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## LOW-RENT HOUSING AND STATE FINANCING\*

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Respect for our constitutions, both federal and state, springs from the conviction that they embody fundamental principles of government and are not mere codes of civil procedure. Unduly restrictive judicial opinions necessitating frequent and specific amendments to endow the legislature with necessary powers of government have a tendency to weaken rather than strengthen the popular regard for the constitution. The vitality of constitutional principles depends in no small part upon their adaptability to the pressing problems of modern democracies. And yet in recent years restrictions and limitations in the constitutions of the various states relating to state and municipal indebtedness have operated in many instances to obstruct or retard the execution of plans to remedy existing social problems. Of these problems, by far the most serious is the widespread unemployment whose threat to the nation's economic well-being directly or indirectly affects the welfare of every state and municipality in the country. It is not necessary to marshal figures to show how drastic the effects of unemployment have become during the past few years,<sup>1</sup> how private charity has been inadequate to meet the situation,<sup>2</sup> how the number of persons receiving relief from public funds has increased,<sup>3</sup> and how expenditures by the Federal Government for relief have steadily mounted.<sup>4</sup>

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1. *The Federation's Revised Unemployment Estimate* (1936) 43 AMER. FEDERATIONIST 64, 65; *Trend of Unemployment* (1935) 40 MON. LAB. REV. 1329, 1339.

2. 2 MON. BUL. SOC. STATISTICS (U. S. Dep't Labor 1934) No. 4.

3. *Report of Federal Emergency Relief Administrator to the Chairman of the Senate Committee on Appropriations*, SEN. DOC. NO. 56, 74th Cong., 1st Sess. (1935).

4. *Hearings before Subcommittee of House Committee on Appropriations on First Deficiency Appropriation Bill for 1936*, pt. 2, 74th Cong., 2d Sess. (1936) 362.

In addition to the unemployment problem, another social problem which has long been present but which only recently has been recognized as a serious threat to the well being of the nation is the inadequate housing facilities for families with low income. Although the effects of inadequate housing on health,<sup>5</sup> morals,<sup>6</sup> safety<sup>7</sup> and general welfare<sup>8</sup> have been understood by those who were imbued with a social consciousness, not until the past few years has the seriousness of the low-rent housing problem been generally recognized. The roving spotlight which has been directed everywhere to uncover the suffering and distress occasioned by unemployment has at the same time shown the squalor and the hovels in which too many of our people have been forced for years to dwell.

There has been no dearth of plans for providing relief for the unemployed and for furnishing decent dwelling accommodations for persons with low income. Motivated by the desire to alleviate the condition of the distressed and to correct the abuses of our social and economic order, students have for years directed their attention to these vexing problems. But the problems are still present, and the solutions are still visionary.

This paper does not offer any panacea. It is submitted, however, that the experience of the Federal Government during the past three years in administering a non-federal public works program and its activity in the field of low-rent housing have made it possible to see clearly an approach to these problems which may lead to permanent and beneficial results. Although unemployment and inadequate housing are not directly attributable to a common cause, the fact is that these two problems are susceptible of a single method of attack. It is generally considered that a sound unemployment relief program requires that persons shall be put to work on useful projects.<sup>9</sup> What more useful projects could be selected for the employment of persons in need of jobs than the construction of dwelling places? A sound plan for financing a low-rent housing program is also a sound method

5. Britten, *The Relation Between Housing and Health* (1934) 49 PUB. HEALTH REP. (U. S. Pub. Health Service) 1301.

6. CRIME COMM. OF STATE OF NEW YORK, *STUDY OF ENVIRONMENTAL FACTORS IN JUVENILE DELINQUENCY* (1928).

7. Lloyd, Moulton and Williams, *Housing and Safety* in HOUSING AND THE COMMUNITY (8 President's Conference on Home Building and Home Ownership, 1932) 54-85.

8. WOOD, *SLUMS AND BLIGHTED AREAS IN THE UNITED STATES* (Fed. Emer. Admin. of Pub. Works, 1935). Excellent treatment of, and bibliographies on, the low-rent housing problem may be found in BAUER, *MODERN HOUSING* (1934); WOOD, *RECENT TRENDS IN AMERICAN HOUSING* (1931). See articles on housing in FORTUNE, Feb. to July, 1932.

9. CLARK, *THE ECONOMICS OF PLANNING PUBLIC WORKS* (1935); ECONOMIC RECONSTRUCTION (Col. Univ. Comm. 1934) 35-37, 160-169; GAYER, *PUBLIC WORKS IN PROSPERITY AND DEPRESSION* (1935); KEYNES, *THE MEANS TO PROSPERITY* (1933); SPRAGUE, *RECOVERY AND COMMON SENSE* (1934) 15-33; Colm and Lehmann, *Public Spending and Recovery in the United States* (1936) 3 SOC. RESEARCH 129; Dickinson, *Public Construction and Cyclical Unemployment* (1928) 139 ANNALS 175; Mund, *Prosperity Reserves of Public Works* (1930 Supp.) 149 ANNALS 1; *Round Table Discussion on Public Works and Unemployment* (1930 Supp.) 20 AM. EC. REV. 15; Slichter, *The Economics of Public Works* (1934 Supp.) 24 AM. EC. REV. 174.

of relieving unemployment.<sup>10</sup> If it can be demonstrated that under existing constitutional limitations and restrictions it is possible for states to finance the construction of adequate housing facilities for persons with low income, the way will be clear for combating two of the most serious problems confronting states and municipalities today.

The principles which underlie the financing of low-rent housing by states and the legal difficulties which must be overcome before such a program can be successfully undertaken are not substantially different from the principles and legal difficulties involved in carrying out any state program of public works. The constitutional barriers which would prevent a state from undertaking a program of public works calculated to furnish its citizens with water, sewerage, electric, educational or hospital facilities would operate to prevent that state from undertaking a program of low-rent housing as well. Likewise, methods which states have successfully employed in financing useful public improvements notwithstanding constitutional limitations and restrictions should also be available for financing a low-rent housing program. It would, therefore, be appropriate to discuss some of the methods which have been attempted by states to finance the construction of various types of public improvements and to make some suggestions for adapting the legal principles involved in these methods to a state-wide low-rent housing program.

#### OBLIGATIONS PAYABLE FROM AN EXCISE TAX

There are several methods which have been successfully employed by states to finance the construction of public improvements despite constitutional provisions which, before judicial clarification, would seem to have precluded the particular type of financing employed. One method is by the issuance of obligations payable from a special fund derived from the proceeds of excise taxes levied on the privilege of engaging in certain activities or on the use of certain facilities. This method of state financing was discussed in a recent New Mexico case<sup>11</sup> in which provisions of the New Mexico constitution relating to the amount and manner of incurring a state debt similar to provisions found in most other state constitutions were construed in relation to obligations payable from a special excise tax. Under a 1934 law,<sup>12</sup> the New Mexico Capitol Addition Commission was authorized to borrow \$175,000 with which to construct and equip a supreme court building as an addition to the state capitol.<sup>13</sup> This sum was to be raised

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10. See Topkis, *Material and Labor Costs Involved in the Construction of a Large Apartment Building* (1935) 41 MON. LAB. REV. 541. See also Byer, *Employment Created by P. W. A. Construction* (1936) 41 MON. LAB. REV. 838.

11. *State ex rel. Capitol Addition Bldg. Comm. v. Connelly*, 39 N. M. 312, 46 P. (2d) 1097 (1935).

