The Future of Nonguaranteed Bond Financing in New York

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I. INTRODUCTION

New York City narrowly escaped municipal bankruptcy in 1975 when it could not service its debt without help from the state and federal governments. New York State's Urban Development Corporation (UDC) was in default on short-term notes for several days in February-March 1975, until the state legislature appropriated $90 million for repayment of principal and interest and for current operating expenses. Bond markets were severely shaken by New York's financial crisis. States and municipalities nationwide experienced difficulty in marketing their obligations, regardless of their individual credit ratings.

The crisis was largely due to the seemingly unsupportable debt burdens on the state, the city and their various authorities and agencies. For example, about $1.7 billion, or 58.6 percent of New York City's real property taxes, was used to service the city's debt in fiscal 1974-75. Total outstanding debts of the state, including commitments to its agencies, stood at $12.8 billion, or $707 per state resident, on March 31, 1975. More than two-thirds of this amount, or $8.7 billion, was "nonguaranteed" debt which had never been submitted to a voter.

1. The terms "debt" and "indebtedness" are subject to various definitions depending on the jurisdiction and the context in which they are used. Broadly, the terms refer to an undertaking to pay a specified amount at a future date. For a discussion of different interpretations of the terms in the context of government obligations, see 15 E. McQuillin, Municipal Corporations § 41.18 (3d ed. 1970) [hereinafter cited as McQuillin].


6. City of New York, Official Statement, General Obligation Serial Bonds 28 (July 1, 1976). It should be noted that the city is limited in levying real property taxes for municipal purposes to 2.5% of full market value. N.Y. Const. art. VIII, § 11(a). However, taxes used for debt service are excluded from this limitation. Id. § 11(a).


8. Id. The state classifies these nonguaranteed debts as "lease purchase" commitments, which amounted to $3.6 billion, and "moral obligation" debts, which amounted to $5.1 billion. Id.

In a typical lease-purchase arrangement, the state enters into a long-term agreement to lease a facility from one of its authorities. The state's rental payments generally are sufficient to enable the authority to repay interest and principal on the bonds it issued to finance acquisition and/or construction of the facility. Such lease commitments are considered executory obligations of the state, rather than legal indebtedness within the meaning of constitutional prohibitions. See 1975 N.Y. Comp. Ann. Rep., pt. 1, at 22-23; State Prospectus, supra note 7, at 61-62; McQuillin, supra note 1, § 41.16; Magnusson, Lease-Financing by Municipal Corporations as a Way Around Debt Limitations, 25 Geo. Wash. L. Rev. 377 (1957).
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referendum and for which the state disclaimed legal liability.

By late 1976, however, an appearance of normalcy had returned to municipal bond markets and to New York finances. The city had met its first deadlines for repayment of state and federal loans. The state's obligations were again being purchased by private investors—there was even a market for the moral obligation bonds of the state's Housing Finance Agency and Municipal Assistance Corporation, albeit at high interest rates. Although a court decision ordered the city to repay almost $1 billion of short-term notes, government officials remained hopeful that fiscal solvency would be maintained, possibly with help from the new administration in Washington.

Financial collapse had been averted by a series of emergency maneuvers. These included a moratorium on repayment of short-term city notes; creation of a Municipal Assistance Corporation (MAC) with power to issue bonds against which the state pledged the city's sales tax and stock transfer tax; the Moral obligation debts consist of bonds issued by an authority or agency of the state, on which the state agrees to appropriate annually any money needed to make up deficiencies in the issuer's debt service reserve fund. The state disclaims any legal liability for the bonds, but there is said to be a moral obligation on the part of the legislature to make such appropriations. 1975 N.Y. Comp. Ann. Rep., pt. 1, at 23-24; State Prospectus, supra note 7, at 62-63. See notes 109-11 infra and accompanying text.

These statistics do not include other authority debts that are unsupported by the moral obligation "makeup" clause. These other debts, however, are sometimes said to carry an implied moral obligation of the state for their repayment in event of default by the issuing authority. See notes 74-80 infra and accompanying text.

9. N.Y. Const. art. VII, § 11, requires that debts guaranteed by the state's full faith and credit be approved by a majority of voters at an election.


13. N.Y. Times, Sept. 17, 1976, at 1, col. 6 (tax-exempt Housing Finance Agency bonds paid 8.5% interest); N.Y. Times, Nov. 5, 1976, at A1, col. 3 (tax-exempt MAC bonds paid 10.25% interest).


15. E.g., New York City Mayor Beame's assertion that "we've met the problem with confidence, in full control of the situation." N.Y. Times, Dec. 28, 1976, at 43, col. 3.


purchase by state and city pension and workmen's compensation funds of large amounts of obligations of the state, MAC, and several state authorities; and a state appropriation of $750 million to the city and MAC.

At the same time, the legislature began to take steps to limit the amount of debt that could be undertaken in the future. The city's ability to sell bonds to the public was placed under control of the Emergency Financial Control Board. Dollar ceilings were placed on the amount of moral obligation debt that could be undertaken by the state's public authorities. Unused moral obligation provisions in legislation governing six authorities and agencies were repealed. A Public Authorities Control Board was created to oversee future authority bond issues and, for some authorities, all new construction projects.

Of equal significance were two 1976 decisions of the New York Court of Appeals which, although involving forms of guaranteed debts, demonstrated the court's willingness to invalidate financing practices which strain constitutional debt limitations. In March, 1976, Wein v. State upheld one of the emergency measures enacted by the state, but attempted to set definite limits on the kinds of financing devices that could be used in the future—to delineate what Chief Judge Breitel called "the brink of valid practice." The following November, in Flushing National Bank v. Municipal Assistance Corp., the court held unconstitutional the state-enacted moratorium on repayment of full faith and credit city short-term notes.

Whether these efforts of the court and legislature will have any long-term effect, however, is problematic. When the financial crisis of 1975 begins to


25. Id. at 142, 347 N.E.2d at 588, 383 N.Y.S.2d at 227.

recede in the memories of New York’s legislators, they will once again become aware of their constituents’ needs for low-cost housing, mass transportation, new hospitals and schools, pollution control and electric power facilities, and other projects of public benefit. The temptation to finance these projects through debt will be strong; and the procedure of a public referendum for approval of full faith and credit debts of the state will seem cumbersome and risky. If this situation arises, how will the legislature react? Moreover, if the legislature renews the practice of financing public works with nonguaranteed debt devices, and if this practice is challenged in court, how might the court of appeals respond? Finally, if the court invalidates such debt financing devices, what practical effect might such a decision have on public financing in New York? These are the key questions that this Comment proposes to explore.

First, the development of general obligation and nonguaranteed debt financing in New York will be reviewed, including the events that led to enactment of constitutional limitations, subsequent legislative evasions of the provisions, and judicial interpretations of the legislative actions. The next section will examine the interplay between courts and legislatures in several minority jurisdictions, where strict judicial construction of constitutional limitations has repeatedly been overridden by legislative action. Finally, an attempt will be made to indicate, on the basis of this investigation, whether existing constitutional debt provisions are likely to be maintained successfully by judicial enforcement in the face of legislative attempts at avoidance.

