

To be argued by: James Ostrowski

Time requested: 20 minutes

Albany County Index No. 6582/08
Appellate Division, Third Department Docket No. 508604

COURT OF APPEALS
of the
STATE OF NEW YORK

Lee Bordeleau, et al.,

Plaintiffs-Respondents,

-against-

State of New York, et al.,

Defendants-Appellants.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
CITATIONS	i
QUESTIONS PRESENTED	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS	3
ARGUMENT	9
I. THE CONSTITUTION BANS CASH GRANTS TO PRIVATE FIRMS FOR ECONOMIC DEVELOPMENT.	9
II. THERE IS NO CONVENTION CENTER EXCEPTION TO THE BAN ON SUBSIDIES.	25
III. THE STATE CANNOT AVOID THE BAN ON CASH GRANTS TO PRIVATE FIRMS BY LAUNDERING THE MONEY THROUGH A PUBLIC CORPORATION.	27
IV. A PROMISE TO ENGAGE IN ECONOMIC DEVELOPMENT IS NOT ADEQUATE CONSIDERATION FOR A CASH GRANT.	29
V. THE DEFENDANTS FAILED TO DEMONSTRATE THAT CASH GRANTS TO PRIVATE FIRMS SERVE A PUBLIC PURPOSE.	36
VI. THE PLAINTIFFS HAVE OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY.	36
VII. THERE IS AN ISSUE OF FACT WHETHER CASH GRANTS TO PRIVATE FIRMS SERVE A PUBLIC PURPOSE.	37
VIII. THE PLAINTIFFS HAVE STANDING.	37
IX. THE COMPLAINT CONTAINS SUFFICIENT DETAIL TO ALLOW THE DEFENDANTS TO PREPARE A DEFENSE.	39
CONCLUSION	40

CORPORATE DISCLOSURE STATEMENT

Plaintiff Cohocton Wind Watch, LTD., also does business as Citizen Power Alliance and has no other parents, subsidiaries and affiliates.

CITATIONS

NEW YORK CONSTITUTION

Article VIII, § 10.	4
Article VII, § 8	4, 9, 27, 29, 33
Proposed Constitution of 1967, Article X, §12(b).	28
Article 1, § 7, (a).	23
Article X, §12(b).	17, 23
Article VII(2-4, 7).	28

UNITED STATES CONSTITUTION

U. S. Constitution, 5th and 14th Amendments	23
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CASES

<i>Admiral Realty Company v. City of New York</i> , 206 NY 110 (1912)	34
<i>Alfred E. Smith v. Smythe</i> , 197 NY 457 (1910)	11
<i>Comerski v. City of Elmira</i> , 308 NY 248, 252 (1955)	28
<i>Denihan Enterprises, Inc. v. O'Dwyer</i> , 302 NY 451 (1951)	37
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).	22

<i>Froslid v. Hults</i> , 20 AD2d 498 (2 nd Dept. 1964).	26
<i>Grace v. University Construction Fund</i> , 44 NY2d 84 (1978).	28
<i>Kradjian v. City of Binghamton</i> , 104 AD2d 16 (3rd Dept. 1984)	24
<i>La Barbera v. Town of Woodstock</i> , 29 AD3d 1054 (3 rd Dept. 2006)	34
<i>Matter of Arbitration Between Central High School Dist. 3 and Board of Education</i> , 34 AD2d 351 (2 nd Dept. 1970).	26
<i>Matter of Schulz v. State of New York</i> , 86 NY2d 225 (1995)	25
<i>Murphy v. Erie County</i> , 28 NY2d 80 (1971).	14-15, 34
<i>NYS Urban Development Corporation v. Vanderlex</i> , 98 Misc. 2d 264, (Sup Ct NY Co. 1979)	15, 22
<i>Palmateer v. Greene Co. Industrial Dev. Agency</i> , 38 AD 1087 (3 rd Dept. 2007)	15
<i>People v. Ohrenstein</i> , 77 N.Y.2d 38 (1990)	15
<i>People v. Westchester County Bank</i> , 231 NY 465 (1921)	11-13, 17, 23, 27, 29, 31
<i>Schulz v. McCall</i> , 86 NY2d 225 (1995)	29
<i>Schulz v. Pataki</i> , 272 AD2d 758 (3 rd Dept. 2000)	15, 28
<i>Schulz v. State</i> , 84 NY2d 231 (1994)	18, 28
<i>Schulz v. Warren County Board of Supervisors</i> , 179 AD2d 118 (1992)	15
<i>Smith v. Levitt</i> , 30 NY2d 934 (1972)	28
<i>Tribeca Community Association v. New York State Urban Development Corp.</i> , 200 AD2d 536 (1 st Dept. 1994).	15
<i>Tri-County Taxpayers Association, Inc. v. Town of Bolton</i> , 165 AD2d 451 (3rd Dept. 1991)	24

<i>Turken v. Gordon</i> , 224 P 3d 158 (2010)	33
<i>Van Curler Development Corp. v. City of Schenectady</i> , 59 Misc2d 621 (Sup. Ct. Schenectady Co. 1969)	33
<i>Waldo's v. Village of Johnson City</i> , 74 NY 2d 718 (1989).	22
<i>Wein v. State</i> , 39 NY2d 136 (1976)	10-11, 27-29
<i>Yonkers Community Dev. Agency v. Morris</i> , 37 NY 2d 478 (1975)	22

TREATISES, PROCEEDINGS, ARTICLES, REPORTS

“Problems Relating to Taxation and Finance,” New York State Constitutional Convention of the State of New York (1867-68), Volume III	19-21
<i>Constitutional History of New York</i> , Charles Z. Lincoln Volume II	10, 16
Report of the Committee on Health, Housing and Human Services, Smith M. Weed, Constitutional Convention of the State of New York (1867-68)	21
W. C. Brown, Constitutional Convention of the State of New York (1867-68), Volume III	30-31
W. Quirk and L. Wein, “A Short Constitutional History of Entities Commonly Known as Authorities,” <i>56 Cornell L. Rev.</i> 521 (1971).	35
Constitutional Convention Committee (1938), Volume X	10, 29, 31
Doc. No. 35, p. 5.	9
Journal of the Constitutional Commission, P. 452 (1873)	10-11, 30

OPINIONS OF THE COMPTROLLER

Opinion of the State Comptroller No. 76-18 (1976)	24
Opinion of the State Comptroller No. 88-79 (1988).	24

QUESTIONS PRESENTED

1. Does the Constitution ban cash grants to private firms for economic development?

Proposed answer: Yes.

