An Illinois Constitution for the Twenty-First Century

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Foreword by George F. Will
Introduction by Richard A. Epstein
Edited by Joseph E. Tabor
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CHAPTER 9

Reinvigorating the Public Purpose Requirement

Clint Bolick

I. Introdution

In 2003, the residents of Pekin, Illinois, a suburb of Peoria situated on the banks of the Illinois River, made a decision many of them soon would come to regret — they elected Lyndell W. Howard as the city's mayor.

Howard might have made a fine mayor were it not for the lure of a nearby riverboat casino called Par-A-Dice. The casino, plus the city's decision to issue the mayor a credit card, proved a dangerous combination.

On three separate occasions in 2004, Mayor Howard used his city credit card to obtain more than $1,400 in cash advances to play video poker at Par-A-Dice. He paid the money back each time, although one of his checks bounced.[1] The mayor considered his actions to be normal operating procedure. "I don't see how that is illegal or questionable," he told the local newspaper. "I did nothing to hide this."[2]

Stewart Umholtz, the Tazewell County state's attorney, disagreed.

"Our contention is that the mayor's use of a credit card to get cash to gamble is not a 'public purpose,'" he argued.[3] After all, the city's credit card provided cash for the mayor to keep gambling, it gave him "player points" that he could use for free meals, it essentially gave him an interest-free loan, and — this was the kicker — the city ultimately was liable for any unpaid balance.[4]

The mayor was indicted for official misconduct for violating Article VIII, Section 1 of the Illinois Constitution, which provides that "[p]ublic funds, property or credit shall be used only for public purposes." In response, the mayor argued that a violation of the public purpose requirement could not be the basis for a criminal offense of official misconduct. The Illinois Supreme Court disagreed,[5] the indictment stood, the mayor was removed, and the good citizens of Pekin were relieved of the obligation to front taxpayer funds to support their mayor's gambling habit.

All thanks to a dozen simple words that comprise a core command of the Illinois Constitution. The words are important because they embody the fiduciary duty that all public officials owe to the people who pay their salaries. As the United States Supreme Court declared in *Trist v. Child,*[6] "The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good." This view was pervasive throughout the United States. "There can be no lawful tax which is not laid for a public purpose," the Illinois Supreme Court declared in 1923. "This limitation on the sovereign is of the essence of all free government."[7]

At least 47 states enshrined this fiduciary duty in the organic law of their constitutions, limiting the use of public funds to public purposes.[8] Some are phrased in terms similar to the Illinois Constitution, while others are styled as "anti-gift" clauses prohibiting government appropriations or loans of credit to private individuals or entities. But

public purpose is the element common to all. As the Montana Supreme Court explained in 1925, the proliferation of anti-gift clauses reflected "the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, and towns in aid of railways, canals, and other like undertakings during the half century preceding 1880, and it 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."[9]

The Illinois public purpose requirement was established in its present form in the 1970 Constitution. It traces to Article IV, Section 20 of the 1870 Constitution, which provided as follows: "The State shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to, or in aid of any public or other corporation, association or individual." As the Illinois Supreme Court explained, although there is a "substantial difference between the language" of the 1870 and 1970 constitutions, the latter places the use of both public credit and public funds under the same restriction: "it must be for a public purpose."[10] The Court cited one of the delegates to the 1970 constitutional convention in explaining that Article VII, Section 1 "is intended explicitly to reaffirm the general rule that public monies cannot be taken or applied for private purposes but can only be applied to public purposes."[11]

II. Effective Application of the Public Purpose Requirement

The reaffirmation of the public purpose requirement in 1970 demonstrated that the framers of the current Illinois Constitution intended that provision would have continuing vitality. Now, nearly a half-century later, its importance as a constraint against self-dealing and government aid to private businesses is greater than ever. Surely a day never passes when some government entity does not come up with some a scheme to funnel public money into the hands of some private

interest. Whether corporate subsidies, bailouts of failing companies, erection of sports facilities, or giveaways to public employee unions, massive amounts of public funds are funneled into private hands where the purposes and benefits are predominantly private rather than public.

