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Michigan Courts Should Revisit Shaky Legal Ground of Corporate Handouts

By Michael LaFaive

Summary

For decades, the Michigan Constitution prohibited the state from selecting private business for favorable financial treatment. The Michigan Supreme Court upended that policy in 1941, but courts today ought to reconsider that decision.

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In Michigan, state and local governments have spent a lot of effort to give handouts to private businesses — nearly \$600 million from one old program in fiscal year 2019 alone — in the hopes of bolstering the economy. But such spending fails to live up to expectations. And according to a new analysis, it rests on a dubious legal foundation.

For nearly 75 years, Michigan courts knocked down attempt after attempt by special interests to get the state to give them subsidies at the expense of everyone else. Then in 1941, Michigan's Supreme Court pivoted dramatically, widening the definition of what constitutes a "public purpose" under which taxpayer money could be spent.

In 1850, lawmakers and the public had amended the state constitution to prohibit the state government from obligating taxpayers for "any work or internal improvement," like railroads and canals. The constitution also said, "The credit of the state shall not be granted to, or in aid of, any person, association or corporation." Finally, it declared: "The state shall not subscribe to, or be interested in, the stock of any company, association, or corporation."

Those who wanted the state to give subsidies to specific businesses launched legal challenges, but they were turned away. In an 1870 case, for example, the legendary state Supreme Court Justice Thomas Cooley said that the state "cannot compel an unwilling minority to submit to taxation in order that it may keep upon its feet any business that cannot stand alone." Knowing how the world of politics works, he warned that if the state were to give out subsidies, "the weaker would be taxed to enhance the profits of the stronger."

In a concurring opinion, Chief Justice James V. Campbell warned that "Taxation for private purposes is no more legal than robbery for private purposes." He further warned that such action was what should be expected in a land with an omnipotent king, not in a country where legislators make the laws.

In 1897, the state enacted a law to subsidize sugar manufacturers, and in 1900, the high court declared it unconstitutional. "This taxation," it said, "is for no such public purpose that it can be upheld." Driving home the point that the constitution prohibited subsidies to private corporations, the court said, "There is no power in the state to authorize a tax for private purposes."



Business subsidies are bad news for taxpayers, citizens.

As if neglecting that ruling, the Legislature, in 1907, enacted a law to give public funds over to an association of corn producers. The result was the same as the 1900 case: The court ruled that the Legislature had enacted an unconstitutional law, because “the only persons who will be directly benefited by the proposed appropriation are those ‘actively interested in the improvement of corn.’” It cited the 1870 decision, as other rulings had done.

The court issued other strongly worded statements in opposition to subsidies over the years, all relying on the clear understanding of the 1850 Michigan Constitution. But a 1941 case upset the apple cart, and the court opened the way for handouts to specific business interests.

The controversy involved a scheme under which the state taxed Michigan-grown apples and spent the money marketing the sale of the fruit. The court, despite decades of precedent, approved the scheme.

It did so by ignoring Justice Cooley’s arguments and instead expanded the definition of “public purpose.” The majority opinion argued that the mere size of the apple industry made promoting its well-being a public purpose. It said that since the advertising (with public dollars) resulted in increased demand for Michigan apples, the tax to fund it was constitutional.

The topic resurfaced at the convention that created the 1963 Constitution, which is in place today. Even though delegates to the convention could look back at over 20 years of new court-approved policy, they did not endorse it in their final document.

A new report from the Mackinac Center for Public Policy explains the apple case and other details from Michigan’s history with corporate handouts. In “From Prohibited to Permitted,” Patrick Wright, the Center’s vice president for legal affairs, maps out this history and concludes that courts should again review whether the public purse ought to be used for private gains. Given that these policies are on shaky legal ground and have been proved over and over to be a waste of taxpayer money, that is good advice.

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