

# Short Constitutional History of Entities Commonly Known as Authorities

William J. Quirk

Leon E. Wein

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

William J. Quirk and Leon E. Wein, *Short Constitutional History of Entities Commonly Known as Authorities*, 56 Cornell L. Rev. 521 (1971)

Available at: <http://scholarship.law.cornell.edu/clr/vol56/iss4/1>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# CORNELL LAW REVIEW

---

Volume 56

April 1971

Number 4

---

## A SHORT CONSTITUTIONAL HISTORY OF ENTITIES COMMONLY KNOWN AS AUTHORITIES

*William J. Quirk† and Leon E. Wein††*

In 1858 a petition was presented to the New York legislature requesting the calling of a new constitutional convention. The petition recited that the convention should abolish the executive and legislative branches of government and vest all of those powers in the President, Vice President, and Board of Directors of the New York Central Railroad. This, the petitioners believed, would only formalize the existing state of affairs and would relieve the people from the large amounts unnecessarily spent to sustain the executive and legislative departments. The call for a new convention was submitted to the people and was narrowly defeated.<sup>1</sup>

This extraordinary gesture reflects, in a radical way, a continuing theme of New York's constitutional history—the desire to curb legislative abuses. The original New York constitution was a comparatively simple and concise document that imposed only slight restraints on the exercise of legislative power. New York's present constitution, however, contains numerous and precise limitations on the legislature's substantive powers as well as its procedures. The development of the constitution from a simple to a complex document, which this article will trace, is largely attributable to repeated efforts on the part of constitutional conventions to correct a particular source of abuse—the legislature's ability to create state indebtedness. All too often, the legislative response

---

† Associate Professor of Law, University of South Carolina. A.B. 1956, Princeton University; LL.B. 1959, University of Virginia.

†† Instructor in Law, Brooklyn Law School. A.B. 1961, Brooklyn College; LL.B. 1966, New York University; Dip. Law 1966, Cambridge University.

<sup>1</sup> 2 C. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 233-34 (1906) [hereinafter cited as LINCOLN].

has been to seek ways in which to subvert the limitations placed upon it. The legislature's most recent response is to use entities known as authorities as debt-evading devices.

## I

### EARLY CONSTITUTIONAL DEVELOPMENT

#### A. *The 1777 Convention*

The first constitution of New York was adopted by convention on April 20, 1777, and, although conceived in haste because of war-imposed pressures, it remained the state's fundamental law for forty-five years.<sup>2</sup> Authored by John Jay, the constitution created a bicameral legislature with power vested in a Senate and an Assembly.<sup>3</sup> A veto power over legislation was placed in a Council of Revision composed of the Governor, the Chancellor, and the judges of the supreme court.<sup>4</sup> All bills passed by the legislature were to be submitted to the Council for their "revisal and consideration."<sup>5</sup> If the Council found the bill "improper," it was to be returned to the legislature with the Council's written objections.<sup>6</sup> The legislature, after consideration of the Council's objections, could enact the bill into law by a two-thirds vote.<sup>7</sup> The only substantive limitations imposed on the legislature were of a bill of rights nature;<sup>8</sup>

---

<sup>2</sup> 1 *id.* at 558. The first constitution was not submitted to the people. The Convention was specifically empowered to create a constitution and the people did not reserve the right to ratify its work. *Id.* at 481-83. For a general discussion of the 1777 Convention, see J. DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 46-57 (1915).

<sup>3</sup> N.Y. CONST. art. II (1777) provided:

This convention doth further, in the name and by the authority of the good people of this state, ORDAIN, DETERMINE AND DECLARE, That the supreme legislative power within this state, shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the state of New York; the other to be called the senate of the state of New York; who, together, shall form the legislature, and meet once at least in every year for the despatch of business.

<sup>4</sup> *Id.* art. III.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* A bill would also become law if the Council failed to return it to the legislature within 10 days after submission. *Id.*

<sup>8</sup> The free exercise of religion was not to be interfered with (*id.* art. XXXVIII); trial by jury was to "remain inviolate forever" (*id.* art. XLI); and bills of attainder were generally forbidden (*id.*). Curiously, the constitution permitted bills of attainder for crimes committed prior to the end of "the present war." *Id.* But in no event was such a bill to "work a corruption of blood." *Id.*

the procedural limitations imposed on the legislature were similarly slight.<sup>9</sup> The state's original constitution, then, created a legislature that was free to act with few constraints.

The original constitution contained no provision for its amendment or for the calling of a new constitutional convention. In 1820 the legislature passed a bill recommending a new constitutional convention be held and providing for the election of delegates.<sup>10</sup> The bill was vetoed by the Council of Revision on the ground that the legislature had no authority to call a convention. The Council's objections, reported by Chancellor Kent, noted that it "may well be doubted whether it belongs to the ordinary legislature—chosen only to make laws in pursuance of the provisions of the existing Constitution—to call a convention . . ."<sup>11</sup> The Council therefore concluded that the question of a general constitutional revision should be submitted to the people in the first instance.<sup>12</sup> The bill was subsequently reconsidered by the legislature but failed to receive the two-thirds vote needed to override the Council's veto.<sup>13</sup> In 1821 the question of calling a convention was submitted to the people.<sup>14</sup>

### B. *The 1821 Convention*

The 1821 Convention, among other things, (1) abolished the Council of Revision, transferring the veto power to the Governor;<sup>15</sup> (2) substantially relaxed property qualifications with respect to suffrage;<sup>16</sup> and (3) expanded the number of specific bill of rights provisions.<sup>17</sup> Of most interest for our purposes, the Convention adopted provisions governing canal policy which placed limits on the legislature's power. By 1821

---

<sup>9</sup> The style of the enacting clause was prescribed (*id.* art. XXXI); the legislature was required to keep and publish a journal of its proceedings (*id.* art. XV); and the doors of both the Senate and Assembly were to be "at all times . . . kept open to all persons" unless the welfare of the state required secrecy (*id.*).

<sup>10</sup> 1 LINCOLN 623-24.

<sup>11</sup> *Id.* at 625.

<sup>12</sup> *Id.* at 626.

<sup>13</sup> *Id.* at 628.

<sup>14</sup> Act of March 13, 1821, ch. 90, [1821] N.Y. Laws 83.

<sup>15</sup> N.Y. CONST. art. I, § 12 (1821). The debates of the 1821 Convention are found in A REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF NEW YORK, 1821 (L. Clarke ed. 1821) [hereinafter cited as 1821 DEBATES]. For a general discussion of the 1821 Convention, see J. DOUGHERTY, *supra* note 2, at 100-39; 2 J. HAMMOND, THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK 1-85 (4th ed. 1850).

<sup>16</sup> N.Y. CONST. art. II (1821).

<sup>17</sup> The 1821 constitution expressly included freedom of speech and of the press (*id.* art. VII, § 8), due process requirements, and a provision that "private property [shall not] be taken for public use, without just compensation" (*id.* § 7).

the canal question had already had a fairly extensive history of state and federal involvement. Its subsequent history was to have a critical effect on constitutional development leading directly to the radical reforms of later constitutional conventions.

President Jefferson, in his 1806 message to Congress, suggested the use of federal funds for such important internal improvements as "roads and canals."<sup>18</sup> New York attempted to secure such aid for canal construction and sent DeWitt Clinton and Gouverneur Morris to Washington in 1812 for that purpose.<sup>19</sup> Congress, however, refused to become involved in the project, and the state determined to proceed with the construction on its own credit.<sup>20</sup> In 1816 the legislature appointed five individuals as Canal Commissioners to "consider, devise and adopt" such measures as might be needed to effect the construction of canals between the Hudson River and Lake Erie and the Hudson River and Lake Champlain.<sup>21</sup> These commissioners were authorized to undertake all necessary surveys and plans for the canal construction,<sup>22</sup> and to make applications to the federal government for grants or donations.<sup>23</sup> In addition, they were to ascertain in what amounts and upon what terms, loans could be "procured on the credit of this state."<sup>24</sup>

In 1817 the canal commissioners were empowered by statute to "commence making the said canals."<sup>25</sup> The same statute created a canal fund under the jurisdiction of a separate group of commissioners known as the Commissioners of the Canal Fund.<sup>26</sup> These commissioners were authorized to borrow "monies on the credit of the people of this state, at a rate of interest not exceeding six percentum."<sup>27</sup> To evidence such loans, the Comptroller was directed to issue "transferable certificates of stock."<sup>28</sup> In addition to the borrowing power, several other sources of income were appropriated to the canal fund.<sup>29</sup> The Canal Fund Commissioners were authorized to provide funds to the Commissioners of the Canal as necessary for the construction of the canal, and the latter

<sup>18</sup> 1 LINCOLN 700.

<sup>19</sup> *Id.* at 704.

<sup>20</sup> *Id.* at 705.

<sup>21</sup> Act of April 17, 1816, ch. 237, § 1, [1816] N.Y. Laws 295.

<sup>22</sup> *Id.* § 3.

<sup>23</sup> *Id.* § 4, [1816] N.Y. Laws 296.

<sup>24</sup> *Id.*

<sup>25</sup> Act of April 15, 1817, ch. 262, § 2, [1817] N.Y. Laws 302.

<sup>26</sup> *Id.* § 1, [1817] N.Y. Laws 301.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The reference to state "stock" is to be understood as a reference to a debt instrument.

<sup>29</sup> *Id.* §§ 4-5, 7. [1817] N.Y. Laws 303-05.

commissioners, when the canal became operable, were required to establish reasonable tolls for the benefit of the canal fund.<sup>30</sup>

As the Convention met, the main canal between Lake Erie and the Hudson River was in the process of construction. Projections for the canal's success tended to be optimistic. Governor DeWitt Clinton, for example, stated that the debt incurred for the canal would be retired within a few years by the revenues produced; these would then become a "prolific source of revenue for the general purposes of government."<sup>31</sup>

The canal policy, as statutorily established, was agreeable to the Convention. The question to the Convention was whether the policy should be left to legislative discretion or fixed in the new constitution. Some delegates believed the legislature could be trusted to act appropriately in the public interest and thought it a mistake to fix a canal policy beyond its control.<sup>32</sup> The majority of the delegates, however, fearful that funds might be diverted from the payment of the canal debt, determined that the existing policy should be constitutionally protected.<sup>33</sup> The constitution therefore provided that the existing toll schedules established by the Canal Commissioners could not be reduced.<sup>34</sup> It further provided that there be "inviolably appropriated" to the payment of the canal debt: (1) the canal tolls, (2) the salt duty, (3) the auction duty, and (4) the "in lieu of" tax on steamboat passengers.<sup>35</sup> In addition, it was expressly provided that "the legislature shall never sell, or dispose of" the canals.<sup>36</sup>

<sup>30</sup> *Id.* § 2, [1817] N.Y. Laws 302.

<sup>31</sup> 1 LINCOLN 708-09. Governor Clinton, in his 1818 message to the legislature, noted the public purpose to be served by the canal and predicted its eventual profitability:

The internal trade of a country is equally essential to the prosperity of agriculture, of manufactures, and of commerce; for, embracing the interests of all, it extends its enlivening influence to every important department of human industry . . . and it is among the first duties of government to facilitate the transportation of commodities . . . for, in peace or in war, it is equally essential to our cardinal interests.

With respect to the debt which will be incurred in the prosecution of internal improvements, there can be no doubt but that light tolls on our own commodities, and higher transit duties on foreign productions, will, in a few years, not only accumulate a fund for its extinguishment, but be a prolific source of revenue for the general purposes of government.

*Id.*

<sup>32</sup> *Id.* at 714.

<sup>33</sup> *Id.*

<sup>34</sup> N.Y. CONST. art. VII, § 10 (1821).

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

<sup>36</sup> *Id.* The canals were completed within a few years of the Convention—the Champlain Canal in 1824 and the Erie Canal in 1825. 1 LINCOLN 712-13.

## II

## THE 1846 CONVENTION

The state's next constitutional convention was not held until 1846. By that time the state had amassed a debt of \$38,000,000.<sup>37</sup> The success of the Erie Canal—completed in 1825—had led the state, and indeed the country, into a wave of public improvement construction.<sup>38</sup> The burden of these improvements fell upon the states since the national government generally chose to avoid involvement.<sup>39</sup> In New York the construction of a group of subsidiary canals was undertaken.<sup>40</sup> In addition, the state had embarked on a program of giving its credit to railroads.<sup>41</sup> With the Panic of 1837 and the general improvidence of its investments, the state ran into hard times. In 1842 Comptroller Flagg reported that the state was pressed “to the very brink of dishonor and bankruptcy.”<sup>42</sup>

New York was not alone in its difficulties; public improvements had been enthusiastically undertaken by many other states as well. By 1842 the states had incurred debts of over \$200,000,000, most of which were unsecured.<sup>43</sup> In 1790 the federal government had assumed the debts of the states.<sup>44</sup> It was now proposed that the federal government

---

<sup>37</sup> *People v. Westchester County Nat'l Bank*, 231 N.Y. 465, 471-72, 132 N.E. 241, 243 (1921).

<sup>38</sup> H. ADAMS, PUBLIC DEBTS 329-30 (1895) [hereinafter cited as ADAMS]; N.Y. STATE CONSTITUTIONAL CONVENTION COMM., REPORT: PROBLEMS RELATING TO TAXATION AND FINANCE 85 & n.7 (1938) [hereinafter cited as TAXATION & FINANCE]. The Erie Canal had not only been a success, but its revenue projections had proven accurate. ADAMS 329.

<sup>39</sup> For example, President Jackson vetoed the Maysville and Lexington road bill, refusing to allow any federal internal improvements until the national debt was paid and the Constitution amended to authorize explicitly the expenditure of federal funds for public works. 3 J. PARTON, LIFE OF ANDREW JACKSON 285 (1861).

<sup>40</sup> As of 1882, when canal tolls were abolished, all of the state's significant canals, with the exception of the original Erie, had lost money. N.Y. STATE COMM. ON CANALS, REPORT, 1900 N.Y. ASSEMBLY DOC. NO. 79, at 151 (table 1).

<sup>41</sup> It is not argued that such gifts of credit did not fulfill a public purpose. In *People v. Westchester County Nat'l Bank*, 231 N.Y. 465, 475, 132 N.E. 241, 244 (1921), the Court of Appeals noted: “Gifts of credit to railroads served an important public purpose.” See also *Bank of Rome v. Village of Rome*, 18 N.Y. 38 (1858); *Clarke v. Rochester*, 24 Barb. 446, 456, 481 (N.Y. Sup. Ct. 1857), *aff'd*, 28 N.Y. 605 (1864).

<sup>42</sup> D. SOWERS, THE FINANCIAL HISTORY OF NEW YORK STATE FROM 1789 TO 1912, at 70 (1914).

The Comptroller's Report stated: “The impulse for internal improvement and local interests regardless of the condition of the finances has pressed the state to the very brink of dishonor and bankruptcy.” *Id.*

<sup>43</sup> ADAMS 331.

<sup>44</sup> Adams points out that assumption was appropriate in that instance since debts incurred in the Revolutionary War were in reality federal debts. *Id.* at 332.

again do the same. The assumption scheme contemplated the distribution of \$200,000,000 of United States stock among the states.<sup>45</sup> The federal government, however, had avoided undertaking these internal improvements in the first instance and had no desire to become involved now that state policy had failed.<sup>46</sup>

Aid to private enterprise was another aspect of the state's problem. The largest single gift of state credit was for the benefit of the New York and Erie Railroad Company. In 1836 the legislature authorized the issuance of \$3,000,000 of state stock to the company,<sup>47</sup> and empowered the company to sell the stock at public auction.<sup>48</sup> The statute provided further that the stock was backed by "the faith and credit of the people of this state."<sup>49</sup> However, it was believed that the state would not be required to redeem the stock or pay interest on it since the railroad promised to pay such amounts.<sup>50</sup>

The statute also granted the state a first mortgage lien and the right to foreclose in the case of a default of either interest or principal.<sup>51</sup> When the railroad became insolvent, however, it was determined that the state's security was practically worthless. The state's lien covered the track and roadbed but not the rolling stock, stations, or yards, which could be freely disposed of by the railroad. Further, the narrow strip of land involved had real value only as part of an operating railroad.<sup>52</sup> The point was proven when, in 1841, the state sold two railroads—security for \$515,000 of debt—for \$16,100.<sup>53</sup>

The state was perfectly free to repudiate its debt<sup>54</sup> but attempted instead to extricate itself. In 1842 the legislature enacted what was popularly known as the "Stop and Tax" bill,<sup>55</sup> which for the first time

<sup>45</sup> *Id.* at 335. The scheme was supported by foreign creditors of the states who desired to exchange their state debtor for a federal debtor. *Id.* at 337.

<sup>46</sup> *Id.* at 339.

<sup>47</sup> Act of April 23, 1836, ch. 170, § 1, [1836] N.Y. Laws 227.

<sup>48</sup> *Id.* § 7, [1836] N.Y. Laws 229. For a general discussion of state aid to railroads, see A. HILLHOUSE, *MUNICIPAL BONDS* 143-99 (1936).

<sup>49</sup> Act of April 23, 1836, ch. 170, § 4, [1836] N.Y. Laws 228.

<sup>50</sup> This was supported by the statute:

The said company shall make provision for the punctual redemption of the said stock, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose . . . .

*Id.* § 9, [1836] N.Y. Laws 229.

<sup>51</sup> *Id.* § 11.

<sup>52</sup> TAXATION & FINANCE 110.

<sup>53</sup> *Id.*; D. SOWERS, *supra* note 42, at 84.

<sup>54</sup> The sovereign power of repudiation was not surrendered in New York until 1920. N.Y. CONST. art. VII, § 11 (1920).

<sup>55</sup> Act of March 29, 1842, ch. 114, [1842] N.Y. Laws 79.



since 1827 imposed direct real and personal property taxes.<sup>56</sup> The Act further provided that expenditures for all public works, with certain exceptions, be suspended.<sup>57</sup>

In 1841 Arphaxad Loomis proposed a basic reform intended to prevent a recurrence of the state's problems.<sup>58</sup> Loomis's bill, known as the "People's Resolution," sought to restrain the previously unlimited legislative power to create debt by requiring that debt could not be incurred without a referendum of the people.<sup>59</sup> In 1842 the Loomis bill was defeated by a tie vote in the Assembly.<sup>60</sup> In 1844, however, the legislature proposed a constitutional amendment incorporating the People's Resolution.<sup>61</sup> Passage by the succeeding legislature and submission to the people would have been required for its enactment.<sup>62</sup> Since a constitutional convention was called in 1845, the People's Resolution was never submitted separately to the people, but it was ratified as part of the 1846 constitution.

On November 4, 1845, the people voted favorably on a proposition calling for a convention to consider and alter the constitution.<sup>63</sup> The Convention assembled in Albany on June 1, 1846, and adjourned October 9 of the same year.<sup>64</sup> The Convention's Address to the People, submitted with the proposed new constitution, stated that the Convention had "placed strong safeguards against the recurrence of debt, and the improvident expenditure of the public money."<sup>65</sup> The constitution

<sup>56</sup> *Id.* § 1; 2 LINCOLN 84.

<sup>57</sup> The law stated: "All further expenditure on the the public works now in the progress of construction, shall be suspended until the further order of the legislature . . ." Act of March 29, 1842, ch. 114, § 10, [1842] N.Y. Laws 83.

<sup>58</sup> 2 LINCOLN 82; TAXATION & FINANCE 86-87.

<sup>59</sup> 2 LINCOLN 82; TAXATION & FINANCE 86-87.

<sup>60</sup> 2 LINCOLN 83; TAXATION & FINANCE 87.

<sup>61</sup> Con. Res. of April 15, 1844, [1844] N.Y. Laws 538.

<sup>62</sup> N.Y. CONST. art. VIII, § 1 (1821).

<sup>63</sup> The vote on the proposition was 213,257 to 33,860. MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 316 (Secretary of State ed. 1969) [hereinafter cited as LEGISLATIVE MANUAL]. The call for a convention was believed by some to be unconstitutional. J. DOUGHERTY, *supra* note 2, at 159 n.13. Presumably the theory was that the 1821 constitution provided a procedure for amendment but not for the calling of a new convention. N.Y. CONST. art. VIII, § 1 (1821). The 1846 constitution settled this question for the future by expressly providing for a call every 20 years and at such other times as the legislature might provide. N.Y. CONST. art. XIII, § 2 (1846). The 20-year call provision is also a recognition that the constitution was moving from a general document granting broad powers to one more statutory in nature. Consequently, the question of revision should be submitted to the people at fairly frequent intervals.

<sup>64</sup> REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1846, at 17, 1082 (W. Attree & W. Bishop eds. 1846) [hereinafter cited as 1846 DEBATES].

<sup>65</sup> 2 LINCOLN 215-16.

was ratified by the people by a vote of 221,528 to 92,436.<sup>66</sup> The two major contributions of the Convention—which have survived more or less intact—concerned (1) the Finance Committee's work on state debt and appropriations and (2) the regulation of corporations.

#### A. *The Work of the Finance Committee*

On July 30, 1846, Michael Hoffman, Chairman of the Finance Committee, reported to the Convention on a proposed new article to restrain the creation of future state debt.<sup>67</sup> Mr. Hoffman believed "that upon this article the committee were in the main . . . unanimous."<sup>68</sup> On September 22 the proposed article came before the Convention for debate.<sup>69</sup>

The article contained three main provisions. Section 1 provided that "no money shall ever be paid out of the Treasury . . . except in pursuance of an appropriation by law" nor unless payment be made within two years of the passage of the act.<sup>70</sup> Further, such an appropriation "shall distinctly specify the sum appropriated, and the object to which it is to be applied."<sup>71</sup> Section 2 provided that the "credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association or incorporation."<sup>72</sup> Section 5 provided that the state could contract no debt except by a law approved by a referendum.<sup>73</sup> Two exceptions were created to this third rule: the legislature could contract debt (1) to "repel invasion" or "suppress insurrection"<sup>74</sup> or (2) in the amount of \$1,000,000 to meet casual expenses.<sup>75</sup> At the

<sup>66</sup> LEGISLATIVE MANUAL 316.

<sup>67</sup> 1846 DEBATES 462. The language of the proposed article was clear and concise. This was no doubt the result of Hoffman's general philosophy, which he expressed early in the Convention: "But there is no law over the Legislature but the Constitution itself, and limitations that were not set forth in clear and definite terms, and in a strong and direct manner, would scarcely be observed by the Legislature." *Id.* at 57-58.

<sup>68</sup> *Id.* at 463.

<sup>69</sup> *Id.* at 940.

<sup>70</sup> *Id.* at 462.

<sup>71</sup> *Id.* The existing practice was apparently somewhat loose. Hoffman observed that "if the executive had but a corporal's guard to drive off the legislature, the government could go on for 50 years without it." *Id.* at 941.

<sup>72</sup> *Id.* at 462.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* The Attorney General was later to rule that the state could not borrow under this exception clause for purposes of the Civil War. The Attorney General apparently reasoned that the state had not been invaded and that the United States, not the state of New York, was at war. III PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK HELD IN 1867 AND 1868, at 1850-51 (E. Underhill ed. 1868) [hereinafter cited as 1867-68 DEBATES].

<sup>75</sup> 1846 DEBATES 462.

same time, further restrictions were placed upon debt that required referendum approval. This debt had to be for some "single work or object to be distinctly specified,"<sup>76</sup> and the law proposing it had to impose a direct annual tax sufficient to pay annual interest and to retire the debt within eighteen years.<sup>77</sup> Such a law could only be submitted at a general election when no other law or constitutional amendment was to be voted upon by the people.<sup>78</sup>

The requirement of specific appropriations and a two-year limitation on such appropriations was adopted by the Convention after little discussion.<sup>79</sup> Even less discussion was had on section 2, the important provision prohibiting the gift or loan of state credit, which was adopted unanimously.<sup>80</sup> Section 3, which permitted debt not in excess

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The requirement of redemption within 18 years apparently was designed to avoid casting the burden of payment upon future generations. *Id.* at 943-44.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 940-43.

<sup>80</sup> Lincoln explains this lack of discussion by noting that the members were all thoroughly familiar with the problem and of one mind as to its solution. 2 LINCOLN 179-80. This, in its entirety, is the Convention's deliberation of the gift and loan provision:

The second section was then read, as follows:

§ 2. The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association or incorporation.

Some conversation here ensued between Messrs. VAN SCHOONHOVEN and RICHMOND, in relation to the matter before at issue between them.

Mr. SWACKHAMER moved to add after the word "credit" the words "money or property."

Mr. HOFFMAN hoped this motion would not be persisted in. If the state had money to loan or property to sell, it had better be allowed to do it. He was ready to guard against mischief which had become apparent, and he was satisfied that the words were broad enough.

Mr. SWACKHAMER had no desire to persist in his amendment, and would withdraw it.

Mr. O'CONNOR moved to add to the end of the section the following:

"Nor shall any gift of public moneys or property be made except as a reward for military services, or by the release of escheats or forfeitures.["]

Mr. RUSSELL thought the words of the section were sufficiently guarded, and he hoped therefore that this amendment would not be adopted.

Mr. O'CONNOR then withdrew his amendment, if there was any objection to it.

The second section was then adopted unanimously.

1846 DEBATES 943.

It should be noted that by amendment adopted in 1874, Mr. Swackhamer's prohibition of the gift or loan of state money became part of the constitution. N.Y. CONST. art. VIII, § 10 (1874).