At a time where demands to regulate campaign contributions and other political expenditures ostensibly to prevent corrupting influences are perhaps more intense than ever, the public purpose requirement — properly construed — can play an important role in making sure that government officials do not use public funds to pay political debts. Moreover, the proliferation of unelected governmental bodies[12] increases the importance of judicial scrutiny of public expenditures, given that democratic processes cannot be counted on to rein in abuses.

And indeed, in a handful of instances, Illinois courts have wielded the clause to prevent the use of government funds for private purposes. Prior to the 1970 Constitution, the Illinois Supreme Court struck down the Illinois Industrial Development Authority Act, which was intended to create employment opportunities through an agency that could borrow money to construct, acquire, and improve industrial properties and to lease them to private entities.[13] The court held that the arrangement "violates the constitutional prohibition against pledging the credit of the State."[14]

In 1976, the Appellate Court ordered the removal of private advertising on a water tower acquired by the city of O'Fallon. "To allow municipal property to be put to a purely private use is uniformly held to be *ultra vires* the authority granted to municipalities," the court held. "No public purpose is furthered and no public benefit results from private advertising . . . upon the property of the City of O'Fallon."[15]

In 1979, the Appellate Court rejected the effort by a retired police chief to reinstate a pension increase that was made pursuant to a statute that was passed after his retirement. Doing so "would render the statute unconstitutional as permitting the expenditure of public funds for

private purposes," given that the former chief would not be required to contribute additional funds to the pension system and no longer was providing services to the community.[16] This case is important because it implicitly requires an element of consideration — something of value in exchange for public funds — as a condition of satisfying the public purpose test.

In 1996, the Illinois Supreme Court dealt with an instance of especially creative self-dealing by elected officials. The city of Danville was sued for violating the Voting Rights Act by electing commissioners through a citywide, at-large system. The commissioners agreed to settle the case by changing to a system of aldermen elected through districts — but not before taking care of themselves. "The settlement also provided that the present commissioners would be appointed as administrators of the various departments that corresponded with their current respective commission duties," as the Court described it. "These newly created administrative positions would be guaranteed for a minimum of three years at salaries the commissioners would set themselves."[17] That's quite a nifty deal.

But that wasn't all. Perhaps anticipating that the scheme might be a little obviously self-serving, the commissioners added a provision, recommended by the corporation counsel, that the city would indemnify them for criminal prosecution arising from the agreement. A grand jury returned an indictment against the commissioners and corporation counsel for official misconduct and conflict of interest. The case ended badly for the defendants, who then sued the city for reimbursement of their attorney fees.

The Illinois Supreme Court ruled that such a payment would violate the public purpose clause. "Defraying the costs of purely private litigation has always been outside the bounds of a proper public purpose," the Court declared in its 1996 decision in *Wright v. City of Danville*.[18] And an "unsuccessful criminal defense involving the holder of a public

office, but not arising from the duties of that office, is purely private litigation."[19] Emphasizing the fiduciary duty that public officials owe to their constituents, the Court observed that "allowing expenditure of public funds for such use would encourage a disregard of duty and place a premium upon neglect or refusal of public officials to perform the duties imposed upon them by law."[20]

The *Wright* decision provides an excellent example of the importance of the public purpose clause, both in holding public officials to their fiduciary responsibilities and in safeguarding taxpayer funds against abuse. Unfortunately, the decision also marked the high-water mark for the public purpose clause in Illinois jurisprudence.

III. Waning Enforcement of the Public Purpose Requirement

Even as the need for rigorous application of the public purpose requirement has grown over time, judicial enforcement of the clause in many states, including Illinois, has grown lax to the point of evanescence. Surely there are many instances in which public funds properly flow to private individuals in pursuit of public purposes, such as contracts with private entities to perform public services. Indeed, the author helped successfully defend an Illinois income tax credit for private school tuition against a public purpose challenge, because it advanced the purposes of public education.[21]

But the courts have approved a number of questionable public expenditures that appear to primarily benefit private individuals and entities rather than the public. It is not just that the weight of case law goes against striking down government actions under the purpose clause, but the judicially created standards render a public purpose challenge virtually impossible to win even against egregious conduct.

A brief sketch of Illinois cases illustrates this point.

