

## ANYTHING GOES: A HISTORY OF NEW YORK’S GIFT AND LOAN CLAUSES

*Peter J. Galie\* and Christopher Bopst\*\**

*“[M]oney in the hands of an authority is not state money . . . .  
[T]he gift and loan clause does not apply to the authorities.”*

—Barbara D. Underwood, Solicitor General of the State of  
New York

*“So anything goes?”*

—Honorable Jonathan Lippman, Chief Judge of the State  
of New York

Oral Argument on *Bordeleau v. State*, New York Court of  
Appeals, Oct. 12, 2011<sup>1</sup>

The New York constitution prohibits gifts or loans of money or  
credit from state and local governments to private enterprises.<sup>2</sup>

---

\* Professor Emeritus, Canisius College, Buffalo, New York.

\*\* Partner, Goldberg Segalla LLP, Buffalo, New York. The authors would like to thank Robert Grimaldi for his assistance on this article.

<sup>1</sup> *Oral Argument Archive*, COURT OF APPEALS STATE OF NEW YORK (Oct. 12, 2011), [http://www.nycourts.gov/ctapps/arguments/2011/Oct11/Oct11\\_OA.htm](http://www.nycourts.gov/ctapps/arguments/2011/Oct11/Oct11_OA.htm) (follow “No. 190 Bordeleau v State of New York” hyperlink).

<sup>2</sup> The prohibition against gifts or loans of state money or credit is found in article VII, section 8 of the New York Constitution. The prohibition against gifts or loans of local money, credit, or property is found in article VIII, section 1 of the New York Constitution. These restrictions are not unique to New York; forty-six other states have some form of limitation on gifts and loans. ALA. CONST. art. IV, § 94; ALASKA CONST. art. IX, § 6; ARIZ. CONST. art. IX, § 7; ARK. CONST. art. XII, §§ 5, 7, art. XVI, § 1; CAL. CONST. art. XVI, §§ 6, 17; COLO. CONST. art. V, § 34, art. XI, §§ 1–2; CONN. CONST. art. I, § 1; DEL. CONST. art. VIII, §§ 4, 8; FLA. CONST. art. VII, § 10; GA. CONST. art. III, § 6, ¶ 6, art. VII, § 4, ¶ 8; HAW. CONST. art. VII, § 4; IDAHO CONST. art. VIII, §§ 2, 4; ILL. CONST. art. VIII, § 1; IND. CONST. art. X, § 5, art. XI, § 12; IOWA CONST. art. VII, § 1, art. VIII, § 3; KY. CONST. §§ 171, 177, 179; LA. CONST. art. VII, pt. 1, §§ 1, 10, 14; ME. CONST. art. IX, § 14; MD. CONST. art. III, § 34; MASS. CONST. art. of amend., art. LXII, § 1; MICH. CONST. art. IV, § 30, art. VII, § 26, art. IX, §§ 18–19; MINN. CONST. art. XI, §§ 2, 12; MISS. CONST. art. VII, § 183; art. XIV, § 258; MO. CONST. art. III, § 38(a), art. VI, §§ 23, 25; MONT. CONST. art. VIII, §§ 8, 10; NEB. CONST. art. XIII, § 3, art. XV, § 17; NEV. CONST. art. VIII, §§ 9–10; N.H. CONST. pt. 2, art. V; N.J. CONST. art. VIII, § 2, ¶ 1, art. VIII, § 3, ¶¶ 2–3; N.M. CONST. art. IV, §§ 26, 31, art. IX, § 14; N.C. CONST. art. V, § 3;

Adopted between 1846 and 1874,<sup>3</sup> these clauses were a response to widespread corruption and mismanagement of public moneys on the part of the state legislature and municipalities.<sup>4</sup> The gift and loan restrictions, coupled with other constitutional amendments adopted during that period—such as a referendum requirement for state full faith and credit debt,<sup>5</sup> a maximum length of time debt could extend,<sup>6</sup> a “single work or object” requirement for debt,<sup>7</sup> and debt and tax limitations for municipalities<sup>8</sup>—combined to strictly limit the state and local governments in their taxing and spending powers.

Notwithstanding the unequivocal nature of New York’s gift and loan clauses,<sup>9</sup> during the twentieth century these provisions have been amended numerous times, adding exception upon exception to the broad prohibitions. They have been circumvented or diluted in the name of meeting the growing demands being placed upon the modern state and its political subdivisions.<sup>10</sup> The tension between

---

N.D. CONST. art. X, § 18; OHIO CONST. art. VIII, §§ 4, 6, 13; OKLA. CONST. art. X, § 15; OR. CONST. art. XI, §§ 5–7, 9; PA. CONST. art. VIII, § 8; R.I. CONST. art. VI, §§ 11, 16; S.C. CONST. art. X, § 11; TENN. CONST. art. II, § 31; TEX. CONST. art. III, §§ 50, 52, art. VIII, § 3, art. XVI, § 6; UTAH CONST. art. VI, § 29; VT. CONST. chap. I, art. VII; VA. CONST. art. X, § 10; WASH. CONST. art. VIII, §§ 5, 7, art. XII, § 9; W. VA. CONST. art. X, § 6; WYO. CONST. art. XVI, § 6.

<sup>3</sup> N.Y. CONST. of 1846, art. VII, § 9 (prohibiting gifts or loans of state credit); N.Y. CONST. of 1846, art. VIII, § 10 (amended 1874) (prohibiting gifts or loans of state money or credit); N.Y. CONST. of 1846, art. VIII, § 11 (amended 1874) (prohibiting gifts or loans of municipal money or credit).

<sup>4</sup> For an account of the national movement to restrict state legislatures in the areas of “economic boosterism and favoritism,” see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 112–13 (1998). For a description of the change in New York during that time from an “active, intimate, palpable connection between the political system and the socioeconomic environment . . . to a passive, supervisory, formalized system,” see L. RAY GUNN, THE DECLINE OF AUTHORITY: PUBLIC ECONOMIC POLICY AND POLITICAL DEVELOPMENT IN NEW YORK, 1800–1860, 1–22 (1988); 2 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 10 (1906) (noting that the constitutional convention of 1846 was held during a time when the power of the legislature was generally believed to be too great).

<sup>5</sup> N.Y. CONST. of 1846, art. VII, § 12 (current version found at N.Y. CONST. art. VII, § 11).

<sup>6</sup> *Id.* (setting limit at eighteen years) (current version found at N.Y. CONST. art. VII, § 12 (setting limit at forty years)).

<sup>7</sup> *Id.* (current version found at N.Y. CONST. art. VII, § 11) (currently using a more relaxed single “work or purpose” requirement).

<sup>8</sup> N.Y. CONST. of 1846, art. VIII, § 11 (amended 1884) (current version found at N.Y. CONST. art. VIII, § 4 (debt limits) and N.Y. CONST. art. VIII, § 10 (tax limits)).

<sup>9</sup> These provisions have been described by one commentator as “strict” when compared to other states. Nicholas J. Houpt, Note, *Shopping for State Constitutions: Gift Clauses as Obstacles to State Encouragement of Carbon Sequestration*, 36 COLUM. J. ENVTL. L. 359, 383 (2011) (describing as “strict” those states whose gift clauses do not contain a textual public purpose exception). Houpt also provides an appendix of states that have recognized by court decision a general public purpose exception to their gift and loan clauses, of which New York is not included. *Id.* app. at 408–12.

<sup>10</sup> This is part of a nationwide trend that has led scholar Richard Briffault to refer to fiscal

2011/2012]

New York's Gift and Loan Clauses

2007

the restraints provided by these provisions and the public programs called for by advocates for a greater role for government in solving social problems has been resolved in favor of the latter.<sup>11</sup> Moreover, the use of public authorities and an interpretation of the clauses which substitutes public purpose for consideration as the critical element in public-private agreements, while affording extensive latitude to the government's determinations as to what constitutes such a public purpose, has resulted in a body of state constitutional law at some remove from the text of the state constitution.<sup>12</sup>

The recent case of *Bordeleau v. State*,<sup>13</sup> represents the latest word by the Court of Appeals concerning New York's ability to give or loan public money to private enterprises. This decision provides the legislature a substantial amount of flexibility in granting money to private enterprises and raises serious questions as to the continued viability and efficacy of the gift and loan clauses as a means of controlling the use of public moneys.<sup>14</sup>

Part I of this article will present a brief textual history of the gift and loan clauses—the conditions which gave rise to them, subsequent amendments, and calls for revision. Part II will examine the decisions of the New York Court of Appeals that have interpreted these clauses, and in particular will show ways in which the court has allowed state and local governments to circumvent them. Part III will analyze the Court of Appeals' own understanding of its role in gift and loan jurisprudence. The court's deference in this area will be juxtaposed with the expansive, activist role it has played when analyzing other provisions of the state constitution. Part IV will offer some reflections on the future of the gift and loan clauses.<sup>15</sup>

## I. A BRIEF HISTORY OF THE TEXT OF THE GIFT AND LOAN CLAUSES

Among the differences between the Federal Constitution and state constitutions is the extent to which the latter address the topic

---

restrictions as the "disfavored constitution." Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 910 (2003).

<sup>11</sup> See Houpt, *supra* note 9, at 383.

<sup>12</sup> See *id.* at 382–83.

<sup>13</sup> *Bordeleau v. State*, 960 N.E.2d 917 (N.Y. 2011).

<sup>14</sup> *Id.* at 922–24.

<sup>15</sup> This article will not examine the merits of providing aid to corporations in today's business climate. For a treatment of different economic incentives available, see Martin E. Gold, *Economic Development Projects: A Perspective*, 19 URB. LAW. 193 (1987).

of finance. In contrast to the Federal Constitution, which contains relatively limited mention of finance and debt,<sup>16</sup> all but four of the twenty articles in the New York Constitution bear directly on the topic.<sup>17</sup> Two of the longest articles in the constitution, articles VII and VIII, are entirely devoted to state and local finances, respectively.<sup>18</sup> In addition to the gift and loan clauses, each of these articles contains multiple, detailed sections governing the issuance

---

<sup>16</sup> There are a few references to finance found in the Federal Constitution. U.S. CONST. art. I, § 2, cl. 3 (apportioning direct taxes among the states); U.S. CONST. art. I, § 6, cl. 1, *amended by* U.S. CONST. amend. XXVII (providing for compensation of members of Congress); U.S. CONST. art. I, § 7, cl. 1 (providing that all revenue bills must “originate in the House of Representatives”); U.S. CONST. art. I, § 8, cl. 1 (providing Congress the authority to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”); U.S. CONST. art. I, § 8, cl. 5 (providing Congress the authority to “coin Money, regulate the Value thereof, and of foreign Coin”); U.S. CONST. art. I, § 8, cl. 6 (providing Congress the authority to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States”); U.S. CONST. art. I, § 8, cl. 12 (providing Congress the authority to “raise and support Armies,” but limiting appropriations for that purpose to a term of no more than two years); U.S. CONST. art. I, § 9, cl. 1 (allowing a tax or duty to be imposed on the importation of persons); U.S. CONST. art. I, § 9, cl. 4, *abrogated by* U.S. CONST. amend. XVI (providing that no direct tax shall be imposed unless in proportion to the census); U.S. CONST. art. I, § 9, cl. 5 (prohibiting the laying of any tax or duty on exports from any state); U.S. CONST. art. I, § 9, cl. 6 (prohibiting any preference by “any Regulation of Commerce or Revenue to the Ports of one State over those of another” and banning the obligation of “Vessels bound to, or from, one State . . . to enter, clear, or pay Duties in another”); U.S. CONST. art. I, § 9, cl. 7 (prohibiting the drawing of any money from the treasury except through “Appropriations made by Law” and requiring the publication “from time to time” of a “regular Statement and Account of the Receipts and Expenditures of all public Money”); U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from coining money, emitting bills of credit, or making anything but gold and silver coins a “Tender in Payment of Debts”); U.S. CONST. art. I, § 10, cl. 2 (requiring the consent of Congress for a state to “lay any Imposts or Duties on Imports or Exports [beyond] what may be absolutely necessary for executing [the state’s] inspection Laws, and requiring the “net Produce of all Duties and Imposts” to be “for the Use of the Treasury of the United States,” and placing such laws within the “Revision and Controul of the Congress”); U.S. CONST. art. I, § 10, cl. 3 (requiring the consent of Congress for a state to “lay any Duty of Tonnage”); U.S. CONST. art. II, § 1, cl. 6 (providing for compensation of the President); U.S. CONST. art. III, § 1 (providing for compensation of members of the judiciary); U.S. CONST. art. VI, cl. 1 (validating “[a]ll Debts contracted and Engagements entered into, before the Adoption of [the] Constitution”); U.S. CONST. amend. XIV (providing that “[t]he validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned,” but holding illegal and void “any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave”); U.S. CONST. amend. XVI (allowing an income tax); U.S. CONST. amend. XXIV (barring a poll tax); and U.S. CONST. amend. XXVII (prohibiting the varying of compensation of members of Congress before an intervening election).

<sup>17</sup> The sections that contain finance provisions are addressed in the text and footnotes below. The only articles that have no mention of finance are article II (Suffrage), article XII (Defense), article XIX (Amendments to Constitution), and article XX (When to take effect).

<sup>18</sup> N.Y. CONST. arts. VII, VIII.

2011/2012]

New York's Gift and Loan Clauses

2009

and payment of debt.<sup>19</sup> The state budget and appropriations processes are detailed in the state finance article.<sup>20</sup> Public benefit corporations, also known as authorities, are addressed in article X of the constitution.<sup>21</sup> In addition to having an entire article devoted to the topic of taxation,<sup>22</sup> aspects of that power are treated in several other places.<sup>23</sup> The remaining provisions concerning finance are scattered throughout the constitution,<sup>24</sup> and in one instance adjacent to the people's right to assemble and petition the government.<sup>25</sup>

At the national level, finance is almost exclusively a matter of public policy.<sup>26</sup> Few constitutional provisions limit decision-makers. In their first incarnations, state constitutions, like their national counterpart, had few provisions concerning finance.<sup>27</sup> The first two constitutions of New York, adopted in 1777 and 1821, did not contain any restrictions on public aid to private enterprise.<sup>28</sup> On the contrary, grants and loans of state money and credit to private corporations were fairly common occurrences, justified by the general view that the state had an obligation to promote the prosperity of all its members.<sup>29</sup> New York's first foray into government stimulus to create jobs dates back to 1790, when the legislature incorporated the New York Manufacturing Society and

<sup>19</sup> N.Y. CONST. art. VII, §§ 9–16, 18–19; N.Y. CONST. art. VIII, §§ 1–9, 12.

<sup>20</sup> N.Y. CONST. art. VII, §§ 1–7.

<sup>21</sup> N.Y. CONST. art. X, §§ 5–8; *see also* N.Y. CONST. art. VII, § 8(3) (allowing the legislature to loan funds to public corporations for various purposes, including construction of new buildings and other facilities). There are other references to “public corporations” (which would, by definition, include public authorities), throughout the constitution. *E.g.*, N.Y. CONST. art. XVI, § 6; N.Y. CONST. art. XVII, § 7; N.Y. CONST. art. XVIII, §§ 2, 5, 7–10.

<sup>22</sup> N.Y. CONST. art. XVI.

<sup>23</sup> N.Y. CONST. art. III, §§ 17, 22–23; N.Y. CONST. art. VII, § 17; N.Y. CONST. art. VIII, §§ 10–12; N.Y. CONST. art. IX, § 2(c)(8); N.Y. CONST. art. XVIII, §§ 2, 4.

<sup>24</sup> N.Y. CONST. art. I, § 9; N.Y. CONST. art. III, §§ 6, 20; N.Y. CONST. art. IV, §§ 3, 6; N.Y. CONST. art. V, § 1; N.Y. CONST. art. VI, §§ 25(a), 29; N.Y. CONST. art. IX, §§ (1)(f)–(g), (2)(c)(1), (4), (8)–(9); N.Y. CONST. art. XI, § 3; N.Y. CONST. art. XIII, §§ 7, 14; N.Y. CONST. art. XIV, §§ 2–3; N.Y. CONST. art. XV, § 3; N.Y. CONST. art. XVII, § 7; N.Y. CONST. art. XVIII, §§ 2–7.

<sup>25</sup> N.Y. CONST. art. I, § 9.

<sup>26</sup> 2 LINCOLN, *supra* note 4, at 91 (noting that lending aid to private businesses had foundations in the idea that it was the government's responsibility to promote the general public's wealth).

<sup>27</sup> *Id.* at 165–66 (noting that it was not until the Convention of 1846 that a finance committee was assembled and charged with proposing constitutional amendments dealing with state financial matters in areas where the legislature had previously been unrestricted).

<sup>28</sup> N.Y. CONST. of 1777 (lacking any constitutional provision which addresses public aid being given to private enterprises); N.Y. CONST. of 1821 (lacking any constitutional provision which addresses public aid being given to private enterprises).

<sup>29</sup> 2 LINCOLN, *supra* note 4, at 91 (“The policy of rendering state aid to private business[es] . . . was founded on the conception that it was the duty of government to promote the prosperity of all the members of the state.”).

authorized the state treasurer to use public funds to acquire one hundred shares of stock in the company.<sup>30</sup> That organization, according to the preamble to the act, had associated “for the laudable purposes of establishing manufacturies, and furnishing employment for the honest industrious poor”<sup>31</sup> and the organization sought incorporation “to enable them more extensively to carry into effect their patriotic intentions.”<sup>32</sup>

The 1938 reports of the New York State Constitutional Convention Committee, commonly known as the *Poletti Report*, has divided pre-1846 gifts and loans to private enterprises into two periods: “moderate subsidizing” between 1790 and 1816 and “very extensive and highly speculative subsidizing” between 1816 and 1846.<sup>33</sup> This transformation resulted from an increase in the need for infrastructure projects, “such as roads, turnpikes, canals and railroads,” and the realization that these enterprises were too great for private capital to support;<sup>34</sup> the state either had to undertake these large projects and their commensurate costs or provide assistance to private entities who would assume the projects.<sup>35</sup>

By the time of the 1846 constitutional convention, state aid had been authorized by statute to thirty-three corporations, including banks, companies providing transportation and infrastructure, health care facilities, and educational institutions.<sup>36</sup> Many of these companies received multiple grants and loans.<sup>37</sup> State debts created to aid projects like canals and railroads were expected to be self-supporting, and there was never an expectation that the state would have to actually answer for this debt.<sup>38</sup> A constant refrain offered by governors and legislators throughout the first half of the nineteenth century was the importance of such aid to the state’s growth and prosperity.<sup>39</sup> In response to public criticism of private projects, Governor William Seward stated:

[I]t is not only the right, but the bounden duty of the

---

<sup>30</sup> 1789–1796 N.Y. Laws 148, 150.

<sup>31</sup> *Id.* at 148.

<sup>32</sup> *Id.*

<sup>33</sup> N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO TAXATION AND FINANCE 107 (1938) [hereinafter TAXATION AND FINANCE].

<sup>34</sup> *Id.* at 106–07.

<sup>35</sup> *Id.* at 107.

<sup>36</sup> 2 LINCOLN, *supra* note 4, at 93; TAXATION AND FINANCE, *supra* note 33, at 110.

<sup>37</sup> 2 LINCOLN, *supra* note 4, at 93; TAXATION AND FINANCE, *supra* note 33, at 110.

<sup>38</sup> TAXATION AND FINANCE, *supra* note 33, at 111.

<sup>39</sup> See 2 LINCOLN, *supra* note 4, at 93–101, for detailed descriptions of the messages of various governors in support of such aid.

2011/2012]

New York's Gift and Loan Clauses

2011

legislature to adopt measures for overcoming physical obstructions to trade and commerce in this state, and for furnishing to each region, as far as reasonably practicable, facilities of access to the great commercial emporium of the union, fortunately located within our own borders . . . that the legislature may direct the construction of such works at the expense of the state, or authorize their construction by associations, and may aid them by loans of the credit of the state upon conditions of perfect indemnity . . . ”<sup>40</sup>

Calls for the discontinuance of state assistance, even those made by officials such as Comptroller Azariah Flagg,<sup>41</sup> met with threatened responses of unemployment.<sup>42</sup> In his transmission to the legislature of a March 1842 letter from the president of the New York and Erie Railroad Company, a company that had been issued \$3 million in state stock in 1836,<sup>43</sup> Governor Seward detailed the devastating effects that would occur if additional aid was withheld:

[T]he laborers employed must be discharged; the interest on the three million state loan, which will accrue on the first of April next, will remain unpaid; the contingent debt will fall immediately upon the treasury; the capital invested in the enterprise by our fellow citizens will be lost; the New York and Erie railroad in its scarcely half-completed condition be exposed to auction at the suit of the state; and the just expectation of immeasurable benefits to result from the enterprise will be suddenly and hopelessly disappointed.<sup>44</sup>

Seward went further: “[t]he association can only be regarded by the people as an agent of the legislature . . . ”<sup>45</sup>

The Panic of 1837 revealed the consequences of this intertwining of state finance and private enterprise. The state had to redeem almost \$3.7 million of the nearly \$4.4 million of stock issued to railroads prior to 1842.<sup>46</sup> Even when the state did have security for

---

<sup>40</sup> William H. Seward, *Annual Message* (Jan. 7, 1840), in 3 MESSAGES FROM THE GOVERNORS 762, 812–13 (Charles Z. Lincoln ed., 1909).

<sup>41</sup> In a 1839 report, Flagg stated, “The Legislature may deem it useful and expedient to lend the credit of the State secured only by a mortgage on railroads which promise no returns for the investment; but—the probability that the State might one day be called on for the payment of the stock, should not be lost sight of.” TAXATION AND FINANCE, *supra* note 33, at 111.

<sup>42</sup> See Letter from William H. Seward to the New York State Assembly (Mar. 14, 1842), in 3 MESSAGES FROM THE GOVERNORS, *supra* note 40, at 999.

<sup>43</sup> 1836 N.Y. Laws 227–28.

<sup>44</sup> Letter from William H. Seward to the New York State Assembly, *supra* note 42, at 999.

<sup>45</sup> *Id.* at 1000.

<sup>46</sup> TAXATION AND FINANCE, *supra* note 33, at 110.

its debts, such security was sometimes later found to have little or no value.<sup>47</sup> The first mortgage lien on the New York and Erie Railroad Company's assets securing the \$3 million loan described above covered only the track and roadbed, and not the much more valuable rolling stock, stations, or yards.<sup>48</sup> In the words of Comptroller Flagg in 1843:

Experience is teaching the inhabitants of this state a severe lesson in relation to the policy of loaning the credit of the people to railroad corporations. These loans were solicited under the plausible pretense of developing the resources of the state, and conferring benefits on the people. But in most cases instead of conferring benefits these measures have inflicted lasting evils on all who labor and pay taxes.<sup>49</sup>

Rather than repudiate its debts as did other states during that period,<sup>50</sup> New York made efforts to correct its financial affairs. In 1842, the legislature passed an act that placed a moratorium on expenditures for all public works, with certain exceptions, and imposed direct real and personal property taxes.<sup>51</sup> A concurrent resolution that would have required a referendum by state voters before debt could be incurred was included as part of a proposed constitutional amendment that received the approval of one legislative session in 1844,<sup>52</sup> but was not reapproved in 1845.<sup>53</sup>

#### A. Convention of 1846

By 1846, New York had accumulated a total debt of just over \$25 million, of which more than \$5 million was the direct result of the state's policy of loaning state credit to corporations.<sup>54</sup> In addition to

---

<sup>47</sup> See *id.* (stating that the mortgages the State held were "practically worthless").

<sup>48</sup> 1836 N.Y. Laws 227–28. For example, in 1841, the state generated \$16,100 on the sale of assets securing \$515,000 in loans made to two separate railroads. TAXATION AND FINANCE, *supra* note 33, at 110.

<sup>49</sup> TAXATION AND FINANCE, *supra* note 33, at 112.

<sup>50</sup> Among the states, nine defaulted on their interest payments and four (Arkansas, Florida, Michigan, and Minnesota) repudiated all or part of their debts. Briffault, *supra* note 10, at 911.

<sup>51</sup> 1842 N.Y. Laws 79, 83.

<sup>52</sup> 1844 N.Y. Laws 538.

<sup>53</sup> The Constitution of 1821 required that amendments to the constitution be approved by two consecutively elected legislatures—the first time by a majority of the members elected to each of the two houses and the second time by two-thirds of the members elected to each house—and then submitted to the voters for adoption. N.Y. CONST. of 1821, art. VIII, § 1. In the years between the constitutions of 1821 and 1846, only eight amendments were approved. N.Y. CONST. of 1821 (amended twice in 1826, twice in 1833, 1835, 1839, 1843, and 1845).

<sup>54</sup> 2 LINCOLN, *supra* note 4, at 165. Of the \$25 million amount, approximately two-thirds



2011/2012]

New York's Gift and Loan Clauses

2013

this debt, other factors such as undue influence and corruption in the granting of corporate charters, a belief that government aid constituted a form of public discrimination, and the perception that the state had not received adequate benefits for its investments led to calls for reform.<sup>55</sup> There were increasing demands to constitutionalize the restrictions found in the 1842 statute and the 1844 resolution.<sup>56</sup> It was against this backdrop that the constitutional convention of 1846 was held.<sup>57</sup>

The convention added two provisions to the constitution, which, as modified and extended, continue to govern the creation of state debt and the use of state moneys.<sup>58</sup> One provided that, "The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation."<sup>59</sup> Because there was general agreement on the need for such a prohibition, the provision invited little debate.<sup>60</sup> One delegate, Mr. Swackhamer, moved to include money and property among the things that the state could not give or loan, but this amendment was withdrawn because "if the state had money to lend, it should be allowed to lend it—if property, to sell it."<sup>61</sup> Another amendment that would have prohibited gifts of public money or property except as a reward for military service was proposed, but was not pressed forward.<sup>62</sup> The section was adopted unanimously.<sup>63</sup> Charles Lincoln saw this provision as a

---

resulted from the "construction and maintenance of [the] canals." *Id.* Other states fell prey to the same lending practices and precipitous decline. William J. Quirk & Leon E. Wein, *A Short Constitutional History of Entities Commonly Known as Authorities*, 56 CORNELL L. REV. 521, 526 (1971). By 1842, the total debt of the states was over \$200 million, the vast majority of which was unsecured. *Id.*

<sup>55</sup> 2 LINCOLN, *supra* note 4, at 73–74 (noting public disapproval with legislative debt and the legislature's inability to self-contain it).

<sup>56</sup> TAXATION AND FINANCE, *supra* note 33, at 112.

<sup>57</sup> *Id.*

<sup>58</sup> The Constitution of 1846 also included a provision that no money could be paid out of the treasury unless done pursuant to an appropriation containing a designated amount of specificity and that no appropriation could be made for more than two years. N.Y. CONST. of 1846, art. VII, § 8. These requirements survive, as amended, in article VII, section 7 of the current constitution.