Henry C. Adams wrote in 1887 of various constitutional attempts to restrict public debt as follows:

Perhaps the most effective method of providing against the evils of public indebtedness, when considered in connection with the history of railroad development in this country, is found in the almost universal provision against lending either State or local credit to private corporations.

of \$1,000,000, and section 4, which permitted debt to repel invasions, were both unanimously adopted by the Convention without discussion.<sup>81</sup>

Section 5 provided that, except as specified in sections 3 and 4, the state could not contract debt without a vote of the people. Finally, the Committee proposal ran into substantial opposition. About a third of the Convention opposed the referendum requirement;<sup>82</sup> another third thought the referendum requirement too liberal and that debt should be prohibited except as provided in sections 3 and 4.<sup>83</sup> The Committee was in the middle. Hoffman, in view of the expected controversy, explained the purpose of the provision at some length:

If we look at home, at the neighboring states, or to foreign representative governments, we shall be obliged to acknowledge that their greatest infirmity is their disposition to contract debts. The freest government on the other side of the water has contracted the largest debt known to history . . . [I]t behoves those who were desirous of securing free and republican government to find some limitation safe in practice to this most dangerous power. In almost any case if a bad law is passed by the legislature it can be repealed—the legislature have few temptations to pass a bad one. It is not so in relation to the subject of debts and compound interest. It is silent, creeps along, gets into the State, and when the act is once passed, the debt incurred, the obligation is as strong as death for its payment. That can only be wrung from the industry of the people, by taxes, indirect or direct. This being the case, and being so entirely different from almost all subjects on which legislation can act, it requires an especial remedy. . . . They who vote the debt, vote to tax, although they cast the burden of the tax upon those who come after them. . . . [Under the proposed section t]he means of payment would go with the work, and this . . . would give reasonable security against unnecessary and improper debt. . . . [T]he provision requiring the appropriation bills to be submitted at a special election [would tend] . . . to direct the undivided attention of the people to the subject.<sup>84</sup>

As Hoffman concluded, objections came from the right and the left. Mr. Worden stated that the referendum requirement “was subversive of every principle of a representative government”;<sup>85</sup> its adoption

---

<sup>81</sup> 1846 DEBATES 943.

<sup>82</sup> *Id.* at 950.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 943-44. The provision requiring a tax sufficient to pay the debt service Hoffman thought essential since, “in the future like the past, it will be alleged that the work will be abundantly productive of revenue, and the legislature might be induced to believe it, and thus incur the debt.” *Id.* at 944. The state’s sad experience with respect to the railroads’ promises was clear in Hoffman’s mind.

<sup>85</sup> *Id.* at 947.

would "be saying to the world in so many words, that republican government had proved a failure."<sup>86</sup> Mr. Bascom agreed, noting that the proposed section would "change our representative government into a democracy."<sup>87</sup> Similarly, Mr. Simmons expressed his view that "it was going back to the old form of personal government as practiced by the Athenians and Romans."<sup>88</sup> Mr. Worden further noted that a referendum requirement would relieve the legislature of responsibility for the creation of debt and would therefore lead to legislative log-rolling.<sup>89</sup>

In support of the Committee proposal, Mr. Arphaxad Loomis pointed out that debt was essentially antidemocratic because it restrained the freedom of future generations without their consent: "[T]he legislature and the people . . . never had the right to legislate for the future, to enthrall and bind down those who came after them, either by debt or any other system of legislation which would prevent them from a perfect freedom of action."<sup>90</sup>

Mr. Nicoll observed that "no one reform had been called for more emphatically or earnestly by the people than that a proper restriction in the matter of creating debt should be imposed upon the legislature."<sup>91</sup> Mr. Nicoll continued:

---

<sup>86</sup> *Id.* at 945.

<sup>87</sup> *Id.* at 944. Mr. Bascom took the position that to require a tax for payment of the debt would sufficiently guard the people's interest without the necessity for a referendum.

<sup>88</sup> *Id.* at 947.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 944-45.

The political tendencies of public debt were outlined by Henry C. Adams as follows: The funding system stands opposed to the full realization of self-government. . . . Any method of procedure, therefore, by which a public servant can veil the true meaning of his acts, or which allows the government to enter upon any great enterprise without bringing the fact fairly to the knowledge of the public, must work against the realization of the constitutional idea. . . .

. . . .  
 . . . A loan calls for no immediate payment from the people, but produces vast sums for the government. It requires a certain degree of thought to recognize that debts imply burdens, and for this reason a government that resorts to borrowing may for a time avoid just censure. Loans do not, like direct taxes, demand a visible payment from the people; nor, like indirect taxes, raise the price of consumed articles. They address themselves rather to the interests of those who have control over capital, and by the promise of a perpetual annuity induce the holders of money to intrust it to the state. The administration is satisfied, since its necessities have been relieved without exciting the jealousy of the people; the lenders are satisfied, since they have secured a good investment for their capital and are not bothered with its management; while the people are not dissatisfied because of their profound ignorance of what has taken place. Herein lies the danger of permitting a government freely to mortgage its sovereign credit.

ADAMS 22-24.

<sup>91</sup> 1846 DEBATES 947.

The experience of the past, had demonstrated that to leave to the legislature the unrestricted power to pledge at their will, to any extent and for any time, the property of every individual in the State was productive of the grossest injustice.<sup>92</sup>

Nicoll then responded to the argument that a referendum was inconsistent with the republican form of government. Nicoll did not desire to become involved in a philosophical discussion; he noted simply that "[i]t might be so" but that the people would consider it an improvement in the "science of government."<sup>93</sup>

In the course of the debates, Hoffman gave the most concise statement of the Committee proposal:

[I]t was saying that we will not trust the legislature with the power of creating indefinite mortgages on the people's property.

. . . .  
 . . . And . . . that whenever the people were to have their property mortgaged for a State debt, that it should be done by their own voice, and by their own consent.<sup>94</sup>

Mr. Worden proposed an amendment that would have deleted the referendum requirement; it was defeated by a vote of seventy to thirty-four.<sup>95</sup> Another amendment was proposed by those who believed the Committee version too liberal. Mr. Shepard, expressing the more restrictive view, observed that to his mind the question was "[w]hether the government should hereafter be confined to the simple purposes of the administration of the laws and the framing of them, or whether it should be left at liberty to run wild as heretofore . . . ."<sup>96</sup> He then moved to amend the section to prohibit debt except in case of invasion or up to \$1,000,000 for casual expenses.<sup>97</sup>

Hoffman's response to Shepard's "too strict" view was that it was unrealistic and that its inflexibility would lead to a situation where "the legislature would in a few years get back the debt contracting

<sup>92</sup> *Id.* at 948.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 946.

<sup>95</sup> *Id.* at 950.

<sup>96</sup> *Id.* at 944. Mr. Patterson spoke in a similar vein:

Mr. PATTERSON was decidedly opposed to incurring a single dollar more of debt. He felt but little interest in these amendments; after we had adopted a provision authorizing the Legislature to create debts in case of war or invasion, then he did not believe there would ever be any necessity to incur any other debt to the amount of a single dollar. [Cries of "Good—that's the true doctrine."] He should, therefore, certainly vote for the amendment of Mr. SHEPARD.

*Id.* at 945.

<sup>97</sup> *Id.* at 944.

power, in full force, without any restrictions."<sup>98</sup> The Convention voted the Shepard amendment down by a vote of seventy-three to thirty-one.<sup>99</sup> The Convention then adopted the Committee proposal by a vote of seventy-two to thirty-six.<sup>100</sup>

### B. *The Regulation of Corporations*

Public feelings with respect to corporations had played a prominent part in calling the 1846 Convention.<sup>101</sup> On July 2, Arphaxad Loomis, as Chairman of the Committee on Incorporations Other than Municipal and Banking, submitted to the Convention his committee's version of a new corporation article.<sup>102</sup> The Committee proposal would have prohibited the creation of any corporation<sup>103</sup> except by general law.<sup>104</sup> Further, the Committee required that all corporations be subject to such laws as "the legislature may from time to time enact." As a result, the power to repeal or modify could not be surrendered or contracted away by the legislature.

In *Trustees of Dartmouth College v. Woodward*,<sup>105</sup> Justice Story said that if a legislature intends to retain the power to alter or revoke rights vested in a corporate charter, "it must be reserved in the grant."<sup>106</sup>

<sup>98</sup> *Id.* at 946.

<sup>99</sup> *Id.* at 950

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

<sup>101</sup> Arphaxad Loomis, addressing the 1846 Convention, noted:

The people had seen a system existing by which the government had granted to particular individuals special privileges which had been refused to others, contrary to the great principle of equality among men.

*Id.* at 222.

<sup>102</sup> *Id.* at 221. Section one of the Committee-proposed article provided:

Sec. 1. Special laws, creating incorporations or associations, or granting to them exclusive privileges, shall not be passed. But the legislature may pass general laws by which any person may become incorporated on complying with the provisions to be contained in such laws. And all corporations shall be subject to all such general laws as the legislature may from time to time enact not inconsistent with the provisions of this constitution.

*Id.*

<sup>103</sup> Loomis, on the Convention floor, offered an amendment to exclude from the general prohibition corporations formed for municipal purposes. *Id.* at 963. This exception is found in Article X, § 1, of the present constitution.

<sup>104</sup> Note 102 *supra*.

<sup>105</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>106</sup> *Id.* at 712 (concurring opinion).

In *Dartmouth College*, Chief Justice Marshall, although finding the college to be a private institution, noted that if the corporate charter "be a grant of political power, if it create a civil institution to be employed in the administration of the government," then the legislature may act "unrestrained by any limitation" in the Constitution. *Id.* at 629-30. What are known in New York as authorities or public corporations all appear to be governmental within the meaning of Marshall's distinction. The Housing Finance Agency statute is typical. It provides that the Agency "shall be a corporate governmental

In *Charles River Bridge v. Warren Bridge*,<sup>107</sup> Justice Taney qualified *Dartmouth College* and ruled that exemption from the power to repeal need not be reserved; that surrender of a sovereign power will not be found unless stated in unmistakable terms. In New York there was to be no question about the matter; the constitution would require that all corporate charters remain subject to the legislative power. If the legislature sought to enact an irrevocable law, it would be beyond its power.

A fair number of delegates were not concerned with the question of irrevocability; they objected to the idea of corporations in any form. During the debate on the corporations article, Mr. Swackhamer is reported as stating:

You talk of the prosperity of the country, and refer to your wealthy citizens and magnificent edifices as an evidence of it. . . . [T]his [is not] a safe criterion by which to judge. . . . The time was in this country when mechanics could reserve something from their weekly earnings for future events, but it [is] not so now—and why? . . . [I]t [is] because we ha[ve] departed from the true principles of government, in creating artificial bodies and interfering with the private business of life.<sup>108</sup>

In a similar vein, Mr. Morris was reported during the debate as stating that he

was in the very broadest practical acceptance of the word anti-corporation. He believed that the legislature should be restricted from granting a corporation [power] to perform any of the ordinary business of life now transacted by individuals or voluntary associations. His honest convictions were that corporations were an evil . . .<sup>109</sup>

Loomis did not agree with these views, stating that the “necessity”

---

agency.” N.Y. PRIV. HOUS. FIN. LAW § 43(1) (McKinney 1962). The recently enacted Urban Development Corporation Act goes even further and provides that it is “a corporate governmental agency of the state, constituting a political subdivision.” N.Y. UNCONSOL. LAWS § 6254(1) (McKinney Supp. 1970). Both acts confer tax exemption on the ground that the exercise of the powers granted will constitute the performance of “an essential governmental function.” N.Y. PRIV. HOUS. FIN. LAW § 54 (McKinney 1962); N.Y. UNCONSOL. LAWS § 6272 (McKinney Supp. 1970). Similarly, tax exemption is granted to the Triborough Bridge and Tunnel Authority because of its performance of “an essential governmental function.” N.Y. PUB. AUTH. LAW §§ 566, 566-a (McKinney 1970). It is therefore apparent, according to *Dartmouth College*, that such authority charters may be freely altered or repealed by the legislature “unrestrained by any limitation” in the Federal Constitution.

<sup>107</sup> 36 U.S. (11 Pet.) 420 (1837).

<sup>108</sup> 1846 DEBATES 972.

<sup>109</sup> *Id.* at 973.



for corporations had been shown.<sup>110</sup> The question as he saw it was "how they should be regulated so as to produce all necessary good and prevent unjust inequalities."<sup>111</sup> Central to the idea of any regulation of corporations was the prohibition of an irrevocable law. As Delegate Jordan stated:

The question is, shall the legislature grant exclusive privileges or monopolies? Shall they have power of granting the franchise of banking or taking toll, or the like, to one, and not to another; or to grant it to one in exclusion of another? All that the section contemplated was that the legislature never should grant the right of doing a particular thing . . . and at the same time stipulate with the grantor that he should be entitled to that right exclusively, and that they could grant it to no one else.<sup>112</sup>

The *Charles River Bridge* case seemed prominent in the delegates' minds. Mr. Simmons queried Mr. Jordan, in the case of a bridge company formed to construct a bridge across the Hudson River at Albany, should not the legislature have the power "to make the privilege worth something, by making it exclusive, and to say that no other bridge should be built within a certain distance of it?"<sup>113</sup> Mr. Jordan replied that the legislature could be trusted not to destroy the benefits of a previously granted franchise that had induced large investment and served the public honestly. But there could be no question that the

<sup>110</sup> *Id.* at 962. Loomis, however, was not free of anticorporation feeling. He expressed something of this idea when he observed:

An incorporation is a person—a legal person, and not a natural one. It is impelled on to action by the same motives of gain which impel private citizens, but it is not restrained by the same motive of benevolence and of humanity, and of fellow feeling, which exists in the mind of every individual person, and which restrain his selfish propensities in the acquisition of gain.

*Id.* at 222.

Similarly, the Committee's original proposal included two other interesting provisions: § 3 would have established proportionate shareholder liability for the obligations of an insolvent corporation (*id.* at 221), and § 2 would have prohibited a corporation from incurring debt in an amount greater than (1) its capital stock actually paid in and (2) its undistributed net profits (*id.*). Section 2 was rejected by the Convention on the ground that it was statutory in nature (*id.* at 974), while § 3 narrowly passed after extensive debate (*id.* at 974-79). As a result of a later impasse in the debates, the entire corporation article was submitted to a select committee for recommendations. *Id.* at 1006. The select committee's draft deleted § 3's shareholder liability provision. *Id.* at 1013. Thereafter, a proposal by a minority of the select committee to impose shareholder liability in an amount equal to the face value of stock held was narrowly rejected by the Convention by a vote of 51 to 42. *Id.* at 1013, 1021.

<sup>111</sup> *Id.* at 962.

<sup>112</sup> *Id.* at 967.

<sup>113</sup> *Id.*

legislature had the power—"the inalienable Constitutional power of doing so."<sup>114</sup>

Apparently, at the time of the Convention, there were considered to be two categories of corporations in the state, those under control of the legislature and those not. In recognition of this, Jordan sought to modify the language of the proposed article "so as to make future laws applicable to future corporations, because there were some corporations now existing which were not under the control of the legislature."<sup>115</sup> Jordan elaborated on this point by saying that he "desired to guard against any infringement of what he considered to be the plighted faith of the state, with reference to corporations already existing."<sup>116</sup> In sum, Jordan seemed to agree with the *Charles River Bridge* case that a charter could be irrevocable if it expressly purported to be.

Mr. Samuel J. Tilden, later Governor of the state, apparently disagreed with this view of existing law. His reply to Jordan took the inalienability approach that there could be no such thing as an irrevocable law. Tilden's statement is reported as follows: "He held that the legislature could grant no corporate power or privilege which it had not the right to revoke."<sup>117</sup>

As adopted by the Convention, the constitution took the Jordan view and did not apply to preexisting corporations.<sup>118</sup> Regardless of whether the Tilden or Jordan view of the prior law was correct, there could be no question as to the future. The constitution henceforth

<sup>114</sup> Mr. Jordan stated:

As a general rule monopolies are odious in this and all other countries. It did not follow that the legislature must, or would, although they had the power, the inalienable Constitutional power of doing so, grant a franchise to the destruction of the benefits of one previously granted, when under the power large investments, conducing to public convenience had been made in good faith, and when it was fairly and honestly exercised. He thought it would be quite safe to leave that to the legislature.

*Id.*

It will no doubt strike the reader as curious that, in 1937, the legislature amended the Triborough Bridge and Tunnel Authority Act to provide that the state of New York does covenant and agree with the holders of any bonds that no tunnel, bridge . . . or other connection for vehicular traffic, which will be competitive with either project hereby authorized [Triborough Bridge and White-stone Bridge] will be constructed or maintained.

Act of Jan. 28, 1937, ch. 3, § 12, [1937] N.Y. Laws 9.

<sup>115</sup> 1846 DEBATES 973.

<sup>116</sup> *Id.* at 974.

<sup>117</sup> *Id.*

<sup>118</sup> N.Y. CONST. art. VIII (1846). Dougherty, in his constitutional history, describes the Convention's deliberations as follows: "As the Dartmouth College decision had placed corporate charters theretofore granted above revocation, the constitution wisely reserved to the legislature the power of altering or repealing all such charters as should thereafter be granted." J. DOUGHERTY, *supra* note 2, at 168.

provided: "All general laws and special acts passed pursuant to this section, may be altered from time to time or repealed."<sup>119</sup>

### III

#### THE 1874 AMENDMENTS

At the 1846 Convention Mr. Swackhamer had sought to broaden the prohibition of the gift or loan of state credit by prohibiting the gift or loan of state property or money.<sup>120</sup> Mr. Hoffman resisted the amendment, remarking that he "was ready to guard against mischief which had become apparent."<sup>121</sup> New mischief quickly became apparent.

In 1851 the legislature enacted a law directing the Comptroller to issue \$9,000,000 of "canal revenue certificates" for the purposes of enlarging the Erie Canal and completing the Genesee Valley and Black River Canals.<sup>122</sup> The "certificates" were to pay interest at a rate not in excess of six percent and were to be redeemed within twenty-one years.<sup>123</sup> In addition, they were payable only out of a special fund of future surplus canal revenues.<sup>124</sup> The statute expressly disclaimed any state liability with respect to the certificates.<sup>125</sup> No referendum was held.

---

<sup>119</sup> The Committee position on irrepealability seemed to be fairly easily accepted by the Convention. Technical objections were directed at other aspects of the Committee proposal. For example, the Committee's absolute requirement of creation pursuant to general law was considered too rigid. 1846 DEBATES 970. The proposal was therefore modified to provide for creation by special act if the legislature determined that the objects of the corporation could not be attained under general laws. N.Y. CONST. art. VIII, § 1 (1846).

Subsequent to the initial adoption of the article on September 25, it was reconsidered and further debate ensued. 1846 DEBATES 981-84. On September 29, Samuel Tilden, to restore some order to the situation, moved that the article be referred to a select committee with instructions to report the next day. *Id.* at 1005-06; see note 110 *supra*. The following day Tilden reported for the select committee. 1846 DEBATES 1013. The committee revised the earlier language and inserted the language now found in the constitution: "All general laws and special acts passed pursuant to this section, may be altered from time to time or repealed." *Id.* This provision was adopted by the Convention. *Id.* at 1020.

<sup>120</sup> 1846 DEBATES 943; see note 80 *supra*.

<sup>121</sup> 1846 DEBATES 943. Hoffman had also said that "limitations that were not set forth in clear and definite terms, and in a strong and direct manner, would scarcely be observed by the Legislature." *Id.* at 58.

<sup>122</sup> Act of July 10, 1851, ch. 485, [1851] N.Y. Laws 911.

<sup>123</sup> *Id.* § 2, [1851] N.Y. Laws 912.

<sup>124</sup> *Id.* § 1, [1851] N.Y. Laws 911.

<sup>125</sup> The statute provided that "the state shall in no event be liable to make up any deficiency of revenue, or to redeem the canal revenue certificates . . ." *Id.* § 14, [1851] N.Y. Laws 916. It further provided that the certificates shall not be "construed as to

Within five years of the 1846 constitution, then, the state was issuing what looked like debt without a referendum,<sup>126</sup> the draftsmen's apparent theory being that this was permissible if the certificates were payable out of a special fund and the state's liability expressly disclaimed. Samuel Tilden, in April of 1851, wrote to the *Albany Atlas* attacking the proposed act.<sup>127</sup> Tilden observed that he owed it to the memory of his friend Michael Hoffman to show that Hoffman's work was not so imperfectly done as to permit such obvious evasion.<sup>128</sup>

The validity of the statute was attacked in two lower court cases. In *People v. Newell*,<sup>129</sup> the validity of the act was upheld without discussion. In *Rodman v. Munson*,<sup>130</sup> the act was held inoperative and void as repugnant to the constitution. It was argued there that the act did not create a debt but was to be viewed as a sale, mortgage, or trust involving future canal revenues. In the alternative, it was maintained that the constitutional provisions only applied to debts which might require resort to taxation; that the constitution did not intend to prohibit debts "which would certainly and eventually pay for themselves."<sup>131</sup> Justice Strong rejected these arguments, observing that promises that an asset would be self-supporting had led to many of the pre-1846 abuses:

Indeed, the most extravagant works in the state, and some of them were very extravagant, had been urgently supported, and had been finally adopted, upon that supposition. The convention had the sagacity to see that the practice of granting away the public money upon the annual productiveness of such works was a dangerous one, and that in fact no human foresight could enable the legislature to determine with certainty that any projected improvement "would certainly and inevitable [*sic*] pay for itself." Indeed, there had been sad mistakes on that subject, for which the state had severely suffered. The convention knew that the legislature had too readily listened to sanguine, loose and interested calculations, and no doubt designed to avert the danger of incurring heavy debts under such pretenses.<sup>132</sup>

---

create any debt or liability against the state, or the people thereof, within the meaning of section twelve, article seven of the constitution [prohibiting the creation of debt without a referendum]." *Id.*

<sup>126</sup> By contrast, the 1938 constitution was to be treated deferentially; it was over 20 years before the legislature passed an act at obvious variance with it. Housing Finance Agency Act, ch. 671, [1960] N.Y. Laws 1945.

<sup>127</sup> J. DOUGHERTY, *supra* note 2, at 175.

<sup>128</sup> *Id.*

<sup>129</sup> 13 Barb. 86 (N.Y. Sup. Ct.), *rev'd*, 7 N.Y. 9 (1852).

<sup>130</sup> 13 Barb. 63 (N.Y. Sup. Ct.), *aff'd*, 13 Barb. 188 (N.Y. Sup. Ct.), *aff'd sub nom.* *Newell v. People*, 7 N.Y. 9 (1852).

<sup>131</sup> 13 Barb. at 204.

<sup>132</sup> *Id.*

The justice also pointed out that the Convention sought to protect the state from the "dishonor of repudiation" and that although in view of the disclaimer "[i]t might not be exactly repudiation," it would nonetheless "look very like it" if the state retained the public work and refused to repay the funds that had constructed it.<sup>133</sup> The court went on to hold that in reality the transaction created state debt in violation of the constitution.

A month later the Court of Appeals affirmed *Rodman* and reversed the lower court decision in *Newell*.<sup>134</sup> Writing for the court, Chief Judge Ruggles (who had been a delegate to the 1846 Convention) found a violation of the constitutional provisions requiring that the canal "remainder" be applied "in each fiscal year" to the Erie enlargement and the completion of the Genesee Valley and Black River canals.<sup>135</sup> These provisions established a constitutional directive that the canal work be financed on a "pay as you go" basis as actual surplus revenues became available. Because, pursuant to the 1851 act, \$9,000,000 would be borrowed and the work would be completed within three years, the Chief Judge found that the constitutional mandate requiring application of the canal remainders "in each fiscal year" had been violated. He noted that "[t]he chief object of the restraint imposed by the [referendum requirement] of the constitution, upon the contracting of public debt, was to protect the people against the exhausting burthen of paying interest."<sup>136</sup>

The Chief Judge was unimpressed with the argument that the debt was not debt within the meaning of the constitutional prohibition since it was not backed by the general credit of the state but was restricted to a special fund:

---

<sup>133</sup> *Id.* at 205.

<sup>134</sup> *Newell v. People*, 7 N.Y. 9 (1852).

<sup>135</sup> N.Y. CONST. art. VII, § 3 (1846). The constitution established a series of priorities for the application of the canal revenues. After paying expenses and ordinary repairs, the revenues were to be applied in each year: (1) towards the payment of the outstanding canal debt at the rate of \$1,300,000 annually between 1846 and 1855 and thereafter at the rate of \$1,700,000 annually until the canal debt "shall be wholly paid" (*id.* § 1); (2) if any revenue remained, it was to be paid towards the outstanding general fund debt ("including the debt for loans of the State credit to railroad companies") at the rate of \$350,000 per year until the canal debt was repaid and thereafter \$1,500,000 annually until the general fund debt was repaid (*id.* § 2); (3) if any revenue remained, the general fund of the state was to receive \$200,000 to defray necessary expenses (*id.* § 3); and (4) "the remainder of the revenues of the said canals shall, in each fiscal year, be applied, in such manner as the Legislature shall direct, to the completion of the Erie canal enlargement, and the Genesee Valley and Black River canals, until the said canals shall be completed" (*id.*). It was the disposition of these least mentioned "remainders" which was at issue in the act of 1851 and *Newell*.

<sup>136</sup> 7 N.Y. at 86.

The restraints imposed by the [referendum requirement] are in effect annulled, if the legislature may borrow without limit upon a pledge of the public property or the public revenue. The extent to which this may be carried, if tolerated in the present instance, renders [that] section of the constitution nugatory and useless.<sup>137</sup>

The Chief Judge was also unpersuaded that the disclaimer provision changed the tenor of the transaction. He noted that the disclaimer section "professing to limit the liability of the state, might give rise to objection and controversy; but sooner or later the claim would prevail, and could not be effectually resisted."<sup>138</sup>

The dissenting opinion of Judge Welles presented the most clever and specious argument on behalf of the act: The constitution prohibits the creation of state debt except in the specified manner (including submission to a referendum); it is obviously impossible to create state debt unless the constitution is complied with; since the 1851 act does not comply with the constitution, it cannot create a state debt. As Judge Welles put it: "Where is the burthen created or debt contracted by the act, which the constitution has not authorized and directed? None whatever has been, or can be shown."<sup>139</sup>

---

<sup>137</sup> *Id.* at 87.

<sup>138</sup> *Id.* at 93. Some 75 years later a disclaimer provision gave rise to "objection and controversy" and, as Ruggles had predicted, the claim prevailed despite the disclaimer. *Williamsburgh Sav. Bank v. State*, 243 N.Y. 231, 153 N.E. 58 (1926). The court in *Williamsburgh* apparently did not have the benefit of the *Newell* decision; it was not argued by the parties and is not cited by the court.

<sup>139</sup> 7 N.Y. at 130.

Ruggles apparently had no patience with this argument and makes no mention of it in his opinion. Judge Johnson, in his concurring opinion, seemed to have it in mind in his discussion of the disclaimer provision:

It does not alter, or profess to alter, any one provision of the act. It leaves them all standing on the statute book, with the apparent force of law, and with the sanction of legislative approval, forming together a single scheme for raising money, on the faith of which capital is invited to assist the state. Under this state of things, can we be asked to take the ground that the state is to be regarded as coming into the money market, with a cunningly devised plan of promises, seemingly efficacious, but really known to be wholly unlawful and incapable of conferring any legal right, and by such means seeking to procure the advance of money? The respect which we owe to the legislature forbids us to listen for one moment to the suggestion.

