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Albany South Mall Contractors Relief Act an Unconstitutional Infringement Upon Court of Claims Jurisdiction

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THE ALBANY SOUTH MALL CONTRACTORS RELIEF ACT—AN UNCONSTITUTIONAL INFRINGEMENT UPON COURT OF CLAIMS JURISDICTION

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By constitution New York provides for a court of claims to hear and determine suits against the state.[1] Section 10 of the Public Buildings Law, enacted in 1969,[2] creates an exception to this constitutional provision. It authorizes the General Services commissioner to determine if the state is liable to certain contractors and, if such liability is found, to make an "equitable adjustment" in the contract price to compensate the contractor for his damages. The General Services commissioner's jurisdiction is limited, under section 10, to contracts awarded in connection with the Albany South Mall project. It is estimated that as a consequence of section 10 the state may pay $150 million "or more" above original contract prices to the South Mall contractors.[3] A statute as curious as section 10 merits a legislative his-

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1 The article was ratified by the people effective January 1, 1950. MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 334 (Sec'y State ed. 1970) [hereinafter cited as LEGISLATIVE MANUAL]. The article provides:

> The court of claims is continued. It shall consist of the eight judges now authorized by law, but the legislature may increase such number and may reduce such number to six or seven. The judges shall be appointed by the governor by and with the advice and consent of the senate and their terms of office shall be nine years. The court shall have jurisdiction to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide.

N.Y. CONST. art. VI, § 9.

2 N.Y. PUB. BLDGS. LAW § 10 (McKinney Supp. 1970). *See* note 109 *infra*.

3 N.Y. Times, June 7, 1971, at 48, col. 1; *id.*, Jan. 27, 1971, at 1, col. 3.

The Albany South Mall project was originally conceived as a means of revitalizing the seat of state government. *Id.*, Jan. 29, 1971, at 17, col. 1. Governor Rockefeller predicted that the Mall "is going to turn out to be the greatest thing that has happened to this country in 100 years." *Id.* The Governor reportedly first was inspired by the idea while riding through Albany with Princess Beatrix of the Netherlands. "There's no question," the Governor said, "that the city did not look as I think the Princess thought it was going to." *Id.*, Feb. 15, 1971, at 44, col. 3.

The state comptroller estimates that the Mall will require the borrowing of one billion dollars. *Id.*, Feb. 8, 1971, at 22, col. 5. Over the past decade the state has adopted an unannounced expansionary policy with respect to debt: the comptroller reports that as of March 31, 1961, all types of state debt totaled $1.6 billion. Ten years later all types of state debt totaled $7.1 billion, an increase of 444%. N.Y. DEP'T OF AUDIT AND CONTROL, COMPTROLLER'S SPECIAL REPORT ON THE PUBLIC DEBT OF THE STATE OF NEW YORK 1961-71,

tory, yet there is no record of either a governor's transmittal letter or a governor's message upon signing the act. Secondary sources, however, give some indication of the thinking behind the statute.

The South Mall project is well behind schedule. According to an estimate made on November 1, 1965, the project would be completed by May 1970.[4] Current official estimates schedule completion for 1975.[5] Governor Rockefeller has taken the position that mud has been responsible for the delay.[6] According to the Governor, "a volume of mud equal to the weight of each building" had to be removed from the site.[7] Apparently the mud problem was unexpected,[8] and this initial delay disrupted the schedule of other contractors. Numerous other possible causes for the delay have also been mentioned.[9]

Section 10 of the Public Buildings Law reportedly was enacted to "keep the contractors from quitting the project and suing the state in the Court of Claims for damages because of the delays and their added costs."[10] General Services Commissioner Cortland V. R. Schuyler conceded that

> the extra payments were being made to contractors to compensate them for delays they encountered in their work at the site.

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at 1 (1971). At the same time the tax burden has nearly tripled—from $2.052 billion in 1961 to $5.821 billion in 1970. N.Y. DEP'T OF AUDIT AND CONTROL, 1970 ANNUAL REPORT OF THE COMPTROLLER 2 (1970).

4 N.Y. Times, June 7, 1971, at 48, col. 1.

5 *Id.*

6 *Id.*, Jan. 29, 1971, at 17, col. 1. The mud theory may be subsidiary to the Governor's "totalitarian society" theory. Asked why a nearby private office building had been completed in 18 months while the South Mall project had foundered, the Governor replied, "[I]t is a perfect illustration of why private enterprise, free enterprise is better than a totalitarian society." *Id. See also* 83 FORTUNE, June 1971, at 92, 94. The Mall is scheduled to include only about 1,665,000 square feet of usable office space. One estimate puts the cost at an average of $150 per square foot compared to an average cost in New York City of $35. *Id.* at 95.

7 N.Y. Times, Jan. 29, 1971, at 17, col. 1.

8 This is somewhat strange since delays caused by foundation problems have been endemic to state office building construction. *E.g.*, Cauldwell-Wingate Co. v. State, 276 N.Y. 365, 12 N.E.2d 443 (1938) (state office building in New York City); Seglin Constr. Co. v. State, 275 N.Y. 527, 11 N.E.2d 326 (1937) (state office building in Albany).

9 *E.g.*, (*1*) inexperienced contractors (N.Y. Times, Jan. 29, 1971, at 17, col. 1), (*2*) an undependable labor market (*id.*, June 7, 1971, at 48, col. 1), (*3*) architectural design changes (*id.*), (*4*) inadequate original plans (*id.*), and (*5*) faulty programming (*id.*). Some of these causes might be considered the state's responsibility while others clearly could not. Certainly an inexperienced contractor would have no claim against the state based on his inexperience, nor would an undependable labor market seem to be a state responsibility. The appropriate forum for sorting out these factors is the court of claims. Section 10 will not permit the court to do so.

10 N.Y. Times, Jan. 27, 1971, at 1, col. 3. *See also id.*, April 14, 1971, at 31, col. 3.

> The state . . . was largely responsible for the delays, which resulted in inflated labor and material costs for contractors.[11]

The state comptroller, moreover, has been quoted as saying that the extra payments are "predicated on the state being in default" and that the contractors are being "compensated for any damages they may have suffered without going to the Court of Claims."[12]

These accounts would lead one to believe that section 10 was intended to deal with an emergency situation. The state's liability, we are told, was clear. Nothing could prevent the contractors from abandoning their contracts and leaving the project in a highly incomplete state. The contractors would then sue the state in the court of claims where the state would be subject to awesome liability. This thesis is, to say the least, doubtful. Initially, it should be noted that the contractors could not simply abandon the project and then immediately sue in the court of claims. The court of claims would have no jurisdiction at that time. If a contractor abandons his contract the state must either relet the contract to a new party or itself abandon the project.[13] In the case of the South Mall, the contracts presumably would be relet.

The Court of Claims Act provides that a claim for breach of contract "shall be filed within six months after the accrual of such claim."[14] In *Edlux Construction Corp. v. State*[15] it was held that the term "claim accrued" is not synonymous with the term "cause of action accrued." A cause of action accrues when a contract is breached. A claim does not accrue until the damages are ascertainable. With respect to an abandoning contractor, damages are not ascertainable until after the contract has been completed by the new contractor and the state has made its "final estimate."[16] The state would not, therefore, have been

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11 *Id.*, Jan. 27, 1971, at 1, col. 3. Section 10 requires that the General Services Commissioner determine state liability before making any equitable adjustment. *See* text accompanying notes 109 & 121 *infra*. The statement by Commissioner Schuyler seems to indicate that he considered state liability a foregone conclusion.

12 N.Y. Times, Jan. 27, 1971, at 46, col. 3.

13 That is, the state is bound by the same contractual rules that bind private individuals. People v. Stephens, 71 N.Y. 527 (1878). Accordingly the state may complete the work through new contracts and recover from the abandoning contractor or its surety the increased cost. National Sur. Corp. v. State, 169 Misc. 479, 8 N.Y.S.2d 77 (Ct. Cl. 1938).

14 N.Y. Ct. Cl. Act § 10(4) (McKinney 1963). Notice of intention to file a claim may be filed within the six month period, in which case the actual claim may be filed within two years after its accrual. *Id.*

15 252 App. Div. 373, 300 N.Y.S. 509 (3d Dep't 1937), *aff'd*, 277 N.Y. 635, 14 N.E.2d 197 (1938).

16 *Id.* at 374-75; 300 N.Y.S. at 512-13. *See* Michael v. State, 187 Misc. 342, 63 N.Y.S.2d

subject to immediate and extensive liability to abandoning contractors. In addition, even if the jurisdictional question could be overcome, the court of claims would not be a desirable forum for the abandoning South Mall contractors since (*1*) "legal evidence" (unnecessary under section 10) would be required; (*2*) the state might be found not liable and the contractors found liable for wrongful abandonment; (*3*) a final determination of such a complicated case could easily take between five and ten years;[17] and (*4*) the largest reported court of claims award in a delay case has been $574,000.[18]

Under authority of section 10 the General Services commissioner has equitably adjusted two contracts. Combined, these contracts were increased by $83,011,723, or sixty-one percent.[19] As noted, it is estimated that equitable adjustments may reach $150 million or more.[20]

A review of the history of claims against New York State, and particularly the movement to establish the court of claims as a constitutional court,[21] makes clear that section 10 is unconstitutional.[22]

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517 (Ct. Cl. 1946). The *Michael* case also involved an abandoning contractor and it was held that no claim accrued until after completion of the contract by the new contractor. In explaining the necessity for keeping the transaction open, the court noted:

> The contractor could not know the extent of the damages it had sustained until it was made aware of the State's measurements of the quantities of work done and materials in place and of the State's computations of the moneys earned up to the time of the cancellation of the contract and, in addition thereto, was informed of the extent of its liability for the excess cost to the State arising out of the completion contract.