<sup>59</sup> N.Y. CONST. of 1846, art. VII, § 9.

<sup>60</sup> See Quirk & Wein, *supra* note 54, at 530 n.80 (describing the entire debate on the provision within the length of one footnote).

<sup>61</sup> S. CROSWELL & R. SUTTON, DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION 722 (1846) [hereinafter DEBATES (1846)] (statement of Michael Hoffman).

<sup>62</sup> *Id.* at 723 (providing statements of various delegates).

<sup>63</sup> *Id.* In addition to preventing future gifts or loans of state credit, the convention also ensured that companies that had previously received state aid would not be able to have those debts released. N.Y. CONST. of 1846, art. VII, § 4. A provision was adopted which provided:

repudiation of the idea that the state should take an active role in supporting economic development, at least in the form of extending the state's credit.<sup>64</sup>

The second provision added by the 1846 convention prohibited the state from contracting debt except by a law approved by a referendum on a single distinct work or object submitted to voters at a general election when no other law or constitutional amendment was to be voted on; mandated a direct annual tax to pay the debt; and required the debt to be discharged within eighteen years.<sup>65</sup> The requirements imposed by this section, especially the referendum requirement, occasioned spirited debate.<sup>66</sup> The referendum represented a middle position between those delegates who thought all debt should be prohibited and those who believed that requiring popular approval to incur debt represented the demise of republican government.<sup>67</sup> Two exceptions were created to these rules: the legislature could contract debt to "repel invasion, suppress insurrection, or defend the State in war,"<sup>68</sup> and could incur indebtedness to meet casual expenses, but only in an amount not exceeding \$1 million.<sup>69</sup>

The 1846 convention did not adopt prohibitions against loans of credit by local governments, but local debt was an issue of concern at the convention.<sup>70</sup> The convention's Select Committee on Municipal Corporations, while not recommending a gift and loan clause for municipalities, proposed both that debt could only be

---

The claims of the State against any incorporated company to pay the interest and redeem the principal of the stock of the State loaned or advanced to such company shall be fairly enforced, and not released or compromised; and the moneys arising from such claims shall be set apart and applied as part of the sinking fund provided in the second section of this article. But the time limited for the fulfillment of any condition of any release or compromise heretofore made or provided for, may be extended by law.

*Id.* One delegate remarked that this section evidenced "returning sanity, and that the day of madness had gone by." DEBATES (1846), *supra* note 61, at 658 (statement of L. S. Chatfield). However admirable the insertion of this provision may have been, the final version removed from the committee report language that would have prohibited the state from "defer[ring]" these claims. Compare *id.* at 655 (showing the proposed section), with N.Y. CONST. of 1846, art. VII, § 4 (showing the final adopted version). It is an early example of the tension between meeting legitimate public needs while prohibiting the use of funds for illegitimate purposes.

<sup>64</sup> 2 LINCOLN, *supra* note 4, at 179–80.

<sup>65</sup> N.Y. CONST. of 1846, art. VII, § 12.

<sup>66</sup> DEBATES (1846), *supra* note 61, at 733–34.

<sup>67</sup> For an excellent synopsis of the debate on this issue, see Quirk & Wein, *supra* note 54, at 531–34.

<sup>68</sup> N.Y. CONST. of 1846, art. VII, § 11.

<sup>69</sup> *Id.* § 10.

<sup>70</sup> See DEBATES (1846), *supra* note 61, at 357 (providing a proposed amendment by H. C. Murphy).

2011/2012]

New York's Gift and Loan Clauses

2015

incurred by cities and villages upon authorization of the legislature and approval of the municipality's voters and only upon satisfaction of conditions similar to those required to incur state debt (for example, single object or work limitation and requirement that tax be assessed to raise money to pay the debt).<sup>71</sup> Concerned more with the financial position of the state than the municipalities, convention delegates did not adopt any of the committee's proposals. Instead, a provision was added imposing upon the legislature the duty "to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations."<sup>72</sup>

The voters approved the constitution,<sup>73</sup> but the lack of a prohibition on gifts and loans of credit by local governments would prove to be a significant omission.<sup>74</sup>

### *B. Constitutional Developments Between 1846 and 1874*

The immediate impact of the changes implemented by the 1846 constitution was to limit the ability of the state to support further "internal improvements,"<sup>75</sup> but the gift and loan clause proved an ineffective barrier to assistance to private enterprises.<sup>76</sup> Between

---

<sup>71</sup> *Id.* (indicating a report of the Select Committee on Municipal Corporations). Interestingly, towns would not have been subject to these restrictions under the committee's proposals.

<sup>72</sup> N.Y. CONST. of 1846, art. VIII, § 9.

<sup>73</sup> The vote on the new constitution was 221,528 for its approval, and 92,436 against its approval. 2 LINCOLN, *supra* note 4, at 213.

<sup>74</sup> *See infra* text accompanying note 76.

<sup>75</sup> TAXATION AND FINANCE, *supra* note 33, at 88.

<sup>76</sup> The referendum requirement proved more difficult to overcome. In 1851, only five years after the gift and loan prohibition was added, the legislature authorized, without voter approval, the issuance of \$9 million worth of canal revenue certificates to be paid from a special fund of future canal revenues. 1851 N.Y. Laws 911. The law explicitly provided that the state would not be bound to make up any deficiencies in canal revenues and that the certificates were not to be understood as creating a debt against the State under the section requiring such a referendum. *Id.* at 917. The Court of Appeals, in *Newell v. People ex rel. Phelps*, 7 N.Y. 9, 86 (1852), struck down the statute, concluding that such legislation, if permitted to stand, would eviscerate the referendum requirement:

The restraints imposed by the [requirement of voter approval] are, in effect, annulled, if the legislature may borrow, without limit, upon a pledge of the public property, or the public revenue. The extent to which this may be carried, if tolerated in the present instance, renders [that] section of the constitution nugatory and useless.

The court did not believe that the section disclaiming liability on the part of the state legitimized the transaction, as such a section would not ultimately be effective in resisting the claim. *See id.*

1846 and 1874, the legislature resorted to two separate means to aid corporations while not running afoul of the constitution. First, the legislature began to freely grant public funds to railroads and private corporations, both profit and nonprofit.<sup>77</sup> It was estimated by one delegate to the 1867 constitutional convention that \$750,000 of state moneys had been given to the Albany and Susquehanna Railroad.<sup>78</sup> A provision debated, but not adopted at that convention, would have also prohibited the state from giving or loaning the money or property of the state in aid of any individual, association, or corporation.<sup>79</sup> Second, even though the 1846 constitution directed the legislature to “restrict” municipal debts and loans of credit to prevent abuses,<sup>80</sup> this provision was interpreted as authorizing the state to allow localities to lend their credit.<sup>81</sup> With loans of state credit off limits, communities along proposed railroad routes and at terminals aided in financing railroad projects either by direct grants or by exchanges of municipal bonds for railroad stock.<sup>82</sup>

Although the legislature in 1853 enacted a law that restricted the amount of debt that municipalities could incur and prohibited gifts and loans of credit to private corporations,<sup>83</sup> local governments got around that restriction by prevailing upon the legislature to pass

---

Judge Welles dissented from the court’s opinion. In language anticipating what would be expressed in the public authorities cases of the twentieth century, Judge Welles accepted the argument that the debt created by the act was not state debt:

In the execution of the act, a large number of creditors would be made[;] but in my judgment they would not be creditors of the state, nor the state their debtor; certainly not, in the sense of the restraining clause referred to. All obligations to them would arise upon the credit of the fund exclusively, beyond which they could have no claim upon any legal or equitable principle. All they would have a right to demand of the state would be, that the legislature should see that the fund was faithfully applied; and that duty or obligation of the state would spring, not out of the act, but the constitution itself.

*Id.* at 127 (Welles, J., dissenting). Because the judge believed it was “beyond the power of sophistry, to turn the transaction into a state-debt,” approval by the voters was not required. *Id.*

<sup>77</sup> This practice was described by the Court of Appeals in *People v. Westchester County National Bank of Peekskill*. 132 N.E. 241, 243–44 (N.Y. 1921).

<sup>78</sup> 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, HELD IN 1867 AND 1868, IN THE CITY OF ALBANY 1143 [hereinafter DEBATES (1867–1868)] (statement of Thomas Alvord).

<sup>79</sup> 3 *id.* at 1840–41 (statements of various delegates).

<sup>80</sup> N.Y. CONST. of 1846, art. VIII, § 9.

<sup>81</sup> Robert W. Cockren et al., Comment, *Local Finance: A Brief Constitutional History*, 8 FORDHAM URB. L.J. 135, 136 (1979–1980) (commenting that the amendment was ambiguous and offered no specific means of enforcement).

<sup>82</sup> *Id.* at 138 (discussing the Town Bonding Act of 1869 which provided cities ample latitude in lending capitol to railroads).

<sup>83</sup> 1853 N.Y. Laws 1135. See Cockren, *supra* note 81, at 136–40 for a thorough description of the local financing of private enterprise that occurred during this period.

2011/2012]

New York's Gift and Loan Clauses

2017

special bills authorizing loans of credit to railroads.<sup>84</sup> These enabling statutes were challenged on the ground, among others, that the state could not authorize local governments to do what it was constitutionally prohibited from doing.<sup>85</sup> In *Bank of Rome v. Village of Rome*, the Court of Appeals rejected this challenge.<sup>86</sup> The court found that nothing in the local finance provision of the constitution, which was “ill-suited in its terms to be judicially applied,”<sup>87</sup> acted to limit the legislature’s discretion to act towards municipalities.<sup>88</sup> The questions of what abuses existed, and what remedy should be fashioned to correct such abuses, were questions to be answered by the legislature and were not subject to review by the courts.<sup>89</sup> The court in *Bank of Rome* made it clear that the remedy for “injurious” or unsound legislation was not a judicial one.<sup>90</sup> This deference to legislative judgments in areas involving the finance provisions of the constitution would become the hallmark of the Court of Appeals’ approach to the requirements of the state constitution regarding the use of public moneys.

The 1867 convention addressed the controversy caused by the local bonding acts. A report issued by the convention’s Committee on Counties, Towns and Villages contained a section that would have put an end to the practice allowed in *Bank of Rome*.<sup>91</sup> The provision would have prohibited any local government from giving any of its property or money, or loaning its credit, to or in aid of any individual, association, or corporation.<sup>92</sup> This amendment was debated extensively, and alternative proposals such as allowing the issuance of debt upon the approval of the taxpayers were discussed.<sup>93</sup> A provision was agreed upon that provided:

The legislature shall not pass any law authorizing any county, town, city, village, municipal corporation or other

---

<sup>84</sup> Cockren, *supra* note 81, at 137.

<sup>85</sup> This argument will reappear in later cases: “When the main purpose of a statute, or of part of a statute, is to evade the constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law.” *People ex rel. Burby v. Howland*, 49 N.E. 775, 778 (N.Y. 1898); *see also* *Bordeleau v. State*, 906 N.E.2d 917, 926 (N.Y. 2011) (Pigott, J., dissenting) (citing to *Howland*); *Wein v. State*, 347 N.E.2d 586, 590 (N.Y. 1976) (citing to *Howland*).

<sup>86</sup> *Bank of Rome v. Vill. of Rome*, 18 N.Y. 38 (1858).

<sup>87</sup> *Id.* at 42.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 43–44.

<sup>90</sup> *Id.* at 44.

<sup>91</sup> 2 DEBATES (1867–1868), *supra* note 78, 1134–35.

<sup>92</sup> *Id.* at 933.

<sup>93</sup> *Id.* at 1134–71 (statements of various delegates debating the language of the provision).

territorial division to give or appropriate any money or property, or to lend its credit to or in aid of any private person, company or corporation, or take or be interested in any stock of any company or corporation, except as in this Constitution is otherwise provided.<sup>94</sup>

The victory for reform advocates was short lived, however, as the convention changed course and rejected the provision.<sup>95</sup>

In sum, New York's first attempts to prohibit certain uses of state money failed to produce the desired results. In the words of the 1967 Temporary State Commission on the Constitutional Convention: "The state resorted to direct grants and loans of money to private corporations. The localities lent railroads their credit and made direct grants of money and property to private corporations."<sup>96</sup> All of the work that had been done by the 1846 convention to address and control the "besetting sin"<sup>97</sup> of incurring debt had not reduced the amount of bonded debt in the state; it simply resulted in a change in creditors from the state to its municipalities.<sup>98</sup> By 1872, local governments of the state had undertaken indebtedness of over \$214 million, an amount in excess of ten percent of the assessed valuation of real and personal property within the state.<sup>99</sup> Of this amount, approximately \$27 million was issued in aid of railroads.<sup>100</sup> Some towns had contracted indebtedness of up to fifty percent of their taxable property.<sup>101</sup> Although the 1867 convention failed to close these loopholes, reform would not be long in coming.<sup>102</sup>

### *C. The 1872 Constitutional Commission*

In response to the defeat of the constitution proposed by the 1867 convention and questions about whether the legislature would have the time and energy to undertake the task of revision, in 1872

---

<sup>94</sup> 5 *id.* at 3851.

<sup>95</sup> The vote was 41 for and 55 against. *Id.* at 3858.

<sup>96</sup> STATE OF N.Y., TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION, STATE FINANCE 108 (1967) [hereinafter STATE FINANCE].

<sup>97</sup> DEBATES (1846), *supra* note 61, at 723 (statement of Michael Hoffman).

<sup>98</sup> STATE FINANCE, *supra* note 96, at 108.

<sup>99</sup> 2 LINCOLN, *supra* note 4, at 558.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 559.

<sup>102</sup> The vote on the constitution was 223,935 in favor and 290,456 against. An amended judiciary article that had been submitted separately to voters was approved, 247,240 to 240,442. BASIL A. PATERSON, MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 319 (1977-79).

2011/2012]

New York's Gift and Loan Clauses

2019

Governor John T. Hoffman recommended creation of a thirty-two member constitutional commission for the purpose of proposing amendments to the constitution.<sup>103</sup> The legislature agreed, and enacted a statute forming this commission.<sup>104</sup> Unique in New York history, the commission, as an extra-constitutional device, lacked the authority to submit its proposals directly to the voters; its proposals would need to be passed by two consecutively elected legislatures prior to submission, as with any amendment first introduced in the legislature.<sup>105</sup> The commission recommended a comprehensive set of reforms affecting a number of areas, including state and local finance.<sup>106</sup> It proposed a new section to the constitution prohibiting the state from giving or loaning its money or credit (but not its property) “to or in aid of any association, corporation or private undertaking.”<sup>107</sup> The more restrictive provision was motivated in large part by the increasing amount of moneys being given to sectarian charitable institutions without any governmental control or accountability.<sup>108</sup> The commission struggled to strike a balance between institutions receiving aid primarily for charitable purposes and those who were using the funds mainly for religious teachings.<sup>109</sup> It rejected a proposal that would have added “property” to the list of items that the state was not allowed to loan or give, as well as a proposition that would have limited the prohibition to sectarian institutions.<sup>110</sup> The commission acknowledged the breadth of the prohibition in its final report:

[T]he amendment . . . cuts off all gifts of money and all loaning of the credit of the state to all other associations,

<sup>103</sup> John T. Hoffman, *Annual Message* (Jan. 2, 1872), in 6 MESSAGES FROM THE GOVERNORS *supra* note 40, at 348, 393–94 [hereinafter Hoffman, *Annual Message*].

<sup>104</sup> 1872 N.Y. Laws 2178.

<sup>105</sup> At that time, a constitutional amendment was required to be approved by a majority of the members elected to each house in consecutive legislative sessions separated by an intervening election of state senators. N.Y. CONST. of 1846, art. XIII, § 1.

<sup>106</sup> Lincoln describes in detail the success of the commission in having its proposals approved by the voters in 1874. 2 LINCOLN, *supra* note 4, at 573–74.

<sup>107</sup> STATE OF N.Y., JOURNAL OF THE CONSTITUTIONAL COMMISSION OF THE STATE OF NEW YORK 1872–73, at 364–65 (1873) [hereinafter JOURNAL 1872–73]. The commission did not propose the repeal of the previously enacted provision restricting gifts or loans of state credit that had been added by the 1846 constitution, so there was a partial overlap between the two provisions. Compare *id.* (“Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking.”), with N.Y. CONST. of 1846, art. VII, § 9 (“The credit of the State, shall not, in any manner be given or loaned to, or in aid of any individual association or corporation.”).

<sup>108</sup> See JOURNAL 1872–73, *supra* note 107, at 451–52 (providing a statement by Mr. Leavenworth, the chairman of the committee on sectarian appropriations).

<sup>109</sup> *Id.* at 451.

<sup>110</sup> *Id.* at 365, 452.

corporations, etc., but they are all subject to the same objection, and appropriations to them of the money of the state are liable to the same abuses. They must all stand or fall together.<sup>111</sup>

The commission did, however, include exceptions to allow the legislature to provide “for the education and support of the blind, the deaf and dumb, and . . . juvenile delinquents.”<sup>112</sup> Further excepted from this prohibition was any fund or property held “by the state for educational purposes.”<sup>113</sup> The section proposed by the commission was adopted by the legislature without amendment and approved by the voters.<sup>114</sup> The inclusion of specific exceptions reflects recognition by commission members that the gift and loan clauses could not be unqualified because a blanket prohibition was inconsistent with pursuit of the legitimate and appropriate purposes of the state.<sup>115</sup>

The commission also addressed the issue of municipal finance. In 1869, the legislature had enacted the Town Bonding Act,<sup>116</sup> which authorized municipalities to lend their credit to railroads.<sup>117</sup> In his 1872 message to the legislature, Governor Hoffman had recommended the immediate repeal of the act, stating, “aid has already been given to railroads, upon the credit of municipalities, to quite as great an extent as is wise, and, in some instances, to the oppression of taxpaying communities.”<sup>118</sup> In addition to permitting municipalities to incur significant amounts of bonded debt, this law led to flagrant abuses, such as the siphoning off of money through graft and corruption.<sup>119</sup> The activities of the Tweed Ring during the 1870s, whereby large amounts of money were concealed from the public while being funneled to finance the ring’s activities and compensate supporters, epitomized these abuses.<sup>120</sup> The commission adopted a section that was subsequently approved by the voters:

---

<sup>111</sup> *Id.* at 452.

<sup>112</sup> *Id.* at 364.

<sup>113</sup> *Id.* at 364–65.

<sup>114</sup> N.Y. CONST. of 1846, art. VIII, § 10 (amended 1874). The vote on the amendment was 336,237 in favor and 195,047 against. *Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments*, N.Y. STATE UNIFIED COURT SYSTEM, [http://www.courts.state.ny.us/history/pdf/Library/Votes\\_Cast.pdf](http://www.courts.state.ny.us/history/pdf/Library/Votes_Cast.pdf).

<sup>115</sup> See JOURNAL 1872–73, *supra* note 107, at 452.

<sup>116</sup> 1869 N.Y. Laws 2303.

<sup>117</sup> *Id.* at 2303–04.

<sup>118</sup> Hoffman, *Annual Message*, *supra* note 103, at 369.

<sup>119</sup> See *id.* (discussing how the act led to “great abuse”).

<sup>120</sup> PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 145–46 (1996).



2011/2012]

New York's Gift and Loan Clauses

2021

No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law.<sup>121</sup>

This section departed from the original report issued by the commission's Committee on Local Indebtedness. The section proposed by that committee would have allowed municipalities to loan their money or credit so long as the total amount of indebtedness would not have exceeded ten percent of the value of the taxable property of the municipality.<sup>122</sup> As with the state gift and loan clause, the local clause was not absolute: an exception to the local prohibition was added to allow for the aid and support of the poor.<sup>123</sup>

#### *D. Constitutional Developments from 1875–1938*

The 1894 constitution retained the gift and loan clauses,<sup>124</sup> but added a new section providing additional public policy exceptions to the restrictions:

Nothing in this Constitution contained shall prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education, of inmates, of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control.

---

<sup>121</sup> N.Y. CONST. of 1846, art. VIII, § 11 (amended 1874). The vote on the amendment was 337,891 in favor and 194,234 against. *Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments*, *supra* note 114.

<sup>122</sup> 2 LINCOLN, *supra* note 4, at 560–61. The state would adopt debt limits for municipalities in 1884, but this amendment did not modify the gift or loan clauses. N.Y. CONST. of 1846, art. VIII, § 11 (amended 1884).

<sup>123</sup> N.Y. CONST. of 1846, art. VIII, § 11 (amended 1874); *see also* 2 LINCOLN, *supra* note 4, at 560 (“[T]he Commission adopted the concluding sentence authorizing local aid in support of the poor.”).

<sup>124</sup> N.Y. CONST. of 1894, art. VII, § 1, art. VIII, §§ 9–10.

Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities. Such rules shall be subject to the control of the Legislature by general laws.<sup>125</sup>

Other amendments were adopted between 1895 and 1938, which also allowed the money or credit of the state to be given or loaned.<sup>126</sup> A 1923 amendment allowed the legislature to create debt in an amount not exceeding \$45 million to pay bonuses to veterans of World War I,<sup>127</sup> effectively reversing the results of *People v. Westchester County National Bank*,<sup>128</sup> which held that bonuses to veterans, despite promoting a public purpose, violated the state gift and loan clause.<sup>129</sup> Another amendment, adopted in 1925, allowed the state to incur debt to provide aid to railroad companies, counties, and cities for the removal of railroad grade crossings.<sup>130</sup> These amendments were consistent with the general practice of that time of easing the restrictions originally imposed by the 1846 constitution.<sup>131</sup>

What impact did these constitutional changes have? The New

---

<sup>125</sup> N.Y. CONST. of 1894, art. VIII, § 14; *see also* 3 LINCOLN, *supra* note 4, at 466–67 (discussing the history of this section).

<sup>126</sup> *E.g.*, N.Y. CONST. of 1894, art. VII, § 13, 14; *see also* N.Y. STATE CONSTITUTIONAL CONVENTION COMM., 2 AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895–1937, at 635–41 (1938) [hereinafter AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION] (describing the adoption of sections 13 and 14 of article VII of the New York Constitution of 1894).

<sup>127</sup> TAXATION AND FINANCE, *supra* note 33, at 94 (discussing the approval of article VII, section 13).

<sup>128</sup> *People v. Westchester Cnty. Nat'l Bank of Peekskill*, 132 N.E. 241 (N.Y. 1921). This case will be discussed in more detail in the sections below. *See* discussion *infra* text accompanying notes 389–98.

<sup>129</sup> *Westchester Cnty.*, 132 N.E. at 247.

<sup>130</sup> N.Y. CONST. of 1894, art. VII, § 14; *see also* 2 AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION, *supra* note 126, at 638–39 (setting forth the amendment); TAXATION AND FINANCE, *supra* note 33, at 94–95 (discussing broadly the adoption of the amendment).

<sup>131</sup> Other amendments further weakened the effects of the other 1846 debt and finance provisions. Two amendments were approved in 1905—one allowing for the submission of a debt proposition at the same time a constitutional amendment was on the ballot and another extending the maximum life of any bonds from eighteen years to fifty years. 4 LINCOLN, *supra* note 4, at 636. In 1918, an amendment was approved eliminating the requirement that any law authorizing a debt also include a direct annual tax sufficient to pay off the debt. 2 AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION, *supra* note 126, at 556–57. In 1923, voters approved an amendment that allowed the submission of multiple debt propositions at the same election. TAXATION AND FINANCE, *supra* note 33, at 97.

2011/2012]

New York's Gift and Loan Clauses

2023

York State Constitutional Convention Committee of 1938 claimed that the referendum requirement “seriously interfered with the state’s ability to carry on internal improvements,”<sup>132</sup> and that the constitutional prohibitions “have been said to act as brakes upon progressive social enterprise”<sup>133</sup> and “complicate extensions of governmental activities for which there is growing public demand.”<sup>134</sup> On the other hand, the same committee concluded: “[b]y the end of the nineteenth century the State of New York was practically out of debt.”<sup>135</sup>

The referendum requirement was not meant to be a barrier to all debt, but only debt not approved by the people. From the adoption of the provision to 1938, the state was able to obtain voter approval for numerous bond issues.<sup>136</sup> Despite this success, increasing demands for public improvements during the early decades of the twentieth century led to a 1925 amendment authorizing “the [annual] issuance . . . of \$10,000,000 of bonds over a period of ten consecutive years for the financing of any public improvements deemed advisable by the Legislature.”<sup>137</sup> Between 1896 and 1937, the state had accumulated aggregate debt of \$800 million, none of which had run afoul of the constitutional requirements, including the gift and loan clauses.<sup>138</sup> The goal of eliminating the government’s role as a creditor had been achieved. The committee’s report on *State and Local Government in New York* concluded that with the exception of the 1925 amendment providing aid for railroad grade crossing elimination, “there ha[d] been no extension of governmental credit, state or local, to private corporations.”<sup>139</sup>

---

<sup>132</sup> TAXATION AND FINANCE, *supra* note 33, at 88. The 1915 convention, the work of which was rejected by the voters, recommended no changes to either section. *See id.* at 114.

<sup>133</sup> N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO EXECUTIVE ADMINISTRATION AND POWERS 325 (1938) [hereinafter EXECUTIVE ADMINISTRATION AND POWERS].

<sup>134</sup> *Id.* at 326.

<sup>135</sup> TAXATION AND FINANCE, *supra* note 33, at 90.

<sup>136</sup> The report noted that during the twenty-five year period from 1895 to 1921, the state used the referendum procedure to gain approval for \$164 million in bonds for the improvement of the canal system, \$50 million worth of bonds for highway improvements, and over \$28 million for state parks. *Id.* at 90–93.

<sup>137</sup> *Id.* at 94. This amendment, deemed a “radical departure from the referendum requirement” by the *Poletti Report*, freed the legislature from the constraints of the separate submission requirement for that amount and for those purposes. *Id.*

<sup>138</sup> *Id.* at 95.

<sup>139</sup> N.Y. STATE CONSTITUTIONAL CONVENTION COMM., STATE AND LOCAL GOVERNMENT IN NEW YORK 544 (1938) [hereinafter STATE AND LOCAL GOVERNMENT].

*E. The Constitutional Convention of 1938*

The 1938 convention signaled a greater recognition of the role of government in providing for the social and economic welfare of the citizens of New York. In areas such as housing and social welfare, the convention constitutionalized and expanded policies previously enacted by the legislature.<sup>140</sup> The convention adopted provisions which gave both state and local governments sufficient authority to meet the housing needs of New Yorkers,<sup>141</sup> and also made it a mandatory obligation of the state to provide “aid, care and support” to the state’s needy.<sup>142</sup>

*1. Changes to the State Gift and Loan Clause*

The expanded role of the state in social areas previously left to private or charitable concerns and the gift and loan clauses were on a collision course. To avoid that collision, numerous exceptions to the prohibitions were added to the constitution. Concerning the state, exceptions were added: for the “care and support of the needy;” for “health and welfares services for all children;” for protection against unemployment, illness and old age; for the “education and support of the . . . physically handicapped;” for “aid, care, and support of neglected and dependent children and of the needy sick” under certain conditions.<sup>143</sup> In addition, a provision was included in the newly adopted housing article which allowed the state to loan money to private corporations in order to provide low-income housing and slum clearance.<sup>144</sup>

Notwithstanding the general relaxation of the prohibition against state assistance, the 1938 convention tightened the state gift and loan clause in one respect: an amendment was passed which prohibited the state from giving or lending its credit to public corporations.<sup>145</sup> Since 1846, the constitution had proscribed gifts or

---

<sup>140</sup> The Constitutional Convention of 1938 re-wrote the entire New York State Constitution and many areas of law that were previously enacted by the legislature were constitutionalized and expanded.