II. NEW YORK’S EXPERIENCE
A. Origins of Constitutional Debt Limitations—And Ways Around Them

The New York Constitution appears to place severe restrictions on the power of the state and its local governmental units to incur financial liabilities. The state cannot give or loan its money or credit in aid of any private corporation or undertaking, nor extend its credit to a public corporation. Nor can the state contract a debt without approval by a majority of the legislature and by a majority of voters at a general election. Money raised by such a procedure can be used only for the purposes specified by the legislature, and must be repaid within 40 years. A sinking fund must be maintained with yearly appropriations adequate to pay interest and principal on state debts and the monies must be repaid within 40 years.

27. In the November 1976 general election, for example, it was estimated that voters nationwide approved only $1.5 billion of a proposed $3 billion of new bond issues. N.Y. Times, Nov. 4, 1976, at 63, col. 5.
28. See section II infra.
29. See section III infra.
30. See section IV infra.
32. Id.
33. Id. § 11.
34. Id. § 12.
segregated from all other funds.\textsuperscript{35} The state may, however, without a referendum, contract debts in anticipation of taxes, revenues and bond sales,\textsuperscript{36} as well as to meet certain grave dangers to public safety.\textsuperscript{37}

Local governmental units face similar restrictions. "No county, city, town, village or school district shall give or loan any money or property [or credit] to or in aid of any individual, or private corporation or association . . . ." subject to certain enumerated exceptions.\textsuperscript{38} All debts contracted by such political subdivisions must be for a municipal purpose, repayable within 40 years, and guaranteed by a pledge of the subdivision's faith and credit.\textsuperscript{39} Subdivisions cannot contract debt in excess of a specified percentage of the value of taxable real estate within their boundaries.\textsuperscript{40}

Forty-four states have enacted constitutional limitations on borrowing power similar to some or all of New York's provisions;\textsuperscript{41} two require greater-than-majority votes of the legislature, and all others require either a referendum or a constitutional amendment before the state can contract most forms of indebtedness.\textsuperscript{42} Most of these debt limitations were developed in the middle to late 19th century, when many states found themselves overburdened with debts they had incurred to help finance canal and railroad construction. The panic of 1837 resulted in several defaults by states on canal bonds.\textsuperscript{43} Although not among the defaulting states, New York at that time was pushed to "the very brink of default on its bonds."\textsuperscript{44} During the latter half of the 19th century, several states and municipalities also defaulted on bonds issued for railroad construction.\textsuperscript{45}

Rhode Island in 1842 and New Jersey in 1844 were the first states to try to erect

\textsuperscript{35} Id. §§ 15-16.
\textsuperscript{36} Id. § 9.
\textsuperscript{37} The enumerated crises are: "to repel invasion, suppress insurrection, or defend the state in war, or to suppress forest fires . . . ." Id. § 10.
\textsuperscript{38} Id. art. VIII, § 1.
\textsuperscript{39} Id. § 2.
\textsuperscript{40} Id. § 4. Percentages range from 5% for school districts and 7% for villages to 10% for New York City and Nassau County. Id.

Additionally, both the state and its subdivisions are prohibited from becoming liable for the obligations of public corporations. Upon legislative authorization, however, they may take over the corporations' properties and pay their debts. Id. art. X, § 5.

\textsuperscript{41} Wagner, Optimality in Local Debt Limitation, 23 Nat'l Tax J. 297, 297 (1970).
\textsuperscript{42} Morris, Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions, 68 Yale L.J. 234, 240-41 & n.15 (1958). See also A.J. Heins, Constitutional Restrictions Against State Debt 29 (1963) [hereinafter cited as Heins].
\textsuperscript{43} Mississippi, Florida, Arkansas and Indiana defaulted in 1841. Illinois, Michigan, Maryland, Pennsylvania and Louisiana defaulted in 1842. Heins, supra note 42, at 7.
\textsuperscript{44} Moreland Commission Report, supra note 3, at 57. See also Newell v. People, 7 N.Y. 9, 85 (1852).
\textsuperscript{45} Typically, a state or municipality would exchange its bonds for stock in a railroad company. The railroad would sell the government bonds to finance its construction projects. The company would later become bankrupt, leaving the state or municipality with bonded indebtedness and practically worthless railroad stock. See Willatt, Constitutional Restrictions on Use of Public Money and Public Credit, 38 Texas B.J. 413, 414-16 (1975).
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constitutional barriers against the unchecked growth of state debt. New York enacted its first such debt provisions in 1846 and gradually added to them at later constitutional conventions. Similar provisions were adopted in most states by 1890.

Despite such restrictions, New York and many other states developed ways to borrow money without referendum or constitutional amendment to finance a variety of projects considered of social benefit. These devices are variously called revenue bonds, improvement bonds, and special fund, or limited obligation bonds. Interest payments on all these obligations are exempt from federal and state taxes. As opposed to the general obligation bond, on which bondholders have recourse to the issuing government's general revenues and full taxing powers, all these devices are nonguaranteed: the issuing state or municipality expressly disclaims any legal liability. Revenue bonds are, typically, payable only from the revenues of the particular project they were issued to finance. Improvement bonds are issued by special districts (such as water or sewer districts), and are payable from assessments on property benefited by improvements in that district. Special fund, or limited obligation bonds are payable from a special fund for debt service which the issuer agrees to maintain. Sometimes, a specific tax is pledged to that fund, although the state or municipality usually states that no liability is to attach to the government's general revenues. In certain instances, the state or municipality may contribute to repayment of any of these bonds by leasing the facility that was built with the bond proceeds. All such arrangements have been held by a majority of

46. Heins, supra note 42, at 8.
47. See Quirk & Wein, A Short Constitutional History of Entities Commonly Known as Authorities, 56 Cornell L. Rev. 521, 526-52 (1971) [hereinafter cited as Quirk & Wein]. The process of amendment continued in New York through the 1938 constitutional convention, when article X, section 5, was added as an express disavowal of the debts of public authorities. Id. at 561-79.
48. See Heins, supra note 42, at 93-120.
51. Interest on these bonds may be taxable unless specifically exempted by statute. 16 E. McQuillin, Municipal Corporations § 44.49 (3d ed. 1972). However, such exemptions are routinely included in enabling legislation. See, e.g., N.Y. Priv. Hous. Fin. Law § 54 (McKinney 1976); N.Y. Pub. Auth. Law § 1296(8) (McKinney Supp. 1976).
52. See 64 Am. Jur. 2d Public Securities and Obligations §§ 13, 417 (1972).
55. See McQuillin, supra note 1, at §§ 43.45, 43.135; 64 Am. Jur. 2d Public Securities and Obligations §§ 13, 418 (1972).
57. See Bowmar, The Anachronism Called Debt Limitation, 52 Iowa L. Rev. 863, 880-84 (1967);
jurisdictions not to create debts or liabilities within the meaning of constitutional prohibitions.  

However, there is often said to be a moral obligation on the part of the state or municipality to repay the bonds from general revenues if the pledged refunding source proves insufficient. This implicit moral obligation, noted as early as 1852, was made explicit in the so-called "moral obligation bond" developed in 1960. These bonds are issued by a public corporation created by the state; they contain, in addition to an express disclaimer of liability by the state, a "makeup" clause, which provides that the state shall make up any deficits in the reserve fund maintained by the issuing agency for debt service. This clause has usually been held to create a moral, but not a legal, obligation on future legislatures to appropriate money needed by the agency. For purposes of this Comment, all forms of nonguaranteed debt described above will be termed revenue bonds, except those containing a "makeup" clause, which will be called moral obligation bonds.