Id. at 347, 63 N.Y.S.2d at 521.

17 Recently, a relatively simple delay case took almost six years from the date of completion of the contract until determination by the court of claims. Felhaber Corp. v. State, 63 Misc. 2d 298, 312 N.Y.S.2d 123 (Ct. Cl. 1970).

18 *Id.* This would come to a little over one percent of the Walsh-Corbetta equitable adjustment. *See* note 19 and accompanying text *infra*.

19 The two contracts are (*1*) Felhaber-Horn foundation work, increased by 86% from an original contract price of $37,377,000 to $68,415,723 (N.Y. Times, Jan. 27, 1971, at 46, col. 3; *id.*, April 8, 1971, at 37, col. 3) and (*2*) Walsh-Corbetta platform work, increased by 53% from an original contract price of $97,777,000 to $149,750,000 (*id.*; *id.*, April 14, 1971, at 31, col. 2). It is reported that Felhaber-Horn subsequently abandoned its contract when refused a further equitable adjustment. *Id.*, April 8, 1971, at 37, col. 4. The additional cost to the state to complete the work is estimated at $3,000,000. *Id.* The Walsh-Corbetta platform contract when let in 1967 was the largest in the state's history. FORTUNE reports that Walsh-Corbetta was "the only bidder out of sixty-six contractors directly solicited by the state. (Others complained that the state's hurry-up schedule gave them too little time to work through the specs.)" FORTUNE, *supra* note 6, at 165.

20 N.Y. Times, Jan. 27, 1971, at 1, col. 3; *id.*, June 7, 1971, at 48, col. 3.

21 The idea of constitutional courts dates to the Declaration of Independence. The Declaration recited King George's "History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States." Among the "usurpations" specified was the King's use of executive courts: "He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."

I

HISTORY OF THE COURT OF CLAIMS

Claims against the state may be divided into two types: legal and moral. A legal claim is one which, as between ordinary citizens, would be recognized as enforceable. A moral claim is one not recognizable

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The federal Constitution sought to prevent this problem in the future by *(1)* vesting the judicial power in the Supreme Court and in such inferior courts as may be established by Congress, *(2)* providing for judicial tenure during "good Behavior," and *(3)* prohibiting any reduction of judicial salaries. U.S. CONST. art. III, § 1. *See* THE FEDERALIST Nos. 78-83 (A. Hamilton). In addition, the Constitution specified the jurisdiction of the federal courts: it provided that the "judicial Power shall extend" to nine classes of cases. U.S. CONST. art. I, § 2. Congress may, pursuant to other provisions of the Constitution, create legislative courts. Such courts may be freely abolished and are not protected by article III's provisions with respect to tenure and salary. The federal Court of Claims was created pursuant to the congressional power to pay the debts of the United States (*id.* art. I, § 8) and was originally viewed as a legislative court. Williams v. United States, 289 U.S. 553 (1933). However, in Glidden Co. v. Zdanok, 370 U.S. 530 (1962), the Supreme Court held that the Court of Claims was in fact a constitutional court.

22 *See* notes 101-02 and accompanying text *infra*. The South Mall project was conceived in illegitimacy. The project is financed with bonds issued by Albany County. The state has entered into a lease agreement with Albany County whereby it agreed to pay "rent" equal to the debt service on the county's bonds. In reality, of course, the bonds are the state's. The Appellate Division has noted, "Investors in county bonds rely on the State's credit which stands behind the rental and indemnity provisions of the South Mall agreement." Schuyler v. South Mall Contractors, 32 App. Div. 2d 454, 457, 303 N.Y.S.2d 901, 904 (3d Dep't 1969). The difficulty is that the constitution provides that "no debt shall be hereafter contracted by or in behalf of the state" unless the debt is approved by a referendum of the people. N.Y. CONST. art. VII, § 11. No referendum has been held with respect to the South Mall project. The Governor and Albany County officials reportedly agreed to evade the referendum requirement, "everybody having assumed from the first that voters around the state would never approve a bond issue for a mall in Albany." FORTUNE, *supra* note 6, at 94.

A recent report of Comptroller Arthur Levitt states that the South Mall financing "circumvents the constitutional procedure which requires public approval of state debt by a voter referendum." N.Y. Times, June 7, 1971, at 48, col. 2. In addition, the use of county bonds will cost the taxpayers an additional $44.2 million in interest because the county had a lower credit rating than the state. *Id.* The report further notes that the state's role in the financing of the project has "virtually all the earmarks of debt, and there is no question that future tax revenues are being 'mortgaged' to pay for it." *Id.*, col. 2.

The comptroller's report seems at least close to the view that the state's obligations do technically constitute debt and are therefore unconstitutional. At a minimum, the state's chief financial officer has expressed serious constitutional doubts as to the validity of the South Mall financing. The marketability of any additional South Mall bonds seems questionable in light of the comptroller's view, since potential investors in South Mall bonds do not seek a risk instrument. According to current estimates, however, the project will require the additional issuance of about $500 million in Albany County bonds. COMPTROLLER'S SPECIAL REPORT ON THE PUBLIC DEBT OF THE STATE OF NEW YORK 1961-1971, *supra* note 3, at 9-10. Two months after the comptroller's report the county

between ordinary citizens but which the state may recognize when equity and justice dictate. Legislative power with respect to both types

sold an additional $70 million of South Mall related debt. County of Albany, N.Y., Prospectus: $70,000,000 South Mall Construction (Serial) Bonds, Series F, Aug. 1, 1971. Purchasers of these bonds have bought with notice of the comptroller's position and may be in a situation different from previous buyers.

Further constitutional difficulties in connection with the South Mall financing surfaced in Schuyler v. South Mall Contractors, 32 App. Div. 2d 454, 303 N.Y.S.2d 901 (3d Dep't 1969). In 1969 the legislature inserted a provision into the deficiency budget (Act of Jan. 8, 1969, ch. 1, [1969] N.Y. Laws 30), authorizing the General Services Commissioner to negotiate a contract for the construction of a library and museum as part of the South Mall project. *Schuyler* tested the 1969 law against two venerable constitutional prohibitions.

Since 1894 the constitution has prohibited the inclusion of any provision in a budget or deficiency budget "unless it relates specifically to some particular appropriation in the bill." N.Y. CONST. art. VII, § 6. This constitutional provision was intended to prevent the inclusion of general legislation in an appropriation bill. As Daniel H. McMillan told the 1894 convention, "The object . . . is to prevent many abuses which have obtained in the Legislature, of tacking on to the annual appropriation and supply bill various provisions which otherwise could not be enacted." II REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1894, at 599 (1900). The *Schuyler* court held that the constitutional prohibition was not violated by the South Mall library and museum provision, reasoning that the deficiency budget did appropriate $136 million for the construction of state buildings including the building in question. 32 App. Div. 2d at 456, 303 N.Y.S.2d at 903.

The second constitutional provision discussed in *Schuyler* was article III, section 15. This section, added to the constitution in 1846, provides that no "private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." The purpose of section 15 has been described by the Court of Appeals as "twofold":

> First, to prevent a combination of measures in local bills, and secure their passage by a union of interests commonly known as "log-rolling." Second, to require an announcement of the subject of every such bill, to prevent the fraudulent insertion of provisions upon subjects foreign to that indicated in the title. It was intended that every local subject should stand upon its own merits, and that the title of each bill should indicate the subject of its provisions, so that neither legislators nor the public would be misled or deceived.

Rochester v. Briggs, 50 N.Y. 553, 558 (1872). If the library and museum provision were considered a "local bill" it would necessarily fall since it was not referred to in the title of the deficiency budget. If the provision related to a county project it would clearly be "local." *Schuyler* held that the South Mall project was not local since the county had no real interest or involvement. It was a state project and the investors in county bonds "rely on the State's credit." 32 App. Div. 2d at 457, 303 N.Y.S.2d at 904. The court therefore found Albany County's role in the South Mall to be purely formalistic: the project is in reality of a "distincly State character." *Id.* at 457, 303 N.Y.S.2d at 905.

The *Schuyler* court's conclusion creates two deep problems for the Mall financing. First, the state's lease is invalid because the state has in reality contracted a debt and no referendum has been held. Second, the county bonds are invalid because the constitution prohibits a county from contracting debt for a state project. N.Y. CONST. art. VIII, § 2. The Albany County bond issue for the Mall was statutorily authorized in 1964. N.Y. COUNTY LAW § 850(1)(e) (McKinney Supp. 1970). The draftsmen of the legislation were aware of the constitutional problem and went to some lengths to establish that a county purpose would be served by the Mall. The legislation begins with a section entitled "legisla-

of claims has always been, and continues to be, extensive. Currently, the only significant constitutional restraint upon the legislative power is procedural: since 1950, when the court of claims became a constitutional court, the constitution has required that all claims against the state, whether legal or moral, be presented in that tribunal.[23]

Restrictions on legislative power with respect to claims against the state may be roughly divided into three historical periods: (*1*) the early period (1777-1874) during which the legislature, with nearly unlimited power, was able to audit and allow any legal or moral claim; (*2*) the middle period (1874-1949) during which certain substantive limitations[24] as well as minor procedural limitations[25] were imposed; and (*3*) the current period (1950-) during which the substantive limitations have been largely deleted[26] but procedural limitations have been strengthened. The constitution now requires that all claims against the state be heard and determined by the court of claims.[27]

A court of claims judge is appointed by the governor with the advice and consent of the senate, for a term of nine years.[28] He is

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tive findings and declaration" which endeavors to establish a county purpose. This section recites that "the process of construction may itself provide a valuable stimulus to the local economy"; "local real property values and revenues to the county government are correspondingly increased"; "state office building projects are thus an important stabilizing and growth factor in the economic vitality of the county in which they are located"; and "it can serve to revitalize the entire area by clearing deteriorated commercial structures and substandard . . . housing conditions." Act of March 23, 1964, ch. 152, § 1, [1964] N.Y. Laws 186. Following these and other "legislative findings and determinations," the section concludes that the above purposes "are hereby found and declared to be county purposes." *Id.* It is hardly credible to argue that such incidental benefits constitute a county purpose sufficient to justify a billion dollars of county debt. In addition, it would seem that the court in *Schuyler* has already repudiated these legislative findings. It is clearly inconsistent to say that the same project constitutes a county purpose for purposes of article VIII and a "distinctly State" project for purposes of article III.