<sup>141</sup> N.Y. CONST. art. XVIII.

<sup>142</sup> N.Y. CONST. art. XVII, § 1.

<sup>143</sup> N.Y. CONST. art. VII, § 8(2).

<sup>144</sup> N.Y. CONST. art. XVIII, § 2. The housing article was approved by the voters 1,686,056–936,279. *Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments*, *supra* note 113.

<sup>145</sup> N.Y. STATE CONSTITUTIONAL CONVENTION, 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: APRIL FIFTH TO AUGUST TWENTY-SIXTH 797–98 (1938) [hereinafter REVISED RECORD 1938] (discussing the passage of article VII, section 8).

2011/2012]

New York's Gift and Loan Clauses

2025

loans of credit to “corporations,” and the Committee on State Finances and Revenues expressed the view that this change would clarify what was already believed: that the prohibition against gifts and loans of *credit* would include assistance to municipal as well as private corporations.<sup>146</sup> This amendment added public corporations to the list of entities to which the state was not allowed to give or lend its credit.<sup>147</sup> The state remained free, however, to give or loan *money* to public corporations.<sup>148</sup>

## 2. Changes to the Local Gift and Loan Clause

The convention amended the local finance article to provide additional flexibility for local governments to take a more active role in addressing social and economic problems. With regard to municipalities, an exception to the gift and loan prohibition was added for the health and welfare of all children, counties were given the authority to incur debt to advance unpaid tax revenue to a town or a school district, and the existing exception for aid to the poor was changed to “aid, care and support of the needy.”<sup>149</sup> The newly enacted housing article allowed cities, towns, and villages to undertake low-rent housing and slum clearance projects, and allowed them to obligate themselves for the repayment of loans made by the state to public corporations functioning in these areas.<sup>150</sup> This increased flexibility was accompanied by further restriction in certain areas. The convention adopted an amendment including “private undertaking[s]” among those to whom money, property, and credit could not be given or loaned.<sup>151</sup> The convention also made school districts subject to the gift and loan prohibitions but did not extend to them the benefit of the exceptions.<sup>152</sup> As with the state provision, the convention adopted an amendment

---

<sup>146</sup> *Id.* The committee also indicated that the governor had taken that position in his previous annual message to the legislature. *Id.* at 798. The committee also believed the amendment was necessary for a more practical reason:

If corporations were here defined as only private corporations, by immediate implication the State credit could be given or loaned to every municipal or other public corporation.

If cities found themselves in difficulties, or if an authority were unable to sell its securities, they could rush to the State for assistance.

*Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 797.

<sup>149</sup> N.Y. CONST. art. VIII, § 1.

<sup>150</sup> N.Y. CONST. art. XVIII, § 2.

<sup>151</sup> N.Y. CONST. art. VIII, § 1.

<sup>152</sup> *Id.*

specifying that gifts or loans of credit to or in aid of “public or private corporation[s]” were prohibited.<sup>153</sup> The voters approved all of the amendments adopted by the convention that pertained to state and local finance.<sup>154</sup>

The work of the 1938 convention reflected a growing tension between the belief that government should take a more active role in addressing social and economic problems and the continuing concern about the use of the credit of the state and localities in ways that might threaten their financial solvency.<sup>155</sup> This tension was palpable in all of the convention debates involving financial matters.<sup>156</sup> The convention repeated the pattern of earlier revisions concerning the gift and loan clauses, namely, ad hoc restrictions on the newly devised practices of state and local government designed to circumvent the provisions and the addition of a number of exceptions to the restrictions—an implicit recognition that the “evasion[s]” were, at least in part, attempts to address legitimate social and economic problems.<sup>157</sup> The tension between these two objectives—ensuring the fiscal integrity of the state and meeting the challenges of a dynamic and diverse society—persists to this day.

*F. Constitutional Amendments to Gift and Loan Clauses, 1938 to Present*

In the approximately seventy-five years since the 1938 convention, the state and local gift and loan clauses have been amended numerous times, most often to add new exceptions. In addition, new sections permitting the state government to guarantee certain obligations have been added to the

---

<sup>153</sup> *Id.*

<sup>154</sup> See *The Constitutional Convention of 1938*, HISTORICAL SOC’Y OF THE COURTS OF THE STATE OF N.Y., [http://www.courts.state.ny.us/history/pdf/Library/1938\\_constitutional\\_convention.pdf](http://www.courts.state.ny.us/history/pdf/Library/1938_constitutional_convention.pdf). The amendment permitting the use of state money and credit for social welfare, including provision, by insurance or otherwise, against the hazards of unemployment, sickness, and old age, was approved by the voters, 1,902,075–943,296. PATERSON, *supra* note 102, at 333. The remaining amendments relating to state and local finance were included in a comprehensive amendment that was approved, with 1,521,036 in favor and 1,301,797 against. Quirk & Wein, *supra* note 54, at 574.

<sup>155</sup> Quirk & Wein, *supra* note 54, at 579 (“In sum, the 1938 constitution determined that neither the state nor local credit could be used in aid of an authority.”).

<sup>156</sup> Quirk & Wein, *supra* note 54, at 561–79 (providing an excellent summary of the 1938 convention’s work in the area of finance, including excerpts from some of the debates over public authorities).

<sup>157</sup> See *id.* at 570, 576–78 (citation omitted); see also STATE FINANCE, *supra* note 95, at 115 (noting a number of exceptions to the restrictions).

2011/2012]

New York's Gift and Loan Clauses

2027

constitution.<sup>158</sup> The net result of these changes has been to make easier the giving and loaning of state money and credit.<sup>159</sup>

### 1. Changes to the State Gift and Loan Clause

A 1947 amendment approved the undertaking of \$400 million in debt for bonus payments to living veterans of World War II and the next-of-kin of deceased veterans.<sup>160</sup> An amendment in 1951 permitted the legislature to increase the “pensions of members of retirement systems of the state or its subdivisions.”<sup>161</sup> Voters in 1951 approved an amendment which allowed the state to guarantee \$500 million of bonds issued by the New York State Thruway Authority,<sup>162</sup> and a 1961 amendment allowed the legislature to make the state liable for up to \$100 million of obligations of the Port of New York Authority issued for various purposes.<sup>163</sup>

A 1961 amendment added an entirely new subsection to the state gift and loan prohibition, authorizing the legislature to loan state money to a public corporation (later named the Job Development Authority) engaged in making secured loans to nonprofit corporations under specified conditions to finance industrial development so as to provide improved employment opportunities.<sup>164</sup> A companion portion of the amendment added a new section (section 7) to the corporations article (article X), which

---

<sup>158</sup> *E.g.*, N.Y. CONST. art. VII, § 18 (providing benefits to veterans of World War II); N.Y. CONST. art. VII, § 8(1)–(2) (providing exceptions to the prohibitions against gifts and loans by municipalities); N.Y. CONST. art. X, § 6 (authorizing the state to guarantee debts incurred for thruway construction); N.Y. CONST. art. X, § 7 (authorizing the state to guarantee debts incurred by the Port of New York Authority); N.Y. CONST. art. X, § 8 (authorizing the state to provide loans for manufacturing plants); N.Y. CONST. art. XVII, § 7 (authorizing the state to provide loans for hospital construction).

<sup>159</sup> *See id.*

<sup>160</sup> N.Y. CONST. art. VII, § 18. A 1949 amendment amended the eligibility requirements for these bonus payments. *Id.* (omitting a requirement that the veteran be a resident of New York at the time of application).

<sup>161</sup> *Historical Notes*, in N.Y. CONST. art. VII, § 8 (McKinney 2006).

<sup>162</sup> N.Y. CONST. art. X, § 6.

<sup>163</sup> N.Y. CONST. art. X, § 7.

<sup>164</sup> N.Y. CONST. art. VII, § 8(3). Four subsequent amendments in 1966, 1973, 1977, and 1985 further refined the scope of the Job Development Authority. *See Historical Notes*, *supra* note 161 (explaining how each subsequent amendment refined the scope of the Job Development Authority). The 1967 Temporary State Commission on the Constitutional Convention questioned the necessity of this amendment on the grounds that the state already had the ability to loan state money to public corporations. STATE FINANCE, *supra* note 96, at 116. A possible purpose for the amendment was to avoid the argument that absent constitutional authority any such loans were impermissible either because the proceeds would ultimately be channeled to private entities or that such uses were not in furtherance of a public purpose.

allowed the state to guarantee up to \$50 million worth of bonds issued by this authority.<sup>165</sup>

A 1966 amendment added language allowing the legislature to provide “for the education and support of . . . the mentally ill, the emotionally disturbed, the mentally retarded,” and also allowed the legislature to “increase . . . the amount of pension benefits of any widow or widower of a retired member of a retirement system of the state or of a subdivision of the state.”<sup>166</sup> An amendment approved in 1969 allowed the state, municipalities, and other public corporations “to lend [their] money or credit to or in aid of any corporation or association” for the purposes of hospital construction.<sup>167</sup>

There were limits to what the voters would allow by way of loosening the prohibition.<sup>168</sup> Perhaps the most prominent example of this was the 1971 rejection of the community development

---

<sup>165</sup> 1961 N.Y. Laws app. 2735–36; PATERSON, *supra* note 102, at 345. Without this exception, the state guarantees would not have been allowed. Section 7, which was renumbered section 8 in 1969, has been amended four times since its enactment, and the current limitation is \$900 million. N.Y. CONST. art. X, § 8. Voters also rejected several amendments, in 1966, 1967, and 1977, which would have each increased the then-threshold for funds which the state could guarantee. Paterson, *supra* note 102, at 350–51, 1495–96.

<sup>166</sup> N.Y. CONST. art. VII, § 8(2). This amendment also modified the functions of the Job Development Authority.

<sup>167</sup> N.Y. CONST. art. XVII, § 7.

<sup>168</sup> The voters rejected the following amendments that would have changed either the state or local debt or finance provisions: 1) a 1955 amendment that would have excluded indebtedness contracted for the collection or disposal of sewage from municipal debt limits; Paterson, *supra* note 102, at 341; 2) a 1955 amendment that would have authorized \$750 million in state debt for construction of state highways; *id.* at 340; 3) a 1959 amendment that would have excluded from New York City's debt limit \$500 million of bonds for school construction; *id.* at 343; 4) a 1961 amendment that would have authorized the state to contract debt for multiple “specific purposes in [the] event of [a] general economic recession”; *id.* at 345; 5) a 1961 amendment that would have authorized the State to guarantee up to \$500 million in bonds issued by a public authority “for the construction of buildings and other improvements at institutions of higher education”; *id.*; 6) a 1964 amendment that would have given the legislature broad powers to affect urban renewal; *id.* at 348; 7) a 1965 amendment that would have included partnerships and trusts among those entities eligible for housing loans from municipalities and would have granted power of eminent domain to these entities; *id.* at 349; 8) a 1966 amendment that would have affected “the power of the Buffalo city school district to contract indebtedness and to raise taxes on real estate”; *id.* at 351; 9) a 1966 amendment that would have related “to the power of cities, towns and villages to contract indebtedness for low rent housing and slum clearance projects on basis of average full valuation of taxable real estate,” rather than taxable valuation; *id.* at 350; 10) a 1971 amendment that would have extended the time limit by which a municipality could exclude from its debt limits indebtedness for sewer facilities; *id.* at 352; 11) a 1975 amendment that would have authorized “municipalities to construct storm water facilities in excess of their own needs . . . and to incur joint indebtedness for such [purposes]”; *id.* at 354; and 12) a 1975 amendment that would have excluded the “employee's contribution for pension, retirement and social security liabilities . . . from the tax limitations of any county, city (other than the city of New York), village or certain school districts.” *Id.*



2011/2012]

New York's Gift and Loan Clauses

2029

amendment.<sup>169</sup> This amendment would have repealed the housing article and replaced it with a new community development article, which would have allowed the state and local governments to grant or lend money to private entities, and to guarantee loans made by such entities, for “community development purposes.”<sup>170</sup> These purposes included, among others: “adequate, safe and sanitary housing;” “urban and community renewal;” “economic prosperity and adequate employment opportunities;” and “health, mental health and environmental health.”<sup>171</sup> The amendment was far reaching; the inclusion of “economic prosperity and adequate employment opportunities”<sup>172</sup> would likely have permitted gifts and loans similar to those given to the railroads and other corporations during the nineteenth century, which resulted in the adoption of the gift and loan clauses.<sup>173</sup>

## 2. Changes to the Local Gift and Loan Clause

The gift and loan clause contained in the local finance article has also been the subject of piecemeal revision. The voters approved two amendments in 1959, adding further exemptions to the general prohibition against gifts and loans of local money. The first “authorized two or more municipal corporations” to engage in joint municipal undertakings and to contract joint or several indebtedness for such undertakings.<sup>174</sup> The second authorized counties, cities, and towns “to increase the pension benefits payable to retired members of a police department or fire department or to [their] widows, dependent children or dependent parents.”<sup>175</sup> A 1963 amendment granted villages the authority previously granted counties, cities, and towns in 1959 to increase pension benefits.<sup>176</sup> In 1965 another exception was adopted, allowing New York City to increase “pension benefits payable to widows, dependent children or dependent parents of members or retired members” of the city’s street cleaning department.<sup>177</sup>

---

<sup>169</sup> This amendment was defeated by a vote of 1,322,065–2,414,805. *Id.* at 352.

<sup>170</sup> 1971 N.Y. Laws app. 3142.

<sup>171</sup> *Id.* § 1.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* § 2.1(a).

<sup>174</sup> *Historical Notes*, in N.Y. CONST. art. VIII, § 1 (McKinney 2006).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

### 3. Suggestions for Systemic Reform of Gift and Loan Clauses

Beginning in the 1950s, there have been numerous suggestions for substantial revision of the state and municipal prohibitions against gifts and loans of money and credit. Upon Governor Nelson Rockefeller's recommendation, the 1959 legislature created the Temporary State Commission on the Revision and Simplification of the Constitution to provide "a comprehensive study of the constitution with a view [of] proposing . . . revision and simplification."<sup>178</sup> In its first report, issued in December 1959, the commission noted that the New York Constitution was not a constitution in a "constitutional sense," but was primarily a legislative document.<sup>179</sup> The commission concluded that lawmaking by referendum was "an unsuitable method of dealing with a plethora of problems and propositions."<sup>180</sup>

In 1961 the commission issued its final report, containing six principles that were to govern and form the nucleus of a local finance article:

1. A pledge of the faith and credit of the localities for the payment of principal and interest on local debt.
2. Assurance to holders of local obligations that principal and interest will be paid on schedule.
3. Mandatory retirement of debt within the useful life of the object financed and debt repayment spread in a prudent manner.
4. A restriction of borrowing to a locality's own purposes, with a proviso facilitating debt incurrence for common or cooperative purposes.
5. A restriction on the gift or loan of money, property or credit.
6. A restriction on the creation of new overlapping jurisdictions with the power to incur debt and levy taxes . . . on real estate.<sup>181</sup>

---

<sup>178</sup> 1959 N.Y. Laws 25.

<sup>179</sup> THE TEMPORARY COMMISSION ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, FIRST STEPS TOWARD A MODERN CONSTITUTION, N.Y. LEGIS. DOC. NO. 58, at 1 (Dec. 31, 1959) (explaining that a number of provisions of the constitution are outdated and inappropriate as constitutional provisions).

<sup>180</sup> *Id.*

<sup>181</sup> THE TEMPORARY COMMISSION ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, SIMPLIFYING A COMPLEX CONSTITUTION, N.Y. LEGIS. DOC. NO. 14, at 23 (Feb. 27, 1961); see also Cockren, *supra* note 81, at 167–73 (discussing the work of this commission).

Despite these efforts, nothing came of these recommendations.<sup>182</sup> In 1965 voters approved a call for a constitutional convention.<sup>183</sup> A Temporary State Commission on the Constitutional Convention was established to provide delegates with information concerning the state of the constitution.<sup>184</sup> The State Finance report issued by the commission offered delegates two alternatives with respect to the gift and loan clauses: removal or retention with the possibility of recasting the exceptions as “positive mandates.”<sup>185</sup>

In April of 1967, a Special Committee on the Constitutional Convention of the Association of the Bar of the City of New York issued a series of reports offering recommendations for constitutional revision.<sup>186</sup> The Special Committee recommended removal of the gift and loan clauses and reliance on the legislature for the construction of sound public finance.<sup>187</sup> The New York City Mayor's Task Force on the Constitutional Convention recommended that the gift and loan clause for local governments be modified to allow aid (including in the form of gifts and loans of money and credit) to individuals and public and private corporations and associations “in furtherance of a public purpose.”<sup>188</sup>

The 1967 convention proposed substantial revisions to the finance provisions,<sup>189</sup> including the following replacement for

---

<sup>182</sup> See N.Y. CONST. art. VIII, § 1 (showing that the legislature has not adopted the commission's recommendations).

<sup>183</sup> The vote on the question was 1,681,438 in favor and 1,468,431 against. JOHN P. LOMENZO, MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 344 (1966–67).

<sup>184</sup> 1965 N.Y. Laws 1342. Ultimately, the commission produced fifteen reports. STATE OF N.Y., TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION, SUBJECT INDEX 9 (1967).

<sup>185</sup> STATE FINANCE, *supra* note 96, at 122–23.

<sup>186</sup> ASS'N OF THE BAR OF THE CITY OF N.Y., REPORTS OF THE SPECIAL COMMITTEE ON THE CONSTITUTIONAL CONVENTION: CONSTITUTIONAL CONVENTION OF 1967, at i (1967) (reporting on the issues discussed at the Constitutional Convention of 1967 and making recommendations).

<sup>187</sup> ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT OF THE SPECIAL COMMITTEE ON THE CONSTITUTIONAL CONVENTION: LOCAL GOVERNMENT AND FINANCE 21–22 (1967).

<sup>188</sup> THE MAYOR'S TASK FORCE ON THE CONSTITUTIONAL CONVENTION, REPORT AND PROPOSED CONSTITUTIONAL AMENDMENTS 17 (1967). The task force also would have allowed aid in the form of tax exemptions, loan guarantees, and exercise of the power of eminent domain on behalf of these entities. *Id.* Included among the items listed as “public purpose” was “[i]mprovement of economic prosperity through aid to commerce and industry.” *Id.*

<sup>189</sup> The proposed constitution would also have eliminated the referendum provision for incurring state debt, and would have allowed debt to be assumed only if enacted at two separately elected sessions of the legislature and only if the accumulated debt (including the liabilities of public authorities) was less than twelve percent of the State's revenues averaged over the two preceding years. See N.Y. STATE CONSTITUTIONAL CONVENTION, 11 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: APRIL FOURTH TO SEPTEMBER TWENTY-SIXTH, DOC. NO. 60, at 33 (1967).

the state and local gift and loan clauses:

§ 18. a. Neither the state nor any local government nor any other public corporation shall (1) grant or lend its moneys to or guarantee the obligations of any person, association or private corporation, except that such money may be granted in any year or periodically by contract, or loaned, for public purposes, but the proceeds of indebtedness contracted therefor shall be used only for loans for capital construction, as defined in section eleven of this article, or (2) guarantee the obligations of any other local government or other public corporation.<sup>190</sup>

The new section would have continued the prohibitions against loans of credit by the state and local governments, and would have added public corporations (for example, public authorities) to the list of entities unable to loan their credit.<sup>191</sup> The section would have allowed grants and loans of money for public purposes, but state or municipal debt incurred to make such loans would only have been able to be used for capital construction.<sup>192</sup> The proposed constitution was overwhelmingly defeated by the voters.<sup>193</sup>

Calls for comprehensive reform in these areas persisted. In 1979, the Association of the Bar of the City of New York's Committee on Municipal Affairs issued a report recommending the following amendment: "[l]ocal government[] can give or loan their money, property or credit only when authorized by the legislature for a public purpose."<sup>194</sup> In 1997, the Association issued a report in anticipation of the constitutionally mandated 1997 vote on whether to hold a constitutional convention.<sup>195</sup> Though sympathetic with earlier Association recommendations, the 1997 report concluded that "[s]ubstantial constitutional revision [was] needed in this area," but to accomplish this revision "an interdisciplinary task force comprised of professionals with experience and knowledge in the subject areas . . . should be charged with formulating a

---

<sup>190</sup> *Id.* at 38.

<sup>191</sup> *See id.*

<sup>192</sup> *See id.*

<sup>193</sup> The vote on the new constitution was 1,327,999 in favor and 3,487,513 against. JOHN P. LOMENZO, *MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK* 349 (1968).

<sup>194</sup> The Committee on Municipal Affairs, *Committee Reports: Proposals to Strengthen Local Finance Laws in New York State*, 34 *RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK* 58, 60 (Jan./Feb.1979) (proposing local financial regulations).

<sup>195</sup> *Report of the Task Force on the New York State Constitutional Convention*, 52 *RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK* 522, 522 (June 1997).

2011/2012]

New York's Gift and Loan Clauses

2033

comprehensive proposal for constitutional and legislative change.”<sup>196</sup> Despite these calls for reform, as of 2012 there has been no entity tasked with reviewing and revising these provisions.

## II. THE APPROACH TAKEN BY THE COURT OF APPEALS TO THE GIFT AND LOAN CLAUSES

In addition to the gradual but continual weakening of the gift and loan clauses by constitutional amendments, the New York courts have handed down a number of decisions, culminating in *Bordeleau v. State*,<sup>197</sup> which have allowed the legislature and local governments to avoid the effect of the prohibitions.<sup>198</sup> These decisions have: 1) narrowly defined concepts such as what constitutes a loan and what constitutes funds of the state for purposes of the prohibitions;<sup>199</sup> 2) allowed otherwise barred claims against a governmental entity to be heard and determined on the basis of a moral obligation;<sup>200</sup> 3) permitted public benefit corporations, commonly referred to as authorities, to engage in acts that the state could not otherwise do;<sup>201</sup> and 4) afforded the state and municipalities deference in their determinations of both what is a public purpose for which money can be spent and whether a public-private agreement confers a public, as opposed to private, benefit.<sup>202</sup>

### A. Limited Definitions of Terms Such as Loan and State Funds

Courts interpreting the gift and loan clauses have defined both the terms “loan” and “funds” in a manner that limits the extent of the prohibitions. The Court of Appeals has held that a municipality’s sale of a parcel of land to a private entity with no money down, and the amount to be paid over the course of fifteen years secured by a purchase money mortgage, did not constitute a

---

<sup>196</sup> *Id.* at 617.

<sup>197</sup> *Bordeleau v. State*, 960 N.E.2d 917 (N.Y. 2011).

<sup>198</sup> See *Report of the Task Force on the New York State Constitutional Convention*, *supra* note 195, at 613 (noting that many court cases have decided it is permissible for the State to use public funds for private enterprises that provide “public purpose[s]”).

<sup>199</sup> See Section, II.A, *infra*.

<sup>200</sup> See Section, II.B, *infra*.

<sup>201</sup> See Section, II.C, *infra*.

<sup>202</sup> See Section, II.D, *infra*. In its jurisprudence, the Court of Appeals has generally treated the state and local gift and loan clauses as interchangeable, relying on decisions interpreting one clause to decide cases involving the other clause. For this reason, the decisions of the court in this article are not separated by whether the case involved the state or local clause.

loan.<sup>203</sup> The court, reversing an appellate division decision invalidating the arrangement, held that a contract providing for the payment of interest upon a deferred payment constituted consideration for the sale and was not the type of transaction contemplated by the local gift and loan clause.<sup>204</sup>

Courts have also held that funds not representing either taxes or fees received from the citizens are not subject to the gift and loan prohibitions.<sup>205</sup> Funds received from a federal financing bank and guaranteed by the United States Department of Housing and Urban Development,<sup>206</sup> penalties and fines collected from certain offenses,<sup>207</sup> gifts that do not involve an expense to the state,<sup>208</sup> and funds raised from a special class by an assessment for a special purpose<sup>209</sup> all may be lent or given without running afoul of the constitution.

*B. Allowance of Moral Obligation Claims as Not Violating Gift and Loan Clauses*

Since the mid-nineteenth century, New York courts have held that the gift and loan prohibitions do not prevent the use of public moneys to remedy injustices in situations where, despite the lack of a legal obligation, some higher obligation of honor, fairness, or broad public responsibility exists.<sup>210</sup> When the legislature enacts a

---

<sup>203</sup> 10 East Realty, L.L.C. v. Inc. Vill. of Valley Stream, 907 N.E.2d 274, 275–76 (N.Y. 2009).

<sup>204</sup> *Id.* at 276. A shift in the characterization of this type of transaction is evident in the opinions of the state comptroller. In 1956 and 1967, the state comptroller took the position that a town was prohibited by the municipal gift and loan clause from taking back a purchase money mortgage in connection with the sale of real property. Opinion 67-904, 23 Op. N.Y. Comptroller 804, 807 (1967); Opinion No. 8100, 12 Op. N.Y. Comptroller 185, 185 (1956). Subsequently, however, during the following two decades, the comptroller issued opinions allowing such transactions. Opinion 87-51, Op. N.Y. Comptroller 78, 78–79 (1987); Opinion 81-61, Op. N.Y. Comptroller 62, 63 (1981); Opinion 78-932, Op. N.Y. Comptroller 1, 7 (1978); Opinion 77-272, 33 Op. N.Y. Comptroller 53, 54–55 (1977); Opinion 77-329, Op. N.Y. Comptroller (1977) (unreported) (on file with Albany Law Review).

<sup>205</sup> See, e.g., Kradjian v. City of Binghamton, 482 N.Y.S.2d 89, 91 (App. Div. 1984), *appeal dismissed*, 478 N.E.2d 212 (N.Y. 1985) (stating the city's participation in a federal program, managed by a federal agency and funded by federal money, did not constitute a loan or a gift within the meaning of the state constitution).

<sup>206</sup> *Id.* at 90–91.

<sup>207</sup> Am. Soc'y for Prevention of Cruelty to Animals v. City of New York, 199 N.Y.S. 728, 735 (App. Div. 1923).

<sup>208</sup> Schulz v. Pataki, 708 N.Y.S.2d 177, 179–80 (App. Div. 2000), *appeal dismissed*, 738 N.E.2d 780 (N.Y. 2000).

<sup>209</sup> Wickham v. Trapani, 272 N.Y.S.2d 6, 10 (App. Div. 1966).