The obvious advantages of these nonguaranteed financing devices are speed and flexibility. Cumbersome and risky referendums are unnecessary, and a public authority can move rapidly to take advantage of new federal grants and other opportunities. Constitutional debt ceilings also can be ignored. Additionally, when tax-exempt bonds are used to finance industrial development and water pollution control projects, they offer financing to private industry at lower interest rates than could be obtained elsewhere. Among their disadvantages are the slightly higher interest rates needed to attract the investing public. Another difficulty is the lack of government control over the amount of debt incurred by authorities and over the uses to which the money is put. Despite these disadvantages, nonguaranteed bonds have become an increasingly popular method of public financing.

Magnusson, Lease-Financing by Municipal Corporations as a Way Around Debt Limitations, 25 Geo. Wash. L. Rev. 377 (1957). Morris, Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions, 68 Yale L.J. 234, 240-43 (1958). See B.U. Ratchford, American State Debts 517-23 (1941) [hereinafter cited as Ratchford]. "No one acquainted with the history of the legislation of this state can doubt that money borrowed under the act of 1851, if applied to the completion of the canals, would be repaid on the ground of this moral obligation . . . ." Newell v. People, 7 N.Y. 9, 93 (1852). See also id. at 102-03 (Johnson, J., concurring); id. at 114-15 (Edmonds, J., concurring).

61. See notes 109-11 infra and accompanying text.
62. Ratchford, supra note 59, at 512.
63. Id. at 516.
65. Heins, supra note 42, at 36-68. See also Hollman & Primeaux, An Examination of Debt Ceilings as Barriers to Efficient Debt Management, 25 Ala. L. Rev. 417 (1973).
B. The Development of Revenue Bond and Moral Obligation Bond Financing

i. Revenue Bonds

One of the first attempts by a state to evade a constitutional debt limitation was made in 1851, when the New York legislature authorized $9 million of "canal revenue certificates" to finance the enlargement of the Erie Canal, and the construction of the Genesee Valley and Black River canals. The certificates were payable out of a special fund maintained by surplus revenues from canal operations, and the state disclaimed any liability on them.

In Newell v. People, the court of appeals held the law a violation of an 1846 constitutional provision that authorized further canal construction to be financed only from the prior fiscal year's surplus canal revenues. This provision had been added by the Constitutional Convention of 1846 as an expression of fiscal caution: debt reduction was given priority over canal construction.

The court warned that the state's disclaimer of liability would be practically, if not legally, ineffective in event of default, since the state would in all probability honor its moral obligation to holders of the certificates. Significantly, however, the majority opinion invalidated the act only due to the specific constitutional provision relating to canal construction. The court did not decide whether the arrangement created a prohibited state debt.

Many years later, in People v. Westchester County National Bank, the court of appeals again noted the policy rationale for the constitutional prohibitions: Great expenditures may be lightly authorized if payment is postponed. To place the

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69. Id. §§ 3-4.
70. Id. § 14.
71. 7 N.Y. 9 (1852).
72. N.Y. Const. art. VII, § 3 (1846) (omitted from N.Y. Const. (1938)).
73. See 7 N.Y. at 85-86.
74. Id. at 93. See also id. at 102-03 (Johnson, J., concurring); id. at 114-15 (Edmonds, J., concurring).
75. Id. at 93. Colorado was the first jurisdiction to hold that such bonds, payable only from canal revenues, did not create a constitutionally prohibited debt of the state. In re Canal Certificates, 19 Colo. 63, 34 P. 274 (1893). Perhaps the furthest early extension of this reasoning was State ex rel. Richards v. Moorer, 152 S.C. 455, 150 S.E. 269 (1929), appeal dismissed sub nom. Johnson v. State Highway Comm'n, 281 U.S. 691 (1930), in which a highway bond issue, payable in the first instance from a gasoline tax and guaranteed secondarily by a pledge of the state's faith and credit was held not to create a state debt. See Ratchford, supra note 59, at 448-54.
76. 231 N.Y. 465, 132 N.E. 241 (1921). The case involved a proposed $45 million bond issue to pay bonuses to World War I veterans who were residents of New York. The court held that the bonus was a constitutionally prohibited gift to private individuals, rather than the performance of a moral obligation, on the grounds that the veterans were servants of the federal government, not of the state, and that their war victory was only of incidental benefit to the state. Id. at 479-81, 132 N.E. at 246-47.
burden upon our children is easy . . . . Conscious of this human weakness, to guard against public bankruptcy the people thought it wise to limit the legislative power.

Soon thereafter, the court held in Williamsburgh Savings Bank v. State that the state did, in fact, have both a moral obligation to repay water commission bonds on which it had disclaimed any legal liability, and the power to honor this obligation. The court found that the state's involvement in the financing arrangement had induced sufficient reliance on the part of the bondholders to create a moral obligation of the state. However, the court noted that the legislature had great discretion in deciding whether to honor its moral obligation.

These early decisions appear to have had little effect in deterring New York from using nonguaranteed bonds with increasing frequency. Issuance of such bonds was spurred by the development of public authorities as mechanisms for public works finance. The Port of New York Authority, formed in 1921, is considered the first modern public authority. It was created initially to solve jurisdictional problems of a port operating in two states (New York and New Jersey), but the advantages of such a corporate entity for nonguaranteed public works finance soon became manifest.

77. Id. at 474-75, 132 N.E. at 244.
78. 243 N.Y. 231, 153 N.E. 58 (1926). The act creating the commission, with power to issue bonds and to take private lands for its use, had been held constitutional in State Water Supply Comm'n v. Curtis, 192 N.Y. 319, 85 N.E. 148 (1908). Although the Curtis decision dealt primarily with the commission's power to initiate condemnation proceedings, it noted that the act "nowhere assumes to pledge the credit of the state or any political subdivision thereof." Id. at 328, 85 N.E. at 151.
79. 243 N.Y. at 245-47, 153 N.E. at 63. The state's involvement was said to consist of initiation and approval of the plan, and representation by a state agency of the future value of lands to be improved. Id.
80. Id. at 244-45, 153 N.E. at 62-63. For other examples of the court's reluctance to upset a legislative decision to honor a moral obligation, see Lehigh Valley R.R. v. Canal Bd., 204 N.Y. 471, 97 N.E. 964 (1912); Town of Guilford v. Board of Supervisors, 13 N.Y. 143 (1855). Contra, People v. Westchester County Nat'l Bank, 231 N.Y. 465, 132 N.E. 241 (1921) (see note 76 supra).
82. Council of State Governments, State Public Authorities 6 (1970); Morris, Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions, 68 Yale L.J. 234, 235 (1958). However, the first decision to uphold the bond issue of an organization similar to an authority is said to be Kennebec Water Dist. v. City of Waterville, 96 Me. 234, 52 A. 774 (1902).
83. Council of State Governments, State Public Authorities 6-9 (1970); Edelstein, The Authority Plan—Tool of Modern Government, 28 Cornell L.Q. 177, 178 & n.6 (1943). During the depression of the 1930's, the federal Public Works Administration (PWA) helped states draft legislation to help stimulate construction projects. The bonds issued by the authorities were purchased with federal funds by the PWA and the Reconstruction Finance Corporation. See Council of State Governments, supra at 9; J. Maxwell, Financing State and Local Governments 199 (rev. ed. 1969). The number of states that authorized local governments to issue nonguaranteed bonds rose from 15 in 1931 to 40 in 1936. J. Maxwell, supra at 199. New York itself had 33 authorities by 1938, including ten in the New York City metropolitan area. Edelstein, supra at 177.
In 1935, *Robertson v. Zimmermann* confirmed that public authorities could issue nonguaranteed bonds which did not fall within constitutional debt restrictions. The court of appeals held that bonds issued by the Buffalo Sewer Authority were debts of neither the city nor the state, and thus did not inflate the city's debt beyond the prescribed percentage of assessed valuation of real estate. Because the Buffalo Sewer Authority, like all other early public authorities, was expected to be "self-liquidating"—that is, to repay its bonded debts from surplus revenues without the aid of outside funds—the legislative disclaimer of state or municipal liability for the bonds was held sufficient to make constitutional debt limitations irrelevant. Moreover, the court noted that the authority was necessary to the public health and welfare.