23 N.Y. CONST. art. VI, § 9.

24 *E.g.*, extra compensation to contractors was prohibited. N.Y. CONST. art. VII, § 24 (1874).

25 *E.g.*, the legislature could not itself audit or allow a claim, but rather was required to refer it to an "appropriate tribunal." People *ex rel.* Swift v. Luce, 204 N.Y. 478, 97 N.E. 850 (1912); Cole v. State, 102 N.Y. 48, 6 N.E. 277 (1886). However, the legislature had full power over the jurisdiction and personnel of the "appropriate tribunal." People *ex rel.* Swift v. Luce, *supra* at 486, 97 N.E. at 852-53. The legislature could, and did, abolish existing tribunals and create new ones more agreeable to it. *See* notes 51-54 and accompanying text *infra*.

26 Extra compensation to contractors is no longer expressly prohibited.

27 N.Y. CONST. art. VI, § 9. For discussions of the court of claims, see E. BREUER, THE NEW YORK STATE COURT OF CLAIMS: ITS HISTORY, JURISDICTION AND REPORTS (1959); J. DAVISON, CLAIMS AGAINST THE STATE OF NEW YORK (1954); Glavin, *The Court of Claims—Its History, Jurisdiction and Practice*, 21 N.Y.S.B.A. BULL. 357 (1949).

28 N.Y. CONST. art. VI, § 9.

subject to the same qualifications and restrictions as supreme court justices.[29] His compensation "shall not be diminished during the term of office."[30] A court of claims judge, except in cases of disability, may be removed only "for cause" and after due notice and a hearing.[31]

The contemporary judiciary article gives some indication of the underlying philosophy of the current period: substantive limitations on claims are not essential if a constitutional court, independent of the legislature and executive, is required to hear and determine all claims.

Reform movements directed at establishing the court of claims as an independent constitutional court date back to the proposed constitution of 1867.[32] The abuses of the early period (1777-1874) had by that time become apparent. Legal claims had been determined and audited by the legislature as it saw fit and legislative discretion was unreviewable. In addition, the legislative jurisdiction had been judicially expanded to include non-legal or moral claims. In *Town of Guilford v. Supervisors of Chenango County*,[33] the Court of Appeals held that taxes might be imposed to pay a private claim that was legally unenforceable. Further, it found that the courts "have no power to supervise or review" the legislative action.[34] The court relied upon *Guilford* four years later when it held that the legislature could compel

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29 *Id.* § 20.

30 *Id.* § 25.

31 *Id.* §§ 22, 23. Section 22 permits removal for cause after notice and a hearing by the court on the judiciary. The court on the judiciary is composed of the Chief Judge and senior associate judge of the Court of Appeals and one appellate division justice from each judicial department. Section 23 permits removal for cause on the recommendation of the governor if two-thirds of the senate concurs. The judge must be served with a statement of the cause alleged and must be given an opportunity to be heard.

32 The federal Court of Claims had been created in 1855. Prior to that date claims against the federal government had been determined by Congress itself. *See, e.g., Ex parte* Bakelite Corp., 279 U.S. 438 (1929), in which the Court stated:

> For sixty-five years following the adoption of the Constitution Congress made it a practice not only to determine various claims itself but also to commit the determination of many to the executive departments. In time, as claims multiplied, that practice subjected Congress and those departments to a heavy burden. To lessen that burden Congress created the Court of Claims and delegated to it the examination and determination of all claims within stated classes.

Id. at 452 (footnote omitted).

33 13 N.Y. 143 (1855).

34 *Id.* at 148 (Denio, J.). Judge Denio found that the legislature could appropriate public monies to meet both legal claims and those "founded in equity and justice." *Id.* at 149. Since its determination of "equity and justice" was nonreviewable, the legislative power was complete, with one exception: since all state action must conform to the state's fundamental law, the legislature could not recognize a claim in violation of "express constitutional restrictions." *Id.*

the city of Syracuse to pay extra compensation to a sewer contractor.[35] Thereafter, the legislative award of extra compensation to specific contractors became a notorious practice. The 1867 convention, in its address to the people, specified its efforts to remedy this practice:

> 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 . . . .[36]

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35 Brewster v. Syracuse, 19 N.Y. 116 (1859). In 1876, however, the court modified *Guilford* to hold that the legislative power to spend funds was not unrestrained: expenditure must be for a "public purpose," which is a judicially reviewable standard, although the "answer is not always ready, nor easily to be found." Weismer v. Village of Douglas, 64 N.Y. 91, 99 (1876). Following this decision, the courts were at least back in the picture, but the vague standards involved, "public purpose" and "equity and justice," led to peculiar results. For example, a claim of war veterans was found to lack "equity and justice" (People v. Westchester County Nat'l Bank, 231 N.Y. 465, 132 N.E. 241 (1921)) while the claim of bondholders—whose bonds contained a disclaimer of state liability—was held to possess "equity and justice" (Williamsburgh Sav. Bank v. State, 243 N.Y. 231, 153 N.E. 58 (1926)).

Guilford itself had qualified the legislative power by ruling that the legislature could not recoguize a claim whose payment would violate an express constitutional provision. Note 34 *supra*. This principle was breached in *Williamsburgh* when the Court held the state liable on bonds which had been issued by the Canaseraga Creck Improvement District without a referendum. The 1938 constitutional convention debated the *Williamsburgh* case and determined to bar any future implied state liability on debt not issued in accordance with the constitution. III REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, at 2258-91 (1938) [hereinafter cited as RECORD—1938]. Liability was to be prohibited whether payment was sought under the guise of a moral claim or otherwise. Since 1938, the constitution has provided:

> Neither the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by such a public corporation heretofore or hereafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof . . . .

N.Y. CONST. art. X, § 5. The law of moral obligation is discussed in Quirk & Wein, *A Short Constitutional History of Entities Commonly Known as Authorities*, 56 CORNELL L. REV. 521, 552-61 (1971).

36 *Address of the Convention to the People of the State*, in V DOCUMENTS OF THE CONVENTION OF THE STATE OF NEW YORK, 1867-68, No. 184, at 2-3 (1868). The text of the court of claims provision read as follows:

> 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 law direct.

Id., No. 185, at 19. The provision is essentially similar to the current constitutional provision ratified by popular vote in 1949. The last phrase of the 1867 language reads, "as the Legislature shall by general law direct," While the current language reads, "as the legislature may provide." N.Y. CONST. art. VI, § 9. In both cases the purpose seems the same: to retain legislative power over the classes of claims which may be heard by the court. However, the extent of the retained power may be different. The history of the 1867 provision makes clear that the legislature was to retain the power to expand

The proposed constitution, with the exception of the judiciary article (which did not contain the court of claims provision), was defeated by popular referendum.[37]

Following the defeat of the 1867 constitution, the legislature returned to its practice of granting special awards of extra compensation to contractors. In 1872, Governor John T. Hoffman called for the creation of 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."[38] The constitutional commission of 1872 considered, but did not recommend, the creation of a constitutional court of claims.[39] Generally, the 1872 commission's approach was less radical than that of the 1867 convention. For example, the 1867 constitution would have prohibited the legislature from passing any special law with respect to a claim.[40] Claims against the state would have been authorized only by general laws, applicable equally to all persons in a given class.[41] All claims would therefore have been legal ones and the special recognition of moral claims would have been eliminated.

The 1872 constitutional commission was not prepared to go that far. It sought only to end the worst substantive abuses and to establish a procedural safeguard. The 1874 constitutional amendments, based on the work of the 1872 constitutional commission, absolutely prohibited the legislature from passing any law (*1*) awarding extra compensation to contractors[42] or (*2*) reviving any claim barred by the statute of limitations.[43] Procedurally, the 1874 amendments prohibited the

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or contract the classes of claims which might be heard. Thomas G. Alvord explained to the convention that the waiver of sovereign immunity was experimental and that it should 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 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK HELD IN 1867 AND 1868, at 3647 (E. Underhill ed. 1868). In 1949 the waiver of sovereign immunity was no longer experimental. It may be that the 1949 amendment incorporated into the constitution the existing statutory jurisdiction of the court of claims. It would then follow that the only currently retained legislative power is to add classes of claims to the court's jurisdiction. *See* note 102 *infra*.