<sup>210</sup> See, e.g., Am. Soc'y for Prevention of Cruelty to Animals, 199 N.Y.S. at 735 (noting that the state constitution does not prohibit public funds to be paid for a moral obligation).

statute allowing payment under these circumstances, no gift or loan has occurred.<sup>211</sup>

The doctrine of moral obligation first arose in *Town of Guilford v. Board of Supervisors of Chenango County*.<sup>212</sup> In *Town of Guilford*, the Court of Appeals upheld a statute requiring a town's board of supervisors to levy an assessment to reimburse the town's former highway commissioners an amount they had been compelled to pay for costs in an unsuccessful legal action brought at the direction of the town's voters.<sup>213</sup> The court held that, in the absence of express constitutional restrictions, the legislature "can make appropriations of money whenever the public well-being requires or will be promoted by it; and it is the judge of what is for the public good."<sup>214</sup> Because "the legislature ha[d] the right to appropriate the public moneys for local or private purposes, and to impose a tax upon the property of the whole state, or any portion of the state,"<sup>215</sup> the judiciary had no power to review these decisions.<sup>216</sup> *Town of Guilford* gave legal status to what later became known as "moral obligation" when it stated:

The legislature is not confined in its appropriation of the public moneys or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude or charity.<sup>217</sup>

In the years since *Town of Guilford*, the concept of moral obligation has been refined. Subsequent courts have held that a moral obligation may not be founded purely on gratitude or charity. In *People v. Westchester County National Bank of Peekskill*,<sup>218</sup> the Court of Appeals addressed the validity of an act authorizing the state to issue \$45 million in bonds, the proceeds of which would be paid into the state treasury and used to pay a bonus of \$10 per month of active service to military veterans who had served during World War I or, if deceased, to their relatives.<sup>219</sup> The court

---

<sup>211</sup> See *id.*

<sup>212</sup> *Town of Guilford v. Bd. of Supervisors of Chenango Cnty.*, 13 N.Y. 143 (1855).

<sup>213</sup> *Id.* at 144–46.

<sup>214</sup> *Id.* at 149.

<sup>215</sup> *Id.* at 146.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 149.

<sup>218</sup> *People v. Westchester Cnty. Nat'l Bank of Peekskill*, 132 N.E. 241 (N.Y. 1921).

<sup>219</sup> *Id.* at 241–42. The act had been approved by more than sixty-eight percent of the electors who had voted on the proposition. *Id.* at 242.

acknowledged that the bonuses would be permissible if they were issued in response to a “moral obligation,” but concluded that such a moral obligation did not exist.<sup>220</sup> The court grouped its moral obligation precedents into two categories: cases in which the state had received a direct (albeit legally unenforceable) benefit from a claimant and cases in which a claimant had been injured under circumstances in which fairness dictated that the state should respond.<sup>221</sup> The court noted that in all of the cases, “more than a mere gratuity was involved.”<sup>222</sup> The court counseled deference to the legislature while preserving the letter and spirit of the constitution:

We are not forgetful of the fact that, if there is any reasonable ground for the legislative decision that a moral obligation exists, the courts may not intervene. If there is such a ground, the legislature must determine whether the claim shall be recognized. But the prohibitions of the Constitution may not be evaded by the assertion that such an obligation exists, when in fact it does not. Arbitrary action may not convert a wrong into a right.<sup>223</sup>

Because the payment of bonuses to the soldiers and sailors was purely gratuitous, the act violated the state gift of credit prohibition.<sup>224</sup>

In *Williamsburgh Savings Bank of Brooklyn v. State*,<sup>225</sup> however, the court held that the state could honor as a moral obligation a claim by holders of debt issued by, *inter alia*, the New York State Water Supply Commission, even though language in both the bonds and the authorizing statute made clear that the state was not obligated for the debt.<sup>226</sup> The court defined the respective roles of the legislature and the judiciary in determining whether a moral obligation exists:

The rule that it rests solely with the state through its

---

<sup>220</sup> *Id.* at 247.

<sup>221</sup> *Id.* at 245.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 247.

<sup>224</sup> *Id.* In dissent, Judge Cardozo would have allowed the bonuses as a moral or honorary obligation. *Id.* at 248 (Cardozo, J., dissenting). Citing Lincoln’s *Constitutional History of New York*, Cardozo articulated the rationale for the state gift and loan prohibition, “to put an end to the use of the credit of the state in fostering the growth of private enterprise and business.” *Id.* Cardozo stated that although he would not limit the prohibition to that precise evil, he would limit it to “evils of a kindred nature.” *Id.*

<sup>225</sup> *Williamsburgh Sav. Bank of Brooklyn v. State*, 153 N.E. 58 (N.Y. 1926).

<sup>226</sup> *Id.* at 60.



legislature to determine whether it will recognize a claim even though founded upon equity and justice, and allow it to be developed into a legal demand, and that the exercise of this choice cannot be delegated to any one else, quite necessarily leads to the other rule that the exercise of this discretionary power by the state is seldom subject to review by the courts. Except under the most extreme circumstances, the courts are not allowed to set up their judgment against that of the state, and say that the decision of the latter that it will give recognition to such a claim ought to have been different. Practically the sole power of the courts in this respect is to determine whether all of the facts established in a given case and presumably within the knowledge of the legislature do establish such a foundation of equity and justice that the legislature within the rules established by the courts was authorized, if it saw fit so to do, to recognize the justice of the claim.<sup>227</sup>

The facts of the case established a foundation of equity and justice sufficient for the legislature to allow recognition of the claims.<sup>228</sup> Because the state had “started on its disastrous course the improvement plan which ha[d] become the source of so much trouble,”<sup>229</sup> it was too heavily involved in the transaction to permit it to deny liability.<sup>230</sup> The state had allowed one of its agencies acting under the state’s authority “to gather into its treasury moneys of its citizens,”<sup>231</sup> and therefore was not required to “stand unresponsive when asked to relieve those whom indirectly at least it has brought into an unhappy predicament, by retiring obligations which in essence and equity are its own.”<sup>232</sup>

Claims based solely on a moral obligation have been allowed by the legislature and upheld by the courts in situations where a claimant has provided services or property to the state,<sup>233</sup> paid

---

<sup>227</sup> *Id.* at 62–63 (citations omitted).

<sup>228</sup> *Id.* at 63.

<sup>229</sup> *Id.*

<sup>230</sup> *See id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 58. A 1938 amendment to the state constitution, described below, prohibits the state or any municipality from assuming the liability of any public authority, N.Y. CONST. art. X, § 5, effectively overruling *Williamsburgh Savings Bank*. *See infra* text accompanying notes 254–58.

<sup>233</sup> *Wrought Iron Bridge Co. v. Attica*, 23 N.E. 542, 544 (N.Y. 1890) (upholding legalization and validation of otherwise unenforceable claim against a town by bridge builder based on premise that moral obligation did not violate constitution); *O'Hara v. State*, 19 N.E. 659, 662 (N.Y. 1889) (allowing claim by supplier who had provided services and materials under the

money to the state for property with a title defect,<sup>234</sup> or sustained an injury for which the state should bear the recovery,<sup>235</sup> as well as when the state has assumed the responsibility and expense for a project that could have otherwise been charged to a private party.<sup>236</sup> However, a statute acknowledging a moral obligation does not automatically guarantee approval by the state courts; some statutes enacted on the basis of a moral obligation have been invalidated,<sup>237</sup> often times because the purported obligation either was not rendered at the request of the state or the claimed injury was not the result of a wrong attributable to the state.<sup>238</sup>

---

direction of quarantine officials to repair state quarantine vessels); *Cole v. State*, 6 N.E. 277, 281 (N.Y. 1886) (allowing claim of port captain who stayed on when his successor had not been appointed by the end of his term).

<sup>234</sup> *Wheeler v. State*, 83 N.E. 54, 56 (N.Y. 1907) (upholding statute which allowed the purchaser of a piece of the land to recover a judgment for the amount he paid to the state plus interest).

<sup>235</sup> *Farrington v. State*, 161 N.E. 438, 441 (N.Y. 1928) (permitting an employee of comptroller's office who had been wrongfully discharged to recover his counsel fees in obtaining reinstatement); *Munro v. State*, 119 N.E. 444, 445 (N.Y. 1918) (upholding statute allowing recovery for an employee who was assaulted by an inmate of a psychiatric institution at which the employee worked); *People ex. rel. Cent. Trust Co. of New York v. Prendergast*, 95 N.E. 715, 718–19 (N.Y. 1911) (upholding validity of a statute which allowed for payment of interest upon damages for the change in the grade of a road despite fact that damages had occurred prior to the enactment); *In re Borup*, 74 N.E. 838, 839 (N.Y. 1905) (upholding statute which made town liable for any damages to a landowner's property as the result of previously authorized and performed grading change).

<sup>236</sup> *Lehigh Valley R. Co. v. Canal Bd.*, 97 N.E. 964, 965 (N.Y. 1912) (upholding barge canal act that obligated state to assume expenses for raising and rebuilding bridges previously erected by railroad companies or for building new bridges).

<sup>237</sup> *See, e.g., Ausable Chasm Co. v. State*, 194 N.E. 843, 845 (N.Y. 1935) (invalidating law which authorized payment to claimants for a bridge they had built with their own funds twenty years earlier); *Rosalsky v. State*, 172 N.E. 261, 261–62 (N.Y. 1930) (voiding as overbroad a statute requiring the state to reimburse any judge who successfully defended against litigation growing out of his official acts); *Cuvillier v. State*, 165 N.E. 284, 285 (N.Y. 1929) (holding unconstitutional an act that conferred jurisdiction upon the Court of Claims to hear and determine a claim by a person for expenses incurred in defending against a charge of criminal libel preferred against him that had been erroneously discharged); *Stemmler v. Mayor of New York*, 72 N.E. 581, 584–85 (N.Y. 1904) (opining that a statute allowing a justice who had been wrongfully denied his office to collect his salary for the time that another person was wrongfully occupying the office would allow an unconstitutional gift); *Mahon v. Bd. of Educ. of New York*, 63 N.E. 1107, 1108 (N.Y. 1902) (invalidating a law which permitted retired teachers to be paid half their salaries as annuities); *Chapman v. City of New York*, 61 N.E. 108, 109 (N.Y. 1901) (striking down a statute that required New York City to repay a public officer expenses which he had incurred in successfully defending against a removal proceeding); *In re Greene*, 60 N.E. 183, 186 (N.Y. 1901) (invalidating a statute which allowed the receiver of a bank to have an adverse judgment vacated and reheard by a referee); *Bush v. Bd. of Superiors*, 53 N.E. 1121, 1122 (N.Y. 1899) (invalidating a law that permitted the boards of several counties upon approval of the voters to levy taxes to pay men who had been obligated to serve in the military thirty years prior).

<sup>238</sup> *E.g., Stemmler*, 72 N.E. at 584 (determining the wrong was not attributable to the state); *Chapman*, 61 N.E. at 110–11 (concluding the state was not liable for the costs of a public officer's defense); *Bush*, 53 N.E. at 1122 (holding that the state was not monetarily

The latest pronouncement by the Court of Appeals on this issue came in *Ruotolo v. State*,<sup>239</sup> a 1994 decision in which the Court of Appeals held that the revival of a dismissed claim seeking relief from the state for injuries to police officers injured or killed in the line of duty was not an unconstitutional gift or loan of state property.<sup>240</sup> The court reaffirmed the continued validity of moral obligation as an exception to the gift and credit clauses:

The New York Constitution specifically forbids the gift or loan of property to a specific individual (N.Y. Const., art. VII, § 8 [“The money of the state shall not be given or loaned to or in aid of any . . . private undertaking . . . or in aid of any individual”]). When the legislature demonstrates that an enactment challenged under this provision was both in response to a moral obligation of the State and does not undermine previously vested rights, the courts will not interfere with the exertion. We have said that the legislature may use public moneys to remedy an injustice in cases even when no legal obligation to pay existed, as long as some higher obligation of honor, fairness or broad public responsibility is identified. Stated differently, it must affirmatively appear that not to act would condone a travesty of justice. With respect to claims previously litigated even to a final judgment on the merits, a “moral obligation” has been found sufficient to revive a State claim and may, by analogy, be used to overturn a final judgment in the State’s favor.<sup>241</sup>

Acknowledgment of moral obligation is not solely the province of the state. Municipalities may also make payments based upon a moral obligation without running afoul of the local gift and loan clause.<sup>242</sup>

---

responsible for a military service obligation).

<sup>239</sup> *Ruotolo v. State*, 631 N.E.2d 90, 95 (N.Y. 1994).

<sup>240</sup> *Id.* at 96–97.

<sup>241</sup> *Id.* at 95 (alteration in original) (citations omitted).

<sup>242</sup> *City of Rochester v. Chiarella*, 470 N.Y.S.2d 181, 184 (App. Div. 1983), *aff’d*, 472 N.E.2d 46 (N.Y. 1984) (upholding enactment authorizing refund of unconstitutionally levied real property taxes); Opinion 86-42, Op. N.Y. State Comptroller 69, 70 (1986) (despite general rule that excessive license or permit fee paid without protest is nonrefundable, situations may exist when a municipality may voluntarily refund a permit without violating local gift and loan prohibition). *But cf.* Informal Op. N.Y. Att’y Gen. 2004-1, 1008, 1008–09, 1010 n.2 (Feb. 19, 2002), *available at* <http://www.ag.ny.gov/appeals-and-opinions/numerical-index?page=3> (reimbursement of city council member for litigation expenses incurred in her unsuccessful lawsuit under the Open Meetings Law was not allowed as a moral obligation, as no “travesty of justice” existed).

*C. Use of Public Authorities to Avoid Gift and Loan Clauses*

By the 1920s, the state began to use public benefit corporations, also known as public authorities, to finance public projects.<sup>243</sup> These authorities did not have their origin as vehicles to circumvent provisions of the state constitution such as debt limits and gift and loan clauses.<sup>244</sup> Initial impetus for these devices came from the need for more flexibility and freedom from the restraints imposed on traditional government entities, the need to insulate tasks from the vagaries of the political process, and the need to overcome the restraints imposed by “political boundaries . . . frozen in time” and unresponsive to economic and demographic shifts.<sup>245</sup> In fact, the first public authorities in the state performed valuable functions, such as creating parks and public recreation spaces, expanding transportation infrastructure throughout the state, and generating electric power.<sup>246</sup> These authorities were largely self-sufficient, and raised their money through tolls, fees, and rents instead of through taxation.<sup>247</sup> It was recognized early on that these public benefit corporations would separate their administrative and fiscal functions from those of the state,<sup>248</sup> and that the state would be protected from liability for their acts.<sup>249</sup>

In 1935, the Court of Appeals, in *Robertson v. Zimmermann*, held that the bonded indebtedness of a sewer authority, the bonds of

---

<sup>243</sup> One scholar has noted that precursors of public authorities date back more than 500 years, when European monarchs resorted to private entities, known as Crown Corporations, to manufacture weapons and goods, distill liquor, and underwrite exploration. Scott Fein, *Would a State Constitutional Amendment Promote Public Authority Fiscal Reform?*, NYSBA GOV'T, L. & POL'Y J., Spring 2010, at 52. In the case of exploration, a company, such as the Dutch East India Company, would undertake exploration and the attendant costs in exchange for a monopoly on trade from any newly discovered lands, from which it would pay off the debt of the exploration. *Id.* Although New York had attempted to use a financing system similar to modern authorities when it enacted the canal financing statute that was struck down in *People v. Newell*, the first authorities in New York were formed under a 1915 law authorizing the creation of river regulation districts. Act of May 20, 1915, 1915 N.Y. Laws 2208; *Newell v. People*, 7 N.Y. 9 (1852). This position is contradicted by the Court of Appeals, which has stated that the Port of New York Authority (now known as the Port Authority of New York and New Jersey) in 1921 represented the first official authority. *Schulz v. State*, 639 N.E.2d 1140, 1146 (N.Y. 1994).

<sup>244</sup> Kenneth W. Bond, *Conduit Financing: A Primer and Look Around the Corner*, NYSBA GOV'T, L. & POL'Y J., Fall 2009, at 68 (discussing the limited value of general obligation bonds to modern public finance); Fein, *supra* note 243, at 52–53 (noting the important public services provided by early public authorities through the 1930s).

<sup>245</sup> See Bond, *supra* note 244, at 68–69; Fein, *supra* note 243, at 52–53.

<sup>246</sup> Fein, *supra* note 243, at 52.

<sup>247</sup> *Id.*

<sup>248</sup> Op. N.Y. Att'y Gen. 1929-223 (July 8, 1929).

<sup>249</sup> Op. N.Y. Att'y Gen. 1951-130 (Apr. 12, 1951).

2011/2012]

New York's Gift and Loan Clauses

2041

which were paid solely with revenues generated by the authority with no liability on the part of the city, was debt that did not have to be included as part of the city's debt limit.<sup>250</sup> The decision encouraged the creation of similar authorities, and by 1938 there were thirty-three authorities operating within the state.<sup>251</sup> *Robertson* was the first of many cases to hold that authorities are not subject to the constitutional limitations imposed upon state and local governments.<sup>252</sup>

Extensive discussion took place at the 1938 Constitutional Convention over the unregulated growth of public authorities and the future role that they would play in New York State. While some delegates viewed authorities as entities originally formed for a legitimate purpose but which had “degenerated into . . . debt evading device[s],”<sup>253</sup> others shared Alfred E. Smith's view that limiting them would “paralyze the one method we have discovered of getting work done expeditiously and without over taxing our people.”<sup>254</sup>

After considerable debate, the 1938 Convention adopted a new section dealing with public authorities. This section includes a provision that neither the state nor any locality could assume any liability for the indebtedness of a public authority.<sup>255</sup> This provision

---

<sup>250</sup> *Robertson v. Zimmermann*, 196 N.E. 740, 741, 744–45 (N.Y. 1935).

<sup>251</sup> *Quirk and Wein*, *supra* note 54, at 562.

<sup>252</sup> *Id.* at 565 n.268 (discussing *Comereski v. City of Elmira*, 125 N.E.2d 241, 244 (N.Y. 1955)). *Comereski* held that a parking authority was not subject to, and thus did not violate, the same constitutional limitations as those to which the city of Elmira would have been subject. *Id.*

<sup>253</sup> REVISED RECORD 1938, *supra* note 145, at 2259 (statement of Abbot Low Moffat). Moffat sponsored General Order No. 45, a “[p]roposed constitutional amendment to amend Article VIII of the Constitution by inserting therein a new section . . . in relation to public corporations.” *Id.* at 2258; *see also* *Quirk & Wein*, *supra* note 54, at 563–71 (discussing Moffat's proposal.).

<sup>254</sup> REVISED RECORD 1938, *supra* note 145, at 2268 (statement of Alfred E. Smith); *see also* *Quirk & Wein*, *supra* note 54, at 571–76 (discussing opposition to General Order No. 45 or the “Moffat proposal”).

<sup>255</sup> N.Y. CONST. art. X, § 5 (1938). The section also provides that: no public authority may be created except by special act of the legislature; no public authority may be created in any city to provide services or facilities “of a character or nature then or formerly furnished or supplied by the city” absent the approval of a majority of the citizens of the city voting on the issue; and that the accounts of any public authority shall be subject to supervision either by the state comptroller or, for authorities having members who are appointed by the mayor of a city, the city comptroller. *Id.* The provision requiring voter approval was a direct response to the *Robertson* decision. *Quirk & Wein*, *supra* note 54, at 565. It was designed to prevent the creation of a public authority to provide functions that a city was already providing (such as the Buffalo Sewer Authority in *Robertson*), simply as a means to avoid municipal debt limits. Such authorities are still allowed, but the approval of the voters is required. N.Y. CONST. art. X, § 5.

was intended to overrule *Williamsburgh Savings Bank*, which held that the state could assume a moral obligation to pay the debts of a commission that had been structured similarly to a public authority.<sup>256</sup> Convention delegates wanted to make it clear to potential creditors of an authority that any debt issued by the authority was not supported by the full faith and credit of the state or the municipality.<sup>257</sup> This provision appears to preclude the legislature from authorizing claims against the state for public authority debt based upon a moral obligation.

### 1. *Union Free School District*

The year after the 1938 convention, the Court of Appeals decided a case, *Union Free School District No. 3 v. Town of Rye*, which involved the application of the municipal gift and loan clause to a conduit-financing device.<sup>258</sup> The Town of Rye had been mandated by statute to borrow money to pay uncollected school taxes, without any repayment obligation on the part of the school district.<sup>259</sup> The Court of Appeals rejected the argument that such borrowing constituted a gift or loan of the town's credit to or in aid of the school district because the town was not borrowing for the school district's purposes.<sup>260</sup> As the legislature had made it a town function or purpose to pay the money for the schools, the town was borrowing for its own purposes.<sup>261</sup> In *Union Free School District*, the court came close to allowing the state to define as a function of one municipality the provision of its credit to that of another municipality, thus reducing the significance of the local gift and loan clause.<sup>262</sup> *Union Free School District* provided an important

---

<sup>256</sup> Quirk & Wein, *supra* note 54, at 564; *see also* *Williamsburgh Sav. Bank of Brooklyn v. State*, 153 N.E. 58, 63–64 (N.Y. 1926) (“Those facts . . . do not permit it to be said, as matter of law that the state is without any moral responsibility for what has happened and that it must stand unresponsive when asked to relieve those whom indirectly at least has brought into an unhappy predicament, by retiring obligations which in essence and equity are its own.”).

<sup>257</sup> The debates on the amendment to include this language can be found in REVISED RECORD 1938, *supra* note 145, at 2259–91 (debating General Order No. 45), and are summarized in Quirk & Wein, *supra* note 54, at 563–79.

<sup>258</sup> *Union Free School Dist. No. 3 v. Town of Rye*, 21 N.E.2d 681, 682 (N.Y. 1939).

<sup>259</sup> *Id.* at 686.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* (holding that when a town borrowed for such a purpose, it did so “[t]o meet its own obligations in aid of a governmental duty”).

<sup>262</sup> Quirk and Wein argue: “[t]he court’s reasoning is unpersuasive. It fails at its starting point—the proposition that the constitution does not restrict the power of the legislature to apportion governmental duties among governmental entities. The gift and loan provisions do exactly that.” Quirk & Wein, *supra* note 54, at 583.

2011/2012]

New York's Gift and Loan Clauses

2043

precedent for later extensions of and variations on this arrangement.

## 2. *Comereski*

The Gift and Loan provisions were next examined in *Comereski v. City of Elmira*.<sup>263</sup> In *Comereski*, the Elmira Parking Authority was authorized to sell bonds and to construct and operate parking lots in the city.<sup>264</sup> The city was authorized to contract with the Authority to pay any yearly deficits incurred by the Authority up to \$25,000, with revenues to be generated from parking meters on the city's streets.<sup>265</sup> A divided Court of Appeals sustained the arrangement against a gift and loan challenge.<sup>266</sup> The court, relying on *Union Free School District*, ruled that the city had not contracted its credit in aid of a public corporation; instead, it had contracted to make a gift to the corporation of \$25,000 a year.<sup>267</sup> The court majority based its decision on pragmatic necessity: "[t]he problems of a modern city can never be solved unless arrangements like these . . . are upheld . . . ." <sup>268</sup> The court, in language that has been oft-repeated, counseled a less than exacting review of these types of arrangements, opining that "[w]e should not strain ourselves to find illegality in such programs."<sup>269</sup>

Judge Fuld was unconvinced by the majority. Noting that the arrangement required the city to guarantee payment of the authority's bonds to a specified amount for a specified amount of city revenues,<sup>270</sup> he points out the implications of the court's reasoning:

It is quite evident that the contract provided, not for any gift or loan of money or property on hand, but rather for a gift or loan of the city's *credit*, for an obligation and purpose not its own. The city's promise is, in essence, to make good, for an unspecified and indeterminate period and out of funds not in existence, an indebtedness incurred by the Authority. The circumstance that that promise is conditional in nature does not alter the fact that the contract calls upon the city to

---

<sup>263</sup> *Comereski v. City of Elmira*, 125 N.E.2d 241 (N.Y. 1955).

<sup>264</sup> *Id.* at 252.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 247.

<sup>267</sup> *Id.* at 242–43.

<sup>268</sup> *Id.* at 244.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 245–46 (Fuld, J., dissenting).

answer for the default of another. The vice of the arrangement is that it mortgages, for the use of others, future general funds of the city which it would otherwise have available for its own purposes, and opens the door to wholesale evasions of the applicable constitutional debt and taxing limitations. It was just this sort of situation at which the constitutional provision was directed.<sup>271</sup>

None of the four opinions written by the members of the court<sup>272</sup> refer to the provision of article X, section 5 inserted by the 1938 Convention, which provides that no political subdivision of the state “shall at any time be liable for the payment of any obligations issued by such a public corporation heretofore or hereafter created.”<sup>273</sup>

### 3. *Wein I*

Twenty years after *Comereski* was decided, the Court of Appeals issued its next significant decision concerning the interplay between public authorities and the gift and loan clauses. During the 1970s, an unprecedented fiscal crisis left New York City unable to pay its normal operating expenses or to meet its outstanding debt obligations.<sup>274</sup> In response, the legislature enacted several statutes utilizing authorities to provide necessary assistance to the cash-strapped city.

In 1974, the legislature enacted the New York City Stabilization Reserve Corporation Act,<sup>275</sup> which created a public authority known as the Stabilization Reserve Corporation (“SRC”).<sup>276</sup> The SRC was authorized to sell \$520 million of its own bonds and notes, the proceeds of which were to be paid over to the city comptroller for

---

<sup>271</sup> *Id.*

<sup>272</sup> There were four opinions written in *Comereski*: the majority opinion written by Judge Desmond, a concurrence written by Judge Froessel, a dissent written by Judge Fuld and joined by Van Voorhis, and a separate dissenting opinion of Judge Van Voorhis.

<sup>273</sup> N.Y. CONST. art. X, § 5.

<sup>274</sup> For an overview of the financial crisis, see generally STACEY M. KEAN, THE NEW YORK CITY FINANCIAL CRISIS: IMPORTANT CITY, STATE AND FEDERAL CONSIDERATIONS (1976). For recent discussion of these events and Governor Hugh Carey’s role in resolving the crisis, see generally SEYMOUR P. LACHMANN AND ROBERT POLNER, THE MAN WHO SAVED NEW YORK: HUGH CAREY AND THE GREAT FISCAL CRISIS OF 1975 (2010) (discussing Governor Carey and his role in New York’s financial crisis). For an overview of the *Wein* cases, as well as cases challenging other fiscal legislation during that period, see generally Gayle Gutekunst-Roth, Comment, *New York—A City in Crisis: Fiscal Emergency Legislation and the Constitutional Attacks*, 6 FORDHAM URB. L.J. 65, 74–99 (1977) (discussing *Wein* and other cases).

<sup>275</sup> New York City Stabilization Reserve Corporation Act, ch. 574, 1974 N.Y. Laws 1564.