12. N. M. Laws Spec. Sess. 1934, c. 14.

13. *Id.* §§ 1-2.

through the sale of debentures which were to be payable from the funds received from the collection of a fee of \$2.50 levied upon every civil action filed in the office of the clerks of the various district courts of the state.<sup>14</sup> The Act provided that the debentures would constitute an irrevocable contract between the State of New Mexico and the holders of the debentures, that the taxes or fees pledged for the payment of the debentures would not be reduced so long as any of the debentures would remain outstanding and unpaid, and that the state would cause the taxes and fees to be collected promptly and set aside and applied to the payment of the debentures and the interest thereon according to their terms.<sup>15</sup> The New Mexico constitution authorizes the state to borrow money in a limited amount to meet casual deficits or for necessary expenses and also authorizes the state to contract debts to suppress insurrection and to provide for the public defense.<sup>16</sup> But aside from this it prohibits the incurring of any state debt unless authorized by law for some specified work or object, which law must provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of the debt within fifty years; and no such law can take effect until it has been approved by a majority of all the votes cast at a general election.<sup>17</sup>

In answer to a mandamus action brought to compel the state treasurer to countersign the debentures as required by the statute,<sup>18</sup> it was contended that the debt proposed to be created by the issuance of the debentures was prohibited by the constitution, inasmuch as the debentures constituted a general obligation on the part of the state and, before being issued, required approval by a majority vote of the qualified electors, as well as compliance with all the other constitutional provisions incident to the creation of a state debt. The Supreme Court of New Mexico had previously upheld the issuance of obligations payable from a special fund derived from the revenues to be furnished by the project for which the bonds were issued as not being a debt within the meaning of the constitutional limitation on municipal indebtedness.<sup>19</sup> This court had also held that obligations of the University of New Mexico payable from a special fund consisting of the income from lands belonging to the University did not constitute a state debt.<sup>20</sup>

The state treasurer argued that these earlier cases were not controlling on the question at issue because the debentures proposed to be issued by the Capitol Addition Building Commission would not be payable from a special fund of the type considered in the earlier decisions. The court, however,

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14. *Id.* §§ 4-5.

15. *Id.* § 12.

16. N. M. CONST. art. IX, § 7.

17. *Id.* § 8.

18. N. M. Laws Spec. Sess. 1934, c. 14, § 6.

19. *Seward v. Bowers*, 37 N. M. 385, 24 P. (2d) 253 (1933).

20. *State v. Regents of Univ. of N. M.*, 32 N. M. 428, 258 Pac. 571 (1927).

construed the word "debt" as used in the New Mexico constitution as comprehending an obligation which was payable from an ad valorem tax but not one payable from a tax in the nature of an excise tax.<sup>21</sup> The basis for this construction was found in the history of the constitutional provision, which, the court stated, showed that the framers were writing and thinking of an obligation payable from the proceeds of a property tax levied against the general assessment rolls, and that the debt the creation of which was prohibited by the constitution or the amount of which was limited thereby was one pledging the general faith and credit of the state with a consequent recourse in the holders to the general taxing power. The court concluded that the debentures in question, since they did not require a resort to the general taxing power of the state for their retirement but were payable from the proceeds of an imposition in the nature of an excise, did not constitute a general obligation on the part of the state and hence were not within the ban of the constitution.<sup>22</sup>

The construction of the word "debt" as embracing only obligations payable from property taxes, is not a construction adopted solely by the Supreme Court of New Mexico, for in other jurisdictions a similar interpretation of a state constitutional debt limitation has been adopted. Thus, in Colorado<sup>23</sup> and in Kansas,<sup>24</sup> revenue anticipation warrants issued for the construction and maintenance of highways, such warrants to be paid with the proceeds of excise taxes derived from the imposition of licenses and registration fees and from the imposition of an excise tax on gasoline, have been held not to be debts of the respective states. Similarly, in Oregon<sup>25</sup> and in Washington<sup>26</sup> the word "debt", as used in a constitutional provision limiting state indebtedness, was held not to apply to obligations payable only from a fund made up of liquor license fees, penalties, forfeitures, and income and revenues received under a state liquor control act.

And in South Carolina an agreement by the state to reimburse a county for moneys spent in the construction of roads, from a special fund consisting of the state gasoline tax, the state automobile tax and sums received as federal aid, was held not to create a debt of the state.<sup>27</sup> The South Carolina court stated the proposition as follows:

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21. *State ex rel. Capitol Addition Bldg. Comm. v. Connelly*, 39 N. M. 312, 46 P. (2d) 1097 (1935).

22. *Id.* at 322, 46 P. (2d) at 1103.

23. *Johnson v. McDonald*, 97 Colo. 324, 49 P. (2d) 1017 (1935); *cf. In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6*, 94 Colo. 101, 31 P. (2d) 325 (1933); *State ex rel. Porterie v. Charity Hospital*, 182 La. 268, 161 So. 606 (1935).

24. *State ex rel. Boynton v. State Highway Comm.*, 138 Kan. 913, 28 P. (2d) 770 (1934); *State ex rel. Boynton v. Kansas State Highway Comm.*, 139 Kan. 391, 32 P. (2d) 493 (1934).

25. *Moses v. Meier*, 148 Ore. 185, 35 P. (2d) 981 (1934).

26. *Ajax v. Gregory*, 177 Wash. 405, 32 P. (2d) 560 (1934).

27. *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153 (1926).

"Is such a limited liability a debt of the state in the constitutional sense? The underlying purpose of the constitutional provisions concerning the creation of state debt was that they should serve as a limit of taxation—as a protection to taxpayers, and especially those whose property might be subjected to taxation. This purpose will not be defeated if it should be held by this court that a debt for the construction of a state highway system, payable exclusively from federal aid moneys and special license taxes to be borne by the persons who will derive the principal benefits from the state highway system, is not a debt of the kind required by the constitution to be approved by the voters of the state before it is incurred."<sup>28</sup>

The principle thus enunciated by the South Carolina court in 1926 has been carried even further in that state by a line of cases involving the issuance of obligations backed by the full faith, credit and taxing power of the state but payable in the first instance from a special excise tax. The most recent affirmance of this principle was in connection with the issuance of obligations by the state for the purpose of financing buildings at various state eleemosynary institutions. These obligations were to be payable in the first instance either from the gross revenues of the institution at which the project to be constructed was located, or from the gross receipts of any excise, license or privilege tax levied by the state on persons, firms and corporations engaged in the business of manufacturing, generating or selling electric power. Regardless of the source of payment of the bonds in the first instance, they were to constitute general obligations and the full faith, credit and taxing power of the state were pledged to their payment. The Act<sup>29</sup> authorizing the issuance of the bonds provided that before such bonds could be issued, the governor and state treasurer should determine in writing that the specific revenues or taxes from which they were to be payable in the first instance would be sufficient to pay the principal of and interest on the bonds without resorting to other taxes or revenues of the state.<sup>30</sup> Following its earlier decisions,<sup>31</sup> the Supreme Court of South Carolina held that obligations secured in the first instance by a pledge of a fund which might reasonably be expected to be sufficient to meet the obligations without resorting to the levy of a property tax do not constitute a bonded debt within the meaning of the constitutional limitation, notwithstanding that the full faith, credit and taxing power of the state are also pledged to their payment.<sup>32</sup>

28. *Id.* at 301, 135 S. E. at 157.

29. S. C. Acts 1934, p. 2269.

30. *Id.* § 2.

31. *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153 (1926); *State ex rel. Richards v. Mooror*, 152 S. C. 455, 150 S. E. 269 (1929); *State ex rel. Crawford v. Stevens*, 173 S. C. 149, 175 S. E. 213 (1934).

32. *Crawford v. Johnston*, 177 S. C. 399, 181 S. E. 476 (1935). In an earlier case the court had held that a guaranty by a city of obligations payable from special assessments upon

The attitude expressed by the New Mexico court in the *Capitol Addition* case and by other courts which have held that obligations payable from a special fund made up of receipts from an excise tax are not state debts is by no means universally accepted.<sup>33</sup> The argument that no state debt is created unless a property tax is pledged to its payment was severely criticized by the Kentucky Court of Appeals which said:

“Under this contention, the legislature, or the debt contracting authority, could divide the public revenue into numerous subdivisions, calling one the ‘road fund,’ another the ‘school fund,’ another the ‘agricultural fund,’ another the ‘public health fund,’ and others almost without limit. Debts could then be contracted in unlimited amounts and payable in the far distant future, and still be immune from attack as violating constitutional provisions limiting indebtedness, provided each debt was made payable out of some one of the specially designated funds into which all of the revenue collected by taxation from the people had been divided. A mere statement of the proposition carries with it, it seems to us, its own refutation.”<sup>34</sup>

Some of the decisions holding that bonds payable from an excise tax do not constitute a state debt possibly can be justified on the ground that the bonds are payable from a tax levied only upon the class specially benefited by the use to which the proceeds of the bonds are devoted, but the courts which have upheld such obligations have not based their decisions upon any such relationship between the project constructed and the particular class upon which the tax is levied. The tenuous reasoning advanced by the courts as a basis for holding that obligations payable from a special excise tax do not contravene a constitutional debt limitation, coupled with the criticism of the cases which attempt to differentiate one type of taxation from another as a basis for determining what obligations create a debt within the meaning of a constitutional limitation, makes it advisable to look to other plans of state financing for a satisfactory method of undertaking a state program of public works, including low-rent housing.