*Id.* at 106.

A recent example of a "cunningly devised plan of promises, seemingly efficacious, but really known to be wholly unlawful" is found in the Housing Finance Agency statute (N.Y. PRIV. HOUS. FIN. LAW §§ 40-59 (McKinney 1962)) and those modeled after it. In the event of a deficiency in the debt service reserve fund, that statute provides that any needed amount "shall be apportioned and paid [by the state] to the agency during the then current state fiscal year." *Id.* § 47(5)(c) (McKinney Supp. 1970). This provision constitutes nothing but a state guarantee, unequivocal on its face, of Housing Finance Agency bonds. Since no referendum was held, the provision is unconstitutional.

Until 1846 there was no constitutional provision dealing with restrictions on the power of cities to incur debt.<sup>140</sup> No city was given this power in its charter; consequently a special authorization from the legislature was required for each city debt issue.<sup>141</sup> The 1846 constitution did not expressly limit the powers of cities to contract debt. Instead, it directed the legislature to restrict a city's power to borrow money or loan its credit "so as to prevent abuses in assessments, and in contracting debt by such municipal corporations."<sup>142</sup> Since the legislature already had full power with respect to this, and since the constitution did not specify any course of conduct, the constitutional provision seems to amount to a general admonition.<sup>143</sup>

As the national government had pushed the burden of financing improvements on to the state, the state now felt constrained to push the burden on to local government. Beginning in 1851 the legislature passed a series of acts, known as the town bonding acts, that authorized cities to borrow money to invest in railroad company stock. The earlier acts permitted the city to borrow for such purpose; the later acts compelled the borrowing. A typical statute authorized the city of Rochester to borrow \$300,000 on its "faith and credit" at an interest rate not to exceed seven percent for a term of no more than twenty years.<sup>144</sup> The proceeds of the bond issue "shall be invested in the stock of the Rochester and Genesee Valley railroad company."<sup>145</sup> The dividends on the railroad stock, if any, were to be applied to the interest on the city bonds; if the dividends were insufficient to meet interest due, the city was authorized to impose a tax.<sup>146</sup> The act provided that it "shall not take effect" until approved by the voters at a special election.<sup>147</sup>

---

It may be argued, as was done in *Newell*, that the provision cannot create a debt because the constitution requires a referendum and appropriation. If made, this argument should be disposed of as indicated by Judge Johnson.

<sup>140</sup> N.Y. STATE CONSTITUTIONAL CONVENTION COMM., REPORT: NEW YORK CITY GOVERNMENT FUNCTIONS AND PROBLEMS 27 (1938).

<sup>141</sup> TAXATION & FINANCE 288. See also N.Y. STATE CONSTITUTIONAL CONVENTION COMM., REPORT: STATE AND LOCAL GOVERNMENT IN NEW YORK 543 (1938).

<sup>142</sup> N.Y. CONST. art. VIII, § 9 (1846).

<sup>143</sup> This gentle measure is an indication that abuses at the municipal level were not the subject of serious concern at the time. That the admonition was ignored by the legislature is demonstrated by the 1873 bond issue of the town of Morrisania. In that year the town issued 7% bonds to mature in 1980. Williams & Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations*, 37 COLUM. L. REV. 177, 180 n.12 (1937). Over the life of the bonds, the town would pay interest amounting to almost 20 times the principal borrowed. *Id.*

<sup>144</sup> Act of July 3, 1851, ch. 389, § 285, [1851] N.Y. Laws 767.

<sup>145</sup> *Id.* § 286.

<sup>146</sup> *Id.* § 287, [1851] N.Y. Laws 768.

<sup>147</sup> *Id.* § 291, [1851] N.Y. Laws 769. This provision led to an interesting question.

It was perfectly clear under the 1846 constitution that the state itself could not undertake the commitment outlined in the Rochester statute.<sup>148</sup> Could it, then, authorize one of its lesser instrumentalities to do so?<sup>149</sup> The Court of Appeals held that it could in a series of cases beginning with *Bank of Rome v. Village of Rome*.<sup>150</sup> In *Bank of Rome*, the Court of Appeals noted that nothing in the constitution expressly limited the legislature's power with respect to municipalities. Rather, Article VIII, section 9, the admonition provision discussed above, was read as a constitutional recognition of unlimited legislative power on the subject. Section 9 directed the legislature to restrict the cities' power to borrow money and loan their credit so as to prevent abuses. The court observed that this provision was "ill-suited" to be "judicially applied" and consequently the legislature's "judgment is not to be reviewed and reversed in a court of law."<sup>151</sup>

---

The constitution vests the legislative power in the legislature. The legislature cannot delegate this power to the people. In view of the referendum provision did the legislature enact the law or did the people? In *Barto v. Himrod*, 8 N.Y. 483 (1853), the 1849 Free School Act, ch. 140, [1849] N.Y. Laws 193, was held unconstitutional on the ground that it was not enacted by the legislature. That law provided for a popular vote on the question "whether this act shall or not become a law." *Id.* § 10. Chief Judge Ruggles observed that the legislative power, with one exception, was vested by the constitution in the Senate and Assembly. The one exception was the referendum requirement for the issuance of state debt. The Chief Judge noted that "[t]he people reserved no part of [the legislative power] to themselves excepting in regard to laws creating public debt; and can therefore exercise it in no other case." 8 N.Y. at 489. A lower court had upheld the Free School Act on the ground that it was a conditional statute, made to take effect upon a future contingent event. Ruggles did not dispute that a law may be passed to take effect upon the occurrence of a condition, but it "must be law *in praesenti* to take effect *in futuro*." *Id.* at 490. This was not true of the 1849 law. Further, and more importantly, a popular vote is not a permissible future condition since its effect would be to delegate a non-delegable duty. Five years later, in the first town bonding case (*Bank of Rome v. Village of Rome*, 18 N.Y. 38 (1858)), the court distinguished *Barto* on grounds that are not persuasive. (The statute involved was similar to the Rochester act, calling for a popular vote by the citizens of Rome to approve the bond issue and purchase of railroad stock.) The court stated that *Barto* involved a general law while this "was one of local interest only." *Id.* at 45. The court concluded that the act was a valid conditional statute. But the court did not meet Ruggles's second point; *i.e.*, that a popular vote cannot be a permissible future condition. Clearly, the *Barto* reasoning is as applicable to a local popular vote as it is to a state-wide vote. Chief Judge Ruggles, who was a delegate to the 1846 Convention, had retired three years prior to the *Bank of Rome* case.

<sup>148</sup> The prohibition of the gift or loan of state credit to, or in aid of, a corporation would necessarily prohibit the state from borrowing to purchase railroad stock. N.Y. Consr. art. VII, § 9 (1846).

<sup>149</sup> Adams, in his work on public debts, made the point as follows: "What right has a legislature to authorize a township or a city to do that which by public law it is itself prohibited from doing?" ADAMS 356.

<sup>150</sup> 18 N.Y. 38 (1858).

<sup>151</sup> *Id.* at 42.



In the absence of an express limitation in the constitution, were there any implied limitations? In *Bank of Rome*, the court thought there might be implied the idea "that the powers conferred on a municipal corporation must relate to the public interests"; that is, there must be a public purpose.<sup>152</sup> The court then found that financing a railroad involved a public purpose.<sup>153</sup> The court did note that the railroad legislation "may be injudicious, and even worse than that," but concluded that recourse must be had to the legislature rather than the courts.<sup>154</sup>

Within fifteen years the Court of Appeals was to regret the *Bank of Rome* decision. Before receding, however, this precedent was fol-

<sup>152</sup> *Id.* at 43.

<sup>153</sup> The court noted that it could not conclude "that the power to subscribe for stock in this railroad was entirely foreign to and unconnected with the public interests of the village of Rome." *Id.* at 44. The court did not discuss the theory that the legislature cannot delegate that which it is prohibited from doing. The theory was well expressed in an 1856 lower court decision by Justice Allen. *Clark v. Rochester*, 13 How. Pr. 204 (N.Y. Sup. Ct. 1856), *rev'd*, 24 Barb. 446 (N.Y. Sup. Ct. 1857), *aff'd*, 28 N.Y. 605 (1864). Justice Allen noted that all municipal powers are derived from the legislature:

The sovereign power by which the corporation is created, may repeal, alter, or modify the charter. The powers conferred are mere municipal regulations, subject to the absolute control of the government, with the qualification that the power delegated to the subordinate legislature cannot exceed that possessed by the legislature from which the power is immediately derived.

The legislature of the state cannot do that by a local and subordinate legislative body, deriving all their powers from it, which it could not do directly by its own proper legislative enactment.

13 How. Pr. at 206. Justice Allen was later elevated to the Court of Appeals and wrote a concurring opinion in the last of the town bonding cases. *Williams v. Town of Duanesburgh*, 66 N.Y. 129 (1876).

<sup>154</sup> 18 N.Y. at 44.

Interestingly, the same legislature that authorized the village of Rome to borrow money and buy railroad stock also enacted a law purporting to restrict the power of municipalities to borrow money and loan their credit. Act of July 21, 1853, ch. 603, [1853] N.Y. Laws 1135. Essentially, the act imposed on the municipalities certain prohibitions that the constitution imposed on the state. The law provided that "[n]o municipal corporation shall in any manner hereafter loan or give its credit to or in aid of any individual, association or corporation." *Id.* § 1. Municipalities were prohibited from contracting debt except pursuant to a referendum. *Id.* §§ 2, 5. Furthermore, in no event could a municipality borrow in excess of eight percent of the value of its assessed real property. *Id.* § 3, [1853] N.Y. Laws 1136.

The law expressly provided that it did not "alter, repeal, or modify" any existing authority that a municipal corporation might have to contract debt. *Id.* § 6. Would the act, then, apply to future municipal authorizations? Obviously not, since one legislature cannot bind another and a later authorization would in every case alter, modify, or repeal chapter 603. In fact, the Constitutional Commission of 1872 found that local debt in the state was excessive. See text accompanying notes 180-82 *infra*. The Act can only be understood as a public relations effort at a time when the legislature was pursuing a disastrous policy in aid of the railroads.

lowed in a series of cases<sup>155</sup> and reached a high water mark in an 1874 case, *Town of Duaneburgh v. Jenkins*.<sup>156</sup> There it was found that when a stock subscription had been executed and bonds had been issued by a town representative, the legislature could compel a town to invest in railroad stock.<sup>157</sup> In formulating the principle of the case, Commissioner Johnson reasoned as follows:

As the majority in any municipal community has no such inherent power to bind the minority and require them to bear taxation for a purpose they disapprove, it is evident that the power thus exercised is derived from the grant of the legislature. Thus granting power, the legislature binds the minority without its consent; and, on the same principle, it may make the duty imperative on both majority and minority in any locality to subscribe for stock, to issue bonds, and to pay taxes levied for the purpose of constructing a railroad.<sup>158</sup>

Commissioner Johnson seems logically correct in his extension of the *Bank of Rome* precedent. However, almost contemporaneous with the fullest development of legislative power, that power began to ebb. In *People v. Batchellor*,<sup>159</sup> a railroad brought a mandamus to compel the town of Stockton to issue town bonds and invest in railroad stock. The court below granted the mandamus. The Court of Appeals reversed, holding that the legislature could not compel a town that had neither executed a stock subscription nor issued bonds to become a stockholder in a railroad corporation. The court distinguished *Bank of Rome* and the cases following it on the ground that those cases only held that the legislature could authorize a town to enter into the transaction.<sup>160</sup>

<sup>155</sup> *Starin v. Town of Genoa*, 23 N.Y. 439 (1861); *Clarke v. Rochester*, 28 N.Y. 605 (1864); *People v. Mitchell*, 35 N.Y. 551 (1866); *People v. Smith*, 45 N.Y. 772 (1871).

<sup>156</sup> 57 N.Y. 177 (1874). This decision was made by the Commission of Appeals, a body having jurisdiction concurrent with that of the Court of Appeals. The Commission was created by the Judiciary Article of 1869 for a limited period of time in order to reduce court backlog. N.Y. CONST. art. VI, §§ 4-5 (1869). This Article was the only part of the constitution proposed by the 1867 Convention which was ratified by the people.

<sup>157</sup> 57 N.Y. at 193.

<sup>158</sup> *Id.* at 190.

<sup>159</sup> 53 N.Y. 128 (1873).

<sup>160</sup> As Commissioner Johnson was to indicate in *Duaneburgh*, decided six months later, the court's distinction was not strong.

The court did not discuss its earlier holding in *People v. Mitchell*, 35 N.Y. 551 (1866), which upheld a mandamus compelling the town of Summit to issue bonds and buy stock in the Albany and Susquehanna Railroad Company. In that case the court stated:

[T]his authority can be conferred in such a manner, that the objects can be attained either with or without a popular vote. . . .

.....  
It is insisted that, though they were empowered to issue the bonds, they

The court noted that the legislature could compel a town to issue bonds for the purpose of constructing a public highway.<sup>161</sup> But that proposition did not control the instant case "unless it shall be further held that a railroad owned and controlled by a corporation and operated by it for the benefit of its stockholders is a public highway in the same sense as the common roads of the country."<sup>162</sup> The court further noted that it had been uniformly held in eminent domain cases that a taking of property for a railroad was a taking for a public use.<sup>163</sup> But the court did not find the eminent domain cases controlling in the case of compelling a town "to aid in the construction of a work public in some respects, but private in others, of at least equal importance."<sup>164</sup>

No doubt the *Batchellor* decision caused consternation in the financial community. The court seemed but a short step from overruling *Bank of Rome* and thereby impairing some \$27,000,000 of local debt.<sup>165</sup> But the step was never taken. Three years later, the last of the town bonding cases came to the court in *Williams v. Town of Duaneburgh*.<sup>166</sup> By this time the 1874 amendments to the constitution, pro-

---

were under no legal obligation to exercise the power. From the nature of the authority, the duty was plainly mandatory . . . .

*Id.* at 552, 555-56.

<sup>161</sup> This issue had been previously decided by the court in *People v. Flagg*, 46 N.Y. 400 (1871).

<sup>162</sup> 53 N.Y. at 139. The Supreme Court of the United States had held that railroads were indeed public highways in an odd series of cases. See note 176 *infra*.

<sup>163</sup> This line of cases begins with the 1837 decision in *Bloodgood v. Mohawk & H.R.R.*, 18 Wend. 9 (N.Y. Ct. Corr. Err. 1837).

<sup>164</sup> 53 N.Y. at 140.

The rule, as the court saw it, was as follows:

The test is, whether the purpose to be effected is public or private; if the former, a mandatory statute is valid. If the latter, it is not within the province of legislation, and consequently not within the power of the legislature, and the act is, therefore, void. We have seen that a railroad corporation possesses some of the characteristics of both; public, as to its franchises; private, as to the ownership of its property and its relations to its stockholders. Were it exclusively public the act of 1870 would be valid, but void if exclusively private. It follows that, as the legislature is supreme only as to public purposes, and as the act in question relates in part to private, that to this extent it is void; and as the latter is inseparably connected with the former, the entire act must be held void.

*Id.* at 143.

The *Batchellor* court noted that a lower court had voided a similar act. In *Sweet v. Hulbert*, 51 Barb. 312 (N.Y. Sup. Ct. 1868), the act held void had authorized the town of Saratoga to borrow \$100,000 and donate the proceeds to a railroad corporation. The court said that it would be "improper" to question the *Bank of Rome* precedent, "although if it were a new question we should hope for a different rule." *Id.* at 319-20. But the court noted that the Court of Appeals "has not yet held" that the legislature may authorize a town to give its money away. The railroad interests did not appeal the *Sweet* decision, apparently deciding to leave well enough alone.

<sup>165</sup> TAXATION & FINANCE 290.

<sup>166</sup> 66 N.Y. 129 (1876).

hibiting the practices that had led to local indebtedness, had been ratified by the people and were in effect.<sup>167</sup> The judgment of the people on *Bank of Rome* was therefore clear.

*Williams* arose in the context of the widespread failure of the various municipally-funded railroads, and the court reviewed the history of state railroad policy since *Bank of Rome*.<sup>168</sup> It noted that the town bonds were purchased "not by capitalists only, but by trustees and persons of limited means."<sup>169</sup> That there was to be a large loss was now evident; the only question was whether it would fall on the community as a whole or on the bondholders. The court determined that it could not "without doing the greatest injustice"<sup>170</sup> overrule *Bank of Rome*. The court observed:

The doctrine of *stare decisis* has here a most forcible application. The rule declared in that case has become in the nature of a rule of property. It is doubtless true, that in many cases severe taxation without compensating benefits will be entailed to pay the indebtedness created under the bonding acts. But the loss must fall either upon the community at large, or upon those who have purchased bonds, the issue of which the legislature sanctioned, and the validity of which this court deliberately affirmed.<sup>171</sup>

---

<sup>167</sup> See text accompanying note 185 *infra*.

<sup>168</sup> Many of these projected lines of road were of doubtful utility, and many others were in localities where neither population [n]or business warranted the expectation of a profitable traffic. But it was easy in the abnormal condition of the country during the civil war to induce individuals or communities to engage in hazardous enterprises, and to pledge their means or credit to support them. Legislation to enable cities and towns to pledge their credit in aid of railroads was readily procured and municipal bonding for railroads became a recognized part of the system of railroad construction. These bonds were put upon the market, and were purchased upon the faith of the decision in *The Bank of Rome v. The Village of Rome*.

66 N.Y. at 132-33.

<sup>169</sup> *Id.* at 133.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* The court then distinguished *Batchellor* on the ground that it only held that a town could not be compelled to issue bonds and that it did "not understand that case as deciding that the construction of railroads is not a public purpose for which taxation may be justified." *Id.* at 135.

Judge Allen, who as a supreme court justice had held void a town bonding statute in 1856 (*Clark v. Rochester*, 13 How. Pr. 204 (N.Y. Sup. Ct. 1856), *rev'd*, 24 Barb. 446 (N.Y. Sup. Ct. 1857), *aff'd*, 28 N.Y. 605 (1864)), concurred in the court's opinion. Judge Allen disagreed with the court's attempt to distinguish *Batchellor*:

[T]he cases which affirm the right of the legislature to confer upon municipal corporations the power referred to were, in effect, overruled. . . . [T]here is no ground upon which it and the cases which preceded it can be reconciled or made consistent.

66 N.Y. at 140 (concurring opinion). He then referred to a recent case holding that the legislature could not authorize a town to issue bonds and invest in the stock of a manufacturing corporation. *Weismer v. City of Douglas*, 64 N.Y. 91 (1876). The 1874 constitu-

The court's approach seems equivocal. If *Bank of Rome* was wrong it should have been overruled; if it was overruled everything pursuant to it would fall. But this view is unkind to the court for the United States Supreme Court had already assured the bondholders of payment even if the Court of Appeals overruled *Bank of Rome*. In 1853, the Iowa Supreme Court upheld the issuance of town bonds in exchange for railroad stock,<sup>172</sup> but in 1859, the Iowa Supreme Court reversed itself and held such bonds void.<sup>173</sup> Suit was brought in the federal courts and the bonds were held valid by the Supreme Court in *Gelpcke v. Dubuque*:<sup>174</sup>

" . . . [I]f the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts . . . ."

The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law.<sup>175</sup>

Presumably, following the *Gelpcke* decision, all of the Iowa town bonds

---

tional amendments did not control the *Weismer* case since the bonds were already outstanding. The case arose when the town stopped paying interest on the bonds. The court held that taxes may be laid only for a public purpose and that such purpose must be "direct and immediate" not "collateral, remote or consequential." *Id.* at 100. The operation of a private lumber corporation was held not to be such a public purpose.

<sup>172</sup> *Dubuque County v. Dubuque & P.R.R.*, 4 Greene 1 (Iowa 1853).

<sup>173</sup> *Stokes v. County of Scott*, 10 Iowa 166 (1859).

<sup>174</sup> 68 U.S. (1 Wall.) 175 (1864).

<sup>175</sup> *Id.* at 206, quoting *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 432 (1853).

The language in the text, while not entirely clear, indicates that a judicial decision could so impair a contract as to be in violation of the Constitution. But the contract clause applies only to laws passed by a state, not judicial decisions. *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). The Court further noted that its decision was required by justice: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." 68 U.S. (1 Wall.) at 206-07. Justice Miller, dissenting, thought the Court's decision brought it into "unseemly conflict" with the state judiciary (*id.* at 207); it was saying to the federal courts sitting in Iowa: "When [the state supreme court] . . . says bonds are void, issued in that State, because they violate its constitution, you shall say they are valid, because they do *not* violate the constitution" (*id.* at 209) (emphasis in original). Miller further stated that he believed the Iowa opinion holding the bonds unconstitutional to be "well-reasoned." *Id.* at 208. Miller thought existing precedent required that the last decision of the state court be followed. He saw no reason to vary from the precedent

if a gambling stockbroker of Wall Street buys at twenty-five per cent. of their par value, the bonds issued to a railroad company in Iowa, although the court of the State, in several of its most recent decisions, have decided that such bonds were issued in violation of the [state] Constitution . . . .

*Id.* at 214.

were negotiated to out-of-state buyers who then successfully brought suit on them in the federal courts; the *Gelpcke* decision was followed in several other Supreme Court cases.<sup>176</sup>

<sup>176</sup> *Havemeyer v. Iowa County*, 70 U.S. (3 Wall.) 294 (1866); *Thomson v. Lee County*, 70 U.S. (3 Wall.) 327 (1866); *Olcott v. Supervisors*, 83 U.S. (16 Wall.) 678 (1872). In *Olcott*, a case that arose in Wisconsin, the Supreme Court said that "[u]ndoubtedly taxes may not be laid for a private use." *Id.* at 694. It then proceeded to find that a railroad was a public highway. The Wisconsin constitution contained an anti-*Dartmouth College* provision similar to that inserted in the New York constitution in 1846. The Court relied heavily on this reservation of power in finding the railroad to be public. It stated:

That the legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan and Fond du Lac Railroad Company is certain. This is a power reserved by the constitution. The railroad can, therefore, be controlled and regulated by the State.

*Id.* at 694. It is doubtful that the draftsmen of New York's 1846 constitution intended the reservation of power to convert a private corporation into a public one.

Sixty years later, the Supreme Court, in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), sought to rationalize the *Gelpcke* group of cases. In *Tidal Oil*, two parties claimed oil lands under deed from the same Creek Indian. Tidal Oil received its deed when the Indian was a minor. Subsequently, the Indian sought to have the deed set aside but was defeated in the Oklahoma courts. After reaching his majority, the Indian conveyed the same property to Flanagan. Flanagan brought suit on his deed and was upheld by the Oklahoma Supreme Court, which also gave recovery for mesne profits. Tidal Oil had made various contracts and oil and gas leases in reliance on the earlier court decision. It argued to the United States Supreme Court that the later state court decision violated the contract clause as interpreted by *Gelpcke* and also deprived it of property without due process of law. Chief Justice Taft disagreed with both arguments. He found that there was no vested right in a court decision and that a change of decision did not deprive a person of property without due process: "The mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the Federal Constitution." *Id.* at 455.

The Chief Justice also noted that it "has been settled by a long line of decisions, that the provision of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation, and not by judgment of courts." *Id.* at 451 (footnote omitted). But the Chief Justice recognized that there was "persistent error" (*id.*) with respect to the point and that *Gelpcke*, which contained certain "unguarded language" (*id.* at 454), was the leading case relied on "to sustain the error" (*id.* at 451). Taft stated that *Gelpcke* did not hold that a later judicial decision could violate the contract clause. Rather, it held that the Court was free, in diversity cases, to determine state law and that it chose to determine it in conformity with the earlier state court decision upholding the validity of certain bonds. The Chief Justice stated:

They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a State prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution . . . .

*Id.* at 452.

The Supreme Court, in 1938, held that in diversity cases the federal courts must apply

Proceeding parallel to the later town bonding cases was a movement for constitutional reform aimed at overruling them. The New York Constitutional Convention of 1867 debated but did not adopt such a provision.<sup>177</sup> Perhaps as a result of this failure, the constitution proposed by the 1867 Convention was defeated by the people.<sup>178</sup>

In 1872 the legislature created a Constitutional Commission for the purpose of proposing amendments to the legislature.<sup>179</sup> The Commission's Committee on Local Indebtedness determined that local debt, in 1872, amounted to \$214,300,000.<sup>180</sup> This came to almost thirteen percent of aggregate assessed valuation,<sup>181</sup> and in some towns the debt amounted to fifty percent of assessed valuation.<sup>182</sup> Of the total local debt, \$27,000,000 was attributable to aid for railroads.<sup>183</sup> The abuses to which *Bank of Rome* had led were now clear.<sup>184</sup>

---

the state law as declared by the state courts. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Therefore, if the Taft explanation of *Gelpcke* is followed, the case can be considered overruled.

177 II 1867-68 DEBATES 1137-71; III *id.* at 1723-26; V *id.* at 3606-07, 3663-65. The 1867 Convention also debated, but did not adopt, a provision to prohibit the state from giving or loaning its money in aid of corporations. The purpose of this provision was later explained by the Court of Appeals as follows:

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.

*People v. Westchester County Nat'l Bank*, 231 N.Y. 465, 473, 132 N.E. 241, 243-44 (1921). Examples of this activity are found in Act of April 3, 1863, ch. 70, [1863] N.Y. Laws 104, and Act of April 25, 1864, ch. 399, [1864] N.Y. Laws 900, which imposed a state-wide tax in order to make a gift of money to the Albany and Susquehanna Railroad Company. Mr. Alvord estimated at the 1867 Constitutional Convention that \$750,000 of state monies had been given to this railroad. II 1867-68 DEBATES 1143. This provision was debated in III *id.* at 1840-48, 2250-59; V *id.* at 3327-31, 3366-69, 3461-82, 3764-65.

178 2 LINCOLN 419. The 1867 constitution's Judiciary Article, separately submitted, was ratified by the people. *Id.*

179 Act of June 15, 1872, ch. 884, [1872] N.Y. Laws 2178. The 32 members of the Commission were appointed by the Governor with the advice and consent of the Senate. *Id.* § 1. The Commission could recommend amendments to the legislature, and if two successive legislatures approved the amendments, they could be submitted to the people. N.Y. CONST. art. XIII (1846). The debates of the 1872 Constitutional Commission are not reported.

