The Public Purpose Doctrine in Wisconsin Part I

Origin and Impact

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Enforcing a requirement that public money be spent for a "public purpose", American state courts have uniformly ruled that governmental expenditures for private purposes were invalid. Part I of this article examines two aspects of the doctrine as it appears in Wisconsin: (1) the transformation by the judiciary of the doctrine from a concept of political morality to a part of the constitutional law of Wisconsin; and (2) the impact of judicial decisions based on the doctrine on the functioning of the older branches of the Wisconsin government. Part II of this article analyzes the decisions of the Wisconsin Supreme Court which relied on the doctrine to invalidate legislative or administrative actions.

THE ADOPTION OF THE DOCTRINE

The public purpose doctrine was a judicial articulation of the belief that governmental power should be used for the benefit of the entire community. As a political ethic, this belief was a main element in the tradition of constitutionalism.[1] The courts, however, did not use the doctrine to test the validity of legislation until the

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[1] See, e.g., LOCKE, ON CIVIL GOVERNMENT, Chap. IX, paragraph 131. Attempts to trace the origin of the doctrine are found in McAllister, *Public Purpose in Taxation,* 18 CALIF. L. REV. 137 (1930), and WALDRON, THE PUBLIC PURPOSE DOCTRINE (unpublished thesis in University of Wisconsin Library, 1952). See also CORWIN, LIBERTY AGAINST GOVERNMENT (1948) for an excellent discussion of the history of extra-constitutional standards.

latter half of the Nineteenth Century.[2] This section of this article examines the formation and adoption of the doctrine by the Wisconsin courts.

The public purpose doctrine first appeared in Wisconsin on January 4, 1860, in *Soens v. Racine*.[3] The Racine city council, under statutory authority, contracted for the construction of breakwaters to prevent erosion along the shore of the city; a portion of the cost was assessed to various lots, and a special tax was levied on these lots. A lower court enjoined the collection of the tax on the ground that it was invalidly levied for a private purpose. The Wisconsin Supreme Court, through Chief Justice Dixon, vigorously approved the doctrine,[4] but it reversed the judgment of the trial court. It ruled that the protection of land from erosion was action for a public purpose. The statement of the doctrine, therefore, was dictum; because the court approved the purpose of the particular statute involved in the case, it could have reserved the question of a limitation on the legislative power.

Despite the strong language of the *Soens* opinion, there were several indications that the public purpose doctrine was not yet a part of the Wisconsin Constitution. The statement in the *Soens* case was dictum. Dixon cited no authorities to support his position. Moreover, the court decided two other cases, *Clark v. Janesville*[5] and *Bushnell v. Beloit*,[6] on the same day that it decided the *Soens* case. Both of these cases involved subscriptions to railroad stock by municipal corporations; these cases, therefore presented opportunities to examine the doctrine.[7] In the *Bushnell* case, Justice

[2] The first significant appearance of the doctrine was in Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853). The opinion by Chief Justice Black does not unequivocably state the source of the doctrine, but a careful reading indicates that Black attempted to derive the public purpose doctrine from the doctrine of the separation powers. This derivation is patently incorrect. Presumably Black would agree that no branch of the government could levy taxes for private purposes. But, for this very reason, it is difficult to see how this restriction can be derived from the "separation" of powers.

[3] 10 Wis. *271 (1860). From this point, the doctrine seems to have developed in Wisconsin only slightly influenced by cases in other states.

[4] "The legislature are not authorized to provide for the levying of taxes for merely private or individual ends. Such taxation would be entirely subversive of the objects of government, and ought not to be tolerated. Legislative authority is not delegated for any such purpose, and the taxing power can only be exercised for the accomplishment of some object of public or common interest." *Id.* at 279-80.

[5] 10 Wis. *136 (1860).

[6] 10 Wis. *195 (1860).

[7] The public purpose issue was not raised in either case by either the court or counsel. Both cases contained a somewhat ill-defined issue of whether or not the expenditures were for proper "municipal" purposes.

Cole expressed regret that a provision prohibiting local government aid to railroads has not been included in the constitution, but refused to "construe the constitution as though such a provision was there."[8] In the *Clark* case, Justice Paine reasoned that the statute was valid under the constitutional provision which empowered municipal corporations to lend credit.[9]

The 1865 decision in *Brodhead v. Milwaukee*[10] added considerable strength to the public purpose doctrine.[11] The case involved the validity of a city tax to pay bounties to Civil War volunteers, draftees, and persons who had secured substitutes. Chief Justice Dixon, a staunch advocate of the doctrine, laid down the governing principles with great assurance:

> Counsel on both sides accept as correct the principles laid down in the great leading case of Sharpless v. The Mayor, etc., 21 Pa. St. 147, 168,[12] upon the subject of taxation. The same principles have frequently been affirmed by this court. The legislature cannot create a public debt, or levy a tax, or authorize a municiple corporation to do so, in order to raise funds for a mere private purpose. It cannot in the form of a tax take the money of the citizens and give it to an individual, the public

[8] 10 Wis. *195, 224 (1860). Justice Cole undoubtedly was influenced by the argument of Matthew Hale Carpenter, counsel for the plaintiff:

> "This court cannot undertake to correct the exercise of discretion vested in the legislature, nor annul its laws, because unwise or impolitic. If no provision of the constitution has been violated, the court cannot interfere on the ground of protecting the welfare of the people of Beloit. If it could, we should then go into argument to show that the local interests of Beloit had been vastly promoted by securing this road, beyond the $100,000 involved. But it is apparent that such an argument should be addressed to the Legislature or to the people; and as the argument has been made in both places, followed by successive decisions in favor of the expediency of this subscription of the town, we submit that the court cannot reverse the decision of the Legislature, and of the people of Beloit, on the ground that they have mistaken their true interests and made an unprofitable contract."

Repsondents' brief, pp. 22, 23, Bushnell v. Beloit, 10 Wis. *195 (1860). It is important to note that the "presumption of constitutionality" approach presaged here by Carpenter was never applied to public purpose doctrine problems by the Wisconsin Supreme Court.

[9] 10 Wis. *136, 174 (1860).

[10] 19 Wis. *624 (1865).