#### OBLIGATIONS PAYABLE FROM THE INCOME OR PROCEEDS OF A LAND GRANT

A sounder method, which some states have employed to finance the construction of necessary improvements, but one which can have only a

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property specially benefited would not create a city debt because the liability of the city was contingent. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421 (1915). See *Sullivan v. City Council of Charleston*, 123 S. C. 91, 116 S. E. 104 (1923); *Simons v. City Council of Charleston*, 187 S. E. 545 (S. C. 1936).

33. *In re Opinions of the Justices*, 225 Ala. 356, 143 So. 289 (1932); *In re Opinions of the Justices*, 225 Ala. 361, 143 So. 808 (1932); *State ex rel. Fletcher v. Executive Council of Iowa*, 207 Iowa 923, 223 N. W. 727 (1929); *Crick v. Rash*, 190 Ky. 820, 229 S. W. 63 (1921); *State ex rel. Diederichs v. State Highway Comm.*, 89 Mont. 205, 296 Pac. 1033 (1931). See *In re Advisory Opinion to Governor*, 94 Fla. 967, 114 So. 850 (1927); *Martin v. Dade Muck Land Co.*, 95 Fla. 530, 116 So. 449 (1928); *Amos v. Mathews*, 99 Fla. 1, 65, 115, 126 So. 308, 331, 347 (1930).

34. *Crick v. Rash*, 190 Ky. 820, 836, 229 S. W. 63, 70 (1921).

restricted application, is the issuance of obligations payable solely from the income or proceeds of a land grant. The rationale of the land grant cases is that moneys received by the states as income or proceeds from lands granted to the states by the Federal Government for specific purposes constitute a trust fund for such purposes. Obligations payable from such a trust fund are held not to constitute debts of the state because the state in issuing such obligations is acting merely as an agency to execute a trust.<sup>35</sup>

What makes the land grant cases significant is that they were among the first to recognize the distinction between the general funds of the state and funds held by the state in trust for certain designated purposes. Even before the question had been raised as to whether bonds issued against the land grant funds were state debts, other constitutional questions had to be cleared away. These questions arose because of state constitutional provisions requiring that state money must be appropriated before it can be paid out of the state treasury<sup>36</sup> and that certain state officers should have exclusive jurisdiction over state funds.<sup>37</sup>

Thus, in an early Montana case, it was held that funds derived from various land grants and trust funds were not subject to the requirement of appropriation by the legislature,<sup>38</sup> and in Idaho it was held that the state treasurer had no authority to place money into the state treasury when such

35. State *ex rel.* Wilson v. State Bd. of Educ. of Mont., 56 P. (2d) 1079 (1936); State v. Regents of Univ. of N. M., 32 N. M. 428, 258 Pac. 571 (1927); Allen v. Grimes, 9 Wash. 424, 37 Pac. 662 (1894); State *ex rel.* State Capitol Comm. v. Clausen, 134 Wash. 196, 235 Pac. 364 (1925); Arnold v. Bond, 47 Wyo. 236, 34 P. (2d) 28 (1934); *cf.* State *ex rel.* Haire v. Rice, 33 Mont. 365, 83 Pac. 874 (1906), *aff'd*, 204 U. S. 291 (1907). A debt is created, however, if the interest on the obligations is payable from taxes [State *ex rel.* State Capitol Comm. v. Lister, 91 Wash. 9, 156 Pac. 858 (1916)], or if the state guarantees the repayment of the obligations [State Capitol Comm. v. State Bd. of Finance, 74 Wash. 15, 132 Pac. 861 (1913)].

In several jurisdictions attempts to issue obligations payable from the proceeds or income from federal land grants have been held unconstitutional. Roach v. Gooding, 11 Idaho 244, 81 Pac. 642 (1905); State *ex rel.* Bd. of Univ. and School Lands v. McMillan, 12 N. D. 280, 96 N. W. 310 (1903); State *ex rel.* Univ. of Utah v. Candland, 36 Utah 406, 104 Pac. 285 (1909), 24 L. R. A. (N. S.) 1260 (1910). These cases are analyzed in the opinion of Blume, J., in Arnold v. Bond, *supra*.

36. E. g., N. M. CONST. art. IV, § 30: "Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant drawn by the proper officer. Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied."

37. E. g., MONT. CONST. art. VII, § 20: "The governor, secretary of state and attorney general . . . shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law. . . ."

For a discussion of constitutional restrictions upon state indebtedness see Secrist, *An Economic Analysis of the Constitutional Restrictions Upon Public Indebtedness in the United States* (1914) No. 637 BULLETIN OF THE UNIVERSITY OF WISCONSIN 1-53.

38. State *ex rel.* Bickford v. Cook, 17 Mont. 529, 43 Pac. 928 (1896). Accord: Evans v. Van Deusen, 31 Idaho 614, 174 Pac. 122 (1918); State *ex rel.* Black v. State Bd. of Educ., 33 Idaho 415, 196 Pac. 201 (1921); State *ex rel.* Diidine v. Collins, 21 Mont. 448, 53 Pac. 1114 (1898).



money was given by the Federal Government for the benefit of certain agricultural and mechanical colleges.<sup>39</sup>

Having laid down the principle that land grant funds were not subject to constitutional provisions governing appropriations of or state officers' control over state moneys, the courts had little difficulty in extending this principle to special funds made up of other than land grant proceeds, such as a fund made up of a special state motor vehicle or motor fuel tax,<sup>40</sup> rents and income of a state sanatorium,<sup>41</sup> revenues of a state normal school,<sup>42</sup> moneys contributed by public bodies pursuant to a bonding statute,<sup>43</sup> sums collected by a state guarantee fund commission,<sup>44</sup> proceeds collected pursuant to a workmen's compensation act,<sup>45</sup> moneys in a state hail insurance fund,<sup>46</sup> and moneys collected pursuant to a state liquor control act.<sup>47</sup>

It would thus appear that the courts would hold that moneys which a state derived from the operation of a revenue-producing enterprise such as a low-rent housing project and which are kept separate from other state moneys are not subject to constitutional provisions relating to appropriations out of the state treasury or to constitutional provisions relating to the control over state moneys by a particular officer or body.<sup>48</sup> In order to support the proposition that obligations payable from such moneys would not constitute a debt of the state, it is not necessary to rely on the cases holding that obligations are not a state debt when made payable from a fund consisting of excise tax proceeds or sources other than the income of a revenue-producing enterprise. That such obligations do not constitute a debt of the state follows from the special fund doctrine. This is the doctrine that obligations payable from a special fund made up from the revenues of an enterprise for the construction or improvement of which such bonds are issued do not constitute debts within the meaning of a constitutional provision restricting or limiting state or municipal indebtedness.<sup>49</sup>

39. *Melgard v. Eagleson*, 31 Idaho 411, 172 Pac. 655 (1918). Accord: *Black v. State Bd. of Educ.*, 33 Idaho 415, 196 Pac. 201 (1921); *State ex rel. Bickford v. Cook*, 17 Mont. 529, 43 Pac. 928 (1896); *State ex rel. Armington v. Wright*, 17 Mont. 565, 44 Pac. 89 (1896); *State ex rel. Koch v. Barrett*, 26 Mont. 62, 66 Pac. 504 (1901); *Barbour v. State Bd. of Educ.*, 92 Mont. 321, 13 P. (2d) 225 (1932).