37 The vote was 223,935 for and 290,456 against. LEGISLATIVE MANUAL 316.

38 VI MESSAGES FROM THE GOVERNORS 402-03 (C. Lincoln ed. 1909).

39 JOURNAL OF THE CONSTITUTIONAL COMMISSION OF THE STATE OF NEW YORK 49, 68, 125, 173-75, 191 (1873).

40 V DOCUMENTS OF THE CONVENTION OF THE STATE OF NEW YORK, 1867-68, No. 185, at 12 (1868).

41 *Id.*

42 N.Y. CONST. art. III, § 3 (1874).

43 *Id.* art. VII, § 14.

legislature from itself auditing or allowing any private claim against the state.[44] Instead, the legislature was only permitted to "appropriate money to pay such claims as shall have been audited and allowed according to law."[45] The Court of Appeals described the situation created by the 1874 amendments as follows:

> The Constitution prohibits the legislature from exercising the power of *itself* auditing claims, which is in its nature judicial, but provides for the payment of claims which shall have been audited or allowed according to law; thus recognizing the power of the legislature to provide by law for the auditing and allowing by some appropriate tribunal of claims against the State.[46]

Prior to 1874 the legislature, as a matter of convenience, had created statutory tribunals to hear certain canal claims.[47] After 1874, the creation of a statutory tribunal was mandatory rather than a matter of convenience if private claims were to be allowed. But the legislature had full control over the form, jurisdiction, and personnel of the tribunal.[48] In *Cole v. State*[49] it was held that the legislature had the power to refer a moral claim, as well as a legal one, to any "proper tribunal."[50]

Free exercise of the legislative power to create "proper" tribunals was the dominant characteristic of the middle period (1874-1949). The following entities, with roughly the same jurisdiction, were consecutively created during this period to hear private claims: (*1*) board of

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44 *Id.* art. III, § 19.

45 *Id.*

46 Cole v. State, 102 N.Y. 48, 52, 6 N.E. 277, 278 (1886) (emphasis in original). In People *ex rel.* Swift v. Luce, 204 N.Y. 478, 97 N.E. 850 (1912), Chief Judge Cullen spoke in a similar vein:

> Thereupon [following the ratification of article III, section 19 in 1874] it became necessary, unless the state was either to violate its obligations or was willing to surrender its immunity and subject itself to suits in the courts like other litigants, for the legislature to create some board or tribunal which could pass upon and audit claims against it.

Id. at 484.

47 Act of April 21, 1870, ch. 321, [1870] N.Y. Laws 749 (board of canal appraisers); Act of April 20, 1825, ch. 275, [1825] N.Y. Laws 398 (canal appraisers); Act of April 3, 1821, ch. 240, [1821] N.Y. Laws 248 (canal appraisers); Act of April 15, 1817, ch. 262, [1817] N.Y. Laws 301 (canal commissioners). During this period the great bulk of claims against the state arose from the ownership and operation of the canal system.

48 This would not, of course, be true if the legislature simply waived sovereign immunity thereby vesting jurisdiction in the supreme court. In New York, however, the state's waiver has always been limited to a special court or tribunal.

49 102 N.Y. 48, 6 N.E. 277 (1886).

50 *Id.* at 53, 6 N.E. at 278. The only limitation on the legislative power was 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.

audit,[51] (2) board of claims,[52] (3) court of claims,[53] (4) board of claims,[54] and (5) court of claims.[55]

These tribunals derived their authority entirely from the legislature. The legislature could not audit or allow a claim,[56] but it could

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51 Act of June 2, 1876, ch. 444, [1876] N.Y. Laws 477.

52 Act of April 7, 1883, ch. 205, [1883] N.Y. Laws 211.

53 Act of March 9, 1897, ch. 36, [1897] N.Y. Laws 14.

54 Act of July 29, 1911, ch. 856, [1911] N.Y. Laws 2396.

55 Act of March 19, 1915, ch. 100, [1915] N.Y. Laws 316; Act of Jan. 28, 1915, ch. 1, [1915] N.Y. Laws 1.

56 The current constitution provides that no "money shall ever be paid out of the state treasury . . . except in pursuance of an appropriation by law." N.Y. CONST. art. VII, § 7. The constitution further provides that the payment of state money, "except upon audit by the comptroller, shall be void." *Id.* art. V, § 1. The comptroller, therefore, is vested with all those powers incidental to, or inherent in, the conduct of an audit. At one point, the Court of Appeals viewed the comptroller's auditing power as involving a "judicial function." People *ex rel.* Grannis v. Roberts, 163 N.Y. 70, 57 N.E. 98 (1900). In that case the comptroller refused payment to a contractor on the grounds that the contract price was excessive and that payment would be a "waste of the funds of the state." The contractor brought a mandamus to require the comptroller to pay, but the court held that mandamus would not lie against the comptroller since his function was discretionary:

> The auditing of an account by the comptroller involves a judicial function. He is required in the language of the books "to hear, to examine, to pass upon, to settle and adjust." That function he cannot be required to exercise in any particular way by mandamus . . . .

Id. at 78, 57 N.E. at 101.

For practical purposes then, following *Grannis* the comptroller's determination was final with respect to matters within his jurisdiction. The relationship of his jurisdiction to that of the statutory court of claims was involved in Quayle v. State, 192 N.Y. 47, 84 N.E. 583 (1908). There, a printer claimed that the state owed him money for work performed under his contract. The jurisdiction of the court of claims was not exclusive; by statute it had been provided that the court not hear a claim if it was submitted by law to any other tribunal or officer for audit or determination. The printer filed his claim with the court of claims which dismissed it. The Court of Appeals believed the issue to be whether the court of claims had any jurisdiction to hear the claim. The court, by Chief Judge Cullen, held that it did not: "We hold that claims for such current expenses of the state government as are provided for by those statutes [appropriations] must be presented to the comptroller for audit." *Id.* at 53, 84 N.E. at 585. Cullen observed that the proper jurisdiction of the court of claims was "those claims which lay beyond the auditing power of the comptroller" and which, prior to the constitutional amendment, had been determined by the legislature itself. The court noted that notwithstanding the 1874 amendment prohibiting the legislature from auditing or allowing a claim,

> the power of the comptroller to audit claims for the payment of which there had been appropriations remained unaffected. It is difficult to believe that the legislature in creating the Board of Audit or of Claims intended to leave it optional with any claimant to apply either to the comptroller or to the board for an audit of his claim, or to allow an appeal from the comptroller to the board.

Id. at 53, 84 N.E. at 585. The court expressly reserved the question whether the court of claims would have jurisdiction if the comptroller refused audit because an appropriation was exhausted.

Quayle represents the high point of the comptroller's power. It held that he had jurisdiction over claims "for such current expenses" as are provided for in appropriation

freely abolish an old forum and create a new one, and its motivation for doing so could not be judicially reviewed. *People ex rel. Swift v. Luce*,[57] which involved the validity of the creation of the board of claims in 1911, removed any question as to the extent of legislative power. The 1911 legislation had effected the removal of judges appointed to the court of claims under an 1897 act. The removed judges asserted that they were "judicial officers" and, according to the constitution, could be removed only by a two-thirds vote of the senate.[58] They argued, in addition, that the constitution required that such removal be "for cause" following notice and an opportunity to be heard.[59] The judges' contention that they were judicial officers entitled to constitutional protection rested on the premise that the 1897 court of claims was a court within the meaning of the constitution.

The Court of Appeals held that it was not. In an opinion by Chief Judge Cullen, the court first noted that the legislature had no power to create a new court with statewide jurisdiction. Cullen based this principle upon an 1857 case, *Sill v. Village of Corning*.[60] *Sill* involved the constitutionality of the legislative creation of a local village court with limited civil jurisdiction. Since the judiciary article of the 1846 constitution expressly required the creation of a series of courts ranging from courts of impeachment to the courts of justices of the peace, it was argued that the constitutional design was complete; therefore the legislature could create no other courts. Chief Judge Denio disagreed, noting that he saw no constitutional prohibition against the creation of a village court.[61] He made clear, however, that the legislature had no power with respect to the "higher courts, whose jurisdiction pervades the whole state."[62] The legislature could not create courts and confer upon them the jurisdiction constitutionally granted to the state supreme court or Court of Appeals.[63]

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acts. *Id.* at 53, 84 N.E. at 585. *Grannis* had already held that his determination was effectively nonreviewable. This situation was drastically altered by a statutory change made shortly thereafter. In 1908 the jurisdiction of the court of claims was expanded to include claims which had been rejected by the comptroller. Act of June 16, 1908, ch. 519, [1908] N.Y. Laws 1894. Subsequently, the comptroller's audit was a necessary, but preliminary, step.

57 204 N.Y. 478, 97 N.E. 850 (1912).

58 N.Y. CONST. art. VI, § 11 (1894).

59 *Id.*

60 15 N.Y. 297 (1857).

61 Chief Judge Denio contrasted language in the 1846 constitution dealing with the judicial and legislative power. Article III, section 1, had provided that the "legislative power of this State shall be vested in the Senate and Assembly." Article VI contained no similar language vesting the state's judicial authority in the courts. 15 N.Y. at 300.

62 *Id.* at 299.