[11] Prior to the *Brodhead* case, the court displayed a favorable attitude toward the public purpose doctrine in three cases in which the doctrine was not a major issue. In Weeks v. Milwaukee, 10 Wis. *242, 258 (1860), Justice Paine said:

> "the right of the public to tax the owner at all for that purpose fails; because the public has no right to tax the citizen to make him build improvements for his own benefit merely. It must be for a public purpose. . . ."

In Hasbrouck v. Milwaukee, 13 Wis. *37, 44 (1860), Chief Justice Dixon commented on local government aid to railroads:

> "It is in view of these results, the public good thus produced, and

> interest being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute.[13]

Dixon made no attempt to derive the doctrine from any express words of the Wisconsin constitution. Justice Downer, dissenting, also accepted the doctrine, although he recognized the extra-constitutional source of the doctrine.[14] But even in *Brodhead* the announcement of the doctrine was dictum, in the sense that a more restrained court could have decided the case without passing on the question of a limitation on the legislature's spending power.

The doctrine was first used to invalidate legislation in *Curtis' Adm'r v. Whipple* (1869)[15] and *Whiting v. Sheboygan and Fond du Lac Railroad* (1870).[16] The *Curtis* case involved the validity of a statute which authorized the town of Jefferson to raise $5,000 by a special tax and donate it to the Jefferson Liberal Institute, a private non-profit corporation, to be used in the construction of

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> the benefits thus conferred upon the persons and property of all the individuals composing the community, that the courts have been able to pronounce them matters of public concern, for the accomplishment of which the taxing power might lawfully be called into action. It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created, that such corporations may engage in, or pledge their credit for their construction. Upon no other principle can the exercise of the power of taxation for such objects be sustained."

In Foster v. Kenosha, 12 Wis. *616, 619-20 (1860), Justice Cole declared a statute invalid on a tortured interpretation of Art. XI, §3 of the Wisconsin Constitution. His motivation appears from his discussion of what might occur if he allowed the statute to stand:

> "No matter how ruinous and oppressive these special taxes might be to the owners of real estate, or to the minority of taxpayers, yet we do not see why, under this section of the charter, the common council and a majority of the qualified voters, might not compel the city to become a stockholder in a line of steamboats to run up and down the lakes for the transportation of freight and passengers; subscribe for stock in railroads; improve harbors; open roads and build bridges within or without the city limits; erect and operate flouring mills; keep hotels; or, in short, embark in any mercantile, manufacturing or commercial enterprise. . . ."

[12] See note 2 *supra*.

[13] 19 Wis. *624, 652 (1865).

[14] *Id.* at 665.

> "It was conceded on the argument that money cannot be raised under the forms of taxation for mere private purposes. Such undoubtedly is the law, and we need not stop to inquire whether this prohibition is contained in some constitutional provision, or is a fundamental principle of free government, though not in the constitution; or whether it is implied from the very meaning of taxation. . . ."

[15] 24 Wis. 350 (1869).

[16] 25 Wis. 167 (1870).

school buildings. The court, through Chief Justice Dixon, ruled that the "incidental benefits" which would result to the town were not "the kind of public benefit and interest which will authorize a resort to the power of taxation."[17] In a seperate concurring opinion, Justice Paine acknowledged the extra-constitutionality of the doctrine.[18]

Dixon did not examine the source of the doctrine in either the *Brodhead* or the *Curtis* case. In both cases, however, his associates wrote separate opinions which recognized that the doctrine was not derived from the constitution. His silence, therefore, was a refusal to acknowledge his invocation of extra-constitutional standards, rather than a mere oversight.

The *Whiting* case involved the validity of a statute authorizing Fond du Lac County to donate $150,000 to the Sheboygan and Fond du Lac Railroad. On the authority of the *Curtis* decision, the court ruled that the legislature did not have the power to authorize such a donation.[19] On motion for re-argument, counsel for the railroad vigorously protested the use of extra-constitutional standards.[20] The protest came too late. The public purpose doctrine was already established in Wisconsin law.

Why did the court, which in form rejected the use of extra-constitutional standards, adopt the public purpose doctrine? In

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[17] 24 Wis. 350, 354 (1869).

[18] *Id.* at 356.

> "It is conceded by all that a tax must be for a public, and not a private, purpose. If, therefore, the legislature attempts to take money from the people by legal compulsion, for a merely private purpose, that is not a tax, according to essential meaning of the word; and, therefore, such a law is not, strictly speaking, unconstitutional, as being prohibited by any positive provision of the constitution, but is void, for the reason that it is beyond the scope of legislation."

[19] The *Curtis* case was argued on February 19, 1869, and decided on June 15, 1869. The *Whiting* case was first argued on April 16-17, 1869, and the original decision was reached on June 15, 1869. In the *Whiting* case there was a motion for re-argument, and the final decision was not reached until the January term of 1870. The two cases therefore were under consideration at the same time, and the first decision in the *Whiting* case was reached at the same time that the *Curtis* case was decided.

[20] "I am aware that some courts assume the right to say that there are certain general principles which enter into constitutions and lie at the base of all civil government, which if not observed render all legislation subject to this objection void. But what is to judge of this? Have the courts a monopoly of constitutional wisdom? Have they a right to declare an act of the legislature void, which violates no provision of the constitution, upon some undefined and indefinite theory of natural justice?
"It has been said that every tax to be valid must be for some object in which the public interest is in some way or to some extent concerned. This is conceded, speaking of the rule which

these early periods of the state's history, much of the determination of public policy passed from the legislature to the courts by default. The legislature did not function efficiently enough to accommodate the social and economic changes caused by the rapid development of the state. The job of reconciling the new conflicts of interests fell primarily to the judges, who became accustomed to weighing competing claims of public policy. The court showed little distrust of its own wisdom. To some extent they felt that they were in possession of eternal truths; and like many people in the possession of eternal truths they were not inclined to question the sources of those truths.