Illinois courts repeatedly have sustained payments to individuals who are deemed deserving, even though the payments were not bar-

gained-for consideration in exchange for services rendered. Hence the court has sustained bonuses for returning servicemen and for widows of public officials on the basis of "moral obligation" as determined by the legislature.[22]

In 1972, the Illinois Supreme Court upheld the Industrial Project Revenue Bond Act, which provided authority to construct or purchase, and to use government bonds to acquire, purchase, construct, improve, or extend any industrial project, even where the project ultimately would be leased or conveyed to private entities. The court held that support of industrial projects constitutes a public purpose to enhance employment,[23] and that because the bonds are secured by a lien against the property, "there is no pledge of public credit or funds."[24] Given the sweeping and open-ended nature of the act, it is difficult to envision any economic development scheme that Illinois courts would invalidate, except perhaps where the state directly lends its credit to private entities — a conclusion supported by subsequent judicial decisions.

In *People ex rel. City of Urbana v. Paley* in 1977, the Illinois Supreme Court ordered the issuance of bonds for urban redevelopment over the objections of the city's mayor, who contended it was a scheme to take private property from one individual to give to another that was "designed to bring financial reward to private developers."[25] The Court held that a public purpose is served not only through the elimination of blight but even the "prevention . . . of blight which has not yet begun."[26]

In 2003, the Supreme Court upheld public financing for renovations to a stadium owned and operated by a city park district, but used by a privately-owned professional football team, based on the legislature's finding that such financing "would confer public benefits by stimulating economic activity."[27]

Perhaps the most egregious abuse of taxpayer funds green-lighted by the Illinois Supreme Court was in its *Empress Casino* decision in 2008. The lawsuit challenged a statute imposing a three percent surcharge

on certain riverboat casino revenues, whose proceeds were distributed to horse racing tracks. Sixty percent of the proceeds were earmarked for racing prizes and forty percent to improve, maintain, market, and operate the racetracks. If ever there were a private purpose served by a government subsidy — taken from competing businesses, no less — this would seem to be it.

Not in the Court's eyes. The Court concluded that the plaintiffs failed to show "that the purpose of the Act is primarily to benefit private interests."[28] Yet the Court's own findings show exactly that: "The emphasis of the Act is to benefit the entire horse racing industry, not simply the track owners, and the collateral businesses associated with that industry"[29] — private interests all! Not to mention the gamblers who reaped additional cash payouts. Yet in the Court's view, the amalgam of private beneficiaries somehow transformed the wealth redistribution scheme into a public purpose. "Illinois has a strong interest in protecting the viability of industries in this state, which in turn will benefit the economy of the state as a whole," the Court concluded.[30] If only it had occurred to former Mayor Lyndell Howard to argue that the city of Pekin's subsidy of his gambling habit inured to the benefit of Illinois commerce, he might have escaped his brush with the law.

It is difficult to imagine a subsidy of private businesses that would not be considered a public purpose under the *Empress Casino* precedent. Illinois courts have created quite a gauntlet for aggrieved taxpayers to run in challenging payments of public funds to private entities, one that is calculated to arrive at a public purpose whatever the predominance of private benefits.

IV. Current Obstacles to Effective Enforcement

Drawing from *Empress Casino* and other decisions, these are the obstacles that challengers must surmount for a successful public purpose claim:

> (1) Facts must be alleged that government action has been taken that directly benefits a private interest without a corresponding public benefit.[31]
>
> (2) The legislature is entitled to great deference in its determination of what constitutes a public purpose, which cannot be set aside "in the absence of a clear showing that the purported public purpose is but an evasion and that the purpose is, in fact, private."[32]
>
> (3) "What is a 'public purpose' is not a static concept, but is flexible and capable of expansion to meet the changing conditions of a complex society."[33]
>
> (4) Government actions "sanctioned by time and the acquiescence of the people may well be said to be a public purpose."[34]
>
> (5) If the principal purpose of the enactment is public in nature, "it is irrelevant that there will be an incidental benefit to private interests." But the determination of "principal" purpose and "incidental" benefit are legislative rather than judicial questions. "If the purpose sought to be achieved by the legislation is a public one and it contains elements of public benefit, then the question of how much benefit the public derives is for the legislature, not the courts."[35]

By this draconian formulation, the public purpose requirement has largely been repealed through judicial fiat.

