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Industrial Development Bonds: Judicial Construction vs. Plant Construction

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(4) The act should expressly disclaim any alteration of the *M'Naghten* "right and wrong" test, to avoid application of the *Creekmore* rationale.

Study and comparison of Florida's rehabilitative sex offender laws reveals that the actual social process of transition from punitive to curative treatment of the sexual deviate involves, in its legal aspect at least, a morass of thorny problems hidden beneath frequently heard glib generalizations prescribing "enlightened" social solutions. The study also reveals, however, that the problems can be solved by diligent and careful efforts of persons sympathetic to the new approach to an age-old problem.

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INDUSTRIAL DEVELOPMENT BONDS: JUDICIAL CONSTRUCTION VS. PLANT CONSTRUCTION

Florida at the present time faces the imperative challenge of providing income and employment for the nation's fastest growing population. The Florida lawyer, as judge, legislator, practicing advocate, business advisor and community leader bears a disproportionate share of the state's responsibility for mounting an effective response to the challenge. Although Florida's remarkable progress during the past decade cannot be gainsaid, glowing economic statistics and a mushrooming population may portend dangers of no lesser magnitude than those associated with a glowing, mushroom cloud. The threat is that of an unbalanced state economy. Florida's economic structure currently exhibits both industrial and geographic imbalance to a degree worthy of serious public concern.

A table of headings and subheadings is appended at the end of this note.

FLORIDA'S ECONOMIC IMBALANCE

Industrial Imbalance

Compared with other major states, a strikingly small portion of Florida's total non-agricultural population is engaged in manufacturing. Florida ranks last among the seventeen most populous states in percentages of state income and employment derived from manufacturing.[1] The state's manufacturing employment is less than one-half, and its income derived from manufacturing approximately one-third, that of the national average.[2] In past years this disparity has not spelled serious consequences for the state because service, trade, citriculture, construction and other non-manufacturing industries have afforded above-average sources of employment and income.

A recent study of Florida's economy, however, made by a nationally recognized authority with local experience, gives some cause for concern about the future. The study forecasts that the non-manufacturing segments of Florida industry will absorb a diminished percentage of the state's total employment by 1970.[3] Projections indicate that only a substantial increase in manufacturing can fill the gap between the level of employment and wages within anticipated capabilities of relatively slow-growth industries and the level sufficient to provide jobs and higher per capita income for an increasing labor force.[4] Although manufacturing employment doubled during the fifties, it must climb even more rapidly to keep pace with anticipated population increases of the sixties.[5]

Geographic Imbalance

One of the most dramatic aspects of Florida's economic growth is its geographic concentration. Of 3,616 new plants established, and 131,303 new manufacturing jobs created in Florida during the

1. U.S. DEP'T OF COMMERCE, OFFICE OF BUSINESS ECONOMICS, STATISTICAL ABSTRACT OF THE UNITED STATES, table No. 281, at 212 (1961).

2. *Id.* table No. 420, at 308.

3. ARTHUR D. LITTLE, INC., REVIEW OF MAJOR SEGMENTS OF THE FLORIDA ECONOMY, Pt. 1 ch. III, at 9 (1960).

4. *Id.* at 10. Military expenditures, such as the Nova moon project, have constituted an important offset to Florida's manufacturing deficiency in recent years. An outstanding state leader has observed, however, "I hope Floridians will have the good sense to take a hard look at defense spending anyway, which, by its very nature is here today and gone tomorrow." Address by Harold Colee, Executive Vice President, Fla. State Chamber of Commerce to the Daytona Beach Area Chamber of Commerce, Jan. 18, 1962.

5. Tampa Tribune, Aug. 14, 1961, p. 24, col. 1 (report of first of series of staff reports of the State Council on Economic Development).

past five years, approximately eighty per cent have been located in the ten most populous counties.[6] Meanwhile, the continuing economic decline of the smaller rural counties has been absolute rather than relative.[7] Fifteen Florida counties have thus far applied to the federal government for relief as depressed areas. The need for new jobs, increased vocational training for adult labor pools, and capital for industrial development has been given primary emphasis in the applications of these counties for federal aid funds.[8] At the state level, the Florida Development Commission has identified thirty-eight underdeveloped counties and has made the economic rehabilitation of these counties the central objective of its Rural County Development Program.[9] Perhaps the exuberant prosperity of many of our urban areas tends to exaggerate the plight of these areas of poverty and despair checkering the face of Florida. In terms of basic human values, however, a state is never any richer than its poorest county. So long as these areas suffer economic decline, they constitute a serious drain on the financial resources of state and local government, undermine the local tax base and result in a serious wastage of manpower.[10]

INDUSTRIAL DEVELOPMENT DEVICES

Florida's economic distortion is not a new problem. Efforts to combat it have run the full cycle of governmental techniques normally utilized by states to preserve a balanced economy and maintain full employment.

Direct Subsidy

During the thirty years following achievement of statehood in 1845, Florida pursued a course of direct public subsidy of private

6. FLORIDA DEVELOPMENT COMMISSION, BUSINESS RESEARCH REPORT NO. 122, FLORIDA'S NEW INDUSTRIAL PLANTS 7 (1960).

7. See U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION, vol. 1, pt. A, ch. 11-11, table 6 (1960). See generally BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, STATE ECONOMIC STUDIES NO. 13, STATISTICS OF PERSONAL INCOME, POPULATION, CONSTRUCTION, BUSINESSES & MANUFACTURING FOR FLORIDA COUNTIES 75 (1961).

8. FLORIDA DEVELOPMENT COMMISSION, OVERALL ECONOMIC DEVELOPMENT PROGRAM, NORTHWEST FLORIDA AREA (AREA A) (Aug. 1961), SUWANNEE RIVER AREA (AREA B) (Aug. 1961).

9. FLORIDA DEVELOPMENT COMMISSION, ECONOMIC STUDY OF RURAL AREAS OF FLORIDA, AREA I-XI (1958).

10. *E.g.*, State welfare payments in Clay County, Florida were running at an annual level of $250,000 as of the close of 1961. See FLORIDA DEPARTMENT OF PUBLIC WELFARE, PUBLIC WELFARE NEWS, ANNUAL STATISTICAL REPORT (1962).

enterprise. Early attempts were made to develop the state economically and spur internal improvement by means of gifts of land, grants of monopolistic franchises and liberal extension of the public credit.[11] Public subsidy later reached an evil flowering during the post-Civil War "reconstruction" years. Many techniques were used to give governmental financial backing to railroads, banks and other commercial institutions, including direct purchases of stocks and bonds from such private enterprises by counties and municipalities as well as the state itself.[12] Many of the private ventures thus supported were unconscionably speculative from the standpoint of normal business prudence; when they failed, the governmental units were left responsible for debts recklessly incurred. Ultimately, the obligations fell upon the taxpayers. Public indignation following the collapse of the reconstruction promotional bubble produced, in 1875, an amendment to the Florida Constitution of 1868. This amendment, now section 10 of article IX,[13] marked the close of the era of direct governmental subsidy by forbidding the engagement of the state and its counties and municipalities, directly or indirectly, in commercial enterprises for profit.[14]

Tax Exemptions

In 1930 the constitution was further amended to provide a tax inducement for the establishment of a wide range of industries.[15] The amendment directed its appeal to firms engaged primarily in manufacturing steel vessels, pulp and paper products, textiles, aircraft, glass and metal containers, sugar and oil refining, and all by-products incident to the designated categories. For a period of fifteen years from the beginning of operations, qualifying industries were exempted from all taxation by state and local authorities. The Florida Supreme Court held that the term "all taxation" applied not only to ad valorem property taxes at all levels, but also to excise

11. 2 DOVELL, FLORIDA, ch. XIV (1952); HANNA, FLORIDA — LAND OF CHANGE, ch. XVI (2d ed. 1948). See Railroad Companies v. Schutte, 103 U.S. 118 (1880); Holland v. State, 15 Fla. 455 (1876).

12. See Bailey v. City of Tampa, 92 Fla. 1030, 111 So. 119 (1926).

13. FLA. CONST. art. IX, §10: "Credit of the state not to be pledged or loaned. — The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual."

14. Bailey v. City of Tampa, *supra* note 12, at 120.

15. FLA. CONST. art. IX, §12.

taxes, such as license and privilege taxes, of every character.[16] Before this constitutional tax incentive expired by its own terms in 1948, an important segment of Florida's basic manufacturing structure had taken shape. The granting of this constitutional tax exemption in the period of the Great Depression perhaps signifies something less than a full retreat from the spirit of the amendment of 1875. But only a special reverence for form can conceal the substantive brotherhood of direct governmental subsidies and tax relief. The 1930 tax concession amendment constituted a highly questionable means of stimulating industrial immigration. It not only discriminated against established industry by denial of the advantage; in effect it required old enterprise to contribute to the development of competitive new enterprise.[17] Florida's consumer-oriented tax structure has perhaps mooted this issue by providing built-in benefits for both old and new industry. Current state taxes falling directly on business and industry have been estimated to be but nine per cent of the state's total tax revenue, compared to the national average of twenty per cent.[18]

Centralized Promotion and Advertising

To compete effectively for new industrial facilities, many states have established centralized, professionally staffed organizations with generous resources. The Florida Development Commission was created in 1955 to consolidate and expand promotional efforts "into one unified, hard-hitting team."[19] The legislature charged the commission with the duty "to guide, stimulate and promote the coordinated, efficient and beneficial development of the State . . . ."[20] Since 1955, Florida has budgeted in excess of $22 million for this agency. These funds have been expended primarily for national advertising and direct promotion of agriculture, tourism and industrial development.[21]

Development Credit Corporations

As developed in the New England states, the prototypal development credit corporation pools loan funds advanced by member