In Wisconsin, at least, this judicial distrust of legislative judgment might have seemed not wholly groundless. One legislature had been bought by a railroad.[21] Despite the warnings given by the panic of 1857, the legislature continued its policy of local government subsidies; the bonded indebtedness of the local governments had risen to alarming proportions.[22] And the judges were only too well aware of how easily the legislature yielded to popular pressure to the detriment of less politically effective property-

should guide the legislature. But it is not conceded that the courts can annul an act of the legislature imposing a tax upon this ground; for this would be to draw from the legislature to this court the jurisdiction of determining *what is for the public good.* And if our case required it we should make a stand upon this point and offer battle. When will judges come to recognize the fact that public virtue does not rest with them alone; that the planets are not kept in their orbits by them, nor civil governments dependent upon their beck and nod. Within the general scope of legislative power, no matter what outrages may be committed, the courts are powerless in the premises, *unless some particular provision of the constitution has been violated.* The court is not the guardian of the people; nor the sole exponent of natural equity and righteousness; nor has it any supremacy over the legislature to review its opinions and reverse its determinations upon matters within its jurisdiction. . . .

"But unless a statute conflicts with the constitution, the court has no right to disregard it. Within the lines of constitutional restrait, much must be left to the discretion of some body; and the people choose to repose that trust in their political representatives, directly and annually responsible to them, not to the courts whose judges are more independent of the people."

Defendant's Brief in Support of Motion for Re-argument, pp. 19-22, Whiting v. Sheboygan and Fond du Lac Railroad, 25 Wis. 167 (1870). Counsel for the railroad was Matthew Hale Carpenter, see note 8 *supra.*

[21] See HUNT, LAW AND EARLY WISCONSIN RAILROADS 1-78 (unpublished thesis in University of Wisconsin Law School Library 1952); MERCK, ECONOMIC HISTORY OF WISCONSIN DURING THE CIVIL WAR DECADE 281 (1916).

[22] There is no data available which shows the size of local government debt for railroad aid for the period before 1872. In THE ANNUAL REPORT OF THE SECRETARY OF STATE FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1873, the local debt figures for 1872 are reported on page 31:

owners; the statutes designed to ease the situation of the railroad-farm-mortgagors provided a striking example.[23]

The court, therefore, was receptive to new instruments of judicial control over legislative action. They were particularly interested in ways to combat the local aid program, which they felt had gotten out of hand. To a large extent, the public purpose doctrine was a *piece d' occasion* for that purpose.

THE IMPACT OF THE DOCTRINE

There is more to law than the opinions of appellate courts. This section examines the effect of the Wisconsin Supreme Court decisions of legislative action. This effect has been divided into two classes for convenience: (1) direct impact *i.e.,* the effect on the particular legislative policies embodied in the statutes which the court declared unconstitutional; and (2) direct impact, *i.e.,* the effect on the implementation of other legislative policies.

Direct Impact

In a surprising number of cases, the court's decision that a particular statute was unconstitutional did not act as a permanent veto on the achievement of the desired objective of the legislature. *Whiting v. Sheboygan and Fond du Lac Railroad*[24] was in effect partly overruled by the Supreme Court of the United States in *Olcott v. The Supervisors,*[25] which involved the rights of a bona fide purchaser of the county orders which had been donated to the railroad. On writ of error the United States Supreme Court held that the *Whiting* case was not binding on the federal courts and sustained the state statute. With perhaps a touch of poetic justice, Mr. Justice Strong based his conclusion on the extra-constitutionality of the doctrine: "The question considered by the court was not one of interpretation or construction. The meaning of no provision of the State constitution was considered or declared."[26]

Having decided that the question was one of "general law",[27] he

	Railroad Aid Debt	Total Debt
Cities, towns, villages	$3,837,672	$6,164,359
Counties	$2,008,732	$2,715,670
Total	$5,846,404	$8,880,029

In the Appendix to the report, these figures are broken down by counties. The data was admittedly incomplete.

[23] HUNT, *op. cit. supra,* 84-130; MERCK, *op. cit. supra,* 238-70.
[24] 25 Wis. 173 (1870). See page 43 *supra.*
[25] 83 U.S. (16 Wall.) 678 (1872).
[26] *Id.* at 689.
[27] *Id.* at 690.

re-examined the constitutionality of the statute. He did not decide that the public purpose doctrine was non-existent; he did, however, decide that promotion of railroad construction was activity for a public purpose, and that therefore the doctrine was not applicable to invalidate the statute.

A somewhat similar phenomenon occurred in connection with *Ellis v. The Northern Pacific Railroad Co.*[28] in which the Wisconsin Supreme Court held that a grant of land by Douglas county to the Northern Pacific Railroad was invalid under the rule of the *Whiting* case. The Supreme Court of the United States at first refused to upset the state court decision,[29] but later confirmed the railroad's title to the land.[30]

Attorney General v. Eau Claire[31] held invalid a statute authorizing the city to construct a dam, because it provided that the city might lease the water power produced to private manufacturers. The decision only temporarily delayed the construction of the dam. The legislature of 1876 amended and re-enacted the original statute.[32] The amendment was minor; it merely made the power to construct the dam collateral to the power to construct an admittedly permissible waterworks. But it made the statute constitutional within the terms of the court's decision; the amended act was not challenged.

State ex rel. Thomson v. Giessel[33] held unconstitutional a statute which increased retirement benefits to retired teachers. The governor approved the original statute on July 6, 1951; the court declared it unconstitutional on June 3, 1952; the governor approved a different statute to achieve the same result on July 2, 1953;[34] the court upheld the second statute on December 30, 1953.[35] The second statute provided compensation to retired teachers for "standing by as . . . available substitute" teachers.

The legislature used the cumbersome process of constitutional amendment to overrule, in part, the decision of *State ex rel. Owen v. Donald*[36] which upset the State Forest Reserve program. The court decided that case in 1915. The legislature of 1921 adopted a joint resolution proposing a constitutional amendment to allow

[28] 77 Wis. 114, 45 N.W. 811 (1890), 80 Wis. 459, 50 N.W. 397 (1891).
[29] Northern Pacific Railroad Co. v. Ellis, 144 U.S. 458 (1892).
[30] Roberts v. Northern Pacific Railroad Co., 158 U.S. 1 (1894).
[31] 37 Wis. 400 (1875).
[32] Wis. Laws 1876, c. 231. The original statute was Wis. Laws 1875, c. 333.
[33] 262 Wis. 51, 53 N.W.2d 726 (1952).
[34] Wis. Laws 1953, c. 434.
[35] State *ex rel.* Thomson v. Giessel, 265 Wis. 558, 61 N.W.2d 903 (1953).
[36] 160 Wis. 21, 151 N.W. 331 (1915).