63 The Chief Judge observed:

I am of the opinion that the [constitutional] provision respecting the higher

Sill arose under the 1846 constitution; the court in *Swift* thought it "even more plain under the Constitution of 1894 that the higher courts there enumerated are intended to be exclusive."[64] In *Swift* it was argued that the foregoing principles, although true, were inapplicable and that there could be no question of depriving the supreme court of its constitutional jurisdiction since it had no jurisdiction over claims against the state. The court rejected this argument noting that the supreme court

> had not jurisdiction solely because of the immunity of the defendant . . . , not because it did not have jurisdiction of such a cause of action. . . . If a claim is made litigable at all, that is to say, if made the subject of a suit or litigation in a court of law, then under the express provision of the Constitution the jurisdiction of the Supreme Court attaches at once.[65]

The court concluded that the legislature had no power to create the court of claims as a court within the meaning of the constitution. The incumbent judges were therefore not "judicial officers" and could be freely removed.

In *Swift* the court noted that an effort had been made at the 1894 constitutional convention to establish the court of claims as a constitutional court.[66] That effort was renewed at the 1915 convention. By 1915 the political football tendencies of a nonconstitutional forum were evident. In 1897 the board of claims had been abolished and the court of claims created; in 1911 the court of claims had been abol-

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courts, whose jurisdiction pervades the whole state, is exclusive in its character, and that no other courts of the same jurisdiction can be added by the legislature. Thus, there can be no Court of Impeachments, nor any Court of Appeals, or Supreme Court, nor I think, any county courts, except those which the constitution has made provision for; and it would be an evasion of the clear constitutional implication to create courts of the same general character and jurisdiction, though differing in some particulars.

Id. at 299-300. The Chief Judge believed the jurisdiction of the constitutional courts to be exclusive although the constitution did not expressly so provide. He noted:

> It is by the application of reasonable principles of construction that we are able to say that no tribunals fulfilling the general purposes of the constitutional courts, expressly provided for, can be erected. The maxim, *expressio unius est exclusio alterius*, applies directly to this case in that aspect . . . .

Id. at 300. Similarly, it cannot be maintained that the legislature has power to turn the General Services commissioner into a court and confer upon him, or it, the jurisdiction of the constitutional court of claims.

64 People *ex rel.* Swift v. Luce, 204 N.Y. 478, 487, 97 N.E. 850, 851 (1912).

65 *Id.* at 487-88, 97 N.E. at 851.

66 Charles Z. Lincoln, the constitutional historian and a delegate to the 1894 convention, offered an amendment to establish a constitutional court of claims. I REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1894, at 436 (1900). The amendment was referred to the judiciary committee which failed to report it out. V *id.* at 1070.

ished and the board of claims reestablished; in 1915 the board of claims had been abolished and the court of claims reestablished. In no case did a desire for substantive change play a role; rather, there was only a desire to change personnel. The changes created a few jobs for the party in power and provided a forum apt to be favorably disposed to the party's contributors. *Swift*, decided in 1912, ruled that such changes were within the power of the legislature.

The judiciary committee of the 1915 constitutional convention, chaired by General George W. Wickersham, proposed a judiciary article which included the creation of a constitutional court of claims. In neither the committee nor the convention did many doubt the necessity of a constitutional court. However, there was some debate as to the form it should take. The committee reported:

> To end the recurrent scandals resulting from the Legislature dealing with the Court of Claims as a mere political football, your Committee has provided for the continuance of this court as a constitutional court. Two courses only appear to be open in dealing with this matter.[67]

The two courses open were (*1*) to transfer to the supreme court the jurisdiction of the existing court of claims, or (*2*) to leave the jurisdiction in a specialized court of claims but to make that court a constitutional one. The committee favored a specialized court to handle claims against the state, observing that its jurisdiction "is essentially different from that of ordinary courts of justice"[68] and should be exercised "in a simple summary manner, without being hampered by technical rules of law."[69]

When the measure reached the convention floor a substantial number of delegates took the position that the jurisdiction should be transferred to the supreme court. These delegates cited the following advantages: (*1*) uniformity of judicial system;[70] (*2*) convenience of litigants;[71] (*3*) more objective treatment;[72] and (*4*) the idea that the full waiver of sovereign immunity[73] should include elimination of the

67 *Report of the Committee on the Judiciary*, in DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1915, No. 42, at 13-14 (1915). *See also* III RECORD (UNREVISED) OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1915, at 2363 (1915) (statement of General Wickersham) [hereinafter cited as RECORD—1915].

68 *Report of the Committee on the Judiciary, supra* note 67, at 14.

69 *Id.*

70 III RECORD—1915, at 2465.

71 *Id.* at 2465, 2480-81.

72 Several delegates viewed the existing court of claims as biased in the state's favor. *E.g., id.* at 2472-76 (remarks of Mr. Ostrander); *id.* at 2478-82 (remarks of Mr. Brackett).

73 N.Y. CT. CL. ACT § 8 (McKinney 1963).

state's special forum.[74] The delegates favoring a constitutional court of claims emphasized that the supreme court would be more susceptible to local influence. Judge Clearwater commented that in the supreme court "every claimant would have . . . local influence which [is] his standing in the community, his influence, the various tentacula which important men have and can extend . . . ."[75] The Wickersham committee had originally favored transferring jurisdiction to the supreme court,[76] but was persuaded by the testimony of judges and state officials that "in the interest of the State and in the protection of the treasury of the State, it was essential to preserve the Court of Claims . . . ."[77] Future Governor Alfred E. Smith agreed with the committee that the special court should be the exclusive forum for claims against the state. Smith observed:

> Having no interest whatever in any claims against the State, and having considerably less in their attorneys, but having some interest in the State, and considerable interest in the taxpayers, I respectfully submit to the Convention that if we are going to continue to allow the State to be sued, let it all be done in one place, so that we can keep our eye on it. (Laughter.)[78]

The convention adopted the committee approach.[79]

With the defeat[80] of the 1915 constitution and its judiciary article, however, the need for judicial reform became more pressing.[81] The legislature therefore created the judiciary constitutional convention of 1921 to consider amendments to the judiciary article.[82] Composed of

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74 III RECORD—1915, at 2465.

75 *Id.* at 2459.

76 *Id.* at 2483.

77 *Id.*

78 *Id.* at 2472.

79 *Id.* at 2487. The text of the provision appears at IV *id.* at 4334-35.

80 LEGISLATIVE MANUAL 322. Former Governor Smith, at the 1938 convention, attributed the defeat of the 1915 constitution to a comment by retired Court of Appeals Judge Cullen. Smith reported that Judge Cullen lived in Brooklyn Heights and used to go walking on Sunday mornings. Smith continued:

> A number of reporters came up to talk to the old Judge and one of them said, "Judge, what do you think about the proposed new Constitution?" And his reply to the reporters was, "No drumhead courts in times of peace."
>
> Now, nobody knew what that meant. I surely did not, and I do not think I ever met anybody who knew what the Judge meant by that, but there was not a single thing said against the Constitution of 1915 that went so far to defeat it by the million votes than that statement by the old Judge. . . .

II RECORD—1938, at 933.

81 IX N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO JUDICIAL ADMINISTRATION AND ORGANIZATION 428 (1938) [hereinafter cited as JUDICIAL ADMINISTRATION].

82 Act of April 30, 1921, ch. 348, [1921] N.Y. Laws 1129. The legislature could not create a "constitutional convention" as that term is used in the constitution. The consti-

thirty appointed members, the judiciary convention met in May 1921 in Albany and elected Judge Pound of the Court of Appeals as its permanent chairman.[83] The convention also appointed an executive committee, of which Judge Pound was a member, and a number of subcommittees, all of which were authorized to hold public hearings. The resulting report of the executive committee recommended the creation of a constitutional court of claims, stating:

> The Court of Claims is made a constitutional court in order to put to an end the practice of making it a football of politics, as has been the case three times in eight years. The practice has developed of reconstituting the court upon every change of political control under mere changes of nomenclature from the Court of Claims to the Board of Claims, and vice versa.
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> . . . .
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> . . . Private claims have been a fruitful source of special legislation and of possible legislative corruption.
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> . . . .
>
> [T]he practice of passing special acts giving the board jurisdiction to hear and decide special private claims continued and indeed is still a source of objectionable legislation.[84]

The executive committee also considered and rejected the idea of transferring the jurisdiction to the supreme court.[85]

The judiciary convention adopted all executive committee recommendations except the court of claims proposal. The proposal was defeated despite almost universal agreement that some kind of constitutional forum should be provided for claims against the state.[86] The committee proposal foundered on the continuing dispute as to whether jurisdiction should be transferred to the supreme court or retained in a special, but constitutional, court of claims.

The 1921 debate was reminiscent of the 1915 constitutional convention. William D. Guthrie of New York City, chairman of the exec-

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tution requires both submission to the people of the question whether a convention shall be held and election by the people of the delegates. Nevertheless, the status of the judiciary convention of 1921 was identical to that of the constitutional commission of 1872. Both could only recommend amendments to the legislature. If two successive legislatures agreed on the amendment it could be submitted to popular referendum.

83 JUDICIAL ADMINISTRATION 430.

84 *Id.* at 445-47.

85 *Id.* at 449.

86 Only Judge Pound questioned this idea; he saw no particular distinction between the statutory court of claims and other legislative boards such as the Public Service Commission. *Id.* at 540. Judge Pound also gave an interesting account of the court of claims legislation. He noted that the 1897 act that first created the court of claims was enacted "to gratify, as I understand, the pride of a gentleman who had held high executive office, but who desired to be an appointee on the Board of Claims . . . ." *Id.*

utive committee, explained the committee's position.[87] After some debate, a vote was taken on the question, should claims be heard in the supreme court? This received a favorable majority of delegates in attendance, but failed to achieve the necessary sixteen votes.[88] Then a vote was taken on the committee proposition, should there be a constitutional court of claims? The vote was thirteen in favor and five opposed.[89] The motion therefore lost and no reference to the court of claims was contained in the convention's proposed amendments.