16. American Can Co. v. City of Tampa, 152 Fla. 798, 14 So. 2d 203 (1943).

17. See Note, *Effect of State & Local Taxes on Industry*, 11 MIAMI L.Q. 159 (1957).

18. FLORIDA DEVELOPMENT COMMISSION, FLORIDA TAXES AS THEY AFFECT BUSINESS AND INDUSTRY (1959).

19. FLA. H.R. JOUR., p. 7 (1955) (Governor's message to 1955 legislature).

20. FLA. STAT. §288.03 (1961).

21. Fla. Laws 1955, ch. 29966 ($3,071,808); Fla. Laws 1957, ch. 57-424 ($5,767,000); Fla. Laws 1959, ch. 59-500 ($5,307,377); Fla. Laws 1961, ch. 61-40, §§1, 2, 9, 10 ($7,467,976).

financial institutions with those obtained from the sale of stock, to supply capital to new industry.[22] The device involves no resort to governmental credit or subsidy, and the corporation may make no loan that a member organization is willing to make. Legislation authorizing the establishment of development credit corporations was passed by the 1955 Florida legislature,[23] but was promptly repealed prior to implementation by the second extraordinary session in 1956.[24] The causes of this early abortion are not disclosed by official records. The Governor's message to the extraordinary session states simply: "Experience with this law has shown that while the principle of it is sound the Act contains some fundamental weaknesses, and the use thereof may result in injurious consequences."[25] A guess may be hazarded that the "fundamental weaknesses" cited by the Governor referred to section 11 of the act. That section exempted development credit corporations from compliance with the state uniform sale of securities law,[26] and was perhaps feared to have opened a door to fraudulent stock promotions.

Industrial Development Corporations

The 1961 Florida legislature provided enabling legislation for the organization of industrial development corporations.[27] Essentially, such an organization is a private corporate instrument by means of which member banking institutions and individual financiers combine and accumulate resources to make low-cost, long-term loans to industries unable to obtain capital funds through normal commercial channels. The Secretary of State cannot approve the charter for such a corporation until a total of fifteen banks, savings and loan associations or insurance companies have agreed in writing to become members.[28] No loan may be approved unless it has been refused at least once in normal banking channels.[29] This stringent membership requirement and loan policy make it appear unlikely

22. See U.S. SMALL BUSINESS ADMINISTRATION, DEVELOPMENT CREDIT CORPORATIONS (1947); also, STATE GOVERNMENT MAGAZINE, DEVELOPMENT CREDIT CORPORATIONS (June 1956).

23. Fla. Laws 1955, ch. 29776, at 454; see 10 MIAMI L.Q. 309.

24. Fla. Laws 1956, 2d Ex. Sess., ch. 31388, at 41.

25. FLA. S. JOUR., p. 32 (2d Ex. Sess., 1956) (message from the Governor advocating repeal rather than reform due to insufficient time in special session for a properly considered amendment).

26. FLA. STAT. ch. 517 (1961).

27. FLA. STAT. §§289.011-.201 (1961). See West v. Industrial Dev. Bd., 206 Tenn. 154, 332 S.W.2d 201 (1960); Halbert v. Helena-West Helena Industrial Dev. Corp. 226 Ark. 620, 291 S.W.2d 802 (1956) (cases upholding similar legislation).

28. FLA. STAT. §289.021 (8) (1961).

29. FLA. STAT. §289.031 (3) (1961).

that the industrial development corporation will be a widely used or successful device to attract manufacturing industry to Florida. In fact, the sole corporation organized to date had to draw its members from throughout Florida.[30]

Governmental experiments in economic development activities have effectively accelerated Florida's rate of economic growth. It is this very success, however, that now threatens serious dislocations if reasonable balance is not maintained between the labor force and employment opportunities. The most critical problem at the present time resides in the state's relative shortage and maldistribution of manufacturing industry. The industrial development corporation may meet a definite need in a severely limited number of instances, but it is an inadequate response to the state's urgent problem of acquiring new manufacturing operations, where these are needed, with requisite speed.

All fifty states now have central economic development agencies[31] and extend some form of direct or indirect subsidy to maintain industrial stability and promote expansion.[32] No section of the country has completely escaped the maladjustments brought on by population explosions, changing industrial patterns, and technological innovations. The chronic labor surpluses of highly industrialized areas such as Pennsylvania and Illinois have evoked substantially the same

30. See Florida Times-Union, Sept. 9, 1961, p. 1B, col. 7 (relative to member-stockholders in the Fla. Indus. Dev. Corp.). A UPI news release appearing in Florida Times-Union, Sept. 1, 1962, p. 2B, col. 2, states that the Fla. Indus. Dev. Corp., since its inception, has made about $1 million available for loans to new industries which have provided jobs for between 1,000 and 2,000 persons. The writer was unable to verify this report prior to press time.

31. COUNCIL OF STATE GOVERNMENTS, 14 BOOK OF THE STATES 453 (1962).

32. See *Hearings Before the Senate Committee on Banking & Currency on the Development Corporations and Authorities*, 86th Cong., 1st Sess. (1959) [hereinafter cited as 1959 *Hearings*]; Hack, *Credit Corporations and Financing Authorities*, 130 INDUSTRIAL DEVELOPMENT AND MANUFACTURERS RECORD (May 1961). In addition to the ample appropriations provided all state promotion agencies, nine states have established industrial financing or building authorities which employ appropriated funds or the public credit to participate in or insure the financing necessary for the location of new industry. Twenty states have created development credit corporations which use public channels for amassing capital to purchase land and erect buildings for new industries. Nineteen states presently provide tax forgiveness or limited taxation for various periods in the case of new plants. Seventeen states authorize the use of bonds, either revenue or general obligation, to purchase sites or construct plants.

response as that induced by similar conditions in Mississippi and Alabama.[33] Taxpayers, the courts, and the business community have accepted — as a general proposition with some qualifications — the use of public funds to stimulate private industrial activity. Much of this common acceptance is probably attributable to the critical need to achieve economic redevelopment of distressed areas. Presently felt economic need has generally outweighed philosophical objections. The realities remain, whether the subsidization plan is characterized as practical and businesslike, as in Pennsylvania,[34] or as a socialistic displacement of private enterprise, as in Nebraska.[35] Here, as in other areas, when local solutions have been denied or have come too late, the people have leapfrogged local governments to secure programs of direct federal assistance.[36]

A New Technique: the Industrial Development Bond Plan

Seventeen states have sought to achieve an advantage in the interstate competition for new industry by fashioning a new technique — the industrial development bond plan.[37] Although individual plans vary in many important particulars, they are similar in basic design and effect. Ordinarily, local governmental units are empowered to acquire land and construct plants with funds derived from the issuance of bonds. The improved site is then leased to a manufacturer whose rental payments are used to retire the bonds. This enables the manufacturer to expand or relocate without diversion of productive capital. Rental payments are deductible under federal income tax laws

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33. *Ibid.*

34. 1959 *Hearings* 176.

35. State *ex rel.* Beck v. City of York, 164 Neb. 223, 228, 82 N.W.2d 269, 273 (1956).

36. See 75 Stat. 47, 42 U.S.C.A. §§2501-19 (1961) (area redevelopment program; providing federal assistance to communities, industries and enterprises to aid in economic redevelopment); 72 Stat. 384, 15 U.S.C. §§631-51 (1958) (authorizing loans and grants in aid of small business, thereby subsidizing a segment of private enterprise in the interest of maintaining free competition); 72 Stat. 689, 15 U.S.C. §§661-96 (1958) (Small Business Investment Act, program to stimulate and supplement the flow of private equity capital and long-term loan funds for small-business, including loans for plant construction, conversion and expansion).

37. Ala. Code tit. 37, §511 (20 to 32) (1959); Ark. Const. amend. 49; Ark. Stat. Ann. §§13-1601-14 (Supp. 1961); Colo. Rev. Stat. Ann. §§36-20-1-10 (Supp. 1960); Ga. Code Ann. §2-6005 (Supp. 1961) (seventeen Georgia counties have ratified "local" constitutional amendments authorizing county issuance of industrial aid bonds); Idaho Laws 1959, ch. 265 (declared unconstitutional in Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho Rep. 337, 353 P.2d 767 (1960); Ill. Ann. Stat. ch. 24, §§1211-24 (Smith-Hurd 1960); Ky. Rev. Stat. §§103.200-.280 (1959); La. Const. art. XIV §14(b)(2); Md. Const. art. III, §54 (ratified Nov. 8,

as an operating expense,[38] which means that costs of plant occupancy may be reduced from thirty to fifty-two per cent for a corporation or from twenty to ninety-one per cent for a sole proprietor or partnership. In addition, interest income derived from the bonds is ordinarily exempt from federal taxation.[39] Part of this savings may be passed on to the company in the form of low rental rates. By buying the bonds itself, moreover, the company may net tax savings both in terms of rent deductions and receipt of exempt interest income. It is possible that the industry may realize a net profit on its occupancy of the plant.[40]

States affording this type of financial incentive for industrial relocation and expansion have utilized general obligation bonds,[41] revenue bonds[42] or a combination of the two.[43] Industrial development bonds have been authorized by constitutional amendment,[44] legislation[45] or both.[46]

JUDICIAL RESPONSES TO THE PLAN

Of the seventeen states that have authorized industrial development bond programs, fourteen did so initially by statute[47] and three

1960); Md. Acts 1953, ch. 662, §103; MISS. CODE ANN. §§8936-46 (1957); MO. CONST. amend. 4; MO. ANN. STAT. §§71.790-.850 (Supp. 1961); NEB. CONST. art. XV, §16 (approved Nov. 1960), NEB. REV. STAT. §§18-1601-13 (1954) (declared unconstitutional in State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1956); N.M. STAT. ANN. §§14-14-31-43 (Supp. 1954); N.D. REV. CODE §§40-5701-18 (Supp. 1957); TENN. CODE ANN. §§6-2901-16 (Supp. 1960); VT. STAT. ANN. tit. 24, §§2701-14 (1959); WIS. STAT. §66.52 (1957) (revenue certificates may be issued to purchase plant sites and install utilities and highways, but not to construct buildings). The term "industrial development bond," adopted herein, refers to a special use of so-called "revenue bonds." Revenue bonds, payable only from the net proceeds of a particular self-liquidating project owned by the issuing agency, are to be distinguished from constitutional bonds which pledge the *ad valorem* taxing power of the issuing unit. See collection of cases and comments in 26 FLA. JUR. *Public Securities* §68 (1959).