In the last 25 years, however, the mechanism of public authority debt has been used increasingly to finance projects that are not self-liquidating. While disclaiming any legal liability, and making no commitment of its general funds, the state or municipality agrees to help repay the debt from a specific revenue source if the project's funds are insufficient. This pledge is usually considered legally binding to the extent of that particular revenue source. *Comereski v. City of Elmira* upheld such an arrangement, whereby the Elmira Parking Authority was created to build and operate parking lots, and the city of Elmira contracted to cover any deficits with up to $25,000 of revenues from its on-street parking meters. The arrangement was held not to create a debt of the state or municipality, but rather was found a constitutionally permissible gift of money to a public corporation. The court noted that such financing arrangements had become common and essential to the needs of modern municipalities.

State courts are divided on the question of whether bonds secured by a specified government revenue source, such as a gasoline tax, but not by the government's full taxing power, constitute debts or obligations within the meaning of constitutional debt limitations. See recent discussions in *Secretary of Transp. v. Mancuso*, 278 Md. 81, 359 A.2d 79 (1976); *State ex rel. Ward v. Anderson*, 158 Mont. 279, 491 P.2d 868 (1971). See also Annot., 100 A.L.R. 900 (1936).

"We should not strain ourselves to find illegality in such programs. The problems of a modern city can never be solved unless arrangements like these . . . are upheld, unless they are patently illegal." *308 N.Y. at 254, 125 N.E.2d at 244* (citation omitted).
public necessity justification was extended from sewage treatment to parking lots; and judicial approval of a nonguaranteed financing device was extended from a self-sufficient authority to a partially subsidized one.

The reasoning of Comereski was ultimately extended to validate an authority with no revenue sources of its own. In May, 1974, early in the city's financial crisis, the state legislature had created a New York City Stabilization Reserve Corporation (SRC), which was authorized to sell bonds for the benefit of the city. Although neither the state nor the city was liable for the debt, the act provided that the city would appropriate money annually to service the SRC debt. If the city failed to appropriate sufficient funds, the state comptroller would make up the deficit from the "first monies available . . . to the city from the stock transfer tax fund" and secondarily from other state aid due to the city.

In Wein v. City of New York, a 4-3 decision, the court of appeals relied on Comereski to find this arrangement constitutional. Appropriations by the city and state were held permissible gifts to a public corporation, rather than legal obligations of either government.

The SRC, however, unlike the Elmira Parking Authority, operated no parking lots. In fact, as the court noted, "the SRC has no visible means of financial support except for what it can derive from the city, State or Federal governments." While the majority brushed aside this distinction, the minority distinguished Comereski precisely on this ground: "[T]he parking authority . . . had an ostensible purpose. It was not a mere financing device and conduit for evasion of article VIII." The dissent took notice of New York's dire need for funds during its financial crisis, but observed that "judicial condonation of constitutional evasion only prolongs the agony of the cities by postponing . . . a sensible reappraisal . . . of constitutional limits upon local finance."

96. N.Y. Pub. Auth. Law §§ 2530-50 (McKinney Supp. 1975). Included was a legislative finding that "the city of New York is faced with a grave and unprecedented fiscal crisis which threatens the city's ability to provide essential services and thereby endangers the welfare of all the inhabitants . . ." Id. § 2533.
97. Id. § 2542.
98. Id. § 2537(c).
99. Id. § 2540(b).
100. Id. § 2540(c).
101. 36 N.Y.2d at 618-19, 331 N.E.2d at 518-19, 370 N.Y.S.2d at 556-57. The court found no violation of constitutional limits on amounts of permissible indebtedness that could be incurred; nor did it find a contracting of debt by a municipality without a pledge of its faith and credit; nor a gift or loan of money or credit to a private corporation; nor a gift or loan of credit to a public corporation. Id.
103. Id. at 617, 331 N.E.2d at 517, 370 N.Y.S.2d at 555.
104. Id.
105. Id. at 623, 331 N.E.2d at 522, 370 N.Y.S.2d at 561 (Jasen, J., dissenting).
106. Id. at 622, 331 N.E.2d at 521, 370 N.Y.S.2d at 559 (Jasen, J., dissenting).
ii. Moral Obligation Bonds

By the time the dissent in *Wein v. City of New York* issued this call for a reappraisal of constitutional debt limits,\(^{107}\) the field of nonguaranteed public finance had undergone 12 years of uninterrupted and unprecedented growth.\(^{108}\) Much of this growth can be attributed to moral obligation bonds.\(^{109}\) As noted above,\(^{110}\) their distinguishing feature is a "makeup" clause, which provides that any deficit in the reserve fund set up by the public corporation to repay its debt will be covered by state appropriations.\(^{111}\) Thus, the moral obligation implicit in revenue bonds was converted to an express, although not a legally binding, promise. New York's courts have not yet squarely addressed the meaning of the makeup clause.\(^{112}\) However, several jurisdictions have held that it imposes merely a moral obligation on future legislatures, and does not create a legal debt or obligation within the meaning of constitutional prohibitions.\(^{113}\)

The moral obligation bond was first used in the New York State Housing Finance Agency Act of 1960,\(^{114}\) after the state had experienced difficulty in securing voter approval of guaranteed bond issues to finance low-income ("Mitchell-Lama") housing.\(^{115}\) In retrospect, it appears that the moral obligation...
clause was the subject of a misunderstanding between the New York State government, on the one hand, and the investment community on the other. The legislature and the governor believed that all projects funded by the bonds would be self-supporting, and that no appropriations by the state would ever be necessary. The investment community believed the state had committed itself as a guarantor of the bonds; therefore, investors purchased them without regard to the financial feasibility of individual building projects.

Moreover, no court test of the validity of the legislation was forthcoming. Perhaps earlier decisions such as Comeretski discouraged such a challenge. Another inhibiting factor was that taxpayer standing to sue the state on constitutional issues was severely restricted until 1975.

Recently, however, the legislation's practical effect—if not its precise legal effect—has been made clear: in event of default by the issuing agency, the state will repay the debt in order to protect its own credit rating.