2. Can the state avoid the ban on cash grants to private firms by laundering the money through a public corporation?

Proposed answer: No.

3. Is a promise to engage in economic development adequate consideration for a cash grant?

Proposed answer: No.

PROCEDURAL HISTORY

The plaintiffs filed a verified complaint in Supreme Court, Albany County, on August 4, 2008. [25 (All citations are to the record on appeal unless otherwise noted.)]

The defendants filed motions to dismiss on or about September 29, 2008. [47 et seq.] Justice Michael C. Lynch dismissed the complaint on February 27, 2009. [13] The plaintiffs filed a notice of appeal to the Court of Appeals on April 6, 2009. [5] On June 30, 2009, the Court of Appeals transferred the appeal to the Appellate Division, Third Department. [12]

On June 24, 2010, the Appellate Division unanimously reversed the trial court and remanded the case to the trial court for further proceedings.

On September 13, 2010, the Appellate Division, with the consent of the plaintiffs, granted permission to appeal to the Court of Appeals.

STATEMENT OF FACTS

Prior to 1846, the State of New York provided credit 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 providing credit to corporations: “The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation.” Article VII, Section 9. The voters approved the amendment, 221,528 to 92,436. [5]

As noted by the 1967 Constitutional Convention, the amendments, including a similar ban on gifts of credit by local governments:

“failed to cure the evils intended, since the State circumvented them by giving direct grants of money and property to private corporations and the localities lent railroads their credit and made direct grants of money and property to private corporations when the Legislature failed to act.

The 1867 Convention attempted to eliminate these practices as well as the fear created by the greatly increased expenditure of funds for charities of private and sectarian nature not under government control. That convention recommended restriction on state and local governments giving of credit, money or property to private corporations. (This Constitution was not approved by the people.)

The 1872 Constitutional Commission recommended a proposal by which the State was prohibited from giving or loaning its money or credit, but not its property "to and in aid of any association, corporation or private undertaking "except for education and support of the blind, deaf, dumb and of juvenile delinquents and further all property held for educational purposes. (Article VIII, Section 10). Local governments were prohibited from giving money or property or loaning money or credit "to or in aid of any individual, association, or corporation", and from owning stocks or bonds in any association, except that local government was allowed to

provide aid or support for its poor as the law authorized.” (Article VIII, Section 10). Document No. 38, pp. 73-74.

Accordingly, in 1874 the prohibition on subsidies was expanded to include a ban on giving the money of the state to private firms. [31] The voters approved the amendment 336,237 to 194,333:

Art. VIII, § 10. “Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the state for educational purposes.”

In 1938, that clause was amended to make explicit that the credit of the state may not be provided to a public corporation and 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.” [31]

Paragraphs 1, 2 and 3 of § 8 set forth various exceptions to the general rule banning state subsidies to private organizations.

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

“The state, any local government and any other public corporation 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, but the proceeds of indebtedness contracted for any such purpose shall be used only for loans for capital construction, as

defined in section eleven of this article..” Proposed Constitution, Article X, §12(b).

The voters defeated the proposed constitution 3,487,513 to 1,327,999. [32]

The state budget which became law on or about April 9, 2008, lists the following unlawful appropriations:

- American Axle—Tonawanda Forge--\$1,000,000
- Delphi Harrison--\$25,000,000
- Excell Partners--\$750,000
- “an international computer chip research and development center”—
\$300,000,000
- Rochester Rhinos Soccer Stadium--\$5,000,000
- New York state apple growers association--\$750,000
- New York wine and grape foundation---\$980,000
- Long Island Wine Council--\$25,000
- Bronx Business Alliance--\$153,000.
- Peconic River Sportsman’s Club, Inc.--\$3,000. [32-33]

There are well over 100 grants to chambers of commerce, groups that supposedly espouse the principles of free private enterprise. On information and belief, recently a candidate for state legislature in Upstate New York approached a chamber of commerce official for support and was told the group could not support him as they were getting state money from the incumbent. This anecdote illustrates the corrupting influence of corporate welfare in our extraordinarily non-competitive political system. [33]

It has also been reported that the Hyatt Hotel in Buffalo (WEST GENESEE HOTEL ASSOCIATES) and INTERNATIONAL BUSINESS MACHINES CORPORATION

(IBM) will be receiving large grants from the state budget or from state funds. Though we cannot find such grants in the 2008 state budget and two freedom of information requests to state agencies were ignored, these grants are apparently in that category of grants that are not disclosed in the state budget. [33]

For many years, Bass Pro Outdoor World, LLC has been seeking state aid to construct a sporting goods store in downtown Buffalo. Prior deals fell through but clearly contemplated millions of dollars in state aid. A state agency, the ERIE CANAL HARBOR DEVELOPMENT CORPORATION has repeatedly announced its intent to aid Bass Pro in building a new store on the site of the abandoned Memorial Auditorium once the building is demolished. [33-34]

The EMPIRE STATE DEVELOPMENT CORPORATION announced the following grants to private firms in the four months prior to the filing of this lawsuit:

- Frederick Goldman, Inc.-- \$150,000
- Unifrax I LLC--\$1,500,000
- \$230,000 - Jamaica Chamber of Commerce
- \$150,000 - Business Outreach Center Network, Inc.
- \$100,000 - The Chamber of Commerce in the Borough of Queens
- Revonate Manufacturing LLC--\$125,000
- Breton Industries--\$200,000
- Dunkirk Specialty Steel--\$500,000.
- Reserve Supply of Central New York, Inc.--\$100,000
- Marathon Boat Group--\$90,000
- BSD, LLC--\$97,500

