Fordham Urban Law Journal

Volume 8 | Number 1 Article 3

1980

Discussion

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Edward M. Kresky†: The only preliminary comment that I'd like to make that Dick Sigal's presentation is extremely good. In a minute or two I will elaborate on why I wish there were papers like that 20 years ago.

For me, this is a return to a subject I once was deeply involved in and had my head bloodied even worse than some recent experiences and incursions in the public sector. I look around the room and I see Bernie Richland. Bernie was an early participant in some of those activities. We didn't always agree. We often did, though. So this is sort of a full circle.

When I was asked by Gene Harper to come to this program today, I asked why and he said, "Well, you know, you're connected with MAC and you once did some work in this field." This week, it took me about two hours to find the work I did. I did find these yellowing volumes. My friend Marilyn Friedman once called me with a most incredulous voice when the Bar Association project first got underway, and said, "Do you know, Ed, that you once did some work in here? We found your name in a public document." Well, I had to shake my memory, but I did. What's so deeply satisfying to me today is that it's very rare that you do a piece of work, present it and the New York Times editorial page is ecstatic over the work. (A sure prescription, I might say, for legislative failure). It is forgotten that the editorials in support of the Rockefeller and Peck commissions in the late 50's, the first incursion into constitutional simplification, were just unbelievably good. They were so good that we broke a precedent for a temporary state commission. We actually printed in our reports editorial comments from the press because they were so uniformly favorable. They were uniformily disfavored by the only bodies capable of acting on our recommendations, both houses of the legislature.

When we started out in advance of the 1957 vote on a constitutional convention, a convention call which was voted down by the

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* The following remarks were made subsequent to the delivery of Mr. Sigal's paper. The discussion has been extracted and edited from a verbatim transcript of the seminar proceedings. Each participant has been provided with a copy of the edited version and the opportunity to make corrections in it.—Ed.

† A complete list of the participants appears on page 27.—Ed.

people, we took one look at this constitution of the state and we said, "I have never in my life seen such garbage." This is supposedly the fundamental document. This is the people's method of forcing restraint upon the legislature. It is a document of restraint. It is not only a document of restraint for local governments, as Dick Sigal pointed out earlier in his paper, it is importantly a document of restraint upon the governor and the legislature. And I might say, being unlicensed in your profession, it is a restraint even on our judiciary, incredible as that may seem.

Well, the constitution was not that kind of document at all. It still is not. It is a badly drawn set of statutes in your constitution, except for some of my "major" triumphs, for example my reducing the military article of the state constitution to a single sentence, which I wrote on the back of an envelope on the Empire State Express on my way to Albany. I also removed from the constitution the royal land grants, none of which I believe have been operative for 200 years.

But on the real difficult things, the really important things, we struck out. I mean really struck out.

We began our work by doing something very unusual. We created an inter-law school committee headed by Walter Gelhorn of the Columbia Law School and a senior faculty member, often a dean, of the major law schools in the state. And we said, "Look at this junk and tell us what can be done with it." Well, the first comment was, "Oh, you can't do it; you'll upset the case law." Fortunately, people like Judge Francis Bergen who sat on the commission said, "Oh, that's nonsense, just get at it. I'm sure this thing can be cleaned up." Walter Gelhorn asked Gerald Gunther, who was then a young faculty member at Columbia, to be the director of research, and a remarkable study project went underway. Less than 6 or 8 months later (which is quite an accomplishment, it means the law school professors got their papers in on time) a report came out calling for, in very strident terms, constitutional simplification.

The purpose of the inter-law school committee was to ignore comments by the state legislature and the judiciary that technically and legally you can not simplify because it would be too disruptive. We figured if we had eight law schools all signing on that it could be done. Well, they did sign on very vigorously and we proceeded with our work. Our work really parallels the committee of the Bar Asso-

ciation in many respects.

We also did a famous apportionment study, which enraged my friends, the then Republican legislative leaders, in Albany. After all, there was something divine in the malapportionment of the New York Legislature. The commission was eventually disbanded because of that study. The report was done by perhaps the only Republican political scientist in America, a Professor Ruth Silva from Penn State, who did not even know anything about the subject when she started. She was an expert on presidential succession. But we could not find a Republican who knew anything on the subject; we couldn't find a Republican political scientist to begin with. And to find one that would know something about apportionment was a total impossibility. So we hired Ruth and she learned about apportionment and wrote a good study. What she wrote was about ten times milder than *Baker v. Carr,* but it was three years earlier so we were given the axe and told to find other employment, which I did.

