

THE ANTI-DONATION CLAUSE

NEW MEXICO FINANCE AUTHORITY OVERSIGHT COMMITTEE

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I. The Anti-Donation Clause

State constitutions normally constrain the fiscal operation of state and local governments. Forty-five state constitutions contain anti-aid provisions. Here is New Mexico's:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section.

The language is old. Except for the final words, the text is from the 1912 Constitution; however, the language was likely copied from an even earlier draft of New Mexico's constitution or another state constitution. Missouri's 1875 constitution, for example, contains similar language.¹

II. The Anti-Donation Clause is large, contains multitudes.

The Anti-Donation Clause's range of application is large. By its text, it implicates providing both coffee to private persons at government events and refundable tax credits that cost the State tens to hundreds of millions of dollars. Courts have responded to that range of application with sweeping (and oversimplified) pronouncements when applying and refusing to apply the

¹ See N.M. Const., art. IX, § 14; Mo. Const. art. IX, § 6 (1875).

prohibition.² My goal today is to move beyond sweeping pronouncements and obtain a clear view of this area of constitutional law.

III. Anti-Donation doctrine in a nutshell

Since 1912, there have been about thirty judicial opinions applying New Mexico's Anti-Donation Clause. The doctrine that emerges is straightforward and is comprised of two questions: (1) Has the State or any county, school district or municipality made a donation or pledged its credit in aid of any person, association or corporation? (2) If yes, does an exception provided by Subsections A through G apply? Roughly, those exceptions allow for: the care and maintenance of sick or indigent persons; veterans' scholarships; loans to nurses; transfers authorized by the Local Economic Development Act; and affordable housing. If no exception applies, then two remedies are available for violations: injunction (to stop the government from making unconstitutional transfers) and restitution (to compel a refund to the state entity).³

IV. Is there a donation to a private person? The four judicially recognized exclusions to the Anti-Donation Clause

Over the past century, courts have decided that four categories of transfers and business arrangements are neither donations nor credit pledges that fall within the clause's scope.

(1) Donee is an arm of the state. A New Mexico governmental entity is not a "person, association or public or private corporation" to which the Anti-

² See, e.g., *State ex rel. Sena v. Trujillo*, 1942-NMSC-044, ¶ 22 ("The constitution makes no distinction as between 'donations', whether they be for a good cause or a questionable one. It prohibits them all.") (holding that pension payment to former Supreme Court clerk would violate Anti-Donation Clause); *City of Clovis v. Sw. Pub. Serv. Co.*, 1945-NMSC-030, ¶ 23 ("In order to understand and interpret this provision it should be construed with reference to the evils it was intended to correct.") (holding that Clovis's sale of municipal water and electrical utility properties to private business in installment payments over 23 years without interest did *not* violate Anti-Donation Clause).

³ See *Hutcheson v. Atherton*, 1940-NMSC-001, ¶¶ 28-34 (upholding injunction against bond issuance to finance auditoriums that a non-profit corporation would use gratis); *State ex rel. Callaway v. Axtell*, 1964-NMSC-046, ¶¶ 12-13, 25-26 (holding Attorney General could recover hay and roughage payments to livestock owners after statute appropriating funds for hay payments was held unconstitutional in *State ex rel. Mechem v. Hannah*, 1957-NMSC-065).

Donation Clause applies. The Anti-Donation Clause does not forbid government entities from making transfers to other government entities. As such, the Anti-Donation Clause aligns with Article IV, Section 31, which forbids the Legislature from appropriating funds to persons “not under the absolute control of the state.” These constitutional rules structure the basic fiscal operations of the State: the Legislature makes appropriations to state agencies, which in turn (i) make grants to governmental entities, (ii) enter agreements with government entities, and (iii) enter contracts with private persons to achieve ends that the state desires.⁴

(2) Revenue bond and lease financing. The courts have routinely rejected anti-donation challenges where a state entity issues revenue bonds to finance projects that are then leased to private corporation and the lease payment is used to pay the State’s obligation on the principal and interest. Private corporations are incentivized by these projects because the corporation lacks tax obligations on the property and the state entity might not pass along all the insurance costs through the lease. Even so, the courts have held that, so long as the state entity owns the building and the lease payments cover the bond financing, the state entity does not pledge its credit or make a loan or donation to a private corporation.⁵