180 TAXATION & FINANCE 290.

181 *Id.* at 290, 296.

182 *Id.* at 290.

183 *Id.*

184 The Court of Appeals was later to summarize the history of this period as follows: [N]umerous railroads had been built upon the bonds procured from towns through which they were constructed in return for stock issued by the corporations. The inhabitants of the towns were induced to give their consent through supposed benefits that would result to their property and upon representations that the earnings of the road would provide dividends upon the stock, with which they could pay their bonds. In some instances the bonds were procured

The Constitutional Commission acted clearly and decisively. Any county, city, town, or village was to be prohibited from: (1) owning the stock of any corporation; (2) giving or loaning its property or money to, or in aid of, any individual or corporation; and (3) giving or loaning its credit to, or in aid of, any individual or corporation.<sup>185</sup> The state was to be prohibited from giving or loaning "money" to, or in aid of, any corporation or private undertaking.<sup>186</sup> The construction of railroads had been held to be a public purpose. That, however, was no longer to be the sole test concerning the disposition of the public credit, property, or monies. The 1874 amendments were ratified by the people; the state prohibition by vote of 336,237 to 195,047, and the local prohibition by vote of 337,891 to 194,234.<sup>187</sup>

In 1884 the constitution was further amended to impose debt limits upon the larger cities. The provision prohibited the creation of debt in excess of ten percent of assessed value in cities with a population of 100,000 or more.<sup>188</sup> The Convention and constitution of 1894 kept many of the provisions discussed above intact; others were changed but not materially for purposes of this article.<sup>189</sup>

---

and sold and the roads never built. In many other cases the roads in a few years were sold out under foreclosure of mortgages and the stock cut off. So great was the evil and so heavy was the burden upon the towns that relief was sought through a constitutional provision.

Sun Printing & Publishing Ass'n v. Mayor, Aldermen & Commonalty, 152 N.Y. 257, 268-69, 46 N.E. 499, 501 (1897).

<sup>185</sup> N.Y. CONST. art. VIII, § 11 (1874). An express exception was created to permit the aid and support of the poor. *Id.*

<sup>186</sup> *Id.* § 10. Express exceptions were created for educational purposes and also for the education and support of the blind, deaf and dumb, and juvenile delinquents. *Id.*

<sup>187</sup> LEGISLATIVE MANUAL 317.

<sup>188</sup> N.Y. CONST. art. VIII, § 11 (1884). This provision operated as a prohibition against the acts of the state legislature. Cities and towns were not given the general power to incur debts until about 1900. TAXATION & FINANCE 298.

<sup>189</sup> The constitution proposed by the Convention of 1915 was defeated by the people by a vote of 400,423 for and 910,462 against. LEGISLATIVE MANUAL 322.

One very unfortunate change took place by amendment in 1918. This was the removal from the 1846 referendum provision of the requirement that the same law that authorizes the debt must also impose a tax sufficient to pay it off in 18 years; when the people vote to authorize a debt they also vote to impose a tax upon themselves. This provision is attributable to Thomas Jefferson. III 1867-68 DEBATES 1744. Jefferson began with the proposition "that the *earth belongs . . . to the living*; that the dead have neither powers nor rights over it." Letter to James Madison, Sept. 6, 1789, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 488 (A. Koch & J. Peden eds. 1944) (emphasis in original). It follows from this proposition that one generation has no right to bind another. If one generation can charge another for its debts, "then the earth would belong to the dead and not to the living generation." *Id.* at 489. Jefferson continued: "The conclusion then, is, that neither the representatives of a nation, nor the whole nation itself assembled, can validly engage debts beyond what they may pay in their own time . . ." *Id.* at 490. Underlying Jefferson's thought is the idea that since debt reduces future options, it



Before discussing the 1938 Convention, which produced New York's present constitution, it is necessary to deal with the law of moral obligation. The law of moral obligation has been said to permit the state, or a city, to use its funds to pay off the bondholders of a defaulting authority.

#### IV

#### THE LAW OF MORAL OBLIGATION

The seminal decision on the law of moral obligation in New York is an 1855 Court of Appeals case, *Town of Guilford v. Board of Supervisors*.<sup>190</sup> Two highway commissioners, Cornell and Clarke, had been directed by a town meeting to bring an action on behalf of the town. The suit involved the town's right to compensation from a private turnpike company for the taking of a public highway and bridge. Clarke and Cornell were defeated in this action and the town received no compensation.<sup>191</sup> The commissioners then brought suit against the town for the recovery of costs and expenses incurred in the prosecution of the suit. Again Clarke and Cornell were defeated, this time on the ground that the town meeting had no power to authorize the commissioners to prosecute the action.<sup>192</sup>

Following this defeat, the commissioners sought relief from the legislature. The legislature complied, passing a law requiring the town to hold a referendum on the validity of the commissioner's claim and the amount of compensation, if any.<sup>193</sup> The statute provided that the vote of the electors "shall be final and conclusive."<sup>194</sup> The referendum was held and the town, "by a large majority,"<sup>195</sup> rejected the claim.

---

is essentially antidemocratic. The point is equally valid today. Assume that one administration embarks on a massive program of public building. It borrows freely to the point where 50% of the government's annual income must be paid for debt service. The burden will remain for 30 or 40 years. A succeeding administration, elected to pursue different policies, will have few options available to it. The government's income has been heavily mortgaged and the debt must be paid. As Michael Hoffman told the 1846 Convention, a bad law can be repealed but a bad debt cannot be.

The Jeffersonian provision was weakened in 1905 when the permissible period for debt was increased from 18 to 50 years. N.Y. STATE CONSTITUTIONAL CONVENTION COMM., REPORT: AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895-1937, at 549 (1938). It was destroyed in 1918 when the requirement for the imposition of a tax was removed. *Id.* at 556.

<sup>190</sup> 13 N.Y. 143 (1855).

<sup>191</sup> *Cornell v. Butternuts & Oxford Turnpike Co.*, 25 Wend. 365 (N.Y. Sup. Ct. 1841).

<sup>192</sup> *Cornell v. Town of Guilford*, 1 Denio 510 (N.Y. Sup. Ct. 1845).

<sup>193</sup> Act of Feb. 7, 1851, ch. 16, [1851] N.Y. Laws 17.

<sup>194</sup> *Id.* § 3.

<sup>195</sup> *Town of Guilford v. Cornell*, 18 Barb. 615, 640 (N.Y. Sup. Ct. 1854).

Again the commissioners turned to the legislature which now passed "An act for the relief of Daniel Cornell and Ransom Clarke."<sup>196</sup> The act provided for the appointment of three commissioners to determine the amount of costs and expenses incurred by the luckless highway commissioners. The statute further directed that the award be paid by taxes imposed upon the town of Guilford. The town resisted, urging that the statute was unconstitutional.<sup>197</sup>

The question presented was whether taxes may be imposed to pay a private claim that was legally unenforceable. The court held that the legislative power to impose a tax for any purpose was not limited by the constitution. It found further that the judiciary had no power to review the legislative determination. There was one exception to this rule—if what the legislature sought to accomplish was prohibited by the constitution, the court would review and strike down the act: "Independently of express constitutional restrictions, [the legislature] can make appropriations of money whenever the public well being requires or will be promoted by it; and it is the judge of what is for the public good."<sup>198</sup>

The above holdings were sufficient to dispose of the case. The court went on, however, to give the first expression to the law of moral obligation. It spoke of "claims founded in equity and justice" as follows:

The legislature is not confined in its appropriations of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity.<sup>199</sup>

Four years after *Guilford*, the court approved a legislative imposition requiring the city of Syracuse to pay extra compensation to a sewer contractor.<sup>200</sup> This was held valid despite a provision of the city's charter prohibiting payments in excess of the agreed-upon contract price.<sup>201</sup> *Guilford* was cited for the proposition that the legislature may

---

<sup>196</sup> Act of Feb. 5, 1852, ch. 8, [1852] N.Y. Laws 12.

<sup>197</sup> The Court of Appeals had already held, in an opinion of Judge Ruggles, that the 1846 constitution did not restrain the legislature's power to tax and to apportion the tax. *People v. Mayor of Brooklyn*, 4 N.Y. 419 (1851).

<sup>198</sup> 13 N.Y. at 149.

<sup>199</sup> *Id.*

<sup>200</sup> *Brewster v. Syracuse*, 19 N.Y. 116 (1859).

<sup>201</sup> In *People ex rel. Wood v. Draper*, 15 N.Y. 532 (1857), it had been held that the power of the legislature over local affairs was complete. In that case, the court held that there was no constitutional impediment to an act that removed the police function from local control. The act established a metropolitan police district dominated by com-

require taxation to meet a legally unenforceable claim, although a normal business risk seems remote from the sympathetic case presented by the highway commissioners.<sup>202</sup> In any case, the legislative award of extra compensation to contractors became a general practice, and, in the Constitutional Convention of 1867, an effort was made to prohibit special legislative recognition of moral obligations.

The proposed constitution would have effected four major changes with respect to private claims against the state.<sup>203</sup> First, the legislature was prohibited from auditing or allowing private claims.<sup>204</sup> Second, a constitutional court denominated the Court of Claims was to be created and given jurisdiction over private claims against the state.<sup>205</sup> Third, the legislature was prohibited from passing special laws with respect to such claims and could act only by general law.<sup>206</sup> Finally, the

missioners appointed by the Governor. For discussions of home rule, see Richland, *Constitutional City Home Rule in New York* (pts. 1-2), 54 COLUM. L. REV. 311 (1954), 55 COLUM. L. REV. 598 (1955); Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145 (1966).

<sup>202</sup> It is hard to see any "equity and justice" in the claim of a sewer contractor who has made a bad bargain with a city. There was no correlative rule requiring a contractor to disgorge his profits if the contract turned out to be advantageous.

<sup>203</sup> In its Address to the People, the Convention described the proposed constitutional changes as follows:

We have created a court of claims for the adjudication of all demands against the State, and taken away the power of the Legislature to pass laws in relation to claims, thereby removing one prolific cause of frequent, interested, and sometimes improvident legislation . . . .

Address of the Convention to the People of the State, Feb. 28, 1868, in V DOCUMENTS OF THE CONVENTION OF THE STATE OF NEW YORK, 1867-68, No. 184, at 2-3 (1868) [hereinafter cited as 1867-68 DOCUMENTS].

<sup>204</sup> Article III, § 16, of the proposed constitution of 1868 provided:

The Legislature shall not audit or allow any private claim or account against the State, or pass any special law in relation thereto, but may appropriate money to pay such claims as shall have been audited and allowed according to law.

V 1867-68 DOCUMENTS, No. 185, at 12.

<sup>205</sup> Article V, § 8, of the proposed constitution provided:

There shall be a Court of Claims, composed of three Judges appointed by the Governor with the consent of the Senate, in which shall be adjudicated such claims against the State as the Legislature shall by general laws direct.

V 1867-68 DOCUMENTS, No. 185, at 19.

<sup>206</sup> Note 204 *supra*. It was suggested that the legislature might abuse its power, even by general laws, to determine which claims against the state could be adjudicated. Mr. Alvord replied that it was necessary to leave the power in the legislature since the waiver of sovereign immunity was experimental and might require limitations in the future. Mr. Alvord stated:

We are relaxing the sovereignty of the State; and I trust that [it will be left] . . . in the hands of the Legislature to say how far individuals shall be permitted to go before the court, and how far the sovereignty of the State shall remain in abeyance, in the decision of claims against the State.

V 1867-68 DEBATES 3647.

legislature was prohibited, even by general law, from allowing claims for extra compensation and claims barred by a statute of limitations.<sup>207</sup>

Mr. Lapham, a member of the committee that drafted these provisions, explained the reasons for the constitutional changes as follows:

What is the evil which we are seeking to guard against? The practice for many years has been that, when a claim has been decided by the tribunal to which it is referred by law and decided to be unwarranted and unjust, and consequently disallowed, to go to the Legislature and ask its allowance; and we all regret to be compelled to say that the application to the Legislature has generally been successful.<sup>208</sup>

The creation of the Court of Claims and the grant of power to the legislature to pass general laws with respect to its jurisdiction constituted a waiver of sovereign immunity.<sup>209</sup> General laws were to be passed to cover all claims against the state.<sup>210</sup> Furthermore, the Convention was alert to the possibility of legislative abuse of the power to pass general laws with respect to private claims, and, therefore, as mentioned above, the proposed constitution prohibited the legislature from passing any law with respect to (1) extra compensation on contracts and (2) any claim barred by a statute of limitations.<sup>211</sup> The proposed con-

---

<sup>207</sup> Article III, § 17 (V 1867-68 DOCUMENTS, No. 185, at 12) (extra compensation); Art. V, § 8 (V 1867-68 DOCUMENTS, No. 185, at 19) (statute of limitations).

<sup>208</sup> IV 1867-68 DEBATES 2770.

<sup>209</sup> The legislature could recognize a moral obligation only by passing a general law requiring the Court of Claims to give a remedy to all persons similarly situated. The claim would then become a legal claim rather than a moral one. This is illustrated by the following colloquy:

MR. MURPHY—I would like to ask the Chairman of the committee, if I can get his ear for a moment, what he proposes to do with private claims against the State which may not be embraced in those authorized to be audited by general law. There may be cases of just claims against the State which may not be embraced in the general laws authorizing this court of claims. My question is, what is to become of such claims against the State under this provision if no special laws shall be passed in relation to them?

MR. RATHBUN—My answer to the gentleman is that it seems to me there can be no difficulty whatever in the Legislature passing a general law by which every man having a claim against the State is entitled to go before the court of claims and have it tried, because they might enact a law that all claims of individuals—private claims—shall be tried in this court of claims, making the law so broad that there can be no pretense of any claim, no matter how it originated, that that court of claims would not have jurisdiction over it.

II *id.* at 1321.

<sup>210</sup> See generally *id.* at 1319-20; IV *id.* at 2771, 2775.

<sup>211</sup> Note 207 and accompanying text *supra*.

A resolution of the Convention provided for the publication of its debates by two Albany newspapers. They were to have been reimbursed by the Convention at a rate of \$6.50 per column but not exceeding \$6,000 to each paper for the entire proceedings. The Convention lasted longer than expected and a resolution was therefore offered "that

stitution, consequently, would have eliminated the law of moral obligation. The legislature could not act by special law; if it enacted a general law covering a class of claims, any obligation arising thereunder would be legal, not moral. With the exception of the Judiciary Article, however, the proposed constitution was rejected by the people.<sup>212</sup>

The abuses caused by special legislative recognition of claims continued, and, in 1872, Governor Hoffman called for a constitutional commission, noting that legislative awards of extra compensation had tended "greatly to encumber the statute book, demoralize the Legislature, and deplete the treasury."<sup>213</sup> The 1872 Constitutional Commission acted to end the more flagrant abuses caused by the moral obligation theory but did not attempt the drastic changes proposed by the 1867 constitution. Thus, the Commission rejected the proposal creating a court of claims to adjudicate claims against the state.<sup>214</sup> More importantly, it failed to adopt the provision prohibiting the legislature from passing special laws in relation to private claims.<sup>215</sup> The Commission did adopt two provisions found in the defeated constitution: (1) the prohibition of the legislative audit or allowance of claims;<sup>216</sup> and (2) the prohibition of extra compensation.<sup>217</sup>

---

the limitation upon the gross amount to be paid the Albany *Argus* and *Evening Journal*, for publishing verbatim reports of the proceedings of the Convention be changed . . . ." V 1867-68 DEBATES 3869. The resolution was carried by a vote of 63 to 40, but it was pointed out in the debates that if the proposed constitution had been in force it would have been impossible for the papers to have obtained the extra compensation. *Id.* at 3870-73.

<sup>212</sup> The constitution was defeated by a vote of 290,456 to 223,935. LEGISLATIVE MANUAL 316. The section creating the Court of Claims was not part of the Judiciary Article.

<sup>213</sup> VI MESSAGES FROM THE GOVERNORS 402-03 (C. Lincoln ed. 1909).

<sup>214</sup> JOURNAL OF THE CONSTITUTIONAL COMMISSION OF THE STATE OF NEW YORK 125-26 (1873).

<sup>215</sup> *Id.* at 91, 160, 184. Another defeated constitution, the 1915 constitution, would have prohibited such special laws. Article III, § 19, in IV RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1915, at 4322 (1915) [hereinafter cited as 1915 RECORD].

<sup>216</sup> N.Y. CONST. art. III, § 19 (1874). A related provision prohibited the payment of any claim barred by the statute of limitations. *Id.* art. VII, § 14. The present constitution combines both provisions in Article III, § 19. In 1883 a board of claims was created. In 1897 the board was transformed into the Court of Claims. 2 LINCOLN 326.

<sup>217</sup> N.Y. CONST. art. III, § 24 (1874). This section prohibited the state or a locality from granting extra compensation to "any public officer, servant, agent or contractor." A related provision, Article VII, § 3, prohibited payment of any extra compensation to a canal contractor. This section, however, permitted cancellation of the contract if the canal board determined it to be "unjust and oppressive." The Committee on Canals reported on this provision as follows:

It is believed that this provision, while it is evidently just and equitable, will be of great value to the State. Many contracts have heretofore been taken at prices known to be unremunerative, in the belief that upon subsequent application to the Legislature the prices would be raised. In this way the pro-

The Commission also expanded the gift and loan provisions.<sup>218</sup> Since 1846, the constitution had prohibited the gift or loan of the state's credit. Now this provision was broadened to also prohibit the gift or loan of the state's money.<sup>219</sup> It might seem that the prohibition of a gift of money would result in the abolition of the law of moral obligation,<sup>220</sup> but this was apparently not the Commission's intent;<sup>221</sup> there would have been no need for a specific prohibition of extra compensation if the law of moral obligation was to be eliminated. In sum, the pattern of the 1874 amendments seems in the direction of controlling and limiting moral obligations rather than abolishing them.

*Guilford* had held that the legislative powers of taxation and appropriation were unlimited. The only exception to this was that these powers could not be used in violation of the constitution. In 1876, the court added a further qualification in *Weismer v. Village of Douglas*.<sup>222</sup> There, the legislature had authorized the village to issue bonds and to invest the proceeds in the stock of a private lumber company. The dividends on the stock were to be applied to the debt service on the village bonds, but, if, as expected, the dividends were insufficient for that purpose, the village was required to impose taxes. After making several interest payments out of taxes, the village refused further payment on the bonds. The bondholders brought suit, arguing that under *Guilford* the taxing power of the legislature was unrestricted.<sup>223</sup> The court, however, limited the *Guilford* holding and found that a public purpose must be present. The bondholders argued further that a public purpose was present since the lumber mill would create job opportunities and increase the village's taxable base. The court rejected this, noting that "these are not the direct and immediate public uses and purpose to which money taken by tax may be directed."<sup>224</sup>

---

visions of the present Constitution for letting contracts to the lowest bidder have been practically evaded, and by shrewd, not to say corrupt, management, great sums of money have been improperly obtained from the State.

JOURNAL OF THE CONSTITUTIONAL COMMISSION OF THE STATE OF NEW YORK 428 (1873).

<sup>218</sup> See notes 72 & 80 and accompanying text *supra*.

<sup>219</sup> N.Y. CONST. art. VIII, § 10 (1874).

<sup>220</sup> A moral obligation assumes payment where there is no legal obligation. Payment of a non-legal obligation would normally be viewed as a gift. Such payment would therefore be prohibited.

<sup>221</sup> It is difficult to ascertain the Commission's intent since no record of its debates was kept. The only record of its proceedings, aside from certain committee reports, is the *Journal*, which is simply a report of action taken by the Commission.

<sup>222</sup> 64 N.Y. 91 (1876).

<sup>223</sup> The case was governed by the pre-1874 constitution. The 1874 amendments prohibited a village from becoming a stockholder in a corporation. N.Y. CONST. art. VII, § 11 (1874).

<sup>224</sup> 64 N.Y. at 103. See also the discussion of the *Batchellor* case, notes 159-64 and accompanying text *supra*.

As *Weismer* added the public purpose qualification to the law of moral obligation, so in 1886 the notion that the claim must be founded in "equity and justice" was formulated in *Cole v. State*.<sup>225</sup> This case involved compensation for certain harbor officials in the port of New York. Cole was appointed captain of the port in 1880. In 1883 the legislature passed a law authorizing the Governor to appoint a captain of the harbor; the act contained an appropriation providing for salaries and expenses. Apparently, the Governor did not exercise his power of appointment under this statute, and Cole continued to act as captain of the port on a hold-over basis. Subsequently, the state refused payment of Cole's salary and expenses on the grounds that he was not entitled to hold the office and that the 1883 act abolished his tenure so that his services since then had been as a volunteer.

In 1885 the legislature conferred jurisdiction on the board of claims "to hear, audit and determine the claims" of Cole and other harbor officials. The board's determination was favorable to Cole and his associates. The state argued that the 1885 act violated the constitutional prohibition against the legislative allowance of claims.<sup>226</sup> The court agreed that the legislature could not allow a claim but found no attempt to do so in the 1885 act; the act merely said that the board was to "determine" the claim. The court stated: "The power to hear and *determine* includes power to reject as well as to allow."<sup>227</sup> The court did not decide whether the claim was a legal or moral one but concluded that "it had a basis in justice and equity."<sup>228</sup> It further found that there was no violation of the constitution.<sup>229</sup>

Although the vague standards inherent in the "public purpose" and "equity and justice" criteria did not present serious obstacles to the state's assuming moral obligations,<sup>230</sup> until 1926 the courts consistently held that no payment of a claim could be made in violation

<sup>225</sup> 102 N.Y. 48, 6 N.E. 277 (1886).

<sup>226</sup> Oddly, the state did not base its argument on the constitutional prohibition against a gift of money. This position could have been argued with force.

<sup>227</sup> 102 N.Y. at 52, 6 N.E. at 278 (emphasis in original).

<sup>228</sup> *Id.* at 58, 6 N.E. at 281.

<sup>229</sup> The court reaffirmed the *Guilford* holding that no obligation could be paid in violation of the constitution: "Where the creation of a particular class of liabilities is prohibited by the Constitution, it would of course be an infraction of that instrument to pass any law authorizing their enforcement . . ." *Id.* at 54, 6 N.E. at 279.

<sup>230</sup> The application of these qualifications on the law of moral obligation has led to peculiar results. For example, a claim of war veterans has been held to lack "justice and equity." *People v. Westchester County Nat'l Bank*, 231 N.Y. 465, 134 N.E. 698 (1921). On the other hand, the claim of bondholders—whose bonds contained a disclaimer of state liability—has been held to possess "justice and equity." *Williamsburgh Sav. Bank v. State*, 243 N.Y. 231, 153 N.E. 58 (1926).

of constitutional prohibitions.<sup>231</sup> This idea had been an essential element of the law of moral obligation since its original formulation in *Guilford*, but in 1926, without discussion of the issue, the Court of Appeals broke with this vital principle in *Williamsburgh Savings Bank v. State*.<sup>232</sup>

In 1910 the State Water Supply Commission issued \$200,000 worth of five percent bonds on behalf of the Canaseraga Creek Improvement District. The District had been created pursuant to state law in order to regulate the flow of water in the creek.<sup>233</sup> Two years prior to the bond issue, the Court of Appeals had discussed the law noting that “[i]t nowhere assumes to pledge the credit of the state . . . .”<sup>234</sup> The bonds were to be paid from a special fund; *i.e.*, the assessments imposed on the benefited lands. After the “improvements” had been completed, an attempt was made to assess the benefited lands in the amount of \$382,385. The landowners resisted, claiming that the improvements had in fact been of little or no value. After trial, it was determined that the landowners were largely correct—the supreme court found the value of the improvements to be under \$30,000.<sup>235</sup> The district bonds were defaulted; apparently the bondholders were in trouble.

In 1923, however, the legislature authorized the Court of Claims to determine if the bondholders’ claim was founded in equity and justice. If the court so found, “the state shall be deemed to have been liable” on the bonds.<sup>236</sup> There could be no question that the state was not liable on the bonds. No referendum was held; no tax was imposed for their payment; none of the constitutional provisions had been complied with. Further, the Court of Appeals had already said that the credit of the state was not behind the district bonds.<sup>237</sup>

---

<sup>231</sup> Thus, an act establishing a pension system for “decrepit” teachers was struck down on the ground that it provided extra compensation. *In re Mahon*, 171 N.Y. 263, 63 N.E. 1107 (1902). On the same ground, a 1919 act authorizing extra payments on “war contracts” was held invalid. *Gordon v. State*, 233 N.Y. 1, 134 N.E. 698 (1922).

<sup>232</sup> 243 N.Y. 231, 153 N.E. 58 (1926).

The necessity of the principle is obvious: any state action, including the payment of a claim, must be governed by the state’s fundamental law.

<sup>233</sup> N.Y. Bds. & COMM’NS LAW, 4 N.Y. CONSOL. LAWS 5352 (1909); Act of April 22, 1907, ch. 195, [1907] N.Y. Laws 278; Act of May 11, 1906, ch. 418, [1906] N.Y. Laws 1016; Act of May 14, 1904, ch. 734, [1904] N.Y. Laws 1872.

<sup>234</sup> *State Water Supply Comm’n v. Curtis*, 192 N.Y. 319, 328, 85 N.E. 148, 151 (1908). The court refused to pass on the constitutionality of the law, although that question had been certified to it by the appellate division. *Id.* at 331, 85 N.E. at 152.

<sup>235</sup> *People ex rel. Morey v. Pratt* (N.Y. Sup. Ct. 1922), *reprinted in* Record on Appeal to the Court of Appeals of the State of New York at 283, *Williamsburgh Sav. Bank v. State*, 243 N.Y. 231, 153 N.E. 58 (1926). For the master’s assessment of value, see *id.* at 275.

<sup>236</sup> Act of May 23, 1923, ch. 830, § 3, [1923] N.Y. Laws 1490.