40. *State ex rel. Boynton v. Kansas State Highway Comm.*, 139 Kan. 391, 32 P. (2d) 493 (1934).

41. *State ex rel. Hawkins v. State Bd. of Examiners*, 97 Mont. 441, 35 P. (2d) 116 (1934).

42. *State ex rel. Blume v. State Bd. of Educ.*, 97 Mont. 371, 34 P. (2d) 515 (1934).

43. *State ex rel. Linde v. Taylor*, 33 N. D. 76, 156 N. W. 561 (1916).

44. *Wirtz v. Nestos*, 51 N. D. 603, 200 N. W. 524 (1924).

45. *State ex rel. Stearns v. Olson*, 43 N. D. 619, 175 N. W. 714 (1919).

46. *State ex rel. Olson v. Jorgenson*, 29 N. D. 173, 150 N. W. 565 (1915).

47. *Moses v. Meier*, 148 Ore. 185, 35 P. (2d) 981 (1934); *Ajax v. Gregory*, 177 Wash. 465, 32 P. (2d) 560 (1934).

48. *Cf. State Water Conservation Bd. v. Enking*, 58 P. (2d) 779 (Idaho, 1936).

49. *Foley, Some Recent Developments in the Law Relating to Municipal Financing of Public Works* (1935) 4 *FORDHAM L. REV.* 13.

## THE SPECIAL FUND DOCTRINE

It is important to bear in mind that not every obligation payable from a special fund involves the application of the so-called special fund doctrine. For example, when obligations issued by a state educational institution to finance the construction of a project are made payable from the revenues of the institution derived from matriculation and laboratory fees as well as from fees imposed in connection with the project, courts have held that such obligations do not create debts of the state because they are payable from a special fund.<sup>50</sup> Although it is perhaps natural for courts in reaching a new result or extending an existing principle to use the phrases mentioned in the precedents relied upon, confusion has undoubtedly resulted from the use of the terms "special fund" and "special fund doctrine" with reference to any obligations payable from a special fund regardless of the sources of the moneys paid into the special fund. The generally accepted special fund doctrine, here applied in connection with state indebtedness, covers only those cases in which obligations issued for a project are made payable from the fees imposed in connection with the project and from no other source.<sup>51</sup> Obligations payable from an excise tax<sup>52</sup> or from any other special source of state revenue<sup>53</sup> would be payable from a special fund, but they would not be the type of obligation which comes within the compass of the special fund doctrine. The decisions of the courts dealing with obligations payable from a special fund range from those which hold that state obligations payable only from the proceeds of certain land grants are not state debts<sup>54</sup> to the extreme case in which state obligations are held not to be a debt within the meaning of a state constitution because they were

50. Cases applying this principle: *Kansas City Bridge Co. v. Alabama State Bridge Corp.*, 59 F. (2d) 48 (C. C. A. 5th, 1932); *Alabama State Bridge Corp. v. Smith*, 217 Ala. 311, 116 So. 695 (1928); *In re Opinions of the Justices*, 225 Ala. 460, 143 So. 900 (1932); *State v. Regents of Univ. System*, 179 Ga. 210, 175 S. E. 567 (1934); *State ex rel. Veeder v. State Bd. of Educ.*, 97 Mont. 121, 33 P. (2d) 516 (1934); *State ex rel. Blume v. State Bd. of Educ.*, 97 Mont. 371, 34 F. (2d) 515 (1934); *Crawford v. Johnston*, 177 S. C. 399, 181 S. E. 476 (1935) *semble*; *cf. State Highway Comm. v. King*, 259 Ky. 414, 82 S. W. (2d) 443 (1935); *State ex rel. Porterie v. Charity Hospital*, 182 La. 268, 161 So. 606 (1935).

51. Cases applying this principle: *In re Canal Certificates*, 19 Colo. 63, 34 Pac. 274 (1893); *Hopkins v. Baldwin*, 167 So. 677 (Fla. 1936); *Brash v. State Tuberculosis Bd.*, 169 So. 218 (Fla. 1936); *Bloxton v. State Highway Comm.*, 225 Ky. 324, 8 S. W. (2d) 392 (1928); *State Highway Comm. v. Veling*, 230 Ky. 381, 19 S. W. (2d) 967 (1929); *Estes v. State Highway Comm.*, 235 Ky. 86, 29 S. W. (2d) 583 (1930); *Hughes v. State Bd. of Health*, 260 Ky. 228, 84 S. W. (2d) 52 (1935); *Van Hooser & Co. v. University of Ky.*, 262 Ky. 581, 90 S. W. (2d) 1029 (1936); *Barbour v. State Bd. of Educ.*, 92 Mont. 321, 13 P. (2d) 225 (1932); *State ex rel. Hawkins v. State Bd. of Examiners*, 97 Mont. 441, 35 P. (2d) 116 (1934); *State ex rel. Kaufman v. Davis*, 59 N. D. 191, 229 N. W. 105 (1930); *Kasch v. Miller*, 104 Ohio St. 281, 135 N. E. 813 (1922); *Baker v. Carter*, 165 Okla. 116, 25 P. (2d) 747 (1933); *McClain v. Regents of the University*, 124 Ore. 629, 265 Pac. 412 (1928); *Bates v. State Bridge Comm.*, 109 W. Va. 186, 153 S. E. 305 (1930). *Contra*: *State Water Conservation Bd. v. Enking*, 53 P. (2d) 779 (Idaho, 1936); *Newell v. People ex rel. Phelps*, 7 N. Y. 9 (1852); *Rodman v. Munson*, 13 Barb. 63 (N. Y. 1852).

52. See cases cited *supra* notes 11, 23-27.

53. *E. g.*, income from land grants.

54. See cases cited *supra* note 35.

payable from a fund built up from a special ad valorem property tax.<sup>55</sup> It is only when the acquisition or improvement of a revenue-producing enterprise is financed by the issuance of obligations payable solely from the revenues of such enterprise that the principles of the special fund doctrine are applicable. It is submitted that the consideration of these problems would be clarified if the use of the term "special fund doctrine" would be confined only to cases where the obligations under consideration are payable from the income of a revenue-producing undertaking and if obligations payable from sources other than such income would be identified by the particular source from which the obligations are payable. Examples of obligations in this latter category would be those payable from an excise tax, or those payable from the proceeds or income of a land grant, and these should not be referred to as obligations involving the special fund doctrine.

Several cases decided by the Supreme Court of Florida<sup>56</sup> during the past few months have shown a novel application of the principles underlying the special fund doctrine. In enunciating a rationale applicable to revenue financing, the Florida court not only outlined a method of state financing of public improvements, but drew an interesting distinction between such financing by the state and by municipal corporations of the state.

The Florida decisions relating to state revenue financing appear to be inconsistent with those relating to revenue financing by cities. The basis for the court's holding that the proposed revenue obligations of the state were not bonds was that the issuance of these obligations would not directly or indirectly impose an added burden on the taxing power of the state or have the effect of impairing the credit of the state. The basis for the court's holding that the proposed revenue obligations of municipal corporations were bonds was that the issuance of these obligations would indirectly create a burden on the taxing power. If the construction of a project will result in a coercive moral or legal necessity for levying a tax in the event the revenues of the project should be insufficient to operate it, then, under the Florida decisions, any obligations, whether payable from revenues or

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55. *Brown v. Ringdahl*, 109 Minn. 6, 122 N. W. 469 (1909). In an earlier case, the Minnesota court had held that the levy of a tax for a period of nine years to provide funds with which to construct the state capitol did not create a debt of the state. *Fleckten v. Lamberton*, 69 Minn. 187, 72 N. W. 65 (1897). The court in the *Brown* case held it immaterial that the earlier act was for the use of taxes levied for a particular purpose and the later act authorized the borrowing of money and the issuance of evidences of indebtedness anticipating the collection of a tax for a particular purpose.