C. "The Brink of Valid Practice"

Against the background of controversy over the nature of moral obligation bonds and public awareness of the huge debt burden facing the state, the court of appeals recently rendered two decisions in which it attempted to restrict certain financing arrangements. In Flushing National Bank v. Municipal Assistance Corp., the court struck down one attempt to circumvent the faith and credit requirement. In Wein v. State, it indicated its willingness to invalidate other financing devices which contravene constitutional debt limitations.

Wein v. State was an action by a taxpayer challenging the constitutionality of state appropriations of $250 million to New York City and $500 million to

116. Moreland Commission Report, supra note 3, at 4-5. "The perception of the bankers and investors proved as a practical matter to be more valid than that held in Albany. For now if the State is to preserve its credit, it must recognize the outstanding moral obligation bonds as in fact State debt and stand behind these bonds." Id. at 5.

117. Id.

118. See notes 89-94 supra and accompanying text.


123. Taxpayer-plaintiff Leon E. Wein, a law professor at Brooklyn Law School, was also
MAC. Repayment was secured by one-year city and MAC notes, and by an assignment of all city mortgages. Secondary security was provided by state aid funds pledged to the city. The appropriations were funded by the sale of short-term revenue-anticipation notes by the state. The court found the appropriations were constitutionally permissible gifts or loans of money to a municipality and a public corporation, and not impermissible extensions of credit. However, after a discussion of the history and purposes of constitutional debt limitations, the court stated that in order to prevent the imposition of a debt burden on future generations, the state notes would be valid only if issued "authentically in anticipation of actually committed taxes or other revenues." Thus, there must be a balanced state budget out of which the notes would be retired. Any "rollover" of the notes would be constitutionally impermissible. The court therefore found the device legal "so long as the fiscal prospects are tenable."

In a warning that prefaced the *Flushing National Bank* decision, Chief Judge Breitel stated for the majority that

> the ingenuity of man can devise at least a verbalistic escape from [constitutional] limitations . . . . But there must be a point, a determinable point, at which an otherwise plausible manipulation may and will be recognized and declared to be the doing indirectly of that which is forbidden to be done directly . . . .

In *Flushing National Bank*, Chief Judge Breitel, again writing the majority opinion, held that the state could not constitutionally allow a moratorium on repayment of a local government's faith and credit obligations. Because New

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125. Id. at 141, 347 N.E.2d at 587, 383 N.Y.S.2d at 227.

126. Id. at 140, 347 N.E.2d at 587, 383 N.Y.S.2d at 226. Although the state notes sold to fund the appropriation represented an extension of credit, the issuance and sale of these notes were separate transactions from the gift of the sale proceeds to the city. Moreover, such short-term borrowing in anticipation of revenues is permitted by article VII, section 9, of the state constitution.

127. Id. at 147, 347 N.E.2d at 591, 383 N.Y.S.2d at 230, relying on *People v. Westchester County Nat'l Bank*, 231 N.Y. 465, 474-75, 132 N.E. 241, 244 (1921).

128. 39 N.Y.2d at 149-51, 347 N.E.2d at 593-94, 383 N.Y.S.2d at 232-33

129. Id. at 151, 347 N.E.2d at 594, 383 N.Y.S.2d at 233. According to *State Prospectus*, supra note 7, at 5, "[t]he implication of [Wein v. State] appears to be that if a court were to hold that there was a tenable basis for the certificates . . . ., the Notes would be valid even if the ultimate result for the 1976-77 fiscal year is a deficit; if, on the other hand, a court were to hold that there was no tenable basis for such certificates, some or all of the 1976-77 Notes . . . . would be held to be invalid. In such event, the result is not certain but some or all of the principal of, and interest on, some or all of the 1976-77 Notes . . . . might be non-recoverable."


York's constitution requires that a municipality pledge its faith and credit for the repayment of debts,132 "the city is constitutionally obliged to pay and to use in good faith its revenue powers to produce funds to pay the principal of the notes when due."133 The majority held that the state cannot evade this requirement through the mechanism of a moratorium.134 Moreover, the fiscal emergency was held insufficient justification for the suspension of the faith and credit provision,135 although the fiscal situation did constrain the court from granting immediate injunctive relief.136

In summary, although early decisions by the New York courts showed a reluctance to approve revenue bond issues, they evinced a greater reluctance to upset legislative interpretations of constitutional provisions. Thus, the state gradually developed revenue bond financing devices, while the courts warned of their dangers. By 1935, the court was ready to accept a public authority—one that was self-supporting and performed a public purpose—as an essential part of society. The court later approved a succession of financing devices, each more sophisticated than the last, until 1976, when events created a renewed public and judicial awareness of the dangers of debt financing. Wein v. State and Flushing National Bank, while they deal with guaranteed bonds and notes, reflect this awareness. In these two decisions the New York Court of Appeals demonstrated its willingness to limit the use of new and more elaborate financing methods.

III. PROCESS OF JUDICIAL CONSTRUCTION AND LEGISLATIVE AMENDMENT IN MINORITY JURISDICTIONS

Despite the New York Court of Appeals' two recent rulings on the constitutionality of debt financing devices,137 it remains uncertain whether courts can provide an effective mechanism for restricting such practices in the future. In examining this question, it is instructive to review the experience of those jurisdictions in which courts have invalidated as unconstitutional certain forms of guaranteed and, especially, nonguaranteed debt financing.

Although the majority of jurisdictions have repeatedly approved such practices, the courts of several states have attempted to limit their use through narrow interpretations of constitutional debt limitations. Such decisions have been based chiefly on two grounds: (1) that the proposed arrangement creates a debt, liability or extension of credit, within the meaning of constitutional

132. N.Y. Const. art. VIII, § 2.
133. 40 N.Y.2d at 736, 358 N.E.2d at 852, 390 N.Y.S.2d at 26.
134. Id. at 732-33, 358 N.E.2d at 850, 390 N.Y.S.2d at 24. The court declined to reach the question of whether the moratorium violated the impairment of contracts clause of the U.S. Constitution, art. I, § 10. Id. at 740, 358 N.E.2d at 854, 390 N.Y.S.2d at 28. The impairment clause was held not to bar a mortgage moratorium enacted by Minnesota during the depression of the 1930's. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). See discussion of this clause in Flushing Nat'l Bank, 40 N.Y.2d at 749-57, 358 N.E.2d at 860-65, 390 N.Y.S.2d at 34-40 (Cooke, J., dissenting).
135. 40 N.Y.2d at 740-41, 358 N.E.2d at 855, 390 N.Y.S.2d at 29.
136. Id. at 741, 358 N.E.2d at 855, 390 N.Y.S.2d at 29.
137. See section II(C) supra.
proscriptions; or (2) that the arrangement primarily aids a private individual or enterprise, rather than the public.

Significantly, however, these decisions have been negated in most instances by a pattern of legislative redrafting or constitutional amendment which has eventually resulted in issuance of the bonds for the desired projects. Thus, the courts have succeeded only in slowing the implementation of financing devices, or in altering their character slightly—not in preventing their ultimate use.

A. Minority Interpretations of Debts, Liabilities and Credit

i. REVENUE BONDS

The great majority of jurisdictions have held that revenue bonds, payable solely from the revenues of a specified project or agency, and for which the state or municipality disclaims any legal obligation, do not create state or municipal debts, liabilities or loans of credit, within the meaning of constitutional prohibitions. A minority of states have held to the contrary.