38. INT. REV. CODE OF 1954, §103 (a) (1).

39. INT. REV. CODE OF 1954, §162 (a) (3).

40. *E.g.*, A public corporation issues revenue bonds for $500,000 at 4¾% for 30 years. Since the bonds are tax exempt, the first year's interest of $23,750 is tax free income to the manufacturer purchasing the bonds. Annual rent is $32,000, but after tax deduction it costs only $15,360. Subtracting out-of-pocket rent costs — $15,360 — from tax free interest — $23,750 — produces an in-pocket profit of $8,390.

41. MISS. CODE ANN. §§8936-46 (1957).

42. KY. REV. STAT. §§103.200-.280 (1959).

43. TENN. CODE ANN. §6-1703 (1956); TENN. CODE ANN. §6-2901 (Supp. 1960).

44. LA. CONST. art. XIV, §14 (b) (2).

45. ALA. CODE tit. 37, §511 (20 to 32) (1959).

46. ARK. CONST. amend. 49 ARK. STAT. ANN. §§13-1601-14 (Supp. 1961).

47. *Supra* note 37 (Ala., Ark., Colo., Idaho, Ill., Ky., Md., Miss., Neb., N.M.,

by constitutional amendment.[48] Not considering, for a moment, the special case of Florida, the highest courts in eight of the states making a statutory adoption have had opportunity to pass upon the constitutionality of the device. Six of these states affirmed the technique;[49] two invalidated it.[50] In Nebraska, one of the invalidating states, the people, in a five-to-two vote, have subsequently enacted a constitutional amendment approving industrial development bond financing.[51]

Eight decisions are perhaps too few to mark a definite trend. Yet this body of judicial reasoning has a special significance because the statutes in each case faced the same two constitutional hurdles. Without exception, but with some additions, the statutes were challenged as unconstitutional on the grounds that they (1) authorized expenditure of public funds for non-public purposes, and (2) appropriated public funds for, or pledged the public credit to, a private corporation. Constitutional prohibitions to similar effect exist in all states including Florida.

Florida is usually classified as a state disapproving industrial development bonds on the strength of *State v. Town of North Miami*.[52] This case was a proceeding brought by the town to validate a $400,000 revenue certificate issue designed to finance an aluminum manufacturing plant. The legislature had conferred no special or extraordinary powers on the town. It had been created and was acting under the general incorporation provisions of Florida law which empowered it to "take and hold property . . . and dispose of same for the benefit and best interest of the [municipal] corporation . . . and do all such other acts or things as are incident to corporate bodies."[53] The aluminum company agreed to rent the facility at a price calculated to retire the certificates over the twenty-year term of the lease. The company had the option to renew the lease for twenty-five years at a rental equal to the taxes that would be paid by the

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N.D., Tenn., Vt., Wis.).

48. *Supra* note 37 (Ga., La., Mo.).

49. Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952); Wayland v. Snapp, 334 S.W.2d 633 (Ark. 1960); Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950); City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956) (public corporation with a $15 million industrial development bonding power purchased a California tool and drill company and moved it to New Mexico, financing the deal with a $1.9 million revenue bond issue); Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951). See generally Note, *Financing Industrial Development in the South*, 14 VAND. L. REV. 621 (1961).

50. Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1956).

51. NEB. CONST. art. XV, §16.

52. 59 So. 2d 779 (Fla. 1952).

53. FLA. STAT. §165.08 (1961).

plant if privately owned, or purchase the plant in fee simple at any time by paying an amount sufficient to retire outstanding bonds plus $1,000. In contesting validation, the state asserted a general lack of issuing authority on the part of the town, the absence of a public purpose and an unconstitutional pledging of the town's credit. The court sustained each challenge, holding the lease and the proposed certificates of indebtedness void as not having a public purpose and as an unconstitutional lending of credit.

No statute expressly authorizing industrial development bonds was at issue in the *Town of North Miami* case. The town attempted to act under its general powers. The decision is therefore distinguishable from cases dealing with specific industrial development bond statutes. However, the Florida court commented on this distinction in the following words:[54]

> "We have called particular attention to the fact that in the cases cited [cases reaching an opposite result] . . . there was a specific legislative determination that the purpose was . . . public . . . . By so doing, we do not mean to hold or imply that had there been such a legislative determination, the certificates of indebtedness would have been valid. There are certain limits beyond which the Legislature cannot go."

Because *Town of North Miami* provided the principal legal support for striking down specific statutes in Nebraska and Idaho, and was given recognition in the Florida county development cases analyzed subsequently, the case should be studied as an important link in the chain of precedents.

The Dialogue of Economic Development

The legal issues presented by industrial development bonds find their natural environment in the surrounding political and economic controversy.[55] The clash of strongly held convictions often creates a highly charged atmosphere poorly suited to calm and objective analysis. Proponents of industrial development bonds are impatient with the slow pace at which the self-corrective procedures of the free enterprise system operate. They are confident that man-made devices can accelerate the changes necessary to relieve immediate economic distress. And to this end they consider it natural and proper to seek solutions to local economic problems through local

54. State v. Town of North Miami, *supra* note 52, at 785.

55. See generally Committee for Economic Development, Distressed Areas in a Growing Economy (1961).

governmental agencies. Opponents of industrial development bonds regard as perilous any tampering with the normal functioning of the free enterprise process. They contend that the system is self-adjusting — labor tends to migrate out of depressed areas and new industry moves toward surplus labor pools. Proponents of industrial development bonds cite the non-occurrence of this theoretical readjustment over the past several decades. They maintain that worker migration has been retarded by deep emotional ties with families and friends, investment in a home, exhaustion of personal savings, and lack of training for new occupations. It is said, moreover, that industrial mobility is discouraged by related factors which cause depressed areas to lose their locational attractiveness for new industry. Declining tax bases and rising welfare burdens curtail basic public services and adversely affect municipal and school system budgets. Ultimately, it is claimed, these factors induce an attitude of despair which inhibits constructive action and further frustrates the theoretical economic readjustment which the free enterprise system relies upon.

The courtroom debate focuses upon two questions of constitutional law. First, does the program possess a public purpose? And second, does the program constitute a constitutionally invalid lending or pledging of the public credit? Although conceptually distinct from issues of economic soundness and desirability, the broad legal categories of "public purpose" and "public credit" inevitably take their specific shape and meaning to some unmeasurable extent from the more tangible content of the economic issues.

The Legal Issues

The doctrine of public purpose is a generally recognized limitation on the activities of municipalities and other public corporations. The courts, however, have not defined its precise content and extent.[56] In some states it derives from specific constitutional provisions;[57] in others, such as Florida, it is an inherent restriction on the power of governments "implied from organic law."[58] A "reasonable belief" that the general public will benefit indirectly from gain or advantage conferred upon a particular individual or group is ordinarily insufficient to support a finding of public purpose.[59] However,

56. See 64 C.J.S. *Municipal Corporations* §1987 (1950); Note, 59 COLUM. L. REV. 618 (1959).

57. *E.g.*, N.C. CONST. art. V, §3.

58. FLA. CONST. art. IX, §5: "Taxes for county and municipal purposes. — The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes . . . ." See Ops. Atty. Gen. 058-258 (1958).

59. 37 AM. JUR. *Municipal Corporations* §119 (1941).

the concept of public purpose has radically expanded with changing conditions of society. Activities such as transportation, communication and power generation, about the private nature of which there once existed no doubt, have now achieved universally recognized public purpose status. In Florida, as in most states, the existence of a public purpose is to be determined as of the time the constitution is construed rather than in terms of what was so considered at the time of its adoption.[60] The Florida Supreme Court has announced that the nature of public purpose is not static and that "each generation may determine its concept of these things."[61]

It is uniformly agreed that the determination of what constitutes a public purpose is primarily a legislative function.[62] Disagreement arises, however, as to the proper scope of judicial review of legislative findings. Florida courts view the legislature's determinations of public purpose as merely persuasive, not conclusive.[63] States that have validated industrial development bond legislation appear to take the general position that the judiciary may properly upset a legislative finding of public purpose only when reasonable men could not differ as to the lack of social utility.[64]

The validating states use several routes to reach the conclusion that industrial development bond programs possess a public purpose. A program may be judged by its ultimate objective, such as relief of unemployment, rather than on the basis of an intermediate step such as the construction of a plant for lease to a private corporation.[65] Or the private aspects of the venture may be viewed as

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60. City of Fernandina v. State, 143 Fla. 802, 197 So. 454 (1940). The Florida Supreme Court held that when the city had incurred an indebtedness for the purpose of attracting industry, the interpretation of "municipal purpose" should be extended to accommodate such an expenditure since attention to economic welfare was "one of the main concerns of the modern city." *Id.* at 804, 197 So. at 456.

61. State v. City of Tallahassee, 142 Fla. 476, 195 So. 402 (1940); see State v. City of Jacksonville, 50 So. 2d 532 (Fla. 1951) (holding that a municipal purpose may comprehend all activities essential to health, morals, protection and welfare of the municipality).

62. 37 AM. JUR. *Municipal Corporations* §120 (1941); 23 FLA. JUR. *Municipal Corporations* §70 (1959).