<sup>237</sup> Nor was the argument available that a debt unconstitutionally contracted may



The Court of Claims held that the bondholders' claim was not founded in equity or justice.<sup>238</sup> The appellate division, on other grounds, affirmed the Court of Claims.<sup>239</sup> The bondholders appealed to the Court of Appeals. Now, the 1852 prediction of Judge Ruggles was to come true. In *Newell*, another special fund case, Ruggles had warned that if a special fund proved deficient, the state would become liable on the bonds. He noted that it "might give rise to objection and controversy; but sooner or later, the claim would prevail, and could not be effectually resisted."<sup>240</sup>

The Court of Appeals held in *Williamsburgh* that the state must be made liable for the debt. The court essentially believed that the state was too heavily involved in the transaction to permit it to deny liability. It noted that the state "started on its disastrous course the improvement plan which has become the source of so much trouble."<sup>241</sup> Further, the district was "acting under [the state's] . . . authority."<sup>242</sup> The state had "permitted one of its agencies to gather into its treasury moneys of its citizens . . . ."<sup>243</sup> Therefore, the state cannot "stand unresponsive when asked to relieve those whom indirectly at least it has brought into an unhappy predicament, by retiring obligations which in essence and equity are its own."<sup>244</sup> The decision breached the consistent holdings that a moral obligation could not create a class of liability forbidden by the constitution by ignoring the constitutional prohibition against the creation of state debt except by referendum.<sup>245</sup>

---

be paid. This position was taken by the Attorney General in *People ex rel. Hopkins v. Board of Supervisors*, 52 N.Y. 556 (1873). The court did not agree with this position. It stated:

If no debt existed, there was no necessity for borrowing money. . . . A debt of \$6,000,000, or liabilities to that amount, and resting as a burden upon the people, resulting from the acts of the legislature and the agents and officers of the State, is an impossibility, for the reason that it is absolutely prohibited; and any attempt to create such debt or incur such liability is a nullity. . . . Neither the legislature nor the officers and agents of the State, or all combined, can create a debt or incur an obligation for or in behalf of the State, except to the amount and in the manner provided for in the Constitution.

*Id.* at 563.

<sup>238</sup> The Court of Claims decision is reprinted in the Record on Appeal to the Court of Appeals of the State of New York at 71-103, *Williamsburgh Sav. Bank v. State*, 243 N.Y. 231, 153 N.E. 58 (1926).

<sup>239</sup> 213 App. Div. 737, 211 N.Y.S. 420 (3d Dep't 1925).

<sup>240</sup> See note 138 and accompanying text *supra*.

<sup>241</sup> 243 N.Y. at 245, 153 N.E. at 63.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 246, 153 N.E. at 63.

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

<sup>245</sup> Strangely, none of these issues was raised by the litigants or discussed by the court.

The *Williamsburgh* decision was not only bad in itself but it became more ominous in view of the proliferation of public authorities during the 1930's. In two cases, the Court of Appeals held that the legislature could create an entity, known as an authority, which was unbounded by the constitutional provisions that restrain the government itself.<sup>246</sup> The state involvement argument, successful in *Williamsburgh*, seemed equally persuasive in the case of an authority. The authority, too, was created by the state; it purportedly fulfilled governmental purposes; its officials were appointed by the Governor; and its properties were granted tax exemptions. If an authority defaulted on its bonds would *Williamsburgh* permit the state to "stand unresponsive"? The question troubled the delegates to the 1938 Convention, and they addressed themselves to it.

## V

## THE 1938 CONSTITUTIONAL CONVENTION

The 1938 Convention assembled in Albany on April 5, 1938.<sup>247</sup> The Convention adopted a constitution on August 24,<sup>248</sup> and decided to submit it to the people in the form of nine separate questions.<sup>249</sup>

---

<sup>246</sup> *Gaynor v. Marohn*, 268 N.Y. 417, 198 N.E. 13 (1935); *Robertson v. Zimmermann*, 268 N.Y. 52, 196 N.E. 740 (1935). In a sense, a public authority is a type of special fund. *Newell* had held that state special fund debt must comply with the normal constitutional provisions governing debt. However, *Newell* was not discussed in either *Gaynor* or *Zimmermann*. *Newell* was discussed in *Kelly v. Merry*, 262 N.Y. 151, 186 N.E. 425 (1933), in which a village undertook to develop its own electric utility. The court decided that a conditional sales contract for electric generators was not a contract involving an "expenditure" within the meaning of the Village Law. The Village Law provided that the village could not enter into a contract involving an "expenditure" unless (1) provision was made for its payment by taxation, or (2) a resolution had been adopted authorizing borrowing. Act of April 6, 1928, ch. 852, [1928] N.Y. Laws 1818 (repealed 1954). These provisions were not complied with. The court held the contract valid, noting that it provided for payment only from the revenue of the lighting plant, and that "[t]he debt was not a general indebtedness of the village." *Id.* at 159, 186 N.E. at 428. The case was overruled by the 1938 constitution which provided that all local indebtedness must be backed by the faith and credit of the locality. N.Y. CONST. art. VIII, § 2.

<sup>247</sup> I REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, at 3 (1938) [hereinafter cited as 1938 REVISED RECORD].

<sup>248</sup> IV *id.* at 3467-68.

<sup>249</sup> *Id.* at 3534. There were a number of considerations underlying the Convention's decision to submit the constitution as a series of separate propositions rather than as a whole. Former Governor Alfred E. Smith explained to the Convention that submission as a whole would surely cause defeat of the constitution. *Id.* at 3486. Smith reasoned that any proposed constitution started with a handicap of 500,000 negative votes, representing the "people that will be against everything." *Id.* Submission as a whole would cause opponents of particular provisions to combine against the constitution which, to-

The Convention made the first question a general provision containing all material as to which there was "little or no dispute."<sup>250</sup> The remaining eight questions covered the more controversial amendments relating to such matters as labor, apportionment, elimination of railroad grade crossings, proportional representation, and slum clearance and low-rent housing.<sup>251</sup> On November 8, 1938, six questions were ratified by the people and three were defeated.<sup>252</sup>

By the time of the 1938 Convention, the state had created thirty-three agencies known as "authorities" or "public corporations."<sup>253</sup> In essence, the authority concept involved the statutory creation of a separate entity that was intended to be self-supporting out of tolls or other fees. Typically, an authority would operate a revenue-producing asset such as a tunnel, bridge, or parkway.<sup>254</sup> Also typically, an authority would finance construction of its assets by the sale of bonds. The bondholders, by a contract with the authority known as an indenture or a resolution, would impose various restrictions on the authority in order

---

gether with the initial handicap, would result in the constitution's defeat. *Id.* at 3486-87 (Governor Smith), 3492 (Senator Wagner). A further consideration in favor of separate submission was that it was "more democratic." *Id.* at 3493 (Senator Wagner).

<sup>250</sup> *Id.* at 3486.

<sup>251</sup> *Id.* at 3472-74, 3506-08.

<sup>252</sup> LEGISLATIVE MANUAL 329-30.

The 1938 constitution may be around for some time. The constitution itself provides that every twentieth year, and at such other times as the legislature may provide, there shall be submitted to the people the question: "Shall there be a convention to revise the constitution and amend the same?" N.Y. CONST. art. XIX, § 2. In 1957 the people answered such a question in the negative. LEGISLATIVE MANUAL 339. In 1967 a convention was held, but the resulting constitution was submitted as a whole to the people (*id.* at 349) and was decisively defeated by an almost three-to-one margin (*id.*).

<sup>253</sup> N.Y. STATE CONSTITUTIONAL CONVENTION COMM., REPORT: PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT 239-40 (1938).

Apparently the first authorities in New York were formed under a 1915 law authorizing the creation of river regulation districts. Act of May 20, 1915, ch. 662, [1915] N.Y. Laws 2208. The statute provided that such districts were to be "public corporations." *Id.* § 431, [1915] N.Y. Laws 2212. The board of the corporation was to be appointed by the Governor. *Id.* § 436, [1915] N.Y. Laws 2215. The statute further provided that the bonds of the corporation were not the debt of the state and that the state "shall not be obligated to pay" on such bonds. *Id.* § 464, [1915] N.Y. Laws 2232. For a discussion of whether this "new species" of entity could be characterized as a civil division of the state, see 1915 RECORD 753-55.

<sup>254</sup> Recently, authorities have shown an inclination towards other types of revenue-producing property such as commercial office buildings and luxury housing. Thus, the Port of New York Authority has undertaken construction of the World Trade Center which will contain 9,000,000 square feet of office space. N.Y. Times, Jan. 18, 1970, § 8, at 6 (table). Similarly, the Battery Park Authority intends to provide for the construction of 5,000,000 square feet of commercial office space and 5,000 units of luxury housing. Agreement of Lease between the City of New York, as Lessor, and the Battery Park City Authority, as Lessee, dated Nov. 24, 1969, Schedule A, at 1, 14 A.

to protect their investment. The validity of an authority as a separate entity apart from the state was upheld by the Court of Appeals in *Robertson v. Zimmermann*,<sup>255</sup> and as a separate entity, the authority was free of normal governmental restrictions on the creation of debt such as the state requirement of a referendum and the local debt limit requirements.

The 1938 Convention was the first opportunity for examination of the authority device by a constitutional convention. Robert Moses, a delegate to the Convention, was generally considered the foremost proponent and developer of the authority concept; at the time of the Convention he was Chairman of the powerful and successful Triborough Bridge and Tunnel Authority.<sup>256</sup> Moses took the position that there was no need for constitutional recognition of the authority device and certainly no need for the imposition of restrictions upon authorities.<sup>257</sup> As the Convention proceeded, however, it became clear to Moses that a distinct threat to the authority notion was developing. He responded by submitting to the delegates of the Convention two memoranda, the first dated July 25, 1938,<sup>258</sup> and the second dated August 8, 1938.<sup>259</sup> The Moses memoranda were in opposition to two proposals, one by Mr. Abbott Low Moffat and the other by Professor Philip Halpern.

The Moffat proposal provided: (1) that no public corporation (authority) could be created with both the power to contract indebtedness and the power to collect charges or fees for facilities furnished except by "special act" of the legislature;<sup>260</sup> (2) that every authority

---

<sup>255</sup> 268 N.Y. 52, 196 N.E. 740 (1935).

<sup>256</sup> Mr. Moses was also Chairman of the Jones Beach State Parkway Authority, the Bethpage Park Authority and *ex officio* head of the New York City Parkway Authority. Memorandum to the Delegates to the Constitutional Convention by Robert Moses, with Relation to Public Authorities I (July 25, 1938) [hereinafter cited as Moses Memorandum I].

<sup>257</sup> Moses Memorandum I. He apparently was well-pleased with the existing state of the law with respect to authorities, particularly the *Zimmermann* and *Williamsburgh* cases.

<sup>258</sup> Moses Memorandum I.

<sup>259</sup> Memorandum to the Delegates to the Constitutional Convention by Robert Moses, with Relation to Public Authorities (Aug. 8, 1938) [hereinafter cited as Moses Memorandum II].

<sup>260</sup> The 1846 constitution required that private corporations be formed under general laws and prohibited their creation by special act. Now N.Y. CONST. art. X, § 1. Mr. Moffat explained that he wished "to require the Legislature to pass directly itself upon the establishment of each new authority, and to prevent the enactment of general laws pursuant to which a municipal corporation can itself create a corporation of the authority type." III 1938 REVISED RECORD 2259. Since authorities "have been created primarily to evade the tax limitations in the Constitution," it would be an "anomaly" to impose

consist of not less than three members;<sup>261</sup> (3) that the accounts of every authority be subject to the supervision of the State Comptroller;<sup>262</sup> and (4) that the *Williamsburgh* "moral obligation" holding be constitutionally overruled. To accomplish this last point Moffat proposed that neither the state nor any political subdivision "shall at any time be liable for the payment of obligations issued by [an authority] . . . nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision . . ." <sup>263</sup> This provision was designed to eliminate a critical element in the security of an authority's bonds; *i.e.*, the generalized belief that in the last

---

debt limitations upon a locality "and then place within its control the power to evade these limitations." *Id.* at 2259-60. In addition, Moffat believed that the creation of public corporations was a part of the sovereign power and "should be retained by the people and should not be delegated." *Id.* at 2260.

The constitution contains no definition of "special act." In 1969 the Court of Appeals determined that the Metropolitan Transportation Authority had been created by a special act. *City of Rye v. Metropolitan Transp. Authority*, 24 N.Y.2d 627, 249 N.E.2d 429, 301 N.Y.S.2d 569 (1969). This authority was created by Act of May 2, 1967, ch. 717, § 83, [1967] N.Y. Laws 1868. Chapter 717 is comprised of 72 pages dealing with a large number of matters other than the creation of the MTA. The majority thought that the special act requirement was met if an authority was created by a "particular creative enactment" of the legislature. 24 N.Y.2d at 634, 249 N.E.2d at 432, 301 N.Y.S.2d at 573. The evil that the 1938 Convention sought to prohibit was, according to the majority, the delegation of the power to create an authority to either administrative officers or local governments. *Id.* In reaching this conclusion the majority relied upon Moffat's statement that the "power to create an authority shall not be delegated." *Id.* The dissenting opinion of Judges Burke, Fuld, and Keating took the position that the 1938 Convention sought to accomplish something more. The special act requirement, in its view, was intended not only to prevent delegation but also to provide public notice. The dissent noted:

When one reads the legislative history of section 5 of article X, it is evident that the reason for its enactment was broader than that attributed to it by the majority. At the time of the Constitutional Convention, the creation of public authorities was a cause for public concern. It was apparent that such authorities, given broad power in specified and delimited areas, were virtually autonomous once unleashed. Cognizant of the ineffectiveness of public reaction upon the activities of an existing authority, the People of New York State insisted upon the requirement of a special act at the time of creation. In this manner, interested citizens were afforded an opportunity to speak out against a proposed authority. In effect, this was the public's sole avenue for circumscribing the proposed delegation of powers to a particular authority.

*Id.* at 641-42, 249 N.E.2d at 436, 301 N.Y.S.2d at 579.

<sup>261</sup> This provision was later deleted from the Moffat proposal. Moffat's argument was simply that no one man should be vested with the "absolute powers" conferred upon authorities. III 1938 REVISED RECORD 2260-61.

<sup>262</sup> This provision was later modified to provide that the accounts of a local authority would be subject to the supervision of the local comptroller and to remove the Port of New York Authority from its coverage.

<sup>263</sup> I PROPOSED AMENDMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, Int. 356, Pr. 375, at 2 (1938).

analysis the government will "bail out" the bondholders of an authority in financial trouble.<sup>264</sup>

The Halpern proposal was directed at a more narrow problem. In the previously mentioned *Zimmermann* case, the Court of Appeals had upheld an act of the legislature creating the Buffalo Sewer Authority against the contention that it permitted evasion of the city's debt limit. Halpern's proposal would prevent creation, without a city referendum, of an authority with both the power to contract indebtedness and collect charges for services (except from occupants of the authority's premises) if such services were "of a character or nature then or formerly furnished or supplied by the city."<sup>265</sup> The proposal was therefore designed to overrule the *Zimmermann* case.

Halpern's proposal, according to the Moses memoranda, was defective in that (1) it contained no definition of "public corporation"—the legislature could therefore define the term as it pleased, and the amendment would be of no effect;<sup>266</sup> (2) it would require numerous and expensive referenda;<sup>267</sup> and (3) it "is aimed primarily to prevent the establishment of agencies like the Buffalo Sewer Commission," and, as a matter of constitutional policy, "there is no reason to load up the Constitution of the State with specific prohibitions . . . ."<sup>268</sup>

Moffat's ideas, when compared to the Halpern proposal, were "even more unnecessary and preposterous" in Mr. Moses's view.<sup>269</sup> Mr. Moses raised a number of technical objections but his essential points were: (1) the authority concept need not be mentioned or recognized in the constitution;<sup>270</sup> (2) the proposed amendment to the state constitution would impair the contractual obligation to bondholders

<sup>264</sup> Bondholders appear confident of a "bail out" because (1) the authority's asset (a bridge or tunnel) typically is necessary to the city or state; (2) an authority default might reflect upon the credit of the state or city; and (3) the authority's lobbyists have been successful in the past. Of course, the *Williamsburgh* case did nothing to discourage bondholder confidence.

<sup>265</sup> III PROPOSED AMENDMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, Int. 596, Pr. 624, 777, 835, 872, at 2 (1938).

<sup>266</sup> Moses Memorandum I, at 2; Moses Memorandum II, at 2.

<sup>267</sup> Moses Memorandum I, at 3-4; Moses Memorandum II, at 3-5.

<sup>268</sup> Moses Memorandum II, at 5. As it turned out, not even a "specific prohibition" was enough. In *Comereski v. Elmira*, 308 N.Y. 248, 125 N.E.2d 241 (1955), the court relied upon *Zimmermann* for the proposition that authorities are not "a mere evasion of the constitutional debt limitations," even if the city conveyed valuable property to the authority. *Id.* at 254, 125 N.E.2d at 244. The force of *Zimmermann* should be considered muted in view of its treatment by the 1938 Convention. See text accompanying notes 321-28 *infra*.

<sup>269</sup> Moses Memorandum I, at 4; Moses Memorandum II, at 5.

<sup>270</sup> Moses Memorandum II, at 1, 9.

in violation of the Federal Constitution;<sup>271</sup> and (3) the prohibition against governmental liability for the obligations of authorities was improper since, "[i]n the case of default the state or city should have the right to pay off the [authority's] debts and take over the [authority's] function."<sup>272</sup> Of course, this "right" to pay off a defaulting authority's debts was what the Moffat proposal sought to preclude.

The Moffat proposal was referred to the Committee on the Legislature and Its Powers.<sup>273</sup> Halpern's proposal was originally referred to the Committee on State Finance<sup>274</sup> but was later transferred to the Committee on the Legislature and Its Powers. After being reported out, the two proposals came before the Convention on August 8, 1938. The second Moses memorandum was distributed to the delegates the same day. The day's debate began with Mr. Moffat explaining the need for his provision. He believed the history of authorities demonstrated a development from an originally legitimate purpose to a system that

<sup>271</sup> *Id.* at 7.

The memorandum stated:

The Moffat amendment undoubtedly constitutes an attempt to violate the contracts made in connection with these Authority projects. These bond agreements are of a most complicated and elaborate nature. They impose much stricter rules of construction, maintenance and financing than are imposed by any government agency of any kind. They provide for the strictest kind of business management. They even restrict the amount which can be expended in any one year for operation and a clear default to the bondholders if this amount is exceeded. These contracts are protected by the Constitution of the United States. They cannot be changed even by an amendment to the State Constitution without a foreclosure by the bondholders. These agreements cannot be tinkered with on any academic theories spun by those who have never had a day's experience in the financing and administration of projects of this kind.

*Id.*

<sup>272</sup> Moses Memorandum I, at 6; Moses Memorandum II, at 8.

Authority statutes, with few exceptions, contain express disclaimers that the bonds of the authority shall not be a debt of state or city and that neither shall be liable thereon. *E.g.*, N.Y. PRIV. HOUS. FIN. LAW § 46(8) (McKinney 1962) (Housing Finance Agency); N.Y. PUB. AUTH. LAW § 564 (McKinney 1970) (Triborough Bridge and Tunnel Authority); *id.* § 159 (Jones Beach State Parkway Authority). Such statutory disclaimers are believed essential if an authority is to be upheld as a separate entity with separate debt rather than as an arm of the state. *See* Robertson v. Zimmermann, 268 N.Y. 52, 196 N.E. 740 (1935). The recently enacted Urban Development Corporation Act, N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney Supp. 1970), unlike existing precedent, contains no statutory disclaimer. The draftsmen apparently intended the absence of a disclaimer to be meaningful. It would not, therefore, be appropriate to imply a disclaimer where the law fails to provide one; the draftsmen of the Urban Development Corporation Act must have meant to create state debt. The constitution prohibits the creation of state debt, with exceptions not pertinent here, without a referendum. As a result, the statute is unconstitutional, even under the *Zimmermann* test.

<sup>273</sup> I 1938 REVISED RECORD 208.

<sup>274</sup> *Id.* at 258. The Halpern amendment now comprises N.Y. CONST. art. X, § 5 (2d ¶). The Moffat proposal constitutes *id.* (1st, 3d, 4th ¶¶).

had "degenerated into a debt-evading device."<sup>275</sup> At first, the authority idea was created to permit a unified approach to problems involving different jurisdictions.<sup>276</sup> Thus, the problem of commerce in the port of New York requiring the cooperation of New York, New Jersey, and a number of cities led to the 1921 compact creating the Port of New York Authority.<sup>277</sup> Similarly, in 1927, the Lake Champlain Bridge Authority was created by compact to "handle a single work where two jurisdictions were involved."<sup>278</sup> But, Moffat continued, "[v]ery shortly after that there came a whole deluge of authorities in this State, most of which were established simply to evade debt limitations imposed in the Constitution"; with a single exception, "they had nothing to do with jurisdictional lines."<sup>279</sup>

A suggestion simply to prohibit the future creation of authorities had been made to the Finance Committee.<sup>280</sup> Moffat did not subscribe to that; he believed that authorities were necessary and that some had "proved of inestimable value."<sup>281</sup> The authority has a "definite place in the governmental structure of the State," and, consequently, the constitution should "specify the minimum requirements relating to their organization, just as the Constitution recognizes other municipal corporations."<sup>282</sup>

Whether there should be such recognition was, of course, the threshold question. Moffat maintained that authorities must be recognized and domesticated; that before radical shifts were made in the character of the state's governmental structure, some constitutional

<sup>275</sup> III 1938 REVISED RECORD 2259.

<sup>276</sup> *Id.* at 2258-59.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 2259.

<sup>279</sup> *Id.*

In large measure, the federal government was responsible for the deluge of authorities. Beginning in 1933, the national government offered funds to localities for various public works in order to relieve unemployment caused by the Depression. *Id.* Frequently, however, the city was too close to its debt limit to permit it to raise its share of the cost. The solution was to establish an authority. *Id.*

Governor Smith commented on the creation of the Buffalo Sewer Authority as follows:

Whenever government gets off on the wrong foot it is pretty hard to get back in step again, and when the PWA dangled a little bunch of money before the City of Buffalo, and said, "Here is our share for your sewer. You go and raise your share," and the City of Buffalo finds out that under the constitutional debt limit it can not raise its share, what does it do? It sets up an authority. A sewer never can be made a self-liquidating project. (Laughter.)

*Id.* at 2287.

<sup>280</sup> *Id.* at 2259.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*



provision was necessary.<sup>283</sup> The importance of constitutional recognition of a new kind of governmental unit was emphasized by the absence of public control over authorities; that is, was it consistent with democratic government to permit large aggregations of wealth, accumulated through the performance of governmental functions, to exist beyond the control of publicly-elected officials?<sup>284</sup> As Moffat expressed the point: "Authorities are corporate governmental agencies with extraordinary powers. Were the locality itself performing the functions assigned to an authority, all steps, all appropriations, would be subject to the approval of the duly elected representatives of the people."<sup>285</sup>

If authorities are to be constitutionally recognized, what essential ground rules should be formulated? It could be provided that the debt of an authority could be issued only under the same conditions that the government may issue its debt. That is, the debt of a local authority would be included within the municipal debt limit and the debt of a state authority would require a referendum. Moffat was not prepared to adopt this approach. He instead took the view that authority debt could be freely issued but it must be clear that such debt was

---

<sup>283</sup> This position was elaborated in a 1938 Report of the Constitutional Convention Commission as follows:

[T]he importance of the authority, and at the same time its significance as an issue which must sooner or later be met, constitutionally or otherwise, is that it is now included in the governmental setup as an additional function, a unique and important one, which has come into being with comparatively little of the excitement usually attending the creation of any additional governmental unit, much less the creation of a *new kind* of governmental unit. No less than a revolution accompanied the creation of the Federal form of government in America, while protracted debates in convention or Legislature by the leading political lights of the day marked the inauguration of fundamental changes in city, village, town and county government.

N.Y. STATE CONSTITUTIONAL CONVENTION COMM., *supra* note 253, at 243 (emphasis in original).

<sup>284</sup> Although the members of an authority are generally appointed by public officials, they may or may not be subject to removal. For example, the Triborough Bridge and Tunnel Authority Act (N.Y. PUB. AUTH. LAW § 552 (McKinney 1970)) and the Jones Beach State Parkway Authority Act (*id.* § 152) do not provide for removal. Those statutes that do provide for removal require that it be for "inefficiency, neglect of duty or misconduct in office" after a hearing. *E.g.*, N.Y. PRIV. HOUS. FIN. LAW § 43(5) (McKinney 1962) (Housing Finance Agency); N.Y. PUB. AUTH. LAW § 1973(5) (McKinney 1970) (Battery Park Authority); *id.* § 1263(7) (Metropolitan Transportation Authority); N.Y. UNCONSOL. LAWS § 6254(8) (McKinney Supp. 1970) (Urban Development Corporation). Differences in policy would clearly not justify removal. The authors have not been able to find an instance where a member of an authority was removed.

<sup>285</sup> III 1938 REVISED RECORD 2260.

As previously discussed, the state, with minor exceptions, may not constitutionally issue debt without a referendum. A city may not issue debt in excess of its constitutional debt limit. *See* notes 67-100, 185-89 and accompanying text *supra*. The constitutional pattern is destroyed if these requirements may be avoided by the creation of an authority.

authority debt and not the debt of the state or city. Thus, an authority could pledge its assets and revenues as security for its bondholders, but the bondholders would neither purchase nor be entitled to the credit of the state or city.<sup>286</sup>

A Report of the Constitutional Convention Commission to the 1938 Convention had noted that "it is not certain as to what would happen if an authority were not able to meet its obligations."<sup>287</sup> The Report stated that all authority statutes specifically contain a disclaimer, providing that the government shall not be liable for the bonds of the authority.<sup>288</sup> To the date of the Convention, the Report observed, no authority had defaulted; several, however, "might have defaulted had the State not come to their rescue with some form of open or hidden subsidy."<sup>289</sup> The Report concluded from this that behind "the authority stands, therefore, an implied liability of the government creating it."<sup>290</sup>

The Report's most significant point was that the question of implied governmental liability was "uncertain." Mr. Moffat sought to remove any uncertainty from the matter. His provision stated that neither the "state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued" by an authority "heretofore or hereafter created."<sup>291</sup> To this point, the provision could be viewed as a constitutional version of the statutory disclaimer and possibly subject to a *Williamsburgh* type of evasion. The provision continued, however, to eliminate the possibility of a future *Williamsburgh*: "nor may the legislature accept, authorize acceptance of or im-

---

<sup>286</sup> Authority bonds always pay a greater rate of interest than governmental bonds. A 1938 Report of the Constitutional Convention Commission to the Convention noted that the "authority device is an expensive method of financing." TAXATION & FINANCE 356. See also N.Y. DEP'T OF AUDIT & CONTROL, ANNUAL REPORT OF THE COMPTROLLER, 1963 N.Y. LEG. DOC. NO. 97, at 3. The higher interest rate paid to authority bondholders should represent compensation for a greater risk undertaken. Unfortunately, the bondholder proponents desired both higher interest rates and the implied liability of government in the event of authority default.