In State ex rel. Saxbe v. Brand, the Ohio Supreme Court held that revenue bonds constituted gifts or loans of credit by the state to private borrowers. Although the revenue bonds did not create a state "debt," the court reasoned that the money raised through their sale was state money. Thus, loans of the funds constituted loans of the state's money and credit.

One year later, the state adopted a constitutional amendment permitting the use of revenue bonds to provide guaranteed loans to private borrowers for industrial development and pollution control. The court then upheld the validity of the amendment and of a statute passed under it.

The Nebraska Supreme Court, in State ex rel. Beck v. City of York, considered a law under which a municipality proposed to issue revenue bonds to finance the purchase of a slaughterhouse which would be leased back to a private company for a rental sufficient to service the debt. This arrangement was held invalid as a prohibited extension of credit to a private company.

138. See cases cited in McQuillin, supra note 1, § 43.34; Annot., 146 A.L.R. 328 (1943); 50 Wash. L. Rev. 440, 448 n.29 (1975).
139. 176 Ohio St. 44, 197 N.E.2d 328 (1964).
140. Id. at 46-48, 197 N.E.2d at 330-31, relying on dictionary definitions of "credit." Ohio Const. art. VIII, § 4 provides: "The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever . . . ."
141. 176 Ohio St. at 51-52, 197 N.E.2d at 333.
143. State ex rel. Burton v. Greater Portsmouth Growth Corp., 7 Ohio St. 2d 34, 218 N.E.2d 446 (1966). "This amendment has a single purpose, to allow the state and governmental subdivisions to give financial assistance to private industry . . . in order to create new employment within this state." Id. at 36-37, 218 N.E.2d at 449. See also State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 77-79, 330 N.E.2d 454, 460 (1974) ("Acts passed pursuant to Article VIII, Section 13, are specifically not subject to the requirements and limitations of other sections of Article VIII . . . .").
144. 164 Neb. 223, 82 N.W.2d 269 (1957).
The court reasoned that although liability on the bonds was limited to revenues from the facility, the fact that the municipal bonds provided an advantage to the company over private financing arrangements meant that the city's credit was being extended. The court reluctantly upheld the law as being, for the most part, within the scope of the amendment.

Idaho, formerly one of the most restrictive minority jurisdictions, has, through a process of constitutional amendment and judicial re-interpretation, changed its approach considerably since the often-cited case of Feil v. City of Coeur d'Alene. In Feil, the Idaho Supreme Court considered an agreement by the city of Coeur d'Alene to purchase a waterworks system from a private company in exchange for bonds that the company would then sell to investors. The city promised to service the debt out of a special fund maintained by revenues from its operation of the waterworks. The court held that the revenue bonds created a "liability" of the city, in violation of the Idaho constitution, through the city's pledge to operate the water system in such a manner as to provide the necessary revenue for servicing the debt.

In Chase v. County of Douglas, 195 Neb. 838, 850, 241 N.W.2d 334, 341 (1976), the court held that the 1960 amendment expressed the "full measure" of exceptions to the general constitutional debt prohibitions. It held that a law authorizing use of general municipal revenues (as opposed to proceeds from revenue bonds) to purchase property for industrial development was an invalid extension of credit to a private interest.

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146. 164 Neb. at 226-27, 82 N.W.2d at 271-72. Neb. Const. art. XIII, § 3, provides that "[t]he credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . ." The Beck court reasoned that a prohibition against the state would also apply to the state's political subdivisions. 164 Neb. at 225, 82 N.W.2d at 271. Thus, in many instances, distinctions between actions by a state and actions by a municipality are not relevant.

147. 164 Neb. at 226-27, 82 N.W.2d at 271-72. The court also found that the arrangement was for a private purpose, and only of incidental benefit to the community. Id. at 228-29, 82 N.W.2d at 272-73. See discussion of the public purpose doctrine in section III(B) infra.


150. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962). "While we may still feel the financing of private enterprises with public funds is foreign to the fundamental concept of our constitutional system, . . . the constitutional prohibition has been removed by amendment and it is now a part of our fundamental law." Id. at 206, 113 N.W.2d at 70.

However, in Chase v. County of Douglas, 195 Neb. 838, 850, 241 N.W.2d 334, 341 (1976), the court held that the 1960 amendment expressed the "full measure" of exceptions to the general constitutional debt prohibitions. It held that a law authorizing use of general municipal revenues (as opposed to proceeds from revenue bonds) to purchase property for industrial development was an invalid extension of credit to a private interest.

151. § 18-1621 was held unconstitutional in part on the ground that it did "not subject the project to taxation to the same extent as private property, as required by the amendment." 173 Neb. at 206, 113 N.W.2d at 70.

152. 23 Idaho 32, 129 P. 643 (1912).

153. Id. at 38, 129 P. at 645.

154. Id. at 58-59, 129 P. at 652. The Idaho Const. art. VIII, § 3, provides: "[n]o . . .
manner as to obtain sufficient funds for debt service. A later decision, however, upheld the constitutionality of a municipal redevelopment authority that had power to issue revenue bonds and to condemn land. The mechanism of a public authority was found sufficient to insulate the city from liability. Additionally, the court's interpretation of municipal liabilities has been narrowed by a series of constitutional amendments that permit municipalities to use revenue bonds for enumerated purposes.

In another line of decisions, the Idaho Supreme Court held in State Water Conservation Board v. Enking that a state authority's revenue bonds created a prohibited liability of the state. However, a 1964 constitutional amendment created a water resource agency with power to issue revenue bonds. Following the amendment, the court observed in Idaho Water Resource Board v. Kramer that "the precedential value of Enking has been totally eroded." Moreover, the court expressly overruled what remained of Enking's interpretation of a liability, holding that the water resource board's revenue bonds did not create "an obligation [the state] is bound in law or justice to perform."

A clear pattern emerges from the foregoing cases. Even in those jurisdictions where courts have strictly defined debt, liability or credit, legislatures have acted to protect their development plans by proposing constitutional amendments. Nonguaranteed bonds appear to have become such an essential part of modern public finance that states are unwilling to be deterred from using such devices by adverse court decisions. Since Robertson v. Zimmermann upheld the device, the question whether revenue bonds create impermissible debts, liabilities or extensions of credit appears well settled in New York. However, the pattern described above has significance in relation to certain unanswered questions in the state, such as the legality of moral obligation bond legislation.

subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, . . . without the assent of two-thirds of the qualified electors . . . ."