63. State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952); *cf.* State v. Monroe County, 148 Fla. 111, 3 So. 2d 754 (1941).

64. See, *e.g.*, Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952); Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 804, 115 A.L.R. 1436, *dismissed for want of a substantial federal question*, 303 U.S. 627 (1938); also, Carmichael v. Southern Coke & Coal Co., 301 U.S. 495 (1937) (wherein the Supreme Court says at page 515: "[I]t would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.").

65. Wayland v. Snapp, 334 S.W.2d 633 (Ark. 1960) (public corporation proposed to issue $1,000,000 in industrial aid bonds to erect manufacturing facility

merely incidental to the project's primary public character.[66] Other courts have found that the legislature has power to determine conclusively the question of public purpose,[67] or that the program represents a permissive exercise of a public corporation's "proprietary" powers.[68] At least one court has invoked the constitutional law doctrine that a legislative enactment perhaps unconstitutional under one set of facts may be constitutional in other circumstances, for example, in an employment crisis.[69] The Maryland Court of Appeals, even in the absence of a specific legislative finding of public purpose, expressed a willingness to take judicial notice that a public purpose existed.[70]

In Florida,[71] Nebraska and Idaho, the three states whose highest courts have invalidated industrial development bonds, the asserted lack of valid public purpose has in each case provided one important ground for the determination of invalidity. These courts refuse to look beyond the fact that an industrial plant is to be financed, built and owned by a public corporation, and leased to a private enterprise. A determination that the project serves a primarily private purpose seems logically to follow. This conclusion is apparently reached even in Florida, a state which otherwise has a relatively high tolerance for the incidental private benefits that commonly flow from public projects.[72] The Florida Court has stated the case against the public

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for lease to the Sieberling Rubber Co.).

66. Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951) (public corporation sought to validate $4,000,000 issue to be used to construct an industrial plant for lease to Textron, Inc., (formerly Texas Instruments, Inc.)).

67. Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952) (public corporation proposed issuance of $1,300,000 in industrial aid bonds to finance an extraction plant for Gulf Naval Stores, Inc.).

68. Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950) (public corporation sought to validate $300,000 revenue bond issue to build a plant for the General Shoe Corp.). *Cf.* Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956).

69. McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958) (public corporation proposed issuance of $350,000 to construct manufacturing facility for Hartmann Luggage Co.).

70. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957) (public corporation attempted issuance of $100,000 to finance manufacturing plant for the Cumberland Undergarment Co.). The declared intent of the Maryland statute was simply "to encourage industrial development." It contained no legislative finding of economic distress or urgent public need.

71. The erratic development of pertinent Florida case law subsequent to the *Town of North Miami* decision and finally culminating in the invalidation of a $500,000 bond issue in State v. Clay County Development Authority, 140 So. 2d 576 (1962), is treated in the later discussion of "Florida's County Development Authorities."

72. See cases cited in State v. Town of North Miami, *supra* note 52; Note, *Developments in Revenue Bond Financing* 6 U. FLA. L. REV. 385 (1953).

purpose nature of industrial development as follows:[73]

> "Every new . . . manufacturing plant . . . which may be established in a municipality will be of some benefit to the municipality. A new supermarket . . . a new meat market, a steel mill, a crate manufacturing plant . . . may be of material benefit to the growth, progress, development and prosperity of a municipality. But these considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose."

The highest courts of Nebraska[74] and Idaho,[75] in striking down state statutes expressly authorizing industrial development bonds, have quoted with approval this language of the Florida Supreme Court. In these states the judicial eye focuses narrowly on the specific project, which is held to lack a public purpose without regard for considerations later in time than plant construction.

Within this restricted view, a corner meat market and a new manufacturing plant both appear to fit neatly into the legal categories of private enterprise and private purpose. But the practical economic distinction between the two kinds of private enterprise is a vital one. It is the difference between mere recirculation of the supply of money already available in the local economy and the injection of new sources of income. An operating industry falls into the limited category of primary wealth generators. Retail trade, indeed the community itself, is dependent upon the presence and successful functioning of such basic income-spawning facilities. If it is indeed true that "each generation may determine its concept of these things," it would not seem that there is any inherent constitutional bar to a broader concept of public purpose more compatible with economic realities and the urgent needs of many local communities. The six validating states have demonstrated this.

The broad provisions found in every state constitution which forbid the extension of public aid or credit to private industry lend themselves to flexible interpretation.[76] Consequently, when courts deny the public purpose nature of industrial financing they seldom

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73. State v. Town of North Miami, *supra* note 52, at 784-85.

74. State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1956) (public corporation proposed to issue bonds to purchase a *completed* cold storage and packing plant to be leased to the same private corporation which had built the facility).

75. Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960) (public corporation proposed a $10,000,000 issue to finance a plant for an unidentified manufacturer).

76. See Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 618 (1959).

find it difficult to discover that there is also an invalid appropriation of funds or loan of credit. Florida reaches this conclusion on the basis that industrial development bond proceeds are "public moneys."[77] Nebraska has held that the use of a public corporation's "name" constitutes an invalidating loan of the public credit.[78] Both of these states and Idaho[79] consider that the public credit, though not formally pledged, is indirectly involved in industrial development bonds because the public corporation, in order to protect its credit rating, would be forced to make good any default out of tax revenues.

It is settled doctrine in most jurisdictions, however, that bonds payable solely from a special fund, such as revenues derived from the operation of projects purchased with the proceeds, are neither general obligations of the issuing body, nor payable from general resources raised by taxation, and that no indebtedness is created within the meaning of the constitutional credit clause.[80] Courts affirming the validity of industrial development bonds take this orthodox position. The dissenting view seemingly limits this doctrine to bonds issued for what are conceived to be public purposes. It is agreed that the bondholder is limited by his contract to a right against the revenues of the project, but it is claimed that the public issuing agency might accrue broader liability in two ways. First, it is said that the issuing agency may be held liable if default can be traced to negligence, misrepresentation or breach of trust. Second, it is insisted that default would adversely affect the credit of the public borrower, and higher taxes might be needed to pay the increased interest charge on other funds borrowed for legitimate purposes.[81] These are, at best, highly speculative arguments which ignore the fact that similar consequences may attach to revenue bonds issued for any purpose, and which grossly underestimate the skill of legal draftsmen, the cautious procedures of the bond market and the sophistication of purchasers. Realistically, the modern bond buyers who purchase industrial development bonds do not place their reliance on the possibility of perfecting a tenuous negligence claim.

The Economic Policy Context

Two basic policy arguments are commonly leveled against industrial development bond programs:

77. State v. Town of North Miami, *supra* note 52, at 785.

78. *Supra* note 74, at 227.

79. *Supra* note 75, at 772.

80. See 43 AM. JUR. *Municipal Corporations* §85 (1942); 26 FLA. JUR. *Municipal Corporations* §27 (1959); FLA. STAT. §159.04 (1961); *accord,* Sunshine Constr. Inc. v. Board of Comm'rs 54 So. 2d 524 (Fla. 1951).

81. See Note, *Incentives to Industrial Relocation: Municipal Bond Plans,* 66

(1) Public assistance to industrial development represents unsound economics which neither appeals to responsible manufacturers nor represents a long-term solution for the distressed community.

(2) Public assistance contravenes and imperils the free enterprise system.

Economic Soundness and Feasibility. The economic effectiveness of public incentives in stimulating industrial development has been scientifically established. Conservative economic studies indicate that ten new manufacturing jobs create about eight new service jobs in the average city, and that manufacturing payrolls generate new business in a volume of 2½ to 3¼ times the actual payroll.[82] In what is perhaps the most thorough analysis of its type, the quantitative impact of 100 new industrial jobs was measured in nine sample communities isolated by valid statistical techniques.[83] The findings shed important light on some of the economic effects of industrialization:

One Hundred New Factory Jobs Mean:

296	more people
$590,000	more personal income per year
$270,000	more bank deposits
112	more households
51	more school children
107	more passenger cars registered
174	more workers employed
4	more retail establishments
$360,000	more retail sales per year

Other authoritative studies have shown the profitability of public aid for industrial development. Figures derived from 130 industrial promotions in forty Wisconsin cities reflect a ratio of payrolls acquired to assistance given of approximately forty-to-one — an average return on investment of 1,000 per cent per year.[84] The documented story of Herrin, Illinois provides another striking example.[85] Since

HARV. L. REV. 898, 902, 908 (1953); Note, 14 VAND. L. REV. 621, 623 (1961); also. Fordham, *Revenue Bond Sanctions*, 42 COLUM. L. REV. 395 (1942).

82. YASSEEN, PLANT LOCATION 174, 175 (1950).

83. CHAMBER OF COMMERCE OF THE U.S., ECONOMIC RESEARCH DEP'T., WHAT NEW INDUSTRIAL JOBS MEAN TO A COMMUNITY (1959).

84. Knight, *Subsidization of Industry in Forty Selected Cities in Wisconsin, 1930-1946*, 1 WISCONSIN COMMERCE STUDIES 173-79 (1947). See also Hopkins, *Mississippi's BAWI Plan, An Experiment in Industrial Subsidization* (1944).

85. 1959 *Hearings* 218-29.

1942, five new industries have been attracted to that city by means of governmental subsidy. In 1959, these firms employed approximately 5,000 persons; their aggregate payroll for that year exceeded $7 million. The price paid for this payroll amounted to a $12 donation plus the extension of a $72 low interest loan for each of Herrin's 9,300 citizens. Considering only the donations, the direct return on investment was in excess of 6,000 per cent per year, meaning that the community earned its investment back five times per month. If the loans and donations are combined, the annual return still exceeds 900 per cent. It is manifest that the public investment in aid of industry in these instances has been dwarfed by the returns to the community. Equally manifest is the public nature of governmental assistance to industrial development when, as in these examples, it converts eked-out misery to stable employment and prosperity.