<sup>276</sup> *Id.* at 1565.



2011/2012]

New York's Gift and Loan Clauses

2045

deposit into the city's general fund.<sup>277</sup> The act provided that any bonds or notes issued by the SRC were obligations solely of that entity; specifically, the act stated that:

The notes, bonds or other obligations of the corporation shall not be a debt of either the state or the city, and neither the state nor the city shall be liable thereon, nor shall they be payable out of any funds other than those of the corporation; and such notes and bonds shall contain on the face thereof a statement to such effect.<sup>278</sup>

Principal and interest payments on notes issued by the SRC would be made out of bond proceeds, and principal and interest payments on the bonds would be paid from a capital reserve fund which would be replenished annually for the purposes of paying the debt service on outstanding bonds during that current fiscal year.<sup>279</sup> The city was required to pay to the SRC for deposit in the capital reserve fund the amount necessary to meet the capital reserve fund requirement, provided that the city must have first appropriated funds for such purpose or that funds were otherwise made available to the city.<sup>280</sup> In the event the city failed to make a necessary appropriation, then the State Comptroller would pay to the SRC the amount necessary to meet the capital reserve fund requirement from amounts due to the city from the state.<sup>281</sup>

This financing scheme was challenged on numerous constitutional grounds, including that it required the city to invalidly give or loan its credit in aid of a public or private corporation.<sup>282</sup> In *Wein v. City of New York (Wein I)*,<sup>283</sup> the Court of Appeals, relying on *Comereski*, rejected this challenge.<sup>284</sup> Just as the city in *Comereski* was not pledging its credit, but instead contracting to make a constitutionally permissible gift to a public corporation, the SRC act required the city of New York to make a gift of funds to the SRC; it in no way bound the city to the debt

---

<sup>277</sup> *Wein v. City of New York*, 331 N.E.2d 514, 516 (N.Y. 1975).

<sup>278</sup> New York Stabilization Reserve Corporation Act § 2542.

<sup>279</sup> New York City Stabilization Reserve Corporation Act, ch. 594, §§ 2536–37, 1974 N.Y. Laws 1563, 1568, 1570–71 (1974).

<sup>280</sup> *Id.* § 2537.

<sup>281</sup> *Id.* § 2540.

<sup>282</sup> *Wein v. City of New York*, 366 N.Y.S.2d 885, 888 (App. Div. 1975). The plaintiffs also argued that the funding arrangement violated section two of article VIII of the New York State Constitution by allowing the city to contract indebtedness without pledging its full faith and credit for repayment; and that it violated section five of article X by making the city liable for payment of an obligation of a public corporation. *Id.*

<sup>283</sup> *Wein v. City of New York*, 331 N.E.2d 514 (N.Y. 1975).

<sup>284</sup> *Id.* at 517–18.

obligations of the authority and could not be deemed a loan of the city's credit.<sup>285</sup> As the court noted, "[i]f such payments [from the city to the SRC] are not made and the SRC goes under because it is unable to collect from the other sources named, the city cannot be liable to the bondholders under the provisions of the SRC Act."<sup>286</sup> Moreover, the appropriation of funds by the city for the capital reserve fund and the diversion of funds from the state for that purpose represented at most gifts to a *public* corporation, which are allowed by the local gift and loan clause.<sup>287</sup>

In addition to relying on *Comereski*, the court also appropriated its language:

Where, as here, the statutory scheme stays within the letter of the Constitution (and carefully so, I believe) then we should heed Judge Desmond's statement in *Comereski* that "We should not strain ourselves to find illegality in such programs. The problems of a modern city can never be solved unless arrangements like these, used in other States, too, are upheld, unless they are patently illegal. Surely such devices, no longer novel, are not more suspect now than they were twenty years ago when, in *Robertson v Zimmermann*, we rejected a charge that this was a mere evasion of constitutional debt limitations, etc. Our answer was this, 'Since the city cannot itself meet the requirements of the situation, the only alternative is for the state, in the exercise of its police power, to provide a method of constructing the improvements and of financing their cost.'"<sup>288</sup>

Judge Jasen, joined by two other judges, dissented. He believed that the funding arrangement disavowed the liability of the city while committing the city's sources of revenue from the state to discharge the obligations of the SRC, amounting to an

---

<sup>285</sup> *Id.* Although a dissent at the appellate division noted that the parking authority in *Comereski* had an ostensible purpose, while the SRC was a device designed entirely "to evade, not merely to avoid" the constitutional requirements for debt, *Wein v. City of New York*, 366 N.Y.S.2d at 892 (Kupferman, J., dissenting in part, concurring in part) the court did not find this a reason to depart from the ruling of *Comereski*, holding that such an arrangement, "while it may raise questions concerning the fiscal wisdom of the SRC operation," did not affect the constitutionality of the financing scheme. *Wein I*, 331 N.E.2d at 517-18.

<sup>286</sup> *Wein I*, 331 N.E.2d at 518.

<sup>287</sup> *Id.* at 518-19. The court cited numerous other conduit arrangements where city moneys were paid or diverted to public benefit corporations, such as the City University Construction Fund, the New York City Housing Development Corporation, the Transit Construction Fund, and the Municipal Bond Banking Agency Act. *Id.*

<sup>288</sup> *Id.* at 519 (quoting *Comereski v. City of Elmira*, 125 N.E.2d 241, 244 (N.Y. 1955)).

unconstitutional commitment of the city's credit.<sup>289</sup> For Jasen, the statute merely perpetuated the cycle of fiscal crisis: "[i]ndeed, judicial condonation of constitutional evasion only prolongs the agony of the cities by postponing to the indefinite future a sensible reappraisal, by those charged with the responsibility, of the need and the form of constitutional limits upon local finance."<sup>290</sup> He challenged the independence of the SRC from the city, citing numerous incidents of overlap between the funding and personnel of the municipality and the authority.<sup>291</sup> Jasen noted that the legislation, while ensuring that on its face that neither the city nor state were liable for the bonds issued by the SRC, set up mechanics by which both the city, and, if necessary, the state, would take action to enforce this moral obligation.<sup>292</sup> He believed that the arrangement allowing the SRC to service a part of its debt with city funds formed an indirect guarantee or grant of the city's credit.<sup>293</sup> He thought *Comereski* distinguishable because it did not involve "a mere financing device and conduit for evasion of [the local finance article]."<sup>294</sup> Not impervious to the argument that the limitations of the constitution were inconsistent with the financial realities imposed upon the twentieth-century city, Jasen believed those issues needed to be addressed through constitutional revision, not a more permissive reading of the existing provisions:

Finally, I am aware that constitutional limits upon debt contracting and taxing powers have been questioned as anachronistic and alternatives have been offered. A reappraisal of the need and the form of such limitations may be in order so that government might be freed of its nineteenth century straitjacket and permitted to perform its twentieth century functions. Moreover, the SRC and other techniques for debt ceiling avoidance erode the principle of constitutional supremacy. And the limits, as they now stand, only provide incentive for further fragmentation of governmental function and retard reform of the hodge-podge organizational setup of political subdivisions and governmental finance in the state. Also, I would suggest

---

<sup>289</sup> *Id.* at 520–21 (Jasen, J., dissenting).

<sup>290</sup> *Id.* at 521.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 521–22.

<sup>293</sup> *Id.* Judge Jasen concluded that this arrangement also circumvented the constitutional debt limit for New York City. *Id.* at 522.

<sup>294</sup> *Id.*

that the present-day confusion and multiplicity of devices could have been, and possibly still may be, avoided by a strict constitutional interpretation voiding them and thrusting upon the legislature and the people the obligation to alter the Constitution or to provide current support for the projects and services presently furnished through these various questionable, illegal and costly schemes and devices.<sup>295</sup>

#### 4. *Wein II*

*Wein v. State (Wein II)*,<sup>296</sup> decided the year after *Wein I*, addressed whether a conduit financing arrangement violated the state gift and loan clause.<sup>297</sup> The New York State Financial Emergency Act for the City of New York<sup>298</sup> appropriated \$250 million to the city and \$500 million to the Municipal Assistance Corporation for the City of New York ("MAC"), a public benefit corporation created solely in response to the fiscal crisis.<sup>299</sup> The appropriations were made from the local assistance fund, an account from which appropriations and disbursements of state aid to local governments emanated.<sup>300</sup> The city and MAC issued notes and bonds payable to the state in amounts equivalent to the advances.<sup>301</sup> The act did not provide a source for the required appropriations, so the state sold short-term tax and revenue anticipation notes in order to fund them.<sup>302</sup>

The Court of Appeals rejected the argument that this arrangement was an unconstitutional gift or loan of credit.<sup>303</sup> Because the state constitution allowed the state to give or lend its money to a municipality or public authority for a public purpose, and also to undertake short-term borrowing in advance of anticipated taxes and revenues to fund appropriations previously made, the court found that the scheme did not constitute an extension of the state's "credit."<sup>304</sup> The plan allowed the state to give funds directly to a public corporation, even though the state

---

<sup>295</sup> *Id.*

<sup>296</sup> *Wein v. State (Wein II)*, 347 N.E.2d 586 (N.Y. 1976).

<sup>297</sup> *Id.* at 586–87.

<sup>298</sup> New York State Financial Emergency Act for the City of New York, 1975 N.Y. Laws 1405, as amended by chapter 870. *See* 1975 N.Y. Laws 1444–45.

<sup>299</sup> *Wein II*, 347 N.E.2d at 586–87.

<sup>300</sup> *Id.* at 587.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 588.

<sup>304</sup> *Id.* at 591.

obtained those funds by incurring debt.<sup>305</sup> The court noted that “[t]he line is a narrow one, but one drawn by the Constitution.”<sup>306</sup>

Notwithstanding the constitutional requirement of a balanced budget,<sup>307</sup> the court acknowledged the existence of flexibility to account for the reality that expenditures and revenues will never exactly equal the estimates.<sup>308</sup> The court reasoned that “[t]he Constitution is designed to permit survival, but it is also designed to prevent the repetition of fiscal abuse the evils of which history taught painfully to the people of this State.”<sup>309</sup> The court also concluded that even though there had been no constitutional violation, the state, in its efforts to avoid a violation, “ha[d] been driven to the brink of valid practice.”<sup>310</sup>

In upholding the financing plan implemented by the statute, the court acknowledged the tension between the statutory maxim that a law is invalid when its main purpose “is to evade the Constitution by ‘effecting indirectly that which cannot be done directly,’”<sup>311</sup> and the “exceedingly strong presumption” of constitutionality.<sup>312</sup> The court reiterated its language from several prior decisions: “[w]e should not strain ourselves to find illegality in such statutory financing programs.”<sup>313</sup>

As in *Wein I*, Judge Jasen wrote a scathing dissent<sup>314</sup> describing

---

<sup>305</sup> *See id.*

<sup>306</sup> *Id.* at 587.

<sup>307</sup> *See* N.Y. CONST. art. VII, § 2 (executive budget).

<sup>308</sup> *Wein II*, 347 N.E.2d at 588.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 590 (citing *People ex rel. Burby v. Howland*, 49 N.E. 775, 778 (N.Y. 1898)).

<sup>312</sup> *Wein II*, 347 N.E.2d at 590 (citing *Montgomery v. Daniels*, 340 N.E.2d 444, 451 (N.Y. 1975); *People v. Broadie*, 332 N.E.2d 338, 246 (N.Y. 1975)).

<sup>313</sup> *Wein II*, 347 N.E.2d at 588 (quoting *Comereski v. City of Elmira*, 125 N.E.2d 241, 244 (N.Y. 1955)); *see also* *Wein v. City of New York*, 331 N.E.2d 514, 519 (N.Y. 1975) (quoting *Comereski* for the same proposition). The court also rejected the argument that the use of the revenue anticipation notes to fund the emergency appropriations violated article VII, section 9, which requires that short-term debt be contracted “in anticipation of the receipt of taxes and revenues.” *Wein II*, 347 N.E.2d at 591 (quoting N.Y. CONST. art. VII, § 9). The court held that the proceeds of constitutionally valid short-term borrowing once raised are cash in hand, and the notes used to finance the appropriations provided by the act were functionally equivalent to the commitment of incoming taxes and revenues. *Id.* As long as the short-term borrowing is “authentically in anticipation of actually committed taxes or other revenues,” it is permissible. *Id.* Because the revenue anticipation notes could not be identified as part of a constitutionally impermissible “rollover,” but new financing to meet an emergency appropriation, they were validly issued. *Id.* at 593. The court was careful to note that the plan would be unconstitutional if it became the starting point for temporary refinancing in the form of a rollover. *Id.* at 594.

<sup>314</sup> The other two judges who joined Judge Jasen’s dissent in *Wein I*, Chief Judge Breitel and Judge Jones, agreed with the majority in finding the funding arrangement of *Wein II* permissible. Presumably, *stare decisis* and the need for some judicial predictability were the

the transactions contemplated by the act as “an ill-disguised effort to evade the limitations imposed by the people of this State, in their Constitution, on the power of State government to arrange its finances.”<sup>315</sup> He referred to the point during the 1938 Constitutional Convention debates when delegates made it clear that if the prohibition on the extension of state credit had not been applied to public corporations, cities in difficulty or authorities unable to sell securities could rush to the state for assistance, thus dissipating the state’s credit, which should be reserved solely for use by the state.<sup>316</sup> Although Judge Jasen conceded that the constitution did not prohibit direct loans or gifts to a municipality, in this case “the State had no money to give.”<sup>317</sup> He viewed the plan as “merely laundering city and MAC notes and bonds, taking such notes and bonds in with its left hand, and selling its notes with its right.”<sup>318</sup> Because the Financial Emergency Act relied upon the state’s credit to funnel funds to the city when the city lacked the ability to borrow such funds on its own, Jasen believed that it violated the prohibition on the loan of state credit.<sup>319</sup>

Judge Jasen asserted that the constitutional provision at issue was designed to ensure that “legislative and executive leadership would not take the easy way out,”<sup>320</sup> and warned that “the holding of our court today does nothing that will discourage or deter the legislature from developing and using ingenious methods to evade the constitutional limitations, secure in knowledge that our court will not strike them down.”<sup>321</sup>

### 5. *Schulz*

In *Schulz v. State*,<sup>322</sup> taxpayers attacked the validity of a four-year, \$20 billion program designed to aid various modes of transportation.<sup>323</sup> The operative statute authorized both the

---

basis for their change in position. In an interesting bit of irony, Chief Judge Breitel wrote the majority opinion in *Wein II*.

<sup>315</sup> *Wein II*, 347 N.E.2d at 594 (Jasen, J., dissenting).

<sup>316</sup> *Id.* at 595.

<sup>317</sup> *Id.* at 596.

<sup>318</sup> *Id.*

<sup>319</sup> Disagreeing with the majority’s reliance upon article VII, section 9, Judge Jasen believed that provision, allowing for the issuance of short-term notes in anticipation of taxes and revenues, did not supersede the strict prohibition of the gift and loan clause. *Id.* at 597.

<sup>320</sup> *Id.* at 599.

<sup>321</sup> *Id.*

<sup>322</sup> *Schulz v. State*, 639 N.E.2d 1140 (N.Y. 1994).

<sup>323</sup> *Id.* at 1142.

Thruway Authority and the Metropolitan Transportation Authority to issue state-supported debt.<sup>324</sup> The proceeds of the bonds issued by these authorities were to be used to fund improvements to state highways and bridges, as well as for mass transit.<sup>325</sup> Similar to the enabling legislation examined in the *Wein* cases, the statute in *Schulz* provided that the debt issued by the authorities was not debt of the state; the debt was to be considered a special obligation of each authority secured solely by appropriations from the state, and, in the case of the Thruway Authority bonds, payments would only be made by the authority if the legislature appropriated funds for those purposes.<sup>326</sup>

The plaintiffs in *Schulz* alleged that the legislation: 1) incurred indebtedness without a voter referendum in violation of article VII, section 11 of the state constitution; 2) loaned the state's credit to the authorities in violation of article VII, section 8; and 3) assumed the debt obligation of a public corporation in violation of article X, section 5.<sup>327</sup>

For reasons similar to those given in the *Wein* cases, the Court of Appeals held that the debt was not full faith and credit debt and therefore, not governed by the referendum requirement.<sup>328</sup> However, the court was never required to address the merits of the second and third allegations mentioned above, because *Schulz* lacked standing to pursue these claims.<sup>329</sup> A 1975 amendment to the State Finance Law, enacted in response to an earlier court decision, removed taxpayer standing to challenge a bond authorization on grounds other than the referendum requirement.<sup>330</sup> The effective removal of the right of a citizen

---

<sup>324</sup> Act of Apr. 15, 1993, ch. 56, 1993 N.Y. Laws 2130.

<sup>325</sup> *Schulz*, 639 N.E.2d at 1442–43. The act provided that the state could assume the obligations of the Thruway Authority or substitute state security for the obligations of the authority only upon a constitutional amendment.

<sup>326</sup> *Id.* at 1143.

<sup>327</sup> *Id.* at 1144.

<sup>328</sup> *Id.* at 1148.

<sup>329</sup> *Id.* at 1144 (holding that no standing existed to challenge a bond issuance other than on the basis that debt was improperly incurred without a referendum; all other claims raised by the taxpayer were barred for lack of standing).

<sup>330</sup> Prior to 1976, the Court of Appeals had imposed a strict standing requirement to challenge the constitutionality of a state statute. See *St. Clair v. Yonkers Raceway, Inc.*, 192 N.E.2d 15, 15–16 (N.Y. 1963). A challenge could only be made by one “personally aggrieved thereby, and then only if the determination of the grievance require[d] a determination of constitutionality.” *Id.* at 16. This narrow definition precluded challenges from unaggrieved, citizen taxpayers. See *id.* at 15–16. In *Boryszewski v. Brydges*, the court liberalized taxpayer standing, holding “that a taxpayer has standing to challenge enactments of our State legislature as contrary to the mandates of our State Constitution.” *Boryszewski v. Brydges*,

taxpayer to challenge a state bond issuance as violating the state gift and loan clause diminishes the effectiveness of the provision by closing the courthouse door on those who would be most likely to bring such a challenge. However, given the court's precedents in this area, it is unlikely the *Schulz* court would have invalidated the financing arrangement on gift and loan grounds.

---

334 N.E.2d 579, 580 (N.Y. 1975). The court rationalized its turnaround:

We are satisfied that the time has now come when the judicially formulated restriction on standing (which we recognize has had a venerable existence) should be modified to bring our State's practice with respect to review of State legislative action into conformity not only with the practice in the majority of other States but also with the procedural standing of taxpayers to challenge local actions. We are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action. In the present instance it must be considered unlikely that the officials of State government who would otherwise be the only ones having standing to seek review would vigorously attack legislation under which each is or may be a personal beneficiary.

*Id.* at 581 (citing N.Y. GEN. MUN. LAW § 51 (McKinney 2012)).

In response, the legislature amended the State Finance Law to provide:

Notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property, *except that the provisions of this subdivision shall not apply to the authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation.*

N.Y. STATE FIN. LAW § 123-b(1) (McKinney 2011) (emphasis added).

Because no common law standing existed to challenge the issuance of state bonds or bond anticipation notes, citizens have no standing to challenge a statutory bond authorization other than on the basis of the public referendum requirement. *See Schulz*, 615 N.E.2d at 955–56. The court, in *Wein v. Comptroller of New York*, acknowledged the state's rationale behind limiting voter standing to challenge bond issuances, and even seemed to suggest a further limitation:

We recognize that challenges of this nature as opposed to those involving expenditures of State funds are often likely to increase the cost of raising the revenue by creating uncertainty in the minds of potential investors. Apparently this concern prompted the legislature to deny standing to taxpayers in cases involving the sale of State bonds and bond anticipation notes. This hazard, however, is also present in cases involving tax and revenue anticipation notes and it is not clear why the legislature did not express similar concern with the taxpayer challenges in these cases as well. In this and other respects the statute often creates ambiguities and incongruities which obscure the over-all legislative policy. This is not only a matter of concern for the courts but a question which the legislature may wish to consider.

*Wein v. Comptroller of New York (Wein III)*, 386 N.E.2d 242, 245 (N.Y. 1979) (citations omitted).



## 6. *Bordeleau*

The case of *Bordeleau v. State*<sup>331</sup> is the latest pronouncement by the Court of Appeals on the applicability of the gift and loan clauses to public authorities. In *Bordeleau*, the plaintiffs challenged appropriations in the 2008–2009 budget made to the New York State Urban Development Corporation (“UDC”), a public benefit corporation, which were then used to fund payments to private entities (including corporations such as IBM and American Axle) for public development purposes.<sup>332</sup> The supreme court dismissed the complaint, holding that no violation of the state gift and loan clause had been shown.<sup>333</sup> The appellate division unanimously reversed.<sup>334</sup>

The Court of Appeals reversed the appellate division and upheld the appropriations. Relying on *Wein*, the Court described the plaintiffs’ burden as “‘exceedingly strong’ because they challenge[d] public expenditures designed in the public interest.”<sup>335</sup> The court held that in such cases, unconstitutionality must be established beyond a reasonable doubt and that public funding programs will be upheld unless they are “patently illegal.”<sup>336</sup>

The court noted that although the gift and loan prohibitions prevented gifts or loans of *credit* to a public corporation such as the UDC, it did not prevent the state from making appropriations of *money* to such an entity.<sup>337</sup> The difference between a gift or loan of money and a gift or loan of credit is that a one-time gift of state money does not result in long-term liabilities to future generations or risks of enduring financial detriment.<sup>338</sup> Recognition of this difference, the court believed, was evident in the actions of the 1938 Constitutional Convention, which extended the prohibition against gifts or loans of state credit to public corporations while not enacting a companion restriction upon gifts or loans of state

---

<sup>331</sup> *Bordeleau v. State (Bordeleau III)*, 960 N.E.2d 917 (N.Y. 2011).

<sup>332</sup> *Id.* at 918. Additional appropriations made directly to the Department of Agriculture were challenged and upheld for reasons addressed in the public purpose section below.

<sup>333</sup> *Bordeleau v. State (Bordeleau I)*, No. 6582-08, 2009 WL 1470451, at \*3 (N.Y. Sup. Ct. Feb. 27, 2009), *aff’d*, 905 N.Y.S.2d 307 (App. Div. 2010), *rev’d*, 960 N.E.2d 917 (N.Y. 2011).

<sup>334</sup> *Bordeleau v. State (Bordeleau II)*, 905 N.Y.S.2d 307, 313 (App. Div. 2010), *rev’d*, 960 N.E.2d 917 (N.Y. 2011).

<sup>335</sup> *Bordeleau III*, 960 N.E.2d at 919 (quoting *Wein v. State*, 347 N.E.2d 586, 590 (N.Y. 1976)).

<sup>336</sup> *Bordeleau III*, 960 N.E.2d at 919–20 (quoting *Schulz v. State*, 639 N.E.2d 1140, 1144 (N.Y. 1994)).

<sup>337</sup> *Bordeleau III*, 960 N.E.2d at 920.

<sup>338</sup> *See id.* at 920–21.

money.<sup>339</sup>

The court reiterated its prior doctrine that authorities are “independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary state board, department or commission.”<sup>340</sup> The failure of the 1938 Convention to prohibit gifts and loans of money to public corporations further demonstrated, in the court’s opinion, approval of the position that these corporations are entities able to function independently of the state.<sup>341</sup> The court concluded that their distinct status allowed money to be passed to authorities without the possibility of violating the gift and loan clauses: once passed, “such money is no longer in the control of the State.”<sup>342</sup>

Judge Pigott—in a dissent in which Judge Smith joined—noted that “[u]nconstitutional acts do not become constitutional by virtue of repetition, custom or passage of time.”<sup>343</sup> The dissent concluded that the state gift and loan clause and its companion case law prohibited making appropriations for the “public purpose of promoting economic development.”<sup>344</sup> Using language from both the majority opinion and Judge Cardozo’s dissent in *Westchester County*,<sup>345</sup> Judge Pigott’s dissent concluded that the appropriations through UDC were invalid.<sup>346</sup> Judge Pigott further noted the attempt of the 1967 convention to allow public subsidization of economic development as further evidence that such distributions are prohibited—or else, such an amendment would not have been needed.<sup>347</sup>

Judge Pigott stated that the use of public authorities to channel funds to private companies evaded the constitution by doing

---

<sup>339</sup> See *id.* at 921.

<sup>340</sup> *Id.* at 921–22 (quoting Plumbing, Heating, Piping & Air Conditioning Contractors Ass’n v. N.Y. State Thruway Auth., 158 N.E.2d 238, 239 (N.Y. 1959)).

<sup>341</sup> *Bordeleau III*, 960 N.E.2d at 922.

<sup>342</sup> *Id.* (citing N.Y. Pub. Interest Research Grp. v. N.Y. State Thruway Auth., 565 N.E.2d 1259, 1262 (N.Y. 1990)).

<sup>343</sup> *Bordeleau III*, 960 N.E.2d at 924 (Piggott, J., dissenting).

<sup>344</sup> *Id.*

<sup>345</sup> Judge Pigott relied upon the majority’s statements in *Westchester County* that gifts made in violation of the gift and loan clauses are invalid regardless of whether they are made in furtherance of a public purpose. *Id.* He also quoted from Judge Cardozo’s dissent stating, “that the true purpose of the clause was not to prohibit the legislature from pledging the credit of the State ‘in recognition of an honorable obligation’ but rather ‘was to put an end to the use of the credit of the state in fostering the growth of private enterprise and business.’” *Id.* at 925 (quoting *People v. Westchester Cnty. Nat’l Bank*, 132 N.E. 241, 248 (N.Y. 1921) (Cardozo, J., dissenting)).

<sup>346</sup> *Bordeleau III*, 960 N.E.2d at 926.

<sup>347</sup> *Id.* at 925–26.

indirectly what could not be done directly.<sup>348</sup> He wrote, “[t]here seems to me no fundamental difference between the State directly giving monies to such private enterprises and the State creating a public corporation with the express intention of doing so.”<sup>349</sup> He also distinguished *Schulz* and *Wein*, reasoning that “[n]either one of those cases sanctions the granting of state money through an intermediary for distribution to a private concern.”<sup>350</sup>

Prior to *Bordeleau*, all of the Court of Appeals’ decisions involving the application of the gift and loan clauses to public authorities involved gifts and loans of credit, rather than money. Various financing arrangements involving public authorities were held not to represent gifts or loans of state or municipal credit.<sup>351</sup> Arrangements such as those in which a municipality was obligated to pay an authority’s debt,<sup>352</sup> or in which an authority incurred debt in order to provide necessary operating funds to a municipality<sup>353</sup> were held not to be loans of “credit,” as in neither case was the municipality held to be liable for the debt of the authority.<sup>354</sup> The court also held that the state could permissibly incur debt in order to make appropriations to a public authority<sup>355</sup> and the debt issued by a public authority was not debt of the state,<sup>356</sup> because the state

---

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 926.