the state to acquire forest lands by purchase.[37] It adopted the resolution again in 1923.[38] The electorate ratified the amendment in 1924. In 1927 the legislature empowered the conservation commission to purchase forest lands.[39]

The court's decision in *State ex rel. Martin v. Giessel*,[40] which held that an appropriation of state funds for distribution to local veterans' housing authorities and city housing authorities was unconstitutional, caused the amendment machinery to operate more swiftly. The court decided the case on March 29, 1948; the governor called a special session of the legislature on July 19, 1948;[41] the special session adopted a joint resolution proposing a constitutional amendment to allow the state to aid veterans' housing on July 20, 1948;[42] the next legislature readopted the resolution on February 1, 1949;[43] the electorate ratified the amendment on April 5, 1949; the governor approved a statute which was in substance a re-enactment of the original statute on August 5, 1949.[44]

The decision in *State ex rel. American Legion 1941 Conv. Corp. v. Smith*[45] limited the use of public funds to support a convention. But the decision merely prevented the corporation's use of state funds to make a deposit to obtain the convention. The convention was held in Milwaukee and state funds were used to defray part of the expenses.[46]

In these seven cases[47] the exercise of the power of judicial review caused but temporary delays; these cases involved relatively major legislative policies. The other decisions seem to have operated as permanent vetoes; but, with the exception of the *Wisconsin Development Authority* case,[48] these decisions involved policies of

[37] Wis. Laws 1921, J.Res. 29,S.
[38] Wis. Laws 1923, J.Res. 57.
[39] Wis. Laws 1927, c. 426.
[40] 252 Wis. 363, 31 N.W.2d 626 (1948).
[41] Wis. S. Jour., pp. 3-4 (Special Ses., 1948); Wis. A. Jour., pp. 3-4 (Special Ses., 1948).
[42] Wis. S. Jour., p. 23 (Special Ses., 1948); Wis. A. Jour., p. 23 (Special Ses., 1948).
[43] Wis. S. Jour., pp. 106-107 (1949); Wis. A. Jour., pp. 110-11 (1949).
[44] Wis. Laws 1949, c. 627.
[45] 235 Wis. 443, 293 N.W. 161 (1940).
[46] The Report of the State Treasurer, 1941 and 1942, p. 76, listed a payment of $11,715.16 to the American Legion in 1941, a payment to the same organization of $20,286.48 in 1942. See also Wis. Laws 1941, J.R. 7, which welcomed the Legion to Milwaukee.
[47] These cases were not decided solely on the basis of the public purpose doctrine; in all of them, however, the doctrine did influence the decision of the court to some extent.
[48] State *ex rel.* Wisconsin Dev. Authority v. Damman, 228 Wis. 147, 277 N.W. 278, 280 N.W. 698 (1938). The case involved the validity of an appropriation to a private non-profit corporation for the promotion of municipal power districts and non-profit public utilities.

narrower effect. Decisions such as the *Lakeside Lumber Co.* case[49] did not create enough political tension to bring other major legal agencies into action. But the court's attempts to restrict policies which had wide political support were ineffective.

Indirect Impact

It is of course impossible to determine what the legislature would have done, if the court had not announced the public purpose doctrine. Perhaps the best method of gauging the impact of the doctrine on the legislature is to examine what the legislature did despite the presence of the doctrine. If significant amounts of legislation in apparent conflict with the doctrine occurred, then it might be inferred that the doctrine had little impact on the legislature. A complete review of all legislation relating to the service functions of the state is beyond the possible scope of this study. One type of legislation has been selected for scrutiny because to some extent it provides the "critical experiment"; this is legislation involving direct fiscal aid by government to private profit-seeking individuals or organizations. It seems probable that the legislature would have felt the impact of the doctrine most acutely in this area; no governmental activity would have conflicted more violently with the laissez-faire notions which underlay the doctrine than aid to private profit-seekers.

Authorizing municipalities to aid railroads occupied much of the time of late nineteenth century legislatures, and Wisconsin followed the pattern. In general, the form of aid authorized took three forms: (1) stock subscriptions;[50] (2) loans;[51] or (3) dona-

[49] Lakeside Lumber Co. v. Jacobs, 134 Wis. 188, 114 N.W. 446 (1908). The case involved the validity of a license to lay pipe across a town lot.

[50] Wis. Laws 1849, c. 92; Wis. Laws (P. & L.) 1853, c. 11, 12, 63, 66, 93, 113, 148, 185, 219, 222, 233, 266, 287, 289, 293 (repealed by Wis. Laws (P. & L.) 1861, c. 23), 403; Wis. Laws (P. & L.) 1854, c. 101; Wis. Laws (P. & L.) 1855, c. 109, 130, 255; Wis. Laws (Gen.) 1856, c. 23; Wis. Laws (P. & L.) 1856, c. 109, 127, 132 (repealed by Wis. Laws (Gen.) 1860, c. 101), 134 (amended by Wis. Laws (Gen.) 1863, c. 39), 138, 141, 222, 267, 269 (amended by Wis. Laws (P. & L.) 1857, c. 100), 368, 381, 458, 486; Wis. Laws (P. & L.) 1857, c. 39, 48, 59, 189, 233, 245, 285 (repealed by Wis. Laws (Gen.) 1859, c. 70), 322 (repealed in part by Wis. Laws (P. & L.) 1858, c. 139), 323 (repealed in part by Wis. Laws (P. & L.) 1858, c. 110), 338 (repealed by Wis. Laws (P. & L.) 1858, c. 195), 342, 346; Wis. Laws (P. & L.) 1859, c. 125 (implemented by Wis. Laws (P. & L.) 1862, c. 200; amended by Wis. Laws (P. & L.) 1862, c. 377; amended by Wis. Laws Extra Session 1862, c. 9); Wis. Laws (Gen.) 1860, c. 199, 222; Wis. Laws (Gen.) 1861, c. 65; Wis. Laws (P. & L.) 1862, c. 159, 328; Wis. Laws (Gen.) 1863, c. 190; Wis. Laws (Gen.) 1864, c. 93, 95, 162, 357; Wis. Laws (P. & L.) 1866, c. 229, 262 (amended by Wis. Laws (P. & L.) 1867, c. 474), 408, 471 (amended by Wis. Laws (P. & L.) 1867, c. 69; amended by Wis. Laws (P. & L.) 1868, c. 337, 410), 547 (amended by Wis. Laws (P. & L.) 1867,