Additional justification for public inducements is found in the changed conditions which have shifted the initiative in industrial development from its exclusive perch on the shoulders of companies desiring to expand. Like it or not, states and communities must meet the competition by seeking out industrial opportunities and influencing locational decisions. Furthermore, many enterprises will not tie up their capital in bricks and mortar when an alternative is available. A leading authority in this area concludes that "this is true of large companies as well as small ones, of old established firms as well as fledgling industries."[86]

There is little truth in the frequently heard argument that a sound and desirable industry needs no governmental assistance.[87] The record shows that stable corporations of national prominence have permitted site selections to be determined by the artificial incentive afforded by industrial bond plans.[88] A community whose public welfare demands greater employment opportunities and new wealth generators may be not only justified but duty bound to take all reasonable steps to secure its future. In many cases the survival of the community is at stake. At the same time, a prospective industry, although not in need of public assistance in the sense that its

86. *Supra* note 82, at 177.

87. *E.g.*, transcript of Governor's press conference, Tallahassee, Fla., March 8, 1962; Tampa Tribune, March 12, 1962, p. 12-A, cols. 1-2.

88. *E.g.*, Armour & Co. ($25,000,000), Fruehauf Trailer Co. ($2,800,000), Minnesota Mining & Mfg. Co. ($275,000), Tennessee Packers, Inc. ($1,800,000), ALA. STATE PLANNING AND INDUSTRIAL DEV. BD., PARTIAL LIST OF INDUSTRIAL BOND ISSUES (Jan. 18, 1962); Ohio Rubber Co., Sieberling Rubber Co., Norge Division of Borg-Warner, The Crane Co., American Greeting Card Co., ARK. INDUSTRIAL DEV. COMM'N, NEW AND EXPANDED INDUSTRIES (July 1960-June 1961); Rand McNally & Co. ($3,600,000), General Tire & Rubber ($9,500,000), Emerson Elec. Mfg. Co.,

existence depends on it, may require assistance as a condition for its establishment in a particular location if without such aid its net investment and costs would be lower elsewhere.[89]

Numerous specific social objectives have been cited in justification of industrial development bond plans. Among these are: provision of a market for milk output, which is determined to affect the economic welfare of the people of an entire parish;[90] relief of unemployment;[91] discouragement of emigration of youth and improvement of business conditions;[92] reduction of widespread unemployment and promotion of agriculture;[93] furnishing employment and measurably increasing the resources of a community and its financial well-being;[94] bolstering a sagging economy, improving public economic welfare and *inspiring new hope*.[95]

Compatibility with Free Enterprise. Industrial development bond programs have been condemned as socialistic governmental intervention,[96] as the death blow to private enterprise,[97] and as entirely foreign to a proper concept of our constitutional system.[98] Free enterprise, however, has always been an evolving concept.[99] Moreover, free enterprise as practiced throughout American history reveals that the invocation of the concept against industrial development bond programs is inapt.

($2,450,000), General Shoe Corp. ($770,000), KY. DEP'T OF ECON. DEV., INDUSTRIAL FINANCING IN KENTUCKY (1962); Textron, Inc. ($6,000,000), Monadnock Paper Mills ($20,000,000), RCA Rubber Co. ($1,000,000), Magnavox Co., Division of General Dynamics ($2,000,000), Hat Corp. of America ($1,500,000), TENN. DEP'T OF CONSERVATION, DIV. OF INDUSTRIAL DEV., REVENUE BONDS, 1951-1960. *But see,* Wall Street Journal, March 2, 1962, p. 1, col. 1, for contrary examples of costly mistakes by some communities acting rashly under the pressure of dire economic circumstances.

89. MOES, LOCAL SUBSIDIES FOR INDUSTRY (1961); Robock, *Industrialization and Economic Progress in the Southeast*, 20 So. ECON. J. 319-20 (1954).

90. Miller v. Police Jury, 226 La. 8, 74 So. 2d 394 (1954).

91. Albritton v. City of Winona, *supra* note 64.

92. Faulconer v. City of Danville, *supra* note 68.

93. Wayland v. Snapp, *supra* note 65.

94. Holly v. City of Elizabethton, *supra* note 66.

95. Village of Deming v. Hosdreg, *supra* note 49; see relative to text at notes 90-94, Note, *The "Public Purpose" of Municipal Financing for Industrial Development*, 70 YALE L. REV. 789 (1961).

96. Village of Moyie Springs v. Aurora Mfg. Co., *supra* note 50, at 775.

97. State *ex rel.* Beck v. City of York, *supra* note 50, at 231.

98. State v. Town of North Miami, *supra* note 52, at 785; *But cf.*, Saunders v. City of Jacksonville, 157 Fla. 240, 25 So. 2d 648 (1946); Gwin v. City of Tallahassee, 132 So. 2d 273 (Fla. 1961) (cases in which the Florida Court appears to reject identical free enterprise arguments and license competition against privately-owned, tax-paying public utility companies by tax-exempt, municipal generating plants).

99. See generally ARNOLD, THE FOLKLORE OF CAPITALISM (1937); DIMOCK, FREE

The framers of the United States Constitution took for granted the legitimacy of state economic action. As Madison wrote in the forty-fifth *Federalist*, "The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and property of the people, and the internal order, improvement and prosperity of the State."[100]

Recent research has shown that state governments played an active role in promoting economic development from the Revolution to the Civil War.[101] The economic philosophy of the times was dominated by the *laissez-faire* ideas of Adam Smith but there was wide disparity between the economic principles practiced and those professed. State government was expected to function as a positive instrument for the common good, and its participation in the promotion of commerce was accepted as a natural part of the contemporary definition of free enterprise.

The ante-bellum free enterprise philosophy of the states was summarized by the Supreme Court of Pennsylvania in the *Sharpless* case.[102] In an opinion upholding a public corporation's investment in railroad construction as authorized by the legislature, Chief Justice Black wrote:[103]

> "It is grave error to suppose that the duty of a state stops with the establishment of those institutions which are necessary to the existence of government: such as those for the administration of justice, the preservation of the peace . . . . [T]o aid, encourage, and stimulate commerce, domestic and foreign, is a duty of the sovereign as plain and as universally recognized as any other."

By a strange irony of legal history, a dictum[104] in the *Sharpless* case first enunciated the public purpose doctrine which some courts have later used to strike down industrial development bond projects.

Hamilton's *Report on Manufacturers* depicted a role for government intervention that differs markedly from the half-accurate gen-

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ENTERPRISE AND THE ADMINISTRATIVE STATE (1951).

100. THE FEDERALIST No. 45 (Madison).

101. HANLIN, COMMONWEALTH, A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 (1947); HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA 1776-1860 (1948); HEATH, CONSTRUCTIVE LIBERALISM, ROLE OF THE STATE IN ECONOMIC DEVELOPMENT IN GEORGIA TO 1860 (1954); PRIMM, ECONOMIC POLICY IN THE DEVELOPMENT OF A WESTERN STATE, MISSOURI 1820-1860 (1954).

102. Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853).

103. *Id.* at 182.

104. "Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with public interests or welfare, it

eralizations about economic individualism sometimes attributed to the founding fathers.[105] A young and struggling nation needed industrial balance and self-sufficiency. Written in 1791, and in present use as a textbook for nations which have sought to develop manufacturing industry through government participation, the *Report* ultimately recommended the indirect subsidy of a protective tariff to encourage new manufacturing. Hamilton also expressed the view, however, that an open bounty or direct subsidy might be preferable. He assumed the logical position that a community must first have enterprise before the private versus public argument becomes meaningful. He asserted that public participation in economic development actually increases opportunities for private entrepreneurs. America probably owes much of her commercial growth to this practical principle of expediency.

The "New South" of post World War II is in many respects not unlike the new nation of 1791. For this reason alone it should come as no surprise to discover that nine of the seventeen state legislatures which have to date authorized industrial development bonds are in the southern region.[106] The emerging South, like young America, is rich in human potential and natural resources, but short on investment capital, technical know-how, and skilled labor. Both societies resorted to public assistance to nourish the development of an industrial base.

The meaning of free enterprise has changed over the years in response to the will of the majority. Perhaps the most constant characteristic of the American free enterprise system as it has in fact functioned in 1800, 1900, and 1960, is the ever-present fact of public assistance to private business enterprise in the form of tariffs, subsidies, services, and direct aids to particular groups.[107] Reluctance to recognize this fact — to separate the reality of America's pragmatic economic tradition from the nostalgic myth of pure commercial competition — may account for some of the hostile reactions to industrial development bond programs.

Florida's County Development Authorities

Clay County, Florida, presents a classic example of a declining local economy. Economic activity has sunk to a level comparable to

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ceases to be taxation, and becomes plunder." *Id.* at 169.

105. 3 J. Hamilton, Works of Alexander Hamilton 246-51 (1850).

106. *Supra* note 37, (Ala., Ark., Ga., Ky., La., Md., Miss., Mo., Tenn.).

107. See, *e.g.*, Fainsod, Government and the American Economy, 93-126, 915-26 (3d ed. 1959); Wilcox, Public Policies Towards Business, chs. 1, 29, 32. (rev. ed. 1960); Corson, *More Government in Business*, 39 Harv. Bus. Rev. (1961).

that which paralyzed all Florida during the thirties. The county's total personal income dwindled seven per cent, and per capita income nine per cent, between 1959 and 1960. Since 1950, Clay County's per capita personal income, despite heavy emigration, has increased less than four per cent while the increase of per capita income for the state as a whole in the same period has exceeded fifty-one per cent.[108] Within the past eighteen months, two industrial mainstays of the Clay County economy have collapsed. The North Atlantic "mothball fleet" at Green Cove Springs is being rapidly disbanded in a national defense realignment. Burlington Hosiery Mills, with a peak employment of 300, has closed its plant. A third basic county enterprise has begun its fade-out from the local scene with the announcement by Emory University that the Yerkes Laboratory for Primate Biology is to be relocated.