<sup>287</sup> TAXATION & FINANCE 356.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* The Report viewed *Williamsburgh* as holding the state liable on bonds despite a statutory disclaimer:

In the *Williamsburgh*[h] Savings Bank case . . . , the Court of Appeals imposed legal liability on the State because of the moral obligation resulting from the creation of the Canaseraga River Improvement District although the bonds were issued, pursuant to statute, "without liability on the part of the State beyond the proportion of any assessment to be made or certified against the State on account of said improvement."

*Id.* n.14, quoting Act of July 12, 1911, ch. 647, § 459, [1911] N.Y. Laws 1528.

<sup>291</sup> I PROPOSED AMENDMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, Int. 356, Pr. 375, at 2 (1938).

pose such liability upon the state or any political subdivision thereof." In other words, in the future, there would be no "moral obligation" owed to authority bondholders.<sup>292</sup>

Moffat concluded his initial statement by offering an amendment to his proposal to permit the state or a locality to take over an authority. This amendment was consistent with Moffat's overall approach that nothing should prevent government from recapturing a function. He explained that "if the State or a locality wants to take over the function of the authority, and put it really into its own activity, it should have the right to buy out the authority."<sup>293</sup> The buy out amendment provided that the state or city could, "if authorized by the Legislature, acquire the properties of [an authority] and pay the indebtedness thereof."<sup>294</sup>

Moses responded to the Moffat statement by observing that he did not "know whether to feel flattered that my friend down here is trying to give so much attention in the Constitution to prevent one man from getting something accomplished."<sup>295</sup> Moses denied that authorities were created to evade municipal debt limits,<sup>296</sup> but he was less than clear about his theory as to why they were created. Rhetorically, he asked himself, why was the Triborough Bridge Authority created? He answered: "[T]he authority could be sustained by tolls. You can call that debt evasion if you please. I call it sound business . . ."<sup>297</sup> In addition, it is probably fair to say that at least part of the Moses theory of the creation of authorities is that they can accomplish more in a short time than government. He repeatedly returned to this theme in describing the accomplishments of his authorities, of the bridges and parkways he had constructed when government had foundered.<sup>298</sup> In response

---

<sup>292</sup> *Id.* Moffat explained the purpose of his provision to the Convention as follows:

Every single one of these authorities without exception provides in the statute that the State shall not be liable, or a political subdivision shall not be liable on the bonds of that authority. Yet, under the Williamsburg[h] Savings Bank case, it is perfectly possible that the Legislature might authorize suit on the bonds of one of these authorities, and, in an action similar to the action in the Williamsburg[h] Savings Bank [case] it might be found by the Court of Appeals that the Legislature by its action in passing such legislation, recognized the liability, and the State had to make good on the bonds.

III 1938 REVISED RECORD 2262-63.

<sup>293</sup> *Id.* at 2263.

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

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

<sup>296</sup> *Id.* at 2264.

<sup>297</sup> *Id.* This answer is unclear. It may mean that all profitable operations should be placed in authorities and made tax exempt, leaving government all losing operations such as police, fire, and welfare. It would seem more reasonable to use profitable bridge or tunnel operations to make up deficits in other governmental functions.

<sup>298</sup> *Id.* at 2263-65.

to Moffat's point that authorities were unregulated, Moses spoke of his bondholders' agreements "which prevent anything from going wrong. . . . [T]hese agreements call for the most stringent regulation of expenditures that I know anything of."<sup>299</sup> This may be true but was not responsive to Moffat's point unless it is assumed that the interest of the bondholders is identical with the interest of the government.

Following Moses's statement, Governor Alfred E. Smith queried Moffat as to why his policy should not be left to future legislatures to be decided as different situations arose.<sup>300</sup> Moffat replied:

I think the State has got to set up [in the constitution] certain policies as to what sort of government it is going to set up, how it is going to operate, and what basic financial principles it is going to approve . . . [and] before we go further in this authority field and this development, which is now entirely unregulated, . . . we ought to put these brakes in the Constitution for control in the future.<sup>301</sup>

Governor Smith was unpersuaded and noted that the proper title for the Moffat proposal would be: "An amendment to the Constitution to paralyze the one method we have discovered of getting work done expeditiously and without overtaxing our people to get it done."<sup>302</sup> Governor Smith stated that he believed the authority method to be a success and that any salutary feature in the Moffat proposal ("if there is any, and I doubt it") could be taken care of by the legislature and should not be in the constitution.<sup>303</sup>

---

<sup>299</sup> *Id.* at 2266.

<sup>300</sup> *Id.* at 2267.

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

<sup>302</sup> *Id.* at 2268.

One supposed advantage of an authority—avoiding taxation—seems ephemeral. Nothing prevents a city from selling bonds, building a bridge, and collecting tolls to pay off the bonds. As a self-supporting project, the bonds would be excluded from the city's debt limit. A toll or fee, however, is a form of taxation, the taxation of a particular class; its effect is to shift the tax burden from the general public to those obliged to use the facility. Consequently, when an authority is given the power to collect tolls, it is given the power to tax.

Imposition of heavy tolls might be part of a reasonable city policy to discourage the use of automobiles. In this instance, the taxing power could be used to achieve a non-fiscal purpose. If authorities control the bridges and tunnels, the city is powerless; the authority and its bondholders desire only that amount of revenue that will not discourage the use of their facilities and have no interest in the city's policy. Or, a city might desire to use the revenues from a profitable bridge operation for an improved mass transit system. Again, if an authority controls the bridge, the city is powerless to do so. Nor is it likely to be able to persuade the authority to contribute to such improvements. The authority and its bondholders have a vested interest in increasing automobile traffic and suppressing competitive means of transportation.

<sup>303</sup> *Id.* at 2270.

Governor Smith moved to strike out the title of the amendment,<sup>304</sup> which would, in effect, kill the Moffat proposal. The Convention voted sixty-seven to sixty-two in favor of the Smith motion,<sup>305</sup> but since a two-thirds vote was required the motion was lost. Nonetheless, the proposal required a favorable majority vote to advance to a third reading,<sup>306</sup> and it appeared to be doomed. Debate continued.

A Mr. Johnson noted that he was cautious about any provision "that propose[d] to register a distrust of the Legislature."<sup>307</sup> He asked those who supported the measure why a constitutional provision was required. Mr. George R. Fearon, Chairman of the Committee on the Legislature and Its Powers,<sup>308</sup> sought to explain its necessity. He noted first that the Moffat proposal had been reported by his committee following a "substantially unanimous vote,"<sup>309</sup> and then he focused on the problem of implied state liability and the *Williamsburgh* case. His statement is quoted at some length because it seems to have been decisive in persuading the Convention to adopt the Moffat amendment:

The people of the State have consistently limited the power of the Legislature with respect to the pledging of the credit of the State and yet under these authorities up to date there has been a very serious question as to whether or not the full faith and credit of the State of New York is not back of the bonds of those authorities, because [of the *Williamsburgh* holding] . . . .

. . . . You know now why the bond attorneys are against it. They want the full faith and credit of the State of New York back of these bonds before they take or underwrite them. They want a distinct understanding that the full faith and credit of the State is back of it. They are trying to get something for nothing—

At this point Moses requested Fearon to yield the floor to him. Fearon declined. He continued:

And [the bond attorneys] are against this amendment, because somebody had the nerve, Mr. Moffat had the nerve to stand up here and say, when you buy these bonds, that the legislative act says that the full faith and credit is not back of them. That is exactly what it means.

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

<sup>305</sup> *Id.* at 2272.

<sup>306</sup> The Convention rules required that an amendment be read to the Convention three times before a vote could be had on its adoption. Rule 36 of the 1938 Constitutional Convention, in *JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK*, 1938, App. 2, at 9 (1938).

<sup>307</sup> III 1938 REVISED RECORD 2273.

<sup>308</sup> I *id.* at 44.

<sup>309</sup> III *id.* at 2274.

. . . .

This comes right down to the question of whether or not you are going to protect the credit of the State, whether you are going to protect the credit of the municipal subdivisions of the State, or whether you are going to give these authorities an absolutely wide open hand and let them go out and spend money in any manner in which they please, issue bonds to any extent to which they can get those bond attorneys to pass them and these underwriting concerns to take them, because they are relying on the proposition that if the revenues of the enterprise are not sufficient to meet the interest and amortization, they can always go to the Legislature and ask for an enabling act and get the Legislature to say in effect that the full faith and credit of the State is in back of it.

I believe that when people buy these bonds they should know definitely and certainly that the credit of the State of New York and that the credit of the municipality is not behind those bonds. There should not be any question about it. . . . If they want to buy them under those circumstances, well and good, but let us not have them buy those bonds and then come back to the Legislature and say: "Well, there has been a precedent established in this State under the Williamsburg[h] case. You did it in the Williamsburg[h] case, and have got to do it for us. You have got to bail us out."<sup>310</sup>

Robert Moses's reaction to the Fearon speech was surprisingly legalistic. He asserted that *Williamsburgh* was "not a case in point . . . it is a case on taxation,"<sup>311</sup> and further, that the case involved an agency, which was not "analogous to an authority . . . in the slightest degree."<sup>312</sup> Mr. Fearon stated that he thought the same legal principle was applicable.<sup>313</sup> Moses disagreed, stating that *Williamsburgh* was a "totally different thing—and the court was actuated by a different motive and you know it."<sup>314</sup> It is curious that Moses's approach was to distinguish *Williamsburgh* on legal grounds. He did not meet the thrust of the Fearon position—that the state or city should not be liable for the bonds of an authority.

---

<sup>310</sup> *Id.* at 2274-76.

<sup>311</sup> *Id.* at 2278.

<sup>312</sup> *Id.* at 2279.

<sup>313</sup> *Id.* Mr. Fearon noted that he believed his legal opinion to be as good as Mr. Moses's. He stated: "I do not know anything about building bridges. I will place my guess as to what the law is against yours and make it an even 50-50 bet." *Id.*

The reasoning of *Williamsburgh* seems equally applicable to an authority. It will be recalled that the court there emphasized the state involvement in the project and concluded that the bonds were "in essence and equity" the state's. In fact, although not discussed on the Convention floor, the Court of Claims had already applied *Williamsburgh* to an authority. *Brockway v. State*, 158 Misc. 424, 285 N.Y.S. 773 (Ct. Cl. 1936).

<sup>314</sup> III 1938 REVISED RECORD 2279.

Mr. Morris Tremaine, the State Comptroller, spoke in agreement with Fearon:

I personally believe every one of these authorities that is created under legislative act will be paid for by this State and by the existing Legislature at the time such a claim may be made.

... There are a number of them being created now of doubtful earning power, and that is the particular reason why I am for Mr. Moffat's amendment.<sup>315</sup>

Following the Comptroller's statement the Convention voted to advance the Moffat amendment to a third reading by a vote of eighty to sixty.<sup>316</sup> On the third reading, one week later, the amendment, with minor changes, was adopted by a vote of 141 to 1.<sup>317</sup> Robert Moses, gracefully bowing to the inevitable, supported the measure on its third reading.<sup>318</sup> On November 8, 1938, the people ratified the amendment, along with other provisions, by a vote of 1,521,036 to 1,301,797.<sup>319</sup> The

<sup>315</sup> *Id.* at 2280-81. The same point had been raised earlier by Mr. Fearon in a colloquy with Mr. Livingston:

Mr. Livingston: . . . [D]o you think if [the Henry Hudson Authority] did not meet its obligations that the State could be held responsible for those debts?

Mr. Fearon: Why, I have not any doubt, Senator, and I think you will agree with me as a practical proposition, that if there was any danger of default in interest on those obligations there would be a bill brought up here in the Legislature. Now, it might not be direct appropriation, but you and I have been up here a long time. There would be a certain number of employees taken off. There would be a lot of—you know. I do not need to tell you how it would be done, because you know how it would be done.

Mr. Livingston: You and I would not be affected by that lobbying, would we? (Laughter.)

Mr. Fearon: Because you and I were not on the Finance Committee.

*Id.* at 2278.

<sup>316</sup> *Id.* at 2282, 2291.

<sup>317</sup> *IV id.* at 2706.

<sup>318</sup> *Id.* at 2705.

<sup>319</sup> LEGISLATIVE MANUAL 329.

In its closing moments, the Convention adopted a resolution calling for the publication of 25,000 copies of the proposed constitution to be made available to the public. IV 1938 REVISED RECORD 3517-18. This version was to italicize new matter, bracket material to be deleted, and add marginal notes as to the source of new matter. *Id.* The marginal note with respect to Article X, § 5, stated: "New section added by Intro. 356, Pr. 869 [Moffat] and Intro. 596, Pr. 872 [Halpern] and amended, combined and numbered by Revision Com." JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, App. 3, Doc. No. 16, at 108 (1938). However, a typographical error had occurred in the last version of the Moffat proposal, Pr. 869. The error was the dropping of the word "except" from the sentence providing that no public corporation "shall hereafter be created except by special act of the legislature." III PROPOSED AMENDMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, Int. 356, Pr. 375, 772, 824, 850, 869, at 2 (1938). With the word "except" dropped, the effect of the provision would be to require creation pursuant to general law, the opposite of the result intended.

Moffat amendment, Article X, section 5, of the State Constitution, became effective on January 1, 1939.<sup>320</sup>

Following the advancement of the Moffat amendment, the Convention took up the Halpern proposal. Halpern's proposal was far more limited and less controversial than Moffat's. Its essential purpose was to overrule constitutionally the *Zimmermann* case;<sup>321</sup> the Buffalo Sewer Authority, upheld in the *Zimmermann* case, had, according to Halpern, accomplished "an evasion of both the debt limit and the tax limit of the city."<sup>322</sup> Governor Smith, who moved to kill the Moffat amendment, spoke in favor of the idea behind the Halpern proposal.<sup>323</sup> Robert Moses made no defense of the *Zimmermann* case, but argued that the

Article X, as read to the Convention and adopted by it, contained the correct provision. IV 1938 REVISED RECORD 3452, 3468. Similarly, the Address of the Delegates to the People of the State contained a correct summary of the provision. The Address, 20,000 copies of which were printed, stated:

Independent public authorities for the operation of public projects may be created only by special act of the Legislature. Neither the State nor any political subdivision shall be liable for their debts, although the Legislature may authorize the taking over of the property and obligations of an authority. Their accounts shall be subject to the supervision of the State or a city comptroller.

*Id.* at 3514.

<sup>320</sup> N.Y. CONST. art. XX, § 1.

<sup>321</sup> As Halpern explained: "The purpose of this proposal is to prevent the recurrence in any cities of the experience of the City of Buffalo." III 1938 REVISED RECORD 2283.

<sup>322</sup> *Id.* The Authority borrowed \$15,000,000, which would have exceeded the city's debt limit, for a sewer improvement. *Id.* It then financed its operations by charging a "sewer rental," which Halpern considered a "new type of real property tax." *Id.*

Tax limits have been imposed upon cities since a constitutional amendment of 1884. TAXATION & FINANCE 231. A tax limit is a restriction upon the amount of real property tax which may be levied. Presently, for example, real estate taxes in New York City may not exceed 2.5% of the average full valuation of taxable real estate in the city. N.Y. CONST. art. VIII, § 10. The 1938 constitution originated the idea that valuation be averaged over five years rather than determined on a current basis. The committees explained that the purpose was to avoid rapid fluctuations in permissible limits. Report of the Committees on State Finances and Revenues, Cities, Counties and Towns, and Villages, in JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, App. 3, Doc. No. 6, at 8 (1938). A parallel provision was inserted into the debt limit provisions. N.Y. CONST. art. VIII, §§ 4, 10. The committees noted that averaging would be helpful since,

in times of depression, when borrowing is least objectionable, the ability to borrow is not reduced too drastically and, in times of rising values, when borrowing should be curbed, there may be a lag in the expansion of the borrowing capacity of the community.

Report of the Committees on State Finances and Revenues, Cities, Counties and Towns, and Villages, *supra* at 6.

Taxes required to pay debt service on city debt were excluded from the tax limit. N.Y. CONST. art. VIII, § 10. For a good discussion of the benefits and detriments of tax limits, see TAXATION & FINANCE 231-66.

<sup>323</sup> III 1938 REVISED RECORD 2287-88.



Halpern language was so broad that it would interfere with the operation of legitimate authorities.<sup>324</sup>

Governor Smith, Senator Wagner, and Mr. Moses raised technical objections to the Halpern proposal, as drafted, fearful that it might affect authorities in no way similar to the Buffalo Sewer Authority.<sup>325</sup> Halpern stated that this was unintentional and the proposal was laid aside for amendment.<sup>326</sup> Three days later, after language modifications, the Convention advanced the proposal to a third reading.<sup>327</sup> On August 19, the Convention adopted the proposal by a vote of 146 to 1.<sup>328</sup> The Halpern amendment, as the second paragraph of Article X, section 5, was ratified by the people on November 8, 1938.

The constitution of 1846 prohibited the gift or loan of the state's credit to "any individual, association or corporation."<sup>329</sup> In 1874 Article VIII, section 10, was added to the constitution by amendment.<sup>330</sup> This section prohibited the gift or loan of the state's credit or *money* to any "association, corporation, or private undertaking."<sup>331</sup> Also in 1874, Article VIII, section 11, was ratified, prohibiting gifts and loans

<sup>324</sup> Moses Memorandum II, at 5. Moses also took the position that the constitution should not be burdened with specific prohibitions "against the recurrence of something which Mr. Halpern does not like in his home city." *Id.*

<sup>325</sup> III 1938 REVISED RECORD 2284-90.

No one at the Convention defended the *Zimmermann* holding. Governor Smith described the Buffalo situation as follows:

So they set up a public authority, and the public authority is to get its money by taxation. That is as near an evasion of the Constitution as anything could be in the known world, and there is as much difference between that and a self-liquidating project as there is between night and day.

*Id.* at 2288.

<sup>326</sup> *Id.* at 2292.

<sup>327</sup> *Id.* at 2521-22.

<sup>328</sup> IV *id.* at 3246-47.

<sup>329</sup> N.Y. CONST. art. VII, § 9 (1846). Except for punctuation changes, this provision remained in its original form until 1938.

<sup>330</sup> N.Y. STATE CONSTITUTIONAL CONVENTION COMM., REPORT: NEW YORK STATE CONSTITUTION ANNOTATED pt. II, at 92 (1938).

<sup>331</sup> *Id.* The draftsmen did not wish to endanger the original 1846 provision. Consequently the 1874 amendment created a new section (N.Y. CONST. art. VIII, § 10 (1874)), leaving the original section unaltered. As a result, the two sections were somewhat duplicative. This duplication was eliminated by the 1938 constitution. N.Y. CONST. art. VII, § 8. The 1874 amendment created express exceptions to its general prohibition. It provided that the prohibition shall not prevent the legislature from making provision for the education and support of the blind, the deaf, the dumb, and juvenile delinquents. It further excluded from the prohibition any fund or property held by the state for educational purposes.

<sup>332</sup> N.Y. STATE CONSTITUTIONAL CONVENTION COMM., *supra* note 330. The local prohibition of a gift or loan of "property" is not expressly paralleled in the state provision.

of money, property,<sup>332</sup> or credit by cities and other local governments<sup>333</sup> to "any individual, association, or corporation."<sup>334</sup>

The state prohibition on the gift of credit preceded, and had greater significance than, the prohibition on the gift of money. The reasons are understandable. A gift of money is non-repetitive and definite; a gift of credit may cover a long period of time and is generally uncertain. The railroads, prior to 1846, had falsely assured the state that their revenues would be sufficient to meet debt service and that the state's guarantee would never be needed. Also, as a function of deferring payment, a gift of credit is likely to involve greater amounts than an outright money gift.<sup>335</sup>

This type of reasoning was in evidence at the 1938 Convention. The Finance Committee observed that the "State frequently gives its money to authorities" and appropriates funds in aid of municipal corporations.<sup>336</sup> This was obviously permissible.<sup>337</sup> But, on the other hand, with respect to gifts or loans of credit, the prohibition must apply to all corporations, public or private;<sup>338</sup> otherwise, the Committee

---

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* It expressly provided that the prohibition shall not prevent a city from making provision for "its poor." *Id.*

<sup>335</sup> The Court of Appeals has expressed this idea as follows:

[G]reat 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.

*People v. Westchester County Nat'l Bank*, 231 N.Y. 465, 474-75, 132 N.E. 241, 244 (1921).

<sup>336</sup> Report of the Committee on State Finances and Revenues, in *JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938*, App. 3, Doc. No. 3, at 5 (1938). In a case involving a possible gift of money, the Court of Appeals observed that "[t]he word 'corporation' there used plainly refers to private and business corporations, and does not include governmental agencies such as counties or towns." *Board of Supervisors v. State*, 153 N.Y. 279, 293-94, 47 N.E. 288, 292 (1897).

<sup>337</sup> To clarify the existing provision, the Committee inserted the adjective "private" before the nouns "association" and "corporation." Report of the Committee on State Finances and Revenues, *supra* note 336. The Committee proposal was adopted and the constitution now prohibits gifts or loans of state money to, or in aid of "any private corporation or association, or private undertaking." N.Y. CONST. art. VII, § 8(1). Unlike the local provision (*id.* art. VIII, § 1), the word "individual" is not used. However, its absence is not believed significant because the phrase "private undertaking" is broad enough to cover that situation.

<sup>338</sup> Report of the Committee on State Finances and Revenues, *supra* note 336. The Committee believed that it was restating existing law in this regard. *Id.* Governor Lehman had taken the same position in his Annual Message to the Legislature of January 6, 1937, when he stated: "Under the Constitution of the State of New York, no loans can be made

noted, "an authority . . . unable to sell its securities . . . could rush to the State for assistance."<sup>339</sup> An amendment to this effect was adopted by the Convention and subsequently approved by the people.<sup>340</sup>

Still another attack on the authority structure came from the Committee on Taxation. Typically, an authority requires that both its property and income and the interest on its bonds be tax exempt. It is also of extreme importance to an authority and its bondholders that the various tax exemptions be irrevocable. An investment premised upon tax exemptions might lose its attractions if the exemption could be repealed by a subsequent legislature. Prior to the 1938 constitution, it was believed lawful for the legislature to grant tax exemption by irrevocable law.<sup>341</sup> To take advantage of this belief, the Triborough Bridge and Tunnel Authority Act was amended in 1937<sup>342</sup> to provide that the Authority "will be performing an essential governmental function" and the "state of New York covenants with the holders of the bonds" (1) that the authority will be required to pay no taxes on its property and income, and (2) that the interest on the Authority's bonds "shall at all times be exempt from taxation."<sup>343</sup>

The Committee on Taxation sought to prohibit legislation of this type by imposing two conditions on the grant of tax exemption. First, it provided that "[e]xemptions from taxation may be granted only by general laws."<sup>344</sup> In other words, exemptions are not to be subject

---

by the State to municipal housing authorities for low-cost housing." PUBLIC PAPERS OF GOVERNOR HERBERT H. LEHMAN—1937, at 34 (1940). The Committee, however, added that "even were this not the correct interpretation of the existing language, the committee believes that this is the limitation which should prevail." Report of the Committee on State Finances and Revenues, *supra* note 336, at 6. To accomplish its purpose, the Committee drafted the language of the present constitution which provides "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 . . ." N.Y. CONST. art. VII, § 8(1).

<sup>339</sup> Report of the Committee on State Finances and Revenues, *supra* note 336, at 6.

<sup>340</sup> It will be evident to the reader that the prohibition of gifts or loans of credit to public corporations covers much the same ground as the previously discussed Moffat amendment. The draftsmen, however, had no assurance that either provision would be adopted by the Convention. In fact, both were.

<sup>341</sup> Moffat, a member of the Committee on Taxation (JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, at 24 (1938)), explained as follows:

We have had experience in this State in the past, the best example being the property where the Chrysler Building is now located, where the Legislature gave an exemption and which now the State is powerless to change even though it is obvious that under economic conditions, as they now exist, that property should not be . . . exempt.

II 1938 REVISED RECORD 1127.

<sup>342</sup> Act of Jan. 27, 1937, ch. 3, [1937] N.Y. Laws 2.

<sup>343</sup> N.Y. PUB. AUTH. LAW § 566 (McKinney 1970).

<sup>344</sup> Report of the Committee on Taxation, in JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, App. 3, Doc. No. 2, at 1 (1938). This provision

to separate negotiation in a special act; they may be granted only by general laws that will treat equally all persons similarly situated. Second, the Committee provided that all exemptions granted "may be altered or repealed."<sup>345</sup>

The prohibition of irrevocable exemptions was discussed on the Convention floor by Moffat who described the Committee's deliberations:

The question came up whether the Legislature should have the power to give an exemption, we will say, to new housing as was done in 1922 for a period of ten years, and guarantee a contract exemption. It was felt that if the Legislature might make a contract for ten years, they might equally make a contract for exemption in perpetuity. And it was felt that it was sounder to say that the Legislature might not contract, give an exemption by contract, which they might not later alter.<sup>346</sup>

The tax article prepared by the Committee on Taxation was ratified by the people as Article XVI of the 1938 constitution.

In sum, the 1938 constitution determined that neither state nor local credit could be used in aid of an authority. This was prohibited both by the Moffat amendment (Article X, section 5) and the gift and loan provisions (Article VII, section 8, and Article VIII, section 1). The constitution further determined that tax exemptions, except for religious, educational, and charitable purposes, were to be repealable. (Article XVI).<sup>347</sup>

---

is now found in N.Y. CONST. art. XVI, § 1 (2d ¶). This language clarified an existing constitutional provision. See note 348 *infra*. It also made clear that the general law requirement applied to public authorities.

<sup>345</sup> Report of the Committee on Taxation, *supra* note 344. This provision expressly excepted exemptions for religious, educational, or charitable purposes. *Id.*

Mr. Martin Saxe of New York was Chairman of the Committee on Taxation at both the 1915 and 1938 Conventions. In 1915 Saxe attempted to include the following language in the tax article: "Laws granting exemptions from taxation, whether heretofore or hereafter enacted, shall be subject to modification or repeal." 1915 RECORD 955. This provision was objected to by General Wickersham, who doubted the wisdom of a "clause which would attempt to repeal contracts, solemnly made by the State." *Id.* at 957. The provision was not included in the 1915 proposed constitution. *Id.* at 3038. In 1938 Saxe succeeded in adding to the constitution the language quoted in the text.