56. *State ex rel. Diver v. Miami*, 113 Fla. 280, 152 So. 6 (1936); *State v. Lake City*, 116 Fla. 10, 156 So. 924 (1934); *State v. Daytona Beach*, 118 Fla. 20, 158 So. 300 (1934); *Boyd v. River Junction*, 121 Fla. 902, 164 So. 558 (1935); *Board of County Comm'rs v. Herrick*, 167 So. 386 (Fla. 1936); *Hopkins v. Baldwin*, 167 So. 677 (Fla. 1936); *Brash v. State Tuberculosis Bd.*, 167 So. 827 (Fla. 1936); *Brash v. State Tuberculosis Bd.*, 169 So. 218 (Fla. 1936); *Hygema v. City of Sebring*, 169 So. 366 (Fla. 1936). For a complete discussion of the cases, see *Foley, Revenue Financing of Public Enterprises* (1936) 35 MICH. L. REV. 1, 23-26.

taxes, issued to finance the original construction of the project are bonds within the meaning of the constitutional provision.

The court's view is that the embarkation upon a new municipal venture might lead to the necessity at some future time for levying a tax in order to continue the services of the new venture, and the court would not interfere with a levy of a tax for such purpose. But in the case of a state project, if an attempt should be made to levy a tax for the purpose of operating a project, originally financed by the issuance of revenue obligations, the court intimates that it would render appropriate injunctive relief. Thus the Florida court applies the special fund doctrine to revenue financing by the state or agencies of the state differently from the way it is applied to municipal revenue financing. The fact that the constitutional provision relating to state bonds is an absolute prohibition, whereas the provision relating to municipal bonds is only a restriction which can be complied with by holding an election, undoubtedly is a factor in explaining this difference in the attitude of the Florida court towards state and municipal revenue financing.

The distinction made by the Florida court in construing powers granted to the state under the constitution and powers granted to municipalities is significant not only in connection with a state program of low-rent housing but with any state public works program. During the past few years there has been a tendency of the courts to uphold the exercise of extensive implied powers by a state agency where such powers would be denied to municipal corporations.<sup>57</sup> Such a distinction is important in view of the fact that the ultimate responsibility for alleviating the distress occasioned by a widespread social evil rests not alone with the governmental unit where the problem is most acute but rather with the state itself, which is better able

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57. Courts have been liberal in construing the powers of incorporated state agencies. The Board of Regents of the University of Wisconsin was empowered "to accomplish the objects and perform the duties prescribed by law." WIS. REV. STAT. (1878) c. 25, § 379. The Supreme Court of Wisconsin, after noting the similarity of the quoted words to the last clause of Art. I, § 8 of the United States Constitution, said: "By parity of reasoning it may be said that it is for the board of regents to choose the means which in their judgment is necessary or convenient, provided only they are calculated to accomplish the objects sought by the charter and within the scope of the general powers granted, and not in conflict with the statute." *State ex rel. Priest v. Regents of University of Wis.*, 54 Wis. 159, 170, 11 N. W. 472, 477 (1882). This attitude towards the powers of incorporated state institutions has found strong support in Georgia and in Minnesota. *State v. Regents of University System*, 179 Ga. 210, 175 S. E. 567 (1934); *Fanning v. University of Minnesota*, 183 Minn. 222, 236 N. W. 217 (1931).

Several recent cases emphasize the distinction in the manner of construing powers granted a state and those granted a municipality. In Kentucky, the State Highway Commission was held to have the implied power to issue revenue refunding bonds. *State Highway Comm. v. King*, 215 Ky. 414, 82 S. W. (2d) 443 (1935). In Washington, the Department of Conservation and Development was held to have the implied power to issue bonds from the power to borrow money. *State ex rel. Banker v. Yelle*, 183 Wash. 380, 48 P. (2d) 573 (1935). And in Montana, the State Board of Education was held to have the implied power to borrow money as well as to issue its negotiable bonds from the power to construct a project. *State ex rel. Wilson v. State Bd. of Educ.*, 56 P. (2d) 1079 (Mont. 1936). Accord: *Guillot v. State Highway Comm.*, 56 P. (2d) 1072 (Mont. 1936).

to cope with forces whose effects are not confined to particular localities. There is considerable judicial precedent sustaining the proposition that constitutional restrictions and limitations on the debt-incurring powers of the states do not preclude the undertaking and financing by states of revenue-producing enterprises on a self-liquidating basis.

Thus, toll bridges by Kentucky<sup>58</sup> and West Virginia;<sup>59</sup> dormitories for educational institutions by Oklahoma,<sup>60</sup> Oregon,<sup>61</sup> Montana,<sup>62</sup> and North Dakota;<sup>63</sup> sanatoria by Kentucky<sup>64</sup> and Montana;<sup>65</sup> water conservation projects by Montana<sup>66</sup> and Ohio;<sup>67</sup> and canals by Colorado<sup>68</sup> all have been successfully financed by the states through the issuance of revenue obligations.

#### LOW-RENT HOUSING: A STATE PURPOSE

The methods which states have successfully employed in financing various types of revenue-producing enterprises should serve as a basis for a plan of financing low-rent housing. In addition to the question of the constitutional limit on state indebtedness, however, there arises in connection with any state program of low-rent housing the question as to whether such an undertaking would be a proper public purpose. Recently this question was passed upon by the New York Court of Appeals in an action to dismiss condemnation proceedings started by the New York City Housing Authority for the purpose of acquiring lands for a low-rent housing project.<sup>69</sup> Although there were judicial precedents upholding the use of public moneys for carrying on a program of housing for persons of low-income,<sup>70</sup> the exercise of the power of eminent domain for such housing purposes had never before been passed upon by the courts in any state.

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58. *Bloxton v. State Highway Comm.*, 225 Ky. 324, 8 S. W. (2d) 392 (1928); *State Highway Comm. v. Veling*, 230 Ky. 381, 19 S. W. (2d) 967 (1929); *Estes v. State Highway Comm.*, 235 Ky. 86, 29 S. W. (2d) 583 (1930).

59. *Bates v. State Bridge Comm.*, 109 W. Va. 186, 153 S. E. 305 (1930).

60. *Baker v. Carter*, 165 Okla. 116, 25 P. (2d) 747 (1933).

61. *McClain v. Regents of the University*, 124 Ore. 629, 265 Pac. 412 (1928).

62. *Barbour v. State Bd. of Educ.*, 92 Mont. 321, 13 P. (2d) 225 (1932).

63. *State ex rel. Kaufman v. Davis*, 59 N. D. 191, 229 N. W. 105 (1930).

64. *Hughes v. State Bd. of Health*, 260 Ky. 228, 84 S. W. (2d) 52 (1935).

65. *State ex rel. Hawkins v. State Bd. of Examiners*, 97 Mont. 441, 35 P. (2d) 116 (1934).

66. *State ex rel. Normile v. Cooney*, 100 Mont. 391, 47 P. (2d) 637 (1935). *Contra: State Water Conservation Bd. v. Enking*, 58 P. (2d) 779 (Idaho, 1936).

67. *Kasch v. Miller*, 104 Ohio St. 281, 135 N. E. 813 (1922).

68. *In re Canal Certificates*, 19 Colo. 63, 34 Pac. 274 (1893). *Contra: Newell v. People ex rel. Phelps*, 7 N. Y. 9 (1852); *Rodman v. Munson*, 13 Barb. 63 (N. Y. 1852).

69. *New York City Housing Authority v. Muller*, 270 N. Y. 333, 1 N. E. (2d) 153, 84 U. OF PA. L. REV. 902, 5 BROOKLYN L. REV. 327, 5 GEO. WASH. L. REV. 813, 31 ILL. L. REV. 113, 45 YALE L. J. 1519 (1936). See also Note (1936) 10 ST. JOHN'S L. REV. 280, 287.

70. *Green v. Frazier*, 44 N. D. 395, 176 N. W. 11 (1920), *aff'd*, 253 U. S. 233 (1920). *Accord: Willmon v. Powell*, 91 Cal. App. 1, 266 Pac. 1029 (1928); *Libby v. Portland*, 105 Me. 370, 74 Atl. 805 (1909); *Simon v. O'Toole*, 108 N. J. L. 32, 155 Atl. 449 (1931); *cf. Hoskins v. Orlando*, 51 F. (2d) 901 (C. C. A. 5th, 1931). *But cf. In re Opinion of Justices*, 211 Mass. 624, 98 N. E. 611 (1912); *In re Opinion of Justices*, 195 N. E. 897 (Mass. 1935).