(3) Donor receives value. Where a state entity receives value either consequent to a bond issuance or in exchange for a transfer, the state has not “pledge[d] its credit or ma[de] any donation to or in aid of [another] person”

⁴ See *White v. Board of Educ. of Silver City*, 1938-NMSC-009, ¶¶ 28, 33 (rejecting challenge to a bond issue for school that would combine state school with local school, because state was not “public corporation” with the meaning of the Anti-Donation Clause); *Wiggs v. City of Albuquerque*, 1952-NMSC-013, ¶ 20 (rejecting challenge to Albuquerque bond issue to finance and build auditorium to be used by UNM); *City of Gallup v. N.M. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 11 (rejecting challenge to agreement between State and Gallup to create, finance and maintain Red Rock State Park).

⁵ See *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶¶ 36-37 (rejecting challenge to revenue bond issuance to finance industrial facility to be leased to private corporation); *State ex rel. State Park and Recreation Comm’n v. N.M. State Auth.*, 1966-NMSC-033, ¶ 49 (rejecting challenge to revenue bond issuance to finance boat dock at Bluewater Lake to be leased to private concessionaire); *Kennecott Copper Corp. v. Town of Hurley*, 1973-NMSC-032, ¶¶ 1-3 (rejecting challenge to industrial revenue bond issuance to acquire property to be leased to private corporation); cf. *Hotels of Distinction West, Inc. v. City of Albuquerque*, 1988-NMSC-047, ¶ 5 (rejecting challenge to development agreement whereby federal grant funds were used to finance construction of hotel to be leased to private corporation).

This analysis sounds in contract law, where the receipt of consideration separates binding contracts from non-binding, donative promises.⁶

(4) Just compensation. When a governmental entity pays compensation for some damage that it has caused—either because it elects to or is required to—the payment is not a “donation” within the meaning of the Anti-Donation Clause.⁷

V. The two main purposes of the Anti-Donation Clause.

(1) Protecting the public trust. Anti-aid provisions were drafted to serve the foundational public-trust principle that the exercise of the tax power and expenditure of public funds must be for the benefit of the public and not private interests. In the nineteenth century, states repeatedly constitutionalized the prohibition on subsidies to private business, because the operation of the legislative

⁶ See *White v. Board of Educ. of Silver City*, 1938-NMSC-009, ¶ 31 (rejecting challenge because board of education “will get value received for every dollar put into the enterprise” of a bond issue to build a school to join state and local schools); *City of Gallup v. N.M. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 9 (rejecting an anti-donation claim because, under agreement, state would receive title to 640 acres in Red Rock State Park, \$1.5M for construction, and maintenance and operation of the park for the life of lease contract with Gallup); *Pierce v. State*, 1996-NMSC-001, ¶ 29 n.12 (rejecting challenge to statutorily conferred pension benefits because benefits are not a gratuity); *Treloar v. County of Chaves*, 2001-NMCA-074, ¶ 32 (rejecting challenge to severance benefits because “severance pay is deemed to be in the nature of wages that have been earned”); *State ex rel. Office of State Eng’r, et al. v. Lewis, et al.*, 2007-NMCA-008, ¶ 51 (rejecting challenge to Pecos River rights settlement because, in exchange for funds, State received land and water rights, as well as settlement of claims in suit); cf. *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (Browning, J.) (“The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for real product. . . . The Court does not believe it should evaluate whether the agreement was a good or bad deal under the Anti-Donation Clause, but merely check for adequate consideration.”).