Oddly, the convention's failure to make any reference to the court of claims created a problem. The convention's supplemental report

87 *Id.* at 531. Guthrie also discussed problems such as whether the judges should be appointed or elected. The advantage of requiring election was that "there ought to be a separation of the judges from the executive." *Id.* The disadvantage was that because of the expense and effort involved it would be difficult to get "first-class men" to run unless the term of office were increased from six to 14 years. *Id.* The committee therefore recommended a compromise proposal providing for the appointment of the three judges, but also for a system of staggered terms so that the governor, during a single term, could appoint only one judge. *Id.* at 532.

In contrast to the 1915 constitution which had provided that the existing judges of the statutory court of claims would serve until the expiration of their terms, the committee proposal eliminated the incumbents and gave the governor power, with the advice and consent of the senate, to appoint new judges. *Id.* at 532-33, 536.

Following Guthrie's explanation of the executive committee's position, three delegates spoke in favor of a transfer of the claims jurisdiction to the supreme court. Mr. Borst said that "the State should submit itself to the jurisdiction of its own court." *Id.* at 537. Mr. Newburger noted that he was unimpressed with the argument that the claims cases required the expertise of a specialized court. The first department, he pointed out, handled many contractors' claims against the city with no particular difficulty. *Id.* at 537-38. Mr. Benedict favored transfer to the supreme court but offered a rather reasonable compromise: if it was believed that a specialized and centralized court was needed, such a court could be established as a special branch or division of the supreme court. *Id.* at 543. These three men had the power, by themselves, to defeat the committee proposal. *See* note 88 *infra*. Arthur Sutherland of Rochester urged the convention not to be distracted by the subsidiary question of where the jurisdiction should go. The point was rather whom it should be taken from; the legislature had abused its power and its control over the jurisdiction should be ended. JUDICIAL ADMINISTRATION 544. "[L]et us not forget," Sutherland warned, "that to leave the matter as it is in the hands of the Legislature, is going to invite a continuance of these scandals which ought not to be continued." *Id.*

88 A peculiarity of the convention was that it required almost unanimous assent to adopt a provision. The statute creating the convention provided that it was to be composed of 30 members and that a majority (16) of favorable votes was necessary to adopt a provision. However, the convention was sparsely attended and no more than 18 members ever appeared at the critical meetings. At times, only 16 members were present and unanimous consent was necessary. *Id.* at 471, 476, 494. Consequently, any proposal before the convention could be defeated by a maximum of three votes. In fact, the committee proposal on the court of claims was defeated although it received a favorable vote of 13 to five. *Id.* at 550.

89 *Id.*

recited that publication of its initial report had caused considerable discussion among members of the bar.[90] As a result, the executive committee had reopened hearings and received testimony from a number of groups which had been silent during the original 1921 hearings. Based on these new hearings the executive committee recommended to the legislature a number of changes in the proposed judiciary amendment. One change involved the court of claims. The supplemental report stated:

> Finally, it was urged that the failure to refer in the Judiciary Article in any way to the Court of Claims or to the power of the Legislature to create, continue, or abolish any such tribunal of State-wide jurisdiction to hear, audit and determine claims against the State might be construed as impairing the legislative power in that respect. In order to prevent any such construction of the Judiciary Article . . . it is recommended that a new section be added . . . .[91]

A section expressly preserving the power of the legislature to create or abolish the court of claims therefore became part of the constitution in January 1925.[92]

It is difficult to understand the reasoning behind the executive committee's recommendation. Constitutional silence would not seem to impair any existing legislative power. Further, the debates and action of the convention had made clear that no change was intended. At best the new section seemed premised on an excess of caution. Nonetheless, the provision possessed considerable importance as a constitutional declaration of existing law, its only intent being to preserve the status quo. It therefore codified *Swift* and provided an interpretation of section 19 of article III, which prohibited the audit or allowance of claims against the state by the legislature; the legislature was permitted only to appropriate money to pay claims which had been "audited

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90 *Id.* at 724. The convention had filed its initial report and proposed amendments on January 4, 1922.

91 *Id.* at 731-32.

92 N.Y. CONST. art. VI, § 23 (1925). The vote was 1,090,632 in favor, 711,018 against. LEGISLATIVE MANUAL 324.

The section said:

> Nothing in this article contained shall ahridge the authority of the legislature to create or abolish any board or court with jurisdiction to hear and audit or determine claims against the state, and any such tribunal existing when this article shall take effect shall be continued with the powers then vested in it until otherwise provided by law.

N.Y. CONST. art. VI, § 23 (1925). This section remained in the constitution until 1950 when it was replaced with the current court of claims provision.

and allowed according to law." The new provision made explicit that the quoted language required actual adjudication of a claim to be by a board, tribunal, or court of some kind.[93]

The state's next constitutional convention was held in 1938. In the years since 1915 the legislature had suspended its practice of recurrent partisan abolishment and re-creation of claims tribunals. As a result, the court of claims issue was far less controversial in 1938 than it had been at the 1915 convention or the 1921 judicial convention.[94] The judiciary committee reported a provision making the court of claims a constitutional court.[95] The committee proposal was accepted by the convention with very little discussion[96] and without amend-

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93 Of some interest is the relationship of section 10 of the Public Buildings Law to article III, section 19 of the constitution. Under section 10 it is the General Services commissioner who audits and allows claims against the state. The General Services commissioner is neither a tribunal nor a board. If he is not a court, article III, section 19 will invalidate his section 10 authority. If he is or is not a court, article VI, section 9 will invalidate his authority. *See* note 1 *supra*.

94 Also in the intervening years the jurisdiction of the statutory court of claims had expanded. In 1929, the state waived its immunity for the torts of its agents. Act of April 10, 1929, ch. 467, [1929] N.Y. Laws 994. In a sense, the passage of this legislation was forced by Governor Smith's veto in 1929 of 60 private bills concerning moral claims against the state. The Governor's veto message stated:

> There is no reason why access to the Court of Claims should be afforded only to a selected few people who have friends to draw special bills for them and who are able to obtain support in the Legislature to pass them. By disapproving these bills my chief purpose is to call attention to the need of the adoption of a new policy in the hope that the next Legislature will give serious attention to this matter and pass the necessary amendments to the General Laws so that this subject may be handled in the future in a logical, fair and orderly way, in place of the haphazard, careless and discriminating procedure which has obtained up to this time.

PUBLIC PAPERS OF GOVERNOR ALFRED E. SMITH—1928, at 202 (1938).

95 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, app. 3, No. 8, at 4 (1938).

96 Charles B. Sears, chairman of the judiciary committee, explained the provision to the convention as follows:

> The committee came to the conclusion that it would best serve the interests of the State to provide for the organization of the Court of Claims by constitutional enactment. The language of this proposal is almost identical with the proposal of the Convention of 1915. There was a time, of course, when the Court of Claims . . . was made the football of politics; there has been nothing of that kind in recent years, and yet there is a possibility of a recurrence of such a condition. The proposal is a simple one, and the committee urges its adoption.

III RECORD—1938, at 2001.

Only one delegate, G. C. Lewis, commented on the proposal. He inquired of Sears the meaning of the language conferring jurisdiction on the courts of claims over claims "between conflicting claimants." *Id.* at 2001-02. The language created a type of "pendent" jurisdiction and Sears replied that it was intended to permit a "complete and final determination" of the controversy. *Id.* at 2002. The court of claims could not only determine the amount of the award to be paid by state but, as between competing claimants, could

ment.[97] The address of the convention to the people simply stated, "The Court of Claims and the Municipal Court of the City of New York are established as constitutional courts."[98] The constitution adopted by the convention was submitted to the people in the form of nine separate propositions. The people ratified six and rejected three.[99] The proposed judiciary article was among those defeated.[100]

Provisions to create a constitutional court of claims had now been rejected three times by the people, twice through defeat of the entire constitution and once through defeat of a judiciary article. On November 8, 1949, a referendum on the proposal as a separate question was presented to the people for the first time. The people voted to establish a constitutional court of claims by vote of 1,479,971 to 616, 707.[101] An "abstract" submitted to the people with the proposed amendment recited:

> The purpose and effect of this proposed amendment is to make the Court of Claims a constitutional court and thereby deprive the legislature of its present power to abolish that court at any time. The court now hears and determines claims against the State pursuant to legislative authority and direction. This amendment would incorporate that statutory authority and direction into the constitution.[102]

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also determine how the award would be divided. This proposal had first been advanced and rejected at the 1915 convention. III RECORD—1915, at 2486.

97 For the text of the provision see IV RECORD—1938, at 3431.

98 *Id.* at 3514.

99 LEGISLATIVE MANUAL 329-30.

Since 1874 New York constitutions had provided that the legislature should not grant any extra compensation to contractors. N.Y. CONST. art. IX, § 10 (1938); *id.* art. III, § 24 (1874). In 1963 the provision was eliminated entirely. Of course, article VII, section 8 prohibits the gift of state money to any private corporation or undertaking. Conceivably, section 10 of the Public Buildings Law takes the peculiar form that it does because of the draftsman's desire to avoid the gift problem. From this viewpoint, it was critical to show some substantial consideration coming from the South Mall contractors in return for the additional state money. This was done by making the General Services commissioner's "equitable adjustment" constitute a release of the contractor's claims.

100 LEGISLATIVE MANUAL 329.

101 *Id.* at 334.

