N.Y.L.J. Nov. 2, 1993

DECISION OF THE DAY

Appellate Division

Third Department

State Finance Law

Moral Obligation Bonds

APPEAL from a judgment of the Supreme Court (Spain, J.), entered July 28, 1993 in Albany County, which, in an action pursuant to State Finance Law article 7-A, inter alia, granted defendants' motions for summary judgment and made a declaration in their favor.

Robert L. Schulz, Glens Falls, appellant in person.

Robert Abrams, Attorney-General (Frank R. Walsh of counsel),

Albany, for State of New York and others, respondents.

Mudge, Rose, Guthrie Alexander & Ferdon (Douglas M. Parker of counsel), New York City, and Michael A. Vaccari, New York City, for Metropolitan Transportation Authority, respondent.

Paul Weiss Rifkind, Wharton & Garrison (Arthur L. Liman of counsel), New York City, for New York State Thruway Authority, respondent.

Victoria A. Graffeo, Albany, for Clarence D. Rappleyea and others, Members of New York State Assembly, amicus curiae.

Robert L. Schulz et al., appellants, v. State of New York et al., respondents.

Decided Oct. 21, 1993.

Before Weiss, P.J.; Mercure, Cardona, Mahoney and Casey, JJ.

MAHONEY, J. — The principal issue in this appeal is whether certain moral obligation bonds constitute State debt within the meaning of NY Constitution, article VII, §11[1]. The facts are undisputed. On April 15, 1993, the Legislature enacted by the Laws of 1993 (ch 56) (hereinafter the Act) a comprehensive, four-year $20.9 billion plan for the improvement of the State's infrastructure, namely, the State and local highways and bridges, the metropolitan mass transportation system, and the railways and aviation facilities. While funding for the work was to come partially from Federal assistance and other sources, a large sum was to come from the proceeds of bonds issued by defendants State Thruway Authority and Metropolitan Transportation Authority (hereinafter MTA). In consequence thereof, the Legislature included now familiar mechanisms to ensure that the Thruway Authority and MTA had adequate assets to secure the bonds and a sufficient income stream to make subsequent debt service payments.

As regards the MTA bonds, the Act creates the MTA dedicated tax fund (hereinafter the MTA tax fund). It is funded by annual legislative appropriations from that portion of the dedicated mass transportation trust fund which represents tax revenues derived predominantly from supplemental petroleum and aviation business fuel taxes (see Tax Law §301-j[d]). The MTA tax fund moneys can be "pledged by [MTA] to secure and be applied to the payment of its bonds, notes or other obligations" and "used for payment of operating costs, and

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capital costs, including debt service" (Public Authorities Law §1270-c [3], added by L 1993, ch 56, §7). While the legislation further provides it to be "the intent of the governor to submit and the legislature to enact" a budget bill for each fiscal year, up to and including the 1996-1997 fiscal year, containing appropriations from the dedicated mass transportation trust fund to the MTA tax fund (State Finance Law §89-c [3], as amended by L 1993, ch 56, §10), the appropriation is in the form of a gift of certain tax revenues and is backed up by no legal obligation (State Finance Law §89-c [3]).

With respect to the Thruway Authority, the Act authorizes that entity to issue bonds at the State's request to finance three types of capital improvements: (1) local highways and bridges, (2) State highways and bridges, and (3) railway and aviation projects. The local highway and bridge bonds are to be secured by the moneys due and owing under service contracts to be entered into between defendant Director of the Division of the Budget and the Thruway Authority (Public Authorities Law §380 [l] [a]). These service contracts, in turn, must "provide for state commitments to provide annually to the thruway authority a sum or sums to fund, or fund the debt service requirements" of the local highway and bridge bonds (L 1993, ch 56, §14 [e], [g]). While payments on the service contracts derive from legislative appropriation (L 1991; ch 329, §11 [d]), all contracts must provide that the obligation to make payment thereunder is not a debt of the State, that the contract is "executory only to the extent moneys are available," that "no liability shall be incurred by the state beyond the moneys available for the purpose," and that "such obligation is subject to annual appropriation by the legislature" (L 1991, ch 329, §11 [d]). The bonds themselves are expressly stated to be "special limited obligations" of the Thruway Authority secured by and payable only out of amounts appropriated by the Legislature and these bonds are to contain on their face a statement that they "shall not be deemed to be an obligation of the state and the state shall not be liable thereon" (Public Authorities Law §380 [l] [b], [c]; added by L 1991, ch 329, §12).

The State highway and bridge bonds work in a similar fashion, the only difference being the substitution of sale/leaseback arrangements in place of service contracts. Under these agreements, called dedicated highway and bridge trust fund cooperative agreements, in return for the bond proceeds the State transfers title to the land and improvements upon which the work is to be done to the Thruway Authority by quitclaim deed. The Thruway Authority then leases the property back to the State via a long-term capital lease and uses the "rent" payments it receives from the State to pay debt service and other related expenses. The "rent" payments are payable solely out of moneys appropriated by the Legislature from the dedicated highway and bridge trust fund (which consists of fuel and highway use tax revenues along with the proceeds of motor vehicle registration fees), and such funds may be pledged by the Thruway

Authority to secure the bonds (Public Authorities Law §385 [1] [c], added by L 1993, ch 56, §34). Like the service contracts, the dedicated highway and bridge trust fund cooperative agreements must contain debt and liability disclaimer provisions (Highway Law §10-3 [5], added by L 1993, ch 56, §33), and like the local highway and bridge bonds these bonds also must contain a statement that they are not a debt of the State, the State is not liable thereon and payment cannot come from any funds other than those the Thruway Authority pledged for them (Public Authorities Law §385 [l] [d], added by L 1993, ch 56, §34).

The railway and aviation bonds are likewise secured and funded by the moneys provided pursuant to a service contract, lease or agreement between the Thruway Authority and various State agencies or municipalities (Public Authorities Law §386, added by L 1993, ch 56, §16). The content and terms of service contracts and leases and bonds are the same as those prescribed in connection with State and local highway and bridge financing (L 1993, ch 56, §19; see Public Authorities Law §386).

Finally, in an ostensible effort to insure that a portion of the transportation-related construction projects were obtainable by small, minority-owned and women-owned businesses, Urban Development Corporation Law §38 was enacted to permit the Urban Development Corporation to establish a revolving loan fund to provide loans or guarantees to these enterprises (L 1993, ch 56, §40), and Public Authorities Law §1838 was enacted creating a State bonding guarantee assistance program to assist the businesses in meeting the payment and/or performance bonding requirements by providing the financial backing needed to induce a surety company to issue construction project bonds (L 1993, ch 56, §39).

Contending that the foregoing, because it all involves use of legislative appropriations from the general fund or other funds comprised predominantly, if not exclusively, of taxpayer revenue to secure debt, pay debt and provide financial backing to private business violates (l) the NY Constitution, article VII, §11 proscription against the State contracting debt without voter approval, (2) the NY Constitution, article VII, §8 prohibition against giving or loaning the State's credit in aid of a public corporation or private enterprise, and (3) the NY Constitution, article x, §5 prohibition against the State assuming liability for the payment of obligations issued by a public corporation and that the use of State taxes for debt service on bonds issued without voter approval constitutes a violation of due process under the State and Federal Constitutions, plaintiffs, all citizen taxpayers and registered voters in the State, commenced the instant action to declare the challenged provisions null and void. Following joinder of issue, all parties moved for summary judgment.

Supreme Court initially concluded that under *Matter of Schulz* v. *State of New York* (81 NY2d 336), plaintiffs lacked standing to challenge the legislation as violative of any constitutional provision other than NY Constitution, article VII, § 11. Moreover, of the six challenges under article VII, §11, the court further found that plaintiffs' third cause of action, challenging as unconstitutional the additional bonding for local highway and bridge improvements, was barred by laches inasmuch as the funding mechanism itself was established in 1991 (L 1991, ch 329, §11). The remaining challenges were addressed on the merits and, upon review, found to be constitutionally sound. Supreme Court reasoned that the financing mechanisms involved were meaningfully indistinguishable from those upheld by the Court of Appeals in *Wein v. City of New York* (36 NY2d 610). Accordingly, the court granted defendants' motions for summary judgment. This appeal by plaintiffs ensued.

Plaintiffs' Standing to Sue

As a threshold issue, plaintiffs contend that Supreme Court erred in concluding that they lacked standing to challenge the subject financing provisions as violative of NY Constitution, article VII, §8 and NY Constitution, article X, §5. We disagree. Because plaintiffs are challenging the Legislature's authorization of bond issues, they cannot claim statutory standing pursuant to State Finance Law §123-b. It is equally clear that they have no common-law standing as taxpayers in this situation (see *Wein* v. *Comptroller of State of N.Y.*, 46 NY2d 394, 399). Moreover, while the Court of Appeals recently accorded plaintiffs standing as voters to challenge financing schemes which are claimed to be subject to voter referendum approval, holding that the right to vote contained in NY Constitution, article VII, §11 allows for separate and independent standing to sue, neither NY Constitution, article VII, §8 nor NY Constitution, article X, §5 are linked to any voting rights (see *Matter of Schulz* v. *State of New York*, 81 NY2d 336, supra). That being the case, the issue of plaintiffs' standing to maintain these challenges continues to be governed by *Wein v. Comptroller of State of N.Y.*, (46 NY2d 394, supra), *New York State Coalition for Criminal Justice v. Coughlin* (64 NY2d 660) and our prior decision in *Matter of Schulz v. State of New York* (185 AD2d 596, appeal dismissed, denied 81 NY2d 336), and, under the principles enunciated therein, plaintiffs cannot proceed.

Laches As Barring Plaintiffs' Challenges to Local Highway and Bridge Bond Financing Mechanisms

We likewise agree with Supreme Court that under the additional principles enunciated in *Matter of Schulz v. State of New York* (81 NY2d 336, 347-350, supra), plaintiffs' third cause of action challenging the financing mechanisms for funding local highway and bridge bonds as violative of NY Constitution, article VII, §11 is barred by laches. While the Act increases the amount of bonds the Thruway Authority is authorized to sell to finance local highway and bridge projects, the financing scheme itself, which is under attack in this cause of action, was not created by that legislation but rather by the Laws of 1991 (ch 329, §11). This legislation was signed into law and became effective on July 15, 1991.

Plaintiffs commenced their action on May 28, 1993, almost two years after the effective date. In the interim, the Thruway Authority has issued bonds to fund the consolidated local highway assistance (hereinafter CHIPS)[2] program and the municipal streets and highways (hereinafter Marchiselli)[3] program. In reliance on these programs, the municipalities have expended funds and committed themselves to future programs with the expectation that they would be reimbursed. Quite simply, to abort these programs at this point would create severe fiscal problems and cause the same sort of disruption and prejudice which led the Court of Appeals to apply the doctrine of laches in *Matter of Schulz* v. *State of New York* (81 NY2d 336, supra).

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Constitutionality of the Challenged Legislation

In resolving the constitutional issue of whether moral obligation debt of the sort challenged here is debt "contracted by or in behalf of the state" within the meaning of NY Constitution, article VII, §11, we begin by noting not only the presumption of constitutionality which attaches to legislative enactments, but also the strength of that presumption in the area of public finance (see, e.g., *Wein v. Beame*, 43 NY2d 326; *Wein v. of City of New York*, 36 NY2d 610, supra). Undoubtedly, there is a certain intrinsic validity to plaintiffs' contentions that the challenged financing schemes are little more than carefully tailored mechanisms to circumvent the referendum requirements of NY Constitution, article VII, §11 (see generally Restoring Credit and Confidence, Report of the Moreland Commission on the Urban Development Corporation and other State Financing Agencies, Mar. 31, 1976, at 113). Likewise, there is a disturbing correctness to their argument that while the State technically is under no legal obligation to appropriate moneys to cover the public authorities' bonds, inasmuch as the public authority would default if the State failed to make these appropriations and such default would affect the State directly by impairing its credit and hampering its ability to issue bonds in the future, the State practically and economically is obligated to make payment. As such, these arrangements have all the earmarks of a long-term State obligation. Be that as it may, however, the inescapable conclusion to be drawn from a reading of applicable precedent on this subject is that such arrangements do not constitute a legal debt of the State.

Despite plaintiffs' arguments to the contrary, we agree with Supreme Court that *Wein v. of City of New York* (36 NY2d 610, supra) is dispositive of this issue. That case involved creation of the Stabilization Reserve Corporation (hereinafter SRC), which was authorized, upon certification of the Mayor of the City of New York, to issue up to $520 million in bonds and to pay the proceeds to the City Comptroller to be used in the City's general fund. The SRC was the sole obligee on the bonds and debt service was to be payable solely out of the SRC capital reserve fund. Inasmuch as the SRC had no assets or independent source of income, however, moneys in the capital reserve fund were to come from City appropriations or, in the event of the City's default, the State. Although the City and the State earmarked funds for payment into the capital reserve fund, the Court of Appeals Specifically found that neither was legally obligated to make any appropriations to fund "the SRC debt and, as such, could not be held liable to bondholders in the event of default. Over a vigorous dissent, the majority reasoned that because there was no legal obligation owed by the City to bondholders, the obligation did not constitute debt within the meaning of NY Constitution, article VIII, §4.

Simply put, the lesson to be learned from *Wein v. City of New York* (supra) and cases construing it (see *Wein v. Levitt*, 42 NY2d 300; *Wein v. State of New York*, 39 NY2d 136; *New York State Coalition for Criminal Justice* v. *Coughlin*, 103 AD2d 40, affd on other grounds 64 NY2d 660; *Matter of Schulz* v. *State of New York*, 151 Misc 2d 594, mod 185 AD2d 596, appeal dismissed, lv denied 81 NY2d 336; *Burns v. Egan*, 129 Misc 2d 130, affd 117 AD2d 38, appeal dismissed 68 NY2d 806, lv denied 69 NY2d 602) is that in order to constitute debt within the meaning of the State and local finance articles of the NY Constitution, the State or locality must legally be obligated to the bondholders in the event of default. Here, as in *Wein v. State of New York* (supra), the State clearly has no legal liability either on the Thruway Authority's State highway and bridge bonds or the railway and aviation bonds. As noted above, both are expressly denominated to be obligations of the Thruway Authority and are backed up solely by Thruway Authority revenue streams, not by the full faith and credit of the State. This lack of affirmative legal obligation effectively distinguishes this case from *Newell v. People* (7 NY 1) and other cases cited by plaintiffs.

Finally, it is now clear that there is no constitutional violation attendant to the fact that the revenue streams backing up the Thruway Authority bonds derive from State appropriations. It is well established that the State can constitutionally give or lend money to assist a municipal or other public corporation in carrying out a public purpose (see, e.g., *Wein* v. *State of New York*, 39 NY2d 136, 140, supra).

All concur.

(1) Essentially, moral obligation debt is created when the State, through legislation, directs a public authority or other public corporation to issue bonds as a means of financing various public capital improvement projects and then, through outright gift or via a variety of long-term, nonrecourse agreements or capital leases, provides it with the requisite income to secure the bonds and make debt service payments thereon. Because the bonds are secured only by the revenue streams from the agreements or leases and not by the full faith and credit of the State, and under the terms of the leases or agreements the State has no legal obligation to appropriate money to make Payments, it has no legal liability to the bondholders and effectively divests itself of all but a moral obligation to appropriate the moneys necessary to fund and secure the bonds.

(2) CHIPS, which began in 1982, apportions bond proceeds to municipalities to fund capital projects and operating expenses. These apportionments are made up to a year in advance so municipalities, which initially pay the non-Federal cost of the projects, can plan their fiscal affairs in anticipation of reimbursement.

(3) The Marchiselli program provides localities with State funds to complement Federal matching grants for local capital infrastructure. In this program, like CHIPS, municipalities undertake the non-Federal cost of financing the projects in expectation of reimbursement from the State of all but about 5 percent of the total cost.

DECISIONS

Second Judicial Department

"GIFT OR LOAN" REFERENCES — SEE SEPARATE FILE

JJW
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CASES:

WEIN V. STATE OF N.Y. — 39 N.Y. 2d 136 (MARCH 23, 1976)

WEIN V. CITY OF N.Y. — 36 N.Y. 2d 610 (MAY 27, 1975)

WEIN V. CAREY — 41 N.Y. 2d 498 (MARCH 31, 1977)

STATE OF N.Y. V. WESTCHESTER COUNTY NATIONAL BANK — 231 N.Y. 465 (1921)

BERNARD COMERESKI V. CITY OF ELMIRA — 308 N.Y. 248 (1955)

UNION FREE SCHOOL DISTRICT V. TOWN OF RYE — 280 N.Y. 469 (1939)

ARTICLES:

26 AMERICAN UNIVERSITY L.R. 657 (1977)

111 UNIV. OF PENNSYLVANIA L.R. 265 (1963)

41 UNIV. OF COLORADO L.R. 135 (1969)

stock ownership interests to participating employees, an objective which may differ from that of the existing plan. Although retirement benefits may be provided more adequately through an ESOP than through another plan, these benefits will be only a result of, not the primary purpose for, the acquisition of employer stock under an ESOP.

To the extent that the sponsoring corporation desires to build stock ownership interests into employees through an ESOP, it may be totally appropriate to utilize existing plan assets to purchase employer stock. But caution must be exercised with respect to such a transaction in light of the fiduciary responsibilities imposed by ERISA. In a proper situation, plan participants may very well benefit from the change in the character of plan assets from a diversified portfolio to one which is invested primarily in employer stock. But where the interests of participants are not protected in the conversion (such as when the sponsoring company is in financial difficulty), the liabilities and remedies under ERISA may result in adverse consequences, both under the law and with respect to employee relations.

ADDENDUM

On September 2, 1977, the IRS and Department of Labor published their final ESOP regulations in the *Federal Register*, 42 Fed. Reg. 44,384 (1977) (to be codified in 26 C.F.R. § 54.4975 and 29 C.F.R §§ 2550.407-.408, respectively).

COMMENTS

STATE CONSTITUTIONAL PROHIBITIONS AGAINST THE LENDING OF STATE CREDIT TO MUNICIPAL CORPORATIONS

INTRODUCTION

On September 5, 1975, Governor Hugh Carey of New York formally called the New York State Legislature into emergency session for the purpose of providing desperately needed financial assistance to the City of New York.[1] By this time, some two months after the adjournment of the 198th regular legislative session, New York City

1. Governor Carey stated that:

The City of New York is on the brink of financial collapse, an unparalleled disaster looms over it.

New York City is unable to raise the funds it needs to pay debts as they become due and to insure that essential municipal services continue uninterrupted. The doors to the capital markets have been closed to it directly, and now also indirectly. New York City's financial failure threatens to paralyze vital governmental [illegible] endangering the health, safety, and welfare of the more than 12 million people in the city and region. If not quickly and decisively contained and resolved, this crisis portends a severe financial risk for New York State and perhaps for the nation as well. . . .

Message of Necessity from the Governor to the State Legislature (Sept. 5, 1975), N.Y. Times, Sept. 6, 1975, at 8, col. 6. *See* N.Y. CONST. art. IV, § 3 (power to call emergency sessions); art. IX, § 2(b)(2) (purpose of message of necessity).

City officials appealed to the state legislature for massive amounts of financial aid when it became apparent that they did not possess the powers and resources necessary to respond adequately to the major economic, social, and political problems which the city confronted. *See generally* F. FERRETTI, THE YEAR THE BIG APPLE WENT BUST (1976).

Like most American cities, New York City is a municipal corporation [illegible] by the state legislature and has only those powers and privileges which the legislature confers upon it from time to time. *In re* Water Front of Upper New York Bay, 246 N.Y. 1, 157 N.E. 911 (1927), *cert. denied*, 276 U.S. 626 (1928). As a municipal corporation, [illegible] do only that which the state allows. *See* Atkin v. Kansas, 191 U.S. 207 (1903). [illegible] with the crisis they faced, New York City officials had no other legal or [illegible] than to appeal to the state legislature for emergency powers and monetary resources.

Historically, the principle that the state legislature is the source of all [illegible] governmental power, known as the "delegation doctrine," was first [illegible] during the period from the 1850s through the 1870s. [illegible] People v. Mun[illegible] (1868); Dennis v. Maynard, 15 Ill. 477 (1854); Anderson v. Kerns Draining [illegible] 199 (1860); Davidson v. Otis, 24 Md. [illegible] (1871); People v. Shepard, 36 N.Y. 285 (1867); People v. Draper, 15 N.Y. 532 (1857) [illegible]

J. KENT, COMMENTARIES ON AMERICAN LAW 305 [illegible] (1858) [illegible] of municipal corporations, which exist [illegible] for public purposes [illegible]

was in the midst of the worst fiscal crisis in its history and appeared to be on the brink of defaulting on its outstanding obligations.[2]

towns, the legislature, under proper limitations, have [*sic*] a right to change, modify, enlarge, restrain, or destroy them. . . .") (emphasis in original). The classic statement of the "delegation doctrine," usually referred to as "Dillon's Rule," is:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable.

1 J. DILLON, MUNICIPAL CORPORATIONS, § 55, at 173 (2d ed. 1873) (emphasis in original). *See generally* Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions*, 62 VA. L. REV. 999 (1976) (framers' failure in early state constitutions to allocate governmental powers to local entities resulted in courts' construing municipal authority as having descended from the constitutional grant of powers to the state legislature).

2. Similar to other large cities, New York is heavily dependent upon borrowing to insure the adequate and efficient provision of services to its residents and commuters. The immediate budgetary crisis which prompted the emergency session of the state legislature resulted from the city's inability to borrow money through the issuance of bonds or notes in the tax-exempt municipal bond market. JOINT ECONOMIC COMM., 94TH CONG., 1ST SESS., NEW YORK CITY'S FINANCIAL CRISIS: AN EVALUATION OF ITS ECONOMIC IMPACT AND OF PROPOSED POLICY SOLUTIONS 3 (Comm. Print 1975). The city thus faced the prospect of imminent default in September, 1975, in the absence of dramatic new governmental action. MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK, ANNUAL REPORT 12 (1976) [hereinafter cited as MAC ANNUAL REPORT]. The long- and short-term debt required to finance various social services was so enormous that for several years New York City undertook the rather dubious accounting practice of "rolling over" its prior debts. Money was borrowed continually through the issuance of municipal bonds, primarily short-term bonds, at high rates of interest in order to repay previously borrowed money, thus swelling the short-term debt.

TABLE I

NEW YORK CITY BALANCE SHEET ITEMS
(Fiscal Years Ending June 30)

($ Millions)

	1970	1971	1972	1973	1974	1975	Change 1970-75
SHORT-TERM DEBT							
Budget Notes	–	308	161	308	308	–	–
Tax Anticipation Notes	170	206	232	265	317	380	+ 210
Revenue Anticipation Notes	537	1,096	1,180	887	1,798	2,560	+2,023
Bond Anticipation Notes (Including Notes for Limited Profit Housing)	468	587	688	957	909	1,570	+1,10[illegible]
Urban Renewal Notes	55	94	86	94	84	30	– 25
TOTAL SHORT-TERM	1,229	2,291	2,647	2,511	3,4[illegible]	4,54[illegible]	+3,311
LONG-TERM DEBT (Net of Sinking Fund Assets)	4,361	4,714	5,515	6,007	6,734	6,798	+2,437
GRAND TOTAL	5,590	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

In an effort to convince potential investors in City of New York Municipal Bonds and Municipal Assistance Corporation (MAC)[3] Bonds of the seriousness with which the state and city regarded this crisis, the legislature enacted comprehensive measures which had a major impact upon virtually every aspect of the governance and financing of the City of New York.[4] In so doing, the state assumed major re-

MAC ANNUAL REPORT at 8.

For further discussion of the causes of the economic and political problems which beset New York City, see F. FERRETTI, THE YEAR THE BIG APPLE WENT BUST (1976); JOINT ECONOMIC COMM., 94TH CONG., 1ST SESS., NEW YORK CITY'S FINANCIAL CRISIS: AN EVALUATION OF ITS ECONOMIC IMPACT AND OF PROPOSED POLICY SOLUTIONS (Comm. Print 1975); MAC ANNUAL REPORT, *supra*; Interview with Abraham Beame: Fianancing New York City, CHALLENGE, Sept./Oct., 1975, at 37; Newfield & DuBrul, *Banks to City: Drop Dead*, The Village Voice, Nov. 22, 1976, at 11; BUS. WEEK, Sept. 1, 1975, at 51; NEWSWEEK, Sept. 15, 1975, at 27, 31; N.Y. Times, Aug. 30, 1975, § 1, at 1, col. 6; *id.*, Sept. 28, 1975, § 4, at 14, col. 1; *id.*, Oct. 18, 1975, at 1, col. 4; T. Clark, Why Did New York Go Broke? And How Many Cities Will Follow? Eleven Wrong Answers and Eight Right Ones (Sept. 1976) (unpublished paper delivered at the American Bar Association National Institute on "Freedom from Fiscal Fiasco", Washington, D.C., Dec. 2-3, 1976).

3. The Municipal Assistance Corporation for the City of New York was established by the State of New York on June 10, 1975. Its two statutory purposes are to assist the city in providing essential services to its inhabitants without interruption, and to instill investor confidence in the debt obligations of the city. MAC ANNUAL REPORT, *supra* note 2, at 11. MAC was empowered to raise up to $3 billion in the public capital market through the sale of "moral obligation bonds" (bonds which are morally, but not legally, backed by the credit of the issuing instrumentality). N.Y. PUB. AUTH. LAW §§ 3001-3040 (McKinney Supp. Pamphlet 1970-75) (originally enacted as New York State Municipal Assistance Corporation Act of June 10, 1975, chs. 168-169, 1975 N.Y. LAWS (McKinney)). MAC was some $1 billion short of its goal at the commencement of the emergency session of the New York State Legislature, however, despite tax-free interest rates as high as 9.25%, "A" ratings from the municipal bond rating agencies, and presentations by MAC board members to bankers in Boston, Chicago, Dallas, Des Moines, Hartford, Houston, Los Angeles, Minneapolis, Philadelphia, San Francisco, and Seattle. MAC ANNUAL REPORT, *supra* note 2, at 11.

On the legal status of bonds which are not backed by the "full faith and credit" of the issuing government, *compare* Wein v. City of New York, 36 N.Y.2d 610, 331 N.E.2d 514, 370 N.Y.S.2d 550 (1975) (city cannot become indebted on moral obligation bonds issued by public corporations expressly created to aid city), Williamsburgh Sav. Bank v. State, 243 N.Y. 231, 153 N.E. 58 (1926) (holder of moral obligation bonds has a moral but not a legal claim enforceable against the issuing state); Town of Guilford v. Board of Supervisors, 13 N.Y. 143 (1855) (legislature can recognize nonlegal claims founded in equity and justice); *and* Griffith, *"Moral Obligation" Bonds: Illusion or Security?*, 8 URB. LAW. 54 (1976), *with* Address by Leon E. Wein, Professor of Law, Brooklyn Law School, to the City Club of New York (Mar. 7, 1975) *and* Quirk & Wein, *Twilight of N.Y. Municipal Bond: Equivocating Judiciary Blamed*, The Daily Bond Buyer, June 30, 1976, at 1, col. 2.

4. New York State Financial Emergency Act for the City of New York, 1975 N.Y. Laws, chs. 868-870 [hereinafter cited as Financial Emergency Act], 1975 N.Y. Laws, chs. 871-895 McKinney 1975 Extraordinary Sess. Special Pamphlet [illegible]

sponsibility for the financial direction of the city and committed its own funds, and possibly its credit, to save New York City from defaulting on its obligations and from probable bankruptcy.[5]

(1976); Comment, *The Limits of State Intervention in a Municipal Fiscal Crisis*, 4 FORDHAM URB. L.J. 545 (1976).

5. Despite these measures New York City nearly defaulted on the repayment of its bonded debt in October, 1975. N.Y. Times, Oct. 19, 1975, § 4, at 1, col. 1. Without federal assistance, city officials predicted that there would be a December default. *Id.* On December 9, 1975, President Ford reluctantly signed a law approving a $2.3 billion short-term loan to the city. New York City Seasonal Financing Act of 1975, Pub. L. No. 94-143, 89 Stat. 797 (codified at 31 U.S.C. §§ 1501-1510 (Supp. V 1975)). *See generally* 2 MOODY'S INVESTORS SERVICE, INC., THE APPRAISAL OF MUNICIPAL CREDIT RISK, ch. 8 (1975); Address by New York City Comptroller Harrison J. Goldin, "Municipal Bankruptcy: The Ultimate 'Fiscal Fiasco,' " American Bar Association National Institute on "Freedom from Fiscal Fiasco," Washington, D.C. (Dec. 2, 1976).

The Financial Emergency Act, *supra* note 4, also includes a section entitled "Local Obligations: Financial Emergency; Condition Precedent to Claims; Stay of Claims; Repayment Plan for Municipality; Termination of Stay." *Id.*, ch. 868, § 19, (amending N.Y. LOCAL FIN. LAW art. II, tit. 6 by adding § 85 (McKinney 1976-77)). Usually called the "prebankruptcy statute," the law outlines the procedure for a city which actually does default on its obligations: 1) notice of suit by creditors; 2) stay of such actions while the city develops a plan to cure default; 3) judicial approval of such a plan; and 4) filing a petition in bankruptcy under any federal law "for the composition or adjustment of municipal indebtedness." In 1976, Chapter IX of the Bankruptcy Act, 11 U.S.C. § 401 (1970), was revised to provide such a federal law.

Revised Chapter IX provides that "essential services" be maintained in a major city in a state of bankruptcy, but does not explain what these services are. Address by New York City Comptroller Harrison J. Goldin, "Municipal Bankruptcy: The Ultimate 'Fiscal Fiasco,' " American Bar Association National Institute on "Freedom from Fiscal Fiasco," at 4, Washington, D.C. (Dec. 2, 1976). There is considerable doubt whether education, courts, jails, mass transit, vocational and employment programs, and social services would be considered "essential services." *Id.* at 4-5. Massive litigation to determine the status and priorities of these services would undoubtedly follow a formal declaration of bankruptcy.

New York City is unique in that it bears certain fiscal responsibilities which are not shared by other major American cities. Because the city is the exclusive local government for taxing and spending, it provides many public services which in other cities are provided by local governments other than the municipalities themselves. MAC ANNUAL REPORT, *supra* note 2, at 7. The city historically has provided some public services which are not provided by most local governments in this country, notably extensive hospital and higher education systems. Unlike most states, New York State law requires the City of New York to fund locally a relatively large percentage of certain other costly services, principally welfare and the court system. In fact, about one-fifth of the city's local tax proceeds is applied to hospitals, higher education, welfare, and courts. *Id.* Were New York City to declare bankruptcy it would lose its real estate taxing authority, used to pay debt service on funded debts. Address by Comptroller Goldin, *supra*, at 6. This would jeopardize some 13% of the city's tax levy. *Id.*

For materials dealing with revised Chapter IX *see* King, *Municipal Insolvency: Chapter IX, Old and New; Chapter IX Rules*, 50 AM. BANKR. L.J. 55 (1976); Klein, *New Chapter IX of the Bankruptcy Act*, 22 PRAC. LAW. 75 (1976); Note, *The Recent Revision of the Federal Municipal Bankruptcy Statute: A Potential Resource for Insolvent Cities?*, 13 HARV. J. LEGIS. 549 (1976); Note, *Municipal Bankruptcy, the* [illegible]

Upon declaring that a state of financial emergency existed within the city,[6] the legislature took a number of steps to deal with the crisis. It created the New York State Emergency Financial Control Board to assure that the New York City budget would be balanced by fiscal 1977-78;[7] instituted a wage freeze upon city employees;[8] authorized the State Comptroller to buy MAC bonds with the monies of seven pension funds,[9] imposed a three-year moratorium on actions to enforce the city's outstanding short-term obligations, *i.e.*, tax anticipation notes, bond anticipation notes, revenue anticipation notes, budget notes, and urban renewal notes,[10] but only with respect to noteholders who declined to exchange their notes for an equivalent

Labor Contracts and Municipal Bankruptcy, 85 YALE L.J. 957 (1976); Note, *Reform of Creditor Participation Procedures in Municipal Bankruptcy*, 85 YALE L.J. 423 (1976); M. Cook, Revision of Chapter IX of the Bankruptcy Act: "Adjustment of Debts of Political Subdivisions and Political Agencies and Instrumentalities"; R. Laufer, State Laws Involving Adjustment of Municipal Debt: Provisions, Constitutionality and Relationship to Federal Municipal Bankruptcy Law (unpublished papers delivered at the American Bar Association National Institute on "Freedom from Fiscal Fiasco"; Washington, D.C. (Dec. 2-3, 1976).

Prior to assuming office, President Carter announced in a meeting with Governor Hugh Carey, Mayor Abraham Beame, and Treasury Secretary W. Michael Blumenthal that bankruptcy was not a viable alternative for New York. Wash. Post, Dec. 29, 1976, § A, at 4, col. 6.

6. Financial Emergency Act, *supra* note 4, at ch. 868, § 2-a. The significance of a state declaration of financial emergency was discussed by the Supreme Court in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). The declaration of the existence of a financial emergency "cannot be regarded as a subterfuge or as lacking in adequate basis." *Id.* at 444. Nor does an emergency increase the constitutional powers possessed by a state nor diminish their restrictions. *Id.* at 425. Rather, the legislative finding of an emergency furnishes the occasion for the state to exercise power which, while already possessed, is rarely employed. *Id.* at 426.

7. Financial control of the city is to be exercised by the Governor, as Chairman of the Board, the State Comptroller, the Mayor, the City Comptroller, and three members appointed by the Governor. Financial Emergency Act, *supra* note 4, at §§ 5-6. The city must submit for the Board's approval a financial plan which will balance the New York City budget. Furthermore, all major city expenditures as well as contracts entered into by the city or by any organization receiving funds from the city, must be consistent with the financial plan. *Id.* §§ 7-9. Thus, the Financial Emergency Act subjects various fiscal functions traditionally within the city's home rule powers to direct oversight by state agencies.

8. *Id.* at § 10. For a discussion of issues raised by this action, see Comment, *The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause*, 125 U. PA. L. REV. 167 (1976).

9. Financial Emergency Act, *supra* note 4, at ch. 870, § 14. This provision was declared violative of N.Y. CONST. art. V, § 7 (pension benefits shall neither be diminished nor impaired) in Sgaglione v. Levitt, 37 N.Y.2d 507, 337 N.E.2d 592, 375 N.Y.S.2d 79 (1975).

10. New York State Emergency Moratorium Act for the City of New York, 1975 N.Y. Laws ch. 874 *as amended by* ch. 875 McKinney 1975 Extraordinary Sess. Special [illegible]

principal amount of long-term MAC bonds;[11] and appropriated from a local assistance fund $250 million to the City of New York and $500 million to the Municipal Assistance Corporation.[12]

In exchange for these appropriations, the state received from the city and MAC a total of $750 million in securities.[13] Anticipating the interest that would accrue on these notes, as well as the revenue to be derived from the eventual sale of the city and MAC bonds, it then issued $755 million of its own securities.[14] The state therefore secured its own bonds in part with the revenues it hoped to derive from the future sale of municipal securities, the same securities whose nonmarketability served in the first instance to elevate New York City's economic problems to the level of a "crisis."[15]

Shortly after this arrangement was finalized it was challenged in court. In *Wein v. State*[16] the issue arose whether the appropriation of $750 million to the City of New York and MAC was a grant of cash, as claimed by the state,[17] or a loan of state credit to a municipal corporation and a public corporation[18] in order to enhance the marketability

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11. *Id.* ch. 874. The moratorium was declared violative of N.Y. CONST. art. VIII, § 2 (city prohibited from contracting any indebtedness unless it pledges its "faith and credit" for the payment of the principal and interest of the indebtedness), in Flushing Nat'l Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976). *See* Will, *New York: Defaulting on the Constitution*, Wash. Post, Nov. 25, 1976, § A, at 27, col. 4. *But cf.* Ropico, Inc. v. City of New York, 415 F. Supp. 577 (S.D.N.Y. 1976) (Moratorium Act upheld against challenges under federal law that it impaired the obligation of contracts in violation of article I, Section 10 of the U.S. Constitution, deprived noteholders of their property without due process in violation of the fourteenth amendment, denied noteholders access to the judiciary to enforce their claims, and violated section 83(i) of the Federal Bankruptcy Act).

12. Financial Emergency Act, ch. 868, §§ 22, 23.

13. *Id.* These notes were in turn secured by mortgages issued and held by the city as well as by future cash payments appropriated by the state to the city. *Id.*

14. *Id. See also* NEW YORK STATE COMPTROLLER, OFFICIAL STATEMENT: BOND ANTICIPATION NOTES, TAX ANTICIPATION NOTES AND REVENUE ANTICIPATION NOTES *and* Annex I to Official Statement, PROPOSED OPINION OF NEW YORK STATE ATTORNEY GENERAL LOUIS J. LEFKOWITZ (Sept. 15, 1975) (concerning the legal validity of the note sale).

15. *See* notes 2, 3 *supra*.

16. 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).

17. Brief for Defendant-Respondent at 11, Wein v. State, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).

18. A public corporation, as distinguished from a private corporation, is one created for political purposes only. In the administration of civil government, its political powers are to be exercised for purposes connected with the public good. 1 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 2.03, at 130 (3d ed. 1971). A public corporation is either municipal or quasi-municipal. *Id.* §§ 2.03-2.30(a). The City of New York, as a municipal corporation, and the Municipal Assistance Corporation, as a quasi-municipal corporation, are both public corporations.

of their seemingly worthless securities. The Constitution of the State of New York makes a clear distinction between a gift or loan of money to a public corporation and a gift or loan of credit: the former is constitutional, the latter, which refers to the use of the state's credit by an entity other than the state, is not.[19] The pertinent provision dictates in part that "[t]he *money* of the state shall not be given or loaned to or in aid of any . . . *private* undertaking; nor shall the *credit* of the state be given or loaned to or in aid of any . . . *public* or *private* corporation . . . or *private* undertaking . . . ."[20]

The New York Court of Appeals upheld the constitutionality of the state appropriation against a taxpayer's challenge.[21] Had the appropriation been found unconstitutional, however, disastrous economic consequences would have resulted from invalidating one of the most critical elements of the complex municipal aid plan which is detailed in the Appendix to this comment. Furthermore, the vast majority of other American cities considered to be in fiscal danger[22] are situated

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19. *In re* City of New York, 72 Misc. 2d 535, 538-39, 339 N.Y.S.2d 292, 297 (Sup. Ct. 1972); Union Free School Dist. v. Town of Rye, 280 N.Y. 469, 474, 21 N.E.2d 681, 683 (1939).

20. N.Y. CONST. art. VII, § 8(1) (emphasis added).

21. Wein v. State, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).

22. One indicator of potential fiscal crisis is the financial rating of general obligation bonds which are secured by the taxing power of the issuer. The quality of the analysis behind the ratings is often undistinguished. *E.g.*, Moody and Standard & Poor both upgraded New York City's bond rating at precisely the time that the city began to accelerate its accumulation of hidden budget deficits. Petersen, *Finance*, in THE URBAN PREDICAMENT 66-67 (W. Gorham & N. Glazer eds. 1976). The ratings, however, do tend to serve as accurate confirmations of fiscal trouble.

In 1976, the more populous cities whose general obligation bonds were rated lowest by Moody, and their ratings, were (with lowest rated first): New York City, N.Y. (*Caa*); Newark, N.J. (*Baa*); Detroit, Mich. (*Baa*); Philadelphia, Pa. (*Baa*); Buffalo, N.Y. (*Baa*); Cleveland, Ohio (A); St. Louis, Mo. (A); Boston, Mass. (A); Baltimore, Md. (A-1); New Orleans, La. (A-1); Jacksonville, Fla. (A-1); and Pittsburgh, Pa. (A-1). MOODY'S MUNICIPAL AND GOVERNMENT MANUAL, as updated by periodic releases (1976). Moody's Investors Service reports on the general obligation bond rating of most American cities on a scale from *Aaa* (a gilt-edged security) to C (an extremely poor risk). An A rating, within the range of most of the above cities' bonds, indicates "upper medium grade obligations. Factors giving security to principal and interest are considered adequate, but elements may be present which suggest a susceptibility to impairment sometime in the future." MOODY'S INVESTORS SERVICE, PITFALLS IN ISSUING MUNICIPAL BONDS 13 (1974).

Although many northeastern cities, such as Buffalo, Trenton, and Paterson, remain technically solvent and able to market their securities, underlying forces of [illegible] often outside their control threaten their existence. Buck, *More Than One City in the Region Needs Propping Up*, N.Y. Times, Oct. 24, 1976, § E, at 5, col. 3. For extended discussions of the "urban crisis," *see generally* ADVISORY COMMISSION ON INTERGOVERNMENTAL [illegible]

in states with similar constitutional prohibitions against the lending of state credit to municipalities.[23] Thus, the credit lending issue confronted by the State of New York is one that will probably face state legislatures across the country as they devise aid packages for their financially troubled cities.

This comment will discuss the history and theory behind state constitutional prohibitions against lending state credit to municipal corporations and will suggest possible judicial responses to the problems that are raised by these provisions. *Wein v. State*[24] will be evaluated in light of the analysis presented, and legislative repeal of the prohibitions will also be discussed. Throughout, the implicit biases of this study are that metropolitan areas within the United States ought to receive massive infusions of state assistance and that they are denied this assistance in part because of the constitutional credit lending provisions.

I. HISTORICAL BACKGROUND OF THE PROHIBITIONS

Constitutional limitations on the ability of state legislatures to lend credit to their municipal corporations have been referred to as anachronistic because they create serious difficulties in marketing bonds for many financially burdened smaller units of local government.[25] Despite this characterization, forty-four states generally forbid loans of credit to or on behalf of any public or private corporation, including municipal corporations.[26] Massachusetts maintains a similar prohibi-

(1975); J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); R. LINEBERRY & I. SHARKANSKY, URBAN POLITICS AND PUBLIC POLICY (1971); Z. MILLER, THE URBANIZATION OF MODERN AMERICA (1973); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968); D. Yates, Goals and Strategies for a National Urban Growth Policy, Institution for Social and Policy Studies, Yale University (1973) (working paper of the Center for the Study of the City and its Environment). *But cf.* P. PORTER, THE RECOVERY OF AMERICAN CITIES (1976) (events favor the ability of cities to attain financial independence and to compete with suburbs as attractive places of residence).

23. It should be noted that with the exception of Boston, all of the financially troubled cities listed in note 22, *supra*, are located in states with constitutional provisions forbidding loans of state credit to municipal or other public corporations. *See* notes 26, 27 & accompanying text *infra*. Massachusetts officials have made it clear, however, that they do not intend to assist Boston with its fiscal problems. Boston Globe, Nov. 29, 1976, § 1, at 1, col. 5.

24. 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).

25. *See* J. FORDHAM, LOCAL GOVERNMENT LAW 61 (1975); Minge, *Guaranteeing Municipal Bonds*, 1974 WIS. L. REV. 89.

26. ALA. CONST. amend. XXVI; ALAS. CONST. art. IX, § 6 (public credit may not be used except for a public purpose); ARIZ. CONST. art. IX, § 7; ARK. CONST. art. 16, § 1; [illegible]

tion only on loans of state credit to private corporations.[27]

The economic and legislative history of various state constitutional credit lending prohibitions indicates that their original purpose was to limit state indebtedness and to restrict legislative involvement in private financial ventures. During the nineteenth century, as the United States was rapidly expanding westward, an adjacent railroad was often vital to a growing community's economic health.[28] As a result, state and local governments offered rather freely many of their financial and political resources to railroads as inducements for specific routes and spurs.[29] Judicial acquiescence to these governmental schemes was prevalent. For example, a fairly substantial body of case law developed in the nineteenth century which held that constitutional provisions prohibiting states from taking stock in a corporation, lending their credit to a corporation, and incurring indebtedness in aid of a corporation did not restrain state legislatures from empowering public corporations, including cities or counties, to provide such aid.[30] Thus, prior to the widespread adoption of the credit lending

CONST. art. VII, § 10; GA. CONST. art. VII, § 2-5604; HAW. CONST. art. VI, § 2 (use of state credit is limited to public purpose); IDAHO CONST. art. VIII, § 2; ILL. CONST. art. VIII, § 1(a) (public credit shall be used only for public purposes); IND. CONST. art. II, § 12; IOWA CONST. art. VII, § 1; KY. CONST. § 177; LA. CONST. art. VII, § 14A (cf. § 14(B) (allows pledge of public credit for public purposes with respect to the issuance of bonds or other evidences of indebtedness to meet public obligations)); ME. CONST. art. IX, § 14; MD. CONST. art. III, § 34; MICH. CONST. art. IX, § 18; MINN. CONST. art. XI, § 2; MISS. CONST. art. XIV, § 258; MO. CONST. art. III, §§ 38(a) (credit may be loaned in cases of "public calamity"), 39(1); NEB. CONST. art. XIII, § 3; NEV. CONST. art. VIII, §9; N.J. CONST. art. VIII, § 2 ¶ 1; N.M. CONST. art. IX, § 14; N.Y. CONST. art. VII, § 8; N.C. CONST. art. V, § 3(2); N.D. CONST. § 185 (credit may be loaned for reasonable support of poor); OHIO CONST. art. VIII, § 4; OKLA. CONST. art. X, § 15; ORE. CONST. art. XI, § 7; PA. CONST. art. VIII, § 8; R.I. CONST. art. XXXI, § 1 (credit may be loaned with express consent of people); S.C. CONST. art. X, § 6; S.D. CONST. art. XIII, § 1 (delineates exceptions to an implied general credit lending proscription); TENN. CONST. art. II, § 31; TEX. CONST. art. III, § 50; UTAH CONST. art. VI, § 31; VA. CONST. art. X, § 10; WASH. CONST. art. VIII, § 5, art. XII, § 9; W. VA. CONST. art. X, § 6; WIS. CONST. art. VIII, § 3; WYO. CONST. art. XVI, § 6.

27. MASS. CONST. art. LXII, § 1 (forbidding loans of state credit to any individual, private association, or privately owned and managed corporation).

28. *See generally* L. BENSON, MERCHANTS, FARMERS & RAILROADS (1969); C. GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 (1960).

29. Comment, *State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise—A Suggested Analysis*, 41 U. COLO. L. REV. 135, 136 (1969).

30. *E.g.*, Taylor v. Ypsilanti, 105 U.S. 60 (1881); Cotten v. County Comm'rs of Leon County, 6 Fla. 610 (1856); Prettyman v. Supervisors of Tazewell County, 19 Ill. 406 (1858); Aurora v. West, 9 Ind. 74 (1857); Dubuque County v. Dubuque and Pacific R.R., 4 Greene 2 (Iowa 1853); Commissioners of Leavenworth County v. Miller, 7 Kan. 298 [illegible]

prohibitions, public deference to the railroads had become virtually unlimited.[31]

Governmental assistance for state internal improvements such as railroads and canals usually took the form of security or stock purchases[32] or cosignatures on bonds issued by railroads.[33] The completion of the Erie Canal in 1825 served as a successful precedent for such assistance[34] and led New York and the rest of the nation into a wave of publicly funded, but privately built, internal improvement construction.[35]

Many of these highly speculative private ventures failed and left various governmental units, and therefore taxpayers, either holding worthless stock certificates or liable for large, inadequately secured debts.[36] As a result of the Depression of 1837, nine states which had acted as loan guarantors defaulted on their debts.[37] In an effort to reassert popular control over legislative power to create state indebtedness, reformers enacted various constitutional prohibitions against the

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Crawford County, 20 Ohio 609 (1851). *See generally* 2 B. ELLIOT & W. ELLIOT LAW OF RAILROADS § 1001 (3d ed. 1897).

31. The experience of New York State, historically a leader in industrial development, is unique in this respect. In 1858, the state legislature received a petition requesting that a new constitutional convention be called. The citizen-petitioners, claiming that they only would be formalizing existing political relationships and thereby be saving tax dollars, urged that the legislative and executive branches of government be abolished and that those powers accrue in the hands of the President, Vice-President, and Board of Directors of the New York Central Railroad. Submitted to the voters in referendum, the measure was narrowly defeated. 2 C. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 233-34 (1906); *see also* Quirk & Wein, *A Short Constitutional History of Entities Commonly Known as Authorities*, 56 CORNELL L. REV. 521 (1971). This article, co-authored by the plaintiff in *Wein v. State*, advances the thesis that the rise of state constitutional government is correlative with a growing public desire to limit legislative power to create indebtedness, and that the usual legislative response has been to attempt to subvert these constitutional limitations.

32. *See, e.g.*, Colorado Cent. R.R. v. Lea, 5 Colo. 192 (1879) (attempted subscription by county to railroad stock held unconstitutional).

33. One member of the 1867 Constitutional Convention of New York stated that because of this practice "in very many instances the State lost the entire amount of [its] investment." 3 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1867, at 1844. *See also* 2 C. LINCOLN, *supra* note 31, at 73-101.

34. A. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 5 (1963).

35. H. ADAMS, PUBLIC DEBTS 329-31 (1893); Quirk & Wein, *supra* note 31, at 526.

36. Comment, *State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise—A Suggested Analysis*, 41 U. COLO. L. REV. 135, 136 (1969).

37. Mississippi and Florida defaulted first in 1841, followed shortly by Arkansas and Indiana. Illinois, Michigan, Maryland, Pennsylvania, and Louisiana defaulted in 1842, bringing the total of defaulting states to nine. A. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT [illegible]

lending of credit by a state or any of its political subdivisions to private corporations.[38]

In 1842 Rhode Island became the first state to expressly limit its borrowing power by adding a debt restriction provision to its constitution.[39] Other forerunners of the modern credit lending clauses appeared in the New Jersey Constitution of 1844,[40] the New York Constitution of 1846,[41] and an 1848 amendment to the Maine Constitution.[42] In the same year as Maine's constitutional amendment, Wisconsin became the first state to constitutionally prohibit the loan of its credit to municipal as well as other corporations.[43] Kentucky adopted a similar provision in 1850.[44]

By 1873, following a period of renewed interest in internal improvements after the Civil War,[45] local indebtedness reached crisis proportions[46] and over the next several decades prompted a new wave of state constitutional provisions limiting the ability of states to incur indebtedness.[47] These provisions can be classified into four general categories: prohibitions on public debt in excess of a stated amount or a stated percentage of the total value of taxable property within a local unit; restrictions on the purposes for which public funds could be expended or for which taxes could be levied and debts incurred; restrictive procedures for incurring debt; and credit lending clauses which specified the types of instrumentalities through which public expenditures could be made.[48]

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38. For a concise history of prohibitions against the extension of New York State's credit from the colonial period to the present, see Brief for Plaintiff-Appellant at 16-27, Wein v. State, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).

39. R.I. CONST. of 1842 art. IV, § 13 (annulled 1951) (legislature cannot, without express consent of people, incur state debts to an amount exceeding $50,000 or pledge the faith of the state for the payment of obligations of others).

40. N.J. CONST. of 1844 art. IV, § 6 (1947).

41. N.Y. CONST. of 1846 art. VII, § 9 (1895).

42. ME. CONST. of 1820, amend. VI (1848).

43. WIS. CONST. art. VIII, § 3.

44. KY. CONST. of 1850 art. II, § 33 (1891).

45. J. HOLLANDER, THE CINCINNATI SOUTHERN RAILWAY 15-18 (1894).

46. H. SECRIST, AN ECONOMIC ANALYSIS OF THE CONSTITUTIONAL RESTRICTIONS UPON PUBLIC INDEBTEDNESS IN THE UNITED STATES 55-56 (1914).

47. *Id.* at 59-60.

48. Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 619, 620-21 (1959).

The desirability of debt limitations has been questioned on the ground that they provide a false sense of security for bondholders and taxpayers. It is argued that relatively extensive debt limitations did not prevent governmental units from defaulting on their bonds during the 1930's. *See* J. ZIMMERMAN, STATE AND LOCAL GOVERNMENT [illegible]

There were few new developments relating to any of these classifications until the Great Depression of the 1930's revealed the frail financial underpinnings of local governments across the United States.[49] Land values, which form the basis for municipal taxation,[50] declined precipitously.[51] Using the prohibitions against lending credit to municipal and other public corporations, states hoped to avoid risking their fiscal solvency through credit extensions to their economically weaker political subdivisions.[52] By 1977, only Connecticut, Kansas,

49. The extent of the economic havoc caused by the Depression upon municipal corporations can be determined by the following chart, which records the number of defaults by these units of local government from 1900 through 1969:

TABLE II

1900–09	1910–19	1920–29	1930–39	1940–49	1950–59	1960–69
51	17	39	1434	31	31	114

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION 10 (1973). Among the cities to default during the 1930's were Fall River, Mass.; Detroit, Mich.; Asheville, N.C.; Jackson, Mich.; Fort Lee, N.J.; Akron, Ohio; Grand Rapids, Mich.; and Asbury Park, N.J. *Id.* at 17-24.

50. R. LINEBERRY & I. SHARKANSKY, URBAN POLITICS AND PUBLIC POLICY 45 (1971).

51. Z. MILLER, THE URBANIZATION OF MODERN AMERICA 160 (1973).

52. This reasoning was expressed by the 1938 New York State Constitutional Convention's Committee on State Finances and Revenues, which reported that with regard to the proposed credit lending prohibition (enacted as N.Y. CONST. art. VII, § 8):

> [C]ustom has long established that the word "corporation" as used in connection with the gifts or loan of credit has meant all corporations, of a governmental as well as private character. This was the position taken by the Governor in his annual message to the Legislature on January 6, 1937. To remove any doubt which may exist and to make the existing language conform to such meaning, the committee has in Section 1 of Article VII inserted before the words "association or corporation" the words "public or private," which adjectives qualify both nouns.
>
> But, even were this not the correct interpretation of the existing language, the committee believes that this is the limitation which should prevail. 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. One or two such instances might do no harm but a general use of the State credit in this manner would dissipate the State's credit and demolish the strongest foundation of our State's financial structure. The committee feels strongly that the State's credit should be reserved for the use of the State only, with only such exceptions as may be specifically set forth in the Constitution.

Report of the Committee on State Finances and Revenues, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, App. 5, Doc. 5, at 5-6 (1938).

Massachusetts, Montana, New Hampshire and Vermont lacked constitutional provisions proscribing guarantees of municipal corporate indebtedness.[53]

State constitutional provisions which restricted the creation of debt were intended to safeguard public money, to prevent the making of improvident investments, and to keep the public debt from imposing too great a burden upon taxpayers.[54] Underlying the prohibitions originally was the clear assumption that subsidizing private, profit-making corporations was an improper governmental activity,[55] but application of the prohibitions to public corporations often was intended also. As the next section discusses, however, the prohibitions should not be interpreted as absolute proscriptions against all legislative appropriations for public purposes which might include credit loans.[56]

II. THE PUBLIC-PURPOSE DOCTRINE

A. Sharpless v. Mayor of Philadelphia *and Its Progeny*

The public-purpose doctrine governs most state expenditures, including loans of state credit.[57] First enunciated in 1853 in *Sharpless v.*

53. *See* note 26 & accompanying text *supra*.

54. *See* Pressman v. Mayor of Baltimore, 200 Md. 107, 113, 88 A.2d 471, 473 (Md. Ct. App. 1952) (street signs and block number plates proposed to be installed by the city were not traffic control signs and signals within the statute and ordinance which authorized indebtedness for that purpose).

55. H. SECRIST, AN ECONOMIC ANALYSIS OF THE CONSTITUTIONAL RESTRICTIONS UPON PUBLIC INDEBTEDNESS IN THE UNITED STATES 69 (1914).

56. For example, some courts have held that a state may lend its credit for public purposes if approved in a referendum. *E.g.*, Hinton v. Lacy, 193 N.C. 496, 137 S.E. 669 (1927) (bond issue to raise money for World War I veterans); Opinion to the Governor, 101 R.I. 329, 223 A.2d 76 (1966) (mortgage loans for recreational project).

57. The credit provisions are subordinate to the public-purpose doctrine, which is directed to all exercises of governmental power, not just expenditures. 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 10.31 at 817 (3d ed. 1970). Unlike other states, Arizona and Nebraska derive the public-purpose doctrine from the credit clause. City of Phoenix v. Michael, 61 Ariz. 238, 148 P.2d 353 (1944); State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).

For background discussion of the public-purpose doctrine, see, e.g., Abbey, *Municipal Industrial Development Bonds*, 19 VAND. L. REV. 25 (1965); McAllister, *Public Purpose in Taxation*, 18 CAL. L. REV. 137 (1930); Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265 (1963); Virtue, *The Public Use of Private Capital: A Discussion of Problems Related to Municipal Bond Financing*, 35 VA. L. REV. 285 (1949); Note, *Incentives to Industrial Relocation: The Municipal Industrial Bond Plans*, 66 HARV. L. REV. 898 (1953); Note, *State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations*, 108 U. PA. L. REV. 95 (1959); Note, *The "Public Purpose" of Municipal Financing for Industrial Development*, 70 YALE L.J. 789 (1961).

Mayor of Philadelphia,[58] the doctrine holds that the state treasury may be utilized only for public purposes.[59] It thus reflects the democratic concern that if public funds are to be risked, the risk must flow from public rather than private decisions.[60] In *Sharpless*, the Pennsylvania Supreme Court defined taxation as "a mode of raising revenue for *public* purposes,"[61] and stated that the taxation power granted the legislature by the state constitution did not include the power to raise funds for private purposes by what purports to be taxation.[62] This reasoning typifies the reaction of state courts to the same legislative excesses which prompted the simultaneous enactment of constitutional restraints on the creation of debt. Beginning with *Sharpless*, the public-purpose doctrine evolved as a limitation of constitutional dimensions on the powers to tax, to incur debt on the security of the taxing authority, and to spend funds derived from taxation.[63]

The public-purpose doctrine found support in several state supreme court decisions following the *Sharpless* case. In 1870, the Michigan Supreme Court ruled that taxation must be for a public purpose, must be exercised according to some rule of apportionment throughout the state, and must be based on a similar local scheme if meant to affect a municipal subdivision.[64] The court reasoned that public purpose was not to be measured by the urgency of the public need to which it was addressed nor to the public benefit to follow. Rather, it was a term of art which designated certain endeavors to be public and, by implication, other endeavors to be private.[65] Faced

58. 21 Pa. 147 (1853) (state legislative authorization of a city to subscribe to railroad stock held constitutional).

59. *Id.* at 169. The test of a public purpose should be whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit. Opinion of the Justices, 337 Mass. 777, 781, 150 N.E.2d 693, 696 (1958).

60. The court probably drew upon the rule traditionally applied in eminent domain cases that private property could be appropriated only for public purposes. *See, e.g.*, *In re* John & Cherry-Streets, 19 Wend. 659, 676-77 (N.Y. Sup. Ct. 1839); Varick v. Smith, 5 Paige Ch. 137, 143 (N.Y. Ch. 1835). *See also* Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 618, 622-23, 640-42 (1959).

61. 21 Pa. at 169 (emphasis in original).

62. *Id.* at 168-69.

63. The doctrine is also applicable to all appropriations or expenditures of public money by municipalities. 15 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 39.19 (3d ed. 1970).

64. People *ex rel.* Detroit & Howell R.R. v. Township Bd. of Salem, 20 Mich. 452, 473-77 (1870) (township tax on behalf of railroad held unconstitutional); *accord*, Weismer v. Village of Douglas, 64 N.Y. 91 (1876).

65. 20 Mich. at 475.

with a similar situation that same year, the Wisconsin Supreme Court used comparable reasoning to deny a county's attempt to aid a railroad.[66] As the doctrine developed, so did the emphasis upon the public nature to be served by the expenditure in question.

In 1872, a tremendous fire in the city of Boston caused vast property damage and tremendous disruption in the state's center of government, commerce, and culture. In response, the Massachusetts legislature passed a bill which authorized the city to issue bonds and lend the proceeds to the landowners whose buildings had been destroyed in the fire. Despite the seemingly overwhelming public purpose of restoring Boston to its previous condition, the Supreme Judicial Court of Massachusetts held the act to be unconstitutional because it violated the public-purpose doctrine.[67] Even though the primary object of the statute was not to benefit private persons[68] but to restore and increase the taxable property and resources of the state,[69] the court declared that "[t]he expenditure authorized by [the] statute [is] for private and not for public objects, in a legal sense."[70] Without a doubt, there are few stricter applications of the public-purpose doctrine.

The United States Supreme Court has not had many occasions to review the public-purpose doctrine. In its initial consideration, the Court tacitly approved the doctrine's development by state judiciaries.[71] It held that Kansas could not justify as lawful taxation a state statute authorizing a city to issue its bonds in aid of private industry because taxation must be for a public rather than a private purpose.[72] On other occasions, the Court has declared that there must be a showing of public purpose to justify the power of eminent domain[73] and has held the public-purpose doctrine to be a requirement of the four-

66. Whiting v. Sheboygan & Fond du Lac R.R., 25 Wis. 167 (1870).

67. Lowell v. City of Boston, 111 Mass. 454 (1873). *See also* Allen v. Jay, 60 Me. 124 (1872) (whether or not the use for which private property is taken is public is a question for the judiciary, not the legislature).

68. 111 Mass. at 457.

69. *Id.*

70. *Id.* at 473.

71. Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. (20 Wall.) 655 (1874) (voiding statute which authorized a town to issue its bonds in aid of an iron works).

72. *Id.* at 664-65.

73. *E.g.*, Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710 (1923) (construction of a railroad tunnel is a public purpose); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (highway construction); Shoemaker v. School Dist. No. 2, 133 U.S. 553 (1890) (school construction).

teenth amendment due process clause.[74] Federal development of the public-purpose doctrine need not be emphasized, however, as the role of the federal judiciary has been minimal in comparison with that of the state judiciary. According to the Supreme Court, local legislative and judicial authorities are best equipped to determine what is or is not a public use;[75] therefore, the judgment of a state's highest court will be accepted by the Court unless clearly unfounded.[76]

State public-purpose doctrines are drawn from one of four sources: explicit constitutional provisions,[77] general due process clauses,[78] organic laws,[79] or common law.[80] Regardless of its source and whether the doctrine is constitutionally rooted, it is a basic rule of constitutional construction and governs the constitutional validity of legislative actions.[81]

Yet, in applying the doctrine, courts usually have not revealed what factors determine whether a project serves a public purpose.[82] In a case involving state legislation to finance reclaimed land and to construct terminal port facilities, the Minnesota Supreme Court stated that

> [w]hat is a "public purpose" that will justify the expenditure of public money is not capable of a precise definition, but the courts generally

74. *E.g.*, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) (upholding as a public purpose a state unemployment compensation law); Jones v. City of Portland, 245 U.S. 217 (1917) (upholding municipal tax to enable a city to establish and maintain a permanent coal and fuel yard). *See also* Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed for want of a substantial federal question*, 303 U.S. 627 (1938).

75. Green v. Frazier, 253 U.S. 233, 242 (1920) (legislation authorizing a commission to conduct and manage utilities and businesses on behalf of state).

76. *Id.*

77. *E.g.*, HAW. CONST. art. VI, § 2 (appropriations for private purposes prohibited); ILL. CONST. art. VIII, § 1(a) (public funds, property, or credit shall be used only for public purposes); MONT. CONST. art. VIII, § 1 (taxes shall be levied for public purposes); *see also* City of Phoenix v. Michael, 61 Ariz. 238, 148 P.2d 353 (1944) (public-purpose doctrine derived from constitutional credit clause), *accord*, State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).

78. *E.g.*, ALA. CONST. art. I, § 6 (no deprivation of life, liberty, or property except by due process of law).

79. *E.g.*, State v. Town of N. Miami, 59 So. 2d 779, 785 (Fla. 1952) (state organic law prohibits the expenditure of public money for private purposes). In this instance, the term "organic law" probably refers to the fundamental values held by the citizens of the state.

80. *E.g.*, McConnell v. City of Lebanon, 203 Tenn. 498, 509-11, 314 S.W.2d 12, 17 (1958) (common law prohibits taxation for private purposes even when there is no express constitutional restriction).
constitutional restriction).

81. *See* note 57 & accompanying text *supra*.

82. *See generally* 79 YALE L.J. [illegible] note 57, at 701 [illegible]

> construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.[83]

This admittedly imprecise statement is problematic on three counts. First, what sort of activity can be classified a "benefit to the community"? Attempts by state courts to equate beneficial activities with those which are of "use,"[84] "utility,"[85] or "advantage"[86] to a community are vague, at best. Second, what are the proper "functions of government" to which the benefit must relate? Third, assuming the purpose of an activity is to benefit a community, which community is to be benefited by the challenged activity brought before the court?[87] This limitation becomes a significant problem when the public-purpose doctrine is applied to state expenditures, including loans of credit, on behalf of political subdivisions incorporated by the state. Is the municipal expenditure really of benefit to the statewide public or is only the city helped?

The next section will examine the relationship between the public-purpose doctrine and one particular type of public corporation, the municipal corporation. This relationship, which creates the framework in which loans of state credit to cities may be analyzed, is complicated by the fact that in states such as New York the public-purpose doctrine is no longer the sole test of whether there has been a legal extension of state credit.[88] No matter how important or useful

83. Visina v. Freeman, 252 Minn. 177, 183, 89 N.W.2d 635, 643 (1958).

84. *See, e.g.*, Embury v. Conner, 3 N.Y. 511, 516 (1850). In the context of early eminent domain cases the "use" requirement was not as meaningless as it is today. *See* Comment, *What Constitutes a Public Use*, 23 ALB. L. REV. 386 (1959).

85. *See, e.g.*, Cleveland, Cin., Chi., & St. L. Ry. v. Polecat Drainage Dist., 213 Ill. 83, 85, 72 N.E. 684, 685 (1904) (public use equated with utility, usefulness, advantage, or benefit).

86. *See, e.g.*, Village of Deming v. Hosdreg Co., 62 N.M. 18, 35, 303 P.2d 920, 931 (1956) (advantage impliedly refers to the relief of unemployment, inspiration of new hope, and promotion of industry).

87. The question of which particular public will benefit from an expenditure has arisen in the economically related field of municipal taxation. Municipal taxes may, by virtue of the public-purpose doctrine, be levied for debt financing. Village of Oshkosh v. Nebraska, 20 F.2d 621 (8th Cir. 1927); People *ex rel.* McDonough v. Mills Novelty Co., 357 Ill. 285, 292, 192 N.E. 236, 240 (1934); People *ex rel.* Hicks v. New York, Chi. & St. L. R.R., 323 Ill. 493, 497, 154 N.E. 193, 194 (1926). They may not, however, be used to finance the obligations of another municipality. People *ex rel.* Nelson v. Trustees Cent. Mfg. Dist., 407 Ill. 291, 297, 95 N.E.2d 421, 424 (1950).

88. *See, e.g.*, People v. Westchester County Nat'l Bank, 231 N.Y. 465, 475, 132 N.E. 241, 244 (1921) (act providing for issuance of bonds to raise money for bonuses to veterans [illegible]

gifts and loans of money to individuals or corporations may be to the public, they may not be raised through resort to a state's credit.[89]

B. *Public Purpose and Municipal Corporations*

The public-purpose doctrine holds that state expenditures must be consistent with a legislatively and judicially declared public purpose. If the state can demonstrate that a challenged expenditure serves a valid public or state interest, the courts will uphold the state's action. The obvious weakness of the doctrine is that some perceptible public purpose can be found in almost any grant of state funds or credit. Certainly a public purpose was always present in the classic historical situation of gifts of cash and credit to railroads. A public purpose will also be present in loans of credit to cities, since urban populations are a definable public body. Thus, emphasis upon the doctrine as the rationale for upholding certain types of state appropriations may, without appropriate refinement, tend to circumvent constitutional provisions designed to limit the types of expenditures a state may authorize.

State constitutional prohibitions against lending state credit to municipal corporations must be analyzed in light of the public-purpose doctrine because the creation of debt, like any use or restriction upon the use of public funds, must be undertaken only for public purposes.[90] By definition, however, a municipal corporation is a public corporation, one which may exercise only those powers expressly or impliedly granted, or essential to its purpose.[91] An apparent dilemma therefore exists: state constitutional provisions prohibit loans of state credit to cities, while the doctrine from which such measures are derived appears to allow the loans because cities are incorporated and empowered by the state for public purposes. The question arises, therefore, whether a constitutional provision derived from a coexistent doctrine should limit the doctrine or whether the prior doctrine mandates that there be a more liberal and flexible interpretation of the constitutional proscription. In the context of a lawsuit, this question would be raised in the determination of which party is to assume the burden of proof. Of course, plaintiff always has the burden of proving

89. *Id.*
90. *See* notes 57-65, 77-81 & accompanying text *supra*.
91. *See* notes 1, 18 *supra*.

the unconstitutionality of any legislative enactment.[92] Yet, in meeting that burden, should a plaintiff challenging state aid as a prohibited loan of credit to municipalities be required to show that the aid is in fact a loan of credit or, alternatively, that such aid does not involve a benefit to the public? The former approach interprets the credit lending prohibitions as limitations upon the public-purpose doctrine, the latter approach assumes that the doctrine liberalizes the constitutional proscription.

However a state court may resolve these questions, common sense dictates that the public-purpose doctrine should not serve as a blanket justification for any state grant of credit to a municipal corporation. Prudence alone would demand that a legal doctrine not automatically allow states to offer their credit to financially troubled cities. Limitless grants of credit would probably result in the overextension of state credit and the state spending power, both undesirable occurrences which the prohibitions were originally designed to curb.

Loans of state credit thus must face a more rigorous test than the public-purpose doctrine now affords. Several factors should be taken into consideration in designing the test. Can the city solve its economic problems through reasonable self-help measures such as revised progressive taxation schedules, curtailment of nonessential services, limited reduction of essential services, and renegotiation of union contracts and pension plans? If so, the state will have difficulty justifying an extension of its credit when other forms of assistance less hazardous to the state fisc are available. How important to the state is the city's continued survival? The municipality's contribution to state commerce, employment, production, taxation, and general quality of life are critical factors to be considered in determining whether a city's economic viability is of sufficient statewide concern to justify an advance of state credit. Might the city face a diminution of its credit rating by the municipal bond rating agencies without the backing of state credit? If so, this diminution might result in a lowered state bond rating that would raise the interest rate at which the state could borrow money. In that situation, a loan of state credit may be justified on the theory that an ounce of prevention is worth a pound of cure.

A more specific test suggests the need for a new public-purpose doctrine which would generally govern state assistance to municipal

92. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), *rehearing denied*, 411 U.S. 910 (1973) (burden is on party attacking legislative arrangement to negate every conceivable basis which might support it) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)).

and other public corporations, because the old test is best suited only for assessing aid to private entities. The new approach represents the attempted resolution of the dilemma created by the conflict of two competing, yet related, rules of constitutional construction.

C. *Toward a New Public-Purpose Doctrine*

1. *A suggested analysis*

It is evident from the preceding discussion that constitutional provisions against loans of state credit to municipalities serve to frustrate complex state plans to aid cities with loans of cash and credit. In order to remedy this defect the revised public-purpose doctrine proposed by this comment suggests that state aid to cities will be found to comport with state constitutions, notwithstanding the fact that it weakens state credit, if the state can sustain an affirmative defense that: 1) the city requires external financial assistance; 2) a unique municipal problem requires action by the state as opposed to another governmental entity for its solution; and 3) a loan of credit, due to the shortage of available state funds, is necessary to resolve the municipal fiscal crisis. This test differs from the present public-purpose doctrine in that under certain conditions of extreme municipal financial hardship, states constitutionally would be permitted to grant credit to their cities.

Certainly, this new public-purpose doctrine is most directly applicable to states with both a public-purpose doctrine and a constitutional prohibition against loaning state credit to municipalities. If the state has no such prohibition, then no problem exists and the constitutional dilemma to which this analysis is addressed is solely of academic interest. If, however, there is a constitutional prohibition but no state public-purpose doctrine, the state then must look to a comparable principle such as state benefit in order to establish its claim. In the lower court hearing of *Wein v. State*,[93] for example, the State of New York, whose legislation is governed by considerations other than the public-purpose doctrine,[94] argued that no loan of credit was involved in its aid to New York City. The state asserted that "[t]he Constitution sought to forbid the loan of the State's credit for the benefit of another *without benefit to the State*."[95] The language

93. 84 Misc. 2d 453, 375 N.Y.S.2d 509 (Sup. Ct. 1975), *aff'd*, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).

94. *See* notes 88-89 & accompanying text *supra*.

95. Brief for Defendant at 16, Wein v. State, 84 Misc. 2d 453, 375 N.Y.S.2d 509 (Sup. Ct. 1975), *aff'd*, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).

met with apparent court approval,[96] thus establishing a public-purpose basis for the state's action.

The new test can be applied only on a case-by-case basis[97] because the elements of every plan for state aid to municipalities are unique. As in cases involving competing constitutional rights of privacy[98] and freedom of expression,[99] the courts would probably employ an ad hoc balancing test using a shifting burden of proof. Plaintiff would have the initial burden of defeating the presumption of constitutionality of the legislative action[100] and would make the affirmative argument that the legislature undertook a constitutionally prohibited loan of credit. Defendant state would then have the burden of showing that its action was not a loan of credit or, in the alternative, was within the purview of the public-purpose doctrine or its equivalent.[101] The burden would

96. Judge Helman of the New York State Supreme Court, ruling in *Wein v. State*, stated: "The amelioration of a State financial crisis arising from the City's financial difficulties is a *proper State purpose* . . . in borrowing money . . . ." 84 Misc. 2d at 459, 375 N.Y.S.2d at 514.

97. *See generally* Green v. Frazier, 253 U.S. 233 (1920) (public purpose determined by peculiar circumstances of case before court).

98. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy is a fundamental right implicit in the penumbras of certain amendments to the Constitution).

99. *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (tort concept of privacy balanced against first amendment guarantees of free speech and free press).

100. *See* note 92 & accompanying text *supra*.

101. Several state courts have in fact upheld what were arguably unconstitutional loans of state credit on the basis of significant public purpose. *See, e.g.*, City of Los Angeles v. Post War Pub. Works Rev. Bd., 26 Cal. 2d 101, 156 P.2d 746 (1945) (act providing aid to municipal agencies to enable them to furnish post-war employment not an unconstitutional loan of state credit to municipal corporation where separate public purpose achieved); State v. Inter-American Center Auth., 143 So. 2d 1 (Fla. 1962) (enabling act of a public authority not violative of credit clause since a public purpose was served thereby); Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972) (statute permitting water resource board to make loans from its revolving development fund held not a violative of constitutional prohibition against lending state credit to individuals); Grout v. Kendall, 195 Iowa 467, 192 N.W. 529 (1923) (issuance of bonds for purposes of paying bonuses to soldiers held constitutional because they were credits to be met by immediate tax levies); Johns Hopkins Univ. v. Williams, 199 Md. 392, 86 A.2d 892 (1951) (loans issued by state and given to private university upheld as a gift of cash, not credit); State ex *rel.* Hawkins v. State Bd. of Examiners, 97 Mont. 441, 35 P.2d 116 (1934) (upholding emergency legislation authorizing construction of state tuberculosis sanitarium and providing for issuance of bonds payable only out of special fund); Tosto v. Pennsylvania Nursing Home Loan Agency, 360 Pa. 1, 331 A.2d 198 (1975) (Commonwealth Nursing Home Loan Agency Law was reasonably designed to effectuate its public purpose and was not a pledge of commonwealth credit); State ex *rel.* Roddey v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951) (upholding general appropriation act providing for construction of school facilities and for financing of program by authorizing issuance of general obligation bonds to be retired from revenue obtained from general sales and use tax); State v. City of [illegible]

then rest upon plaintiff to prove that a loan of credit had taken place or, alternatively, that the legislative action was inimical to the public purpose.

State constitutional prohibitions against lending state credit were designed traditionally to prevent state involvement in high-risk projects that were not truly statewide in concern.[102] Although historically and conceptually derived from the public-purpose doctrine, the prohibitions did not allow states to respond to the economic crises of public corporations, particularly cities, in a flexible manner.[103] Instead, they were interpreted as absolute bars against lending credit to public corporations because they had originated as inflexible barriers to lending credit to private corporations.[104]

Municipal governments, like all governments, bear the ultimate "police power" responsibility of assuring their political and economic survival under the limited authority granted them by the state. The probability that other cities will find themselves facing economic problems similar to those of New York[105] therefore indicates that state courts and legislatures[106] must act in the future to preserve the economic viability of their local governments and the security of their people by easing municipal access to state credit.

The suggested criteria of the new public-purpose doctrine offer a more flexible approach to the application of state constitutional prohibitions against lending state credit to municipal corporations. Moreover, in contrast with most judicial analyses, the suggested analysis recognizes that municipal problems may at times be of statewide concern and legitimately within the ambit of a modified public-purpose doctrine.

2. Wein v. State

i. *Under the strict interpretation of the credit lending prohibition*

During the New York City fiscal crisis, the state advanced to the Municipal Assistance Corporation and New York City a total of $750 million from a local assistance fund.[107] Pursuant to the balanced budget provision of the state constitution,[108] the legislature during its regular legislative session had accounted for all cash flows. Therefore, the funds necessary for aid to the city were not available. In order to raise money, the state issued $755 million in short-term notes secured by mortgages issued and held by the city and by expected future revenues to be collected during the subsequent fiscal year.[109] These revenues were to be derived from the eventual sale by the state of an equivalent amount of city and MAC securities which the state had purchased from the issuing public corporations, as well as from the prospective interest on these notes.[110] This appropriation was challenged in *Wein v. State*,[111] where a taxpayer sought a declaratory judgment that there had been a violation of the state constitutional proscription against lending state credit to municipal and other public corporations.[112] Plaintiff contended that short-term borrowing by the state, secured by securities whose very lack of liquidity resulted in the immediate crisis New York City and MAC faced,[113] represented an unconstitutional extension of state credit to the city, and that the state in reality had created a guaranty for the city.[114]

State appropriations are usually given as grants of cash. *Wein*, however, poses the difficult question of whether a grant of cash raised

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ity facilities shall be made at expense of state, as long as such relocation is eligible for federal participation, does not violate credit lending clause); Almond v. Day, 197 Va. 782, 91 S.E.2d 660 (1956) (purchase by state of corporate securities did not constitute lending of its credit where purchase not made with purpose of aiding construction and maintenance of works of corporation). *But see, e.g.*, Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960) (statute authorizing municipality to issue revenue bonds on behalf of private corporation held unconstitutional notwithstanding incidental public benefit); State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957) (proposed municipal bond issue for purpose of purchasing building which private firm would construct and then lease from city which would use lease revenues strictly for bond payments held unconstitutional as not serving public purpose); State *ex rel.* City of Charleston v. Sims, 132 W. Va. 826, 54 S.E.2d 729 (1949) (invalidating statute which authorized payments to municipalities out of funds derived from profits of liquor control commission).

102. *See* notes 25-36 & accompanying text *supra* (Section I).

103. J. Fordham, Local Government Law 61 (1975).

104. *See* note 38 & accompanying text *supra*.

105. In Detroit, for example, estimates of budget deficits increasing from $40 million in 1977 to $170 million by 1980 have led city budget officials to warn of bankruptcy in the absence of greater state and federal aid. Wash. Post, Jan. 6, 1977, § A, at 5, col. 6.

106. *See* notes 127-28 & accompanying text *infra*.

107. *See* note 12 & accompanying text *supra*.

108. N.Y. Const. art. VII, § 2. The provision requires that the state budget contain a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and all money available for those expenditures.

109. *See* notes 13, 14 & accompanying text *supra*.

110. *Id.*

111. 84 Misc. 2d 453, 375 N.Y.S.2d 509 (Sup. Ct. 1975), *aff'd*, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976), N.Y.S.2d 225 (1976).

112. *See* note 20 & accompanying text *supra*.

113. *See* notes 2, 3 *supra*.

114. Plaintiff's action challenged only the $250 million state appropriation to the city. However, the fate of the $500 million appropriation to MAC was clearly [illegible]

through a local assistance fund guaranteed by the state is a constitutional loan of state funds or an unconstitutional loan of its credit. Under the strict judicial interpretation of the state credit lending proscriptions, the cash-credit distinction is the critical issue addressed by the courts. In what is perhaps the leading case which differentiates the lending of credit from the lending of cash, the Maryland Court of Appeals noted that "[c]ash is not credit. Credit is sometimes a means of procuring cash, but the word is never used to describe a gift of cash."[115] The court thus upheld under the state's credit clause the issuance of state bonds whose proceeds were to be given as a cash grant to a private university. In so doing it negated any distinction between this mode of raising revenue and a direct subsidization by the state:

> If the State should have a balance of a million and a half in its treasury from annual receipts, there could be no constitutional objection to its giving this amount to the Johns Hopkins University for the purpose of constructing an engineering building. If the State does not have this amount available, but borrows it and then gives the cash to the University, which it is attempting to do, it is not giving or loaning its credit to, or in aid of, the University—it is using its credit with banking institutions to borrow the money, and it is giving the University its cash.[116]

In accord with this analytical approach, the State of New York responded to the taxpayer's challenge in *Wein* by focusing upon the cash loan-credit loan distinction. It argued that the issuance of short-term bonds to raise money for a municipal corporation is not an advance of credit to a public corporation but an advance of cash.[117]

Arguably, the positions of both the state and the taxpayer are overly simplistic. The state did not provide an outright grant of its credit to the city, as plaintiff claims. New York City received money as an appropriation which was to be used for municipal purposes.[118] Nor is the state completely accurate in its assertion that the appropriation merely involved the disposition of state monies and revenues,[119] for it is obvious that these funds were at one point raised through resort to the state's credit in order to supply the "paper value" of the municipal and MAC securities with "real value."[120]

115. Johns Hopkins Univ. v. Williams, 199 Md. 382, 401, 86 A.2d 892, 901 (1951).
116. *Id. See also* Engelking v. Investment Bd., 93 Idaho 217, 458 P.2d 213 (1969) (loaning of state credit, not funds, is prohibited).
117. Brief for Defendant-Respondent at 15, Wein v. State, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).
118. Financial Emergency Act, *supra* note 4, ch. 868, § 22.
119. Brief for Defendant-Respondent, *supra* note 117, at 12.
120. *See* notes 13-15 & accompanying text *supra*.

The New York State Court of Appeals upheld the state action but barely. Noting that "[t]he line [between a loan of cash and one of credit] is a narrow one, but one drawn by the Constitution,"[121] the court went on to declare that "[f]or 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."[122]

Due to the enormous significance of the multimillion dollar state appropriation involved, *Wein v. State* should have represented the death-knell of the traditional judicial interpretation of the constitutional prohibitions against the lending of state credit to municipal corporations. It should also have marked the end of the illogical cash-credit distinction which is the cornerstone of the strict interpretation of state lending proscriptions. Instead, the constitutionality of the aid to New York City was upheld by the court on the thinnest of grounds, based on "narrow" lines of distinction which drove the state "to the brink of valid practice." Logically, of course, there is no difference between an outright grant of cash and a grant given from a fund raised by a bond issue.[123] The strict interpretation not only assures that the unreasonable distinction remains, but uses that distinction as the focal point of its analysis. Although the court should have been concerned with the state public purpose to be served in assisting New York City in its struggle to survive, judicial scrutiny was directed at the means by which the state's money was raised and not the ends for which it was to be used. Yet, the latter was of far greater statewide concern than the former. Certainly, the continuing fiscal crisis confronted by cities across the country[124] demands that future state aid plans to municipalities be guided by a judicial doctrine more logical, predictable, and realistic than the strict interpretation of the state credit lending provision used in *Wein*.

ii. Under the suggested analysis

The suggested public-purpose doctrine[125] differs from the strict interpretation of the credit lending prohibitions chiefly in its resolution of the constitutional dilemma discussed earlier.[126] Rather than construing the constitutional proscription as a limitation upon general

121. 39 N.Y.2d 136, 137, 347 N.E.2d 586, 587, 383 N.Y.S.2d 225, 226 (1976).
122. *Id.* at 136, 347 N.E.2d at 588, 383 N.Y.S.2d at 227.
123. *See* notes 115-16 & accompanying text *supra*.
124. *See* note 22 & accompanying text *supra*.
125. *See* text accompanying notes 93-106 *supra* (Section II-C-1).
126. *See* text following note 97 *supra*.

doctrine, as is usually done, the modified approach views the public purpose doctrine as a liberalization of the constitutional proscription. Thus, under the suggested analysis, the state's argument in *Wein v. State* would have ignored the credit-cash distinction and focused instead upon the broad public purpose effectuated by a loan of cash which indirectly might have relied on the credit of the state.

The State of New York thus would have defended its appropriation by affirmatively showing that 1) New York City needed external financial assistance to avoid insolvency; 2) the state was in the best position to provide that assistance; and 3) there was no way to raise the money for the assistance other than through the issuance of bonds backed by state credit. Such proof would have successfully overcome the challenge that the state loaned its credit to the city because it would have given plaintiff a double burden: proving a legislative action unconstitutional and proving, on policy grounds, that New York City did not need state aid. The state's arguments as posited above thus would shift the major issue considered by the court away from the credit lending prohibition and to the public-purpose doctrine suggested earlier. As a litigation strategy, this makes the constitutional proscription a much less significant restraint upon municipal aid plans involving possible loans of state credit during times of financial hardship for cities and states.

D. *Legislative Repeal of the Constitutional Prohibitions*

As the prospect of fiscal crisis continues to plague American cities,[127] state legislative bodies will seek greater independence from judicial and constitutional restrictions upon the types of aid packages they can devise. Foremost among these constraints, of course, are those constitutional provisions which limit legislative ability to incur indebtedness by extending credit to municipalities. The political and economic exigencies faced by a city requesting state aid are unique; therefore, state legislatures must be sufficiently free of judicial and constitutional constraint to respond adequately to these complex and varied demands.

The suggested public-purpose test, as the preceding analysis of *Wein v. State* indicates, offers states greater economic flexibility in creating municipal assistance plans which might of necessity include loans of credit. Under the credit lending prohibitions, however, the judiciary has the power to rule finally on the legality of a loan of state

127. *See* note 22 & accompanying text *supra*.

credit, thus making the outcome of the legislative action uncertain. Faced with the inherent uncertainty of two conflicting standards by which their actions could be judged, a constitutional provision which limits their powers and a judicial public-purpose doctrine which expands them, legislatures may simply decide to foreclose judicial interference by a comprehensive repeal of the constitutional credit lending prohibitions. This tactic would appeal particularly to states that are not governed by a public-purpose doctrine through which the inflexibility of the constitutional credit lending proscriptions could be liberalized. Alternatively, formulation of a constitutional amendment either excluding all municipal corporations from the province of the credit lending provisions or excluding only specified cities would also identify municipal fiscal solvency as a fundamental state interest completely compatible with either the old public-purpose doctrine or its suggested revision.[128]

III. Conclusion

Three distinct analytical approaches to the problem of state constitutional prohibitions against the loaning of state credit to municipal corporations are discernible. The first, a judicial approach, is the strictest. It disregards the economic needs of near-bankrupt cities and supports the retention of existing credit lending proscriptions and their interpretation as absolute bars to the lending of state credit. The rationale of this strict approach is to contain the effects of municipal economic problems and to prevent their statewide spread. Thus, it is akin to the popular desire to limit legislatively created indebtedness which underlay the original prohibitions against the lending of state credit for internal improvements.[129] Corollary to this reasoning is the notion that those states without credit lending prohibitions should adopt them in order to assure state fiscal solvency against the financial misfortunes of cities. If city officials know that their access to state credit is restricted, they will be encouraged to be more fiscally responsible. Countervailing notions of the public purpose that may be served by granting cities state credit to enhance their sagging resources are therefore immaterial under this approach.

128. Analogous to this proposal, some states have explicitly excluded from their constitutional credit lending clauses certain activities deemed of special public importance to the state. *E.g.*, IDAHO CONST. art. VIII, § 2 (water power); N.Y. CONST. art. VII, § 8(1) (education, mental health, or mental retardation purposes); ORE. CONST. art. XI, § 7 (preparation for war, repelling invasion, suppressing insurrection, building and maintaining permanent roads).

129. *See* notes 25-36 & accompanying text *supra* (Section I).

A second judicial approach retains the democratic concern that public debts be created only to finance public corporations, works, or endeavors. It differs from the first approach, however, in that its principal focus is on the nature of the public purpose to be served by a loan of state credit. This approach assumes that state credit must be viewed as an integral element of the larger state financial structure, a structure which of necessity includes municipal as well as state fiscal solvency.[130] Municipal economic requirements may thus be decisive countervailing factors to the inflexibility of the first approach to the constitutional proscriptions.

The third approach involves state legislatures rather than courts. It urges repeal of the constitutional provisions, general exclusion of municipal corporations from their scope, or specific exclusion of only certain municipal corporations.[131] This approach offers the greatest degree of legislative flexibility to the states, but accomplishes this goal at the expense of removing judicial oversight of certain state appropriations to cities. Repeal removes the uncertainty as to whether final judicial approval will be accorded complex municipal financial assistance plans but also removes an important check upon legislatively created indebtedness. Constitutional prohibitions force legislators to extend state credit as part of a municipal aid scheme only as a last resort. Without the prohibitions, it is possible that efforts by states to maintain viable credit ratings by limiting their assistance to financially troubled cities will not succeed. Unrestricted aid to cities may further jeopardize state credit by linking state and municipal interests too closely, consequently antagonizing the states' suburban, rural, and business communities.

Although the judicial and legislative approaches discussed herein each offer possible disadvantages as well as advantages to states seeking a means of providing effective assistance to cities facing economic hardship, three overriding realities remain nonetheless. First, the reductions in municipal services inherent in a fiscal crisis result in more people dying in fires, police making fewer arrests, streets becoming filthier, and road and transportation systems deteriorating.[132] Second, unless the states give greater economic priority to cities, these problems will get worse rather than improve.[133] And third, as the economies of the more populous cities deteriorate, so will the economic fortunes of their respective states.[134] Clearly, any judicial or legislative approach to the state constitutional credit lending prohibitions that does not take these realities into consideration is doomed to failure.

PAUL K. BARDACK

130. The interrelationship has been stated as follows:

> [T]he credit and financial reputation of the State and of all of its units of local government are judged by the events that take place within the state.
>
> A financial emergency occurring in even one unit of local government can cause serious damage to the credit of governments throughout the State.

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES, THE INTERGOVERNMENTAL DIMENSION 7 (1973).

131. *See* text accompanying note 128 *supra*.

132. *See, e.g.*, NEW YORK MAYOR'S MANAGEMENT REPORT, THE CITY RECORD, at 1 (Feb. 22, 1977) (report details each city agency's performance through the fiscal crisis, sets city's priorities for the next fiscal year, and criticizes the state and federal governments for not assuming costs of programs such as higher education, hospitals, and courts).

133. *See, e.g.*, THE AMERICAN ASSEMBLY, COLUMBIA UNIVERSITY, THE STATES AND THE URBAN CRISIS (1970).

134. The New York State Legislature has taken cognizance of this point:

> The status of [New York City] as the financial capital of the nation and of the world and as the headquarters of American and international commerce would be severely shaken [by its formal declaration of bankruptcy]. Just as significantly, the exodus from the city of corporate and individual taxpayers would increase, thereby having the effect of imposing a greater burden on the remaining taxpayers.
>
> . . . In addition to being the state's largest city, the city is the commercial, financial, cultural, communications and transportation center of the state. If the city were unable, because of the lack of funds, to function in its normal manner, the economy of the state would, therefore, be drastically harmed.

Financial Emergency Act, *supra* note 4, ch. 868, § 1.

APPENDIX

Financing for the City of New York, May-December 1975
($ Millions)

Month	Action	Amount	Monthly Total
May-June	State aid advances to City	800	800
June-July	"Bridge" loans from commercial banks of $275 million		
July	Sales of MAC bonds		
	to public	550	
	to commercial banks [*see* note 3 & accompanying text *supra*]	450	1,000
August	Sales of MAC bonds		
	to public	213	
	to banks, City and State pension funds [id.]	627	840
September	State agreement to purchase debt of City ($250) and MAC ($500) [*see* notes 12-15 & accompanying text *supra*]	750	
	Sales of MAC bonds		
	to banks, City pension and sinking funds, State Insurance Fund, and certain institutions [*see* note 9 & accompanying text *supra*]	557	1,307
October	Sales of MAC bonds		
	to City pension and sinking funds, and State Insurance Fund	281	281
November	Sales of MAC bonds		
	to City pension and sinking funds, State Insurance Fund, and certain institutions	200	
	State legislation establishing moratorium on publicly held City notes [*see* notes 10-11 & accompanying text *supra*]	1,600	
	Agreement of November 26, 1975		
	Stretchout of City Notes	819	
	Exchange of City notes for City bonds	200	
	Agreement to purchase City bonds	2,530	
	Further agreement to reinvest City bond proceeds	579	
	State tax increase package	500	6,428
December	Federal Seasonal Credit Agreement [*see* note 5 & accompanying text *supra*]	2,300	2,300
Grand Total		12,956	12,956

SOURCE: MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK, ANNUAL REPORT 16 (1976).

State of New York, 41 NY2d 486, *supra,* decided herewith), between the State and a town, which understandably seeks to promote its own development, even, if necessary, at the expense of regional planning for the benefit of all the people and future generations. Such a controversy is not resolvable by the principles designed to encourage strong, decentralized, local government in matters exclusively of local concern and to restrain the State from paternalistic interference with local matters. The issue is much larger. It is whether the State may override local or parochial interests when State concerns are involved. That issue is, and has been, resolved in favor of State primacy. The price of strong local government may not be the destruction or even the serious impairment of strong State interests. Both article IX of the State Constitution and the Statute of Local Governments make patently clear that that is how the issue should be resolved. For that reason there appear the multiplication of provisos and exceptions in article IX and in the Statute of Local Governments. They are not the product of clumsy draftsmanship but of a fine-tuned sensitivity to the difficult problem of furthering strong local government but leaving the State just as strong to meet the problems that transcend local boundaries, interests, and motivations.

Accordingly, the judgment at Special Term should be affirmed, with costs.

Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur.

Judgment affirmed.

Leon E. Wein, Appellant, v Hugh L. Carey, as Governor of the State of New York, et al., Respondents.

Argued March 22, 1977; decided March 31, 1977

State — tax anticipation notes — deficit budget.

1. Under article 7-A of the State Finance Law and the case of *Boryszewski v Brydges* (37 NY2d 361), plaintiff taxpayer has standing to challenge as unconstitutional the issuance by the State of tax and revenue anticipation notes on the ground that State officials knew that there was no authentic balance between income and expenditures in the fiscal year, and State officials, at least in the case of the Comptroller, do not possess sovereign immunity.

2. Bona fide holders of the notes in good faith for value without notice of defects may enforce them, regardless of their validity, since there is explicit constitutional

authority for the issue and the investor may rely on such patent authority. Lack of patent authority may render an issue wholly void, while remedies arising from latent infirmities are not enforceable against bona fide holders for value. Plaintiff's complaint alleging infirmities relating to procedures, findings, accounts and nonpublicized documents, not readily available to investors, cannot support a declaration of voidness in view of the patent authority for the issue. A contrary holding would render public bond issues vulnerable to constitutional attack at any time and would make such issues speculative.

3. The purportedly balanced budget in the year of issuance of the notes is not proved to have been knowingly unbalanced merely because it was one in a series of budgets which ultimately resulted in deficits in the year of repayment. Although a planned deficit is unconstitutional and although two successive deficits occurred, it cannot be said that there must have been a planned deficit, since all that is necessary for a deficit to occur is a shortfall in revenues or a rise in spending beyond estimates. As a practical matter, any honestly balanced budget will not remain in balance to the end of the fiscal year and will result in either a deficit or surplus. Even assuming an invalid rollover of anticipated deficits in the past, a current budget plan is valid if it provides for payment of such deficit in a balanced budget.

4. Proof of improper budget manipulation must be found in the estimates of revenues and expenditures in order to show the unconstitutional use of anticipation notes to balance an imbalanced budget, and the burden of proof thereon should be upon the challenger, regardless of a showing of successive deficits, since a courtroom would otherwise be converted into a super-auditing office duplicating the responsibilities of the Governor and Legislature.

5. Accordingly, plaintiff is not entitled to an injunction barring further issuance of tax anticipation notes pending a balancing of the budget.

