

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ALBANY

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LEE BORDELEAU, et al.,

*Plaintiffs,*

**PLAINTIFFS’  
MEMORANDUM  
OF LAW**

Index No. 6582-08

**-against-**

The STATE OF NEW YORK, et al.,

*Defendants.*

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**I. THE CONSTITUTION BANS CASH GRANTS TO PRIVATE FIRMS  
FOR ECONOMIC DEVELOPMENT.**

Prior to 1846, the State of New York provided large loans and grants to private business allegedly for economic development. When many of these projects failed, state taxpayers were left with a fiscally unstable state government and much higher taxes to pay off loan guarantees. To remedy this problem, the state constitution was amended in 1846 to ban loans to private firms. The voters approved the amendment, 221,528 to 92,436.

In 1874, the provision was expanded to include a ban on giving the money of the state to private firms. That provision, with slight modifications over the years, became what is now Article VII, § 8, paragraph 1 which states:

“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state

be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational, mental health or mental retardation purposes.”

Paragraphs 1, 2 and 3 of § 8 set forth various exceptions to the general rule banning gifts of state funds to private organizations. None of those exceptions authorizes the gift of state funds for “economic development,” whether those gifts are made directly by the state or through intermediaries.

In 1967, a Constitutional Convention whose delegates included eminent legal scholars recommended approval of a new constitution with this substantial revision of the above provision:

“The state . . . may grant to any person, association or private corporation in any year or periodically by contract, or loan its money for economic and community development purposes. . . the legislature may enact general or special laws for economic and community development purposes. Proposed Constitution, Article X, §12(b), (c).<sup>1</sup>

*The voters defeated the proposed constitution 3,487,513 to 1,327,999.* In the years that have passed, state officials have acted as though the 1967 amendment had become law. For some time, it has been the practice of the State to openly, notoriously and proudly give away state funds for “economic development” and other unauthorized purposes such as promotion of agriculture.

Surely, if this practice is so widespread and longstanding, it must be legal. To such an argument, the late Judge Matthew Jasen replied: “The very magnitude of the illegality cannot serve as its shield.”<sup>2</sup> It should not be a surprise that challenges to this practice have been extremely rare. The research for this lawsuit took much of four months. There are few attorneys

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<sup>1</sup> Proceedings of the Constitutional Convention (1967), Vol. XI, p. 36.

<sup>2</sup> *Wein v. State of New York*, 39 NY2d 136, 159 (1976).

with expertise in litigation willing to spend that much time preparing a case, or clients willing to pay them, and even fewer attorneys willing to sue virtually the entire state government.

We can find no reported appellate case that squarely holds that such cash grants pass constitutional muster. There is one trial level case that holds that grants to non-profit corporations are permissible. *Schulz v. State*, 160 Misc. 2d 741 (Sup. Ct. Albany Co. 1994). For reasons specified below, we strongly disagree with that case and of course it is not binding on this Court.

In the absence of clear appellate authority interpreting Article VII, § 8, paragraph 1, its clear and plain language and clear and plain legislative history should be dispositive here. A report to the State Constitutional Convention of 1938, stated that the period—

“from 1816 to 1846 . . . involved very extensive and highly speculative subsidizing by the State which eventually caused highly speculative embarrassment to the State and was responsible for the incorporation in the State Constitution eventually of strict prohibitions against the lending of State credit and giving of State money to private enterprise. . . .”<sup>3</sup>

In his *Constitutional History of New York*, Charles Z. Lincoln writes about the Convention of 1846:

“. . . the state had already gone too far in its policy of granting aid to private enterprise. It was now clear that the state, as a political agent, organized for purposes of government, should not engage in private business, nor assume the financial responsibility of corporations by affording them aid from the public treasury. . . .”<sup>4</sup>

A Constitutional Commission report published in 1873 stated:

“There is another ground of objection to this mode of distribution, in this, that the moneys are given to private corporations not owned or controlled by the State, which cannot superintend the expenditure of the money, or even control it, so far as to compel its use for the purposes for which it was appropriated. \* \* \* *the*

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<sup>3</sup> “Problems Relating to Taxation and Finance,” New York State Constitutional Convention Committee (1938), Volume X, page 107.

<sup>4</sup> Volume II, page 179 (1906).

*amendment proposed by the Commission cuts off all gifts of money and all loaning of the credit of the State to all other associations, corporations, etc., but they are all subject to the same objection, and appropriations to them of the money of the State are liable to the same abuses. They must all stand or fall together.”* Journal of the Constitutional Commission, P. 452 (1873) (emphasis added).

The historical underpinnings of the ban on aid to private firms are clear, unambiguous and readily acknowledged by the Court of Appeals. *Wein v. State*, 39 NY2d 136, 142-143 (1976). In *People v. Westchester County Bank*, 231 NY 465, 483 (1921), Judge Cardozo (dissenting) stated:

“the purpose of the prohibition is revealed in its history (2 Lincoln, Constitutional History of New York, p. 87). The purpose was to put an end to the use of the credit of the state in fostering the growth of private enterprise and business.”