The commission's approach is interesting in relation to the work of the Bar Association committee. We first took on the local government article, a "brief" statement of "fundamental law" running almost 4,000 words, which we reduced to about 300 words. The late Frank Moore almost went into cardiac arrest because we were stepping on the toes of a lot of very important things like the continuation of assessors as constitutional officers and a couple of other side items like that. Eventually, I'm happy to say, Governor Moore agreed with our approach a number of years later in a very gracious exchange of correspondence I had with him.

As to the local government article, we had the guts to make a specific proposal word for word. We did not have that same courage when we had to face the monstrous local finance article. We stated principles and we evoked good government themes but when it came to tax and debt limits we failed to cut the mustard. We were petrified of such traditions like the New York Board of Real Estate. I see the Bar Association had a little bit of that problem too.

I think that the concept that the people, through the constitution, know best and that the people should prescribe our form and structures of local finance, is typified by the language on the ballot in 1955, where the bewildered voters were faced by this language. Not even a bond counsel could write this:

> The legislature shall provide the method by which a fair proportion of joint indebtedness proposed to be contracted pursuant to paragraphs (d) and (f) of this section shall be allocated to any county, city, town or village for the purpose of determining the amount of any such exclusion. The provisions of paragraph C of section 5, and section 10-A of this article, shall not apply to indebtedness contracted pursuant to paragraphs (d) and (f) of this section.

This has been New York constitutional practice, and although I might disagree here and there with the Bar Association's approach, and I will indicate some of my views later, the Bar Association report gladdens the heart of the old Peck Commission.

What makes me even happier is that after dealing with the mischief of the New York Legislature, the New York City Board of Estimate and the City Council, I still come out saying constitutional simplification is sound. Accordingly, I am most sympathetic to the approaches that Dick Sigal has outlined in his paper.

I think a good New York State Constitution article on local finance must be an expression of faith in the governor and the legislature of this state. It must bank its faith on the statutory process. The Bar Association, in talking about monitoring and disclosure, are guiding the legislature and the governor as to what kinds of statutory provisions ought to exist.

However, faith in the constitution itself, in my judgment, is a prescription for more fiscal mischief rather than for less. If the legislature is free to act, the legislature can then direct these problems in a straightforward manner. If the legislature feels that the local finance laws need change, then let them do it directly and face the consequences of public opinion and the electoral process.

On the other hand, to have a constitution glorified by complex provisions requires inventiveness by the imaginative lawyers that we referred to, by imaginative investment bankers, and by imaginative political leaders attempting to meet public goals.

So I believe that in the final analysis, the legislature is going to set the tone. The legislature is going to do good or do bad. I'd rather have them do good out in the open than do badly attempting to work behind the closed closets of provisions such as I've just read.

I totally agree with Dick Sigal's view regarding the gift and loan provision. I expressed to my good friend Don Robinson at lunch that I do not understand the "public purpose" language in the "gift and loan" provision. I think the "gift and loan" provision has helped prevent the city of Sherill from investing in New York and Harlem

River Railroad bonds. The abuses that were prevalent in the 19th century, as Dick pointed out, are not the abuses that put us in the soup in the early 1970's. I think the general provision prohibiting the gift or loan of city money is sound. I would not dude it up with a concept of public purpose. I believe economic development goals can be met through a variety of ways without that.

As to the pledge of faith and credit, I think some of it is hortatory. You see, I did not go to law school but I did learn some fancy words like hortatory. I think some of it is hortatory, though I like it. I think it's a nice thing to have in the constitution. The constitution is supposed to say some of these things and do a little uplifting just the way the Bar Association report says there ought to be a balanced budget, whatever that means. That's a hortatory statement, but it's a good one. So there are good things and there are bad things that are not necessary for a constitution, but a constitution is somewhat naked without some of them.

Getting to the subject of debt and tax limits, I was only the associate director of this commission back in the late 50's. I was not Judge Peck and I was not a member of the commission. I'm trying to remember Judge Peck's own personal view on it. I think he thought they were a lot of nonsense too. I know Judge Bergen did. We did not really set our efforts on them. We sort of got to the table, looked at what was in front of us, shrieked as if it were a plate full of cauliflower, broccoli and brussel sprouts and ran the other way. We never showed much courage.

I do not know what the Bar's proposals did as far as debt limits. They're sort of there and they're not there. I would be much happier with silence on debt limits. On tax limits I clearly favor silence. I don't believe they do anything. I think they are confusing. It is a prescription to go to the limit and then when you get to the limit you begin to have inventive financing. I think it's an invitation for abuses.