Wein v Carey, 56 AD2d 787, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 18, 1977, which, by a divided court, affirmed a judgment of the Supreme Court at Special Term (CHARLES G. TIERNEY, J.), entered in New York County in an action for declaratory judgment, (1) granting defendants' motion for summary judgment and denying plaintiff's cross motion for summary judgment, and (2) declaring (a) that none of certain revenue anticipation notes issued by the State of New York at various dates commencing in April, 1976 and ending in June, 1976 were "rollover" notes in violation of constitutional limitations, and (b) that all of said notes were constitutionally and validly issued.

Leon Edward Wein, pro se, and *William J. Quirk*, Brooklyn, for Leon E. Wein, appellant.

Louis J. Lefkowitz, Attorney-General (Shirley Adelson Siegel and *Samuel A. Hirshowitz* of counsel), New York City, for respondents.

Edwin B. Mishkin, Stephen L. Dinces, Evan A. Davis, Victor

I. Lewkow and *Edmund H. Kerr,* New York City, for Solomon Brothers and others, *amici curiae.*

Chief Judge BREITEL. Plaintiff, as a taxpayer, seeks a declaratory judgment that some unspecified portion of State tax and revenue anticipation notes issued in the aggregate amount of $3.72 billion in the spring months of 1976 was, as a matter of law under the State Constitution, void. He seeks too an injunction barring the State from issuing further tax and revenue anticipation notes until it achieves a "balanced budget". At stake, therefore, is also the prospective issuance by the State of almost $4 billion of similar notes in the spring 1977 financing of the State budget plan for fiscal year 1977-1978, which financing starts on the heels of the decision by this court.

The complaint stands dismissed on summary judgment under CPLR 3212. The Appellate Division by a divided vote affirmed the dismissal at Special Term.

The critical question is whether, with respect to the State's 1976-1977 fiscal year, there were issued anticipation notes by the State's officials with knowledge, actual or constructive, that there was no authentic balance between expenditures and moneys from all sources in the State's budget plan. If so, there was no constitutional authority to issue the anticipation notes (NY Const, art VII, § 9). There are subsidiary questions: upon whom falls the burden of proof to establish that there is, or is not, the balanced budget required by the Constitution (art VII, § 2; *Wein v State of New York,* 39 NY2d 136, 141-142), and whether that burden of proof has been sustained. There are also peripheral questions with respect to plaintiff's standing as a taxpayer to raise the questions, the State's sovereign immunity from suit without its consent, the validity of notes issued in violation of the Constitution, and the enforceability of such notes in the hands of bona fide holders for value without notice of defects.

Before considering the ultimate merits of the appeal, the peripheral questions, because they are of recurring prime significance, must be treated.

Plaintiff has standing and State officials such as defendants, at least in the case of the Comptroller, possess none of the sovereign immunity of the State. None may read the majority opinion in *Boryszewski v Brydges* (37 NY2d 361, 362-364) without concluding that a citizen or taxpayer has the right to

challenge in the courts, as unconstitutional, acts of government—"the classical means for effective scrutiny of legislative and executive action" (p 364). The right of a taxpayer or citizen to sue has since been recognized by the Legislature (State Finance Law, art 7-A [as added by L 1975, ch 827]). This is not to say that there may or may not be limits. It is enough that this appeal does not exceed possible limits and follows naturally in the wake of *Wein v State of New York* (39 NY2d 136, *supra),* a case upon which all the parties rely.

On the showing in this case, even if the anticipation notes had been issued in violation of the Constitution and are therefore invalid and unenforceable between the issuer and purchasers who took with notice or without value, purchasers in good faith for value would not necessarily be without remedy. There is patent authority in the Constitution and the statutes to issue them upon the findings and certifications of the appropriate authorities (NY Const, art VII, § 9; State Finance Law, § 55).

Bonds and notes issued by the State and its municipal subdivisions, at least when there is explicit constitutional authority, are prima facie invulnerable and the investor may rely on such patent authority (cf. *Citizens' Sav. Bank v Town of Greenburgh,* 173 NY 215, 222-226; *Van Dolsen v Board of Educ.,* 162 NY 446, 451-452; *Hoag v Town of Greenwich,* 133 NY 152, 163; *Brownell v Town of Greenwich,* 114 NY 518, 528-529; *Town of Solon v Williamsburgh Sav. Bank,* 114 NY 122, 133-134, 137-139; *Cagwin v Town of Hancock,* 84 NY 532, 541-542; but cf. *Alvord v Syracuse Sav. Bank,* 98 NY 599, 604; see, generally, 64 Am Jur 2d, Public Securities and Obligations, §§ 308-323, and cases cited, indicating that a distinction must be made between lack of patent authority to issue securites, by reason of which securites may be wholly void, and latent infirmities, such as lack of underlying preconditions, whether of substance or form, which may render public securities subject only to remedies not enforceable against bona fide holders for value; see, also, Uniform Commercial Code, § 8-202, subd [2], including Official Comments, esp Comment 6, which, because subject to constitutional limitations, is not determinative but is, nevertheless, instructive).

On this last view, the complaint in seeking without qualification a declaration of "voidness" of the anticipation notes may not be sustained. When the alleged infirmities, as here, relate to procedures, findings, accounts, and nonpublicized

documents, never readily available to investors, security analysts, and financial institutions, the purchasers of the governmental obligations may rely on the patent, meaning explicit, authority of the issuers to do as they have done.

The principle last discussed rests not only in reason but in necessity. Otherwise, even long-term public bonds, issued directly by the State or governmental entities apparently by express authority of the Constitution, would always, until payment, or even afterward, remain vulnerable to constitutional attack. Vulnerability of that sort would make bonds speculative rather than the prime investment securities they are, issuable at comparatively low rates of interest. The Legislature has recognized this concern (State Finance Law, § 123-b, subd 1, which statute, of course, is also subject to constitutional limitations).

The ultimate issues on this appeal are of a different order and quite easily and definitively resolved. This case is a sequel to the *Wein* case *(supra),* in the opinions of which the background and relevant constitutional issues implicated in State finance, and particularly the mechanisms involved in the use of anticipation notes, are detailed. Reference is made to those opinions in order to keep the compass of the present discussion reasonably limited.

In the spring of 1976 the State by action of the Governor and the Legislature adopted a purportedly balanced budget plan, implemented by statutes providing for revenue raised by taxes to supplement other revenues and moneys, and appropriations for the operation of the State government, including various forms of local assistance. The budget plan as implemented balanced at $10.9 billion (Exhibit D, Official Statement of April 15, 1976, p 22). Included in the plan was provision for the redemption of anticipation notes, shortly to mature, in the sum of $382 million, the product of a deficit resulting from the 1975-1976 fiscal year. As required by the Constitution and the State Finance Law these deficit notes were to be and were paid in the 1976-1977 fiscal year from certain revenues impounded by the Comptroller (NY Const, art VII, § 9; State Finance Law, § 55, subd 1, par [b]).

Plaintiff emphasizes that the $382 million deficit was then but the last of a series of deficits which the State had experienced successively during prior years.

In the budget plan for 1977-1978, there is a "new" remainder of deficit anticipation notes from the 1976-1977 fiscal year

in the sum of $158 million. These too are to be paid out of certain revenues impounded by the Comptroller.

Beyond the amounts of deficit anticipation notes running over from one fiscal year to another, the State in each of the last two fiscal years has experienced a deficit in the once balanced budget plans of revenues and expenditures. Either revenues have fallen short of the budget estimates or expenditures have exceeded those contained in the budget estimates, or both have occurred.

On the basis of these facts of the past and present, plaintiff urges that the State has failed in its constitutional obligation to provide for a balanced budget, and that therefore the recurring issuance of anticipation notes in successive years is in violation of the Constitution. He relies on the holding in *Wein v State of New York* (39 NY2d 136, *supra)* that "if repayment of tax and revenue anticipation notes may only be made by creating, directly or indirectly, a budgetary deficit in the year of repayment, such borrowing is not an anticipation of the receipt of taxes and revenues and thus violates constitutional limitations" (p 149). He relies further on the repeated admonition in the *Wein* case that in order for a budget to be balanced, the estimates of revenues and expenditures must be "authentic" *(id.,* pp 148, 149).

His syllogism is simple but mistaken. It is, in effect, that a planned deficit is unconstitutional (which it is); that two successive annual deficits occurred (which is true); and, therefore, that there must have been a planned deficit (which results in a classic example of the fallacy of the undistributed middle term). On the basis of this disjointed syllogism, he argues, therefore, that the anticipation notes of 1976-1977 were invalid, and, to make matters worse, by implication and necessary consequence from the relief he seeks, that the plan to issue more anticipation notes in 1977-1978 would be an ill-disguised "rollover" or unconstitutional refinancing of a planned deficit.

To support his flawed syllogism plaintiff quotes an inner quotation from the *Wein* case: "As was stated by the 1938 Subcommittee on Taxation and Finance of the Constitutional Convention Committee: 'The spirit of the clause implied that the State must not have two or more budgetary deficits in succession' " (39 NY2d 136, 149, *supra).* The context in which the inner quotation appears makes clear that the reference is to two *planned* deficits in succession. In common sense it could

room 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 harmony or in conflict, most often in conflict, for several months of each year.

The justification of the budget plan before the Legislature and its fiscal committees is the responsibility of the Governor for the executive branch, and of judicial representatives for the judicial branch. That is the constitutional process, and indeed the only practical one. Consequently, it would be ludicrous to deny prima facie validity to this constitutionally mandated and meticulously directed process (NY Const, art VII, §§ 1-4).

The burden of proof, therefore, is on one who attacks the budget plan. It is a formidable burden in any event and, realistically, impossible as to some categories of estimates. But there are some estimates that could be demonstrated on their face to be unreasonable. An extreme example would be a tripling of the estimates of personal income tax revenue, without a change in the tax rate, in a period in which the economy appears to be on a plateau or in decline. Another would be an estimate of expenditures falling short of statute-mandated expenses or constitutionally directed covering of maturing indebtedness. Still another would be an omission of estimated expenditures for judgments rendered in courts of law. There are many other possible examples.

That the task is not an easy one is no reason to alter the allocation of the burden of proof. The reverse would be much worse of an evil—the occasionally irresponsible attack on a budget plan requiring enormous expenditures of time and money in the wrong forum to resolve the issue.

None of the foregoing should be read to permit judicial review of a State budget plan directly. There is no such power (cf. *New York Public Interest Research Group v Steingut,* 40 NY2d 250, 257). Judicial intervention may be invoked only in the narrowest of instances. The issue in this case, like the issue in the *Wein* case *(supra),* is one such instance, namely, where the validity of indebtedness determinable only by reference to the budget plan requires such intervention in order to resolve the constitutional question.

On this analysis, it is evident that plaintiff's ambitious venture may not succeed. The shortcut, based, in the first

instance, on a logical fallacy, and the attempted misplacement of the burden of proof demonstrate the summary judgment was justified. No issue of fact is presented requiring a trial. That does not mean that, in truth, all is as it should be, but only that there has been no showing that it may not be as it should be.

Consequently, beyond the prayer for a declaration that the 1976-1977 anticipation notes or some portion of them are void, plaintiff has not established the right to injunctive relief.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

Order affirmed.

In the Matter of ANONYMOUS ATTORNEYS, Appellants. BAR ASSOCIATION OF ERIE COUNTY, Respondent.

In the Matter of ANONYMOUS, an Attorney, Appellant. BAR ASSOCIATION OF ERIE COUNTY, Respondent.

Argued February 15, 1977; decided April 5, 1977

Attorney and client — disciplinary proceedings — immunity from prosecution.

1. The possible sanctions flowing from a disciplinary proceeding against an attorney do not constitute a "penalty or forfeiture" within the meaning of CPL 50.10 and, accordingly, a grant of immunity thereunder, while protecting appellant attorneys from use of their Grand Jury testimony in any criminal proceeding, is ineffective to bar a disciplinary proceeding based upon that testimony. CPL 50.10 encompasses penalties imposed upon conviction for a criminal offense committed in violation of State statute and does not protect against all private consequences of facts revealed by testimony given under its shelter. Disciplinary proceedings are civil in nature and serve to protect the court and society and are not criminal proceedings.

2. While a grant of immunity under CPL 50.10 must be coextensive with the privilege against self incrimination which it replaces, that privilege provides only that no person shall be compelled to be a witness against himself in any criminal proceeding. Since the privilege does not extend to use in noncriminal proceedings, immunity does not protect against such use where the testimony cannot be later used in a criminal proceeding.

APPEAL, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of said court, entered February 23, 1976, which denied motions by appellants to dismiss disciplinary proceedings initiated against them by respondent. The following question

conflict with this section concerning care and treatment of person suffering from mental disorder or defect. In re Asker, 1954, 284 App.Div. 712, 134 N.Y.S.2d 685, affirmed 309 N.Y. 983, 132 N.E.2d 895.

4. Liability for inmate's conduct

The state was not liable for property damage caused by fire started by high grade moron who escaped from Wassaic State School, where school authorities could not reasonably have anticipated from moron's history of harmless escapes that moron would be likely to set fires or become dangerous. Excelsior Ins. Co. of N.Y. v. State, 1946, 296 N.Y. 40, 69 N.E.2d 553.

The state owes no duty to the community to guard closely a state institution inmate who is a moron but who is neither insane nor criminal or to see that inmate does not leave the institution. Id.

§ 5. [Institutions for detention of criminals; probation; parole; state commission of correction; visitorial power]

The legislature may provide for the maintenance and support of institutions for the detention of persons charged with or convicted of crime and for systems of probation and parole of persons convicted of crime. There shall be a state commission of correction, of which the head of the department of correction shall be the chairman, which shall visit and inspect, or cause to be visited and inspected by members of its staff, all institutions used for the detention of sane adults charged with or convicted of crime.

Adopted Nov. 8, 1938, Jan. 1, 1939.

Historical Note

Section derived from Const.1894, Art. 8, § 11, pt., as amended in 1925 and 1931. Provisions relating to state prison inspectors were contained in Const.1846, Art. 5, § 4.

Library References

Prisons ⚿4.

C.J.S. Prisons § 5.

Notes of Decisions

Closing of jails 2
Probation 3
Visitorial powers 1

1. Visitorial powers

This section and sections 2 and 6 of this article do not impose a duty on the State Commission of Correction to visit and inspect private institutions to which, among others, sane adults convicted of crime are committed. 1943, Op.Atty.Gen. 235.

2. Closing of jails

In pursuing its power under subdivision 8 of section 46 of the Correction Law to inspect and close county jails, Commission of Correction acts as an arm of the legislature, and is possessed of the same powers, and so long as it follows the dictates of the statutes and is not arbitrary, its actions may not be questioned by the courts. Cayuga County v. McHugh, 1958, 4 N.Y.2d 609, 176 N.Y.S.2d 643, 152 N.E.2d 73.

Commission of Correction, in inspecting county jails and determining

that jail should be closed, was performing an administrative, rather than a quasi-judicial function, and, where it followed requirements prescribed by subdivision 8 of section 46 of the Correction Law of giving notice to county and holding a hearing, its action in closing jail did not deprive county of due process, regardless of whether it based its decision on information not furnished to county. Id.

3. Probation

Because probationer is at liberty only by grace of the court, terms of his liberty can be circumscribed by court and its officers to any extent necessary to protect public and to ensure effective supervision of probation program. People v. Chinnici, 1966, 51 Misc.2d 570, 273 N.Y.S.2d 538.

§ 6. [Exclusiveness of visitation and inspection]

Visitation and inspection as herein authorized, shall not be exclusive of other visitation and inspection now or hereafter authorized by law.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

Historical Note

Section derived from Const.1894, Art. 8, § 13.

ARTICLE XVIII—HOUSING

Sec.

1. Housing for persons of low income and nursing home accommodations; slum clearance.
2. Idem; powers of legislature in aid of.
3. Article VII to apply to state debts under this article, with certain exceptions; capital and periodic subsidies.
4. Powers of cities, towns and villages-to contract indebtedness in aid of low rent housing and slum clearance projects; restrictions thereon.
5. Liability for certain loans made by the state to certain public corporations.
6. Loans and subsidies; restrictions on and preference in occupancy of projects.
7. Liability arising from guarantees to be deemed indebtedness; method of computing.
8. Excess condemnation.
9. Acquisition of property for purposes of article.
10. Power of legislature; construction of article.

§ 1. [Housing for persons of low income and nursing home accommodations; slum clearance]

Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and

conditions as it may prescribe for low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.

Adopted Nov. 8, 1938; amended Nov. 2, 1965, eff. Jan. 1, 1966.

Historical Note

The 1965 amendment provided for nursing home accommodations for persons of low income.

Library References

Constitutional Law ⟹81.
Zoning ⟹21 et seq.

C.J.S. Constitutional Law § 174 et seq.
C.J.S. Zoning §§ 15, 22, 23, 39, 44.

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1. Generally

Once the state embarks into area of housing as function of government, necessarily that function is subject to constitutional commands. Vinson v. Greenburgh Housing Authority, 1968, 29 A.D.2d 338, 288 N.Y.S.2d 159.

2. Authority of legislature—Generally

Under this section setting up basic framework for public housing program, duty and power to determine what is low rent housing and who are persons of low income has been delegated to the legislature. Neufeld v. O'Dwyer, 1948, 192 Misc. 538, 79 N.Y.S.2d 53.

3. —— Delegation of

The delegation of authority to local housing authority by the Public Housing Law, § 1 et seq., is not an unconstitutional delegation of legislative power. Davidson v. City of Elmira, 1943, 180 Misc. 1052, 44 N.Y.S.2d 302, affirmed 267 App.Div. 797, 46 N.Y.S.2d 655, appeal denied 267 App.Div. 926, 47 N.Y.S.2d 604.

The general definitions of terms "sanitary dwellings", "persons of low income" and "low rent housing" in Public Housing Law, §§ 3, 156, 215, leaving their application to the local housing authority, did not render such law unconstitutional. Id.

4. Persons of low income

Proposed public project to provide housing units for persons of annual income of $7,000 was not unconstitutional where it appeared that project was designed for those who had been found by appropriate public agency to be persons falling within legislative definition, for housing purposes as provided by this section, of persons of low income. Minkin v. City of New York, 1960, 24 Misc.2d 818, 198 N.Y.S.2d 744, appeal dismissed 10 A.D.2d 830, 202 N.Y.S.2d 992.

Under this section to effect that legislature may provide in such manner, by such means, and upon such terms and conditions as it may prescribe, for low-rent housing for persons of low income as defined by law, it is left to legislative action to define what is meant by persons of low income. Id.

5. Condemnation—Generally

The condemnation of private property authorized by McKinney's Unconsol.Laws former § 3420, adopted under this section and section 2 of this Article granting Legislature extraordinary power in relation to housing for persons of low income or slum clearance is not objectionable on ground that it is not for a "public use". Murray v. LaGuardia, 1943, 291 N.Y. 320, 52 N.E.2d 884.

Condemnation to eliminate areas of intangible physical blight in a municipality is for a public purpose, and redevelopment may properly be accomplished by private persons, and area condemned may thereafter be properly used for nonresidential purposes, and power thus exercised comes within this section, even though the area condemned is not a slum with tangible physical blight. Cannata v. City of New York, 1961, 14 A.D.2d 813, 221 N.Y.S.2d 457, affirmed 11 N.Y.2d 210, 227 N.Y.S.2d 903, 182 N.E.2d 395, appeal dismissed 83 S.Ct. 28, 371 U.S. 4, 9 L.Ed.2d 48.

6. —— Certificate of

Term "conclusive evidence" in provision of former Public Housing Law § 135 declaring that in any proceeding to acquire property, certificate issued by State Housing Commission shall be "conclusive evidence" as to matters lawfully certified therein, means that certificate should be given great weight, and that matters certified are conclusive in character, if certificate was issued in manner described by law, and if there is any basis for commissioner's determination, and therefore provision is not unconstitutional, on ground that it denies property owners right to review a determination of commissioner. Amalgamated Housing Corp. v. Kelly, 1948, 193 Misc. 961, 82 N.Y.S.2d 577.

7. —— Sales subsequent to

A city has no power to acquire real property for the purpose of razing the deteriorated buildings thereon and offering the land for sale to a purchaser who will develop it without undertaking such a project in accordance with an urban renewal program for the designated area. Op. State Compt. 67–906.

8. Areas subject to clearance—Generally

Land, virtually all of which was utilized for productive purposes, was not vacant land, which cannot constitute a slum or substandard or insanitary area within this section authorizing tax exemptions for clearance, replanning, reconstruction and rehabilitation of such area though most of buildings on land were of flimsy, ramshackle nature and part of it consisted of small gardens; term "vacant" implying entire abandonment or non-occupancy for any purpose. Diehm v. City of New York, 1955, 208 Misc. 209, 143 N.Y.S.2d 298.

9. —— Size

A parcel of approximately two square blocks of land was not too small to constitute an "area" within this section and former section 3426 of McKinney's Unconsol.Laws, authorizing tax exemptions for clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas. Diehm v. City of New York, 1955, 208 Misc. 209, 143 N.Y.S.2d 298.

Former General Municipal Law § 23 and this section contemplate that clearing and redevelopment of slum area in city will be of an entire area

and not of a separate parcel. Boro Hall Corp. v. Impellitteri, 1954, 128 N.Y.S.2d 804, affirmed 283 App.Div. 889, 130 N.Y.S.2d 6, reargument and appeal denied 283 App.Div. 951, 130 N.Y.S.2d 887, appeal and stay denied 307 N.Y. 672, 120 N.E.2d 847.

10. —— Substandard areas

Land on which there were makeshift wooden huts, with no sanitary facilities, screened-in garden patches, and rubbish heaps in densely populated and industrialized section of city, was "substandard" within this section authorizing tax exemptions for clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, so as to authorize grant of partial tax exemption to cooperative apartment development proposed to be erected on such land by redevelopment corporation. Diehm v. City of New York, 1955, 208 Misc. 209, 143 N.Y.S.2d 298.

11. Incidental or appurtenant facilities

The phrase "facilities incidental or appurtenant thereto" as used in this section and subdivision 14 of section 3 of Public Housing Law authorizing an additional debt limit of two percent for low rent housing and slum clearance projects or "facilities incidental or appurtenant thereto" does not exclude in all circumstances a public school serving such housing projects, so that a city may never resort to two percent debt limit in financing cost of school. Diehl v. O'Dwyer, 1948, 193 Misc. 1032, 84 N.Y.S.2d 109.

12. Emergency housing projects

State Legislature acted within its constitutional prerogative when it empowered New York City to erect emergency housing projects, and prescribed as a term or condition that emergency housing project must be removed and disposed of by July 1, 1951. In Rego Park Houses, Borough of Queens, City of New York, 1950, 198 Misc. 959, 102 N.Y.S.2d 510.

13. Public Housing Law

The Public Housing Law is constitutional. Borek v. Golder, 1947, 190 Misc. 366, 74 N.Y.S.2d 675. See, also, George F. Weaver Sons Co. v. City of Utica, 1949, 196 Misc. 634, 92 N.Y.S.2d 372.

14. Redevelopment companies

Former § 3401 et seq., McKinney's Unconsol.Laws adopted under this section and section 2 of this Article granting Legislature extraordinary power in relation to slum clearance are not unconstitutional as unreasonable or arbitrary or because they bear no real and substantial relation to the object sought to be attained or because they are a clear usurpation by the Legislature of a prohibited power. Murray v. La Guardia, 1943, 291 N.Y. 320, 52 N.E.2d 884.

Former Unconsolidated Laws § 3401 et seq. are not unconstitutional because they are not confined to slum clearance and to reconstruction for former slum dwellers, in view of fact that this section under which they were adopted authorizes Legislature either to provide for low rent housing for persons of low income or to provide for clearance, reconstruction, and rehabilitation of substandard and insanitary areas. Id.

§ 2. [Idem; powers of legislature in aid of]

For and in aid of such purposes, notwithstanding any provision in any other article of this constitution, but subject to the limitations contained in this article, the legislature may: make or contract to make or authorize to be made or contracted capital or periodic subsidies by the state to any city, town, village, or public corporation, payable only with moneys appropriated there-

for from the general fund of the state; authorize any city, town or village to make or contract to make such subsidies to any public corporation, payable only with moneys locally appropriated therefor from the general or other fund available for current expenses of such municipality; authorize the contracting of indebtedness for the purpose of providing moneys out of which it may make or contract to make or authorize to be made or contracted loans by the state to any city, town, village or public corporation; authorize any city, town or village to make or contract to make loans to any public corporation; authorize any city, town or village to guarantee the principal of an interest on, or only the interest on, indebtedness contracted by a public corporation; authorize and provide for loans by the state and authorize loans by any city, town or village to or in aid of corporations regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing housing facilities or nursing home accommodations; authorize any city, town or village to make loans to the owners of existing multiple dwellings for the rehabilitation and improvement thereof for occupancy by persons of low income as defined by law; grant or authorize tax exemptions in whole or in part, except that no such exemption may be granted or authorized for a period of more than sixty years; authorize cooperation with and the acceptance of aid from the United States; grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities.

As used in this article, the term "public corporation" shall mean any corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in this article.

Adopted Nov. 8, 1938; amended Nov. 2, 1965, eff. Jan. 1, 1966.

Historical Note

The 1965 amendment permitted the legislature to authorize and provide loans to corporations engaged in providing nursing home accommodations.

Cross References

Additional state debt of $200,000,000 for public housing loans, see McKinney's Unconsol.Laws § 3505 et seq.

Library References

States ⇐85 et seq., 113 et seq., 123.

C.J.S. States §§ 104, 106 et seq., 141 et seq., 156.

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1. Purpose

The purpose of this section granting Legislature extraordinary powers in aid of reconstruction of urban housing areas was not limited to low rent housing for persons of low income, but extends also to reconstruction and rehabilitation of substandard areas. Murray v. La Guardia, 1943, 180 Misc. 760, 43 N.Y.S.2d 408, affirmed 266 App.Div. 912, 42 N.Y.S. 2d 612, affirmed 291 N.Y. 320, 52 N. E.2d 884, certiorari denied 64 S.Ct. 530, 321 U.S. 771, 88 L.Ed. 1066.

2. Loans to local housing authorities

Facts alleged in complaint failed to show that action of municipal housing authority in entering into contract with state to borrow funds to finance housing project under Public Housing Law was arbitrary or capricious, and hence complaint did not authorize an injunction enjoining the project on such grounds. Davidson v. City of Elmira, 1943, 180 Misc. 1052, 44 N.Y.S.2d 302, affirmed 267 App.Div. 797, 46 N.Y.S.2d 655, appeal denied 267 App.Div. 926, 47 N.Y.S.2d 604.

3. Security for federal loans

In contracting for federal loans for urban renewal programs, a municipality may pledge, as security for such loans, payments thereafter received under federal capital grants. 1961, Op.Atty.Gen. 11.

4. Emergency housing

Counties may not undertake to provide emergency housing facilities. 4 Op.State Compt. 339, 1948.

5. Discrimination

The refusal of housing accommodations to prospective tenants because of race, color, creed or religion in a housing project constructed under a contract with city entered into in June 1943, under Redevelopment Companies Law, former Unconsolidated Laws § 3401 et seq. was not a violation of any provision of the Federal or State Constitutions or of any statutory provisions applicable to such housing projects. Dorsey v. Stuyvesant Town Corp., 1947, 190 Misc. 187, 74 N.Y.S.2d 220.

6. Eminent domain

The condemnation of private property authorized by former Unconsolidated Laws § 3420 adopted under this section and section 1 of this article is not objectionable on ground that it is not for a "public use". Murray v. La Guardia, 1943, 291 N.Y. 320, 52 N.E.2d 884. See, also, Stuyvesant Housing Corporation v. Stuyvesant Town Corporation, 1944, 183 Misc. 662, 51 N.Y.S.2d 19.

Under former Unconsolidated Laws § 3420, adopted under this section, the redevelopment company organized to reconstruct and rehabilitate urban housing area was not required to be subjected to regulation by law for all time as to rents, profits, dividends, and disposition of its property in order to make project one for public use so as to permit city of New York to exercise power of eminent domain. Murray v. La Guardia, 1943, 291 N.Y. 320, 52 N.E.2d 884. See, also, Stuyvesant Housing Corporation v. Stuyvesant Town Corporation, 1944, 183 Misc. 662, 51 N.Y.S.2d 19.

Fact that former Unconsolidated Laws § 3420, adopted under this section and section 1 of this article permits city of New York to exercise power of eminent domain to accomplish a project from which a private corporation may ultimately reap a profit does not render said section 3420 unconstitutional. Murray v. La Guardia, 1943, 291 N.Y. 320, 52 N.E. 2d 884. See also, Stuyvesant Housing Corporation v. Stuyvesant Town Corporation, 1944, 183 Misc. 662, 51 N.Y. S.2d 19.

The power of eminent domain may properly be exercised in connection with project for the reconstruction and rehabilitation of urban housing area. Murray v. La Guardia, 1943, 180 Misc. 760, 43 N.Y.S.2d 408, affirmed 266 App.Div. 912, 42 N.Y.S.2d 612, affirmed 291 N.Y. 320, 52 N.E.2d 884, certiorari denied 64 S.Ct. 530, 321 U.S. 771, 88 L.Ed. 1066. See also, Stuyvesant Housing Corporation v. Stuyvesant Town Corporation, 1944, 183 Misc. 662, 51 N.Y.S.2d 19.

Municipality has power to acquire property for rehabilitation, housing, recreation, or any incidental purpose. In re Harlem Slum Clearance Project, City of New York, 1952, 114 N. Y.S.2d 787, affirmed 281 A.D. 1024, 122 N.Y.S.2d 623.

An order denying a motion to restrain the city of New York from exercising power of eminent domain for acquisition of property to carry out housing plan of a private corporation was affirmed. Murray v. La Guardia, 1943, 266 App.Div. 912, 42 N.Y.S. 2d 612, affirmed 291 N.Y. 320, 52 N. E.2d 884, certiorari denied 64 S.Ct. 530, 321 U.S. 771, 88 L.Ed. 1066.

7. Redevelopment companies

A municipality's power under this article and enabling act, former Unconsolidated Laws § 3401 et seq., providing for reconstruction and rehabilitation of urban housing areas is akin to the "police power", and as such is properly exercised by contract with redevelopment companies subject to public regulation. Murray v. La Guardia, 1943, 180 Misc. 760, 43 N.Y.S.2d 408, affirmed 266 App.Div. 912, 42 N.Y.S.2d 612, affirmed 291 N. Y. 320, 52 N.E.2d 884, certiorari denied 64 S.Ct. 530, 321 U.S. 771, 88 L. Ed. 1066.

§ 3. [Article VII to apply to state debts under this article, with certain exceptions; capital and periodic subsidies]

The provisions of article VII, not inconsistent with this article, relating to debts of the state shall apply to all debts contracted by the state for the purpose of providing moneys out of which to make loans pursuant to this article, except (a) that any law or laws authorizing the contracting of such debt, not exceeding in the aggregate three hundred million dollars, shall take effect without submission to the people, and the contracting of a greater amount of debt may not be authorized prior to January first, nineteen hundred forty-two; (b) that any such debt and each portion thereof, except as hereinafter provided, shall be paid in equal annual installments, the first of which shall be payable not more than three years, and the last of which shall be payable not more than fifty years, after such debt or portion thereof shall have been contracted; and (c) that any law authorizing the contracting of such debt may be submitted to the people at a general election, whether or not any other law or bill shall be submitted to be voted for or against at such election.

Debts contracted by the state for the purpose of providing moneys out of which to make loans to or in aid of corporations

regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing housing facilities pursuant to this article may be paid in such manner that the total annual charges required for the payment of principal and interest are approximately equal and constant for the entire period in which any of the bonds issued therefor are outstanding.

Any law authorizing the making of contracts for capital or periodic subsidies to be paid with moneys currently appropriated from the general fund of the state shall take effect without submission to the people, and the amount to be paid under such contracts shall not be included in ascertaining the amount of indebtedness which may be contracted by the state under this article; provided, however, (a) that such periodic subsidies shall not be paid for a period longer than the life of the projects assisted thereby, but in any event for not more than sixty years; (b) that no contracts for periodic subsidies shall be entered into in any one year requiring payments aggregating more than one million dollars in any one year; and (c) that there shall not be outstanding at any one time contracts for periodic subsidies requiring payments exceeding an aggregate of thirty-four million dollars in any one year, unless a law authorizing contracts in excess of such amounts shall have been submitted to and approved by the people at a general election; and any such law may be submitted to the people at a general election, whether or not any other law or bill shall be submitted to be voted for or against at such election.

Adopted Nov. 8, 1938; amended Nov. 8, 1955; Nov. 5, 1957, eff. Jan. 1, 1958.

Historical Note

The 1955 amendment of this section authorized an increase in the aggregate amount of periodic subsidies outstanding in any one year from $5 million, to $34 million, and added "and any such law * * * at such election", to second paragraph.

The 1957 amendment provided that debts contracted by the state for the purpose of providing moneys out of which to make loans to or in aid of corporations regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing housing facilities pursuant to Article XVIII of the State Constitution may be paid in such manner that the total annual charges required for the payment of principal and interest are approximately equal and constant for the entire period in which any of the bonds issued therefor are outstanding. Under present constitutional provision such loans must be paid in equal annual installments on account of principal plus interest resulting in such payments being higher during the first years of the loans and lower during their last years. It is believed that substantial reductions in rent for such projects will be possible by means of the proposed charge. Abstract of Department of State.

Cross References

Additional state debt of $200,000,000 for public housing loans, see McKinney's Unconsol.Laws § 3505 et seq.

Increase of state debt for housing loans, see McKinney's Unconsol.Laws § 3501 note.

Library References

States ⇔113 et seq., 114.

C.J.S. States §§ 132 et seq., 141 et seq., 143.

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1. Indebtedness exceeding $300,000,000

Indebtedness in excess of three hundred million dollars to provide funds for loans to municipalities and public corporations may be authorized by the legislature, subject to approval by the electorate, without the necessity of a constitutional amendment. 1946, Op.Atty.Gen. 84.

2. Housing bonds—Generally

State housing bonds constitute valid and binding obligations of the State. 1948, Op.Atty.Gen. 138.

3. —— Borrowing in anticipation of

Temporary borrowing in anticipation of the sale of housing bonds is authorized. 1940, Op.Atty.Gen. 217.

4. —— Level payment basis

The state may not issue housing bonds on "level payment plan", under which serial maturities are so arranged that total annual charges required to pay interest and principal are constant for entire period in which any bonds are outstanding, equal amounts paid annually discharge state's entire obligation, and amount of principal repaid increases yearly to same extent that interest requirements decline, but may issue such bonds only on "equal annual installment plan," whereby equal amount of principal, plus interest, is payable each year and amount of interest payable decreases yearly until final payment of principal. Weinfeld v. Tremaine, 1940, 259 App.Div. 958, 20 N.Y.S.2d 437.

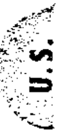
State bonds on a level debt payment basis may be issued to make loans to limited profit housing companies under the $50,000,000 authorization approved by the people in 1955, and mortgage commitments may be made or amended to accord therewith. 1959, Op.Atty.Gen. 20.

5. —— Maturity of

The 50 year maturity of a housing bond issue under this section must date from the original date of the bond obligation itself. 1940, Op. Atty.Gen. 162.

6. Periodic subsidies—Amount of

The maximum amount of periodic subsidies permitted to be contracted for in any one year may be increased to a sum greater than one million dollars in any one year by legislative enactment, subject to approval by the electorate, without the necessity of a constitutional amendment. 1946, Op. Atty.Gen. 84.



7. Fiscal year

Laws 1939, c. 953, which apportioned subsidy money appropriated thereunder at two-thirds for New York City and one-third for the rest of the State, is applicable only to the moneys appropriated by said Act for the fiscal year commencing July 1, 1939, so that at present time section 73 of Public Housing Law controls. 1944, Op.Atty.Gen. 100.

Change in fiscal year by L.1943, c. 1, did not affect measurement of "any one year" provided in this section. 1943, Op.Atty.Gen. 75.

8. Single or several projects

The term "single work or purpose" as used in section 11 of Article VII, embraces the scope of "housing" under the article, and may include one or more such projects. 1940, Op.Atty. Gen. 162.

§ 4. [Powers of cities, towns and villages to contract indebtedness in aid of low rent housing and slum clearance projects; restrictions thereon]

To effectuate any of the purposes of this article, the legislature may authorize any city, town or village to contract indebtedness to an amount which shall not exceed two per centum of the average assessed valuation of the real estate of such city, town or village subject to taxation, as determined by the last completed assessment roll and the four preceding assessment rolls of such city, town or village, for city, town or village taxes prior to the contracting of such indebtedness. In ascertaining the power of a city, or village having a population of five thousand or more as determined by the last federal census, to contract indebtedness pursuant to this article there may be excluded any such indebtedness if the project or projects aided by guarantees representing such indebtedness or by loans for which such indebtedness was contracted shall have yielded during the preceding year net revenue to be determined annually by deducting from the gross revenues, including periodic subsidies therefor, received from such project or projects, all costs of operation, maintenance, repairs and replacements, and the interest on such indebtedness and the amounts required in such year for the payment of such indebtedness; provided that in the case of guarantees such interest and such amounts shall have been paid, and in the case of loans an amount equal to such interest and such amounts shall have been paid to such city or village. The legislature shall prescribe the method by which the amount of any such indebtedness to be excluded shall be determined, and no such indebtedness shall be excluded except in accordance with such determination. The legislature may confer appropriate jurisdiction on the appellate division of the supreme court in the judicial departments

in which such cities or villages are located for the purpose of determining the amount of any such indebtedness to be so excluded.

The liability of a city, town or village on account of any contract for capital or periodic subsidies to be paid subsequent to the then current year shall, for the purpose of ascertaining the power of such city, town or village to contract indebtedness, be deemed indebtedness in the amount of the commuted value of the total of such capital or periodic subsidies remaining unpaid, calculated on the basis of an annual interest rate of four per centum. Such periodic subsidies shall not be contracted for a period longer than the life of the projects assisted thereby, and in no event for more than sixty years. Indebtedness contracted pursuant to this article shall be excluded in ascertaining the power of a city or such village otherwise to create indebtedness under any other section of this constitution. Notwithstanding the foregoing the legislature shall not authorize any city or village having a population of five thousand or more to contract indebtedness hereunder in excess of the limitations prescribed by any other article of this constitution unless at the same time it shall by law require such city or village to levy annually a tax or taxes other than an ad valorem tax on real estate to an extent sufficient to provide for the payment of the principal of and interest on any such indebtedness. Nothing herein contained, however, shall be construed to prevent such city or village from pledging its faith and credit for the payment of such principal and interest nor shall any such law prevent recourse to an ad valorem tax on real estate to the extent that revenue derived from such other tax or taxes in any year, together with revenues from the project or projects aided by the proceeds of such indebtedness, shall become insufficient to provide fully for payment of such principal and interest in that year.

Adopted Nov. 8, 1938; amended Nov. 8, 1949, eff. Jan. 1, 1950.

Historical Note

The 1949 amendment authorized the exclusion of certain indebtedness by villages of 500 or more population and made second last sentence applicable to such villages.

Library References

Municipal Corporations ⟹860, 910.

C.J.S. Municipal Corporations §§ 1835 et seq., 1905, 1906.

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1. Obligations within debt limitation

Obligations issued or proposed to be issued by the city to finance urban renewal projects are subject to the 2 per cent debt limitation of this section and section 150.00 of the Local Finance Law. 18 Op.State Compt. 217, 1962.

Where village undertakes public housing projects by itself rather than through instrumentality of a housing authority, it is restricted to the two per centum (2%) limitation on housing indebtedness prescribed by this section. 1959, Op.Atty.Gen. 22.

2. Obligations excluded from debt limitation

Bond indebtedness contracted by a city housing authority for housing projects is excluded from the city housing and urban renewal debt limitation. 18 Op.State Compt. 217, 1962.

§ 5. [Liability for certain loans made by the state to certain public corporations]

Any city, town or village shall be liable for the repayment of any loans and interest thereon made by the state to any public corporation, acting as an instrumentality of such city, town or village. Such liability of a city, town or village shall be excluded in ascertaining the power of such city, town or village to become indebted pursuant to the provisions of this article, except that in the event of a default in payment under the terms of any such loan, the unpaid balance thereof shall be included in ascertaining the power of such city, town or village to become so indebted. No subsidy, in addition to any capital or periodic subsidy originally contracted for in aid of any project or projects authorized under this article, shall be paid by the state to a city, town, village or public corporation, acting as an instrumentality thereof, for the purpose of enabling such city, town, village or corporation to remedy an actual default or avoid an impending default in the payment of principal or interest on a loan which has been theretofore made by the state to such city, town, village or corporation pursuant to this article.

Adopted Nov. 8, 1938; amended Nov. 5, 1957, eff. Jan. 1, 1958.

Historical Note

The 1957 amendment provided that in ascertaining the power of a town or village to become indebted for housing purposes pursuant to the provisions of article eighteen, the liability of such town or village for the repayment of any loans and interest thereon made by the state to any public corporation acting as an instrumentality of such town or village shall be excluded, except in case of default in payment under the terms of any such loan, the unpaid balance thereof shall be included in ascertaining the power of such town or village to become so indebted. Such exclusion is now applicable to cities only.—Abstract of Department of State.

Library References

Counties ⇐153.
Municipal Corporations ⇐859, 869, 877.
States ⇐124.
Towns ⇐46(3).

C.J.S. Counties § 222.
C.J.S. Municipal Corporations §§ 1833 et seq., 1869, 1877.
C.J.S. States § 155.
C.J.S. Towns § 116.

Notes of Decisions

1. Limitation of indebtedness

The provisions in contract entered into by city with state and municipal housing authority for construction of housing project, which provided for exemption from local taxation of improvements added to realty pursuant to the project, and which made city liable for money borrowed from state in case of default by the authority, did not impose obligations upon city which would be included in determining whether city had incurred indebtedness in excess of its statutory and constitutional limitations. Davidson v. City of Elmira, 1943, 180 Misc. 1052, 44 N.Y.S.2d 302, affirmed 267 App.Div. 797, 46 N.Y.S.2d 655, appeal denied 267 App.Div. 926, 47 N.Y.S.2d 604.

Under this section, a village is liable for the repayment of any loans made by the State to the village housing authority and therefore the borrowing of such authority from the state is restricted to the 2% limitation of section 4 of this article and must be included in the 10% debt limitation of section 4 of Article VIII, and the only exception, as contained in this section, is in the case of a city. 1940, Op.Atty.Gen. 164.

1957 amendment of this section included villages in provision allowing exclusion of village indebtedness to state in estimating the debt assuming potential of such village and though housing authority of a village had contracted state indebtedness prior to effective date of amendment, village was still entitled to benefit of exclusion of indebtedness provision on all debt statements of village for fiscal years following effective date of 1957 amendment. 17 Op.State Compt. 346, 1961.

§ 6. [Loans and subsidies; restrictions on and preference in occupancy of projects]

No loan or subsidy shall be made by the state to aid any project unless such project is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and insanitary area or areas and for recreational and other facilities incidental or appurtenant thereto. The legislature may provide additional conditions to the making of such loans or subsidies consistent with the purposes of this article. The occupancy of any such project shall be restricted to persons of low income as defined by law and prefer-

ence shall be given to persons who live or shall have lived in such area or areas.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

Library References

States ⟹123. C.J.S. States § 156.

Notes of Decisions

1. Discrimination

Refusal of corporation organized under former Redevelopment Companies Law, McKinney's Unconsol. Laws § 3401 et seq., to consider applicants as tenants because of race, color, creed or religion in a housing project constructed under a contract with city under such law, was not "state action" so as to violate equal protection clauses of state or federal Constitutions. Dorsey et al. v. Stuyvesant Town Corporation, 1949, 299 N.Y. 512, 87 N.E.2d 541.

§ 7. [Liability arising from guarantees to be deemed indebtedness; method of computing]

The liability arising from any guarantee of the principal of and interest on indebtedness contracted by a public corporation shall be deemed indebtedness in the amount of the face value of the principal thereof remaining unpaid. The liability arising from any guarantee of only the interest on indebtedness contracted by a public corporation shall be deemed indebtedness in the amount of the commuted value of the total interest guaranteed and remaining unpaid, calculated on the basis of an annual interest rate of four per centum.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

Library References

Municipal Corporations ⟹865(2). C.J.S. Municipal Corporations § 1849.

§ 8. [Excess condemnation]

Any agency of the state, or any city, town, village or public corporation, which is empowered by law to take private property by eminent domain for any of the public purposes specified in section one of this article, may be empowered by the legislature to take property necessary for any such purpose but in excess of that required for public use after such purpose shall have been accomplished; and to improve and utilize such excess, wholly or partly for any other public purpose, or to lease or sell such excess with restrictions to preserve and protect such improvement or improvements.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

Library References

Eminent Domain ⟹61. C.J.S. Eminent Domain § 29.

Notes of Decisions

1. Sale of excess area

Resolution of board of estimate that following condemnation of certain land for rehabilitation purposes the property, which included petitioners' stores, should be sold at public auction, authorized the sale merely incidental to the objects of the clearance and rehabilitation project, and the taking did not constitute the taking of private land for private use. In re Harlem Slum Clearance Project, City of New York, 1952, 114 N.Y.S.2d 787, affirmed 281 A.D. 1024, 122 N.Y.S.2d 623.

§ 9. [Acquisition of property for purposes of article]

Subject to any limitation imposed by the legislature, the state, or any city, town, village or public corporation, may acquire by purchase, gift, eminent domain or otherwise, such property as it may deem ultimately necessary or proper to effectuate the purposes of this article, or any of them, although temporarily not required for such purposes.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

Library References

Municipal Corporations ⟹223.
States ⟹85.
Towns ⟹35(1).

C.J.S. Municipal Corporations §§ 958–960.
C.J.S. States §§ 104, 106.
C.J.S. Towns § 90 et seq.

§ 10. [Power of legislature; construction of article]

The legislature is empowered to make all laws which it shall deem necessary and proper for carrying into execution the foregoing powers. This article shall be construed as extending powers which otherwise might be limited by other articles of this constitution and shall not be construed as imposing additional limitations; but nothing in this article contained shall be deemed to authorize or empower the state, or any city, town, village or public corporation, to engage in any private business or enterprise other than the building and operation of low rent dwelling houses for persons of low income as defined by law, or the loaning of money to owners of existing multiple dwellings as herein provided.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

Library References

Constitutional Law ⟹81. C.J.S. Constitutional Law § 174 et seq.

Notes of Decisions

Generally 1
Police protection 2

dates. New York City Housing Authority v. Medlin, 1968, 57 Misc.2d 145, 291 N.Y.S.2d 672.

1. Generally

Courts cannot prescribe conduct or attempt to make administrative decisions for another branch of the government, and cannot substitute their judgment for that of legislature and of administrative agencies having power to carry out legislative mandates. New York City Housing Authority v. Medlin, 1968, 57 Misc.2d 145, 291 N.Y.S.2d 672.

2. Police protection

Fundamental change in law to insure adequate police protection for tenants in public housing projects is function of legislature and not courts. New York City Housing Authority v. Medlin, 1968, 57 Misc.2d 145, 291 N.Y.S.2d 672.

ARTICLE XIX—AMENDMENTS TO CONSTITUTION

Sec.
1. Proposal of amendment; procedure by attorney-general; approval by legislature; ratification by people.
2. Future constitutional conventions; how called; election of delegates; compensation; quorum; submission of amendments; officers; employees; rules; vacancies.
3. Amendments simultaneously submitted by convention and legislature.

§ 1. [Proposal of amendment; procedure by attorney-general; approval by legislature; ratification by people]

Any amendment or amendments to this constitution may be proposed in the senate and assembly, whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments

to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.

Formerly Art. 14, § 1; renumbered Art. 19, § 1, and amended Nov. 8, 1938; Nov. 4, 1941, eff. Jan. 1, 1942.

Historical Note

The 1941 amendment provided that neither the failure of the attorney-general to render an opinion concerning a proposed amendment nor his failure to do so timely shall affect the validity of the amendment or legislative action thereon.

Derivation. Const.1894, Art. 14, § 1; Const.1846, Art. 13, § 1; Const. 1821, Art. 8, § 1.

Library References

Constitutional Law ⇐5 et seq.

C.J.S. Constitutional Law § 7 et seq.

Notes of Decisions

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Nature of section 1
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Reference to succeeding legislature 7
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Validity of particular amendments 11
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1. Nature of section

Former section 1 of Article 14 was mandatory, but was not, however, self-executing. 1915 Op.Atty.Gen. 100.

2. Continuation of prior law

This section is not inconsistent with similar provision in Constitution of 1894, but was a continuation of the same purpose and method in adopting constitutional amendments through resolutions by the Legislature. Stoughton v. Cohen, 1939, 281 N.Y. 343, 23 N.E.2d 460.

This section was not intended by constitutional convention of 1938 to supersede or wipe out all previous acts performed under section 1 of Article XIV of the Constitution of 1894. Id.

3. Duplicate proposed amendments

Where both companion concurrent resolutions proposing an amendment to the state constitution, identical in text, have been adopted by the legislature, the concurrent resolution which was first approved by both houses of the legislature should be submitted to the electorate. 1961, Op.Atty.Gen. 43.

4. Opinion by attorney general

That provision of this section required opinion of Attorney General

§ 4. [Care and treatment of persons suffering from mental disorder or defect; violation of institutions for]

New York Codes, Rules and Regulations

Visitation and inspection of facilities, see 14 NYCRR Part 71.

Notes of Decisions

1. Generally

Care and custody of mentally ill rests with individual states. Matter of Eber, 1983, — Misc.2d —, 460 N.Y.S.2d 458.

§ 5. [Institutions for detention of criminals; probation; parole; state commission of correction; visitorial power]

The legislature may provide for the maintenance and support of institutions for the detention of persons charged with or convicted of crime and for systems of probation and parole of persons convicted of crime. There shall be a state commission of correction, which shall visit and inspect, or cause to be visited and inspected by members of its staff, all institutions used for the detention of sane adults charged with or convicted of crime.

As amended Nov. 6, 1973, eff. Jan. 1, 1974.

3. Probation

This section grants to the legislature the power to maintain and support probation departments, and art. 6, § 1 et seq. providing for the establishment of the unified court system did not necessarily affect this grant of power any more than it impaired the legislative power to build courthouses, staff them with nonjudicial employees, or supply them with facilities, supplies, or building maintenance. Browne v. Nassau County, 1975, 37 N.Y.2d 75, 371 N.Y.S.2d 449, 332 N.E.2d 323.

§ 7. [Loan of public funds for hospital facilities]

Notwithstanding any other provision of this constitution, the legislature may authorize the state, a municipality or a public corporation acting as an instrumentality of the state or municipality to lend its money or credit to or in aid of any corporation or association, regulated by law as to its charges, profits, dividends, and disposition of its property or franchises, for the purpose of providing such hospital or other facilities for the prevention, diagnosis or treatment of human disease, pain, injury, disability, deformity or physical condition, and for facilities incidental or appurtenant thereto as may be prescribed by law.

Adopted Nov. 4, 1969, eff. Jan. 1, 1970.

Library References

Hospitals ⇐2.
C.J.S. Hospitals § 4.

ARTICLE XVIII—HOUSING

§ 1. [Housing for persons of low income and nursing home accommodations; slum clearance]

Supplementary Index to Notes

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1. Generally

Vinson v. Greenburgh Housing Authority, 29 A.D.2d 338, 288 N.Y.S.2d 159, main volume, affirmed 27 N.Y.2d 675, 314 N.Y.S.2d 1, 262 N.E.2d 211.

This article authorizing the legislature to, inter alia, provide housing for persons of low income and for slum clearance is an article of authorization and not limitation. Akari House, Inc. v. Irizzary, 1975, 81 Misc.2d 543, 366 N.Y.S.2d 955.

Due process, as applied to residents in low income housing whose tenancy is to be terminated, includes a meaningful opportunity to be heard, an effective opportunity to defend by confronting and cross-examining adverse witnesses, and the right to effective assistance of counsel. Newton v. Municipal Housing Authority for City of Yonkers, 1973, 72 Misc.2d 633, 340 N.Y.S.2d 89.

2. Authority of legislature—Generally

Urban Development Corporation Act is corollary of and supportive of this section providing for override power with respect to low rent housing and nursing home accommodations People v. Miceli, 1973, 73 Misc.2d 133, 341 N.Y.S.2d 262.

3a. Local regulations

Urban Development Corporation, which was established by the legislature, was exempt from compliance with city zoning, ordinance in connection with its construction of apartment complex in area zoned for highest residential use as provision of homes for the People of the State pursuant to the police power constituted a governmental function. Peters v. New York State Urban Development Corp., 1973, 41 A.D.2d 1008, 344 N.Y.S.2d 151.

10. —— Substandard areas

Areas eligible for urban renewal are not limited to slums. Yonkers Community Development Agency v. Morris, 1975, 37 N.Y.2d 478, 373 N.Y.S.2d 112, 335 N.E.2d 327, appeal dismissed 96 S.Ct. 440, 423 U.S. 1010, 46 L.Ed.2d 381.

Courts are required to be more than rubber stamps in the determination of existence of substandard conditions in urban renewal condemnation cases. Id.

15. Municipal housing authorities

The board of representatives of a county does not have the power to create a municipal housing authority to carry out the purposes of this article. 1970, Op.Atty.Gen. (Inf.) 153.

16. Urban renewal plan

For an area to be termed "blighted" and thus subject to urban renewal condemnation, degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors do not have to be arrived at with precision, since combination and effects of such things are highly variable. Yonkers Community Development Agency v. Morris, 1975, 37 N.Y.2d 478, 373 N.Y.S.2d 112, 335 N.E.2d 327, appeal dismissed 96 S.Ct. 440, 423 U.S. 1010, 46 L.Ed.2d 381.

Factors to be considered in determining if area is "blighted" and thus subject to urban renewal condemnation include such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of existing mixture of residential and industrial property, overcrowding, incidence of crime, lack of sanitation, drain area makes on municipal services, fire hazards, traffic congestion and pollution. Id.

Extensive authority to make initial determination that area qualifies for urban renewal as "blighted" is vested in agencies and municipalities; courts may review their findings only upon limited basis. Id.

Compelled compliance with rehabilitation provisions of urban renewal plan, in the event petitioner's property, which had initially been designated "to be acquired," was ultimately classified as "not to be acquired" would not amount to a diminution of right causing urban renewal agency to respond in damages. O'Brien v. Troy Urban Renewal Agency, 1973, 72 Misc.2d 1058, 340 N.Y.S.2d 367.

17. Slum clearance

Slum clearance purpose of this article relating to, inter alia, slum clearance is not limited to physical reconstruction and rehabilitation of buildings. Akari House, Inc. v. Irizzary, 1975, 81 Misc.2d 543, 366 N.Y.S.2d 955.

18. Development of low-income housing by county

Suffolk county is not authorized under this section to actively engage in the development or operation of low-income housing and, therefore, may not act as a "public housing agency" under the Federal Housing and Community Development Act of 1974, 42 U.S.C.A. § 1437 et seq. 1978, Op.Atty.Gen. (Inf.) 162.

19. Urban renewal agency subsidization

A city may subsidize its urban renewal agency in the operation of a commercial mall until the mall becomes self-sustaining. Op.State Compt. 79–459.

juana in open view. They proceeded to the location of the dresser, as described by the informer, and found the bricks of marijuana the informer had said were there. We held the warrantless search to be valid. We noted that the police might have sealed off the defendants' apartment while a warrant was obtained. However, this would have involved an intrusion of greater magnitude than that engendered by an immediate search. We concluded that "a fair or sensible balancing of the competing private and public interests" did not demand that "the greater intrusion be preferred over the lesser." (37 NY2d, at p 681.)

In my view, *Clements* is fully applicable to this case. The police had probable cause to arrest Gonzalez and his wife and to search their apartment for drugs. The arrest had to be made quickly for Gonzalez had become nervous about the identity of the undercover agent. Once having arrested Gonzalez, there was a grave danger that the drugs would be disposed of before a warrant could be obtained. Indeed, the defendant's wife, immediately upon the arrest of her husband, flushed the previously observed cocaine down the toilet. Her grandfather was found waiting outside the door when the police concluded their search. "In sum the situation was sufficient to create, and evidently did create, a perceived likelihood" that the narcotics which the police knew to be in the apartment "might be destroyed". *(People v Clements, supra,* at p 680.)

I would reverse the orders of the Appellate Division, sustain the validity of the search, and reinstate the judgments of conviction.

Judges GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur with Chief Judge BREITEL; Judge JASEN dissents and votes to reverse in a separate opinion.

Orders affirmed.

LEON E. WEIN, Appellant, v STATE OF NEW YORK et al., Respondents.

Argued January 13, 1976; decided March 23, 1976

State — loan of credit — revenue anticipation notes issued to fund appropriations for reimbursable advances to City of New York and Municipal Assistance Corporation do not violate constitutional proscription against giving or lending of credit of State to public corporations, since cash in hand may be

given or loaned, and, where appropriation therefor has been made under balanced budget, funds may be obtained through short-term notes secured by committed revenues authentically anticipated within one year.

The issuance of revenue anticipation notes to fund appropriations of $250 million and $500 million for reimbursable advances to the City of New York and the Municipal Assistance Corporation for the City of New York respectively, while reaching the limits of valid constitutional practice, does not violate the proscription against the giving or lending of the credit of the State to public corporations (NY Const, art VII, § 8, subd 1). The Constitution does not prohibit the giving or lending of money to a municipal or other public corporation, such that cash in hand may be given or loaned, and, where the appropriation for a gift or loan has been made under a balanced budget, the transaction involves cash in hand, regardless of whether the funds are temporarily financed by borrowings. The required funds may be obtained through short-term notes, which are secured by committed tax, Federal grant and bond revenues authentically anticipated within one year and which may not be rolled over into long-term obligations or a new short-term issue. Such temporary obligations, properly administered, will not burden future taxpayers by the direct or indirect creation of a deficit in the year of repayment, in contrast to the constitutionally prohibited use of long-term borrowing to finance State gifts. Historically, the constitutional prohibition against gifts or loans of the State's credit was intended to protect posterity from the consequences of future contingent liabilities profligately incurred. The instant transactions present no such abuse, so long as the fiscal prospects are tenable.

Wein v State of New York, 84 Misc 2d 453, affirmed.

APPEAL, on constitutional grounds, from a judgment of the Supreme Court at Special Term (NATHANIEL T. HELMAN, J.), entered October 21, 1975 in New York County in an action for a declaratory judgment, which granted summary judgment to defendants declaring sections 22 and 23 of the State Financial Emergency Act for the City of New York (L 1975, ch 868, as amd by L 1975, ch 870) constitutional and valid.

Leon Edward Wein, pro se, and *William J. Quirk* for Leon E. Wein, appellant. I. The $250 million characterized by Special Term as an appropriation of money involves an unconstitutional loan of the State's credit to or in aid of the City of New York. II. Chapters 868 and 870 of the Laws of 1975 violate section 8 of article VII of the Constitution of the State of New York in that they provide for a gift or loan of the State's credit in aid of a public corporation. *(People v Westchester County Nat. Bank,* 231 NY 465; *Bank of Rome v Village of Rome,* 18 NY 38; *Starin v Town of Genoa,* 23 NY 439; *Gould v Town of Sterling,* 23 NY 456; *People v Mead,* 24 NY 114; *Clarke v City of Rochester,* 28 NY 605; *People v Mitchell,* 35 NY 550; *People ex rel. Haines v Smith,* 45 NY 772; *People ex rel. Freeman v Hulbert,* 46 NY 110; *People ex rel. Allen v Knowles,* 47 NY 415; *People ex rel. Dunkirk, W &*

P R. R. Co. v Batchellor, 53 NY 128.) III. Section 8 of article VII of the Constitution prohibits the gift or loan of State credit in any form. IV. Short-term borrowing involves the credit of the State.

Louis J. Lefkowitz, Attorney-General (Shirley Adelson Siegel and *Samuel A. Hirshowitz* of counsel), for Arthur Levitt, respondent. I. The $750 million appropriation is a constitutional advance of money to public corporations. *(Union Free School Dist. v Town of Rye,* 280 NY 469; *Comereski v City of Elmira,* 308 NY 248; *Wein v City of New York,* 36 NY2d 610.) II. The Constitution expressly permits short-term borrowing to fund appropriations. No exception is made for appropriations from the Local Assistance Fund. III. The constitutional prohibition against loan of the State's credit does not apply. *(Courtesy Sandwich Shop v Port of N. Y. Auth.,* 12 NY2d 379; *Matter of Van Berkel v Power,* 16 NY2d 37; *I. L. F. Y. Co. v Temporary State Housing Rent Comm.,* 10 NY2d 263, 369 US 795; *Matter of Roosevelt Raceway v Monaghan,* 9 NY2d 293, 368 US 12; *Wiggins v Town of Somers,* 4 NY2d 215; *People v Westchester County Nat. Bank,* 231 NY 465; *Union Free School Dist. v Town of Rye,* 280 NY 469; *Salzman v Impellitteri,* 203 Misc 486, 281 App Div 1023, 305 NY 414; *Murphy v Erie County,* 28 NY2d 80.)

Martin Kleinbard, Max Gitter and *Dean B. Allison* for the Municipal Assistance Corporation for the City of New York, *amicus curiae.* I. The challenged legislation does not entail a gift or loan of the State's credit. *(Union Free School Dist. v Town of Rye,* 280 NY 469; *Matter of City of New York [U. N. Development Corp.],* 72 Misc 2d 535.) II. Section 9 of article VII of the Constitution expressly authorizes the State to employ short-term revenue anticipation borrowings to satisfy prior appropriations to a public corporation. III. The gift or loan of credit clause does not apply to the appropriations and short-term borrowings involved here. IV. The short-term State borrowings here do not entail a gift or loan of credit because they were undertaken to fulfill the legal obligations of the State itself. *(Union Free School Dist. v Town of Rye,* 280 NY 469; *County of Oneida v City of Utica,* 285 NY 788; *Comereski v City of Elmira,* 308 NY 248; *Wein v City of New York,* 47 AD2d 367, 36 NY2d 610; *Salzman v Impellitteri,* 203 Misc 486, 281 App Div 1023, 305 NY 414.) V. The appropriations provided for in the Emergency Act and the State's subsequent

short-term borrowing do not violate section 8 of article VII of the Constitution because they were undertaken "in aid of" the State itself. *(Salzman v Impellitteri,* 203 Misc 486, 281 App Div 1023, 305 NY 414; *Union Free School Dist. v Town of Rye,* 280 NY 469; *Wein v City of New York,* 47 AD2d 367, 36 NY2d 610; *Matter of Froslid v Hults,* 20 AD2d 498, 14 NY2d 722; *East N. Y. Sav. Bank v Hahn,* 293 NY 622.)

Haliburton Fales, 2d, Willis McDonald, IV, Marion Jay Epley, III, Thomas J. O'Sullivan, Robert L. Clare, III, and *John E. Osnato* for Certain New York Financial Institutions, *amicus curiae.* I. The instant case does not involve a loan or gift of "credit" within the meaning of section 8 of article VII of the New York Constitution. *(People v Westchester County Nat. Bank,* 231 NY 465; *Sun Print. & Pub. Assn. v Mayor of City of N. Y.,* 152 NY 257; *Union Free School Dist. v Town of Rye,* 280 NY 469.) II. The State's appropriation of funds for the city is not unconstitutional since such State expenditure is primarily for State purposes. *(Union Free School Dist. v Town of Rye,* 280 NY 469; *Salzman v Impellitteri,* 203 Misc 486, 281 App Div 1023, 305 NY 414; *Comereski v City of Elmira,* 308 NY 248; *Wein v City of New York,* 47 AD2d 367, 36 NY2d 610; *Matter of Froslid v Hults,* 20 AD2d 498, 14 NY2d 722; *People v Westchester County Nat. Bank,* 231 NY 465; *East N. Y. Sav. Bank v Hahn,* 293 NY 622, 326 US 230.) III. Investors have acted in reasonable reliance on the realistic approach taken in this area by the New York courts in the past. It would not be in the interests of justice, nor in the interests of the people of the State and City of New York, to now change the ground rules and adopt a rigid approach. *(Wein v City of New York,* 36 NY2d 610; *People ex rel. De Forest v Denniston,* 23 NY 247; *Bank for Sav. in City of N. Y. v Grace,* 102 NY 313; *Sun Print. & Pub. Assn. v Mayor of City of N. Y.* 152 NY 257; *Union Free School Dist. v Town of Rye,* 280 NY 469; *County of Oneida v City of Utica,* 260 App Div 363, 285 NY 788; *Salzman v Impellitteri,* 203 Misc 486, 281 App Div 1023, 305 NY 414; *Comereski v City of Elmira,* 308 NY 248.)

Chief Judge Breitel. In a taxpayer's action Supreme Court summarily on motion declared constitutional sections 22 and 23 of the State Financial Emergency Act for the City of New York (L 1975, ch 868, as amd by L 1975, ch 870). Plaintiff taxpayer appeals directly to this court urging the statute's

unconstitutionality (NY Const, art VI, § 3, subd b, par [2]; CPLR 5601, subd [b], par 2).

In a desperate fiscal crisis the Nation's largest city faces bankruptcy and the State lacks cash resources to tide the city over its immediate problems by outright grant of funds. The issue is whether appropriations, at an Extraordinary Session of the Legislature in mid-fiscal year, of $250 million to the City of New York and $500 million to the Municipal Assistance Corporation for the City of New York (MAC), to be funded by short-term State borrowing in the form of revenue or tax anticipation notes, constitute a gift or loan of the credit of the State to public corporations, in violation of constitutional limitations (NY Const, art VII, § 8, subd 1).

There should be an affirmance. The Constitution does not prohibit the State for a public purpose from giving or lending its money to assist a municipal or other public corporation. Nor does the Constitution prohibit the State from short-term borrowing in advance of anticipated taxes and revenues to fund appropriations previously made. Indeed, short-term borrowing for this purpose is expressly and unconditionally authorized by the literal terms of section 9 of article VII. Hence, if the State chooses to use the proceeds of otherwise constitutionally valid short-term borrowing, payable out of anticipated revenues, in disbursement of an appropriation of money to assist for a public purpose a municipal or other public corporation, the State's "credit" is not extended to the municipality or other public corporation in violation of constitutional limitations. The device is that the State gives cash in hand to the public corporation, albeit obtained by its own borrowing. Such borrowing is permitted in limited fashion by the Constitution, by short-term paper in advance of authentically anticipated revenues from taxes, Federal grants or long-term bonds authorized but not yet issued. The line is a narrow one, but one drawn by the Constitution.

On September 5, 1975, because of the desperate fiscal crisis in New York City, the Legislature convened in Extraordinary Session. On September 9, it passed, and the Governor approved, the New York State Financial Emergency Act for the City of New York, an intricate fiscal plan to meet the city's immediate financial paralysis (L 1975, ch 868, as amd by L 1975, ch 870).

The Legislature declared "that a financial emergency and an emergency period exists in the city of New York. The city is unable to obtain the funds needed by the city to continue to provide essential services to its inhabitants or to meet its obligations to the holders of outstanding securities" (§ 1). To meet the emergency, $250 million and $500 million were appropriated "in the first instance" as advances to the city and to MAC, respectively (§§ 22, 23). The appropriations were purportedly made from the Local Assistance Fund, an account, and not an actual fund, into which appropriations and disbursements of State aid to local governments are charged and credited (State Finance Law, § 70, subd 3, par [a]). As a precondition to receiving the funds, the city and MAC were required to enter into repayment agreements with the State Budget Director, and to issue notes and bonds payable to the State in the principal amounts of the advances.

No provision was made in the particular statute for the source from which the State expected to obtain the funds to pay the appropriations. This is not unusual in appropriations made by the Legislature. On September 15, 1975, however, the State sold short-term revenue anticipation notes (RANs) in the amount of $250 million, for the purpose of crediting the proceeds to the Local Assistance "Fund" and offsetting a portion of the MAC appropriation. (In October and November, 1975, after Special Term had declared the appropriations sections constitutional, an additional $500 million in short-term notes were sold to fund the remainder of the appropriations.) By general statute, sufficient revenues to pay the particular RANs are available by impounding of the revenues to be received by the State (State Finance Law, § 55; 1934 Opns Atty Gen 190, 191).

Critical to understanding State finances is that the Constitution mandates a balanced budget (art VII, § 2). At the annual regular session of the Legislature, usually not later than February 1, the Governor must present a balanced budget, namely, a plan of expenditures and revenues which balance, with permissible contingencies which do not merit consideration in the present context. Temporary borrowing, discussed later, is permitted to anticipate planned committed revenues and, in certain limited situations, not now relevant, unanticipated needs. There is no express treatment in the Constitution governing appropriations made after the regular session and during the fiscal year at extraordinary sessions, but the implication is, and an essential one, that additional appropriations must be covered by matching revenues, or else the balanced

budget of the regular session would be a device easily evaded at a later extraordinary session. A control on such evasion, however, and reinforcing the implication are the constitutional limitations on short-term borrowing.

There is flexibility in the Constitution, as there must be, because estimates of expenditures will never be fulfilled exactly and estimates of revenues will even less likely be fulfilled exactly. And this lack of capacity to prophesy expenditures and revenues in relatively ordinary times is minor when compared to changes of magnitude due to disasters, economic upheavals, war, the coming of peace after war, and the like. The 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.

The issues raised in this case involve the principles of the constitutional plan, manipulation of its provisions, and the likelihood of the very abuses the Constitution was intended to prevent. The issues are not easily resolved, and the answers are not categorical. If the city and the State had enormous aggregate temporary debt, without immediate provision for its liquidation or valid refunding in the aggregate, it would be demonstrative that either the constitutional plan is not exact enough to prevent what has happened or that the plan has been violated.

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.

Plaintiff contends that the appropriations to the city and MAC, funded by short-term State borrowing, constitute a gift or loan of the credit of the State in violation of constitutional limitations. In short, he contends that the State has attempted to do indirectly what it may not do directly.

Section 8 of article VII of the Constitution provides: "The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking".

The prohibition against lending or giving the State's credit was prompted largely by the extensive and highly speculative subsidizing in the first half of the nineteenth century of

private railroad and canal companies by the State's long-term debt obligations (see *People v Westchester County Nat. Bank*, 231 NY 465, 471-472; Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York [1846], at pp 884-894; New York State Constitutional Convention Comm, Problems Relating to Taxation and Finance [1938], vol 10, ch V; New York Temporary State Comm on the Constitutional Convention, State Finance [1967], p 108; Sowers, Financial History of New york State, pp 82-85; Bidwell, Taxation in New York State, pp 32-33; 2 Lincoln, Constitutional History of New York, pp 91-101, 179-180; see, also, *Johns Hopkins Univ. v Williams*, 199 Md 382, 388-390). For example, to aid the construction of railroads, the State would issue or "loan" to the railroad "State stock", a form of long-term debt instrument backed by the State's full faith and credit. The public would then purchase the State stock from the railroad at auction, and the proceeds would be applied to the private corporation's capital improvements (e.g., L 1836, ch 170, §§ 1, 4, 7).

It was not anticipated that the State would ever have to pay the debt to the purchasers of the State stock from its own tax-raised funds (see Problems Relating to Taxation and Finance [1938], *op. cit.*, at p 109; Debates and Proceedings [1846], *op. cit.*, at pp 856, 1085; Proceedings and Debates of the Constitutional Convention of 1867, vol 3, at p 1844). This was because, in return for the stock, the railroads promised to pay the annual interest and to redeem the principal before it became due, thus exonerating the State of its liability (e.g., L 1836, ch 170, § 9). In the words of Mr. Hoffman, Chairman of the 1846 Convention Committee on Finances, "The people stand in this case as security for those debts" (Debates and Proceedings [1846], *op. cit.*, at p 852). Mortgages of railroad real property were given to secure the promises.

In the halcyon days of economic boom, stimulated by the improvements which presaged the eventual industrial and commercial development of the State, the practice of subsidizing internal transportation improvements foretold no fiscal difficulties, and seemed very much in the public interest. With the onset of the depression of 1837-1842, however, the railroads, too rapidly and profligately built, were unable to pay their debts. The State paid. Foreclosure of the railroad mortgages was futile, as they covered only real property, practically worthless apart from the rolling stock. Public funds thus

disbursed were never reimbursed and the people became disillusioned with the policy of subsidizing private internal improvements, however seemingly desirable. As a consequence, section 9 of article VII of the Constitution of 1846 was adopted to prohibit the lending or giving of the State's credit to corporations (see *People v Westchester County Nat. Bank,* 231 NY 465, 471-472, *supra;* Debates and Proceedings [1846], *op. cit.,* at pp 853-856; Revised Record of the New York State Constitutional Convention of 1915, vol 2, at pp 1255-1256; Problems Relating to Taxation and Finance [1938], *op. cit.,* at pp 109-112; Lincoln, *op. cit.,* at pp 98-101, 179-180).

In 1938, following the Great Depression with memories then fresh of the financial stringencies of municipal corporations, the prohibition against lending or giving the State's credit was for the first time made applicable to public corporations (NY Const, art VII, § 8). The 1938 Convention Committee on State Finances and Revenues reported: "If corporations were 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. One or two such instances might do no harm, but a general use of the State credit in this manner would dissipate the State's credit and demolish the strongest foundation of our State's financial structure. The committee feels strongly that the State's credit should be reserved for the use of the State only, with only such exceptions as may be specifically set forth in the Constitution" (Journal and Documents of the New York State Constitutional Convention [1938], Appendix 3, Doc No. 3, at p 6).

The foregoing historical summary indicates that the prohibition was intended to protect the State from the uncertain and possibly disastrous consequences of incurring future contingent liabilities, liabilities easy for a current generation to project but a burden on future generations.

The State Comptroller, Arthur Levitt, in his 1975 Annual Report, quoted the eighteenth century philosopher, David Hume, to pertinent effect: "It is very tempting to a minister to employ such an expedient, as enables him to make a great figure during his administration, without overburthening the people with taxes, or exciting any immediate clamors against himself. The practice therefore of contracting debt will almost infallibly be abused, in every government. It would scarcely be

more imprudent to give a prodigal son a credit in every banker's shop in London, than to empower a statesman to draw bills, in this manner, upon posterity."

The prohibition against extending the State's credit is not, however, limited solely to instances where the State acts as a surety or guarantor of the debt of others, or to situations where the debt is noncontigent, as had been the case in the early days (see *People v Westchester County Nat. Bank,* 231 NY 465, 476, *supra;* Temporary State Comm., State Finance [1967], *op. cit.,* at pp 113-114, n 41; compare Proposed NY Const of 1967, art X, § 18, which would have expressly prohibited the State only from guaranteeing the obligations of municipal or other public corporations). In *People v Westchester County Nat. Bank* (231 NY 465, 483, *supra),* the court interpreted section 8 of article VII to apply not only where the State has guaranteed the debt of others, but also where the State has issued its own long-term bonds and made a gift of the proceeds. As the court stated (p 476): "[T]he mere form of the transaction is immaterial. 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. The evasion of the constitutional provision would be palpable and it could not and should not be permitted" (see 81 CJS, States, §§ 136-137, p 1167, n 50).

Of course, the *Westchester Bank* case was an application of the familiar rule of statutory construction that, when the main purpose of a statute, or a part of a statute, is to evade the Constitution by "effecting indirectly that which cannot be done directly, the act is to that extend void, because it violates the spirit of the fundamental law" *(People ex rel. Burby v Howland,* 155 NY 270, 280). On the other hand, there is an exceedingly strong presumption that a statute is constitutional (see, e.g., *Montgomery v Daniels,* 38 NY2d 41, 54; *People v Broadie,* 37 NY2d 100, 117). And, as stated in *Comereski v City of Elmira* (308 NY 248, 254): "We should not strain ourselves to find illegality in such [statutory financing] programs" (see *Wein v City of New York,* 36 NY2d 610, 619).

It is undisputed that the State may give or lend money, as distinguished from its credit, to assist a municipal or other public corporation in a public purpose *(People v Westchester County Nat. Bank,* 231 NY 465, 472-474, *supra;* Journal of the

Constitutional Convention [1938], *op. cit.*, Appendix 3, Doc No. 3, at p 5; Temporary State Comm, State Finance [1967], *op. cit.*, at p 114; see, also, *Wein v City of New York*, 36 NY2d 610, 619, *supra: Comereski v City of Elmira*, 308 NY 248, 252, *supra: Union Free School Dist. v Town of Rye*, 280 NY 469, 474; *Salzman v Impellitteri*, 203 Misc 486, 495, affd 281 App Div 1023, mod and affd 305 NY 414; 1938 Opns Atty Gen 256, 257). Under the Constitution, any such monetary assistance must, of course, be made pursuant to an appropriation, which must distinctly specify the sum appropriated and the object or purpose to which it is to be applied (art VII, § 7). These requirements were met in the instant case (see L 1975, ch 868, §§ 22, 23, as amd by L 1975, ch 870).

It is also undisputed that the State may validly contract debts in authentic anticipation of the receipt of taxes and revenues, for the purpose and within the amounts of appropriations previously made (NY Const, art VII, § 9). Notes issued in exchange for the moneys so borrowed must, however, under the Constitution and by implementing statute, be paid from such taxes and revenues within one year from the date of issue (art VII, § 9; see State Finance Law, § 55). This is the key device in the Constitution with respect to temporary financing. If properly observed, temporary obligations may not become long term and a burden on future taxpayers who undoubtedly will have their own fiscal problems to solve.

The concern expressed in the *Westchester Bank* case *(supra)*, namely, that the State's credit would be impaired and posterity burdened by the improvident use of long-term borrowing to finance gifts of the State's money, is obviated by using constitutionally valid short-term borrowing to finance appropriations of money to assist municipal or other public corporations (see Revised Record [1915], *op. cit.*, at pp 1269-1271; Problems Relating to Taxation and Finance [1938], *op. cit.*, at p 69, n 8). Unlike long-term borrowing, which is limited in term to a period of "the probable life of the work or purpose for which the debt is to be contracted", constitutionally valid short-term borrowing, which must be repaid within one year, imposes no "burden upon our children" (NY Const, art VII, § 12; *People v Westchester County Nat. Bank*, 231 NY 465, 474, *supra)*. Indeed, the constitutional limitations on short-term borrowing were carefully designed to avoid this problem (see discussion below). Moreover, the proceeds of constitutionally valid short-term borrowing once raised are

cash in hand. Temporary notes validly issued in authentic anticipation of taxes and revenues to be received within one year, are therefore functionally equivalent to the commitment of incoming taxes and revenues. Hence, the use of short-term borrowing to finance an appropriation of money to a municipal or other public corporation does not violate the prohibition against giving or lending the State's credit, provided the short-term borrowing is authentically in anticipation of actually committed taxes or other revenues.

On the face of it, then, the appropriations of money to assist the city and MAC, ultimately financed in part by the RANs, would appear to be a constitutionally valid reimbursable grant of the State's money for a public purpose to municipal and public corporations. Section 9 of article VII requires, however, that short-term debt must be contracted "in anticipation of the receipt of taxes and revenues". The resolution of the issues in this case thus revolves entirely on the validity and use of anticipation notes to fund the emergency appropriations under attack.

In the Constitution of 1846, under an exception to the referendum requirement applicable to long-term bonds, the State was authorized to incur up to $1 million of debt "to meet casual deficits or failures in revenues, or for expenses not provided for" (art VII, § 10). The $1 million limit on such debt was not, however, considered applicable to temporary borrowing in anticipation of revenues or to cover unanticipated budgetary deficiencies. Thus, large debts were incurred by means of issuing tax anticipation notes (see 1915 Opns Atty Gen 161, 162-164; Problems Relating to Taxation and Finance [1938], *op. cit.*, at pp 67-68; Temporary State Comm, State Finance [1967], *op. cit.*, at p 75). This practice had been termed a violation of the "spirit" of the Constitution (Problems Relating to Taxation and Finance [1938], *op. cit.*, at p 68).

To remedy the situation, the provision was revised in 1920 expressly to permit the State to contract short-term debt in anticipation of taxes and revenues. Instead of a $1 million limit, which had become anomalously small, the short-term debt was limited to the amount of appropriations previously made and presumably in accordance with a balanced budget plan. For reasons that history makes clear, obligations issued for the money borrowed were required to be paid from taxes and revenues within one year of the date of issue (NY Const of 1894, art VII, § 2, as amd; see Revised Record [1915], *op.*

cit., at pp 1270-1271). It was believed that the revised provision would suffice to cover customary tax anticipation loans as well as budget deficit loans (Problems Relating to Taxation and Finance [1938], *op. cit.,* at p 70).

With the onset of the Great Depression and the resulting large annual budgetary deficits, however, it became evident that tax and revenue anticipation loans, which had to be repaid within one year, were inadequate to close large fiscal gaps. The State was forced to "rollover", that is, replicate what was supposed to be a one-instance temporary debt until it was finally retired. In 1938, a proposal was made to give the State the authority to contract five-year loans to finance budgetary deficits, but this proposal was never adopted. Instead, a bifurcated provision was made for bond anticipation notes, that is, notes in anticipation of proceeds from bonds authorized by referendum and limited by term to the probable usefulness of the project for which the bonds were authorized, payable within two years from the date of issue of the bond anticipation notes. The one-year limitation for "customary" tax and revenue anticipation notes was retained (NY Const, art VII, § 9; see Problems Relating to Taxation and Finance [1938], *op. cit.,* at pp 71-72; Journal of the Constitutional Convention [1938], *op. cit.,* Appendix 3, Doc No. 3, at p 6).

Thus, the device of issuing tax and revenue anticipation notes was designed to permit the State to borrow temporarily to meet expenses for which appropriations under a balanced budget have been made, but for which revenues, both committed and anticipated, have not yet come in, thus adjusting the cash flow of taxes and revenues to expenditures. Put another way, these short-term obligations may be used to raise funds to offset temporary deficits in the fiscal year of issuance and payable not later than in some early portion of the next fiscal year (see 1932 Opns Atty Gen 119). According to the Constitution, however, and this is of critical significance, tax and revenue anticipation notes must be issued "in anticipation of the receipt of taxes and revenues"; they may not be issued in anticipation of a budgetary deficit (see Temporary State Comm, State Finance [1967], *op. cit.,* at p 86).

Consequently, if it cannot reasonably be anticipated at the time the notes are issued that the State will have sufficient committed taxes and revenues, based on authentic estimates, to pay the obligations within one year of the date of issue, such borrowing is constitutionally impermissible. For example,

if repayment of tax and revenue anticipation notes may only be made by creating, directly or indirectly, a budgetary deficit in the year of repayment, such borrowing is not an anticipation of the receipt of taxes and revenues and thus violates constitutional limitations (see Governor's Budget Message 1976-1977, at p M10, recognizing and endeavoring to meet the problem). As was stated by the 1938 Subcommittee on Taxation and Finance of the Constitutional Convention Committee: "The spirit of the clause implied that the State must not have two or more budgetary deficits in succession. Unless the State intended that it would have sufficient revenue to retire the deficit loans, it really had no power to contract them" (Problems Relating to Taxation and Finance [1938], *op. cit.,* at p 71). (For an example of an intractable deficit carry-over, see State Comptroller's 1975 Report, vol 1, at p 8, with reference to fiscal years 1972-1973, 1973-1974.)

Of course, such a violation of the "spirit" of this provision would be compounded by another tax or revenue anticipation note issue to offset a budgetary deficit in the second year, thus in effect "rolling over" the initial issue. In short, "rollovers" of revenue and tax anticipation notes are not consonant with constitutional limitations or their spirit. Of course, it would be naive not to recognize that the ingenuity of man can devise at least a verbalistic escape from limitations and perhaps even an escape through the inevitable loopholes in man's language to accomplish his purpose. But there must be a point, a determinable point, at which an otherwise plausible manipulation may and will be recognized and declared to be the doing indirectly of that which is forbidden to be done directly (see *People v Westchester County Nat. Bank,* 231 NY 465, 476, *supra; People ex rel. Burby v Howland,* 155 NY 270, 280, *supra).*

The $250 million of RANs in the instant case, the only notes before Special Term, were validly issued in authentic anticipation of revenues to be received within one year of their date. The Governor has estimated that the 1975-1976 budget is currently in deficit in the amount of $449 million. To meet the deficit and balance the budget the Governor has proposed drawing upon an estimated $67 million in liquid assets of tax stabilization funds, and issuing $382 million in additional tax notes in anticipation of committed taxes and revenues (Budget Message, at p M10).

At the time the RANs were offered by prospectus, on

September 10, 1975, the State had $3,385 million of tax and revenue anticipation notes outstanding, in some large measure undoubtedly a product of previous short-term financing (see State Prospectus of September 10, 1975 for the instant notes, at p 5, n 1, projecting a refinancing of part of temporary notes maturing in September by tax anticipation notes, conceivably a "rollover" of notes, but notes not involved in this case). Nevertheless, on August 31, 1975, 10 days before the issuance of the RANs, for the then current fiscal year 1975-1976 there were taxes and revenues anticipated but not received of $6,422.1 million. The total recommended expenditures for fiscal year 1976-1977 are $10,764 million, including coverage of anticipation notes already issued and to be issued; the total anticipated revenues are $10,764 million (Budget Message, at pp A50-A51, A75). If there are insufficient funds to repay the RANs when they fall due, the Comptroller will issue refunding notes and begin to impound taxes and revenues to repay the refunding notes. Thus, it does not appear that at the time of the issuance of the RANs, the State could not reasonably have anticipated that there would be sufficient taxes and revenues to pay the particular RANs within one year of the date of issue, or at least at this stage of the matter the court cannot say so. The $250 million of RANs were, therefore, validly issued within the meaning of constitutional limitations.

The point then is that these RANs are not identifiable, at this initial stage, as part of a "rollover", but are a new financing to meet a new emergency appropriation. There is, of course, more to the problem.

To balance the budget for the new fiscal year (1976-1977), it is anticipated that the ultimate funds for the payment of the RANs will come from the anticipated proceeds of MAC notes issued to the State in September, 1975 and which will mature in September, 1976 (see L 1975, ch 868, § 23). If so, the situation is fine. If not, when these RANs become due they would be payable, on default, out of first impounded revenues. Of course, were the fiscal paralysis of the city to renew, the temptation for temporary refinancing in the nature of a "rollover" might occur, but such a pessimistic prophesy is the privilege of the financial soothsayer and not of a court applying the rules of law. It is interesting that with respect to city notes issued to the State as part of the October, 1975 transaction, they are further secured by the power of the State to withhold State aid due to the city (§ 22). With respect to MAC there is no similar provision but, instead the hope that MAC will be able to sell its bonds to reimburse the State on the temporary notes.

One may not leave the subject without observing 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 if it becomes the starting point for temporary refinancing in the nature of a "rollover". The device is not justified because of the extreme fiscal emergency but only because the particular appropriations and the particular RANs are in fact not violative of constitutional limitations. Their validity depends upon the prospect that the particular RANs will be paid as contemplated and there is nothing now at hand to suggest that they will not. Indeed, if the constitutional mandate for a balanced budget is obeyed, they must be paid.

In sum, there is no unconstitutional granting of the State's credit to MAC or the city, and there is no unconstitutional abuse of the temporary borrowing power of the State. The first is true because the State may grant or lend its funds in hand for a public purpose to a public corporation. The second is true because the State's temporary debt as a part of the device must be exonerated in the ensuing fiscal year. The legalities of the device are present so long as the fiscal prospects are tenable.

Accordingly, the judgment of Supreme Court should be affirmed, without costs.

JASEN, J. (dissenting). I dissent and would hold that the appropriations contained in sections 22 and 23 of the New York State Financial Emergency Act for the City of New York and the notes issued to finance these appropriations are in violation of the State Constitution.

In September, 1975, the Legislature, in an Extraordinary Session called to consider the financial plight of New York City, appropriated the sum of $250 million to the city and another $500 million to the Municipal Assistance Corporation (MAC) created for the benefit of the city. (L 1975, ch 868, §§ 22, 23.) In return for these advances, the State took back equivalent amounts of city and MAC notes. The State's taxes and revenues having been otherwise accounted for to finance

the appropriations, the State issued short-term tax and revenue anticipation notes. In my view, these transactions were 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. By these arrangements, the State lent its credit to other public corporations and this, under the explicit strictures of our Constitution, it cannot do. Since the appropriation and the notes issued to finance it are in derogation of both the spirit and the letter of the paramount law of this State, our court should strike them down.

Our State Constitution, like the Constitutions of the other States, places restrictions on the power of the State to tax its citizens and to spend public resources. These limitations do not derive from any abstract considerations of how State fiscal affairs should or should not be managed. The constitutional proscriptions, instead, flow from the hard and bitter experiences of the people of this State when, on prior occasions in our history, hard times caught up with optimistic fiscal sleight-of-hand. In the formative years in the industrial development of New York, the State, through a variety of financial schemes, issued bonds and stocks to finance railroads, banks, turnpikes, hospitals, and other private enterprises then deemed essential for society. Contrary to expectations, these businesses defaulted on their obligations and the State, or rather its taxpayers, were required to make good on the securities. Moreover, the State was required to invest still more public money lest the value of its earlier investments be lost. As the extent of the State's obligations became fully known, a storm of opposition arose to the policy of advancing State money or State credit to private enterprise. (2 Lincoln, Constitutional History of New York, pp 93-101; see, also, Problems Relating to Taxation and Finance, Documents of the New York State Constitutional Convention Committee [1938], vol X, pp 108-112.) This opposition developed because taxpayers "were finally incensed at the thought that they would have to shoulder the burdens of the bad investments of the State" (at p 110). In 1843, the State Comptroller noted that, in most cases, loans of State credit had not resulted in benefits to the State, but, rather, had "inflicted lasting evils on all who labor and pay taxes." (New York State Assembly Documents [1843], No. 10, p 33.) Thus, in 1846, the Constitutional Convention of that year adopted, without much discussion or debate,

a provision prohibiting loans of State credit: "The credit of the state shall not, in any manner, be given or loaned to, or in aid of any individual, association, or corporation." (NY Const of 1846, art VII, § 9.)

Doubts later arose as to whether the constitutional prohibition applied to public corporations. In one case, this court held that it did not. *(Board of Supervisors of County of Cayuga v State of New York,* 153 NY 279, 293-294.) After the Great Depression had displayed, with great force, the weakness of the financial foundation underlying many local governments, the members of the 1938 Constitutional Convention deemed it advisable to extend the constitutional prohibition to public corporations. The Committee on State Finances and Revenues reported that were the prohibition not extended, "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. One or two instances might do no harm, but a general use of the State credit in this manner would dissipate the State's credit and demolish the strongest foundation of our State's financial structure. The committee feels strongly that the State's credit should be reserved for the use of the State only, with only such exceptions as may be specifically set forth in the Constitution." (Journal and Documents of the New York State Constitutional Convention [1938], Appendix 3, Doc No. 3, p 6.) Contrary to the assertion of the majority that the prohibition was intended only to guard against the easy imposition of burdens upon future generations by present leaders (p 144), it is unmistakably clear that the prohibition was primarily designed to insure that the credit of the State would be reserved for the sole use of the State government. Nowhere was it even suggested that short-term loans of credit ought to be permitted. The framers sought to guard against the dissipation and abuse of the State's hard-won credit. In the absence of express constitutional sanction, no other entity, corporate or governmental, was to be given access to it, whether access was for a year, or 2, or 20. What was feared was that cities, unable to borrow on their own credit or unable or unwilling to raise taxes, might induce and secure the loan of sound State credit to bolster up their own sagging credit, thereby threatening the financial structure of the State. The "declared intention" of the draftsmen was to prohibit "the use of the credit of one

unit to supplement the credit of another unit." *(Union Free School Dist. v Town of Rye,* 280 NY 469, 478.)

As it has come down to us, the Constitution of our State provides that State money "shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking" (NY Const, art VII, § 8, subd 1). The 1967 Constitutional Convention proposed a new section that would have weakened the force of this prohibition.[1] That section, along with the rest of that proposed Constitution, was rejected by the people.

It should be recognized that the Constitution does not prohibit the State from loaning or giving money to other public corporations. However, such an explicit prohibition was unnecessary since the power to give or loan is necessarily controlled by the resources available to make the gifts or loans. There is no difficulty with the State giving or loaning money to a locality for a public purpose, provided that the State has, legitimately, adequate funds available to do so. (See *Union Free School Dist. v Town of Rye,* 280 NY 469, 474, *supra.)*

I believe that the legislation involved in this case and notes issued in pursuance of the legislative scheme are in violation of the constitutional prohibition. This case does not involve a mere gift or loan of State money, for it is clear that the State had no money to give. The arrangement provided for in sections 22 and 23 of the New York State Financial Emergency Act for the City of New York can, most appropriately, be classified as an exchange. The city and its Municipal Assistance Corporation were unable to find purchasers for their own securities in the public marketplace. (See L 1975, ch 868, § 1; Public Authorities Law, § 3031.) The State still could. The State took from the city and MAC $750 million in securities and then, anticipating the revenue to be derived from the eventual sale of the State-held MAC bonds and from the interest accruing on the MAC and city notes,[2] issued its own notes. (See L 1975, ch 868, §§ 22, 23.)

1. The 1967 revision would not have prevented the State from "loaning" its credit to public corporations. It would have prohibited only the issuance of guarantees of the obligations of local governments. (Proposed 1967 Const, art X, § 18, subd a, par [2].)

2. The proposed 1976-1977 State budget makes it clear that the principal on the $250 million in State tax anticipation notes is to be repaid from the proceeds of the eventual sale of the State-held MAC bonds. On the other hand, no specific appropria-

In September, 1975, the State issued $250 million in revenue anticipation notes. These were absorbed by the general investing public. In October, the State issued another $250 million of revenue anticipation notes. These were purchased by the State Comptroller, acting on behalf of the State Common Retirement Fund. In November, $250 million in tax anticipation notes were sold to the Commissioner of Taxation and Finance, the State Thruway Authority and the State Teachers' Retirement System. The State was serving as the mere conduit for a flow-through of securities from the city and MAC to other purchasers. The State was placing its credit behind that of the city and MAC. In effect, the State was 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.

The revenues generated by the sale of the State notes were never intended to be applied for the benefit of the State coffers generally. The prospectus distributed with the September offering stated that the proceeds would be used solely to pay the special appropriation made to the city by the Legislature. (State Prospectus of September 10, 1975, p 3.) The evident purpose of the Financial Emergency Act was to get vitally needed funds to the city at a time when the city could not borrow the funds and the State could. That the purpose was achieved by a resort to the State's credit is obvious and indisputable. The money advanced to the city was produced solely by resort to the State's credit. No amount of words can disguise that essential fact. Even if the technical letter of the scheme is considered obscure, its substance is plain. It is also plain that, despite the majority's effort to gloss over the invasion of credit with an articulate veneer of words, the credit of the State was loaned in direct violation of the command of our State Constitution.

A more difficult question would be presented had the State made the appropriation as part of the normal budgeting process and did not earmark the proceeds of the notes for the particular purpose of assisting public corporations. Yet, in this case, the State issued anticipation notes with the express condition that their proceeds should be given to two specific

tion of revenue is made for the repayment of the revenue anticipation notes. A total of $61.8 million is set aside for the payment of interest on all three sets of State-issued securities. (1976-1977 Executive Budget, at pp 644-645.)

unit to supplement the credit of another unit." *(Union Free School Dist. v Town of Rye,* 280 NY 469, 478.)

As it has come down to us, the Constitution of our State provides that State money "shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking" (NY Const, art VII, § 8, subd 1). The 1967 Constitutional Convention proposed a new section that would have weakened the force of this prohibition.[1] That section, along with the rest of that proposed Constitution, was rejected by the people.

It should be recognized that the Constitution does not prohibit the State from loaning or giving money to other public corporations. However, such an explicit prohibition was unnecessary since the power to give or loan is necessarily controlled by the resources available to make the gifts or loans. There is no difficulty with the State giving or loaning money to a locality for a public purpose, provided that the State has, legitimately, adequate funds available to do so. (See *Union Free School Dist. v Town of Rye,* 280 NY 469, 474, *supra.)*

I believe that the legislation involved in this case and notes issued in pursuance of the legislative scheme are in violation of the constitutional prohibition. This case does not involve a mere gift or loan of State money, for it is clear that the State had no money to give. The arrangement provided for in sections 22 and 23 of the New York State Financial Emergency Act for the City of New York can, most appropriately, be classified as an exchange. The city and its Municipal Assistance Corporation were unable to find purchasers for their own securities in the public marketplace. (See L 1975, ch 868, § 1; Public Authorities Law, § 3031.) The State still could. The State took from the city and MAC $750 million in securities and then, anticipating the revenue to be derived from the eventual sale of the State-held MAC bonds and from the interest accruing on the MAC and city notes,[2] issued its own notes. (See L 1975, ch 868, §§ 22, 23.)