tions.[52] Many statutes authorized the muncipalities to select the form of aid.[53] The Supreme Court of Wisconsin approved the

c. 351); Wis. Laws (P. & L.) 1867, c. 457 (amended by Wis. Laws (P. & L.) 1868, c. 462; amended by Wis. Laws (P. & L.) 1869, c. 96; see also Wis. Laws (P. & L.) 1869, c. 469; Wis. Laws (P. & L.) 1870, c. 198), 552; Wis. Laws (P. & L.) 1868, c. 149, 157, 410; Wis. Laws (P. & L.) 1869, c. 90, 165, 469; Wis. Laws (Gen.) 1870, c. 24 (amended by Wis. Laws (Gen.) 1871, c. 48; see also Wis. Laws 1876, c. 180); Wis. Laws (P. & L.) 1870, c. 141, 148, 172 (amended by Wis. Laws (P. & L.) 1871, c. 13), 198, 210 (amended by Wis. Laws (P. & L.) 1872, c. 34), 242, 244, 247, 251, 273 (amended by Wis. Laws (P. & L.) 1871, c. 188), 326, 499, 501, 505, 506; Wis. Laws (P. & L.) 1871, c. 75, 78, 160, 263, 273, 287, 341, 391, 404, 441, 479, 482 (amended by Wis. Laws (P. & L.) 1872, c. 66), 487; Wis. Laws (Gen.) 1872, c. 182 (amended by Wis. Laws 1873, c. 238, 277, 289; Wis. Laws 1874, c. 317; Wis. Laws 1875, c. 117; Wis. Laws 1876, c. 128; Wis. Laws 1877, c. 4; Wis. Laws 1883, c. 333; Wis. Laws 1895, c. 366); Wis. Laws (P. & L.) 1872, c. 10, 109; Wis. Laws 1873, c. 68; Wis. Laws 1876, c. 119; Wis. Laws 1877, c. 99, 283; Wis. Laws 1882, c. 100, 300; Wis. Laws 1883, c. 150; Wis. Laws 1887, c. 529; Wis. Laws 1889, c. 356; Wis. Laws 1895, c. 256; Wis. Laws 1901, c. 74; Wis. Laws 1907, c. 208; Wis. Laws 1909, c. 46, 299; Wis. Laws 1911, c. 244; Wis. Laws 1913, c. 37; Wis. Laws 1921, c. 576.

[51] Wis. Laws (P. & L.) 1853, c. 90 (repealed by Wis. Laws (P. & L.) 1861, c. 23), 105, 123, 244, 268, 288 (amended by Wis. Laws (P. & L.) 1853, c. 406), 365, 392, 395, 399; Wis. Laws (P. & L.) 1854, c. 125 (amended by Wis. Laws (P. & L.) 1854, c. 246), 152, 208, 303; Wis. Laws (P. & L.) 1855, c. 220, 236, 269; Wis. Laws (P. & L.) 1856, c. 110, 153 (repealed by Wis. Laws (P. & L.) 1857, c. 76), 282, 456, 489, 502; Wis. Laws (P. & L.) 1857, c. 37, 63, 134, 169, 349, (c. 196 repealed all previously authorized loans by Columbia County or its subdivisions); Wis. Laws 1878, c. 155 (amended by Wis. Laws 1879, c. 197).

[52] Wis. Laws (P. & L.) 1857, c. 244; Wis. Laws (P. & L., Supp.) 1861, c. 294; Wis. Laws (Gen.) 1863, c. 109, 195 (postponed by Wis. Laws (Gen.) 1864, c. 94; reinstated by Wis. Laws (P. & L.) 1866, c. 561); Wis. Laws (Gen.) 1864, c. 96, 199, 258 (amended by Wis. Laws (Gen.) 1870, c. 91), 307 (amended by Wis. Laws (Gen.) 1869, c. 114; repealed in part by Wis. Laws (P. & L.) 1872, c. 116), 309, 372 (amended by Wis. Laws (Gen.) 1869, c. 130), 398 (amended by Wis. Laws (P. & L.) 1867, c. 263; amended by Wis. Laws (Gen.) 1868, c. 73), 401 (repealed in part by Wis. Laws (P. & L.) 1872, c. 118), 447; Wis. Laws (Gen.) 1865, c. 378 (amended by Wis. Laws (Gen.) 1866, c. 21; amended by Wis. Laws (P. & L.) 1866, c. 460); Wis. Laws (P. & L.) 1866, c. 326, 310 (amended by Wis. Laws (P. & L.) 1871, c. 280), 338, 406, 491, 575; Wis. Laws (P. & L.) 1867, c. 448; Wis. Laws (P. & L.) 1868, c. 99, 165, 214 (amended by Wis. Laws (P. & L.) 1869, c. 211), 337, 352, 450, 459 (repealed by Wis. Laws (P. & L.) 1869, c. 414), 491; Wis. Laws (P. & L.) 1869, c. 183, 201, 287, 380, 436, 454; Wis. Laws (P. & L.) 1870, c. 450.

[53] Wis. Laws (Gen.) 1853, c. 112; Wis. Laws (P. & L.) 1853, c. 117, 165, 308; Wis. Laws (P. & L.) 1854, c. 1, 42 (amended by Wis. Laws (P. & L.) 1854, c. 225), 124 (amended by Wis. Laws (P. & L.) 1856, c. 93), 279, 288, 299; Wis. Laws (P. & L.) 1855, c. 222, 337; Wis. Laws (P. & L.) 1856, c. 75, 143, 166, 171 (repealed by Wis. Laws (Gen.) 1861, c. 205); Wis. Laws (P. & L.) 1857, c. 132, 297, 347, 390; Wis. Laws (P. & L.) 1858, c. 138 (repealed by Wis. Laws (Gen.) 1860, c. 101), 162; Wis. Laws (Gen.) 1860, c. 130 (amended by Wis. Laws (Gen.) 1861, c. 197; Wis. Laws (Gen.) 1862, c. 1); Wis. Laws (Gen.) 1863, c. 289; Wis. Laws (P. & L.) 1867, c. 93 (amended by Wis. Laws (P. & L.) 1869, c. 166; amended by Wis. Laws (P. & L.) 1871, c. 76; amended by Wis. Laws 1876, c. 180), 204, 267; Wis. Laws (Gen.) 1868, c. 168 (amended by Wis. Laws (Gen.) 1869, c. 96); Wis. Laws (P. & L.) 1868, c. 311, 327, 330, 429, 436, 439, 449, 481; Wis. Laws (Gen.) 1869, c. 113, 126, 134, 188; Wis. Laws (P. & L.) 1869, c. 203, 348,

