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A REEXAMINATION OF THE PUBLIC PURPOSE DOCTRINE: NICHOLS V. SOUTH CAROLINA RESEARCH AUTHORITY
ARTHUR L. COLEMAN*

I. INTRODUCTION

An elementary principle of South Carolina law is that all legislation must serve a public purpose.¹ Although the public purpose doctrine has been applied in many contexts, a precise definition of the term "public purpose" has proven elusive to courts, thereby generating uncertainty about the parameters of the doctrine.² In South Carolina, a public purpose "is a fluid concept which changes with time, place, population, economy and countless other circumstances. It is a reflection of the changing needs of society."³ The fluid nature of the doctrine helps explain the difficulty courts have encountered when attempting to define precisely the doctrine. Generally, however, legislation held to serve a valid public purpose has been described as promoting "the public health, morals, general welfare,


The author gratefully expresses his thanks to the Honorable Karen L. Henderson, United States District Judge, who not only proved to be a most worthy adversary in Nichols v. South Carolina Research Auth., but who also selflessly offered her insights and shared her expertise on this subject.

2. The South Carolina Supreme Court has acknowledged that its public purpose decisions "are not entirely consistent." Nichols v. South Carolina Research Auth., 290 S.C. 415, 427, 351 S.E.2d 155, 162 (1986). South Carolina courts are not alone in wrestling with the definitional problems the doctrine poses. See Note, Incentives to Industrial Relocation: The Municipal Industrial Bond Plans, 66 Harv. L. Rev. 898, 901 (1953); Note, State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations, 108 U. Pa. L. Rev. 95, 96 (1959). Most cases are decided on their peculiar facts and circumstances. See Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975); 2 E. McQuillin, Municipal Corporations §10.31 (3d ed. 1979).
security, prosperity, and contentment" of the residents of a given political entity.⁴

Although it is undisputed that legislation must serve a public purpose, a legitimate controversy has arisen regarding the precise public purpose standard to be applied. This controversy gives rise to the central question addressed in this Article: whether the public purpose standard that all legislation must satisfy is the same standard that all legislation authorizing the levy of taxes must satisfy.

Courts generally have acknowledged that legislation serves a public purpose if (1) the articulated goals of the legislation are in the furtherance of a public purpose, and (2) there is a reasonable relationship between the public purpose sought to be achieved and the means chosen to effectuate that purpose.⁵ When analyzing the public purpose of legislation that subjects taxpayers to pecuniary liability, courts usually have undertaken a more exacting scrutiny than this standard suggests. In most of these cases, however, the courts have failed to acknowledge expressly the heightened level of judicial review.

Precise guidelines for this heightened scrutiny were never explicitly set forth until the South Carolina Supreme Court in Byrd v. County of Florence⁶ addressed the public purpose requirement in the context of the issuance of county general obligation bonds for the acquisition of an industrial park.⁷ In a three-to-two opinion the court promulgated a four-part standard for establishing the public purpose of legislation sanctioning the levy of county ad valorem property taxes to repay a debt created for the purpose of industrial development. The court stated that the public purpose of this legislation should be determined by examining: (1) the ultimate goal or benefit to the public in-

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7. A general obligation debt is defined as "any indebtedness of the political subdivision which shall be secured in whole or in part by a pledge of its full faith, credit and taxing power." S.C. Const. art. X, § 14(3).
tended by the project; (2) whether public or private parties will be the primary beneficiaries; (3) the speculative nature of the project; and (4) the probability that the public interest will be served and to what degree. Applying this standard, the court in Byrd held an ordinance, which authorized the issuance of general obligation bonds to purchase land for industrial development, to be invalid.

The holding in Byrd was challenged in Nichols v. South Carolina Research Authority, in which the South Carolina Supreme Court addressed the constitutionality of legislation designed to attract and promote the development of high technology industry in South Carolina. In a unanimous opinion, the South Carolina Supreme Court upheld the challenged legislation on public purpose grounds and overruled Byrd to the extent it held that industrial development did not constitute a valid public purpose. The court, however, reaffirmed the application of the Byrd four-point standard to legislation which provided for financing industrial development.

In an attempt to resolve the question concerning the public purpose standard to be applied and, consequently, to settle the controversy generated by Nichols, this Article will provide an overview of the public purpose doctrine in South Carolina and trace its evolution in conjunction with the "changing needs of society" in recent years. Furthermore, this Article will suggest that, while purporting to advance the liberality of the public purpose doctrine in South Carolina, the Nichols court may have set forth a restriction on economic development legislation which did not previously exist. To that extent, therefore, Nichols, not Byrd, may be inconsistent with the public purpose doc-

8. 281 S.C. at 407, 315 S.E.2d at 806.
9. Id., 315 S.E.2d at 807.
11. Unlike the ordinance in Byrd, the legislation in Nichols did not authorize the levy of taxes to accomplish its public goals. For a discussion of the scope of the Nichols holding, see infra notes 105-23 and accompanying text.
13. This Article focuses on the public purpose question in the context of legislation which authorizes the issuance of bonds. Other types of legislation relevant to the public purpose issue, but beyond the primary focus of this Article, relate to (1) eminent domain, see S.C. Const. art. I, § 18; (2) tax exemptions, see S.C. Const. art. X, § 3; and (3) the sale of state property for less than its full market value, see S.C. Const. art. III, § 31.
trine as it has been applied in South Carolina since 1884.