1. The 1967 revision would not have prevented the State from "loaning" its credit to public corporations. It would have prohibited only the issuance of guarantees of the obligations of local governments. (Proposed 1967 Const, art X, § 18, subd a, par [2].)

2. The proposed 1976-1977 State budget makes it clear that the principal on the $250 million in State tax anticipation notes is to be repaid from the proceeds of the eventual sale of the State-held MAC bonds. On the other hand, no specific appropriation of revenue is made for the repayment of the revenue anticipation notes. A total of $61.8 million is set aside for the payment of interest on all three sets of State-issued securities. (1976-1977 Executive Budget, at pp 644-645.)

In September, 1975, the State issued $250 million in revenue anticipation notes. These were absorbed by the general investing public. In October, the State issued another $250 million of revenue anticipation notes. These were purchased by the State Comptroller, acting on behalf of the State Common Retirement Fund. In November, $250 million in tax anticipation notes were sold to the Commissioner of Taxation and Finance, the State Thruway Authority and the State Teachers' Retirement System. The State was serving as the mere conduit for a flow-through of securities from the city and MAC to other purchasers. The State was placing its credit behind that of the city and MAC. In effect, the State was 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.

The revenues generated by the sale of the State notes were never intended to be applied for the benefit of the State coffers generally. The prospectus distributed with the September offering stated that the proceeds would be used solely to pay the special appropriation made to the city by the Legislature. (State Prospectus of September 10, 1975, p 3.) The evident purpose of the Financial Emergency Act was to get vitally needed funds to the city at a time when the city could not borrow the funds and the State could. That the purpose was achieved by a resort to the State's credit is obvious and indisputable. The money advanced to the city was produced solely by resort to the State's credit. No amount of words can disguise that essential fact. Even if the technical letter of the scheme is considered obscure, its substance is plain. It is also plain that, despite the majority's effort to gloss over the invasion of credit with an articulate veneer of words, the credit of the State was loaned in direct violation of the command of our State Constitution.

A more difficult question would be presented had the State made the appropriation as part of the normal budgeting process and did not earmark the proceeds of the notes for the particular purpose of assisting public corporations. Yet, in this case, the State issued anticipation notes with the express condition that their proceeds should be given to two specific

public corporations, New York City and MAC. "The evasion of the constitutional prohibition [is] palpable and * * * should not be permitted." *(People v Westchester County Nat. Bank,* 231 NY 465, 476.)

The invasion made in this case on the State's credit is exactly the sort of invasion that the draftsmen feared. It does not require an extensive economic analysis to realize that the short-term notes issued by the State in aid of the city might pre-empt the market. The danger is that when the time comes for the State to issue short-term notes in order to carry on the legitimate purposes of State government, it might well find that the securities market could not, or would not, handle any further short-term notes issued by New York State. By reserving the State's credit for the sole use of the State government, the draftsmen were not being needlessly parsimonious or niggardly. Rather, the provision was designed to make sure that the State's credit would be there when the State needed it. The action of the Legislature and the court's decision today sustaining it weakens the force of that protection.

The majority takes the position that there is no constitutional violation since the State is given express constitutional sanction to issue short-term notes in anticipation of taxes and revenues. (NY Const, art VII, § 9.) However, this argument is not persuasive for two reasons. First, the Constitution prohibits all loans of credit, whether financed by short-term notes or long-term notes. If an exception should be made to permit short-term loans of credit, the exception should be made by the people, for it is their Constitution and its protection is for their benefit. "The courts did not make the Constitution; the courts may not unmake the Constitution." *(Sgaglione v Levitt,* 37 NY2d 507, 514.) Secondly, short-term anticipation notes can only be issued "within the amounts of appropriations theretofore made." (NY Const, art VII, § 9.) Although appropriations were made, the appropriations were not made previous to the issuance of the notes, but, rather, virtually simultaneously with their issuance. Section 9 recognizes that receipts do not arrive necessarily at the same time expenditures are to be made. Thus, if appropriations are made in the budget, and the allocated revenue is not collectible until a few months later, the Constitution permits a temporary borrowing. In my opinion, it is a distortion of the limited borrowing permitted by section 9 to authorize the Legislature to add new and

massive appropriations after the budget has been adopted and cover them with anticipation notes.

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 (p 145; *Comereski v City of Elmira,* 308 NY 248, 254), 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" (p 142). 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. (See *Marbury v Madison,* 1 Cranch [5 US] 137, 178.) 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." *(People ex rel. Burby v Howland,* 155 NY 270, 281.)

I do not doubt that efforts to assist New York City at the time of severe and almost overwhelming economic difficulty are acts undertaken in the public interest, acts designed to effectuate a legitimate State purpose. The city has found itself in a fiscal crisis of unprecendented magnitude. The consequences of a final bankruptcy would be devasting, not only to the people of the city, but to the people of the State and to the Country as a whole. It has taken the combined effort of both the State and Federal Governments to restore a measure of fiscal stability to that financially troubled city. The State's continued participation in the efforts to restore the city to fiscal health is essential. However, in assisting the city, the State should act within its own resources, lest it too be swept away by a rising tide of indebtedness. It is for this very reason that people of our State imposed limitations on the power of the State government to utilize its credit and to contract debt. The State is bound to act within these limitations, "for noth-

ing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power." *(Carter v Carter Coal Co.,* 298 US 238, 291; *Matter of Fink v Cole,* 302 NY 216, 225.) "However important, however useful the objects designed by the legislature, they may not be accomplished by * * * a loan of credit * * * to a [public] corporation." *(People v Westchester County Nat. Bank,* 231 NY 465, 475, *supra.)* Expediency is no substitute for constitutional authority.

It should be pointed out that there are valid, constitutionally permissible means of assisting New York City. To obtain the necessary wherewithal to aid New York City, the State could have raised taxes or could have reduced expenditures in other areas. Such decisions are, of course, often politically and socially painful. That they are does not mean that they should be avoided. To be sure, the people of our State already bear the burden of a staggering amount of taxation. Understandably, the Legislature is extremely reluctant to add to that burden. On the other hand, a reduction in expenditures would necessitate the elimination of programs and cause a diminution in the level of services provided to the people, a result equally bitter to contemplate. However, as becomes clearer with each passing day, we do not live in a world of infinite resources. The State must, as all must, set a level of priority and apply whatever resources are available to meeting the needs that are the most vital. This is the essence of the budgetary process. The answer is not to make loans of credit in the brittle hope that in a year's time the situation will improve. That approach is not only unconstitutional, it is shortsighted. By loaning its credit to New York City, the State might jeopardize its own financial security. A crisis in the securities marketplace, a marketplace already unreceptive to securities issued by the State of New York, might not only topple New York City, but New York State as well. The consequences of a State bankruptcy or even a temporary inability on the part of State government to finance its own operations, the true purpose for which anticipation notes may be issued, will permanently scar the people of this State. If the State must reduce expenditures or increase taxes in order to obtain the funds to aid New York City, the cost is still less than the price to be paid by a State-wide financial catastrophe. If the people are aroused by these temporary measures, it

is not difficult to image their anger when, as in the past, they discover that as a result of gimmickry designed to deceive them, the State has been shorn of its financial foundation. The constitutional provision here under consideration was designed in part to ensure that the difficult decisions would be made, that the legislative and executive leadership would not take the easy way out. To sustain the sort of financial legerdemain involved here is to encourage the type of practice that, in part, has created the financial crisis before us.

I am well aware that the amount of money at issue is enormous and that the implications of a declaration of unconstitutionality are of grave significance. However, the duty of the court in a constitutional democracy is also clear. When confronted with a legislative enactment in clear violation of the State Constitution, I believe that the court has no choice but to strike it down, notwithstanding the political, social or economic ramifications of the decision. To do otherwise is to challenge the rule of law by which all, legislators as well as individual citizens, must abide. The very magnitude of the illegality cannot serve as its shield. If the rule were otherwise, the larger violations, the ones most to be feared, would be immune from judicial scrutiny. Moreover, 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. The court's decision today, while salvaging the financial scheme immediately before us, will, I fear, ultimately do a greater injury by depriving the people of a measure of their protection against State fiscal mismanagement.

For the reasons stated, I dissent.

Judges GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur with Chief Judge BREITEL; Judge JASEN dissents and votes to reverse in a separate opinion.

Judgment affirmed.

In the Matter of DONALD J. SIWEK, Respondent, v EDWARD J. MAHONEY et al., as Commissioners of Election in the County of Erie, Appellants, and NEW YORK STATE BOARD OF ELECTIONS, Intervenor-Appellant.

Argued March 22, 1976; decided April 1, 1976

Elections — voter registration by mail — constitutional law — provision under section 153 of Election Law for applications for voter registration to be

Comments: While the "emoluments" clause of the Connecticut state constitution is unusual, forty-five states have a related clause in their constitutions which typically provides that the credit of the state and its political subdivisions "shall not in any manner be given or loaned to or in aid of any individual, association or corporation." This limitation on taxing and spending arose out of the railroad scandals of the later nineteenth century. State legislatures authorized their municipalities to issue bonded debt in aid of railroad construction, and there were massive defaults when many of these enterprises failed. The so-called "lending of credit" provision was an attempt to foreclose this kind of public borrowing and spending.

The purpose of the "lending of credit" clause is detailed in Pinksy, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach,* 111 U. PA. L. REV. 265, 280 (1963):

> The term "lending of credit," so popular in the nineteenth century but now relatively obsolete, is significant. A basic element of the railroad-aid schemes was the marketing of state and municipal obligations, without direct government control, by the corporation which was to receive the proceeds. The common pattern involved delivery to the railroad of governmental bonds payable to the corporation or bearer, either as a donation or in exchange for shares; the corporation in turn disposed of the bonds as it saw fit. . . .
>
> In addition, there was practically no public control over the planning of the railroad project or over the actual expenditures of publicly contributed funds. These functions were completely delegated to private corporate officials. To phrase it more dramatically, but no less accurately, there was a total abdication of public responsibility.

Apparently the majority of state courts treat the public purpose and lending of credit limitations as fungible; the lending of credit objection is overcome if a public purpose is found. This approach to the issues is strenuously protested in Comment, *State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise — A Suggested Analysis,* 41 U. COLO. L. REV. 135 (1969). The author of the comment suggests that the lending of credit provision was directed to a "critical problem" not subsumed within the public purpose limitation, and that analysis of the lending of credit issue should focus on the relationship of the parties, the nature and extent of the public funding commitment, and the classification of the transaction as a loan or a donation. *Id.* at 139, 140.

In *Common Cause v. State,* 455 A.2d 1 (Me. 1983), the court held that state borrowing for a port development project served a proper public purpose but rejected an argument that it violated a constitutional lending of credit provision. The court treated the lending of credit provision as a separate limitation but held that it was limited to cases in which the state agreed to provide surety for private debt.

Both the public purpose limitation and the lending of credit provision were intended as restrictions on state and local borrowing powers, and as a method of limiting public debt. These restrictions are often used to challenge projects in which public borrowing powers are utilized to secure funding for privately owned and operated projects in which there is nevertheless a distinct public interest. The next case illustrates this situation.

IDAHO WATER RESOURCE BOARD v. KRAMER

Supreme Court of Idaho
97 Idaho 535, 548 P.2d 35 (1976)

[This case was a challenge to a state statute authorizing joint ventures between the Board and private companies for the construction of a dam and hydroelectric power generating facility in the Grandview-Guffey Reach of the Snake River.

LEON E. WEIN, Respondent-Appellant, v CITY OF NEW YORK et al., Appellants-Respondents.

Argued May 2, 1975; decided May 27, 1975

Municipal corporations — indebtedness — New York City Stabilization Reserve Corporation Act (Public Authorities Law, §§ 2530–2549), which provides for sale of bonds by public corporation, with proceeds to be paid to City of New York and yearly deficit of corporation to be paid by city or, if necessary, by State Comptroller from city's per capita State aid or Stock Transfer Tax Fund, is constitutional; act does not violate constitutional prohibition (NY Const, art VIII, § 1) against loan of city's credit in aid of public corporation, since appropriation would be gift rather than payment of indebtedness — since city can in no way become indebted, there is no violation of sections 2 or 4 of article VIII or section 5 of article X of Constitution which prohibit city from contracting indebtedness without pledging its full faith and credit, from contracting indebtedness exceeding debt limitation and from becoming liable for obligations of public corporation, and no lien is created by city's exercise of right to pay portion of State aid moneys to public corporation — plaintiff has standing to bring action under provisions of section 51 of General Municipal Law and city is proper and necessary party, since complaint is directed at its constitutional duties.

1. The New York City Stabilization Reserve Corporation Act (Public Authorities Law, §§ 2530–2549) is constitutional. The act provides for sale of bonds by a public benefit corporation, with the proceeds to be paid to the City of New York and yearly deficits of the corporation to be paid by the city. It is specified that neither the city nor the State is liable for debts of the corporation, and if the city fails to make appropriations therefor the State Comptroller will pay the required amounts from the first moneys becoming available to the city from per capita State aid or the Stock Transfer Tax Fund. The act complies with section 1 of article VIII of the New York Constitution, which prohibits the loan of the city's credit in aid of a public corporation, since any appropriation would be, according to the terms of the act, a gift rather than payment of indebtedness.

2. Since the city can in no way become indebted, there is no violation of sections 2 or 4 of article VIII or section 5 of article X of the Constitution which prohibit, respectively, the city from contracting indebtedness without pledging its full faith and credit, from contracting indebtedness in excess of its debt limitation and from becoming liable for the obligations of a public corporation. The city has a right to pay a portion of its State aid moneys to a public corporation and the mere directive by the State and city respecting the distribution of such funds creates no lien thereon.

3. Reference in the complaint to the constitutional debt limitation of the City of New York and to the insufficiency of borrowing power of the city under such restriction to permit the contemplated sale of bonds under the act does not indicate an overindebtedness separate from that questioned with respect to the Stabilization Reserve Corporation, and no cause of action is made out in relation thereto.

4. Since the plaintiff himself specifically requested judgment pursuant to subdivision (c) of CPLR 3211, which converts a motion to dismiss into a summary judgment motion, he cannot be heard to complain that he received insufficient notice that the court would treat the defendant's CPLR 3211 motion as a CPLR 3212 motion for summary judgment.

5. The plaintiff has standing to bring this action under the taxpayer provisions of section 51 of the General Municipal Law. The city is a proper and necessary party, since the complaint is directed at the manner in which the city meets its constitutional mandates, which obviates the technical arguments respecting the nonjoinder of the State and the Stabilization Reserve Corporation.

6. Accordingly, the Stabilization Reserve Corporation Act was properly declared valid, and the complaint stated a cause of action for the relief demanded.

Wein v City of New York, 47 AD2d 367, modified.

CROSS APPEALS from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 17, 1975, which, by a divided court, affirmed a judgment of the Supreme Court at Special Term (HYMAN KORN, J.; opn 80 Misc 2d 894), entered in New York County, (1) adjudging that plaintiff had standing to bring the action under section 51 of the General Municipal Law, (2) adjudging that the complaint did not state a cause of action for the relief demanded in the complaint, (3) denying plaintiff's application for an injunction, (4) granting defendants' motion for summary judgment, and (5) declaring the New York City Stabilization Reserve Corporation Act (L 1974, ch 594) constitutional and valid. Defendants appeal from so much of the Appellate Division order as affirmed the adjudication that plaintiffs had standing to maintain the action and plaintiff appeals from each and every other part of said order.

Leon Edward Wein, pro se, and *William J. Quirk* for Leon Edward Wein, respondent-appellant. I. Special Term should not have dismissed the complaint on the ground that it failed to state a cause of action nor should it have granted summary judgment in defendants' favor. Special Term should have granted summary judgment to plaintiff with respect to the constitutionality of the Stabilization Reserve Corporation bonds. (*Mareno v Kibbe*, 32 AD2d 825; *Foley v D'Agostino*, 21 AD2d 60; *Falk v Goodman*, 7 NY2d 87; *De France v Oestrike*, 8 AD2d 735; *Terranova v Emil*, 20 NY2d 493; *Peterson v Spartan Ind.*, 33 NY2d 463.) II. Aside from questions raised with respect to the Stabilization Reserve Corporation, the City of New York has issued debt in excess of that permitted by the Constitution. (*Levy v McClellan*, 196 NY 178; *Marine Midland Trust Co. of Southern N. Y. v Village of Waverly*, 42 Misc 2d 704, 21 AD2d 753; *Hurd v City of Buffalo*, 34 NY2d 628; *Matter of New York City Housing Auth. v Muller*, 270 NY 333.) III. The obligations of the Stabilization Reserve Corporation are New York City indebtedness and are subject to the limitations of the Constitution of the State of New York. (*Robertson v Zimmermann*, 268 NY 52; *St. Clair v Yonkers Raceway*, 13 NY2d 72, 375 US 970; *People v Newell*,

7 NY 9, 13 Barb 86; *Gaynor v Marohn*, 268 NY 417; *Kelly v Merry*, 262 NY 151; *New York State Elec. & Gas Corp. v City of Plattsburgh*, 281 NY 450.) IV. Chapter 594 of the Laws of 1974 violates article VIII (§ 1) of the Constitution of the State of New York in that it provides for a gift or loan of the city's credit in aid of a public corporation. *(People v Westchester County Nat. Bank of Peekskill*, 231 NY 465.) V. Chapter 594 of the Laws of 1974 violates article X (§ 5) of the Constitution of the State of New York in that it provides for city liability for obligations issued by a public corporation. *(State Water Supply Comm. v Curtis*, 192 NY 319.) VI. Chapter 594 of the Laws of 1974 violates article VIII (§ 2) of the Constitution of the State of New York in that it fails to pledge the faith and credit of the city. VII. New York State has permitted taxpayer suits against city officials to prevent "any illegal act". This law is intended to provide a remedy to taxpayers against city and local officials fraudulently issuing bonds. *(Matter of Reynolds*, 202 NY 430; *Ayers v Lawrence*, 59 NY 192; *Rathbone v Wirth*, 150 NY 459; *Bloom v Mayor of City of N. Y.*, 28 NY2d 952; *Ofenback v Gaynor*, 66 Misc 2d 185, 35 AD2d 913.)

W. Bernard Richland, Corporation Counsel (Stanley Buchsbaum and *Kenneth F. Hartman* of counsel), for appellants-respondents. I. The obligations of the New York City Stabilization Reserve Corporation are not indebtedness of the City of New York nor is the city liable thereon. *(Comereski v City of Elmira*, 308 NY 248; *Union Free School Dist. v Town of Rye*, 280 NY 469; *Matter of City of New York [U. N. Development Corp.]*, 72 Misc 2d 535; *Hurd v City of Buffalo*, 34 NY2d 628; *Matter of Carey v Morton*, 297 NY 361; *Matter of City of New York v Beame*, 37 AD2d 89; *Newell v People*, 7 NY 9; *Williamsburgh Sav. Bank v State of New York*, 243 NY 231; *Robertson v Zimmermann*, 268 NY 52.) II. The determination of Special Term was proper. There was no need to grant a trial on any issue with regard to whether the city is issuing bonds and notes in excess of the amount constitutionally permitted since plaintiff's contentions in this regard are without merit as a matter of law. *(New York State Thruway Auth. v Ashley Motor Ct.*, 10 NY2d 151; *Matter of Roosevelt Raceway v Monaghan*, 9 NY2d 293; *Wiggins v Town of Somers*, 4 NY2d 215; *Seagram & Sons v Hostetter*, 45 Misc 2d 956, 23 AD2d 933, 16 NY2d 47, 384 US 35; *Marine Midland Trust Co. v Village of Waverly*, 42 Misc 2d 704, 21 AD2d 753.) III. Plaintiff lacks standing to bring this taxpayer's action pursu-

ant to section 51 of the General Municipal Law, since he has not made a necessary party, the SRC, defendant to the action and since this cannot be remedied because such an action cannot be brought against the SRC. *(Matter of Kuhn v Curran*, 294 NY 207; *Schnepel v Board of Educ. of City of Rochester*, 302 NY 94; *Matter of Posner v Rockefeller*, 26 NY2d 970; *Matter of Blaikie*, 11 AD2d 196; *Blaikie v Lindsay*, 49 Misc 2d 612.)

Louis J. Lefkowitz, Attorney-General (Samuel A. Hirshowitz and *Shirley Adelson Siegel* of counsel), *pro se*. Any debt to be contracted by the New York City Stabilization Reserve Corporation will not constitute indebtedness of the City of New York. *(Comereski v City of Elmira*, 308 NY 248; *Robertson v Zimmermann*, 268 NY 52; *Bacon v Miller*, 247 NY 311; *Kittinger v Buffalo Traction Co.*, 160 NY 377; *Matter of Van Berkel v Power*, 16 NY2d 37; *New York Steam Corp. v City of New York*, 268 NY 137; *Cherey v City of Long Beach*, 282 NY 382; *Bugeja v New York City*, 17 NY2d 606; *Levy v McClellan*, 196 NY 178.)

Orison S. Marden, Willis McDonald, IV, Marion Jay Epley, III, Robert L. Clare, III and *Evan A. Davis* for the Financial Community Liaison Group, *amicus curiae*. I. The SRC legislation is constitutional. *(Bank for Sav. in City of N. Y. v Grace*, 102 NY 313; *Levy v McClellan*, 196 NY 178; *Williamsburgh Sav. Bank v State of New York*, 243 NY 231; *Comereski v City of Elmira*, 308 NY 248.) II. Plaintiff's other contentions are without merit. III. Investors have acted in reasonable reliance on the realistic approach taken in this area by the New York courts in the past. It would not be in the interests of justice, nor in the interests of the People of the State and City of New York, to now change the ground rules and adopt a rigid approach. *(Bank for Sav. in City of N. Y. v Grace*, 102 NY 313; *Levy v McClellan*, 196 NY 178; *Union Free School Dist. v Town of Rye*, 280 NY 469; *Salzman v Impellitteri*, 203 Misc 486, 305 NY 414.)

GABRIELLI, J. Plaintiff brings this taxpayer's action seeking a judgment declaring the New York City Stabilization Reserve Corporation Act (L 1974, ch 594) invalid claiming, essentially, that the act is violative of the provisions of article VIII (§ 4, subd [c]) of the State Constitution in that the act sets up a framework and procedure which illegally permits the city to obtain additional operating revenues through the sale of

bonds by the corporation, created by the Legislature, without extending its debt obligations beyond the permissible limit of 10% of the valuation of real estate, the outside limit provided by the Constitution (art VIII, § 4, subd [c]).

Title 26 of the Public Authorities Law, comprising 20 sections (§§ 2530–2549) created the Stabilization Reserve Corporation (SRC), a "corporate governmental agency constituting a public benefit corporation" (§ 2532, subd [a]) and, in detail, provided for its operation and method of obtaining funds by the sale of bonds without a pledge of the full faith and credit of either the City or State of New York.

It is important to here note that the enactments to be construed are statutes adopted and promulgated by the State Legislature, and not enactments by the City of New York.

Section 2533 sets forth the legislative purpose as one to meet the city's unprecedented fiscal crisis by setting up a corporation to assist the city in providing essential services during the fiscal years 1973–1974 and 1974–1975. The SRC is denominated a public service corporation (§ 2532, subd [a]) to which the Mayor is authorized to certify 150 million dollars for the 1973–1974 fiscal year and 370 million dollars for 1974–1975 (§ 2538). Upon such certification the SRC is authorized to sell up to 520 million dollars of its own bonds and notes and pay the proceeds to the City Comptroller to be used in the city's general fund. The act further provides that the bonds are to mature in 10 years or less, and the principal and interest thereon are repayable in equal annual or semiannual installments (§ 2536).

The bonds and notes thus sold are the obligations solely of the SRC and, indeed, it is specified that "[t]he 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" (§ 2542).

It is further provided that principal on notes would be paid out of bond proceeds, and interest and principal on bonds would be paid out of an SRC Capital Reserve Fund which would be replenished annually for purposes of paying principal and interest on outstanding bonds during the current fiscal year (§ 2537).

Section 2537 (§ 1, par [c]) provides that: "(c) To assure the continued operation and solvency of the corporation for the carrying out of its corporate purpose, provision is made in paragraph (a) of this subdivision for the accumulation in the capital reserve fund of an amount equal to the capital reserve fund requirement. In order further to assure such maintenance of the capital reserve fund, there shall be paid by the city to the corporation for deposit in the capital reserve fund on or before the first day of December, in each year, such amount, if any, needed for the purpose of maintaining the capital reserve fund at the capital reserve fund requirement as shall be certified by the chairman of the corporation to the mayor and the director of the budget on or before the fifteenth day of February next preceding; provided that any such amount shall have been first appropriated by or on behalf of the city for such purpose or shall have been otherwise made available."

If the city fails to make such yearly appropriations, then the SRC chairman may certify to the State Comptroller the amount needed to maintain the fund at a proper level whereupon the comptroller will pay the first moneys available for the next succeeding payments to the city from the Stock Transfer Tax Fund and, if there remains a shortage, the first moneys available for the next succeeding payments of State per capita or other aid payable to the city from the State (§ 2540). The SRC is also authorized to accept gifts, grants or loans from the Federal Government or any of its agencies (§ 2535, subd [14]).

Plaintiff's suit was commenced on February 5, 1975. He requested the declaratory and injunctive relief already mentioned, alleging his taxpayer status and that the SRC Act was unconstitutional upon the additional ground that it violates section 2 of article VIII of the Constitution since the city would be contracting indebtedness without pledging its full faith and credit for repayment; that it violates section 1 of article VIII which prohibits the city from giving or loaning its credit in aid of any public or private corporation; and that section 5 of article X prohibited the city from becoming liable for payment of any obligations of a public corporation.

Defendant city submitted no answer, but interposed a motion under CPLR 3211 (subd [a], pars 3, 7) to dismiss the complaint on the grounds (1) plaintiff had no legal capacity to sue and (2) that the pleading failed to state a cause of action.

Special Term overruled all of plaintiff's contentions and granted summary judgment in defendant's favor, apparently under the provisions of CPLR 3211 (subd [c]) permitting him to treat defendant's motion as one for summary judgment, and directly declared the act constitutional. Special Term found plaintiff's contentions all based upon the argument that the city would be a debtor on the bonds and construed the statute literally to the effect that the city was specifically exempted from such status. This ruling, in turn, obviated plaintiff's arguments that the city was pledging its credit in aid of a public corporation and that it would be incurring indebtedness without pledging its full faith and credit. Plaintiff's contention concerning article X was not dealt with, but that would fall also upon the decision that the city in no way was obligated. The Appellate Division affirmed.

The case of *Comereski v City of Elmira* (308 NY 248) was relied upon by both Special Term and the Appellate Division. Justice KUPFERMAN, in his brief dissent at the Appellate Division, said that (47 AD2d 367, 374) "[t]he case of *Comereski* * * * is easily distinguished. The parking meter authority there had an ostensible purpose and was not merely a conduit for circumvention". Defendant city claims that *Comereski* is dispositive of all of plaintiff's contentions. In that case, the Elmira Parking Authority was created, authorized to sell bonds and to run the municipal parking lots. By amendment to the city charter, the city was authorized to contract with the authority to pay any yearly deficits incurred by the authority up to $25,000. Such money was to come from parking meter revenues collected by the city. The constitutional argument raised against this arrangement was that section 1 of article VIII was being violated in that the city was pledging its credit in aid of a public corporation. On this point the court held that the city did not contract to pledge its credit, but, rather, contracted to make a gift of up to $25,000 a year, if needed, which was in no way violative of the Constitution which only bars gifts to individuals or private groups. While that part of the *Comereski* decision is dispositive in the instant case insofar as it disposes of plaintiff's section 1 of article VIII argument, it does not *directly* apply to his other constitutional arguments, although it obviously necessarily follows that if yearly deficit payments such as this are permissible gifts, then they are not debt obligations, this latter point going to the heart of plaintiff's remaining arguments.

On the facts, *Comereski* differs, of course, in that the parking authority could generate its own income by renting parking spaces whereas the SRC has no visible means of financial support except for what it can derive from the city, State or Federal governments. This apparently is what the dissenter below was driving at in that portion of his dissent I have quoted. This factual distinction, however, while it may raise questions concerning the fiscal wisdom of the SRC operation (with which we need not concern ourselves), does not affect the constitutional points. The city here is no more obligated than was the City of Elmira to pay off the parking authority's obligations. Even if it be conceded that the SRC is a mere "conduit", such labeling does not necessarily violate the various aspects of the Constitution raised by plaintiff, all of which, as pointed out by Special Term, rest on the assertion that the city has become indebted or obligated. The very terms of the statute clearly preclude such indebtedness. The city *may*, for the two years in question, make payments of up to $520 million. It is not bound to. If such payments 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.

Other cases urged upon us for consideration are not especially helpful since they are factually and legally different in important respects which do not reach the legally novel plan with which we are dealing. In *Robertson v Zimmermann* (268 NY 52) the question presented was whether the City of Buffalo's indebtedness would be raised beyond constitutional limits because of the bonded indebtedness of its sewer authority. But it was pointed out in that case that the authority's obligations would be payable out of its own revenues and that (p 62) "it must be borne in mind that there is not involved the diversion of any existing source of revenue of the city". In *Hurd v City of Buffalo* (41 AD2d 402, affd 34 NY2d 628), where a legislative scheme providing for the funding of pension and retirement liabilities was declared in violation of the debt limitations imposed in article VIII, it was held that the plan lacked any rational basis since it attempted to exempt future pension payments from those taxes, the total of which could not exceed the real property tax limit of 2% as defined in section 10 of article VIII of the Constitution. In essence, the statute attempted to classify such future expenditures as, in effect, current expenditures for the years in which they would

be paid so as to conform to an exception to section 10 of article VIII exempting current expenditures from classification as debt. The courts reasoned that, by mere legislative declaration, prior obligations simply could not be called current obligations. In *Hurd,* the letter of the Constitution was being "twisted". Here, it is being scrupulously observed in that the city incurs no obligation now or in the future.

In a summary of the merits, I am of the opinion that plaintiff's argument that section 4 of article VIII is violated because of excessive indebtedness, is refuted by the statutory provision that in no way can the city become indebted. Plaintiff's argument that section 2 of article VIII is violated since the city would be contracting indebtedness without pledging its full faith and credit, is also refuted by the statutory provision that in no way can the city become indebted. His argument that section 1 of article VIII is violated since the city would be loaning its credit in aid of a public corporation is refuted because, as we have previously held *(Comereski v City of Elmira,* 308 NY 248, *supra),* this type of contract to provide for the appropriation of a gift only is legally and constitutionally proper. His argument that section 5 of article X is violated since the city would become liable for payment of the SRC's obligations is refuted because, again, the statute specifically disallows such liability.

Underlying all of this is the rationale in the *Comereski* case to the effect that if nonmandated deficit payments by the city to the authority are anything, they are only gifts. Thus, there is a double-barreled refutation of plaintiff's contentions. The statute itself provides for no city debt liability, and *Comereski* holds approvingly that if the city should, in fact, make payments as provided for, such payments are constitutionally permissible gifts.

It is well to here point out, and indeed emphasize, that should the city appropriate money to help make up a deficit in any given year, *or,* should Stock Transfer Tax moneys and per capita State aid be funneled thereto under subdivision (c) of section 2540 such payments would be a gift to a public corporation permissible under section 1 of article VIII of the State Constitution *(Comereski v City of Elmira,* 308 NY 248, *supra; Union Free School Dist. v Town of Rye,* 280 NY 469). It is basically upon this theory that similar city moneys are paid or diverted to other public benefit corporations such as the City University Construction Fund (Education Law, art 125-B,

§ 6279), the New York City Housing Development Corporation (Private Housing Finance Law, art XII, § 656, subd 1, par e), the Transit Construction Fund (Public Authority Law, tit 9-a, § 1225-i, subd [b]) and the Municipal Bond Banking Agency Act (Public Authority Law, tit 18, § 2436, subd [3]), to name but a few. It will be observed that their statutory framework and the legislative language used in forming them are nearly identical to that of the SRC.

While the constitutional validity of these other enactments is not before us, we must assume that the legal and constitutional basis for the funneling of a municipality's State-aid moneys to these other public benefit corporations by the State Legislature, is founded on the similar right of a municipality to make gifts to a public benefit corporation pursuant to section 1 of article VIII of the Constitution and the other cited authorities. Upon a contrary holding it could be argued, successfully or otherwise, that their funding would be illegal.

It is not questioned, as indeed it may not be, that the city has an absolute right, following the receipt of any State-aid moneys, to pay a portion thereof to a public benefit corporation (NY Const, art VIII, § 1); and based upon that permissible authority, the statutes here being considered specifically provide for such payment. The fact that the comptroller is permitted,* under certain circumstances, to pay a portion thereof directly to a public benefit corporation on behalf of the city, does not create any illegality, and we hold and find that no lien is thereby created on that fund. Basically, that which is actually accomplished is merely a directive by the State and city as to the manner in which the funds are to be distributed —a right, as we have pointed out, which the city possesses in any event. The moneys received by or due to the city is a gift for all purposes and may be used by the city in the manner herein described, and under no circumstances may it be deemed a lien.

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* (308 NY 248, 254, *supra)* 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

* We do not intend to indicate that the comptroller could not be compelled to transfer these funds, which he is directed to do by section 2540 of the Public Authorities Law.

other States, too, see *State ex rel. Bibb v. Chambers,* 138 W Va 701) 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 Zimmerman* (268 NY 52, 62) we rejected a charge that this was a mere evasion of constitutional debt limitations, etc. Our answer was this (p 65): '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.' "

Plaintiff also raises the argument that aside from the SRC Act, and without relation thereto, the city has exceeded its debt limit and that this involves questions of fact for which a trial is required. Neither court below treated this contention, and rightly so, since no such separate cause of action is enunciated anywhere in the complaint. The thrust of the complaint is that the SRC arrangement is unconstitutional for the reasons discussed. As part of this, reference is made to paragraphs 3 and 4, to wit:

"3. Article VIII of the Constitution of the State of New York provides that the City of New York may not become indebted in an amount in excess of its constitutional debt limit as set out therein.

"4. The amount of borrowing power under the restriction aforesaid is insufficient to permit the sale of almost $700 million in bonds and notes by defendant Goldin on behalf of the City of New York which sale was announced by defendant Goldin on January 27, 1975."

Neither, taken alone nor in combination, do these paragraphs make out a cause of action based on overindebtedness separate from that involved in the SRC question. The gravamen of the complaint is that because of the SRC funding plan the constitutional limitation "would be" exceeded. There is nothing there to indicate that there is otherwise an overextension made up of other debts.

Plaintiff raises an additional point which requires treatment. It is argued that he received insufficient notice that the court would treat defendant's CPLR 3211 motion as a CPLR 3212 motion for summary judgment. Plaintiff himself specifically asked for judgment pursuant to CPLR 3211 (subd [c]), which converts the dismissal motion into a summary judgment motion, in his affidavit in opposition to defendant's

motion, so he can hardly be heard to complain that the court should not have treated the motion in that fashion.

Finally, the city has argued against plaintiff's standing all through this litigation, but agrees that we should treat with the merits even if plaintiff is not a proper party. Here plaintiff seems clearly within the taxpayer provisions of section 51 of the General Municipal Law. Both lower courts wrote extensively on this point and our liberal interpretation of standing in *Bloom v Mayor of City of N. Y.* (28 NY2d 952) obviates the city's technical arguments that here the SRC and the State are the real defendants and are not joined. The complaint is aimed directly at the SRC statutory scheme which involves the city and the manner in which the city remains in compliance with certain constitutional mandates. The city is thus a proper and necessary defendant. Moreover, neither the SRC nor the State moved to intervene as parties.

Accordingly, we conclude that the courts below correctly declared the constitutional validity of the statutes before us. It was error, however, to adjudge that the complaint did not state a cause of action for the relief demanded in this declaratory judgment action. In that respect, the order appealed from should be modified, without costs, and, as so modified, affirmed.

JASEN, J. (dissenting). The Stabilization Reserve Corporation Act violates the letter and the spirit of article VIII of the State Constitution. No amount of words can disguise the simple fact that while liability of the city is disavowed, it effectively commits its sources of revenue from the State to the discharge of the obligations of the Stabilization Reserve Corporation. It is, therefore, indistinguishable from a commitment of its credit. The fact is that while the city's sources of revenue from the State are not committed by existing law but only by annual appropriations, their continuance is economically and governmentally inevitable. The city has, therefore, committed its sources of revenue to the payment of these "debts"; that is tantamount to a commitment of credit economically, practically and, therefore, legally. As a consequence, the act is unconstitutional.

However we might empathize with the plight of local governments in general and the City of New York in particular at this time of unprecedented fiscal crisis, the constitutional limitations upon local finance cannot and should not be

blinked. Indeed, 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.

The Stabilization Reserve Corporation (SRC), a public corporation, was established in 1974 by act of the Legislature (L 1974, ch 594) to funnel to the City of New York funds deemed necessary to meet its requirements for essential services for fiscal years 1973–1974 and 1974–1975. The statutory scheme is rather simple and resembles in operation other devices increasingly employed in recent years to enable government to meet its burgeoning responsibilities without exceeding constitutional debt ceilings. Essentially, SRC is empowered to issue bonds and notes up to $520 million and is *required* to deliver such amount to the city for deposit in its general fund. (Public Authorities Law, §§ 2536, 2538, 2539.) Proceeds from the sale of bonds are used to pay principal and interest on the notes. SRC revenues, "voluntary" payments by the city to SRC's capital reserve fund made upon request of SRC, are used to pay the bonds. (§ 2537.) In the event that the city is unable to make payments to SRC's capital reserve fund pursuant to this "moral obligation" provision, alternative provisions are made for diversion to SRC of State funds owing the city—Stock Transfer Tax Funds and per capita aid. (§ 2540.) Although it is expressly provided that neither the city nor the State shall be liable on SRC's debt (§ 2542), the act also provides that establishment expenses for SRC, undefined in the act, shall be borne by the city (§ 2540). Furthermore, SRC owns no property and has no other sources of revenue. Finally, it has no corporate offices, all of its officers and directors are officials of city government and its bonds are sold by the defendant comptroller. (§§ 2546, 2549.)

From what has been said, it should be clear that SRC is a barely disguised technique for debt ceiling avoidance and subverts in varying degrees the constitutional limits upon local finance. While it may be, as is suggested, that SRC lacks a legally independent existence and, hence, that its obligations are truly those of the city (cf. *Ayer v Commissioner of Admin.* 340 Mass 586), I address myself particularly to the manner in which SRC offends section 1 of article VIII of the Constitution, which bars a gift or loan of the city's credit in aid of a public corporation and section 5 of article X which provides that no political subdivision of the State shall be liable for the payment of any obligation issued by a public authority.

SRC is purely a financing agency. It owns no property and presently generates absolutely no revenue apart from contributions by the city, or the State, to its capital reserve fund. As noted, should the city default on this moral obligation, the State stands ready to, indeed must, divert to SRC funds due or becoming due the city sufficient to meet SRC's capital reserve requirements. To that extent at least, the city and to a lesser extent the State, stand behind SRC's obligations guaranteeing, albeit indirectly, its debt by assuring a fund for debt service. Without this guarantee, SRC could not survive. And while in the first instance the city's duty to replenish the capital reserve fund is permissive, ultimate funding is assured by virtue of the diversion of stock transfer tax funds or per capita aid from the State should this be necessary. Ultimately, then, SRC services a part of its debt with city funds and thereby assures its continued operation, solvency and the marketability of its securities. This indirect guarantee, a form of credit or debt, thereby offends section 1 of article VIII and section 5 of article X of the Constitution. Moreover, the whole scheme facilitates evasion of the constitutional debt ceiling for the city and in that sense violates the spirit and the tenor of article VIII (§ 4, subd [c]).

Comereski v City of Elmira (308 NY 248) may be distinguished. There the parking authority with which the city contracted to pay an annual sum to be used for service of the authority's debt had an ostensible purpose. It was not a mere financing device and conduit for evasion of article VIII. And while *Comereski* holds that the city's payments were not an unconstitutional gift or loan of credit, the section 5 of article X point was not briefed or argued to the court.

Finally, I am aware that constitutional limits upon debt contracting and taxing powers have been questioned as anachronistic and alternatives have been offered. (See, generally, Bowmar, The Anachronism Called Debt Limitation, 52 Iowa L Rev 863.) 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. (See U.S. Advisory Committee on Intergovernmental Relations, Governmental Structure, Organization and Planning [Report A-5, 1961]; Virtue, The Public Uses of Private Capital, 35 Va L Rev 285, 304.) Also, I would suggest 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. (See Morris, Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions, 68 Yale L J 234.)

Accordingly, I dissent.

Judges WACHTLER, FUCHSBERG and COOKE concur with Judge GABRIELLI; Judge JASEN dissents and votes to reverse in a separate opinion in which Chief Judge BREITEL and Judge JONES concur.

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

In the Matter of ABRAHAM WERFEL, Appellant, v THOMAS S. AGRESTA, as a Justice of the Supreme Court, Queens County, Respondent.

Argued April 29, 1975; decided June 9, 1975

Attorney and client — compensation — assigned counsel — Appellate Division lacks subject matter jurisdiction to review allowance made to assigned counsel in criminal matter under County Law (§§ 722, 722-b) and petition fails to state cause of action for relief under CPLR article 78, since, if civil in character, matter is precluded from review by subdivision 2 of that section because determination made in criminal action is challenged, but if considered as arising in criminal action, no mode of appeal is provided (CPL 450.10, 450.15); compensation for assigned counsel is designed to ease burdens of willing participants in plan, and there is no basis for justiciable review — petitioner is entitled to apply to appropriate Administrative Judges for adjustment of allowance.

1. The Appellate Division lacks subject matter jurisdiction to review an allowance made to assigned counsel in a criminal matter pursuant to sections 722 and 722-b of the County Law, and the petition fails to state a claim for relief under CPLR article 78. The fixing of compensation for assigned counsel might be characterized as "administrative" and, as the practice statutes are structured, does not fall within either criminal or civil proceedings for purposes of review. If the matter is considered as arising within a criminal action, as is ultimately the case, no mode of appeal is provided (CPL 450.10, 450.15), and, if civil in character, is without judicial mode of review under the opening paragraph of CPLR 7801 and precluded from review by subdivision 2 of that section, since a determination in a criminal action is challenged. Compensation for assigned counsel is designed to ease the burdens of those who are willing participants in the plan, with knowledge that the limited fees are not full compensation, and there is no basis for justiciable review of allowances made within the maximums provided.

2. Petitioner is entitled to apply to the appropriate Administrative Judges for an adjustment of his allowance.

Matter of Werfel v Agresta, 44 AD2d 610, affirmed.

APPEAL, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from a judgment of said court, entered March 29, 1974, which, in a proceeding pursuant to CPLR article 78 to review respondent's determination fixing the compensation to be paid to petitioner for his fee for legal services rendered as assigned counsel for a defendant in a criminal action, granted a motion by respondent to dismiss the petition on the grounds that the court lacked jurisdiction of the subject matter and that the petition failed to state facts entitling petitioner to the relief sought, and dismissed the petition.

Abraham Werfel, appellant *pro se*. The Appellate Division has jurisdiction to entertain a review of a trial court's order awarding counsel fees below the statutory rate. (*Matter of Fisher v Schenck*, 39 AD2d 813; *Matter of Werfel v Fitzgerald*, 23 AD2d 306; *People v Perry*, 27 AD2d 154; *Matter of New York Post Corp. v Leibowitz*, 2 NY2d 677; *Morrissey v Brewer*, 408 US 471; *United States ex rel. Harrison v Pace*, 357 F Supp 354; *Gair v Peck*, 6 NY2d 97; *Lee v County Ct. of Erie County*, 27 NY2d 432; *Hogan v Ascione*, 31 AD2d 517; *Williams v Gualtieri*, 32 NY2d 641; *Fino v Johnson*, 38 AD2d 681.)

Louis J. Lefkowitz, *Attorney-General* (*Robert S. Hammer* and *Samuel A. Hirshowitz* of counsel), for respondent. The fixing of compensation for counsel assigned under article 18-b of the County Law lies within the unreviewable discretion of the court in which the service is rendered, provided the statutory limit is not exceeded. (*Matter of Fisher v Schenck*, 39 AD2d 813; *People v Perry*, 27 AD2d 154; *Gair v Peck*, 6 NY2d 97; *Matter of Nichols v Gamso*, 35 NY2d 35; *Matter of New York Post Corp. v Leibowitz*, 2 NY2d 677; *People v*

STATE CONSTITUTIONAL PROVISIONS PROHIBITING THE LOANING OF CREDIT TO PRIVATE ENTERPRISE— A SUGGESTED ANALYSIS

I. Introduction

Municipal and urban problems have commanded increasing attention from both press and politicians in recent years. The "urban crisis" follows a period in which government power, both decision making and financial, has been concentrated outside the city in state and federal government. The "crisis" has resulted in increased demands for a decentralization of government and local control in spite of the fact that municipal governments find themselves serving twentieth century needs with nineteenth century tax structures. Most politicians envision federal assistance on a flow-back or trickle down theory, apparently conceding that municipal financing is not only inadequate and antiquated but also beyond salvation.

The federal government has enjoyed some success with programs involving a partnership between public and private financing.[1] In order to effect a more efficient utilization of local revenues, state and municipal governments have long indicated an interest in the employment of private enterprise to accomplish governmental objectives. Most state constitutions, however, place specific debt limitations and financing restrictions on state governments and their subdivisions.

This comment will explore a common limitation which prohibits state and local governments from loaning their credit to private ventures. These state constitutional provisions have been the basis of considerable litigation challenging programs which effectuate a partnership between public and private capital. Since the vast majority of this litigation has involved municipal corporations, it is in the area of municipal law that these provisions have received the most comment.[2]

The courts, unfortunately, have failed to explore the basic policies underlying the credit lending provisions and have thus not clearly articulated their real and intended import. In spite of widespread litigation, the courts persist in using a limited case by case analysis, giving little weight to fundamental policy considerations. This comment will discuss these basic policy tenets in light of the constitutional

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1. *E.g.*, Communications Satellite Act of 1962, 47 U.S.C. §§ 701, 702, 721, 731-35, 741-44 (1964).

2. *See, e.g.*, 2 C. Antieau, Municipal Corporation Law §§ 15A.01–15A.40 (1968); 15 E. McQuillin, The Law of Municipal Corporations § 39.30 (3d ed. 1950); C. Rhyne, Municipal Law § 15.3 (1957); Comment, *State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations*, 108 U. Pa. L. Rev. 95 (1959).

purpose of credit lending prohibitions, and suggest an analysis which, it is believed, will provide the intended protection, and at the same time establish guidelines for governmental planning. Although the approach used by the Colorado Supreme Court will be emphasized, the analysis should be equally applicable to all jurisdictions.

II. The Historical Background and the Colorado Provision

In the nineteenth century, the United States was enjoying a rapid westward expansion. A key element in this expansion was the construction of railroads and other communication and transportation systems, the routes of which vastly influenced growth. An adjacent railroad was often crucial to the economic growth, if not the very existence, of many localities. As a result, state and local governments, in order to encourage specific routes and spurs, offered financial assistance to struggling railroads. This assistance was not entirely without precedent in light of earlier successes with similar projects such as the Erie Canal.[3] Governmental assistance usually took the form of stock or security purchases,[4] or co-signatures on bonds issued by railroads.[5] Since these private ventures were at best highly speculative, many failed, leaving governmental units, and thus the taxpayer, either holding worthless stock certificates or, even worse, liable for large inadequately secured debts. During the depression of 1837 nine states defaulted on, or repudiated, debts of this type.[6] These repudiations were made easier because a significant portion of the debt certificates were held by European investors who desired a stake in the American adventure.[7]

The resulting economic crisis led to the passage of constitutional provisions designed to limit state indebtedness and restrict governmental involvement in private ventures. Forty-five state constitutions contain provisions prohibiting the lending of credit;[8] Illinois' provision is

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3. A. Heins, Constitutional Restrictions Against State Debt 3 (1963).

4. *See, e.g.*, Colorado Cen. R.R. v. Lea, 5 Colo. 192 (1879) holding unconstitutional Boulder County's attempt to subscribe to railroad stock in the amount of $200,000 to assist in the construction of a connecting line.

5. *See, e.g.*, quotation of Mr. Alvord, a delegate to the New York Constitutional Convention, appearing in Johns Hopkins Univ. v. Williams, 199 Md. 382, 386, 86 A.2d 892, 895 (1952).

6. A. Heins, *supra* note 3, at 7, indicating that Mississippi, Florida, Arkansas, Indiana, Illinois, Michigan, Maryland, Pennsylvania, and Louisiana defaulted in that order.

7. *Id.* at 5-6.

8. Alas Const. art. IX, § 6; Ariz. Const. art. 9, § 7; Ark. Const. art. 16, § 1; Cal. Const. art. 12, § 13; Colo. Const. art. XI, § 1; Del. Const. art. 8, §§ 4, 8; Fla. Const. art. 9, § 10; Ga. Const. art. VII, § 2-5601; Hawaii Const. art. VI, § 6; Idaho Const. art. 8, § 2; Ill. Const. art. 4, § 20; Ind. Const. art. 10, § 6; Iowa Const. art. VII, § 1; Ky. Const. § 177; La. Const. art. 4, § 12; Me. Const. art. IX, § 14; Md. Const. art. III, § 34; Mass. Const. art. LXII, § 1; Mich. Const. art. IX, § 18, art. VII, § 26; Minn. Const. art. 9, § 10; Miss. Const. art. 14, § 258, art. 7, § 183; Mo. Const. art. 3, §§ 38(a), 39, art. 6, §§ 23, 25; Mont. Const. art. V, § 38; Neb. Const. art. XIII, § 3; Nev. Const. art. 8, §§ 9, 10; N.H. Const. Pt. 2 art. 5; N.J. Const. art. 8, § 2, para. 1, art. 8, § 3, para. 2; N.M. Const. art. IX.

typical,[9] Alaska's the most modern,[10] and Colorado's the most pervasive.[11]

Unfortunately, prior to the adoption of the state constitution, Colorado had succumbed to the thirst for railroad service. In spite of the obvious risk, Colorado taxpayers approved with reckless abandon bond issues in which they assumed thousands of dollars in railroad securities. As a result, at the time of the Colorado Constitutional Convention most of the populous counties in Colorado were heavily mortgaged.[12] Public indebtedness, therefore, became one of the more thoroughly debated topics at the convention.[13] The concern over public indebtedness, coupled with a basic distrust of corporations, was responsible for the drafting of a provision which is "broader in scope, and more specific in the matter of restriction, than any similar constitutional provision."[14] After several increasingly stringent drafts,[15] the following provision became the fundamental law of Colorado:

> Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.[16]

In an early treatment of the credit lending provision, the Colorado Supreme Court held that the constitutional framers had successfully implemented their desire to prohibit governmental involve-

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§ 14; N.Y. CONST. art. 7, § 8, art. 8, § 1; N.C. CONST. art. V, § 4; N.D. CONST. § 185; OHIO CONST. art. VIII, §§ 4, 6; OKLA. CONST. art. 10, §§ 15, 17; ORE. CONST. art. XI, § 7; PA. CONST. art 9, §§ 6, 7; R.I. CONST. art. XXXI, § 1; S.C. CONST. art. X, § 6; TENN. CONST. art. II, § 31; TEX. CONST. art. III, § 50, art. XI, § 3; UTAH CONST. art. VI, § 31; VA. CONST. § 185; WASH. CONST. art. VIII, §§ 5, 7, art. XII, § 9; W. VA. CONST. art. X, § 6; WIS. CONST. art. VIII, § 3; WYO. CONST. art. 16, § 6. South Dakota's constitution appears to provide that the state's credit can be loaned. S.D. CONST. art. XIII, § 1.

9. The state shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of any public or other corporation, association or individual. ILL. CONST. art. IV, § 20.

10. No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose. ALAS. CONST. art. IX, § 6.

This provision is the most modern in the sense that it appears to adopt the judicial treatment given credit lending provisions in many states. In fact, the provision provides no protection beyond that afforded under the fourteenth amendment due process provisions.

11. COLO. CONST. art. XI, § 1, text appearing at note 16 and accompanying text *infra*.

12. D. Hensel, A History of the Colorado Constitution In the Nineteenth Century 156, Aug. 9, 1957 (unpublished thesis in Norlin Library, University of Colorado).

13. *Id.* at 158.

14. Lord v. Denver, 58 Colo. 1, 15, 143 P. 284, 288 (1915).

15. *Id.*; PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION—COLORADO 41, 45, 158, 517, 562 (1875-76).

16. COLO. CONST. art. XI, § 1.

ment in private enterprise. The court stated that the "language could not make plainer the intent of the framers of the constitution, to utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever."[17]

From this historical background, it is evident that the purpose of this provision was to protect the property tax base from debts resulting from private mismanagement by preventing private speculation with public funds. It appears that at the time of the constitutional convention the primary concern was the protection of the *ad valorem* property tax base, as this was the primary source of revenue. The policy of the credit lending provisions, however, should be equally applicable to other general revenue sources as the state's tax base is expanded.[18] This purpose, as deduced from the historical framework, will have an important role in the following discussion.

III. The Public Purpose Doctrine—A Critque of Judicial Reasoning

Public funds derived from tax revenues cannot be expended for private purposes.[19] This doctrine is well based in common law and has been specifically imposed on the states through the fourteenth amendment due process provision. The United States Supreme Court announced in *Citizens' Savings & Loan Association v. Topeka,*[20] that there can be no lawful taxation which is not for a public purpose. Subsequently in *Green v. Frazier,*[21] the Court clearly related this concept to the fourteenth amendment due process provision by stating:

> Before the adoption of the Fourteenth Amendment this power [taxation] of the State was unrestrained by any federal authority. That Amendment introduced a new limitation upon state power into the Federal Constitution. The States were forbidden to deprive persons of life, liberty and property without due process of law. . . .
>
> The due process of law clause contains no specific limitation upon the right of taxation in the States, but it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes.[22]

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17. Lord v. Denver, 58 Colo. 1, 16. 143 P. 284, 288 (1915).

18. *See, e.g.,* Trinidad v. Haxby, 136 Colo. 168, 315 P.2d 204 (1957); Reimer v. Holyoke, 93 Colo. 571, 27 P.2d 1032 (1933).

19. In Citizens' Sav. & Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 659 (1874), the Court indicated that the public purpose doctrine is a limitation on the spending of tax revenues only, by stating:

> If these municipal corporations . . . have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good . . . .

20. 87 U.S. (20 Wall.) 655 (1874).

21. 253 U.S. 233 (1920).

22. *Id.* at 238.

Unfortunately the public purpose doctrine virtually defies definition and explicit application.[23] The Minnesota court attempted a workable definition by stating:

> What is a "public purpose" that will justify expenditure of public money is not capable of precise definition, but the courts generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.[24]

Thus it is well settled that state government action requiring the use of tax funds, derived from any source, must be for a public purpose. The only remaining question is whether the public purpose doctrine can be further applied so as to hold constitutional those transactions which involve a loan of credit and would thus appear to be invalid. Many, if not a majority, of the state courts have answered this question in the affirmative.[25] It is submitted that such an extension of the public purpose doctrine to credit lending cases is improper because it runs counter to the purpose and intent of the constitutional prohibition.

Since the public purpose limitation on the states' taxing and spending powers was well established at the time many of the state constitutions were drafted,[26] it is reasonable to assume that the drafters, aware of this limitation, intended to place an additional and specific restriction on the use of public tax funds by including the credit lending provisions. History further indicates that the drafters did not view the credit lending restriction as a general limitation on the taxing and spending powers similar to that imposed by due process, but as an explicit prohibition designed to neutralize a specific critical problem. Thus, if the credit lending provisions are to be given their intended effect, transactions challenged under them must satisfy the due process requirement of public purpose and, in addition, withstand an analysis designed to implement the purpose of the constitutional provisions. To extend the public purpose doctrine to hold credit lending transactions constitutional is to render these provisions nugatory.

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23. *See, e.g.*, Wilmington Parking Authority v. Ranken, 34 Del. Ch. 439, 105 A.2d 614 (Sup. Ct. 1954); Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); C. ANTIEAU, *supra* note 2, at § 15A.05.

24. Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958), *citing* 16 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 44.35 (3d ed. 1950). *See also* John Wright & Associates v. Red Wing, 254 Minn. 1, 6, 93 N.W.2d 660, 664 (1959); Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 176, 91 N.W.2d 642, 651 (1958).

25. *See* 15 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 39.30 (3d ed. 1950).

26. Citizens' Sav. & Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874), was decided prior to the Colorado Constitutional Convention of 1876; and many state constitutions that were drafted or redrafted since that date include credit lending prohibitions.

In its first case involving Article XI, Section 2,[27] of the Colorado Constitution, the Colorado court, with three delegates to the constitutional convention participating as justices, stated:

> If the existence of a public benefit is to . . . take it [the stock purchase] out of the constitutional prohibition, then the prohibition is utterly nugatory and valueless, as such consideration would exist in every probable case.[28]

Thus, Colorado, at an early stage, adopted a judicial position consistent with the constitutional intent and history of the credit lending provisions.

Those courts which have held that the public purpose doctrine satisfies the credit lending provisions appear to have done so either because of a failure to analyze adequately the policy of the provisions, or because of an inclination to supplant them with judicial discretion. This conclusion is buttressed by the fact that the public purpose doctrine neither adds nor clarifies anything, due to its own indefinite and changing limits. Even following the extension of the public purpose doctrine to credit lending cases, the courts have had to treat the credit lending provisions in a limited case by case manner without providing clear guidelines or workable rules of law for use in future cases. While a public purpose is necessary for due process reasons, compliance with the lending provisions ought also to be a prerequisite to validity. Furthermore, it ought not to be difficult for the judiciary to take into account this compliance, for it is possible to develop a workable analysis which will implement the intent of these provisions and at the same time produce decisions of far reaching precedential value.

IV. The Form of the Transaction

When faced with a challenge to an arrangement involving public and private capital the court should initiate an in-depth analysis of the transaction. This analysis should focus on the relationship of the parties, the nature and extent of the commitment of public funds derived from general revenues, and the classification of the transaction as either a loan or a donation. The court should relate this analysis to the narrow and specific evils which credit lending provisions are designed to neutralize, *i.e.*, private speculation at the expense of the general tax funds.

A. *Surety and Indemnity Contracts*

Historically a common form of aid was granted by means of surety agreements on bonds issued by the railroads to raise needed capital.

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27. Colo. Const. art. XI, § 2, a companion provision to Colo. Const. art. XI, § 1, prohibits the same governmental bodies from making donations to, or becoming joint owners of, private business. The reasoning applied to art. XI, § 2, would be equally applicable to art. XI, § 1.

28. Colorado Cent. R.R. v. Lea, 5 Colo. 192, 196 (1879).

Thus, the purchaser, realizing the railroad itself was highly speculative, felt secure in the knowledge that the government, and its tax base, would stand behind the bond should the railroad fail. The Wisconsin court has explicitly held that a surety relationship is necessary before a transaction will infringe on the credit lending prohibitions. In *State v. Giessel*,[29] the court concluded that "the only purpose of this provision is to prohibit the state from acting as a surety or guarantor of the collateral obligation of another party."[30] The court then approved an arrangement whereby the University of Wisconsin paid its rental obligations under a lease contract directly to the mortgagee of the private nonprofit lessor. The court's decision was based on the limited obligation of the University under its lease contract instead of a direct liability for the debts of the lessor under the mortgage. A similar analysis was made by the Iowa court in *Edge v. Brice*,[31] in approving financial assistance to public utilities for a relocation of transmission facilities necessitated by the construction of the interstate highway system. The interstate highway program precipitated considerable litigation similar to *Brice*, and the judicial reactions to virtually identical fact situations in the various states present an illustrative study of the contrasting and conflicting holdings typical of credit lending cases.[32]

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29. 271 Wis. 15, 72 N.W.2d 577 (1955).

30. *Id.* at 29, 72 N.W.2d at 584. *See also*, State v. Barczak, 34 Wis. 2d 57, 148 N.W.2d 683 (1967) (lending of credit must result in a legally enforceable obligation against the state); State v. Dammann, 228 Wis. 147, 280 N.W. 698 (1938). In *Dammann* the court stated:

> It is our conclusion that the giving or loaning of the credit of the state which it was intended to prohibit by sec. 3, Art. 8, constitution, occurs only when such giving or loaning results in the creation by the state of a legally enforceable obligation on its part to pay to one party an obligation incurred or to be incurred in favor of that party by another party. There is no such giving or loaning of the state's credit within the meaning of that prohibitory provision when all that is done by the state is to incur liability directly . . . . 280 N.W. at 715.

31. 253 Iowa 710, 113 N.W.2d 755 (1962); Note, 17 RUTGERS L. REV. 233 (1962).

32. Following the enactment of the Federal-Aid Highway Act, 23 U.S.C. § 123 (1964), in 1956, there was a rash of litigation challenging the states' contribution to nonbetterment relocation costs of public utilities necessitated by the interstate highway construction. Six cases found such assistance constitutional under credit lending provisions because it served a public purpose. State Highway Dep't v. Delaware Power & Light Co., 39 Del. Ch. 467, 167 A.2d 27 (Sup. Ct. 1961); Edge v. Brice, 253 Iowa 710, 113 N.W.2d 755 (1962); Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642 (1958); State v. Eakin, 357 S.W.2d 129 (Mo. 1962); Jones v. Burns, 138 Mont. 268, 357 P.2d 22 (1960); State v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965). Three courts approved the assistance because it was prospective. Department of Highways v. Pennsylvania Pub. Util. Comm., 185 Pa. Super. 1, 136 A.2d 473 (1957); State v. Austin, 160 Tex. 348, 331 S.W.2d 737 (1960); State Rd. Comm. v. Utah Power & Light Co., 10 Utah 2d 333, 353 P.2d 171 (1960).

The New Hampshire court found constitutionality without considering the credit lending problem, limiting its discussion to constitutional provisions dealing with the expenditure of highway funds. Opinion of the Justices, 101 N.H. 527, 132 A.2d 613 (1957). *But see*, Opinion of the Justices, 152 Me. 449, 132 A.2d 440 (1957). North Dakota found that the credit lending provisions did not apply to internal improvements. Northwestern Bell Tel. Co.

In *Mayor v. Shattuck*,[33] the Colorado court, in less explicit terms, indicated that only the tri-partite relationship necessary to a surety contract will violate the constitution. The court stated, with reference to Article XI, Section 1, of the Colorado Constitution, that:

> This section is to be construed as prohibiting a town or city by its own voluntary corporate act from pledging its credit to, or becoming responsible for, any debt, contract, or liability in aid of a *third party*.[34]

The necessity of a surety relationship for a transaction to be held unconstitutional in Colorado is further indicated by the confusion created by municipal guarantees on general obligation bonds issued by special assessment improvement districts. In *Aurora v. Krauss*,[35] the court held that such guarantees were unconstitutional as a loan of credit by the city to the taxpayers of the improvement district. *Aurora* was specifically overruled in *Bradfield v. Pueblo*,[36] the court reasoning that the debt was that of the city and that the provision does not prohibit the city from pledging its credit for the payment of its own debts. The *Aurora* court's decision was based on a misconception of the obligations created by the improvement district, the court holding that the district's debts were those of the

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v. Wentz, 103 N.W.2d 245 (N.D. 1960). Three states found the assistance violative of the credit lending provisions because there was no public purpose. State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959); State v. Southern Bell Tel. & Tel. Co., 204 Tenn. 207, 319 S.W.2d 90 (1958); Washington State Highway Comm. v. Public Northwest Bell Tel. Co., 59 Wash. 2d 216, 367 P.2d 605 (1961).

New Mexico encountered problems in handling the highway program assistance provisions, first finding them unconstitutional. State Highway Comm. v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007 (1958), and then constitutional three years later because they were prospective. State v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

In deciding these cases the courts must have had the practical implications of their holdings in mind, but only the Minnesota court articulated such implications. In *Zimmerman* that court stated:

> The Federal-aid program is to be financed out of Federal funds, presumably resulting from Federal taxes contributed in part by the people of this state. If the utilities located in this state must undertake relocation of their facilities without a right to reimbursement, their costs will be substantially increased and this in turn will be reflected in higher utility rates in Minnesota communities. Futhermore, to the extent that other states effectuate Federal aid to their utilities and Minnesota does not, the people of Minnesota will be paying Federal taxes which will benefit the people of the other states but which will not benefit the people of Minnesota. 253 Minn. at 177, 91 N.W.2d at 652.

33. 19 Colo. 104, 34 P. 947 (1893).

34. *Id.* at 116, 34 P. at 951 (emphasis added). The Colorado court recently approved a lease arrangement between the City of Boulder, Colorado and Security Life and Accident Company for an as yet unconstructed off-street parking facility by stating:

> The City of Boulder neither assumed, secured, guaranteed, underwrote or pledged its credit, directly or indirectly, for any indebtedness or obligation of Security Life. McCray v. Boulder, 439 P.2d 350, 354 (Colo. 1968).

35. 99 Colo. 12, 59 P.2d 79 (1936).

36. 143 Colo. 559, 354 P.2d 612 (1960). The court quotes at length from Justice Butler's strong dissent in Aurora v. Krauss, 99 Colo. 12, 59 P.2d 79 (1936).

private taxpayers within the district, thereby producing the tripartite transaction. In rejecting the *Aurora* construction, the *Bradfield* court removed the tripartite relationship and found virtually the same transaction constitutional.

Restricting the prohibition's effect to surety transactions does not, however, adequately implement the basic policy represented in the provision; some indemnity contracts should also be held unconstitutional. The surety contract creates a secondary obligation in the surety and requires three parties.[37] The indemnity contract, on the other hand, creates a primary obligation between two parties,[38] and raises serious constitutional questions requiring careful treatment. The policy underlying the credit lending prohibitions is to prevent private management from controlling the advent and amount of liability. Therefore, indemnity contracts which leave such control in public hands should be found constitutional, while those which abdicate control to the private sector should be found unconstitutional. Thus, a city might properly indemnify a landlord against the city's negligence in the occupancy of the premises, or issue a special warranty deed on a conveyance of city land.[39] The Texas Supreme Court has held, however, that a municipality could not indemnify a railroad against tort liability arising from the railroad's operation of a bridge.[40]

Surety and some indemnity contracts provide the most obvious dangers to tax funds. Those arrangements which abdicate control over potential liability to private hands are to be evaluated with great caution, and the courts should not attempt to narrow the application of the credit lending provisions at the expense of policy considerations. It would be of considerable benefit if the courts would clarify their position on the "indemnity-surety" dichotomy by explicitly defining those arrangements which are prohibited, as the Iowa and Wisconsin courts have attempted to do. It is suggested that the situs of control of the potential liability should be the principal criterion upon which a meaningful distinction could be based.

B. *Revenue Bonds and Special Funds*

Since the purpose of the constitutional prohibition against credit lending is to protect general tax revenues, transactions which take the form of credit lending and provide adequate safeguards for such revenues should be upheld. Thus, most courts, including that of

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37. 2 A. Corbin, Contracts § 349 (1950).

38. *Id.*

39. A special warranty deed warrants the title to be free of any claims accruing during and under the ownership of the grantor. Colo. Rev. Stat. Ann. § 118-1-15 (1963).

40. Texas & N.O.R. v. Galveston County, 141 Tex. 34, 169 S.W.2d 713 (1943).

Colorado, have adopted revenue bond exceptions to the credit lending prohibitions.

Revenue bonds create a lien on specified revenues only, usually those derived from the operation of the enterprise to be created or constructed with the funds resulting from a particular bond issue. In addition courts have broadened permissible revenue sources to include similar structures or activities.[41] Revenue bonds do not give their holders any claims against general tax revenues of the issuing government. The power to issue revenue bonds must be delegated to the municipality or governmental agency by statute or constitution,[42] and the courts have held that the absence of such delegation precludes their issuance.[43]

Special funds, in contrast, are essentially trust funds derived from specified revenue sources and pledged to the payment of a specified obligation.[44] Such funds cannot be subsequently appropriated to other uses, and a judgment against an exhausted fund cannot be enforced by execution against the general funds or property of the issuing governmental agency.[45] Typical of special fund arrangements is the pledging of nongeneral fund revenues, *e.g.*, gasoline or motor vehicle revenues. to the payment of bonds issued to finance the construction of streets and highways.

Originally revenue bond and special fund transactions were utilized as a means of avoiding constitutionally imposed debt limitations. In *Shields v. Loveland*,[46] the Colorado court was confronted with an arrangement whereby the City of Loveland, in financing the construction of an electric light plant, issued three hundred thousand dollars in revenue bonds to be paid out of the revenue collected from the operation of the plant. The bond issue was challenged on the grounds that the debt limit of the municipality had been exceeded. The court held:

> We do not think that they [the bonds] amount to a debt within the intent of the Constitution or statute. The definitions of the word "debt" are many . . . . Its meaning in the

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41. Lewis v. State Bd. of Agriculture, 138 Colo. 540, 335 P.2d 546 (1959) (revenues from existing dormitories pledged for the construction of new dormitories and a student union); Searle v. Haxtun, 84 Colo. 494, 271 P. 629 (1928) (revenues from existing light plant pledged to finance additions and improvements to plant).

42. C. ANTIEAU, *supra* note 2, at § 15.02. The cities and counties of Colorado are empowered to issue anticipation warrants to finance public projects. COLO. REV. STAT. ANN. § 36-19-3 (1963).

43. C. ANTIEAU, *supra* note 2, at § 15.02, *citing* Miehls v. Independence, 249 Iowa 1022, 88 N.W.2d 50 (1958).

44. Haxtun v. Wangnild, 109 Colo. 518, 127 P.2d 328 (1942). 2 C. ANTIEAU, *supra* note 2, at § 15.39. *See generally* 15 E. MCQUILLIN, *supra* note 2, at § 43.132.

45. 15 E. MCQUILLIN, *supra* note 2, at § 43.132. *See also* Rising v. Hoffman, 116 Colo. 63, 179 P.2d 430 (1947) (when fund is insufficient it is to be prorated among the outstanding bonds).

46. 74 Colo. 27, 218 P. 913 (1923).

> sections of the Constitution and statutes now before us must be determined by their purpose, which was to prevent the overburdening of the public and bankruptcy of the municipality. Clearly the revenue bonds are not within that purpose. The public can never be overburdened by that which it is under no obligation to discharge, nor can the city become bankrupt by what it does not have to pay.[47]

Colorado was one of the first jurisdictions to recognize the validity of special funds.[48] Since this recognition, the court has treated the special fund doctrine and revenue bond transactions similarly, apparently ignoring their basic conceptual differences. In *Searle v. Haxtun*,[49] the court, relying on *Shields*, approved the pledging of revenues derived from an existing light plant to pay for the construction of improvements and additions to the plant. This holding was narrowed, however, in *Reimer v. Holyoke*,[50] where the court held that such revenues could not be pledged when they had previously been available for general purposes supported by tax levy and the city had reached the constitutionally imposed debt limit. A similar result was reached in *Trinidad v. Haxby*,[51] where the court held that cigarette taxes and parking meter funds could not be pledged for the construction of a hospital because they had been previously available for general purposes. The *Trinidad* and *Reimer* courts engaged in an in-depth cost accounting analysis which is both unique and proper in these cases. In *Davis v. Pueblo*,[52] however, the court, ignoring *Reimer* and *Trinidad*, held that the debt limitations do not apply to home rule cities and that charter restrictions apply only to general obligation bonds; it then approved the pledging of meter funds previously available for general use for the construction of new parking facilities.

Recently the Colorado court has extended the revenue bond exception previously applied in debt limit cases to credit lending problems. In *Ginsberg v. Denver*,[53] the court dismissed a challenge, based on the credit lending prohibition, to the issuance of revenue bonds to construct a stadium for professional athletics by stating:

> [T]here is no pledge of the credit of Denver on the bonds and no debt of Denver is created. On the contrary, the bonds themselves clearly show that Denver shall in no event be

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47. *Id.* at 32, 218 P. at 915-16. *See also* Baro v. Murphy, 32 Ill. 2d 483, 207 N.E.2d 593 (1965); State v. New Mexico State Authority, 76 N.M. 1, 411 P.2d 984 (1965).

48. *In re* Canal Certificates, 19 Colo. 63, 34 P. 274 (1889) (sale of federally donated school lands).

49. 84 Colo. 494, 271 P. 629 (1928).

50. 93 Colo. 571, 27 P.2d 1032 (1933).

51. 136 Colo. 168, 315 P.2d 204 (1957).

52. 158 Colo. 319, 406 P.2d 671 (1965). *See also* Berman v. Denver, 156 Colo. 538, 400 P.2d 434 (1965).

53. 436 P.2d 685 (Colo. 1968). *See also* Petition of Bd. of Pub. Bldg., 363 S.W.2d 598 (Mo. 1962); State v. Bane, 148 W. Va. 392, 135 S.W.2d 349 (1961).

> looked to for payment or be liable therefor. . . . [I]t is obvious that no reliance will be placed on the credit of the City.[54]

This extension of the revenue bond exception to the credit lending prohibitions should be equally applicable to special funds,[55] at least for home rule cities and statutory cities which have not previously used the pledged revenues for general purposes. The extension of the revenue bond exception should pave the way for the validation of industrial park legislation which has recently been enacted in Colorado[56] and which has caused considerable litigation in states previously enacting such legislation.[57]

C. *Consideration*

The fact that the provisions are intended to prohibit the mingling of public and private funds does not mean that the government is not empowered to enter normal contractual relationships involving a direct exchange of consideration; such transactions do not involve a loan of credit.[58] In the leading case of *Cremer v. Peoria Housing Authority*,[59] the Illinois Supreme Court considered the constitutionality of a transaction in which, pursuant to state statute and grant, the Peoria Housing Authority had purchased land, installed improvements and then requested bids for further development. Receiving no bids, the Authority conveyed the land for the cost of the improvements to Illinois Valley Homes, which in turn agreed to construct twenty-five two story apartment buildings containing one hundred thirty-six apartments. The court took judicial notice of the fact that alleviation of the extreme housing shortage was a matter of public welfare. However, the plaintiff sought to enjoin the transaction on the grounds that state credit could not be loaned and that the state could neither purchase a financial interest in a private business nor appropriate funds for private benefit. In sustaining the transaction, the court held that the credit lending provisions of the Illinois Constitution did not

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54. 436 P.2d at 691.

55. *See, e.g.*, Schuerman v. State Highway Comm'n, 377 Mich. 609, 141 N.W.2d 62 (1966).

56. Colo. Laws 1967, ch. 330. The statute provides that counties and municipalities may acquire, lease, improve and dispose of properties to promote industrial growth. The funding is to be by revenue bonds which will not constitute a government debt, and no general revenues are to be employed in the program. *Id.* at §§ 5, 18.

57. *See* Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265 (1963) and the cases cited therein; Comment, *The "Public Purpose" of Municipal Financing for Industrial Development*, 70 YALE L.J. 789 (1961).

58. To be enforceable a surety contract must be supported by consideration. The primary and direct flow of consideration in a surety contract, however, is between the third party and the guarantee. 1 A. CORBIN, CONTRACTS § 125 (1963). Therefore, it is not contemplated that a surety contract should be found constitutional because it is supported by consideration.

59. 399 Ill. 579, 78 N.E.2d 276 (1948).

preclude contracts in which there was an exchange of consideration between the parties. The corporation's agreement to construct the apartments was sufficient consideration in that the corporation suffered a detriment and the authority received a benefit.

Most of the cases turning on consideration involve the rendering of a service which is difficult to value. There is some authority that the consideration is not to be measured under normal contract law as to its adequacy or sufficiency.[60] Massachusetts has upheld as adequate consideration the payment of nine hundred thousand dollars in return for one year's continued service by a railroad and an option to purchase some of the railroad property at salvage value.[61] In *Oswege & S.R.R. v. State*,[62] Judge Cardozo indicated that a claim in law or equity was sufficient consideration. A moral duty has frequently been held sufficient consideration to validate a payment or annuity given to a private person.[63] Ten dollars and a public purpose were held sufficient consideration for the conveyance of a determinable fee in land appraised at nine thousand dollars to a veterans organization pursuant to statutory authority.[64]

In *McNichols v. Denver*,[65] the Colorado court held that a retirement plan which included contributed tax funds was constitutional since it was compensation for services rendered. It is clear in Colorado, by constitutional fiat, that such retirement plan contributions must be concurrent with service rendered, and any special appropriation to, or creation of, a retirement annuity following the employee's retirement is unconstitutional as a donation.[66]

In *Chitwood v. Denver*,[67] the court held that Article XI, Section 1, did not preclude cash transactions because the provision contemplated "a period of time over which the credit is loaned or pledged."[68] The underlying premise of the opinion was consideration, however, and the court could have enhanced the precedential value of the case by clearly articulating this theory as the basis of the decision.

By adopting the contract approach which involves an exchange of consideration, it might be possible to render assistance to private enterprises which perform public services within the confines of public purpose. It is conceivable that a city might contract with a private

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60. Hill v. Summit, 64 N.J. Super. 522, 166 A.2d 610 (1960).
61. *In re* Opinion of Justices, 337 Mass. 800, 152 N.E.2d 90 (1958).
62. 226 N.Y. 351, 124 N.E. 8 (1919).
63. *See, e.g.*, Kioke v. Board of Water Supply, 44 Hawaii 100, 352 P.2d 835 (1960); Rutgers College v. Richman, 41 N.J. Super. 259, 125 A.2d 10 (1956); State v. Gainer, 146 W. Va. 840, 122 S.E.2d 618 (1961); State v. Sims, 142 W. Va. 201, 94 S.E.2d 857 (1956). *See also* C. ANTIEAU, *supra* note 2, at § 15A.17.
64. Hill v. Summit, 64 N.J. Super. 522, 166 A.2d 610 (1960).
65. 131 Colo. 246, 280 P.2d 1096 (1955).
66. COLO. CONST. art. V, § 28. *See also* Levine v. Lee, 21 Conn. Supp. 116, 145 A.2d 378 (Super. Ct. 1958).
67. 119 Colo. 165, 201 P.2d 605 (1948).
68. *Id.* at 168, 201 P.2d at 607. *See also* Edge v. Brice, 253 Iowa 710, 113 N.W.2d 755 (1962).

hospital,[69] chamber of commerce,[70] or other public service organization which performs services within the normal purview of municipal action and public purpose; and the courts should find such contracts constitutional.

V. The Nature of the Lending Agency and the Recipient

A. *The Lending Agency*

Not infrequently courts uphold transactions involving the loan of credit because the lending entity is not within the prohibition.[71] In some states such a holding is understandable because the express wording of their constitutional provisions limits their application to the state.[72] Rulings based on strict construction can, however, run contrary to the intent and purpose of the provisions. Colorado, on the other hand, provides that neither "the state, . . . county, city, township or school district" may loan its credit.[73] Since the purpose of the provision is to protect the general tax fund, it is evident that in cases of doubt all governmental units having general taxing powers should be included within the prohibition. The Colorado court appears to have recognized this rule in a different setting. In *Lewis v. State Board of Agriculture*,[74] the court entertained a revenue bond question in which the revenues from certain existing dormitories were to be pledged for the payment of bonds issued to build and equip other dormitories and a student union building. The court answered the question of the constitutionality of a cross-pledge between facilities not involving tax revenues by referring to the indebtedness provisions of the Colorado Constitution. Distinguishing *Trinidad v. Haxby*,[75] the court held that the State Board of Agriculture had no taxing powers, and that the pledged revenues had not been available for general purposes supported by tax revenues. The court, therefore, *intimated* that the indebtedness provisions apply only to governmental entities having general taxing powers or, in the alternative, apply only to those entities having at least the power to commit general tax revenues. It would not be a great extension of this theory, due

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69. Local governments have at times been upheld in spending to aid various civic and nonprofit associations performing public or quasi-public functions for the local community. C. ANTIEAU, *supra* note 2, at § 15A.15.

70. Support of chambers of commerce has been upheld. Dennis V. Raleigh, 253 N.C. 400, 116 S.E.2d 923 (1960). *Contra*, Horner v. Chamber of Commerce, 231 N.C. 440, 57 S.E.2d 789 (1950). In *Dennis* the funds were to be expended only to advertise the city as an industrial site, whereas in *Horner* the appropriation was unrestricted.

71. Comment, 108 U. PA. L. REV., *supra* note 2, at 101-03.

72. *See, e.g.*, Port Authority v. Fisher, 269 Minn. 276, 132 N.W.2d 183 (1964) (constitution does not limit counties, cities, or towns); Lawrence v. Schellstede, 348 P.2d 1078 (Okla. 1960) (credit lending provision has no application to municipalities). *Contra*, State v. York, 164 Neb. 223, 82 N.W.2d 269 (1957) (credit lending prohibition applies to state and any subdivisions thereof).

73. *See* note 17 *supra*.

74. 138 Colo. 540, 355 P.2d 546 (1959).

75. 136 Colo. 168, 315 P.2d 204 (1957).

to the purpose of the credit lending prohibitions, to bring the provisions within the same reasoning. In contrast, the court held in *Anderson v. Westminster*[76] that municipal improvement districts are not restricted by the constitutional debt limits because they are not one of the enumerated entities in Article XI, Section 8. These districts do have *ad valorem* property taxing powers,[77] however, and therefore should be within the prohibitions against credit lending. In spite of narrowly worded provisions, the courts should not exclude governmental agencies from the credit lending prohibition when such agencies have general taxing powers.

B. *The Recipient*

Some courts have found transactions constitutional because the entity receiving the assistance is not among those declared ineligible as recipients by the constitution. Thus, it has been held that the prohibitions do not preclude aid to nonprofit corporations,[78] public utilities,[79] or the federal government.[80] An interesting problem arises when intergovernmental transfers or assistance are contemplated within a state. In this situation management of the funds remains in public officials but not those responsible for the borrowed tax base. This transfer of control between public officials should not, in itself, raise serious credit lending problems. Almost universally assistance would be rendered by the greater tax base to a lesser, but included, tax base, *e.g.*, county to municipal. The courts might properly hold that governmental bodies, *i.e.*, municipal corporations, are not to be included among those entities to whom grants of assistance are considered unconstitutional.

It is not uncommon for a court to rule that the credit lending provisions do not prohibit aid to state agencies such as port authorities,[81] housing authorities,[82] etc., but most such cases turn more on public purpose than the nature of the recipient. The Colorado court has indicated that aid to improvement districts is not precluded when the financed improvement is a direct benefit to the municipality.[83]

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76. 125 Colo. 408, 244 P.2d 371 (1952). *See also* People v. Letford, 102 Colo 284, 79 P.2d 274 (1938); Milheim v. Moffat Tunnel Improvement Dist., 72 Colo. 268, 211 P. 649 (1922).

77. *See, e.g.*, COLO. REV. STAT. ANN. §§ 89-1-20, 89-3-16, 89-4-12, 89-5-14, 89-6-15 (1963).

78. People v. Cain, 410 Ill. 39, 101 N.E.2d 74 (1951); Hager v. Kentucky Children's Home Soc'y, 119 Ky. 235, 83 S.W. 605 (1904).

79. *See* note 32 *supra*. These cases turn primarily on public purpose, but the courts did not ignore the governmental supervision under which public utilities operate.

80. McNichols v. Denver, 101 Colo. 316, 74 P.2d 99 (1937); Sommers v. Flint, 355 Mich. 655, 96 N.W.2d 119 (1959).

81. Orbison v. Welsh, 242 Ind. 385, 179 N.E.2d 727 (1962) (port authority an agent of the state). *See also* Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1958).

82. Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N.E.2d 276 (1948); State v. Housing Authority, 190 La. 710, 182 So. 725 (1938).

83. Bradfield v. Pueblo, 143 Colo. 559, 354 P.2d 612 (1960).

Based on the narrowly defined purposes of the credit lending provisions, aid to governmental units, where a direct benefit is realized by the assisting governmental unit, should be outside the credit lending prohibitions.

VI. The Analysis

Having presented the historical and policy background of the credit lending provisions, and reviewed the criteria upon which the courts have based their holdings, it is now possible to formulate a basic analysis for evaluating cases involving credit lending problems. Such an analysis, as previously stated, should enforce the policy of the credit lending provisions, and at the same time provide useful guidelines that may be applied in the future. The court must answer four basic questions which entail consideration of all of the criteria previously discussed.

> (1) Does the transaction under consideration involve a sufficient public purpose to satisfy the fourteenth amendment due process provisions?

This question must be answered in the affirmative, as such a public purpose must underlie all expenditures, or potential expenditures, of public tax funds. Public purpose is primarily a judicial question, but the courts have been disposed to give great weight to the legislative determination.[84] Having determined that the transaction is for a public purpose, the court must entertain the second question.

> (2) Are the tax-derived general funds of the governmental entity placed in jeopardy by the transaction?

In answering this question the mechanism of the loan of credit becomes relevant. It is here that the court should consider any protections accorded the tax-derived general funds by the transaction. The revenue bond and special fund doctrines provide the most obvious protections of the tax funds, and if present, should lead to a finding that the transaction is constitutional. The court should also consider the taxing powers, or relationship to such taxing powers, of the state agency or subdivision lending its credit. If such agency or subdivision lacks taxing powers or the power to commit tax funds, the court might find the transaction constitutional.

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84. The United States Supreme Court in Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710 (1922), *aff'g* 72 Colo. 268, 211 P. 649 (1922), stated:

> The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any state. And like respect should be accorded to the declarations of the legislative body of the state. *Id.* at 717 (citations omitted).

(3) Does the transaction substitute private management for public management as to the advent and amount of liability to be sustained by the general tax base?

The primary consideration here is the nature of the recipient of the loan of credit. If the management of the recipient is public, as in another governmental body, or subject to comprehensive public supervision, the court might find the loan of credit constitutional. Of equal importance, however, is the possibility that such management can be found to have remained in the governmental agency loaning its credit, in which case a finding of constitutionality should follow.

(4) Is the transaction supported by a direct exchange of consideration adequate to remove it from the loan or donation categories?

As has been previously indicated, the credit lending provisions are not designed to destroy the normal contracting powers of government. If the transaction contemplates a transfer of property or the rendering of a service within the normal scope of governmental action under the public purpose doctrine, and if this service or property is adequate consideration, the transaction should be upheld.

By utilizing this analysis the courts might well clarify the reasoning behind their decisions while providing explicit criteria upon which subsequent decisions could be based, thereby permitting adequate governmental planning and a possible reduction in the number of future cases.

VII. Conclusion

It is not suggested that the analysis here presented would revolutionize case results, but it is hoped that it would bring uniformity and consistency to what has been a hopelessly confusing and random area of the law. The framers of state constitutions, in adopting the credit lending prohibitions, intended to restrict governmental conduct in a narrow and specific manner. It is not for the courts to supplant or modify the framers' intent. This comment has attempted to show that the protection of the tax base intended in the credit lending provisions can be afforded, and the framers' intent implemented, by a careful analysis based primarily on a narrow structuring and application of the credit lending provisions.

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STATE CONSTITUTIONAL LIMITATIONS ON PUBLIC INDUSTRIAL FINANCING: AN HISTORICAL AND ECONOMIC APPROACH

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The widespread disillusionment resulting from the excesses of the railroad bond era of the nineteenth century caused a constitutional revolution among the states. New limitations on the financial powers of the states and their political subdivisions were adopted, including express restrictions on government economic aid to private enterprises. At the same time, the judiciary evolved a public purpose doctrine to complement the new constitutional provisions.

Since the adoption of the Mississippi Balance Agriculture With Industry plan (BAWI) in 1936, and especially since the end of World War II, a number of local and national economic problems have generated a twentieth-century counter-revolution. At first gradually, but now with increasing momentum, a considerable minority of jurisdictions have adopted statewide programs which authorize the investment of state and municipal funds [1] in factories and equipment as a means of inducing industrial development.[2] Several of these programs present no problem of state constitutional law as they are based on

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[1] Unless the context indicates otherwise, the terms "municipal" and "municipality" will be used to refer to all political subdivisions of the state.

[2] Public industrial financing is only one technique which has been utilized to encourage industrial development. Most states allocate considerable sums to advertising and personal solicitation. Technical staffs are made available to supply a

newly adopted amendments. The majority, however, resting solely on statute, do present constitutional difficulties which are the focus of this study.[3]

The Article divides itself into four major parts. First, the principal programs of public industrial financing currently in effect and the judicial reaction to them will be outlined. Second, the historical emergence of the constitutional limitations which are the subject of this study and the judicial application of them during the nineteenth century and the early decades of the twentieth century will be reviewed. Third, the application of these constitutional restrictions to modern industrial financing will be analyzed. Finally, the question of state tax exemption incident to public industrial financing will be discussed.

I. Economic Need and Legislative Response: The Current Public Industrial Financing Programs

A. The Mississippi Plan: Municipally Owned Plants Financed by General Obligation Bonds

The modern phase[4] of state industrial financing began in 1936 with the enactment by the Mississippi legislature of the BAWI plan.[5]

great variety of detailed information to prospective industry. See GILMORE, DEVELOPING THE "LITTLE" ECONOMIES 27-48 (1959). In addition, many southern states offer tax exemptions to new industry for specified periods of time. See Note, 59 COLUM. L. REV. 618, 626 n.66 (1959), where the pertinent constitutional and statutory provisions granting tax exemptions are set forth.

[3] See generally Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 618 (1959); Note, *State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations*, 108 U. PA. L. REV. 95 (1959); Note, *The "Public Purpose" of Municipal Financing for Industrial Development*, 70 YALE L.J. 789 (1961).

[4] State governments have been encouraging new industry by offering subsidies and tax exemptions since colonial times. In 1662, Virginia granted a bounty of five pounds of tobacco for every yard of woolen cloth made in the colony. During the eighteenth century, Maryland, North Carolina, South Carolina, and Virginia offered bounties to encourage the production of several products. Public loans and land grants were likewise common. See HAWK, ECONOMIC HISTORY OF THE SOUTH 104-07 (1934); WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 87-88 (2d ed. 1949).

[5] The 1936 enactment, by its own terms, lapsed in 1940. The present legislation, enacted in 1944, is substantially the same. MISS. CODE ANN. §§ 8936-05 to 8938-08 (1956).

The BAWI program was not the first twentieth-century industrial financing program. It was preceded by at least one other, the Kansas industrial levy. Enacted in 1923, the Kansas statute originally authorized certain cities, and later by amendment all cities, to levy a tax "for the purpose of creating a fund to be used in securing industries or manufacturing institutions for such city . . . ." KAN. GEN. STAT. ANN. § 13-1441 (Supp. 1959). While some of the proceeds of the tax have been used for the purchase of land and buildings for lease to private industry, there has been uncertainty in the state as to whether the statute authorizes outright industrial financing of this kind, or is limited to expenditures designed to aid and encourage industrial expansion, such as advertising and installation of water mains and sewers. As a result of this uncertainty as well as other factors, such as the fluctuating attitudes of the voters in approving the levy, this program has not played an important role in Kansas. See HITE, THE INDUSTRIAL LEVY IN KANSAS 1-18 (Kansas Univ. Bureau of Business Research 1954).

Mississippi was faced with a short-run and a long-run problem.[6] The impact of the depression was severe. Both unemployment and under-employment were acute. Per capita income was at the desperate figure of 41% of the national average.[7] Further, to use the language of the economist W. W. Rostow, the state's basically agricultural economy was on the verge of its "take-off"—its first period of rapid, sustained, industrial growth.[8]

The legislature responded to these problems with a program of municipal industrial financing. The BAWI statute authorizes any municipality, upon approval of a project by its electorate and a state agency, to issue, within statutory limits, general obligation bonds to finance the construction of a plant, together with the necessary machinery and equipment, for long-term lease to a private industry.[9] The state agency is directed to issue a certificate of public convenience and necessity if it finds that there are sufficient natural resources and labor to support the proposed industry, and that the project will promote the economic objectives set forth in the statute.[10]

At the outset, nominal rentals made BAWI an outright subsidy program.[11] However, over the years, the philosophy of the administrators has moved away from that policy. Today, the objective is to fix rentals so that they will amortize the bonded indebtedness and pay the interest charges within the primary term of the lease.[12] Net leases are used whereby the lessee maintains the premises at his own expense and pays all insurance premiums. The primary term of the lease may be as high as twenty-five years with options to extend for seven-year periods at nominal rentals. A maximum term is fixed at ninety-nine years.[13] The lessee thus has an assured occupancy for the entire useful life of the facility. Elements of subsidy still remain, however, as rentals fail to reflect any charge for risk of loss or costs of administration, and tax exemptions are still provided.

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6 Hopkins, Mississippi's BAWI Plan 4-9, 17-18 (Fed. Reserve Bank of Atlanta, 1944); Wallace, Industrializing Mississippi 2-3, 13-17 (Univ. of Miss. Bureau of Public Administration 1952).

7 Survey of Current Business at 15, Aug. 1949.

8 Rostow, The Stages of Economic Growth 4-9, 17-18 (1960).

9 Miss. Code Ann. §§ 8936-08 to -09, -11, -13 (1956).

10 Miss. Code Ann. § 8936-08 (1956).

11 Hopkins, *op. cit. supra* note 6, at 3-6, 9, 29; Wallace, *op. cit. supra* note 6, at 7-9, 27, 30.

12 Miss. Agricultural & Industrial Bd., Mississippi's BAWI Plan 3 (undated); Letter From W. P. Starnes, Ass't Director, Miss. Agricultural & Industrial Bd., to David E. Pinsky, Dec. 16, 1960.

13 Miss. Agricultural & Industrial Bd., Mississippi's BAWI Plan 3 (undated); Letter From Lester G. Franklin, Ass't Attorney General, State of Mississippi, to David E. Pinsky, Aug. 15, 1959.

Except for a four-year hiatus during World War II, the BAWI plan has been continuously in effect since 1936. Substantially similar programs are now in operation in at least six other jurisdictions,[14] five of which are southern or border states. As the Appendix indicates, total activity under the Mississippi plan, however, far exceeds that in any other state.

The Mississippi plan is attractive to industry because of the savings it passes on to the lessee. As public property, the land and plant are exempt from all state and local real property taxes.[15] In addition, municipal bonds are marketed at lower interest rates than private corporate bonds so that the lessee has less to amortize in rent. This interest saving springs from several factors. Because public financing pledges future taxes, government obligations are more attractive to investors even at lower interest rates than those of many small private enterprises whose ability to repay is uncertain. Moreover, income from municipal bonds is exempt from federal income taxes[16] while the bonds themselves are exempt from state personal property taxes[17] so that a lower interest rate does not really reduce net income. Further, in several states, municipal bonds are authorized as investments for banks, fiduciaries, and others who are traditionally regulated.[18] This facilitates their sale, without having to compete with other bonds by offering high returns.

B. The Revenue Bond Plan: Municipally Owned Plants Financed by Revenue Bonds

Beginning in 1946, a number of state legislatures enacted statutes authorizing municipalities to finance the construction and equipping of industrial plants by the issuance of revenue bonds. Although these plans are modeled on the BAWI program, they differ from it in that the bonds are payable only from the income produced by the facility rather than from general taxes. Though revenue bonds do not, therefore, rest entirely upon the credit of the municipality, the plans which utilize them offer to industry many of the features which make the

[14] Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956) (construing a general borrowing enabling statute); ALA. CONST. amends. 84, 94, 95, 104, 128; LA. CONST. art. 14, § 14(b.2); MO. CONST. art. 6, § 23(a); MO. REV. STAT. §§ 71.790-.850 (Supp. 1961); N.D. CENT. CODE ANN. §§ 40-57-02 to -20 (Supp. 1961); TENN. CODE ANN. §§ 6-2901 to -2916 (Supp. 1962). The programs in Kentucky, North Dakota and Tennessee do not rest on any enabling constitutional amendment.

[15] See notes 224-25 *infra* and accompanying text.

[16] INT. REV. CODE OF 1954, § 103.

[17] *E.g.*, MISS. CODE ANN. § 8936-17 (1956); TENN. CODE ANN. § 6-2913 (Supp. 1962).

[18] LA. REV. STAT. § 9:2061(4) (1951); MISS. CODE ANN. § 421 (1956); TENN. CODE ANN. § 6-2914 (Supp. 1962).