I've been impressed with what has happened in the city in the last few years, where I've seen a restriction on the real property tax done the right way. It is far better to structure the real property tax on the basis of the economic development needs for the city, that is, on the basis of what kind of a burden the community can carry, rather than on some mechanical formula. I do not believe the formulas work on debt and tax limits. Many states do without them and

many of those that do without them have far better standing in the marketplace for tax exempt securities than our state, and certainly our city.

So, I come out of my reintroduction after an 18-year sleep on this subject most excited and pleased. I'm sure the legislature will do very little about it, certainly in the immediate future. But I am not sure at all that they may not begin taking this a bit more seriously in a few years. Fortunately, the Bar Association does not have to live off appropriations of the legislature, so the Bar Association can continue pressing this activity in the period ahead. We were cut off for some sins that we had committed and the commission disappeared. The 1967 constitutional convention was just a meeting of the New York legislature wearing different hats and on a different payroll. Basically, it was the legislature sitting as a constitutional convention so an opportunity was missed again to seriously look at the subject.

I would recommend, as a veteran of these wars and as a person with some public responsibility for public finance, certainly in my own city, that the Bar Association keep at this task. An enormous amount of good constitution simplification is reflected in its draft. A legislature will not buy this the first turn around. I think I once expressed that to Evan Davis a year or two ago and Evan was hopeful that there would be very quick action. I think Evan was concerned that if we got it passed during the current session we would not have to wait a whole year for the intervening election. There are going to be a lot of intervening elections before the legislature adopts an approach toward the local finance article which makes sense. So be it. It's a hard process. For 18 years this subject lay dormant and here it has come back, phoenix-like, and I could not be more pleased. I think that the chances of doing something with the weight of the legal community behind it, continuing to push, is fairly good. Maybe the Bar Association will even think again about taking out the tax and debt limits. Thank you very much.

Stephen A. Lefkowitz: After hearing Ed Kresky, I was delighted. I thought that he was strongly supporting our position. But, after a plea for constitutional simplification he concluded that the gift and loan provision is sound and that we should not dude it up. So I thought I would just hand him back a small measure of his own medicine and read for his benefit as well as for the record:

> No county, city, town or village or school district shall give or loan any money or property to or in aid or any individual or private corporation or association or private undertaking . . . however nothing in this constitution contained shall . . . prevent the city of New York from increasing the pension benefits payable to widows, dependent children or dependent parents of members or retired members of the relief and pension fund of the department of street cleaning of the city of New York.

Ladies and gentlemen, that is article 8, section 1 of the New York State Constitution.

Let me suggest, ladies and gentlemen, that this is not a constitution. Let me invite your comparison to the due process clause of the Constitution of the United States or to similar provisions of other state constitutions. The notion of the voters of the City of Buffalo passing on whether the City of New York may make provision for the dependent parents of retired members of the department of street cleaning of the City of New York strikes me as not worthy of constitutional treatment. And that is a provision we now have. It is, as the Bar Association report maintains, a holdover from the 19th century, and, in my judgment, is ill-adapted to contemporary needs. It has through the century been amended piece by piece, in what I like to call the salami method of constitution making, slice by slice as the individual need arises.

It has also led to a series of artifices and circumventions. All of the cases that Dick Sigal cites I think fit within this category: *Comeresky, Stabilization Reserve Corporation, Museum of Modern Art, Buffalo Stadium.* The very doctrine that he cites about rigidly adhering to the letter of the constitution and not, as the court in *Comeresky* said, straining or stretching the imagination to find things unconstitutional, is because the provision itself is so rigid, so unyielding, and so narrow. The constitution is much like a statute, as Ed Kresky said, rather than like a constitutional provision, an organic law for the State of New York.

As we say in the report, I believe that this does create disrespect for the law. I also think it certainly leads to extra costs, the costs of circumvention, which Dick Sigal mentions and with which I agree. I think it is absolutely unintelligible to the general public. It is unintelligible to most lawyers and judges as well. It does not seem to me to be a proper way to write or to maintain a constitution for the State of New York.

I think, as did many on the Bar Association committee, that we

need a fresh start, a clear statement of the restraints on local government's ability to finance. We need a real constitutional provision rather than this hodgepodge of statutes and exceptions and amendments that have accumulated over the years like a coral reef in the bay.