II. ORIGINS AND DEVELOPMENT OF THE PUBLIC PURPOSE DOCTRINE

The supreme court first addressed the public purpose doctrine in South Carolina in Feldman & Company v. City Council of Charleston. In Feldman the court invalidated legislation authorizing the issuance of “fire loan bonds.” These bonds were to be loaned to fire victims in Charleston “enabling them to ‘build up and rebuild the waste places and burnt districts of the city of Charleston, or erect improvements upon their lots.’” The court in Feldman held that the legislation authorizing the levy of taxes to pay for the bonds was unconstitutional and concluded that “the purpose of the act . . . was to aid private individuals in carrying out private enterprises, . . . although such [private] enterprises might prove of incidental advantage to the public.”

The basis for the court’s opinion was two-fold. First, reasoning that the “power to issue the bonds necessarily implied the power to levy taxes to provide for the payment thereof,” the Feldman court concluded that the power to levy taxes was not an unlimited power. According to Feldman, taxation, by its very definition, required that a public purpose be served. The court stated:

A tax is a sum of money assessed under the authority of the State on the person or property of an individual for the use of the State. Taxation, by the very meaning of the term, implies the raising of money for public uses, and excludes the raising if for private objects and purposes.

Second, the court construed article I, section 41 of the South Carolina Constitution of 1868 to mandate that any exercise of a taxation power must be for some public purpose.
Feldman and later cases have exhibited confusion about the source of the public purpose doctrine. Like Feldman, many of the first cases addressing the public purpose doctrine relied primarily, if not exclusively, on the definition of "tax" to justify the imposition of a public purpose requirement.\textsuperscript{20} In cases in which the levying of taxes was not at issue, courts sought to identify the source of the public purpose requirement in the state constitution, or more generally, in "the spirit of our institutions."\textsuperscript{21}

Consistent with its uncertain origins, the fundamental public purpose requirement applicable to all legislation is now generally held to arise from article 1, section 3\textsuperscript{22} of the South Carolina Constitution.\textsuperscript{23} By contrast, the public purpose requirement inherent in the common-law definition of "tax"\textsuperscript{24} was first codified in 1977 when article X of the South Carolina Constitution was revised.\textsuperscript{25} Article X, section 5 now provides:

\begin{quote}

part, that "the enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all other powers not herein delegated remain with the people." S.C. Const. art. I, § 41 (1868).

This constitutional provision may explain the differing judicial interpretations regarding the power of the legislature in Feldman and in State ex rel. Copes v. Mayor of Charleston, 44 S.C.L. (10 Rich.) 491 (1857). In Copes the court of errors affirmed the constitutionality of Charleston's bond issuance to buy stock in railroad companies, stressing the broad power of the legislature: "I know no restrictions on legislative power, which in this State is vested by the Constitution in the General Assembly, except those which deny certain powers, or which by implication arise because certain powers are conferred on Congress." Id. at 501. When Copes was decided, the Constitution of 1790 contained no provision comparable to article I, § 41 of the Constitution of 1868.


22. Article I, § 3 provides that the "privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art. I, § 3. Like S.C. Const. art. I, § 41 (1868), this provision does not expressly set forth a public purpose requirement.


24. See supra note 18 and accompanying text.

25. Although the current art. X, § 5 can be traced to the South Carolina Constitution of 1868, art. I, § 37 and art. IX, § 4, the older version merely required a stated "object" of the tax.
No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.26

Similarly, article X, section 13(3)27 states that general obligation debt may not be incurred except for a public purpose.28

III. APPLICATION OF THE PUBLIC PURPOSE DOCTRINE

A. Introduction

Since the seminal opinion in Feldman, legislation that has been held to satisfy a public purpose has related to the construction of a hospital,29 the construction of hydroelectric plants,30 the provision of low income housing,31 the construction of memorials,32 the construction of a cafeteria in a highway department,33 the promotion of industrial development,34 the control of air and water pollution,35 the issuance of bonds to finance student loans for higher education,36 the development of residential housing for low income families,37 the construction of a grain elevator,38 the provision of loans for low income farmers,39 the

27. Id., art. X, § 13(3).
28. See also S.C. CONST. art. X, §§ 14(4), 15(3), which relate to the general obligation debt of political subdivisions. Under the revised Article X, revenue bonds must also satisfy a public purpose: "The General Assembly may authorize the State or any of its agencies, authorities or institutions to incur indebtedness for any public purpose payable solely from a revenue-producing project or from a special source . . . ." S.C. CONST. art. X, §13(a); cf. S.C. CONST. art. X, § 14(10) (does not expressly require revenue bonds issued by cities, counties, and special purpose districts to serve a public purpose).
provision of financial assistance to small businesses, the development of waterfront property, the development of research parks to attract high technology industry, and the construction of lodging and restaurants to promote tourism.