155. 23 Idaho at 52-53, 129 P. at 650.
157. Id. at 884, 499 P.2d at 583.
160. "Though disclaiming state liability, it is clearly the intention of the act to place the credit of the state, morally and in some degree financially, back of this enterprise . . . ." 56 Idaho at 734, 58 P.2d at 783-84 (emphasis omitted).
163. Id. at —, 548 P.2d at 58.
164. Id. at —, 548 P.2d at 55.
165. Id. at —, 548 P.2d at 56.
167. See section III(A)(ii) infra.
ii. Moral Obligation Bonds

It is unclear whether the "makeup" clause in moral obligation bonds imposes any greater obligation on the state, in event of default by the issuing agency, than the "moral obligation" imposed by any other nonguaranteed bond. 168 Most of the jurisdictions which have considered the question have held that the makeup clause creates neither a debt nor an obligation of the state, but is "intended only to express to succeeding legislatures an expectation and aspiration that the project might be found worthy of financial assistance, if later needed." 169

In Gibson v. Smith, 170 however, an intermediate Oregon court held that the language of the makeup clause in a housing finance act was an attempt to create, indirectly, a state debt, in violation of the state constitution. 171 After the ruling, the legislature amended the act to change the clause's language from "[t]he amount so certified ... shall be appropriated by the Legislative Assembly," 172 to "[t]he amount so certified ... may be appropriated by the Legislative Assembly." 173 The Supreme Court of Oregon upheld the legislation, as amended. 174 It ruled that the clause did not create a legal obligation and that the constitution did not prohibit moral obligations. 175

In Casey v. South Carolina State Housing Authority, 176 a form of makeup clause that created a guaranty fund in a mortgage loan act was held by the Supreme Court of South Carolina to pledge the state's "credit to make good any deficit arising because of default . . . ." 177 The majority stated that although

168. See Griffith, "Moral Obligation" Bonds: Illusion or Security? 8 Urban Law. 54, 62-66 (1976). Indeed, it was the UDC's default on short-term notes that did not contain a makeup clause which resulted in the New York legislature's appropriation of $90 million for the agency, and which triggered the crisis of disillusionment over moral obligation bonds. Id. at 66. See note 3 supra and accompanying text.
171. Id. at 727-28. Law of July 1, 1973, ch. 828, § 27(5), [1973] Ore. Laws 2460 provided: "[i]f the amount of money on deposit in the capital reserve account in any year is less than the debt service reserves [needed], the administrator shall certify to the Governor the amount of such deficiency . . . . [T]he Governor shall include in his next budget request to the Legislative Assembly the amount certified . . . . The amount so certified . . . . shall be appropriated by the Legislative Assembly . . . ."
172. Ore. Const. art. XI, § 7, provides that the legislature shall not lend the state's credit, nor create state debts or liabilities of more than $50,000.
173. See note 171 supra (emphasis added).
175. Id. at 404, 537 P.2d at 545. However, the court declined to indicate whether the result would have been the same had the statutory language not been changed. Id. at 404-05, 537 P.2d at 545.
177. Id. at 313, 215 S.E.2d at 187. This clause differed from the typical clause in that it provided that the state treasurer had a "mandatory and obligatory and enforceable" duty to cover deficits by use of the guaranty fund; however, there was no legal obligation on the legislature to make appropriations into the fund. Id. at 311-13, 215 S.E.2d at 186-87.
future legislatures had no legal obligation to appropriate money into the guaranty fund, there would be a "compelling desire" to protect the state's credit by covering any deficit that might arise.\textsuperscript{178} In this instance, the legislature neither amended the constitution to permit use of a makeup clause, nor redrafted the legislation to retain the substance of the clause in a more acceptable form. Instead, the act was amended to eliminate the Guaranty Fund entirely.\textsuperscript{179}

In New York, there is a paucity of rulings on the makeup clause. \textit{Matter of Smith v. Levitt}\textsuperscript{180} and \textit{Wein v. City of New York}\textsuperscript{181} both held that the express disclaimer of liability in moral obligation legislation was sufficient to put the debt outside constitutional prohibitions. Although neither case devoted extended analysis to the network of the obligations created by the clause, \textit{Wein v. City of New York} held that appropriations under the clause were permissible gifts.\textsuperscript{182} \textit{Matter of Smith}, however, noted that UDC bonds "might be classified as contingent liabilities on the part of the State . . . ."\textsuperscript{183} Neither case, however, represented a direct challenge to the state on the nature of moral obligation legislation. Since the two decisions, \textit{Boryszewski v. Brydges}\textsuperscript{184} has created a basis for taxpayer standing for such a challenge, and it is possible that one will soon be forthcoming.

**B. The Public Purpose Doctrine**

Municipal bonds issued to aid industrial development or to build water pollution control facilities for private industry are valid only if issued for a "public purpose." Use of a government's taxing power for a purely private purpose has long been held a violation of due process\textsuperscript{185} and of state constitutional debt limitations.\textsuperscript{186} However, the distinction between private and public purposes has never been clearly delineated.\textsuperscript{187}

A majority of jurisdictions have held that projects which aid the local economy, increase employment, redevelop blighted neighborhoods or reduce pollution are for valid public purposes, regardless of any incidental benefits that

\begin{itemize}
\item 178. Id. at 313, 215 S.E.2d at 188.
\item 182. Id. at 618-19, 331 N.E.2d at 518-19, 370 N.Y.S.2d at 556-57.
\item 183. 37 App. Div. 2d at 421, 326 N.Y.S.2d at 338.
\item 185. Jones v. City of Portland, 245 U.S. 217 (1917).
\item 186. E.g., Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874); Sharpless v. Mayor of Phila., 21 Pa. (9 Harris) 147 (1853).
\end{itemize}
may accrue to private industry. Some states, however, have invalidated use of the government’s taxing power, or power of eminent domain, for similar projects, on the ground that they are of direct benefit to private interests and of only incidental benefit to the public. The typical legislative response has been the proposal of constitutional amendments which allow use of bonds for specific purposes. The courts appear to have construed such amendments as narrowly as possible, upholding only those financing devices expressly permitted, and adhering in all other situations to their prior interpretations of the intent of the constitutional debt prohibitions.

The North Carolina Supreme Court, in *Mitchell v. North Carolina Industrial Development Financing Authority*, scrutinized a public authority which had been given the power to purchase industrial sites with proceeds from tax-exempt revenue bonds, and to lease those sites back to private industry. The majority found that the practical effect of the legislation was to enable the authority to exercise the power of eminent domain to benefit private industry. The court therefore held the scheme violative of the public purpose requirement of the state constitution. In 1971, the state legislature passed a similar bond act for pollution control.


189. E.g., Nebraska, North Carolina and Washington. See notes 192-209 infra and accompanying text and note 147 supra.

190. See notes 192-209 infra and accompanying text.

191. Id.


194. 273 N.C. at 159, 159 S.E.2d at 760.

195. Id. at 159, 159 S.E.2d at 761. The constitution provided: "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1).

The North Carolina court, however, has been liberal in other respects. For example, it held that moral obligation bond legislation to finance low-income housing was for a public purpose and did not pledge the credit of the state. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

The statute expressly provided that "[n]o Authority shall have any right or power to acquire any property through the exercise of eminent domain." The court found this exercise in draftsmanship unsatisfactory. If such financing arrangements were found to be for a valid public purpose, the court reasoned, subsequent legislatures would be free to repeal the clause prohibiting exercise of eminent domain, and to allow local authorities to take private property for what would then be considered public purposes. In 1975, the legislature approved the same legislation again, this time accompanied by a proposed constitutional amendment that would authorize local authorities to issue revenue bonds for industrial development and pollution control projects. The amendment, which also provided that the power of eminent domain could not be exercised, was approved by voters in a 1976 election. How the court will construe the amendment remains to be seen.

Similarly, the Washington Supreme Court held that the use of eminent domain powers by a port district to take private lands for an industrial development project was an unconstitutional use of those powers for a private purpose. In a second decision, the court held that expenditures of public money by port districts for "promotional hosting" of shippers and other potential port users was an unconstitutional municipal "gift" to private individuals.