first method in 1860,[54] the second method in 1872.[55] It held the third method unconstitutional in the *Whiting* case in 1870,[56] but in 1878 it held that statutes conferring a choice of methods did not empower the municipalities to donate to the railroads, and were, therefore, constitutional.[57] The legislature felt the impact of the *Whiting* case; no statutes authorizing donations were passed after 1870.[58] But it should be realized that the scope of the *Whiting* restriction was not broad; it prohibited only one of the three methods of aiding railroads, and the method it prohibited had not been the most popular one.

Moreover, the vast volume of legislation relating to railroad aid indicated that the legislature's concept of the role of government in the community differed considerably from the court's. The court had been reluctant to sustain the stock subscriptions originally,[59] and bluntly stated that it continued to recognize their validity only because of *stare decisis*.[60] In contrast, the legislature displayed few qualms on the subject. Further evidence of the legislature's broad conception of the government's role are the statutes authorizing aid to plankroads;[61] from a legal point of view the plankroads were identical with railroads; the absence of legis-

423 (amended by Wis. Laws (P. & L.) 1870, c. 511); Wis. Laws (Gen.) 1870, c. 25 (amended by Wis. Laws (Gen.) 1871, c. 76; amended by Wis. Laws 1873, c. 227), 114, 122; Wis. Laws (P. & L.) 1870, c. 100, 248, 254, 434, 435; Wis. Laws (Gen.) 1871, c. 87, 96; Wis. Laws (P. & L.) 1871, c. 215, 248, 486, 490; Wis. Laws 1875, c. 117 (amended by Wis. Laws 1876, c. 29; amended by Wis. Laws 1877, c. 4), 168; Wis. Laws 1885, c. 143; Wis. Laws 1889, c. 223.

[54] Clark v. Janesville, 10 Wis. *135 (1859); Bushnell v. Beloit, 10 Wis. *195 (1860).

[55] Rogan v. Watertown, 30 Wis. 259 (1872).

[56] 25 Wis. 167 (1870). See page 43 *supra*.

[57] Bound v. Wisconsin Central Railroad Co., 45 Wis. 543 (1878).

[58] See note 52 *supra*.

[59] See Bushnell v. Beloit, 10 Wis. *195, 219-20 (1860).

[60] Philips v. Albany, 28 Wis. 340, 357 (1871):

> "However we might feel bound to regard this question [the validity of municipal subscriptions to railroad stock], or to hold upon it, were it a new one, we are now effectually precluded from any examination of it, and such subscriptions must stand so long as the legislature sees fit to authorize them and the towns and municipalities to make them, or until the people deem it expedient to change the constitution in this particular. Enough was said in *Whitney* [sic] *v. The Sheboygan and Fond du Lac Railroad Company and others*, 25 Wis., pp. 186, 187, 209 and 210, to indicate the distinction—all that there is—between a stock subscription and a donation or other appropriation of public moneys [sic] for the use and benefit of those private railroad corporations, and also to indicate that, but for past decisions holding valid the subscription and taxation to pay it, to which decisions we were required to adhere, the majority of this court would not hesitate to declare the subscription likewise void, and the tax to pay it wholly unauthorized."

lation after 1870 authorizing aid to them was probably caused by their technological inability to compete with the railroads rather than the action of the court.

Nor do the court's decisions seem to have had much influence on the use of public funds to aid other private enterprises. Before 1870 the legislature had authorized aid to telegraph companies,[62] steamship companies,[63] hotels,[64] waterworks,[65] gas companies,[66] building companies,[67] bridge companies,[68] canal companies,[69] and river improvement companies.[70] After 1870, the legislature authorized aid to dry dock companies,[71] manufacturing companies,[72] and bridge companies.[73]

Nor was direct aid to profit-seekers solely a nineteenth century phenomenon. The legislatures of the twentieth century also attempted to use governmental fiscal power to aid the economy. The problem that they faced was a familiar one: capital scarcity. But in the twentieth century the scarcity bore most heavily on a different sigment of the economy; now it was the farmers who needed aid. The vast areas of cutover lands in northern Wisconsin needed capital for development into agricultural lands or for reforestation; moreover, farm tenancy was increasing in southern Wisconsin. To combat both problems the legislature tried hard and often to make capital available to the farmers.

The legislature of 1911 passed the first twentieth century statute which attempted to use governmental credit to aid individual farmers.[74] Counties were empowered to issue bonds "[f]or the purpose of promoting the public welfare, by enabling settlers to reclaim

[61] Wis. Laws 1849, c. 48, 196; Wis. Laws (P. & L.) 1852, c. 36 (amended by Wis. Laws (P. & L.) 1852, c. 196); Wis. Laws (P. & L.) 1853, c. 59, 150, 160, 241, 265, 291, 299, 406; Wis. Laws (P. & L.) 1854, c. 40, 48 (amended by Wis. Laws (P. & L.) 1855, c. 287), 56, 58, 160, 206, 239, 264, 316; Wis. Laws (P. & L.) 1855, c. 37 (amended by Wis. Laws (P. & L.) 1855, c. 258); Wis. Laws (P. & L.) 1856, c. 457, 523; Wis. Laws (P. & L.) 1859, c. 243; Wis. Laws (Gen.) 1861, c. 131; Wis. Laws (P. & L.) 1866, c. 390; Wis. Laws (P. & L.) 1870, c. 307.

[62] Wis. Laws (P. & L.) 1853, c. 124.

[63] Wis. Laws (P. & L.) 1853, c. 301.

[64] Wis. Laws (P. & L.) 1867, c. 75, 537.

[65] Wis. Laws (P. & L.) 1855, c. 335; Wis. Laws (P. & L.) 1853, c. 116.

[66] Wis. Laws (P. & L.) 1857, c. 47, 176.

[67] Wis. Laws 1860, c. 140.

[68] Wis. Laws (P. & L.) 1867, c. 62.