<sup>350</sup> *Id.* at 926 n.3. Judge Smith, in a separate dissent, harshly criticized the illusion “that prosperity can be attained by taking money from taxpayers and handing it to favored businesses,” and took the legislature to task for its devotion to this practice. *Id.* at 926 (Smith, J., dissenting). After giving examples of specific appropriations that he found impractical or wasteful, Judge Smith echoed Judge Pigott’s comments about the role of the gift and loan clauses:

I have defended before, and will no doubt defend again, the right of elected legislators to commit folly if they choose. But when our legislature commits the precise folly that a provision of our Constitution was written to prevent, and this Court responds by judicially repealing the constitutional provision, I think I am entitled to be annoyed.

*Id.* at 927.

<sup>351</sup> See *Wein v. City of New York*, 331 N.E.2d 514, 519 (N.Y. 1975) (holding that incurring debt for necessary municipal operations did not represent a loan); *Comereski v. City of Elmira*, 125 N.E.2d 241, 244 (N.Y. 1955) (holding that a municipality’s obligation to pay an authority’s debt is not a gift or loan).

<sup>352</sup> *Comereski*, 125 N.E.2d at 244.

<sup>353</sup> *Wein I*, 331 N.E.2d at 519.

<sup>354</sup> *Id.*; *Comereski*, 125 N.E.2d at 244.

<sup>355</sup> *Wein v. City of New York*, 347 N.E.2d 586, 594 (N.Y. 1976).

<sup>356</sup> The debt issued in these cases is known as “moral obligation financing.” William J. Quirk & Leon E. Wein, *Rockefeller’s Constitutional Sleight of Hand*, 1, 11 EMPIRE ST. REP. 429, 430 (1975). This term originated in the 1960s and is used to describe appropriation-risk bonds that are not legally binding on the legislature beyond a session but create a “moral obligation” to appropriate money in the event of a default by the public authority. *Id.*; Humphrey S. Tyler, *The Steady Growth of Backdoor Financing*, 1, 6 EMPIRE ST. REP. 211, 213 (1975). Bondholders, although not having any legal rights against the state, still have a

was not legally obligated in the event that the authority defaulted.<sup>357</sup> None of these financing arrangements was held by the court to be an impermissible gift or loan of credit.

Unlike these prior decisions, *Bordeleau* involved gifts of money, rather than credit. *Bordeleau* did more, however, than just apply existing precedent to monetary gifts and loans. The previous decisions involved public authorities that provided financing for other public entities for a state or public purpose; in *Bordeleau*, the public authority provided funds to a private association.<sup>358</sup> *Bordeleau* suggests that so long as an appropriation to a public authority has a public purpose,<sup>359</sup> it is unreviewable, whether or not the funds are destined for receipt by a private corporation.<sup>360</sup> Since public authorities are created by special law, rather than constitutional amendment, gifts and loans of money may be made to private companies through ordinary legislation simply by channeling funds through existing or newly created public authorities. Although direct gifts from the state or local treasuries to private corporations may still be prohibited by the gift and loan clauses, the ease with which these prohibitions may be circumvented through the use of public authorities has made aiding private enterprises no more difficult than it was before the clause was adopted.

---

moral assurance that the state will make the appropriations. *Id.*

<sup>357</sup> *Wein II*, 347 N.E.2d at 594; *Schulz v. State*, 639 N.E.2d 1140, 1148 (N.Y. 1994). Commentators have criticized this notion, arguing that neither a state nor a municipality would ever let a public authority default on its obligations, as it would negatively affect the applicable government's ability to obtain credit. *Bond, supra* note 244, at 72. In fact, when the Urban Development Corporation defaulted on its obligations to pay \$135 million in notes in February 1975, Governor Hugh Carey and UDC Chairman Richard Ravitch were able to convince the legislature to provide a series of appropriations for a State Project Finance Agency, which allowed the authority to stave off default. JOSEPH F. ZIMMERMAN, *THE GOVERNMENT AND POLITICS OF NEW YORK STATE* 179–80 (2d ed. 2008).

The financial problems of the UDC resonated throughout the bond market and other agencies—both within and outside of New York State—were required to pay significantly higher interest rates than would have been required absent UDC's default. ADAM SIMMS, HUGH L. CAREY CTR. FOR GOV'T. REFORM, *NEW YORK'S "SECRET GOVERNMENT": PUBLIC AUTHORITIES ARE OUT OF CONTROL AND THREATENING THE STATE'S FISCAL HEALTH* 19–20 (2008).

<sup>358</sup> *Bordeleau v. State*, 960 N.E.2d 917, 923 (N.Y. 2011).

<sup>359</sup> Given the court's deference to the legislature concerning what constitutes such a public purpose, as described *infra* text accompanying notes 457–61, the likelihood of success in challenging any future appropriations made through a public authority is remote.

<sup>360</sup> *Bordeleau III*, 960 N.E.2d at 921–23.

*D. The Evolving Notion of Public Purpose in Gift and Loan Jurisprudence*

Another way in which the gift and loan prohibitions of the state constitution have been blunted has been through the expansion of “public purpose” to uphold governmental expenditures that may otherwise be deemed gifts or loans. It has long been the law in New York that contracts between governments and private entities that serve a public purpose are permitted even if a private benefit exists.<sup>361</sup> Recent cases and opinions of the Attorney General have shown significant deference to the applicable legislative body as to both what constitutes a public purpose and whether that public purpose outweighs the private benefit. In some Attorney General’s opinions, expenditures in the absence of a contract or legal obligation have been upheld solely on the basis that they served a public purpose;<sup>362</sup> the language of *Bordeleau* can be read as endorsing this approach.

The concept of public purpose as a sword to permit government action is far removed from the initial notion of public purpose as a shield to prevent the use of public funds for private purposes. Starting in the nineteenth century, courts began to impose a “public purpose” requirement as a check upon legislative authority in the areas of taxation, eminent domain, and spending.<sup>363</sup> The public purpose doctrine provides that the government may impose a tax, take private property, or spend public money only for a public purpose; it may not do so for purely private purposes.<sup>364</sup> New York had recognized the concept of public purpose in takings law as early as 1816.<sup>365</sup> Even though courts in other states were beginning to impose a public purpose requirement upon the taxation power as

---

<sup>361</sup> See *People v. Morris*, 13 Wend. 325, 325 (N.Y. 1835) (making this argument in 1835).

<sup>362</sup> See opinions cited *infra* note 416.

<sup>363</sup> See *Taylor v. Porter & Ford*, 4 Hill 140, 143–48 (N.Y. 1843) (applying the public purpose requirement to disallow the use of eminent domain to seize property to build a private road).

<sup>364</sup> The notion that legislative power is bound to acting for public purpose is found in the writings of numerous political philosophers. See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 70–71 (C.B. Macpherson ed., Hackett Publishing Company 1980) (1690).

<sup>365</sup> *Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162, 166–67 (N.Y. 1816). In *Newburgh*, Chancellor Kent cited Grotius, Puffendorf, Bynkershoek, and Blackstone for the proposition that private property may be taken only for a public purpose; see also *Morris*, 13 Wend. at 328 (“It is now considered an universal and fundamental proposition, in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private purposes at all, nor for public without a just compensation . . .”).

early as 1853,<sup>366</sup> the New York courts were not as quick to impose such a requirement.

### 1. *Weismer*

*Weismer v. Village of Douglas*<sup>367</sup> brought the state in line with the concept of public purpose that had been enunciated by other state courts and the U.S. Supreme Court.<sup>368</sup> In *Weismer*, the Village of Douglas had been authorized by statute to subscribe for and take capital stock of a manufacturing company, to issue municipal bonds to raise money to pay for the stock, and to use its taxation powers to collect moneys to pay the bonds.<sup>369</sup>

The court invalidated the bonds issued pursuant to the law, holding that the corporation being financed was “a private business, to be carried on for private profit, to be controlled by private rules, or even private caprice.”<sup>370</sup> *Weismer* also provides perspective on the protean nature of public purpose. Rejecting the argument that a public purpose was present since the lumber mill would create job opportunities and increase the village’s taxable base, the court noted that “[a]ny such enterprise tends indirectly to the benefit of every citizen . . . . [T]hese are not the direct and immediate public uses and purpose to which money taken by tax may be directed.”<sup>371</sup>

One commentator has characterized the *Weismer* court’s definition of public purpose as follows:

(1) it must produce a “benefit or convenience to the public”;

---

<sup>366</sup> In *Sharpless v. Mayor of Philadelphia*, the Pennsylvania Supreme Court denied an injunction to prohibit the spending of public funds to purchase railroad stock subscriptions, which would consequently aid the development of the railroad in Philadelphia. 21 Pa. 147, 158–59 (1853). The court used firm language to describe the requirement of public purpose:

Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder.

*Id.* at 168–69.

<sup>367</sup> See *Weismer v. Vill. of Douglas*, 64 N.Y. 91, 106 (1876) (invalidating an act authorizing a village to issue bonds for the purchase of stock in a lumber company).

<sup>368</sup> See *Loan Ass’n v. Topeka*, 87 U.S. 655, 665–67 (1874) (invalidating bonds issued by a municipality to benefit a private company; holding that public funds could only be spent for a ‘public purpose’ and that helping to establish a private ironworks factory is not a public purpose, and that public indebtedness could only be contracted for purposes for which taxes can be levied).

<sup>369</sup> See *Weismer*, 64 N.Y. at 97.

<sup>370</sup> *Id.* at 101.

<sup>371</sup> *Id.* at 103.

- (2) the public may be the “whole commonwealth or of a circumscribed community”;
- (3) if a circumscribed community, “the benefit or convenience must be direct and immediate, not collateral, remote or consequential”; and
- (4) the benefit must be non-exclusive; that is, available to all, and one person’s use of the good does not diminish or impair another’s use of the same good.<sup>372</sup>

Even a cursory reading of more recent decisions of the Court of Appeals and opinions of state Attorneys General and Comptrollers over the past half century reveals the distance between current understandings of public purpose as applied to taxing and spending and the one undergirding *Weismer*.<sup>373</sup>

## 2. *Sun Printing*

Only twenty years after *Weismer* was decided, the Court of Appeals began to retreat from its strict standards for public purpose.<sup>374</sup> In *Sun Printing & Publishing Ass’n v. City of New York*,<sup>375</sup> the court sustained the constitutionality of a series of acts which allowed a newly created rapid transit commission to issue

<sup>372</sup> Michael A. Vaccari, *Public Purpose and the Public Funding of Sectarian Educational Institutions: A More Rational Approach After Rosenberger and Agostini*, 82 MARQ. L. REV. 1, 15 (1998) (quoting *Weismer*, 64 N.Y. at 100) (citing RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 70–81 (4th ed. 1984)).

<sup>373</sup> See *infra* text accompanying notes 412–21.

<sup>374</sup> One commentator described New York’s jurisprudence in the area of public purpose as “a judicial approach that is extremely reluctant to overturn a legislative determination in this area.” Vaccari, *supra* note 372, at 22. In the 1967 report of the Temporary State Commission on the Constitutional Convention, the commission noted that no state or federal court during the twentieth century until then had held an appropriation of state funds unconstitutional for lack of a public purpose. See STATE FINANCE, *supra* note 96, at 107. There have, however, been cases in which courts have voided municipal expenses as being for a private, not public, purpose. See, e.g., *Smith v. Smythe*, 197 N.Y. 457, 462–63 (1910) (invalidating expenditure of a village for the care and maintenance of a private right of way within a residential subdivision in which one-third of the village’s population resided and more than forty percent of the total assessed value of real property within the village lay as not having a village purpose). The court differentiated between “public interest” and “public purpose”:

Undoubtedly the well being and prosperity of every individual member of the community is of interest to the whole community, for the community is but the aggregation of its individual members. But the political corporation that represents the community, such as a city or village, represents only the corporate and governmental aspect of the community. . . . There is . . . a clear distinction between what may be [called] “public interests” in the broadest sense of that term and the corporate interest of the municipality, and it is a corporate or governmental purpose alone . . . which is a city or village purpose within the meaning of the Constitution.

*Id.* at 463.

<sup>375</sup> *Sun Printing & Publ’g Ass’n v. Mayor of New York*, 152 N.Y. 257 (1897).

city bonds to finance construction of a railway through New York City, and to enter into a contract for the lease of the road for a specified period, with an unlimited amount of renewals.<sup>376</sup> After giving a brief history of the gift and loan clause as applied to municipal governments, the court differentiated between the construction of railroads upon local bonds in exchange for stock issued by the corporations and the construction and ownership of the railroads by the municipalities themselves.<sup>377</sup> Because the road being constructed remained the property of the city, there was no loan of the city's credit to or in aid of any individual or corporation.<sup>378</sup>

Since the New York Constitution provides that city money can only be spent for a city purpose,<sup>379</sup> the court had to determine whether the development of the railroad served such a purpose.<sup>380</sup> In reaching its determination, the court announced its understanding of what constitutes a city purpose: “[g]enerally, we think, the purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character, and authorized by the legislature.”<sup>381</sup> The court provided a factual record concerning the need for the subway, which included statistics about the population of the city, the increase in railroad congestion during the previous twenty years, and the geographic layout of the city,<sup>382</sup> despite the fact that the parties at argument conceded the need for the subway.<sup>383</sup>

The criteria for public purpose laid down in *Sun Printing* is far removed from that of *Weisner*: the *Sun Printing* court imposed no requirement that any benefit or convenience achieved by the undertaking be “direct and immediate” or non-exclusive.<sup>384</sup> Moreover, the terms used in the later case are more imprecise than those used in *Weisner*, and invite additional deference to the wishes of the legislative body.<sup>385</sup> *Sun Printing* represented the first of

---

<sup>376</sup> The statutes provided that the road would be the absolute property of the city, and “be deemed to be a part of the public streets and highways of the city.” *Id.* at 263.

<sup>377</sup> *Sun Printing & Publ’g Ass’n v. Mayor of New York*, 46 N.E. 499, 500 (N.Y. 1897).

<sup>378</sup> *Id.* at 502.

<sup>379</sup> N.Y. CONST. of 1894, art. VIII, § 11 (codified at N.Y. CONST. art. VIII, § 1).

<sup>380</sup> *Sun Printing*, 46 N.E. at 500.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 503.

<sup>383</sup> *Id.* This is in marked contrast to the lack of any factual findings or other quantitative data supporting the expenditures in *Bordeleau*.

<sup>384</sup> *Id.* at 500.

<sup>385</sup> Compare *Sun Printing*, 46 N.E. at 264–265 (“Generally, we think, the purpose must be necessary for the common good and general welfare of the people of the municipality,



2011/2012]

New York's Gift and Loan Clauses

2061

many cases in which the Court of Appeals sustained a public-private agreement that served a public purpose against a gift or loan challenge, and the deference given to legislative interpretations of public purpose in connection with transactions that may otherwise be deemed gifts or loans evidenced in *Sun Printing* continues through *Bordeleau*.

In dissent, Judge O'Brien argued that the judgment of the majority "open[ed] the door for a revival of all the abuses that grew out of the exercise by municipalities of the power to issue bonds and to use their credit and funds for the construction of railroads."<sup>386</sup> Contending that the constitutional amendment intended to curb the power of the legislature to authorize towns and cities to issue bonds and to contract debts in aid of railroads, "under the pressure of some real or supposed necessity,"<sup>387</sup> the dissent noted that the language inserted was "broad and comprehensive, and should be construed by the courts in the spirit in which it was framed, and with reference to the public policy in view."<sup>388</sup> Arguing that nothing in the opinion prohibited the legislature from allowing either leases in perpetuity or leases for a nominal rental, the dissent used ominous language to describe the anticipated abuse of this power:

If this be the true interpretation of the constitution, then practically nothing has been accomplished by the restrictions upon the power of cities and towns to issue bonds, or use their credit, in aid of the construction of railroads. The decision in this case suggests a method by which they may do it still. I cannot believe that the limitations of the constitution were intended to have only such a narrow and feeble operation. It is broad enough in its letter and spirit to condemn the legislation now under consideration. . . . It seems to me that the decision practically nullifies the constitutional restrictions, and defeats the purpose that was

---

sanctioned by its citizens, public in character, and authorized by the legislature."), *with Weismer v. City of Douglas*, 64 N.Y. 91, 100 (1876) ("The benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right, and take unto his own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof.").

Even if the court had applied the criteria announced in *Weismer*, the expense incurred to construct the publicly available subway would still likely have been valid.

<sup>386</sup> *Sun Printing*, 46 N.E. at 503 (O'Brien, J., dissenting).

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

plainly in view in their enactment by the people.<sup>389</sup>

Similar words will be repeated throughout the history of New York's gift and loan clause jurisprudence.

### 3. *Westchester County National Bank*

In *Westchester County*, described in greater detail above,<sup>390</sup> the Court of Appeals directly addressed the question of whether public purpose created sufficient grounds to avoid the prohibitions of the gift and loan clauses.<sup>391</sup> Even though *Westchester County* invalidated an act authorizing the state to issue bonds to pay a bonus to World War I veterans, the law did not fail for want of a public purpose.<sup>392</sup> Relying on language supplied by the U.S. Supreme Court in *Citizens' Savings & Loan Ass'n v. City of Topeka*,<sup>393</sup> the court stated that courts making a determination of whether the objects of taxation serve a public purpose:

must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to a public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.<sup>394</sup>

The court acknowledged that the act served a public purpose, but rejected the notion that a public purpose standing alone would allow the gift and loan clauses to be avoided:

Whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the state's credit. Such a purpose may not be served in one particular way. However important, however useful, the objects designed by the legislature, they may not be accomplished by a gift or a loan

---

<sup>389</sup> *Id.* at 504.

<sup>390</sup> The facts of this case are described in more detail in the moral obligation section. See *supra* text accompanying notes 218–24.

<sup>391</sup> *People v. Westchester Cnty. Nat'l Bank of Peekskill*, 132 N.E. 241, 242 (N.Y. 1921).

<sup>392</sup> *Id.*

<sup>393</sup> *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 87 U.S. 655 (1874).

<sup>394</sup> *Westchester Cnty. Nat'l Bank of Peekskill*, 132 N.E. at 242 (quoting *Citizens' Sav. & Loan Ass'n*, 87 U.S. at 665).

of credit to an individual or to a corporation. It will not do to say that the character of the act is to be judged by its main object; that, because the purpose is public, the means adopted cannot be called a gift or a loan. To do so would be to make meaningless the provision adopted by the convention of 1846. Gifts of credit to railroads served an important public purpose. That purpose was distinctly before the legislatures that made them. Yet they were still gifts and so were prohibited.<sup>395</sup>

The court also counseled that in evaluating the legality of a transaction, substance should prevail over form: "If the gift of the bonds of the state to a railroad corporation would be such a gift, and it undoubtedly would be, then so would be an issue of bonds by the state with the express condition that their proceeds should be given to the same corporation."<sup>396</sup> Because the bonds in the case were being issued to provide a gift to individuals, this was an impermissible gift of the state's credit.<sup>397</sup>

*Westchester County* has been cited both as precedent for imposing limitations upon the state's ability to spend its moneys even for a public purpose,<sup>398</sup> and, by virtue of its recognition of moral obligation claims, as precedent for a relaxed view of the gift and loan clauses.<sup>399</sup> Whatever the subsequent readings, the case was an explicit rejection of the view that an appropriation for a public purpose is, by definition, not a gift.

#### 4. *Murphy*

Fifty years after *Westchester County* was decided (during which time two constitutional conventions had been held), the Court of Appeals handed down the next significant case involving the

---

<sup>395</sup> *Westchester Cnty. Nat'l Bank of Peekskill*, 132 N.E. at 244.

<sup>396</sup> *Id.* at 245.

<sup>397</sup> *Id.* at 244. At the time of the *Westchester Cnty. Nat'l Bank of Peekskill* decision, as now, individuals were excepted from the prohibition against gifts or loans of state money. N.Y. CONST. of 1894, art. VIII, § 9 (codified at N.Y. CONST. art VII). Consequently, the court could invalidate the arrangement only if the act constituted an improper gift or loan of state credit. *Westchester Cnty. Nat'l Bank of Peekskill*, 132 N.E. at 245. The case did not hold that the bonuses would have been improper gifts of money; rather, the case held that by incurring debt to pay the bonuses, the state was actually making a gift of its credit. *Id.* at 247.

<sup>398</sup> STATE FINANCE, *supra* note 96, at 106 ("New York courts . . . hold that the applicable restrictions [of the gift and loan prohibitions] prohibit expenditures for public purposes unless they fall within one of the specific constitutional exceptions.").

<sup>399</sup> Op. N.Y. Att'y Gen. 1980-89 (describing *Westchester Cnty. v. Nat'l Bank of Peekskill* as spelling out "the essence of the softening" of the rigid limitations of the state gift and loan clause).

interplay between the public purpose doctrine and the gift and loan clauses. In *Murphy v. Erie County*,<sup>400</sup> taxpayers challenged an agreement between Erie County and a private corporation in which the corporation agreed to donate to the county a portion of land on which a domed stadium would be built by the county.<sup>401</sup> The parties agreed to enter into negotiations for a forty-year lease of the stadium site to the corporation, and if the parties could not agree on a lease within a specified period of time, the parties would enter into a twenty-year management contract for the company to operate the stadium in return for a percentage of the revenues.<sup>402</sup>

The plaintiffs, conceding that the erection of the stadium served a public purpose, argued that the county's relinquishment of control over the stadium to the corporation, either through the lease or the management contract, converted the stadium into a private use for the company's benefit.<sup>403</sup> The Court of Appeals unanimously rejected this argument,<sup>404</sup> holding that the identity of the party operating the stadium was irrelevant to whether the purposes of the statute, described as "furnish to, or foster, or promote among, or provide for the benefit of, the people of the county of Erie, recreation, entertainment, amusement, education, enlightenment, cultural enrichment,"<sup>405</sup> were being met.<sup>406</sup> Because the residents of the county were still able to obtain the full benefit of the stadium, regardless of whether the company also derived a benefit from it, the expenditure was permissible.<sup>407</sup>

The court found inapposite cases in which a public benefit was found to be incidental to the private benefit,<sup>408</sup> holding that the private benefit to the company was incidental to the public purpose of the stadium.<sup>409</sup> Having resolved the public purpose issue, the

---

<sup>400</sup> *Murphy v. Erie Cnty.*, 268 N.E.2d 771 (N.Y. 1971).

<sup>401</sup> *Id.* at 772.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* at 774. The plaintiffs further argued that the lease or management contract exceeded the authority provided by the enabling legislation passed by the state. *Id.* at 773. Because the enabling legislation specifically permitted the county to "enter into contracts, leases, or rental agreements with, or grant licenses, permits, concessions, or other authorizations, to any person or persons," the Court of Appeals rejected this argument. *Id.* at 773.

<sup>404</sup> *Id.* at 774–75. Judge Burke took no part in the decision. *Id.* at 775.

<sup>405</sup> *Id.* at 774 (internal quotation marks omitted) (emphasis omitted).

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* The court included *Westchester County National Bank of Peekskill* in its recitation of cases falling within this category, despite the fact that the court in that case found that the bonuses did serve a public purpose.

<sup>409</sup> *Id.* at 774. The court found inapposite *Denihan Enterprises v. O'Dwyer*, 99 N.E.2d 235

court relied on precedent holding that a municipality may lease its public improvements, such as railroads or public stadiums to private concerns “so long as the benefit accrues to the public and the municipality retains ownership of the improvement.”<sup>410</sup> Although the *Murphy* court did not specifically find, as it had in other cases, that the lease payments or management fee being paid to the county represented adequate consideration to support the contract,<sup>411</sup> it detailed the financial terms of the arrangement between the county and the corporation, leading a reader to conclude that the terms were relevant while leaving open the question of whether the county could have entered into such a transaction absent the receipt of monetary or other consideration.

### 5. *Bordeleau*

In the forty years between *Murphy* and *Bordeleau*, several other cases addressed public purpose in the context of the gift and loan

---

(N.Y. 1951), a takings case which affirmed an order denying the dismissal of a case challenging a contract between New York City and the New York Life Insurance Company in which the city agreed to acquire by condemnation certain property upon which a fifty-year lease would be offered at a public auction, subject to conditions providing for the construction of a public parking garage. *Id.* at 237. The company agreed to bid for the lease, subject to specified conditions, which, according to the plaintiff's complaint, were for the private and exclusive benefit of the company. *Id.* at 239. The *Denihan* court reiterated the long standing precedent that an incidental private benefit would not invalidate a project having as its primary object a public purpose, but also acknowledged that where the public benefit was only incidental to the private, no public use would be found. *Id.* at 238. Because the facts alleged in the complaint purported to show that the public use was incidental and subordinate to the private benefit conferred upon the company, triable issues were presented. *Id.* at 239. In *Denihan*, the court uses the terms “public purpose” and “public use” synonymously.

<sup>410</sup> *Murphy*, 268 N.E.2d at 774; see *Salzman v. Impellitteri*, 113 N.E.2d 543, 543 (N.Y. 1953) (affirming lease by New York City of its subway system to a private operator); *Admiral Realty Co. v. City of New York*, 99 N.E. 241, 245 (N.Y. 1912) (upholding contracts between Public Service Commission and two transit companies for the construction, equipment, and operation of subway and elevated railroads in Manhattan and Brooklyn); *Martin v. City of Philadelphia*, 215 A.2d 894, 896 (Pa. 1966) (allowing the city to lease its stadium to private enterprise because the lease was “incident to providing for ‘the recreation or the pleasure of the public’”).

<sup>411</sup> In contract law, consideration is where “each party [to the contract] agrees to surrender something in return for what it is to receive,” and is what “distinguishes a contract from a mere gift.” STEVEN H. GIFIS, *LAW DICTIONARY* (4th ed. 1996).

In the *Admiral Realty* case, the court explained that a bargained for exchange like the one later examined in *Murphy* was by its definition not a gift or loan:

The city constructs and leases its subways to the company for a consideration or rental to be paid from the net earnings; and it affords to its lessee an opportunity to derive profit from the lease by receipt of a like share of such earnings. There is no gift or loan in this, but an ordinary contract for a consideration just as valid in the case of a municipality as in the case of an individual.

*Admiral Realty*, 99 N.E. at 248.

clauses, tax exemption, and condemnation, often applying decisions reached in one area to cases affecting other areas.<sup>412</sup> These cases, as well as opinions of the attorney general issued during that period, counseled deference towards the government's determination of what constituted a public purpose and to the determination of whether or not a private benefit was incidental, in one case even allowing the state to participate in a vanpool program that would "come[] within the prohibition of [the gift and loan clause] if the words [were] read literally."<sup>413</sup> The next significant judicial reexamination of the public purpose doctrine as applied to the gift and loan prohibitions would come in *Bordeleau*.