After citing earlier New York cases upholding the power of eminent domain for drainage purposes as affording an analogy to condemnation for housing purposes, the New York Court of Appeals held that the project for which the New York City Housing Authority was seeking to condemn lands constituted a public use for which the legislature might confer the power of eminent domain. The basis for the court's decision was concisely stated by Judge Crouch as follows:

"The fundamental purpose of government is to protect the health, safety, and general welfare of the public. All its complicated activities have that simple end in view. Its power plant for the purpose consists of the power of taxation, the police power, and the power of eminent domain. Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety, or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it. There are differences in the nature and characteristics of the powers, though distinction between them is often fine. [Citations omitted.] But if the menace is serious enough to the public to warrant public action and the power applied is reasonably and fairly calculated to check it, and bears a reasonable relation to the evil, it seems to be constitutionally immaterial whether one or another of the sovereign powers is employed."<sup>71</sup>

The Supreme Judicial Court of Massachusetts in 1912 had held unconstitutional a statute to provide homes "for mechanics, laborers or other wage earners" on the ground, among others, that providing housing for such a limited group of persons would be for a private purpose.<sup>72</sup> This same point of view was urged in the New York case, but the court very emphatically disposed of it by saying:

"This objection disregards the primary purpose of the legislation. Use of a proposed structure, facility, or service by everybody and anybody is one of the abandoned universal tests of a public use. The designated class to whom incidental benefits will come are persons with an income under \$2,500 a year, and it consists of two-thirds of the city's population. But the essential purpose of the legislation is not to benefit that class or any class; it is to protect and safeguard the entire public from the menace of the slums."<sup>73</sup>

Once it is established that housing for persons of low income is a purpose for which public funds may properly be expended, there remains only to determine how such projects may best be financed if we are to see any substantial advances made in solving the problem.

71. 270 N. Y. at 340, 1 N. E. (2d) at 155.

72. *In re* Opinion of Justices, 211 Mass. 624, 98 N. E. 611 (1912).

73. *New York City Housing Authority v. Muller*, 270 N. Y. 333, 342, 1 N. E. (2d) 153, 155 (1936).

## LOW-RENT HOUSING: A METHOD OF FINANCING

It has already been pointed out that a state-wide program of low-rent housing projects could lawfully be financed on a self-liquidating basis by the issuance of revenue bonds payable solely from the revenues of the projects. The method employed by the New York legislature has not been direct state action but the creation of housing authorities which are corporate entities, separate and distinct from the state itself and from the municipal corporations of the state, with broad powers to undertake and finance slum clearance and low-rent housing projects.<sup>74</sup> These authorities have no taxing power but must depend for their revenues entirely upon the income-producing ability of the projects which they undertake. The authority concept in the field of public revenue financing represents the most promising development in the law relating to the financing of useful public improvements. In the past few years the use of the authority as an instrument for undertaking and financing public improvements has been successful for many types of enterprises. The utilization of such a separate corporate instrumentality has been sustained by courts in Texas to finance a state program of electrification and water conservation;<sup>75</sup> in Montana, for the conservation of the water resources of the state;<sup>76</sup> in South Carolina, for the development of a state hydro-electric navigation and flood control program;<sup>77</sup> in Nebraska, for public power and irrigation;<sup>78</sup> in New York, for sewer<sup>79</sup> and power<sup>80</sup> projects; in California, for a toll bridge;<sup>81</sup> and in Arizona,<sup>82</sup> Georgia,<sup>83</sup> Idaho,<sup>84</sup> Louisiana,<sup>85</sup> and Minnesota<sup>86</sup> for the construction of buildings by state educational institutions.<sup>87</sup>

The use of the housing authority as an instrumentality for financing, constructing and operating adequate housing facilities for persons with low income as well as for providing employment in the construction of such housing projects is a practical as well as a lawful method of attacking the unemployment and the inadequate housing problems. Judged by any stand-

74. N. Y. Laws 1934, c. 4.

75. *Lower Colo. River Authority v. McCraw*, 125 Tex. 268, 83 S. W. (2d) 629 (1935).

76. *State ex rel. Normile v. Cooney*, 100 Mont. 391, 47 P. (2d) 637 (1935). *Contra: State Water Conservation Bd. v. Enking*, 58 P. (2d) 779 (Idaho, 1936).

77. *Clarke v. South Carolina Pub. Serv. Authority*, 177 S. C. 427, 181 S. E. 481 (1935).

78. *State ex rel. Loseke v. Fricke*, 126 Neb. 736, 254 N. W. 409 (1934).

79. *Robertson v. Zimmermann*, 268 N. Y. 52, 196 N. E. 740 (1935).

80. *Gaynor v. Marohn*, 268 N. Y. 417, 198 N. E. 13 (1935).

81. *California Toll Bridge Authority v. Wentworth*, 212 Cal. 298, 298 Pac. 485 (1931); *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, 21 P. (2d) 425 (1933).

82. *Board of Regents v. Sullivan*, 42 P. (2d) 619 (Ariz. 1935).

83. *State v. Regents of University System*, 179 Ga. 210, 175 S. E. 567 (1934).

84. *State ex rel. Miller v. State Bd. of Educ.*, 52 P. (2d) 141 (Idaho, 1935).

85. *Caldwell Bros. v. Bd. of Supervisors*, 176 La. 825, 147 So. 5 (1933); *State ex rel. Porterie v. Charity Hospital*, 182 La. 268, 161 So. 606 (1935) (buildings for state hospital).

86. *Fanning v. University of Minn.*, 183 Minn. 222, 236 N. W. 217 (1931).

87. For a collection of laws creating authorities, see *Foley, Revenue Financing of Public Enterprises* (1936) 35 MICH. L. REV. 1, 6.

ards which can be applied in appraising the efficacy of any particular plan of public financing, the housing authority offers the best solution to the problem of furnishing adequate housing facilities to persons with low income. That it is possible under the state constitutions for the legislatures to pass laws creating or providing for the creation of housing authorities is beyond question. Such authorities may be given powers as broad, in constructing, financing and operating housing projects, as private corporations engaged in a similar type of business customarily exercise.<sup>88</sup> The public has nothing to fear from such broad powers being vested in public corporate entities when such agencies are engaged in a non-profit-making endeavor, are managed by experts whose full time and energy are devoted to the business of the corporation, and are constantly under public regulation and control. Moreover, the fact that such authorities do not have the power to levy taxes or to draw upon general public funds must commend this type of instrumentality to those persons who are concerned with the spectre of rising state and municipal taxes.

Although the use of the authority as a device for financing and undertaking public service enterprises has been a very recent development in the field of municipal law, twenty states have adopted laws creating or providing for the creation of authorities with power to undertake low-rent housing programs.<sup>89</sup> Most of these laws were prepared by the Public Works Administration at the request of the governors of the respective states. The type of authority which was suggested was one created by or under state legislation but not one which would be authorized to engage in a state-wide housing program.<sup>90</sup> On the contrary, the law suggested by PWA provided for the creation of housing authorities in many municipal corporations.

Under the form of law suggested by PWA and enacted in many states, each housing authority would be a body corporate and politic managed by five commissioners appointed by the mayor to serve for staggered terms of five years. The commissioners would receive no salary, but the expenses incident to the exercise of their duties would be reimbursed. Each housing authority would be empowered to plan, construct, reconstruct and operate

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88. See *supra* note 57.