- Panattoni Development Corporation of New Jersey----\$97,500
- Klein Steel Service Inc.-- \$100,000
- Nationwide Precision Products--\$80,000
- 3 Kids Corp of Middletown - \$187,500 (Middletown)
- County Draperies, Inc - \$150,000 (Middletown)
- Hannay Reels, Inc. - \$525,000 (Westerlo)
- American Packaging Corporation--\$150,000
- Pall Corporation--\$500,000
- Stella D'oro--\$175,000
- Starline USA, Inc.--\$275,000
- \$437,500 to the Bank of New York Mellon Corporation (Onondaga County)
- \$1.5 million to Sitel (Steuben County)
- \$325,000 to Kirtas Technologies (Ontario County)
- Knowlton Technologies, Jefferson County – \$425,000
- Marietta Corporation, Cortland County – \$575,000
- \$50,000 to CASP LLC. of Penn Yan (Yates County)
- \$25,000 to Viking Cives Corporation of Harrisville (Lewis County) [34-35]

These grants are merely illustrative of many more provided in recent years and many others in the process of being considered for approval, all such grants totaling many hundreds of millions of dollars. [35]

A perusal of the State Board of Elections website reveals that recipients of state grants tend to be heavy political contributors. For example, a Delphi PAC, on information and

belief, related to the defendant DELPHI HARRISON, made numerous of donations to candidates in recent years. [36]

Paul L. Snyder, on information and belief, the managing partner of WEST GENESEE HOTEL ASSOCIATES, made these donations in recent years:

- 500.00 16-JUN-08 CITIZENS FOR SAM HOYT
- 250.00 27-APR-07 CITIZENS FOR SCHIMMINGER
- 5,000.00 14-FEB-08 COLLINS FOR OUR FUTURE
- 200.00 20-JUL-06 COMMITTEE TO ELECT MAZIARZ STATE SENATE
- 150.00 08-AUG-06 FRIENDS OF MARK SCHROEDER
- 150.00 24-MAY-07 FRIENDS OF MARY LOU RATH
- 500.00 18-JUN-06 MARC A. COPPOLA FOR STATE SENATE
- 500.00 29-NOV-07 NYS SENATE REPUBLICAN CAMPAIGN COMMITTEE
- 1,000.00 23-JUN-08 PATERSON FOR GOVERNOR, INC.
- 1,000.00 11-JUL-08 SENATOR VOLKER CAMPAIGN COMMITTEE
- 600.00 10-AUG-06 SENATOR VOLKER CAMPAIGN COMMITTEE
- 500.00 04-OCT-06 SENATOR VOLKER CAMPAIGN COMMITTEE
- 1,000.00-22-JAN-08 SENATOR VOLKER CAMPAIGN COMMITTEE [36-37]

Governor Paterson stated in 2008: “In the beginning of May, our budget director projected our New York State deficit over the next three years at \$21.5 billion – that was a record. But things have changed. That number has now erupted to \$26.2 billion – a staggering 22 percent increase in less than 90 days.” [37] This Court may take judicial notice that the State of New York remains mired in a severe and chronic fiscal crisis caused by lavish spending.

ARGUMENT

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

The New York constitution states at Article VII, § 8, paragraph 1:

“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. By that omission, they reinforce the general rule.

As noted in the Statement of Facts, an attempt to amend the constitution to allow corporate subsidies failed in 1967. Since the purpose of the proposed amendment was to “provide the state Legislature with the tools required to meet the essential needs of the last third of the 20th Century,” the proponents of the change evidently believed that the Legislature lacked such powers. Report of the Committee on Health, Housing and Human Services, Doc. No. 35, p. 5.

However, state officials simply ignored the work of the 1967 Convention—concluding that an amendment was required—and the results of the election and have acted as though that proposed 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.”

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.” *Wein v. State of New York*, 39 NY2d 136, 159 (1976). It should not be a surprise that challenges to this practice have been extremely rare. The initial research for this lawsuit took much of four months. There are few attorneys 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. The clear and plain language and clear and plain legislative history of Article VII, § 8, paragraph 1, 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. . . .”
“Problems Relating to Taxation and Finance,” New York State Constitutional Convention Committee (1938), Volume X, page 107.

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....” Volume II, page 179 (1906).

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 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, before this Court is the plain language of the Constitution and the undisputed historical background that the State had gotten into severe financial problems by subsidizing private firms to promote economic development. 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. As with the defendants here, 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. 11

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 all citizens 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, supra*, 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 that the ban on gifts to private entities:

“represent[s] 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 today, 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. 12

Judge Andrews went on to write 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).

The defendants take issue with *People v. Westchester County Bank’s* continuing relevance while failing to cite any change in the text of the constitution since 1921 that casts doubt on the reasoning in *Westchester*. They allege that the ban on credit that *Westchester* dealt with is somehow distinct and worthy of greater protection than the ban on giving money. However, there is no basis for this position. In fact, the ban on credit and the ban on giving money arise out of the same concerns. The ban on giving money was installed after the ban of giving credit failed to stop special interest groups from raiding the treasury for wasteful spending. *People v. Westchester County Bank, supra* at 473.

The State alleges that the ban on giving money was “particularly” targeted against sectarian giving. [Brief at 17] This is not correct. Concern with sectarian giving was a factor but no greater than concern over grants for economic development. In fact, a proposal to ban gifts for “any private or sectarian purpose whatever” failed. Constitutional Commission of 1872, p. 475. Again, the primary means of determining constitutional meaning is the text and the text does not limit itself to bans on sectarian or charitable purposes.

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). *Murphy* did not involve a cash grant to a private firm for economic development. *Murphy* in fact involves a clause not at issue in this lawsuit: the ban on counties “giving” their “property” to private firms. NY Constitution, Article VIII, §1; *Murphy v. Erie County*, *supra* at 88. Rather, that case upheld a lease of a planned domed stadium against a claim that the lease was an illegal gift of “property.” 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.

The fact that the proposed lessee in *Murphy* expected to benefit from the lease did not convert it into a gift otherwise all leases would be gifts since no firm signs a lease without expecting to benefit. *Murphy* 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 ban on gifts meaningless. A lease is not a gift is the lesson of *Murphy*.