[69] Wis. Laws (P. & L.) 1866, c. 295.

[70] Wis. Laws (P. & L.) 1870, c. 268.

[71] Wis. Laws 1874, c. 15; Wis. Laws 1873, c. 282; Wis. Laws (P. & L.) 1871, c. 410.

[72] Wis. Laws 1889, c. 27, 158, 491.

[73] Wis. Laws 1883, c. 231; Wis. Laws 1877, c. 299.

[74] Wis. Laws 1911, c. 656.

[75] Wis. Laws 1913, c. 774.

cutover lands. . . ." These bonds were not general obligations of the county; they were secured only by special tax liens on lands given as security for loans from the county to individual farmers. In essence they were mortgages, with respect to which the county acted only as an agent.

The 1911 county reclamation bonds were not successful, and the statute authorizing them was repealed in 1913.[75] The legislature of that year enacted a very similar statute to replace it, and expanded the statement of the policy.[76]

These bonds were also special liens on the lands given as security for the county loans, but they were also general county obligations. The commissioners of the public lands were authorized to invest the state trust funds in these bonds.

The 1913 legislature also directed the commissioners of public lands to invest the trust funds in 5% farm mortgages "[f]or the purpose of assisting the borrower to erect necessary dwelling houses and farm buildings, to build silos and to clear his lands of stumps, trees, brush and fallen timber."[77]

In 1917 the legislature created the "Settlers' Reclamation Department" in the State Department of Agriculture.[78] This agency was to administer loans to settlers on unimproved land. However, the state government did not supply the fund from which the loans were to be made; the counties were to supply the funds, and each county fund was to be used for loans to settlers in that county.

The 1917 legislature also revised the investment powers of the commissioners of public lands, but continued their authority to invest in county reclamation bonds.[79]

In 1921 the legislature created the annuity board to administer the teachers' retirement fund.[80] The legislature told this board that: "In making loans, preference shall be given to applications for small loans on improved farm property. . . ."

Although the legislature adopted a "General Municipal Borrow-

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[76] *Ibid.*
"[F]or the purpose of promoting the public welfare by the proper development of natural resources, . . . any county may issue special improvement bonds . . . and may loan the proceeds on the security of agricultural land to settlers within the county to assist them in reclaiming land within the county for agricultural use by draining said land where necessary and by removing from it such stumps, brush, fallen or standing timber or stones as prevent an efficient use of the land for agricultural purposes."

[77] Wis. Laws 1913, c. 647.

[78] Wis. Laws 1917, c. 288.

[79] Wis. Laws 1917, c. 536.

[80] Wis. Laws 1921, c. 459.

ing Act" in 1921,[81] to regulate municipal borrowing practices, bonds issued under the 1913 act were exempted from the regulations. The 1921 statute did, however, empower counties to issue bonds to provide funds to be administered under the 1917 statute by the Settlers' Reclamation Department.

Further efforts were made by the 1923 legislature to make credit available to farmers. One statute passed by that legislature provided that preference in selecting depositories for state funds should be given to banks which made non-mortgage loans to farmers or farm organizations.[82] Another statute provided that the "Soldiers' Rehabilitation Fund" should be invested in the same manner as the teachers' retirement fund.[83]

In 1925 the legislature limited the interest rate on farm loans from the teachers' retirement fund and the soldiers' rehabilitation fund to 5%.[84]

The legislature of 1931 appointed a special committee to study the cutover land tax delinquency problems of northern Wisconsin,[85] and appropriated $5,000 to enable it to carry out its study.[86]

The Special Session of 1931-1932 declared, by joint resolution,[87] that the annuity board had not complied with the provision of the 1921 statute directing it to give preference to farm mortgages. The board was directed to dispose of all its non-Wisconsin railroad and public utility holdings and to re-invest in farm mortgages.

Further pressure was put on the annuity board in 1933. By statute[88] the legislature directed it to invest at least 70% of its funds in Wisconsin; the preference order of investment was: (1) farm mortgages, with interest no greater than 5%, and no principal payments required for the first three years; (2) loans to cooperative associations on farm mortgages issued by the associations; and (3) loans to town mutual insurance companies on farm mortgages issued by the companies.

The 1933 legislature directed the annuity board to lower its farm mortgage interest rate to the level set by the federal land banks.[89]

For all of the farm credit legislation discussed so far, the legislature made no use of the general funds of the state. Instead, it

[81] Wis. Laws 1921, c. 576.
[82] Wis. Laws 1923, c. 186.
[83] Wis. Laws 1923, c. 345.
[84] Wis. Laws 1925, c. 368.
[85] Wis. Laws 1931, J. Res. 54.
[86] Wis. Laws 1931, c. 398.
[87] Wis. Laws 1931-32 Spec. Sess., J. Res. 37.
[88] Wis. Laws 1933, c. 126.
[89] Wis. Laws 1933, J. Res. 114.

drew on the resources of the trust funds, the teachers' retirement fund, and the soldiers' rehabilitation fund. County funds were also used.

It could perhaps be argued that the use of these funds was not restricted by the public purpose doctrine; the doctrine was usually phrased as a limitation on the power of taxation, and these funds were not directly derived from taxation. But there is strong evidence that the use of these special funds rather than the general fund of the state was not due to the legislature's fear of the restraint of the public purpose doctrine. The cause was more immediate: the state did not have unencumbered general funds in sufficient quantities to act effectively as a source of credit.

Five separate constitutional amendments were proposed to enable the state to borrow money to lend to farmers. The first of these proposals was adopted in 1913.[90] The proposed change was an amendment to Article VIII, section six, the provision which limited the state debt. The amendment would have allowed the state to borrow any amount to loan to individuals on the security of agricultural lands.