102 *Quoted in* Easley v. New York State Thruway Auth., 1 N.Y.2d 374, 377, 135 N.E.2d 572, 574, 153 N.Y.S.2d 28, 30 (1956). An "abstract" is prepared by the Secretary of State pursuant to statutory authority. N.Y. ELECTION LAW § 68 (McKinney 1964). The last sentence of the abstract raises an interesting question. The constitutional provision itself says nothing about incorporating existing statutory authority into the constitution. Article VI, section 9 provides:

> The court shall have jurisdiction to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide.

This language is different from that of the proposed 1915 and 1938 constitutions, both of which provided:

The amendment has been discussed by the Court of Appeals in *Easley v. New York State Thruway Authority*.[103] *Easley* concerned the validity of a statute conferring exclusive jurisdiction upon the court of claims to determine all claims against the Thruway Authority for tort or breach of contract. Plaintiff's negligence action against the Authority for personal injuries was dismissed by the supreme court on the ground that, in view of the statute, the supreme court lacked jurisdiction over the subject matter. Plaintiff argued that the statute was invalid since the constitution limited the jurisdiction of the court of claims to "claims against the state."[104] The court upheld the statute,

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The court shall have the jurisdiction now exercised by it and such additional jurisdiction to hear and determine claims . . . as the legislature may provide.

DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1915, No. 52, at 32 (1915); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1938, app. 3, No. 15, at 79 (1938). Under the proposed 1915 and 1938 language it was clear that the legislature could add to the court's jurisdiction but could not remove any jurisdiction "now exercised" by the court. If the last sentence of the 1949 abstract is accurate, the change in language between the 1915 and 1938 proposals and the 1949 amendment was not intended to be meaningful. The current situation would then be that the legislature may expand, but not contract below 1949 levels, the court's jurisdiction. Some support for this view is found in the Court of Appeals statement that the purpose of the 1949 amendment was to remove "uncertainty" concerning the "power" of the court of claims. Easley v. New York State Thruway Auth., 1 N.Y. 2d 374, 378, 135 N.E.2d 572, 574, 153 N.Y.S.2d 28, 30 (1956). It would follow from this interpretation that the state has constitutionally waived its sovereign immunity with respect to the court's 1949 jurisdiction.

A different interpretation is that the language change noted above is indeed meaningful and that the legislature may therefore contract the court's jurisdiction. By this view, the state's sovereign immunity has not been constitutionally waived. Necessarily, according to this approach, the last sentence of the abstract is wrong; no statutory authority has been incorporated into the constitution. The abstract would then amount to a deceit practiced upon the people. To avoid this unique and disturbing problem, the courts may well adopt the former view despite its textual weakness.

A new judiciary article, including the court of claims provision, was adopted by the people on November 7, 1961, to take effect on September 1, 1962. LEGISLATIVE MANUAL 341. It may be that this later date, rather than 1949, is the relevant one for determining what statutory authority, if any, has been incorporated.

103 1 N.Y.2d 374, 135 N.E.2d 572, 153 N.Y.S.2d 28 (1956).

104 In *Easley* the constitutional issue was properly before the court. Under existing New York law, a mere taxpayer has no standing to attack the constitutionality of state legislation. St. Clair v. Yonkers Raceway, Inc., 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963). "[T]he constitutionality of a State statute may be tested only by one personally aggrieved thereby . . . ." *Id.* at 76, 192 N.E.2d at 15-16, 242 N.Y.S.2d at 44. Only New York and New Mexico clearly prohibit taxpayer actions. *Id.* at 78, 192 N.E.2d at 17, 242 N.Y.S.2d at 46 (dissenting opinion). The expressed rationale is that to permit taxpayers suits "would be an interference by one department of government with another." *Id.* at 76, 192 N.E.2d at 16, 242 N.Y.S.2d at 45. Judge Fuld disagreed with the *St. Clair* majority, noting that it was fundamental in our form of government "that determination of the constitutionality of legislation is essentially a judicial function." *Id.* at 80, 192 N.E.2d at 18, 242 N.Y.S.2d at 48. Judge Fuld observed, "It is self-evident that the denial of standing to a taxpayer

reasoning that the court of claims's constitutional jurisdiction was not limited to actions "brought directly against the State"[105] and that it "cannot be doubted that this Authority is an arm or agency of the State."[106] The court reviewed the constitutional history of the 1949 provision, observing that

> [i]ts purpose was to remove the Court of Claims from political control and uncertainty of existence and power. It did this by making the Court of Claims a constitutional court and by providing in the Constitution that the court should always have jurisdiction of suits against the State.[107]

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will in most instances prevent any challenge to an expenditure of state funds as violative of the Constitution." *Id.* at 79, 192 N.E.2d at 18, 242 N.Y.S.2d at 47. *Cf.* Flast v. Cohen, 392 U.S. 83 (1968), in which Mr. Justice Douglas wrote that the judiciary "is often the one and only place where effective relief can be obtained. . . . [I]t is abdication for courts to close their doors." *Id.* at 111 (concurring opinion).

The New York constitution is not self-executing. If the comptroller refuses payment pursuant to a questionable statute, the validity of the statute is likely to be tested in the courts. The contractor would be obliged to sue the comptroller and the comptroller would assert the defense of unconstitutionality. The *St. Clair* approach, however, places the comptroller in a difficult and unfair position, since if he fails to stop payment his non-action effectively establishes the statute as constitutional in the sense of preventing all constitutional challenges to the law. The comptroller is thus forced to play a last-chance role. He would seem justified in refusing payment in any case in which a substantial constitutional question is brought to his attention. This is plainly an imposition upon the comptroller, but is required by the *St. Clair* rationale.

Although *St. Clair* grants the state immunity, taxpayer actions may be freely brought against local officials. N.Y. GEN. MUNIC. LAW § 51 (McKinney 1965). This provision is traceable to an 1872 law (Act of April 2, 1872, ch. 161, [1872] N.Y. Laws 467) which was intended to provide a remedy for municipal taxpayers against the practice of local officials fraudulently issuing town bonds for the benefit of private railroads. *See* Ayers v. Lawrence, 59 N.Y. 192 (1874). The current section 51 provides that "an action may be maintained against" an officer of a county or other locality "to prevent any illegal official act." N.Y. GEN. MUNIC. LAW § 51 (McKinney 1965). Since $850 million or possibly one billion dollars of Albany County bonds are to be issued in connection with the Mall, it would seem that the validity of the South Mall scheme could be tested by an action brought against the appropriate Albany County official.

105 1 N.Y.2d at 378, 135 N.E.2d at 574, 153 N.Y.S.2d at 30.

106 *Id.* at 376, 135 N.E.2d at 573, 153 N.Y.S.2d at 29.

107 *Id.* at 378, 135 N.E.2d at 574, 153 N.Y.S.2d at 30-31. In dissent Judge Van Voorhis took the position that the Authority was not an arm or agency of the state. He believed it to be an independent corporate entity whose separate identity must be maintained. Of the jurisdiction of the court, he wrote that it "is to hear and determine claims against the State or by the State against the claimant or between conflicting claimants 'as the legislature may provide': that is to say, where the Legislature has waived immunity." *Id.* at 383, 135 N.E.2d at 577, 153 N.Y.S.2d at 34-35.

Subsequent to the establishment of the court as a constitutional court, several unsuccessful efforts were made to merge its jurisdiction into that of the supreme court. TEMPORARY STATE COMM'N ON THE COURTS 1958, 1958 N.Y. LEG. DOC. No. 36, at 9; *id.*, 1957 N.Y. LEG. DOC. No. 88, at 94; *id.*, 1957 N.Y. LEG. DOC. No. 6, at 10.

II

PUBLIC BUILDINGS LAW SECTION 10 AND THE COURT OF CLAIMS

The draftsmanship of section 10 of the Public Buildings Law demonstrates a conscious effort to parallel the jurisdiction[108] of the court of claims. The critical language of the statute provides as follows:

> In any contract heretofore or hereafter awarded by the commissioner of general services for the construction, reconstruction, alteration, repair, or improvement of any public building or facility in the Albany South Mall project where the commissioner has determined that the performance of all or any part of the work has been suspended, delayed, or interrupted for an extraordinary and unreasonable period of time by an act or omission of the state not expressly or impliedly authorized by the contract, an equitable adjustment may be made for any increase in the cost of performance of the contract directly caused thereby. . . . Upon the agreement of the parties the contract may be modified in writing accordingly, and any cause of action for damages which otherwise might have accrued because of such act or omission shall be extinguished. Any agreement so modifying the contract shall state the terms of the agreement, the amount of the adjustment and the basis therefor. Every such agreement shall be subject to the approval of the state comptroller, the presiding judge of the court of claims and, as to the form and manner of execution, the state attorney general. . . .[109]

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108 The Court of Appeals has defined jurisdiction as "the power to hear and determine." Schieffelin v. Komfort, 212 N.Y. 520, 530, 106 N.E. 675, 667-78 (1914).

109 N.Y. PUB. BLDGS. LAW § 10 (McKinney Supp. 1970). Provision is also made for adjustment agreements to be made public. *Id. See* note 113 *infra.*

The General Services commissioner largely controls the design, construction, and maintenance of state buildings. N.Y. PUB. BLDGS. LAW § 3 (McKinney Supp. 1970). He is the primary state agent in the award of state construction contracts, although the award procedure permits him little discretion. *Id.* § 8. Under section 18, the commissioner may make "addition[s] in price" respecting state contracts. Rather than the adjudicatory determination authorized in section 10, however, this section seems to contemplate minor contract renegotiations. That the legislature enacted section 10 when section 18 was already in existence constitutes some evidence that it was consciously expanding the commissioner's power with respect to one category of construction contracts.