In addition to challenging appropriations channeled to private entities through a public authority, the UDC,<sup>414</sup> the plaintiffs in *Bordeleau* challenged a second group of appropriations: ones made to the State Department of Agriculture and Markets to fund

---

<sup>412</sup> See, e.g., *Hotel Dorset Co. v. Trust for Cultural Res.*, 385 N.E.2d 1284, 1292 (N.Y. 1978) (upholding against special legislation challenge a statute which permitted Museum of Modern Art to realize income through tax equivalency payments that would be made upon the completion and sale or rental of condominium apartments to be constructed above the museum facilities; gift or loan clause not discussed; further stating that the term "incidental" in describing the threshold of income which may be permissibly derived from a state held property without losing tax exempt status does not mean that the public use must outweigh the private use to which the facility is put); *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327 (N.Y. 1975) (holding that removal of substandard conditions is a sufficiently dominant public purpose to constitutionally permit the exercise of condemnation, and fact that entity ultimately using the land may be private company does not change the permissible nature of the taking; holding also that even though agency has wide discretion to determine what constitutes blight, facts supporting such a determination should be set forth); *Tribeca Cmty. Ass'n, Inc. v. N.Y. State Urban Dev. Corp.*, 607 N.Y.S.2d 18 (App. Div. 1994) (upholding, against gift and loan challenge, a project calling for the construction by public authorities of a new office tower and trading floor for commodities exchanges who in turn signed ninety-nine year lease and binding commitment to stay in city for thirty years; court held that "[d]espite an incidental private benefit, this project provides a substantial public benefit"); *Metro. Transp. Auth. v. Vill. of Tuckahoe*, 325 N.Y.S.2d 718 (Sup. Ct. 1973), *aff'd*, 328 N.Y.S.2d 615 (App. Div. 1971) (holding that expenditure of public funds for work to be performed by a private, independent contractor for ultimate benefit of the general public did not violate the state gift and loan clause).

<sup>413</sup> N.Y. Op. Att'y Gen. 1980-88 (opining that participation in a federal vanpool program in which vanpool entity was private corporation or association engaged in a private undertaking and state money received was undoubtedly a loan would not violate the state gift and loan clause; relying on public interest and public purpose to allow participation); see also Informal Op. N.Y. Att'y Gen. 1989-115 (allowing payment by the Board of Elections of the City of New York of postage for voters' return of absentee ballots because it served the public policy of encouraging broader voter participation); Informal Op. N.Y. Att'y Gen. 1986-97 (allowing county to fund employee award program); Informal Op. N.Y. Att'y Gen. 1985-168 (allowing town contributions to subsidize the expenses of extending cable television service to rural town residents).

<sup>414</sup> The portion of *Bordeleau* addressing the appropriations made through the UDC was treated in the previous section, *supra* text accompanying notes 331-50.

contracts with not-for-profit corporations to market and promote New York agricultural products.<sup>415</sup> The appellate division, relying on *Westchester County*, found these appropriations invalid; it stated that if the public purpose of the expenditure took the funds out of the state gift or loan prohibition, it would “make meaningless the provision adopted by the [constitutional] convention of 1846.”<sup>416</sup> The appellate division rejected the argument that the disbursements were not gifts because they were provided in exchange for services or other consideration, holding that none of the cases relied upon by the state supported such an interpretation.<sup>417</sup> The court noted that in the other cases in which public funds were given to authorities for disbursement, the public purpose was dominant and there was only an incidental benefit to private entities; the appellate division also held that the state had not established in this case that the “public benefits of the appropriations were so dominant and their private benefits so incidental as to constitute adequate consideration as a matter of law.”<sup>418</sup>

The Court of Appeals reversed the appellate division and sustained the appropriations. The court found that *Murphy* rather than *Westchester County* “provide[d] the appropriate standard for resolving a challenge to an appropriation”<sup>419</sup> under either the state or local gift and loan clauses. In determining the predominance of the public purpose served by the appropriations, the court relied heavily on the language of the statute creating the Department of Agriculture and Markets.<sup>420</sup> Since the challenged appropriations “fulfill[ed] a predominantly public purpose,”<sup>421</sup> the court concluded

---

<sup>415</sup> These groups included the New York State Apple Growers Association, New York Wine and Grape Foundation, and Long Island Wine Council.

<sup>416</sup> *Bordeleau v. State*, 905 N.Y.S.2d 307, 310 (App. Div. 2010), *rev'd*, 960 N.E.2d 917 (N.Y. 2011) (quoting *People v. Westchester Cnty. Nat'l Bank of Peekskill*, 132 N.E. 241, 244 (N.Y. 1921)).

<sup>417</sup> The court found inapposite cases in which: 1) a town granted a conservation easement to a not-for-profit entity in exchange for the preservation of the land as an undeveloped public park; 2) a public entity expended public funds for promotional activities where the activities promoted the entity itself; and 3) an agriculture commissioner made payments for publicity designed to create new markets for apples, where the moneys disbursed were the proceeds of assessments against the parties to be benefited. *Bordeleau*, 905 N.Y.S.2d at 311–12.

<sup>418</sup> *Id.* at 312.

<sup>419</sup> *Bordeleau v. State*, 960 N.E.2d 917, 923 (N.Y. 2011).

<sup>420</sup> *Id.* (citing to sections of the statute to support the proposition that the purpose of that entity is to “obtain specialized marketing services to promote a major industry in New York—the agriculture industry—for the overall benefit of the public and the State’s competitiveness to foster growth in this important sector of the State’s economy”).

<sup>421</sup> *Id.*

that they were not barred by the state gift and loan clause.

Judge Pigott's dissent found little common ground with the majority opinion:

For these reasons, the majority errs in holding that the legislature may do indirectly, through a public corporation conduit, what the Constitution forbids it to do directly. But this error is apparently of only academic importance, because the majority, after discussing the indirect appropriations at length, goes on to hold that the legislature may also do directly what the Constitution forbids. Some of the appropriations that plaintiffs challenge do not go through conduits, but are routed directly to trade associations made up of private firms—and the majority upholds these also. Either overruling *Westchester County National Bank* or shrinking it beyond recognition, the majority seemingly decides that any gift or loan of money to private recipients is valid as long as it has “a predominantly public purpose.” It is hard to see what is left of the constitutional prohibition.<sup>422</sup>

### *E. Beyond Bordeleau*

*Bordeleau* represents the culmination of a line of decisions that counsel almost complete deference to the determination of other branches of government as to whether the public purpose of a particular transaction outweighs any private benefit. Although the court in *Bordeleau* announced that it was using the same standard as *Murphy*, significant differences exist between the cases. In *Murphy*, the community would have received a direct benefit from having a stadium at which public events could be held.<sup>423</sup> In *Bordeleau*, no such direct benefit to the state existed as a result of increased marketing provided for in the agricultural contracts; instead any benefit (potential increased jobs, tax revenues, and increase in New York's competitiveness in the market) would be indirect and could be used to justify assistance to any entity.<sup>424</sup> In *Murphy*, the county was going to receive consideration from the other party in the form of either rental payments or a share of revenues from the stadium.<sup>425</sup> In *Bordeleau*, the consideration

---

<sup>422</sup> *Id.* at 926 (Pigott, J., dissenting).

<sup>423</sup> *Murphy*, 268 N.E.2d at 772.

<sup>424</sup> *Bordeleau*, 960 N.E.2d at 923.

<sup>425</sup> *Murphy*, 268 N.E.2d at 772.



received by the state—and never discussed by the Court of Appeals—consisted of promises by the nonprofit organizations to promote the sales of products produced by the organizations' constituent members.<sup>426</sup> Although the Court of Appeals has never provided a listing of criteria or a scale by which private and public benefits and purposes are weighed, the “public purpose” of the appropriations in *Bordeleau*, measured by any definition of that term as used over the course of New York's history, is beyond that permitted in prior cases. *Bordeleau* leaves no doubt as to the minimal role the court will play in superintending legislative policy concerning such purposes.<sup>427</sup>

Many state courts have read into their gift and loan clauses a “public purpose” exception.<sup>428</sup> The court in *Bordeleau* did not explicitly adopt that view. Neither did it expressly overrule *Westchester County's* holding that public purpose alone will not validate an otherwise impermissible gift. The *Bordeleau* court did, however, state that the “appropriate standard for resolving a challenge to an appropriation” was found in *Murphy*, a case in which the court upheld a lease between a county and a private company because it had for its “primary object a public purpose.”<sup>429</sup> With this language, the *Bordeleau* court seems to imply that any

<sup>426</sup> See *Bordeleau v. State*, 307 N.Y.S.2d 307, 311 (App. Div. 2010) (discussing a contention that is not brought up in the opinion rendered by the Court of Appeals), *overruled by* 960 N.E.2d 917 (N.Y. 2011).

<sup>427</sup> Quirk and Wein anticipate the consequences of folding consideration into public purpose:

But the value of the goods or services purchased must be ascertainable; if the value of the consideration cannot be known, it is impossible to determine that a gift has not been made. In the pre-1874 railroad cases, the town, in at least some instances, received value by inducing the railroad to come through the town. It was, however, value of an unascertainable sort . . .

Quirk & Wein, *supra* note 54, at 583.

<sup>428</sup> See Houpt, *supra* note 9, at 407 app. (listing thirty states (and describing one state as “unclear”) that recognize a judicial public purpose exception to the gift and loan prohibitions). Some opinions of attorneys general have read such an exception into the New York State Constitution. See opinions cited *supra* note 413.

The state comptroller, however, has taken a more firm stance:

[The local gift and loan prohibition] has been construed to require that there be a contractual or statutory obligation by a municipality before funds can be paid to, or expended on behalf of, private individuals or entities. Article VIII, § 1 is applicable even if the private activity is not undertaken for profit and serves a laudable purpose. Accordingly, as a general rule, a town may not make outright contributions to a private individual or entity even if in furtherance of a proper municipal purpose.

N.Y. Op. Comptroller 2002-9, <http://www.osc.state.ny.us/legal/2002/op2002-9.htm> (citations omitted); see also N.Y. Op. Comptroller 1994-18, <http://www.osc.state.ny.us/legal/1994/legalop/op94-18.htm> (discussing Article VIII, § 1); N.Y. Op. Comptroller 1991-62, <http://www.osc.state.ny.us/legal/1991/legalop/op91-62.htm> (discussing Article VIII, § 1).

<sup>429</sup> *Bordeleau v. State*, 960 N.E.2d 917, 923 (N.Y. 2011).

appropriation, regardless of the consideration (or even in the absence of consideration), is governed solely by the character of its purpose.

The waters are further muddled by the court's statement at multiple points in the decision that the appropriations were used to fund "agreements."<sup>430</sup> From this language, one might infer that the court upheld the appropriations as being made pursuant to valid contracts supported by adequate consideration.<sup>431</sup> Much of the appellate division's opinion was spent considering and rejecting the argument that the agreements were supported by valid consideration.<sup>432</sup> The Court of Appeals, however, fails to mention any specific terms in any of the contracts, never uses the word "consideration," and does not provide any analysis as to whether any consideration received in exchange for the services provided was fair and adequate.<sup>433</sup> The court notes the existence of the agreements but makes no attempt to describe the relevance these contracts had to the holding, leaving one to wonder what role, if any, the agreements played in the decision and whether consideration has been entirely supplanted by public purpose.<sup>434</sup>

As for its public purpose analysis, *Bordeleau* provides little. The court relies on the Agriculture and Markets Law to support its conclusion that a public purpose exists, but provides no evidence that it weighed the public purpose of the appropriations against the private benefit received by the recipients.<sup>435</sup> Although the court agreed with the state that the public purpose was predominant and the private benefit was incidental, no facts to support this conclusion are reflected in the opinion.<sup>436</sup> As written, the opinion seems to suggest that if a legislative body makes a determination that a particular transaction serves a public purpose, and inserts language into a statute to that effect, that determination is both sufficient and unreviewable.

---

<sup>430</sup> *Id.*

<sup>431</sup> A bargained for exchange, with adequate consideration, is not a gift or loan: There is no violation of article VIII, § 1, however, if municipal moneys are paid to a private individual or entity in furtherance of a proper municipal purpose pursuant to a duly authorized contractual arrangement under which the municipality receives fair and adequate consideration. 2002 N.Y. Op. Comptroller 9, *supra* note 428; *see also* Antonopoulou v. Beame, 296 N.E.2d 247, 249–50 (N.Y. 1973).

<sup>432</sup> *Bordeleau v. State*, 905 N.Y.S.2d 307, 311 (App. Div. 2010), *rev'd*, 960 N.E.2d 917 (N.Y. 2011).

<sup>433</sup> *Bordeleau III*, 960 N.E.2d at 923.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* at 923–24.

<sup>436</sup> *Id.* at 923.

A person reading *Bordeleau* may come away with one of three separate readings concerning the agricultural appropriations: 1) the appropriations were made in furtherance of a public purpose and were supported by valid contractual consideration; 2) the appropriations were made in furtherance of a public purpose, and that public purpose took the place of any required contractual consideration; or 3) any appropriation, regardless of whether it is part of a bargained for exchange, is now valid if it serves a public purpose.

Which one of these interpretations, if any of them, is correct remains unclear. Under any reading, however, *Bordeleau* represents a significant departure from *Westchester County*, and shows almost complete deference to the determinations of the lawmaking body both as to what constitutes a public purpose and the acceptable ratio of public to private benefits accruing from the arrangement.

### III. THE JANUS FACE OF JUDICIAL REVIEW IN NEW YORK

The New York Court of Appeals has played a significant role in protecting and enhancing the rights afforded to citizens of the state. Its record of protecting civil and political liberties is noteworthy.<sup>437</sup> In oft-quoted language, the Court of Appeals has affirmed the judiciary's obligation to see that the legislature does not "shirk its responsibility."<sup>438</sup>

Notwithstanding the vigilance of the court in reviewing the enactments of the legislature in areas involving rights, the court has not been nearly as vigilant in enforcing provisions prohibiting gifts and loans of public money or credit.<sup>439</sup> Much ink has been expended on defending the notion of "preferred freedoms," the idea that certain constitutional freedoms are fundamental in a free society and consequently are entitled to more judicial protection than other constitutional values, and the dual standard it creates.<sup>440</sup>

---

<sup>437</sup> See PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION* 41–82 (2011) (examining the New York Court of Appeals' record of protecting civil and political liberties).

<sup>438</sup> *Tucker v. Toia*, 371 N.E.2d 449, 453 (N.Y. 1977).

<sup>439</sup> See N.Y. CONST. art. VII, § 8. This judgment also applies to the referendum requirement imposed by article VII, section 11, and the debt limits imposed upon local governments by article VIII, section 4. See N.Y. CONST. art. VII, § 11; N.Y. CONST. art. VIII, § 4.

<sup>440</sup> Most of this literature has focused on the U.S. Supreme Court. See, e.g., CRAIG R. DUCAT, *CONSTITUTIONAL INTERPRETATION*, E12–E16 (7th ed. 2000); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Howard Gilman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties*

However, the arguments on behalf of judicial restraint and minimal scrutiny on the part of the United States Supreme Court in matters concerning the use of public moneys and regulatory measures cannot be applied to state high courts without significant modifications.<sup>441</sup>

What are the justifications that have been offered by the Court of Appeals for exacting review in cases involving the preferred freedoms and minimal review of cases involving the finance articles? Can this bifocal approach be traced to the text of the document? Former Chief Judge Judith Kaye, while on the Court of Appeals, supported a deferential approach when the court was faced with challenges to the expenditure of public funds,<sup>442</sup> but seemed to undercut a textual basis for that distinction when she wrote on another occasion:

Given its laborious detail, our Constitution may not in every phrase ring with the majesty of Chief Justice Marshall's declaration: "It is a *constitution* we are expounding." But it *is* a constitution we are expounding, and its commands are therefore entitled to the particular deference that courts are obliged to accord matters of constitutional magnitude. To borrow former Chief Judge Breitel's eloquent words, in overturning the moratorium on enforcement of City obligations as violative of the state constitutional requirement of a pledge of faith and credit: But it is a Constitution that is being interpreted and as a Constitution it would serve little of its purpose if all that it promised, like the elegantly phrased constitutions of some totalitarian or dictatorial Nations, was an ideal to be worshipped when not needed and debased when crucial.

One cannot help but wonder, reading our Constitution, why some seemingly everyday matters were elevated to a place in that document of fundamental law and, even beyond, enshrined in its Bill of Rights. Many of these matters were and are the subject of state statutes, some

---

*Jurisprudence*, 49 POL. RES. Q. 623, 633–50 (1996).

<sup>441</sup> For a defense of judicial activism at the state level in areas other than the "preferred freedoms," see Peter J. Galie, *State Courts and Economic Rights*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 76, 81–87 (1988) (stating that arguments against judicial activism in the area of regulation of property and the economy generally at the national level have less force at the state level).

<sup>442</sup> Chief Judge Kaye wrote the majority opinion in *Schulz v. State*, 639 N.E.2d 1140 (N.Y. 1994).

2011/2012]

New York's Gift and Loan Clauses

2073

additionally the subject of federal statutes. They were nonetheless purposefully placed in our state Constitution—within an ambit of special deference and protection—in many instances to declare the existence of a right and correlative commitment by the state; to put them beyond repeal by the legislature; and to insure that derivative legislation involving the expenditure of state money and credit would not be cast out as unconstitutional by the judiciary. *The People have declared to the courts and others that, as part of the Constitution, these matters stand above the miscellaneous statutes as their expression of what they consider to be particularly important and not subject to revision except by them.*<sup>443</sup>

Judge Jasen said much the same when he wrote:

The majority is able to salvage the validity of the legislation and the notes only through the benefit of some rather attenuated reasoning. Although a court, as the majority again cautions, should not “strain to find illegality” in statutory financing programs, it also should not strain to place a cloak of legitimacy around a constitutionally defective practice. The majority, in an apparent effort to dissuade the legislature from ever doing this again, states that the state “in avoiding violation has been driven to the brink of valid practice.” However, what is valid once can be valid twice. Rather than having been taken to the brink once, I submit that the state has been pushed over the precipice, and it might happen again and again. I believe this court should refuse to sanction, even on a one-time basis, actions which are clearly taken in violation of the state Constitution.

The State Constitution is the fundamental and paramount law of this state. The courts cannot close their eyes to the Constitution and see only the acts and doings of the legislature. Otherwise, the Constitution would offer but a frail protection and citizens would “be at the mercy of ingenious efforts to circumvent its object and to defeat its commands.”<sup>444</sup>

---

<sup>443</sup> Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 42 RECORD ASS'N BAR CITY NEW YORK 285, 298 (emphasis added) (quoting Chief Judge Breitel).

<sup>444</sup> Wein v. State, 347 N.E.2d 586, 598 (N.Y. 1976) (Jasen, J., dissenting) (citations omitted).

Or is the court's approach a function of the nature of the subject matter itself? Has the court made a determination that it is more important to guard the provisions dealing with individual rights than those that address finance? Or is it that the protections of civil and political rights are more amenable to adjudication than are the finance provisions? Is it both? Any investigation of these questions needs to begin with the justifications for judicial deference offered by the court itself. These justifications can be grouped under three separate but related categories: lack of judicial competence,<sup>445</sup> avoidance of political questions, and minimization of unnecessary costs.

### A. *Lack of Judicial Competence*

It has been argued by scholars such as Lon Fuller and Donald Horowitz that courts lack the resources, expertise, procedures, or time necessary to comprehend what is really at issue in certain types of cases, to provide a wise and fair resolution to them, and to insure that their decisions are enforced.<sup>446</sup> This sentiment was succinctly expressed by Judge Simon H. Rifkind, when he wrote that "the courts are being asked to solve problems for which they are not institutionally equipped or not as well equipped as other available institutions."<sup>447</sup> As more cases are filed which seek to use the courts as a vehicle for social engineering, such as in areas of prison and education reform, there exists a belief that the judiciary should be limited to those things that they can do well.<sup>448</sup>

This understanding of the judicial role was expressed in New York as far back as the nineteenth century. In *Bank of Rome*, one of the earliest cases to address this question, the Court of Appeals combined concerns about judicial competence with the political

---

<sup>445</sup> Competence is part of a larger category of cases usually grouped under the term justiciability, which refers to the "inappropriateness of the subject matter for judicial consideration." *Baker v. Carr*, 369 U.S. 186, 198 (1962). In cases where non-justiciability is raised, the courts will proceed to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. *Id.*

<sup>446</sup> See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 255-57 (1977) (arguing that courts have difficulty in predicting the unintended consequences of their decisions); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing various situations where the judiciary's remedial powers are of limited utility).

<sup>447</sup> See, e.g., Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 372 (1980) (quoting Judge Rifkind).

<sup>448</sup> *Id.*

2011/2012]

New York's Gift and Loan Clauses

2075

question doctrine.<sup>449</sup> The court was asked to apply a provision of the 1846 constitution directing the legislature “to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations.”<sup>450</sup> The text specifically directed the legislature to “restrict” the powers of local governments. Characterizing the rule of restriction prescribed by the provision as “ill-suited in its terms to be judicially applied,”<sup>451</sup> the court concluded,

the provision in question does not set forth any rule by which a court can adjudge an act of the legislature to be void. . . .<sup>452</sup>

. . . .

That this kind of legislation may be injudicious, and even worse than that, is not denied, but the consideration of that aspect of the question belongs not to the courts, but to the legislature and the constituents of the legislature.<sup>453</sup>

The court has on occasion noted that undertaking review of certain actions involving state finance is not among the functions for which it is properly equipped. In refusing to “police” the state budget to determine whether it contained the necessary amount of specification required by the constitution,<sup>454</sup> the court stated that such an undertaking “would require the courts to assume a role for which they are not constituted, suited, not, indeed designed.”<sup>455</sup> Similarly, the court rejected the notion that the state should be required to prove the authenticity of certain budget estimates of revenues and expenditures following successive deficits:

Assuming it were feasible to convert a courtroom into a super-auditing office to receive and criticize the budget estimates of a state with an \$11 billion budget, the idea is not only a practical monstrosity but would duplicate exactly what the legislature and the Governor do together, in

---

<sup>449</sup> *Bank of Rome v. Vill. of Rome*, 18 N.Y. 38 (1858).

<sup>450</sup> N.Y. CONST. of 1846, art. VIII, § 9.

<sup>451</sup> *Bank of Rome*, 18 N.Y. at 42.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.* at 44. The court did not ask the threshold question—has the legislature carried out the mandate—let alone the question as to whether its enactments constituted a good faith effort to “prevent abuses”; the latter question being more vulnerable to the arguments offered by the court as justification for its refusal to get involved.

<sup>454</sup> See *People v. Tremaine*, 21 N.E.2d 891, 895 (N.Y. 1939) (“We cannot deal with every provision of these budget bills and of the action of the legislature thereon.”).

<sup>455</sup> *Saxton v. Carey*, 378 N.E.2d 95, 98 (N.Y. 1978).

harmony or in conflict, most often in conflict, for several months of each year.<sup>456</sup>

These decisions make clear that the court does not perceive its function as micromanaging the finances of the state.

### *B. Avoidance of Political Questions*

The political question doctrine, the doctrine that a court will not address questions textually granted to other branches or more appropriately resolved through the political process,<sup>457</sup> surfaced in *Schultz v. State* where the court, describing the plaintiff's heavy burden in challenging financial legislation, wrote: "enactments of the legislature—a coequal branch of government—enjoy a strong presumption of constitutionality."<sup>458</sup> This presumption is "so strong as to demand of those who attack them a demonstration of invalidity beyond a reasonable doubt, and the courts strike them down only as a last unavoidable result."<sup>459</sup>

In *Hotel Dorset v. Trust for Cultural Resources*,<sup>460</sup> the court reaffirmed this position:

Courts are required to exercise a large measure of restraint when considering highly intricate and imaginative schemes for public financing or for public expenditures designed to be in the public interest. Some may be highly controversial. But when a court reviews such a decision, it must operate on the rule that it may not substitute its judgment for that of the body which made the decision.<sup>461</sup>

The argument that the court must not substitute its judgment for

---

<sup>456</sup> *Wein v. Carey*, 362 N.E.2d 587, 591 (N.Y. 1977).

<sup>457</sup> The leading Supreme Court case in the area of political question doctrine is *Baker v. Carr*, 369 U.S. 186 (1962). In that case, the Court outlined six elements of the political question doctrine:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

<sup>458</sup> *Schulz v. State*, 639 N.E.2d 1140, 1144 (N.Y. 1994).

<sup>459</sup> *Van Berkel v. Power*, 209 N.E.2d 539, 541 (N.Y. 1965). Such language would not be found when the court addresses challenges based on the state bill of rights.

<sup>460</sup> *Hotel Dorset Co. v. Trust for Cultural Res. of N.Y.*, 385 N.E.2d 1284 (N.Y. 1978).

<sup>461</sup> *Id.* at 1289.



that of a policy making body has not prevented the court from addressing complex fact based questions involving property, condemnation, and review of government decisions as to what constitutes blight. As the court itself noted, cases involving eminent domain and challenges based on article I, section 7, must be:

Carefully analyzed, it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A *determination of public purpose* must be made by the courts themselves and they must have a basis on which to do so.<sup>462</sup>

Deference to co-equal political branches, derived from the political question doctrine, has been stretched to its limits by the Court of Appeals. The court's statement that "[i]f . . . modern ingenuity, even gimmickry, have in fact stretched the words of the Constitution beyond the point of prudence, that plea for reform in state borrowing practices and policy is appropriately directed to the public arena . . ."<sup>463</sup> reinforced the court's tradition of deferring to the political branches of the government, and its unwillingness to monitor the state's financial practices.

### C. *Minimization of Unnecessary Costs*

It would appear that the justification offered by the Court of Appeals has less to do with lack of institutional competence or deference to political branches *per se*, and more to do with the court's view that fashioning remedies and undertaking careful analysis of the financial provisions of the constitution are not the most effective uses of its power and resources. The court as an institution has determined that the cost of activism in this area would be high and the likelihood of successful intervention low.

Costs take various forms. Courts, like other institutions, have an interest in shepherding their power and nurturing their legitimacy. Judges have an immediate interest in protecting the court's reputation and legitimacy among the general public and the other

---

<sup>462</sup> *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 333 (N.Y. 1975) (emphasis added) (citing *Denihan Enters. v. O'Dwyer*, 99 N.E.2d 235, 238 (N.Y. 1951)); *see also Denihan*, 99 N.E.2d at 239 (holding that material issues of fact existed as to whether proposed condemnation was predominantly for a public or private purpose and required a trial on the matter).