Certainly, Illinois courts are not alone in sanctioning the use of public funds for private purposes despite clear constitutional prohibitions.

The strong trend is to defer to conclusions reached by public officials that taxpayer funds bestowed upon private entities will reap commensurate public benefits.

V. An Example for Illinois to Follow

At least one state is bucking that trend. Arizona courts have revitalized the state's anti-gift clause in recent years. In its 2010 decision in *Turken v. Gordon*, the Arizona Supreme Court ruled that payments to private corporations violate the prohibition unless supported by a public purpose and consideration.[36] While the court was deferential to the city defendant on the public purpose requirement, it was far more demanding on the consideration requirement, holding that "the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract."[37] Notably, the court ruled that "indirect benefits," such as sales tax revenues, do not count as consideration, but only what "one party to a contract obligates itself to do."[38] The consideration received by the public compared to the public expenditure cannot be "so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity."[39]

In Arizona, then, direct payments or loans of public credit to private entities in the guise of economic development would not pass constitutional muster. Similarly, after-the-fact compensation based on "moral obligations" would not be permissible. The recipient of the government aid would have to show that it was obligated to provide a tangible public benefit roughly commensurate with the amount of the expenditure.

Skeptics could argue that the difference between Illinois and Arizona jurisprudence is attributable to the fact that Arizona has an anti-gift clause, which as construed by Arizona courts encompasses both a public purpose and a consideration requirement, whereas the Illinois Constitution contains only a public purpose requirement. But if the pub-

lic purpose requirement has any meaning, certainly it should embody the notion that the public should be guaranteed to receive something of tangible value in return for its expenditures. Indeed, several Illinois cases imply a consideration requirement under the public purpose clause. Even in *Empress Casino*, the Illinois Supreme Court defines a public purpose claim as one in which "governmental action has been taken which directly benefits a private interest *without a corresponding public benefit*."[42]

The recognition that a genuine *quid pro quo* is a necessary prerequisite to a finding of public purpose could point the way to a revival of the constitutional protection. For if the recipients are simply doing business as usual, collecting profits from public expenditures, and obligating themselves to do nothing that they wouldn't otherwise do, then how can it genuinely be said that the purpose of the expenditure is public rather than private, or that the private benefits are merely "incidental" to the public benefits? Given the manipulation of representational government by special interests that has been recognized at least since *The Federalist* No. 10, meaningful judicial review of public funds flowing to private entities is essential to prevent subsidies and ensure that a genuine public purpose is secured.

All too often, however, courts refrain from vigorously enforcing important constitutional guarantees and instead defer excessively to the discretion of government officials, even when it is the improper exercise of that discretion that gives rise to the constitutional protection. That has been the case with the overly deferential Illinois jurisprudence on the public purpose clause.

VI. Amending the Public Purpose Clause of the Illinois Constitution

A more specific guarantee reflecting the intent of the public purpose clause should be considered. The following language reflects one possible approach:

> All public officials, elected and appointed, owe a duty of undivided loyalty to the citizens of Illinois. No public expenditure shall ever be made, nor public credit be extended, to any private individual, corporation, or association, except for a public purpose. In reviewing such actions, the judiciary shall make an independent determination of whether public benefits predominate over genuinely incidental private benefits, and whether proportionate consideration is provided by the private contracting party.

That proposed language, of course, is nothing more than what the framers of the public purpose clause intended. But the greater specificity may lead to greater protection if the judiciary continues to abdicate its assigned role in giving meaning to the original constitutional guarantee.

It might be that Illinois state and governments, considering themselves untethered by meaningful constitutional limitations, will continue to push the boundaries of their fiduciary duties so far that the courts finally will rein them in. That is what happened in Arizona, where local governments, in a frenzy to increase sales tax revenues, engaged in open warfare to outbid one another in giving ever-greater subsidies to retail developers to locate within their boundaries. But when decisions such as *Empress Casino* sustain naked corporate subsidies for the clear economic benefit of a particular favored industry — and do so without a single dissenting opinion — it appears that only the people of Illinois can ensure that government officials abide their fiduciary duties and constitutional limits by demanding a constitutional amendment.