⁷ See *State ex rel. City of Albuquerque v. Lavender*, 1961-NMSC-096, ¶¶ 22-23 (holding that when Legislature exercises police power to authorize relocation of utility’s property, reimbursement of costs is not unconstitutional donation); *State ex rel. N.M. Water Quality Control Comm’n v. City of Hobbs*, 1974-NMSC-064, ¶¶ 11-13 (holding court-ordered remedies for civil wrongs committed by state or political subdivision not unconstitutional donations); *Battaglini v. Town of Red River*, 1983-NMSC-067, ¶ 10 (holding payment of just compensation to owners of removed signs not unconstitutional donation); *City of Albuquerque v. N.M. Pub. Reg. Comm’n*, 2003-NMSC-028, ¶ 27 (rejecting anti-donation challenge to PRC’s approval of tariff that would have allowed PNM to recover relocation costs caused by local governments).

process could not be guaranteed to prevent them.⁸ In 1870, in *Salem Township*, the Michigan Supreme Court clearly expressed this thought:

When the State once enters upon the business of subsidies, we shall not fail to discover the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger.⁹

The debate regarding whether and which government subsidies serve the public interest is old and seemingly interminable. After the New Deal, however, the gravity in that debate shifted. The *Salem Township* view no longer commands a consensus. Now, many New Mexicans believe that (at least some) subsidies are in the public interest; indeed, the Anti-Donation Clause has been amended several times to exclude certain subsidies that are in the public interest.

Furthermore, since the New Deal, state courts—being heavily influenced by the federal courts interpreting the federal constitution—generally have come to accept the *Carolene Products* (1938) view that courts apply minimal scrutiny to decisions about economic matters that neither affect fundamental rights nor involve discrimination against discrete minorities.¹⁰ This is so even though, unlike the federal constitution, state constitutions contain many provisions explicitly addressing state fiscal structure.¹¹ No New Mexico appellate opinion, however, has ever straightforwardly applied rational basis review to reject an anti-donation challenge to a subsidy a governmental entity has bestowed on a private person.

⁸ See, e.g., Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L. J. 907, 910-913 (2003).

⁹ *People ex rel. Detroit & Howell R.R. Co. v. Salem Township Bd.*, 20 Mich. 452, 487 (Mich. 1870).

¹⁰ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938); see also *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“[C]ourts do not substitute their economic and social beliefs for the judgment of the legislative bodies . . .”); see also, e.g., *Zhao v. Montoya*, 2014-NMSC-025, ¶¶ 46-47 (applying rational basis review to reject Article VIII, Section 1(A) “equal and uniform” challenge to acquisition-value (tax lightening) statute).

¹¹ See Briffault, *supra* note 8, at 956. See also, e.g., N.M. Const., arts. VIII & IX.

(2) Demarcating the State. Like Article IV, Section 31, the Anti-Donation Clause serves to demarcate the State from public-spirited groups that are not the state and not subject to state control and, thus, helps to ensure control, accountability, and transparency over the expenditure of public funds.

VI. Application to NMFA

Under a cursory review, the above implicit and explicit exceptions to the Anti-Donation Clause might variously apply to NMFA administered programs. For example:

- **Small Business Recovery Loans:** the state receives consideration in exchange for the loan—namely, interest at one-half the *Wall Street Journal* prime rate on the date the loan closes
- **The Business Recovery Grants Program** was enacted under the Local Economic Development Act, NMSA 1978, § 5-10-16 (2021), for which Section D provides an exception. *See* N.M. Const., Art. IX, § 14(D) (LEDA).
- **Various financing projects:** Public Project Revolving Fund loans (consideration on loans; donee is often a state entity); Opportunity Enterprise Fund (consideration on loans and leases; *see also* revenue bond financing cases).
- **Colonias Infrastructure funds:** consideration on loan; grant to instrumentality of the state; affordable housing exception with respect to housing infrastructure projects. *See* N.M. Const., Art. IX, § 14(E)-(F) (affordable housing exception); Attorney General Advisory Ltr. 2017-06 (Oct. 31, 2017).

For additional analysis, the Commission provides advisory opinions and advisory letters, which it has done for inquiries related to certain NMFA administered programs. *See, e.g.,* State Ethics Comm’n Adv. Op., 2021-09 (concluding that a legislator or a business owned by a legislator could not apply for a small business recovery loan under Article IV, Section 28 of the New Mexico Constitution).