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[90] Wis. Laws 1913, J. Res. 23. The preamble to the resolution recited:
"WHEREAS, The free public lands of the United States which are suitable for farming purposes have been almost entirely disposed of; and
"WHEREAS, There are thousands of men in Wisconsin and elsewhere who could with great benefit to themselves and to the state of Wisconsin engage in the occupation of farming on the undeveloped farm lands of this state if they could be assisted in obtaining the capital necessary to purchase and develop these lands; and
"WHEREAS, Farm tenancy has increased in the southern counties of our state largely as a result of the increase in land values until fifteen of these counties report that from twenty to thirty-four out of every hundred farms are operated by renters; and
"WHEREAS, Easier means of borrowing money are needed both to help the renter to become a farm owner and thus prevent the rise of a wide-spread system of tenant farming, and to enable the settler on the cut-over lands to develop his farm; and
"WHEREAS, Our existing banking and other money-lending agencies can not or do not provide the funds needed; and
"WHEREAS, The experience of New Zealand, Australia, and the Philippine Islands and other countries and the experience of eight of the United States clearly demonstrates the possibility of successfully managing a state system of loans to farmers on the basis of real estate security. . . ."
The text of the amendment provided that:
"For the purpose of obtaining funds to promote the general welfare by making loans to individuals on the security of agricultural land to assist such individuals to acquire or improve agricultural land for their own use and occupancy for farm purposes, the state may contract such public debts as the legislature by a vote of a majority of all the members elected to each house, taken by yeas and nays, from time to time shall authorize."

The next proposal for change came in 1919.[91] That legislature wanted to amend Article VIII, section seven, the provision which limited the state's emergency borrowing power, to allow the state to borrow up to 1% of the last state assessment "for the purpose of aiding land settlement."

The legislature of 1921 proposed a similar amendment,[92] also to Article VIII, section seven. This proposal set the limit at one-fifth of one mill on the dollar of the last state assessment.

The 1923 legislature approached the problem from a slightly different direction.[93] It proposed an addition to Article VIII, section ten, the "internal improvements" prohibition. This amendment would have allowed the state to lend money to individuals on real estate security; debts incurred by the state in implementing the amendment were not to be subject to the constitutional restrictions on state debts. Despite the difference in approach, the purport of the amendment was the same: to empower the state to borrow money.

These proposed constitutional amendments strongly indicate that the obstacle to state participation was lack of funds, not the public purpose doctrine. This inference is conclusively established by the action of a subsequent legislature.

In 1937 the legislature made these findings of fact and declaration of policy:

> It is hereby declared that a public economic emergency does, and continues to, exist in the state of Wisconsin. Great upheavals have occurred in our debt and credit structure, resulting in a multiplicity of bankruptcies and mortgage foreclosures, the wholesale eviction of thousands from their farms, homes, and places of business, and widespread unemployment and public relief. The worst drought in history has aggravated and made more serious the conditions already existing. The state and federal governments have helped alleviate these conditions by making credit facilities and other types of relief available through various agencies, but the emergency still exists. It is hereby declared to be the policy of the legislature

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[91] Wis. Laws 1919, J. Res. 76.
[92] Wis. Laws 1921, J. Res. 47S.
[93] Wis. Laws 1923, J. Res. 71, 72.
"Provided further, that for the purpose of developing the agricultural resources of the state, the state may establish and maintain a system of rural credits and thereby loan money and extend credit to the people of the state upon real estate security in such manner and upon such terms and conditions as may be prescribed by law, and to issue and negotiate bonds to provide money to be so loaned, and the debts so incurred shall not be subject to the limitations contained in section 6 of this article."

> in this emergency to assist needy farmers, home owners, and others in obtaining credit facilities, in refinancing and adjusting their debts, and in safeguarding their homes, property, and means of subsistence; and to cooperate with the federal government in accomplishing these ends. To carry out this policy it is deemed necessary to establish an emergency agency, which shall be known as the "Wisconsin Home and Farm Credit Administration" . . . .[94]

The legislature appropriated funds to the agency to carry out its duties of co-operating with the federal government, mediating disputes between debtors and creditors, and performing similar functions. It also appropriated $1,000,000 to be made available by the agency through county boards for farm loans.[95] There was no judicial test of the validity of this act.

Although the legislature itself showed little concern over the application of the public purpose doctrine to legislation, the governor sometimes called it to their attention in a veto message. In 1913 Governor McGovern vetoed a bill which provided for administrative regulation of the marketing of certain agricultural products.[96] He based his veto partly on the public purpose doctrine, but his major objection was that the bill would not be effective.[97]

Governor Phillips used the public purpose doctrine as the basis of several vetoes. He disapproved a bill which authorized and ratified county payments of $500 to individuals or corporations constructing and operating ferries.[98] In the same year he vetoed a bill which authorized any city to buy and sell to its inhabitants any of the common necessities of life;[99] this veto was based solely on the public purpose doctrine. Governor Phillips also attached a memorandum to his siguature of a bill which increased the number of cities which could engage in the ice and fuel business;[100] his approval was reluctant, but, since the question had not been expressly ruled

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[94] Wis. Laws 1937, c. 38; see also Wis. Laws 1937, c. 26.
[95] Wis. Laws 1937, c. 25.
[96] Wis. A. Jour. 1176 (1913).
[97] Wis. A. Jour. 1183 (1913).
"Finally, let me say that even though the constitutional infirmities of this bill were removed, the limited appropriation of $2,000 which it provides would prove altogether insufficient to accomplish anything worthwhile along the lines proposed. Why nibble at the fringe of this great problem? If we wish to improve marketing conditions in Wisconsin, why not deal comprehensively with the question? Partial and piece-meal legislation concerning this matter is not only liable to fail because of unconstitutionality but is quite certain also to prove ineffective in practice."
[98] Wis. A. Jour. 661 (1917).
[99] *Id.* at 1077.
[100] *Id.* at 1211.

upon in Wisconsin, and the decisions in other states were conflicting, he thought it advisable to leave the matter to the courts.

Governor Phillips also vetoed a bill passed by the following legislature which empowered any city to establish and operate plants to process dairy products; the governor held that this was not a public purpose.[101]

The Attorney General advised the 1921 legislature that a bill authorizing municipal markets in second class cities was of doubtful constitutionality. The legislature decided not to pass the bill.[102]

The evidence, therefore, indicates that the legislature passed many acts which were in apparent violation of the public purpose doctrine; and these acts received executive approval. The severe constitutional limits on state debt restricted the legislature much more than did the courts' enunciation of the public purpose doctrine. Though the governor occasionally vetoed a bill on the ground that it did not serve a public purpose, these instances were few. In general, the direct and indirect impact of the doctrine on the legislature seems to have been of very limited extent.

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[101] Wis. A. Jour. 1338 (1919).
[102] Wis. A. Jour. 1537 (1921).