By contrast, legislation that has not been held to satisfy the public purpose requirement has related to airport improvements, construction of a medical office building, development of housing for low to moderate income families, slum clearance, alcohol fuel development, development of computer office facilities, construction of shopping centers, and development of an industrial park.

These varying results confirm that the public goal of legislation, alone, does not always control the ultimate resolution of whether the legislation satisfies the public purpose test. To better understand the underpinnings of these mixed results, a more careful examination of the context in which the public purpose challenges have arisen is necessary. An examination of cases construing legislation that has authorized the issuance of revenue bonds (which do not involve the taxing power) and general obligation bonds (which do) provides a framework for determining that the legislative imposition of tax liability has affected the judicial interpretation of the public purpose doctrine.

49. Id.
50. Id.
B. Revenue Bonds

Revenue bonds are payable only from the income of projects erected or constructed with the proceeds of the bond issue.\(^52\) Holders of these bonds can maintain no claim upon funds to be raised by taxation to secure payment of their obligations.\(^53\)

The leading case in South Carolina addressing the public purpose doctrine as applied to county revenue bonds is *Elliott v. McNair*.\(^54\) In *Elliott* the court held that the Industrial Revenue Bond Act, which authorized financing incentives to promote industrial development, satisfied the public purpose requirement of article I, section 5.\(^55\) The court examined the legislation in an effort to determine if the legislature had been "clearly wrong" in its public purpose findings.\(^56\) Affirming the "established legislative policy"\(^57\) of industrial expansion, the *Elliott* court confirmed that the public purpose determination was primarily vested with the legislature.\(^58\)

This presumption in favor of legislation's validity has been confirmed in similar cases, even when, as in *Elliott*, private entities have benefited incidentally from the enactment. For instance, in *State ex rel. Medlock v. South Carolina Family Farm Development Authority*,\(^59\) the court upheld the Family Farm Development Act, which authorized the issuance of revenue bonds to provide loans to low and moderate income farmers, even though benefits accrued primarily to a specific segment of the state's population. Similarly, in *Carll v. South Carolina Jobs*

\(^{52}\) 2 E. McQuillen, *supra* note 2, § 43.11.

\(^{53}\) Id.

\(^{54}\) 250 S.C. 75, 156 S.E.2d 421 (1967).

\(^{55}\) S.C. Const. art. I, § 5 (1895). That provision is now contained in article I, § 3. See *supra* note 22. The concept of industrial revenue bonds—in 1967 a relatively new idea—is illustrated in *Elliott*, in which a private company acquired a tract of land to establish its business in South Carolina. After acquiring the land, the company conveyed the tract of land to Richland County, which was to issue revenue bonds to pay for the land and finance the construction of the facilities. The facilities and the land were then to be leased back to the private company. The reduced rate of interest from the tax-exempt financing of municipal bonds would make the undertaking by the private company economically feasible.

\(^{56}\) 250 S.C. at 88, 156 S.E.2d at 428.

\(^{57}\) Id. at 89, 156 S.E.2d at 428.

\(^{58}\) Id. at 88, 156 S.E.2d at 428; see also Park v. Greenwood County, 174 S.C. 35, 41, 176 S.E. 870, 872 (1934).

Economic Development Authority, the court upheld legislation authorizing the issuance of revenue bonds. The court concluded that the legislation designed to further business development in South Carolina was clearly supported by "detailed and comprehensive" legislative findings and that its provisions were reasonably related to its goals. Most recently, in Hucks v. Riley, the court upheld legislation authorizing the issuance of county industrial revenue bonds to finance the construction of public lodging and restaurant facilities. Based on a finding that tourism, the second largest industry in the state, would benefit by the legislation, the court held that the resulting economic improvement justified the legislation.