So, we have the plain language of the Constitution and the undisputed historical background that the State had gotten into severe financial problems by subsidizing private firms.

In this context, it is critical to point out the first rule of interpretation. *When the language is neither vague nor ambiguous, there is nothing to interpret.* There is simply the matter of applying the law to the facts. See, *Anderson v. Regan*, 53 NY2d 356, 361-2 (1981).

Nevertheless, an examination of the few Court of Appeals cases that deal with these clauses provides no cause for straying from their straight-forward application.

In *Alfred E. Smith v. Smythe*, 197 NY 457 (1910), the Court of Appeals held that a village may not spend public funds for the benefit of a privately-owned section of the village. The village was creative in proffering rationales for this expense. The court responded by drawing a critical distinction between the “public interest” and “governmental purpose”:

“Undoubtedly the well being and prosperity of every individual member of the community is of interest to the whole community, for the community is but the aggregation of its individual members. But the political corporation that represents the community, such as a city or village, represents only the corporate and governmental aspect of the community. . . . There is . . . a clear distinction

between what may be called ‘public interests’ in the broadest sense of that term and the corporate interest of the municipality, and it is a corporate or governmental purpose alone . . . which is a city or public purpose within the meaning of the Constitution.” *Id.* at 463.

The Court then aptly applied this distinction in striking down the program as a subsidy to some taxpayers at the expense of others:

“A village purpose within the meaning of the Constitution must be for a public use; that is, *it must be for the benefit and advantage of all of the public and in which all have a right to share.* . . . The effect of the statute is to transfer this burden, which rested on the corporation or individuals, to the village and authorized an expenditure of village money to discharge the same. This is a gift of village money in aid of private purposes.” (emphasis added)

Similarly, when the state taxes us to give grants to a small number of companies (based on rather murky and unspecified criteria), this represents a net transfer of wealth from the many to the few. To add insult to constitutional injury, it represents a transfer of state funds from the poor, the working class, the middle class, and from unsubsidized wealthy persons to arbitrarily selected wealthy persons and firms. This is precisely the type of corrupt and economically senseless subsidy banned by the plain language of the Constitution.

In *People v. Westchester County Bank*, 231 NY 465 (1921), the Court of Appeals struck down the issuance of \$45,000,000 in bonds for the benefit of soldiers and sailors from World War I. In his trenchant and frankly, brilliant opinion, Judge Andrews wrote about the ban on gifts to private entities:

“They . . . represent the triumph of efforts to prevent improvidence, to make useless any pressure from special interests, to safeguard the credit of the state, and the interests of the people as a whole. *They are not to be brushed aside. They are to be fairly construed to obtain the object for which they were intended.* As in 1846 so to-day, economy, public and private, is one of our pressing needs. Upon it depends the prosperity of the state and its inhabitants. The crushing load of taxation—national, state and municipal—now as then threatens our future--the future of him who pays no direct taxes as well as the future of him who does. . . . Conscious of . . . human weakness, to guard against public bankruptcy the people

thought it wise to limit the legislative power. *The courts must see to it that their intentions are not frustrated or evaded.*” *Id.* at 474-475.

Judge Andrews went on to say that the Constitution “is not be amended informally,” by judicial fiat. *Id.* at 475. Then, he made a point that goes to the heart of this lawsuit:

“Whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the state’s credit. Such a purpose may not be served in one particular way. *However, important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of credit to an individual or to a corporation. . . . To do so would make meaningless the provision adopted by the convention of 1846.* Gifts of credit to railroads served an important public purpose. That purpose was distinctly before the legislatures that made them. Yet they were still gifts and so were prohibited.” *Id.* at 475 (emphasis added).

Judge Andrews’ assertion that a public purpose will not justify a clearly prohibited gift to a private firm is not at all contradicted by *Murphy v. Erie County*, 28 NY2d 80 (1971). That case upheld a lease of a domed stadium against a claim that the lease was in illegal gift. The lease called for rental payments of as much as 63.75 million dollars over forty years and of course imposed on the firm the obligation of managing a large and complex facility for the duration of the lease. *Murphy* stands for the proposition that a county may lease land so long as there is a public purpose. It does *not* stand for the proposition that a county may give its money to a private firm so long as it is for a public purpose. So holding would render the clause meaningless. A lease is not a gift is the point of *Murphy*.

Thus, that cash grants to private business are banned is clear from the text of the constitution, its history and case law from the state’s highest court.