Later Court of Appeals cases confirm that a good purpose will not override the clear ban on subsidies. Subsidies are prohibited "irrespective of how beneficent or desirable to the public the subsidized activity might seem to be" (*Schulz v. McCall*, 86 NY2d 225, 233-234 (1995)), and "even when the subsidized private organization performs functions beneficial to the public" (*id. at 234*). In *People v. Ohrenstein*, 77 N.Y.2d 38, 51 (1990), this Court stated: "Many of the acts declared improvident are arguably *in the public interest* and beneficent . . . The primary goal of the section is to prevent or invalidate legislation which is fiscally unwise. . . (emphasis added)"

Another lease case cited by the defendants is *Tribeca Community Association v. New York State Urban Development Corp.*, 200 AD2d 536 (1st Dept. 1994). The defendants also cite *Schulz v. Warren County Board of Supervisors*, 179 AD2d 118 (1992), where, as noted by the Appellate Division in this case, "the activities promote the public entity itself." [282-283] *Palmateer v. Greene Co. Industrial Dev. Agency*, 38 AD 1087 (3rd Dept. 2007), involved not state-appropriated money that went to private firms but payments in lieu of taxes that went to an industrial development agency for an industrial park apparently owned by the IDA. In any event, that case was presented to the Appellate Division in this case and that court did not read its own opinion as justifying cash grants of state money to private firms for economic development.

The defendants misuse *Murphy* in an attempt to have this Court judicially amend the Constitution—one defendant calls it "soften[ing] the limitation of Section 8" [Brief of West Genesee Hotel Associates, p. 76] They wish to negate the meaning of a clause that was ratified in 1846 and whose core was never repealed by the voters in spite of numerous amendments. On the contrary, the amendments, by carving out exceptions to

the general rule serve to reinforce the continued validity of that rule. The same is true for Article XVIII which allows the state to subsidize corporations that provide low-income housing and nursing home facilities but explicitly forbids the state from engaging “in any private business or enterprise” other than low income housing. Section 10. See also, Article VII, §18 (veterans bonuses) and Article XVII(7) (subsidies for hospitals).

It is worth noting at this point the larger issue in this case. This case is about something far more important than whether the state can continue to waste a few billion here and a few billion there on failed development efforts. This case is also about the very serious question of whether citizens can restrain governments through written constitutions. The people clearly spoke at the polls against corporate grants in 1846 and 1872 and 1967. Yet, the politicians created a regime of corporate welfare anyway and got away with it until now. If the courts, bowing to political pressure, can “soften” the meaning of the constitution, even while the language stays the same, the very notion of constitutionally limited government is jeopardized.

Along the same lines, the defendants assert that there is now a mere public purpose test superimposed upon the plain text of the Constitution, oblivious to the historical fact that the very purpose of the clause was to void the public purpose test for gifts of state credit. See, *Constitutional History of New York*, supra at Vol II, 179-180. Thus, pre-1846, the state could give away its credit for a public purpose. After 1846, it could not do so, as Judge Andrews correctly noted, *whether or not there was a public purpose*. For purposes of state law then, economic development had been considered a public purpose before 1846 but thereafter no longer was insofar as state credit was concerned. Between 1846 and 1874, gifts of state money could be made for a public

purpose but after 1874 they could not be made for any purpose not explicitly listed as an exception to the general rule such as “for educational purposes.” Subsequent amendments then carved out additional exceptions to the rule but the ban remains in effect generally. The omnibus public purpose test urged by the defendants would simply repeal the ten amendments concerning gifts from 1846 through 2001 and take us back to the legal regime that obtained before 1846 without the inconvenience of having to amend the Constitution. They propose a judicial nullification.

Worse yet, in 1967, there was an effort to amend the Constitution to do precisely that which the defendants in this case wish this Court to do for them. The proposed amendment would have restored the pre-1846 status quo by allowing gifts to private firms so long as they served a public purpose. Article X, §12(b).

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

The defendants either ignore or distort the history and purpose of the constitutional ban on subsidies. The briefs filed by Globalfoundaries U. S., Inc., IBM, and West Genesee Hotel Associates are utterly silent about them. The State’s brief discussion of these is inaccurate. [State’s Brief, pp. 16-18]. The ban on credit passed in 1846 and the ban on money grants and loans passed in 1874 are genetically linked. *People v. Westchester County Bank, supra* at 473-474. It was found that banning the provision of the state’s credit failed to staunch the flow of tax money to politically-connected private companies for dubious projects. “Cut off from the right to loan or give the credit of the state, however, by 1867, the legislature had begun to resort freely to grants of public

funds to railroads and to charitable associations.” *Id.* at 473. The policy concerns underlying the ban on credit and the ban on grants were substantially identical:

1. waste of scarce state resources on unwise projects;
2. the burden of high taxes caused by spending on subsidies;
3. arbitrary and uneven distribution of grants including geographically; fairness; justice;
4. ending corruption and special interest group politics commonly referred to in those times as “logrolling”;
5. loss of control over how state money is spent.

Grants and loans can cost the state as much or more than extensions of credit and since money is fungible, grants of money drain resources and lead to pressures for more borrowing. A grant of *credit* costs the state nothing unless there is a default but every dollar *given* is a sunk cost.

This Court’s discussion of the difference between gifts of money and extensions of credit in *Schulz v. State*, 84 NY2d 231, 246 (1994), cited by the defendants, pertains only to legitimate gifts of money to public corporations, not to the money laundering to private corporations at issue here. The defendants neglect to cite this proviso: “Such a distinction presumes, of course, that the State has adequate funds to support a gift.” *Id.* at 246. That condition no longer exists with the state in chronic fiscal crisis and cutting spending on core government functions such as the courts. The question is not, may the state give money to public corporations generally, but rather, may the state, after the voters refused to allow subsidies to private firms and public corporations for economic development,

allow the state to launder money through public corporations for precisely that illicit purpose?

At the 1867-1868 Constitutional Convention, there was an extended debate on the pros and cons of grants to business enterprises. The anti-subsidy position that ultimately prevailed in 1874 was ably and forcefully stated by former New York City Mayor George Opdyke, who was also a member of the Constitutional Commission of 1872. His speech is worth quoting at great length because it explains what this lawsuit is all about:

“This giving, by the Legislature, of the money or property of the State to private business enterprise, what is the true character of the transaction? Rightly understood, it is the taking of money from the tax payers of the whole State, and paying it into the hands of individuals or private incorporations, for their personal gain. It either gives it to the individuals who receive it or to the stockholders of the incorporation who receive it; or it goes to benefit the owners of property in that section of the State through which their improvements run; or else, as is often the case, it is invested in improvements that yield no benefits to any one, and is, therefore, thrown away. Now, it does not benefit the people of the State at large, from whom the taxes are collected; but, as the gentleman from St. Lawrence [Mr. W. C. Brown], told us this morning, it is often injurious to them by developing the resources of a given locality, and thus bringing its products to market more cheaply than theirs, through which the value of property in all other portions of the State is diminished. The gentleman from Rensselaer [Mr. M. I. Townsend], has cited the Albany and Susquehanna railroad as one instance where the exercise of this power by the Legislature has produced a beneficent result. Let us see whether it has or not. It has received from the State, I think, about a million of dollars as a free gift, and whom has it benefited? *In the first place, whence came that money?* It came from the pockets of the tax payers. Into whose pockets has it gone? If it has gone into the pockets of any one it has either gone into the pockets of the shareholders of that railroad, or into the pockets of the owners of the land in the district of the State through which it passes; but not a dollar has been returned to the pockets of the tax payers from whom it came. *In other words, it is an act of legal robbery. It taxes the whole people for the benefit of a favored few.* No one pretends that it adds to the value of the property in the northern, or western, or south-western portion of the State. It is only in that locality that it has afforded any benefit at all. Is it just to take from the whole by taxation and put it into the pockets of the few? *In my judgment it is the very essence of injustice, the very opposite of beneficence. It is a gross wrong and outrage, and it cannot*

result in good. What is the motive that prompts individuals to ask it? It is that they have not either the sagacity or public spirit to develop their own resources. Because, if the given improvement has merit sufficient to warrant its construction at all, that is to say, if it will produce more benefit than the cost of its construction, the people of the section which is to be benefited by it should know that fact and should have public spirit enough to carry it into execution. If they have not, they should be the sufferers, and not the people of other portions of the State who have no interest in the question at all. But, as I said before, it often happens that an enterprise is an illegitimate one. Its results will not justify the expenditure. What then?

[A]n enterprise of this kind has no aspect except the pecuniary one. It can only be looked at in an economic point of view. It benefits the State in no other way. Therefore, its results must be measured in dollars and cents. It must be measured in the revenues of the improvement itself, or the benefit it confers upon the neighboring land, or in these two put together. *If the benefits accruing are not equal to the expenditures, it is an illegitimate enterprise and a loss to somebody, and it should be a loss to themselves and not to the people of the whole State, who have no interest in the enterprise.* There is another step in the progress of this class of legislation. The very moment you give to the Susquehanna railroad a million of dollars for the special benefit of the stockholders of that road find the owners of property in that section of the State, *you at once engender a brood of claims, founded in justice, from every other portion of the State, for pecuniary aid for similar improvements.* They will say to the Legislature "You have given a million of dollars to this section of the State; ours is equally needy, and we claim it as a right that aid shall be given to us." They will come, not from one section of the State only, but from every portion of the State; and if that be the policy of the State, though I deny that it should be, they are claims that cannot be justly resisted. It will soon be precisely as it was before the adoption of the Constitution of 1846. Then the State undertook these enterprises itself. *The Constitution of 1846 stopped that, but left this door open by which the State should give aid to enterprises, whether undertaken by individuals, associations or incorporations.* When it is the policy of the State to give money for public improvements—aid to a canal here, or a railroad there—it generates claims for pecuniary aid from every part of the State, similar in character to the multitude of canal projects pressed upon the Legislature in 1846, and many of which could not have been resisted but for the prohibitions of the Constitution then adopted. So, giving to the Susquehanna railroad, or the Champlain railroad, or to any road, will generate, before you are aware of it, a cluster of these claims from every portion of the State, which cannot be resisted. In my judgment it is proper that that door should be closed. *No possible good can come of that class of legislation, but much evil.* For these reasons I hope that the substitute offered by the gentleman from Orleans [Mr. Church] will be adopted. I am sure that the exercise of that power can never be beneficial

to the State, but will always be attended with injustice and wrong, and the sooner it is stopped the better.” Constitutional Convention of the State of New York (1867-68), Volume III, pp. 2004-2005 (emphasis added).

Mayor Opdyke’s speech is critical as it captures with remarkable sophistication the basic policy concerns that underlie the ban on grants per se. The defendants have highlighted the policies that underlie corporate grants. However, the Opdyke speech shows conclusively that the framers of the ban on grants were acutely aware of these policy predilections and soundly rejected them in the strongest possible terms. The defendants wish the Court to believe that theirs is the sophisticated modern view that should prevail over the antiquated view urged by the plaintiffs. E.g., State’s Brief at 13; Brief of West Genesee Hotel Associates at 50. The reality is that these modern ideas are not modern at all. There is nothing new under the sun. *Legalized robbery is as old as recorded history*. The framers saw it in action for many decades, grew tired of it and finally abolished it in 1874.

The opponents of the ban predicted that New York would fall behind other states that did not restrain their legislatures in this way:

“if we prohibit the State from aiding in the development of its own resources, if we prohibit localities from taxing themselves to build railroads and to make other public improvements, if we adopt this system of curtailing and cramping the enterprise of the country, we shall always see, as we see now, these vast tracts of wilderness kept wild and unproductive, as a farmer keeps his wood lot.” Smith M. Weed, Constitutional Convention of the State of New York (1867-68), *supra* at 2014.

In fact, New York State became the economic engine of the world in the following decades and has only declined in the last four decades which featured the availability of a variety of programs to “stimulate economic development” *including massive cash grants*.

Thus, the Appellate Division’s opinion, based as it is on the plain language of the Constitution and its undisputed historical background, is correct. There is no denying the fact that Article VII, § 8, paragraph 1 was prompted by the disastrous consequences of state subsidies to private firms for economic development in the 19th Century. Ignoring that evidence, the defendants boldly asked the trial court to ignore that constitutional history.

The defendants also ask this Court to ignore the plain language of the Constitution. They spent little time parsing that language. Rather, they simply pretend it doesn’t exist. There is an analogy between this case and *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Supreme Court would not say that the “right of the people to bear arms” means that the people *do not* have the right to bear arms. Similarly, this Court should not sign an order that says, in effect, that the words “The money of the state *shall not* be given or loaned to or in aid of any private corporation or association, or private undertaking” *really mean* that the money of the state *may* be given to private undertakings.