Now, where do we start? I think there are three basic alternatives. One alternative, raised by Dick Sigal, is no restraint at all. That is to say, just repeal article 8, section 1. Let me say, by way of footnote, that I am really speaking to article 1 here rather than to the other provisions of the draft. We might repeal section 1 of article 8 and get rid of the gift and loan provision entirely. I personally would be prepared to accept that. I agree with Mr. Sigal's analysis that the public purpose test would survive a repeal of article 8, section 1. The test is not imposed by article 8, section 1. It exists outside of that. I agree with Dick Sigal that the *Weismer* case is still good law. I also cite the due process clause which has been cited by many cases to the effect that the public funds can only be spent for a public purpose. So, we do not need article 8, section 1.

But I also agree with Dick Sigal that simply to abolish it in its entirety and to put nothing in its place would be unrealistic. I do not think that it could ever be done or would ever be done, and I am not altogether sure that it should be done. I think it is useful to have a reminder that we do have restraints and limitations. I think it is useful to have a declaration, a constitutional statement, that we do have a standard of public purpose. As the report of the Bar Association points out, recently Michigan and Illinois have scrapped their 19th century gift and loan formulations and substituted for them a clear and simple public purpose test. This is substantially what the Bar Association is proposing.

The second alternative that Dick Sigal mentions is to repeal the "gift and loan" provision as it now exists and to substitute in its place specific provisions which would enable economic development or assistance for economic development such as many of us were interested in achieving. The analogy of course is to article 18 of the existing constitution which deals with housing and urban renewal. In other words, provide a set of standards for economic development as article 18 does for public assistance, on both the state and local level, for housing and urban renewal. I would disagree with that. I think article 18 is far too narrow and rigid. It is far worse than article

8, section 1. It is really quite unintelligible. It reaches the statutory level of restraint and goes below that to the regulatory level of restraint. It reads more closely to the Internal Revenue Code regulations than to anything else. It looks less like the organic law of the State than even article 8.

I think the "gift and loan" provision is much too narrow. Those of us who have worked with it over the forty years of its existence have seen how unyielding and rigid it is in many ways. To pick a very simple example, it restricts the loan of public funds to corporations regulated by law as to rents, profits, dividends and disposition of property. That has led to all kinds of contortions to steer public funds for subsidized housing into other entities which can take federal tax depreciation and other federal tax benefits. People who have worked with it have had to go through that and I submit it is entirely useless to set out that level of restriction or guideline. That is a legislative job, in my judgment. I would think it perfectly appropriate to have a straightforward declaration that assisting an economic development is a public purpose and then let the governor and legislature take it from there.

I really would resist very strongly an article 18 type approach. It has been used and of course it has proved useful in many ways in the housing area. But it has also proved useless, and it has caused silly situations. Article 18 speaks of low-income housing and, as we all know, a great deal of publicly assisted housing which fits, for lack of any other place, under article 18 and which is denominated as low income, is for persons who obviously are not low income. But it is the only constitutional peg we have to hang it on.

The third alternative is the Bar Association's alternative, which is to repeal the existing "gift and loan" provision, and instead substitute this broad public purpose test. I would be satisfied with a simple reference to public purposes without any further elaboration as some of the other states have done. I suggest that it is simple and it is easy to understand for lawyers, for judges, for ordinary voters. It speaks, to my mind, in constitutional terms and it leaves program decisions to the legislature where I think they should be made. What would be the impact of this suggestion?

I would like to start with the question that Dick Sigal raises: have there been circumventions of gift and loan in the area of economic development? Dick Sigal says no. He says the constitutional restraints in the area of economic development seem to have worked.

I disagree. I think there has been a tremendous amount of what I call circumvention over the last few decades in the area of economic development, avoidance of restraints on gifts and loans and on pledges of credit to public corporations. I think all of the cases Dick Sigal cites would fit into that category. Indeed, I am sure many people in this room have worked on some of those things which I could fairly call circumvention. Some of the most important financing tools we now have work on circumventions of the "gift and loan" provisions, sometimes from the state, sometimes from the municipality.

But I will assume that Dick Sigal is right and this is the position of the Bar Association: that the restraints that we now have have resulted in an inability on the part of New York City and the other municipalities to involve themselves usefully in economic development matters and have pushed them into circumventions or directions which are not as efficient and are certainly more costly. The result, we submit, is to hamper New York City and other municipalities in the state in moving forward in an increasingly important area of government concern.

Now the Bar Association position is, and my personal position is, that if we should be doing things on the municipal level to stimulate economic growth and development, then let us do it correctly. The Bar Association report says the proposal would do this. It would permit localities to act directly with attention focused on real fiscal consequences and based on a clear determination that local assistance to public or private entities serves a public purpose. It would permit matters of policy to be clearly resolved and honestly implemented in contrast to the sorts of techniques with which we are familiar.