Mississippi plan attractive.[19] Other closely related statutes permit the organization of local public corporations or authorities which have the power to construct industrial plants for long-term lease or sale to private industry.

At least fifteen states have one of these two related types of legislation.[20] A few of these are northern jurisdictions, but the only substantial implementation of these programs has been in Alabama, Kentucky, and Tennessee,[21] all states with per capita incomes of no more than 70% of the national average and still in the midst of their industrial take-offs.[22]

C. The Pennsylvania Plan: Second Mortgage Loans Financed by Current Taxation

The economic background of the Pennsylvania industrial financing program was very different from that of the BAWI and other southern plans. The economy of Pennsylvania reached maturity by World War I; by the end of World War II it was clearly in the post-maturity period. Certain sectors of the state's economy entered a period of severe decline, causing persistently high unemployment in many counties.[23] To meet these problems, the Pennsylvania legis-

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19 The land and the facility are generally exempt from property taxes. See notes 224-25 *infra* and accompanying text. While the public credit is not pledged, the interest rate on the bonds is for several reasons lower than many small enterprises could obtain. As in the case of general obligation bonds, the interest on revenue bonds is exempt from federal income taxes. Rev. Rul. 187, 1957-1 CUM. BULL. 65; Rev. Rul. 106, 1954 CUM. BULL. 28; *cf.* Bryant v. Commissioner, 111 F.2d 9 (9th Cir. 1940). This advantage has been condemned by many observers; see notes 51-53 *infra* and accompanying text. See generally Armstrong, *"Municipal Inducements"—The New Mexico Commercial and Industrial Project Revenue Bond Act*, 48 CALIF. L. REV. 58 (1960). In addition, many states make revenue bonds authorized investments for savings banks and insurance companies. *E.g.*, ALA. CODE tit. 37, § 511(29) (1958). Finally, the formal status of the bonds as governmental obligations may well make them more attractive to investors for other than economic reasons. Many investors, for example, are motivated by feelings of civic obligation. Letter From Ed. E. Reid, Executive Director, Alabama League of Municipalities, to David E. Pinsky, June 21, 1960.

20 Legislation authorizing municipalities to issue revenue bonds: ALA. CODE tit. 37, §§ 511(20)-(32) (1958); ARK. STAT. ANN. §§ 13-1601 to -1614 (Supp. 1961); GA. CODE ANN. § 87-802(a)(11) (Supp. 1961); ILL. ANN. STAT. ch. 24, §§ 8-4-1 to -22 (Smith-Hurd 1962); KY. REV. STAT. §§ 103.200-.280 (1959); MISS. CODE ANN. §§ 8936-51 to -69 (Supp. 1960); MO. CONST. art. 6, § 27; MO. REV. STAT. §§ 71.790-.850 (Supp. 1961); N.M. STAT. ANN. §§ 14-41-31 to -43 (Supp. 1961); N.D. CENT. CODE ANN. §§ 40-57-02 to -18 (1961); OKLA. STAT. tit. 62, ch. 2(d), §§ 2-16 (1961); TENN. CODE ANN. §§ 6-1701 to -1716 (1955); VT. STAT. ANN. tit. 24, §§ 2701-14 (1959); Kan. Sess. Laws 1961, ch. 81, §§ 1-11; Neb. Laws 1961, ch. 54, No. 159, at 200.

Legislation authorizing the organization of public corporations or authorities: ALA. CODE tit. 37, § 815-30 (1958); PA. STAT. ANN. tit. 53, § 306(A) (Supp. 1961); TENN. CODE ANN. §§ 6-2801 to -2820 (Supp. 1962).

21 See Appendix, pp. 326-27 *infra*.

22 U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 310 (1961).

23 The depletion of the state's forest resources led to the decline of the lumbering industry. The anthracite coal industry was severely affected by the pronounced

lature in 1956 enacted a new kind of industrial development program, under which the Pennsylvania Industrial Development Authority was created.[24] The Authority is authorized to make second mortgage loans from appropriations out of current revenues for industrial plant construction in areas of the state which have a substantial labor surplus as defined in the act.[25] The loans, however, are not made directly to industry, but to local non-profit industrial development corporations which in turn lease the factories to private enterprises. Under the typical financing pattern, the local non-profit development corporation constructs a plant for long-term lease to private industry. A first mortgage for 50% is obtained from a private lender; the Authority lends 30% on a second mortgage security for a term up to 25 years;[26] and the local non-profit development corporation invests the remaining 20%, often raising it by the sale of securities to local citizens.

In 1958, Kentucky adopted legislation substantially similar to the Pennsylvania program,[27] and variants have been enacted in two other jurisdictions.[28]

D. The New England Plan: State Insurance of First Mortgages

Like the economy of Pennsylvania, that of New England had developed weak sectors by the end of World War II.[29] In an attempt

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shift in demand from coal to oil and gas for heating purposes. Railroad maintenance was for many years a major industry in many parts of Pennsylvania, but the dieselization of the railroads and the growth of competitive trucking industry have sharply reduced employment in many Pennsylvania communities formerly dependent on the railroad maintenance shops. In addition, there has been a southward exodus of the textile industry. See Davlin, *State Development Corporations: The Pennsylvania Experience*, 24 LAW & CONTEMP. PROB. 89 (1959); *Hearings before Subcommittee No. 3 of the House Committee on Banking & Currency*, 86th Cong., 1st Sess. 51-55 (1959); Fernstrom, *A Community Attack on Chronic Unemployment*, in Senate Special Committee on Unemployment Problems, *Studies in Unemployment*, 86th Cong., 2d Sess. 367 (Comm. Print 1960); *P.I.D.A.—A Look at State-Wide Ventures in Industrial Development*, FED. RESERVE BANK OF PHILA. BUS. REV. 3, 4 (July 1958).

[24] PA. STAT. ANN. tit. 73, §§ 301-14 (1960).

[25] PA. STAT. ANN. tit. 73, § 303(d) (1960).

[26] The statute does not fix either the maximum terms of the Authority's mortgage or the interest rate. The maximum term has been fixed by the Authority itself at 25 years. PA. DEP'T OF COMMERCE, 100% FINANCING FOR YOUR PLANT 1 (undated). Typical loans, however, are from 12 to 18 years. *P.I.D.A.—A Look At State-Wide Ventures in Industrial Development*, *op. cit. supra* note 23, at 7. The Authority has fixed the minimum interest rate at 2%, but actual interest rates have ranged from 2% to 5%, with an average rate of 2½%. GILMORE, *op. cit. supra* note 2, at 53; PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY, A QUESTION AND ANSWER SUMMARY 8 (undated).

[27] KY. REV. STAT. §§ 154.001-.170 (Supp. 1961).

[28] ARK. STAT. ANN. §§ 9-523, -532 (Supp. 1961). See note 5 *supra* for a discussion of the Kansas statute. See also the following two Arkansas Statutes which have recently been repealed: Ark. Acts 1957, No. 567, § 19 at 1475; Ark. Acts 1955, No. 404, § 34, at 1088.

[29] Technological changes, decline in certain industries, obsolete multistory buildings, and loss of certain industries such as textiles to the South are some of the

to remedy the situation, agencies have recently been created in Maine,[30] Rhode Island,[31] and Vermont[32] with the power to insure long-term first mortgage loans by pledging the credit of the state. These loans, made by private investors for industrial plant construction, may be insured in amounts as high as 90% of the project cost. The mortgagor must be a non-profit development corporation which intends to sell or lease the property to a private manufacturer.

The Pennsylvania and New England plans, despite obvious differences between them, have similar underlying economic and social approaches which differ markedly from those of the Mississippi plan. While BAWI provides 100% public financing, the northern plans seek to encourage the maximum possible financing from conventional private investment sources. In addition, unlike the Mississippi plan, the northern programs are initiated by local government groups, which serve as a potential check on government error. Moreover, the northern plans are based on a statewide tax or credit base in which many risks are pooled under one system, while BAWI is supported by a narrow municipal tax base in which even one loss can have a substantial effect on a municipality's total financial position. Lastly, while the Mississippi plan rests in part on state and federal tax exemptions, these play only a minor role in the northern programs.[33]

E. The Oklahoma Plan: State or Municipal General Obligation Bonds to Finance Mortgage Loans to Local Non-Profit Development Corporations

Legislative trends in the last five years reflect the impact of the Pennsylvania and New England formulas. Pursuant to constitutional

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responsible factors. *Hearings Before Subcommittee No. 3 of the House Committee on Banking and Currency*, 86th Cong., 1st Sess. 161-165 (1959). The first response of New England legislatures to these economic problems was the creation of statewide development credit corporations chartered by special acts. Their purpose is to provide risk capital for promising industrial firms that cannot qualify for medium or long-term loans from commercial banks. See generally GILMORE, *op. cit. supra* note 2, at 140-51; Shils, *State Development Credit Corporations and Authorities and Problems of Financing Small Business*, and Anderson, *State Development Credit Corporations*, in SENATE COMM. ON BANKING & CURRENCY, DEVELOPMENT CORPORATIONS AND AUTHORITIES, 86th Cong., 1st Sess., 1, 28 (Comm. Print 1959).

[30] ME. CONST. art. IX, § 14-A; ME. REV. STAT. ANN. ch. 38-B, §§ 1-14 (Supp. 1961).

[31] R.I. GEN. LAWS ANN. §§ 42-34-1 to -18 (Supp. 1961). Article 4, section 13 of the state constitution provides that the credit of the state shall not be pledged for the payment of the obligation of others without the consent of the people. Article 4, section 14 provides that two-thirds of the members elected to each house of the legislature must assent to any bill appropriating public money for local or private purposes. Both provisions were complied with.

[32] VT. STAT. ANN. tit. 10, §§ 201-215 (Supp. 1961).

[33] If the non-profit development corporation raises its equity investment by the issuance of bonds, the interest on these obligations may be exempt from federal income taxes. Treasury Dep't, Treasury Ruling: I-FCD-5 (1959). This does not however, create a significant element of subsidy.

amendment, the Oklahoma legislature in 1959 adopted legislation creating a state authority with the power to make second mortgage loans to local development corporations financing industrial development projects.[34] The authority obtains its funds by issuing general obligation bonds. Variants of the Oklahoma plan have been adopted in New York,[35] Maryland,[36] and New Hampshire.[37]

New Hampshire diagnosed its needs differently than did other states. While not regarding the state as distressed, the legislature was concerned that the state's factories, largely of the multistory mill type, were fast becoming obsolete, and that the state would stagnate economically unless a sufficient number of modern plants were built to replace them.[38] The land potentially available for industrial development was largely unready in that it lacked water and sewerage connections and access roads. New Hampshire attempted to meet this problem by making available short-term construction loans for the preparation of sites as industrial parks and for the construction of plants.[39] Local development corporations are responsible for securing permanent financing from other sources.

F. The Curtailment of Sources of Long-Term Capital

The impact of the various economic developments that have stimulated legislation making available public funds for industrial development has been greatly intensified by certain profound institutional changes throughout the economy which have curtailed the availability of long-term capital for small business,[40] particularly manufacturing

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34 OKLA. CONST. art. X, § 34; OKLA. STAT. tit. 74, ch. 28, §§ 851-68 (Supp. 1962).

35 N.Y. CONST. art. VII, § 8, art. X, § 7; N.Y. PUB. AUTH. LAW §§ 1800-49.

36 MD. ANN. CODE art. 45A, §§ 1-3 (Supp. 1962) (mortgage loans by municipalities). Compare Md. Laws 1953, ch. 662, at 1462. Similar legislation was adopted in Arkansas pursuant to constitutional amendment, but it was recently repealed. Ark. Acts 1959, No. 121, §§ 1-10, at 341.

37 N.H. REV. STAT. ANN. §§ 162-A:1 to -A:16 (Supp. 1961).

38 See GILMORE, *op. cit. supra* note 2, at 50-51; letter from Winfred L. Foss, Secretary, N.H. Industrial Park Authority, to David E. Pinsky, July 13, 1960.

39 See *ibid.*; N.H. INDUSTRIAL PARK AUTH., BIENNIAL REP. TO THE 1959 GENERAL COURT.

40 See COMM. OF NEW ENGLAND OF THE NATIONAL PLANNING ASS'N, THE ECONOMIC STATE OF NEW ENGLAND, NEW ENGLAND'S FINANCIAL RESOURCES AND THEIR USE 1-21 (1953) [hereinafter cited as NEW ENGLAND]; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM REP. TO THE COMM. ON BANKING & CURRENCY AND THE SELECT COMM. ON SMALL BUSINESS, 85th Cong., 2d Sess. 12-149 (Comm. Print 1958) [hereinafter cited as BOARD OF GOVERNORS]; *Hearings Before a Subcommittee of the Senate Committee on Banking & Currency, Financing Small Business*, 85th Cong., 2d Sess. 50-55 (1958); REPORT TO THE INDUSTRIAL DEVELOPMENT AND MIGRATION SUBCOMM. OF THE TENN. LEGISLATIVE COUNCIL, MIGRATION AND INDUSTRIAL DEVELOPMENT IN TENNESSEE 204-41 (1958) [hereinafter cited as TENNESSEE]; SMITH, EQUITY AND LOAN CAPITAL FOR NEW AND EXPANDING BUSINESS (W. E. Upjohn Institute for Employment Research); Cahn, *Capital for Small Business: Sources and Methods*, 24 LAW & CONTEMP. PROB. 27 (1959).

units.[41] A considerable alteration has occurred in the channels through which capital flows into productive investment. Increasing proportions of savings are going into institutional forms—life insurance, savings and loan associations, government bonds, pension funds, and trusts. Both legal and economic factors limit the power of these financial intermediaries to invest in long-term obligations or in equities. State laws generally fix the maximum amount of loans that can be made by state incorporated commercial banks in such a manner as to restrict the ability of many of them to make long-term loans for plant construction. In Tennessee, for example, only 29 of the 216 state incorporated banks can make loans of over $75,000.[42] Moreover, commercial banks must keep their loans quite liquid and are therefore limited to short or at most intermediate terms.[43]

Loans by life insurance companies to small business are likewise restricted by state regulatory legislation and by the general inability of small borrowers to meet credit standards as to earnings, stability, and management.[44] Insurance companies do not believe that the higher interest rate charged small borrowers adequately compensates the lender for these added risks. Similarly, law and custom combine to limit trust institutions and individual fiduciaries to "blue chip" investments.[45] Finally, high rates of personal and corporate income taxes and continued inflation also contribute to the gap in allocating savings to small business.[46]

The need for more long-term capital, particularly for small manufacturing units, is directly reflected in the state industrial development programs. They are generally intended to make public funds and credit available to manufacturing rather than other industrial enterprises. Several statutes explicitly impose this limitation,[47] while others, containing no such express restriction,[48] have been administered as if so limited.[49] Moreover, while none of the statutes expressly limit the size of projects to be financed, smaller business units have been the major beneficiaries.[50]

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41 Board of Governors at 13.

42 Tennessee at 225-26.

43 See Smith, *op. cit. supra* note 40, at 33.

44 See New England at 18-19; Tennessee at 44, Smith, *op. cit. supra* note 40, at 42-43; Board of Governors at 32-35, 512-24.

45 New England at 19.

46 *Id.* at 13.

47 Me. Rev. Stat. Ann. ch. 38-B, § 5 (III) (Supp. 1961); Ky. Rev. Stat. § 103.200 (1959); Tenn. Code Ann. §§ 6-1702, 6-2902 (Supp. 1962).

48 *E.g.*, Pa. Stat. Ann. tit. 73, § 303(i) (1960).

49 See Pennsylvania Industrial Development Authority, Rep. No. 10, Summary of Loan Activities, July 31, 1956-June 21, 1960; *cf. In re* Opinion to the Governor, 155 A.2d 602 (R.I. 1959).

50 See Gilmore, *op. cit. supra* note 2, at 58-59. During the period July 31, 1956 to March 30, 1959, 60% of the projects approved by the Pennsylvania Industrial

G. The Policy Controversy

As might be expected in a private enterprise society, public industrial financing has met strong opposition. The Investment Bankers Association has recommended that its members "exercise extreme caution in underwriting or marketing [industrial financing] bonds." [51] Others have joined in the opposition.[52] The federal income tax exemption of income from municipal obligations, particularly revenue bonds, has been under persistent attack.[53] Commentators allege that public financing has been overemphasized at the expense of other factors far more crucial to industrial site selection.[54] There is also a genuine concern that the use of public credit to finance private industrial expansion will hamper the ability of state and local governments to improve other community services.[55] Furthermore, to the extent that public industrial financing becomes a weapon in the interstate struggle to attract new industry, the public participants may find that their losses from tax exemption and hampered borrowing power exceed their gains.

While it is not the objective of this study to focus on these vital questions of policy except to the extent that they are pertinent to constitutional issues, a brief digression may not be inappropriate. Regrettably, there has been a paucity of effort by economists to critically evaluate public industrial financing. The dearth of economic studies limits the lawyer's resources for intelligent judgment. The curtailment of sources of long-term capital, particularly those available to small manufacturers, and the failure of the federal government to adequately correct the situation, may justify some commitment of public funds or

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Development Authority involved project costs of $300,000 or less. See PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY, REP. No. 4, SUMMARY OF LOAN ACTIVITIES, JULY 31, 1956-MARCH 30, 1959.

[51] INVESTMENT BANKERS ASS'N OF AMERICA, MUNICIPAL INDUSTRIAL FINANCING 24 (1961).

[52] Resolution of the American Bar Ass'n, Section on Municipal Law (1952); Resolution of the Municipal Finance Officers' Ass'n (1953); *Panel Discussions Before House Ways and Means Committee, Income Tax Revision*, 86th Cong., 2d Sess. 339-46 (1959); S. REP. No. 1622, 83rd Cong., 2d Sess. 41 (1954); H.R. REP. No. 1337, 83rd Cong., 2d Sess. 33 (1954).

[53] *Ibid.* Bills have been introduced to remove the exemption for industrial financing revenue bonds, see, *e.g.*, H.R. 798, 87th Cong., 1st Sess. (1961); and to deny any deduction for rental paid by an industrial lessee to any state or local government, see, H.R. 6368, 87th Cong., 1st Sess. (1961).

[54] See FYFE, MUNICIPAL ASSISTANCE TO LOCATION OF INDUSTRY (1961); SOHN & BARNES, SURVEY OF EXECUTIVE ATTITUDES TOWARD MASSACHUSETTS AND NEW ENGLAND 52-58, 72-86, 90-92 (1955); UNIV. OF ALABAMA BUREAU OF PUBLIC ADMINISTRATION, LOCAL GOVERNMENT SERVICES AND INDUSTRIAL DEVELOPMENT IN THE SOUTHEAST (1952); *cf.* WALLACE, INDUSTRIALIZING MISSISSIPPI 51-52 (1952). See generally GREENHUT, PLANT LOCATION IN THEORY AND PRACTICE (1956).

[55] UNIV. OF ALABAMA BUREAU OF PUBLIC ADMINISTRATION, *op. cit. supra* note 54; Paty, *Local Government: Its Quality and Performance*, 2 J. PUB. L. 85 (1953). See generally Report of the Comm. On Industrial Development to the Southern Governors' Conference, Sept. 24-27, 1961.

credit by states with serious economic problems. However, since state programs are initiated and implemented in a context of interstate competition to attract new industries, it is difficult for any state to objectively draw a line between adequate and excessive allocation of public funds and credit for industrial financing. Only federal intervention can effectively provide the necessary restraint.

One suggestion for such intervention is that Congress deprive the states, municipalities, and their lessees of the federal tax advantages they presently enjoy. Such a step, however, might be looked upon as a punitive measure directed primarily at the South. In addition, any attempt to modify the tax-exempt status of industrial financing bonds would be opposed by many nonsouthern state and local government officials who would view it as an entering wedge for the complete elimination of the tax-exempt status of all municipal obligations.

Federal action linked to the Federal Area Redevelopment Act would be more acceptable.[56] Presently this statute prohibits federal financial assistance to aid industries in relocating.[57] Future amendments could, particularly if the amount of federal aid is expanded, require certain minimum fair standards for competition by states for new industry as a condition of eligibility for federal benefits. The creation of such standards would no doubt require careful consideration by the appropriate committees of Congress. However, until Congress takes such action, the danger that the states and municipalities will overcommit their limited resources in industrial financing will persist.

II. Economic Need and Judicial Response

The Supreme Court of Mississippi upheld the BAWI statute in 1938 in the landmark case of *Albritton v. City of Winona.*[58] Attacks based on the state constitutional prohibition against lending public credit to private enterprise and on the public purpose doctrine were rejected. The court analogized to the generally approved practice of governmental construction and leasing of transportation facilities. The *Albritton* decision marked a new phase in state constitutional law. Relying heavily on the critical nature of the economic problems sought to be remedied, courts in southern and border states followed *Albritton.*[59] Particularly noteworthy is the Maryland case of *City of Frost-*

[56] 75 Stat. 47 (1961), 42 U.S.C.A. §§ 2501-25 (Supp. 1961).

[57] 75 Stat. 50 (1961), 42 U.S.C.A. § 2505(a) (Supp. 1961).

[58] 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938).

[59] Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959); Halbert v. Helena-West Helena Industrial Dev. Corp., 226 Ark. 620, 291 S.W.2d 802 (1956) (statute authorizing state to invest a portion of treasury surplus in bonds of local non-profit development corporations sustained in both Arkansas cases); Industrial Dev. Authority v. Eastern Ky. Regional Planning Comm'n, 332

burg v. Jenkins,[60] in which tax supported industrial financing was upheld by analogy to the long standing public practice of financing port facilities for use by water carriers. Related decisions permit port districts to exercise the power of eminent domain for port related industrial uses.[61] At the same time, however, a roughly equal number of courts—principally in northern jurisdictions—sharply rejected *Albritton*.[62] The judges ruled, either expressly or impliedly, that the urgency of need for public financing had no constitutional relevance.

Courts have also split on the validity of the revenue bond plans, with the weight of authority in favor of their validity.[63]

The basic difference in approach between the southern and northern courts lies in the consideration to be given to economic factors in constitutional decision. The difference, however, may be more apparent than real. Of the eight states in which industrial financing plans were sustained, six had a per capita income level of less than 80% of the average rate for the continental United States, and five had per capita income levels of 70% or less. On the other hand, all five states in which industrial financing legislation was invalidated had per capita income levels of 80% of the average national rate or better.[64] The contrast in the rates of unemployment of these states is also significant. Five of the eight jurisdictions which sustained industrial financing had, for virtually the entire twenty-four month period prior to the court

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S.W.2d 274 (Ky. 1960) (Pennsylvania plan); Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956) (Mississippi plan); City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957) (variant of Oklahoma plan); McConnell v. City of Lebanon, 203 Tenn. 448, 314 S.W.2d 12 (1958) (Mississippi plan).

[60] 215 Md. 9, 136 A.2d 852 (1957).

[61] Port of Umatilla v. Richmond, 212 Ore. 596, 321 P.2d 338 (1958); Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Civ. App.), *aff'd*, 153 Tex. 645 (1954), *appeal dismissed*, 350 U.S. 804 (1955).

[62] McClelland v. Mayor of Wilmington, 159 A.2d 596 (Del. Ch. 1960); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952) (alternative holding); Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957); *cf.* Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959). While these decisions, with the exception of *Hogue*, all involve issues of revenue bonds, this in fact adds to their force, for the constitutional argument against the validity of revenue bonds is weaker than the case against general obligation bonds.

[63] Plans upheld: Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952); Wayland v. Snapp, 232 Ark. 57, 334 S.W.2d 633 (1960); Kansas *ex rel.* Ferguson v. City of Pittsburg, 188 Kan. 612, 364 P.2d 71 (1961); Bennett v. City of Mayfield, 323 S.W.2d 573 (Ky. 1959); Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950); Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956); Darnell v. County of Montgomery, 202 Tenn. 560, 308 S.W.2d 373 (1957); Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951); *cf.* Opinion of the Justices, 254 Ala. 506, 49 So. 2d 175 (1950); West v. Industrial Dev. Bd., 206 Tenn. 154, 332 S.W.2d 201 (1960).

Plans held invalid: McClelland v. Mayor of Wilmington, 159 A.2d 596 (Del. Ch. 1960); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952); Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).

[64] See Table I, p. 327 *infra*.

ruling, rates of insured unemployment dramatically higher than the national average. In four of the five states which invalidated such legislation, the rate of insured unemployment prior to the decision was significantly lower than the national average.[65] The Washington court was the only one to strike down industrial financing legislation in the face of an unemployment rate markedly higher than the national average;[66] and it is noteworthy that this is the only invalidating decision which was the product of a divided court. These statistics must, of course, be viewed with caution. They do suggest, however, that economic conditions have been a significant factor in many judicial decisions. The figures indicate that favorable decisions may be expected in states where the economic need for them is strong, and invalidating decisions may be anticipated in states where economic need is less urgent. The probability of accurate prediction in the latter states, however, is less certain.

III. The Emergence of State Constitutional Provisions Prohibiting Public Financial Assistance to Private Enterprise

The state constitutional limitations which threaten to restrict current programs of public industrial financing cannot properly be analyzed without reference to their historical background. The history of these provisions has been related before and will be set forth here only summarily.[67] It begins during that frenetic period in American history, the railroad-aid bond era. During the 1830's and 1840's, the economies of the eastern states were preparing for and commencing their "take-offs." The construction of adequate social overhead capital, particularly railroads and canals, was an essential precondition of that development.[68] As pressure mounted for longer railroads to penetrate more sparsely settled areas, private capital was not readily forthcoming. A demand for the use of public credit accordingly developed. During the mid-nineteenth century, several state governments filled this financial vacuum by lending their credit or by borrowing in order to purchase railroad shares. The panic of 1837, however, forced a more sober approach, resulting in the first adoption of state constitutional

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65 *Ibid.*

66 Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959); see note 64 *supra.*

67 See generally Adams, Public Debts 301-06, 317-42 (1893); Cleveland & Powell, Railroad Finances 31-32 (1920); Hillhouse, Municipal Bonds 143-99 (1936); Secrist, An Economic Analysis of the Constitutional Restrictions Upon Public Indebtedness in the United States 13-44, 54-83 (1914); Wright, Economic History of the United States 280-86 (1949).

68 See Rostow, The Stages of Economic Growth 24-26, 38 (1960). Compare text accompanying notes 7-8 *supra.*

limitations on incurring state debt. But the constitutional changes adopted placed restrictions upon state debt only. It was generally assumed that the new limitations had no application to political subdivisions.[69] Legislatures freely authorized counties and municipalities to incur debt to aid railroad construction, and these units did so eagerly. The mood of euphoric optimism which prevailed was soon replaced, however, by one of disillusionment. Many railroad lines were abandoned as unprofitable, thus dangerously impairing the credit of the many municipalities which had financed them. The result was a second constitutional reaction, directed this time at restricting the financial activities of political subdivisions as well as of the states.

Debt limitations, provisions requiring electorate approval of borrowing, prohibitions against the state's becoming a party to any work of internal improvement, and prohibitions on financial aid to private enterprise were the principal constitutional limitations which emerged. The latter prohibitions are of particular interest in this study. Three principal types predominate. First, and most common, is the clause—referred to herein as the credit clause—which provides that the credit of the state and of its political subdivisions "shall not in any manner be given or loaned to or in aid of any individual, association or corporation." [70] A second type, almost as fashionable as the first, is a clause —referred to herein as the stock clause—which prohibits the state and political subdivisions from becoming stockholders in any corporation.[71] These two provisions were a direct response to two common methods of providing public financial assistance to railroads. One method was public guaranty of railroad bonds, which in some instances took the form of an exchange of railroad bonds for governmental obligations, the latter then being sold on the market by the private corporation.[72] In reality, the railroad was the principal debtor and the more attractive public credit was made available only to assist it in raising the neces-

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69 Prettyman v. Supervisors of Tazewell County, 19 Ill. 406 (1858); City of Aurora v. West, 9 Ind. 74 (1857) (internal improvement clause); Comm'rs of Leavenworth County v. Miller, 7 Kan. 479, 491-94 (1871) (internal improvement clause); Davidson v. Comm'rs of Ramsey County, 18 Minn. 482, 494-95 (1872); Benson v. Mayor of Albany, 24 Barb. 248, 258-59 (N.Y. Sup. Ct. 1857); Cass v. Dillon, 2 Ohio St. 607, 614-15 (1853); Clark v. City of Janesville, 10 Wis. 136, 170-75 (1859); Bushnell v. Beloit, 10 Wis. 195, 221-28 (1860). *Contra*, People *ex rel.* Bay City v. State Treasurer, 23 Mich. 499, 503-05 (1871).

70 *E.g.*, PA. CONST. art. 9, § 6. This clause first appeared in the Rhode Island Constitution of 1842 as a limitation on the state in the absence of electorate approval. It next appeared in the New Jersey Constitution of 1844 (art. 4, § 6, par. 3) and the New York Constitution of 1846 (art. 7, § 9) as absolute limitations on the state.

71 *E.g.*, PA. CONST. art. 9, § 6. This clause first appeared in the Iowa Constitution of 1846 (art. 8, § 2) as a limitation on the state.

72 See, *e.g.*, Society for Sav. v. City of New London, 20 Conn. 174 (1860); Benson v. Mayor of Albany, 24 Barb. 248, 258 (N.Y. Sup. Ct. 1857); Rogan v. City of Watertown, 30 Wis. 259 (1872); see CLEVELAND & POWELL, *op. cit. supra* note 67, at 31-32.

sary capital. As a variant of this procedure, there were instances of the donation of county and municipal bonds to railroad corporations.[73] The credit clause was designed to eliminate these forms of financial aid to private enterprise. However, in the case of the political subdivisions, the other method—stock subscriptions—was by far the most common form of financial assistance.[74] Typically railroad stock was exchanged for public bonds, the latter, of course, being duly sold by the corporation on the market. Even though the public stock subscriptions were almost universally financed by borrowing, the legislatures and courts of the time drew a clear distinction between an exchange of bonds for bonds, prohibited by the credit clause, and an exchange of public bonds for railroad stock, which was viewed as a form of joint venture in the business of railroading not prohibited by the credit clause.[75] This distinction made necessary the stock clause as an additional constitutional safeguard against public financial assistance to the railroads.

The credit and stock clauses, however, did not erect any barrier against loans or donations financed out of current taxation, or against gifts of land.[76] A number of states, therefore, adopted additional prohibitions barring this type of aid, even though it did not occur in significant proportions. This third type of clause, somewhat less common than the credit and stock clauses, varies in wording from jurisdiction to jurisdiction. Pennsylvania's is typical in commanding the legislature not to authorize any political subdivision "to obtain or appropriate money for . . . any corporation, association . . . or individual." [77]

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[73] See, *e.g.*, Sweet v. Hulbert, 51 Barb. 312 (N.Y. Sup. Ct. 1868); Whiting v. Sheboygan & F.R.R., 25 Wis. 167 (1870) (act held invalid).

[74] See *e.g.*, Clarke v. City of Rochester, 24 Barb. 446 (N.Y. Sup. Ct. 1857, *aff'd*, 28 N.Y. 605 (1864); Cass v. Dillon, 2 Ohio St. 607 (1853); Nichol v. Nashville, 28 Tenn. 252 (1848). Municipal shareholdings were often substantial. At the close of the year 1851, for example, political subdivisions in Pennsylvania had subscribed to almost six million dollars of stock in the Pennsylvania Railroad as compared with private subscriptions of under two and one-half million dollars. See BURGESS & KENNEDY, CENTENNIAL HISTORY OF THE PENNSYLVANIA RAILROAD COMPANY 58 (1949).

[75] See note 156 *infra*.

[76] The language of the credit clause itself clearly does not embrace moneys paid out of current revenues. However, the only nineteenth-century decision so holding appears to be Merchants' Union Barb-Wire Co. v. Brown, 64 Iowa 275, 20 N.W. 434 (1884). Twentieth-century cases are all in accord. Industrial Dev. Authority v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d 274 (Ky. 1960); Opinion of the Justices, 337 Mass. 800, 152 N.E.2d 90 (1958); see Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959); Halbert v. Helena-West Helena Industrial Corp., 226 Ark. 620, 291 S.W.2d 802 (1956). With respect to the stock clause, see note 156 *infra*.

[77] PA. CONST. art. 9, § 7 (applicable to municipalities). The New York clause is clearer and broader in prohibiting the giving or lending of money or property. See N.Y. CONST. art. 7, § 8, art. 8, § 1. More limited than both the Pennsylvania and New York versions is the clause adopted in Kentucky which is applicable only to the state and which is limited to donations. KY. CONST. § 177. The first clear version of the current appropriations clause appears to be article 9, section 10, of the Pennsylvania Constitution of 1873.

This type of provision will hereafter be referred to as the "current appropriations" clause, and the three clauses will be generically termed "public aid limitations."

At the turn of the century, some form of public aid limitation had been incorporated in the constitutions of a large majority of the states. For better or for worse, they are still with us, virtually unchanged. Although the public aid limitations took certain common forms, the pattern which has emerged throughout the country is not uniform. The constitutional movement of the nineteenth century was an extremely pragmatic one; each change in each state was a direct reaction to the specific evils which had manifested themselves in that and perhaps neighboring jurisdictions. Some constitutions therefore contain only a credit clause, others join to it a stock clause, and still others have all three. The potential for diversity is further intensified by the fact that any or all of these restrictions may apply only to the state, to counties, to cities and towns, or to a specified combination of these.[78]

It is appropriate at this point to consider in somewhat greater detail the specific evils to which the public aid limitations were addressed. The term "lending of credit," so popular in the nineteenth century but now relatively obsolete, is significant. A basic element of the railroad-aid schemes was the marketing of state and municipal obligations, without direct governmental control, by the corporation which was to receive the proceeds. The common pattern involved delivery to the railroad of governmental bonds payable to the corporation or bearer, either as a donation or in exchange for shares; the corporation in turn disposed of the bonds as it saw fit.[79] They were often sold in eastern markets for as low as 65 to 70 cents on the dollar.[80]

In addition, there was practically no public control over the planning of the railroad project or over the actual expenditures of publicly contributed funds. These functions were completely delegated to private corporate officials. To phrase it more dramatically, but no less accurately, there was a total abdication of public responsibility. Not infrequently, railroad planning was so speculatively conceived and incompetently executed that the proposed line was never completed. Waste and dishonesty in the expenditure of funds led to corporate insolvency and abandonment of routes. Finally, even if the road was completed and put into use, there was the danger of mismanagement in its operation, which was free from any significant government con-

78 See note 91 *infra* and accompanying text.

79 See, *e.g.*, City of Bridgeport v. Housatonic R.R., 15 Conn. 475 (1843). See generally Note, *County Subscriptions to Railroad Corporations*, 20 U. PA. L. REV. 737 (1872).

80 See HILLHOUSE, *op. cit. supra* note 67, at 150; *cf.* Parkersburg v. Brown, 106 U.S. 487, 495 (1883).

trol.[81] The public was commonly burdened with enormous debt while its interest in improved transportation, which motivated projects in the first place, was completely or substantially frustrated.

The nineteenth-century experience which gave rise to the public aid limitations demonstrates that if public funds are to be risked, the risk must flow from public rather than private decision. Adequate protection of the public financial interest necessitates public control consonant with public financial risk. However, in several jurisdictions in which the state had directly participated in railroad and canal construction and operation, the constitutional revolution went even further. Provisions that "the state shall not be a party to, nor be interested in any work of internal improvement, nor engage in carrying on any such work" were adopted.[82] This type of clause, invariably drafted as a limitation on the state, has generally been interpreted not to limit political subdivisions.[83] Unlike the public aid limitations, the internal improvement clause is directed at financial risk flowing from public decision making as well as that incident to uncontrolled private decision making.[84]

The constitutional movement soon produced a complementary judicial reaction—the enunciation of the public purpose doctrine.[85] Its first clear articulation was by Chief Justice Black of the Supreme Court of Pennsylvania in 1853, in *Sharpless v. Mayor of Philadelphia*.[86] This was a taxpayer's suit which challenged the validity of several acts of the legislature authorizing the city to subscribe to stock in specified railroads, and to raise the necessary funds by borrowing. Although holding the statutes valid, the court declared that it was implicit in the state constitution that taxes could be levied only for public purposes. A statute which purported to tax for purposes clearly unrelated to government would be neither legislation nor taxation. A further implication of the opinion was that any purported tax statute which crossed the public-private barrier would violate the due process clause of the state constitution, as a taking of property for private use.

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[81] See HILLHOUSE, *op. cit. supra* note 67, at 152-53; see, *e.g.*, Garland v. Board of Revenue, 87 Ala. 223, 225, 6 So. 402, 403 (1889); Sun Printing & Pub. Ass'n v. Mayor of New York, 152 N.Y. 257, 268-69, 46 N.E. 499, 501 (1897).

[82] *E.g.*, MICH. CONST. art. 10, § 14.

[83] Commissioners of Leavenworth County v. Miller, 7 Kan. 479, 491-97 (1871); Cass v. Dillon, 2 Ohio St. 607, 614-15 (1853); Bushnell v. Beloit, 10 Wis. 195, 221-26 (1860), cited with approval in State *ex rel.* Martin v. Giessel, 252 Wis. 363, 371, 31 N.W.2d 626, 630 (1948). *Contra*, Attorney General *ex rel.* Brotherton v. Common Council of Detroit, 148 Mich. 71, 111 N.W. 860 (1907).

[84] See Rippe v. Becker, 56 Minn. 100, 114, 57 N.W. 331, 334 (1894); State *ex rel.* Jones v. Froehlich, 115 Wis. 32, 38, 91 N.W. 115, 116-17 (1902).

[85] See generally McAllister, *Public Purpose in Taxation*, 18 CALIF. L. REV. 137 (1930).

[86] 21 Pa. 147 (1853).

This substantive due process argument—as a matter of state constitutional law—was later more clearly enunciated by other courts,[87] and a number of state constitutions were amended expressly to incorporate the limitation.[88] Thus was fashioned a powerful new judicial tool. The public purpose doctrine was subsequently incorporated by the United States Supreme Court into the fourteenth amendment;[89] but it is now clear that the Court will defer to the state legislatures in the area of taxation so as to permit local economic experimentation.[90]

While the public purpose doctrine has been characterized by the courts as a limitation on the power to tax, it is more realistically a limit on the spending power, except in the unusual case of a special tax levied to finance a specific spending program. Both the public purpose test and the public aid limitations, therefore, perform the same general function as constitutional controls of expenditures.

IV. The Public Purpose and Public Aid Limitations in the Courts

Since the public purpose test goes no further than the public aid limitations, it need not be resorted to in any instance in which a specific constitutional provision is applicable to cases involving alleged public financial assistance to private enterprise, or, as it will be hereinafter referred to, the enterprise aid issue. However, as was noted earlier, the public aid limitations are not uniform in their applicability. Some states have no public aid limitations, and those that do usually have gaps in coverage, in that some governmental units are not limited or that no restriction is placed on the use of current appropriations.[91] The

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[87] See Opinion of the Justices, 58 Me. 590 (1871); People *ex rel.* Bay City v. State Treasurer, 23 Mich. 498, 501-02 (1871).

[88] *E.g.*, Ky. Const. § 171. See McAllister, *supra* note 85, at 138 n.2.

[89] Jones v. City of Portland, 245 U.S. 217 (1917); *cf.* Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 158 (1896).

[90] The refusal of the Supreme Court to give the taxpayers any relief in Green v. Frazier, 253 U.S. 233 (1920) and Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938) compels this conclusion.

[91] In order to determine the extent to which the various public aid limitations have been adopted and the diverse pattern which has emerged, a study of 30 state constitutions was made, limited to the credit clause and the current appropriations clause. (The stock clause is generally joined with the credit clause and, as explained in note 156 *infra*, is of little practical importance today.) The results of this 30 state study are as follows:

No credit clause limiting the state 2
Limited[a] credit clause limiting the state 1
No credit clause limiting political subdivisions[b] 6
Limited[a] credit clause limiting political subdivisions 4
No current appropriations clause limiting the state 16
Limited current appropriations clause limiting the state 1
No current appropriations clause limiting political subdivisions 16

[a] The term "limited" is used to refer to a limitation which is subject to being overridden by a specified procedure, such as a vote by the majority of voters in the municipality, or in the case of the state, a specified majority of the legislators. See, *e.g.*, Tenn. Const. art. 2, § 29.

[b] See note 196 *infra* and accompanying text.

public purpose doctrine, therefore, has independent significance in a large number of states. However, since the historical development of the public purpose test in enterprise aid cases has been very much influenced by judicial interpretation of the public aid limitations, it is unnecessary to treat the two types of restrictions separately in the historical discussion which follows.

A. Late Nineteenth Century

Several judicial developments during the late nineteenth century are noteworthy. One was the distinction between proprietary risk and enterprise aid risk. In *Walker v. City of Cincinnati*,[92] the Ohio court held that the credit clause did not prohibit municipal borrowing to construct a publicly owned railroad. The court ruled that the credit clause, unlike the internal improvement clause, was not directed at the risks incident to decision making by public officers—hereinafter referred to as proprietary risk—, but was designed to prohibit the assumption of financial risks flowing from private decision making—hereinafter referred to as enterprise aid risk. The court, placing the first important judicial gloss on the credit clause, stated that it interdicted only "a business partnership between a municipality or subdivision of the State, and individual or private corporations or associations." [93] The *Walker* case thus indicated the continued stress on the need for public control consonant with public financial risk.

Because many legislatures had adopted a credit clause directed only at the state,[94] litigation involving the validity of municipal railroad-aid bonds under the public purpose test was frequently before the courts. The majority of courts continued to adhere to the Pennsylvania view in the *Sharpless* case that an exchange of public bonds for corporate stock was valid under the public purpose doctrine.[95] Much reliance was placed on the vital economic importance of a viable transportation system and the quasi-public character of the railroads, illustrated by their exercise of the power of eminent domain, their common-law duty to serve the public without discrimination, and the power of the state to regulate their rates.[96] In dealing with manufac-

[92] 21 Ohio St. 14 (1871).

[93] *Id.* at 54. (Emphasis added.)

[94] See cases cited note 69 *supra*. Where a credit clause was expressly applicable, railroad-aid bonds were uniformly held invalid. See, *e.g.*, Whitney v. Kentucky Midland Ry., 110 Ky. 955, 63 S.W. 24 (1901).

[95] See cases cited note 69 *supra*, except for the *Bay City* case, 23 Mich. 499 (1871). *Contra*, Burlington & M.R.R.R. v. County of Wapello, 13 Iowa 388, 399-424 (1862) (dictum—later contradicted in Stewart v. Board of Supervisors, 30 Iowa 9 (1870)); People *ex rel.* Detroit & H.R.R. v. Township Bd., 20 Mich. 452 (1870).

[96] See Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 661-62 (1874); Stewart v. Board of Supervisors, *supra* note 95, at 19-26; Commissioners of Leavenworth County v. Miller, 7 Kan. 479, 519-536 (1871).

turing corporations, however, the state courts uniformly followed the Supreme Court decision in *Loan Ass'n v. Topeka*,[97] that the donation of municipal bonds to private corporations or their exchange for stock in such companies violated the public purpose test.[98] The quasi-public nature of the railroads, it was argued, distinguished them from other forms of private enterprise.

These decisions demonstrate that even in the early stages of the evolution of the public purpose doctrine, courts placed great emphasis on the need for public control adequate to insure that the economic objectives of the program—hereinafter referred to as the public purpose objectives—would not be frustrated. Donations of municipal bonds to railroad companies, therefore, were viewed by the judiciary in a considerably different light than the nondonative railroad-aid programs. Four courts—making up the numerical weight of authority in the nineteenth century—struck down such plans.[99] The rationale of their decisions is noteworthy. In *Whiting v. Sheboygan & F.R.R.*,[100] for example, the Wisconsin court distinguished between municipal purchase of railroad stock and donative aid on the ground that purchase made the municipality a part owner of the enterprise with legal remedies against the misapplication of corporate funds, while donation denied the public any such control. In addition to drawing a firm line between gratuitous and non-gratuitous aid, these four courts announced that in applying the public purpose test thereafter, they would more carefully scrutinize programs that pledged the public credit, in order to determine whether the public financial interest had reasonably been protected. It was made clear that the constitutional revolution that had given birth to the public aid limitations would have a marked impact on the judicial development of the public purpose test.

B. Twentieth-Century Needs Versus Constitutional Limitations

1. Public Control—Transportation, Recreation, and Parking: The Consumer Facility Cases

As the economy developed in the late nineteenth and early twentieth centuries, a new form of social overhead capital[101] became

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97 87 U.S. (20 Wall.) 655 (1874).

98 *E.g.*, Central Branch U.P.R.R. v. Smith, 23 Kan. 745 (1880); Allen v. Inhabitants of Jay, 60 Me. 124 (1872); Weismer v. Village of Douglas, 64 N.Y. 91 (1876).

99 Hanson v. Vernon, 27 Iowa 28 (1869) (per curiam); Detroit & H.R.R. v. Township Bd., 20 Mich. 452 (1870); Sweet v. Hulbert, 51 Barb. 312 (N.Y. Sup. Ct. 1868); Whiting v. Sheboygan & F.R.R., 25 Wis. 167 (1870).

100 25 Wis. 167 (1870).

101 See Rostow, *op. cit. supra* note 68, at 24-26.

necessary—high speed urban transportation. The need for public financing was accordingly increasingly felt. Instead of a system of 100% public financing and operation, however, the dominant pattern which emerged was that of mixed public and private financing, with private operation in some cases and public operation in others.[102]

The proposed construction of the New York City elevated system produced the first case of direct challenge to a plan of municipal borrowing for the construction of a transportation facility which was to be leased to a private party on a long-term basis. Having failed to attract fifty-five million dollars in private capital, New York City determined to borrow that sum iteslf in order to construct the elevated and then lease the operation of it to a private party for a period of between thirty-five and fifty years. The rates to be charged by and the rules governing operations of the elevated were to be set by public officers. The plan was attacked as an unlawful loan of government credit to the operating corporation on the ground that the city was in reality borrowing the necessary capital and then lending the proceeds to the lessee, while the city retained only nominal title to the facility. In *Sun Printing & Publishing Ass'n v. Mayor of New York*,[103] however, the court, with two members dissenting, upheld the plan, emphasizing that it authorized spending public money for a public facility which would, for all time, constitute a part of the streets of the city. Private operation of the elevated was held to be ancillary to the dominant purpose of the plan, and would not render it an unconstitutional loan of credit. The court felt that it would have been anomalous to strike down a plan which harmonized so well the emphasis in our society on private enterprise with the absolute need for public financing.[104]

Perhaps the dominant proposition emerging from *Sun Printing* is that the so-called lease of the facility was more in the nature of a contract to operate than it was a conventional real property lease. By

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[102] In Boston, a state board of trustees took over the operation of a private corporation's entire urban transportation system. The state subsequently guaranteed a new issue of company bonds. Public operation, however, assured sufficient protection of the public financial and transportation interests so that the plan was upheld under the credit clause despite the fact that the term of the bonds was 40 years while state management could terminate in 15 years. Opinion of the Justices, 261 Mass. 523, 543-45, 159 N.E. 55, 65-66 (1927). For a somewhat similar decision arising out of the Boston transportation problem, see City of Boston v. Treasurer, 237 Mass. 403, 130 N.E. 390 (1921), *aff'd*, 260 U.S. 309 (1922).

[103] 152 N.Y. 257, 46 N.E. 499 (1897).

[104] The reasoning in *Sun Printing* has been followed by other courts. See, *e.g.*, People v. City of Chicago, 349 Ill. 304, 182 N.E. 419 (1932); Kittel v. City of Cincinnati, 78 Ohio App. 251, 69 N.E.2d 771, *appeal dismissed*, 147 Ohio St. 246, 70 N.E.2d 372 (1946); City Club v. Public Serv. Comm'n, 92 Pa. Super. 219, 231-32 (1927).

its control over the rates charged and the manner of operation, the municipality would be able to exercise sufficient control to insure that the public purpose objective—economical, frequent, high speed transportation—was attained.

Sun Printing may profitably be contrasted with *Lord v. City of Denver*,[105] a case arising out of the proposed construction of the Moffat Tunnel, west of Denver. A city commission had proposed to construct the tunnel at an approximate cost of four and one-half million dollars, two-thirds of which was to be raised by city borrowing and one-third by an interested railroad. The agreement between the city and railroad provided for title to be held by the city and the tunnel to be leased by it to the railroad at a rental designed to satisfy the interest on the public bonds and payments into a sinking fund. Once the municipal debt was retired, title was to pass to the railroad. The city, however, was to retain perpetual easements for water and electricity purposes. The railroad for its part covenanted to allow other carriers perpetual use of the tunnel tracks under specified terms and conditions.

The Colorado court looked upon the plan as a joint venture between the company and the city—or as a naked form of public financial assistance to the railroad—and therefore held it invalid under the credit clause. That the city took title was deemed of little significance in view of what realistically seemed to be a delayed contract of sale to the railroad. The perpetual easements granted to the city were characterized by the court as an incidental consideration rather than the dominant factor motivating the project. Further, the public interest in insuring that other railroads could use the tunnel at reasonable rates was held to be inadequately protected. In the *Denver* case, therefore, unlike *Sun Printing,* there was insufficient public control provided for the attainment of the public purpose objectives.

Post-World War II cases relating to government acquisition and leasing of recreation and off-street parking facilities continue to emphasize the need for adequate public control over the attainment of the public purpose objectives. In a leading Florida case, a municipality sought a decree validating a proposed issue of bonds, the proceeds of which were to be used for the construction of a marina, auditorium, and related facilities to be leased to a private corporation for a thirty-year term.[106] The proposed agreement between the municipality and the corporation reserved no power in the city to control the admission fee to be charged by the lessee or any other aspect of operations. Even

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[105] 58 Colo. 1, 143 Pac. 284 (1914).

[106] City of West Palm Beach v. State, 113 So. 2d 374 (Fla. Sup. Ct. 1959) (alternative holding).

though the bonds were obligations payable from a special fund and not general debt,[107] the court held the proposed plan invalid under the credit clause because of the city's surrender of control.

A number of other recent cases involving proposed leasing of publicly financed facilities indicate that the Florida result is not limited to applications of the credit clause but also occurs under the public purpose test and, when eminent domain is involved, under the public use limitation.[108] In a recent Rhode Island opinion, for example, a factual situation strikingly similar to that in the Florida case was presented.[109] The Rhode Island constitution contains no public aid limitations applicable to municipalities. Nevertheless, the court held that the failure of the municipal agency to reserve control over the manner of operation of the proposed facility invalidated the proposed issuance of bonds under the public purpose doctrine and the exercise of eminent domain under the public use requirement.

Urban renewal cases further reinforce the control principle. Legal attacks on the exercise of eminent domain for urban renewal purposes have often centered on the fact that the cleared land is promptly turned over to private redevelopers. In answering these attacks, supporters of renewal emphasize the significant degree of control reserved by the public agency in its redevelopment agreement and deed restrictions, both of which insure redevelopment and subsequent use of the land in accordance with the overall renewal plan.[110]

Modern cases in the fields of recreation, parking, and urban renewal, although small in number, give positive indication of a judicial tendency toward incorporating into the public purpose limitation on

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[107] The bonds pledged the revenues from a utilities service tax in addition to the proceeds of the project. See State v. City of Tampa, 72 So. 2d 371 (Fla. Sup. Ct. 1954).

[108] City of San Francisco v. Ross, 44 Cal. 2d 52, 279 P.2d 529 (1955) (eminent domain and general obligation borrowing); Opinion to Governor, 76 R.I. 365, 70 A.2d 817 (1950); see Ventura Port Dist. v. Taxpayers of Ventura Port Dist., 53 Cal. 2d 227, 347 P.2d 305 (1959) (authority bonds); City of Daytona Beach v. King, 132 Fla. 273, 181 So. 1 (1938). Although the respective state constitutions contain a credit clause applicable to municipalities, the opinions in both the *Ventura* and *Daytona Beach* cases rest on the public purpose test. *Cf.* Foltz v. City of Indianapolis, 234 Ind. 656, 130 N.E.2d 650 (1955); State *ex rel.* Hawks v. City of Topeka, 176 Kan. 240, 270 P.2d 270 (1954). Both *Foltz* and *Hawks* involve the exercise of eminent domain and financing by bonds payable from project revenues and revenues of a related facility. *Cf.* Zachry v. City of San Antonio, 296 S.W.2d 299 (Tex. Ct. Civ. App. 1956) (lease of city land). *But cf.* Cabot v. Assessors of Boston, 335 Mass. 53, 63 n.1, 65-68, 138 N.E.2d 618, 625 n.5, 626-28 (1956), *appeal dismissed*, 354 U.S. 907 (1957) (tax exemption).

[109] Opinion to Governor, *supra* note 108.

[110] See Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 143-45, 104 A.2d 365, 369-70 (1954); Velishka v. City of Nashua, 99 N.H. 161, 168, 106 A.2d 571, 575-76 (1954); Davis v. City of Lubbock, 160 Tex. 38, 48-51, 326 S.W.2d 699, 706-08 (1959).

expenditures and the public use limitation on the power of eminent domain the same requirement of public control over effectuation of the public purpose objectives as has been applied under the credit clause.

Although twentieth-century cases have focused on the adequacy of public control with respect to the effectuation of the public purpose objectives, analysis of them in the light of the nineteenth-century evils sought to be remedied—that is from the standpoint of public control consonant with financial risk—is illuminating. It is apparent that the twentieth-century formula of government ownership and private lessee operation remedies the first two evils of the railroad-aid bond era—lack of public control over the marketing of the public debt, and over the planning and construction of the facility. In the few modern cases in which the municipality failed to provide for control of the construction of the project, the proposed financing program was held invalid under the credit clause.[111]

The third danger which the public aid limitations sought to prevent relates to the risks which result from lack of government control over the current operations of publicly owned enterprises. It is clear that the municipality's title to the facility under the modern formula constitutes a significant safeguard. Regardless of the financial imprudence or recklessness of the lessee, the public financial interest in the facility itself is protected. Nevertheless, there remains a significant residue of financial risk. The public interest demands a maximum assured rental, particularly while the debt is outstanding, yet percentage rentals have been approved,[112] and at least two courts have upheld leases wherein the rental payments were contingent upon earnings and made junior to debt service on the company's debt and dividends on a portion of its stock.[113] These arrangements have apparently been approved on the ground that there is a sufficient residuum of public control reserved over the lessee's operations.

In addition to lease provisions, long-run economic and social changes are ever present sources of financial risk. Population shifts or

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[111] Griffin v. Jeffers, 221 Ala. 649, 130 So. 190 (1930); *In re* Opinion of the Justices, 276 Mass. 617, 176 N.E. 607 (1931).

[112] People v. City of Chicago, 349 Ill. 304, 182 N.E. 419 (1932); Frankenstein v. Goodale, 30 Ohio App. 110, 164 N.E. 363 (1928).

[113] People v. City of Chicago, 349 Ill. 304, 337-41, 182 N.E. 419, 435-37 (1932); Admiral Realty Co. v. City of New York, 206 N.Y. 110, 99 N.E. 241 (1912). *But see* State *ex rel.* Campbell v. Cincinnati St. Ry., 97 Ohio St. 283, 119 N.E. 735 (1918). While it was not apparent in *Sun Printing*, the above cases reveal that long-term leasing of transportation facilities generally involves a union of private and public capital in apparent violation of the *Walker* case dictum. Rolling stock and working capital are joined with publicly owned subway tunnels and elevated structures. This has tended to lead to an intimate integration of the company's and the city's debt structure in the manner indicated in the text.

widespread economic recession may cause the number of subway riders to fall significantly, thus producing financial losses to the municipal owner. These risks, however, are inevitable concomitants of public decision making. Such basic decisions as whether to build the subway and what route to select are public decisions. Accordingly, the *Denver* case and those which followed it, in invalidating certain leasing arrangements in which private decision making was a factor, demonstrate that in applying the public control criteria, twentieth-century courts have gone beyond those of the nineteenth in placing their crucial emphasis on public control over the effectuation of the public purpose objectives.

2. Urgency of Need: The Port Facility Cases

In the cases applying the public purpose doctrine and the public aid limitations to the fields of transportation, recreation, and parking, courts have placed considerable emphasis on the public importance of the project and the urgency of the need for public financing.[114] These factors have been most stressed, however, in the area of municipal construction of port facilities for long-term lease to private parties.[115] Courts have uniformly upheld use of the eminent domain power [116] and public financing by the issuance of general obligation [117] and revenue bonds [118] for such purposes.

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[114] The urban transportation cases, note 113 *supra*, approving lease arrangements wherein the rental payments to the municipal lessor are made junior to interest on the lessee corporation's debt and dividends on a portion of its stock, demonstrate that when the public importance of the objective and the urgency of the need for public financing are great enough, concern for protection of the public financial interest will be relaxed.

[115] Public financing of port facilities for private operation has a long history. It is clear that by the mid-nineteenth century the practice was well established in New York City. Griffin, The Port of New York 7 (1959). The practice in New York has, in fact, been traced back to the latter part of the seventeenth century. Sun Printing & Publishing Ass'n v. Mayor of New York, 8 App. Div. 230, 287, 40 N.Y. Supp. 607, 647 (1896) (dissenting opinion), *aff'd*, 152 N.Y. 257, 46 N.E. 499 (1897).

[116] *In re* Mayor of New York, 135 N.Y. 253, 31 N.E. 1043 (1892); Dyer v. Mayor of Baltimore, 140 Fed. 880 (C.C. Md. 1905), *appeal dismissed*, 201 U.S. 650 (1906); Marchant v. Mayor of Baltimore, 146 Md. 513, 126 Atl. 884 (1924).

[117] City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328 (1929); State *ex rel.* McElroy v. Baron, 169 Ohio St. 439, 160 N.E.2d 10 (1959); Paine v. Port of Seattle, 70 Wash. 294, 127 Pac. 580 (1912); see Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1958). In the above cases, public financing was upheld under the credit clause. *Cf.* Harrison v. Day, 200 Va. 764, 107 S.E.2d 594 (1959) (current appropriations).

[118] Sigman v. Brunswick Port Authority, 214 Ga. 332, 104 S.E.2d 467 (1958); North Carolina State Ports Authority v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Harrison v. Day, 202 Va. 967, 121 S.E.2d 615 (1961).

In analyzing public financing of port facilities, it is essential to differentiate between the leasing of marine terminals which serve all carriers, and that of piers which are used exclusively by one carrier. In the case of terminals, the municipality can substantially regulate wharfage charges and other aspects of operation. The control which can be exercised is similar to that exerted in the consumer facility cases. In the case of piers, however, it is constitutionally impossible for the municipal lessor to control the rates and services of water carrier lessees who are engaged in interstate and foreign commerce. Moreover, relatively short-term leases can be used effectively, in the case of marine terminals, to afford the municipality the opportunity of periodically reviewing the lessee's activities.[119] The carrier lessee, however, like the industrial lessee, will usually want the security of a long-term lease, or at least an option to extend a shorter term; and the municipality for its part may not desire to pledge its credit unless the term is sufficiently long so that rental payments will amortize the principal and pay the interest on its debt.

While case authority exists for the use of eminent domain for the construction of public piers which will be leased on a long-term basis for exclusive use by a single carrier,[120] direct support for public financing of such facilities is scant.[121] If the public control requirement, as articulated in the consumer facility cases, is applied, such financing cannot be sustained. Nonetheless, the author has found no holding that public financing for this purpose is invalid under the credit clause

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119 See generally U.S. COMM'R OF CORPORATIONS, REPORT ON TRANSPORTATION BY WATER IN THE UNITED STATES pt. III, at 6 (1910).

120 See cases cited note 116 *supra*. The following cases have also approved the exercise of eminent domain in port areas and subsequent leasing for port and port related industrial purposes. Port of Umatilla v. Richmond, 212 Ore. 596, 598-620, 321 P.2d 338, 340-50 (1958); Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Ct. Civ. App. 1954), *appeal dismissed*, 350 U.S. 804 (1955). *But see* Hogue v. Port of Seattle, 54 Wash. 2d 799, 82 N.W.2d 269 (1957) (sale rather than lease).

121 The California Supreme Court, in City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328 (1929), upheld municipal general obligation bond financing of a warehouse building in the port area which was to be leased for a ten-year term to a firm engaged in packing, processing, and shipping dried fruit. The court rejected arguments based upon the public purpose test and the credit clause. The court was completely silent on the importance, if any, of the limited term lease. *Cf.* Visina v. Freeman, 252 Minn. 177, 189, 89 N.W.2d 635, 646 (1958). In contrast, the Washington court in Paine v. Port of Seattle, 70 Wash. 294, 322, 127 Pac. 580, 582 (1912), approved a proposed lease of a marine terminal which was for a "limited time" and which provided for municipal control over wharfage charges. The Ohio court, in State *ex rel.* McElroy v. Baron, 169 Ohio St. 439, 160 N.E.2d 10 (1959), similarly passed on a limited term lease. The statement in *Paine* on control of wharfage charges, however, must be construed in the context of the facts of the case—a proposed leasing of a marine terminal. The court did not address itself even by way of dictum to the question of leasing a pier for the exclusive use of a carrier. Both the Washington and Ohio courts were unclear as to how they construed "limited time." *Paine*, in fact, approved a thirty-year term.

or the public purpose test.[122] Despite the lack of direct authority, there is good reason to believe that public financing of port facilities for long-term lease to water carriers is an accepted part of our jurisprudence even though the lessor retains no control over the operation of the facility, other than to limit the lessee to waterfront uses.[123] The validity of this type of public financing was not at issue in the eminent domain cases, but it must have been perfectly clear to the courts that public financing was involved. The practice of leasing publicly owned piers to steamship companies, often for long terms, is of long standing, and should therefore be accorded respect by the courts.[124] In addition, even though the degree of control over the water carrier lessees which can be exercised by the municipality is small, the lessees are common carriers subject to common-law duties[125] and gradually expanding federal regulation.[126] This regulation, together with the program of federal subsidies,[127] serves to place water carriers in a very special category, much like the nineteenth-century railroad. Moreover, the historically asserted government interest in the control and development of ports further justifies special treatment of this type of municipal activity.[128] This concern is based on both the vital importance of ports

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122 *But cf.* Paine v. Port of Seattle; State *ex rel.* McElroy v. Baron, *supra* note 121.

123 See State *ex rel.* McElroy v. Baron, *supra* note 121, at 444, 160 N.E.2d at 13-14; *cf.* City of Douglas v. Douglas Canning Co., 161 F. Supp. 379 (D. Alaska 1958). *But cf.* Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co., 82 Mo. 121 (1884).

124 See, *e.g.*, *In re* Mayor of New York, 135 N.Y. 253, 31 N.E. 1043 (1892); Dyer v. Mayor of Baltimore, 140 Fed. 880 (C.C. Md. 1905), *appeal dismissed*, 201 U.S. 650 (1906); City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328 (1929); see ALBION, THE RISE OF NEW YORK PORT 222 (1939). Twenty-three piers owned by the City of New York were under lease to steamship companies in 1952, twenty-one of which were being used by steamship companies under a permit. N.Y. CITY DEP'T OF MARINE AND AVIATION, PORT PROGRESS REPORT 33 (1952). On the other hand, only one of the thirteen municipally owned piers in Philadelphia which are leased for port commerce purposes is leased for the exclusive use of a water carrier. Letter From Peter Schuffler, Deputy Director of Commerce, City of Philadelphia, to David E. Pinsky, Sept. 26, 1960. Furthermore, long-term leases have not been uncommon. New York City leases now extend for as long as twenty years. See GRIFFIN, *op. cit. supra* note 115, at 90. A federal agency report in 1909 criticized the large number of long-term pier leases in New York and Baltimore. U.S. COMM'R OF CORPORATIONS, *op. cit. supra* note 119, pt. III, at 6, 11.

125 *In re* Mayor of New York, 135 N.Y. 253, 31 N.E. 1043, 1046 (1892), placed emphasis on this factor, in approving the exercise of eminent domain by the City of New York to acquire waterfront land to be used for the construction of piers for long-term lease to water carriers.

126 See AUERBACH & NATHANSON, THE FEDERAL REGULATION OF TRANSPORTATION, 28-31, 35-38 (1953); Zoll, *The Development of Federal Regulatory Control over Water-Carriers*, 12 ICC PRAC. J. 552 (1945).

127 See AUERBACH & NATHANSON, *op. cit. supra* note 126, at 31-32.

128 See Commissioner v. Ten Eyck, 76 F.2d 515, 517-18 (2d Cir. 1935); *Ports and Harbors*, 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 258-60 (1937). The ownership and control of port facilities was historically regarded in England and Scotland as a part of the royal prerogative. See GOULD, WATERS § 14 (3rd ed. 1900).

to economic development and to national defense. Judicial opinions and statutes have emphasized that public financing of port facilities is looked upon as part of a comprehensive plan for the development of the port.[129]

Economic considerations buttress the modern legal acceptance of public financing of port facilities for long-term lease to water carriers. The fact that an exceedingly small number of piers are owned by steamship companies suggests [130] that public financing is needed because private capital has not been forthcoming for this purpose. This need for public financing is consistent with the concept that governments can finance social overhead capital,[131] which should be defined to encompass port facilities. This form of capital has three characteristics: a large investment is essential; the time needed to pay off such investments is usually long; and by its very nature, social overhead capital indirectly benefits the community as a whole rather than the initiating entrepreneurs. Because of these attributes, government units have often been compelled to supply the economy's need for social overhead capital. Piers and related port facilities clearly have the second and third characteristics of such capital, and the first to a somewhat lesser extent; in fact, transportation facilities are generally deemed to be the classic example of social overhead capital.

The port facility cases illustrate very pointedly that where attainment of the public purpose objectives is deemed sufficiently vital and the need for public capital sufficiently urgent, the requirement of public control under public financing will be substantially relaxed.

In summary, the history of the judicial application of the credit clause to the enterprise aid issue in areas other than industrial financing can best be explained as an attempt to balance two somewhat conflicting criteria. The courts first look to the degree of public control exercised over private decision making. This in turn can be analyzed from two vantage points—public control exerted to insure the effectuation of the public purpose objectives, and public control exerted for the protection of the public investment.[132] Twentieth-century courts have

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129 City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328, 332-34 (1929); Marchant v. Mayor of Baltimore, 146 Md. 513, 521, 126 Atl. 884, 887 (1924); *cf.* Paine v. Port of Seattle, 70 Wash. 294, 318, 323, 127 Pac. 580, 583 (1912).

130 In 1951, there was only one steamship owned pier in Boston, three in New York, none in Philadelphia, seven in Baltimore, and none in Norfolk. MOTT, A SURVEY OF UNITED STATES PORTS 66, 141, 167, 59, 150 (1951).

131 The discussion of social overhead capital which follows is based on ROSTOW, THE STAGES OF ECONOMIC GROWTH 17-18, 24-26 (1960).

132 The nature of the citizen's interest in the effectuation of the public purpose objectives of any public program will in many instances conflict with his interest in protecting the public financial interest. In the case of a municipally financed off-street parking garage, for example, the citizen's interest in protecting the public financial interest is a narrow one; he is interested in minimizing the direct financial

placed maximum emphasis on the former. The second criterion applied by the courts is the urgency of the need for public financing and the availability or nonavailability of reasonable alternative sources of capital to accomplish the public purpose objectives without sacrificing the public control requirement. Public financing of port facilities for long-term lease as exclusive carrier piers seems to be the only significant area in which urgency of need for public financing has achieved dominance and virtually submerged the public control requirement.

These two criteria—the degree of public control exercised and the urgency of the economic need—will be referred to hereafter as the enterprise aid criteria. With respect to the application of the public purpose test in states with no pertinent public aid limitations and the application of the public use limitation on eminent domain, although the number of cases is small, the evidence suggests that the same criteria have been employed and the same balance achieved.

V. The Tax Supported Plans

Analysis of the application of the public aid limitations and the public purpose test to the current programs of state and municipal industrial financing may now be undertaken. The contrast between the several tax supported and revenue bond plans, however, is sufficiently fundamental to warrant separate treatment of the two categories. The objective of this section is two-fold: to apply the enterprise aid criteria to the tax supported plans in order to determine the extent to which these plans depart from the body of decisional law discussed earlier; and to consider whether these departures can be harmonized with the historical guidelines underlying the public aid limitations and the public purpose doctrine.

A. Application of the Enterprise Aid Criteria to the Mississippi Plan

1. The *Albritton* Rule Contrasted With the Rule of the Consumer Facility Cases

The objectors in the *Albritton* [133] case alleged that the BAWI statute authorized outright municipal financial assistance to private enterprise in violation of the state constitution's credit clause and the public purpose doctrine. The overwhelming weight of authority up to

loss incident to the enterprise, and if possible, in making it self-sustaining. This may mean, for example, closing the garage from 2 a.m. to 6 a.m. and raising rates. On the other hand, optimum effectuation of the public purpose objectives of the project may best be realized by 24-hour operation and low rates, even though direct financial losses result.

[133] Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938).

that time had held that governmental financial aid to private manufacturers, by subsidies or guarantees of credit, violated both the credit clause and the public purpose test; this was hornbook law from Dillon [134] to McQuillin.[135] Virtually every case cited in the treatises, however, had involved either outright donations of public property or bonds to a private corporation, or an exchange of municipal bonds for corporate stock or bonds, and were thus reasonably distinguishable from the BAWI plan. However, the Mississippi case of *Carothers v. Town of Booneville,*[136] decided shortly before *Albritton,* had involved a program of municipal plant construction for long-term lease to private industry, thus closely resembling the BAWI plan. The statute contested in *Carothers* had been declared invalid by the court four years prior to the *Albritton* decision.

The *Albritton* court, however, had before it a statute well fortified against the anticipated assault. The proposed project in *Carothers* had been authorized by special legislation, no doubt pushed through the Mississippi legislature in response to local pressure. It therefore lacked any legislative finding of economic justification. In *Albritton,* however, the court for the first time was faced with a statute which launched an industrial financing program of general applicability throughout the state and which carefully set forth legislative findings of economic need justifying the pioneering legislation. Moreover, in *Carothers* the court had emphasized that because the municipality was not authorized to operate the proposed plant itself, the statute permitted outright financial assistance to a private manufacturing enterprise in violation of the credit clause and the public purpose test. The BAWI statute, however, had been carefully drafted to avoid the *Carothers* objection by authorizing a municipality to operate a factory itself as well as to lease it to a private party. It seems reasonably clear that the legislature and the interested public officers did not anticipate any municipal operation, but had incorporated that alternative power into the statute to bolster it against legal attack.[137] This defensive strategy proved successful, for the statutory authorization for municipal operation became, in essence, the anchor of the court's opinion. Taking an expansive view of the state's power to assume functions theretofore not exercised by government when economic and social conditions so dictated, the court held that the BAWI statute validly authorized the use of municipal credit for construction of a new but necessary type of

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[134] 2 DILLON, MUNICIPAL CORPORATIONS § 884, at 1364-65 (5th ed. 1911).

[135] 15 MCQUILLIN, MUNICIPAL CORPORATIONS §§ 43.30, 39.26, at 74-75 (3d ed. 1950).

[136] 169 Miss. 511, 153 So. 670 (1934).

[137] See HOPKINS, MISSISSIPPI'S BAWI PLAN 16-20 (Fed. Reserve Bank of Atlanta, 1944).

public facility. Should the municipality prefer tenant rather than government operation, the lessee, according to the court, would be "the municipality's agent for operating the industry. . . ."[138]

If the BAWI statute had not authorized municipal operation, the court's position would have been untenable; but the judges felt very much at ease with a scheme granting municipalities the power to construct a public facility with the optional power to operate it themselves or through a lessee. The court found support in the transportation leasing cases. However, municipal power to build a facility which municipalities were, in fact, legally without power to operate and which was to be leased for a long term to a private party was a novel concept, difficult to distinguish from direct financial assistance to private enterprise. In upholding the BAWI statute, the court thus relied heavily on the pro forma statutory authorization of municipal operation.

Having distinguished *Carothers,* one major obstacle remained for the court—to harmonize its decision with the enterprise aid criteria. It attempted to do so by imposing a requirement that leases under the statute set forth "the character and capacity of the proposed industry, and [provide] for the termination of the lease if the lessee fails within a specified time to . . . operate the industry as described . . . or discontinues for a specified time thereafter to so operate it."[139] Such a lease, it appears fairly certain, would give the municipality authority to prevent conversion of the facility to a use less desirable to the community than that originally contemplated.[140] While the *Albritton*

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[138] Albritton v. City of Winona, 181 Miss. 75, 107, 178 So. 799, 807, *appeal dismissed*, 303 U.S. 627 (1938).

[139] *Id.* at 107, 178 So. at 808; *cf.* City of Douglas v. Douglas Canning Co., 161 F. Supp. 379 (D. Alaska 1958); Ferrell v. Doak, 152 Tenn. 88, 92, 275 S.W. 29, 30 (1925).

[140] The *Albritton* standard is implemented in Mississippi by a standard lease provision that if the lessee abandons the premises or discontinues manufacturing operations for a period of one year, the municipality may terminate the lease without discharging the lessee from liability for rent. MISS. AGRICULTURAL & INDUSTRIAL BD., ATTITUDE IN ACTION, form 5, para. 12. Whether the municipality can exercise its right of termination for breach of the covenant restricting use of the premises without a successor lessee being reasonably available, and then proceed to hold the lessee liable for rent while the plant remains vacant, is a question subject to considerable doubt. Such action by the municipality would subject the lessee to a penalty without yielding any apparent advantage to the municipality. However, as a practical matter the municipality would only be interested in enforcement if a successor lessee who agrees to conform to the covenants limiting use is found.

Compare the following lease provision, in common use in Kentucky under the revenue bond plan:

> Immediately upon the completion of the industrial building and the installation of operating machinery and equipment the Company intends during the term of this lease and until January 1, 1980, to use and occupy the said building primarily in the processing and manufacture of vehicular rubber tires or other products as determined from time to time by the Company, as distinguished from warehousing space where employment of factory workers is not important. The Company does not now know of any reasons why the said building will not be so used and occupied by it for such period and anticipates that it will be so used and occupied by it in the

rule is hardly a strict one, it at least recognizes a need to adopt in modified form the control requirement of the consumer facility cases. The decisions which have followed *Albritton*, however, have ignored the problem.[141]

The actual degree of government control over the effectuation of the public purpose objective achieved under the *Albritton* rule, however, falls far short of that required in the consumer facility cases. If the requirements imposed in the latter cases were insisted upon in the field of industrial financing, leases would have to include provisions requiring a minimum weekly payroll, minimum wage rates, and minimum working standards.[142] None of the modern industrial financing programs, however, provide municipal control over any of these sub-

> absence of supervening circumstances not now anticipated by it or beyond its control. The Company agrees that when such building is used and occupied during the term of this lease or until January 1, 1980, it will be used primarily only in the processing and manufacture of vehicular rubber tires or other products, or as a factory, mill, shop, processing plant, assembly plant or fabricating plant, but the failure to use and occupy the leased premises as aforesaid shall in no way abate or reduce the rent payable by the Company to the City under the provisions of this lease.

City of Mayfield, Kentucky, Official Statement Relating to the Issuance of $9,500,000 Industrial Building Revenue Bonds Dated April 1, 1959, Contract of Lease and Rent, 19.

141 Cases cited note 59 *supra*. The three leading cases are summarized below. In City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957), the questioned project involved construction of a manufacturing plant to be financed one-half by the city and one-half by the manufacturing corporation. The city's contribution was to be raised by the issuance of general obligation bonds. The city was to hold title to the facility only until the corporation had paid the city the amount of its investment and interest. The city was, therefore, a first mortgagee. The court did not find the facility to be a public one but frankly characterized the plan as one of financial assistance to industry. Industrial financing was then analogized to public construction of port facilities for long-term lease. Since the Maryland credit clause does not limit cities, the court's holding was that the public purpose doctrine had been complied with. There is dictum, however, that the same result would follow under the credit clause.

In Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956), the city proposed to use the proceeds of general obligation bonds for the construction of an industrial facility for lease to industry. The only legislative authority for the program, however, was a broad enabling statute authorizing cities of specified classes, upon finding that it was "necessary to incur any indebtedness," to issue bonds in accordance with the statutory procedure. There was, therefore, no legislative finding of economic justification or express legislative authorization, deemed so important in *Albritton*. The court, however, did impose on the defendant municipality the burden of demonstrating that abnormal unemployment conditions existed in the area. This burden was satisfied, and the bond issue upheld, under the credit clause.

In McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958), the court upheld, under the public purpose doctrine, a statute modeled closely on the BAWI statute, but lacking the pro forma grant of power for municipal operation which the *Albritton* court deemed so significant. This difference, however, was of no interest to the Tennessee court. The Tennessee Constitution, which allows a loan of credit in aid of a private enterprise upon approval of three-fourths of the voters (art. II, § 29), was complied with. The vote of the electorate, however, did not obviate the need for judicial determination of compliance with the public purpose test.

142 *Cf.* Ferrell v. Doak, 152 Tenn. 88, 92, 275 S.W. 29, 30 (1925).

jects. The lease provision commonly used in Mississippi[143] permits termination only if manufacturing operations are interrupted for a continuous period of one year. Thus, as long as a minimal level of operations is maintained, the termination provision probably would not apply, even though the payrolls being paid would greatly disappoint the community's expectancies. Moreover, in case of default by the lessee, the municipality's power to insure continuing payrolls under the present programs is considerably less than the control exercised by lessor municipalities in the consumer facility cases. Once a transportation, recreational, or parking facility is constructed, the very facts of its existence and municipal ownership carry with them the assurance that the public purpose objectives can be carried out. Regardless of the financial failure of the lessee, the municipality can legally and realistically operate the facility itself or easily obtain a successor lessee. If economic or other changes preclude continued operation on a self-sustaining basis, the facility can be subsidized. In the case of municipally owned industrial plants, however, there is far less certainty that the default of the lessee will not interfere substantially with the continued flow of payroll income. Generally, municipalities lack the legal authority to run industrial plants themselves;[144] and even in Mississippi, where the power exists, its exercise would be completely unrealistic.[145] Municipal operation of manufacturing plants producing for distant markets would be completely out of harmony with American tradition and practices. Accordingly, the only practical municipal alternative in the face of lessee default under industrial financing is to find a successor lessee. Even when economic conditions are favorable, the realities of the industrial real estate market are such that a facility may remain idle for a period of some months before a tenant who wants the particular plant is found; when general economic conditions are unfavorable, several years may elapse before a new tenant is obtained. In addition to the financial loss it causes, a vacant plant within the framework of public industrial financing means a frustration of the public purpose objectives.

Accepted principles of state constitutional law in related areas may by analogy impose a duty upon the BAWI lessee not to unreasonably discriminate in selecting and discharging employees. Under the firm rule of the nineteenth-century cases, otherwise private corporations which may exercise the power of eminent domain or which receive franchises to the use of public streets are under an implied duty to

143 See note 140 *supra*.

144 The BAWI statute is the sole exception to this rule. MISS. CODE ANN. § 8936-09 (Supp. 1960) permits municipal operation conditioned upon state approval.

145 See notes 144 and 137 *supra* and accompanying text. Municipal operation in Mississippi has apparently never been implemented. Letter From Lester G. Franklin, Ass't Attorney General, State of Mississippi, to David E. Pinsky, August 15, 1959.

serve all members of the public without unreasonable distinctions.[146] While all of these cases involved corporations which occupied positions of monopoly or oligopoly, one contemporary treatise writer has treated them as supporting a more general rule applicable to all private enterprises which receive substantial government aid.[147] In the field of industrial financing this rule would impose an obligation upon the lessee not to discriminate unreasonably in selecting and discharging employees. In each case, the corporation should be looked upon as an instrumentality of the financing government for the attainment of specific public purposes—the provision of services to citizens as consumers, and of employment to them as wage earners. In both capacities, the ultimate beneficiaries of the program should be the local citizenry. Discrimination in providing consumer services is basically no different than discrimination in providing employment opportunities.[148] Moreover, beyond state constitutional law, there looms a substantial federal question under the fourteenth amendment.[149]

The contrast between the degree of public control exacted by the consumer facility cases and that required under the Mississippi plan may also be examined in terms of protection of the public financial interest. The pattern of public financing under the BAWI statute, like that in the consumer facility cases, remedies many of the grossest financial abuses of the nineteenth-century railroad-aid bond era. There is adequate public control over the marketing of the municipal bonds, and the plants are constructed by the municipalities or by contractors under their direct supervision. However, available evidence suggests that,

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146 See Snell v. Clinton Electric Light Co., 196 Ill. 626, 63 N.E. 1082 (1902); Portland Natural Gas & Oil Co. v. State *ex rel.* Keen, 135 Ind. 54, 34 N.E. 818 (1893); Lumbard v. Stearns, 58 Mass. (4 Cush.) 60 (1849); Haugen v. Albina Light & Water Co., 21 Ore. 411, 28 Pac. 244 (1891).

147 2 MORAWETZ, PRIVATE CORPORATIONS 1075-76 (2d ed. 1886).

148 The rule prohibiting discrimination would probably not apply in any case in which a municipality, owning real property no longer needed for its former public uses, decided to lease it to a private lessee in order to protect the municipality's finan-
cial interest. *Cf.* Derrington v. Plumber, 240 F.2d 922, 925 (5th Cir. 1956), *cert.*
denied, 353 U.S. 924 (1957); Burton v. Wilmington Parking Authority, 365 U.S. 715, 723 (1961) (dictum).

149 It is now well settled that the lessee of publicly owned property, engaged in selling services to the public, is subject to the limitations of the equal protection clause and may not discriminate in service. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). By analogy, the Mississippi plan lessee may have a constitutional duty not to discriminate in employment. The restaurant and recreation cases are grounded on the proposition that a private party engaged in performing public purpose objectives on publicly owned property is subject to the same duty under the equal protection clause as would be imposed on the public lessor. Industrial lessees under the Mississippi plan are engaged in performing public purpose objectives on publicly owned property. Full analysis of the equal protection clause question, however, would necessitate a discussion of many related problems not germane to the problems of state constitutional law with which this Article is concerned. See Ming v. Horan, 3 Race Rel. L. Rep. 693 (Cal. Super. Ct. 1958); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

unlike consumer facility projects, municipal control of planning and design in industrial financing is minimal, with much of the responsibility being turned over to the lessee. Where a proposed plant is to be a highly specialized one, built around highly specialized processes, and where the project includes the public financing of equipment,[150] there must inevitably be a virtually complete delegation to the lessee of planning and design. To the extent, therefore, that a project reflects the image of a particularized manufacturing process, the public investment will be jeopardized by private decision making. The admonition of *Walker v. City of Cincinnati* [151] against the union of public and private capital, then, becomes significant. If, however, the needs of the lessee can be fulfilled by a relatively adaptable plant, and if public financing does not include payment for specialized equipment, municipal supervision is more feasible. Although a plant can seldom be fully adaptable, workable distinctions can be made between those plants which are relatively adaptable and those which are relatively specialized. However, only one court has considered the factor of adaptability pertinent.[152]

Another important consideration is the extent to which the municipality's title constitutes a financial safeguard against the risks, inherent in any manufacturing enterprise, which may arise during the term of the lease. Subject to obvious inaccuracies of generalization, business failures may be divided into those caused by internal factors, relating to the quality of management, and those caused by external ones such as changes in technology, demand, competition, and the business cycle. Many business failures, of course, are due to a combination of internal and external factors, as competency in business management includes the ability to forecast basic economic trends and to make intelligent adaptation to change. This internal-external dichotomy, however, will be used for analytical purposes. To the extent that the lessee's default is due to management failures, rather than to external forces, the municipality's title to the plant, insofar as it is adaptable, provides a reasonably good safeguard against substantial loss, although a short period of vacancy may result before the industrial real estate market produces a new tenant. When the default is due to forces affecting the particular industry of the lessee, such as technological

[150] The BAWI statute authorizes the financing of equipment. MISS. CODE ANN. §§ 8936-09 (Supp. 1960). The state agency, however, has recently instituted a policy of not permitting the cost of machinery to be included in any bond issue. Letter From W. P. Starnes, Ass't Director, Miss. Agricultural and Industrial Bd., to David E. Pinsky, Dec. 16, 1960. The Tennessee and North Dakota statutes—patterned after the Mississippi plan—do not include machinery. TENN. CODE ANN. § 6-2903 (Supp. 1962); N.D. CENT. CODE ANN. §§ 40-57-02, -19 (Supp. 1961). The revenue bond statutes generally include machinery. *E.g.*, ALA. CODE tit. 37, § 511(20) (1958); KY. REV. STAT. § 103.200 (1959).

[151] 21 Ohio St. 14 (1871).

[152] See City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328 (1929).

changes or changes in demand patterns, a relatively adaptable plant again provides a reasonably good safeguard. If, however, default is due to broad economic forces producing a national depression, or to long-run forces adversely affecting the economy of the particular section or region where the plant is located, a long period of vacancy or occupancy at a depressed rental may follow, causing serious financial loss to the municipality. This risk, however, unless it is aggravated by the specialized nature of the plant, is analogous to the long-run risk incident in a subway system as discussed earlier. It is proprietary risk, flowing from public decision making—the basic decision to invest public capital in industrial plants.

To the extent, therefore, that it permits financing of nonadaptable industrial projects, the Mississippi plan provides less public control relative to financial risk than consumer facility projects. But even if plants are made adaptable, the BAWI program still fails to meet the test of the *Denver* case and the decisions following it with respect to the adequacy of public control over effectuation of the public purpose objectives.

2. The *Albritton* Rule Contrasted with the Rule of the Port Facility Cases

The limited public control exercisable under the Mississippi plan more closely resembles that which is exerted under judicially approved programs of pier construction for long-term exclusive lease to carriers. In both cases the lessor municipality cannot insure effectuation of the public purpose objectives except to require the lessee to use the facility at some minimal level of activity and for specified purposes only. But even the port facility programs better protect the public financial interest than does the Mississippi plan where the latter finances nonadaptable plants. As with consumer service facilities, the risk to the public financial interest in port facility investments is proprietary.

Port and industrial development perform similar functions in the economy of the financing government. From the standpoint of the port area, it is common to analyze the movement of goods by water as involving two functions, the industrial and the commercial.[153] When the port moves freight originating in or destined for the port area, it functions in its industrial capacity; when, however, it moves through-freight the port performs a commercial function. In its industrial capacity, the port provides an essential service to local industry—transportation of raw materials and finished products—so that government

[153] See BRYAN, PRINCIPLES OF WATER TRANSPORTATION (1939); U.S. COMM'R OF CORPORATIONS, *op. cit supra* note 119, pt. III, at 2.

financing of piers for lease to private parties very closely resembles municipal investment in urban transportation, both being designed to provide an essential local service. However, when the port functions commercially, its activities resemble those of manufacturing industries in terms of the role played in the economy of the area. The municipally owned pier is then providing services for other more distant regions just as the municipally owned industrial plant provides goods for them. The only public service performed by both activities is the generation of additional income for the residents of the port area—both primary payroll income and secondary income—due to the multiplier effect.[154]

Both legal and economic analyses, therefore, underscore a significant similarity between municipal pier and municipal industrial financing. However, there remain significant distinctions between them which cannot be ignored: federal regulatory control over water carriers; less financial risk flowing from private decision making in the case of port facilities; the long asserted preeminent governmental interest in all aspects of port development; and the economic status of port facilities as essential social overhead capital. It follows, therefore, that Mississippi plan industrial financing fails to satisfy the enterprise aid criteria as applied in the port facility cases.

B. *Application of the Enterprise Aid Criteria to the Pennsylvania, New England, and Oklahoma Plans*

Mortgage plans of industrial financing have a common feature which distinguishes them from the Mississippi plan. The government of the state or municipality does not construct and then lease plants itself. Instead, the government makes or insures mortgage loans to local non-profit development corporations in order to enable the latter to construct industrial facilities for lease or sale to private manufacturers. However, there is also a significant difference among the mortgage plans themselves. The New England and Oklahoma plans, because they pledge the public credit, are prima facie subject to the credit clause. In contrast, the Pennsylvania plan, financed by funds appropriated out of currently levied taxes, is not. The credit clause clearly addresses itself only to incurring debt and not to making appropriations from current revenues.[155] The stock clause is likewise inapplicable to the Pennsylvania plan.[156] The current appropriations

[154] See note 178 *infra* and accompanying text.

[155] See note 76 *supra* and accompanying text.

[156] In several jurisdictions, including Pennsylvania, no current appropriations clause has been adopted limiting state financial action; only the credit and stock clauses apply. See note 91 *supra*. Whenever such a state adopts the Pennsylvania plan, with the credit clause clearly inapplicable, attention is focused on the stock

clause, if adopted, and the public purpose doctrine, therefore, are the only limitations to the Pennsylvania scheme of industrial financing.

clause. Of course, even if the stock clause is inapplicable, the public purpose test has prima facie applicability. Since the state becomes a creditor rather than a shareholder under the Pennsylvania plan, the stock clause does not have literal application. However, it can be argued that the policy against risking public funds in private undertakings which underlies that limitation calls for its application to the purchase of mortgage bonds as well as stock, even though the public funds are subject to a lesser degree of risk than if they were invested in corporate stock. Once the stock clause is construed to include the purchase of mortgage bonds out of current revenues, it would be incongruous not to extend it to embrace an even more flagrant problem—outright donations to private industry out of current appropriations. The broad question presented is whether the stock clause should be interpreted as coextensive with the current appropriations clause, as well as with the credit clause.

The argument against such broad construction of the stock clause rests upon the nineteenth-century background. Public financial aid to the railroads was effectuated by four common methods—public guaranty of railroad bonds, exchange of public bonds for private bonds, donation of public bonds, and exchange of public bonds for private stock. See notes 72-74 *supra* and accompanying text. The first three techniques amounted to giving or lending of credit and were, therefore, prohibited by the credit clause. But the fourth technique, the purchase of corporate stock financed by borrowing, was the most common technique in many states. It seems reasonably clear that mid-nineteenth-century legislators made a clear distinction between stock subscriptions, even if financed as above, and a loan of credit. Stock subscriptions made the public agency a part owner. The fact that the purchase was financed by borrowing did not convert the transaction into a lending of credit. See Clarke v. City of Rochester, 24 Barb. 446, 484, 489 (N.Y. Sup. Ct. 1857), *aff'd*, 28 N.Y. 605 (1864) (dictum that the credit clause did not prevent the state from being a stockholder in a private corporation); 1 DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF OHIO 523 (1850-51); 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF IOWA 295-97 (1857). The court, as well as counsel, in Walker v. City of Cincinnati, 21 Ohio St. 14, 37, 54 (1871) and the dissenting opinion in Cass v. Dillon, 2 Ohio St. 607, 633 (1853), carefully distinguished between a stock subscription and a loan of credit. Statutes authorizing stock subscription and cases passing on them were careful not to characterize a stock subscription transaction as a loan of credit. An exchange of corporate bonds for public bonds, on the other hand, was so characterized. See City of Aurora v. West, 9 Ind. 74, 75-78 (1857); Commissioners of Leavenworth County v. Miller, 7 Kan. 479, 481-82, 487-88 (1871); Commonwealth *ex rel.* Thomas v. Commissioners of Allegheny County, 32 Pa. 218, 219, 222 (1858); Nichol v. Nashville, 28 Tenn. 251, 253-63 (1848); Pa. Laws 1848, No. 224, § 1, at 273 (all involving stock purchases); Benson v. Mayor of Albany, 24 Barb. 248, 264 (N.Y. Sup. Ct. 1857); Commissioners of Knox County v. Nichols, 14 Ohio St. 260, 266-70 (1863) (involving loans of credit). As the constitutional movement of the nineteenth century reached its culmination, however, there was a tendency to construe stock purchases financed by the issuance of public bonds as within the proscription of the credit clause. See Hill v. Memphis, 134 U.S. 198 (1890); Baltimore & D.P.R.R. v. Pumphrey, 74 Md. 86, 21 Atl. 559 (1891).

That there was a need for a constitutional limitation aimed directly at the stock purchase technique was clear, but the verbal form it should take was not. In large measure, the evil sought to be remedied was not stock purchase per se, but stock purchase financed by the use of public credit. See Garland v. Board of Revenue, 87 Ala. 223, 225, 6 So. 402, 403 (1889); Hagler v. Small, 307 Ill. 460, 468-69, 138 N.E. 849, 852-53 (1923); Hanson v. Vernon, 27 Iowa 28, 33 (1869); Walker v. City of Cincinnati, 21 Ohio St. 14, 53-54 (1871); Cass v. Dillon, 2 Ohio St. 607, 631-32 (1853) (dissenting opinion); 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF IOWA 289-344 (1857); HILLHOUSE, MUNICIPAL BONDS 143-99 (1936). However, the pattern of exchanging corporate stock for public bonds so dominated the day that except in Indiana, see IND. CONST. art. 10, § 6, almost no one gave consideration to the possibility that stock ownership might be financed by other means than borrowing. The clause that emerged, therefore, was a very simple one that purported to cover an area wider than the evil sought to be remedied.

In the light of the above historical background, it is suggested by some that the stock clause be limited to a proscription of stock purchased by the incurring of debt.

In several of the states with which we are concerned—those in which the public aid limitations directed at state action are limited to the credit and stock clauses—

Since state funds under the mortgage plans are loaned to a non-profit development corporation, it might be asserted that no limitations are applicable. Some courts have held that the public aid limitations [157] and the public purpose test [158] do not prohibit public financial aid to certain non-profit organizations.[159] While there is considerable opposing authority in the case of the public aid limitations,[160] it is not necessary to resolve that conflict here, as industrial development corporations are sharply distinguishable from non-profit associations. The latter are generally charitable associations, which operate educational or recreational facilities, such as museums or zoos. In doing so, the non-profit association itself acts as a quasi-public instrumentality for achieving public policy objectives. The same is not true of non-profit development corporations. They are not the primary agents for achieving public objectives, but only serve as conduits through which public funds flow to private manufacturers who ultimately benefit the public.[161] To rely on the non-profit organization feature of the mort-

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the same constitutional conventions which adopted credit and stock clauses limiting the state and municipalities also adopted current appropriations clauses directed solely at municipalities. *Compare* IDAHO CONST. art. 8, § 2, *with id.*, art. 12, § 4; *Compare* PA. CONST. art. 9, § 6, *with id.*, art. 9, § 7. It was clearly recognized that in order to restrict appropriation of public funds from currently levied taxes for use as donations or for the purchase of stocks or bonds, an additional constitutional limitation was necessary. The final decision of the framers to adopt a current appropriations clause, applicable to municipalities, but not to the state, seems to rest on a determination that there was no strong need to so limit state financial action. In this group of jurisdictions, therefore, the argument for limiting the stock clause to the purchase of stock by the incurring of public debt is especially persuasive.

The suggested result is certainly a reasonable one. The incurring of public debt is a substantially greater danger to the taxpayer than an expenditure out of current revenues. It is hardly unreasonable for the constitutional conventions to have acted to prevent the greater evil, while remaining silent on the lesser.

157 Furlong v. South Park Comm'rs, 340 Ill. 363, 172 N.E. 757 (1930); Hager v. Kentucky Children's Home Soc'y, 119 Ky. 235, 83 S.W. 605 (1904); Johns Hopkins Univ. v. Williams, 199 Md. 382, 86 A.2d 892 (1952); *cf.* McGuire v. City of Cincinnati, 40 N.E.2d 435 (Ohio Ct. App. 1941), *appeal dismissed*, 139 Ohio St. 218, 38 N.E.2d 1023 (1942).

158 Legat v. Adorno, 138 Conn. 134, 83 A.2d 185 (1951); City of Minneapolis v. Janney, 86 Minn. 111, 90 N.W. 312 (1902).

159 This is apparently the view of the former Secretary of Commerce of Pennsylvania. See Davlin, *State Development Corporations: The Pennsylvania Experience*, 24 LAW & CONTEMP. PROB. 89, 92-93 (1959).

160 Fluharty v. Board of County Comm'rs, 29 Idaho 203, 158 Pac. 320 (1916); State *ex rel.* Board of Control v. City of St. Louis, 216 Mo. 47, 89-95, 115 S.W. 534, 546-48 (1909); Johns v. Wadsworth, 80 Wash. 352, 141 Pac. 892 (1914).

161 The dictum in Wilmington Parking Authority v. Ranken, 34 Del. Ch. 439, 462, 105 A.2d 614, 628 (Sup. Ct. 1954), is particularly pertinent:

> But the prohibition contained in *Art. VIII, Sec. 8 of the Constitution* [the credit, stock, and current appropriations clauses] should not receive too narrow a construction. Clearly, if the public body receiving the appropriation were a mere channel through which public money were to be invested in a private corporation, thus making the City a creditor or stockholder of such a corporation, the transaction would be illegal.

gage plans, therefore, as immunizing them from constitutional scrutiny, is to lean on a slender reed.