In response to these decisions, a constitutional amendment was approved in 1966, which provided: "The use of public funds by port districts . . . for industrial development or trade promotion and promotional hosting shall be deemed a public use for a public purpose, and shall not be deemed a gift . . . ." The Washington court construed this amendment strictly, holding that it permitted only those uses expressly described by the amendment. A lease-financing arrangement, whereby two port districts agreed to use bond proceeds to buy and lease-back pollution control facilities to private corpora-
tions for rentals sufficient to service the debt on the bonds, was held a loan of money\textsuperscript{208} that was "not . . . within the scope" of the constitutional amendment.\textsuperscript{209}

In New York, although the public purpose doctrine received consideration in some early cases,\textsuperscript{210} it has drawn scant attention since the advent of modern industrial development financing techniques. A few cases have considered the question as it relates to functions of non-profit public corporations,\textsuperscript{211} but not in situations where private businesses would receive substantial benefits. The major reason for the dearth of rulings on this issue is probably that most of New York's bond legislation has not directly benefited private industry, except to the extent that authority building projects provide lucrative contracts for private construction firms. However, New York has several laws similar to the industrial development legislation in other states. Chief among these statutes is the Job Development Authority Act.\textsuperscript{212} The legislation was passed pursuant to a constitutional amendment that permits the state, through a public corporation, to "mak[e] loans to non-profit corporations to finance [industrial development], including the acquisition of real property therefor . . . to improve employment opportunities in any area of the state . . . ."\textsuperscript{213} However, there has been no court test to determine whether the actual operations of the authority\textsuperscript{214} conform to the enabling language of the amendment or whether they would violate the public purpose requirements of other constitutional provisions.

\textbf{IV. Conclusion}

Constitutional provisions limiting state and municipal debt have not had their intended effect. They were enacted in response to severe economic pressures experienced by states in the 19th century as a result of the heavy debt burden incurred to help finance canal and railroad expansion. Despite the intent of these constitutional provisions, states continued to favor bonded indebtedness as a means of public works financing and began to develop nonguaranteed financing devices to circumvent black-letter limitations.\textsuperscript{215} Although the devices grew

\textsuperscript{208} 85 Wash. 2d at 219-22, 527 P.2d at 264-66. The court distinguished these arrangements from "true lease agreement[s]." Id. at 223, 527 P.2d at 266-67.

\textsuperscript{209} Id. at 233, 533 P.2d at 130.


\textsuperscript{211} E.g., Comeresski v. City of Elmira, 308 N.Y. 248, 254, 125 N.E.2d 241, 244 (1955); Robertson v. Zimmermann, 268 N.Y. 52, 64-65, 196 N.E. 740, 745 (1935). See notes 84-94 supra and accompanying text.


\textsuperscript{213} N.Y. Const. art. VII, § 8(3).

\textsuperscript{214} Typically, the authority uses proceeds from bond sales to finance second mortgages to private companies that are building new facilities. Unlike such arrangements in many other states, the bonds are guaranteed by New York State.

\textsuperscript{215} As one commentator observed: "Debt limitations were adopted as a result of experience; in principle they are not so 'archaic' as the financial methods which brought them into being.
increasingly elaborate, they were consistently upheld by courts in a majority of jurisdictions, including New York.

At the present time, there are no effective legal restraints to prevent a recurrence of this pattern in New York. The seriousness of the state's recent financial crisis will probably instill fiscal caution in the New York legislature for some time to come. Already, new legislation has been passed which places limits on future authority indebtedness; other measures may follow. But given the ease with which existing constitutional limitations can be circumvented, the advantages of tax-exempt nonguaranteed financing, and the present lack of alternative methods of finance that would provide equivalent advantages, a return by the state to previous financing practices remains a distinct possibility.

Furthermore, the tone of recent New York decisions, and the possibility of further adverse holdings, may not be as significant as the legal and political communities now believe. The experiences of minority jurisdictions where the courts have struck down certain debt financing practices suggest that state courts can have only a minimal effect in retarding or limiting the use of these devices. Legislatures have regarded debt financing as an essential means of achieving growth and development within the state. Where court decisions in some jurisdictions held legislation unconstitutional, the desired financing was achieved through either legislative redrafting or constitutional amendments which carved out specific exceptions to the general prohibitions. The process of constitutional amendment, as a reflection of the people's will, is preferable to mere legislative redrafting designed to side-step a particular judicial decision. Nevertheless, in view of the inadequate restrictions currently imposed on nonguaranteed financing mechanisms, it is unlikely that public debate can fully apprise the people of the ultimate debt burden such an amendment could create for themselves and future generations.

What appears to be needed is extensive reform of existing constitutional provisions. Ideally, debt limitations should allow the state to secure necessary financing quickly and flexibly, but would admit of strict enforcement, to ensure prudent debt management. Additionally, the provisions should allow the public a far greater measure of control over state indebtedness.

It is submitted that the following constitutional revisions would be most effective in achieving the above goals: (1) repeal of the referendum requirement for issuance of general obligation debts, to be replaced by a requirement of a two-thirds vote of the legislature; (2) enactment of a requirement that the state pledge its faith and credit for the repayment of all debts of the state and of its public corporations; and (3) enactment of a ceiling on total state indebtedness.
fixed at a percentage of either the market value of all taxable real property in the
state, or the total tax revenues received by the state.\textsuperscript{220} Existing limitations on
local indebtedness should be retained in their present form.

Such measures would result in an end to the use of nonguaranteed debt and the
added interest costs it entails. Public authorities could be retained for their
original purpose of administrative convenience; but the political reality implicit
in authority debts—the state's ultimate liability in event of default—would be
legally recognized. Repeal of the referendum requirement would allow the
legislature the speed and flexibility necessary for public works financing.
Moreover, these proposals could be strictly enforced by the courts, with little
detriment to public financing programs.

Perhaps the greatest significance of these proposed revisions is that they would
provide the state legislature with full knowledge and control of total state
liabilities; this would, in turn, give the public greater influence over political
decisions involving further state debt increases. Debt statistics would no longer
be fragmented into such categories as guaranteed debts, authority debts and
moral obligation debts. Instead, there would be two easily ascertainable
amounts: total state debts and total local debts. It is submitted that such a clear
accounting system, in addition to direct legislative responsibility for all debts,
would result in an increase in public influence over state and local financing
policies. A well-informed public that is able to communicate its concerns to
elected representatives at the state and local levels would provide a better
safeguard against fiscal mismanagement than is now provided by the archaic,
easily-evaded referendum requirement.

Government officials and commentators have recommended similar, though
often less drastic, reforms.\textsuperscript{221} It is not within the scope of this Comment to
analyze their proposals. Nonetheless, it is submitted that unless radical changes
are made in methods of debt financing, New York may well be destined to repeat
the patterns of the past.

\textit{Michael D. Utevsky}

\textsuperscript{220} This debt ceiling would also follow the pattern of limits on local debts. Id. § 4.

\textsuperscript{221} See, e.g., Proposed N.Y. Const. arts. X-XII, in 12 Proceedings of the Constitutional
Convention of the State of New York 26-46 (1967); Moreland Commission Report, supra note 3,
at 56-61; Bowmar, The Anchronism Called Debt Limitation, 52 Iowa L. Rev. 863, 896-900
(1967); Hollman & Primeaux, An Examination of Debt Ceilings as Barriers to Efficient Debt