## **II. THE STATE BUDGET VIOLATES THE CONSTITUTION BY FAILING TO SPECIFY THE SUM APPROPRIATED AND THE PURPOSE OF THE APPROPRIATION.**

It is bad enough that the State and its various agencies illegally distribute cash grants to favored corporations and thereby worsen the economic health of both the state and its taxpayers. However, this error is compounded by the disregard of yet another constitutional mandate. Article VII, § 7 of the constitution requires that funds paid out of the state treasury be limited to those authorized by “appropriation by law” that “distinctly specif[ies] the sum appropriated, and the object or purpose to which it is to be applied. . . .” However, at numerous places in the state budget, often where illegal cash grants are made, language is used to the effect that the money appropriated will be spent according to some future agreement by the Governor, Speaker and Majority Leader or other officials. Such provisions not only violate the Constitution but also promote secrecy, concentrate enormous financial power into the hands of a few, and reduce public accountability for appropriations such as cash grants for wealthy corporations.

This language appears, for example, at page 751 of the Transportation, Economic Development and Environmental Conservation Budget:<sup>5</sup>

“The funds made available through this appropriation shall be utilized for the payment of the costs of eligible projects in accordance with a memorandum of understanding entered into between the governor, the majority leader of the senate and the speaker of the assembly, or their designees.”

The same or similar language appears over twenty times in that volume of the budget alone (pp. 234, 235, 745, 765-768, 770-71, 777, 798, 803-4, 806, 823, 831, 839, 841 (3), 842-844, and 846). In certain places in the budget where such language is used, the Majority Leader is replaced by the Temporary President of the Senate.

All such provisions violate Article VII, § 7 and improperly delegate legislative power away from the Senate and Assembly.

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<sup>5</sup> S. 6805—D; A. 9805—D.

Complaints about state politics being dominated by “Three Men in a Room,” the Governor, Speaker and Majority Leader, are legion. What makes this corrupt regime possible is the flagrant disregard of the Constitution, both in appropriating grants to favored corporations and in allowing those three officials to secretly choose the recipients of the illegal largesse. As pointed out in the complaint, many recipients of grants return the favor by making campaign contributions to influential legislators. This further increases their power over the rank and file legislators who need this money at election time.

As with Point I, this issue involves application of the plain language of the Constitution in an area of law where little if any relevant case law exists. We cannot find case law applying Article VII, § 7 to the kind of language used in this year’s budget. What case law that does exist illuminates the background and purpose of this clause, buttressing our present claim. In *Anderson v. Regan*, 53 NY2d 356, 363-4 (1981), the court wrote:

Initially adopted in 1846. . . the appropriations rule was part of an effort to stabilize the management of the State and to superimpose a measure of legislative control over the then unbridled power of the executive branch to spend. . . The prohibition against the expenditure of funds in the treasury without specific legislative appropriation . . . would, it was hoped, ‘compel every new Legislature to see what money went for *this*, and for *that* object, and the people, by reading the statutes, could then get some idea of how the money went, where it went, and how much was paid annually to carry on the government.’ \* \* \* The absence of accountability in this sector of government is, manifestly, an unacceptable state of affairs in light of the framers’ intention that *all* of the expenditures of government be subjected to legislative scrutiny.” (emphasis in original, citation omitted)

In *Saratoga Harness racing Association, Inc. v. Agriculture and New York State Horse Breeding Development Fund*, 22 NY2d 119, 124 (1968), the court stated:

“The history of section 7 of article VII indicates that it was motivated by a concern that, absent legislative control over expenditures, it was possible for the State to incur obligations in excess of its actual income and thus ‘leave burthens for the future, and severe taxation or repudiation, the meanest of all things.’” (citation omitted).

As with the violation of the rule against cash grants to private business, the violation of the appropriation clause has led to the very same evils it was designed to prevent: severe taxation, lack of accountability and the diminution of the role of the legislature as a whole, replaced as it has been, in effect, by three men in a room.

## **CONCLUSION**

By ignoring clear constitutional mandates, state officials have dragged New York State back to the dire circumstances of the mid-1840's when the unwise practice of subsidizing private firms threatened the State's solvency and economy.

This Court has the authority under the New York State Constitution, CPLR 3001 and State Finance Law § 123-b to grant an injunction against the defendants to bar them from distributing or receiving state funds in violation of the New York State Constitution, and to issue an appropriate declaration of the rights of the parties.

So doing will not only revive the State Constitution but will be an important first step to curing what ails New York State: excessive spending and taxation, domination of the state government by special interest groups, political corruption, economic stagnation, and widespread public cynicism and despair.

The Court should grant the following relief:

1. an order and permanent injunction barring the state defendants from giving state funds to the private defendants or any other private corporation or undertaking similarly situated;

2. an order directing the return of funds previously transferred to private defendants pursuant to the current state budget or pursuant to action of any public respondent in violation of the state constitution, together with interest;
3. a declaration that it is illegal for any state defendant to transfer state monies to private corporations or firms unless explicitly authorized by one of the three exceptions specified in Article VII;
4. an injunction against any spending resulting from the improper delegation of the legislative power of appropriation to other officials;
5. an injunction against any spending in violation of Article VII, § 7;
6. costs, disbursements and reasonable attorney's fees; and,
7. for such further relief as to the Court may seem just and proper.

Dated: Buffalo, New York  
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