A notable exception to this line of cases is Anderson v. Baehr in which the court held that legislation with the aim of "slum clearance and redevelopment" did not serve a public purpose. Under the legislation addressed in Anderson, South Carolina taxpayers were not faced with the possibility of a levy of taxes to pay for the proposed housing and building redevelopment. Nonetheless, the legislation failed to pass the constitutional challenge because the Act lacked specific public purpose findings. Although the legislation in Anderson fell "on the wrong side of the border," Anderson is not inconsistent with Elliott and its progeny. Indeed, Anderson suggests that if, as in Elliott, the legislature had identified precisely the public purpose to be accomplished, along with a rational means to achieve

61. Id. at 443, 327 S.E.2d at 334.
63. Id. at 494, 357 S.E.2d at 459.
65. Id. at 162-63, 217 S.E.2d at 47-48.
66. The court noted that "the legislature has not spelled out a public purpose [and] the answer of the city has not, except in a general way, plead [sic] a public purpose." Id. at 162, 217 S.E.2d at 47. The court also observed: "[t]hat which the city and/or developer proposes to do specifically is not indicated in the record." Id. at 161, 217 S.E.2d at 47. The court further indicated a reluctance to uphold the challenged legislation absent clear public purpose findings because the legislation permitted the taking of private property by eminent domain. Compare State ex rel. McLeod v. Riley, 276 S.C. 323, 322, 278 S.E.2d 612, 617 (1981) (per curiam) (legislation providing for the financing of computer and office facilities and shopping centers would "solve no problems confronted by substantial numbers of the public").
67. 265 S.C. at 161, 217 S.E.2d at 46.
that end, the legislation would have been upheld. 68

C. General Obligation Bonds

Unlike revenue bonds, general obligation bonds are payable from funds provided by taxation. When general obligation bonds are issued, the full faith and taxing power of the government entity is pledged as security. 69 In cases in which the legislation has authorized the pledge of the taxing power, the supreme court has rigorously reviewed the legislation, and has often held such legislation unconstitutional. 70

In Bolton v. Wharton, 71 for instance, the court considered a taxpayer challenge to the city of Union's use of general obligation bonds issued to underwrite stock in a proposed silk manufacturing company. Holding that the obligations, which were to be secured by the taxing power of the city of Union, were "not issued for a valid corporate purpose," 72 the court emphasized:

"The power given to the city council to issue bonds, so as to bind not only all the taxpayers of the city, but their children as well, is a very high confidence and trust, and can be properly exercised for no other purpose than "for the public use of the [city] . . . ." 73

Similarly, in Casey v. South Carolina State Housing Authority 74 the supreme court addressed the constitutionality of legislation authorizing the issuance of notes or bonds to promote housing accommodations for persons of moderate to low income. The court in Casey held that the mortgage loan and mortgage purchase programs at issue unconstitutionally pledged the credit of the state because the act establishing those programs established a guaranty fund composed of future tax revenues from

68. See generally supra note 5 and accompanying text.
69. See supra note 7.
70. See, e.g., supra notes 14-18 and accompanying text.
71. 163 S.C. 242, 161 S.E. 454 (1930).
72. Id. at 250, 161 S.E. at 457.
73. Id. at 249-50, 161 S.E. at 457 (quoting Mauldin v. City Council of Greenville, 33 S.C.L. 24, 11 S.E. 434, 438 (1890); see also Jacobs v. McClain, 262 S.C. 425, 205 S.E.2d 172 (1974) (statute authorizing hospital district to issue general obligation bonds to finance construction of offices to be leased by physicians unconstitutional because such buildings are not "public")).
which the state treasurer was statutorily required to pay any
deficit incurred by the Housing Authority.\textsuperscript{75} Although the court in \textit{Casey} did not expressly address the public purpose of the
Act, the import of the \textit{Casey} holding was that the Act failed to
serve the requisite public purpose.\textsuperscript{76}

In \textit{State ex rel. McLeod v. Riley},\textsuperscript{77} the supreme court invali-
dated legislation which authorized the issuance of general obli-
gation bonds to finance an alcohol fuel development loan pro-
gram. Acknowledging that “a properly tailored legislative
enactment seeking to promote the development of fuel alcohol
by government entities”\textsuperscript{78} might serve a public purpose, the
court found that the “indirect and speculative nature”\textsuperscript{79} of the
public purpose rendered the legislation constitutionally defective
under article X, sections 11 and 13(3).\textsuperscript{80}

Striving to clarify the court’s position on the question of
public purpose in the context of general obligation debt, a three-

\textsuperscript{75} Article X, \S 11 of the South Carolina Constitution, which provides that the
"credit of neither the state nor any of its political subdivision shall be pledged or loaned
for the benefit of any individual, company, association, corporation, or any religious or
private education institution” has generally been interpreted to relate “solely to general
obligation bonds payable from the proceeds of ad valorem tax levies.” \textit{Carll}, 284 S.C. at
443-44, 327 S.E.2d at 335. This constitutional proscription does not bar the pledging of
the credit of the state or its subdivisions if the challenged legislation serves a public
purpose. \textit{See, e.g., South Carolina Farm Bureau Mktg. Ass’n v. South Carolina State