Section 10 also provides:

> No adjustment shall be made to the extent that performance would have been so affected by any other cause, including, among others, the fault or negligence of the contractor and any other factor of difficulty, expense, delay, damage, or risk of loss within the legal responsibility of the contractor. No adjustment shall be granted in an amount which, together with any other sum obligated under the contract, shall exceed the money appropriated or otherwise lawfully available for the project.

N.Y. PUB. BLDGS. LAW § 10 (McKinney Supp. 1970).

Several parallels between section 10's authorization and that of the court of claims may be noted.

Jurisdiction. The jurisdiction of the court of claims is to "hear and determine claims against the state."[110] The jurisdiction of the General Services commissioner is to make a "determination" of the state's responsibility for delay of the South Mall project.[111]

Claims. The Court of Claims Act provides that a "claim shall state the time when and place where such claim arose, the nature of same, and the items of damage or injuries claimed to have been sustained and the total sum claimed."[112] Section 10 provides:

> Any contractor so aggrieved may make application in writing for such a determination and adjustment. Any application by a contractor for an equitable adjustment shall recite the grounds upon which relief is claimed, including the nature and circumstances thereof, and the items of damage alleged to have been sustained.[113]

Substantive Elements. Under the Court of Claims Act, state liability for breach of contract[114] based on delay requires a determination (*1*) that the work has been delayed for an extraordinary or unreasonable period of time,[115] (*2*) that the delay was caused by state action[116] or failure to coordinate,[117] and (*3*) that the delay is not authorized by the contract.[118] Section 10 provides that the General Services commissioner shall determine if "[*1*] the work has been suspended, delayed, or interrupted for an extraordinary and unreasonable period of time [*2*] by an act or omission of the state [*3*] not expressly or impliedly authorized by the contract . . . ."[119]

The Court of Claims Act requires that the state's legal liability be proved. It provides that no "judgment shall be granted on any

110 N.Y. CONST. art. VI, § 9; N.Y. CT. CL. ACT § 9(2) (McKinney 1963).

111 N.Y. PUB. BLDGS. LAW § 10 (McKinney Supp. 1970).

112 N.Y. CT. CL. ACT § 11 (McKinney 1963).

113 N.Y. PUB. BLDGS. LAW § 10 (McKinney Supp. 1970). In the code language of section 10, "application" equals claim and "adjustment" or "equitable adjustment" equals judgment.

114 N.Y. CT. CL. ACT § 9(2) (McKinney 1963).

115 Forest Elec. Corp. v. State, 30 App. Div. 2d 905, 292 N.Y.S.2d 589 (3d Dep't 1968). The court noted that "[a]ctionable delay must be more than 'ordinary' delay." *Id.* at 906, 292 N.Y.S.2d at 590.

116 Wright & Kremers v. State, 263 N.Y. 615, 189 N.E. 724 (1934); Johnson, Drake & Piper, Inc. v. State, 29 App. Div. 2d 793, 287 N.Y.S.2d 480 (3d Dep't 1968).

117 Forest Elec. Corp. v. State, 30 App. Div. 2d 905, 292 N.Y.S.2d 589 (3d Dep't 1968); Websco Const. Corp. v. State, 57 Misc. 2d 9, 292 N.Y.S.2d 315 (Ct. Cl. 1966).

118 The terms of the standard state contract provide that ordinary delays "shall be compensated for by an extension of time." *See* Forest Elec. Corp. v. State, 30 App. Div. 2d 905, 906, 292 N.Y.S.2d 589, 590 (3d Dep't 1968).

119 N.Y. PUB. BLDGS. LAW § 10 (McKinney Supp. 1970).

claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity."[120] Section 10 also authorizes the General Services commissioner to determine the legal sufficiency of a contractor's allegation of state liability:

> No adjustment shall be made to the extent that performance would have been so affected by any other cause, including, among others, the fault or negligence of the contractor and any other factor of difficulty, expense, delay, damage, or risk of loss within the legal responsibility of the contractor.[121]

The section, however, does not require presentation of "legal evidence."

Relief. The Court of Claims Act provides that the "determination of the court upon a claim shall be by a judgment."[122] The court may award damages for additional cost directly caused by the state's wrongful delay.[123] Section 10 provides that the General Services commissioner may, if he finds the state liable, make an "equitable adjustment" of the contract. The "equitable adjustment" shall be made for "any increase in the cost of performance of the contract directly caused [by the state's delay]."[124]

Res Judicata. A judgment of the court of claims is, of course, res judicata. The Court of Claims Act provides that a judgment "shall forever bar any further claim or demand against the state arising out of the matters involved in the controversy."[125] Section 10 provides for a consensual res judicata. If the contractor accepts the equitably adjusted contract, "any cause of action for damages which otherwise might have accrued because of such act or omission shall be extinguished."[126]

Despite these parallels, however, the two provisions differ in several significant ways. In the court of claims the state is represented by the attorney general. Before the General Services commissioner the state is not represented. Any judgment of the court of claims may be

120 N.Y. Ct. Cl. Act § 12(1) (McKinney 1963).

121 N.Y. Pub. Bldgs. Law § 10 (McKinney Supp. 1970).

122 N.Y. Ct. Cl. Act § 20(1) (McKinney 1963).

123 *See, e.g.*, Seglin-Harrison Const. Co. v. State, 30 N.Y.S.2d 673 (Ct. Cl. 1941), *aff'd as modified*, 264 App. Div. 466, 35 N.Y.S.2d 940 (3d Dep't 1942).

124 N.Y. Pub. Bldgs. Law § 10 (McKinney Supp. 1970). The statute apparently contemplates an award for prospective damages, *i.e.*, those not yet incurred. No court of claims case permitting such damages has been found. The absence of such a case is related to the jurisdictional question discussed at note 16 and accompanying text *supra*.

125 N.Y. Ct. Cl. Act § 20(4) (McKinney 1963). *See* Chaffee v. Lawrence, 282 App. Div. 875, 124 N.Y.S.2d 425 (2d Dep't 1953).

126 N.Y. Pub. Bldgs. Law § 10 (McKinney Supp. 1970).

appealed by the attorney general.[127] There is no appeal by the state from the General Services commissioner's "equitable adjustment."[128]

Under section 10, the role of the attorney general is extremely limited. He is to approve the new equitably adjusted contract only as to "form and manner of execution."[129] Section 10 also calls for approval by the comptroller and the presiding judge of the court of claims.[130] These gentlemen are faced with an unenviable task since there is essentially no record to review. The only existing documents would seem to be (*1*) the original contract, (*2*) the contractor's "application" for an adjustment, and (*3*) the new equitably adjusted contract. There is no record of a hearing nor, indeed, any requirement that a hearing be held. There is no presentation of the state's case since the attorney general has been excluded. Further, section 10 gives no indication of what standards are to be applied in granting or withholding approval.

In summary, section 10 parallels the jurisdiction and practice of the court of claims except for certain provisions favorable to contractors. Particularly may be noted (*1*) the absence of the attorney general to present the the state's case; (*2*) the absence of the requirement that any determination be based on "legal evidence"; (*3*) the apparent contemplation of prospective damages; and (*4*) the concept of consensual res judicata. There is no explanation why such provisions should be restricted to the South Mall contractors.

Conclusion—Section 10 is Unconstitutional

Established by constitution, the court of claims plainly cannot have its jurisdiction transferred, in whole or in part, to the General Services commissioner. Yet it appears equally clear that this is the intent and effect of section 10. To avoid this conclusion, one would have to maintain that either (*1*) section 10 does not provide for the determination of a claim against the state or (*2*) the jurisdiction of the court of claims is not exclusive.

The first contention is patently absurd. Section 10 obviously pro-

127 N.Y. Ct. Cl. Act § 24 (McKinney 1963). Appeal is generally taken to the appellate division, third department. *Id.*

128 N.Y. Pub. Bldgs. Law § 10 (McKinney Supp. 1970).

129 *Id.*

130 The provision for the presiding judge of the court of claims as an approving party is of interest. It may reflect the draftsman's belief that the presiding judge would bring his constitutional jurisdiction to the act of approving the agreement. But constitutional jurisdiction is not like the shell of a turtle; it does not move around with its owner. Constitutional powers are not personal; they must be exercised in conformity with the constitution and the Court of Claims Act.

vides a statutory pattern which provides for the determination of a legal claim against the state.[131]

The second argument is also erroneous. The only point of the movement to establish a constitutional court of claims was to restrain legislative power over the forum in which claims against the state were determined. To prevent the recurrence of legislative abuse, the court of claims was established as a constitutional court with exclusive jurisdiction.

By transferring part of the jurisdiction of the court of claims to the General Services commissioner, the New York legislature has exercised a prerogative that it no longer had, and one that had been taken away after nearly a hundred years of efforts at constitutional reform. As the history traced in this article clearly shows, the intent of the constitutional reformers was to prevent such legislative transfers of jurisdiction over claims against the state. Section 10, therefore, must be regarded as unconstitutional.[132]

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131 *See* text accompanying notes 108-30 *supra.*

132 No further payments should be made pursuant to an unconstitutional scheme. As to payments which have already been made, the Court of Appeals has recently demonstrated a substantial flexibility in order to avoid forfeiture to a private contractor. Gerzof v. Sweeney, 22 N.Y.2d 297, 239 N.E.2d 521, 292 N.Y.S.2d 640 (1968).