The mortgage plans abandon the façade of a publicly owned facility and make apparent the reality of financial assistance. They are, therefore, even less able to satisfy the enterprise aid criteria of the consumer facility cases than the Mississippi plan. Analogizing to FHA program, states and municipalities in their capacities as mortgagees or mortgage insurers can impose restrictions on the use of premises, so as to prevent their conversion to uses less desirable for the local economy,[162] but the feasibility of doing so is limited.[163] Moreover, once a mortgage is satisfied, control over effectuation of the public purpose objectives is at an end.[164]

C. The Public Aid Limitations—Conclusions

The constitutional validity of the tax supported plans, under the criteria applied in the consumer facility cases, is questionable. Municipalities are better immunized against certain types of risk than they were under the nineteenth-century railroad-aid bond plans. Nonetheless, except in the case of a fully adaptable plant, the public assumes a considerable financial risk incident to private decision making; and in all instances inadequate public control is reserved over the effectuation of the public economic objectives. The judicially approved port facility programs more closely resemble the Mississippi plan, but, as already indicated, the two are legally and economically distinguishable.

In applying the enterprise aid criteria, courts have failed to distinguish carefully between the public aid limitations and the public purpose test. This failure is unfortunate and should not become a principle of state constitutional law. Both the public aid limitations and the public purpose test have similar origins, but they are significantly different in form. The public aid limitations were adopted as a specific constitutional response to particular evils which plagued the "take-off" period of the nineteenth century. These limitations, when construed against their historical background, have a specificity

162 *Cf.* FHA v. Darlington, Inc., 358 U.S. 84 (1958).

163 In view of the unorthodox nature of such restrictions in mortgages, there may be a reluctance on the part of industry to agree to such terms. So far as enforcement is concerned, see note 140 *supra* for discussion of the related problem in the case of the Mississippi plan.

164 The degree of public control which can be exercised to safeguard the public financial interest is reduced, under the mortgage plans, if control over the construction of the facility is delegated to the development corporation. However, this need not be done; the public agency can exercise as close a control over construction as is possible under the Mississippi plan. Of course, under all plans, the degree of control which can be exercised over construction will depend in large part on the extent to which the project involves a specialized plant and equipment rather than an adaptable plant with no public financing of equipment.

rooted in nineteenth-century experience which limits their constitutional elasticity—their capacity to sustain changed interpretation in the light of new conditions. Thus, the tax supported plans not only do violence to the language of the public aid limitations, but to their historical spirit. Fortunately, only two states, Mississippi and Kentucky, have sustained tax supported plans under public aid limitations;[165] the other decisions favorable to tax supported public industrial financing come from jurisdictions in which there is no pertinent public aid limitation.[166] The Mississippi-Kentucky approach is not satisfactory. In the interest of the integrity of our judicial system, specific constitutional limitations deemed obsolete by a subsequent generation should be eliminated by amendment rather than by judicial accommodation. A similar conclusion is suggested with respect to internal improvement clauses.[167]

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[165] Albritton v. City of Winona, 181 Miss. 75, 110-12, 178 So. 799, 809-10, *appeal dismissed*, 303 U.S. 627 (1938); Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956).

[166] Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959), and Halbert v. Helena-West Helena Industrial Dev. Corp., 226 Ark. 620, 291 S.W.2d 802 (1956), both sustained statutes authorizing the state to invest a portion of the surplus in the state treasury in bonds of non-profit development corporations. These corporations were engaged in making mortgage loans to industry. Since the state did not incur debt or contingent debt, the credit clause was deemed inapplicable. The court in *Halbert*, however, invalidated a provision of the same statute which authorized municipalities to purchase membership in a local non-profit industrial development corporation, holding it violative of the constitutional prohibition against any grant of financial aid by municipalities to private enterprises. *Id.* at 625-26, 291 S.W.2d at 806. The Kentucky court upheld the Pennsylvania plan in Industrial Dev. Authority v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d 274 (Ky. 1960). The current appropriations clause applicable in the state, however, is limited to donations. KY. CONST. § 177. A variant of the Oklahoma plan was upheld in City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957), and the Mississippi plan was sustained in McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958). Maryland has no credit clause applicable to cities; the Tennessee constitution allows a loan of credit upon approval by three-fourths of the votes cast at an election and this provision was satisfied. TENN. CONST. art. 2, § 29.

[167] For the background of the internal improvement clause, see text accompanying notes 82-84 *supra*. The question presented is whether this limitation should be construed rather narrowly to proscribe only those particular evils in the minds of the nineteenth-century draftsmen—aid to transportation facilities. The answer of the courts has generally been in the negative. Minnesota has invalidated the proposed construction and operation by the state of a grain elevator or warehouse. Rippe v. Becker, 56 Minn. 100, 57 N.W. 331 (1894). Alabama has invalidated state concentration produce markets which would be competitive with private industry. *In re* Opinion of the Justices, 237 Ala. 429, 187 So. 244 (1939). More recently, Wisconsin has held invalid the use of state funds for veterans' housing. State *ex rel.* Martin v. Giessel, 252 Wis. 363, 31 N.W.2d 626 (1948). *But see In re* Opinion of the Justices, 247 Ala. 66, 22 So. 2d 521 (1945); Harrison v. Day, 200 Va. 750, 107 S.E.2d 585 (1959). Underlying these decisions is the conviction that the constitutional intention was to draw a clear line between functions strictly necessary to the exercise of sovereignty, on the one hand, and other functions "which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promotors. . . ." State *ex rel.* Jones v. Froehlich, 115 Wis. 32, 38, 91 N.W. 115, 116-17 (1902). As applied by the courts, therefore, the internal improvement clause has been construed as a vigorous, inflexible version of the public purpose limitation. According to these courts, the internal improvement clause clearly proscribes all industrial financing programs which pledge the state's credit or which

D. The Public Purpose Test—Conclusions

The public purpose test emerged as a response to the same problems which led to the adoption of the public aid limitations. But the nineteenth-century cases which approved nondonative railroad-aid bonds, indicate that its highly generalized verbal anatomy has the same elasticity as do the concepts due process and equal protection under the federal constitution. Judge Learned Hand's description of the first, fifth, and fourteenth amendments may aptly be applied to the public purpose doctrine—it is "cast . . . in such sweeping terms that [its] . . . history does not elucidate [its] . . . contents." [168]

Since the meaning of this limitation has the capacity to change with the times, pertinent factors must be judicially determined to direct the nature and course of its evolution. It is significant that the decision in *Loan Ass'n v. Topeka* [169] in 1875, invalidating industrial aid bonds under the public purpose test, coincided with the beginning of an important transformation in the United States Supreme Court's philosophy of judicial review.[170] In the 1870's and 1880's the Court began to abandon in practice its pre-Civil War attitude of self-restraint. While it continued to reiterate the principle that any rational doubt was to be resolved in favor of contested statutes, the Court passed upon economic regulatory legislation as would a policy making body. This philosophy has, of course, now been replaced by one of rigorous self-restraint and liberality, permitting maximum legislative economic experimentation. Economic legislation will not be disturbed unless the challenger overcomes a presumption of constitutionality by demonstrating that the statute "is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." [171]

The approach of the Supreme Court is destined to exert a profound impact on the development of the public purpose test in state courts. Economic regulatory and national security legislation may impinge upon one relatively small economic, social, or political group contrary to the mandates of the first, fifth, or fourteenth amendments. On

use current appropriations from the state treasury. While this type of inflexible constitutional limitation may be regretted as a matter of policy, the interpretation is the one most in harmony with nineteenth-century constitutional history. As in the case of the public aid limitations, constitutional amendment should be looked to as the appropriate route for change.

[168] HAND, THE BILL OF RIGHTS 30 (1958).

[169] 87 U.S. (20 Wall.) 655, 661-67 (1875).

[170] See Barnett, *Constitutional Interpretation and Judicial Self-Restraint*, 39 MICH. L. REV. 213, 232-37 (1940).

[171] United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); see Carolene Prods. Co. v. United States, 323 U.S. 18, 31-32 (1944); AFL v. American Sash & Door Co., 335 U.S. 538, 543-44, 555-57 (1949) (concurring opinion).

review, courts assume that the political processes may be inadequate to protect them. In contrast, programs of public spending do not require sacrifice from any one group, but from all taxpayers in accordance with existing patterns of taxation. There is, therefore, more reason for courts to assume that the normal political processes will be adequate to protect the public.[172] While conflicts between economic groups are very much in evidence during the drafting of tax legislation, the resolution of these differences must necessarily be left to the poltical arena, subject to federal and state constitutional limitations on the taxing power.

The danger that judicial scrutiny of constitutionality may degenerate into policy review by a super-legislature is present with greater force in the case of public spending than regulatory enactments. In passing upon regulatory legislation, courts can at least attempt to balance the public benefits to be attained against the private sacrifices called for. As difficult as the judicial task may be in these cases, it would be considerably more difficult to develop meaningful standards by which to review an appropriation or bond issue for industrial financing purposes which represented an average tax burden of only a few dollars a year. There is good reason to consider the public purpose issue as approaching the political question limit.

A countervailing consideration, however, must be weighed. Implicit in the philosophy of rigorous judicial self-restraint, at least where no problem of federalism is present, is the assumption that a reasonably healthy legislative institution exists. Unfortunately this is not the fact in most states. As Dean Fordham has recently pointed out, state legislatures are underdeveloped in power, structure, and procedure.[173] The typical legislature meets only in short biennial sessions; its powers are sharply limited by detailed restrictions which interfere with a healthy exercise of independent judgment; and its members are generally poorly paid and without professional staffs. The capacity to make intelligent and independent policy decisions depends in good part on thorough committee work, but the weakness of the committee system in state legislatures is pitiful. Unless significant reforms are carried out, state courts may well be reluctant to give the same degree of deference to local legislative judgment as the Supreme Court gives to congressional decisions.

Although the condition of the state legislative institution militates against judicial self-restraint, the time is ripe for the public purpose

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[172] Today, unlike the nineteenth century, the mass media and numerous civically oriented citizens groups play an important role in informing taxpayers of the issues involved in taxation and spending questions.

[173] See FORDHAM, THE STATE LEGISLATIVE INSTITUTION 11-76 (1959).

doctrine to tear itself away from strict adherence to the enterprise aid criteria as applied in the consumer facility cases and to evolve independently as a more relaxed limitation on state and municipal financial action. Encouragingly, modern industrial financing cases reflect, to a considerable extent, a movement in this direction.[174]

This conclusion, however, does not carry with it any imperatives as to the content of the new standard. At least two possibilities exist. One course is to adopt the Supreme Court's "rational basis" standard of review in economic regulatory matters. A persuasive policy argument can, of course, be made against financing industrial projects by issuance of general obligation bonds. The public assumes the risk of economic loss without any offsetting guarantee that its objectives will be attained. Moreover, it has been forcefully asserted that it is much sounder in competing for industry to expend limited municipal resources to improve educational, recreational, street, and other traditionally public facilities than to finance manufacturing plants.[175] But under the rational basis test these views do not assume constitutional dimension.

Economic considerations do furnish a rational basis for legislative determinations to finance industrial development. The urgent economic need to alleviate unemployment and to raise standards of living, and the curtailment of nongovernmental investment in manufacturing plants, provide good reason for using public capital,[176] and courts have in fact been influenced by these considerations.[177]

Increased knowledge of area economics, particularly of the importance of the local multiplier concept, further supports the legislative determination that has been made. Under the local multiplier concept the productive activity of a community is divided into two types, basic and derivative.[178] Basic activity produces an inflow of income from

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[174] See note 166 *supra* and accompanying text.

[175] See GILMORE, DEVELOPING THE "LITTLE ECONOMIES" 62 (Comm. on Economic Development Supp. Paper No. 10, 1959); INTERNATIONAL CITY MANAGERS' ASS'N, MANAGEMENT INFORMATION SERVICE, THE CITY'S ROLE IN ECONOMIC DEVELOPMENT (Rep. No. 177, 1958); UNIV. OF ALABAMA, LOCAL GOVERNMENT SERVICES AND INDUSTRIAL DEVELOPMENT IN THE SOUTHEAST (1952); *Laws and Attitudes in the Industrial Development of the South*, 2 J. PUB. L. 63, 85-6 (1953). See also the clear emphasis on factors other than industrial financing in COMM. ON INDUSTRIAL DEVELOPMENT, REPORT TO THE SOUTHERN GOVERNORS' CONFERENCE (1961).

[176] See notes 40-46 *supra* and accompanying text. In making federal funds available for industrial financing under the Area Redevelopment Act, Congress has recognized and in effect approved state and municipal industrial financing activities. 75 Stat. 51 (1961), 42 U.S.C.A. § 2505(b)(9)(B) (Supp. 1961).

[177] See notes 64-65 *supra* and accompanying text.

[178] See WEIMER & HOYT, PRINCIPLES OF REAL ESTATE 319-60 (3d ed. 1954); UNIV. OF NEBRASKA COLLEGE OF BUSINESS ADMINISTRATION, THE COMMUNITY ECONOMIC BASE AND MULTIPLIER (1958); Andrews, *Mechanics of the Urban Economic Base*, 29 LAND ECON. 161 (1953). While the multiplier concept seems elementary, only in the last three or four decades has it been articulated in formal terms and applied to various communities in field studies.

the export of goods to other areas or the purchase of goods and services in the area by tourists. Derivative activity, on the other hand, produces a net flow of income away from the area. Manufacturing is a principal form of basic activity. The essence of the multiplier concept is that every increment of investment in a basic activity has a leverage effect, increasing or decreasing employment and payrolls in the basic sector. The volume of derivative activity will vary accordingly. The local multiplier is determined by dividing basic employment into total employment. When a state industrial financing program successfully attracts a manufacturing industry, the ensuing economic gain to the community is measured not only by the company's payroll but also by the amount of secondary income induced by it, which will vary from area to area depending upon the local multiplier. The concern expressed by the Supreme Court in *Loan Ass'n v. Topeka*[179] that public financial assistance to manufacturing must ineluctably lead to similar programs to assist "the merchant, the mechanic, [and] the innkeeper," therefore, proves to be unwarranted. A reasonable line can be drawn between basic and derivative activities and public industrial financing confined to the former.[180] The argument for sustaining industrial financing legislation under the rational basis standard is, accordingly, persuasive.

Due to the close historical relationship between the public purpose doctrine and the public aid limitations, and to the weakness of the state legislative institution, some courts may be reluctant to apply the rational basis test to industrial financing legislation. They may prefer to apply a modified enterprise aid standard of review, which departs less decisively from the criteria applied in the consumer facility cases. Under this standard, the enterprise aid criteria would be used as a framework for reasoned anlysis rather than as strict requirements; the urgency of the need for public financing would be given greater weight and the public control requirement relaxed. Courts could demand only that degree of public control which is realistically possible. Prohibitions against unreasonable discrimination in employment, for example, are economically feasible and might well be required. The lease provision currently used in Mississippi, prohibiting conversion of the plant to a nonmanufacturing use, is also practical. Although payroll controls are probably not possible, municipalities can better control the effectuation of economic objectives and safeguard the public financial interest by bringing the process of project selection under more intelligent public direction. The courts can insist that statutes require pub-

[179] 87 U.S. (20 Wall.) 655, 665 (1875).

[180] The industrial financing programs have generally observed this line in practice. See notes 47-49 *supra* and accompanying text.

lic industrial financing to be carried on only in a context of comprehensive local economic planning.

Compliance with the modified enterprise aid standard would call for municipal preparation of an economic base study, in which all the facts necessary to an understanding of the area's economy are assembled and organized.[181] A development plan, containing area goals, should then be formulated, in accordance with the base study. The broad economic goals of all areas are to a considerable extent identical. They are directed toward a viable economy, customarily described in terms of stability, balance, and worker productivity.[182] These goals, however, are only meaningful if related to the resources and skills which the particular locality currently possesses, and to its potentialities for future development.[183] An economic development plan should include, as an integral component, plans for public and private action to improve the quality and quantity of services upon which industry is generally dependent—water, electricity, gas, and industrial waste disposal—together with plans to expand the community's facilities to technically train workers.[184] The evidence is persuasive that industries, in deciding on plant location, give substantial weight to all aspects of community life—health and recreational facilities, the educational system, the local transit system, housing, and the quality of local government.[185] A comprehensive economic development plan must incorporate a master program for the community's development in these fields. Once the

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181 The discussion of economic base studies and economic development plans is based on CHAPIN, URBAN LAND USE PLANNING 117-28 (1957); HERRING, SOUTHERN INDUSTRY AND REGIONAL DEVELOPMENT 1-8 (1940); URBAN LAND INSTITUTE, PREPARING YOUR CITY FOR THE FUTURE—HOW TO MAKE AN ECONOMIC STUDY OF YOUR COMMUNITY (Tech. Bull. No. 29, 1956); INTERNATIONAL CITY MANAGERS' ASS'N, MANAGEMENT INFORMATION SERVICE, THE CITY'S ROLE IN ECONOMIC DEVELOPMENT (Rep. No. 177, 1958).

182 Stability refers to the capacity of the economy or of an industry to withstand fluctuations in the business cycle and to minimize seasonal business variations. Balance refers to diversification of productive activity in an economy which requires a wide range in the type of economic activity including manufacturing, trade, construction, finance, and government, as well as variety within the all-important manufacturing category itself. Productivity refers to the goal of a high value added by the manufacturer per wage earner reflecting itself in a high wage rate. See CHAPIN, *op. cit. supra* note 181.

183 Two of the goals articulated in a recent economic base study of an area in western Pennsylvania were to attract industries using semi-finished steel as a raw material and those employing female labor. PENNSYLVANIA ECONOMY LEAGUE, AN ECONOMIC BASE SURVEY OF THE SHENANGO VALLEY AREA AND MERCER COUNTY 26-30 (1956).

184 See UNIV. OF ALABAMA, LOCAL GOVERNMENT SERVICES AND INDUSTRIAL DEVELOPMENT IN THE SOUTHEAST (1952) and other authorities cited note 175 *supra*. The significance of the factors mentioned is underscored by the recently enacted Federal Area Redevelopment Act which places major emphasis on loans and grants for public facilities which "will tend to improve the opportunities . . . for the successful establishment or expansion of industrial or commercial plants . . ." and financial assistance to promote the occupational training and retraining of unemployed and underemployed persons. 75 Stat. 52-3, 58-60 (1961), 42 U.S.C.A. §§ 2506-07, 2513-14 (Supp. 1961).

185 See authorities cited note 175 *supra*.

master plan is prepared, each industrial financing project should be certified by appropriate state or local officials as in conformance with it to the extent that such conformance is realistically possible.[186]

This recommendation is by no means novel.[187] But it could be argued that it does not rise to constitutional dimension. No court has held that the constitutionality of industrial financing legislation depends upon conformity to an economic development plan.[188] One court has invalidated legislation even though it did so.[189] We have already noted, however, the emphasis in the port facility cases on comprehensive planning for the development of the port.[190] In urban land use planning as well, one of the principal themes is that the legality of a single act may well depend upon its relationship to a well considered master plan. Taking by eminent domain of unblighted as well as blighted properties under urban renewal legislation is constitutionally justified under the public use limitation because the taking is integrated

[186] In making this certification as to whether the proposed industrial financing project is in conformance with an overall economic development plan, the approving officials should in addition consider the plant adaptability. See notes 150-52 *supra* and accompanying text. While the failure of the plan to provide for an adaptable plant or its inclusion of equipment financing should not make the project unacceptable *per se*, this should be one factor to be weighed.

In order to preclude frustration of the plan by subsequent action of the industry in shifting the use of the plant to some less desirable use, it may be necessary to incorporate use restrictions in the lease or mortgage. However, radical shifts in the use of a facility will often be the product of adverse economic conditions, and covenants limiting use would, under these circumstances, become realistically unenforceable. See note 140 *supra*.

[187] Legislation in Washington authorizes the creation of port districts with authority to take so-called marginal lands by eminent domain, to develop them for port and industrial purposes pursuant to a comprehensive plan, and to levy a tax for these purposes. WASH. REV. CODE §§ 53.25.020-.900, 53.36.100 (Supp. 1959). Despite the requirement of a compresensive plan, the statute was held invalid as authorizing a taking for a private purpose. Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959). The Federal Area Redevelopment Act requires a comprehensive economic plan as a requisite for eligibility. 75 Stat. 50 (1961), 42 U.S.C.A. § 2505(b)(10) (Supp. 1961). Analogous provisions are found in the Housing Act of 1954, 68 Stat. 623, 625, 626, *as amended*, 42 U.S.C.A. §§ 1451(c), 1455(a), 1460(b) (Supp. 1961).

[188] *But cf.* Opinion of the Justices, 99 N.H. 528, 114 A.2d 514 (1955). The court was asked for an advisory opinion on the validity of proposed legislation creating an authority with power to develop real property for industrial parks, including power to construct industrial plants. The state treasurer was authorized to purchase the authority's notes. The court ruled that the proposed statute would be invalid because it failed to set forth standards guiding the authority in its determination that a proposed project would serve a public purpose and because it did not require the agency to make a formal finding of public purpose, preferably after a public hearing. While the approach of the New Hampshire court and the view espoused here are certainly distinguishable, they are related by a common concern with the need for additional safeguards after the legislature has determined that industrial financing is for a public purpose. The New Hampshire court resolved its concern by a traditional approach—legislative standards and a hearing. This approach, however, is of limited practicality in industrial financing, where legislative standards must necessarily be even more general in nature than usual. To require the appropriate officers to engage in comprehensive economic planning, however, and to relate each project to such a plan is feasible and in general harmony with precedent in related areas of public law.

[189] Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959).

[190] See note 1[illegible] *supra* and accompanying text.

with a rational plan for area renewal.[101] Conformance with an overall plan normally is statutorily required in zoning.[102] To the extent that the requirement approaches a test of reasonableness, the statutory provision imposes a constitutional due process standard.[103] If an economic base plan is required, the general taxpayer will be protected against arbitrary action somewhat in the manner of an owner of real property affected by zoning and eminent domain.

None of the current tax supported plans satisfies the modified enterprise aid standard. Their defects, however, can easily be remedied by legislation. Whether a given state adopts the rational basis test or the modified enterprise aid standard, or continues to adhere strictly to the original enterprise aid requirements, will depend not only on the factors discussed in this section but on the intensity of the economic need for public financing.[104] The type of plan before the court may also be significant. A reasonable line can be drawn between the Pennsylvania plan, which rests on current appropriations, and those plans which rest upon general obligation debt or public guarantees of credit. Because the latter obligate the community, including future taxpayers unrepresented in the legislature, for a generation or more, a stricter standard of judicial review may be applied to them. The Pennsylvania plan might be judged by the rational basis standard, while the other tax supported plans are required to comply with the modified enterprise aid standard.

E. Credit Clause Directed at the State—Applicability to Municipalities

Several states have adopted, in addition to the other public aid limitations, a credit clause which is directed in express terms only at the state.[195] This limitation should not be construed to embrace political subdivisions, unless it is a fundamental statement of public policy. The majority of courts have adopted the narrower view that it applies only to the state.[196] This result is more consistent with the intention of the adopting conventions. There is no evidence that the public aid limitation provisions were the result of sloppy draftsmanship

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[101] See Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954).

[102] The majority of state enabling acts follow closely the Standard State Zoning Enabling Act of the Department of Commerce. Section 3 contains the "comprehensive plan" requirement. U.S. DEP'T OF COMMERCE, SURVEY OF ZONING LAWS AND ORDINANCES 10 (1928), reprinted in 2 RATHKOPF, THE LAW OF ZONING AND PLANNING 877-82 (3d ed. 1960).

[103] See Haar, "*In Accordance With a Comprehensive Plan*," 68 HARV. L. REV. 1154, 1170-75 (1955).

[104] See notes 64-66 *supra* and accompanying text.

[195] *E.g.*, ME. CONST. art. 9, § 14. See generally note 91 *supra* and accompanying text.

[196] See authorities cited note 69 *supra*. *Contra*, State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957); OPS. IOWA ATT'Y GEN. 80 (1938); SECRIST, AN ECONOMIC ANALYSIS OF THE CONSTITUTIONAL RESTRICTIONS UPON PUBLIC INDEBTEDNESS IN THE UNITED STATES 63-64 (1914).

management within the meaning of former section 21 of Article 3. 1935, Op.Atty.Gen. 167.

5. Time limitation

The appropriation of 1933 for the St. Regis Indian Annuities having remained unpaid for more than two years after the passage of the appropriation act lapsed and became a part of the State General Fund. 1935, Op.Atty.Gen. 377.

The two year period ran not from the time that the moneys were made available but from the time of the passage of the act. 1916, Op.Atty. Gen. 239.

6. Receipts not yet collected, appropriation of

The appropriation of miscellaneous receipts not yet collected was approved. 1927, Op.Atty.Gen. 170.

7. Audit, necessity of

Former section 21 of article 3 contemplated that the moneys of the state should not be paid out without an audit, and the legislature was deprived of the power to audit. People v. Travis, 1916, 96 Misc. 490, 160 N.Y.S. 737, reversed on other grounds 175 A.D. 721, 161 N.Y.S. 850. See, also, Matter of Brooklyn Public Library v. Craig, 1922, 201 A.D. 722, 194 N.Y.S. 715.

8. Counsel in removal proceedings

The State is not obligated to pay the expenses of counsel presenting charges in proceedings for removal of county judge unless so retained or authorized by the Senate as part of the expenses for services to the Senate. 1939, Op.Atty.Gen. 337.

9. Eminent domain appropriation

If there was no money available, under Highway Law § 30 authorizing superintendent of public works to acquire by appropriation property deemed necessary for purpose of constructing state buildings, superintendent had no authority to file maps covering land sought to be taken for state building sites. City of Albany v. McMorran, 1962, 34 Misc.2d 3[illegible], 230 N.Y.S.2d 421.

It is state officials' duty to k[illegible] within appropriation made for a[illegible]quiring land by eminent domain. Burnham v. Bennett, 1931, 141 Misc. 514, 252 N.Y.S. 788, affirmed 235 A.D. 751, 256 N.Y.S. 938, affirmed 259 N.Y. 655, 182 N.E. 222.

10. Horse breeding development fund

McK.Unconsol.Laws § 8041 et seq. creating horse breeding development fund, and providing that pari-mutuel race tracks should pay percentage of "breakage" to fund, was not violative of this section providing that "no money shall ever be paid out of the state treasury or any of its funds or any of the funds under its management, except in pursuance of an appropriation by law". Saratoga Harness Racing Ass'n v. Agriculture and New York State Horse Breeding Development Fund, 1968, 22 N.Y.2d 119, 291 N.Y.S.2d 335, 238 N.E.2d 730.

11. Refunds by state

No refund is possible unless there be an authorized appropriation and statutory authority therefor. People ex rel. Bankers Trust Co. v. Graves, 1934, 152 Misc. 531, 274 N.Y.S. 20[illegible], affirmed 245 A.D. 166, 281 N.Y.S. 312, affirmed 270 N.Y. 316, 1 N.E.2d 114.

Where fines for violations of the Conservation Law have been paid over by the conservation commission to the state treasurer, they may not be refunded to the person paying such fines upon the reversal or modification of the judgment of conviction, except by appropriation of the legislature. 1921, Op.Atty.Gen., 26 St.Dept.Rep. 335.

12. Public Service Commission, payment of employees

Public utility, protesting charge made by Public Service Commission for expenses of investigation, could not complain of unconstitutionality of Public Service Law, § 18–b authorizing chairman of commission to approve payment of state funds to temporary employees, where payments were to be made from funds previously appropriated by state or previously paid in by public utilities. Kings County Lighting Co. v. Maltbie, 1935, 244 A.D. 475, 280 N.Y.S. 560.

13. State aid for highways

Under Highway Law, §§ 112, 279, providing state aid to counties and towns in construction, improvement and repair of highways, compliance by counties and towns with conditions of such sections does not ripen into a contract with state and thereby require mandatory payments of contributions, since contrary construction would violate constitutional principle that one Legislature cannot limit the powers of subsequent Legislatures. Seneca County v. State, 1942, 47 N.Y.S.2d 687.

14. Tax credits and exclusions

Where the comptroller, acting under the authority of Laws 1889, c. 463, has readjusted the franchise tax of a corporation and has allowed the corporation a credit on its amount for excess taxes already paid, a second corporation to which a portion of that credit has been assigned is not entitled to have the comptroller apply the portion of the credit by it required to the payment of its taxes. "These taxes are payable to the treasurer of the state, and if the credit transferred to the relator becomes operative as a payment, taxes to that amount are diverted from the treasury for the purpose of the payment of a claim against the state held by the relator as the assignee of the Panama Company. This operates indirectly, through the act of the comptroller in transferring the credit, as a payment of a claim which the comptroller had no right directly to pay. He had no right to draw a warrant on the treasury for its payment, and no money could be paid out of the treasury except in pursuance of an appropriation by law." People v. Roberts, 1898, 30 A.D. 78, 51 N.Y.S. 747, affirmed 156 N.Y. 693, 51 N.E. 1093. See, also, People v. Wemple, 1892, 133 N.Y. 617, 30 N.E. 1002.

Laws 1926, c. 543, excluding stock dividends from computation as income under Tax Law, § 350, and declaring it retroactive, was not violative of this section, prohibiting money from being paid out except in pursuance of appropriation, especially in view of Tax Law § 382, and section 373, subd. 3, as added by Laws 1926, c. 329, § 3. People ex rel. Clark v. Gilchrist et al., State Tax Commission, 1926, 243 N.Y. 173, 153 N.E. 39.

§ 8. [Gift or loan of state credit or money prohibited; exceptions for enumerated purposes]

1. The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational, mental health or mental retardation purposes.

2. Subject to the limitations on indebtedness and taxation, nothing in this constitution contained shall prevent the legislature from providing for the aid, care and support of the needy directly or through subdivisions of the state; or for the protection by insurance or otherwise, against the hazards of unemploy-

ment, sickness and old age; or for the education and support of the blind, the deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the mentally retarded or juvenile delinquents as it may deem proper; or for health and welfare services for all children, either directly or through subdivisions of the state, including school districts; or for the aid, care and support of neglected and dependent children and of the needy sick, through agencies and institutions authorized by the state board of social welfare or other state department having the power of inspection thereof, by payments made on a per capita basis directly or through the subdivisions of the state; or for the increase in the amount of pensions of any member of a retirement system of the state, or of a subdivision of the state; or for an increase in the amount of pensions of any widow of a retired member of a teachers' retirement system of the state or of a subdivision of the state to whom payable as beneficiary under an optional settlement in connection with the pension of such member. The enumeration of legislative powers in this paragraph shall not be taken to diminish any power of the legislature hitherto existing.

3. Nothing in this constitution contained shall prevent the legislature from authorizing the loan of the money of the state to a public corporation to be organized for the purpose of making loans to non-profit corporations to finance the construction of new industrial or manufacturing plants in this state or the acquisition, rehabilitation or improvement of former industrial or manufacturing plants in this state, including the acquisition of real property therefor, and the use of such money by such public corporation for such purposes, to improve employment opportunities in any area of the state, provided, however, that any loan by such public corporation shall not exceed thirty per centum of the cost of any such project and the repayment of which shall be secured by a mortgage thereon which shall not be a junior incumbrance thereon by more than fifty per centum of such cost.

Formerly § 1, renumbered 8 and amended Nov. 8, 1938; Nov. 6, 1951; Nov. 7, 1961; Nov. 8, 1966, eff. Jan. 1, 1967.

Historical Note

The 1951 amendment authorized the legislature to provide for increases in pensions of members of retirement systems of the state or its subdivisions.

The 1961 amendment added subdivision 3.

The 1966 amendment provided that the legislature's power to authorize the loan of money of the state to a public corporation for the purpose of making secured loans to non-profit corporations to finance construction of new industrial or manufacturing plants in this state or the acquisition, rehabilitation or improvement of former industrial or manufacturing plants in this state shall be extended so as to provide improved employment opportunities in any area of the state, rather than only in areas of the state where unemployment is or may become a critical problem; empower the legislature to provide for the education and support of the mentally ill, the emotionally disturbed, and the mentally retarded, and provide that the legislature may increase the amount of the pension payable under an optional settlement to the widow of a retired member of a teachers' retirement system of the state or of a subdivision of the state.

Derivation. Const.1894, Art. 7, § 1, and Art. 8, § 9. Said section 1 was from Const.1846, Art. 7, § 9. Said section 9 was from Const.1846, Art. 7, § 9, as amended in 1874, Art. 8, § 10.

Former Art. 8, § 8. Section is now covered by Art. 15, §§ 1 and 2.

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1. Retroactive effect

Former section 1 was prospective in its operation; and where the credit of the state was loaned before its adoption, a statute extending that

credit in accordance with a provision of the original loan was not unconstitutional. Thus, Laws 1840, c. 193, authorized the sale, by and for the benefit of the Long Island railroad, of certificates secured by the state and reimbursable at its pleasure at any time after twenty years from the issue thereof. Under that statute the certificates did not automatically fall due twenty years from the date of their issue. Payment could not be demanded until the legislature should fix the date thereof. Wherefore, Laws 1858, c. 36, deferring payment until fifteen years after the expiration of the twenty years provided for, was valid. People v. Denniston, 1861, 23 N.Y. 247.

2. Legislature, power of

Legislature alone has power to determine when state's credit or moneys shall be used to promote public welfare or convenience. Ausable Chasm Co. v. State, 1935, 266 N.Y. 326, 194 N.E. 843.

3. Funds within section—Generally

As subdivision (8) of section 294 of the Agricultural and Markets Law declares that funds raised under a marketing order are not state funds, and as they are raised from special class by assessment for special purpose, distribution to private corporations and payment for services rendered is not a violation of this section. Wickham v. Trapani, 1963, 41 Misc.2d 749, 246 N.Y.S.2d 137, affirmed 26 A.D.2d 216, 272 N.Y.S.2d 6.

4. —— Fines and penalties

Penalties and fines collected under former article 16 of the Penal Law [now article 26 of the Agriculture and Markets Law] upon conviction of cruelty to animals were not public moneys within the meaning of former sections 9 and 10 of article 8. American Society, etc. v. New York, 1923, 205 A.D. 335, 199 N.Y.S. 728.

5. —— License fees

License fees were moneys of the state within the purview of former section 9 of Article 8. Wherefore, Laws 1896, c. 445, allowing the societies for the prevention of cruelty to animals incorporated in cities of a specified population to collect license fees of every person owning or harboring a dog therein and to appropriate to their purposes the funds so realized, was a gift of money to a private association in violation of former section 9 of Article 8 or of former section 10 of Article 8, dependent on whether the funds were regarded as the property of the state or of the municipality. Fox v. Mohawk, etc., Humane Soc., 1901, 165 N.Y. 517, 59 N.E. 353.

6. —— Local funds

The prohibition of former section 9 of Article 8 against the gift or loan of state money had "reference to money raised by general taxation throughout the state, or revenues of the state or moneys otherwise belonging in the state treasury or payable out of it . . . and not to money raised by ordinary local taxation for local purposes, and to be disbursed by the local authorities." Thus, Laws 1871, c. 269, § 3, directing the board of supervisors of the county of New York to raise the sum of $5,000 by means of a tax on the property in the city and county of New York and to pay that sum to a certain charitable corporation named therein, was not unconstitutional thereunder. The money so appropriated was not money of the state, nor was it made such by reason of the circumstance that it was raised by the county supervisors pursuant to legislative enactment. Shepherd's Fold of Protestant Church v. New York, 1884, 96 N.Y. 137.

The legislature may, pursuant to this section, authorize and/or require the use of local public moneys to provide increases in the pensions of retired public employees of the localities. 1952, Op.Atty.Gen., January 29.

7. Corporations and associations within section—Generally

Construction of a power line by the state to replace a power line of a private utility to serve the New York State Rangers School, Syracuse University, and private customers would

result in expending state moneys for the benefit of a private corporation in violation of this section. 1947, Op.Atty.Gen. 195.

The advancement of money under Laws 1920, c. 901, to the American Seamen's Friend Society did not violate former section 9 of Article 8, if made in accordance with the terms of Laws 1840, c. 173, and Laws 1845, c. 37. 1920, Op.Atty.Gen., 24 St. Dept.Rep. 608.

8. —— Governmental agencies

Apparently, except in certain exceptional cases, the legislature may not invest a private corporation or association with governmental powers affecting the life, liberty and property of the citizens of the state, and thereby justify an appropriation of public money to such corporation or association. Stating that conclusion, Mr. Judge Cullen said: "If it were necessary for the disposition of this case, agreeing with the view of the learned appellate division, I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty and property of the citizens, except that of eminent domain, to be exercised for a public purpose and the management and control of reformatory institutions to which persons may be committed by the judicial or other public authorities. There may be other exceptions, but they do not occur to me. Of course, the state or any of its subdivisions may employ individuals or corporations to do work or render service for it; but the distinction between a public officer and a public employee or contractor is plain and well recognized." Fox v. Mohawk, etc., Humane Soc., 1901, 165 N.Y. 517, 59 N.E. 353.

The Industrial Exhibit Authority, being a governmental agency and not in the class of corporations to which the money and credit of the State might not be given or loaned, had power to pledge to the Federal Emergency Administration of Public Works as security for a loan, such portion of the gate and grandstand receipts of the State Fair as might be allotted to it by agreement entered into with the Commissioner of Agriculture and Markets. 1935, Op.Atty. Gen. 344.

9. —— Political subdivisions

A county was not a "corporation" within the meaning of former section 9 of Article 8. Thus, Laws 1885, c. 428, validating the claim of Cayuga county for expenses incurred by it in the prosecution of certain criminal acts was not violative of that provision. Cayuga County v. State, 1897, 153 N.Y. 279, 47 N.E. 288.

10. Incumbrances, computation of

Obligation to pay rent under lease constitutes prior incumbrance upon project to which the New York Job Development Authority's incumbrance would be junior and must be included in computation of amount of such prior incumbrances. 1965, Op. Atty.Gen., Dec. 23.

11. Bonus to soldiers and sailors

Laws 1920, c. 872, providing for the payment of a bonus to residents of New York who served in the military or naval service of the United States at any time between April 6, 1917, and November 11, 1918, promotes the public welfare and is not objectionable on the theory that it appropriates public moneys for other than a public purpose. But it violated former section 1 by providing that the money to pay the bonus should be obtained from the sale of bonds of the state; for that constituted a gift of the state's credit, as the bonus was but a gratuity and not the payment of an equitable or moral obligation. People v. Westchester County Nat. Bank, 1921, 231 N.Y. 465, 132 N.E. 241.

12. Bridge construction

Laws 1903, c. 147, providing for the construction of the Barge canal was not unconstitutional because the state therein assumed for itself the cost and expense of raising and rebuilding bridges previously erected by railroad corporations over streams canalized, where the raising and re-

building of the bridges was necessitated by the improvements made in such streams for the canal. Lehigh Val. R. Co. v. Canal Board, 1912, 204 N.Y. 471, 97 N.E. 964.

Laws 1933, c. 368, authorizing Court of Claims to hear and determine claims of persons expending moneys for construction of bridge over river between two sections of state highway, constructed when former Highway Law § 250 left to towns duty and expense of constructing highway bridges, was invalid. Ausable Chasm Co. v. State, 1935, 266 N.Y. 326, 194 N.E. 843. See, also, Ausable Chasm Co. v. State, 1934, 49 St.Dept. 451.

13. Child care

Maintenance of a child care project in a parochial school or religious school building with funds appropriated by L.1943, c. 196, violates this section. 1943, Op.Atty.Gen. 118.

14. Compensation for services—Generally

Agriculture and Markets Commissioner's use of funds collected from assessments to pay apple growers' associations for services performed under contracts with him were not unconstitutional gifts of state funds. Wickham v. Trapani, 1966, 26 A.D.2d 216, 272 N.Y.S.2d 6.

15. —— Constitutional convention delegates

Even if Legislature had passed enabling act empowering Court of Claims to hear and determine claim by constitutional convention delegate for difference between amount he was paid for the 72 days he served as delegate during 176-day convention session and the annual salary payable to delegates working the full 176 days, such an act would have violated prohibition of this section against gift or loan of state credit or money except for enumerated purposes. Rice v. State, 1968, 55 Misc.2d 964, 287 N.Y.S.2d 263.

Requested payment to constitutional convention delegate for days in which he was neither qualified as a delegate nor discharged duties of one would be objectionable as a "gift" within prohibition of this section against gift of state credit or money except for enumerated purposes. Id.

16. —— Dual compensation

A newspaper designated as a state paper under Laws 1863, c. 248, as amended, and also designated as a county paper pursuant to Laws 1892, c. 686, as amended, for the purpose of publishing the Session Laws, was not entitled to compensation for publishing the laws under both designations where, as a matter of fact, there was but a single publication. Compensation under both designations in such a case would fall within the prohibition of former sections 9 and 10 of Article 8. People v. Journal Co., 1913, 158 A.D. 326, 143 N.Y.S. 389.

17. —— Gratuities

Officers and employees of the State may be reimbursed for reasonable tips paid out by them for services rendered to them while traveling on official business. 1959, Op.Atty. Gen. 48.

Tips, fees, and gratuities could not be audited by the comptroller as payment thereof was in violation of former section 9 of Article 8. 1931, Op.Atty.Gen. 177.

18. —— Prison chaplains

The payment of a chaplain for the conduct of religious ceremonies in a prison or reformatory does not come within meaning of constitutional provision prohibiting use of property or credit or any public money directly or indirectly in aid or maintenance of any school or institution of learning, since neither "prison" nor "reformatory" is a "school" or "institution of learning" within meaning of Constitution. People ex rel. New York League for Separation of Church and State v. Lyons, 1940, 173 Misc. 821, 21 N.Y.S.2d 250.

19. Contract price increases

Laws 1923, c. 821, which authorized the Court of Claims to hear and determine a contractor's claim for increased cost of construction due to delay of another contractor ran counter to former section 9 of article 8. A. B. Barr & Co., Inc. v. State, 1926, 127 Misc. 75, 215 N.Y.S. 313.

The Knight Act, Laws 1919, c. 459, providing for the cancellation on the application of the contractor of war contracts theretofore executed by the state commission of highways and the waiver of any and all claims against the state for damages and anticipated profits, accompanied by waiver and release by the surety of any uncollected premiums on the contractor's bond, and making provision for compensating the contractor for work done under the contract before its cancellation, and conferring jurisdiction on the Court of Claims to hear all claims for alleged increase in the cost of labor, materials and transportation and to determine the increased cost whether the whole or a part which is properly chargeable against the state and such portion, if any, which may be paid by any subdivision of the state, and to render judgment against the state for the sum so determined, but not for a greater amount than a certain per cent of the contract price, is constitutional and valid. The provision in such act conferring jurisdiction on the Court of Clams to hear all claims for alleged increase in the cost, as to contracts which have been completed, and for which final payment has been made, if unconstitutional and void, does not invalidate the provisions in reference to uncompleted contracts. Gordon v. State, 1921, 196 A.D. 589, 190 N.Y.S. 107.

20. Conviction, claims for

Laws 1946, c. 1, giving Court of Claims jurisdiction to determine named person's claim against state for damages resulting from his erroneous conviction and imprisonment for forgery, did not contravene Art. 3, § 1, prohibiting Legislature from auditing or allowing private claims or accounts against state, or this section. Campbell v. State, 1946, 186 Misc. 586, 62 N.Y.S.2d 638.

21. Death of National Guard member

An enabling act, Laws 1918, c. 611, is invalid which provides for the payment of damages to the widow and child of a member of the National Guard for his death, which was caused by his own negligence in being drawn up from the floor of the armory to the balcony, by means of a block and fall, in clear violation of his duties as a soldier, for such payment would constitute a pure gift in violation of the Constitution; the legislature cannot direct the payment of a claim where there is no legal or moral obligation against the state. Lewis v. State, 1921, 197 A.D. 712, 189 N.Y.S. 560, affirmed 234 N.Y. 587, 138 N.E. 457.

22. Deposit of funds with state

Laws 1866, c. 576, authorizing the North American Life Insurance Company to deposit with the superintendent of the insurance department a fund for the security of its registered policyholders, and the provisions of Laws 1869, c. 90 and of Laws 1867, c. 708, making similar provision for a special fund for the security of registered policyholders, were not violative of former section 1. "The credit of the state was not given or loaned by these acts. It simply became the custodian of the securities deposited with it. It incurred or assumed no responsibility, except as a depositary. . . . It was never before supposed that the constitutional provision cited was intended to prohibit the assumption by the state of the responsibility imposed by such acts." Attorney-General v. North American Life Ins. Co., 1880, 82 N.Y. 172.

23. Educational purposes

Former section 9 of Article 8 permitted "the acceptance of public moneys or public property by a private corporation for educational or like purposes under contract with the state to render certain services," in connection therewith. People v. Brooklyn Cooperage Co., 1907, 187 N.Y. 142, 79 N.E. 866. See, also, Fox v. Mohawk, etc., Humane Soc., 1901, 165 N.Y. 517, 59 N.E. 353; Exempt Fire-

men's Benev. Fund v. Roome, 1883, 93 N.Y. 313.

Thus, Laws 1898, c. 122, authorizing the state, upon the acceptance by Cornell University of the provisions made therein, to acquire certain forest lands in the name of the university, vesting the title to those lands in that institution for a period of thirty years, and empowering it, during such period, to use the lands for the purpose of conducting experiments in forestry with a view to obtaining and imparting information concerning the scientific management of forests, was not violative of former section 9 of Article 8. The university, in conducting the forestry experiments, was a subordinate governmental agency, discharging under contract a public function looking to the conservation of the forests of the state. The legislature might properly allow it compensation for those services. People v. Brooklyn Cooperage Co., 1907, 187 N.Y. 142, 79 N.E. 866.

The New York Higher Education Assistance Corporation is a public corporation and Legislature may appropriate state moneys to be used by the Corporation for purpose of establishing a reserve fund as collateral to secure loans made to corporation. 1958, Op.Atty.Gen. 174.

Legislature may create a fund to be loaned through the agency of the New York Higher Education Assistance Corporation to college students for furtherance of their education. Id.

Five hundred thousand dollar appropriation to New York Higher Education Assistance Corporation may be paid to such corporation in lump sums and not on the basis of vouchers for actual loans to students, guarantees of loans to students and operating expenses. 1958, Op.Atty. Gen. 145.

The State may legally construct a building upon land of a private corporation organized for the purpose of and engaged in the instruction of deaf mutes, under an agreement containing a reversionary clause to the effect that the building and the land on which it was erected would revert to the state in case it no longer was used for the instruction of the deaf. 1945, Op.Atty.Gen. 194.

The Legislature may constitutionally appropriate funds to repair or contribute to the repair of damages to the school buildings and equipment of school districts caused by a disastrous flood. 1942, Op.Atty.Gen. 319.

Where a co-operative corporation is formed to purchase school supplies for its various school members, State moneys may not be appropriated and paid to such corporation to accomplish such purpose. 2 Op.State Compt. 454, 1946.

Moneys utilized by the board of education to pay for an annuity is considered to be a part of the salary being paid to the teacher. Op.Educ. Dept., 1963, 2 Educ.Dept.Rep. 522.

24. Eminent domain payments

Since owners of property abutting a street had an easement therein which under the provisions of the state and federal constitutions could not be invaded unless compensation was made, Laws 1901, c. 729, authorizing the Court of Claims to award damages, to be paid by the state, to the owners of property abutting on Fourth Avenue in the city of New York, for injuries caused by a change effected by the state in the grade of a viaduct in that avenue, was not unconstitutional under former section 9 of Article 8. Sander v. State, 1903, 182 N.Y. 400, 75 N.E. 234.

Legislature has power to pass an enabling act sanctioning the allowance of a private claim for the appropriation of land. Frankfater v. State, 1967, 54 Misc.2d 159, 282 N.Y.S.2d 339.

Payment of interest on claims arising from appropriation of real property is a proper expenditure of State funds. 1962, Op.Atty.Gen. 20.

25. Employees loaned to localities

The loaning of employees by the Conservation Department to a county clerk to assist in the performance of the duties imposed on him by former subdivision 5 of section 185 of the Conservation Law relative to the issuance of licenses for taking of antlerless deer does not constitute a violation of this section. 1943, Op.Atty. Gen. 214.

26. Federal food and fuel administration

Moneys of state might be used for federal food and fuel administration. 1917, Op.Atty.Gen., 14 St.Dept.Rep. 498.

27. Federal funds, loans by state

A state agency may grant to nonprofit private agencies moneys allotted to it by the federal government in lump sum and not on a per capita basis, if appropriate legislation is enacted by the state keeping the federal moneys in a separate fund outside the State Treasury. 1946, Op.Atty. Gen. 95.

28. Flood control

Where the subject of Laws 1915, c. 717, as expressed in its title, was the control and restraint of the waters of the Allegany river and Olean creek in the city of Olean by acquiring lands for such purpose, and the way and manner such subject was to be treated, handled and made effective, it was violative of former section 9 of Article 8, in that it gave money of the state to the city of Olean for a private undertaking. Flood Abatement Commission v. Merritt, 1916, 94 Misc. 388, 158 N.Y.S. 289.

29. Highways—Construction

Claim of county of Westchester for relief from its burden of taxation and overhanging debt from the construction of parkways which were declared to be public highways was a claim "founded on equity and justice" so as to exclude application of provision of this section prohibiting gift or loan of money or credit of state, particularly in view of state's policy of constructing its state-wide highways at its own expense and where plan for relief would cause state no financial loss. Bogart v. Westchester County, 1945, 185 Misc. 561, 57 N.Y.S.2d 506, affirmed 270 A.D. 274, 59 N.Y.S.2d 77, appeal denied 295 N.Y. 934, 68 N.E.2d 36, appeal dismissed 296 N.Y. 701, 70 N.E. 2d 531.

The state can, without expectation of compensation from county, repay previous conditional grant of federal aid for county parkway construction or can make a gift to federal government, and, irrespective of such repayment or gift, can refund moneys expended by county for parkways. Bogart v. Westchester County, 1945, 270 A.D. 274, 59 N.Y.S.2d 77, appeal denied 295 N.Y. 934, 68 N.E.2d 36.

30. —— Toll collection

Laws 1945, c. 594, authorizing county of Westchester to collect tolls on certain parkways built by county with some federal aid, providing for repayment to federal government of such aid by application by state of such sums on other federal aid projects in the state, with further provision for repayment to state by county, is not unconstitutional as a gift or loan of money or credit of the state to county or private or public corporation. Bogart v. Westchester County, 1945, 185 Misc. 561, 57 N.Y. S.2d 506, affirmed 270 A.D. 274, 59 N.Y.S.2d 77, appeal denied 295 N.Y. 934, 68 N.E.2d 36, appeal dismissed 296 N.Y. 701, 70 N.E.2d 531.

31. Investment of funds

If authorized by the Legislature, the Comptroller may invest sums not exceeding 20% of the assets of the New York State Employees' Retirement System in certain obligations of private corporations. 1959, Op.Atty. Gen. 40.

A law may be enacted pursuant to this section authorizing the comptroller to invest funds of the New York State Employees' Retirement System in contract obligations issued by the Federal Administrator of General Services under 40 U.S.C.A. § 356. 1958, Op.Atty.Gen. 144.

Investment of New York State Employees' Retirement System moneys

in ship mortgage bonds under Title 11 of the federal Merchant Marine Act. 46 U.S.C.A. § 1271 et seq., is constitutional under this section. 1957, Op.Atty.Gen. 176.

32. Jurisdictional grants to Court of Claims

The Legislature may not make a gift of the moneys of the state, nor itself audit or allow a private claim against the state, but may recognize private claims, which, though unenforceable through the application of legal principles, are founded on equity and justice, and may empower the Court of Claims to audit and allow them. Agnew v. State, 1938, 166 Misc. 602, 2 N.Y.S.2d 954. See, also, Bogart v. Westchester County, 1945, 185 Misc. 561, 57 N.Y.S.2d 506, affirmed 270 A.D. 274, 59 N.Y.S.2d 77, appeal denied 295 N.Y. 934, 68 N.E.2d 36, appeal dismissed 296 N.Y. 701, 70 N.E.2d 531; Mowers v. State, 1938, 168 Misc. 651, 6 N.Y.S.2d 408.

Laws 1915, c. 658, authorizing the Court of Claims to hear and determine the claim of a state employee for which the state would not otherwise be liable did not give or loan money or credit of the state "to or in aid of any association, corporation or private undertaking" in violation of former section 9 of Article 8. Munro v. State, 1918, 223 N.Y. 208, 119 N.E. 444.

Under this section prohibiting gift or loan of state credit or money except for enumerated purposes, Legislature may pass enabling act empowering Court of Claims to hear and determine a claim as directed, in event of a moral obligation. Rice v. State, 1968, 55 Misc.2d 964, 287 N.Y.S.2d 263.

Act granting Court of Claims jurisdiction to hear claim of a named claimant for alleged negligence of a national guardsman did not violate provision of this section that state money shall not be given in aid of any individual. Barish v. State, 1950, 197 Misc. 909, 96 N.Y.S.2d 342.

A judgment denying recovery for injuries sustained by state normal school student in jumping from window of burning building was not res judicata of the right to recover therefor under Laws 1934, c. 780, subsequently enacted, which conferred jurisdiction on the Court of Claims to hear, audit, and determine the matter, and removed the legal objections that defeated recovery under initial authorization. Agnew v. State, 1938, 166 Misc.2d 602, 2 N.Y.S.2d 954.

Laws 1934, c. 780, authorizing the recovery of damages for injuries sustained by state normal school student in jumping from window of burning building upon proof of failure by the state to exercise ordinary care was not unconstitutional as a "gift" or "allowance of a claim," notwithstanding that purpose and effect of authorization was to remove the obstacles to recovery upon which a denial of recovery under previous statute was based. Id.

33. Litigation expenses of public officers and employees

Laws 1928, c. 772, conferring jurisdiction upon the Court of Claims to audit and determine "the claim of any judge or judges of the Court of General Sessions of the county of New York for counsel fees and expenses incurred by him or them in successfully defending any action or proceeding heretofore brought against him or them by reason of any act, decision or judgment arising out of his or their judicial duties since nineteen hundred and twenty," and providing that upon a finding that such an action or proceeding had been brought and had been finally determined in favor of the judge or judges, there was to be a judgment against the state "for such sum as shall be just and equitable," not exceeding an amount stated, is too broad to be upheld. The jurisdiction of the Court of Claims is not limited by the statute to the allowance of claims rooted in morality and conscience. Rosalsky v. State, 1930, 254 N.Y. 117, 172 N.E. 261.

Where a Member of Assembly, properly held for committing criminal libel, was unjustifiably discharged on habeas corpus, there was no legal, equitable or moral obligation on the part of the State to reimburse him for the expense he incurred in defending himself, and Laws 1927, c. 711, conferring upon the Court of Claims jurisdiction to hear and determine a claim for such expenses was violative of former section 9 of Article 8 and void. Cuvillier v. State, 1929, 250 N.Y. 258, 165 N.E. 284, affirmed 132 Misc. 182, 229 N.Y.S. 235.

Laws 1927, c. 716, authorizing the Court of Claims, if it finds that plaintiff herein was illegally discharged from his position in the office of the state comptroller and reinstated by legal proceedings, to make an award and render judgment against the state for his counsel fees, expenses and disbursements incurred in securing such reinstatement, is constitutional. It was well within the power of the legislature to declare that the state was morally obligated to make requital for the financial loss occasioned claimant by his illegal discharge. Farrington v. State, 1928, 248 N.Y. 112, 161 N.E. 438.

Laws 1929, c. 475, under which was filed a claim for counsel fees and expenses incurred by city magistrate in successfully defending a charge of publishing a libel involving a public officer was contrary to former section 9 of Article 8, since no obligation, legal, moral, or equitable, existed on the part of the state toward the claimant, the publication being his personal act. Corrigan v. State, 1931, 142 Misc. 160, 254 N.Y.S. 146, affirmed 236 A.D. 752, 258 N.Y.S. 975, affirmed 260 N.Y. 645, 184 N.E. 129.

34. Moral and equitable claims

The rule formerly obtained that the legislature was not confined in its appropriations of state funds in favor of individuals to cases wherein a demand valid in law existed against the state, but that it could recognize and allow claims founded in equity, gratitude, or charity. That doctrine was abrogated in 1875 by the adoption of the predecessor of this section. The legislature then no longer competent to a[ppro]priate state funds to charity, where specifically allowed to d[o so] by the constitution; nor could any case justify an appropriati[on for] private purposes on consideratio[n of] gratitude. It was, however, well [set]tled that the legislature could d[irect] the payment of claims founded i[n eq]uity and justice, even though [they] would not be enforceable in a c[ourt] of law if the state were not imm[une] from suit. Lehigh Val. R. C[o. v.] Canal Board, 1912, 204 N.Y. 47[1, 97] N.E. 964. See, also, Cayuga Co[unty] v. State, 1897, 153 N.Y. 279, 47 [N.E.] 288; O'Hara v. State, 1889, 112 [N.Y.] 146, 19 N.E. 659; Cole v. State, [1886,] 102 N.Y. 48, 6 N.E. 277; Ex[empt] Firemen's Benev. Fund v. Ro[ome,] 1883, 93 N.Y. 313; Wheeler v. S[tate,] 1904, 97 A.D. 276, 90 N.Y.S. 18; [Peo]ple v. Miller, 1903, 85 A.D. 14[7,] N.Y.S. 559, affirmed 181 N.Y. 43[9,] N.E. 477; American Bank Note [Co.] v. State, 1901, 64 A.D. 223, 71 N.[Y.S.] 1049.

To justify Legislature in reco[gniz]ing claim against state as base[d on] moral obligation or founded on [jus]tice and equity, obligation w[hich] would be recognized by men [with] keen sense of honor and real d[esire] to act fairly and equitably wit[hout] compulsion of law must exist. A[usa]ble Chasm Co. v. State, 1935, 26[6 N.]Y. 326, 194 N.E. 843.

Individual, impelled by expecta[tion] of personal profit or sense of pu[blic] spirit or of charity to provide f[rom] his own resources for public [need] for which Legislature has negle[cted] or refused to provide, imposes [no] moral obligation on state to re[imburse] him, as required to authorize Legi[sla]ture to recognize his claim for re[im]bursement. Id.

Legislature's decision that cer[tain] facts create moral obligation, re[quir]ing recognition of claim aga[inst] state, is not conclusive, courts b[eing] called on to decide whether Legi[sla]ture's judgment was correct [and] whether it intruded into broader [field] than that of moral obligations [left] open by constitutional limitation [on] its power. Id.

Former section 9 of Article 8 did not prohibit Legislature from doing in state's behalf what fine sense of justice and equity would dictate to honorable individual, but prohibited it from doing what only sense of gratitude or charity might impel generous individual to do. Id.

Exceptions to prohibition of this section against gift or loan of state credit or money refer, inter alia, to allowing Legislature to determine when there is moral obligation and providing manner in which the obligation may be met. Rice v. State, 1968, 55 Misc.2d 964, 287 N.Y.S.2d 263.

Constitutional provision that neither the money nor credit of the state shall be given or loaned to or in aid of an individual or public or private corporation or association or private undertaking does not prevent the Legislature from recognizing claims against the state founded on equity and justice. Frankfater v. State, 1967, 54 Misc.2d 159, 282 N.Y.S.2d 339.

While Legislature may not sanction a gift of public monies for private purposes, it may acknowledge justice of private claim against state and provide for its allowance by Court of Claims, providing that claim appears to belong to class of claims concerning which, in exercise of wide discretion, the Legislature might reasonably say are founded in equity and justice and involve moral obligations upon part of the state which the state should satisfy. Id.

Decision by Legislature that certain facts create a moral obligation upon the state which the state should satisfy is not conclusive upon Court of Claims. Id.

While the Legislature may not sanction a gift of public moneys for private purposes, it may acknowledge justice of private claim against the state and provide for audit and allowance thereof by Court of Claims if claim appears to judicial mind and conscience to be one which Legislature, in exercise of a wide discretion, may reasonably say is founded in equity and justice and involves moral obligations which state should satisfy. Campbell v. State, 1946, 186 Misc. 586, 62 N.Y.S.2d 638.

The Legislature has a wide discretion as to the conditions upon which it will recognize a claim which is founded in equity and justice. Agnew v. State, 1938, 166 Misc. 602, 2 N.Y.S.2d 954.

The Legislature did not exceed its authority by the enactment of Laws 1932, c. 370, by which jurisdiction was conferred on the Court of Claims to determine the claim of Syracuse against the state for local improvement assessments and to make an award therefor. The recognition of the moral obligation of the state represented by the assessments rests within the power of the Legislature. Syracuse v. State of New York, 1933, 147 Misc. 319, 263 N.Y.S. 810.

35. Pensions

Laws 1877, c. 64 and Laws 1879, c. 80, appropriating public funds to the use of retired volunteer firemen in the city of New York are not open to criticism as making appropriations in violation of this section, although the volunteer fire department of that city had been supplanted by a paid organization styled the Metropolitan Fire Department. Those funds are granted in lieu of certain exemptions and grants made to induce membership in the volunteer fire department. Good faith demands their continuation or the allowance of an equivalent. "The constitutional provision was not intended and should not be construed to make impossible the performance of an honorable obligation founded upon a public service, invited by the state, adopted as its agency for doing its work, and induced by exemptions and rewards which good faith and justice require should last so long as the occasion demands." Exempt Firemen's Benev. Fund v. Roome, 1883, 93 N.Y. 313.

"It is strenuously contended that however the payment might be construed while the firemen were a public body and doing a public duty, the appropriation became purely a gift when made after the service ended,

and when there was no legal or equitable obligation operating upon the state. It is true that no promise to continue the appropriation had been given, and the state was at liberty to withhold it; but that does not alter the inherent character of the payment when made. If a merchant fails in business and compromises with his creditors for a part only of their debts, or is discharged in bankruptcy with a small dividend, and thereafter being fortunate and becoming rich, calls his old creditors together, and gives to each principal and interest of the discharged balance, he does what he is not obliged to do, what neither law nor equity could compel, but he does not make a gift or dispense a charity. A purely moral obligation rests upon him, which he may or may not heed, but if he does, it characterizes his act, and makes that an honest payment of an honest debt which otherwise would have been a charity and a gift. So the state, in continuing the appropriation to the firemen when their services were no longer required, recognized an honorable obligation founded upon their past services and the injuries and suffering which those had occasioned." Id.

36. Prison chapels, erection of

The erection of chapels of a particular religious denomination by prison labor volunteered in the Clinton Prison and the Elmira State Reformatory, upon funds and materials being supplied through gifts of such denomination, was in keeping with the freedom of worship as expressed in the constitution, and did not violate constitutional provision forbidding use of state funds for anything but state purposes. People ex rel. New York League for Separation of Church and State v. Lyons, 1940, 173 Misc. 821, 21 N.Y.S.2d 250.

37. Public works costs

Statutes regulating the wages or personnel of those employed on public works were not invalid under former section 9 of Article 8 because of the circumstance that, either directly or indirectly, they enhanced the cost of works undertaken by the state. The enhancement in cost caused by such regulations was not a gift of state funds. People v. Crane, 1915, 214 N.Y. 154, 108 N.E. 427. See, also, People v. Metz, 1908, 193 N.Y. 148, 85 N.E. 1070; Ryan v. New York, 1904, 177 N.Y. 271, 69 N.E. 599.

The exclusion under the Labor Law of aliens from employment on public works was not a violation of former section 9 of Article 8 on the theory that discrimination between citizens and aliens might increase the cost of public works by limiting the supply of labor. "The money that goes to laborers on public works is not given or loaned in aid of individuals within the meaning of these provisions. It is paid for service rendered. That is the direct and primary purpose of the payment. The primary and direct purpose being legal, the payment does not become illegal because a collateral and secondary purpose may be to protect a large class of the community against the peril of pauperism. In the long run, the payment may be found to have lessened the public burdens rather than to have increased them." People v. Crane, 1915, 214 N.Y. 154, 108 N.E. 427.

38. Railroad improvements

Sections 62–66 of the Railroad Law of 1890 [now sections 91–95 of the Railroad Law] authorizing the public service commission to compel a railroad to eliminate dangerous grade crossings and imposing a proportion of the cost thereof upon the state and the village wherein the change was made, were not obnoxious to former section 9 of article 8. Matter of New York Cent., etc., R. Co., 1910, 136 A.D. 760, 121 N.Y.S. 524. See, also, Oswego, etc., R. Co. v. State, 1919, 226 N.Y. 351, 124 N.E. 8; Matter of Boston, etc., R. Co., 1901, 64 A.D. 257, 72 N.Y.S. 32.

Where Public Service Commission makes a determination as to inclusion of railroad improvements not an essential part of the elimination in the work shown on the plans at time of their approval, and the cost of the project is paid from other than grade crossing elimination bonds, the

itemized; therefore provision did not violate constitutional proscription against tacking nonbudgetary items onto budgetary appropriations. Schuyler v. South Mall Constructors, 1969, 32 A.D.2d 454, 303 N.Y.S.2d 901.

§ 7. [Appropriation bills]

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4. Funds of state

Expenditure or payment of monies, which were received by state from federal government and were contained in joint custody funds of state treasury, without there being an appropriation by state legislature, violated this section providing that no money was to be paid out of state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law. Anderson v. Regan, 1981, 107 Misc.2d 335, 437 N.Y.S.2d 912, reversed 80 A.D.2d 490, 439 N.Y.S.2d 776, reversed 53 N.Y.2d 356, 442 N.Y.S.2d 404, 425 N.E.2d 792.

State funds may not be expended in excess of amounts appropriated and for purposes other than those specified in appropriations bill, but once funds have been appropriated, it is then incumbent upon agency or department to expend such funds, within guidelines established by their respective enabling legislation and specific appropriation act. Oneida County v. Berle, 1977, 91 Misc.2d 694, 398 N.Y.S.2d 600, affirmed 411 N.Y.S.2d 884, modified on other grounds 49 N.Y.2d 515, 427 N.Y.S.2d 407, 404 N.E.2d 133.

4a. Federal funds

Under this section providing that no "money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law," federal funds which are received by the state and placed in a joint custody account within the state treasury must be appropriated by the legislature before they may be disbursed by the executive department. Anderson v. Regan, 1981, 53 N.Y.2d 356, 442 N.Y.S.2d 404, 425 N.E.2d 792.

15. Transfer of funds

Dollar amount set forth in an item of the budget or the total dollar amount set forth with respect to a program is obviously intended by the Constitution to be a ceiling on the expenditures for such item or program, so that Director of the Budget has no power to transfer funds between programs and departments. Posner v. Rockefeller, 1969, 60 Misc. 2d 597, 304 N.Y.S.2d 28.

16. Legality of budget

Neither this section which specifies that no money may be paid out by state except in pursuance of an appropriation by law nor Const. Art. 5, § 1, imposing certain duties upon state comptroller compel comptroller to institute a declaratory judgment action to test legality of the budget as adopted. Posner v. Levitt, 1971, 37 A.D.2d 331, 325 N.Y.S.2d 519.

17. Wages of State employees

Issuance of scrip to "pay" State employees their earnings is not advisable. Op.Atty.Gen. 82-F1.

18. Compulsion of appropriations

Mandamus is available to compel making of appropriations by bodies inferior to State Legislature, but it cannot coerce appropriations from latter. State Div. of Human Rights on Complaint of Geraci v. New York State Dept. of Correctional Services, 1982, 90 A.D.2d 51, 456 N.Y.S.2d 63.

§ 8. [Gift or loan of state credit on money prohibited; exceptions for enumerated purposes]

[See main volume for text of 1]

2. Subject to the limitations on indebtedness and taxation, nothing in this constitution contained shall prevent the legislature from providing for the aid, care and support of the needy directly or through subdivisions of the state; or for the protection by insurance or otherwise, against the hazards of unemployment, sickness and old age; or for the education and support of the blind, the deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the mentally retarded or juvenile delinquents as it may deem proper; or for health and welfare services for all children, either directly or through subdivisions of the state, including school districts; or for the aid, care and support of neglected and dependent children and of the needy sick, through agencies and institutions authorized by the state board of social welfare or other state department having the power of inspection thereof, by payments made on a per capita basis directly or through the subdivisions of the state; or for the increase in the amount of pensions of any member of a retirement system of the state, or of a subdivision of the state; or for an increase in 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 to whom payable as beneficiary under an optional settlement in connection with the pension of such member. The enumeration of legislative powers in this paragraph shall not be taken to diminish any power of the legislature hitherto existing.

3. Nothing in this constitution contained shall prevent the legislature from authorizing the loan of the money of the state to a public corporation to be organized for the purpose of making loans to non-profit corporations or for the purpose of guaranteeing loans made by banking organizations, as that term shall be defined by the legislature, to finance the construction of new industrial or manufacturing plants, the construction of new buildings to be used for research and development, the construction of other eligible business facilities, and for the purchase of machinery and equipment related to such new industrial or manufacturing plants, research and development buildings, and other eligible business facilities in this state or the acquisition, rehabilitation or improvement of former or existing industrial or manufacturing plants, buildings to be used for research and development, other eligible business facilities, and machinery and equipment in this state, including the acquisition of real property therefor, and the use of such money by such public corporation for such purposes, to improve employment opportunities in any area of the state, provided, however, that any such plants, buildings or facilities or machinery and equipment therefor shall not be (i) primarily used in making retail sales of goods or services to customers who personally visit such facilities to obtain such goods or services of (ii) used primarily as a hotel, apartment house or other place of business which furnishes dwelling space or accommodations to either residents or transients, and provided further that any loan by such public corporation shall not exceed forty per centum of the cost of any such project and the repayment of which shall be secured by a mortgage thereon which shall not be a junior incumbrance thereon by more than fifty per centum of such cost or by a security interest if personalty, and that the amount of any guarantee of a loan made by a banking organization shall not exceed eighty per centum of the cost of any such project.

As amended Nov. 6, 1973, eff. Jan. 1, 1974; Nov. 8, 1977, eff. Jan. 1, 1978.

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A short constitutional history of entities commonly known as authorities. 56 Cornell L.R. 521 (1971).

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½. Purpose

This section prohibiting gifts of public funds was intended to curb raids on public purse for benefit of favored individuals or enterprises furnishing no corresponding benefit or consideration to state. Teachers Ass'n, Central High School Dist. No. 3 v. Board of Ed., Central High

School Dist. No. 3, Nassau County, 1970, 34 A.D.2d 351, 312 N.Y.S.2d 252.

2a. Gift or loan

Emergency Act of 1975, L.1975, cc. 868, 870, authorizing appropriation of specified amounts from local assistance fund as an advance to New York City for city purposes without requiring a borrowing by state to meet such appropriations involved a gift or loan of money and not of credit of state and thus did not violate this section prohibiting the giving or loaning of credit of state to or in aid of a public or private corporation. Wein v. State, 1975, 84 Misc. 2d 453, 375 N.Y.S.2d 509, affirmed 39 N.Y.2d 136, 383 N.Y.S.2d 225, 347 N.E.2d 586.

8. —— Governmental agencies

Prohibition in this section against a loan or gift of the state's credit is limited in application to aiding any individual, or public or private corporation or association, or private undertaking and, hence, does not extend to the State Insurance Fund which is a state agency rather than a corporate entity. Methodist Hosp. of Brooklyn v. State Ins. Fund, 1983, 117 Misc.2d 178, 459 N.Y.S.2d 521.

12. Bridge construction

Notwithstanding contention of violation of this section prohibiting the gift or loan of state monies to private corporations and despite absence of "take over" agreement, preliminary injunction, which would enjoin village from enforcing building code as it would apply to construction, under supervision of metropolitan transportation authority, of footbridge overpass connecting new high level platform that had passenger access facilities for commuter railroad, would be issued, in light of overriding considerations of the public interest and finding that certain agreement constituted an "arrangement" within specific language of section 1266(2) of the Public Authorities Law and thus that transportation authority was entitled to undertake such construction. Metropolitan Transp. Authority v. Village of Tuckahoe, 1971, 67 Misc.2d 895, 325 N.Y.S.2d 718, affirmed 38 A.D.2d 570, 328 N.Y.S.2d 615.

14. Compensation for services—Generally

Racing commission regulation requiring that thoroughbred horse owner pay annual fee of $100 to the Jockey Club, a private organization, in connection with registering racing [illegible] public money and was impermissible in view of this section providing that public money shall not be given in aid of any private corporation or association. Halpern v. Lomenzo, 1975, 81 Misc.2d 467, 367 N.Y.S.2d 653.

18a. —— State employees

While the issuance of scrip to "pay" State employees their net earnings would not constitute an unlawful contracting of State debt in violation of Const. Art. 7, § 11, nor an unlawful loan of the State's credit either to the State employees or to the bank in violation of this section, it would not be advisable to do so. Op.Atty.Gen. 82–F1.

23. Educational purposes

Funds used to operate and maintain facilities on campus of state university were funds held by the state for educational purposes and excepted from the general proscription against gifts of state funds; thus, president of the university did not make an illegal gift of state funds by authorizing the use of space in the student union to an approved nonprofit student activity. Cavages, Inc. v. Ketter, 1982, 86 A.D.2d 753, 447 N.Y.S.2d 546.

A not-for-profit corporation formed to provide educational, health and social services information to community residents by way of video tape presentations would come within specific exceptions to prohibition of gift of State money to private corporations. 1976, Op.Atty.Gen. 9.

23a. Mental health purposes

Property held by Office of Drug Abuse Services is held for mental health purposes and loan of such property to non-profit drug treatment programs is not prohibited by this section. 1977, Op.Atty.Gen. 59.

27. Federal funds, loans by state

This section prohibiting gifts and loans in aid of private undertakings would not be violated by the Department of Transportation's participation in the Federal Vanpool Program to encourage group commuting to and from work. 1980, Op.Atty.Gen. 88.

37. Public work costs

Agreement by state to reimburse pipeline company for cost of relocating its pipeline necessitated by state's taking for highway purposes area where pipeline was located was not illegal and amounts to be paid, whether termed "reimbursement or relocation costs" or more broadly viewed as "compensation," were monies to which claimant was entitled by reason of taking. Tennessee Gas Transmission Co. v. State, 1969, 32 A.D.2d 71, 299 N.Y.S.2d 578, affirmed 27 N.Y.2d 608, 313 N.Y.S.2d 415, 261 N.E.2d 412.

Where attorney general's opinion approved agreement under which state agreed to reimburse pipeline company for cost of relocating pipeline necessitated by state's taking for highway purposes land where pipeline was located and attorney who drafted contract for Superintendent of Public Works testified that contract provision relating to certificate of attorney general that pipeline was entitled to payment, referred to certificate as to pipeline company's title, fact that attorney general had not issued certificate did not invalidate payments made by state to pipeline company. Id.

43. Sick leave payments

Provision of collective bargaining agreement between high school district board of education and teachers' association for payment of sum equivalent to percentage of accumulated unexercised sick leave when employee dies in service was not prohibited by this section prohibiting gifts of public funds. Teachers Ass'n, Central High School Dist. No. 3, v. Board of Ed., Central High School Dist. No. 3, Nassau County, 1970, 34 A.D.2d 351, 312 N.Y.S.2d 252.

Sick leave as condition of employment offers inducement to competent and efficient workers to enter public service, and right of accumulation of unused sick leave encourages employee to stay in public service and to avoid absenteeism for trifling ailments, and sick leave is sheltered from bar of this section against gifts of public funds. Id.

44. Reimbursable advances to localities

L.1975, c. 868, under which the anticipation notes would be issued by state to fund appropriations for reimbursable advances to City of New York and municipal assistance corporation, did not violate proscription of this section against giving or lending of credit of state to public corporations, since cash in hand may be given or loaned by state and, where appropriation therefor has been made under balance budget, funds may be obtained through short-term notes secured by committed revenues authentically anticipated within one year. Wein v. State, 1976, 39 N.Y.2d 136, 383 N.Y.S.2d 225, 347 N.E.2d 586.

45. Payments solely on account of sickness

The state and its subdivisions are not authorized to make payments to their employees solely "on account of sickness"; however, such payments, if authorized by the legislature, would not conflict with the constitutional bar against gifts of public money to individuals under this section and Const. Art. VIII, § 1. 1979, Op. Atty.Gen. 17.

46. Federal vanpool program

This section, prohibiting gifts and loans in aid of private undertakings would not be violated by the department of transportation's participation in the federal vanpool program to encourage group commuting to and from work. 1980, Op.Atty.Gen. 88.

47. Labor union trust funds, payments to

Lump sum payments paid by off-track betting corporation to union trust fund were not a gift of public funds, but a proper exercise of authority legislatively sanctioned. Western Regional Off-Track Betting Corp. v. Service Employees Intern. Union, AFL–CIO, Local 235, Ticket Sellers, Ticket Takers, Doormen and Ushers, 1982, 115 Misc.2d 124, 453 N.Y.S.2d 582.

§ 9. [Short term state debts in anticipation of taxes, revenues and proceeds of sale of authorized bonds]

5. Tax anticipation notes

Taxpayer had standing to challenge, as unconstitutional, state's issuance of tax and revenue anticipation notes on ground that state officials knew that there was no authentic balance between income and expenditures in the fiscal year. Wein v. Carey, 1977, 41 N.Y.2d 498, 393 N.Y.S.2d 955, 362 N.E.2d 587.

State officials, at least in the case of Comptroller, did not possess sovereign immunity in regard to action in which taxpayer challenged, as unconstitutional, state's issuance of tax and revenue anticipation notes on ground that state officials knew that there was no authentic balance between income and expenditures in the fiscal year. Id.

It is only when the estimates are dishonest, that fault may be found with state's budget plan or that which is done with it; it is then that use of tax and revenue anticipation notes to balance unbalanced budget plan is an unconstitutional practice. Id.

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Colleges and Universities ⚷4. C.J.S. Colleges and Universities § 9.
States ⚷113 et seq. C.J.S. States § 141 et seq.

ARTICLE VIII—LOCAL FINANCES

Sec.
1. Gift or loan of property or credit of local subdivisions prohibited; exceptions for enumerated purposes.
2. Restrictions on indebtedness of local subdivisions; contracting and payment of local indebtedness; exceptions.
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§ 1. [Gift or loan of property or credit of local subdivisions prohibited; exceptions for enumerated purposes]

No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association; nor shall any county,

city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, except that two or more such units may join together pursuant to law in providing any municipal facility, service, activity or undertaking which each of such units has the power to provide separately. Each such unit may be authorized by the legislature to contract joint or several indebtedness, pledge its or their faith and credit for the payment of such indebtedness for such joint undertaking and levy real estate or other authorized taxes or impose charges therefor subject to the provisions of this constitution otherwise restricting the power of such units to contract indebtedness or to levy taxes on real estate. The legislature shall have power to provide by law for the manner and the proportion in which indebtedness arising out of such joint undertakings shall be incurred by such units and shall have power to provide a method by which such indebtedness shall be determined, allocated and apportioned among such units and such indebtedness treated for purposes of exclusion from applicable constitutional limitations, provided that in no event shall more than the total amount of indebtedness incurred for such joint undertaking be included in ascertaining the power of all such participating units to incur indebtedness. Such law may provide that such determination, allocation and apportionment shall be conclusive if made or approved by the comptroller. This provision shall not prevent a county from contracting indebtedness for the purpose of advancing to a town or school district, pursuant to law, the amount of unpaid taxes returned to it.

Subject to the limitations on indebtedness and taxation applying to any county, city, town or village nothing in this constitution contained shall prevent a county, city or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control, or from providing health and welfare services for all children, nor shall anything in this constitution contained prevent a county, city, town or village from increasing the pension benefits payable to retired members of a police department or fire department or to widows, dependent children or dependent parents of members or retired members of a police department or fire department; or prevent the city of New York from in-

creasing the pension benefits payable to widows, dependent children or dependent parents of members or retired members of the relief and pension fund of the department of street cleaning of the city of New York. Payments by counties, cities or towns to charitable, eleemosynary, correctional and reformatory institutions and agencies, 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 person cared for by any such institution or agency, nor for a child placed in a family home, who is not received and retained therein pursuant to rules established by the state board of social welfare or other state department having the power of inspection thereof.

Formerly § 10, in part, renumbered 1 and amended Nov. 8, 1938; Nov. 3, 1959; Nov. 5, 1963; Nov. 2, 1965, eff. Jan. 1, 1966.

Historical Note

The 1959 amendment to the first paragraph authorized two or more municipal corporations, pursuant to law, to jointly provide any municipal facility, service, activity or undertaking which each of them has the power to provide separately, and to contract joint or several indebtedness for such undertaking in such manner and proportion as the legislature may provide by law, and to levy real estate or other authorized taxes or impose charges therefor.

The amendment to the second paragraph authorized a county, city or town to increase the pension benefits payable to retired members of a police department or fire department or to widows, dependent children or dependent parents of members or retired members of a police department or fire department.—Abstract of Department of State.

The 1963 amendment provided villages with the same authority heretofore granted counties, cities and towns to increase the pension benefits payable to retired members of a police department or fire department, or to widows, dependent children or dependent parents of members or retired members of a police department or fire department.

The 1965 amendment related to the increase of pension benefits payable to widows, dependent children or dependent parents of members or retired members of the relief and pension fund of the department of street cleaning of the city of New York.

Derivation. Const.1894, Art. 8, § 10, as amended in 1899, 1905, 1907, 1909, 1917, and 1927; Const.1846, Art. 8, § 11, as added in 1874, and amended in 1884. Provisions relating to the maintenance and support of inmates of charitable institutions were contained in Const.1894, Art. 8, § 14, as amended in 1931.

Former Art. 8, § 1. Renumbered Art. 10, § 1.

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I. GENERALLY

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1. Construction with other laws

Mandatory provisions in statutes enacted prior to the adoption of former section 14, requiring the payment by localities of public money to private charitable institutions and making the discharge of that requirement an administrative duty of an officer of the locality, were not rendered null and inoperative or made permissive by force of the stipulation of former section 14 that such payments "may be authorized, but shall not be required by the legislature." That stipulation was prospective in its operation, limiting the power of the legislature only in regard to future appropriations. It left unaffected statutes in force at the time of its adoption. People v. Comptroller, 1897, 152 N.Y. 399, 46 N.E. 852. See, also, Matter of New York Juvenile Asylum, 1902, 172 N.Y. 50, 64 N.E. 764.

2. Purpose

With reference to the provision of former section 14 prohibiting any payments for inmates of private charitable or correctional institutions not received in such institutions pursuant to rules established by the state board of charities, this has been said: "The object and purpose of the provision was that there should be some means provided for determining whether the inmates of these asylums were properly a public charge. This duty the constitution delegated to the state board of charities, but subject to legislative control. It impaired no legislative function; it merely involved an inquiry as to the condition of the inmates in regard to their financial responsibility or that of their parents or guardians. It doubtless was not deemed practicable for the board itself to investigate and determine the financial condition of each inmate of these asylums throughout the state, consequently it was given power to adopt rules and to specify officers by whom these questions could readily be determined." Matter of New York Juvenile Asylum, 1902, 172 N.Y. 50, 64 N.E. 764. See, also, People v. Society for Prevention of Cruelty to Children, 1900, 162 N.Y. 429, 56 N.E. 1004; People v. Fitch, 1897, 154 N.Y. 14, 47 N.E. 983; People v. Comptroller, 1897, 152 N.Y. 399, 46 N.E. 852.

The provisions of former section 10 prohibiting any county, city, town or village from becoming the owner of stock in, or bonds of, any association or corporation were placed in the constitution in 1874 to avoid the evils which arose from the sale of railroad bonds to municipalities. Sun Printing, etc., Ass'n v. New York, 1897, 152 N.Y. 257, 46 N.E. 499.

Former section 10 of Article 8 prohibiting loaning of town moneys for private purposes was enacted to protect municipalities, and not for purpose of depriving them of their lawful property. Cook v. Burtis, 1935, 157 Misc. 140, 283 N.Y.S. 146.

3. Retroactive effect

Constitution 1846, Article 8, § 11, ratified in 1874 at the same election at which the electorate ratified Article 14, providing that amendments take effect on January first succeeding election, became effective January 1, 1875 and did not affect a conveyance by a city to a charitable organization made prior to its effective date. Hebrew Orphan Asylum v. New York, 1934, 150 Misc. 299, 270 N.Y.S. 310.

4. Definitions

A school district is a "public corporation" within this section prohibiting local unit from giving or loaning its credit to or in aid of any public or private corporation. Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 1939, 280 N.Y. 469, 21 N.E.2d 681.

The term "public corporation" as used in this section does not include the State. 4 Op.State Compt. 363, 1948.

5. Generally

This section permits use of its credit by a local governmental unit only for purposes of such unit, and prohibits it from giving or loaning its credit to or in aid of any public or private corporation. Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 1939, 280 N.Y. 469, 21 N.E.2d 681.

6. Nature of restriction

Within its defined limits, constitutional restriction on use of credit by local unit must be rigidly enforced according to its letter and its spirit, and every obligation of governmental unit must rest on its own credit, and no governmental unit may give or loan its credit except for purpose of meeting its own obligations incurred in performance of governmental function or duty which state may intrust to it. Union Free School Dist. No. 3 of Town of Rye, Westchester County v. Town of Rye, 1939, 280 N.Y. 469, 21 N.E.2d 681.

7. Test of gift or loan

The fact that a city was in the first instance to pay the cost of a public burden, to be reimbursed thereafter by a tax on the property benefited, did not render the payment by the city a loan. People v. Banks, 1876, 67 N.Y. 568.

Whether an appropriation of public money or property was a gift or loan, had to be determined, not by the uses to which the money or property was being or had been put, but by the uses to which it might legally be put under the terms of the appropriation. Mt. Sinai Hospital v. Hyman, 1904, 92 App.Div. 270, 87 N.Y.S. 276.

8. Motive

The rule formerly prevailed that considerations of gratitude or charity constituted a sufficient cause for the appropriation of municipal funds to private purposes, but that rule was abrogated in 1874, and it is now well settled that a gift of the money or property of a municipal corporation can never be justified on the ground of gratitude or on the ground of charity, except in certain specified cases provided for by this section. Stemmler v. New York, 1904, 179 N.Y. 473, 72 N.E. 581. See, also, People v. Partridge, 1902, 172 N.Y. 305, 65 N.E. 1164; Mahon v. Board of Education, 1902, 171 N.Y. 263, 63 N.E. 1107; Chapman v. New York, 1901, 168 N.Y. 80, 61 N.E. 108; In re Greene, 1901, 166 N.Y. 485, 60 N.E. 183; Mt. Sinai Hospital v. Hyman, 1904, 92 App.Div. 270, 87 N.Y.S. 276.

9. Moneys of local subdivisions

License fees were municipal moneys within the purview of the provision of former section 10, and accordingly, Laws 1896, c. 447, allowing the societies for the prevention of cruelty to animals, incorporated in cities of a specified population, to collect license fees of every person owning or harboring a dog within such cities, and to appropriate to their own purposes the funds so realized, was a gift of money to a private association in violation of said section. Fox v. Mohawk, etc., Humane Soc., 1901, 165 N.Y. 517, 59 N.E. 353.

Former section 10 prohibiting loaning of town moneys for private purposes was inapplicable to funds derived from town lands. Cook v. Burtis, 1935, 157 Misc. 140, 283 N.Y.S. 146.

Penalties and fines collected under former Article 16 of the McKinney Penal Law upon a conviction of cruelty to animals were not public moneys within the meaning of former section 10. American Society, etc. v. New York, 1923, 205 App.Div. 335, 199 N.Y.S. 728.

The fees collected by the police department are town moneys and may not be turned over to the Policemen's Benevolent Association. 14 Op.State Compt. 57, 1958 (1st case).

10. Property of local subdivisions

A cause of action in favor of a municipality was property within the meaning of that term as used in former section 10, so that a county treasurer who had wrongfully paid to a town supervisor certain funds which were received from taxes levied on real property within the town and which were required to be applied to the outstanding bonds thereof, was liable to the town for the funds so misapplied, and Laws 1903, c. 515, was violative of such section 10, if construed to validate such payment and thereby to extinguish the cause of action in favor of the town. Walton v. Adair, 1906, 111 App.Div. 817, 97 N.Y.S. 868, affirmed 191 N.Y. 509, 84 N.E. 1121.

11. Stock or bond investments

Board of Cemetery Commissioners of Elmira may not purchase shares in a savings and loan association with perpetual care funds. 8 Op. State Compt.File No.5755, 1952.

A school district may not lawfully own shares in a savings and loan association. 4 Op.State Compt. 349, 1948.

Police and fire pension funds are part of governmental organization of city, and moneys of such funds may not be deposited in savings banks or invested in shares of savings and loan associations. 3 Op.State Compt. 367, 1947.

Municipalities may not retain bank stocks acquired upon bank reorganizations. 2 Op.State Compt. 341, 1946.

Where a bank acting as depository of the funds of a school district was

reorganized after the bank holiday of 1933 and as a result of such reorganization the school district received stock in such bank, the school district may not continue to hold such stock for investment purposes. 2 Op.State Compt. 282, 1946.

A town may not exchange capital stock of one railroad company which it owns for capital stock and bonds of another railroad company. 1 Op. State Compt. 116, 1945.

A town may not invest town property or funds in the stock or bonds of any private corporation. Id.

12. Rules governing reception of inmates

The prohibition of former section 14 against payments for the support of inmates of charitable or correctional institutions not received therein pursuant to the rules of the board of charities, was not, in the absence of such rules, self-executing. The prohibition imparted binding force to the rules, when adopted, however, and on their adoption became self-executing. Matter of New York Juvenile Asylum, 1902, 172 N.Y. 50, 64 N.E. 764. See, also, People v. Comptroller, 1897, 152 N.Y. 399, 46 N.E. 852.

"It is the constitution that gives life and force to these rules and it is the constitution that places limitations upon the payments that the statutes had previously authorized and required. The constitution itself does not provide the means for the determination of the question as to whether the children in these institutions are properly a public charge; that function, as we have seen, devolves upon the state board of charities. Until therefore, the state board of charities takes action in the matter and provides the means by adopting rules, the constitutional provision may not be self-executing; but as soon as the board takes action and adopts the rules, then the constitution acts presently upon the existing statutes and all payments thereafter made must be in accordance with its provisions." Matter of New York Juvenile Asylum, 1902, 172 N.Y. 50, 64 N.E. 764.

13. Computation of payments to charities

The provision that "payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control," should not be made for any inmate who was not received therein pursuant to rules established by the board of charities, clearly contemplated that all such payments should be based on the number of indigent inmates in the institutions to which payments were made and that all appropriations should be subject to control by the state board of charities. It was also intended that payments should be made from time to time as was required by the necessities of the institutions to which they were made. Mount Sinai Hospital v. Hyman, 1904, 92 App.Div. 270, 87 N.Y.S. 276. See, also, People v. Comptroller, 1897, 152 N.Y. 399, 46 N.E. 852.

The contribution of a lump sum to a hospital or charitable institution, wholly or partly under private control, was in violation of former section 10, but to appropriate municipal funds to be paid to such institutions on a per capita basis or upon vouchers for services actually rendered for the relief of the poor would have brought such payment within the exception contained in former section 14. 1923, Op.Atty.Gen. 243. See, also, Op.Dept. of Audit and Control, 1928, 38 St.Dept. 205.

A grant of real property to a hospital under private control could not be sustained under former section 14 where not based on the number of patients in the hospital and where the property itself was not subject to the control of the board of charities but might be put to such use of the hospital as might seem best to its governing board. Mount Sinai Hospital v. Hyman, 1904, 92 App.Div. 270, 87 N.Y.S. 276.

Payment in a lump sum of annual appropriations without regard to per capita costs to private incorporated hospitals are prohibited by this section and section 87 of the General Municipal Law. 1945, Op.Atty.Gen. 259.

14. Blind, institutions for

An institution did not have to be exclusively charitable in character to be charitable within the meaning of the prohibition against payments for the support of inmates of such institutions not received therein conformably to the rules of the board of charities. Thus, the New York Institution for the Blind, an institution under private control, organized in 1831 by Laws 1831, c. 214, for the special education of the blind, was to be regarded as a charitable institution so far as it clothed, educated and maintained indigent pupils at public expense or by donations from individuals. Accordingly no payment could properly be made by a county, city, town, or village to that institution for the care and support of any indigent pupil who was not received pursuant to the rules of the board of charities. People v. Fitch, 1897, 154 N.Y. 14, 47 N.E. 983.

Former section 9 of this article, now Article 7, § 8, did not, in specifically empowering the legislature to appropriate funds for the education and support of the blind, withdraw institutions for the support of such persons from the operation of the provision that no payments should be made for any inmate of a charitable institution under private control unless the inmate was received therein pursuant to rules established by the state board of charities. Id.

II. PARTICULAR TRANSACTIONS AS GIFTS OR LOANS

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31. Advertisements

Considered either as a purchase of advertising space or as a donation to a student activity, an expenditure of district moneys by a school district board of education for an advertisement in a high school yearbook is illegal. Op.State Compt. 68–131.

A private association may not sell advertising space on village owned property nor may it have exclusive use of such property. Op.State Compt. 63–11.

A municipality which sponsors a Little League Association as part of its youth programs should not pay for advertisements whereby the Little League Association thanks its private sponsors. 15 Op.State Compt. 384, 1959 (1st case).

32. Bonus payments

Chapter 664 of Laws 1892, which purported to authorize the supervisors of the several counties, upon a petition of a majority of the taxpayers of the county or of a city or town, to raise by ordinary taxation the money needed to pay any drafted man who served personally in the civil war, or furnished a substitute, or paid commutation money, or to the heirs of any such man, the sum of $300, with interest, was in violation of former section 10. Bush v. Orange County, 1899, 159 N.Y. 212, 53 N.E. 1121.

Municipalities are prohibited from paying a bonus or reward for past services to any of its officers and employees. 1965, Op.Atty.Gen. (Inf.) May 5.

A county may not, pursuant to this section, legally contract to pay retiring policemen a terminal leave allowance as either a retirement bonus or benefit. Op.State Compt. 68–642.

A cost of living bonus may not be given county officers elected or appointed for fixed terms, other than supervisors and members of the judiciary, for services rendered in the past as this would constitute a gift of moneys prohibited by this section. 8 Op.State Compt. 299, 1952.

A town may not pay assessors an amount in excess of their fixed compensation, in the nature of a bonus, for past services. 4 Op.State Compt. 354, 1948.

Emergency bonus may not be paid a city judge when charter provides that compensation of such city judge may not be increased or decreased during his term of office, however, increased compensation may be granted city judge when charter is amended by act of Legislature or by local law. 3 Op.State Compt. 35, 1947.

A temporary bonus may not be paid county employees where such bonus is not an increase in salary or based upon services to be rendered. 1 Op.State Compt. 53, 1945.

33. Charge accounts

City may not deposit municipal funds with a private airline company in order to establish charge account with such company. 6 Op.State Compt. 54, 1950.

34. Charges or fees, waiver of

Laws 1906, c. 440, including veteran firemen's associations among the charitable organizations exempt from water rates under chapter 696 of the Laws of 1887, did not offend former section 10, since a municipality was not precluded from fulfilling honorable obligations founded upon a public service rendered. People v. Metz, 1907, 120 App.Div. 565, 104 N.Y.S. 1115. See, also, Exempt Firemen's Benev. Fund v. Roome, 1883, 93 N.Y. 313.

A town may not acquire a site for the erection of a treatment plant in a sewer district where the consideration for such transfer would be services of the district to the former owner for a number of years without charge. 1967, Op.Atty.Gen. (Inf.) Jan. 24.

A city may not waive the payment of building and inspection fees already due from a local hospital but, under certain limitations, it may prospectively establish certain classes which are exempt from the fees. Op.State Compt. 67-226.

A village may not issue a "Senior Citizen's Permit" which would enable certain elderly citizens to park in metered areas without paying the required fee. 15 Op.State Compt. 157, 1959.

Building permit fees may not be waived or reduced for a church or other non-profit organization. 11 Op.State Compt. 159, 1955.

35. Civic activities

Commission on Historic Observances, created by L.1958, c. 971, has authority to publish and sell souvenir booklets and award prizes for essay contests for Hudson and Champlain Celebration. 1958, Op.Atty.Gen. 211.

A town may not make a contribution to a county historical society. Op.State Compt. 68-278.