\textsuperscript{76} Three years after the \textit{Casey} opinion, in \textit{Bauer v. South Carolina State Hous.
Auth.}, 271 S.C. 219, 246 S.E.2d 869 (1979), the same general legislative scheme was held
to be constitutional in all respects. In \textit{Bauer} the supreme court stated that \textit{Casey} had
invalidated the legislation “on the ground that it constituted a pledge of the state’s
credit for the benefit of the private sector in violation of the state constitution.” \textit{Id. at
223}, 246 S.E.2d at 871. The \textit{Bauer} court distinguished the legislation in \textit{Casey} and found
that, unlike “the previous enactments, which had as their intended beneficiaries only
persons and families of moderate to low income, the 1977 act also includes persons and
families of low income as beneficiaries. And, for the first time, a precise definition of the
beneficiary classes is contained in the legislation.” \textit{Id. at 224}, 246 S.E.2d at 872. Signifi-
cantly, Justice Gregory, concurring in the result, expressly acknowledged that the “same
basic scheme employed by the 1974 act [addressed in \textit{Casey}] . . . was declared to serve a
private purpose. Today, it is determined to serve a public purpose.” \textit{Id. at 237}, 246
S.E.2d at 878-79 (Gregory, J., concurring). Concluding that the Act in \textit{Bauer} satisfied the
public purpose requirement, Gregory stated that the constitutional impediment to fund-
ing the project with tax revenues, present in \textit{Casey}, had been removed. \textit{Id. at 237}, 246
S.E.2d at 879. (Gregory, J., concurring).

\textsuperscript{77} 276 S.C. 323, 328, 278 S.E.2d 612, 615 (1981).
\textsuperscript{78} \textit{Id. at 330}, 278 S.E.2d at 616.
\textsuperscript{79} \textit{Id. at 329}, 278 S.E.2d at 615.
\textsuperscript{80} \textit{Id. at 329-30}, 278 S.E.2d at 615-16; \textit{see also supra} note 66.
justice majority in Byrd v. County of Florence\textsuperscript{81} struck down the use of general obligation bonds by a political subdivision as violative of article X, section 14(4) of the South Carolina Constitution.\textsuperscript{82} In Byrd the court addressed the constitutionality of a county ordinance permitting the issuance of general obligation bonds to be used by Florence County to purchase a tract of land. The ordinance provided for the development of an industrial park on the purchased property that would be sold or leased to private industry. The purpose of the legislation was to promote industrial development and to create jobs in an economically depressed area.\textsuperscript{83}

For the first time in its history, a majority of the court explicitly set forth a precise and more rigorous standard for determining whether legislation subjecting taxpayers to additional taxes satisfied a public purpose. Expressly recognizing the distinction between general obligation and revenue bonds, the Byrd majority adopted Justice Harwell's dissent in State ex rel. McLeod v. Riley.\textsuperscript{84} The court stated: "[O]ne of the relevant and logical considerations is the source of repayment [of the obligation]. A distinction is justified. In revenue bonds, taxpayers can not [sic] lose. In general obligation bonds, taxpayers may lose much."\textsuperscript{85}

In view of the possible financial liability of Florence County taxpayers under the ordinance, the court articulated a four-point test for reviewing legislation authorizing general obligation debt. The court stated that the following factors should be analyzed: (1) the ultimate goal or benefit to the public intended by the project; (2) whether public or private parties will be the pri-


\textsuperscript{82} S.C. Const. art. X, § 14(4) provides that general obligation debt may be incurred "only for a purpose which is a public purpose and which is a corporate purpose of the applicable political subdivision."


\textsuperscript{84} 276 S.C. 323, 333, 278 S.E.2d 612, 617 (1981).

\textsuperscript{85} 281 S.C. at 405, 315 S.E.2d at 805. The observation that Byrd was rarely cited and never applied prior to the Nichols opinion, see State and Local Government, Annual Survey of South Carolina Law, 39 S.C.L. Rev. 161, 163 (1987), can be easily explained. Between 1984, when the Byrd decision was rendered, and 1986, when the Nichols challenge was addressed, no case concerning the public purpose of legislation which authorized the imposition of general obligation debt was addressed by the South Carolina Supreme Court.
mary beneficiaries; (3) the speculative nature of the project; and (4) the probability that the public interest will be ultimately served and to what degree.\textsuperscript{86}

The \textit{Byrd} majority concluded that the nature of the proposed development was speculative because the park was not clearly defined and no purchaser or tenant had been identified.\textsuperscript{87} The court also reasoned that "the primary beneficiaries, if any, of this project would be private businesses,"\textsuperscript{88} concluding that the ordinance impermissibly permitted the County to promote some businesses which would compete with other businesses that would not receive the financial benefits provided by the ordinance.\textsuperscript{89}

\textbf{D. Summary}

South Carolina courts have recognized, even if they have not always articulated, different levels of public purpose scrutiny applicable to legislation, depending on whether the legislation has authorized the levy of taxes.\textsuperscript{90} In nontax cases the statutory examination based on article I, section 3 of the South Carolina Constitution has compelled only limited judicial review. In those cases, a clear legislative statement setting forth the statute's public purpose, along with a reasonable means for implementing that public purpose, have been sufficient to withstand constitutional attack. In cases in which the statute has authorized a levy of taxes, the supreme court has more closely scrutinized the leg-

\textsuperscript{86} 281 S.C. at 407, 315 S.E.2d at 808.