Clay County's response to present and impending financial disasters and to the fact that it has been by-passed in the state's great post-war growth and expansion furnished the creative impulse behind Florida's first county development authority. Legislation creating the authority charged it with the duty of "performing such acts as shall be necessary for the sound planning for, and development of Clay County for the public good and welfare of the County."[109] The authority is empowered to undertake projects including "the acquisition of lands, properties, and improvements for development, expansion and promotion of industry, commerce, agriculture, natural resources and vocational training and the construction of buildings and plants for the purpose of selling, leasing or renting such structures to private persons, firms or corporations."[110] The authority has further power to lease or purchase real property, to construct improvements thereon and to pay the cost thereof by the issuance of *revenue anticipation certificates* or by the use of other funds.[111]

Some twenty other Florida counties have legislatively established development authorities through provisions closely similar or identical to those of the Clay County Act.[112]

But see, WALLICH, THE COST OF FREEDOM: A NEW LOOK AT CAPITALISM 178 (1960) (advocating the "sink or swim" variety of economic Darwinism in spite of some sacrifice in terms of equality of income, productivity and growth).

108. BUREAU OF ECONOMIC & BUSINESS RESEARCH, UNIVERSITY OF FLA., 21 ECON. LEAFLETS No. 2, *Personal Income Received in Florida Counties* (Feb. 1962).

109. Fla. Laws Spec. Acts 1957, ch. 57-1226, §12.

110. Fla. Laws Spec. Acts 1957, ch. 57-1226, §2.

111. Fla. Laws Spec. Acts 1957, ch. 57-1226, §2 (7).

112. Fla. Laws Spec. Acts 1957, ch. 57-1129 (Baker Cty.); Fla. Laws Spec. Acts 1959, ch. 59-1308 (Gilchrist Cty.), ch. 59-1322 (Hamilton Cty.), ch. 59-1429 (Jefferson Cty.), ch. 59-1460 (Lafayette Cty.), ch. 59-1506 (Liberty Cty.), ch. 59-1529 (Madison Cty.), ch. 59-1629 (Okaloosa Cty.), ch. 59-1903 (Suwannee Cty.), ch.

Consistency with Florida Precedents

Architects of the county development authorities were mindful of applicable national and Florida precedents. The public corporations created possessed few of the normal attributes of local government.[113] Several features were incorporated to mitigate the impact of the *State v. Town of North Miami* decision. In particular, a specific legislative determination was expressed that the operation of the authorities would serve a public purpose. Since the authorities were granted no taxing power, there could be no argument that a levy could be compelled either directly or indirectly. Special precautions were taken to insure that no action of the authorities could create public indebtedness. The authorities are specifically denied any such ability in their own behalf, or in behalf of any local municipality or the county itself.[111] Furthermore, the issuance of bonds must be in accordance with the State Revenue Bond Act of 1953[115] which contains a similar disclaimer of power to incur public indebtedness.

The draftsmen also sought to restrict the authorities' activities in conformance with approved public objectives recognized by the Florida Supreme Court on numerous occasions both before and after the *Town of North Miami* decision. The court has frequently ruled that if a valid public purpose is served by a proposed bond project, the fact that a private interest is "incidentally" benefited does not invalidate the issue. For example, it was held in *State v. Inter-American Center Authority*[116] that bonds could be issued for the purpose of furthering inter-American trade and construction of a cultural center. A portion of the center was to be leased to private enterprise, but the court validated the obligations on grounds that the project itself had a public purpose. In *State v. Daytona Beach Racing and Recreational Facilities District*,[117] the court held that the district could issue certificates to construct racing and recreational facilities to be leased to private enterprise six months of each year for a period of forty years. The court said:[118]

59-1927 (Taylor Cty.), ch. 59-1939 (Union Cty.), ch. 59-1961 (Walton Cty.), ch. 59-1964 (Washington Cty.); Fla. Laws Spec. Acts 1961, ch. 61-1894 (Bradford Cty.), ch. 61-2270 (Holmes Cty.), ch. 61-2285 (Jackson Cty.), ch. 61-2373 (Lake Cty.), ch. 61-2727 (Putnam Cty.), ch. 61-2982 (Wakulla Cty.).

113. *E.g.*, The County Development Authority, unlike the typical municipal corporation, possesses (1) no taxing power, (2) no eminent domain power, (3) no police power, (4) no power to create a public debt.

114. *Supra* note 109, §10.

115. FLA. STAT. §159.04 (1961).

116. 84 So. 2d 9 (Fla. 1955).

117. 89 So. 2d 34 (Fla. 1956).

118. *Id.* at 38. *Contra*, City of West Palm Beach v. State, 113 So. 2d 374

> "In State v. Town of North Miami . . . the incidental public purpose accomplished was too inconsequential in comparison the private gain. We do not feel that the case at bar has such shortcomings . . . . [T]he issuance of $2,900,000 revenue bonds is in aid of a valid public purpose [encouraging tourism] and does not violate Section 10 of Article IX of our State Constitution."

In *State v. Board of Control*,[119] the issuance of revenue certificates was approved for the purpose of building houses to be leased to college social fraternities. The court in discussing this point said:[120]

> "The mere fact that some one engaged in private business for private gain will be benefited by every public improvement undertaken by the government or a governmental agency, shall not and does not deprive such improvement of its public character or detract from the fact that it primarily serves a public purpose. An incidental use or benefit which may be of some private benefit is not the proper test in determining whether or not the project is for a public purpose."

Under these precedents it would appear that the issuance of industrial development bonds to salvage and rebuild Clay County's economy would have a public purpose. The use of such bonds would produce only an "incidental private benefit" within the authority's total program for county redevelopment.

The Florida Supreme Court has previously indicated that economic problems may be of such a serious nature that efforts to solve them constitute legitimate public purposes. Justice Hobson, in his concurring opinion in *Seaboard Air Line R.R. Co. v. Peters* stated:[121]

> "The economic stability of Dade County and the general welfare of not only its residents but as well that of the people of this State and Nation depend in a real and vital sense on the continuation and expansion of the Miami International Airport. In the light of such circumstance the legislative declaration to the effect that . . . the . . . airport constitutes a project which is a county purpose is completely justified. Indeed, this

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(Fla. 1959) (revenue bond financing scheme involving contingent pledge of city utility tax held invalid); City of Clearwater v. Caldwell, 75 So. 2d 765 (Fla. 1954) (declaring city had no power to lease lands to private individual for construction of a hotel and apartment houses for private gain).

119. 66 So. 2d 209 (Fla. 1953).

120. *Id.* at 210.

121. 43 So. 2d 448, 456 (Fla. 1949).

> Court is warranted in holding said airport to be an 'essential governmental requirement' of Dade County."

Justice Hobson's reasoning was re-affirmed by the court in *State v. Dade County*,[122] in which it was agreed that the Dade County Port Authority could issue revenue certificates to raise money to construct a large warehouse and overhaul shop for lease to an airline. The private industry involved, National Airlines, Inc., agreed to rent the facilities for an amount sufficient to pay the principle and interest of the certificates as they matured.

There is an apparent similarity between the use of revenue certificates to assist the tourist and transportation industries, and the use of such certificates in aid of Clay County manufacturing. In the latter case the benefits flowing to the community-at-large appear to be of far greater significance. These decisions expanding the permissible scope of revenue certificate utilization reasonably supported a belief that as long as the county authority legislation had a substantial relation to the public welfare and could fairly be said to serve a public purpose, the courts would not strike it down. The Florida Supreme Court had affirmed, moreover, that "each generation may determine its concept of these things,"[123] evidently in the spirit of Mr. Justice Holmes' classic argument for separation of legal theory and economic philosophy:[124]

> "I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. Some . . . laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution . . . ."

The Cotney Case

The Clay County Development Authority was organized and began functioning June 14, 1957. As one project in its plan for integrated development of the county, the authority purchased with funds

122. 62 So. 2d 404 (Fla. 1953).
123. *Supra* note 61.
124. Lochner v. New York, 198 U.S. 45, 75 (1905) (dissenting opinion).

on hand a large tract of surplus property from the United States Government, known as Fleming's Island. Other contemplated projects included the acquisition of vocational training facilities at Camp Blanding and county-wide activities to improve outdoor recreational resources. The Fleming's Island project included construction of an airport and public golf course and dedication of part of the remaining land as sites for industrial plants to be sold or leased to private concerns.

In early 1958, to eliminate any doubt regarding the authority's powers, the Attorney General of Florida brought an original proceeding in quo warranto challenging the validity of the Clay County development act and actions of the authority thereunder.[125] The state contended that the act contravened section 10 of article IX of the Florida Constitution.[126] The act was characterized as "an invalid attempt by the legislature to create and confer upon a public corporation the power to loan its credit to private interests and to acquire property which is to be developed for private interests . . . ."[127] In support of this contention the state relied on the *Adams* case,[128] which had struck down the Daytona Beach housing authority act, which permitted that authority not only to purchase but also to condemn property through the use of eminent domain with the avowed purpose of selling the entire property so acquired to private interests for private use. The *Adams* case was summarily distinguished, on the basis that the Clay County Authority had neither taxing power, nor power to create a public debt, nor power of eminent domain.[129] The court ultimately held in favor of the Clay County authority:[130]

> "We have no doubt that the Clay County Development Authority was created to and will serve a valid public purpose in providing for the over-all development of Clay County. The setting aside for industrial and commercial purposes of a portion of the property already purchased is certainly a part of the balanced over-all plan for the County's development; but there is nothing in the record here to show that this was the primary purpose for the acquisition of the federal government's surplus tract of land, rather than an incidental part thereof. In these circumstances we can find nothing in the previous decisions of this Court construing §10 of Article IX

125. State *ex rel.* Ervin v. Cotney, 104 So. 2d 346 (Fla. 1956).
126. See text accompanying note 13, *supra.*
127. *Supra* note 125, at 348.
128. Adams v. Housing Authority, 60 So. 2d 663 (Fla. 1952).
129. *Supra* note 125, at 348.
130. *Supra* note 125, at 349.

requiring us to hold that the Authority's acquisition of the property and proposed program for its development amounts to an appropriation of the Authority's funds for, or the lending of its credit to, a private enterprise."