Dick Sigal believes, I think, that the government should not involve itself as directly in these matters as we have proposed. As he says, of course, this is a political and social judgment. My personal opinion is that government should be able to do that constitutionally, and that it is a legislative and gubernatorial judgment as to the specific means of carrying that out. I think the Bar Association report reflects that when it says we believe that localities should be more free to act in order to generate private investment and economic and job development activities.

New York State and its municipalities have been disadvantaged in the competition among the states to attract new industrial and

commercial activity. One of the difficulties with the existing gift and loan restriction is that it does not permit public and private enterprise to combine in order to capitalize on the strengths of each. Too often, the only alternative is to abandon privately provided service for complete government ownership and operation. Since there is a possibility of new federal incentives for urban investment, it is extremely important that local government be able to respond to these programs in an effective and flexible manner.

I think our problem has been too often that all private or it has got to be all public. If the public takes something over, the private sector is excluded for fear of mingling public and private funds. If the private sector is carrying out an activity, the public is really precluded from benefiting. Dick Sigal mentions stock ownership. We can provide tax exemptions for the Commodore Hotel. We can provide other sorts of benefits for the Commodore Hotel. The public sector cannot, however, share directly in the upside benefits from the Commodore Hotel and I think that is too bad. I think we should be able to do so.

We obviously cannot here solve the social and political question of whether local or state government should be able to involve itself more closely in these economic development activities. It's obviously a point of legitimate dispute between individuals. But I do want to point out that a number of other states have moved quite forcefully in that direction. And again, to quote the Bar Association report, Illinois, which had a provision much like New York's present gift and loan restriction, has recently scrapped that traditional formulation and substituted this simple principle: "Public funds, property or credit shall be used only for public purposes." The Michigan constitution of 1963 provides simply: "Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or except as provided by law for any public purpose." Pennsylvania has something similar and there are others. There are states like Connecticut which have not, at least within recent memory, labored under the "gift and loan" provisions.

I would like to emphasize that states like Illinois, Michigan, Connecticut and Pennsylvania have not sunk into the ground or the sea. They're doing perfectly well. Their fiscal situations have not deteriorated. I do not think that we are less able to manage ourselves. We

should really strive toward adopting a straightforward and clear formulation such as that which the Bar Association report proposes.

I would like also to mention, as a concluding note, Dick Sigal's final comment about state indebtedness and state practices. I agree with him quite strongly. If the Bar Association committee were not one on municipal affairs but on state government I would hope we would have tackled the state finance article along exactly the same lines. It is my opinion that article 7, section 8, should be amended along the same lines as are recommended here for article 8, section 1, so that the state could also be free of the "gift and loan" provision, and be much more free to act aggressively in the area of economic development. I must say that constitution writing is not for today, not for tomorrow and not for even the decade, but for the longer haul and we should write provisions with that in mind. The United States Constitution is a marvelous model of longevity, flexibility and suitability for generations. I would love to see, as I think Ed Kresky would, the New York State Constitution try to come closer to that model. Thank you.

Donald J. Robinson: When we met in committee, Steve Lefkowitz and I were very much in favor of simplification. And after we got through article 8, section 1, we asked ourselves what we should do. I think we both agreed that the article should remain blank. We realized however that that was a political impossibility. But I think, again with the input of Ken Hartman and Evan Davis, we came out with the conclusion that we have.

As to article 8, section 2, the first sentence of the new proposal is a reaffirmation of the existing constitutional provision with respect to full faith and credit. Based on the *Flushing National Bank* decision, it was our thinking that a municipal issuer, like any issuer, should pledge its full faith and credit. We felt that if you permitted revenue financing the municipal issuer would be able to carve out sources of revenue and pledge those revenues in payment of other obligations of that issuer. You would have a proliferation of both general obligation and revenue obligation financing which would once again adversely affect the investment community perception of obligations of New York municipalities.

The municipalities operating through newly created authorities can, in certain cases, like industrial development authorities, create obligations which are secured solely by revenues. The same thing is

true of sewer authorities.

As to the remaining portion of article 8, section 2, I think Dick Sigal possibly misreads what the committee tried to do. Nowhere in the language do you see the word "appropriation" which exists in the existing article 8, section 2. We tried to strengthen the article so that provision would be made for payment. Dick Sigal mentions two ways. One, the pledge of specific revenues for payment of debt service; two, the creation of a reserve fund. Certainly the suggestion that is made by the committee will permit both of those. Thank you.