\textsuperscript{87} The parties stipulated that "the industries to be located in the park [were] unknown and indefinite, and no commitments or contracts by any industry to locate within the park [had] been made." \textit{Id.}, 315 S.E.2d at 806-07.

\textsuperscript{88} \textit{Id.}, 315 S.E.2d at 807.

\textsuperscript{89} \textit{Id.} at 407, 315 S.E.2d at 806-07. In a vigorous dissent, Justice (and later Chief Justice) Ness asserted that the act was fundamentally identical to the legislation upheld in \textit{Elliott}, and that, consequently, the \textit{Elliott} holding should have governed the \textit{Byrd} decision. Taking issue with the idea that taxpayer liability should relate to the public purpose issue, he also posited that the aim and implementation of the county ordinance was no different from that of a specific provision of the Home Rule Act, S.C. Code Ann. \textsection 4-9-30(5) (Law. Co-op. 1986). 281 S.C. at 408-09, 315 S.E.2d at 807-08 (Ness, J., dissenting).

islation, often examining the speculative nature of the goal to be furthered by the act or more carefully analyzing the true nature of public purpose set forth in the act.

The divergence of these standards of review may have been erased in 1986, however, when the South Carolina Supreme Court issued its opinion in *Nichols v. South Carolina Research Authority*.\(^{91}\)

**IV. Nichols v. South Carolina Research Authority**

**A. Background**

In *Nichols*\(^ {92}\) the supreme court addressed the constitutionality of legislation establishing the South Carolina Research Authority for the purpose of attracting high technology industry to South Carolina. Under that legislation\(^ {93}\) the primary means of attracting such industry was the development of research parks near university centers. Pursuant to the act, the state deeded the Research Authority four tracts of land in fee simple, each near major research and education centers in South Carolina.\(^ {94}\)

The Act authorized the Research Authority to construct, operate, and maintain the research parks and related facilities. The Authority was also permitted to issue revenue bonds to further the purposes of the act.

The Authority stipulated that, as part of its effort to attract high technology industry to South Carolina, it intended to provide financial incentives to high technology industries.\(^ {95}\) These incentives included mortgaging land received from the state, purchasing equipment, and selling and leasing land to high technology industries.\(^ {96}\) Negotiations between the Authority and eleven high technology industries interested in locating in the Authority's research parks were ongoing, and two of these industries had reached the final phases of negotiations with the Research Authority. Each of the eleven industries was projected to employ approximately twenty-five individuals at the beginning

\(^{91}\) 290 S.C. 415, 351 S.E.2d 155 (1986).

\(^{92}\) Id.


\(^{94}\) Record at 15-16.

\(^{95}\) Id. at 17.

\(^{96}\) Id.
of its operations. 97

B. Resolution by the Lower Court

The plaintiff in Nichols conceded that the legislation at issue satisfied the public purpose requirement of article I, section 3, 98 but contended, nonetheless, that the legislation could not withstand the more exacting scrutiny required of legislation that required the pledge of the state’s credit and potential loss of taxpayer revenues. The plaintiff argued that the legislation did not pass constitutional muster because (1) the act permitted the pledge of the state’s credit in violation of article X, section 11, and (2) the act failed to satisfy the corresponding public purpose requirement imposed on legislation authorizing the levy of taxes. In response, the Authority contended that the legislation did not pledge the state’s credit and that, even if the mortgaging of state property could be construed to be a pledge of the state’s credit, the legislation satisfied the public purpose mandate of Byrd. 99

The lower court in Nichols held that the legislation served a public purpose under article I, section 3. 100 The court reasoned that the legislation was designed to serve a public purpose and the means chosen to achieve its public goals were rationally related to those ends. The lower court also observed that the incidental benefit to private industry did not invalidate the act. 101 The court, however, held that a more rigorous public purpose examination was required because the act empowered the Authority to mortgage or otherwise encumber its property. 102 Con-

97. Id. at 17-18.
98. Id. at 23. See generally supra note 22 and accompanying text.
99. The parties also disputed the constitutionality of the provision in the act which did not require adherence to the Advanced Refunding Act. S.C. Code Ann. §§ 11-21-10 to -80 (Law. Co-op. 1986). In addition, the Nichols challenge raised the questions of whether the Research Authority could sell its property at less than full market value and whether it could enter into joint ventures with private industry. The supreme court affirmed the lower court’s order on these issues and concluded that: (1) the provision of the act which failed to require adherence to the Advanced Refunding Act constituted special legislation in violation of S.C. Const. art. III, § 34(IX); (2) the Authority could sell its property at less than full market value under S.C. Const. art. III, § 31, as long as public benefits would result from the sale; and (3) S.C. Const. art. X, § 11 prohibited the contemplated joint ventures with private industry.
100. Record at 23-28.
101. Id. at 27-28.
102. Justifying the heightened standard of review, the court reasoned that the mort-
sequently, the court ruled that the act did not satisfy the public purpose scrutiny demanded by the four-part standard of *Byrd*. The court determined that the public benefits resulting from mortgages or other encumbrances of property were speculative and that the primary beneficiary of the contemplated mortgaging of property would be private industry. Unwilling to risk the foreclosure of 1,500 acres of state property for the development of high technology industry in South Carolina, the court concluded:

If the financing of research parks serves a public purpose at all, it does so, as in *Elliott*, "barely above the border" and only because bonds which do not constitute general obligation debt will be issued. But with the addition of a pledge of the state's credit through the mortgaging of all authority property to secure those bonds, the financing, as in *Byrd*, "falls barely, if not greatly, below the border." 104

C. The Appeal: *Byrd* Overruled

On appeal to the supreme court, the Authority pressed the same arguments it made before the lower court and also contended that the lower court had erroneously applied the *Byrd* test. The Authority argued alternatively that *Byrd* should be overruled if the supreme court concluded that the lower court's *Byrd* analysis was correct. 105 The supreme court in *Nichols* upheld the act 106 and reversed the lower court's finding that the act impermissibly pledged the state's credit. The court held that the mortgage of a known quantifiable asset, which imposed no potential present or future taxpayer liability, would not violate the proscription of article X, section 11. 107

After concluding that the act neither pledged the state's credit nor resulted in possible taxpayer liability, the court, in dicta, addressed the public purpose question and seized the op-

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103. Id. at 39.
104. Id. at 40-41 (quoting *Byrd* v. County of Florence, 281 S.C. 402, 407, 315 S.E.2d 804, 806 (1984)).
105. See *Brief of Appellants* at 27.
106. See also supra note 99.

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portunity to overrule Byrd.\textsuperscript{108} Instrumental in the court's analysis was its broad construction of Byrd, which the Nichols court determined had effectively nullified at "state, county and municipal levels any legislation which authorizes the expenditure of public funds for industrial development."\textsuperscript{109} Under the Nichols court's interpretation, Byrd held "that industrial development does not pass constitutional muster as a 'public purpose' within the meaning of S. C. Const. Art. X, §14(4)."\textsuperscript{110}

In overruling Byrd, the court in Nichols reexamined the record in Byrd and observed that at the time of the Byrd opinion, the Florence County economy was underdeveloped. With 6,000 persons unemployed, the unemployment rate in Florence County was greater than the overall rate in the state. The court also took note of the drastic drop in the per capita income in Florence County, relative to other counties in South Carolina. It further recognized that only three new industries had located in Florence County in ten years. Finally, concurring with the Byrd dissent, the court observed that the financing proposed in Byrd was the equivalent of the General Assembly's practice of expending revenues for the State Development Board to use.\textsuperscript{111}

Reaffirming the principle set forth in Bauer v. South Carolina State Housing Authority,\textsuperscript{112} that "the mere fact that benefits will accrue to private individuals or entities does not destroy public purpose,"\textsuperscript{113} the court concluded:

It would be anomalous to hold that a government which expends hundreds of millions to alleviate the suffering of its indigent population through multiple social and humanitarian pro-

\textsuperscript{108} Once the issue regarding the pledge of the state's credit was resolved in favor of the Authority, no issue regarding the public purpose of the legislation remained. All parties agreed that the lesser standard required by article I, § 3 was satisfied by the legislation. Record at 23.

\textsuperscript{109} 290 S.C. at 423, 351 S.E.2d at 160.

\textsuperscript{110} Id. A close reading of Byrd suggests, however, that the Byrd majority did not render such a comprehensive opinion. In Byrd, the majority engaged in a fact-specific inquiry prior to concluding that the contemplated project would be speculative and that primary beneficiaries of the project would be private businesses. 231 S.C. at 405-07, 315 S.E.2d at 805-07. Furthermore, the distinction between the legislation challenged in Elliott v. McNair and the Florence County ordinance at issue in Byrd, a distinction expressly acknowledged by the Byrd majority, appears to refute the Nichols court's sweeping construction of Byrd.

\textsuperscript{111} 290 S.C. at 427-28, 351 S.E.2d at 161-62.

\textsuperscript{112} 271 S.C. 219, 246 S.E.2d 869 (1978).