The state pursued a second line of attack directed against a specific provision of the Clay County act authorizing the issuance of revenue anticipation certificates (industrial development bonds) for "the acquisition of land, properties and improvements . . . for the development . . . of industry . . . and the construction of plants for the purpose of selling, leasing or renting such structures to private persons, firms or corporations."[131] The court implied that this language could be fatal to the act's constitutionality. But the interpretation leading to unconstitutionality was rejected in deference to the legislative determination of a public purpose and the absence of contrary evidence in the record.[132] The opinion put an apparent stamp of approval on the joint public-private developmental activities contemplated by the act:[133]

"When construed as authorizing the sale or lease for industrial and commercial purposes of a portion, only, of a tract of land acquired as a single project encompassing recognized public purposes as the primary object of the acquisition; or as authorizing the construction of improvements on such property for utilization by private enterprises as an incident to and in furtherance of a primary and recognized public purpose, . . . we find no constitutional infirmities in the Act."

The *Cotney* case appears to hold that although a public corporation cannot use its financing powers for the sole purpose of inducing the location of new manufacturing operations, it can lend assistance to private enterprise so long as the assistance is incidental to a primary objective which effectuates a valid public purpose. This, in any event, is the manner in which the *Cotney* case was interpreted by the legislative delegations and legal advisors in the twenty Florida counties that promptly drafted and secured passage of development authorities modeled on the Clay County pattern.

The Suwannee County Case

The heightened hopes of the declining counties were abruptly shattered by the next court test of the use of public corporations to

131. *Supra* note 109, §2 (2).
132. See Gray v. Central Fla. Lumber Co., 104 Fla. 446, 141 So. 604 (1932).
133. *Supra* note 125, at 349.

promote industrialization. The Suwannee County Development Authority[134] sought to validate a $100,000 industrial development bond issue to provide funds for the purchase of real estate and the construction of a building for lease to a private business. The authority contended that this undertaking was only a first step in a much larger overall development and reasoned that since the overall project had a valid public purpose under the *Cotney* rationale, incidental use of a portion of the project by private interests did not dissipate the public nature of the project as a whole. The circuit court validated the issue and alluded to the stagnant economy of Suwannee County as follows:[135] "The County has no tourism, no substantial industry and no recreational facilities. Existing labor is unskilled and no means are available for training skilled craftsmen . . . . [T]here is a trend among the young people of the county to move to other areas."

In a five-to-one decision, Justice Terrell dissenting, the Supreme Court reversed the circuit court and held that the validation of the industrial development bonds would violate section 10, article IX of the Florida Constitution.[136] Speaking for the majority, Justice O'Connell noted that the testimony showed clearly that the authority's only definite plan was to use all, or certainly a major portion of the proceeds of the bonds, for the purchase of land and construction of buildings. There was no firm plan defining the specific industry the authority hoped to attract to Suwannee County, or the specific land and buildings to be used. Furthermore, Suwannee County, unlike Clay, was subject to a statute[137] directing the Board of County Commissioners to pay over to the development authority, from its distributive share of state race track revenues, $30,000 per year for three years and $10,000 per year thereafter. The lack of a definite, comprehensive plan, and the possible involvement of public moneys led to the finding of a primarily private purpose and an attempted unconstitutional pledging of the public credit. In a concurring opinion, Justice Thornal pointed out that in view of conditions in Suwannee County, "such a project could *in and of itself* constitute a public purpose that would justify the expenditure of public funds."[138] The validation proceeding, however, was "totally lacking in any showing that the money will be used for a purpose contemplated by the authorizing statute."[139] Vigorously dissenting, Justice Terrell took

134. Fla. Laws Spec. Acts 1959, ch. 59-1903.
135. Quoted in dissenting opinion of Justice Terrell, *infra* note 136, at 195.
136. State v. Suwannee County Development Authority, 122 So. 2d 190 (Fla. 1960).
137. Fla. Laws Spec. Acts 1959, ch. 59-727.
138. *Supra* note 136, at 194.
139. *Supra* note 136, at 194.

extensive judicial notice of the depressed conditions in Suwannee County and their attendant human deprivations. He considered the development authority to be a reasonable experiment in local self-help for a legitimate public purpose to which any private advantage was merely incidental.[140]

Although the particular financing plan was struck down, the majority opinion in the *Suwannee County* case once again expressly approved the validity, under proper circumstances, of an act empowering a development authority to purchase sites, construct buildings and lease them to private enterprise. It qualified the broad holding in *Cotney*, however, by *severely restricting* the projects of the authority to those in which private use of project assets is only incidental to a predominantly public use of the assets.

The Second Clay County Case

This was the state of the law when the development authority technique faced its most recent judicial test in the second *Clay County* case.[141] But for the unfortunately premature and inherently weak Suwannee County attempt, little doubt would have existed that the Clay County proposal would easily win court approbation. In July 1961, the Clay County Development Authority entered into a lease agreement with Eclipse Plastic Industries, Inc. The authority agreed to construct, erect, install and equip an industrial plant on a specified section of the Fleming's Island tract, and to lease the plant to Eclipse for a term of sixteen years. The agreement provided that the authority would finance the cost of the plant through the issuance of industrial development bonds payable solely from rentals under the lease. At the end of sixteen years the total anticipated income from such rentals would have retired the bonds. Eclipse committed itself to supply any building or equipment funds that might be required in excess of the $500,000 bond issue proposed.

These concrete developments presented a legal situation materially different from the proposition invalidated in the *Suwannee County* case.[142] The Suwannee authority proposed to purchase one parcel of land for the exclusive purpose of constructing a manufacturing plant to be leased to a private concern. In the second *Clay County* case, the authority already owned the land, the major portion of which was to be developed for unquestionably public purposes. Only a small portion was scheduled for development as industrial sites, and

140. *Supra* note 136, at 198.

141. State v. Clay County Development Authority, 140 So. 2d 576 (Fla. 1962).

142. See generally Brief for Appellee, pp. 9-10, State v. Clay County Development Authority, 140 So. 2d 576 (Fla. 1962).

that merely as an incident in the overall program recognized by the court in the *Cotney* case as having a valid public purpose.

The Suwannee authority at the time of its validation proceedings had no specific or definite plan for general redevelopment of the county. It was by piercing Suwannee's *ostensible* plan that the court invalidated the proposed issue as having a primarily private purpose. On the other hand, the Clay authority, when it sought to validate its industrial development bonds in late 1961, had a definite county-wide redevelopment program which had been in operation for three years. The circuit court found as a fact that the Clay authority had implemented a representative portion of the overall public program upon which it had embarked.[143] Moreover, the Suwannee authority had not selected the site of its project nor had any industry committed itself to lease the contemplated manufacturing plant. The bonds, in short, were intended to borrow money for some unexplained and unidentified future use. In sharp contrast, the site was definite in the second *Clay County* case, and Eclipse Plastic Industries, Inc.[144] had entered into a binding lease agreement to become effective upon the sale of the bonds. Finally, in the *Suwannee County* case the industrial development bonds arguably were payable from state race track revenues annually allocated to the county. In the second *Clay County* case the bonds were payable from rentals only and no other source of money was pledged to pay the obligations. If the Clay County bonds could in fact be marketed, buyers would take with notice that they were backed solely by rentals from the particular project and that the authority had no power to tax or to create a public debt.

The state duly appealed the chancellor's final decree approving a $500,000 issue of industrial development bonds in the second *Clay County* case. In March of 1962, the Florida Supreme Court ruled that the issue was contrary to section 10, article IX of the Florida Constitution.[145] In its review of the *Suwannee County* and the *Cotney* precedents, the court found that the contemplated exercise of the power to construct and lease facilities to private enterprise in Clay County was not one of those severely restricted instances in which private use is only incidental to a primarily public purpose and use.

The court re-examined the *Gate City Garage* case[146] and the *Pana-*

143. Clay County Development Authority v. State, (Cir. Ct. 4th Jud. Cir., 1962).

144. Estimated minimum total tangible assets: $300,000; sales range: below $1 million; products: plastic pipe, fittings, tubing and rods; employees: 25. 4 THOMAS, REGISTER OF AMERICAN MANUFACTURERS 286 (52d ed. 1962).

145. *Supra* note 141, at 580.

146. Gate City Garage, Inc. v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953).

ma City case,[147] which had been cited as supporting authority in *Cotney*.[148] In *Gate City Garage*, the City of Jacksonville had proposed to lease to a private individual a service station located on a portion of land to be developed by the city as a municipal parking area, such development to be financed by the issuance of securities. The lease of the service station had been found to be a merely incidental aspect of a concededly public project. An identical question had been presented in the *Panama City* case, in which the city had proposed to issue revenue certificates to build a marina, including stores to be leased to private individuals. It had been estimated that twenty per cent of the total anticipated revenues would be derived from, and 1.22 per cent of the total area would be occupied by, private interests. The court had held that this degree of intrusion by private concessionaires did not destroy the overall public nature of the project.