89. Ala. Gen. Acts 1935, no. 56, p. 126; Colo. Sess. Laws 1935, c. 132; Del. Laws 2d Spec. Sess. 1933, c. 16; Ill. Laws 3d Spec. Sess. 1934, p. 159; Ky. Acts 1934, c. 113; La. Acts 1936, no. 275, p. 697; Md. Laws Spec. Sess. 1933, c. 32; Mass. Acts 1933, c. 364, amended by Mass. Acts 1935, c. 449; Mont. Laws 1935, c. 140; Neb. Laws 1935, c. 29; N. J. Laws 1933, c. 444; N. Y. Laws 1934, c. 4, amended by N. Y. Laws 1935, c. 310; N. C. Pub. Laws 1935, c. 456; Ohio Laws 1st Spec. Sess. 1933, § 1078, p. 56; PA. STAT. ANN. (Purdon Supp. 1935) tit. 53, § 2900 (not limited to housing); R. I. Acts Spec. Sess. 1935, c. 2255; S. C. Laws 1934, no. 783, p. 1368, amended by S. C. Laws 1935, nos. 301, 345, pp. 424, 502; Tenn. Acts Spec. Sess. 1935, c. 20; W. Va. Acts 2d Ex. Sess. (1933), c. 93; Wis. Laws 1935, c. 525. Hawaii also has a housing authority act: Hawaii Laws 1935, c. 262A.

For a discussion of the Kentucky Act, see Pumphrey, *Housing Legislation in Kentucky* (1936) 24 Ky. L. Rev. 306, 470.

90. An act similar to Tenn. Acts Spec. Sess. 1935, c. 20, was suggested rather than an act along the lines of N. J. Laws 1933, c. 444.



housing projects, to take over projects by lease or purchase and to operate projects so acquired, to act as agent in the acquisition, construction, operation or management of housing projects, to acquire necessary personal property and to acquire real property by eminent domain under procedure provided by existing state law, to engage in research relating to housing, to convey real property to a governmental agency for use in connection with a housing project, and to borrow money and to accept grants for housing projects. The authority would have the power to finance a housing project by the issuance of bonds secured by a mortgage on and a pledge of the income from such project, but in no case would the authority be authorized to issue a bond which would be an obligation of the state or the municipality in which the authority operates.

Whether or not a revenue bond of a housing authority additionally secured by a foreclosable mortgage would constitute a debt of a state or of the municipal corporation in which the authority is operating notwithstanding provisions in the enabling act prohibiting the authority from creating such a debt, has not been decided by any court. If the authority's bonds are secured solely by a pledge of revenues, there is no question but that such a debt would not be created in those states which adopt the special fund doctrine.<sup>91</sup> It is only the mortgage—sometimes considered as necessary if private capital is to be attracted—which makes the legality of the bonds of a housing authority an unsettled question.

A few courts have held that a foreclosable mortgage on state or municipal property as additional security for a revenue bond will create a debt within the meaning of a constitutional provision relating to municipal or state indebtedness.<sup>92</sup> These decisions, however, should not be controlling as to bonds issued by a housing authority for the reason that the property of such an authority is not property of the state or of any municipal corporation, but property of an entity separate and distinct from the state or any municipal corporation. Moreover, so long as the mortgage covers property acquired by the authority with the proceeds of obligations which it issues, no question of state or municipal debt should arise because the mortgage in such a case would be in the nature of a purchase money mortgage which is generally considered as coming within the purview of the special fund doctrine.<sup>93</sup>

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91. See *supra* note 49.

92. *Santa Cruz v. Wykes*, 202 Fed. 357 (C. C. A. 9th, 1913); *Boykin v. River Junction*, 121 Fla. 902, 164 So. 558 (1935); *Brash v. State Tuberculosis Bd.*, 167 So. 827 (Fla. 1936); *Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861 (1902); *Browne v. Boston*, 179 Mass. 321, 60 N. E. 934 (1901); *Ironwood Waterworks Co. v. Trebilcock*, 99 Mich. 454, 58 N. W. 371 (1894); *Lesser v. Warren Borough*, 237 Pa. 501, 85 Atl. 839 (1912); *In re Opinion to the Governor*, 54 R. I. 45, 169 Atl. 748, 89 A. L. R. 1521 (1933); *State v. Portage*, 174 Wis. 588, 184 N. W. 376 (1921).

93. *Jerseyville v. Connett*, 49 F. (2d) 246 (C. C. A. 7th, 1931); *Fox v. Bicknell*, 193 Ind. 537, 141 N. E. 222 (1923); *Hughes v. State Bd. of Health*, 260 Ky. 228, 84 S. W. (2d)

In fact, it can be argued that even if the mortgage covers property which has been donated to the housing authority by the state or a municipal corporation, or is purchased with moneys turned over to the authority by a state or a municipal corporation, the principle that no state debt is created should apply, because once the property or the money comes into the hands of the authority, for example, from an appropriation by the state, it ceases to be state or municipal property and thereafter should be subject to the same liability as any other property acquired by the authority.<sup>94</sup> Nor should the use of state funds in aid of a housing authority be construed as a lending of the state's credit in violation of a constitutional provision prohibiting the lending of credit to a person, association or corporation.<sup>95</sup>

The argument that when a housing authority mortgages its property to secure its bonds the bonds become debts of the state or of a municipal corporation, must rest upon the theory that the property is state or municipal property and that the risk of the forfeiture of this property may result in the levy of a tax to save it from foreclosure at the hands of bondholders. This argument is fallacious. It overlooks the fundamental facts that the housing authority is an entity separate and distinct from the state or any municipal corporation and that the legislature has delegated to the housing authority full power to take title to property in its own name and to hold such property for its own uses. Having plenary control over its property, however acquired, the authority may convey fee simple title to such property. It would hardly be disputed that such a conveyance by the authority would not be regarded as a conveyance by the state or any municipal corporation or as the conveyance of property owned by the state or a municipal corporation. How, therefore, can it be said that a mortgage of a housing authority, which is simply a conveyance subject to a condition subsequent, is a mortgage by the state or by a municipal corporation on property of the state or of any corporation other than the authority?

It would be an anomalous doctrine which would affirm that when the state or a municipal corporation, acting under proper legislative authority, creates an encumbrance upon its property which, like the property of the

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52 (1935); *State ex rel. Excelsior Springs v. Smith*, 336 Mo. 1104, 82 S. W. (2d) 37 (1935); *State ex rel. Normile v. Cooney*, 100 Mont. 391, 47 P. (2d) 637 (1935); *Farmers State Bank v. Conrad*, 100 Mont. 415, 47 P. (2d) 853 (1935); *Kasch v. Miller*, 104 Ohio St. 281, 135 N. E. 813 (1922); *Clarke v. South Carolina Pub. Serv. Authority*, 177 S. C. 427, 181 S. E. 481 (1935); *Seward v. Bowers*, 37 N. M. 385, 24 P. (2d) 253 (1933) *semble*.

94. See *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, 21 P. (2d) 425 (1933); *State Highway Comm. v. Veiling*, 230 Ky. 381, 19 S. W. (2d) 967 (1929); *State ex rel. Porterie v. Charity Hospital*, 182 La. 268, 161 So. 606 (1935); *State ex rel. Hannibal v. Smith*, 335 Mo. 825, 74 S. W. (2d) 367 (1934); *State ex rel. Normile v. Cooney*, 100 Mont. 391, 47 P. (2d) 637 (1935). But see *Wilson v. State Water Supply Comm.*, 84 N. J. Eq. 150, 93 Atl. 732 (1915).

95. *State ex rel. Porterie v. Charity Hospital*, 182 La. 268, 161 So. 606 (1935); *State ex rel. Normile v. Cooney*, 100 Mont. 391, 47 P. (2d) 637 (1935); *Loomis v. Callahan*, 196 Wis. 518, 220 N. W. 816 (1928). But see *Brash v. State Tuberculosis Bd.*, 167 So. 827 (Fla. 1936); *In re Opinion of the Justices*, 195 N. E. 897 (Mass. 1935).

housing authority, is held for the benefit of the public, no debt is contracted except that of the state or the municipal corporation itself, but that if a housing authority creates an encumbrance on its property, a debt of the state or some public corporation, in addition to the debt of the housing authority, is contracted. No special grounds of public policy and no historical antecedents require or justify such a rule of law.