<sup>463</sup> *Schulz v. State*, 639 N.E.2d 1140, 1150 (N.Y. 1994).

branches. Not surprisingly, strategic decisions are made with these factors in mind. When confronted with questions or conflicts that have the potential to threaten their institutional status, courts will be reluctant to get involved, or do so with a degree of circumspection.<sup>464</sup>

Costs also come in the form of ineffective decisions. Evidence of the court's understanding of the limits of its power and of the impact of failure on its legitimacy and prestige can be found in the arguments offered for its deference to the political branches.<sup>465</sup> On a number of occasions, the Court of Appeals has intimated that emergencies give rise to constitutional authority. In *Robertson v. Zimmerman*,<sup>466</sup> the Court wrote: "[s]ince the city cannot itself meet the requirements of the situation, the only alternative is for the state, in the exercise of its police power, to provide a method of constructing the improvements and of financing their cost."<sup>467</sup> Twenty years later, in *Comereski v. City of Elmira*, Judge Desmond wrote: "[t]he problems of a modern city can never be solved unless arrangements like these . . . are upheld . . . . We should not strain ourselves to find illegality in such programs."<sup>468</sup>

A generation later, in the face of a desperate fiscal crisis in New York City, the court wrote, "For the reasons to be stated it is concluded that there has been no constitutional violation, but it is also apparent that the state in avoiding violation has been driven to the brink of valid practice."<sup>469</sup> After describing the state's scheme as poised on "the brink of valid practice," the court went on to acknowledge that "the device under scrutiny, even if it is not identifiable at this stage as a violation of constitutional limitations in control of the state's temporary debt, may in the course of time prove violative . . . ."<sup>470</sup> The court conceded the dubious status of the measures and came close to asserting that when the state adopts measures to combat a crisis, the court should find some way to sanction them.<sup>471</sup> Implicit in the reasoning is a concern that the

---

<sup>464</sup> See generally WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964) (discussing the ability of individual Supreme Court justices, through the use of their discretion, to shape U.S. public policy). For examples of these strategies, see Frank B. Cross, *The Justices of Strategy*, 48 Duke L.J. 511, 530–31 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, A REVIEW OF THE CHOICES JUSTICES MAKE (1998)).

<sup>465</sup> Cross, *supra* note 464, at 528.

<sup>466</sup> *Robertson v. Zimmermann*, 196 N.E. 740 (N.Y. 1935).

<sup>467</sup> *Id.* at 745.

<sup>468</sup> *Comereski v. City of Elmira*, 125 N.E.2d 241, 244 (N.Y. 1955) (emphasis added).

<sup>469</sup> *Wein v. State*, 347 N.E.2d 586, 588 (N.Y. 1976).

<sup>470</sup> *Id.* at 588, 594.

<sup>471</sup> Another New Yorker, former United States Supreme Court Chief Justice Charles Evans

court would shoulder and suffer the consequences of denying the state the power to address critical economic conditions.

Related to the pressure on the court created in emergencies is the belief that the court is not likely to be effective in adjudicating these questions even in the absence of a crisis. This calculus has led one commentator to call the finance provisions of state constitutions the "Disfavored Constitution," and to offer a justification in line with positions the court has espoused:

[C]ourts could more strictly scrutinize the fit between the public end and the means chosen, or the balance between the public and private benefits, particularly for measures that provide significant private gains but only speculative public ones. But this would involve difficult empirical questions of assessing the benefits from a program and calculating how likely they are to occur. In many cases a more difficult question would be deciding whether to classify a particular benefit as public or private, or what is the proper balance between public and private benefits. Given that the theory of economic-development-as-public-purpose assumes a public interest in individuals getting jobs or in persuading a business to remain in a jurisdiction, then most benefits of these programs are simultaneously public and private. Requiring a court to disentangle the two may be an impossible job. Moreover, even if the public and private elements can be distinguished, determining how much public benefit is enough to justify a program that also provides significant private benefits is just as problematic. The state courts may well be wise in concluding that such review is beyond their capacity, and that the means for pursuing economic development as well as the determination that economic development is a legitimate public end is a political question, not a judicial one.<sup>472</sup>

Contrast this scenario with the rights arena where more exacting judicial review is the norm. Here the impact of the state policies on individuals is immediate and personal; a human being is before the court whose life has been affected by government action, often in devastating ways. In these cases the likelihood the court can

---

Hughes, writing for the majority in the case of *Home Building & Loan Association v. Blaisdell*, anticipated the argument for necessity when he wrote: "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

<sup>472</sup> Briffault, *supra* note 10, at 939, 946–47.

provide an effective remedy is much higher.<sup>473</sup>

It is difficult to ascertain the extent to which this distinction drives the court's activism in one area and engenders torpor in the area of public finance; in any case the distinction is questionable. The court blurred any bright line between policy concerns and rights with the role it has taken in enforcing the state constitutional provisions concerning education (article XI) and care of the needy (article XVII). In doing so, it extended its activism to policy provisions in which the primary role is textually granted to the legislature.<sup>474</sup>

In *Board of Education, Levittown Union Free School District v. Nyquist*,<sup>475</sup> the Court of Appeals held that, despite the textual commitment in the education article of that area to the legislature,

---

<sup>473</sup> In this respect, it is instructive to note the response to *Citizens United v. Federal Election Commission*, which held that the First Amendment prohibited the government from restricting political expenditures by corporations and unions. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 917 (2010). What provoked the most passionate criticisms from commentators, as well as the dissent of Justice Stevens, was the notion that corporations have rights; in this case the right of free speech. See *id.* at 950 (Stevens, J., dissenting). Typical in this respect is, Douglas Turner, *Citizen's United Ruling Has Backfired on GOP*, BUFFALO NEWS (Feb. 27, 2012), <http://www.buffalonews.com/editorial-page/columns/douglas-turner/article742525.ece>. Another case in point is the repudiation of substantive due process as enunciated in *Lochner v. New York*, on the grounds that it enabled judges, under the guise of due process, to substitute their personal judgment for the judgment of either Congress or the state legislature, and to read their economic philosophies into the Constitution. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393, 404 (1937) (citing *Lochner v. New York*, 198 U.S. 45 (1905)) (overruling *Lochner* on the basis that the legislature has broad discretion to enact laws that provide for the public health, safety, and general welfare); see also *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963) (explaining that it is not the province of courts to strike down laws it believes to be unreasonable because of the law's incompatibility with a particular economic or social philosophy). But the substantive due process that was repudiated was “economic” substantive due process. See Howard J. Vogel, *The “Ordered Liberty” of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1482 (2007). Substantive due process as a means to protect personal rights, particularly privacy and personal autonomy, was not repudiated, even though the latter was at least as likely to be a vehicle for the “constitutional sin” of *Lochner*: substituting the judge's personal values for those of the political branches of government, and reading one's personal philosophy into the Constitution. See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973); Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 824 (2000).

<sup>474</sup> Concerning education, the New York Constitution provides: “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST. art. XI, § 1. In the area of social welfare, the constitution provides: “[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.” N.Y. CONST. art. XVII, § 1.

<sup>475</sup> *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).

the article required the state to provide a “sound basic education.”<sup>476</sup> Thirteen years later, in *Campaign for Fiscal Equity v. State (CFE I)*,<sup>477</sup> the court stated that “a sound basic education . . . should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury,”<sup>478</sup> and held that the plaintiffs had stated a cause of action against the state that the public school funding system violated the education article because it did not provide students the opportunity to obtain such an education.<sup>479</sup> In a later case, *Campaign for Fiscal Equity v. State (CFE II)*,<sup>480</sup> the court affirmed the conclusion of the trial court that because of inadequate public school funding, children in New York City were not receiving the constitutionally mandated opportunity for a sound basic education.<sup>481</sup> The court directed the state to determine the actual cost of providing a sound basic education in New York City and to enact necessary reforms.<sup>482</sup> Other cases have made, clear, however, that if there is a “right” to a sound basic education, it is a right to have an opportunity to obtain it, not a guarantee that one will receive it.<sup>483</sup>

Just as article XI of the state constitution commits education policy to the legislature, article XVII, imposing a duty upon the state to provide for the care of the needy, gives the legislature discretion to determine the means and manner of such care. Notwithstanding this language, the Court of Appeals unanimously

---

<sup>476</sup> *Id.* at 369.

<sup>477</sup> *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661 (N.Y. 1995).

<sup>478</sup> *Id.* at 666.

<sup>479</sup> *Id.* at 667–68.

<sup>480</sup> *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326 (N.Y. 2003).

<sup>481</sup> *Id.* at 329, 348.

<sup>482</sup> *Id.* at 348–49.

<sup>483</sup> The court made its determinations in the two *CFE* cases without disturbing its finding in *Donohue v. Copiague Union Free School District*, 391 N.E.2d 1352 (N.Y. 1979), a case in which the court rejected an educational malpractice suit brought by a student, holding that the education article did not impose a duty on school districts to see that each pupil received a minimum level of education. *Id.* at 1354. Although the *CFE* cases may have put *Donohue* in limbo, subsequent cases have limited the areas in which the education article can provide relief. See *Paynter v. State*, 797 N.E.2d 1225, 1229 (N.Y. 2003) (holding that article does not require the state to provide equal educational opportunities in every school district; article does not make state responsible for the demographic composition of every school district; if the state puts adequate resources into the classroom, the requirements of the education article are met regardless of whether student performance remains substandard); *N.Y. Civil Liberties Union v. State*, 824 N.E.2d 947, 950–51 (N.Y. 2005) (holding that an education article claim requires a clear articulation of the asserted failings of the state, sufficient for the state to know what it will be expected to do should the plaintiffs prevail; district-wide failure must be alleged and proven in order to succeed on such a claim).

invalidated a law requiring a needy minor to obtain an order of disposition against a legally responsible parent or relative.<sup>484</sup> The court agreed that the statute furthered a valid state objective, but nonetheless represented an impermissible “refus[al] to aid those whom it has classified as needy.”<sup>485</sup> On the other hand, the court has neither mandated that public assistance be granted on an individual basis in every instance nor required the state always to meet in full measure all legitimate needs of each public assistance recipient.<sup>486</sup>

Despite a textual commitment of both education and social welfare to the legislature and a possible lack of judicial competence to deal with potential policy issues such as what constitutes a sound basic education or under what type of conditions public assistance should be granted, the Court of Appeals has shown a willingness to overrule legislation or policy it has deemed inconsistent with the education and care for the needy clauses. This is because the court has viewed education and social welfare to be fundamental values: fundamental because citizens in their constituent capacity have placed them in the constitution. But citizens have also placed in the constitution a series of limitations on how and how much debt can be incurred as well as prohibitions on what uses can be made of public moneys. The commitment is no less fundamental at least in this respect.

The court itself has indicated that the line between policy and rights is a fine one. Writing for the majority in *Campaign for Fiscal Equity v. State (CFE III)*,<sup>487</sup> a case in which the Court of Appeals refused to invalidate the state’s estimate as to the cost of providing a sound basic education to children in New York City’s public schools (which the court in *CFE II* required the state to do), Judge Pigott addressed the interplay between policies viewed as fundamental and individual rights:

On the one hand, the Judiciary has a duty “to defer to the legislature in matters of policymaking, particularly in a matter so vital as education financing, which has as well a

---

<sup>484</sup> *Tucker v. Toia*, 371 N.E.2d 449, 450–52 (N.Y. 1977).

<sup>485</sup> *Id.* at 452. The opinion held that “[s]uch a definite constitutional mandate cannot be ignored or easily evaded in either its letter or its spirit.” *Id.*

<sup>486</sup> See, e.g., *Bernstein v. Toia*, 373 N.E.2d 238, 244 (N.Y. 1977). In *Brownley v. Doar*, the Court of Appeals, in holding that no right to a constitutionally prescribed minimum shelter allowance was created by article XVII, reaffirmed its view that no individual rights are established by this article. 903 N.E.2d 1155, 1162–63 (N.Y. 2009).

<sup>487</sup> *Campaign for Fiscal Equity, Inc. v. State (CFE III)*, 861 N.E.2d 50 (N.Y. 2006).

core element of local control. We have neither the authority, nor the ability, nor the will, to micromanage education financing.” On the other hand, “it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them.”

The need for deference, where appropriate, is no less important for this Court than it is for the Judiciary as a whole. We are the ultimate arbiters of our State Constitution. Yet, in fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government. We have often spoken of this tension between our responsibility to safeguard rights and the necessary deference of the courts to the policies of the legislature. “While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government.” When we review the acts of the legislature and the Executive, we do so to protect rights, not to make policy.<sup>488</sup>

The distinction has made the court reluctant to take judicial notice of the connection between the rationale and intent of these finance provisions and the duty of the state to promote the general well being of the community by ensuring the soundness of its finances. By requiring the state to provide what it has determined to be constitutionally mandated standards of education and social welfare benefits, the court has made it incumbent upon the state to appropriate public moneys—in the case of welfare and education, significant amounts of money.<sup>489</sup> But the ability of the state to satisfy these court-imposed expenditures is dependent on the fiscal soundness of the state. The failure of the state to act in fiscally responsible ways jeopardizes its ability to provide the services required by the constitution. The financial crises faced by the Paterson and Cuomo administrations prevented the state from complying with the requirements of the court.<sup>490</sup> Even more telling

---

<sup>488</sup> *Id.* at 58 (citations omitted).

<sup>489</sup> Estimates of the costs of implementing the *CFE* decisions have ranged upwards of 5.5 billion dollars. *See id.* at 64.

<sup>490</sup> *See* Vinay Harpalani, *Maintaining Educational Adequacy in Times of Recession*, 85 N.Y.U. L. REV. 258, 279 (describing how New York State was only able to honor its

was the retreat by the court itself in the face of these exigent circumstances.

Evidence of the connection between the goals of the finance provisions and the obligations imposed by other articles of the constitution is found in the response of Michael Rebell, lead attorney for the plaintiff in the *CFE* litigation, to the gap that developed between the promise of *CFE* and the realities of state finance:

In 2007, I represented the plaintiffs in a precedent-setting case on school funding: *Campaign for Fiscal Equity Inc. vs. State of New York*. In a landmark decision, the state's highest court ruled that the existing system for financing public education was unconstitutional—and in response, the legislature adopted far-reaching reforms to ensure all students their constitutional right to “the opportunity for a sound basic education.”

This was not mere rhetoric. To reach this goal, our lawmakers promised schools in New York City and high-need school districts in other parts of the state an increase of \$5.5 billion in basic state “foundation” funding, as well as other increases, to be phased in over four years. All this was, in the minds of those we elect to write the laws, a necessary result of the court ruling—and a constitutional obligation.

Yet now, at the end of that four-year period, the promised increases have been stalled. That's troubling enough. Even more troubling, if Cuomo's proposed \$1.5 billion cuts are enacted, virtually all of the state aid funding gains that New York City and other high-need districts have achieved since 2007 will be wiped out. Should this budget proposal be adopted, the state clearly will be violating its Constitution.<sup>491</sup>

Rebell continued:

Constitutional rights are a permanent affirmative obligation of the government; they cannot be put on hold because there is a recession or a budget deficit. As the U.S. Supreme Court clearly put it in 1992, “Financial constraints may not be used

---

educational commitments because it received federal stimulus money); Andrew Cuomo, *The New N.Y. Agenda: A Plan for Action* x–xi (2010) (arguing that New York State is in a financial crisis and cuts have to be made in order for the state to operate within its means).

<sup>491</sup> Michael Rebell, *Cuomo's School Cuts are Unconstitutional, Says Lead Lawyer from Campaign for Fiscal Equity Case*, N.Y. DAILY NEWS, Mar. 17, 2011, [http://articles.nydailynews.com/2011-03-17/news/29172436\\_1\\_school-cuts-sound-basic-education-cuomo](http://articles.nydailynews.com/2011-03-17/news/29172436_1_school-cuts-sound-basic-education-cuomo).



to justify the creation or perpetuation of constitutional violations . . . .”<sup>492</sup>

The connection between fiscal responsibility and the ability to honor constitutional commitments could not be clearer. The court has repeatedly noted that when it decides cases based on the state and local finance articles that the constitution should not be understood as a straightjacket preventing the state from confronting financial emergencies. But a colorable case can be made that this approach has not succeeded, unless one defines success as staving off bankruptcy. It is not unreasonable to argue that court condonation of state financial practices has given the green light for the state to rely on a variety of devices concocted to extricate itself from financial collapse.

Undoubtedly the court is aware of these realities. So the question remains: why has the court, for all intents and purposes, abandoned the role of enforcing the gift and loan clauses found in articles VII and VIII? What has driven the court to the brink of abdication? Underlying the justification offered by the court are two other factors: an unwillingness to commit judicial resources to provisions it believes are anachronistic and do not represent the views and perspectives of the state's decision-makers; and the acceptance of an expansive understanding of public purpose, one the court sees as reflecting the consensus that has developed among state decision-makers, if not among the citizens.

The 1938 Convention's amendments to the gift and loan clauses reflect an ongoing tension between the prohibitions and their purpose on the one hand and the spending priorities judged necessary to meet important social needs but interdicted by the prohibitions. The tensions between what were perceived as the dangers of public authorities to the state's credit and financial well being and the usefulness and effectiveness of authorities is a case in point. A prominent critic of public authorities at the convention, Abbot Low Moffat, declined to support a measure that would have put authorities under the same constitutional restraints placed on the state and local governments, namely that state authorities would need a referendum before incurring debt and that local authorities would be subject to municipal debt limits.<sup>493</sup> Moffat acknowledged the value of these authorities and was satisfied with a provision making it clear that the debt of these authorities would

---

<sup>492</sup> *Id.*

<sup>493</sup> Quirk & Wein, *supra* note 54, at 568.

not be debt of the state.<sup>494</sup>

A gap has developed between the financial restrictions, such as the gift and loan clauses, debt limitations, and referendum provisions and their objectives, and the political culture of the state. New Yorkers, not unlike citizens of other states, want neither a large state debt nor high taxes, but they do want decent social services and an efficient infrastructure. These contradictory goals or commitments are reflected in the constitution itself. While articles VII and VIII reflect a concern for fiscal responsibility and frugality,<sup>495</sup> articles XI, XIV, XVII, and XVIII impose obligations on the state to provide education, welfare, housing, and protection of the environment.<sup>496</sup> Cross-pressured, elites looked for ways to avoid the dilemma. “Back door financing” was the result.<sup>497</sup> It can be argued that the gift and loan clauses and other financial limitations adopted during the nineteenth century have only tenuous and ambivalent support among the citizens, allowing legislators and governors, with the approval of the courts, to treat these limitations as obstacles to be overcome rather than provisions to be obeyed. They are not seen by decision-makers as legitimate safeguards to the fiscal integrity and solvency of the state, and they fail to command the necessary consensus that might have sustained them.

A new consensus has emerged among decision-makers in all branches of government as to the meaning of these prohibitions. This consensus is reflected in the numerous exceptions to the gift and loan clauses placed in the Constitution since 1938, in decisions of the Court of Appeals described above, and in Comptroller and Attorney General opinions, especially those issued after 1970. A 1980 opinion of the Attorney General epitomizes this consensus:

In the half century since the *Westchester* decision, the courts

---

<sup>494</sup> REVISED RECORD 1938, *supra* note 145, at 2262. By the year 2000 New York had more debt than any state except the much larger state of California; ninety percent of New York's debt is not-guaranteed.

<sup>495</sup> See N.Y. CONST. art. VII, § 11 (requiring a referendum in order for the state to contract debt); N.Y. CONST. art. VIII, § 12 (requiring the legislature to restrict the ability of various political subdivisions to tax, contract debt or lend credit in order to prevent abuses).

<sup>496</sup> See N.Y. CONST. art. XI, § 1 (requiring the legislature to provide for the maintenance and support of a school system); N.Y. CONST. art. XIV, § 4 (making the conservation and protection of natural resources a policy of the state); N.Y. CONST. art. XVII, § 1 (requiring the state to provide aid to the needy); N.Y. CONST. art. XVIII, § 2 (allowing the legislature significant latitude to provide financing for low income housing and nursing homes).

<sup>497</sup> Cf. Sarah Lyall, *Cuomo Proposes End to 'Back-Door Financing,'* N.Y. TIMES, Jan. 9, 1993, <http://www.nytimes.com/1993/01/09/nyregion/cuomo-proposes-to-end-back-door-financing.html?src=pm> (discussing the governor's plan to end the practice of “back-door financing” and to balance the budget's books while also providing funds for public works).

in effect have further softened the limitation of Section 8 by broadening the concept of “direct benefit” to the state. This has taken the form of recognizing the public interest and public purpose in the expenditure of public funds in ways that “directly benefit” private groups in the course of furthering the public interest. . . .

The essence of a century of developing judicial gloss on the “gifts and loans” prohibition is a recognition that what is a public purpose and in the public interest is vastly different now. In today’s complex, inter-dependent society there are many things that can be more effectively accomplished through controlled assistance to private groups than by direct action by government.<sup>498</sup>

Eight years later, another opinion from that office made no mention of contract or consideration, implicitly conflating consideration and public purpose:

In the past, we have concluded that a municipality’s home rule powers allow it to carry out programs that incidentally benefit private parties as long as a valid public purpose is served at the same time. Valid public purposes have been found in municipal actions to permit blind persons to operate vending concessions on county property; county funding for a migrant child care center; town subsidies to extend cable TV service within the town; and county funded employee incentive award programs. In each of these instances it was concluded that the municipality’s power to pass laws to promote the “protection, order, conduct, safety, health and well-being of persons or property [within the municipality]” authorized the actions, even though an incidental benefit to private parties was included.<sup>499</sup>

Contrast this understanding with the one informing an opinion issued in the early 1940s concluding that “[a] town may not enter into an agreement with a private industrial corporation that if such corporation will remain within the town and furnish employment to the citizens thereof the property owned and occupied by the

---

<sup>498</sup> N.Y. Op. Att’y Gen. 980-88 (1980) (opining that participation in a federal vanpool program in which vanpool entity was private corporation or association engaged in a private undertaking and state money received was undoubtedly a loan would not violate the state gift and loan prohibition; relying on public interest and public purpose to allow participation) (citations omitted).

<sup>499</sup> Informal Op. N.Y. Att’y Gen. 1987-12 (Feb. 25, 1987) (citations omitted).

corporation shall be tax free.”<sup>500</sup> Another opinion around the same time interpreting the municipal gift and loan clause made clear that no real property owned by the village could be transferred for inadequate consideration:

You inquire if a village may sell real property acquired through foreclosure of tax liens to an American Legion post for a “nominal” consideration or a consideration based on the cost to the village of such property which you state in each case “might be well below the actual market value.” You also ask if the village may “lease such property to a local American Legion post for a period of 99 years at an annual rental of \$1.00 per year.”

A village may sell real property not held for public use. It is asserted in a leading treatise on the subject that such a sale must be made in good faith upon adequate consideration. In my opinion, a sale of village property upon a nominal consideration “well below the market value,” as described in your letter, is in effect a gift of village property prohibited by Article VIII, Section 1 of the New York state Constitution.<sup>501</sup>

The gap between the general public and political elites, constitutional provisions and political practice, and the lack of consensus as to what direction the state should move, are the underlying factors informing the decisions of the court over the past half century and are also the factors making constitutional reform difficult if not impossible.

#### IV. THE FUTURE

This article has presented a brief constitutional history of the gift and loan clauses of the New York Constitution, an examination of the major court decisions interpreting those provisions, and an analysis of the standard of review the Court of Appeals has adopted in applying them. It has demonstrated that the major goals these provisions hoped to achieve have proved elusive: the numerous exceptions by amendments, court decisions, and attorney general and comptroller opinions have conspired to create a constitution which bears little relationship to the operational realities of the

---

<sup>500</sup> Informal Op. N.Y. Att’y Gen. 1943-244 (Dec. 11, 1943).

<sup>501</sup> Informal Op. N.Y. Att’y Gen. 1947-10 (Feb. 11, 1947) (citation omitted).

state in the area of public finance. In large measure the gap between the formal and the operational constitutions in New York can be traced to the tension between the commitments to education, social welfare, and environmental goals and financial integrity, and the ambivalence about these commitments in the electorate and among state decision-makers.

The problems to which the prohibitions were addressed are not, by and large, the problems facing twenty-first century state governments; understandings of public purpose are far more expansive than those regnant when the provisions were adopted. The fact that in post-*Bordeleau* New York, public moneys can be spent for purposes that were intended to be prohibited by these provisions is testament not only to the ingenuity and persistence of policy-makers, but also to the difficulty of applying nineteenth-century provisions and their attendant assumptions about public purpose and state responsibilities to twenty-first century conditions and problems.

Is effective constitutional reform possible under such conditions? Does the constitution have any role to play in the public finances of the state? If so, what is that role and how extensive should it be? What form should constitutional provisions take: absolute prohibitions, directives to the legislature, self-executing grants of authority, or some mixture? How much discretion should be granted to those who enforce the provisions? Should a clause be added signaling to the judiciary that it is expected to play a more active role in interpreting and enforcing these provisions?<sup>502</sup>

No satisfactory answers to these questions will be forthcoming unless the following are recognized: The gift and loan clauses were nineteenth century responses to particular problems and have limited relevance in an age of expanded understandings of public purposes and increased state responsibilities; The state constitution contains commitments to goals that are in tension; Public opinion reflects this tension; and decision-makers, under pressure to solve

---

<sup>502</sup> Examples of such constitutional directives include: N.Y. CONST. art. III, § 5 (authorizing review by New York State Supreme Court of any legislative apportionment); N.Y. CONST. art. V, § 1 (authorizing taxpayer suits with consent of New York State Supreme Court in Appellate Division challenging payment of any state moneys except by audit of comptroller); N.Y. CONST. art. VII, § 16 (authorizing suit by bondholders against comptroller to set aside and apply revenues to pay bonds); N.Y. CONST. art. VIII, § 2 (granting bondholders first claim on available revenues and the right to initiate suit in court against fiscal officers of local governments for enforcement of their claims); N.Y. CONST. art. XIV, § 5 (permitting citizens' suits with consent of Appellate Divisions of New York Supreme Court on notice to Attorney General for violations of any provisions of the conservation article).

problems and to provide for the general welfare, have opted to respond to these problems by resorting to measures of questionable constitutionality, which courts, by and large, have sanctioned.

It may be that the best course would be to do nothing, at least in the way of constitutional change, and “muddle through.”<sup>503</sup> A rejuvenated legislature under the goading of an energetic and reform-minded governor may be able to address some of the problems (for example, public authority reform).

Whichever path we take, it is time we heeded the advice of the Association of the City Bar of New York’s 1997 Report and recommend that the governor, with legislative support or backing, form a commission to take a comprehensive look at the gift and loan provisions of the state constitution.<sup>504</sup> These provisions last underwent systematic revision at the constitutional convention of 1938.<sup>505</sup> Temporary constitutional commissions have provided analyses of these provisions; but none of their recommendations, which are now more than fifty years old, generated any changes to these clauses. Some of the most significant reforms in the gift and loan area resulted from the work of the 1872 commission. A new commission could undertake an assessment of whether there is continued need for these provisions and make recommendations as to their future.

---

<sup>503</sup> This position, which Richard Briffault appears to support, would leave determinations involving public purpose consideration and the balance of public versus private benefits under the gift and loan provisions to the political branches. Briffault, *supra* note 10, at 946–47.

<sup>504</sup> *Report of the Task Force on the New York State Constitutional Convention*, *supra* note 195, at 605.

<sup>505</sup> TAXATION AND FINANCE, *supra* note 33, at 106.