The court in the second *Clay County* case concluded that the proposed Clay County project would have to fall within the ambit of the holdings in *Gate City Garage* and *Panama City*. It was "crystal clear" to the court, however, that the dominant and paramount purpose of the proposed certificates was "to lend the credit of the county to a private enterprise for private profit . . . ."[149] The only "possible" public purpose of the project was considered to be the alleviation of unemployment and the economic development of the area. The court expressed concern that recognition of these aims as valid public objectives would leave no limit upon the extent to which the credit of the state and its authorities might be extended to private interests.

Evaluation of the Development Authority Precedents

It is difficult to reconcile the court's affirmation of the comprehensive Clay County plan in *Cotney* with its later rejection of a predictable implementing phase of the plan in the second *Clay County* case. In both cases the same basic project and the same specific tract of land were involved. The industrial financing activities regarded as incidental to a primary purpose in *Cotney* would appear to have been equally incidental when they were reconsidered in the second *Clay County* case, even though the overall plan was not then before the court. However, the court viewed the phase of the project in question as though it were faced with a *Town of North Miami* situation in which a unit of government proposed to acquire and develop

147. Panama City v. State, 93 So. 2d 608 (Fla. 1957).
148. See text at note 133, *supra*.
149. *Supra* note 141, at 580.

an isolated tract of land for private benefit. The court apparently did not find convincing the circuit court's determination that the total Clay County plan was in fact underway. Perhaps the industrial development aspect of the plan would have fared better had it been implemented later in time than the other segments of the county-wide redevelopment plan. The incidental purpose test as applied in the second *Clay County* case appears to raise the timing and sequence of development — and perhaps litigation — to critical importance. Some concern should be shown, however, for the practical aspects of implementing economic redevelopment programs, which to some extent must proceed one step at a time. Self-sustaining portions of the program should be initiated early, since they have a multiplier effect in stimulating economic activity and do not subtract from limited funds available for non-revenue producing improvements.

It is also difficult to justify the court's insistence that industrial development bond projects must be measured by the severe test of incidental purpose as found in the *Gate City Garage* and *Panama City* decisions. In each of those cases, the public corporations issuing revenue bonds had and were exercising taxing powers. When such power exists a stricter test of public purpose may well be in order. But the "public purpose" doctrine in Florida is an implied limitation derived from the taxing power. It has no independent constitutional source. Therefore, the public purpose limitation should attach with less force to the development authority which has no power to tax. Even if a revenue bond holder were to perfect a negligence claim against the issuing authority, the latter would have no taxing power which could be compulsorily exercised.

The difficulty lies in the selection of a proper perspective in which to view the authority's industrial financing. The total development of the Fleming's Island tract for public purposes may be only indirectly dependent upon the establishment of manufacturing there. But if the range of vision is extended to encompass the intended economic and social rehabilitation of Clay County, a substantial and functional relationship becomes manifest between the industry and the ultimate objective of the authority.

The economic projects of prosperous counties and the tourist industry generally appear to fare better than the self-improvement efforts of depressed counties. The preference for tourism and recreational developments as opposed to manufacturing industry is perhaps understandable. The vacationing trade is more familiar, better established and of greater present significance to Florida's total economy. Accordingly, the millions of public dollars expended by state and local governments for tourist advertising and recreational facilities rarely encounter any legal challenge. Golf courses, race tracks, fraternity houses, airports, trade marts and overhaul shops

have been approved.[150] These projects produce varying degrees of public and private benefits. Whether the private benefit is primary or incidental depends upon the perspective in which such projects are viewed. Private advantage is an element common to all of them. None could be built or operated if they were not profitable to private groups. Manufacturing development, however, is no less worthy an objective than the expansion of tourism. As many states have recognized, manufacturing industry has evolved public aspects sufficiently vital to community well-being to justify reasonable governmental assistance. This is especially true in rural counties which are as dependent upon industrial employment as other areas are dependent upon the tourist trade. Industrial development bonds are entitled to be viewed in the same broad perspective of general public advantage as are recreational projects. The private benefit derived from issuance of revenue bonds to assist a Clay County manufacturer is no less incidental to the public welfare than issuance of such certificates to help a Dade County airline.

Revenue bond undertakings of the more prosperous counties likewise find a smoother road to travel. A commendable desire to permit the thriving areas of the state to continue their growth without interruption, and a confidence in financial soundness engendered by their success, perhaps account in part for the favored treatment accorded these projects. These extrinsic circumstances, however, should not influence the finding of a valid public purpose more materially than does a legislative expression to the same effect in the county development authority acts. The attraction of industry may be the logical initial step for the underdeveloped counties, but this fact does not render it the primary or major objective. Industrial financing remains incidental to the overall public purpose of providing employment and achieving economic security.

The decisive factor in the second *Clay County* case was the court's holding that the revenue bonds in question violated the constitutional ban on pledging the public credit. The basis for this conclusion is unclear. The certificates were payable solely from rentals and no other source. The authority would own the property at all times. Under such circumstances, it would seem that the only credit extended was that of the lessee, rather than that of the authority. Justices Terrell and Thornal, in separate dissenting opinions, are equally troubled by the majority's conclusion:[151]

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150. See Grubstein v. Urban Renewal Agency, 115 So. 2d 745 (Fla. 1959). An excellent discussion of leading Florida cases on the public purpose doctrine in which five justices separately record their views.

151. *Supra* note 141, at 582, 584.

"Not one cent from the public treasury is pledged to these certificates. No tax in any form is committed to the securities. No lien on the property is granted to support the issue. The sole source of funds to liquidate the certificates is expressly limited to the rental income to be derived from the building which would be constructed. In no fashion is the public credit obligated or committed."

Constitutional public purpose and credit limitations were adopted to protect taxpayers from fraudulent and speculative investments on the part of state and local governments. State statutes and legal precedents afford taxpayers equivalent safeguards when revenue bonds are involved. In both situations the creation of any public financial liability for the benefit of private industry is effectively avoided. Technically only the constitutional prohibition against pledging the public credit is pertinent in determining the validity of industrial development bonds because the taxing power on which the public purpose doctrine is based is not affected. It is well established in Florida that the credit clause is not an absolute bar to the use of revenue bond financing even though private interests may be incidentally benefited. To date, however, the Florida court has considered the public benefits produced by industrial development bonds too insubstantial to meet the constitutional standard set by the credit clause and an artificially extended public purpose doctrine. Substantial doubt exists that either the public purpose or the credit clause was intended to defeat the efforts of depressed Florida counties to achieve economic recovery.

Conclusion

Have the three Florida county development authority cases permanently rendered the authority useless as a tool of economic improvement? This writer thinks not. If the Florida Supreme Court were confronted with either a "sounder" financing proposition or a further deterioration of local economic conditions the authority technique might well be upheld. A reasonable expectancy of court approval might arise under these conditions:

(1) the deepened economic depression of which the declining counties are virtually assured;

(2) a thoroughly implemented county-wide redevelopment plan; and

(3) an executed lease agreement with a nationally established, "blue chip" manufacturer.

A constitutional amendment expressly authorizing industrial development bonds is a possible alternative if the court remains adverse to the statutory solutions.

As a third possibility, the county authority might be made more judicially palatable by incorporating the authority technique into a *state* coordinated plan. Projects might be passed upon by a central state board authorized to issue "Certificates of Soundness and Necessity" empowering a county authority in a sufficiently depressed area to proceed with a bond issue for an industry meeting certain minimum standards of suitability and financial responsibility. Such an arrangement, however, might suffer from delays, increased costs of administration and some loss of local initiative.

Any successful new approach must include a satisfactory answer to a simple question: *"Why, if the public credit is not being pledged, are industrial development bonds able to attract manufacturing industry when private financing is unable to do so?"* The question is answered only negatively by the fact that county development authorities have no power to tax or to incur any public indebtedness. Federal tax laws contain the real answer. It is the Internal Revenue Code of 1954, not the public credit, which makes industrial development bonds work. Use of the public credit is not a significant consideration to either the county or the industry. The issuing sources of the revenue bonds would be immaterial if the same federal tax benefits could otherwise be obtained.

The primary public purpose served by industrial aid bonds is the increase in employment as workers are hired to staff the new plant. A second advantage flows to business generally as increased payrolls circulate in the community. Public morale and private incentive are enhanced, civic pride is reawakened, and real estate values (and tax rolls) are stabilized or enlarged. Industry begets industry, moreover, and satellite plants often spring up to meet the needs of the acquired manufacturer.

The defects which may be arrayed against these advantages are far less tangible. It is said that such financial practices may lead to socialism. But the seventeen states that have adopted the technique are thinking and acting in a context of evolutionary capitalism and revitalized local democracy, not socialism. It is said that industrial development bonds represent a dangerous expedient without lasting benefits commensurate with the obligation undertaken by the issuer. But this technique has succeeded to rehabilitate badly depressed areas and has reversed declining economic trends of long-standing. Mistakes have been and probably will continue to be made in extending public assistance to private enterprises. Such risks are inherent in business operations generally, however, and effective planning and control can reduce them to an acceptable minimum. Finally, it is said that business without subsidy cannot compete with subsidized business, and that eventually all business must obtain a subsidy if it is to exist at all. However, industrial subsidization is an historic

and ever-present fact of American economic life. Reasonable public assistance has been used traditionally to preserve free enterprise, rather than destroy it. People living in financially desperate communities in Florida and elsewhere are resorting to industrial development bonds not to stifle competition but to develop it.

The question may be fairly asked: With whom would a plastic pipe manufacturer, attracted to Clay County by means of industrial development bonds, be in unfair competition? The abandoned Navy base? The defunct hosiery mill? The primate laboratory now being shut down?

Florida's depressed counties will have little chance to compete effectively for a fair share of new industry when similar counties in all adjacent and nearby states are armed with the industrial development bond — the most effective technique yet devised for rebuilding local economies.

DON R. LIVINGSTONE

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