Park district funds may not under this section be used in support of a local drum and bugle corps. Op. State Compt. 67-445.

The city of Niagara Falls may contract with a symphony orchestra for concerts for school children, and payments thereunder are not gifts and so they do not violate this section. Op.State Compt. 67-252.

The City of Niagara Falls has no statutory authority to contribute money to a "Community Ambassador Program" and statute or local law purporting to authorize the same would result in unconstitutional gift. Op.State Compt. 25, 1963.

A village may purchase a building to house and provide an office for the village historian and contract to furnish quarters for the village historical society but it may not provide free quarters for the senior citizens organization. 17 Op.State Compt. 261, 1961.

A county may not grant moneys to an author who has written a book concerning the history of the county, to subsidize the printing of the same. 1961, 17 Op.State Compt. 67, 1961.

Village funds may not be expended for the purchase and erection of a plaque commemorating the State's construction of a bridge in the village nor for the entertainment of officials attending its opening ceremony. 16 Op.State Compt. 319, 1960.

Village Board of Trustees may not expend village funds to purchase pins for village employees who have served the municipality for an unusually long period of time. 13 Op. State Compt. 221, 1957, 1st case.

Village funds may not be used to furnish a testimonial dinner and medallions to retiring officers. 13 Op.State Compt. 46, 1957 (2nd case).

A city war memorial fund may not be contributed toward the construction cost of a community center owned by a private organization. 11 Op.State Compt. 301, 1955.

City moneys may not be expended to provide gifts and scrolls for city residents called to military service. 7 Op.State Compt. 32, 1951.

Village moneys may not be expended to purchase equipment for a drum and bugle corps composed of members of the fire department. 4 Op. State Compt. 552, 1948.

36. Clothing allowances

A village may not pay a uniform allowance to its water meter readers or water maintenance department employees, but may, however, purchase uniforms or badges for use by its water meter readers and protective clothing for use by its water maintenance department employees. Op.State Compt. 68-422.

A village, by local law, may authorize the purchase of a judicial robe to be worn by the police justice but ownership of the robe must be in the village. 20 Op.State Compt. 70, 1964.

Purchase by village of protective items such as rain coats, hats, boots and coveralls for public works department employees for use in inclement weather, are not construed as gratuities forbidden by this section but as part of compensation of employees. 17 Op.State Compt. 43, 1961.

37. Compensation of public officers and employees—Generally

Former section 14 of Labor Law regulating the wages or personnel of those employed on public works was not invalid under former section 10 because of the circumstance that, either directly or indirectly, they enhanced the cost of municipal undertakings as enhancement in cost caused by such regulations was not a gift of municipal funds. People v. Crane, 1915, 214 N.Y. 154, 108 N.E. 427. See, also, People v. Metz, 1908, 193 N.Y. 148, 85 N.E. 1070; Ryan v. New York, 1904, 177 N.Y. 271, 69 N. E. 599.

The provision of former section 245 of the Military Law, requiring that an employee of a state or political subdivision be paid his salary as such during absence on military or naval duty is not violative of prohibition of this section and section 2 of this article against "gifts" of county money to an individual or creation of an indebtedness for other than "county purposes", as applied to county from which investigator for Department of Public Welfare sought to recover salary for first 30 days after he was called as a reserve officer into federal military service, though there was no guarantee that he would return to his position at end of his military or naval duty. Hoyt v. Broome County, 1941, 285 N.Y. 402, 34 N.E.2d 481.

A municipality which had paid a de facto officer who had performed the functions of an office the salary attached thereto, was not liable, legally or morally, to pay such salary again to one who was subsequently adjudged to be the lawful incumbent of the office but who had rendered no service therein and the remedy of the latter was an action for damages against the usurper. Consequently, a statute directing the municipality to pay to a de jure officer the salary of the office for the term served by the de facto officer, was violative of former section 10. Stemmler v. New York, 1904, 179 N.Y. 473, 72 N.E. 581.

Former section 245 of the McKinney Military Law as amended by Laws 1917, c. 435, providing that during the absence of an employee of a municipal corporation in the performance of duty in the federal military service he shall receive such part of his salary or compensation as such officer or employee as equals

the excess, if any, of such salary or compensation over the compensation paid to him for the performance of such duty, did not violate former section 10 in that it required the city to make to the employee a gift. Henn v. Mt. Vernon, 1921, 198 App.Div. 152, 189 N.Y.S. 851.

A city was not competent to employ a sexton to take care of a public cemetery not owned by the city and not located within its boundaries and payment by the city of a salary to a sexton so employed would have been a gratuity, inuring to the sole benefit of the sexton and the owners of the cemetery and in no wise subservient of any legitimate city purpose. Holley v. Mt. Vernon, 1910, 141 App.Div. 823, 126 N.Y.S. 460.

A county may not legally contract, pursuant to this section, to carry a policeman, who is the president of the county Policemen's Benefit Association, on the county payroll while relieving him of police force duties for the purpose of devoting full time to union activities. Op.State Compt. 68–642.

A proposed "retirement benefit" plan of a central school district board of education, providing for salary increases to teachers during their last one or two years of employment, based upon faithful service and attendance, is illegal as, firstly beyond the statutory powers of the board of education, and secondly an unconstitutional gift of public moneys. Op. State Compt. 67–355.

Where salaries of village assessors are paid semiannually in December and May, and a village assessor leaves office on the first Monday in April because of expiration of term, such officer is entitled to that portion of the six months salary payment allocable to the period from the previous payment to the date his term expires. 19 Op.State Compt. 279, 1963.

Village may not pay employee the sum it properly received as reimbursement for sick leave payments to said employee from workmen's compensation board. See, also, Op.State Compt. 63–27 with respect to town employee. 18 Op.State Compt. 480, 1962.

Where a village policeman was required, under the policy in effect at the particular time, to take an 80 hour course in a police training program on his own time, he has no legal right to compensation for the 80 hours, nor can the village under this section pay him therefore; merely because a subsequent change of policy now permits village police officer to take such course during his regular hours of duty without loss of salary. 18 Op.State Compt. 122, 1962.

A village officer may not be paid overtime compensation. 12 Op.State Compt. 79, 1956.

Failure to recapture compensation paid in error would constitute a proscribed gift and, therefore, school district was not only authorized but duty bound to recoup such moneys. Matter of the Appeal of Morris Selitzky, 1968, 7 Educ.Dept.Rep.No. 7874.

Wrongfully dismissed regular substitute teacher is not entitled to salary for period of discharge since municipality hired a placement for said period, as such payment would violate this section's prohibition against a gift of public funds. Matter of Appeal of Murray Beer, 1964, 3 Educ. Dept.Rep. 153.

38. —— Back pay

Provisional employees, who as a result of correction of ratings received in special examination for permanent positions in welfare department stood higher on list of eligibles than those appointed to permanent positions as result of original examination of which provisional employees did not have proper notice, though they were entitled to supplant such appointees and to correction of date of appointment to permanent positions to date of termination of provisional employment, could not in absence of express statute be awarded back pay, since such award would violate this section prohibiting gifts of public moneys or property. Rindone v. Marsh, 1944, 183 Misc. 10, 49 N.Y. S.2d 450.

A town assessor, appointed to fill a vacancy, may not be paid for any period prior to the date he was appointed and qualified. 11 Op.State 442, 1955.

39. —— Death

Town may not pay legal representatives of town officer his salary for any period subsequent to his death. 5 Op.State Compt. 316, 1949. See, also, Op.State Compt. 57–311.

A town board may not pay the widow of a deceased town officer his salary for any months subsequent to his death. 1948, Op.Atty.Gen. October 14.

The salary of the justice of the peace determines on the date of death and the legal representative of his estate may be paid only for that portion of the quarter during which he served, on the basis of a daily rate. 16 Op.State Compt. 138, 1960.

Salary accrued to an improvement district employee at the time of his death may, within limitations, be paid to his widow or others, but no such payment may be made on account of accrued vacation. 13 Op. State Compt. 277, 1957.

If an assessor, paid an annual salary on a quarterly basis, dies during his term of office, a proportionate share of the quarterly payment should be made, based on the number of days served. 11 Op.State Compt. 258, 1955.

40. —— Increases

The New York City transportation board's grant of retroactive pay increases to its employees, pursuant to agreement to make any such increases retroactive to specified date, if employees continued working after such date, were not "gifts" prohibited by this section, but were supported by valid and legal consideration. Timmerman v. City of New York, 1946, 69 N.Y.S.2d 102, affirmed 272 App.Div. 158, 70 N.Y.S.2d 140.

A "Final Year Increment" plan submitted by a faculty negotiating group to a central school district board of education, providing for a salary increase to teachers during their last year of service, the amount of the increase to be determined by the total number of school-calendar days over one hundred seventy worked by the teacher throughout his service in the school district, is illegal as being an unconstitutional gift of public moneys, and beyond the statutory powers of the board of education. Op.State Compt. 68–232.

A salary increase which is truly retroactive to some date prior to the determination to grant the increase, would be illegal and would violate this section, since additional compensation for past services would be an unconstitutional gift. Op.State Compt. 68–61.

A local law may increase salaries earned on and after the date it takes effect, but may not retroactively increase salaries earned prior to that date. Op.State Compt. 67–547.

The board of education of a union free school district may not adopt a resolution, in the current school year, providing for extra compensation to a music teacher who performed extra curricular activities and duties, namely a band director, in the prior school year, where the board of education failed to make a formal resolution providing for the extra compensation in the prior school year. 19 Op.State Compt. 119, 1963.

A town may not pay extra compensation to the town attorney for services rendered in addition to those contemplated at the time of his appointment. 15 Op.State Compt. 424, 1960.

No salary increase for a village officer may be made retroactive. 13 Op.State Compt. 97, 1957, 2nd case.

Retroactive pay increase may not be granted to town employee who by oversight was omitted when increase was granted to all town employees at beginning of year. 7 Op.State Compt. 242, 1951.

Increased compensation may not be paid to custodians of voting machines because of additional work entailed by a special election when such increase is retroactive. 5 Op.State Compt. 120, 1949.

Justices of the peace of town of the second class whose salaries have been fixed may not be paid adjusted compensation at the end of the fiscal year. 3 Op.State Compt. 508, 1947.

The salary of the town superintendent may be increased during his term with respect to services to be thereafter rendered to an amount not in excess of the maximum amount specified for such salary in the notice of hearing on the preliminary budget. 3 Op.State Compt. 60, 1947.

41. —— Insurance benefits

A village would not seem authorized to make direct payment of premiums for "salary reimbursement insurance" to idemnify village police officers for loss of private, independent salary or income resulting from disability incurred through performance of police duties. Op.State Compt. 67-435.

A city may not pay any portion of group life insurance premiums for its employees, although a city may pay all or part of medical, surgical and hospital insurance premiums for its retired officers and employees, providing such officers and employees have retired subsequent to the city's adoption of such plan. 20 Op.State Compt. 359, 1964.

A county may contribute to the cost of group accident and health insurance of county hospital employees if so authorized by local law which fixes the compensation of such employees. 10 Op.State Compt. 248, 1954.

There is no authority for a town to pay the cost of Blue Cross and Blue Shield Insurance nor is a town authorized to contribute to the cost of group death benefit insurance. 10 Op.State Compt. 221, 1954.

Payment of the cost of hospitalization insurance of village employees to be construed as gratuities forbidden by this section, but would be considered as part of the compensation of the employees. 6 Op.State Compt. 384, 1950.

There is no authority for a town to contribute to the cost of Blue Cross hospitalization insurance for its highway employees, as a part of their compensation. 6 Op.State Compt. 354, 1950.

There is no authority for a city to contribute city moneys to the payment of part of the premium of a policy of group life insurance procured by members of the paid fire department in the absence of statute permitting such an expenditure. 4 Op.State Compt. 373, 1948.

County may not pay group hospitalization insurance premiums for its employees. 2 Op.State Compt. 80, 1946.

42. —— Sick leave payments

A school district plan which grants retiring school teachers leaves of absence with pay (calculated from accumulated sick leave credits) immediately preceding retirement is illegal as a local retirement benefit in violation of Retirement and Social Security Law § 113 or as a gift of public moneys. Op.State Compt. 68-357.

A provision in a collective bargaining agreement between a city and a union representing its employees, which requires the payment of all accrued sick leave to the estate of a deceased employee, is invalid and not binding on such city. Op.State Compt. 67-735.

When an injured town employee is receiving workmen's compensation benefits, the town, in the absence of a sick leave plan, may not pay him a portion of his salary in addition thereto. 19 Op.State Compt. 89, 1963, 2nd case.

A city may not pay a member of its fire or police department a sum of money computed on the basis of his accumulated sick leave, when such member retires or withdraws from the service of the city. 7 Op. State Compt. 435, 1951.

43. —— Termination pay

Agreement by which local school board attempted to get rid of tenured teacher without charges or hearing in return for payment of salary for balance of year for not teaching was violative of section 3013 of the Education Law and of this section which imposes ban against gifts of public moneys. Boyd v. Collins, 1962, 11 N.Y.2d 228, 228 N.Y.S.2d 228, 182 N.E.2d 610.

School board's payment of lump sum to teacher, against whom charges had been filed, as part of settlement agreement in which teacher resigned, was for legitimate school purpose and was not an unconstitutional gift of public moneys without services rendered. Cedar v. Commissioner of Ed. of New York State Dept. of Ed. of State University of New York, 1967, 53 Misc.2d 702, 279 N.Y.S.2d 661, affirmed 30 A.D.2d 882, 291 N.Y.S.2d 719.

A village may not grant severance pay to policemen should the village police department be abolished. 19 Op.State Compt. 343, 1963.

44. —— Vacation or holiday pay

In accordance with this section prohibiting gifts of public money, a teacher may not legally be paid for service that has never been rendered and hence when a teacher dies, is dismissed or retires during the school year, he has no claim for additional vacation period pay. Matter of Appeal of Sedille Shepard and Matter of Appeal of Eda Smithline, 1952, 72 St.Dept. (Educ.) 134. See, also, Matter of Lederman, 72 St.Dept. (Educ.) 119.

Under this section, a teacher who rendered service to the board of education during the school year 1948-1949 until her resignation in February 1949, was not entitled to prorata pay for the summer months of July and August in 1949. Matter of Appeal of Eleonor B. Manheim, 1952, 72 St.Dept. (Educ.) 128. See, also, Matter of Appeal of Ethel M. Dommrich, 1952, 72 St.Dept. (Educ.) 127.

City's payment of vacation pay to its provisional employee upon termination of his employment would not violate this section prohibiting gift of public funds. Vaccaro v. Board of Ed. of City of New York, 1967, 54 Misc.2d 206, 282 N.Y.S.2d 881.

Town highway department employees who have already resigned may not now be paid cash for accrued and unused vacation time where the town had not previously adopted a plan providing for such payment. Op.State Compt. 67-853.

A municipal governing board may lawfully adopt a rule or regulation providing for the allowance of compensatory time off with pay to an officer or employee whenever a day designated a holiday by such board occurs upon an assigned day of rest or vacation; such regulation may also provide for payment of extra pay or equivalent time off with pay where an employee is required to work regardless of holiday. 14 Op. State Compt. 421, 1958.

A municipality may not grant holiday pay to an officer or employee for a day on which he is not scheduled to work. Id.

Village funds may not be paid to a former village officer in lieu of vacation after such officer's term has been completed. 2 Op.State Compt. 330, 1946.

45. Credit agreements

A credit arrangement in an original bid amounts to a loan to private corporation and violates this section. Matter of Appeal of Stanley L. Hirsch, 1955, 76 St.Dept. (Educ.) 91.

46. Deposits

Certain funds of fire districts may be temporarily deposited to earn interest in (a) time deposits, open account, in, and (b) time certificates of deposit issued by, banks or trust companies but not savings banks, industrial banks or savings and loan associations. 20 Op.State Compt. 250, 1964.

A deposit of money by a school district subject to a 30 day notice of withdrawal is a violation of this section. 9 Op.State Compt. 82, 1953.

47. Employment guidelines

Stipulations under the Labor Law that citizens only should be employed on the public works of the state was not in violation of the spirit of former section 10 on the theory that discrimination between citizens and al-

ions might increase the cost of public works by limiting the supply of labor as the money that goes to laborers on public works is not given in aid of individuals within the meaning of these provisions but is paid for service rendered. People v. Crane, 1915, 214 N.Y. 154, 108 N.E. 427.

The Wicks Law, former Unconsolidated Laws, § 1031.1 et seq., requiring cities unifying transit facilities to continue to employ all employees of companies previously owning and operating transit facilities does not violate this section. McKinnon v. Delaney, 1941, 27 N.Y.S.2d 713, affirmed 263 App.Div. 986, 34 N.Y.S.2d 399, affirmed 289 N.Y. 656, 45 N.E.2d 166, motion granted 290 N.Y. 669, 49 N.E.2d 625.

48. Expenses of collection from cities

The retroactive provisions of General Municipal Law § 70–a, requiring a city to pay reasonable expenses incurred by state agency in compelling payment to such agency of money by city for a public purpose are not unconstitutional as an attempt to authorize use of municipal funds in furtherance of private enterprise. Tobin v. La Guardia, 1943, 290 N.Y. 119, 48 N.E.2d 287, motion denied 290 N.Y. 743, 49 N.E.2d 1009.

49. Fire departments—Generally

Town board may not authorize contribution to a local fire department to assist it in purchasing an ambulance. 20 Op.State Compt. 90, 1964.

A village may not appropriate and expend village moneys to render financial assistance to the village fire department in the sponsorship of a firemanic convention. 19 Op.State Compt. 281, 1963.

A town may not contribute town moneys to certain fire companies located in such town to aid such companies in participating in a commemorative celebration. 16 Op.State Compt. 26, 1960.

Although guests may attend the annual parade and inspection of the fire department, the fire district may not provide refreshments for such guests from fire district funds. 14 Op.State Compt. 58–1115.

Town may not contribute a sum of money from its general fund to a village or to the fire department of a village towards the purchase of an ambulance for the emergency relief squad, on the basis that fire protection is furnished to a fire district in the town by the village. 4 Op.State Compt. 330, 1948.

50. —— Volunteer

By an act passed in 1895, it was provided that if an active member of a volunteer fire company in a city or incorporated village dies from injuries incurred while in the performance of his duties as such fireman, the city or village should pay a designated sum to his executor or administrator for the benefit of his next of kin. By the charter of a city subsequently incorporated it was provided that the call men connected with its fire department should be entitled to the same privileges as were accorded by the law to volunteer firemen. One of these call men, while performing his duties as such, received injuries from which he died. In an action to recover for his death it was decided that the word "privileges" as used in the provision giving to the call men "the same privileges and exemptions as are accorded by the laws of this state to volunteer firemen" was synonymous with the word "rights," and hence when plaintiff's intestate became one of the call firemen there was read into his contract with the city the provision of the statute providing for payment to him, if injured, of the sum specified by the statute or to his representatives in case of his death. It was said to be in the nature of insurance—a part of the compensation agreed to be paid, and, therefore, did not come within the prohibition of former section 10. Hammond v. Fulton, 1917, 220 N.Y. 337, 115 N.E. 998.

Volunteer fire companies are recognized as discharging a municipal function, and it is a legitimate use of municipal funds to pay such organizations, the same as it is to pay for

fire protection afforded by a paid department. People v. Grout, 1903, 79 App.Div. 61, 79 N.Y.S. 1027.

Section 722 of the revised Greater New York charter, Laws 1901, c. 466, which directed the payment of municipal funds to certain volunteer fire companies and attached to the payment no conditions other than might be implied from the fact that the volunteer fire company was authorized by law to continue to discharge the duties for which it was organized until a paid fire department should be provided, was in no wise repugnant to former section 10. Id.

A town may not purchase advertising in a volunteer fire company's program for a fire association convention where the town has already been designated as the site of the convention. Op.State Compt. 68–927.

A town may not contribute money from its publicity fund to help pay the publicity expenses of a volunteer fire department's field days. 16 Op. State Compt. 170, 1960.

A village may not contribute to a volunteer fire corporation a portion of the cost of erecting a fire training tower to be erected on a plot of land owned by the fire corporation, however, it may lease land and erect tower, but lease should give village right to remove tower at expiration of term. 9 Op.State Compt. 103, 1953.

A school district may not make a gift of its school building and real property to a volunteer fire corporation. 7 Op.State Compt. 351, 1951.

A town may not contribute money from a publicity fund to help defray the expense of a convention and parade of the County Volunteer Firemen's Association to be held within the town. 5 Op.State Compt. 462, 1949.

A town may not aid a volunteer fire department. 4 Op.State Compt. 301, 1948.

Appropriations to volunteer fire companies for their use by villages were gifts and prohibited by former section 10, but a volunteer fire company which included paid men under the control of the municipality might be maintained at the expense of the village. Op.Dept. of Audit and Control, 1928, 38 St.Dept. 33.

51. Grade crossing eliminations

Sections 62–66 [now §§ 91–95] of the Railroad Law of 1890, authorizing the public service commission to compel a railroad to eliminate dangerous grade crossings and imposing a proportion of the cost upon the state and the village wherein the change was made, were not obnoxious to former section 10. Matter of New York Cent., etc., R. Co., 1910, 136 App.Div. 760, 121 N.Y.S. 524. See, also, Matter of Boston, etc., R. Co., 1901, 64 App.Div. 257, 72 N.Y.S. 32, affirmed 170 N.Y. 619, 63 N.E. 1115.

Laws 1911, c. 842, creating the railway terminal commission of the city of Buffalo, empowering that commission to adopt plans calculated to relieve the traffic congestion in that city and to eliminate grade crossing therein, and directing the city to adapt its streets to the changes in the railroad lines ordered by the commission, was not unconstitutional as changes in the streets are city purposes and the expenditures therefor proper public expenditures. People v. Bradley, 1913, 207 N.Y. 592, 101 N.E. 766.

52. Guarantee and indemnification agreements

A town may not contract with an omnibus corporation to guarantee the corporation an annual gross amount and agree to make good any deficiencies in the guaranteed annual gross. 12 Op.State Compt. 201, 1956.

A contract between the county and a village for the installation by the county of "selective calling" equipment in local fire houses, municipal buildings and similar locations, for use for mutual aid, civil defense and similar emergencies, may not contain a clause that the municipality will save harmless from any cause whatsoever the county, its agents and employees, where the county owns the equipment, makes the installation

and retains full ownership and control thereof, including duty of repair and maintenance. 11 Op.State Compt. 479, 1955.

53. Health services

An appropriation of city property to a hospital was void, even though the hospital was at the time discharging a public function in harboring the destitute sick, if by the terms of the appropriation, the property, or the proceeds therefrom, was not forever devoted to that public purpose but might be directed to private use. Mt. Sinai Hospital v. Hyman, 1904, 92 A.D. 270, 87 N.Y.S. 276.

A gift of city-owned real property to a nursing home company created under the provisions of Public Health Law, Art. 28–A is prohibited by this section. 1968, Op.Atty.Gen. (Inf.) Oct. 28.

Under certain conditions a city council might give funds to a visiting nurses' association. 1925, Op.Atty. Gen., 35 St.Dept. 210.

A town may not purchase an x-ray machine for use by a medical practitioner who has just established a private practice in the town. Op.State Compt. 68–415.

A county may not contract with a private non-profit hospital for the purpose of furnishing improved emergency room medical care to the general public. Op.State Compt. 67–728.

A village may not purchase property in order to rent it to a physician at a nominal consideration, the village may, however, establish a hospital or seek special legislation to create a health center for the village. Op.State Compt. 67–468.

A village may not make a gift of funds to a nonprofit ambulance corporation, but the village may contract for general ambulance service under General Municipal Law, § 122–b. Op.State Compt. 67–450.

A county may not contribute $25,000 to a private organization to assist in the care and treatment, as out-patients, of physically handicapped children. 17 Op.State Compt. 309, 1961.

There is no authority for a town to appropriate funds for the use of a private organization which furnishes certain medical supplies to townspeople and any appropriation for the benefit of such an organization, no matter how benevolent its purpose, would be a gift prohibited by this section. 16 Op.State Compt. 434, 1960.

In the absence of a contract with a membership corporation furnishing ambulance service, a town may not install radio or other equipment in the ambulance. 13 Op.State Compt. 318, 1957, 1st case.

Where a county laboratory furnishes services to patients in a hospital operated by a charitable corporation in that portion of the county served by the laboratory, the services should be rendered pursuant to a contract which must provide that the hospital will pay for such laboratory services rendered, whether or not such hospital is paid for such services by its patients and the county laboratory may not reimburse the hospital for any fees collected by the hospital and remitted to the county laboratory by the hospital. 12 Op.State Compt. 311, 1956.

A town may expend money for sodium floride treatment of the teeth of pre-school children in the town. 11 Op.State Compt. 635, 1955.

Contract entered into between County and private association for operation of mental health program in county need not necessarily provide that payments thereunder be on pro-rata basis according to the portion of the contract performed; the contract may provide any reasonable schedule of payments warranted under the circumstances. 11 Op.State Compt. 445, 1955.

City of Norwich may lease building for use as isolation ward in case of epidemic, if lease is made in good faith and for a fair consideration. 11 Op.State Compt. 394, 1955.

A village may not give or loan its funds to a physician for the purpose of establishing him in private practice within the village. 9 Op.State Compt. 455, 1953.

A village may not contribute funds to a consolidated health district. 8 Op.State Compt. 174, 1952.

Town moneys may not be expended to buy special equipment to be donated later to a private hospital. 3 Op. State Compt. 459, 1947.

54. Housing projects

A contract entered into by city, state and municipal housing authority, whereby state agreed to loan to the authority money to finance housing project, and city agreed to exempt from local taxation improvements added to realty pursuant to the project and to be liable as surety in case of default by the authority, was not invalid on ground that it constituted a "gift" or "loan" or "extension of credit" of local subdivision in violation of this section. Davidson v. City of Elmira, 1943, 180 Misc. 1052, 44 N.Y.S.2d 302, affirmed 267 App.Div. 797, 46 N.Y.S.2d 655, appeal denied 267 App.Div. 926, 47 N.Y.S.2d 604.

A city may not loan its money to a private non-profit organization to aid in the rehabilitation of residential property for the use of low income families. Op.State Compt. 67–610.

55. Industrial development

The devoting of municipal funds towards defraying the expense of moving a private industry to a city was illegal. 1933, Op.Atty.Gen., 48 St.Dept. 585.

A contract for publicity services to foster industrial development, between a city and non-profit corporation which details actual services to be performed and makes provision for reasonable payment therefor, may be entered into and would not conflict with this section. 17 Op.State Compt. 331, 1961.

A village may not appropriate moneys from its publicity fund to assist in preparing property in the village for occupancy by a desirable industry. 8 Op.State Compt. 272, 1952.

Money may not be borrowed and used by municipality for sole purpose of purchasing and remodeling a building to lease to private industry in order to furnish employment for its citizens. 4 Op.State Compt. 168, 1948.

56. Insurance—Generally

A fire district may carry insurance with a mutual insurance company. 7 Op.State Compt.File No. 5184, 1951. See, also, 6 Op.State Compt. 206, 1950.

57. —— Liability

A town may not purchase liability insurance to cover officers or employees from liability for libel, slander, false arrest or false imprisonment. Op.State Compt. 68–2.

Under this section, a village may not pay additional premiums on insurance not in fact earned where such premiums are paid for a liability provision which upon inspection is found not to be included in the policy. 17 Op.State Compt. 339, 1961.

Town may not pay premium on public liability policy covering premises of justice of the peace. 6 Op. State Compt.File No. 4789, 1950.

A village may not make a gift of money to the fire department to be used by the latter in purchasing liability insurance. 4 Op.State Compt. 396, 1948.

58. —— Pupils

A school district has no authority to procure insurance providing for payment for doctor bills incurred by pupils resulting from accidental injuries, payment not being dependent upon liability of school district. 4 Op.State Compt. 457, 1948.

Board of education is prohibited by this section to act as middlemen in offering the product of a private corporation in the form of accident insurance to school children and in doing so utilize the time and services of school personnel in offering and collecting premiums and making out claim forms. Matter of the Appeal of Gerald Hupert, 1967, 7 Educ.Dept. Rep.No. 7722.

Board of education so as not to violate this section must refrain from

offering to parents through school channels participation in a group insurance plan upon payment of a premium, and from any and all future actions in regard to the use of school buildings or facilities or personnel in furtherance or aid of, or in anyway involving the handling of brochures, premiums, claims forwarding information or in anyway having anything to do with the purchase by the parent of such insurance coverage. Matter of the Appeal of Samuel Kalsmith, 1966, 7 Educ.Dept.Rep.No. 7671.

Use of school staff facilities to sell insurance is violative of this section. Matter of the Appeal of Niagara Falls Federation of Teachers, 1965, 4 Educ.Dept.Rept. 104.

Board of education may not require students to purchase insurance as prerequisite for participating in school program through the usage of teachers as agents for benefit of private corporation in the sale of said insurance. Matter of Appeal of Elias Shapnek, 1963, 3 Educ.Dept. Rep. 99.

59. Intervention in civil actions

In instances where a village itself has a governmental or a proprietary right in certain real property, with reference to the enforcement of restrictive covenants, the village may intervene in an action commenced by others to enforce the same but it may not, however, intervene in any action in which it has neither a governmental nor a proprietary right. 19 Op.State Compt. 565, 1963.

60. Investments

Neither a town nor the Suffolk County sewer agency may purchase the stock of a sewerage disposal corporation in lieu of acquiring the assets thereof. Op.State Compt. 68–51.

Notwithstanding the charitable purpose for which a non-profit corporation is organized, a town may not invest in securities issued by such corporation because the transaction would constitute an illegal investment of municipal funds and would also violate Const. Art. 1, § 8. Op. State Compt. 67–840.

Bond proceeds may be invested only pursuant to this section, thus an investment in time deposits would be an unconstitutional loan of municipal money. 10 Op.State Compt. 423, 1954.

61. Judgments for locality, invalidation of

Chapter 614 of the Laws of 1899, which in effect vacated a judgment upon the merits in favor of a county defendant and granted the plaintiff a new trial before a referee to be specially appointed for the purpose and directs the levy of a tax to pay any amount found due him, was void, since it was virtually a bestowal of a gratuity in violation of former section 10. In re Greene, 1901, 166 N.Y. 485, 60 N.E. 183.

Where final judgment is upon the merits, for the legislature to vacate or disregard it and direct the levy of a tax to pay it, either without a new trial or with judgment upon it, would be the bestowal of a gratuity, but where such judgment is not upon the merits, because of some defect in the authority of the officers to bind the municipal body for which they assume to act, and thus in good conscience is not decisive against the justice of the claim, the legislature may, in order that justice shall prevail direct its reexamination and determination, and, if found to be just, direct that it be provided for by taxation. Id.

Where a judgment in favor of a city in an action against it was not upon the merits, but was rendered on formal considerations, and hence in good conscience was not decisive against the justice of the claim made therein, the legislature might direct a re-examination of such claim and, if found to be just, direct that payment thereof be provided for by taxation. People v. Prendergast, 1911, 144 App.Div. 308, 128 N.Y.S. 1082.

Section 246 of the Greater New York charter, providing that the board of estimate and apportionment might inquire into and determine any claim against the city which had been certified to it by the comptroller as an illegal or invalid claim

against the city, conferred on the comptroller a discretionary power to investigate and to certify to the above-mentioned board only claims which had been adjudged invalid on account of some formal defect, and hence, such section did no violence to former section 10. Id.

62. Leases

The contracting of indebtedness to finance the construction of a public improvement and the subsequent leasing of such improvement do not per se constitute a loan of credit to the lessee, at least where the improvement reverts to the lessor. 10 Op.State Compt. File No. 401, 1954. See, also, Salzman v. Impellitteri, 1953, 305 N.Y. 414, 113 N.E.2d 543; Admiral Realty Co. v. City of New York, 1912, 206 N.Y. 110, 99 N.E. 241; Sun Printing & Publishing Ass'n v. Mayor, etc., of New York, 1897, 152 N.Y. 257, 46 N.E. 499.

A supplemental agreement by city reducing rental rate of lessee of a pier was not void under this section, where city was unable to complete construction and dredging according to terms of lease and city by the supplemental agreement reduced rental in consideration of lessee's release of all claims against the city and undertaking by lessee to complete pier with funds to be advanced by it. Atlantic Gulf & West Indies S. S. Lines v. City of New York, 1946, 271 App. Div. 196, 63 N.Y.S.2d 11, affirmed 297 N.Y. 474, 74 N.E.2d 181.

A village may lease for a fair consideration a parcel of village owned real property not devoted to a public use and no longer necessary for the purposes of the village since a lease for less than a fair consideration would constitute an unconstitutional gift. 13 Op. State Compt. 6, 1957, 1st case.

A village may not lease lands to private association for nominal rent. 6 Op. State Compt. 124, 1950.

63. Libraries

A town may grant moneys for the support of a free association library if the services provided by such library are available to and accessible by the residents of the town, and such appropriation must be held by town fiscal officer and paid out on duly authenticated vouchers under direction of the library trustees. Op. State Compt. 67–771.

A city may not contribute a sum of money to a private corporation which will use the same for the support of a free association library. 20 Op. State Compt. 355, 1964.

A public library may not legally expend funds to be used to sponsor and publish a pamphlet prepared by a league of women voters or purchase copies for free distribution or distribution at a nominal charge. 17 Op. State Compt. 18, 1961.

A town may not give money to or in aid of Adelphi College for the establishment and construction of a library. 15 Op. State Compt. 380, 1959 (2nd case).

Village may not erect library building for purpose of conveyance or lease to free association library. 8 Op. State Compt. 87, 1952.

Village may not donate land to free association library for latter to erect library building thereon. 7 Op. State Compt. File No. 5321, 1951.

Property of village public library may not be transferred without consideration to free association library formed to serve village. 6 Op. State Compt. 253, 1950.

Village may not make a lump sum payment to free library associations. 3 Op. State Compt. 191, 1947.

An appropriation by a municipal corporation or school district to a free association library as consideration for the maintenance of public library service can not be a gift or donation within the meaning of this section. Op. Counsel Educ.Dept. 1951, 1 Educ.Dept.Rep. 707.

64. License fees

Notwithstanding the provision of former section 10 that no city should give any money to or in aid of any individual, the State might say what part of a liquor license fee, if any,

should be returned by a municipality to the licensee on the termination of his license. Bushell v. New York, 1934, 242 App.Div. 366, 274 N.Y.S. 957, affirmed 266 N.Y. 516, 195 N.E. 179.

65. Litigation expenses, reimbursement of

In the absence of statute no duty, legal or moral, rested upon a municipality to defend its officers against charges of official misconduct, wherefore, Laws 1899, c 700, authorizing a city to reimburse its officers for the sums expended by them prior to the passage of the act in successfully defending themselves against charges of official misconduct, was void under former section 10. Chapman v. New York, 1901, 168 N.Y. 80, 61 N.E. 108. See, also, Matter of Straus, 1899, 44 App.Div. 425, 61 N.Y.S. 37; Matter of Jensen, 1899, 44 App.Div. 509, 60 N.Y.S. 933.

The legislature was competent to provide that the expenses incurred by the officers of a municipality successfully defending themselves against charge of official misconduct brought after the passage of the act, should be reimbursed them by the municipality. Deuel v. Gaynor, 1910, 141 App.Div. 630, 126 N.Y.S. 112. See, also, Kane v. McClellan, 1905, 110 App.Div. 44, 96 N.Y.S. 806; Matter of Jensen, 1899, 44 App.Div. 509, 60 N.Y.S. 933.

Where former public official, in whose behalf legal services, for value of which he and others sued city, were rendered in certain actions, was not a party to some of such actions and was impleaded as a party to another of them by the city, which filed a cross-claim against him to hold him personally liable for alleged neglect, there can be no recovery against city for necessary costs of litigation in such cases. Buckley v. City of New York, 1942, 264 App.Div. 116, 34 N.Y.S.2d 577, affirmed 289 N.Y. 742, 46 N.E.2d 352.

Where a former public official did not represent public interest in city's action against him, but offered defense solely for his own benefit in his individual capacity, not for city purpose, he and attorneys, rendering legal services in his behalf therein, are not entitled to reimbursement from city for expenditures thus incurred. Id.

Section 308 of the Code of Criminal Procedure, which authorized the payment, out of the funds of a county, of not more than $500 to an attorney assigned to defend a person accused of a capital offense did not violate former section 10, since the state is burdened with the responsibility and duty of conducting such trial, and money appropriated therefor is necessarily appropriated for a public purpose. People v. Grout, 1903, 87 App.Div. 193, 84 N.Y.S. 97.

The public funds of a town, city, county or village could not be used to reimburse an officer or those claiming under him for expenses brought about by his own gross negligence, bad faith, or malice in the performance of his public duties, even though the claim was made that such expenses were incurred for the benefit of the municipality. Rockefeller v. Taylor, 1902, 69 App.Div. 176, 74 N.Y.S. 812.

Expenses incurred by the assessors of a town in defending, without the direction or resolution of the town board, certiorari proceedings instituted to review an assessment made by such assessors, which, owing to the gross negligence, bad faith or malice of the assessors, was grossly excessive, were not proper town charges, and could not be paid by the town without violating former section 10. Id.

A village may not pay attorney fees and court costs or satisfy any judgment against a member of its board of trustees when the trustee is sued for alleged commission of an ultra vires act. Op. State Compt. 67-718.

Legal fees for services rendered to a town official sued individually are not proper town charges, and the town may not reimburse the official therefor. 17 Op. State Compt. 125, 1961.

Legal fees for services rendered to town officials sued in their official capacities are proper town charges, where the town board has directed the officials to appear in the action and to defend the rights of the town. Id.

The town of Grand Island may not join as party plaintiff, a taxpayers' action to enjoin the New York State Thruway Authority from collecting certain tolls, nor may the town expend town funds in aid of such legal action by its inhabitants where controversy involves private interests of litigants. 16 Op. State Compt. 432, 1960.

County may not pay legal expenses incurred by sheriff in defending an action brought against him as an individual, though arising out of performance of an official act, since such payment would constitute a gift in violation of this section. 13 Op. State Compt. 1, 1957, 1st case.

A city may not pay any portion of the legal expenses incurred by a city policeman in the defense of a tort action arising out of the performance of his duties. 12 Op. State Compt. 479, 1956.

Village funds may not be used to pay the attorney fees incurred in defending a civil action for assault against a village police officer sued in his private capacity. 11 State Compt. 23, 1955.

A city has neither the right nor duty to reimburse city judge and chief of detectives for expense of defending civil action for false arrest and for damages recovered against them. 9 Op. State Compt. 133, 1953.

66. Local subdivisions

A municipality may make a gift of real property to another municipality, in the absence of other legal impediments to the transfer. 20 Op. State Compt. 479, 1964.

67. Modification or rescission of contracts

A municipality might bargain for modification of a contract which it had made and which had become unsuited to its needs, and to that end the municipality might pay adequate consideration either for what it received or for what the other party surrendered under the modification, and a consideration so paid was in no sense a gift. Admiral Realty Co. v. New York, 1912, 206 N.Y. 110, 99 N.E. 241. See also. Hopper v. Willcox, 1913, 155 App.Div. 213, 140 N.Y.S. 277.

Rescission by a municipality of a lease of certain of its subways where it desired to operate those subways in connection with others as one system, and where such action was necessary to afford proper transportation facilities for the public was not prohibited by this section. Id.

Where franchise required telephone company to furnish board of education with telephones at one-half standard rates, board could not waive or contract away its rights and contract anew at higher rate. New York Telephone Co. v. Board of Education of City of Elmira, 1936, 270 N.Y. 111, 200 N.E. 663.

A town may not pay a contractor more than the agreed amount of a public works contract merely because the contractor has not paid his employees the prevailing rate of wages and now must make up the difference. Op. State Compt. 68-212.

Where the low bidder on a contract to supply fuel oil to a school district now claims he is losing money on the contract, the school district may not pay him more than the contract price, since such action would constitute a gift in violation of this section. 13 Op. State Compt. 8, 1957, 2nd case.

Modification of existing municipal garbage disposal contract for sole benefit of private contracting party, without some benefit to municipality, would constitute prohibited gift of municipal funds under this section. 9 Op. State Compt. 325, 1953.

Board of education of a central school district may not increase purchase price of coal over definite price stated in contract and such increase would constitute a gift which would be void. 7 Op. State Compt. 99, 1951.

Town may not increase purchase price of highway machinery over definite price stated in contract, since increase would constitute a gift which would be void, and county superintendent should not approve a contract intended to accomplish such price increase. 3 Op. State Compt. 46, 1947.

68. Moral or equitable claims

While considerations of gratitude or charity were not sufficient justification for appropriations of municipal funds it was well established that such funds might be devoted to the payment of claims which were founded in equity and justice, even though by reason of some technical defect they were not enforceable in law against the municipality, and payment of claims of that nature at the direction of the legislature in no wise contravened former section 10. People v. Prendergast, 1911, 202 N.Y. 188, 95 N.E. 715. See, also, Wrought-Iron Bridge Co. v. Attica, 1890, 119 N.Y. 204, 23 N.E. 542, 2 N.Y.S. 359; Gaynor v. Port Chester, 1920, 230 N.Y. 210, 129 N.E. 657; Lehigh Val. R. Co. v. Canal Board, 1912, 204 N.Y. 471, 97 N.E. 964; In re Borup, 1905, 182 N.Y. 222, 74 N.E. 838; In re Greene, 1901, 166 N.Y. 485, 60 N.E. 183; People v. Board of Education, 1908, 126 App.Div. 414, 110 N.Y.S. 769, affirmed 193 N.Y. 601, 86 N.E. 1130; People v. Metz, 1907, 120 App.Div. 565, 104 N.Y.S. 1115; Mt. Sinai Hospital v. Hyman, 1904, 92 App.Div. 270, 87 N.Y.S. 276; Syracuse v. Hubbard, 1901, 64 App.Div. 587, 72 N.Y.S. 802; Matter of Straus, 1899, 44 A.D. 425, 61 N.Y.S. 37; Matter of Jensen, 1899, 44 App.Div. 509, 60 N.Y.S. 933; Bush v. Orange County, 1896, 10 App.Div. 542, 42 N.Y.S. 417, affirmed 159 N.Y. 212, 53 N.E. 1121; Guest v. Brooklyn, 1876, 8 Hun 97, affirmed 69 N.Y. 506.

While the allowance against a municipality of a claim which had been adjudged invalid on its merits would have been a gratuity and was therefore within the prohibition of former section 10, claims adjudged invalid on account of some matter of form, if in themselves just, might properly be allowed. People v. Prendergast, 1911, 144 App.Div. 308, 128 N.Y.S. 1082. See also In re Greene, 1901, 166 N.Y. 485, 60 N.E. 183.

To justify Legislature in using public moneys to remedy an injustice in cases where no legal obligation to pay existed at time payment was withheld, obligation which would be recognized by men of keen sense of honor and real desire to act fairly and equitably without compulsion of law must exist, and even then remedy may not be through grant of extra compensation. Mullane v. McKenzie, 1936, 269 N.Y. 369, 199 N.E. 624, reargument denied 270 N.Y. 563, 200 N.E. 319.

It is well settled that a statute authorizing the payment by municipal corporations of claims founded in justice and supported by a moral obligation does not conflict with this section. People v. Prendergast, 1911, 202 N.Y. 188, 95 N.E. 715.

This section providing against city conveying its property without consideration, or for inadequate consideration, does not prevent city from recognizing moral obligation to reconvey property to owners or lienors foreclosed by an in rem proceeding. Old Dutch Lands, Inc. v. City of New York, 1967, 55 Misc.2d 384, 286 N.Y.S.2d 86.

A town board may not audit and pay a claim made by a village for improvements made by mistake upon town lands, but legislation authorizing the town to discharge a moral obligation would not violate this section. 5 Op. State Compt. 332, 1949.

69. Mortgages

Mortgage securing purchase price of land purchased from town did not violate former section 10 prohibiting loaning of town moneys for private purposes. Cook v. Burtis, 1935, 157 Misc. 140, 283 N.Y.S. 146.

A town may not take back a purchase money mortgage as part of the consideration for the sale of town-owned property which it no longer requires for any public use. 12 Op. State Compt. 185, 1956.

A village may not join in the execution of a mortgage without becoming liable on the bond where the effect of such joinder would be authorizing the sale of the village's property without consideration. 11 Op. State Compt. 687, 1955.

70. Non-profit corporations

A contribution by the County of Warren to a non-profit membership corporation is not violative of this section if a duly executed contract is entered into between the county and the association and the contract contains a provision that payment of county funds must be for services actually performed and made after the rendering of a verified account and audit of vouchers attached thereto. 1968, Op.Atty.Gen. (Inf.) August 26th.

A village may not contribute village moneys to a non-profit corporation to help defray the costs of a federally approved anti-poverty project. Op. State Compt. 68–251.

71. Patriotic organizations

In suit to invalidate a deed from town transferring property to a Post of the American Legion so as to limit the property conveyed to land appurtenant to a building and to exclude other land inadvertently included, where the deed was delivered for a consideration of $50 and the evidence indicated that the value of the building and land was $5,000, evidence established prima facie that the conveyance was in violation of the constitution and that the deed was delivered without authorization of the village board. Incorporated Village of Sag Harbor v. Chelberg and Battle Post # 388 of The American Legion, Inc., 1961, 12 A.D.2d 520, 207 N.Y.S.2d 464.

Town board may not contribute money or land to an American Legion Post in aid of the erection of a veterans' memorial. 15 Op. State Compt. 329, 1959.

Village may not convey real property to American Legion without consideration. 9 Op. State Compt. 46, 1953.

A village may not pay a claim of a local American Legion Post for participation in memorial services conducted by the post outside the village in conjunction with another post when such services were not part of the village observance of Memorial Day and such post was not placed in charge of the observance by the board of trustees. 4 Op. State Compt. 345, 1948.

A village board of trustees may not contribute public moneys toward the purchase or construction of a home for a local post of the Veterans of Foreign Wars. 3 Op. State Compt. 201, 1947.

The purchase of a building by a town board for the exclusive use of a patriotic organization violates this section. Id.

The purchase of a building by a town board for the exclusive use of a patriotic organization is unconstitutional. 3 Op. State Compt. 50, 1947.

72. Pensions—Generally

Laws 1900, c. 725, directing the board of education of the city of New York to place certain persons, who had been retired as teachers before the establishment of the pension system by chapter 296 of the Laws of 1894, on the list of retired teachers entitled to receive as annuities one-half the salaries paid to them while in service, and to pay to them such annuities from the time of their respective retirements, not earlier than the enactment of the statute of 1894, was unconstitutional so far as it related to teachers who retired before the enactment of that statute, it being an appropriation of city moneys to persons who had been employees at a time when no pension system was provided by law, and as such, it had to be regarded as making a gratuity or extra compensation to a public servant, and was, therefore, within the prohibition of former section 10. Mahon v. Board of Education, 1902, 171 N.Y. 263, 63 N.E. 1107.

School board's compliance with supplemental retirement plan for teachers would not violate this sec-

tion prohibiting gifts out of public funds. Herreboudt v. Board of Ed. of Peekskill City School Dist., 1963, 41 Misc.2d 547, 245 N.Y.S.2d 612.

Pensions given in consideration of services not fully recompensed when rendered are not gifts of public funds but constitute pay withheld to induce long, continued and faithful service. Burton v. City of Albany, 1963, 40 Misc.2d 50, 242 N.Y.S.2d 510.

Benefits under school district's supplementary retirement plan were not gratuities and did not render retirement plan violative of this section prohibiting school districts from making gifts; but benefits constituted deferred compensation to promote long continued and faithful services. Anderson v. Board of Ed. of Peekskill City School Dist., 1957, 5 Misc. 2d 1056, 165 N.Y.S.2d 908.

Pension awarded pursuant to section B18-4.0 of the New York City Administrative Code, granting pension to members of police department and providing that any member who shall perform duty on force for 20 years and who subsequently shall serve as police commissioner or deputy shall be granted pension allowed to chief inspector in department, is sustained by adequate consideration and grant made in good faith is not gift of city's money. Bergerman v. Murphy, 1951, 278 App.Div. 388, 105 N.Y.S.2d 642, affirmed 303 N.Y. 762, 103 N.E.2d 545.

Where section B18-4.0 of the New York City Administrative Code awarding pension to members of police department of municipality gave police commissioner or his deputy pension much larger than that for other members of force, appointments of ex-chauffeur and bodyguard of mayor to position as commissioner when coupled with fact that such persons held office but short time and then resigned and requested pension, and fact that neither of them had performed duties of office to which appointed, were made in fraud of rights of city and were not in good faith, and award to them of commissioner's pension was invalid. Id.

A "gift" within this section, is a voluntary transfer of money or property without any consideration or compensation therefor, while a "pension" which is not in violation of the constitutional provision, is a period allowance made by a government to an individual or to those who represent him on account of past services or some meritorious work done by him. Bergerman v. Murphy, 1951, 199 Misc. 1008, 102 N.Y.S.2d 622, affirmed in part and reversed in part on other grounds 278 App.Div. 388, 105 N.Y.S.2d 642.

Subdivision 3 of section 464 of the Charter of the City of Buffalo granting pensions to certain members of the police force was constitutional. Carr v. Roesch, 1930, 231 App.Div. 19, 246 N.Y.S. 628, affirmed 255 N.Y. 614, 175 N.Y.S. 336.

The payment of a pension by the city of New York to a Civil War veteran, retired under former Civil Service Law, § 21-a, by the Bronx Parkway Commission, a state board limited to New York city and Westchester county, was not an appropriation of public moneys for the payment of a gratuity, and where the city comptroller refused payment on such ground, mandamus would issue to compel him to make the payment. Matter of Wright v. Craig, 1922, 202 App.Div. 684, 195 N.Y.S. 391, affirmed 234 N.Y. 548, 138 N.E. 441.

A school district may not establish a plan whereby the retiring members of the teaching and supervisory staff are paid what amounts to a retirement benefit during their final working year, nor may it provide for the payment of a lump sum death benefit other than as expressly allowed by the General Municipal Law. Op. State Compt. 68-205.

A water district may not contribute on behalf of its employees additional amounts assessed upon such employees based upon the fair rental value of premises owned by the water district and occupied by such employees. 11 Op. State Compt. 647, 1955.

A water district which joins the New York State Employees Retirement System may not contribute on behalf of its employees the deficiency contributions assessed against such employees. 11 Op. State Compt. 603, 1955.

A city ordinance interpreted so as to allow an increase in pension benefits to those already receiving benefits would be unconstitutional when such involves an added expense to the city. 4 Op.State Compt. 371, 1948.

Moneys utilized by the school board to pay for the annuity is a part of the salary being paid to the teacher. Op. of Counsel (Educ.Dept.) 1963, 2 Educ.Dept.Rep. 522.

Where a city enacted a Teachers' Retirement Fund Act, the payment of an annuity to a teacher who was not in service at the time of the enactment of the ordinance or during its continuance in force, on account of services rendered by her prior to such enactment, was in the nature of a gratuity and in contravention of former section 10. Op. Education Department, 1919, 19 St.Dept.Rep. 301.

73. —— Widows

The provision of the charter of the city of Brooklyn, Laws 1888, c. 583, tit. 11, § 42, authorizing the granting of a pension to the widow of any member of the police force or attaché of the police department who should have died after ten years of service in the police department of that city, was void under former section 10 if construed to have retroactive effect and to authorize the granting of a pension to the widow of a policeman who had been retired upon a pension after twenty years' service and who had died several years before the enactment of the statute. People v. Partridge, 1902, 172 N.Y. 305, 65 N.E. 164.

Local law enacted by city in 1952 calling for pension payments to widows of disabled members of police force was unconstitutional under Const. art. 9, § 10 prohibiting extra compensation, as applied to widow of member of police force who had retired in 1946, and such unconstitutionality was not cured by subsequent constitutional amendments authorizing increases in pension benefits. Burton v. City of Albany, 196[3], 40 Misc.2d 50, 242 N.Y.S.2d 510.

The provision of subdivision 3, se[ction] 264 of the 1916 charter of t[he] city of Buffalo, that the comm[on] council in its discretion might gra[nt] a pension to widows of decease[d] members of the police force, etc., wa[s] in violation of former section 1[0]. Glasser v. Buffalo, 1921, 115 Mis[c.] 88, 187 N.Y.S. 337.

A city may provide supplement[al] pensions for widows of deceased po[-] licemen even though such policeme[n] were members of the New Yor[k] State Employees' Retirement System. 18 Op. State Compt. 340, 1962.

An increase of pension to widow[s] would constitute a gift of municipa[l] moneys, prohibited under this section. 15 Op. State Compt. 285, 1959 (1s[t] case).

74. Prepayments by local subdivisions

Village board may not make a deposit of public moneys with a water corporation, or contract to make periodic payments in the future for materials or services to be furnished at this time; or pay now for materials and services to be furnished later. 21 Op.State Compt. 65-173.

A municipality for its benefit and in order to take advantage of special rate, may enter into an agreement with a public utility corporation providing for annual payments in advance of actual rendition of service. 11 Op.State Compt. 254, 1955.

City undertaking slum clearance and redevelopment project may not advance funds not yet legally due to contractor to be reimbursed from advances by Federal Housing and Home Finance Administrator. 11 State Compt. 98, 1955.

Officers and employees of City of Poughkeepsie may not be paid in advance for vacation period. 8 Op. State Compt. 139, 1952.

A school district may not provide for payment of a teacher's compensation in advance of the services to be-

rendered. 5 Op.State Compt. 53, 1949.

75. Private corporations

A municipality was competent to give aid and support to its poor through the medium of a private corporation engaged in charitable work and to that end might appropriate its funds to such corporation. People v. Fitch, 1897, 154 N.Y. 14, 47 N.E. 983. See, also, White v. Inebriates' Home, 1894, 141 N.Y. 123, 35 N.E. 1092; Shepherd's Fold of Protestant Church v. New York, 1884, 96 N.Y. 137.

A municipality was not precluded from making payments to a private corporation in the support of the poor by reason of the fact that the corporation had other purposes than the care and support of such persons. Shepherd's Fold of Protestant Church v. New York, 1884, 96 N.Y. 137. See, also, People v. Fitch, 1897, 154 N.Y. 14, 47 N.E. 983.

Laws 1871, c. 269, § 3, appropriating the annual sum of $5,000 from the funds of New York city to the Shepherd's Fold, a corporation that had as its principal object the support and education of poor children and that was intrusted by Laws 1868, c. 775, with the care of such children within the city, was not void under former section 10 of Article 8 because that organization also undertook to receive children of poor clergymen for training and education, who might be deemed eligible and who should be approved by the trustees, and to receive other children and youths for education and training to such extent as in the judgment of the trustees might be expedient. "The main corporate purpose was to support orphans and other friendless children, and by the Act of 1868 the magistrates and commissioners of charities of the city were empowered to place destitute children in the care of the plaintiff, and we think that the legislature had power to authorize the city to provide for the burden assumed by the plaintiff and that which might be cast upon it under the Act of 1868 by a payment of a gross annual sum instead of keeping a separate account of the expense of supporting each child who might be committed or transferred, under that act or of each destitute child, living in the city, who might be received by the plaintiff and who otherwise would have become a county charge." Shepherd's Fold of Protestant Church v. New York, 1884, 96 N.Y. 137.

A county board of supervisors may appropriate funds for the relief of poor persons in a children's health camp conducted by private persons under the supervision of the county tuberculosis hospital, provided such camp is duly incorporated and presents a certificate of approval from the State Board of Charities. 1927, Op.Atty.Gen. 283.

76. Private vehicles, compensation for use

A deputy city clerk may not be paid a lump sum per day for the use of her auto on official city business. Op.State Compt. 67–581.

77. Public buildings—Generally

Use or loan of public buildings by private interests without compensation is prohibited. 1968, Op.Atty. Gen. (Inf.) Mar. 27.

78. —— Use of

Permitting two religious groups to use auditorium of fire house for religious services at stated time, while their respective places of worship are being erected or repaired, does not violate constitutional provision for separation of church and state or constitute a loan of public property for private use in violation of this section. Lewis v. Mandeville, 1951, 201 Misc. 120, 107 N.Y.S.2d 865.

A village may not permit a savings and loan association to use village offices for the collection of moneys from borrowers and deposits by members, with or without consideration. 19 Op.State Compt. 412, 1963.

A village may permit a political party to lease space in the village hall when and where the village does not need the same for village purposes, provided that the village will receive a fair consideration for such lease from the political party. 17 Op.State Compt. 435, 1961.

A city may not permit the use of its clerk's office by a city employee at times when the public is excluded for the purpose of making searches resulting in the employee's personal gain. 11 Op.State Compt. 139, 1955.

79. —— Mixed public and private use

A town attorney may not, pursuant to this section prohibiting a gift of public property to a private person, install an extension of his private office telephone in the town hall to be answered, with the name of his private office, by the town clerk. Op. State Compt. 67–897.

When a town and a village have jointly appointed a physician as health officer and the town and village are joint owners of a municipal building, such town and village may rent space therein to such health officer but they may not allow such health officer to use, rent free, such space which he would be using essentially for private practice as a physician. 19 Op.State Compt. 63–502.

A board of education may not permit private persons to install candy vending machines on school district property. 16 Op.State Compt. 485, 1960.

A village may not construct a building, to be financed by the issuance of bonds, to be used partially for fire department and library purposes and partially for rental purposes as a grocery store. 4 Op.State Compt. 254, 1948.

80. Public corporations

The constitutional provision that no city shall give or loan its credit, to or in aid of any individual or public or private corporation or association, does not prohibit gifts of money by a city or county to another public corporation for a public purpose. Comereski v. City of Elmira, 1955, 308 N.Y. 248, 125 N.E.2d 241.

Under this section there is no prohibition against gifts of moneys to public corporation for public purpose, at least where local unit does not borrow money so given or loaned. Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 1939, 280 N.Y. 469, 21 N.E.2d 681.

A city, county, town, or village, was no more competent to make a gift of its money or property to a public than to a private corporation, and a gift to either the one or the other would have been invalid under former section 10. Deady v. Lyons, 1899, 39 App.Div. 139, 57 N.Y.S. 448.

The adoption of this section renders invalid all existing statutes authorizing the giving or loaning of credit to public corporations, such as regional market authorities, as well as forbidding the enactment of such legislation in the future. 1938, Op. Atty.Gen. 256.

A school district in a city of less than 125,000 persons may sell or donate its realty to a public corporation without a public auction provided that such realty is to be used for the purposes of such corporation or for a public use. 12 Op.State Compt. 139, 1956.

81. Public equipment, use of

A municipality was without the right to extend to an individual the privilege of using a municipal automobile for private purposes. Fox v. Employers' Liability Assur. Corp., 1935, 243 App.Div. 325, 276 N.Y.S. 917, affirmed 267 N.Y. 609, 196 N.E. 604.

A village-owned vehicle may not be used for personal purposes by the village police chief. Op.State Compt. 67–973.

A town highway superintendent may not permit town machinery to be used for private individuals. Op. State Compt. 67–855.

The chief engineer of a village volunteer fire department may not use a village-owned automobile either for commuting to and from his place of employment outside the village or for personal business within the village. 17 Op.State Compt. 420, 1961.

A village may not authorize a private organization to use village parking meters for display of Christmas decorations. 16 Op.State Compt. 469, 1960, 2d case.

A village may not lease its equipment to a private individual, nor use its equipment for private construction, with or without consideration. 16 Op.State Compt. 197, 1960.

Town equipment may not be used for the sole benefit of private persons and if such equipment has been so used, there appears to be no statutory authority for town to enforce payment by the private beneficiaries. 16 Op.State Compt. 56, 1960.

Village may lease village electric department poles for use by operator of commercial closed-circuit to television system. 13 Op.State Compt. 351, 1957.

The town superintendent of highways may not retain for his own use and benefit moneys paid by the county to the town under an agreement concerning the rental of town highway machinery with operator for his services on county roads unless he is employed by the county. 10 Op.State Compt. 246, 1954.

A town may not lend the use of town highway machinery to grade land owned by a private cemetery corporation or association. 10 Op. State Compt. 50, 1954.

Under this section a city may not permit the use of city parking meters for the collection of money for the March of Dimes. 9 Op.State Compt. 456, 1953.

A county may not permit a private corporation to use county property for its corporate purposes without consideration. 8 Op.State Compt. 93, 1952.

Board of education of a central school district may not permit the use of a cement mixer and a truck with snow plow by an individual or village with or without consideration. 4 Op.State Compt. 112, 1948.

82. Radio or television broadcasting

Broadcasts over municipal radio station of the city of New York of speeches delivered by prominent speakers at Communion Breakfasts sponsored by organizations of Catholic municipal employees did not violate this section in view of fact that broadcasts were made because of the interest to the listening public, and were not made for the benefit of the organizations. Lewis v. La Guardia, 1939, 172 Misc. 82, 14 N.Y.S.2d 463, affirmed 258 App.Div. 713, 14 N.Y.S. 2d 991, affirmed 282 N.Y. 757, 27 N.E.2d 44.

While a city might maintain a broadcasting station as an adjunct to its governmental departments, it could not use it for broadcasting for private purposes. Ford v. Walker, 1929, 227 App.Div. 416, 237 N.Y.S. 545.

Commercial sponsorship in any form would render violative of this section any broadcasting or televising of public high school football games or other sports events taking place on public school property. Op.Educ. Dept., 1965, 5 Educ.Dept.Rep. 226.

83. Recreation programs

A city may not purchase land and share the cost of erection and use of a facility to be constructed thereon with a boys club and a childcare day nursery activity even though both are operated by private nonprofit organizations. 1967, Op.Atty.Gen. (Inf.) May 12.

A town may not contribute its funds to a recreational program, for both youth and adults, sponsored by the local Rotary Club and operated jointly with the town. 20 Op.State Compt. 436, 1964.

A town board may not authorize expenditure of town moneys to aid an archery program supported by a local sportsmen's club. 20 Op.State Compt. 90, 1964.

A village may not appropriate village moneys for a "Little League" nor may a school district convey real property to a village to be used for "Little League" purposes, since the "Little League" is a privately organized and operated program. 17 Op. State Compt. 388, 1961.

A town board may not make a donation of town funds for support of a "little league" baseball club. 17 Op.State Comp. 213, 1961.

A town may not set up a program similar to the "State Youth Program" and allot certain amounts from town general funds to youth programs within the town on a matching fund basis. 15 Op.State Compt. 92, 1959.

A town lacks authority to make a gift to a village of funds earmarked for village programs supporting Little League Baseball or Boy Scout and Girl Scout programs. 14 Op. State Compt. 378, 1958, 2nd case.

A town may not expend moneys, through its recreation commission, to finance the operations of the Little League Baseball program in the town, or to defray expenses of the basketball tournament sponsored by the C.Y.O. of another municipality, in which teams from the town participate, or to purchase prizes for a bowling league for youths in the town, sponsored by interested individuals. 14 Op. State Compt. 148, 1958.

Town funds may not be used in aid of a private youth recreation project. 13 Op.State Compt. 82, 1957.

The town may acquire land and carry liability insurance thereon, for the use of the general public in the conduct of baseball games, youth projects, Independence Day celebrations and other similar events. 12 Op.State Compt. 217, 1956.

The town board may not appropriate moneys for the use of a local baseball team. Id.

School district funds may not be used for the purchase of sweaters or jackets to be awarded to students who have participated in athletic activities. 11 Op.State Compt. 78, 1955.

Village moneys may not be appropriated to "Hi-Teen Club" where such club is not operating a municipally sponsored youth recreation project. 8 Op.State Compt. 166, 1952.

Town may not appropriate moneys for expenses of operating a privately owned community hall aside from those which lawfully may be appropriated to a "youth recreation project" operated for the town by the organization owning such hall. 7 Op. State Compt. 447, 1951.

City may expend city funds to buy prizes for projects conducted by city recreation commission, as a lawful, authorized city purpose. 7 Op.State Compt. 210, 1951.

84. Releases

A town or village might not give a bank a release of liability for any of its funds deposited therein even though the stockholders issued certificates of beneficial interest to the municipality which were to become prior obligations of the bank, or stock in the bank was given in return. 1933, Op.Atty.Gen., 48 St.Dept. 586. See, also, 1933, Op.Atty.Gen., 48 St.Dept. 787.

Where purchaser of tax lots paid no consideration for release of lands under water in addition to that paid for tax lots when they were purchased, subsequent release by Board of Estimate to purchaser of rights of city to that portion of tax lots lying within lines of Jamaica Bay at no additional consideration was void as a gift of city property in violation of this section. Solow v. City of New York, 1966, 25 A.D.2d 442, 266 N.Y.S. 2d 823, affirmed 20 N.Y.2d 960, 286 N.Y.S.2d 852, 233 N.E.2d 855.

It is not legal for a village to execute a release of a reverter clause in a deed without additional consideration. 11 Op.State Compt. 687, 1955.

A city may not release without consideration condition in deed of its property providing for forfeiture and reversion of title to city upon breach of condition. 7 Op.State Compt. 230, 1951.

85. Removal proceeding expenses

Subdivision 16 of former section 240 of the McKinney County Law which provides that the reasonable costs and expenses in proceedings before the governor for the removal of any county officer upon charges preferred against him, including the taking and printing of the testimony

therein, are proper charges against a county, does not offend this section. Garvin v. Rensselaer County, 1917, 221 N.Y. 222, 116 N.E. 996. See, also, People v. Oneida County, 1917, 178 App.Div. 716, 165 N.Y.S. 511, appeal dismissed 221 N.Y. 367, 117 N.E. 578.

The reasonable expense of residents of a county in employing counsel to prosecute before the governor a proceeding voluntarily brought by them for the removal from office of a county officer upon the ground that he was unfit to discharge his duties was an expense for a county purpose, and as such might be paid by the county. People v. Onondaga County, 1914, 164 App.Div. 89, 149 N.Y.S. 572.

86. Repairs and remodeling

Under former section 10, the issuance and sale of bonds by city and expenditure of proceeds thereof for purpose of repairing and restoring factory property, secured by city under a tax deed, so that the property could be sold or leased, did not constitute a violation of such section prohibiting cities from giving or loaning money or credit to individuals, corporation or association. Walrath v. City of Salamanca, 1938, 255 App.Div. 158, 6 N.Y.S.2d 513.

Laws 1870, c. 291, would have been unconstitutional if construed to allow a village to expend its funds in the repair of a county courthouse for the purpose of retaining the courthouse therein and preventing its removal to another village, since expenditures of that nature would amount to a gift to the county which had the duty of keeping its courthouse in repair. Deady v. Lyons, 1899, 39 App.Div. 139, 57 N.Y.S. 448.

An agreement by a county to accept a conveyance of real property from a private flying club for the purpose of expending public funds for its improvement, maintenance, repair and snow removal and for its reconveyance thereafter to said private flying club is in violation of restriction imposed by this section. 1967, Op.Atty.Gen. (Inf.) Mar. 15.

A town may expend funds to improve property leased from another municipality for a municipal purpose, provided that such improvement be completely amortized during the life of the lease. Op.State Compt. 68-732.

While a town may lease space in a privately owned office building, such space to be used for certain town offices, the town may not spend town money to remodel or alter the leased space so as to provide separate offices for certain town officials. 18 Op.State Compt. 147, 1962.

Village may not repair an archway over a drainage ditch in which the village has an easement for drainage purposes where the archway has been constructed by the owner of the fee, covered with asphalt and used as the area upon which a gasoline filling station is situated. 11 Op.State Compt. 296, 1955.

Money may not be borrowed and used by municipality for sole purpose of purchasing and remodeling a building to lease to private industry in order to furnish employment for its citizens. 4 Op.State Compt. 168, 1948.

87. Sales

Where city, which had found certain area in city to be "substandard and insanitary," which approved plan for renewal thereof, and which ordered its acquisition by city through condemnation was to pay about $16 a square foot for land and buildings in area, and denominational university purchased part of the area for $7 a square foot and agreed to raze buildings, relocate tenants of buildings, and use cleared land for campus and buildings only, and the $7 a square foot, which university paid, was at least equal to re-use value as established by several appraisals, sale of land to university was not an unconstitutional grant or subsidy of public moneys to a religious corporation, since university was not receiving a gift, grant, or subsidy of public property. 64th St. Residences, Inc. v. City of New York, 1958, 4 N.Y.2d 268, 174 N.Y.S.2d 1, 150 N.E.2d 396, certiorari denied 78 S.Ct. 1152, 357 U.S. 907, 2 L.Ed.2d 1175.

The sale of city property for which the city has no use is in no sense a gift for or in aid of the person to whom the sale is made, wherefore, Laws 1905, c. 537, empowering the board of public works of the city of Tonawanda to sell to corporations and individuals outside of the city the right to use such waters of the city as were not needed by it or its inhabitants was not void under former section 10. Simson v. Parker, 1907, 190 N.Y. 19, 82 N.E. 732.

Provision of this section that no county, city, town, village, or school district shall give or loan any money or property to or in aid of any individual, private corporation, or association, or private undertaking, is designed to forbid gift of property by a local unit of government without consideration, not to regulate the price or adequacy of the consideration of a bona fide sale of property, and therefore had no application to the sale by Board of Education of central school district of realty owned by former common school district to one who was not the highest bidder. Application of Ross, 1954, 284 App.Div. 522, 132 N.Y.S.2d 760, reversed on other grounds 308 N.Y. 605, 127 N.E. 2d 697.

A city may sell or dispose of its used and unneeded fire alarm boxes to anyone, including a village, at a fair and reasonable consideration, with or without advertising for bids. Op.State Compt. 68-109.

The board of education of a central school district may not give to private citizens, or sell for less than its reasonable value, property belonging to the school district. Op.State Compt. 67-673.

A city may enact a local law providing for the sale of city-owned property (city public hospital) at private sale, and the consideration therefor must be equal to the actual value of the property sold. Op.State Compt. 67-504.

Although a county may not donate a parcel of county owned land, now vacant and not presently needed by the county for county purposes, it may enact a local law whereby such land may be leased or sold without public bidding therefor and a private corporation may lease or purchase from the county such land, pursuant to such local law. 20 Op.State Compt. 261, 1964.

A town may not convey town owned real property to a fire district fire department or fire company for a consideration less than the actual value of such real property. 19 Op. State Compt. 94, 1963.

A town may not convey real property to a private corporation unless it receives adequate compensation even though the town originally received the property as a gift. 18 Op.State Compt. 69, 1962.

A village may not sell an obsolete fire truck to a village fire company for a nominal sum. 17 Op.State Compt. 280, 1961.

A village may not convey title to a part of an abandoned village street to a private person for a nominal sum. Id.

Board of Education may not donate unused school building to a private association and it may lease or sell such building only when all children in such building are educated outside district thereof. 17 Op.State Compt. 53, 1961.

A village may not loan or sell to a person, for resale to another person, village property of a nature difficult to procure otherwise. 11 Op.State Compt. 323, 1955.

A town may not convey property to an American Legion Post for a nominal consideration. 9 Op.State Compt. 436, 1953.

Village may not grant discounts from prices established for sale of village cemetery lots to resident purchasers. 7 Op.State Compt.File No. 5228, 1951.

88. School districts

Subdivision 9 of former section 302 of the County Law precludes payment of a portion of revenues received from use of facilities in a

county park, to the school district in which such park is located. 18 Op. State Compt. 77, 1962.

City of Oneonta has no authority under existing laws to give city school district proceeds from water rents in excess of operating and other expenses of city water department. 9 Op.State Compt. 434, 1953.

While this section does not prohibit a city from loaning money to a city school district, at least where the money loaned is not borrowed, a loan which is primarily for the purpose of aiding and assisting the school district, and from which the city will derive little or no advantage or profit, may not be made in the absence of an authorization from the Legislature. 7 Op.State Compt. 263, 1951.

89. Sectarian institutions

A county, city, town or village was not precluded from appropriating funds for the secular education of the inmates of an orphan asylum by reason of the circumstance that the asylum was under the control of some religious organization. Former section 14, in authorizing provisions for the secular education of inmates of orphan asylums, recognized the fact that the instruction of such inmates was neither practicable nor possible elsewhere than in the institution itself. Accordingly, provision might be made therefor regardless of the religious belief of those in control of the asylum. Thus, St. Mary's Boys' Orphan Asylum of the city of Rochester, incorporated under chapter 319 of the Laws of 1848, was neither a school nor an institution of learning within the meaning of former section 4 of article 9 of the constitution, now Article XI, § 3, prohibiting the payment of public moneys to a denominational school or institution of learning, but on the contrary was an orphan asylum within the meaning of former section 14. Sargent v. Board of Education, 1904, 177 N.Y. 317, 69 N.E. 722.

90. Streets and highways—Generally

This section prohibiting the giving as a gift or loan by any city of any money or property to or in aid of any individual or private corporation had no application to situation in which defendant city acquired from corporation an authorization to enter in and upon corporation's property for purposes of destroying existing sidewalk in front of corporation's premises, so that regardless of extent of existing sidewalk which city's contractor destroyed or what, if anything, contractor accomplished by its authorization to enter corporation's property, a consideration was exchanged. Steiner Egg Noodle Co. v. City of New York, 1968, 57 Misc.2d 479, 293 N.Y.S.2d 416.

The provision of chapter 339 of the Laws of 1892, that the city of New York, and the New York and Harlem, and the New York Central and Hudson River railroad companies, should each bear one-half the expense of the elevation of railroad tracks in Fourth avenue and thereby restore to public use the streets under the structure, was not unconstitutional within former section 10 as the benefit inuring to the city from the restoration of the cross streets to public use was a valuable consideration for which the city might justly be compelled to pay. Tocci v. New York, 1893, 73 Hun 46, 25 N.Y.S. 1089.

A town may construct a bridge having a span of five feet or more as a part of a village street, although such street is used as an entry to privately owned property leased by the village for use as a public parking lot. 5 Op.State Compt. 508, 1949.

Town may not reimburse owner of drained land for expense incurred and paid by her in lowering culvert across highway pursuant to agreement. 5 Op.State Compt. 300, 1949.

91. —— Closings

A municipality had no property interest in a street in which it had no fee and therefore, the action of the legislature in closing such a street for railroad purposes was not objectionable under former section 10 as a gift of municipal property to a private undertaking. McCutcheon v. Terminal Station Commission, 1915, 168 App.Div. 301, 154 N.Y.S. 711.

92. —— Grade changes

The legislature was competent to impose on a municipality liability for the damage done abutting property by a change in the grade of a street, although at the time the change was effected no liability attached for injuries caused thereby. People v. Prendergast, 1911, 202 N.Y. 188, 95 N.E. 715. See, also, In re Borup, 1905, 182 N.Y. 222, 74 N.E. 838.

One who purchased property after it had been damaged by a change of street grades was not entitled to an award of substantial damages for the injury to the property resulting from the change of grade since the allowance of compensation for such injuries would have been a pure gratuity. People v. Stillings, 1909, 134 App.Div. 480, 119 N.Y.S. 298. See, also, People v. Phillips, 1903, 88 App.Div. 560, 85 N.Y.S. 200.

93. —— Paving contracts

A contract for the paving of a city street, the entire expense of which was to be borne by the owners of abutting property, should not be construed as pledging the credit of the city in aid of individuals, because of the fact that the city was made a party thereto, where it appeared that the city was in no wise liable on the contract and was made a party only for the purpose of representing the interested property owners in entering into the contract and of collecting for the contractors the assessments that would be devoted to paying for the paving. Kronsbein v. Rochester, 1902, 76 App.Div. 494, 78 N.Y.S. 813.

94. —— Private roads and driveways

Under this section, section 34 and Const. art. 8, § 1, a city may not spend city funds for lights to improve private streets which have not been accepted by the local legislative body. 1967, Op.Atty.Gen. (Inf.) June 27.

Snow removal from private roads and driveways by town highway equipment is improper as violative of this section. Op.State Compt. 68–818.

Where the town clerk's home serves as the clerk's office and also as the place where town board meetings are held, the town highway superintendent may keep the driveway leading to the clerk's home free from snow. 19 Op.State Compt. 63–992.

A town lacks authority to repair roads upon private property with or without consideration prior to their becoming public highways. 16 Op. State Compt. 123, 1960.

A town may neither use its own equipment nor hire privately owned equipment to plow private driveways and roads. 15 Op.State Compt. 440, 1959.

The town board does not have the power to maintain at town's expense private roads prior to formal acceptance of an offer of dedication. 12 Op.State Compt. 218, 1956.

A town highway department may not improve a private road at town expense. 15 Op.State Compt. 17, 1959 (1st case).

A town may not pay the cost of erecting a gate or warning system at a privately owned grade crossing. 12 Op.State Compt. 200, 1956.

95. Taxes—Generally

This section did not terminate county's liability to school district for amount of unpaid school taxes on property purchased by county at tax sales and stricken from district tax rolls, but recognized absolute obligation of county to pay school district amount of such taxes. Union Free School Dist. No. 11 of Town of Urbana, Steuben County v. Steuben County, 1942, 178 Misc. 415, 33 N.Y. S.2d 854, affirmed 264 App.Div. 945, 36 N.Y.S.2d 440.

This section does not prevent the Legislature from placing on the city of Utica the duty of collecting the state and county taxes and of paying the amount thereof, whether collected or not, to the treasurer of the county of Oneida. Oneida County v. City of Utica, 1940, 260 App.Div. 363, 22 N.Y.S.2d 642, affirmed 285 N.Y. 788, 35 N.E.2d 189.

State and county taxes are the property of the city of Utica, and the city, when paying to the county of Oneida the amount of such taxes, is not loaning its credit in violation of this section, but is merely satisfying an obligation imposed on it by the Legislature. Id.

A county does not collect the amount of state and county taxes from the persons taxed, but it collects it from the city which owes that amount to the county, and thus the amount uncollected of state and county taxes is an indebtedness of the city. Id.

In the absence of a valid purchase agreement for prorating taxes, a school district may not pay real property taxes which are a seller's legal responsibility. 20 Op.State Compt. 488, 1964.

A town may not agree to reimburse a private property owner the amount of a possible increase in taxes, either as part of the consideration for the purchase of adjoining property, or as a condition subsequent contained in the contract of purchase and sale. 16 Op.State Compt. 66, 1960.

Unless authorized by statute, a county may not make payments to another political subdivision in lieu of taxes on county owned tax exempt property. 8 Op.State Compt. 120, 1952.

96. —— Advances for uncollected taxes

The contracting of indebtedness by city for the purpose of advancing to a county the amount of its uncollected taxes remaining unpaid is not violative of this section or section 2. 1939, Op.Atty.Gen. 164.

The borrowing of money by town to pay to school district uncollected school tax pursuant to Westchester tax law was not a "gift or loan of town's credit to or in aid of" school district, prohibited by this section. Free School Dist. No. 3 of Town of Rye, Westchester County v. Town of Rye, 1939, 280 N.Y. 469, 21 N.E.2d 681.

Under this clause providing that no county, city, town, village or school district shall loan its credit, further provision that this shall not prevent a county from contracting indebtedness to advance to town or school district the amount of unpaid taxes returned to it, should be confined to a true loaning of credit. Union Free School Dist. No. 3, Town of Rye, Westchester County v. Town of Rye, 1939, 256 App.Div. 456, 10 N.Y.S.2d 333.

The procedure authorized by Laws 1916, c. 105, § 31, whereby supervisor, when directed by town board, pays over to treasurer of each school district amount of unpaid school taxes by borrowing such amount upon town's credit, does not violate this clause providing that no town shall loan its credit to any public corporation, a "school district" not being a "public corporation" within this clause but being a "municipal corporation" within the definition of General Corporation Law § 3, subd. 1. Id.

97. —— Waiver of

Section 889-a of the Charter of the City of New York, providing that a "building in course of construction commenced since the preceding first day of October and not ready for occupancy, shall not be assessed," did not violate former section 10. People ex rel. 1170 5th Ave. Corp. v. Goldfogle, 1930, 254 N.Y. 476, 173 N.E. 685.

Village taxes levied subsequent to January 1, 1944, may not be reduced, compromised or cancelled by the village. Op.State Compt. 67–617.

Although a village may pass a law having retroactive effect within constitutional limitations, it may not thereby waive a utility tax already accrued. 13 Op.State Compt. 315, 1958, 2nd case.

Fourteen year old tax claim is barred by statute of limitations but remains as a valid debt, release or compromise of which would constitute a gift prohibited by Constitution. 10 Op.State Compt. 162, 1954.

98. Transfer of liability

Laws 1881, c. 700, providing that the several towns in this state shall be liable to any person suffering the same, for all damages to person or property by reason of defective highways or bridges in such town, in cases in which the commissioner or commissioners of highways of said towns are now by law liable therefor, instead of such commissioner or commissioners of highways, did not effect a gift of the money or property of the towns in aid of an individual and hence was not obnoxious to former section 10. Bidwell v. Murray, 1886, 40 Hun 190. See, also, Taylor v. Constable, 1891, 61 Hun 622, 15 N.Y.S. 795, affirmed 131 N.Y. 597, 30 N.E. 63.

99. Transit operations

The power to build and own railroads because effecting a proper municipal purpose must include the lesser power to perfect an incomplete municipal system by leasing for a limited term a privately owned system to be operated in connection with it and payments made by the municipality to the owner of such private road under a contract whereby the operation of the two roads under a system of transfers was secured, was in no sense a gift of municipal funds. Admiral Realty Co. v. New York, 1912, 206 N.Y. 110, 99 N.E. 241. See, also, Hopper v. Willcox, 1913, 155 App.Div. 213, 140 N.Y.S. 277.

The prohibition of former section 10 against any municipality becoming the owner of stock in, or bonds of, any association or corporation, was designed to prevent municipalities from obtaining an interest in privately owned railroad corporations, but it had no reference to a project whereby a municipality attempted to own and construct a railroad, and therefore, such section should not be held to prohibit such ownership. Admiral Realty Co. v. New York, 1912, 206 N.Y. 110, 99 N.E. 241. See, also, Sun Printing, etc., Ass'n v. New York, 1897, 152 N.Y. 257, 46 N.E. 499. Halleran v. New York, 1928, 132 Misc. 73, 228 N.Y.S. 116.

Laws 1894, c. 752; Laws 1895, c. 519, amending Laws 1891, c. 4, allowing the construction of a railroad by a city, was not objectionable as allowing the city to lend its credit to private enterprise because it permitted the lease of the road when constructed to private corporations. Sun Printing, etc., Ass'n v. New York, 1897, 152 N.Y. 257, 46 N.E. 499. See, also, Admiral Realty Co. v. New York, 1912, 206 N.Y. 110, 99 N.E. 241.

Proposed extension of county airport was not a "gift" prohibited by this section. Sardo v. Dutchess County, 1967, 53 Misc.2d 603, 279 N.Y.S.2d 319, affirmed 27 A.D.2d 989, 282 N.Y.S.2d 187, affirmed 20 N.Y.2d 692, 282 N.Y.S.2d 760, 229 N.E.2d 441.

A town may not provide school bus transportation when the school district is not required to provide such transportation and fails to provide it, since to do so would be an unconstitutional gift of public funds to the school children involved or to their parents, on the premise that such transportation is the sole responsibility of the parents. Op.State Compt. 67–769.

100. Traveling expenses

A city may reimburse its officers and employees for reasonable tips and gratuities paid by them while engaged in authorized travel on official city business. 19 Op.State Compt. 63–656.

Publicity fund moneys may not pay travel expenses of a foreign exchange student. 18 Op.State Compt. 199, 1962, 1st case.

A city may not purchase airplane tickets for officials for their private use, even though such officials ultimately reimburse the city therefor. 16 Op.State Compt. 357, 1960.

City may not make advance lump sum payments to officers and employees on account of expenses to be incurred by them in performance of official duties. 6 Op.State Compt. 272, 1950.

A city may grant authority to an appropriate official or officials to expend city funds to purchase specified

types of traveling accommodations for such officers and employees in advance of the time when such accommodations are to be used. Id.

A salaried chief of police who is also town constable and deputy sheriff is not entitled to receive mileage from a town where prisoners were arraigned and committed by a police justice of a village. 4 Op.State Compt. 545, 1948.

Salaried village chief of police may not be reimbursed for use of his own automobile in performance of duties of his office either on a contract or lump sum basis. 3 Op.State Compt. 456, 1947.

101. Unauthorized expenses

Former section 10 and former Article 3, § 28, now Article 9, § 10, did not apply to chapter 585 of Laws 1918, which permitted the enforcement of an obligation arising from ultra vires action on the part of the public authorities as there was no constitutional objection to a curative act which in effect ratified an unauthorized municipal contract. Holbrook, etc., Corp. v. New York, D.C. N.Y.1921, 277 F. 840.

Where operating contract between city of New York and private corporation, whereby private corporation undertook to operate a foreign trade zone theretofore operated by city under a federal grant, did not require issuance of corporate stock or serial bonds by city or expenditures contemplated under proposed arrangement between city and Works Progress Administration for improvement of zone, illegality of operating contract did not constitute a reason for enjoining carrying out of proposal, since contemplated expenditure was in connection with improvement of city property. American Dock Co. v. City of New York, 1940, 174 Misc. 813, 21 N.Y.S.2d 943, affirmed 261 App.Div. 1063, 26 N.Y.S.2d 704, affirmed 286 N.Y. 658, 36 N.E.2d 696.

The cost of operation to a city of an unauthorized motor bus line was a violation of the provision of former section 10 that no city should give or loan money or credit to or in aid of any individual or corporation, nor should any city incur any indebtedness except for city purposes. Belt Line Ry. Corp. v. New York, 1922, 118 Misc. 665, 195 N.Y.S. 203.

Where the legislature could have authorized village authorities to make a certain contract, although otherwise it would have been unlawful, it had power, by a subsequent act, to validate a contract illegally made by the village authorities, and such an act was not a giving of the village property in violation of former section 10 of this article. Gaynor v. Port Chester, 1916, 174 App.Div. 122, 160 N.Y.S. 978.

Town moneys may not be paid to a resident of the town as compensation for his unauthorized services in removing snow from a town highway. 1948, Op.Atty.Gen. July 30.

102. Water and sewer systems

Contribution of limited private housing company of $250,000 to cost of extending municipal water system to serve housing project did not become a loan to company from city in violation of this section merely because contribution was payable over a five-year period and was evidenced by note of housing company. Jamaica Water Supply Co. v. City of New York, 1963, 39 Misc.2d 866, 242 N.Y. S.2d 275, affirmed 25 A.D.2d 957, 270 N.Y.S.2d 975.

Housing developer's contribution to cost of city's construction of water system did not become a "loan", within constitution prohibition, merely because it was payable over five-year period and was evidenced by note. Jamaica Water Supply Co. v. City of New York, 1962, 38 Misc.2d 205, 236 N.Y.S.2d 816, affirmed 25 A. D.2d 957, 270 N.Y.S.2d 975, affirmed 19 N.Y.2d 1000, 281 N.Y.S.2d 838, 228 N.E.2d 819.

Where the commissioners of the water district had the power to lay the pipes for the purpose of supplying residents living along the private roads within the district and the pipes were laid under free grants of permanent easements or rights to lay such pipes, and the title to the pipes remained in the water district, it could not be said that there was a violation of either the letter or the spirit of former section 10 which prohibited the expenditure of public moneys of a town for private purposes. Horsfall v. Schuler, 1926, 217 App.Div. 146, 216 N.Y.S. 391.

A rule of a water company whereby a city was to repay the company the cost of the extension of a water system, depending on the doubtful increase of consumption of water for the repayment of the money advanced, was unreasonable and violative of the fundamental law prohibiting a municipality from giving money or property or loaning money or credit to and in the aid of individuals or corporations. Mamaroneck v. New York Interurban Water Co., 1925, 126 Misc. 382, 212 N.Y.S. 639.

A village board of trustees has no authority to furnish village water service to members of the village fire department without charge, since such a practice might operate to cause the firemen to lose their rights, privileges and exemptions as volunteer firemen. 1948, Op.Atty. Gen. Mar. 8.

A village may not construct and pay for sewer service lines on private property. Op.State Compt. 68–776.

Villages may not install septic tanks in private homes beyond boundaries of municipal sewage system unless the public health is endangered. 18 Op.State Compt. 457, 1962.

A city may not purchase and install water pumps in individual homes for the purpose of increasing water pressure therein at no cost or at a nominal cost to the owners. 18 Op.State Compt. 222, 1962.

Maintenance and repair, by a village of a private sewer pump is unauthorized, except when the public health is endangered. 16 Op.State Compt. 493, 1960.

A village may not operate a chlorinator for sewage purposes, for the sole benefit of three property owners. 16 Op.State Compt. 20, 1960.

It is unconstitutional for a village to enter into an agreement to provide free water to a private individual from a village-owned well. 15 Op. State Compt. 313, 1959, (1st case).

A village may require private water service lines located on private property to be installed at a certain depth below the surface of the ground and be protected from frost at the owners expense. 15 Op.State Compt. 172, 1959.

A village may by contract, place a service charge upon private water meters with cost of service to be borne by the owners of the meters. Id.

A town may not install a sump pump in a private residence to facilitate a sewer connection. 13 Op.State Compt. 306, 1957.

A village may not construct a water supply line and issue obligations to finance the cost, with the purpose of conveying title to a private corporation which will pay the annual debt service on the obligations. 10 Op.State Compt. 171, 1954.

A town board may not care for and maintain a privately owned water system. 7 Op.State Compt. 272, 1951.

Property owner may not require village to furnish septic tank where nearest sewer is too high for gravity drainage. 4 Op.State Compt. 440, 1948.

Village may not furnish water free, or at flat or special rates to schools. 3 Op.State Compt. 222, 1947.

103. Welfare services

The provision of Social Welfare Law § 226 [now Social Services Law § 324], that any balance of proceeds of county welfare commissioner's sale of realty, conveyed to him by recipient of old age assistance, after grantor's death, shall be paid to grantor's estate or persons entitled thereto, is not void as violating this section prohibiting county from giving or loaning money to or in aid of any individual, in view of following provision of this section that nothing in Constitution shall prevent county

from making provision authorized by law for aid and support of the needy. In re Nolta's Estate, 1945, 185 Misc. 501, 56 N.Y.S.2d 818.

Payments made under former Public Welfare Law, Art. 5, to a needy aged person who was an inmate of a fraternal home did not violate this section, though payments may have been spent in the home. Application of Van Marter, 1942, 263 App.Div. 498, 33 N.Y.S.2d 677, affirmed 288 N.Y. 729, 43 N.E.2d 351.

In consideration of services rendered by Social Service Exchange, the county may permit the exchange to use county property. 10 Op.State Compt. 363, 1954.

104. Miscellaneous transactions

Local law authorizing award of damages to person injured by police officer while engaged in making arrest was not invalid as providing for gift to individual or permitting creation of indebtedness for other than city purpose. Evans v. Berry, 1933, 262 N.Y. 61, 186 N.E. 203.

The payment of compensation by the town to the property owners is in no proper sense a gift or gratuity of either the money or property of the town, but simply a method which the legislature adopted to repair an injury to an individual inflicted by the town under the authority of law, and the mere fact that the injury was suffered at a time when the property owner was without remedy could not prevent the law-making power from providing a remedy afterwards. In re Borup, 1905, 182 N.Y. 222, 74 N.E. 838.

Taking of substandard real estate by municipality for redevelopment by private corporations constitutes a species of public use, and such taking by town and overall plan which contemplated an eventual conveyance by town to private corporation with consideration to be amount paid by town for properties acquired, plus all expenses incurred in connection therewith, would not constitute an unlawful gift of public land by town to private corporation. Wheeler v. Town of Islip, 1966, 51 Misc.2d 386, 273 N.Y.S.2d 399.

To extent that town officials in their bargaining with dredging company did nothing to recoup money which town should have had under prior contract or to provide for less payment than actual value of all property taken, they made donation to company in violation of this section. Nance v. Town of Oyster Bay, 1963, 41 Misc.2d 446, 244 N.Y.S.2d 916, modified on other grounds 23 A.D.2d 9, 258 N.Y.S.2d 156.

A newspaper designated as a state paper under Laws 1893, c. 248, and also designated as county paper pursuant to Laws 1892, c. 686, for the purpose of publishing the Session Laws, was not entitled to compensation for publishing the laws under both designations where, as a matter of fact, there was but a single publication since compensation under both designations in such a case would fall within the prohibition of former section 100. People v. Journal Co., 1913, 158 App.Div. 326, 143 N.Y.S. 389.

Laws 1905, c. 747, providing for the payment of damages from city funds to a person who should be the owner of such property on the 9th day of May, 1894, was violative of this section in so far as it purported to award damages to one who purchased the property in its damaged condition. People v. Stillings, 1909, 134 App.Div. 480, 119 N.Y.S. 298.

State Civil Defense Commission appropriations may be used to finance certain operations and equipment of the civil air patrol. 1960, Op.Atty.Gen. 11.

County facilities and county employees may not be used for the operation of a food service commissary by a county highway department for the sole use and benefit of county highway employees on duty during the emergency snow season. Op. State Compt. 68-480.

A village may not pay for refreshments for its auxiliary police as a part of their civil defense drill or inspection. Op.State Compt. 68-135.

A city may not pay the expenses of its patrolmen in attending a Police Benevolent Association Convention. Op.State Compt. 67-375.

A village has no civil liability to property owners, where its building and plumbing inspectors failed to require a contractor's compliance with building and plumbing codes in the installation of cesspools, and the village may not repair these at village expense. 20 Op.State Compt. 513, 1964.

A town board, on behalf of a fire protection district, may not agree that in case it cancels a fire protection contract for failure of the fire company to provide adequate fire protection, it will continue to make payments thereunder to any lending institution to which the fire company has assigned the payments as security. 19 Op.State Compt. 406, 1963.

A school district may not reimburse a teacher for damage to the frame of her eyeglasses which were broken while the teacher was supervising a gymnasium class. 19 Op. State Compt. 63-328.

Board of managers of a public general hospital may not expend public moneys to provide a dinner in honor of a women's volunteer auxiliary. 18 Op.State Compt. 239, 1962, 1st case.

A town may not permit a private college the use of its voting machines for use in its student elections and for purposes of instruction. 17 Op. State Compt. 218, 1961.

A municipality may not expend funds to purchase lunches for state officials. 17 Op.State Compt. 200, 1961.

A county may not include within its yearly budget, nor may it appropriate, county moneys to reimburse a non-profit membership corporation for expenses incurred in furtherance of a public benefit project. 17 Op. State Compt. 60, 1961.

A village and a fire district may not purchase jointly a "squad car", nor may a town purchase such a vehicle for the joint use of a fire district and a village. 15 Op.State Compt. 275, 1959 (2nd case).

Where a village power line crosses private property and village cannot be required to relocate the power line, it may not voluntarily assume the expense of such relocation, since such action by the village would constitute an unconstitutional gift of village moneys. 13 Op.State Compt. 83, 1957.

Town may not purchase private automobiles for supervisor and town superintendent of highways, with said officers reimbursing the town for the purchase price. 13 Op.State Compt. 71, 1957, 2nd case.

Lump sum payments or fixed expense allowances in lieu of reimbursement for actual expenses may not be authorized for municipal officers or employees. 11 Op.State Compt. 264, 1955.

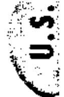
No part of receipts from parking meters may be refunded to the taxpayers who paid the special assessments. 11 State Compt. 91, 1955.

A village may not purchase and install in private homes garbage disposal units, the cost of each unit to be repaid to the village by the property owners over a five year period. 10 Op.State Compt. 390, 1954.

Town board may not reimburse contractor for expenses incurred in the partial performance of a contract where the contract provides that payment will be made upon completion of performance. 10 Op.State Compt. 353, 1954.

Board of education may pay part of property damages to private institution only if under actual legal or moral obligation to do so. 10 Op. State Compt. 10, 1954.

The expenditure of public moneys for the construction of a special improvement district where all of the real property within the district is owned by a sole taxpayer, does not violate this article. 4 Op.State Compt. 81, 1948.



Tax and Revenue Anticipation Notes ("TRANs") may be issued at the end of a fiscal year to meet a deficit in revenues relative to budgeted expenditures and may mature in the early part of the next fiscal year, regardless of the date of issuance of any TRANs previously issued. 1978, Op.Atty.Gen. 35.

§ 11. [State debts generally; manner of contracting; referendum]

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2. Generally

In interpreting this section prohibiting any debt from being contracted by or on behalf of the state "unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein," the Appellate Division had to consider, among other things, the circumstances surrounding its passage and the past practice in regard to the provision. New York Public Interest Research Group v. Carey, 1977, 59 A.D.2d 172, 398 N.Y.S.2d 968, reversed on other grounds 42 N.Y.2d 527, 399 N.Y.S.2d 621, 369 N.E.2d 1155.

