purpose and that the differences of opinion had been as to whether or not railroads were to be deemed objects of public bounty. Turning to the question in the principal case, he remarked that courts "must be governed mainly by the course and usage of the government." However, he added, "this may not be the only criterion of rightful taxation." In reaching a conclusion on the particular facts, the opinion of Mr. Justice Miller presents a curious parallel to the opinion of Mr. Justice Appleton in Allen v. Jay just

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28 See Chamberlayne, The Sugar Bounties (1892) 5 HARV. L. REV. 320, 326; for additional cases see infra n. 40.
29 See supra n. 23.
31 (1874) 87 U. S. (20 WALL.) 655.
32 Ibid. at 665.
33 See supra n. 27.
considered. Mr. Justice Miller could see that the industry would be of "benefit" to the town, but, he said, "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 business men of the city or town." Translating this argument into an argument concerning the scope of the taxing power, he found that the expenditure of public funds in this case was for a "private" purpose, and therefore unconstitutional.

The unanimity of the courts was marred by the frank dissent of Mr. Justice Clifford who declared that "Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction." This is the language of a prophet of a more critical age.

Several points may be noted in this case. In the first place, it involved the acceptance of the doctrine of public purpose in taxation by the highest court in the land. In the second place, the decision is not grounded in the due process clause of the Fourteenth Amendment. In some later decisions this was supposed to be the case, and this view has been taken by some writers. Nowhere in the opinion is there any reference to the due process clause. Further, the case reached the Supreme Court from a lower federal court so that there was no necessity of finding a question under the Federal Constitution. It was not until later that the doctrine of public purpose was admitted into the close of due process. In the third place, the decision involved repudiation of the bonds, as they had been sold in the market, and the decision was made in the face of a determined stand against repudiation of municipal bonds held by bona fide purchasers.

The almost universal current of authority has denied the validity

34 87 U. S. (20 Wall.) at 665.
35 Ibid. at 669.
36 Mr. Justice Matthews in Hurtado v. California (1884) 110 U. S. 516, 536, 4 Sup. Ct. 111, 121; Mr. Justice Gray in Missouri Pacific Railroad v. Nebraska (1896) 164 U. S. 403, 417, 17 Sup. Ct. 130, 135; by implication Mr. Justice Harlan takes this position in Madisonville Traction Company v. Bernard Mining Company (1905) 196 U. S. 239, 252, 25 Sup. Ct. 251, 256, but this is denied by Mr. Justice Holmes in his dissent, 196 U. S. at 260, 25 Sup. Ct. at 258.
37 Note (1917) 27 YALE L. J. 824; TAYLOR, DUE PROCESS OF LAW (1917) § 155; McGEE, DUE PROCESS OF LAW (1906) 228.
38 Mr. Justice Miller in Davidson v. New Orleans (1877) 96 U. S. 97, 105, pointed this out.
39 See WARREN, loc. cit. supra n. 16.
of state and municipal aid to industry. The Loan Association case is usually cited after a dogmatic assertion of the doctrine. It has been pointed out that the props are none too strong. Had later courts wished to be critical, they would have found sufficient to criticize and these cases might have found repose with the convenient label of "anomalous." But such has not been their fate. They have prospered and today enjoy a vitality which their questionable origin might not seem to justify. It is not hard to understand this. The judicial mind was no doubt outraged at the thought that the public money might be spent for what they conceived to be private purposes. In this the judges simply reflected the reaction of other taxpayers. Most of the judges were undismayed at finding no constitutional provisions. Some clutched at the nearest straw—the power of eminent domain. That said something about taking private property for a public use. Others sought a prop in the definition of a tax and cited Webster's Dictionary. Others did both and topped it off with an essay on the nature of all free governments.

**Breck P. McAllister.***

**WASHINGTON, D. C.**

(To Be Concluded)

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40 Parkersburg v. Brown (1883) 106 U. S. 487, 1 Sup. Ct. 442 (aid to manufacturers); City of Ottawa v. Carey (1883) 108 U. S. 110, 2 Sup. Ct. 361 (aid to private manufacturer); Cole v. La Grange (1885) 113 U. S. 1, 5 Sup. Ct. 416 (aid to iron and steel company).

There has been some controversy over aid to public grist mills. In Township of Burlington v. Beasley (1876) 94 U. S. 310, such aid was upheld and the Loan Association case was distinguished on the ground that a public grist mill is a public utility. In Osborne v. County of Adams (1882) 106 U. S. 181, 1 Sup. Ct. 168, the court distinguished Burlington v. Beasley, supra, on the ground of peculiar state constitutional provisions and denied aid to a grist mill. But in Blair v. Cuming County (1884) 111 U. S. 363, 4 Sup. Ct. 449, the Court reverted to its original position.

In the state courts the course of decision has been the same: People v. Parks (1881) 58 Cal. 624 (storage of debris from mines); Clee v. Sanders (1889) 74 Mich. 692, 42 N. W. 154 (private stave mill); State v. Williams (1919) 43 Nev. 290, 185 Pac. 459 (loans to individuals); Weismer v. Village of Douglas (1876) 64 N. Y. 91 (private manufacturer); Ferrell v. Doak (1925) 152 Tenn. 88, 275 S. W. 29 (private box factory).

41 Mr. Justice Miller in Loan Association v. Topeka, supra n. 31, at 664.

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