<sup>346</sup> II 1938 REVISED RECORD 1127. N.Y. CONST. art. XVI, § 1, provides that "[t]he power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes . . ." Assuming authority bonds to be such securities, it would therefore be permissible to provide, by general law, that the interest on authority bonds shall be tax exempt. But such a law could not be irrevocable. Moffat explained that the language, "'Exemptions may be altered or repealed,' is a clarification tied up with the words 'contracted away.'" II 1938 REVISED RECORD 1127.

<sup>347</sup> It is probably fair to say that the authority system cannot survive under such restraints. However, as of March 31, 1970, the Comptroller reported an outstanding

## VI

## DEVELOPMENTS: 1939-1960

Despite the provisions inserted into the constitution by the 1938 Convention, authorities subsequently created continued to be granted tax exemption by special act.<sup>348</sup> In 1939 and 1940, immediately following adoption of the constitution, many authorities had their statutes amended to create a "tax contract" between their bondholders and the state.<sup>349</sup> For example, the Triborough Bridge and Tunnel Author-

---

authority debt of \$6.5 billion which is more than two and a half times greater than outstanding state debt. N.Y. DEP'T OF AUDIT & CONTROL, 1970 ANNUAL REPORT OF THE COMPTROLLER 2 (1970). His report further noted that total authority assets approximated \$10 billion, an increase of 50% in just four years. *Id.* at 22. Finally, the report shows that authority gross revenues were almost \$155 million greater than state sales tax receipts. *Id.* at 2, 9. It may be asked, why, in light of the constitutional restraints, is there outstanding in New York today some \$6.5 billion of authority debt? The answer is simple—the constitution has been ignored.

Clearly, the impact of the 1938 constitution is not noticeable in the following statement of Mr. Brenton Harries, Vice President of Standard & Poor's Corporation. Mr. Harries's statement was in explanation of why Standard & Poor's had rated the bonds of the Urban Development Corporation, a public corporation, as "AA," only one notch below the state's "AAA" rating. Mr. Harries stated:

"[O]ur rating on U.D.C. . . . depends upon our rating on New York State. . . .

. . . .

. . . [I]n our judgment, the legislative intent and commitment . . . is to insure the timely repayment of U.D.C.'s bond principal and interest when due."

N.Y. Times, Feb. 10, 1971, at 47, col. 4.

<sup>348</sup> Authorities in existence at the time of the Constitutional Convention of 1938 were exempted from taxation pursuant to the provisions of the special acts that created them. *E.g.*, Act of April 17, 1933, ch. 145, § 13, [1933] N.Y. Laws 542 (Triborough Bridge and Tunnel Authority); Act of March 20, 1933, ch. 70, § 9, [1933] N.Y. Laws 110 (Jones Beach State Parkway Authority); Act of March 17, 1933, ch. 67, § 12, [1933] N.Y. Laws 96 (New York State Bridge Authority). These exemptions may have been unlawful when enacted. N.Y. CONST. art. III, § 18 (1894), established a number of categories with respect to which the "Legislature shall not pass a private or local bill." Instead, the "Legislature shall pass general laws providing for the cases enumerated in this section." In 1901 the constitution was amended to add a new category of cases to this section—any law "[g]ranting to any person, association, firm or corporation, an exemption from taxation on real or personal property." N.Y. CONST. art. III, § 18 (1901). The state's policy against special tax exemptions had already been statutorily established in the General Tax Law of 1896, ch. 908, [1896] N.Y. Laws 795. *See People ex rel. Roosevelt Hosp. v. Raymond*, 126 App. Div. 720, 111 N.Y.S. 177 (1st Dep't 1908). It might have been argued that the constitutional phrase "corporations" did not include public corporations such as authorities. The 1938 constitution removed any question by providing that tax exemptions "may be granted only by general laws." N.Y. CONST. art. XVI, § 1.

<sup>349</sup> *E.g.*, Act of June 15, 1939, ch. 874, § 14, [1939] N.Y. Laws 2452 (Triborough Bridge and Tunnel Authority); Act of June 16, 1939, ch. 891, § 12, [1939] N.Y. Laws 2938 (Jones Beach State Parkway Authority); Act of April 25, 1940, ch. 764, § 5, [1940] N.Y. Laws 1989 (New York State Bridge Authority). Examples of "tax contract" provisions for authorities created subsequent to 1940 include N.Y. PRIV. HOUS. FIN. LAW § 54 (McKinney

ity statute was amended to provide that the state "covenants with the purchasers and with all subsequent holders" of the Authority's bonds that "in consideration of the acceptance of any payment for the bonds" they "shall at all times be free from taxation."<sup>350</sup> These "tax contracts" attempt an irrevocable grant of tax exemption. They represent a peculiar effort to bring their tax exemption within the protection of the Federal Constitution's impairment of contracts clause.<sup>351</sup>

In a legal sense, this effort fails because no valid contract can be entered into in violation of the state constitution, and the "tax contract" device violates three constitutional provisions: (1) it is created by special act, not general law;<sup>352</sup> (2) it purports to be an irrevocable tax exemption;<sup>353</sup> and (3) it purports to be irrevocable even though the constitution contains an anti-*Dartmouth College* provision that all laws governing corporations "may be altered from time to time or repealed."<sup>354</sup> The "tax contract" effort, therefore, merely resulted in burdening the statutes of the state with a large number of unconstitutional provisions.

In 1939 the constitutional prohibition on the gift or loan of a local government's credit to a public corporation first came before the courts in *Union Free School District v. Town of Rye*.<sup>355</sup> The Westchester County Tax Law, enacted in 1916,<sup>356</sup> required that the town collect school taxes in an amount determined by the school district officials. This tax collection procedure was contrary to the practice in the rest of the state, where the county collected taxes on behalf of school districts and towns. The Westchester County statute directed the town to pay over the full amount of taxes required to be collected.<sup>357</sup> If any taxes were uncollected, the town was directed to borrow money to meet the deficiency arising from such unpaid taxes.<sup>358</sup> After the town paid such deficiency, the statute provided that any payment

---

Supp. 1970) (Housing Finance Agency); N.Y. UNCONSOL. LAWS § 6272 (McKinney Supp. 1970) (Urban Development Corporation).

<sup>350</sup> N.Y. PUB. AUTH. LAW § 566-a (McKinney 1970).

<sup>351</sup> U.S. CONST. art. 1, § 10. See generally CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION (6th ed.), S. Doc. No. 39, 88th Cong., 1st Sess. 378-400 (1964).

<sup>352</sup> N.Y. CONST. art. XVI, § 1.

<sup>353</sup> *Id.* Authorities do not come within the constitutional exceptions for religious, charitable, or educational purposes.

<sup>354</sup> *Id.* art. X, § 1.

<sup>355</sup> 256 App. Div. 456, 10 N.Y.S.2d 333 (2d Dep't), *aff'd*, 280 N.Y. 469, 21 N.E.2d 681 (1939).

<sup>356</sup> Act of March 31, 1916, ch. 105, [1916] N.Y. Laws 228.

<sup>357</sup> *Id.* § 24, [1916] N.Y. Laws 235.

<sup>358</sup> *Id.* § 31, [1916] N.Y. Laws 239.

of the taxes "shall belong to the town."<sup>359</sup> Upon collection, such amounts were to be applied to reduce the town's indebtedness.<sup>360</sup> The town was therefore both a collecting agency for, and a guarantor of, the school taxes. But even in its capacity as guarantor it would suffer no loss if it could eventually collect the unpaid taxes.

The case arose when the town of Rye refused to borrow money to pay an unpaid tax deficiency. The town argued that the 1938 constitution, prohibiting gifts of credit to public corporations, made the statutory scheme illegal; that is, the constitution prohibited the gift of the town's credit in aid of a public corporation—the school district. The constitution, after the 1938 changes, permitted counties, but not towns, to borrow to meet a deficiency in the taxes they were required to collect on behalf of school districts or towns.<sup>361</sup> The appellate division held that a school district was not a "public corporation" within the meaning of the constitution but was instead a civil division of the state. The court believed that the constitution intended the prohibition to apply to public benefit corporations "of which the Triborough Bridge Authority is typical."<sup>362</sup> The proviso clause, which clearly assumed that school districts were public corporations, was inserted, according to the court, "as a matter of excessive caution."<sup>363</sup>

The Court of Appeals rejected the lower court's narrow interpretation and held that school districts were public corporations. Nonetheless, the court upheld the validity of the statute requiring the town to borrow and pay over the funds to a public corporation. It did so by reaching the conclusion that the borrowing was in aid of the town of Rye, not the school district. The court reasoned that the constitution does not restrict the power of the legislature to apportion the duties of government among governmental entities. It may delegate to one entity the duty to educate and to another the responsibility for col-

<sup>359</sup> *Id.* § 24, [1916] N.Y. Laws 235.

<sup>360</sup> *Id.* § 31, [1916] N.Y. Laws 239.

<sup>361</sup> [N]or shall any . . . town . . . give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking . . . . 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.

N.Y. CONST. art. VIII, § 1 (emphasis added).

The express exclusion of counties from the state's general tax collection system could lead to the implication that the Convention would have excluded the Westchester reverse tax collection system if it had been called to its attention. This is not a good rule of constitutional construction but it seemed to influence the courts. See text accompanying note 368 *infra*.

<sup>362</sup> 256 App. Div. at 458, 10 N.Y.S.2d at 336.

<sup>363</sup> *Id.* at 457, 10 N.Y.S.2d at 335.

lecting taxes. Further, it may make the tax-collecting entity a guarantor of any tax deficiencies.<sup>364</sup> Consequently, when a town borrowed for such a purpose, it did so to "meet its own obligations in aid of a governmental duty"<sup>365</sup> properly imposed upon it by the legislature. The court's reasoning is unpersuasive. It fails at its starting point—the proposition that the constitution does not restrict the power of the legislature to apportion governmental duties among governmental entities. The gift and loan provisions do exactly that.

The court was plainly influenced by the long-standing use of the tax collecting system and the absence of a clear constitutional intent to alter it,<sup>366</sup> observing that overturning the statute would "disrupt our system of taxation."<sup>367</sup> Finally, the court noted:

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 . . . .<sup>368</sup>

A possible way to look at the *Union Free School District* case is to say that no gift was involved since the town received consideration: *i.e.*, educational services. It is, of course, true that the gift and loan provisions do not prevent a city from purchasing for value goods and services. It is not a gift to the railroad if the city buys a railroad ticket to send an official to Washington on city business. But the value of the goods or services purchased must be ascertainable; if the value of the consideration cannot be known, it is impossible to determine that a gift has not been made. In the pre-1874 railroad cases, the town, in at least some instances, received value by inducing the railroad to come through the town.<sup>369</sup> It was, however, value of an unascertainable sort and the constitution was amended to prohibit such transactions.

In one case, *Comereski v. Elmira*,<sup>370</sup> *Union Free School District* has been relied on in a situation having nothing to do with the system

<sup>364</sup> The propriety of this system had been upheld in a pre-1938 constitution case, *Town of Amherst v. County of Erie*, 260 N.Y. 361, 183 N.E. 851 (1933).

<sup>365</sup> *Union Free School Dist. v. Town of Rye*, 280 N.Y. 469, 481, 21 N.E.2d 681, 686 (1939).

<sup>366</sup> See III 1938 REVISED RECORD 2520-21.

<sup>367</sup> 280 N.Y. at 478, 21 N.E.2d at 685.

<sup>368</sup> *Id.* at 480, 21 N.E.2d at 686. Generally, later cases have viewed *Union Free School District* as holding only that one political subdivision may collect taxes on behalf of another and may guarantee the payment of unpaid taxes. See *County of Oneida v. City of Utica*, 260 App. Div. 363, 22 N.Y.S.2d 642 (4th Dep't 1940), *aff'd mem.*, 285 N.Y. 788, 35 N.E.2d 189 (1941); *Union Free School Dist. v. County of Steuben*, 178 Misc. 415, 33 N.Y.S.2d 854 (Sup. Ct. 1942).

<sup>369</sup> See II 1867-68 DEBATES 1141; III *id.* at 1997-99, 2014-15.

<sup>370</sup> 308 N.Y. 248, 125 N.E.2d 241 (1955).



of collecting taxes. The Elmira Parking Authority was authorized to develop and operate parking lots. The city of Elmira maintained jurisdiction of parking meters on the city's streets. In connection with a \$500,000 Authority bond issue, the city and the Authority entered into an agreement with respect to the city's parking meter revenues. The Authority was to give the city notice of any estimated deficit in its operation and maintenance fund and its debt service fund. The city agreed to pay over the amount of any estimated deficits, up to \$25,000, out of the net revenues of the parking meters. The agreement expressly provided that it was for the benefit of Authority bondholders. In other words, the city was to guarantee the Authority's bonds. The guarantee was to be limited in amount and contingent upon funds being available, but that in no way changed its nature. The agreement contained everything that Moffat, Fearon, and the 1938 Convention had sought to avoid. Not twenty years had passed and it was proposed to use governmental credit to support authority debt.

Remarkably, the appellate division upheld the validity of this agreement. More remarkably, the Court of Appeals upheld the appellate division. The rationale of the decision is unacceptable: the constitution clearly permits gifts of property and money by localities to public corporations, and since a promise to make a payment of money in the future is simply a promise to make a permitted gift in the future, the agreement is valid.

The 1938 Convention—consistent with the state's constitutional history—drew a sharp distinction between gifts of money and gifts of credit. A gift of money will not burden future generations, and since governments do not hold large surpluses, the amount of an outright gift is not likely to be large. Furthermore, the size of a money gift is restrained by public scrutiny. In a credit transaction, however, the public is not apt to know what is going on. As Michael Hoffman told the 1846 Convention: "It is silent, creeps along, gets into the State, and when the act is once passed, the debt incurred, the obligation is as strong as death for its payment."<sup>371</sup> The state's most serious evils had all derived from the use of debt supported by state or local credit.

But the constitutional distinction has no value if the courts interpret a promise to pay money in the future as not involving a city's credit.<sup>372</sup> This was pointed out by Judge Fuld in his dissenting opinion:

---

<sup>371</sup> 1846 DEBATES 943.

<sup>372</sup> The court relied on *Union Free School District* for this proposition, stating that it "is flat authority that the city may do what the city is doing here." 308 N.Y. at 252, 125 N.E.2d at 243. However, *Union Free School District* is not based on such reasoning.

It is quite evident that the contract provided, not for any gift or loan of money or property on hand, but rather for a gift or loan of the city's *credit*, for an obligation and purpose not its own. The city's promise is, in essence, to make good, for an unspecified and indeterminate period and out of funds not in existence, an indebtedness incurred by the Authority. The circumstance that that promise is conditional in nature does not alter the fact that the contract calls upon the city to answer for the default of another. The vice of the arrangement is that it mortgages, for the use of others, future general funds of the city which it would otherwise have available for its own purposes, and opens the door to wholesale evasions of the applicable constitutional debt and taxing limitations. It was just this sort of situation at which the constitutional provision was directed.<sup>373</sup>

A further curiosity in the *Comereski* decision is the absence of any discussion of the Moffat amendment, Article X, section 5. That section provides that no political subdivision of the state "shall at any time be liable for the payment of any obligation issued by a public corporation heretofore or hereafter created." The provision is not mentioned by the court and apparently was not argued by the parties. The great Moses-Moffat debates at the 1938 Convention and the resulting constitutional provision were therefore not available to the court.

In sum, between 1939 and 1960, some erosion of the 1938 Convention's work had occurred, in some instances with judicial sanction. But the massive undermining still lay ahead.

## VII

### SUBVERTING THE NEW YORK CONSTITUTION

The story begins with the passage, in 1955, of the Mitchell-Lama law.<sup>374</sup> This act was intended to provide housing for families earning between \$5,000 and \$10,000—those somewhat above public housing levels.<sup>375</sup> The law provided that government would grant low-interest

---

<sup>373</sup> *Id.* at 257, 125 N.E.2d at 246 (emphasis in original).

<sup>374</sup> Act of April 18, 1955, ch. 407, [1955] N.Y. Laws 1061.

<sup>375</sup> The Mitchell-Lama program is discussed in Quirk & Wein, *Homeownership for the Poor: Tenant Condominiums, the Housing and Urban Development Act of 1968, and the Rockefeller Program*, 54 CORNELL L. REV. 811, 855-57 n.230 (1969). The program was intended to produce housing that would rent for about \$20 per room per month. The constitution and statute require that the subsidized housing be provided only for "families of low income." N.Y. CONST. art. XVIII, § 1; N.Y. PRIV. HOUS. FIN. LAW §§ 12(10), 31(2)(a) (McKinney Supp. 1970). Recently, the New York City Board of Estimate, pursuant to the city Mitchell-Lama program, has approved a rental project with estimated rents of \$76.74 per room per month. Tanya Towers, Inc., N.Y. City Bd. of Estimate,

mortgage loans and tax exemptions to make possible new housing within the means of such families.<sup>376</sup> Section 2 of the law appropriated \$50,000,000 of a bond issue for the State Division of Housing to meet the needs of the program.<sup>377</sup> In conformity with the constitution's referendum requirement, section 3 of the law provided that the \$50,000,000 appropriation "shall not take effect unless and until it shall have been submitted to the people at a general election." The people voted in favor of the initial funding of the Mitchell-Lama program by a vote of 954,145 to 931,783.<sup>378</sup> In 1956 a proposed bond issue for an additional \$100,000,000 was defeated by a vote of 1,586,297 to 1,220,186.<sup>379</sup> In 1958 the third and final referendum held with respect to the Mitchell-Lama program approved a \$100,000,000 bond issue by a margin of 23,000 votes.<sup>380</sup>

This narrow margin and the defeat of the 1956 issue made it clear that the Mitchell-Lama program had but a tenuous hold on the public imagination. The dependence of funding upon "the vagaries of popular mood"<sup>381</sup> was not acceptable to the program's executive and legislative proponents. Instead, they determined upon a scheme to evade the constitution.

The Housing Finance Agency (HFA) statute was enacted in 1960.<sup>382</sup> Its draftsmanship is generally attributed to John Mitchell, currently the Attorney General of the United States.<sup>383</sup> As of 1970 about \$1,900,000,000 worth of bonds had been issued pursuant to it.<sup>384</sup> More-

---

Calendar No. 95, Project Plan Summary, at 11 (Feb. 13, 1970). A family with three or more dependents is eligible for a unit if the family's income does not exceed seven times the unit's rental. N.Y. PRIV. HOUS. FIN. LAW § 31(2)(a) (McKinney Supp. 1970). Thus, assuming a seven-room apartment at a rental of \$76.74 per room, a family of four with an income of \$45,132.12 would be eligible for occupancy. It is not believed that any court will consider such a family to be "low income" within the meaning of the constitution.

<sup>376</sup> N.Y. PRIV. HOUS. FIN. LAW §§ 22-23, 33 (McKinney Supp. 1970).

<sup>377</sup> A new bond issue was not necessary. The previous year, pursuant to Act of Feb. 13, 1954, ch. 15, [1954] N.Y. Laws 33, the people had authorized a \$200,000,000 bond issue for purposes of slum clearance and public housing. After a referendum, § 2 was to authorize the diversion of \$50,000,000 of this bond issue to the Mitchell-Lama program. The 1954 public housing and slum clearance bond issue secured a plurality of 400,000 votes. TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION, REPORT: HOUSING, LABOR, NATURAL RESOURCES 116 (1967). The 1955 Mitchell-Lama referendum achieved a plurality of 22,000 votes. *Id.*

<sup>378</sup> TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION, *supra* note 377.

<sup>379</sup> *Id.*

<sup>380</sup> The 1958 vote was 1,156,093 to 1,133,936. *Id.* at 117.

<sup>381</sup> Reilly & Schulman, *The State Urban Development Corporation: New York's Innovation*, 1 URBAN LAW. 129, 135 (1969).

<sup>382</sup> Act of April 18, 1960, ch. 671, [1960] N.Y. Laws 1945.

<sup>383</sup> Reilly & Schulman, *supra* note 381.

<sup>384</sup> N.Y. DEP'T OF AUDIT & CONTROL, *supra* note 347, at 24.

over, it has served as a model for a number of other statutes,<sup>385</sup> and the Comptroller has estimated that a total of some \$6.5 billion of "non-state debt" is outstanding in New York.<sup>386</sup>

The HFA statute characterizes the entity created by it as a "corporate governmental agency constituting a public benefit corporation."<sup>387</sup> The legislative history of the statute indicates that its drafters

<sup>385</sup> N.Y. EDUC. LAW § 378 (McKinney 1969) (State University Construction Fund, 1962); N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney Supp. 1970) (Urban Development Corporation, 1968); *id.* §§ 7381-406 (New York City Health and Hospitals Corporation, 1969); *id.* §§ 4401-17 (Health and Mental Hygiene Facilities Improvement Corporation, 1968).

<sup>386</sup> N.Y. DEP'T OF AUDIT & CONTROL, *supra* note 347, at 22.

<sup>387</sup> N.Y. PRIV. HOUS. FIN. LAW § 43 (McKinney Supp. 1970). This is a fairly typical description of what is commonly known as an authority. The description, however, is not helpful in determining the nature of an authority; it is better understood by examining its various attributes. The following are some of the characteristics generally found in authorities: (1) freedom from local debt limit provisions (Gaynor v. Marohn, 268 N.Y. 417, 198 N.E. 13 (1935); Robertson v. Zimmermann, 268 N.Y. 52, 196 N.E. 740 (1935)); (2) freedom from local tax limit provisions (Gaynor v. Marohn, *supra*; Robertson v. Zimmermann, *supra*); (3) freedom from referendum requirement for state debt (*see, e.g.*, III 1938 REVISED RECORD 2259); (4) freedom from local real estate tax (Bush Terminal Co. v. City of New York, 282 N.Y. 306, 26 N.E.2d 269 (1940)); (5) freedom from state or local tax on interest of authority bonds (*see, e.g.*, N.Y. PUB. AUTH. LAW § 566 (McKinney 1970) (Triborough Bridge and Tunnel Authority)); (6) freedom from federal tax on interest of bonds (Commissioner v. White's Estate, 144 F.2d 1019 (2d Cir. 1944); Commissioner v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944)); (7) freedom from federal tax on operating profit (Commissioner v. White's Estate, *supra*; Commissioner v. Shamberg's Estate, *supra*); (8) authority bonds not considered "general obligations" of the government within meaning of Banking Act of 1933, 12 U.S.C. § 24 (Seventh) (Supp. V, 1970) (Port of New York Authority v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968)); (9) freedom from constitutional civil service requirements (Agesen v. Catherwood, 55 Misc. 2d 744, 750, 286 N.Y.S.2d 969, 975 (Sup. Ct. 1968), *rev'd on other grounds*, 32 App. Div. 2d 416, 303 N.Y.S.2d 987 (2d Dep't 1969)); (10) freedom from N.Y. LABOR LAW § 220 (McKinney Supp. 1970), requiring payment of prevailing rates of wage (Agesen v. Catherwood, 32 App. Div. 2d 416, 303 N.Y.S.2d 987 (2d Dep't 1969)); (11) freedom from municipal regulation (Agesen v. Catherwood, 55 Misc. 2d 744, 748, 286 N.Y.S.2d 969, 973 (Sup. Ct. 1968), *rev'd on other grounds*, 32 App. Div. 2d 416, 303 N.Y.S.2d 987 (2d Dep't 1969)); (12) freedom from emergency rent law (Port of New York Authority v. J.E. Linde Paper Co., 205 Misc. 110, 127 N.Y.S.2d 155 (N.Y. City Mun. Ct. 1953)); (13) freedom from suit without consent on ground that authority has sovereign immunity (Howell v. Port of New York Authority, 34 F. Supp. 797 (D.N.J. 1940); Benz v. New York State Thruway Authority, 9 N.Y.2d 486, 174 N.E.2d 727, 215 N.Y.S.2d 47 (1961), *petition for cert. dismissed*, 369 U.S. 147 (1962); *see* Dormitory Authority v. Span Elec. Corp., 18 N.Y.2d 114, 218 N.E.2d 693, 271 N.Y.S.2d 983 (1966)); (14) freedom from N.Y. STATE FIN. LAW § 135 (McKinney Supp. 1970), requiring separate specifications for contracts (Plumbing Ass'n v. New York State Thruway Authority, 5 N.Y.2d 420, 158 N.E.2d 238, 185 N.Y.S.2d 534 (1959)); (15) freedom from N.Y. STATE FIN. LAW § 174 (McKinney Supp. 1970), requiring that contracts be awarded to low bidder (Thompson Constr. Corp. v. Dormitory Authority, 48 Misc. 2d 296, 264 N.Y.S.2d 842 (Sup. Ct. 1965)); (16) freedom from public disclosure of books and records (New York Post Corp. v. Moses, 10 N.Y.2d 199, 176 N.E.2d 709, 219 N.Y.S.2d 7 (1961)); and (17) power to adopt traffic rules whose violation shall

first contemplated having the state guarantee the mortgages in which the HFA would invest.<sup>388</sup> This idea was rejected, presumably because of blatant unconstitutionality, and the following statutory pattern evolved.

The statute provides that the "state does hereby pledge to and agree with the holders of any notes or bonds" that (1) it "will not limit or alter the rights hereby vested" in the HFA to fulfill the terms of any bondholder agreement, and (2) it will not "in any way impair the rights and remedies" of any bondholders.<sup>389</sup> By its terms, the state's pledge and agreement continue in force until the notes and bonds, with interest, "are fully met and discharged."<sup>390</sup> The statute therefore purports to be irrevocable until the bonds are paid off.

The anti-*Dartmouth College* provision of the state constitution prohibits an undertaking of this kind. It provides that all laws creating a public or private corporation "may be altered from time to time or

be a misdemeanor punishable in the state courts by fine or imprisonment (People v. Malmud, 4 App. Div. 2d 86, 164 N.Y.S.2d 204 (2d Dep't 1957); N.Y. PUB. AUTH. LAW § 553(5) (McKinney 1970) (Triborough Bridge and Tunnel Authority)).

It is apparent, therefore, that the courts have been generally amenable to the highly selective approach taken by the authorities. Authorities covet those governmental attributes that are considered desirable, such as tax exemptions, immunity from suit, and immunity from municipal regulation. Authorities deny those governmental attributes that are considered undesirable, such as referendum requirements, local debt limits, civil service provisions, multiple bidding, and public disclosure of books and records. The resulting entity cannot be viewed as either governmental or nongovernmental; it is a polyglot.