If, based on no clear appellate holding, the defendants asked the trial court to ignore the plain language and plain history of the Constitution, what authority did they cite? Eminent domain cases. E.g., *Yonkers Community Dev. Agency v. Morris*, 37 NY 2d 478, 483 (1975); *NYS Urban Development Corporation v. Vanderlex*, 98 Misc. 2d 264, 269, 272-274 (Sup Ct NY Co 1979); *Waldo’s v. Village of Johnson City*, 74 NY 2d 718 (1989). Obviously, this case is not about condemnation of private property. There are explicit constitutional provisions that govern litigation over eminent domain. Both the state and federal constitutions *require* that the courts find a “public use” before allowing a taking

of private property. U. S. Constitution, 5th and 14th Amendments; N. Y. Constitution, Article 1, § 7, (a). Thus, it is no surprise that in condemnation cases, courts determine whether a public purpose exists. They must do so by explicit constitutional direction!

Here, the opposite condition prevails. Not only is there no constitutional mandate to find a public use or purpose, *but the provision in question bars grants whether or not there is a public purpose behind the grant.* By its plain language, the constitution implicitly forbids the superimposition of such an exception as that would constitute amendment of the constitution by judicial fiat. *People v. Westchester County Bank, supra* at 474-475 (1921). The delegates to the 1967 Constitutional Convention understood that and hence made a lawful effort to change the law in this area by drafting an explicit “public purpose” test for all grants:

“Neither the state nor any local government nor any other public corporation shall (1) grant or lend its moneys to or guarantee the obligations of any person, association or private corporation, except that such money may be granted in any year or periodically by contract, or loaned, for public purposes . . . “ Art. 10, § 18(a).

Obviously, but perhaps not obvious to the defendants here, this proposed amendment was rejected by the voters.

The same proposed constitution attempted to liberate public corporations from an apparent prior ban on using their own money for economic development purposes:

“The state, any local government and any other public corporation 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, but the proceeds of indebtedness contracted for any such purpose shall be used only for loans for capital construction, as defined in section eleven of this article.” Article X, §12(b).

Here, the defendants assert that public corporations, in spite of the failure of this amendment, can spend the state’s money transferred to it in the face of an explicit ban on the

state so spending its money. However, the drafters apparently believed that public corporations could not even spend their own money in that way.

In addition to the failed amendments of 1967, there is other persuasive evidence that grants are generally illegal under New York law. First, the general rule against grants and loans is subject to an exception directly related to economic development. Article VII, Section 8(3) allows the state to loan money for *economic development* under certain circumstances. If there was not a general prohibition on corporate subsidies under paragraph 1, there would have been no need to carve out an exception for certain types of loans.

Also, several cases or formal opinions have held that *federal funds* may be given to private firms. *Kradjian v. City of Binghamton*, 104 AD2d 16 (3rd Dept. 1984); *Tri-County Taxpayers Association, Inc. v. Town of Bolton*, 165 AD2d 451 (3rd Dept. 1991); Opinion of the State Comptroller No. 76-18 (1976); Opinion of the State Comptroller No. 88-79 (1988). Again, this exception reinforces the main rule that bars the use of *state funds* for corporate subsidies.

The State's brief is fascinating because it represents the very first time that any defendant has mentioned the legislative history of the ban on subsidies in any of the three courts that have had jurisdiction over this case. That means that of the twelve chances for the defendants to mention legislative history in the three courts, only one chance has been seized. It should therefore come as no surprise that the State stumbled badly here. While the State takes the position that subsidies for economic development are constitutional [State's Brief at Point I], it concedes that the 1846 ban on credit was "prompted by the state fiscal crisis from the State's guarantee of the debts of private railroad corporations

that subsequently defaulted.” [pp. 16-17] But the state subsidized these railroads to spur economic development! Do the State defendants believe this clause is no longer in effect? When was it repealed? Of course, they are silent on this since they either have to admit that their whole premise is wrong or be forced to explain why a constitutional clause that has never been repealed is no longer in effect.

The State quibbles about whether the Appellate Division misstated the date the ban on cash gifts was enacted. But the Appellate Division accurately quoted this Court’s opinion in *Matter of Schulz v. State of New York*, 86 NY2d 225, 233-234 (1995) which set forth the policy behind these clauses as ending aid to “private enterprises.” If the Appellate misstated the date when the ban on cash grants was added to the constitution, that court accurately stated the policy behind it, something that State defendants in this case have yet to do.

II. THERE IS NO CONVENTION CENTER EXCEPTION TO THE BAN ON SUBSIDIES.

West Genesee Hotel Associates proffers what amounts to a convention center exception to the ban on subsidies. [Brief of West Genesee at Point I] Because the Buffalo Convention Center is publicly owned, a nearby private hotel can also be subsidized. As they concede in a Freudian slip, to uphold that argument, this Court will have to “soften” the constitution. *Id.* at 76. The notion that courts exist to soften—eviscerate—constitutions should give Americans butterflies in their stomachs.

The argument has no basis in the text or history and it proves too much. While there is nothing stopping the state from subsidizing the Buffalo Convention Center, it cannot subsidize each and every business that bears a relationship to every convention center and

every other public building in the state. There are thousands of publicly-owned buildings throughout the state that would or do benefit from the existence of nearby hotels, shops, restaurants, theaters, and many other private firms. The exception urged by West Genesee would soon destroy the general rule against subsidies. The Constitution has been amended many times to create exceptions to the general rule. West Genesee's resort should be to the amendment process.

Ironically, one would think that convention centers are designed to aid surrounding businesses such as hotels. The fact that the state feels the need to come to the rescue of those nearby firms to prop up the decades-old convention center is yet another illustration of the debacle of current economic development policy in New York.

The main case cited by West Genesee is *Froslid v. Hults*, 20 AD2d 498 (2nd Dept. 1964). That case upheld the Commissioner of Motor Vehicle's right to put the slogan "World's Fair" on state license plates. The beneficiary was a non-profit corporation that ran the 1964 World's Fair. All net proceeds went to the City of New York to maintain Flushing Park and for educational purposes. The State itself had an exhibit at the Fair and the Appellate Division cited that factor in its opinion. These facts bear little resemblance to the cash grants to private firms for economic development at issue in this case.

West Genesee, citing no legislative history, proposes that the main point of the ban on subsidies is to prevent "raids on the public purse" by greedy individuals. They cite *Matter of Arbitration Between Central High School Dist. 3 and Board of Education*, 34 AD2d 351 (2nd Dept. 1970). However, as demonstrated in Point I, the ban was designed

to prevent raids on the treasury by business corporations such as West Genesee that has been receiving public subsidies for thirty-one years now. [See, West Genesee Brief at 37]

III. THE STATE CANNOT AVOID THE BAN ON CASH GRANTS TO PRIVATE FIRMS BY LAUNDERING THE MONEY THROUGH A PUBLIC CORPORATION.