1 People v. Howard, 888 N.E.2d 85, 86-87 (Ill. 2008).
2 Bigboydan, *Mayor is facing criminal charges of betting city funds at the local riverboat casino*, MajorWager.com (June 18, 2005, 4:43 PM), http://www.majorwager.com/forums/mess-hall/43880-mayor-facing-criminal-charges-betting-city-funds-local-riverboat-casino.html (reposting Kevin McDermott, *Gambling-related crimes no longer shock Pekin, Ill.*, Post-Dispatch Springfield Bureau (June 18, 2005)).
3 *Id.*
4 *Howard*, 888 N.E.2d at 86-87.
5 *Id.* at 90.
6 88 U.S. 441, 450 (1874).
7 Hagler v. Small, 138 N.E. 849, 854 (Ill. 1923).
8 Jonathan Riches, Public Money for Private Gain: Legal Strategies to End Taxpayer-Funded Union Activism and Pension Spiking 25-29 app. (2014).
9 Thaanum v. Bynum Irrigation Dist., 232 P. 528, 530 (Mont. 1925).
10 People ex rel. City of Urbana v. Paley, 368 N.E.2d 915, 919 (Ill. 1977).
11 *Id.* (citing 2 Record of Proceedings, Sixth Illinois Constitutional Convention 869).
12 See, e.g., Clint Bolick, Leviathan: The Growth of Local Government and the Erosion of Liberty 14-24 (2004).
13 Bowes v. Howlett, 182 N.E.2d 191, 192 (Ill. 1962).
14 *Id.* at 194.
15 O'Fallon Dev. Co. v. City of O'Fallon, 356 N.E.2d 1293, 1299 (Ill. App. Ct. 1976).
16 Ziebell v. Bd. of Trs., 392 N.E.2d 101, 104 (Ill. App. Ct. 1979). The court subsequently distinguished *Ziebell* in sustaining severance payments to a public employee that were part of the employment contract. Vill. of Oak Lawn v. Faber, 880 N.E.2d 659, 666 (Ill. App. 2007).
17 Wright v. City of Danville, 675 N.E.2d 110, 113 (Ill. 1996).
18 *Id.* at 115.
19 *Id.*
20 *Id.* at 117.
21 Toney v. Bower, 744 N.E.2d 351 (Ill. App. Ct. 2001). See also Bd. of Educ. v. Bakalis, 299 N.E.2d 737 (Ill. 1973) (holding that public funded transportation for private school students serves a public purpose); In re Marriage of Lappe 680 N.E.2d 380, 391 (Ill. 1997) (sustaining child support enforcement services to all custodial parents regardless of their financial abilities because they are "being provided for the benefit of the . . . child, not the custodial parent").
22 See, e.g., *Hagler*, 138 N.E. at 856; People ex rel. Douglas v. Barrett, 19 N.E.2d 340, 342 (Ill. 1939).
23 People ex rel. City of Salem v. McMackin, 291 N.E.2d 807, 813-14 (Ill. 1972).

24 *Id.* at 815.
25 368 N.E.2d at 921.
26 *Id.* at 920.
27 Friends of the Parks v. Chi. Park Dist., 786 N.E.2d 161, 167 (Ill. 2003).
28 Empress Casino Joliet Corp. v. Giannoulias, 896 N.E.2d 277, 296 (Ill. 2008).
29 *Id.* at 295.
30 *Id.* at 296.
31 *Id.* at 293.
32 *Id.* at 294 (internal citations omitted).
33 *Id.* (internal citations omitted).
34 *Id.* (internal citations omitted).
35 I*d.* at 294-95 (internal citations omitted).
36 224 P.3d 158, 161 (Ariz. 2010).
37 *Id.* at 164.
38 *Id.* at 165-66.
39 *Id.* at 165 (internal citation omitted).
40 Empress Casino Joliet Corp. v. Giannoulias, 896 N.E.2d 277, 293 (Ill. 2008) (internal citation omitted) (emphasis added).