Some discussions of authorities are found in TEMPORARY STATE COMM'N ON COORDINATION OF STATE ACTIVITIES, STAFF REPORT OF PUBLIC AUTHORITIES UNDER NEW YORK STATE, 1956 N.Y. LEG. DOC. NO. 46; Edelstein, *The Authority Plan—Tool of Modern Government*, 28 CORNELL L.Q. 177 (1943); Nehemkis, *The Public Authority: Some Legal and Practical Aspects*, 47 YALE L.J. 14 (1937); Netherton, *Area-Development Authorities: A New Form of Government by Proclamation*, 8 VAND. L. REV. 678 (1955); Shestack, *The Public Authority*, 105 U. PA. L. REV. 553 (1957); Williams & Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations*, 37 COLUM. L. REV. 177 (1937).

The Shestack article concludes that the authority "presents a departure from democratic traditions unwarranted by need or experience." Shestack, *supra* at 569.

<sup>388</sup> The Governor's Report of Task Force on Middle Income Housing recommended the creation of the HFA on this basis. The Report stated that "the indirect use of the State's credit through the guarantee of the mortgages held by the Agency would not involve an unduly burdensome contingent liability to support even as much as two billion dollars of loan guarantees." NEW YORK STATE LEGISLATIVE ANNUAL, 1960, at 278 (N.Y. Legislative Service, Inc. 1960). Whether the obligation would be "unduly burdensome" or not, such an undertaking by the state would be clearly unconstitutional in the absence of a referendum. As has been seen, the avoidance of a referendum was the only purpose for the creation of the HFA. The state-guaranteed mortgage would also violate the prohibition on the gift or loan of state credit.

<sup>389</sup> N.Y. PRIV. HOUS. FIN. LAW § 48 (McKinney 1962).

<sup>390</sup> *Id.*

repealed."<sup>391</sup> The constitutionally-reserved power cannot, of course, be contracted away.

The HFA statute states that the Agency's "property" and "income" shall be exempt from state and local taxes.<sup>392</sup> The statute is a special act since the constitution provides that no public corporation shall be created "except by special act."<sup>393</sup> But the constitution requires that exemptions from taxation be granted "only by general laws."<sup>394</sup> The exemption of HFA property and income is therefore invalid.<sup>395</sup>

The statute does not expressly provide that the exemption is to be irrepealable, but the state agreement not to limit or alter vested rights until the bonds are paid off has the effect of making the exemption irrepealable until the bonds are redeemed. The constitution, however, provides that all exemptions "may be altered or repealed" except those granted for "religious, educational or charitable purposes."<sup>396</sup> The constitution therefore prohibits, with the noted exceptions, an irrepealable tax exemption. This result is further required because the exemption is contained in an act that creates a corporation, and according to the constitution, such an act "may be altered from time to time or repealed."<sup>397</sup> Consequently, even if an exemption is originally valid, the constitution provides that it is freely repealable.

---

<sup>391</sup> N.Y. CONST. art. X, § 1. It may be that, in the case of a public corporation such as the HFA, the constitutional reservation is not necessary. Chief Justice Marshall made it clear that the constitution "did not intend to restrain the States in the regulation of their civil institutions." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819). See *Mount Pleasant v. Beckwith*, 100 U.S. 514 (1879).

<sup>392</sup> N.Y. PRIV. HOUS. FIN. LAW § 53 (McKinney 1962).

<sup>393</sup> N.Y. CONST. art. X, § 5.

<sup>394</sup> *Id.* art. XVI, § 1.

<sup>395</sup> As a practical matter, since the HFA is a financing agency, the exemption of its property would not seem important. The question is of the utmost importance, however, when a large property-holding authority such as the Triborough Bridge and Tunnel Authority is considered. Its exemption is based also on a special act. N.Y. PUB. AUTH. LAW § 566 (McKinney 1970). Similarly, the tax exemption of the Urban Development Corporation is based upon a special act. N.Y. UNCONSOL. LAWS § 6272 (McKinney Supp. 1970). N.Y. REAL PROP. TAX LAW § 412 (McKinney 1960) provides that the real property owned by authorities enumerated in the Public Authorities Law "shall be entitled to such exemption as may be provided therein." The section does not establish any standards. The Public Authorities Law is a series of special acts. The effect of § 412 is to delegate to a special act the power to exempt that which can only be exempted by general law. Section 412 could not, therefore, be considered a general law for purposes of the constitution. Section 404 of the Real Property Tax Law exempts real property "owned by the state of New York or any department or agency thereof." The provision would not seem applicable to authorities that have successfully maintained in the courts that they are separate and independent entities. *But see* ANNUAL REPORT OF THE ATTORNEY GENERAL, 1953 N.Y. LEG. DOC. No. 68, at 205.

<sup>396</sup> N.Y. CONST. art. XVI, § 1.

<sup>397</sup> *Id.* art. X, § 1.

The exemption of the interest on HFA bonds is the next problem. The statute provides that the creation of HFA "is in all respects for the benefit of the people" and that the agency "will be performing an essential governmental function."<sup>398</sup> It continues, "[t]he state covenants with the purchasers" of bonds "in consideration of the acceptance" and payment for the bonds, that the interest thereon "shall at all times be free from taxation."<sup>399</sup> The provision is constitutionally invalid since, as has been noted, any act creating a corporation "may be altered from time to time or repealed."<sup>400</sup> The Court of Appeals has held that tax exemptions contained in charters are subject to the reserved power to alter or repeal but that the exercise of such power must be direct and will not be implied.<sup>401</sup> Thus, any exemption validly granted with respect to the interest on bonds may be repealed by the legislature.

The statute provides that the state may, upon furnishing funds, require the agency to redeem "any issue of bonds."<sup>402</sup> Creating a potential state liability is, of course, the essence of this "right" to redeem, but the constitution provides that the state shall not at "any time be liable for the payment of any obligations" issued by a public corporation.<sup>403</sup> The constitution creates one exception to its general prohibition; the state may "acquire the properties of any such corporation and pay the indebtedness thereof."<sup>404</sup> In other words, the state may "buy out" an authority. The statute, however, does not provide for the termi-

<sup>398</sup> N.Y. PRIV. HOUS. FIN. LAW § 54 (McKinney 1962).

<sup>399</sup> *Id.*

<sup>400</sup> N.Y. CONST. art. X, § 1. In a proper case, an interesting question may be presented. The first paragraph of Article XVI, § 1, provides that the power of taxation shall never be surrendered or contracted away "except as to securities issued for public purposes." This seems clearly to imply that the power of taxation could be contracted away for public purposes. The second paragraph of Article XVI, § 1, provides that exemptions may be granted only by general law and that all exemptions may be altered or repealed. The two paragraphs are in apparent conflict. Three interpretations seem possible: (1) the first and second paragraphs are independent; if an exemption is granted for securities issued for public purposes it need not be done by general law and it may be irrepealable; (2) the second paragraph qualifies the authorization of the first; the taxing power can be contracted away but it must be done by a general law and such law will be repealable; or (3) the taxing power may be initially contracted away by special act but such act must be repealable. See note 346 *supra*.

<sup>401</sup> *People ex rel. Cooper Union v. Sexton*, 273 N.Y. 462, 6 N.E.2d 404 (1936) (Chrysler Building Case); *People ex rel. Roosevelt Hosp. v. Raymond*, 194 N.Y. 189, 197, 87 N.E. 90, 93 (1909); see *Lord v. Equitable Life Assurance Soc'y of the United States*, 194 N.Y. 212, 87 N.E. 443 (1909).

<sup>402</sup> N.Y. PRIV. HOUS. FIN. LAW § 49 (McKinney 1962). This "right" may not be exercised until the bonds have been outstanding for 20 years. The state must pay 105% of face value and accrued interest unless the bond indenture provides otherwise.

<sup>403</sup> N.Y. CONST. art. X, § 5.

<sup>404</sup> *Id.*

nation of the HFA upon payment of its bonds or for the conveyance of its property to the state; the state would therefore pay off the HFA debt and receive nothing in return. Since the HFA "right" to redeem provision does not come within the constitutional exception, it is invalid.<sup>405</sup> Further, it is disingenuous to refer to a bail out as a "right."

The statute provides in unequivocal terms that the state shall guarantee the debt of the HFA.<sup>406</sup> The guarantee is not direct; rather, it provides that if the HFA reserve for the payment of principal and interest is insufficient then the HFA shall draw a "blank check" on the state treasury and the needed amount "shall be annually apportioned and paid to the agency."<sup>407</sup> It requires a peculiar mind to draw a distinction between a direct guarantee of the bonds and a guarantee of a fund out of which the bonds will be paid. That, however, is the theory of the statute. This guarantee or "blank check" provision is considered the most important innovation in the HFA statute. It has been said that this section transformed what would have been "speculative securities into rated bonds."<sup>408</sup>

It should not be disputed that a guarantee is a form of debt or credit. The constitution, since 1846, has prohibited the contracting of state debt without a referendum of the people.<sup>409</sup> That constitution further provided that the credit of the state "shall not, in any manner, be given or loaned to, or in aid of any individual, association or corporation."<sup>410</sup> This prohibition was absolute; even a vote of the people could not authorize the use of state credit for such purposes. The 1938 Convention expressly expanded this provision to prohibit the use, with limited exceptions, of state credit in aid of a public corporation as well as a private one.<sup>411</sup>

It is apparent that the HFA guarantee violates both the constitutional referendum requirement and the prohibition on the gift or loan

---

<sup>405</sup> A less substantial constitutional violation is found in the HFA annual report section. N.Y. PRIV. HOUS. FIN. LAW § 56 (McKinney 1962). It provides for an annual report to be submitted to the Governor setting forth the agency's "receipts and expenditures . . . in accordance with the categories or classifications established by the agency." The constitution provides, however, that the accounts of a public corporation "shall be subject to the supervision of the state comptroller." N.Y. CONST. art. X, § 5.

<sup>406</sup> N.Y. PRIV. HOUS. FIN. LAW § 47(1)(d) (McKinney Supp. 1970).

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

<sup>408</sup> Reilly & Schulman, *supra* note 381. The authors note that real estate bonds "without the state guarantee were considered poor by the bond market." *Id.* Since the HFA bonds were accepted by the bond market, it is reasonable to assume that investors believed they had the state guarantee. See note 347 *supra*.

<sup>409</sup> N.Y. CONST. art. VII, § 12 (1846).

<sup>410</sup> *Id.* § 9.

<sup>411</sup> N.Y. CONST. art. VII, § 8.



of state credit. It also violates the section discussed above which provides that the state shall not "at any time be liable for the payment of any obligations" issued by a public corporation "nor may the legislature accept, authorize acceptance of or impose such liability upon the state."<sup>412</sup>

A further unconstitutionality occurs when the HFA guarantee provision is read in conjunction with the state's purportedly irrevocable agreement not to limit or alter the rights of the agency until the bonds are paid off. Again, the constitution provides that any law creating a corporation "may be altered from time to time or repealed."<sup>413</sup>

The state guarantee of HFA bonds therefore violates no less than four constitutional provisions. An act whose essential provisions—state guarantee, tax exemptions, and general irrevocability—are unconstitutional must fall as a whole.<sup>414</sup>

<sup>412</sup> *Id.* art. X, § 5. This section was expressly designed to prohibit any state or city liability for authority debt. From time to time the people have approved specific amendments that have created exceptions to this prohibition. *Id.* §§ 6-8; *id.* art. XVII, § 7. No specific amendments have been proposed or adopted with respect to the HFA or the Urban Development Corporation.

<sup>413</sup> *Id.* art. X, § 1.

<sup>414</sup> The Supreme Court has noted:

An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

*Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

As has been shown, practically all statutes creating authorities provide a disclaimer to the effect that the authority debt shall not be a debt of the state and that the state shall not be liable for the authority's bonds. Despite the work of the 1938 Convention, it has recently been said that the "moral obligation" of the state underlies authority debt. *See, e.g., N.Y. DEP'T OF AUDIT & CONTROL, supra* note 286, where Comptroller Levitt stated:

Two other methods of financing or acquiring capital facilities have been used in recent decades: (1) lease-purchase arrangements, such as have been used in connection with certain state office buildings; and (2) the creation of public corporations [authorities] with independent borrowing powers. I am convinced that the State is making excessive use of them at present. The financial community regards the obligations created through these methods of financing as carrying the moral commitment of the State.

*See also N.Y. DEP'T OF AUDIT & CONTROL, 1967 ANNUAL REPORT OF THE COMPTROLLER* 21, 23 (1967); *TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION, REPORT: STATE FINANCES* 80, 172-73 (1967); *TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION, supra* note 377, at 51. The financial community appears confident that the state will "bail out" the bonds of a defaulting authority. Comptroller Levitt has expressed this view as follows:

The moral obligation derives from the language of pertinent laws, the expressions of the financial community regarding these obligations, and the use to which the funds are put. The applicable laws generally provide that the State will apportion to the various debt service reserve funds or rental reserve accounts the amounts necessary to assure that the funds will be sufficient to meet the immediate debt service needs. These payments are permissive, rather than manda-

Recently, a new feature has been added to authority financing in an effort to further insulate it from constitutional requirements. The use of lease-financing in New York has also been credited to John Mitchell,<sup>415</sup> but the origins of this financing method may be traced to the nineteenth century.<sup>416</sup> Its purpose is the same as that of an authority—to evade referendum requirements at the state level and debt limitations at the local level. Unlike a typical authority, however, it can be used for completely non-self-supporting projects.

A lease-financing operation is quite simple. An authority undertakes to construct a facility needed by government. Prior to construction, the authority, which will own the facility, enters into a long-term lease with the state or city. The authority, with the governmental lease as security, issues bonds and with the proceeds constructs the facility. With the lease payments the authority pays the debt service on its bonds. At the end of the lease term, title to the facility is transferred to the state or city for little or no consideration. The state or city pays annually as "rental" an amount equal to the debt service incurred by the authority and other of its expenses.

Clearly, the state or city credit—in the form of the lease—is what underlies the transaction.<sup>417</sup> The bondholders, for practical purposes,

---

tory, since they are subject to annual Legislative appropriation. However, in the words of a major bond rating service, "it is expected that the State of New York will remain at all times under strong moral suasion to maintain its schedules of charges and programs of aid to the end that these bonds will remain in good standing."

N.Y. DEPT OF AUDIT & CONTROL, 1967 ANNUAL REPORT OF THE COMPTROLLER 23 (1967). And although the Comptroller characterizes the state payments as "permissive, rather than mandatory," we have seen that the statutes providing for such payments are unequivocal and mandatory. Proponents of the moral obligation view should read Article X, § 5, and the 1938 Convention debates.

<sup>415</sup> A recent article states:

Mitchell's former law partners credit him with devising the scheme called "lease-financing," under which a municipality whose borrowing powers are restricted sets up a quasi-public corporation to build facilities, then lease[s] them back for public use.

Viorst, *Attorney General Mitchell's Philosophy Is "The Justice Department Is an Institution for Law Enforcement Not Social Improvement,"* N.Y. Times, Aug. 10, 1969, § 6 (Magazine), at 70.

<sup>416</sup> See *Smith v. City of Newburgh*, 77 N.Y. 130 (1879).

<sup>417</sup> The South Mall project is a major example of lease-financing. The project site was acquired by the state which then conveyed it to Albany County. Albany County leased the site back to the state (for a 40-year term) and also agreed to issue county bonds to cover the cost of construction. The state "rental payments to the county are calculated to reduce county bond obligations progressively over the lease period." *Schuyler v. South Mall Constructors*, 32 App. Div. 2d 454, 456, 303 N.Y.S.2d 901, 904 (3d Dep't 1969). By the end of the lease term, all of the county bonds will be retired and the buildings and site will be reconveyed to the state. The appellate division has recently summarized the reality of this transaction as follows:

have no other security. The foreclosure and sale of a hospital or educational facility is not likely to recover the cost of construction. Similarly, the massive South Mall state office building project would not bring a great deal at auction. If the transaction is premised upon government credit, it must be said that government has incurred a debt. The scheme's success depends upon a judicial determination that the payments are in fact rent and not a form of debt payment, but that appears unlikely.<sup>418</sup>

It is no doubt true in a normal lease transaction that rent due in a future period is not an existing obligation or debt, but New York courts have not applied this rule in the case of lease-financing. Rather, they have looked at the realities of the situation. For example, in 1871 the city of Newburgh entered into a "lease" to acquire land needed for the city's reservoir system. State law had authorized the city to enlarge and improve its water system and to levy taxes for that purpose.<sup>419</sup> The law, however, provided that any "expenditure of money" in excess of \$10,000 must be approved by a referendum of the taxpayers. The "lease," which was not approved by referendum, provided for "rental" payments of \$1,500 per year for the first ten years and \$2,500 per year for the next ten years. The city possessed an option to purchase, at any time, for \$30,000. In no one year, then, would the "lease" payments exceed the prohibited \$10,000 amount, but if the aggregate "lease" payments were considered as a present obligation the transaction would involve \$40,000 and would be in violation of the law. In *Smith v. City of Newburgh*,<sup>420</sup> the Court of Appeals held the "lease" to be illegal since no referendum was held and "the obligation incurred at the time was

---

[N]o use or expenditure of funds by the locality [Albany County] is actually involved and the entire operation is underwritten by a State indemnification against any "local" loss or expense. Investors in county bonds rely on the State's credit which stands behind the rental and indemnity provisions of the South Mall agreement.

*Id.* at 457, 303 N.Y.S.2d at 904.

<sup>418</sup> An excellent article on the subject states:

It seems apparent that lease-financing is actually borrowing by another name. To contend that the method of payment alters the fact of payment strains ratiocination. Unlike ordinary leases, these leases are in practice non-terminable, nor do the parties ever intend to terminate them. The amounts paid as "rent" are not the use value of the property, as true rent would be, but equal debt amortization charges on the full cost of the facility financed.

Magnusson, *Lease-Financing by Municipal Corporations as a Way Around Debt Limitations*, 25 GEO. WASH. L. REV. 377, 390 (1957) (footnote omitted).

<sup>419</sup> Act of March 16, 1867, ch. 88, [1867] N.Y. Laws 124.

<sup>420</sup> 77 N.Y. 130 (1879).

in excess of the sum named [\$10,000]."<sup>421</sup> Lease-financing cannot succeed in the New York courts unless *Newburgh* is overruled.<sup>422</sup>

In view of *Newburgh*, it is doubtful that the New York courts will support the "rental" characterization, and in the 1964 case of *Marine Midland Trust Co. v. Village of Waverly*,<sup>423</sup> the New York courts have indicated that *Newburgh* will be followed and that the reality of the situation will control. There, a twenty-year "lease" with an option to purchase at the end of the term for \$1.00 was held to be an installment purchase rather than a lease. The transaction was void since the village had no authority under the Local Finance Law to make an installment purchase.<sup>424</sup>

<sup>421</sup> *Id.* at 134.

<sup>422</sup> Reasoning similar to *Newburgh* was adopted by a federal circuit court in *Coulson v. Portland*, 6 Fed. Cas. 629 (No. 3,275) (C.C. Ore. 1868). The charter of the city of Portland provided that the indebtedness of the city "shall never exceed in the aggregate the sum of fifty thousand dollars" and that any debt or liability in excess of such amount shall be "null and void." *Id.* at 635. The city entered into an agreement with the Oregon Central Railroad Company providing (1) that the city, at various stages of the railroad's construction, would undertake the payment of the interest coupons on specified amounts of railroad bonds (the city was not to be liable for the principal), and (2) that the railroad would provide, for 20 years, free transportation for the city's public messengers and for all stone, gravel, and lumber needed for construction of public buildings. The opinion contains no estimate of the value of this consideration coming from the railroad. However, the city's assumption of liability was clearly valued at \$300,000. The bonds in question were for a term of 20 years and the city intended to raise the money required for interest by levying taxes as the coupons became due. A taxpayer sought to enjoin the transaction, claiming, among other things, that it exceeded the city's debt limit. The city defended, making the odd argument that no debt was incurred because provision was made for the levying of taxes as the coupons fell due. The circuit court, in rejecting the city's argument, stated:

By means of such artificial reasoning and unlooked for construction of popular and plain terms and phrases, constitutions may be purged of every prohibition upon the legislative power of taxation and creating indebtedness, which the wisdom or fears of the people may place in them.

These constitutional provisions restraining the creation of public debts are the gradual outgrowth of the last twenty or thirty years. They have been erected by the peoples of various states as barriers against the creation of debt by the legislature in a time of popular excitement about internal improvements. . . .

. . . A debt exists against the city whenever the city agrees to pay money in return for services or for money borrowed.

*Id.* at 636-37.

The court held the transaction void as an attempt "to create a debt against the city exceeding \$50,000." *Id.* at 637. Therefore, as in *Newburgh*, the court found that the entire obligation was incurred at the time the agreement was made.

<sup>423</sup> 42 Misc. 2d 704, 248 N.Y.S.2d 729 (Sup. Ct. 1963), *aff'd mem.*, 21 App. Div. 2d 753, 251 N.Y.S.2d 937 (3d Dep't 1964).

<sup>424</sup> The court noted:

Article VIII of the New York Constitution and the provisions of the Local Finance Law are part of the effort to create and maintain fiscal integrity. To

Lease-financing is simply state or local debt by another name and it too is unconstitutional.

### CONCLUSION

The reader will recall that at a critical point during the 1938 Convention, Comptroller Tremaine came to the support of the Moffat amendment because he feared that the state would become financially responsible for the failure of weak authorities.<sup>425</sup> The Comptroller's thought was fairly clear: there is relatively little danger to the state treasury in the case of a strong authority holding a vital or valuable asset. The Triborough Bridge and the Port Authority tunnels are good examples. If the bondholders are obliged to foreclose, they will secure a revenue-producing asset which will pay off their debt; no recourse to the state treasury is needed. But if authorities undertake projects of "doubtful earning power," a very distinct threat to the state or city treasury is posed. As Al Smith pointed out, "A sewer never can be made a self-liquidating project."<sup>426</sup>

---

allow the agreement in question to stand would be a clear evasion of the Constitution and statutes of this State. Such methods of evasion are not uncommon throughout the country and the weight of authority strikes these agreements down.

*Id.* at 707, 248 N.Y.S.2d at 732.

The court relied on an earlier case, *Gardner v. Town of Cameron*, 155 App. Div. 750, 140 N.Y.S. 634 (4th Dep't 1913), *aff'd mem.*, 215 N.Y. 682, 109 N.E. 1074 (1915). In that case the town entered into a lease for a steam roller. The town undertook to pay "rent" of \$10 per day and agreed to use the steam roller for a minimum number of days. The lease provided for a five-year term but the town could terminate it at the end of each year. At the end of the five-year term the town would take title to the steam roller for \$1.00. The court held that "in substance and effect" the instrument was not a lease but a conditional contract of purchase. *Id.* at 756, 140 N.Y.S. at 639. The court noted: "This contract upon its face bears the evidence of having been drawn for the purpose of subverting the declared policy of the State . . ." *Id.* at 757, 140 N.Y.S. at 639.

<sup>425</sup> Text accompanying note 315 *supra*.

<sup>426</sup> III 1938 REVISED RECORD 2287. See note 279 *supra*.

The distinction drawn by Smith involves the difference between taxation and an optional use. A sewer must be used by all of a city's citizens; charges in that case can only be characterized as taxation. This would be true of most normal governmental facilities such as schools, hospitals, and police departments. A charge for an optional use means that the user has other options but because of increased convenience or whatever, he chooses to pay a toll for the use of an authority facility. An example would be the New Jersey Turnpike, constructed by an authority, which is more convenient to use than the pre-existing highway system. Smith would consider such an authority to be legitimately self-supporting. When, however, an authority secures a monopoly position this distinction fails. If travel between two points must be over an authority facility, the authority has a monopoly. The use of its facility is optional only if travel between two points is optional. But, it is impossible, as a practical matter, to travel by car between New York City and New Jersey except by use of a Port Authority bridge or tunnel. The Port Authority tolls consequently should be considered as taxes. Since

Beginning in 1960, however, authorities became involved in projects that were only marginally self-supporting (subsidized middle-income housing)<sup>427</sup> and others that were clearly not self-supporting in any normal sense of the term (hospitals,<sup>428</sup> educational facilities,<sup>429</sup> and dormitories<sup>430</sup>). But how can the bonds of a weak authority be sold? If the authority's asset is insufficient security for a bondholder what will make the bonds marketable? Clearly, only governmental credit in one form or another. Equally clearly, the constitution prohibits this use of the state's credit.

Authorities are created only for antidemocratic purposes—the evasion of rules that apply to government itself. At present, authority debt exceeds state debt by more than two and a half times. Authorities constitute a separate government, wealthier than the constitutional government and not responsible to the people or the people's representatives. Their power serves to subvert the state's constitution. Since it is apparent that authorities cannot be adequately controlled or regulated, their functions should be returned to the constitutional government.

---

1938, the constitution has prohibited the creation of an authority with both the power to contract debt and to levy taxes. N.Y. CONST. art. VIII, § 3. Since every authority contracts debt, this provision amounts to a prohibition on granting an authority the power to tax. If an authority's tolls or charges are in fact taxes, the constitution is violated. Also, it should be pointed out that government has far more regulatory power over private utilities than over authorities. If a private utility is given a monopoly position, government always retains the power to regulate rates, among other things. An authority can set its tolls as it wishes.

<sup>427</sup> Housing Finance Agency Act, ch. 671, [1960] N.Y. Laws 1945.

<sup>428</sup> N.Y. UNCONSOL. LAWS §§ 4401-17 (McKinney Supp. 1970); N.Y. PRIV. HOUS. FIN. LAW § 47-d (McKinney Supp. 1970) (Health & Mental Hygiene Facilities Improvement Corporation).

<sup>429</sup> N.Y. PRIV. HOUS. FIN. LAW § 47-c (McKinney Supp. 1970) (State University Construction Fund).

<sup>430</sup> *Id.* These functions would normally be considered governmental. Concurrently, at the other extreme, authorities have moved into traditionally free enterprise ventures such as commercial office buildings and luxury housing. *E.g.*, the World Trade Center (N.Y. UNCONSOL. LAWS §§ 6601-18 (McKinney Supp. 1970)) and the Battery Park City Authority (N.Y. PUB. AUTH. LAW §§ 1970-88 (McKinney 1970)).