An authority, such as a housing authority, is not within the express language of any constitutional provision limiting the creation of debts by the state or its political subdivisions. Nor is a housing authority within the intended scope of such constitutional provisions, which were framed to apply only to state agencies having the power of taxation. In order to avoid a default upon its bonds, the housing authority can impose no tax burden upon any property owner.

The case law on the subject of authorities has been further developed in Pennsylvania and New York than in any other states. The Supreme Court of Pennsylvania, in the case of *Tranter v. Allegheny County Authority*,<sup>96</sup> upheld the validity of a statute<sup>97</sup> creating an authority in each county of the second class in the commonwealth. Pursuant to this statute, the commissioners of Allegheny County obtained a certificate of incorporation for the Allegheny County Authority and the Authority proposed to finance the construction and operation of a tunnel as part of the highway system in the vicinity of the City of Pittsburgh. The Pennsylvania Supreme Court, carefully limiting its decision to the project before it, decided that the highways, roads, streets and bridges of the state were property of the state, and the legislature could set up a public corporation as the agency of the state to finance, administer, control and maintain them. The separate corporate status of the authority was recognized to the extent that the court said "it cannot be said that the Authority's debt will be the debt of the county." The earlier decision in the case of *Lesser v. Warren Borough*<sup>98</sup> was cited with approval and distinguished on the ground that in that case "the borough's bonds were to be secured, not alone by the revenue from the waterworks proposed to be purchased, but by the waterworks itself." Although the statute pursuant to which the Allegheny County Authority was created authorized an authority to give a mortgage on the property as security for its revenue bonds, this power was not exercised by the Allegheny County Authority, and the court therefore did not pass upon the effect of a mortgage given as additional security for the authority's bonds.

The most recent Pennsylvania case relating to authority legislation is *Kelley v. Earle*,<sup>99</sup> in which was involved a statute creating the General State

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96. 316 Pa. 65, 173 Atl. 289 (1934).

97. PA. STAT. ANN. (Purdon Supp. 1935) tit. 16, § 4160.

98. 237 Pa. 501, 85 Atl. 839 (1912).

99. 320 Pa. 449, 182 Atl. 501 (1936).

Authority.<sup>100</sup> The project which was the subject of the litigation was a waterworks, to be constructed by the General State Authority on land to be donated to the authority by the commonwealth and to be leased to the commonwealth at a rental sufficient to pay operating expenses of the authority and the principal of and interest on its bonds. The lease provided that upon payment by the commonwealth of the stipulated rentals title to the waterworks would vest in the commonwealth. The court held that the proposed lease would create a debt of the commonwealth prohibited by the constitution for the reason that it amounted to the purchase by the commonwealth of a capital improvement through annual instalments. The majority opinion (there were three dissenting opinions) did not expressly state that the Act creating the state authority was unconstitutional, and it can reasonably be construed as condemning, not the act creating the authority, but the particular method employed by the authority for financing the project.<sup>101</sup> In approving the *Tranter* decision, the court reaffirmed the proposition that revenue financing by public corporations is consistent with the constitution.

In New York, the Court of Appeals has held that the legislature may create<sup>102</sup> or provide for the creation<sup>103</sup> of an authority where there is no attempt to grant it general powers of local government but where the sole purpose of the authority is to finance and undertake a useful revenue-producing enterprise.<sup>104</sup> On the question of the constitutionality of bonds of an authority, the court has held that obligations of the Buffalo Sewer Authority payable solely from the revenues of the sewer project under the jurisdiction of the Authority did not constitute a debt of the City of Buffalo.<sup>105</sup> Under both the New York and Pennsylvania decisions the question is still open as to whether a debt within the meaning of the state constitution would be created if bonds of an authority are additionally secured by a mortgage either upon property which is acquired by the authority with the proceeds of its obligations or upon property of the authority conveyed to it by the state or a municipality.

In the *Buffalo Sewer Authority* case, the New York court mentioned and apparently considered the fact that the bonds of the Authority were not secured by a mortgage, for the court said:

"Bonds issued by the Sewer Authority are not protected by a lien upon the lands or properties either of the existing sewer system or upon the

100. PA. STAT. ANN. (Purdon Supp. 1935) tit. 71, § 1707.

101. From the language of the dissenting opinions and from the nature of the pleadings, however, it is possible to justify the conclusion that the entire act was condemned.

102. *Robertson v. Zimmermann*, 268 N. Y. 52, 196 N. E. 740 (1935); *Gaynor v. Marohn*, 268 N. Y. 417, 198 N. E. 13 (1935).

103. *Suffolk County v. Water Power and Control Comm.*, 269 N. Y. 158, 199 N. E. 41 (1935).

104. See Foley, *A Note on Recent Authority Cases* (1936) 1 LEGAL NOTES ON LOCAL GOVERNMENT 2.

105. *Robertson v. Zimmermann*, 268 N. Y. 52, 196 N. E. 740 (1935).

lands and properties to be acquired. The sewer rents provide the only means of payment.”<sup>106</sup>

A favorable decision by the New York Court of Appeals or the Pennsylvania Supreme Court on questions raised by the additional security of the mortgage would go a long way toward establishing a legal basis for a nation-wide movement for the creation of state authorities to finance, construct and operate housing projects for persons of low income.

#### CONCLUSION

There is a story told by Mr. Justice Holmes about a Vermont justice of the peace, before whom a suit was brought by one farmer against another farmer for breaking a churn. The justice of the peace took time to consider the problem and then said he had looked through the statutes, could find nothing about churns, and therefore gave judgment for the defendant. It is to be hoped that the same state of mind will not be shown by justices who, sooner or later, will be looking through the cases for something about housing authorities.

The cases which will arise involving housing authorities will not be solved by reference to any precedent in point, for there is none. There are some analogies on one side and some analogies on the other side. In the field of housing there is no established rule of law. If there are but a few precedents specifically upholding the power of the state to deal with housing, there are even fewer precedents which deny that power. Every effort to extend the functions of the state is viewed with alarm and is branded as socialistic by its opponents. But by others equally devoted to our institutions an extension of the social functions of the state into new fields is regarded as necessary to preserve those institutions. Certainly city slums are not the safest frontiers against subversive ideas. But whatever the conflict may be as to the wisdom of state action in the housing field, it is submitted that this conflict presents a legislative rather than a judicial question. It is not for judges to strike down legislation simply because it does not conform with their own social or economic predilections.

In this article an attempt has been made to choose between the competing analogies of existing rules and to select that analogy which appears to be thoroughly in harmony with the rest of the law of public financing and wholly consonant with the social purpose of government. It is submitted that the following general propositions are sound in principle:

(1) That the legislature has the power to create and provide for the creation of new public corporations.

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106. *Id.* at 62, 196 N. E. at 744.

(2) That the legislature has the power to authorize as the sole corporate purpose of such public corporations the construction of homes for persons having an income insufficient to obtain the use of privately owned safe and sanitary dwelling accommodations.

(3) That the legislature has the power to declare that housing for persons of low income is a public purpose for which land may be condemned and for which public property may be donated.

(4) That although not vested with power to undertake a state-wide housing program, a housing authority created by or under state laws and limited in its activities to a local area, because it is concerned primarily with health and public welfare, is a state instrumentality and not the agency of the municipal corporation within whose territory it may function.

(5) That the obligations of such public corporations are not debts enforceable against the state or of any other of its agencies or instrumentalities, or of its political or civil subdivisions, since such public corporations are juristic persons, independent of their creators, and like other corporations wear the cloak of limited liability.

(6) That the obligations of such public corporations do not constitute debts within the meaning of a constitutional debt provision, since such obligations are not payable from revenues derived from taxation, nor are they a burden on the taxing power.

(7) That since such public corporations have the power to take title to property in their own names, hold such property for their own uses, and alienate such property when alienation is desirable, the fact that the obligations of such public corporations are secured by liens upon their property, as well as upon the revenues of their property, should not make such instruments debts of the state or of any corporation other than the expressed obligor.

(8) That the creation of housing authorities of the character described provides a constitutional method whereby a state may accomplish a desired social result without interfering with or duplicating the functions of local governmental units.