Although requirement of this section that no debt shall be authorized by law unless it be for a single work or "purpose" is undoubtedly more flexible than the single work or "object" requirement that prevailed until 1938, the framers of the 1938 constitutional amendment did not intend to permit incurrence by the state of multi-purpose debt. Id.

4. Single work or purpose

Provision of this section which prohibits state from contracting a debt unless the debt shall be authorized for some single work or purpose by the people at a general election is concerned with debts created by long-term borrowing and bond obligations and not with debts paid out of current appropriations in the state's general fund, replenished by the collection of taxes and necessary for the ongoing business of state government. Wein v. Levitt, 1977, 42 N.Y.2d 300, 397 N.Y.S.2d 758, 366 N.E.2d 847.

5. Specification of work or purpose

In order for a bond authorization act to constitute a "single purpose" as required by this section, the various components that enter into it must be so necessarily and naturally related that, when combined, they constitute an entity; something complete in and of itself but separate and apart from other objects. New York Public Interest Research Group v. Carey, 1977, 59 A.D.2d 172, 398 N.Y.S.2d 968, reversed on other grounds 42 N.Y.2d 527, 399 N.Y.S.2d 621, 369 N.E.2d 1155.

Laws 1977, c. 455 authorizing the creation of state debt in the amount of $750,000,000 for the purpose of promoting and implementing a comprehensive and integrated economic action program by providing moneys for industrial and community development, tourism and recreation, conservation and environment, and local transportation access is unconstitutional, since the statute is not for a single purpose such as transportation or environment but rather is for four separate and disparate purposes divided into functional categories, and since the broad term "comprehensive economic development" does not constitute a single purpose. Id.

11. Wages of State employees

While the issuance of scrip to "pay" State employees their net earnings would not constitute an unlawful contracting of State debt in violation of this section, nor an unlawful loan of the State's credit either to the State employees or to the bank in violation of Const. Art. 7, § 8, it would not be advisable to do so. Op.Atty.Gen. 82-F1.

§ 14. [State debt for elimination of railroad crossings at grade; expenses; how borne; allocation of funds for reconstruction of state highways and parkways]

Cross References

Grade crossing elimination, see Transportation Law § 221.

ARTICLE VIII—LOCAL FINANCES

§ 1. [Gift or loan of property or credit of local subdivisions prohibited; exceptions for enumerated purposes]

Law Review Commentaries

A short constitutional history of entities commonly known as authorities. 56 Cornell L.R. 521 (1971).

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2. Purpose

This section prohibiting gifts or loans of property or credit of local subdivisions is intended to curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no corresponding benefit. Local 456 Intern. Broth. of Teamsters v. Town of Cortlandt, 1971, 68 Misc.2d 645, 327 N.Y.S.2d 143.

2b. Sports events

A village may not contribute funds to a private association that holds a boat race, but may, by local law, authorize itself to establish a publicity fund from which expenditures to promote a privately sponsored boat race could be made if the village board determines that such race will publicize the village as a recreational or resort area. Op.State Compt. 80-739.

5. Generally

Expenditure of public funds is constitutionally prohibited in absence of express statutory provision to contrary. Hess v. Board of Ed. of Central School Dist. No. 1 of Townships of Liberty, Et Al., 1973, 41 A.D.2d 151, 341 N.Y.S.2d 536.

Incidental benefit to private interest does not invalidate town's proposed expenditure otherwise public in nature. New York Tel. Co. v. Secord Bros., Inc., 1970, 62 Misc.2d 866, 309 N.Y.S.2d 814.

Even where a purpose is public in nature, it may not be accomplished by a gift to an individual in violation of this article. Op.State Compt. 82-262.

7. Test of gift or loan

Generally, there must be a legal obligation on part of state or municipality before funds can be paid to individuals in view of prohibition of this section against gifts to individuals. Antonopoulou v. Beame, 1973, 32 N.Y.2d 126, 343 N.Y.S.2d 346, 296 N.E.2d 247.

There is no statutory authority for a town to repair a private sewage system at town expense and that an expenditure for such a purpose might well contravene this section which prohibits gifts or loans of public moneys for private purposes. Op. State Compt. 78-481.

9. Moneys of local subdivisions

Moneys generated from the sale of recyclable waste paper collected in county buildings and sold as part of

county recycling program are county moneys and such moneys may be turned over for use by employees pursuant to a collective bargaining agreement. Op.State Compt. 81-199.

10. Property of local subdivisions

Purchase of unpaid tax parcel by county was within classification of a county purpose, and L.1920, c. 311, § 45 authorizing county to reject any and all bids and bid in and purchase parcel for county at rate of interest established by resolution of county legislature not to exceed stated maximum rate of interest and providing that bid of county shall be preferred over all other bids does not violate this section against contracting indebtedness except for county purpose. Harris v. Jacobs, 1972, 69 Misc.2d 4, 329 N.Y.S.2d 229, appeal dismissed in part, affirmed in part 40 A.D.2d 677, 336 N.Y.S.2d 229.

In the absence of specific statutory authority, town equipment cannot generally be used outside the town and its use whether inside or outside the town, must be for a public purpose (use by and for a public governmental corporation), as opposed to a private use by private individuals, corporations or groups. Op.State Compt. 78-552.

11. Stock or bond investments

While the town of Skaneateles is authorized to take by gift real and personal property for any public use upon such terms or conditions as may be prescribed by the donor and accepted by said town, it is not authorized to accept all of the stock of a business corporation whose only asset is the land it wishes to donate to the town. 1973, Op.Atty.Gen. (Inf.) 216.

15. Standing to challenge gift

Taxpaying residents of school district had standing by virtue of this provision forbidding gifts of public funds, to review an agreement under which district's superintendent resigned in return for a lump-sum settlement and continuation of certain insurance policies. Ingram v. Boone, 1983, 91 A.D.2d 1063, 458 N.Y.S.2d 671.

31. Advertisements

In the absence of express legislative sanction, no municipality may engage in the private business of advertising or allow its buildings or property to be used for advertising purposes. 1973, Op.Atty.Gen. (Inf.) 51.

32. Bonus payments

Terms of a collective bargaining agreement providing incentive bonuses to police officers on successful completion of courses leading to degrees in police science, are legal and authorized and are not violative of constitutional prohibition of gift or loan. Op.St.Compt. 81-236.

A collective bargaining agreement which provides that municipal employees will receive extra payments for achieving certain predetermined levels of performance involves a contractual relationship and, therefore, the awarding of such payments is not an unconstitutional gift. Op.State Compt. 79-349.

A county has no authority to make cash safety awards, based on accident-free work performance, to employees of the transit system owned and operated by the county and such awards would be gifts by the county to private individuals and as such, prohibited by this section. 24 Op. State Compt. 971, 1968.

34. Charges or fees, waiver of

If a county which maintains a park within a village or town elects to connect with the local sewer system, the town or village is not precluded by this section from exempting the county from payment of sewer rents and connection fees, but whether such exemption would violate Art. 11, § 1 as being discriminatory depends upon the validity of the classification of the county as an exempt user. Op.State Compt. 81-400.

A city may not provide water at a free or reduced rate to a private hospital or private adult nursing home. Op.State Compt. 79-755.

Writing off an uncollectible account which, with reasonable diligence, could in fact be collected may be tantamount to an unconstitutional gift of public funds to the debtor and what constitutes reasonable diligence may vary from case to case. Op.State Compt. 78-684.

35. Civic activities

When a town board has determined that attendance of the supervisor or other official at a dinner or other meeting of a community organization is important to serve the town's interests, then the town may pay for the cost of the official's ticket to the event. Op.State Compt. 80-750.

A town may enter into an agreement pursuant to Town Law § 64(12) with a private baseball club to provide an Independence Day fireworks display and pay all or part of the expense therefor, if the display is a town activity and, as such, under the sponsorship and control of the town. Op.State Compt. 79-742.

A town may neither make a contribution nor pay membership dues to a chamber of commerce. Op.State Compt. 78-899.

A village cannot contribute to a private civic organization which will operate a summer youth recreation program, but it may contract with such an organization for the operation of a village program, with certain restrictions, to be conducted in addition to the organization's own program. 25 Op.State Compt. 240, 1969.

37. Compensation of public officers and employees—Generally

While this section requires that there be a legal obligation on part of state or municipality before public funds can be paid to individuals, such a legal obligation may be either statutory or contractual. Piro v. Bowen, 1980, 76 A.D.2d 392, 430 N.Y.S.2d 847.

When a municipality grants pensions, vacations or military leave, it is not conferring a gift on its employees but is compensating them as one of the terms and conditions of employment, in some cases withheld or deferred until the completion of continued and faithful service. Local 456 Intern. Broth. of Teamsters v. Town of Cortlandt, 1971, 68 Misc.2d 645, 327 N.Y.S.2d 143.

Payment to teachers for credit hour charges incurred in taking and completion of graduate courses, as well as payment for in-service training of teachers or for attendance at schools conducted for betterment of municipal government, would not constitute unconstitutional "gift." Board of Ed. of Union Free School Dist. No. 3 of Town of Huntington v. Associated Teachers of Huntington, Inc., 1970, 62 Misc.2d 906, 310 N.Y.S.2d 929, modified 36 A.D.2d 753, 319 N.Y.S.2d 469, modified 30 N.Y.2d 122, 331 N.Y. S.2d 17, 282 N.E.2d 109.

A town board, which grants a leave of absence with pay as compensation to regular town employees who could not work on several severe snow days, could legally make the same or a similar provision for seasonal employees not normally entitled to paid days off. 1978, Op.Atty.Gen. (Inf.) May 12.

Where a city or town has not exercised its option to continue the office or offices of assessor, as the case may be, as elective, the term of office of its elected assessors terminate on Sept. 30, 1971 and the payment of salary after that date would be a violation of this section. 1971, Op. Atty.Gen. (Inf.) Nov. 17.

In the absence of a provision in a collective bargaining agreement dealing with compensation for time not worked due to inclement weather or other such circumstances, any such payment by a municipality would violate this section. Op.State Compt. 82-228.

There is no violation of this section when a city official is given full-time use of a city-owned vehicle as part of his compensation in exchange for services. Op.State Compt. 79-850.

A retroactive pay raise for city officers and employees not covered by a collective bargaining agreement amounts to an unconstitutional gift. Op.State Compt. 78-810.

A town board may not make the appointment and commencement of compensation of an assessor retroactive to a date prior to such appointment. 28 Op.State Compt. 14, 1972.

A city may not pay the parking costs of municipal employees. 27 Op. State Compt. 81, 1971.

A former village treasurer may not be paid compensation for the completion and filing of any financial reports which are prepared as a function of his office. 26 Op.State Compt. 81, 1970.

A city may not grant terminal "leaves of absence" with pay to retiring officers and employees. 25 Op.State Compt. 360, 1969.

38. —— Back pay

Payment of public money to college lecturer pursuant to a grievance settlement under collective bargaining agreement between city board of higher education and teachers' federation awarding back salary for a period when lecturer concededly rendered no services would not constitute a gift of public funds in violation of this section since collective bargaining agreement created an enforceable contractual right and there was a legal obligation on part of municipality to comply with the settlement decision. Antonopoulou v. Beame, 1973, 32 N.Y.2d 126, 343 N.Y.S.2d 346, 296 N.E.2d 247.

Awards of back pay and fringe benefits designed to reimburse pregnant teachers for losses resulting from enforcement of discriminatory rule requiring pregnant teachers to take unpaid leaves of absence not later than five months prior to delivery regardless of physical ability and desire to continue teaching were in the nature of damages and did not come within prohibition of this section against do-

nations from the public purse. Board of Ed. of Union Free School Dist. No. 2, East Williston, Town of North Hempstead, Nassau County v. New York State Division of Human Rights, 1973, 42 A.D.2d 49, 345 N.Y.S.2d 93, affirmed 35 N.Y.2d 673, 360 N.Y.S.2d 887, 319 N.E.2d 202.

Where city was obliged under Taylor Act, this article, to bargain for and enter into labor contract, and, after long period of negotiation, entered into contract with retroactive wage increase, ultimate benefit to city was contract which provided necessary services to city for period of time beyond date of signing, and retroactive effect did not bring about "gift" or "gratuity" which city had no power to make. American Federation of State, County and Municipal Emp., AFL–CIO, Local 788 v. City of Plattsburgh, 1971, 72 Misc.2d 744, 340 N.Y.S.2d 18.

A retroactive appointment would permit a member of a town planning board to be compensated for time not actually served and would, therefore, be prohibited by this section. 26 Op. State Compt. 63, 1970.

38a. —— Collective bargaining rights waived, payment for

Payments by the city of Yonkers of $30,000 to the Police Benevolent Association and $15,000 to the Captains, Lieutenants, and Sergeants Benevolent Association in return for agreements by the unions not to make any claim under or enforce past practices provisions of their respective collective bargaining agreements, to the extent that they authorized police to solicit donations from the Yonkers business community while on duty, were not illegal as gifts to the unions, as there was sufficient consideration therefor; however such agreements should, for the protection of the city, immediately be reduced to writing. Op.State Compt. 79–811.

40. —— Increases

Salary increment for teachers during their last year of service before retirement served legitimate purpose of inducing experienced teachers to remain in employ of school district and was not therefore a prohibited "gift" of monies under this section. Board of Ed. of Union Free School Dist. No. 3 of Town of Huntington v. Associated Teachers of Huntington, Inc., 1972, 30 N.Y.2d 122, 331 N.Y.S.2d 17, 282 N.E.2d 109.

Constitutional prohibition against gifts by any municipality was intended to curb raids on the public purse for benefit of favored individuals or enterprises furnishing no corresponding benefit, and such provision is inapplicable where, without any previous agreement on the subject of compensation, additional compensation is granted for services previously rendered. Taylor v. McGuire, 1979, 100 Misc.2d 834, 420 N.Y.S.2d 248.

Personnel order providing increased compensation for prior and current services did not violate constitutional prohibition against gifts by a municipality where there was no previous agreement on subject of compensation and where employee continued to work, foregoing the right to retire or otherwise leave his job. Id.

An agreement between the Green Island union free school district 1 and a teachers association for increases in salaries entered into between the respective parties may be honored retroactively under this section when such agreement was reached with the understanding that the salary increases would later be paid retroactively. 1972, Op.Atty. Gen. (Inf.) 204.

Pursuant to a collective bargaining agreement, a community college may establish a system for paying "productivity increases" to faculty members. Op.State Compt. 80–701.

Retroactive salary increases may be provided for county employees pursuant to a collective bargaining agreement, and such increases may be extended to certain officers and employees who are not represented by a bargaining unit, pursuant to a formal agreement or informal understanding. Op.State Compt. 80–644.

A municipality may, pursuant to a collective bargaining agreement, grant its employees a retroactive pay increase. 29 Op.State Compt. 114, 1973.

Where an individual leaves municipal service after the announcement of a salary increase but before the actual determination of the amount of such increase, he has a right to any retroactive increase established after his separation from service, but payable for work performed in any period covered by the increase, during which he was in municipal service. 24 Op.State Compt. 841, 1968.

Appellant's contention that even if it is ultimately determined that differential was improperly granted to him, board should be estopped from cancelling or rescinding the differential and be precluded from recapturing moneys paid to the appellant in error, is untenable inasmuch as this section specifically prohibits school districts from making gifts of such money to private individual, and failure to recapture moneys paid in error would, in effect, constitute such a proscribed gift. Matter of Appeal of Morris Selitzky, 1967, 7 Educ.Dept. Rep. 141.

41. —— Insurance benefits

A village is prohibited from purchasing insurance protection for its policemen to indemnify the members of a village police force for any individual or personal liability under a claim for false arrest. 26 Op.State Compt. 196, 1970.

A municipality may undertake the payment of the full cost of Blue Cross and Blue Shield health insurance for its retired employees, under a plan entered into pursuant to section 92a of the General Municipal Law or section 163(2) of the Civil Service Law, provided such retired employees retire subsequent to the adoption of such increased benefit plan. 25 Op.State Compt. 206, 1969.

41a. —— Retirement incentive plan

A local law providing for municipal incentive payments to present employees, and not to retirees, to induce early retirement could be viewed as deferred compensation for long and faithful service deferred until retirement and would not involve an unconstitutional gift. Op.State Compt. 83–37.

42. —— Sick leave payments

The governing board of a city school district may provide for an extended sick leave benefits plan in a collective bargaining agreement, and payments made under such a plan would not contravene this section. Op.State Compt. 81–423.

43. —— Termination pay

Breaking of relationship of employer and employee by employee's separation from civil service results in loss of right to compensatory time achieved by credited overtime, and monetary equivalent of such compensatory time cannot be obtained except under proper authority, statutory or otherwise. Grossman v. City of New York, 1972, 71 Misc.2d 234, 335 N.Y.S.2d 890.

In absence of statutory or other authority for payment of cash compensation to employee no longer in city service, it was improper to award plaintiff, who had been engaged as computer programmer by defendant, a verdict for such pay for overtime worked at least where he voluntarily left city's service and there was no collective bargaining agreement covering the situation. Id.

Fact that civil service employee was permitted to utilize his annual leave for period of September 12, 1966 through October 7, 1966 and thereby obtain vacation pay for that period although his resignation was entered in payroll records as effective September 12, 1966 did not serve to estop city from denying his request for cash compensation for overtime worked. Id.

Hudson River Museum is a city agency and director may not be paid lump-sum severance pay upon his resignation. 1976, Op.Atty.Gen. 78.

43a. —— Tuition payments

A county infirmary may pay the college expenses of an individual not presently employed by the infirmary as part of a recruitment program to obtain medical personnel, in exchange for the individual's promise to accept employment with the infirmary for a specific number of years. Op.State Compt. 81–411.

44. —— Vacation or holiday pay

School board could not make payment for accumulated vacation time to employee who resigned where board had not passed resolution which would permit it to make such payment, although board accepted resignation tendered in letter containing phrase "subject to my vacation pay" and there was allegedly prior plan of such payments. Hess v. Board of Ed. of Central School Dist. No. 1 of Townships of Liberty, Et Al., 1973, 41 A.D.2d 151, 341 N.Y.S.2d 536.

45. Credit agreements

A county hospital may not co-sign promissory notes of individuals who borrow money in order to pay their hospital bills. Op.State Compt. 78–449.

46a. Drug abuse programs

A school district may not contribute public funds to a community drug abuse program which is run by a private organization. Op.State Compt. 81–384.

48a. Extra compensation

Within the meaning of this section's ban on gifts, extra compensation is compensation over and above that fixed by contract or by law when the services were rendered. Local 456 Intern. Broth. of Teamsters v. Town of Cortlandt, 1971, 68 Misc.2d 645, 327 N.Y.S.2d 143.

A town police department may not provide extra police services to private persons or organizations on a contract basis. 1974, Op.Atty.Gen. (Inf.) 158.

49. Fire departments—Generally

A village may not transfer title to its real property without consideration to an incorporated fire company. Op.State Compt. 78–451.

Where a village fire company owns the firehouse, apparatus and equipment, the village may appropriate and expend such funds as may be reasonably necessary and incidental for the operation and maintenance thereof, but may not appropriate funds for extensive and major repairs on such property, moneys from the treasury of the fire company must be used for such repairs. 26 Op.State Compt. 41, 1970.

50. —— Volunteer

A municipality may not contribute funds to a volunteer fire company for use in parades or conventions nor may it contribute funds to a veterans organization for use in Memorial Day observances or other celebrations. Op.State Compt. 81–132.

A village employee who is a volunteer fireman and is permitted to leave work to respond to a fire call should be removed from the village payroll during the time he is absent from work to fight a fire, but he may be compensated for such time if he charges appropriate leave time. Op.State Compt. 80–335.

The Camillus volunteer fire department may, without public bidding, purchase an ambulance with its own funds and then donate the ambulance to the village, but any purchase made with village funds must meet the requirements of public bidding. Op. State Compt. 79–666.

A town may not donate money to a village volunteer fire company or department. Op.State Compt. 78–606.

50a. Gas, electric and steam service

The provisions of article 2 of the Public Service Law and the corresponding regulations of the Public Service Commission pertaining to budget payment plans and a continuation of service during cold weather periods to residential customers by municipal utilities do not violate this section. Op.State Comp. 81–428.

53. Health services

The expenses of combating a local condition involving the presence in private well-water supplies of known or suspected carcinogens that pose a risk to public health and safety, are lawful town charges. Op.Atty.Gen. (Formal) 82–1.

Except as authorized by local law, a town may not contract to pay a sum of money to a private hospital for the purpose of trying to insure the continued availability of general medical and surgical services for the general public. Op.State Compt. 79–259.

Federal Revenue sharing moneys may not be used to support a private, not-for-profit hospital, either by direct or indirect contributions or under a contract for hospital services for the general public. Op.State Compt. 79–10.

Although towns may not contribute to a private organization furnishing ambulance services, they may singly or jointly contract with an organization of this type to provide such services. Op.State Compt. 78–827.

A city could appropriate funds and convey an ambulance to a private hospital pursuant to a contract for general ambulance service with such hospital. Op.State Compt. 78–759.

A hospital and/or county laboratory attached thereto may not provide free or discounted services to professional staff members and their families on the ground that this would be a gift in violation of the state constitution. Op.State Compt. 78–303.

A city may contract to provide free laboratory tests in the city laboratory for nurses employed by the city. 25 Op.State Compt. 103, 1969.

53a. Payments solely on account of sickness

The state and its subdivisions are not authorized to make payments to their employees solely "on account of sickness"; however, such payments, if authorized by the legislature, would not conflict with the constitutional bar against gifts of public money to individuals under this section and Const. Art. VII, § 8. 1979, Op.Atty. Gen. 17.

54. Housing projects

A town does not have the power to donate funds to a private organization that intends to build a senior citizens' housing project. Op.State Compt. 78–333.

56. Insurance—Generally

Municipality may directly contract with any insurance company authorized to do business in the state for the purpose of furnishing medical and surgical services; such payments are for a proper purpose and are not an attempt to give or lend public money to aid a private enterprise. Local 456 Intern. Broth. of Teamsters v. Town of Cortlandt, 1971, 68 Misc.2d 645, 327 N.Y.S.2d 143.

School district may not establish fund to compensate substitute teachers for personal property losses occasioned by acts of vandalism during school strike as such a fund would act primarily as a co-insurer with the insurance companies of the injured individuals, paying the deductible amounts not covered by those individual insurance policies. 34 Op.State Compt. 193, 1978.

Under Town Law § 174(3) which provides that fire commissioners shall receive no compensation for their services, a payment by the fire district to a member of the board of fire commissioners in reimbursement of the cost of health insurance premiums paid by such member, would constitute a prohibited gift. Op.State Compt. 78–621.

58. —— Pupils

A board of education may carry insurance to cover the loss of personal property by teachers when bargained for as a condition of employment, but may not carry such insurance for students. 27 Op.State Compt. 190, 1971.

58a. —— Reimbursement for hospitalization premiums

A village may not reimburse prior retirees for amounts expended for hospitalization insurance between the date of retirement and date health insurance plan or the collective bargaining agreement is implemented, unless the provision of hospitalization insurance for retirees is a previously unresolved issue of collective bargaining, in which case it may, pursuant to a collective bargaining agreement, reimburse retirees from the date such issue began to be negotiated. Op.State Compt. 79–389.

60. Investments

A municipality may accept notes issued by the Lehigh Valley Railroad Company in settlement of a portion of that company's liability for delinquent real property taxes provided that the notes are issued pursuant to a reorganization plan approved by a federal court. Op.State Compt. 78–468.

A municipality may accept notes of the reorganized Penn Central Transportation Company in partial payment of a claim for delinquent taxes pursuant to the amended plan of reorganization as approved on March 17, 1978. Op.State Compt. 78–383.

Moneys from the Mount Hope and Riverside Cemetery Reserve Funds and from the Mount Hope and Riverside Cemetery Perpetual Care Funds are municipal moneys and may not be invested in common stock. 24 Op. State Compt. 466, 1968.

62. Leases

State, in entering into lease of land conveyed to state for "public purposes" devoted property to public purpose where lease, inter alia, required lessee to maintain cultural and educational center focused on traditional Mohawk way of life which was to be open to the public. Altona Citizens Committee, Inc. v. Town of Altona, 1981, 54 N.Y.2d 908, 445 N.Y.S.2d 131, 429 N.E.2d 809.

To permit municipality to lease public property for private purposes, legislative sanction must be clear and certain and lease must satisfy requirements of this section proscribing loans or gifts of property by municipalities to private individuals. Lake George Steamboat Co. v. Blais, 1972, 30 N.Y.2d 48, 330 N.Y.S.2d 336, 281 N.E.2d 147.

A municipality may lease its public improvements to private concerns so long as the benefit accrues to the public and the municipality retains ownership of the improvement. Murphy v. Erie County, 1971, 28 N.Y.2d 80, 320 N.Y.S.2d 29, 268 N.E.2d 771.

A village may purchase a building for use as a public library and lease a portion of that building to an American Legion post at a nominal rent for a term not to exceed five years, provided there is no interference with the public use. Op.Atty. Gen. (Inf.) 82–77.

The City of Newburgh may lease its water front property and public improvements thereon to a private concern so long as the benefit accrues to the public and the municipality retains ownership of the water front property and improvements thereon but such lease must satisfy the requirements of this section. 1976, Op. Atty.Gen. (Inf.) 145.

A village may not by lease agreement relieve from village taxes property which it leases from a corporation for the length of the lease term. Op.State Compt. 81–208.

A village may lease a portion of its village hall to a private group for fair consideration provided that the village reserves the right to use the facility during the period for which it is leased if an unanticipated need develops. Op.State Compt. 81–203.

May a village purchase real property solely for the use of leasing or reselling it? Id.

A village may lease unneeded space in the village hall to a U.S. Congressman for fair consideration. Op.State Compt. 81–43.

A town may not lease real property from a private, not-for-profit corporation for the purpose of providing a place to conduct a Red Cross community blood drive since such blood drive would be essentially a private endeavor and would be in furtherance of a private rather than public purpose. Op.State Compt. 80–124.

Where a lease between a county and a not-for-profit corporation for 20 years is terminated prematurely by the corporation, the county cannot reimburse the corporation the sum of $80,000 for improvements made by it to the building, for, since the improvements became the property of the county upon installation pursuant to the lease, the payment to the tenant for such improvements would constitute an illegal gift of public funds. Op.State Compt. 79–605.

The use of the proceeds from the sale of obligations to purchase buses to be leased to the private transit operator would not entail a prohibited gift or loan of municipal money or property. Op.State Compt. 79–601–A.

A town may lease the portion of its town hall not used for town purposes to a private group for adequate consideration. 34 Op.State Compt. 150, 1978.

A village may not lease village property for a nominal rental to a non-profit ambulance corporation, but, may lease its property to such corporation as part of the consideration of a contract for general ambulance services for the village residents. 29 Op.State Compt. 113, 1973.

Village property in current use by a village may not be used by or rented to private individuals or organizations for a nominal sum. 27 Op.State Compt. 178, 1971.

62a. Sports facilities

Where it was recognized that erection of domed stadium by county was a public purpose, contract with private concern for management of stadium for a period of either 20 or 40 years was not invalid as a "loan" or "gift" of county property in aid of a private corporation in violation of this section. Murphy v. Erie County, 1971, 28 N.Y.2d 80, 320 N.Y.S.2d 29, 268 N.E.2d 771.

An agreement between Suffolk county and a not-for-profit corporation, whereby the corporation is to build a sports complex on county property and pursuant to which the county retains a right of first use of the facilities and will own the facilities when the agreement terminates, does not violate this section. Op. State Compt. 82–191.

A town may not enter into an agreement with a private college to install lights on an athletic field owned by the college in exchange for use of the field at certain times. Op.State Compt. 81–390.

63. Libraries

Operation of the New York City public library system is not violative of the New York Constitution. Petker v. City of New York, 1976, 87 Misc.2d 534, 385 N.Y.S.2d 495.

The public library of the village of Malverne, New York, may sponsor educational programs offered by a private university. 1975, Op.Atty. Gen. (Inf.) 240.

The board of trustees of a town library may not permit the use of the library building to stage plays by a private theater group where an admission fee is charged and the proceeds are retained by the group. 28 Op.State Compt. 105, 1972.

65. Litigation expenses, reimbursement of

Public owes no duty to defend or even aid in the defense of a charge of misconduct against a public official. Corning v. Village of Laurel Hollow, 1979, 48 N.Y.2d 348, 422 N.Y.S.2d 932, 398 N.E.2d 537.

In absence of extraordinary circumstances, municipality may not be compelled to compensate for services rendered by an attorney unless his retainer is authorized by statute or appropriate resolution of governing body. Id.

Certain former high-ranking officials of village were not entitled to reimbursement from village for their costs, disbursements, and legal fees incurred in asserting successful defense to civil rights action brought against them as result of acts performed in their official capacities; without benefit of authorizing legislation, such reimbursement by village would constitute gift of public funds for purely private purpose in violation of this section. Id.

An attorney may not be compensated for services rendered a municipal board or officer unless he has been retained in accordance with statutory authority or appropriate resolution of the governing body since, without benefit of authorizing legislation, reimbursement by a municipality of expenses incurred by a board or officer in defending an action would constitute a gift of public funds for a purely private purpose, a matter expressly forbidden by this section. Blumberg v. Town of North Hempstead, 1982, 114 Misc.2d 8, 450 N.Y.S.2d 698.

Municipal employees assigned to shut off municipal electricity at a non-paying consumer's residence who were arrested on charges of assaulting the consumer may not have their defense provided at municipal expense. 1977, Op.Atty.Gen. (Inf.) 91.

The town attorney may not, in his official capacity, represent the town employees' federal credit union in a pending foreclosure action in which the credit union has been named as co-defendant. Op.State Compt. 79–692.

A village may not reimburse a police officer for legal fees incurred in connection with criminal charges arising from actions committed while the officer was off-duty. Op.State Compt. 79–290.

On the basis of Gaylord v. Village of North Collins, a town may reimburse its police officer for legal expenses incurred in defending a criminal assault charge arising from a good faith exercise of duties in making an arrest. 34 Op.State Compt. 191, 1978.

66. Local subdivisions

It is questionable whether the village of Albion may adopt a local law authorizing it to enter into an agreement with the town of Gaines under which the village would promise to pay the town $20,000 in exchange for the town's promise not to object to the annexation of a parcel of property by the village. Op.State Compt. 79–885.

67. Modification or recission of contracts

Where an attorney's contract with a village was modified orally by the mayor to double the attorney's hourly rate of compensation, the village board could not ratify such modification if there was no new consideration for the increase since payment of the increase in those circumstances would constitute a gift of public moneys. Op.State Compt. 80–140.

68a. Obligations resulting from governmental functions

Municipality may expend its funds only to meet its lawful obligations incurred as a result of performance of its governmental functions. Corning v. Village of Laurel Hollow, 1979, 48 N.Y.2d 348, 422 N.Y.S.2d 932, 398 N.E.2d 537.

69. Mortgages

An agreement by a municipality whereby its title to real property is subordinated to a mortgage given by a long term lessee of such real property could possibly be construed as an unconstitutional gift of municipal property and in any event would certainly constitute an unauthorized use of municipal property. Op.State Compt. 78–666.

70. Non-profit corporations

A municipality may not convey real property owned by it to a not-for-profit corporation for less than adequate consideration. 1971, Op.Atty. Gen. (Inf.) Apr. 21.

72. Pensions—Generally

"Gift" within this section prohibiting county from giving money to any individual is voluntary transfer of money or property without any consideration or compensation therefor; while "pension," which is not in violation of this section is periodic allowance made by government to individual or to those who represent him on account of past services or some meritorious work done by him. Lecci v. Nickerson, 1970, 63 Misc.2d 756, 313 N.Y.S.2d 474.

"Termination pay" provided under collective bargaining agreement between county and policemen's association, whether considered as retirement award, retirement allowance, retirement pension, or retirement pay, was earned compensation and not constitutionally prohibited gift. Id.

General constitutional ban on gifts does not come in conflict with constitutional power to confer on employees retirement benefits as welfare provision in consideration of their continuous and faithful service. Id.

75. Private corporations

A village may enter into an agreement with a federal government agency pursuant to which it agrees to loan federal grant moneys to a private business, take back a mortgage in connection with such loan and, if necessary, foreclose on the mortgage to enforce repayment of the loan and it may also agree to perform any and all other acts necessary to effectuate the purposes of the federal program not inconsistent with state law. Op. State Compt. 80–744.

It is improper for a board of education in a union free school district to contribute money to a teachers association to help defray the cost of a dinner for retired teachers and teachers who have already attained more than a set number of years of service. Op.State Compt. 80–649.

A county may not purchase real property for the sole purpose of reselling it to a private organization nor may a county give or loan any county money to such an organization to fund such a purchase, unless section 852 is applicable, in which case the county may loan its money or credit to the organization for the purchase of real property. Op.State Compt. 80–389.

A village may not contribute moneys to a local historical society to assist the society in publication of a historical magazine where the sole purpose of the contribution is to defray the publication costs; however, the village may enter into a contract with the society to publish a commemoration magazine on behalf of the village, and such contract may provide that the society shall distribute and sell the magazine and that payments by the purchasers will be made directly to the village. Op.State Compt. 79–366.

A village may not donate its real property to a private corporation pursuant to an agreement that the property, together with the buildings and improvements to be erected thereon, will revert to the village after forty years for a nominal payment of $1.00. 25 Op.State Compt. 413, 1969.

76. Private vehicles, compensation for use

A village may not authorize a periodic lump sum personal automobile allowance to a village officer to cover the cost of operating his own automobile in the performance of his own official duties. 25 Op.State Compt. 158, 1969.

78. —— Use of

Use of part of town hall as a commercial theatre at nominal rental is prohibited under this section. 1971, Op.Atty.Gen. (Inf.) Dec. 16.

A village may not allow a private non-profit group to use the village hall. Op.State Compt. 81–203.

A town may acquire a school district building having office space in excess of its present needs and rent the surplus space to third parties when the town board reasonably anticipates utilization of the additional space for town purposes within the foreseeable future. Op.State Compt. 81–197.

There is no violation of either this section, or Const. Art. XI, § 3 where an historical society leases to a religious organization, for several hours a week for school purposes, an historical edifice which was purchased and is supported by town moneys paid to the historical society pursuant to contract. Op.State Compt. 79–765.

Fair rental value must be paid by a private organization for using a social room in a village firehouse, but such a room can be used without paying a fee by members of the fire department and their guests. Op. State Compt. 79–610.

A political group may not use the facilities of a town hall or any portion thereof for the purpose of private and/or public meetings if they are also used for town purposes. 34 Op.State Compt. 150, 1978.

A town may not permit the use of a portion of its town hall by a private organization, with or without consideration, where said portion is needed for governmental purposes. 27 Op.State Compt. 130, 1971.

Boards of education may not permit the use of school district personnel or facilities for the conduct of a private business, such as music lessons. Op. Commissioner Educ.Dept., 1975, 14 Educ.Dept.Rep. 358.

A school district may not allow the use of facilities for school personnel for private gain (photography). Matter of Appeal of Edward Albert, 1967, 7 Educ.Dept.Rep. 8.

80. Public corporations

Public Authorities Law, § 2530 et seq., providing for sale of bonds by public benefit corporation, with proceeds to be paid to city and yearly deficits to be paid by city, but specifically § 2542 providing that neither city nor state is liable for corporate debts does not violate prohibition of this section against lending of city's credit in aid of public corporation and any appropriation would be a gift and not a payment of indebtedness. Wein v. City of New York, 1975, 36 N.Y.2d 610, 370 N.Y.S.2d 550, 331 N.E.2d 514.

A grant of money by Ulster county to the New York State Consumer Protection Board or to the board's consulting firm for the purpose of opposing a rate increase request by the New York Telephone Company would be constitutional and not in violation of law. 1979, Op.Atty.Gen. (Inf.) Mar. 16.

A county may impose a user fee to defray cost of maintaining special recreational facilities within a county park located in a town except that it may not assist the town in paying for additional expenses that accrue through public use of the park. Op. State Compt. 82–209.

81. Public equipment, use of

A town may not use town equipment and town employees to perform work on private property to alleviate health hazards to private water supplies as this would constitute a gift in violation of this section. Op.State Compt. 81–325.

83. Recreation programs

Village funds may not be expended for a dinner, picnic or similar outing for its employees inasmuch as the benefit which might be derived would be too indirect and incidental to warrant expenditure of municipal funds. Op.State Compt. 82–263.

A municipality may contribute funds to a little league baseball affiliated organization pursuant to an agreement whereby the organization is to run a portion of the municipal recreation program under the supervision and control of the municipality. Op.State Compt. 82–225.

A municipality may not give public funds to a private organization such as a Little League as this would violate the provisions of this section but, under certain circumstances, a municipality may contract with a private organization to have it operate all or a portion of a municipal recreation program as long as it was a legitimate town program instituted for the benefit of town residents and not a device to channel public money to a private organization. Op.State Compt. 81–211.

A municipality may establish recreational programs for youth and, in doing so, may obtain the help of the office of parks and recreation, but it may not contribute to the recreational program of a private organization. Op.State Compt. 80–471.

A town may not purchase baseballs specifically for use by a privately-operated little league, although the town may purchase baseballs for use in its own recreation program and the bid specifications for such items may include reasonable restrictions as to type and quality which will best serve the interests of the town. Op. State Compt. 80–204.

Neither town funds nor federal revenue sharing funds may be used by a town to fund a hunter safety program undertaken by a rod and gun club. 34 Op.State Compt. 65, 1978.

A village may not contribute to a private membership corporation which will operate a youth center program, but it may contract with such an organization for the operation of an approved village youth program. 25 Op.State Compt. 288, 1969.

84. Releases

A town receiver of taxes is personally liable for taxes collected by him which are lost or misplaced and the town could not release him from liability for loss of such moneys unless the loss was caused by Act of God or the public enemy, since a release would be tantamount to a gift of town moneys which is prohibited by this section. Op.State Compt. 79–190.

86. Repairs and remodeling

The expenditure of federal grant money for the rehabilitation of historically or architecturally significant churches, when such money is obtained by a municipality under Title I of the Housing and Community Development Act of 1974, 42 U.S.C.A. § 5301 et seq., does not violate this section. 1978, Op.Atty.Gen. (Inf.) 139.

In the absence of a collective bargaining so authorizing, a town board may not permit highway employees the use of the highway garage and town equipment to repair and work on their own personal vehicles. Op. State Compt. 82–241.

A town which pays actual and necessary expenses instead of a mileage allowance may reimburse only for actual disbursements for such items as gasoline, oil and storage but may not under any circumstances, pay for the general servicing and repair of a privately owned vehicle. Op.State Compt. 81–263.

It is highly inadvisable for an employment contract between a village and a village administrator to provide for use of village equipment and employees to repair the administrator's personal vehicle in lieu of providing a mileage allowance. Op.State Compt. 81–28.

The issuance of obligations by a village, to make certain federal and state mandated improvements to the village hospital before it conveys the hospital and its assets to a private hospital, is not a violation of this section. Op.State Compt. 78–932.

86a. Purchases

Because such a purchase would constitute acquiring property primarily for a private, not a county, purpose, a county may not purchase a copying machine for a county officer who would reimburse the county and take title. Op.State Compt. 83–26.

87. Sales

Provision of this section prohibiting gift or loan of property or credit of local subdivisions was not designed to regulate price or adequacy of consid-

eration of sales of public property made in good faith. Van Curler Development Corp. v. City of Schenectady, 1969, 59 Misc.2d 621, 300 N.Y.S. 2d 765.

City's sales of tax delinquent properties for amounts ranging from $475 to $525 were supported by substantial consideration, and this being so there was no gift within provision of this section prohibiting gift or loan of property or credit of local subdivisions. Id.

A sale of property, acquired through tax foreclosure proceedings for $10 and an agreement by the purchaser to rehabilitate the property within 18 months and to occupy it as his principal residence for three years is supported by legal consideration and does not constitute a gift of city property. 1974, Op.Atty.Gen. (Inf.) 314.

Provided there is receipt of fair consideration, a town may sell gravel and other materials removed from the town's sanitary landfill to a private firm. Op.State Compt. 81–234.

A town may not sell a parcel of real property for a nominal sum. Op.State Compt. 81–228.

A village conservation advisory council may not retain a gift of stock received in the name of the village but the sale of such stock may be temporarily delayed until market conditions are favorable. Op.State Compt. 80–349.

A village may sell an old fire engine no longer needed for village purposes to a volunteer firemen's association that wishes to use it for parades, and such a transaction is not subject to competitive bidding but the price paid should represent fair and adequate consideration rather than a nominal sum. Op.State Compt. 79–1082.

A village may not contribute to the maintenance of a cemetery owned by a private cemetery association, but it may accept a conveyance of the property by the association, or may purchase it and maintain it as a village cemetery. 24 Op.State Compt. 912, 1968.

Sale of photographs taken of all pupils in the school individually in the school during school day with a percentage of sale price turned over to a scholarship fund constituted exploitation of children through sale of a product to them under the auspices of the school authorities and was within the prohibition of this section which prohibits use of public property and facilities for private profit. Matter of Appeal of Edward Albert, 1967, 7 Educ.Dept.Rep. 7.

88. School districts

Where school district permitted teachers' association to use certain parts of school buildings for office space, there was no lease, and the right to use the office space was not covered in parties' collective bargaining contract, district was not required to go to arbitration to regain possession of the property, since teachers' association was merely a licensee for use of the space, and its license was revocable at will of school board, and to grant association greater rights or to compel board to participate in arbitration violated both public policy and this section of Constitution prohibiting school districts from giving or lending money or property to aid private undertakings and associations. Matter of Bd. of Educ., Connetquot Cent. School Dist. of Islip, N.Y., 1983, 91 A.D.2d 421, 459 N.Y.S.2d 624.

It would seem that a school district may convey a library building, without consideration, to the school district public library established in the district, and that the school district public library may convey, without consideration, a portion of its real property to the school district. Op. State Compt. 81–81.

90. Streets and highways—Generally

Steiner Egg Noodle Co. v. City of New York, 57 Misc.2d 479, 293 N.Y.S.2d 416, main volume, affirmed 34 A.D.2d 892, 310 N.Y.S.2d 1001.

An arrangement whereby a private firm engages to install bus shelters along town roads at no cost to the town in return for the right to sell and display private advertising on the shelters, is valid provided the town receives fair and adequate consideration under the agreement. Op.State Compt. 82–133.

A town is not authorized to use its highway department employees to perform non-municipal work on private property for the benefit of the property owner even when the town will benefit from such work and, if the benefit received by the town is much less than the benefit received by the property owner, this would also constitute an unconstitutional gift. Op.State Compt. 81–120.

94. —— Private roads and driveways

A village may not become a subtenant to a lessee of property within the village for the purpose of repairing and maintaining a private highway on the property. Op.State Compt. 80–788.

A village may not enter into a contract to pave, repair, or maintain a private street or alley. Op.State Compt. 80–617.

It is improper for a town, except in emergency situations, to remove snow and ice from private roads, or to maintain them in any way. Op. State Compt. 79–62.

A town highway superintendent may not plow a private roadway unless there exists an emergency affecting the health, safety and welfare of town residents. Op.State Compt. 79–18.

Where two towns jointly performed work in improving the driveway of a town justice's home, which driveway was allegedly used by the public for access to justice court but such improvements were much more extensive than necessary for the purpose of providing suitable public access to the justice court so as to primarily benefit the town justice in a personal manner, no proper town purpose was served by the use of town equipment and employees, and such use was therefore unauthorized and unlawful. Op.State Compt. 78–656.

A town may not plow undedicated roads in a subdivision, irrespective of whether or not it intends to backcharge the developer. Op.State Compt. 78–313.

A town may utilize men and equipment to plow snow from private roadways in emergencies, such as illness, death, or fire, if necessary in order to render the home accessible. 26 Op.State Compt. 27, 1970.

Use of town highway equipment to remove snow from private road on which residence of the town supervisor is situated is improper and may not be authorized by the town board or by the town supervisor. 25 Op. State Compt. 44, 1969.

Snow removal, by a town, from private roads and a roadway located upon state canal lands is improper. 25 Op.State Compt. 20, 1969.

A town may maintain and plow snow from the driveway of the town clerk's home where the clerk's office is in her home and the driveway is necessary for access to the office. 24 Op.State Compt. 953, 1968.

95. Taxes—Generally

Ordinance authorizing city to repay taxes raised through illegal assessments in prior years by providing a credit on property taxes for the current year resulted in unconstitutional gifts of public money being made to people who, in the year in question, owned more expensive property than they owned in the prior years and to the people who owned city property in the current year but did not own property at the time that the excess taxes were collected. Angelone v. City of Rochester, 1980, 72 A.D.2d 445, 424 N.Y.S.2d 933, affirmed 52 N.Y.2d 982, 438 N.Y.S.2d 287, 420 N.E.2d 85.

96a. —— Promissory notes as payment

A municipal corporation may accept notes of the reorganized Penn Central Transportation Company as payment in compromise of unpaid taxes. 6 Op.Counsel S.B.E.A. No. 34.

97a. Tax sales—Agreements postponing

A county is prohibited from entering into an agreement with the owner of commercial real property not to sell the premises at tax sale if installment payments of past-due taxes are made by the owner over a period of several years until all delinquent and current taxes are paid. 1978, Op.Atty.Gen. (Inf.) 265.

97b. —— Profits

It would be unconstitutional for a county board of supervisors to pay a former real property owner the profit consisting of the difference between the amount for which his property was bid in by the county at a tax sale and the increased amount subsequently realized by the county when it resold that property to another individual. 1978, Op.Atty.Gen. (Inf.) Sept. 5.

99. Transit operations

Statutory scheme requiring county to contribute to payment of operating expenses of transportation authority, which provided mass transportation services to county, does not violate this section prohibiting counties from making gift or loan of money or extending their credit to individual or private groups. Niagara County v. Levitt, 1978, 97 Misc.2d 421, 411 N.Y.S.2d 810, modified on other grounds 49 N.Y.2d 922, 428 N.Y.S.2d 675, 406 N.E.2d 490.

100. Traveling expenses

A city may not make fixed, monthly, lump sum payments to its visiting nurses for the use of their own cars on city business. 26 Op.State Compt. 39, 1970.

101. Unauthorized expenses

Where a landlord of a multiple dwelling within a village neglects to properly heat the building, the village may not order fuel oil on behalf of the landlord, pay the cost thereof to the dealer, and seek reimbursement by assessing the cost thereof against

the property but may enact legislation requiring sufficient heat to be provided by a landlord to maintain minimum temperatures. 30 Op.State Compt. 6, 1974.

102. Water and sewer systems

Where village had charged its water and light department employees only minimum charge for water and sewer service, regardless of use, but village had not treated the amount of services received free by employees as expenses of employment and employees had not treated such as salary, this section prohibiting gifts from municipality to an individual was violated. Village of Wellsville v. AFSCME, N. Y. Council 66, 1979, 103 Misc.2d 151, 425 N.Y.S.2d 441.

A town may enter into a contract with a private developer to build a sewer line which will allow the town and the developer to hook up to an existing sewer system. 1981, Op. Atty.Gen. (Inf.) Jan. 19.

A village has authority to establish, by contract, higher or lower than normal rates for the water and sewer services for hospital facilities in excess of 50 beds as long as it is based on greater than normal use even though the only facility involved is operated by the county. 1977, Op. Atty.Gen. (Inf.) 245.

A town and city may enter into an agreement pursuant to which the town, on behalf of an improvement area, would issue obligations to finance 25% of the cost of expanding the city's water supply capacity without the town acquiring a joint ownership interest in the city water plant; however, the town would have to acquire a contractual commitment from the city guaranteeing water supply to the town subject to city water users' needs, over a period of time which, at a minimum, would have to equal the period of time for which town obligations issued to finance its share of the project cost would be outstanding, and the town may not issue obligations the proceeds from which would be used to reimburse the city for past capital expenses already incurred by the city unless the town acquires a joint ownership in the plant. Op.St.Compt. 81-359.

It is improper for a town to expend funds to improve a private drain pipe on private property. 34 Op.State Compt. 55, 1968.

It would be an unconstitutional gift of public funds should a village compromise a claim for damages incurred by a homeowner by reason of a ruptured water main, unless there is a legal basis for village liability for such damages. 33 Op.State Compt. 42, 1977.

Town moneys may not be used to maintain a private dam or control weeds in a privately owned lake. 25 Op.State Compt. 300, 1969.

102a. Water conservation devices

A village may not legally purchase water conservation devices from a not-for-profit corporation to be attached to private water fixtures in order to benefit the property owners by reducing their water bills. Op. State Compt. 81-377.

104. Miscellaneous transactions

Award of public arbitration panel directing city to pay union officials for time devoted to union business did not constitute unconstitutional gift of public money for private purposes. Albany Police Officers Union, Local 2841, Council 82, Am. Federation of State, County and Municipal Emp., AFL-CIO v. City of Albany, 1977, 55 A.D.2d 346, 390 N.Y.S.2d 475.

Where claim of county department of social services against estate was fully documented with copies of agency book entries for contracted nursing home care, drugs, medical care, and hospital expenses for decedent and his spouse, compromise of county commissioner of social services was illegal, unauthorized, and resulted in gift of substantial sum of public money to private charity in violation of this section. In re Andrus' Estate, 1976, 85 Misc.2d 1062, 381 N.Y.S.2d 985.

Recovery by public utility corporation, which, at request of town sewer construction contractor, made temporary changes, relocations and restorations of utility's telephone facilities, for such work as donee beneficiary of construction contract provision imposing on contractor cost of maintaining uninterrupted utility services, tions and restorations of utility facilities including temporary changes, relocaties as might aid contractor in prosecution of its work, would not violate this section providing that no town shall give money or aid to private corporation. New York Tel. Co. v. Secord Bros., Inc., 1970, 62 Misc.2d 866, 309 N.Y.S.2d 814.

A soil and water conservation district may expend public funds for the payment of dues in the National Association of Conservation Districts and for the support of programs administered by such Association, provided such expenditures are supported by adequate consideration. Op. Atty.Gen. (Formal) 82-2.

While the village of Babylon does not have statutory authority to repair the facade of privately-owned condominiums its board of trustees could request a special act giving it authority to use its credit to repair the facade and to recoup the cost by special assessments against the condominium owners. 1980, Op.Atty.Gen. (Inf.) Dec. 10.

An intermunicipal transfer of an old fire truck is not prohibited by this section as the prohibition does not, by its terms, extend to a gift from one municipality to another municipality for proper public purposes. 1978, Op.Atty.Gen. (Inf.) 136.

In view of this section and in the absence of statutory authority, the town of Islip is not authorized to offer or pay a bounty to any person who discloses a litterer to the Town. 1977, Op.Atty.Gen. (Inf.) 186.

A town police department may not provide extra police services to private persons or organizations on a contract basis. 1974, Op.Atty.Gen. (Inf.) 158.

Under this section and section 122-b(1) of the General Municipal Law, a town is not authorized to purchase an ambulance and lend it for a nominal consideration to a voluntary ambulance corps which serves the town but the town may make such purchase and contract with the voluntary ambulance corps to operate and maintain such vehicle and furnish emergency treatment if such corps is otherwise qualified to enter into such contract and perform such services. 1970, Op.Atty.Gen. (Inf.) 174.

A municipality may not purchase shade trees to be planted upon private property nor may a municipality reimburse a private property owner for the cost of shade trees so planted. 1970, Op.Atty.Gen. (Inf.) 132.

A town comes within the prohibition of this section in defraying utility rental costs of lights mounted on utility poles which light the building of a civic association more particularly because the lights were installed several years ago at the request of the private association and solely for the purpose of lighting its building. Op.State Compt. 82-126.

A fifteen minute time break to cash paychecks allowed by water district to its employees would be violative of this section proscribing gifts of public funds for private endeavors but the practice would be allowable if employees were to use personal leave credits for the period of their absence or if the practice was included in a collective bargaining agreement. Op.State Compt. 82-125.

The use of county funds to set up a reserve fund to prevent a private mental health clinic from experiencing a cash flow problem would be in violation of this section since it would constitute a loan of county moneys to a private institution. Op. St.Compt. 81-285.

A county may make payments to a mental health clinic, which has a cash flow problem, at the beginning of each month for the services to be rendered that month in order to help the clinic avoid said cash flow problems and the need to borrow moneys to meet current operating costs. Id.

A town may not issue obligations to finance the purchase of a fire truck for a fire district located within the town. Op.State Compt. 81-156.

A town is not authorized to use its highway department employees to perform non-municipal work on private property for the benefit of the property owner even where the town will benefit from such work and, moreover, if the benefit received by the town is much less than the benefit received by the property owner, it would also constitute this an unconstitutional gift. Op.St.Compt. 81-120.

A town may not use town funds or town employees to prepare a proposed budget or other documents for the purpose of showing residents of a proposed village the cost of incorporating and operating a village. Op. State Compt. 81-26.

A village board may hold an annual dinner for unsalaried members of various village boards where only the meals of the members will be paid for by the village as a token of appreciation for the services rendered by such members to the village. Op. State Compt. 80-775.

A town board may hold an annual dinner for unsalaried members of various town boards where only the meals of the members will be paid for by the town as a token of appreciation for the services rendered by such members to the town. Op.State Compt. 80-282.

A town may purchase plaques at a cost of approximately $20 per plaque to give, as a token of appreciation, to unsalaried members of the planning, zoning and conservation boards who are leaving town service. Op.State Compt. 79-882.

A town may contract with a private conservation group to provide the town with investigative services and reports needed for litigation concern-

ing the environmental impact of chemical waste disposal but contract payments may not be made in advance of the receipt of services. Op.State Compt. 79-634.

A village has neither the authority to donate funds to "The Family", a private organization that assists people in temporary emotional distress, nor to contract with such an organization. Op.State Compt. 78-914.

A city may not contribute to a local chamber of commerce for the purchase of Christmas holiday decorations to be used in the city at Christmas time. Op.State Compt. 78-686.

It is not an unconstitutional gift nor is there any other impropriety for town employees to cart off abandoned articles from a town dump for their personal use if, according to town policy, any member of the public is permitted to browse through the dump and take possession of discarded abandoned objects. Op.State Compt. 78-375.

That the rate to be paid by Blue Cross for services rendered by the hospital to Blue Cross subscribers is not sufficient to cover the expenses to the hospital in rendering such services, with the result that the hospital is providing services at a deficit which must be made up out of general city taxes, does not give rise to gift either to Blue Cross or Blue Cross subscribers. Op.State Compt. 78-240.

A town may not expend moneys for the purpose of constructing retaining walls to stabilize banks on private property. 33 Op.State Compt. 63, 1977.

A city may not pay the fine and other expenses of a city officer incurred as a result of a parking violation while on official business, nor may the corporation counsel represent the officer in matters relating to such violation, at city expense. 30 Op.State Compt. 78, 1974.

A school district may not pay transportation, meal expenses or babysitting fees for parents who are involved in a counseling program run by the school. 30 Op.State Compt. 19, 1974.

Proceeds from the sale of tickets to interschool athletic events may not be donated to a private organization for use in establishing scholarships for graduate students. 29 Op.State Compt. 154, 1973.

A town highway employee may not use town highway equipment for private purposes and a town may not put gravel in a parking area on private property, notwithstanding that a school bus is parked there. 29 Op. State Compt. 122, 1973.

A county may purchase bus tokens and re-sell them to senior citizens at a reduced price. 28 Op.State Compt. 201, 1972.

A county may not pay the costs incurred by a county legislator in personally conducting a bulk mailing to his constituents on a matter having no relationship to county business. 26 Op.State Compt. 247, 1970.

A contract between a school district and a dental consultant, which provides that the dentist's fee be paid to a student as a scholarship, is not prohibited. 26 Op.State Compt. 81, 1970.

Control of municipal funds appropriated for an historical commemoration may not be turned over to private citizens for administering the program. 25 Op.State Compt. 396, 1969.

A board of education may not agree to refund to a teacher a portion of his tuition cost for completing an approved graduate course. 25 Op.State Compt. 109, 1969.

A payment by a municipality to a contractor, after completion of a construction contract, over and above the contract price, predicated on his failure to include sales tax costs in his bid, would be an unconstitutional gift of public funds to an individual. 25 Op.State Compt. 98, 1969.

105. Obsolete equipment, gift of

Items of personal property which have become obsolete and unusable and have no market value as evidenced by inability to dispose of such items at a public sale, may be given away by the town, or destroyed or donated to a not-for-profit organization. Op.State Compt. 82-232.

A town may make a gift of used, unneeded and obsolete voting machines to a student organization, where they have no market value. 28 Op.State Compt. 38, 1972.

106. Down payments

A municipality may make a down payment on a fire truck where certain safeguards are taken to protect the municipality's interest. 30 Op. State Compt. 171, 1974.

107. Vehicles owned by city

Initial determination of whether use of city owned vehicles by employee union members during nonworking hours was fringe benefit accorded employees under their contract or a "gift" should be made in arbitration proceedings held to determine rights under collective bargaining agreement and, until the initial determination was made, it would not be proper or possible for court to decide whether the use was an unconstitutional cash benefit to employees without any corresponding benefit to municipality. City of Rochester v. AFSCME, Local 1635, 1976, 54 A.D.2d 257, 388 N.Y. S.2d 489.

A town highway superintendent has the power to authorize highway employees to take highway vehicles home at night regardless of any contrary policy adopted by the town board. Op.State Compt. 80-806.

A municipal official who is subject to being called to perform official duties in situations such as emergencies during hours other than his regular established working hours may be permitted, in the public interest, to have a municipal vehicle on a full-time basis to insure his ready availability in such situations and, under those circumstances, reasonable personal use of the municipal vehicle under those circumstances would be a private benefit which is incidental to a legitimate public purpose and thus not in violation of this section. Op. State Compt. 79-850.

Municipal officials who are subject to being called to perform official duties in situations such as emergencies, during hours other than regular established working hours, may be permitted, in the public interest, to use municipal vehicles on a full-time basis to ensure the ready availability of essential city personnel during such situations. Id.

108. Senior citizens

A municipality may not donate money to a not-for-profit corporation but may contract with such a corporation to provide hot meals to senior citizens, and such a contract could involve State aid, if approved by the Office for the Aging, or might be made without such approval, in which case State aid would not be available. Op.State Compt. 79-37.

A municipality may not make direct or indirect donations or contributions of moneys to a private senior citizens' organization without contravening this section of the New York State Constitution, which prohibits gifts or loans of public moneys to private organizations. 34 Op.State Compt. 134, 1978.

It is not permissible for a town to pay the telephone bill for the private phone of the president of a senior citizens' organization or to pay mileage on his car when he uses it to attend senior citizen functions if the president is not an employee of the town. Op.State Compt. 78-398.

A city may establish a reduced fee schedule for the use of the municipal golf course by senior citizens. 33 Op. State Compt. 50, 1977.

109. Conveyance of property

An arrangement whereby a state grant is made to assist a private developer, the successful bidder on a contract with the municipality, to rehabilitate for commercial reuse and to preserve and maintain in accordance with stated conditions, a landmark city hall listed in the National Register of Historic Places, whereby ownership of the building will be conveyed to the developer at the end of 30 years, does not violate the gift and loan provision of this section. 1979, Op.Atty.Gen. 60.

A village may offer the dirt in a railroad abutment, free of charge, to anyone willing to pay the cost of removing it if the value of the dirt is roughly equivalent to the cost of its removal by the village. Op.State Compt. 80-523.

A contract between a county and private persons relating to the operation and maintenance by the latter of a parcel of land acquired by the county at a land tax sale, may be deemed valid, where terms of the agreement are that the total consideration for the purchase of the property will be the aggregate of the delinquent taxes previously due the county, together with all interest, penalties and publication costs, and the payment of a minimum of $600 per month until the full delinquent taxes have been paid (with the purchasers also paying all current taxes) at which time the county will convey the title to the aforesaid purchasers. 33 Op.State Compt. 53, 1977.

110. Federally funded programs

A county may participate in the Division for Youth's probation employment program since any funds expended are in actuality federal funds and their disbursement would not violate the private gift prohibition of this section. 1978, Op.Atty.Gen. (Inf.) Aug. 7.

A county may not generally provide county moneys to a private day care center unless it enters an agreement with a center which has a federally approved and federally funded program relating to the general welfare and designed to serve an area within the county. Op.State Compt. 82-134.

If otherwise permissible under applicable federal rules and regulations,

a village may loan $200,000 of a $300,000 Urban Development Action Grant received from the federal government to a private company with the loan secured by a second mortgage on the company's property at the prevailing rate of interest. Op.State Compt. 80-589.

111. Rescue squad

A town may not make an outright gift or transfer of moneys to the emergency rescue and first aid squad of a volunteer fire department or fire company. Op.State Compt. 80-271.

A town may not purchase equipment for a private incorporated rescue squad nor may it grant money to such squad for such purpose. Op.State Compt. 78-647.

112. Subsidies

A town may not contribute money to a YWCA in order to assist that organization's construction and maintainence of a building. Op.State Compt. 78-919.

113. Use of public equipment

A town highway superintendent may not use town equipment for his own private purposes. Op.State Compt. 78-950.

114. Flood control

It is not unconstitutional for a village to expend funds to protect private property from the problem of basement flooding. Op.State Compt. 79-417.

115. Volunteer ambulance service

A central school district may not permit a not-for-profit volunteer ambulance squad to store its ambulance, without charge, in a school district bus garage. Op.St.Compt. 82-62.

A village may not make a gift of funds to a volunteer ambulance service but may contract with it for the rendering of ambulance service to the village and this assumes, of course, that the ambulance service possess a valid voluntary ambulance service statement of registration. Op.State Compt. 79-492.

116. Youth programs

State aid paid to a village for youth programs cannot be used to fund athletic events sponsored by a private athletic association. Op.State Compt. 79-783.

117. Refreshments

A town may expend funds to provide refreshments for the general public at official town functions. Op.State Compt. 79-902.

118. Payment of damages

Payment of public funds as damages for breach of a contractual obligation or in settlement of a contested claim in not prohibited by this provision forbidding gifts of public funds. Ingram v. Boone, 1983, — A.D.2d —, 458 N.Y.S.2d 671.

Payment of public moneys as damages for breach of contractual obligation on part of state or municipality is not within prohibition of this section forbidding donations from public purse. Piro v. Bowen, 1980, 76 A.D.2d 392, 430 N.Y.S.2d 847.

Actions for punitive or exemplary damages could not be maintained against public entities, including school district. Buck v. Hooker Chemicals & Plastics Corp., 1982, 117 Misc.2d 496, 458 N.Y.S.2d 134.

119. Reward for outstanding performance

A village may not make payments beyond the amount fixed in a service contract to a contractor who has rendered what is considered outstanding performance. Op.State Compt. 80-527.

122. Legal services

A village may not pay for the legal services rendered to private litigants although the same law firm could represent both the village and private individuals if they are co-defendants. Op.State Compt. 80-789.

123. Recovery of salary overpayments

A village is entitled to recoup salary payments made in excess of the salary set in a collective bargaining agreement due to a clerical error by making deductions immediately and in full from one or more pay checks under certain circumstances, the overpayment may be recouped by periodic deductions of less than the full amount from several pay checks, or by another equitable method agreed to by both parties. Op.State Compt. 80-752.

124. Environmental matters

A town may not donate public funds to a private environmental group. Op.State Compt. 80-756.

125. Public relations expenditures

The administrator of a public general hospital may not use moneys in the hospital's public relations fund to purchase a membership in a private yacht club. Op.St.Compt. 81-368.

Although a school district may use district money to educate and inform the public on a proposed school budget, it may not use district money to convey favoritism, partisanship, partiality, approval or disapproval of such budget. Op.State Compt. 80-114.

126. Meals

A town may hold a recognition luncheon for its volunteer library workers but the town may only pay for the meals of volunteers and the cost of the meals must be reasonable. Op.St.Compt. 82-66.

Where a municipal governing body has determined that the attendance at a dinner business meeting of its own municipal officers with business executives or other municipal or state officers or employees, will serve the interests of the municipality, then the cost of meals consumed by all persons in attendance may be paid for by the municipality as a proper municipal expenditure. Op.State Compt. 81-38.

127. Maintenance of private property

A village may not repair a break in a privately owned sewer pipe even though the owners reimburse the village for the cost thereof because such an undertaking is not a village purpose. Op.State Compt. 82-304.

Where a defect in a private water or sewer line creates an emergency condition which is an imminent threat to the public health or welfare, requiring immediate corrective action, then a village, in the exercise of its general police powers, may undertake repairs as necessary and appropriate to protect the public interest even though there is no express authority for such action in the form of a statute or local enactment. Id.

A village may not provide maintenance for privately owned water or sewer lines at village expense because the expenditure of public moneys therefor would constitute a gift in violation of this section. Id.

A town may not make a gift of public funds to a private historical association but it may enter into a contract with an historical association for the support or maintenance of any historic edifices in the town. Op.State Compt. 82-283.

A village may not accept, erect and/or maintain signs containing maps of the village which are given to the village where the signs also contain private advertisements and where the revenues from the sale of the advertising are retained by the donor. Op.State Compt. 80-735.

128. Urban renewal support

A municipality, in carrying out an urban renewal plan, may enter into a long-term agreement with a private developer under which the municipality guarantees the availability of a designated number of parking spaces in public parking lots for use of the developer's customers. Op.Atty.Gen. (Inf.) Oct. 19, 1981.

129. Scholarships

A student scholarship grant whereby each county legislator would be allocated $500 to provide a resident of his district a grant in that amount toward yearly educational expenses at a community college, violates this section. Op.St.Compt. 81-238.

§ 2. [Restrictions on indebtedness of local subdivisions; contracting and payment of local indebtedness; exceptions]

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2a. Purpose

Prescription of this section that a city's pledge of faith and credit for its indebtedness is designed, inter alia, to protect rights vulnerable in the event of difficult economic circumstances. Flushing Nat. Bank v. Municipal Assistance Corp., for City of New York, 1976, 40 N.Y.2d 731, 390 N.Y.S.2d 22, 358 N.E.2d 848, on remand 88 Misc.2d 1047, 391 N.Y.S.2d 969.

Purpose of this section prohibiting county to contract indebtedness except for county purposes is to prevent county from becoming indebted for other purposes than those for which it was created. Blomquist v. Orange County, 1972, 69 Misc.2d 1077, 332 N.Y.S.2d 546.

3. Debts within section

A contract made in 1942 by a village to supply water free of charge to two nonresident lower riparian owners as long as the village maintains a water system, in consideration for the village's right to draw more water from a lake, resulting in a reduced flow downstream, did not constitute a "contract of indebtedness" within the meaning of this section. Op.State Compt. 79-129.

7. Payment of indebtedness—Generally

This section requires that debt obligations of a city be paid, even if tax limits must be exceeded. Flushing Nat. Bank v. Municipal Assistance Corp. for City of New York, 1976, 40 N.Y.2d 731, 390 N.Y.S.2d 22, 358 N.E.2d 848, on remand 88 Misc.2d 1047, 391 N.Y.S.2d 969.

rather than of careful consideration; indeed, the evidence is to the contrary. In Iowa, for example, the constitutional convention of 1857 gave lengthy consideration to the merits of imposing public aid limitations on cities and counties, and to the interrelationships between such limitations and similar limitations on the state.[107] The constitution which was finally adopted had a credit and stock clause directed only at the state; and it would be difficult to conclude that this was not the result of deliberate choice. In addition, state constitutions generally differentiate in all financial areas between provisions applicable to the state and those applicable to political subdivisions. The lending of credit should be no exception. To apply the credit clause to the state but not to its political subdivisions is not unreasonable. The problem of excessive state debt may well be more serious than that of municipal debt. Also, a constitution may reasonably permit local experimentation in aiding economic development while restricting the state from doing the same thing.

VI. The Revenue Bond Plan

The revenue bond plan is a type of municipal industrial financing only in a limited sense. Because the public credit is not pledged, the bondholders must look for repayment to a special fund fed solely by rental revenues. In the typical revenue bond project, the municipality agrees to construct and equip a manufacturing plant in accordance with plans and specifications approved by a private corporation and then lease it to the corporation for a term of twenty to twenty-five years. A rental is fixed which will amortize the bonded indebtedness and pay the interest charges during the term of the lease. The agreement usually is a net lease, under which the lessee is obligated to maintain the premises and to pay all insurance premiums. Both the facility and the bonds are tax exempt.[108] At the close of the primary term, the lessee usually has an option to extend at a nominal rent, often by successive short-term renewals. In many instances the lessee has an assured occupancy for a total period of fifty to sixty years. The lease usually can be freely assigned or the premises sublet without the consent of the municipality. It is also common for the lessee to be granted an option to purchase during the primary term by satisfying the municipality's debt and interest charges, or after the close of the primary term, by paying a nominal sum.[109] Although the city, therefore, holds title to the land and facility, the corporation is

[107] 1 Debates of the Constitutional Convention of Iowa 289-344 (1857).

[108] See notes 224-28 *infra* and accompanying text.

[109] This description of a typical revenue bond plan is based on Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952); Bennett v. City of Mayfield, 323

guaranteed the right to use the facility for virtually all of the useful life, so long as it pays the principal debt and interest, discharges its duties to maintain the facility, and keeps it properly insured.

The Kentucky court has aptly characterized the municipality's role as that of a trustee.[200] More precisely, it can be analogized to a trustee under a mortgage deed of trust. The municipality, like the mortgage trustee,[201] is basically a conduit for funds flowing between the user of the facility and the bondholders. It even assumes certain duties similar to those of the trustee,[202] including the handling of the revenues and the preservation and enforcement of the lease.[203] The differences between the mortgage trustee and the municipal issuer of industrial revenue bonds are relatively slight. While the mortgage trustee does not hold legal title,[204] the municipality does. The mortgage trustee also has no equity in the property, but the municipality has a proprietor's right to possession if the lessee fails to exercise any of its options to extend the term or to purchase.[205] Opportunity to exercise these rights, however, will be unlikely to occur if the facility has any market value. Even if the lessee no longer needs the plant

S.W.2d 573 (Ky. 1959); Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950); Village of Deming v. Hosdreg Co., 62 N.M. 18, 36-37, 303 P.2d 920, 932 (1956) (dissenting opinion); Darnell v. County of Montgomery, 202 Tenn. 560, 308 S.W.2d 373 (1957); ALABAMA STATE PLANNING AND INDUSTRIAL DEV. BD., THE PROCEDURE FOR ISSUING INDUSTRIAL DEVELOPMENT BONDS BY MUNICIPALITIES 24-27 (Reprint 1959); City of Mayfield, Kentucky, Official Statement Relating to the Issuance of $9,500,000 Industrial Building Revenue Bonds Dated April 1, 1959, at 29; City of Scottsville, Kentucky, Official Statement Relating to $850,000 Industrial Building Revenue Bonds Dated June 1, 1960, at 23-24. The picture presented is a typical or composite one. There are, of course, variations. The power of Alabama municipalities to grant purchase options is qualified by opinions of the Attorney General's ruling that the option is valid under the credit clause only if based upon more than nominal consideration. Ops. Ala. Att'y Gen. to Hon. Pleas Looney, Director, Alabama Planning and Industrial Dev. Bd., May 6, May 16, & Aug. 5, 1957.

200 Bennett v. City of Mayfield, 323 S.W.2d 573, 576 (Ky. 1959); Faulconer v. City of Danville, 313 Ky. 468, 474, 232 S.W.2d 80, 84 (1950).

201 For a discussion of the functions and duties of the trustee under the mortgage deed of trust, see 1 GLENN, MORTGAGES §§ 20-21.3 (1943).

202 The fact that commercial trustees are sometimes designated to perform these functions, as well as the usual duties of a mortgage trustee upon default, does not detract from this analysis. In such cases, the municipal trustee has merely delegated some of its duties.

203 Compare the analysis of public building authorities by Professor Morris. A building authority constructs a public building, finances it by the issuance of its bonds, and then leases it to a traditional unit of government. Since the authority has no other unpledged income, the bondholders rely exclusively on the rental income received by the authority. Under Professor Morris' analysis, the building authority, realistically a conduit of funds, can be looked upon as a trustee under a mortgage deed of trust and the lessee government is realistically the debtor. Morris, *Evading Debt Limitations With Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234, 243-50 (1958).

204 GLENN, *op. cit. supra* note 201, § 20, at 127-29.

205 The municipality will, of course, take possession upon lessee's default. But in that case, it will be under a duty to the bondholders to re-lease upon terms similar to those in the prior lease.

for its own business, it can avail itself of the usually unrestricted right to assign or sublease.

The majority of decisions have sustained the validity of the revenue bond plans under the public aid limitations and the public purpose test. The courts have held that a statute which pledges only project revenues does not pledge the public credit, and therefore does not lend the public credit in aid of anyone.[206] The public purpose test and the public aid limitations have been identically treated. Of the four courts that invalidated revenue bond statutes, two relied on both the credit clause and public purpose test,[207] one on the credit clause alone,[208] and one on the public purpose test alone.[209]

These minority courts[210] and law review commentators[211] have asserted that several factors justify the invalidation of revenue bond statutes under the credit clause and the public purpose test. Public officers who administer the plans must perform various duties similar to those of the mortgage trustee, including fixing and collecting rentals and providing insurance coverage. It is alleged that it is improper for them to be so occupied. If so, taxpayers have a valid interest in the proper use of officers' time. Further, the use of officers' time can be translated into an expenditure of public funds—a given percentage of their salaries. In addition, improper performance of their duties by municipal officers may create municipal liability to bondholders or others. Even if that does not occur, a default by the lessee might produce a default on the bonds which would adversely affect the city's credit status.

It is important to determine how significant these arguments are to the application of the credit clause. The first factor, officer time and its financial component is *de minimis*. When due deference is given to the legislative judgment, the application of either the credit clause or the current appropriations clause for this reason is weak indeed.

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206 See cases cited note 63 *supra* under the heading "Plans upheld."

207 State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).

208 Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

209 McClelland v. Mayor of Wilmington, 159 A.2d 596 (Del. Ch. 1960). Although the Delaware Constitution contains a credit clause applicable to municipalities, article 8, section 8, the court did not rely upon it.

210 See cases cited note 63 *supra* under the heading "Plans held invalid"; Village of Deming v. Hosdreg Co., 62 N.M. 18, 37, 303 P.2d 920, 932-33 (1956) (dissenting opinion).

211 Virtue, *The Public Use of Private Capital: A Discussion of Problems Related to Municipal Bond Financing*, 35 VA. L. REV. 285, 294-95, 306-07 (1949); Note, *Incentives to Industrial Relocation: The Municipal Industrial Bond Plans*, 66 HARV. L. REV. 898, 902 (1953); Note, *The "Public Purpose" of Municipal Financing For Industrial Development*, 70 YALE L.J. 789, 792-93 (1961).

The second danger, potential municipal liability flowing from improper performance of official duties, presents a more serious problem. A considerable number of courts, dealing with special fund-special assessment bonds, have imposed liability on the municipality for failure to levy adequate assessments [212] and for misappropriation of moneys collected,[213] either on a theory of implied contract [214] or of negligence.[215] There is some indication that similar rules would be applied in the case of revenue bonds.[216] Most of the revenue bond statutes in the field of industrial financing, however, contain exculpatory clauses, drafted as strongly and precisely as possible to immunize the municipality from such liability.[217] The effect which courts will give them is still uncertain.

Nonetheless, even if these clauses are liberally construed, municipal activity in connection with an industrial financing project, like any municipal activity, creates an ever present potential for tort or contract liability to persons other than bondholders, a type of liability which seems to be outside the scope of the exculpatory clauses.[218] On balance, however, the risk presented by potential tort or contract liability is quite small.

In any case, the possibility of municipal liability does not necessarily bring the issuance of revenue bonds within the credit clause. The trustee under a mortgage deed of trust is not regarded as pledging his own credit because the courts can impose liability for breach of his duties. To hold the credit clause applicable because of the possibility of tort liability runs counter to the closely related line of cases holding that special assessment bonds, payable from a special fund, and revenue bonds are not debt for the purpose of state constitutional debt limitations—notwithstanding the possibility of tort liability.[219] If no debt is

[212] See 15 McQuillin, Municipal Corporations §§ 43.136, 43.161 (3d ed. 1950); Note, *Municipal Liability Upon Improvement Bonds*, 44 Harv. L. Rev. 610, 613 (1931).

[213] *E.g.*, Rothschild v. Village of Calumet Park, 350 Ill. 330, 183 N.E. 337 (1932).

[214] *E.g.*, Nagle Engine & Boiler Works v. City of Erie, 350 Pa. 158, 38 A.2d 225 (1944).

[215] *E.g.*, City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329, 334, 346-48 (8th Cir. 1905).

[216] Getz v. City of Harvey, 118 F.2d 817 (7th Cir. 1941), *cert. denied*, 314 U.S. 628 (1941); *cf.* RFC v. Municipal Bldg. Corp., 63 F. Supp. 587 (D. Me. 1945); Public Market Co. v. City of Portland, 171 Ore. 522, 587-90, 130 P.2d 624, 649-51 (1942). *Contra*, Oppenheim v. City of Florence, 229 Ala. 50, 155 So. 859 (1934) (dictum).

[217] *E.g.*, Ala. Code tit. 37, §§ 511(23)-(24) (1958).

[218] See Oppenheim v. City of Florence, 229 Ala. 50, 56, 155 So. 859, 864 (1934) (dictum); Springfield Tobacco Redryers Corp. v. City of Springfield, 41 Tenn. App. 254, 293 S.W.2d 189 (1956).

[219] City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329, 346-48 (8th Cir. 1905); Indiana Harbor Belt R.R. v. City of Calumet, 391 Ill. 280, 294-98, 63 N.E.2d 369, 375-77 (1945); see 15 McQuillin, Municipal Corporations §§ 41.31-.32 (3d ed. 1950).

created, logically there is no lending of public credit. Application of the credit clause to the revenue bond plans inhibits experimental economic legislation by unreasonably stretching the clause to cover potential evils not within its spirit and never contemplated by the framers of the limitation.

The third factor—possible adverse effect of a default on the city's credit—perhaps comes closest to the rationale of the public aid limitations. If this should materialize, the municipal officers would be faced with a number of unhappy choices, all of which would impinge directly on the taxpayer: assuming the debt as a moral obligation; refunding at a higher interest rate; financing future capital improvements out of current taxation; or cancelling planned improvements. Whether default on industrial revenue bonds would adversely affect a municipality's credit standing and, if so, to what extent, are questions that require delicate prediction based upon technical expertise. Unfortunately, those who have concluded that the danger is realistic have done so on the basis of informed speculation only.[220] To rebut the presumption of constitutionality, those who attack revenue bond industrial financing legislation should support their position by reliable testimony from investment bankers.[221] Only when the probability of damage to the municipality's credit rating is properly established on the record, should courts face the question of how much weight should be accorded this factor. In any event, it would be necessary to overrule or distinguish the cases which have upheld special fund obligations under debt limitations. Such overruling would effectively strike down all special fund financing; but the doctrine of these cases is too entrenched to render this an actual possibility. Yet to distinguish them away is also difficult, for both constitutional debt limitations and credit clauses were intended to protect taxpayers from heavy future taxes levied to pay for recklessly incurred past debt, a danger plainly not present with revenue bonds. While damage to credit standing is a related evil, it is of a lesser magnitude. Due deference to the legislative judgment again dictates not a broad interpretation of the credit clause that would prohibit

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[220] See Bessemer Inv. Co. v. City of Chester, 113 F.2d 571, 574 (3d Cir. 1940); Harbold v. City of Reading, 355 Pa. 253, 257-58, 49 A.2d 817, 820 (1946).

[221] The expectancy that the municipality will support bonds out of general funds to prevent a default may be greater in the case of special assessment bonds and non-industrial revenue bonds than revenue bonds. They are issued for improvements which have traditionally been deemed public in nature and are at the vital core of community life. In contrast, any perceptive investor purchasing industrial development revenue bonds would rely exclusively on the general credit of the lessee corporation.

legislative pioneering, but a relatively strict interpretation which would limit the credit clause to what is conventionally regarded as debt. The credit clause should not, therefore, be a bar to revenue bond plans.

The validity of these plans under the public purpose test follows a fortiori. The rationale of the judicial restraint espoused earlier in connection with the public purpose test as applied to tax supported plans leads logically to an even more limited concept of review of revenue bond programs. The modified enterprise aid standard is only justified by the need to protect present and future taxpayers against the serious tax burden flowing from recklessly incurred debt. Except to the extent that credit standing is impaired, this consideration is irrelevant to revenue bond financing. Just as Pennsylvania plan financing calls for less judicial scrutiny than plans which incur general obligation debt, so revenue bond plans call for an even more relaxed standard of judicial review. Judicial examination of revenue bond industrial financing legislation should be limited to a determination of whether the statute rests upon a rational basis within the knowledge and experience of the legislators.

As in the case of the tax supported plans, the rational basis which supports the revenue bond plan is the urgent need for more community income and the lack of private financing for industrial expansion. However, the revenue bond plans do not, in actual operation, provide public financing; the municipality, as "trustee," merely facilitates private borrowing by "lending" the lessee its federal tax exemption on municipal bond income and its state property tax exemption. State courts need not determine whether this use—or misuse—of tax exemptions is reasonable.[222] To do so would be to enter a "political thicket" which should be avoided. The question of exploitation of the tax exemptions can more appropriately be left to Congress, the Supreme Court, and the state legislatures.[223] With this troublesome problem removed from consideration, the only question before a state court is whether there is a rational nexus between the economic need which cannot be met by private financing, and the use of revenue bond financing. The responsive analysis is the same as in the case of the tax supported plans; again, the argument for not disturbing the legislative judgment calls for the use of the rational basis standard.

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[222] See note 53 *supra* and accompanying text.

[223] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 586 (1895), held that Congress could not constitutionally levy a tax on the income from state or municipal bonds. More recent decisions in Alabama v. King & Boozer, 314 U.S. 1 (1941), Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939), and Helvering v. Gerhardt, 304 U.S. 405 (1938) cast doubt on the continuing validity of *Pollock*.

VII. State Tax Exemption Under the Mississippi and Revenue Bond Plans

The Mississippi and revenue bond plan statutes are generally silent on the question of tax exemption for the financed industrial facility.[224] In states where the Mississippi plan rests upon constitutional amendment, the amendments are also silent on this point. As a matter of practice, however, these facilities have been treated as exempt,[225] and the one court which has faced the question has upheld exemption.[226] In contrast, the statutes generally expressly exempt the bonds issued to finance the project,[227] but tax exemption for revenue bonds has been held invalid under the uniformity clause by the one court to which the question was presented.[228]

In many states, the constitution—in some states as a mandatory provision,[229] and in others as a grant of authority to the legislature[230]—exempts municipal property used for public purposes from taxation. Even in the absence of such a provision, courts have reached the same result.[231] The exemption will be referred to as the public purpose exemption. Under the public purpose exemption, the validity of an industrial financing program does not imply a tax exemption, as "public purpose" need not have the same meaning when used as a limitation on public expenditures as it does when used as a restriction on tax exemption.[232]

In some other states the constitutions exempt municipal property from taxation regardless of the use to which it is put.[233] Accordingly, once a court approves a financing program, there is no serious question of state law with respect to tax exemption, except in the case of revenue bond plans.[234]

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224 The Mississippi statute is an exception. MISS. CODE ANN. § 8936-21 (1956) expressly exempts the public facility from taxation.

225 See Wayland v. Snapp, 232 Ark. 57, 71-73, 334 S.W.2d 633, 641-42 (1960); Village of Deming v. Hosdreg Co., 62 N.M. 18, 36-37, 303 P.2d 920, 932 (1956) (dissenting opinion); GILMORE, DEVELOPING THE "LITTLE" ECONOMICS 62 (1959).

226 Wayland v. Snapp, *supra* note 225, at 71-73, 334 S.W.2d at 641-42.

227 *E.g.*, TENN. CODE ANN. § 6-2913 (Supp. 1962) (Mississippi plan); ALA. CODE tit. 37, § 511(30) (1958) (revenue bond plan).

228 Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 349, 353 P.2d 767, 775 (1960).

229 *E.g.*, ARK. CONST. art. 16, § 5.

230 *E.g.*, IND. CONST. art. 10, § 1.

231 See 51 AM. JUR. *Taxation* §§ 557, 562, 569-76 (1944).

232 See Wayland v. Snapp, 232 Ark. 57, 78, 334 S.W.2d 633, 644 (1960) (dissenting opinion); City of Cleveland v. Carney, 172 Ohio St. 189, 174 N.E.2d 254 (1961); *In re* Township of Moon, 387 Pa. 144, 127 A.2d 361 (1956); FORDHAM, THE STATE LEGISLATIVE INSTITUTION 83-84 (1959).

233 *E.g.*, IDAHO CONST. art. 7, § 4.

234 If we apply the earlier characterization of the municipality's role under the revenue bond plan as that of a trustee under a mortgage deed of trust, a serious ques-

A number of cases have held that public income-producing property leased to a private lessee is not used for a public purpose for purposes of tax exemption.[235] However, this body of cases is of limited significance. Unlike the leases involved in those decisions, the principal goal of industrial financing programs is not to produce rental income. The receipt of rent is no more a vital objective of public industrial financing than it is when municipal airport property is leased to an air carrier. In addition, the cases referred to usually arose in a context of conflict among taxing units; the underlying problem presented was that of apportioning an economic burden among taxing units.[236] This problem of allocating economic burdens does not, however, generally loom as a significant difficulty in industrial financing.[237]

The economic benefits of tax exemption under the Mississippi and revenue bond plans are passed on directly to the lessee who generally has an assured occupancy for virtually the entire useful life of the facility. The crucial problem is whether exemption of the facility from taxation unreasonably discriminates among taxpayers. Virtually every state constitution contains a uniformity clause, which at the very least

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tion is presented as to whether the facility should be deemed public property for tax exemption purposes. The exemption of public property has generally not been applied in cases where the municipality is acting as a trustee for private persons. St. Louis v. Wenneker, 145 Mo. 230, 47 S.W. 105 (1898); City of Seattle v. King County, 3 Wash. 2d 26, 99 P.2d 621 (1940); *cf.* Calvin v. Custer County, 111 Mont. 162, 107 P.2d 134 (1940) (upholding an exemption on property to which the United States held equitable title under a contract of sale).

[235] City of Cleveland v. Carney, 172 Ohio St. 189, 174 N.E.2d 254 (1961); *In re* Township of Moon, 387 Pa. 144, 127 A.2d 361 (1956); Public Parking Authority v. Board of Property Assessment, 377 Pa. 274, 105 A.2d 165 (1954); see 51 AM. JUR. *Taxation* §§ 573-76 (1944).

[236] See Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 426-28 (1934); note 237 *infra*.

[237] The underlying problem typically presented in litigation challenging the tax exempt status of publicly owned property is one of allocation of economic burden among taxing units. See Stimson, *supra* note 236. If a county-owned airport is located in townships *A* and *B*, the effect of tax exemption is to compel *A* and *B* to participate in the operating costs of the airport. Even if the townships provide no services, considerable areas which would otherwise be taxable are withdrawn from the tax rolls. Residents of townships *A* and *B*, therefore, contribute to the airport in a dual capacity as township taxpayers and as county taxpayers; taxpayers in townships *C* and *D*, however, contribute only as county taxpayers. See, *e.g.*, *In re* Township of Moon, 387 Pa. 144, 127 A.2d 361 (1956).

This problem of allocation of burden among taxing units is generally not a problem of first magnitude in industrial financing. While it is difficult to anticipate all possible conflicts among taxing units, some are set forth here. The Mississippi and revenue bond plan statutes commonly grant authority to cities to construct a project outside the municipal limits. See, *e.g.*, TENN. CODE ANN. § 6-2903(1) (Supp. 1962). If a city should utilize these powers to construct a plant in the unincorporated area beyond its limits, the tax exemption would be borne by all county taxpayers equally. Since both the direct and indirect economic benefits will normally be felt over an entire county, county taxpayers can hardly complain about the allocation of burden. A less likely possibility is presented by the construction of a facility by the county government within the city limits. Here, city residents could justly complain of having to contribute both as city taxpayers and as county taxpayers for a county-initiated project.

forbids unreasonable classification of taxpayers.[238] In the few states which lack such a provision, an equal protection clause subsumes the same requirement.[239] In construing the public purpose exemption therefore, courts must harmonize it with the prohibition against unreasonable classification so as to accord vitality to both. This task will not necessarily be accomplished by equating the public purpose limitation on expenditures with the public purpose exemption. In a very real sense, the fundamental question concerns the validity of a subsidized pattern of industrial financing. Without the element of tax exemption, the Mississippi plan can be looked upon as only a minimal subsidy; and this is true a fortiori of revenue bond plans. The emphasis suggested here may seem inconsistent with the traditional approach which treats the problem of selection and exemption of objects of taxation independently of the question of appropriation of public funds.[240] On closer consideration, however, there is no conflict. Unlike the typical tax exemption problem, the Mississippi and revenue bond plans present the question in a special context—one in which public financing is bound up with tax exemption. Because of this, courts may well abandon the traditional approach for a more realistic one which considers the tax exemption issue as one element in a complex program.

The factors which support the use of public industrial financing do not necessarily apply to the question of the reasonableness of classification for purposes of tax exemption. Public financing is necessary because of the critical need to expand incomes and the paucity of private long-term investment in industrial expansion. However, there is no reason to believe that industrial lessees need the indirect subsidy of tax exemption any more than do manufacturers who construct new plant facilities with private financing. Quite to the contrary, the manufacturer who with great difficulty obtains private financing at high interest rates may have the greater need of tax relief. It is also possible that the economic benefits to the community derived from his activity may be greater than those realized from lessees of municipal facilities. A number of states grant tax exemption to all new manufacturing industries for a fixed term, or even an indefinite term,[241] with judicial ap-

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[238] See NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 9-11 (1959).

[239] See *id.* at 595-600.

[240] See, *e.g.*, Williams v. Baldridge, 48 Idaho 618, 284 Pac. 203 (1930); Baker and Curry, *Taxpayer's Paradise in the Caribbean*, 1 VAND. L. REV. 194, 199-201 (1948); Stimson, *supra* note 236, at 419.

[241] In some states, this is accomplished by constitutional amendment, and in others by statute alone. See Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 618, 626 n.66 (1959), where the pertinent constitutional and statutory provisions are set forth.

proval.[242] The validity of the classification in public industrial financing, however, is considerably weaker. It rests precariously on the fact of legal title in the municipality, the only differential between the exempt class of manufacturing enterprises and all others.

The public purpose limitation on public spending and the public purpose exemption should not be equated but rather, in approving tax exemption under the public purpose exemption, courts should require a higher degree of public control over the project than is exacted under the public purpose limitation on public expenditures. A decree holding the tax exemption invalid for failure to satisfy the entreprise aid criteria would not be unwarranted. As a minimum, compliance with the modified enterprise aid standard should at least be required for tax exemption, with the proviso that the approving officials be required to certify that both the public financing and the exemption are necessary and in harmony with the area economic development plan.

Where state tax exemption for the facility is expressly incorporated into the industrial financing statute, as in Mississippi, there is the additional consideration of deference due to the legislative judgment. However, in this instance the position advanced with respect to the problem of classification should prevail over the presumption of constitutionality; unless the safeguards of the modified enterprise aid standard are met, tax exemption should be held invalid under the uniformity clause, as an unreasonable classification.[243]

A similar conclusion is merited with respect to the validity of the statutory exemption commonly granted owners of industrial revenue bonds from state personal property and income taxes. The economic benefits of these exemptions are also passed on to the lessee. Accepting the characterization of the municipality as analogous to a trustee under a mortgage deed of trust, the exemption of these bonds seems equally unreasonable unless the requirements of the modified enterprise aid standard are met.

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[242] See, *e.g.*, Crafts v. Ray, 22 R.I. 179, 46 Atl. 1043 (1900); 2 COOLEY, TAXATION §§ 757-58 (4th ed. 1924); *cf.* Allied Stores v. Bowers, 358 U.S. 522, 528 (1959) (dictum).

[243] The equal protection clause of the fourteenth amendment also operates as a limitation on state tax exemptions by requiring reasonable classification. However, the inhibitions implicit in a federal system make for greater judicial restraint in the application of federal constitutional limitations by federal courts, so that classifications deemed unreasonable by many state courts might be sustained at the federal level. A comprehensive analysis in 1938 of the application of the equal protection clause in the area of state tax legislation concluded that the Supreme Court has permitted state legislatures great discretion in classifying for tax purposes. Sholley, *Equal Protection in Tax Legislation* (pts. 1-2), 24 VA. L. REV. 229, 388, 414-16 (1938). A 1959 study substantially confirms this conclusion. NEWHOUSE, *op. cit. supra* note 238, at 601-08. It would seem highly unlikely, therefore, that the Supreme Court would characterize as wholly arbitrary the exemption of a publicly owned industrial facility either as public property or as public property used for public purposes—regardless of the lack of public control reserved over the facility.

Statutory tax exemption of general obligation bonds, however, can be justified without imposing additional requirements. These bonds pledge the credit of the municipality. Since they flow freely in commerce, there may well be no easy means of ascertaining the purpose for which the proceeds were expended. It is true that the economic benefits of the exemption flow directly to the lessee in the form of reduced rent, but the exemption is several steps removed from the lessee as it is an exemption on the property and income of third parties, the bondholders. In considering the problem of exemption of the facility however, the very object of the tax levy is a structure in which the lessee has an interest approximating full ownership.

VIII. Conclusion

Public industrial financing is a logical culmination of the city and state planning movement which began in the early years of this century. Public planning guided private development, but it rarely actively stimulated it. By the end of World War II, the emphasis had shifted from planning to planning joined with development.[244] Negative attitudes toward expanding government were overcome by a resurgence of the American drive for growth and progress. The primary economic energy for this drive has come from the industrially underdeveloped southern and border states which are in the midst of their regional take-off. Significant secondary support has come from the mature economies of the Middle Atlantic and New England states that have decided to come to grips with the many adverse long run regional trends.

The increasing recognition that the states and municipalities must assume a more affirmative role in promoting local and regional development is also reflected in the current programs of public subsidization of commuter rail transportation in metropolitan areas.[245]

The growing acceptance of the necessity for public industrial financing has stimulated a state constitutional counter-revolution directed at sharply modifying the public aid limitations and the public purpose doctrine, our legacies from the nineteenth-century constitutional revolution. The current movement has taken two forms—outright modification by constitutional amendment and erosive modification by combined legislative and judicial action. Public industrial financing programs based upon an enabling constitutional amendment

244 See GILMORE, *op. cit. supra* note 225, at 13-14, 28-31.

245 See, *e.g.*, Opinion of the Justices, 337 Mass. 800, 152 N.E.2d 90 (1958); N.J. STAT. ANN. §§ 48:12A-1 to -16 (Supp. 1961); 1958 OPS. PHILADELPHIA CITY SOLICITOR 42.

present no substantial question of state constitutional law. This study has accordingly focused upon the constitutional problems arising under programs which rest solely upon statute.

The principal conclusions can be summarized as follows:

1. *The Tax Supported Plans.* Approval of these plans requires a significant departure from settled judicial construction of both the public aid limitations and the public purpose test over a period of many decades. In passing upon programs involving public investment in transportation, recreation and parking facilities, leased for long terms to private parties, courts have placed major emphasis on the degree of public control asserted—control to insure realization of the public purposes underlying the program and control in the interest of safeguarding the public investment. However, where the urgency of achieving the economic objectives so dictated, courts have relaxed the weight accorded the public control factor. This relaxation has been particularly apparent in the case of public investment in port facilities which are leased to private carriers. Judicial approval of tax supported public industrial financing requires an even further dilution of the public control requirement.

The need for careful differentiation between the public aid limitations and the public purpose test has been emphasized. The former come to us with a specificity rooted in the nineteenth-century reaction to the evils of the railroad bond era. To permit a further relaxation of the public control requirement would do violence to the language of the public aid limitations and to their spirit. Tax supported plans should, therefore, be deemed invalid in states where a pertinent public aid limitation has been adopted.

The public purpose doctrine, however, is basically a due process limitation and is capable of greater elasticity. It is urged herein that the public purpose test evolve in the direction of greater judicial restraint. Two alternative standards are recommended: the rational basis standard, which would permit judicial approval of the tax supported plans in their present form; and the modified enterprise aid standard, which would permit approval of these plans after the adoption of feasible legislative changes.