The trial court's central contention was that the state may use a public corporation as a middle man to dole out grants that the state itself could not. [15-16] There was no appellate case that said so and this tactic runs afoul of the principle that the Constitution may not be evaded by indirect means. See, *Wein v. State of New York*, 39 NY2d 136, 145 (1976); *People v. Westchester County Bank*, *supra* at 476. It also ignores key language in the Constitution itself. The Constitution states that "The money of the state shall not be given or loaned to *or in aid of* any private corporation or association, or private undertaking. . . ." Article VII, § 8, paragraph 1 (emphasis added). The words "in aid of" foreclose the tactic of giving money to a public corporation for the benefit of private firms.

The State should not be allowed to create entities so that constitutional mandates can be avoided. For example, the State should not be allowed to create a public corporation to run court operations so that the Bill of Rights need not be respected.

Finally, the defendant's argument is refuted by Article VII, § 8, paragraph 3 which allows the legislature to loan the money of the state to a "public corporation" to make loans to private firms for economic development. Clearly, the drafters and ratifiers of this provision believed that the state's use of a public corporation middle man for economic development loans *had previously been illegal*. Obviously, the Constitution has never been

amended to allow for *cash grants* to public corporation middlemen though pro-corporate welfare forces did try to do so in 1967. See, Proposed Constitution, Article X, §12(b).

None of the three cases cited by the trial court supports its holding that the state can launder money through a public corporation to do an end-run around the constitution. None involves cash grants to private firms for economic development. *Comerski v. City of Elmira*, 308 NY 248, 252 (1955) involved a contract with a public corporation to provide parking facilities. *Wein v. State*, 39 NY2d 136 (1976) involved state assistance to a financially struggling municipality, New York City. That case cites with approval *Westchester Bank*, heavily relied on by the plaintiffs here at Point I above. *Id.* At 145. Finally, *Schulz v. State*, 84 NY2d 231 (1994) involves the funding of public works projects, not private firms.

IBM argues that, while the ESDC receives appropriations from the legislature, that “its subsequent use of the appropriated funds is not under the State’s control. . . .” [pp. 13-14] This is a remarkable statement that ignores the constitutional authority and right of the legislature and executive to make appropriations and apparently transfers that right to a public authority. The Constitution allocates the power of appropriation to the governor and the legislature and forbids expenditures not appropriated according to law. Constitution, Article VII §§ 2-4, 7.

None of the cases cited by IBM at page 14, note 5 remotely justifies the laundering of money through public authorities as an end-run around the constitution. These cases did not did not involve cash grants to private firms for economic development. *Smith v. Levitt*, 30 NY2d 934 (1972); *Schulz v. Pataki*, 272 AD2d 758 (3rd Dept. 2000); *Grace v. University Construction Fund*, 44 NY2d 84 (1978).

Under the defendants' view, the state can set up a public corporation called, *End-Run Around the 1846 Constitution, Inc.*, to serve as a pass-through for all the cash grants that the state could not give directly to private entities. For example, while the state cannot give plaintiffs' attorney one million dollars for a lavish cruise around the world, it could, consistent with state law, give the money to *End-Run* which could then give it to me and off I go!

IV. A PROMISE TO ENGAGE IN ECONOMIC DEVELOPMENT IS NOT ADEQUATE CONSIDERATION FOR A CASH GRANT.

The Appellate Division held that, in the absence of "adequate" or "sufficient consideration," a grant of state funds is barred by the Constitution. [283]. In determining whether adequate consideration exists, the phrase "in aid of" must be given full effect. NY Const. Article VII, § 8, paragraph 1. Even if there was slight and contrived consideration for a grant of millions of dollars to a private firm, such grant would nevertheless be "in aid of" such firm and therefore be barred.

The essence of improper giving is the "subsidization" of private undertakings. *Schulz v. McCall*, 86 NY2d 225, 233-234 (1995); *Wein v. State*, *supra* at 228; see also, "Problems Relating to Taxation and Finance," New York State Constitutional Convention Committee (1938), Volume X, page 107. The fact that "loans" are also barred demonstrates that the constitutional ban is broadly intended to end state subsidies to private business, whether or not there is a token of "consideration" under contract law. See, *People v. Westchester County Bank*, *supra* at 483 (1921), Judge Cardozo (dissenting). (purpose was to end use of the state credit to aid private enterprise).

Neither does the history of the clause support the defendants' interpretation. A prime concern of the drafters of the 1874 revision which added the giving of money to the prohibition on aid was the willy-nilly distribution of such grants. While taxes are imposed on a uniform basis throughout the state, pre-1874 grants were distributed on an arbitrary basis:

“. . . they have been distributed to classes of the population, in very unjust proportions, and with very little reference, if any, to their respective numbers or wants. They have also been distributed to the several parts of the State, without any reference to their population or their necessities—giving to some parts of the State, for many years in succession, large sums of money—while other localities have received comparatively little, or nothing whatever. . . . any such distribution, as above, is most manifestly unsatisfactory and unjust. The State has been filled with complaints of this injustice, springing from each of these sources for many years.”
Journal of the Constitutional Commission, pp. 451-452 (1873)

This type of arbitrary and unjust distribution is evidenced in the record of this case. Why, for instance, should the Hyatt Hotel in Buffalo owned by West Genesee Hotel Associates receive \$5.1 million in cash [140] while the rest of the business firms in Erie County do not and cannot? Since public funds, like all funds, are scarce, it can never be the case that all business firms get subsidies. Rather, all unsubsidized firms subsidize through their taxes a necessarily small number of politically-favored firms. Why should IBM get \$44,000,000 and other business firms nothing but the privilege of paying for IBM's windfall? [273] This is precisely the kind of robbing Peter to pay Paul that the drafters of the clause cited as the major reason for extending the ban to grants:

“These donations can never be just or right; every donation of the money of the State for the construction of a railroad is always and necessarily partial and unjust. It is taking the money of the people of one portion of the State and giving it for the direct and immediate benefit of individuals in another portion of the State, and often to the very prejudice of many of those whose money is taken by taxation for those purposes, levied as a forced contribution to establish or sustain a rival enterprise.” W. C.