\textsuperscript{113} 290 S.C. at 428, 351 S.E.2d at 161.
grams, and properly so, is proscribed from providing jobs for the unemployed, who, once employed, contribute tax revenues in support of those very programs.\textsuperscript{114}

Although it rejected the Byrd majority opinion, the Nichols court approved as "reasonable" the four-part standard articulated in Byrd as the proper inquiry "by which a particular statute for financing industrial development should be tested for constitutionality."\textsuperscript{115}

\section*{V. Conclusion}

The courts must now face the difficulty of construing the Nichols holding and applying it within the public purpose realm. By choosing to re-evaluate the validity of the Byrd holding in a case which did not concern general obligation debt, the supreme court established a justification for reading Nichols broadly and for thereby concluding that the Byrd four-point analysis is applicable to any bond legislation challenged on public purpose grounds, regardless of whether that legislation permits the imposition of taxpayer liability. Furthermore, the Nichols rejection of Byrd, based on the inconsistency between Byrd and Bauer \textit{v. South Carolina Housing Development Authority},\textsuperscript{116} and based on the Byrd dissent\textsuperscript{117} suggests that the court in Nichols may have embraced fully Justice Ness's conclusion that the issues of public purpose and taxpayer liability are unrelated.\textsuperscript{118}

It is not clear, however, that the supreme court in Nichols erased the distinction between the standard applicable to legislation that authorizes taxation and the standard applicable to legislation that prohibits the imposition of taxpayer liability. If, as the dicta of Nichols indicates, the four-point standard formulated in Byrd applies only to "acts of the General Assembly or its political subdivisions which expend public funds for indus-

\textsuperscript{114} Id. at 429, 351 S.E.2d at 163.

\textsuperscript{115} Id.

\textsuperscript{116} Id. Bauer, which did not involve general obligation debt, is discussed more fully at supra notes 37 and 76 and accompanying texts.

\textsuperscript{117} 290 S.C. at 428, 351 S.E.2d at 162.

trial development," then this standard applies only when taxpayers are subjected to possible pecuniary liability. Moreover, a convergence of the different standards of public purpose review belies the stated goal of the Nichols court: "[T]o broaden the scope of activities which may be classed as involving a public purpose."120

The supreme court's recent decision in Hucks v. Riley further supports a narrow reading of Nichols on the public purpose issue.121 In Hucks the court upheld an amendment to the Industrial Development Bond Act which authorized the issuance of industrial revenue bonds to finance the acquisition of public lodging and restaurant facilities.122 The court cited Nichols only for the proposition that "the current trend is to broaden the scope of those activities which serve a public purpose, and legislation is not for a private purpose merely because private parties may be benefited."123 The failure of the Hucks court to address the application of the four-point standard affirmed in Nichols suggests that standard is applicable only in cases addressing legislation authorizing the imposition of taxpayer liability.

Regardless of the construction of Nichols, however, one fact is certain: the distinction South Carolina courts previously employed when evaluating the public purpose of legislation has been called into question. To help resolve the imprecision inherent in the public purpose analysis, it is incumbent on the courts to set forth more clearly the parameters governing application of the public purpose doctrine. Although to a large extent the case-by-case analysis reflected in the opinions addressing the public

119. 290 S.C. at 430, 351 S.E.2d at 163 (emphasis added). The applicability of the Byrd standard has been at issue only when legislation designed to promote industrial development has been challenged. The opinion in Nichols and the majority opinion in Byrd suggest, however, that the heightened scrutiny is justified in other contexts, as well, separate and apart from whether the four-point standard is limited to cases addressing legislation that allows for the imposition of taxpayer liability. See also State ex rel. McLeod v. Riley, 276 S.C. 323, 340, 278 S.E.2d 612, 621 (1981) (Harwell, J., dissenting).

120. 290 S.C. at 425, 351 S.E.2d at 161. If the four-point standard applies to all bond legislation, whether or not the legislation imposes taxpayer liability, then legislation that was previously subject to the more limited review, see supra notes 54-63 and accompanying text, will be governed by the more rigorous Byrd standard.


123. 292 S.C. at 493-94, 357 S.E.2d at 459.
purpose issue is unavoidable, the court can reduce the confusion surrounding the public purpose doctrine with pronouncements more clearly identifying the standards to be applied and with guidelines precisely identifying the contexts in which those standards apply.

Specifically, the courts should reaffirm the previously recognized distinct standards of review relevant to the public purpose issue. If courts are to consider the "peculiar circumstances" relevant to each legislative enactment, then "one of the relevant and logical considerations is the source of the repayment. [A] distinction . . . is justified. In revenue bonds, taxpayers can not [sic] lose. In general obligation bonds, taxpayers may lose much." In determining the constitutionality of legislation, the role of the judiciary is a limited one. "[A]ll reasonable doubt must be resolved in favor of the constitutionality of [an] act." Yet, courts also have a "solemn duty" 127 to declare an act unconstitutional when the act is clearly unconstitutional. To strike the proper balance in upholding these principles, the judiciary's role as safeguarder of individual rights and liberties justifies a more demanding review of legislation when that legislation more directly affects the liabilities of citizens—taxpayers—of the state.

124. "Public and private interests are so commingled in many cases that it is difficult to determine which predominates. . . ." 1 COOLEY ON TAXATION, § 175 (4th ed. 1924).
125. 281 S.C. at 405, 315 S.E.2d at 805.