The public aid limitations are becoming obsolete in twentieth-century America. Outright repeal rather than *ad hoc* modification is probably the healthiest remedy. If some judicially enforceable constitutional limitation on the purpose of public expenditures is deemed necessary, this can best be accomplished by the use of the public purpose doctrine, a limitation which can be made responsive to the forces of change in a dynamic society.

2. *The Revenue Bond Plan.* While projects under this plan are not tax supported, municipal activity under these statutes could lead to tort liability or impaired credit status. These risks, however, must be regarded as minimal. Due deference to the legislative judgment dictates a strict application of both the public aid limitations and the public purpose test so as to permit economic experimentation.

3. *Tax Exemption.* Whether a tax exempt status for the facilities and the bonds can be upheld should be considered as questions independent from that of the validity of the financing. Tax exemption of the facility must be regarded realistically as a subsidy—a gratuitous rendering of municipal services to selected manufacturers. In deciding whether this classification scheme can be justified under the uniformity clause of state constitutions, courts may appropriately require a higher degree of public control over the tax exempt facility than is here recommended under the public purpose test.

APPENDIX

THE EXTENT OF PUBLIC INDUSTRIAL FINANCING [1]

State	*Number of Projects*	*Total Public Funds Invested (Dollars)*	*Total Project Cost (Dollars)* [2]	*Date of Enactment of Statute or Constitutional Amendment*
		1. MISSISSIPPI PLAN		
Alabama [3]	9		3,210,000	1950
Arkansas	34		9,931,250	1958
Louisiana [4]	16		3,430,000	1952
Mississippi [5]	320		110,343,000	1936
Tennessee	44		13,492,000	1955
		2. REVENUE BOND PLAN		
Alabama [6]	24		39,935,000	1949, 1951
Arkansas	25		32,483,000	1960
Georgia	no information		approx. 4 to 5 million	1957
Kentucky	29		30,570,000	1946
Mississippi	2		370,000	1960
New Mexico	4		9,113,000	1955
North Dakota [7]	2		3,500,000	1955
Tennessee	105		49,733,000	1951
		3. PENNSYLVANIA PLAN		
Arkansas [8]	7	601,000	no information	1955, 1960
Kansas [9]	no information	124,005	no information	1923
Kentucky	3	517,000	3,074,390	1958
Pennsylvania [10]	157	19,507,174	61,438,094	1956
		4. NEW ENGLAND PLAN		
Maine	16	5,103,431	5,993,000	1958
Rhode Island	15	12,547,000	14,000,000	1958
		5. OKLAHOMA PLAN		
Maryland	1	17,500	no information	1960
New Hampshire	11	3,202,000	3,202,000	1955
Oklahoma	3	569,989	2,557,160	1960

[1] Unless otherwise indicated, all information is based upon letters and reports of the appropriate state agencies.

[2] In the case of the Mississippi and revenue bond plans, unless otherwise stated, the cost of the project equals the total funds raised by the municipalities.

[3] Complete information on Alabama is not available. In addition to the projects listed above under the Mississippi and revenue bond plans, the Alabama Planning and Industrial Development Board lists twenty-six other projects in the amount of $5,214,000; the agency is uncertain as to whether these have been financed by general obligation or revenue bonds. However, since municipalities in only five counties have been authorized to issue general obligation bonds for industrial financing, it is likely that the bulk of these projects were financed by revenue bonds.

[4] INVESTMENT BANKERS ASS'N OF AMERICA, MUNICIPAL INDUSTRIAL FINANCING (1961). 1961 projects are not included.

[5] For the ten-year period, 1952 through 1961, the statistics for Mississippi are as follows: 242 projects; project cost of $93,707,000.

[6] See note 3 *supra*.

[7] While the cost of the project generally equals the amount of revenue bonds issued, this is not true in North Dakota, where the industrial firm had advanced a portion of the capital. The total amount of revenue bonds issued is $2,555,000.

[8] This includes current state funds used to finance four purchases of issues of second lien obligations of non-profit development corporations in the amount of $151,000 pursuant to ARK. STAT. ANN. § 9-532 (Supp. 1961), and three purchases of issues of municipal revenue bonds under the authority of ARK. STAT. ANN. § 13-1207 (Supp. 1961).

[9] HITE, THE INDUSTRIAL LEVY IN KANSAS 11, 30 (Kansas Univ. Bureau of Business Research 1954). The statistics are for the period 1939-1953.

[10] This includes $165,000 of authority loans (four projects) which have been retired.

TABLE I

State	Case	Per capita income as percentage of continental U.S.[a]	Number of months in 24 month period prior to decision in which unemployment rate is higher than national average[b]
	Legislation upheld		
Ala.	Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952).	62	20
Ark.	Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959).	61	24
Kan.	Kansas *ex rel.* Ferguson v. City of Pittsburg, 188 Kan. 612, 364 P.2d 71 (1961).	92	2
Ky.	Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956).	68	24
Md.	City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957).	106	0
Miss.	Albritton v. City of Winona, 181 Miss. 75, 178 So. 799 (1938).	36	[c]
N.M.	Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).	77	0
Tenn.	McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958).	70	24
	Legislation held invalid		
Del.	McClelland v. Mayor of Wilmington, 159 A.2d 596 (Del. Ch. 1960).	136	2
Fla.	State v. Town of No. Miami, 59 So. 2d 779 (Fla. 1952).	80	9
Idaho	Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).	82	9
Neb.	State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).	90	3
Wash.	Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959).	105	17

[a] The figures on per capita income as a percentage of the continental United States are generally for the year of the state court decision. However, in the case of Delaware, Idaho, and Kansas, the statistics for the year 1959 are used because later years are unavailable. Where more than one industrial financing decision has been before any court, the case which appears to be the most crucial has been selected for this table. Unless otherwise indicated, all the information on per capita income is from the *United States Statistical Abstract*, as follows:

Ala. 1954, at 306.
Ark. 1961, at 310.
Del. 1961, at 310.
Fla. 1954, at 306.
Idaho 1961, at 310.
Kan. 1961, at 310.
Ky. 1958, at 314.
Md. 1959, at 314.
Miss. Survey of Current Business, August, 1949, at 15.
Neb. 1959, at 314.
N.M. 1958, at 314.
Tenn. 1960, at 313.
Wash. 1961, at 310.

[b] This column sets forth the number of months in the 24 month period immediately preceding the state court decision in which the ratio of state insured unemployment to average covered employment is higher than the similar ratio for the entire continental United States. All information is from the pertinent monthly issues of *U.S. Dep't of Labor, The Market and Employment Security*.

[c] There are no reliable statistics available. In view of general information about the critical state of the Mississippi economy during this period, however, it is reasonable to infer that the rate of unemployment was higher than the national average. See generally WALLACE, INDUSTRIALIZING MISSISSIPPI 2-3, 13-17 (Univ. of Miss. Bureau of Public Administration 1952).

offer, and the acceptance in order to be binding must be an unconditional and unqualified acceptance of all the material terms of the offer.

Accordingly, the order of the Appellate Division and that of Special Term should be reversed, the question certified answered in the negative and the complaint dismissed, with costs in all courts.

DYE, FULD, FROESSEL and VAN VOORHIS, JJ., concur with DESMOND, J.; CONWAY, J., dissents in an opinion in which LEWIS, Ch. J., concurs.

Order affirmed, etc.

BERNARD COMERESKI, Appellant, v. CITY OF ELMIRA et al., Respondents.

Argued January 3, 1955; decided February 24, 1955.

Constitutional law — municipal corporations — gift of municipal funds to parking authority — (1) contract whereby city of Elmira agreed to give part of city's income from its parking meters to Elmira Parking Authority to apply on deficit in funds of said authority available for payment of authority's bonds is not prohibited by State Constitution; city may make gift of its public funds to public corporation for proper public purposes (N. Y. Const., art. VIII, § 1) — (2) local law permitting such contract is within home rule powers (N. Y. Const., art. IX, § 12; City Home Rule Law, § 11) — (3) contract not prohibited by Public Authorities Law (§ 1487) — (4) provision of Public Authorities Law (§ 1493) that authority's bonds shall not be payable out of funds other than those of said authority does not prohibit transfer of money by city to authority.

1. The Elmira Parking Authority, organized to alleviate traffic and parking problems in the city of Elmira through the acquisition, operation and maintenance of parking facilities, entered into a contract with the city of Elmira which provided that in each year the authority should give notice to the city of the amount of the estimated deficit, if any, in the funds of the authority available for the payment of its bonds, and that the city should pay the amount thereof to the authority from the city's net revenue from its parking meters only, and that in no event would more than $25,000 be paid in any calendar year. Section 1 of article VIII of the State Constitution prohibits a gift or loan of money by a city to an individual or private group, and also prohibits a city from giving or loaning its credit to or in aid of any individual, or public or private corporation or association. Accordingly, the contract provision is valid since, within the Constitution, the city may make a gift of its public funds to another public corporation for proper public purposes although it could not

give or loan its credit (*Union Free School Dist.* v. *Town of Rye,* 280 N. Y. 469, followed).

2. Local Law No. 5 of 1949 of the Local Laws of the City of Elmira, which amended the Elmira City Charter to permit execution of this contract, is within the grant of home rule powers (N. Y. Const., art. IX, § 12; City Home Rule Law, § 11).

3. Section 1487 of the Public Authorities Law empowers the city to convey to the authority, for the latter's purposes, any real or personal property owned by the city, subject to the requirement that title to any real property so conveyed shall remain in the city. Subdivision 3 of section 1487 authorizes the making of contracts between the city and the authority for conveyances of property by the city to the authority, and provides that such contracts may be pledged by the authority to secure its bonds and that the obligations of the city incurred thereby shall be provided for in the city's capital budget. The language of section 1487 does not forbid such a contract as is here involved. The statute is a legislative consent that the city may turn over property, including profits from parking meters, to the authority and make contracts for such turning over, and that such contracts shall form part of the security for the authority's bonds.

4. Section 1493 of the Public Authorities Law provides that "The bonds and other obligations of the authority shall not be a debt of the state of New York or of 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 authority". Those provisions do not forbid the transfer of money or property by the city to the authority and are not inconsistent with provisions permitting direct assistance by the city to the authority.

Comereski v. *City of Elmira,* 283 App. Div. 556, affirmed.

APPEAL from a judgment in favor of defendants, entered April 14, 1954, upon an order of the Appellate Division of the Supreme Court in the third judicial department which (1) reversed an order of the Supreme Court at Special Term (NEWMAN, J.), entered in Chemung County, denying a motion by defendants for an order dismissing the complaint, and (2) dismissed the complaint.

Donald H. Monroe for appellant. I. The agreement is a contract to guarantee bondholders, and is not authorized or permitted by the provisions of the Elmira Parking Authority Act. II. The agreement is prohibited by and is in violation of the Elmira Parking Authority Act. III. The agreement is illegal because it contemplates and requires that meters be maintained on the streets of the city, not merely as a means of regulating traffic but for the purpose of raising revenue. (*People* v. *Littman,* 193 Misc. 40; *Laubach & Sons* v. *City of Easton,* 347 Pa. 542.) IV. The agreement is illegal and void

because it is an illegal surrender of its governmental function and power. (*Schwab* v. *Graves*, 221 App. Div. 357; *Belden* v. *City of Niagara Falls*, 230 App. Div. 601; *Board of Commissions of City of Newark* v. *Local Govt.*, 133 N. J. L. 513.) V. The provisions of the purported agreement are in violation of section 1 of article VIII of the New York Constitution. (*Union Free School Dist.* v. *Town of Rye*, 280 N. Y. 469; *Altschul* v. *Ludwig*, 216 N. Y. 459.) VI. The act of the city in the enactment of Local Law No. 5 of 1949 conveys no further power or authority on the Elmira Parking Authority than is provided by the Elmira Parking Authority Act.

Harry Moseson for City of Elmira Parking Authority, respondent. I. The contract does not violate section 1 of article VIII of the New York Constitution. (*Denihan Enterprises* v. *O'Dwyer*, 302 N. Y. 451; *Union Free School Dist.* v. *Town of Rye*, 280 N. Y. 469; *Admiral Realty Co.* v. *City of New York*, 206 N. Y. 110; *Hesse* v. *Rath*, 249 N. Y. 436; *Bush Term. Co.* v. *City of New York*, 282 N. Y. 306; *Salzman* v. *Impellitteri*, 305 N. Y. 414; *Davidson* v. *City of Elmira*, 180 Misc. 1052, 267 App. Div. 797, 292 N. Y. 723.) II. The contract does not violate the provisions of the Elmira Parking Authority Act. III. The contract was not in violation of the provisions of the city charter. IV. The contract does not involve the City of Elmira in a surrender of any of its governmental functions and powers. (*People* v. *Littman*, 193 Misc. 40.) V. The complaint does not set forth any allegation of actual or potential waste or injury to the City of Elmira. (*Western N. Y. Water Co.* v. *City of Buffalo*, 242 N. Y. 202; *Altschul* v. *Ludwig*, 216 N. Y. 459.)

DESMOND, J. Plaintiff, as a taxpayer in the city of Elmira, sues for a judgment which would declare invalid a contract between the city and the Elmira Parking Authority, the latter being a public benefit corporation organized, in 1948, pursuant to a special act which is title 9 of article 7 of the Public Authorities Law. The general purpose of the authority, whose members are appointed by the Mayor of Elmira, is to acquire and use real and personal property for indoor and outdoor automobile parking "projects" in that city. The city of Elmira, itself, has, under section 72-j of the General Municipal Law, and section 54 of the Vehicle and Traffic Law, power to set up

and operate parking lots and garages, and parking meters in its streets. However, in Elmira it was decided, for reasons not explained in the record and not important for our purposes, that the Parking Authority would develop and operate parking lots, while the city would own and operate parking meters in the Elmira streets. In order to use part of the city's parking meter profit, if any, to defray the losses, if any, of the authority's parking lots, the two public corporations, in May, 1950, entered into a contract, the validity of which is here questioned by plaintiff. The Appellate Division, for reasons with which we are in general agreement, has held the contract lawful, and has dismissed plaintiff's complaint.

The contract recites that the authority has been created to alleviate traffic and parking problems, in the city of Elmira, through the acquisition, operation and maintenance by the authority of adequate parking facilities, and for the payment of the cost of the same out of their operation; that the city is desirous of co-operating with the authority in this respect and, to that end, will turn over to the authority part of the revenues from the city's street meters. After reciting that the authority has authorized the issuance of $500,000 in bonds, the agreement goes on to provide that there shall be estimated, every year, the deficit, if any, in the funds of the authority to be available for the payment of its bonds, that the authority shall give notice to the city of the amount of such estimated deficit, if any, and that the city shall then pay the amount thereof to the authority. Such payments are, by the contract's terms, to be made from the city's net revenue from its own parking meters only, and, in no event, is more than $25,000 to be paid in any calendar year, the city further agreeing that, during the existence of the agreement, which is to run until the bonds are paid, the city may abandon any of its meters or change their sites but may not substantially reduce their number, and that the city will not cause to be operated any public parking areas except those operated by the authority. The only other important provision of the agreement is the one which says that the agreement shall be construed to be for the benefit not only of the parties but for the benefit of the holders of the bonds, also.

An Elmira Local Law (No. 5 of 1949) amended the city's charter to permit the execution of this very contract (see Local

Laws for 1949, published by the Secretary of State, p. 50). That Local Law, we are persuaded, is well within the grant of "Home Rule" powers found in section 12 of article IX of the State Constitution, and section 11 of the City Home Rule Law. Plaintiff insists, however, that the contract (and the Local Law) violates section 1 of article VIII of the State Constitution and also, contravenes, or at least is not permitted by, the sixth and twelfth sections of the Elmira Parking Authority Act (Public Authorities Law, §§ 1487, 1493).

We deal, first, with the assertion of plaintiff that the making of this contract violated section 1 of article VIII of our State Constitution which says, among other things, that no city shall "give or loan its credit to or in aid of any individual, or public or private corporation or association". The principal decision answering this is *Union Free School Dist.* v. *Town of Rye* (280 N. Y. 469), where this court held (p. 474) that the same constitutional language here cited did not prohibit gifts of money by a city or county to another public corporation for a public purpose. In other words, the first part of section 1 of article VIII of the Constitution prohibits a gift or loan of money by a county or city to an individual or private group, whereas the second part of the section, with which we are here concerned, prohibits only the giving or loaning, of its credit, by a county or city, to an individual or public or private group. The *Union Free School* case (*supra*) is flat authority that the city may do what the city is doing here, and what it is specifically authorized by Local Law No. 5 (*supra*) to do, that is, make a gift of its public funds to another public corporation for proper public purposes (see *Western N. Y. Water Co.* v. *Erie Co. Water Auth.*, 305 N. Y. 758; and see *Davidson* v. *City of Elmira*, 180 Misc. 1052, 1058, affd. 267 App. Div. 797, motion for leave to appeal denied 292 N. Y. 723).

Next, we come to plaintiff's allegation that the contract is forbidden by, or at least not authorized by, section 1487 of the Public Authorities Law. That lengthy section, in its first subdivision, empowers the city to convey to the authority for the latter's purposes any real or personal property owned by the city, subject to the requirement that, as to any real property so conveyed, title shall remain in the city. In other words, the city could have made a gift to the authority, of the parking

meters themselves. Subdivision 3 of section 1487 authorizes the making, between the city and the authority, of contracts for conveyances by the city to the authority of property, which contracts "may be pledged by the authority to secure its bonds", and the obligations of the city incurred thereby are to be provided for in the city's capital budget. We need not decide whether this language in terms authorizes the city to agree to make up, out of its meter revenue, part of the authority's operating deficit. At least, it does not forbid such a contract as we are here examining, and — what is more important — it is a broadly stated legislative consent that the city freely turn over property to the authority, and make contracts for such turning over, which contracts shall form part of the security for the authority's bonds. No reason appears why the Legislature, thus giving the city a free hand to assign to the authority any real or personal property useful for the authority's "projects", should at the same time forbid the allocation of part of the city's meter profits to help out the authority in making up the latter's deficits. In all these discussions, we keep in mind that both the city and the Parking Authority are public corporations of the people of Elmira carrying out public purposes (see legislative declaration in Public Authorities Law, § 1495, and see *Denihan Enterprises* v. *O'Dwyer*, 302 N. Y. 451), and that the members of the authority are public officials appointed by the Mayor of the city.

Plaintiff's chief reliance, it seems, for its charge that this contract is illegal, is on that part of the Elmira Parking Authority Law, which appears as section 1493 of the Public Authorities Law, and reads thus: "The bonds and other obligations of the authority shall not be a debt of the state of New York or of 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 authority". Such provisions are common, indeed almost universal, in the various statutory systems creating "public authorities" in this State.[1] Frequently, those statements, that municipalities are not liable on the authority's bonds and that

1. See Public Authorities Law, §§ 109, 132, 159, 207, 237, 262, 287, 312, 511, 534, 564, 583, 639, 663, 708, 806, 831, 855, 884, 1037, 1061, 1083, 1103, 1136, 1308, 1332, 1358, 1384, 1414, 1436, 1474, 1513, former 1531, 1553, 1577, 1611.

the bonds are payable out of the authority's funds only, are coupled with authorization or mandates of various kinds of direct assistance to authorities from those same municipalities.[2] Apparently, the Legislature did not see, nor do we, any inconsistency between the two kinds of statutory pronouncements. Provisions such as those in section 1493 mean just what they say: the authority's bonds are to be a debt of the authority only, payable out of its funds only. They do not forbid the transfer of money or property by State or city to an authority. Indeed, the numerous statutes cited in note 2 hereinbelow show that a city's nonliability on an authority's bonds and the same city's right or duty to assist the authority financially are part of the same conventional statutory pattern. 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, see *State ex rel. Bibb* v. *Chambers*, 138 W. Va. 701) 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. *Zimmerman* (268 N. Y. 52, 62) we rejected a charge that this was a mere evasion of the constitutional debt limitations, etc. Our answer was this (p. 65): " 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. The statute in question affords an equitable and proper method of accomplishing such a result ". The *Robertson* case (*supra*) involved the transfer from the city of Buffalo of property and rights far more extensive and valuable than those in the present case.

The judgment should be affirmed, with costs.

FROESSEL, J. (concurring). I concur for affirmance with Judge DESMOND. I agree — and for the reasons stated by him — that the contract between the authority and the city in nowise violates section 1 of article VIII of the State Constitution.

While section 1493 of the Public Authorities Law provides that the authority's bonds shall not be a debt of the city, and

2. See Public Authorities Law, §§ 154, 230, 231, 255, 256, 281, 282, 308, 529, 556, 557, 579, 632, 633, 656, 657, 810, 835, 1041, 1053, 1079, 1095, 1355, 1379, 1404, 1407, 1449, 1468, 1507, former 1525, 1547, 1571, 1605.

that the city shall not be liable thereon, nor shall they be payable out of any funds other than those of the authority, this language does not forbid the city from sharing voluntarily with the authority its parking meter funds as provided in the contract. The city is charged with the burdensome obligation of solving its problem of traffic congestion, which plagues so many of our municipalities today. Since it may in its efforts to relieve this problem condemn real property at its own cost, not only for the projects of the authority, but for new highways and the widening of existing highways, as provided in subdivision 2 of section 1487, increase its police force or otherwise expend moneys in aid of this purpose, surely it may in aid of the same purpose and at much less cost voluntarily make grants to the authority.

Indeed, subdivision 12 of section 1485 of the Public Authorities Law, enacted simultaneously with section 1493, and which must be read together, expressly authorizes the authority to " accept *grants*, loans or *contributions* from the * * * *city* * * * and to expend the proceeds for *any* purposes of the authority " (emphasis supplied). It necessarily follows that if the city may thus make an unconditional grant of moneys it may voluntarily undertake a much lesser responsibility by limiting the amount of its contributions to not more than a specific sum, payable only out of parking meter fees when available, " for any purposes of the authority ".

FULD, J. (dissenting). Section 1493 of the Public Authorities Law in the most unequivocal of language provides that bonds issued by a parking authority shall not be payable out of city funds:

> " The bonds and other obligations of the authority shall not be a debt of the state of New York or of 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 authority."

In the face of that explicit prohibition, I find it impossible to uphold as permissible the city's contract with the Elmira Parking Authority that it will make good any deficit, up to $25,000 a year — if the Authority is unable in any year to meet payments due on its bonds — by paying the amount of said deficit

out of the net revenue realized from the city's own parking
meters. I see no escape from the conclusion that such an agree-
ment plainly contravenes the statutory provision that the bonds
of the Authority shall not be a debt of the city or be payable
out of any funds other than those of the Authority.

Whatever force the local law — to which Judge DESMOND refers
(opinion, pp. 251–252) — may otherwise have, it certainly cannot
override or affect the express prohibition of section 1493: sec-
tion 1501, in so many words, provides that, "In so far as the
provisions of this title are inconsistent with the provisions
* * * of any local law of the city, the provisions of this title
shall be controlling."

To suggest that the contract is valid, because section 1487
"empowers the city to convey to the authority for the latter's
purposes any real or personal property owned by the city"
(opinion, p. 252), leaves out of account the statute's limiting
provisions that the city may make such a conveyance only of
property owned by it and only "*for use by the authority as a*
project or projects or a part thereof" (Public Authorities
Law, § 1487, subd. 1), the term "project" being defined as
"any area or place operated or to be operated by the authority
for the parking or storing of motor and other vehicles"
(§ 1483, subd. 6). The meaning of the statute is clear. It
authorizes a present conveyance of property owned by the
city to the authority, but it is essential that such property
be used in the operation of a parking lot. The agreement
before us makes no present conveyance of anything now
owned by the city, and, beyond that, the moneys to be
turned over to the Authority by the city are manifestly not
designed for use in the operation, or in the construction or
maintenance, of any parking lot.[1] The sole purpose underlying
the contract provision in question is to bind the city for the

1. Nor does subdivision 12 of section 1485 — mentioned by Judge FROESSEL
(concurring opinion, p. 255) — furnish support for respondents' position. That
provision does no more than empower the authority to "accept grants, loans
or contributions from the United States, the state of New York * * * or
the city, or an individual, by bequest or otherwise, and to expend the proceeds
for any purposes of the authority." This specification of ordinary powers
accorded the authority cannot possibly be read or regarded as an implied grant
of a power to the city (to pay bonds of the authority out of its own funds),
in the face of section 1493's express prohibition to the contrary.

future so as to assure payment, out of city funds, to holders of
the Authority's bonds after a deficit has occurred in the latter's
own funds. This is made abundantly clear by section 8 of the
agreement which provides that it shall be construed to be not
only for the benefit of the parties, "but also for the benefit of
the holders of any of the aforesaid bonds of the Authority."
Quite obviously, the bonds of the Authority are, contrary to
the proscription contained in section 1493, made payable, at
least to the extent of $25,000 a year, out of funds other than
those of the Authority.

Although I could, therefore, rest my dissent solely on the
ground that the agreement is not authorized by the statute, I
would go further and add that, in my view, the agreement also
offends against section 1 of article VIII of this state's
Constitution.

That constitutional provision, this court was careful to point
out in *Union Free School Dist.* v. *Town of Rye* (280 N. Y. 469)
draws "a clear distinction" between "a gift or loan of the
money or *property*" of a unit of local government "and a gift
or loan of its *credit*" (p. 474; see, also, *Western N. Y.*
Water Co. v. *Erie Co. Water Auth.*, 279 App. Div. 1132,
affd. 305 N. Y. 758). In this case, as already appears, Elmira
agreed to guarantee the payment of the Authority's bonds, up
to $25,000 a year, out of revenues to be realized by the city from
its own parking meters. 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 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 whole-
sale evasions of the applicable constitutional debt and taxing
limitations. It was just this sort of situation at which the
constitutional provision was directed. "The entire machinery
of local government may break down," the court wrote in the

Union Free School Dist. case (*supra*, 280 N. Y. 469, 474), " if the credit of the units of local government required to carry out their governmental functions is impaired, and there may be danger of such impairment if a local unit is permitted to give or loan its credit or to borrow money in aid of undertakings outside of its own field. To safeguard that credit the Constitution permits the use of its credit by a local unit only for the purposes of that unit, and prohibits it from giving or loaning its credit to or in aid of any ' *public or private* corporation.' " And, added the court (p. 480), " Within its defined limits the constitutional restriction must be rigidly enforced according to its letter and its spirit. Every obligation of a governmental unit must rest upon its own credit and no governmental unit may give or loan its credit except for the purpose of meeting its own obligations incurred in the performance of a governmental function or duty which the State may entrust to it."

Nor is there any basis for the fear that " the problems of a modern city can never be solved " unless we uphold " arrangements like these " (opinion, p. 254). Section 72-j of the General Municipal Law provides explicit warrant for a city itself to construct and operate a parking project without the intervention of a parking authority. However, when an authority is set up, any contract entered into between the authority and the city, any arrangements made between them, must comply with the operative provisions of constitution and statute — and that is so no matter how desirable the end in view may appear to be.

The complaint states a cause of action; the Appellate Division's order of dismissal should be reversed.

VAN VOORHIS, J. (dissenting). I concur in the dissenting opinion by Judge FULD. Concerning the constitutional objection, it is pertinent to observe that a parking authority involves the exercise of a proprietary rather than a governmental function on the part of a municipality (*Augustine* v. *Town of Brant*, 249 N. Y. 198), and consequently the constitutional objection as well as the statutory objection discussed by Judge FULD is well taken (contrast *Town of Amherst* v. *County of Erie*, 260 N. Y. 361, with *Village of Kenmore* v. *County of Erie*, 252 N. Y. 427; *Union Free School Dist.* v. *Town of Rye*, 280 N. Y. 469).

CONWAY, Ch. J., DYE and BURKE, JJ., concur with DESMOND, J.; FROESSEL, J., concurs in a separate opinion; FULD, J., dissents in an opinion in which VAN VOORHIS, J., concurs in a separate memorandum.

Judgment affirmed.

In the Matter of AMERICAN CYANAMID AND CHEMICAL CORPORATION et al., Appellants, against LAZARUS JOSEPH, as Comptroller of the City of New York, Respondent.

Argued January 19, 1955; decided March 3, 1955.

Taxation — New York City sales tax — certificates of resale — (1) New York City sales tax (Administrative Code, ch. 41, tit. N) need not be collected by vendor if he receives from purchaser, properly registered with city, certificate indicating goods are purchased for resale; tax improperly assessed against petitioner which took resale certificates in good faith and failed to collect tax on sales not actually made for resale — (2) petitioner not liable for tax although it possessed notice or information giving reasons for suspicion that sales were taxable; vendor under no duty to investigate customers or argue taxability with them.

1. The Administrative Code of the City of New York (ch. 41, tit. N) provides that the retail sales tax, imposed on a purchaser, shall be paid by the purchaser to the vendor as trustee for the city, and makes the vendor liable for the collection of the tax (Administrative Code, § N41–2.0). A purchaser who is properly registered with the city may furnish the vendor a certificate indicating that goods are being purchased for resale, and, unless a vendor shall have taken such a certificate from the purchaser, the sale is deemed to be taxable (§ N41-2.0, subd. i). Petitioner sold acids and chemicals in the city of New York to customers engaged in a variety of businesses, but failed to collect the tax on numerous sales transactions over a period of years. In every instance, petitioner had a resale certificate from its purchaser, who was registered with the city as authorized to issue certificates. None of the sales were, however, in fact, for resale. Petitioner had reason for suspicion or belief that the sales were taxable, but had no actual knowledge of that fact and made no further investigation. It acted in good faith in taking the resale certificates, and in failing to collect the tax. Tax assessments were improperly made against petitioner because of its failure to collect the tax on such transactions.

2. The possession of notice or information which gave it reason for suspicion or belief that the sales were taxable does not make petitioner liable for the tax. The vendor has no duty to investigate or police his customers. It was not intended that a vendor should be forced to debate the difficult question of the taxability of items which are not resold as such and may or may not become components of another article which is resold.

Matter of American Cyanamid & Chem. Corp. v. *Joseph*, 283 App. Div. 99, reversed.

been chorused by both Shapiro and Miller, Inc., rather than made by the latter alone. The general contractor, therefore, should be allowed to participate in the new trial.

The judgments should be reversed and a new trial granted, with costs to abide the event.

CRANE, Ch. J. (concurring in result). There has been so much written and said about the defense of negligence in an action of nuisance that the subject has become a mystery, smothered in verbiage.

The law in my judgment is, and should be, that except in rare cases of absolute nuisance of extreme danger, the negligence of the plaintiff contributing to the injury *may be* a bar to recovery. Whether it should be must be a question for the jury, and it is useless to attempt to define the degree of negligence which would thus be a defense. It must necessarily depend upon the circumstances. Where the plaintiff has exercised no care, or the care which the circumstances call for, and was thus injured by the nuisance, it must be that his own contributing negligence may prevent recovery. To try to distinguish between the different kinds of nuisance or the degree of nuisance, and the cases where the negligence of the plaintiff would or would not bar recovery, has led the courts into a maze.

I believe the rule to be as I have stated it, and, therefore, I cannot agree with the prevailing opinion, although I do concur in the result.

RIPPEY, J. (dissenting). In my opinion no question of error in submission of the case is presented for the consideration of this court. Under those circumstances I vote for affirmance without considering the question as to whether there was or was not an error in the charge on the subject of nuisance.

LEHMAN, HUBBS and LOUGHRAN, JJ., concur with FINCH, J.; CRANE, Ch. J., concurs in result in separate opinion; RIPPEY, J., dissents in memorandum; O'BRIEN, J., taking no part.

Judgments reversed, etc.

UNION FREE SCHOOL DISTRICT NO. 3, TOWN OF RYE, WESTCHESTER COUNTY, Respondent, v. TOWN OF RYE, Appellant.

Constitutional law — municipal corporations — towns — school districts — tax — chapter 105 of Laws of 1916, in so far as it requires towns in Westchester county to borrow money to pay school districts' uncollected school taxes, not violative of section 1 of article 8 of State Constitution — school district a "public" corporation — within power of Legislature to apportion governmental duties and require town to raise money for expenditure by district boards of education — judgment properly directed in favor of school district upon submission of controversy whether it might require payment from town of amount of uncollected school taxes.

1. Chapter 105 of the Laws of 1916, providing for the collection of taxes in the county of Westchester, in so far as it requires (§ 31) each town supervisor to "borrow upon the credit of the town" a sum sufficient to permit payment to the treasurer of each school district of the amount of unpaid school taxes, is not violative of section 1 of article 8 of the State Constitution, which provides that no town shall "give or loan its credit to or in aid of any individual, or public or private corporation."

2. A contention that a school district is not a public corporation within the meaning of the constitutional restriction cannot be upheld. A school district is a municipal corporation and municipal corporations are "public" corporations.

3. The constitutional provision, however, does not restrict the power of the Legislature to apportion governmental duties and by the statute in question it has directed each town in Westchester county to levy and collect a tax for school purposes and to borrow money to meet a deficiency arising from unpaid taxes. The obligation is that of the town, and it is to meet its own obligation in aid of a governmental duty that it is authorized to borrow money. The fact that the Legislature has apportioned to the trustees of the district boards of education the duty to administer the schools and expend the moneys provided by the towns does not affect the situation. The borrowing of money by the town to enable it to pay to the school district the uncollected school tax does not constitute a loan or gift of its credit to such school district.

4. Upon submission of a controversy, therefore, as to whether, under the provisions of chapter 105 of the Laws of 1916, the plaintiff, a school district in the county of Westchester, may require the town in which it is situated to pay to it an amount of school taxes which the town had been unable to collect, judgment was properly directed in favor of the

plaintiff. A contention of the supervisor of the town that under section 1 of article 8 of the State Constitution he may not borrow money to pay the required amount to the school district was properly overruled.

Union Free School District No. 3 v. *Town of Rye*, 256 App. Div. 456, affirmed.

Argued April 5, 1939; decided June 2, 1939.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 25, 1939, in favor of plaintiff, upon the submission of a controversy pursuant to sections 546-548 of the Civil Practice Act.

John L. Coward for appellant. The Constitution of the State of New York bars the defendant from borrowing money for the purpose of raising the necessary funds to pay over to the plaintiff the uncollected taxes. (N. Y. Const. art. 8, § 1.)

William A. Davidson for respondent. The town, in borrowing money to pay to the school districts the amount of the unpaid school tax, is not loaning its credit in violation of section 1 of article 8 of the Constitution. (*Capes* v. *Burgess*, 135 Ill. 61; *Richard* v. *American Union Bank*, 123 Misc. Rep. 92; *Imperial Curtain Co.* v. *Strauss*, 76 Misc. Rep. 533.) The provisions of the new Constitution do not controvert the provisions of the Westchester County Tax Law (L. 1916, ch. 105, as amd.) so as to make unconstitutional section 31 of the Tax Law, which has been in effect for upwards of twenty years. (*City of New York* v. *Davenport*, 92 N. Y. 604; *Matter of Oswego County* v. *Foster*, 262 N. Y. 439; *Town of Amherst* v. *County of Erie*, 260 N. Y. 361.) The school district is a governmental agency of the State and, therefore, the raising of its school moneys is for a governmental and town purpose. (*Village of Kenmore* v. *County of Erie*, 252 N. Y. 437; *Herman* v. *Board of Education*, 234 N. Y. 196; *Matter of McAneny* v. *Board of Estimate*, 232 N. Y. 377.)

LEHMAN, J. The Westchester county tax law (Laws of 1916, ch. 105, with subsequent amendments) is intended

"to provide for the assessment of property and the collection of taxes and assessments in the several towns of Westchester county, and in the special tax and school districts in such towns." In many respects the system devised for Westchester county is different from the system used in other counties. In other counties the tax machinery of the county is used to supplement the machinery of local units in levying and collecting taxes for local purposes. In Westchester county assessment rolls are prepared in each town by a *single town board of assessors* "for the purpose of taxation within their respective towns, whether for state, county, town, special tax district or school district purpose or purposes." (§ 7.) After the amount of a tax to be raised within the town or special tax district for any or all of such purposes has been fixed according to law and the amount certified to the supervisor of the town, the *town* is charged with the duty of extending, collecting and paying over to the proper officers of the county and school districts the amount of the tax so certified.

The tax law provides that "The amount of the annual tax and special assessments of each school district shall be fixed and determined, as the law provides, by the trustees or board of education of each school district, and shall be certified to the supervisor of the town before June first in each year." (§ 16.) Upon receiving such certification the supervisor is under a duty to "extend" the tax and deliver to the receiver of taxes his warrant for the collection of the tax. (§ 17.) The receiver of taxes must deposit to the credit of the town all amounts collected and file on the first day of each month with the supervisor of the town a report showing the amount of state, county, town, school district, and special district taxes collected and received by him. He must "on the fifteenth day of September of each year file with the county treasurer of Westchester county a report showing the amount of State and county taxes and assessments uncollected by him since the first day of January, April and/or May as the case may be last preceding." (§ 23.) He must upon written demand of the board of education of a

school district file in addition a report which "shall show the total amount of taxes and assessments of such school district uncollected by him during the current fiscal year." (§ 28.)

The supervisor of the town must "on or before the fifth secular day of each month pay to the treasurer of Westchester county, the state and county tax or assessments so collected and deposited by said receiver and to the treasurer of each school district in said town the amount of school tax of said district so collected and deposited by said receiver." (§ 24.) Whenever after the fifteenth day of September the supervisor of the town "shall receive from the receiver of taxes, an account of unpaid state, county, town, town district, or special assessments, and after the first day of February in each year an account of unpaid school taxes, he shall, under the direction and authority of the town board or a majority of them, borrow upon the credit of the town a sum not exceeding the amount of the unpaid taxes so reported. * * * From the proceeds of such bonds or certificates of indebtedness, the supervisor shall pay to the county treasurer the amount of unpaid state and county taxes included in such report; and shall pay to the treasurer of each school district the amount of unpaid school taxes of such district included in such report." (§ 31.) State, county, town, special district or school taxes collected thereafter belong to the town. (§ 24.)

The plaintiff is a school district within the village and town of Rye in Westchester county. The amount of the school tax to be raised by assessment of the tax upon property within the school district was fixed at $205,289.58 and the amount so fixed was certified to the supervisor of the town of Rye in June, 1938. The supervisor extended the tax and issued his warrant to the receiver of taxes. On the 1st day of February, 1939, $189,362.42 had been collected by the receiver of taxes and a balance of $15,927.16 remained due and owing. The plaintiff made a demand upon the supervisor of the town of Rye for the payment of such balance. The supervisor has refused to make such payment, claiming that he has not on hand sufficient money and that under

the provisions of the Constitution of the State he may not borrow money for that purpose. There is no contention that the statute does not *in terms* place upon the town the duty to pay to the school district the uncollected balance of the school tax. When the statute was adopted, the Constitution of the State provided that "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 * * * nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes." (Art. VIII, § 10.) So long as the Constitution so provided, the validity of the statutory command that the town should pay to the school district uncollected taxes and the authority conferred by statute upon the town to borrow the required money was never challenged on the ground that a loan contracted by the town for such purpose would constitute a loan of its credit to a corporation in violation of that constitutional provision. The refusal of the town to borrow money and to pay it to the school district is based upon the contention that provisions of the statute have been rendered invalid by *change* in the Constitution which became effective on January 1, 1939. The controversy has been submitted to the Appellate Division upon an agreed statement of the facts.

The Constitution in present form provides: "No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or *private* corporation or association, or *private* undertaking * * * nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or *public or private* corporation or association, or private undertaking, *but this provision shall not prevent a county from contracting indebtedness for the purpose of advancing to a town or school district, pursuant to law, the amount of unpaid taxes returned to it.*" (Italics of course are ours.) (Art. VIII, § 1.) "No county, city, town, village or school district shall contract any indebtedness except for county, city,

town, village or school district purposes, respectively." (Art. VIII, § 2.)

There is here a clear distinction in the scope of the restriction, placed by the Constitution upon a unit of local government in the administration of its finances, between a gift or loan of the *money* or *property* of such a unit and a gift or loan of its *credit*. Public moneys should be used for public purposes: therefore, gifts or loans of public money or property may not be made to an individual or *private* corporation or association or private undertaking, but there is no prohibition against gifts of moneys to a *public* corporation for a public purpose, at least where the local unit does not borrow the money so given or loaned. Unwise use of local public moneys even for a public purpose may cause hardship to the taxpayer but correction of error there is left by the Constitution to the people whose money is used and who select the local officials. The entire machinery of local government may, however, break down if the credit of the units of local government required to carry out their governmental functions is impaired, and there may be danger of such impairment if a local unit is permitted to give or loan its credit or to borrow money in aid of undertakings outside of its own field. To safeguard that credit the Constitution permits the use of its credit by a local unit only for the purposes of that unit, and prohibits it from giving or loaning its credit to or in aid of any "*public or private* corporation."

We are told that a school district is not a "public corporation" within the meaning of the constitutional restriction; that the restriction in present form, like the restriction contained in the Constitution in effect when the statute was enacted, does not apply to the gift or loan of credit to or in aid of a governmental agency or municipal corporation, but was intended to apply only to corporations which are "public" in the limited sense that railroad, steamboat, telephone, telegraph and similar corporations are public corporations. The constitutional provision may not be so read. The reports of the Committees on State

Finances and Revenues; Cities: Counties and Towns; and Villages, introducing this amendment in the Constitutional Convention show beyond possible question that the Convention intended that the restriction should apply to every corporation, public or private, including a governmental agency, like a school district. Without regard to such reports, however, it appears from the language of the section itself that any narrower construction would thwart the plain intention of the Legislature. "Public" corporations within the meaning of the constitutional provision include "municipal corporations."

The question remains, however, whether in this case the town by borrowing money to pay to the school district the uncollected school tax is giving or lending its credit to or in aid of the school district. As we pointed out at the beginning of this opinion, under the provisions of the Westchester tax law, the town is charged with the duty of levying, collecting and *paying over* to the treasurer of the school district the amount of the school tax previously certified to the supervisor. It must pay that amount in full even though it fails to collect the tax in full. The uncollected taxes then belong to the town. So long as the town pays over to the school district the full amount of the tax which was levied, whether the payment is made by the town out of moneys in the treasury of the town or out of moneys borrowed for that purpose by the town and whether or not the town subsequently succeeds in collecting the unpaid taxes, are matters which in no wise affect the school district. The statute is intended to place upon the town an unconditional obligation to pay the amount of the tax to the school district and the school district is under no obligation to repay the town, and, in final analysis, the question is whether borrowing money by the *town* to meet such an unconditional obligation of the *town* constitutes a gift or loan of the credit of the town "to or in aid of" the school district.

Counties, towns and school districts are all "municipal corporations" or governmental subdivisions of the State.

We have said in *Village of Kenmore* v. *County of Erie* (252 N. Y. 437, 442), that the Legislature in the exercise of its power and the performance of its duty to "arrange the territory of the state into civil divisions and to so apportion among them governmental duties" may use the county and its officers for the performance of such governmental functions or duties as it sees fit. "School districts are, like counties, governmental subdivisions of the state, though their governmental function is confined to education. The state uses the machinery of county government to supplement the machinery of the school districts where the latter proves inefficient in the collection of school taxes (Education Law, §§ 434, 439; Cons. Laws, ch. 16)." "A town is a municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as have been, or, may be conferred or imposed upon it by law." (Town Law; Cons. Laws, ch. 62, § 2.) There is similar definition of a county in the County Law (Cons. Laws, ch. 11), section 3. In the Education Law the Legislature provided for the use of the machinery of the county to supplement the machinery of the school district in the collection of school taxes. In the Westchester tax law the Legislature has gone further. It has apportioned to the towns the full duty of assessing, levying and collecting taxes within its boundaries "whether for state, county, town, special tax district or school district purpose or purposes," and of paying to the State, county or district the amount of such taxes. The Legislature might apportion that duty to the town as it might apportion that duty to the county. It might place upon the town or county the duty of paying each governmental unit the tax levied to meet the governmental expenses of that unit, placing upon the tax-collecting unit the risk that it might not be able to collect the full amount. (*Mayor* v. *Davenport*, 92 N. Y. 604; *Town of Amherst* v. *County of Erie*, 260 N. Y. 361.)

The town does not question that under the new Constitution, as under the old, the Legislature has the power

to place that risk and duty upon the town and to command the town to use for such purpose the money *in its treasury*. It contends only that the Legislature may not command or authorize it to use its credit to *borrow* money to be paid to the school district in performance of the function or duty imposed upon the town. That, it says, constitutes an indirect gift or loan of its credit to or in aid of the school district, prohibited by the Constitution. The town does not question that since education is a governmental function the Legislature might, if it chose, apportion the function of education to town or county instead of school district (Cf. *Village of Kenmore* v. *County of Erie, supra; Town of Amherst* v. *County of Erie, supra*); nor does the town question that if the Legislature had provided that schools within the town should be maintained and conducted by the town there would be no prohibition in the Constitution against borrowing by the town to pay the school expenses. It argues, however, that what would be permitted to the town if the statute had placed upon the town the duty of *maintaining* the schools is forbidden by the new Constitution when the town's function is confined to raising or supplying the moneys required for that purpose and the function of administering the moneys supplied is apportioned to another unit.

The task of the Constitutional Convention was to restate the fundamental law of the State so that adequate governmental powers might be vested in appropriate governmental agencies and to subject those powers to such restrictions as wisdom, gained by experience, might dictate. The problem was to be viewed in relation to existing institutions and established policies and to conditions either now existing or which might be anticipated. In the interpretation of the Constitution formulated by the Convention as its solution of the problem the same matters must be given due weight for the words of the Constitution should be read as they naturally would be read and understood by persons who know the conditions now existing which might be affected by changes in the fundamental law.

The representatives of the People in convention assembled, doubtless viewed with concern the possibility that, if a

local unit, unable to raise by taxation or by use of its credit all the moneys it desired to expend for its local governmental purposes, were permitted to rush to another local unit with better credit or to the State and to induce the loan of sound credit to bolster up its own failing credit, the entire financial structure of the State might be weakened. To safeguard the public credit against such a threat, section 1 of article VIII was formulated for the protection of the finance of local units, and similar provision made in article VII to protect the finances of the State. In the original form it contained no saving clause. The declared intention of draftsmen of these provisions, manifested in notes appended to their proposals, was to prevent, perhaps with exceptions thereafter to be inserted, the use of the credit of one unit to supplement the credit of another unit. Only in the saving clause thereafter added can suggestion be found that provision devised for so sound a purpose might without that clause be construed in manner which would disrupt our system of taxation under which the risk of failure to collect all taxes for governmental purposes may be placed upon a single governmental unit.

The saving clause was not contained in the report of the Committees on State Finances and Revenues; Cities; Counties and Towns; and Villages, which drafted and introduced the article on "Local Finances" of which this provision is the first section, but, it appears from the proceedings of the Convention, the saving clause was thereafter proposed by a delegate on the floor of the Convention. Whether its introduction and adoption was due to excess of caution or because some of those responsible for its drafting believed that without the saving clause the tax system prevailing generally throughout the State would be destroyed, does not appear from the records of the Convention and is not, perhaps, of serious consequence now. Certainly not all those who originally joined in presenting section 1, article VIII, thought that a saving clause would be necessary to preserve the system previously in effect; for one of them, in reply to a request for a statement indicating that the

provisions of section 1 did not "prohibit the continuance of the present system" stated that "I have been asked two or three questions which I would like to answer for the purpose of the record. One is whether the provisions of Section 1 preclude a county from advancing the amount of school taxes returned as uncollected by the school districts, either from funds on hand or money borrowed for that purpose. The answer to that is no, the provisions of the first paragraph do not prohibit the continuance of the present system. The second question is, do the provisions of this section adversely affect the present system of collecting taxes in towns primarily referring to the *Amherst* decision, and the answer is likewise no." (Record of the Convention, pp. 2520 and 2521.) To that statement there was no dissent from the floor of the convention.

Even so, the adoption of the saving clause thereafter shows, at least, that some of the members of the Convention believed that the proposed provision of the Constitution might otherwise be construed differently. Perhaps where one local unit is required to borrow money for the purpose of "*advancing*" the amount of taxes imposed by another governmental unit argument might be made that indirectly such borrowing is a loan of credit by the local unit making the "advances" in aid of the unit which received the advances. That would be so at least where the unit making the "advances" was entitled to claim reimbursement from the unit receiving them. In counties other than Westchester the towns and the school districts have, as already pointed out, power to levy and collect their own taxes though ultimate duty to pay to towns or school districts, taxes which they fail to collect, rests upon the counties. Perhaps in such case payment by the counties might be regarded as an "advance," and without the saving clause there might be question whether the established system might be continued. In Westchester, as we have pointed out, the town is the sole unit which may levy or collect any taxes. It does not, in any sense, "advance" to the county or to the school districts "the amount of unpaid taxes returned to it." It pays over the amount which it collects up

to a fixed date upon taxes which it levies and after that date it pays the uncollected balance and receives in return title to the taxes. We cannot reasonably read into the constitutional provision an intent to prohibit the continuance of such a system because a saving clause has been added intended to preserve a similar taxing system in effect in the other fifty-six counties of the State outside of New York city, especially where argument, not completely devoid of force, might be made that without such saving clause the prohibition would apply to these fifty-six counties even though it might not apply to Westchester county.

If the Legislature in the exercise of its discretion chooses to make the town in Westchester county the sole taxing unit responsible for the ultimate payment to school districts and to county of school and county taxes, it would be unreasonable, in the absence of clearest language, to apply to the system in effect in Westchester county a prohibition specifically made inapplicable to the other fifty-six counties, though no claim is made that the danger against which the constitutional provision is intended to protect is more inherent or imminent in the Westchester system than in the system used in the other counties.

Within its defined limits the constitutional restriction must be rigidly enforced according to its letter and its spirit. Every obligation of a governmental unit must rest upon its own credit and no governmental unit may give or loan its credit except for the purpose of meeting its own obligations incurred in the performance of a governmental function or duty which the State may entrust to it. The constitutional provision here invoked does not restrict the legislative power to apportion governmental duties. The Legislature may now, as formerly, apportion to the trustees or board of education of school districts, the duty to administer the schools within the districts and apportion to the town the duty to supply the moneys required by such trustees or board. The Legislature has done so by its command to the town to levy and collect a tax for such purpose and to pay over to the treasurer of the school district the tax so collected and, in addition, the amount not collected at a fixed date." To meet its own obligations in aid of a governmental duty and only to meet such obligations the town may borrow money where necessary. That is not a loan or gift of its credit to the school district in anticipation of reimbursement either directly by the school district or by the collection of taxes which belonged to the school district, for the school district never owned the taxes — they belong to the town — and the school district was never directed or authorized to raise the moneys by taxation or by use of its credit.

The judgment should be affirmed, without costs.

CRANE, Ch. J., HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ., concur; O'BRIEN, J., taking no part.

Judgment affirmed.

BORO PARK SANITARY LIVE POULTRY MARKET, INC., Appellant, Impleaded with Others, v. MAX HELLER, as President of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 167, et al., Respondents.

Corporations — stockholders — labor unions — injunction — corporation and stockholders who labor for wages in its business stand in relation of employer and employees — controversy as to whether stockholders or members of labor union should be employed, a "labor dispute" — action for injunction to restrain labor union from interfering in business of corporation — complaint properly dismissed where plaintiff fails to plead or prove matters required to be shown under section 876-a of the Civil Practice Act to obtain injunction in labor dispute — corporate entity of plaintiff may not be ignored — union may insist that relationship of employer and employees exists between corporation and stockholders notwithstanding it has refused stockholders membership on the ground that they were employers.

1. A corporate employer and its stockholders who labor for wages in its business stand in the relation of employer and employees, and a controversy as to whether the stockholders or the members of a labor union should be employed to do the work of the corporation constitutes a "labor dispute" within the meaning of section 876-a of the Civil Practice Act regulating the exercise of the equitable power of the Supreme Court "to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute."

defendant and its predecessor were desirous of obtaining a market for a particular kind of bread which it manufactured. In order to accomplish this purpose it was agreed that plaintiff should purchase and defendant sell *all* the bread of the kind specified which plaintiff required in a certain locality and pay therefor a price specified in the agreement. The plaintiff also agreed he would not sell any other bread of that kind on that route during the life of the contract, which was to continue so long as the parties remained in business. This contract, it will be noticed, specified the articles to be sold, the price to be paid, the quantity to be furnished, and the term of the contract, during which time plaintiff agreed not to sell any other bread of the kind named in that territory.

In the instant case, as we have already seen, there was no obligation on the part of the plaintiff to sell any of the defendant's glue, to make any effort towards bringing about such sale, or not to sell other glues in competition with it. There is not in the letter a single obligation from which it can fairly be inferred that the plaintiff was to do or refrain from doing anything whatever.

The price of glue having risen during the year 1916 from nine to twenty-four cents per pound, it is quite obvious why orders for glue increased correspondingly. Had the price dropped below nine cents it may fairly be inferred such orders would not have been given. In that case, if the interpretation put upon the agreement be the correct one, plaintiff would not have been liable to the defendant for damages for a breach, since he had not agreed to sell any glue.

The judgments of the Appellate Division and trial court should be reversed and the complaint dismissed, with costs in all courts.

HISCOCK, Ch. J., HOGAN, POUND, CRANE and ANDREWS, JJ., concur; CHASE, J., deceased.

Judgments reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THE WESTCHESTER COUNTY NATIONAL BANK OF PEEKSKILL, NEW YORK, Appellant.

Constitutional law — gift of credit of state in aid of individuals — chapter 872 of Laws of 1920, providing for sale of bonds of state and payment of proceeds as a bonus to individuals who served in World War, invalid as contravening section 1 of article 7 of State Constitution.

1. Whether or not the legislature is curbed by any constitutional formula no tax may be imposed except it be for a public purpose. Otherwise, however, unless for some constitutional restriction the taxing power is plenary. Except for such restriction the legislature may appropriate public moneys for private corporations or for individuals if thereby the public welfare is promoted.

2. Chapter 872 of the Laws of 1920, providing for the payment of a bonus to residents of New York state who served in the military or naval service of the United States at any time between April 6, 1917, and November 11, 1918, for a longer period than two months, promotes the public welfare and is not objectionable on the theory that it appropriates public moneys for other than a public purpose.

3. Whether the purpose is a public one is, however, no longer the sole test as to the proper use of the state's credit. However important or useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of credit to an individual or to a corporation. (Const. N. Y. art. 7, § 1; art. 8, § 9.)

4. The provision of the statute in question that bonds of the state shall be sold and the proceeds used for payment of such bonus constitutes a gift of the state's credit to the same extent as if the bonds themselves were to be given.

5. The proposed bonus is not the payment of an equitable or moral obligation due the beneficiaries from the state. That services rendered the United States incidentally benefited every state is no foundation for a claim of obligation. The act itself shows an attempt, not to pay a claim, but to give a reward. The state proposes to give its credit to the soldiers and sailors, not to satisfy any obligation that it owes them, but as a gratuity. The act is, therefore, prohibited by section 1 of article 7 of the Constitution, since such prohibition

may not be evaded by the assertion that an obligation exists, when in fact it does not exist. (*Bush* v. *Board of Supervisors*, 159 N. Y. 213, followed.)

People v. *Westchester County Nat. Bank*, 198 App. Div. 928, reversed.

(Argued June 29, 1921; decided August 31, 1921.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 20, 1921, in favor of plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

Louis Marshall and *Chester D. Pugsley* for appellant. If this legislation is violative of the Constitution in any of the particulars mentioned, then the bonds would be void and non-enforcible against the state. Consequently this infirmity would constitute a full justification for the defendant's refusal to accept and pay for the bonds which were struck off to it. (*Newburgh Savings Bank* v. *Town of Woodbury*, 64 App. Div. 305; 173 N. Y. 55; *Thompson* v. *Comrs. of Canal Fund*, 2 Abb. Pr. 248.) The purpose for which these bonds are sought to be issued was not a public but a private purpose, which does not fall within the taxing power of the state. If issued they would constitute the giving of the credit and money of the state in aid of individuals in violation of the organic law. (Const. N. Y. art. 7, § 4; *Kneedler* v. *Lane*, 45 Penn. St. 238; *Selective Draft Law Cases*, 245 U. S. 366; *Powers* v. *Shepard*, 48 N. Y. 540; *Weismer* v. *Vil. of Douglas*, 64 N. Y. 91; *Matter of Tuthill*, 163 N. Y. 133; *Bush* v. *Bd. of Suprs.*, 159 N. Y. 212; *Gautier* v. *Ditmar*, 204 N. Y. 26; *Stuart* v. *Palmer*, 74 N. Y. 188; *Olcott* v. *Board of Supervisors of Fond du Lac*, 16 Wall. 678; *People ex rel. D., W. & P. R. R. Co.* v. *Batchellor*, 53 N. Y. 142.)

Charles D. Newton, *Attorney-General* (*Edward G. Griffin*, *J. S. Y. Ivins* and *P. H. Clune* of counsel), for respondent. *Charles G. Blakeslee*, *Charles P. Coffey*, *Samuel E. Aronowitz* and *Edward N. Scheiberling* for American Legion. The state has always had inherent power to grant a pension or gratuity to veterans of the wars. (*United States* v. *Hall*, 98 U. S. 343; *Frisbie* v. *United States*, 157 U. S. 160; *Taber* v. *Bd. of Suprs.*, 131 N. Y. 432; *Gilbert* v. *Minnesota*, 254 U. S. 325; *Gustafson* v. *Rhinow*, 144 Minn. 415; *Opinion of Justices*, 190 Mass. 611; *People ex rel. Doscher* v. *Sisson*, 180 App. Div. 464.) The amendments to the State Constitution do not limit this inherent power of the state as a sovereign to grant a bonus; such amendments apply at most only to the municipalities of the state. (*Rumsey* v. *N. Y. C. R. R. Co.*, 130 N. Y. 88; *Town of Guilford* v. *Supervisors*, 13 N. Y. 143; *Taber* v. *Suprs. of Erie County*, 131 N. Y. 433; *People* v. *Suprs. of Columbia County*, 43 N. Y. 130; *Powers* v. *Shepard*, 48 N. Y. 541; *L. V. R. R. Co.* v. *Canal Board*, 204 N. Y. 471.) The bonus will be expended for a public purpose founded upon good morals, equity and justice, and as such is valid under first principles and the existing Constitution. (*Matter of Mahon* v. *Bd. of Education*, 171 N. Y. 263; *People ex rel. Waddy* v. *Partridge*, 172 N. Y. 305; *Matter of Jensen*, 44 App. Div. 509; *Hammitt* v. *Gaynor*, 82 Misc. Rep. 196; *Porter* v. *Fletcher*, 153 App. Div. 470; *Matter of Borup*, 182 N. Y. 222; *L. V. R. R. Co.* v. *Canal Board*, 204 N. Y. 471; *People ex rel. Cayuga Nation of Indians* v. *Loan Commissioners*, 207 N. Y. 42; *Firemen's Benevolent Fund* v. *Roome*, 93 N. Y. 313; *Oswego, etc., R. R. Co.* v. *State*, 226 N. Y. 351; *State* v. *Clausen*, 194 Pac. Rep. 793.)

ANDREWS, J. The only question before us is the validity of chapter 872 of the Laws of 1920. The defendant was the successful bidder for $25,000 of bonds issued under the authority of that act. It later refused to accept them. If the act is constitutional, under the

submission the plaintiff is entitled to an affirmance of the judgment of the Appellate Division in its favor. If not, the defendant should succeed.

The act provides for the issue of $45,000,000 of bonds by the state. Their proceeds are to be paid into the state treasury and expended for a bonus to persons who served in the military or naval service of the United States at any time between April 6th, 1917, and November 11th, 1918. These moneys, therefore, must be applied for this object and for no other purpose whatever. (Constitution, art. 7, sec. 4.) "Every person, male or female, who was enlisted, inducted, warranted or commissioned, and who served honorably in active duty in the military or naval service of the United States at any time" during the war "for a period longer than two months, and who at the time of entering into such service was a resident of the state of New York, and is a resident at the time this act takes effect, and who was honorably separated or discharged from such service, or who is still in active service, or has been retired, or has been furloughed to a reserve," is to receive ten dollars for each month of active service, not exceeding, however, $250 in the aggregate. If dead the same amount shall be paid to the relatives of the deceased. As required by its terms this act was submitted to the people and was approved by a vote of 1,454,940 in its favor as against 673,292 in opposition.

The logic of this opinion is not that the legislature is unauthorized to aid the wounded. We cannot too clearly emphasize at the outset of our discussion that this is not an act to care for and restore to health and usefulness those who became disabled in the performance of their duty. To do this is a sacred trust. Every human impulse prompts us to its full accomplishment. Neglect here spells disgrace. Yet by this act help for the wounded is at least postponed. For them as a class nothing is done. Whatever right the state may have to use its

moneys in making these the subject of its first and devoted consideration, this right finds no expression in the present statute. The wounded are not a reason or a ground for its enactment. He who occupied a perfectly safe, although highly useful desk in a department, stands on a level, under this act's provisions, with that other who comes back to us shattered in mind or body because of a more perilous service. This court, of course, considers the purpose of the act as it is written. What we may say has no bearing upon and is no definition of the power of the state to provide for the disabled, for whose prompt and adequate care there is an insistent and righteous demand. The statute includes every one indiscriminately, who served the United States for two months, whatever the circumstances of his or her induction into the service. It is not in fulfillment of any promise made to encourage enlistment. The Selective Service Act expressly provided that no bonus should be given for that purpose and that no substitute should be accepted. It called upon every citizen of the United States between certain ages to render his full obligation to the nation. The only exceptions allowed were those made in the act itself. It is also true that the number of the beneficiaries and the amount they will receive is indefinite. It is now assumed that $45,000,000 will suffice. It may be so. It may be equally true that a far larger sum will be required to make the payments designed. We all know how often, when an issue of bonds is proposed, the amount that will be required in the end is underestimated. More than once we have had that experience. Nor is there any assurance that other and greater debts may not be incurred if a second bonus is proposed. It may be said, and said truly, that ten dollars a month will not compensate our soldiers for their sacrifices. Elsewhere the sum of fifteen dollars or more has been allowed under somewhat similar acts. Should New York, it has already been asked, do less than others? We see no

limit to the indebtedness with which the state may be burdened.

If, however, the legislature has the power to create a debt for the purpose declared in this act, these considerations are not for us. They serve but to admonish us to scrutinize our Constitution with the greater care, to use the greater caution in deciding how and when and why New York may incur indebtedness under its limitations. To that question we confine ourselves.

At the basis of our ideas as to the relation of the citizen to the state is one outstanding principle of taxation. Whether or not the legislature is curbed by any constitutional formula no tax may be imposed except it be for a public purpose. Otherwise, however, unless for some constitutional restriction the taxing power is plenary. Except for such restriction the legislature may appropriate public moneys for private corporations or for individuals if thereby the public welfare is promoted. (*Town of Guilford* v. *Board of Supervisors, Chenango Co.*, 13 N. Y. 143.)

It is said that this act serves no such purpose. We think, however, that it does. In deciding whether the object for which taxation is imposed is for a public object the courts "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." (*Loan Association* v. *Topeka*, 20 Wall. 655, 665.) In this state the granting of pensions and gratuities for military service is not a new experiment. By the act of May 11th, 1784, public land was granted

to revolutionary veterans. By chapter 8 of the Laws of 1814, pay in addition to that granted by the United States was given to soldiers of the war of 1812. By chapter 178 of the Laws of 1904 a pension was granted to the last survivor of that war. By section 220 of the Military Law a pension was given to any member of the militia who had been disabled within ten years in the performance of duty. A pension policy has long been adopted by the United States and acts similar to ours have been passed in at least nineteen other states.

The payment of a pension or a bonus for past services showing the gratitude of the people, showing that the state is mindful of those who have made sacrifices for it, is an incitement to patriotism and an encouragement to defend the country in future conflicts. Even if such a payment is not clearly one made in the general interest, at least there is such ground for the claim that where the legislature has accepted that view, the courts may not interfere. That they believe the action unwise or unnecessary is immaterial. As to that question the legislature is the final arbiter. (*Jones* v. *City of Portland*, 245 U. S. 217; *State ex rel. Atwood* v. *Johnson*, 175 N. W. Rep. 589; *State ex rel. Atwood* v. *Johnson*, 176 N. W. Rep. 224; *Gustafson* v. *Rhinow*, 144 Minn. 415; *State ex rel. Hart* v. *Clausen*, 194 Pac. Rep. 793; *Opinions of the Justices*, 211 Mass. 608.) What long custom and usage has sanctioned, what the weight of judicial authority has approved, that we should be slow to declare wrongful. Nor may a distinction be made between such a bonus as our act provides and a pension. The one is a reward for past military services payable at once; the other such a reward payable in installments.

We are to determine, therefore, whether there are any limitations in our Constitution upon the powers of the legislature which affect the matter before us. Originally there were none. In the constitutional convention of 1846, however, it was found that the state had contracted

debts which with interest amounted to some $38,000,000. Six million dollars represented instances where the public credit had been used to finance railroads then insolvent; $2,700,000, for railroads still rated as solvent but whose condition was precarious. There was much discussion as to how this debt should be paid, and as to how in the future "abuses of delegated power" should be prevented. Gross extravagance was charged. There was fear of repudiation. Moneys raised by loans could be wasted with little comment, when the same waste would cause a storm of protest if the moneys had to be raised by taxation. The existing evil required drastic remedies. The power to create debts must be curbed before ruin came. Reliance might not be solely placed upon the public spirit and the economic knowledge of the legislature. Something more was needed. So the committee on the state finances finally reported an article entitled "On the power to create future state debts and liabilities and in restraint thereof." This report, which was adopted with immaterial verbal alterations, became a part of article 7 of the Constitution. No longer under any circumstances might the credit of the state in any manner be given or loaned to or in aid of any individual, association or corporation. To meet casual deficits the state might contract debts not exceeding at any time $1,000,000 in the aggregate. It might also contract debts to repel invasion, suppress insurrection or for defense in war. Except for these purposes a debt might be incurred at all only for some specific object distinctly named, in an act passed in a certain way, approved by the people, containing provisions for a direct tax sufficient to provide for its repayment within eighteen years.

This article as reported was confined solely to limiting the power of the legislature as to debts. It did not touch the power to appropriate the property of the state or the money it might raise by taxation for payments or gifts to individuals or corporations so long as such payments or gifts subserved the public good. It was proposed to limit this power also. Mr. Charles O'Connor suggested the addition to the section of the provision "Nor shall any gift of public moneys or property be made, except as a reward for military services, or by the release of escheats and forfeitures." This was objected to, however, and as the evil apparently was not serious, the effort was abandoned and the section was allowed to stand as reported. (Debates of the Convention, p. 722.) In the address by the members of the convention to the people it was said: "They have incorporated many useful provisions more effectually to secure the people in their rights of person and property against the abuses of delegated power." (Convention Journal, p. 1547.)

Cut off from the right to loan or give the credit of the state, however, by 1867 the legislature had begun to resort freely to grants of public funds to railroads and to charitable associations. Therefore, in the constitutional convention of that year the attempt was renewed to deprive it of that power. Sanford E. Church, later the distinguished chief judge of this court, reported from the committee of finance a proposed article of the Constitution. It contained a section numbered eleven. "Neither the credit, money or property of the state shall in any manner be given or loaned to or in aid of any individual, association or corporation." (Proceedings of Debates, p. 791.) This proposal was debated at length but it was not adopted.

This Constitution having been rejected by the people a commission was appointed in 1872 to consider amendments. It was again proposed to limit the right of the state with regard to gifts and loans of its property. The committee on sectarian appropriations reported a clause: "Neither the credit nor the money or property of the state or of any county, city, village or town shall in any manner be given or loaned to or in aid of any association, corporation or other private institution whatever."

Later a substitute for this proposal was accepted — "neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation or other private undertaking." Still later the word "other" was deleted. In the report it was said that this proposed amendment "cuts off all gifts of money and all loaning of the credit of the state to all other associations, 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." (Journal, p. 452.) In this form the section now stands in our Constitution. (Art. 8, sec. 9.)

We find, therefore, among others, two limitations imposed on the legislature in addition to the one that was always implied. They both relate to gifts or loans either of the credit or the moneys of the state. "The credit of the state shall not in any manner be given or loaned to or in aid of any individual." (Art. 7, sec. 1.) "Neither the credit nor the money of the state shall be given or loaned to or in aid of * * * any private undertaking." (Art. 8, sec. 9.) They both also represent the triumph of efforts to prevent improvidence, to make useless any pressure from special interests, to safeguard the credit of the state, and the interests of the people as a whole. They are not to be brushed aside. They are to be fairly construed to obtain the object for which they were intended. As in 1846 so to-day economy, public and private, is one of our pressing needs. Upon it depends the prosperity of the state and its inhabitants. The crushing load of taxation — national, state and municipal — now as then threatens our future — the future of him who pays no direct taxes as well as the future of him who does. Now as then great expenditures may be lightly authorized if payment is postponed. To place the burden upon our children is easy. Nor do we scrutinize so closely the expenditures to be made if that be

done. We all recognize this tendency in private life. We incur a future obligation cheerfully, where we would hesitate had we to pay the cash. It is true in public matters. The pressure which will come when the obligation matures is ignored. Conscious of this human weakness, to guard against public bankruptcy the people thought it wise to limit the legislative power. The courts must see to it that their intentions are not frustrated or evaded. And this is true even if the action questioned seems to be approved by the voters. One of the chief objects of the Constitution is the protection of minorities against the hasty acts of the majority. It expresses the well-considered, unimpassioned and deliberate judgment of the people. It is not to be amended informally. Twice, two legislatures, with newly elected members in each house, must pass upon such a proposal before it is submitted to the voters.

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 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.

As we have seen, this act provides that $45,000,000 shall be raised by the state upon its bonds and the proceeds applied as a bonus to those who have been in the military service of the United States. We have seen also that the proceeds can be used only for this one object. Is this a

gift or a loan of the credit of the state? Clearly it is not a loan. A loan implies repayment. Here there is no such situation. The bonds are issued for full value. Their proceeds are transferred absolutely with no promise, express or implied, of return.

If not a loan then does this act contemplate a gift of the state's credit? In answering this question the mere form of the transaction is immaterial. 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. The evasion of the constitutional prohibition would be palpable and it could not and should not be permitted.

The important question is, therefore, whether under this act the provisions made for the soldiers and sailors is a gift to them or a gift in their aid. We have held that a payment to an individual is not a gift if it be made in recognition of a claim, moral or equitable, which he may have against the state. "The legislature, however, is not prevented from recognizing claims founded on equity and justice though they are not such as could have been enforced in a court of law if the state had not been immune from suit." (*Munro* v. *State of N. Y.*, 223 N. Y. 208, 215.) What meaning then have the courts given to these terms? What is an equitable or moral obligation against the state? Instances where such payments have been authorized are many. In some, claims have been allowed where beneficial services have been performed for the state (*Cole* v. *State of N. Y.*, 102 N. Y. 48); in others where property was furnished it (*O'Hara* v. *State of N. Y.*, 112 N. Y. 146); or the state received money for land the title to which proved defective (*Wheeler* v. *State of N. Y.*, 190 N. Y. 406); or work was done, the expense of which in equity the state should bear (*Lehigh Valley R. R. Co.* v. *Canal Board*, 204 N. Y. 471). In

another class of cases the legislature has authorized payment where the claimant had been injured by the negligence of the servants of the state. (*Splittorf* v. *State of N. Y.*, 108 N. Y. 205.)

These cases give some indication of what we mean when we speak of a moral obligation. In all some direct benefit was received by the state as a state or some direct injury suffered by the claimant under circumstances where in fairness the state might be asked to respond — where something more than a mere gratuity was involved.

We are referred, however, to three cases where it is said a far wider interpretation was given to this doctrine. This we believe to be a mistake. In *Munro* v. *State of N. Y.* (223 N. Y. 208) Munro was employed by the state in what has been defined as a hazardous employment in connection with a state hospital for the insane. (Workmen's Compensation Law [Cons. Laws, ch. 67], sec. 2, group 7.) While engaged in his work he was struck by one of a gang of eighteen insane patients, who, under the care of two keepers, were repairing a road. The state conceded on the trial that Sabilski, who assaulted him, was known to be dangerous, and also conceded that there was negligence in permitting him to be working in a gang with but two attendants. Under these circumstances there was a clear moral obligation. Munro was injured by the negligence of the state's employees. He was engaged in the kind of work which had the employer been an individual would have, our legislature has said, required compensation for an accident irrespective of fault. In *Matter of Borup* (182 N. Y. 222) we held that by retroactive statute the legislature might assume liability or require a town to assume it where the owner's property was injured by a change of the grade of a street although at the time of the change no recovery was possible. The law in this respect was, to the common idea, unjust. For the benefit of the public a private injury must be borne

without compensation. We carefully pointed out that the individual was harmed by a public work authorized by the state. Under such circumstances it might fairly be said that a moral claim existed to compensation for affirmative acts done under its authority. In *Trustees Exempt Firemen's Benev. Fund* v. *Roome* (93 N. Y. 313), volunteer firemen in New York city served without pay and to partly compensate them for years they were exempted from certain public duties and also a tax upon foreign insurance companies was paid to a corporation representing them for their use and benefit. The corporation in turn used these funds to aid them when they became disabled and indigent. When the paid fire department came into being and the volunteer firemen were disbanded the exemptions were continued and so for a limited time were the provisions as to this tax. Under the circumstances we said that this was not a gift. It was the performance of its equitable obligation by the state. The firemen had enlisted with this provision in view; they were disbanded without fault of their own; in justice the state should maintain this fund in the future as it had in the past until its objects were accomplished. Again, however, this obligation arose because of the acts of the state. The state but fulfilled, and in honor it should, its implied promise under which it had obtained the unpaid service of the firemen.

In every case that we have found, therefore, there was the foundation of a claim against the state itself, however imperfect. In all there was some obligation, not enforcible against it, perhaps because it might not be sued, perhaps because the maxim of *respondeat superior* may not be invoked against it, perhaps because of the absence of some small element, the presence of which would give a legal cause of action and where without that element payment might still be morally required. They are cases where the state is allowed to make compensation for benefits which it has received or for injuries which

have been suffered in its service or because of its acts or acts done under its authority or because of the acts of its servants. So far at least when we have used the term we have implied an obligation — something that binds — if not in law, at least in morals. There must be a duty, even if it is a duty not enforcible. The desire to compensate those to whom we owe gratitude is a natural one. It finds expression every day in common life. It is entirely to be praised. But a moral obligation, when we use that term in relation to the spending of public funds, means more than this. Gratitude is not enough.

Under these decisions is the bonus to our soldiers and sailors the payment of an obligation due them from the state? This is the ultimate question. Upon its answer depends the validity of the act of 1920. It is so conceded in one of the dissenting opinions. And in discussing it we do not ignore the splendid services and the great patriotism not only of the American expeditionary forces but of those who remained on this side of the sea. We do not forget the love and admiration that they have won and the gratitude that is theirs. We know that when the United States declared war it declared it for the whole country; that the government of the state, the government of the United States were equally interested in victory; that while serving the United States our soldiers and sailors were also protecting New York. We were all vitally interested in the war. Defeat spelled unspeakable calamity. Yet the men who gained the victory were not in any respect servants of the state. It did not call them from their homes or lead them to battle. It did nothing. It exercised no authority. It is said that our soldiers were taken from homes and occupations and compelled to risk their lives for inadequate pay while others earned large wages in safety — that the statute attempts in a small way to distribute more fairly the public burden. It is all true, but again the state was not

the actor. Neither it nor its servants injured any one. It received no property for which it has not paid. Nor were services rendered to it in any sense that services were not rendered to every city in the land. That services rendered the United States incidentally benefited every state is no foundation for a claim of obligation, however great the gratitude due. Gratitude may impel an individual to reward his benefactor. One may do as he will with his own. The state of New York may not. Its Constitution forbids. It may not attempt to equalize among its citizens inequalities caused by federal legislation. For that equalization resort must be had to the federal government. And the federal government recognizes the claim. It intends to discharge the obligation as its own. As soon as its finances permit payments are to be made that it is estimated will amount to between $3,000,000,000 and $5,000,000,000. This proposition receives popular approval. It is not forbidden by our national Constitution. Thus and thus only can every one, in whatever state he may reside, receive an equal reward for equal services. And when the time comes for this distribution New York, as a part of the United States, will bear a very large proportion of the total expense involved. So it will aid in repaying the moral obligation which is due from the country to its defenders. But under this act it will bear a double burden. Its citizens will pay twice — once for the state, once for the nation. Is New York under a moral obligation to make this second satisfaction?

Should we give the words "moral obligation" the broad meaning urged upon us we may go far. More than once men of whom we are proud, through sheer patriotism, have gone to Washington and served us in serving the United States at great cost to themselves in money and health and comfort. Have they a moral claim against the state? It is said they were voluntary agents, that they were not compelled to do what they did.

Is the obligation less towards one who aids us of his free will than towards one whom the law constrains?

On its face the act itself shows an attempt, not to pay a claim but to give a reward. No distinction is made between one and another. All, whatever their merits, whether their duties led them to danger or to safety, are treated alike. No attempt is made to adjust economic conditions. And as a reward not a payment the public rightly regards it. Did the majority favor the act because they believed they were discharging an obligation? Or was their vote a testimony of their gratitude? We are told that similar statutes have been passed elsewhere. So we have already said. It is one thing, however, to quote such practices as illustrating those fundamental principles common to free governments as we have quoted them. It is another to use them as defining the distinction between a gift and the payment of an obligation necessitated by the language of our Constitution. Such decisions as have been made show the danger of such a course. In Massachusetts the justices were of the opinion that money might lawfully be raised by taxation to pay veterans of the Civil War but they speak of such a payment as a gratuity. (*Opinion of the Justices*, 211 Mass. 608.) In Wisconsin money was to be raised by taxation to pay a bonus to veterans. In considering the constitutionality of this act the court held that notwithstanding the soldiers served the United States they also served Wisconsin and that as the object was to promote loyalty the act served a public purpose. But the question we must decide, whether any moral obligation rested on the state to make compensation, did not arise. The inference is that the court did not so believe for it treats the bonus as a mere gratuity. Further, an article in its Constitution similar to ours (Wisconsin Constitution, sec. 3, art. 8), was not violated, not because the bonus was in payment of an obligation but because

the money was to be raised by taxation. (*State ex rel. Atwood* v. *Johnson*, 175 N. W. Rep. 589; *State ex rel. Atwood* v. *Johnson*, 176 N. W. Rep. 224.) In Minnesota the money necessary to pay a bonus was to be borrowed. It was held that the purpose of the loan was public and the act constitutional. A clause like ours was in the Constitution (Sec. 10, art. 9), but this phase of the matter seems not to have been argued. Certainly it was not referred to in the opinion. (*Gustafson* v. *Rhinow*, 175 N. W. Rep. 903.) Again in Washington a bonus was to be financed by an issue of bonds. Again, too, a similar clause in the Constitution (Sec. 5, art. 8) was not referred to. But in discussing whether the purpose of the act was public, the court did say that moral obligation to make a compensation rested on the state. (*State ex rel. Hart* v. *Clausen*, 194 Pac. Rep. 793.)

As striking an illustration as can be found of the general understanding of this subject may be found in a recent message of the President of the United States to Congress. He says: "I have commended the policy of generous treatment of the nation's defenders, not as a part of any contract, not as a payment of a debt that is owing, but as a mark of the nation's gratitude."

We need, however, go no further than our own decisions. We have used the same language under like circumstances. In 1892 an act was passed directing supervisors to raise by tax and pay each man drafted in the Civil War the sum of $300. Such men never received a bounty. They were compelled to serve, as the majority of the soldiers and sailors of this war served, under an act of the national government granting them no compensation except their military pay. We said our national government had the right to call upon these men and that they had no claim, legal or equitable, against the town or county where the money was to be raised. Those who served under conscription only discharged their obligation to the general government. They did nothing more than fulfill their

duties as citizens, and we called the proposed grant a gratuity. It is true the case might have been decided upon another ground alone. As a fact it was not. Therefore, what this court said cannot be treated as dictum. And if because of the circumstances there was no equitable claim against a county it would seem there was none against the state. The same reason would be applicable. (*Bush* v. *Board of Supervisors, Orange Co.*, 159 N. Y. 213.)

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. Arbitary action may not convert a wrong into a right.

Such we believe is the situation here. The state proposes to give its credit to the soldiers and sailors, not to satisfy any obligation that it owes them, but as a gratuity. The act is, therefore, prohibited by section 1 of article 7 of the Constitution.

The judgment appealed from should be reversed and judgment should be rendered in favor of the defendant against the plaintiff, with costs in this court.

CARDOZO, J. (dissenting). "The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association or corporation" (Constitution of New York, art. VII, sec. 1). The purpose of the prohibition is revealed in its history (2 Lincoln, Constitutional History of New York, p. 87). The purpose was to put an end to the use of the credit of the state in fostering the growth of private enterprise and business. That is the mischief which gives understanding of the ermedy. I do not mean that the prohibition is to be limited to the particular evil that inspired it. It is

limited, however, to evils of a kindred nature. The credit of the state may not be pledged in aid of an individual who has no claim in justice or morals to relief or compensation. It *may* be pledged in recognition of an honorable obligation to effect a proportionate and equitable distribution of the burdens of public service (*Munro* v. *State of N. Y.*, 223 N. Y. 208, 216; *Matter of Borup*, 182 N. Y. 222; *Trustees of Exempt Firemen's Benev. Fund* v. *Roome*, 93 N. Y. 313, 326). Payments so made or promised are in one sense gifts, for they are the voluntary assumption of liabilities not theretofore imposed by law. They are not gifts, however, in the sense of the prohibition under discussion, for their animating purpose is not benefaction, but requital.

We are told that requital, if due at all, is due, not from the state, but from the nation, which summoned the host to service. I find myself unable to define by bounds so artificial the claims of equity and honor. The service that preserved the life and safety of the nation preserved at the same time the life and safety of the states (*Opinion of the Justices*, 190 Mass. 611, 615; *Gilbert* v. *Minnesota*, 254 U. S. 325, 328; *Gustafson* v. *Rhinow*, 144 Minn. 415; 175 N. W. Rep. 903; *State ex rel. Atwood* v. *Johnson*, 170 Wis. 251; 175 N. W. Rep. 589). If something is still due beyond the letter of the bond (*Opinion of the Justices*, 175 Mass. 599), state, as well as nation, will not rest till justice has been done. Neither can silence conscience by referring the claimant to the other. I am not convinced by the argument that reparation, if due from our legislature to residents of New York, is due in equal measure to residents of Maine and California. Each state may fairly be left to take care of its own. Most have already done so. One finds it hard to believe that they have, all of them, been meddling in matters not of their concern. It is the state rather than the nation — possessing as the state does the residuary powers of government — which in our federal system is to be viewed as *parens patriæ*. The

parent does not listen unmoved to the necessities of her sons who have fought in her defense.

I pass, then, to the question whether the legislature might reasonably hold that men who in greatly serving had also greatly suffered, gained thereby a claim to reparation for their suffering. I mean, of course, a claim in justice or equity or morals or honor. Great achievement and great sacrifice have been meagrely rewarded. The perils of battle, the hardships of camp and trench, may be poorly paid at any price; few will assert that they are recompensed at the rate of a dollar a day. Even for those who did not reach the firing line, there were the pangs of separation from home and kindred, the anxieties and the strain of a new and hazardous adventure. Legislature and people, beneficiaries of this devotion, have heard the call of a moral duty to mitigate the disparity between suffering and requital. But the catalogue of suffering does not end with pain of mind and body. There was money loss as well, or so at least a legislature, looking at average conditions, might not unreasonably believe. Its judgment in such matters must prevail unless wholly arbitrary and baseless (*Matter of Stubbe* v. *Adamson*, 220 N. Y. 459, 469). Labor in the market was paid with no such modest stipend as these men received for labor in submarine and trench. Even with food and housing added to the stipend, we cannot say that there is mere caprice in a finding of the lawmakers that compensation was inadequate. Often the stipend was sent home for the benefit of relatives who, if not wholly dependent on the absent one, had need of something more if they were to be maintained in his absence according to the standards of the past. Lost also were indefinite opportunities for profit and advancement. While soldiers and sailors risked their lives abroad, wages abnormally high were the reward of those who stayed behind. The losses did not end with peace. Men who had left their callings

overnight, breaking up the old relations of business and employment, found on their return that business must be rebuilt, and employment sought anew. Then, too, the shock and strain provoked a period of reaction, in which idleness was inevitable. New losses must be suffered till work could be resumed, and life adjusted to the ways of peace. It is significant, I think, that the statute limits the bonus to soldiers and sailors of the lower grades, *i. e.*, to those whose pay was smallest, and who are most in need of aid. Of these, some may bear a loss more easily than others, but for many, if not for all, there will be loss in some degree. Legislation, in such matters, must take note of average conditions (*Tenement House Dept. N. Y. City* v. *McDevitt*, 215 N. Y. 160, 167). The problem is too complex, the difficulty of proof too great, for investigation of the individual case, and adjustment of reward accordingly. We take judicial notice of these things (*People ex rel. Durham Realty Co.* v. *La Feira*, 230 N. Y. 429; *People* v. *Schweinler Press*, 214 N. Y. 395; *Matter of Stubbe* v. *Adamson*, 220 N. Y. 459). We take judicial notice, too, that since the beginnings of our history, a sense of the moral obligation to give aid to the returning soldier has been felt and acted on by government (*U. S.* v. *Hall*, 98 U. S. 343, 346). The call of these and kindred equities has been heard and answered in the past. Are the equities so feeble, is their summons so plainly an illusion, that we may answer them no more?

We have held that the legislature is still free, with all the restrictions imposed by the Constitution upon gifts of money or of credit, to assume liability in law when liability may be found in equity or honor (*Lehigh Valley R. R. Co.* v. *Canal Board*, 204 N. Y. 471). Equity and honor are the same as in olden days. The Constitution does not define them, nor seek to circumscribe their content. An employee in a state hospital was injured by the assault of a patient confided to his care (*Munro* v. *State of N. Y.*,

223 N. Y. 208). A statute after the event declared that upon a finding by the Court of Claims that the injuries "were so sustained," damages therefor should "constitute a legal and valid claim against the state." We held that the right to reparation was so rooted in equity and fairness that the legislature was free to recognize it by assuming liability. We did not put our decision, as the legislature did not base the statute, upon any theory of negligence in the conduct of the enterprise. The claimant had been injured by an "unforeseen accident" (p. 216) as the result of service to the state, and that was thought enough, though the state was not at fault. If a hospital attendant, serving in times of peace, has a moral claim to be indemnified against the risks of an employment which he was free to accept or to reject, the soldier injured in a war has at least an equal equity. I cannot doubt that under *Munro* v. *State of N. Y.* (*supra*), a bonus or pension to the maimed or incapacitated would be the recognition and fulfillment of a moral obligation, and not a largess or donation, the dole of charity or benevolence. The conscience of the state would listen with little patience to the argument that wounded and disabled had no claim upon its bounty because wounds and disabilities were suffered in the service of the nation. This the prevailing opinion apparently concedes, though I cannot reconcile the concession with the logic of its theorem. Relief in such circumstances would not rest upon the narrow ground that the injured or disabled might be in danger of becoming paupers. It would be due, if so the legislature should read the promptings of morality, though all were self-supporting. Aid to men thus stricken is not benevolence to the poor. It is an attempt, however feeble, with sacrifice outweighing payment, to set the balance true.

If the account may be recast by adjusting recompense to suffering when the disparity disturbs the conscience, it

is for the legislature to declare when conscience is disturbed. Not this form of sacrifice or that to the exclusion of another, but merely sacrifice unrequited, is the basis of its power. I cannot say that there is an equity in unrequited wounds, and none in other suffering of body or of mind. The grip is, indeed, weaker, and yet it can be felt. I cannot say, if there is an equity in suffering of body or of mind, that there is none in economic suffering, the loss of money or money's worth. Few would doubt this if the soldiers had received no pay at all. Pay so inadequate as to be almost nominal does not greatly change the balance. A has saved the life of B, or of B's child, and in so doing has suffered loss. Many a man in B's case would feel that the loss should be repaired. We deal here with a like service, not of one man, but of an army. "That which would have been merely a charity or a gift is not such by reason of the service given, the consideration rendered, the honorable obligation incurred" (*Trustees Exempt Firemen's Benev. Fund* v. *Roome*, 93 N. Y. 326). We err when we envisage the soldier's relation to the government in the category of contract. Contract in the true sense there is none, but service conscripted by the sovereign, and, even though not conscripted, rewarded at its will. That is why payment of the wage does not always satisfy the conscience that there has been payment of the debt. The Constitution does not silence these mutterings of spiritual disquiet when sacrifice unevenly distributed oppresses those who profit by it with the sense of a burden undischarged. Our ruling in *Matter of Borup* (182 N. Y. 222) was founded in that truth. We held that it was in the power of the legislature by a retroactive statute to assume liability to a landowner injured by a change of grade, though at the time of the change the impairment of value was damage without wrong. Under the law before the statute, the loss was one of the incidents of life in organized society.

It was part of the price which the citizen must pay for the benefits of government. We held that the legislature might readjust the incidence of the burden, might establish a more equitable distribution between the individual and the public, through the voluntary acceptance of liability for a loss which was without a remedy when suffered. I cannot yield to an appraisal of values that would find the basis of an equity there, and a mere cobweb, an illusion, here. In neither case is there legal liability unless the legislature assumes one. In each there is an unequal pressure of the burdens and the power of government upon one man and upon others. The readjustment of these burdens along the lines of equality and equity is a legitimate function of the state as long as justice to its citizens remains its chief concern (*Oswego & Syracuse R. R. Co.* v. *State of N. Y.*, 226 N. Y. 351).

I am led, therefore, to the conclusion that the payment of this bonus, as money earned, but not received, is not wholly without support in something which the legislature might estimate as a moral or honorary obligation. If there is any reasonable basis for such an estimate, for such a conception of equity and justice, the courts must yield to the judgment of the legislature that it is worthy of recognition. The question is then one that the legislature must determine for itself (*U. S.* v. *Realty Co.*, 163 U. S. 427, 444; *Oswego & Syracuse R. R. Co.* v. *State of N. Y. supra*, at p. 357). "Its decision * * * can rarely, if ever, be the subject of review by the judicial branch of the government" (*U. S.* v. *Realty Co., supra;* cf. *Opinion of the Justices*, 175 Mass. 599, at p. 602). Some may think the service so far beyond requital that the attempt should be surrendered for mere futility. Others may think that high and unselfish sacrifice is cheapened when repaid in money. Others again may think that for the sake of the economic or financial stability of the commonwealth, losses already

suffered should be left to lie where they have fallen. These are questions of political or legislative expediency. I make no attempt to answer them. I am not to substitute my judgment for the judgment of the lawmakers. The act, moreover, was either valid or invalid at the date of its enactment. Its validity cannot turn upon the hope or expectation that aid, at some indefinite period hereafter, may be granted by the nation. Impressive is the list of like statutes to be found in other states (California, Connecticut, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Hampshire, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, Washington, Wisconsin and Wyoming) as well as in foreign countries (Italy, France, Great Britain, Canada and Australia). Impressive too is the vote in favor of our own statute, when submitted to the electors. I cannot bring myself to believe that all these concurring acts were unmoved by any conception of honor or of duty, or that the conception, if held, had no basis in reality. If there be the possibility of conflicting motives, those that vitiate are to be rejected, and those that validate presumed.

We are warned that the recognition of this equity may be followed by the recognition of others still weaker and more rarefied. All sorts of hypothetical situations are suggested in the briefs of counsel, and held before us *in terrorem*. I am not swerved by these forebodings. I do not know the equity that is incapable of being reduced to an absurdity when extended by some process of analogy to varying conditions. Here, as often in the law, the difference between right and wrong is a difference of degree. Most of these imaginary problems will never in fact arise. They assume a legislature and an electorate without responsibility or conscience. The public credit is not pledged in these cases by the legislature alone. The pledge is invalid unless ratified by the vote of the

electors (Const. art. VII, sec. 4). I find little opportunity here for the charlatan or the cheat. Something more than a bizarre and shadowy pretense, some service stirring the deep currents of public gratitude and loyalty, will be needed before these protecting dykes and dams are overcome and flooded. But the existence of a power is not refuted by demonstrating the opportunity for its abuse. The abuse must be dealt with when it arises (*Opinion of the Justices*, 175 Mass. 599, at p. 602). We may not nullify a statute from mere mistrust of the capacity of legislature and people to use their power wisely. I am persuaded that hundreds of thousands of earnest men and women believe that justice and equity demand the payment of this bonus. They may be wrong. I do not know. It is enough that I cannot characterize their belief as a vagary of the mind, an idle dream or phantasy, an irrational pretense.

None of the previous cases in this state controls the case before us. *Bush* v. *Board of Supervisors Orange Co.* (159 N. Y. 212) is not decisive. The claim of drafted men or of those who had hired a substitute that they should receive, many years after the civil war, a bounty equal to that paid as a reward for volunteering, had small support in morals (cf. *Opinion of the Justices*, 190 Mass. 611; *Opinion of the Justices*, 211 id. 608). That decision, moreover, could stand on the single ground that the debt, contracted by a county, was not one for county purposes, and that there was surely no moral obligation resting on the county, even though upon some strained theory we might ascribe one to the state. The *Mahon* case (*Matter of Mahon* v. *Bd. of Education N. Y. City*, 171 N. Y. 263) does not control, for the teachers were servants of the municipality, who had made a voluntary contract, and the Constitution prohibits the grant of extra compensation to public officers, servants, agents or contractors of the state, or of its civil subdivisions (Art. III, sec. 28). That provision is inappli-

cable here, for it postulates a contract to which the state or the municipality was a party, and not submission to a mandate, issued by another agency of government, where volition is excluded. What was said in the other cases, so far as it is applicable here, was *obiter*. We may even assume in accordance with the rather sweeping dictum of CULLEN, Ch. J., that there is no longer room for the play of mere gratitude and charity (*Lehigh Valley R. R. Co.* v. *Canal Bd.*, 204 N. Y. 471). The dictum is coupled with the concession that room there still is for the recognition of the claims of equity and justice (pp. 475, 476). *Trustees of Exempt Firemen's Benev. Fund* v. *Roome* (93 N. Y. 313) and *Munro* v. *State of N. Y.* (223 N. Y. 208) show how plastic and comprehensive is the content of those terms. There is a difference, not to be ignored, between profit and indemnity. If the soldiers had not suffered, and the sole purpose of the bonus were to reward them above others, the reward might be said to have no basis except gratitude, a free offering of thanksgiving, untouched by the admixture of any sentiment of justice. Their service has been coupled with sacrifice, and from the union of the two there is born the equity that prompts to reparation.

The judgment should be affirmed with costs.

POUND, J. (dissenting). The New York Constitution, article VII, section 1, provides: "The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation." I am unable to agree with my associates that this limitation prohibits the creation of a debt upon submission to the people, pursuant to article VII, section 4, for the purpose of raising money to pay soldiers' bonuses or for any other public purpose which is to be carried out by the state itself without the intervening agency of an individual, association or corporation.

The credit of the state is not given to or in aid of the recipients of the state's bounty under chapter 872, Laws of 1920. It is not given or loaned "in any manner." It is sold in the market to the purchasers of the bonds. The borrowed money becomes the money of the state and is held subject to the provisions of article VIII, section 9. It may not be given "to or in aid of any * * * private undertaking." Except for such limitation, it may be given to individuals for any public purpose "in pursuance of an appropriation by law," but not otherwise. (Const. art. 3, § 21.)

The payment of soldiers' bonuses is or may be recognized as being for a public purpose and a public undertaking. The purpose and the undertaking are to supplement the pay of the soldiers and thereby to promote military zeal in the future. Whether the sense of gratitude or the sense of obligation prevailed with the legislature and the people as the impulse of the legislation; whether the bonus is to be regarded as alms or honorarium, thus becomes a matter of indifference to the court. What to one seems an act of gratitude becomes to another the recognition of an equity. But the state may borrow money for its public purposes whether moved thereto by benevolence or by moral constraint, so long as no association, corporation or private undertaking acting as a *quasi* state agency receives the money or is thereby aided.

I vote to affirm.

HISCOCK, Ch. J., HOGAN, MCLAUGHLIN and CRANE, JJ., concur with ANDREWS, J.; CARDOZO and POUND, JJ., each read a dissenting opinion.

Judgment reversed, etc.