Brown, Constitutional Convention of the State of New York (1867-68),
Volume III, p. 2001.

Adopting a rule that legitimizes grants in exchange for nominal consideration ignores the critical fairness component of the ban on subsidies.

Surely, the subsidies that the State gave to private firms prior to 1846 that led to economic chaos and to the enactment of the initial ban on the use of the state's credit for private purposes, were governed by written contracts that featured consideration such that they would not be deemed to be common law "gifts." See, "Problems Relating to Taxation and Finance," New York State Constitutional Convention Committee (1938), Volume X, page 107. Like the present grants, those transactions contemplated the improvement of the economy by developing railroads and canals and other infrastructure.

For example, in 1792, the State, "to promote commerce," gave \$12,500 each to two private canal companies but only on the condition that the companies previously spend \$25,000 each on canal projects. (L. 1792, ch. 40). The explicit purpose of these "free gifts" was the "encouragement" of "commerce." Since this statute is cited in the legislative history of the constitutional ban on state subsidies to private corporations, it constitutes an example of the kind of grant, to promote commerce, and given only after the company itself had spent its own capital, that led to the enactment of the ban on subsidizing but *which the defendants here maintain is still perfectly legal*. "Problems Relating to Taxation and Finance," New York State Constitutional Convention Committee (1938), Volume X, page 108; *People v. Westchester County Bank, supra* at 473. It is also significant that the legislators used the word "gift" to describe a transaction that the defendants would call a "contract."

In 1836, the State loaned the New York and Erie Railway Company \$3,000,000 in “stock” but only on the condition that they first build six railroad lines. The State was to receive interest payments and the principal sums after twenty years and receive a mortgage on the company’s property for security. See, Laws of New York, Fifty-Ninth session, Chapter 170 pp. 227 et seq. (1836). This is precisely the type of contract, supported by consideration and for the purpose of spurring economic development and employment that the respondents argue is lawful even though it was outlawed by the Constitution long ago. It is not surprising that the defendants have largely ignored the legislative history of the ban on subsidies.

Thus, the defendants urge upon the Court a meaning of the clause that ignores its original purpose and negates its meaning. They fail to cite any case that holds that a cash grant for economic development was not an illegal gift but a lawful contract because the company promised to invest funds and/or create jobs. If the defendants' view is upheld, the constitutional ban on subsidizing private firms will be effectively repealed by court decision.

A narrow interpretation or “softening” of the gift clause essentially also negates the loan clause. The State cannot *loan* a company a billion dollars but under the defendants' view of the gift clause, they can *give* the company a billion dollars if the company promises to create one part-time seasonal job. It is not clear under such a narrow construction what kinds of pre-1874 subsidies of cash would have been forbidden. We *do* know that many pre-1874 subsidies are allowed under this doctrine. That raises the question: what do the defendants think the 1874 drafters were banning?

On the other hand, requiring the State to receive “objective fair market value” in exchange for its grants, as the State of Arizona requires (*Turken v. Gordon*, 224 P 3d 158 (2010)), creates an interesting anomaly. The fair market consideration for a grant of money is interest and the principal returned at the end of a period of time. However, that transaction would be a prohibited loan. NY Constitution, Article VII, § 8, paragraph 1.

Is there a middle ground between allowing a scintilla of “consideration” to, in effect, negate both the gift and loan clauses and the fair market test that would ban all grants? If the Court allows this doctrine, it will have to define it as the defendants have not done so. Is the promotion of economic development sufficient consideration? How much development for how much grant money? If *any* amount of development is enough, which is apparently the position of West Genesee Hotel Associates [Brief at 43-44], then every grant will pass muster because, arguably, every tiny grant stimulates development to some extent. In fact, dropping grant money from a helicopter over Times Square would have an economic impact.

Is a commitment to spend matching funds sufficient? How much? A dollar? Fifty dollars? Are the courts ready and able to review each grant to determine if it is a gift or a contract? The conundrum is this: whether consideration is adequate usually involves the question of how much *money* constitutes adequate consideration for a certain *property*. E.g., *Van Curler Development Corp. v. City of Schenectady*, 59 Misc2d 621 (Sup. Ct. Schenectady Co. 1969 (cited by the defendants)). Here, however, the question is, what is the fair consideration for cash money? Fair market consideration for money is interest and repayment of principal which makes the transaction illegal not to mention not very useful as a subsidy.

The defendants have failed to formulate a coherent doctrine of consideration that companies and state officials can apply and which would not lead to a steady stream of litigation. They have also failed to cite any case that held that promises to engage in economic development constitute adequate consideration for a cash grant. *La Barbera v. Town of Woodstock*, 29 AD3d 1054 (3rd Dept. 2006) involved preservation of a publicly-owned park and recreational facility. *Admiral Realty Company v. City of New York*, 206 NY 110 (1912), like *Murphy*, involved a lease which called for the lessees to spend tens of millions of dollars. *Antonopoulou v. Beame*, 32 N.Y.2d 126 (1973) involved the settlement of a grievance filed pursuant to a collective bargain agreement.

To sum up, there are three possible rules the Court can adopt on the adequacy of consideration for grants:

1. objective fair market value
2. nominal consideration
3. somewhere between (1) and (2)

Option (1) would end all grants by turning them into illegal loans.

Option (2) would effectively repeal the 1874 ban on gifts and toss aside the text, purpose, intent and history of the clause and the will of the voters who enacted the ban.

Option (3) would involve judicial amendment of the Constitution and would lead to a steady stream of litigation over the adequacy of consideration. Ironically, we agree with GlobalFoundaries and West Genesee that a unclear notion of what constitutes adequate consideration will lead to an avalanche of unnecessary lawsuits. [Brief of GlobalFoundaries at p. 29; Brief of West Genesee Hotel Associates at p. 69].

Only option (1) is consistent with the text, history and intent of the clause and only option (1) would not turn the courts into the reviewer of each and every state contract that grants money to private firms.

In a law review article cited by the State defendants in their brief [p. 16], Quirk and Wein argue that the gift clause was designed to prohibit grants where the value of the purported consideration is not ascertainable:

“. . . the value of the goods or services purchased must be ascertainable; if the value of the consideration cannot be known, it is impossible to determine that a gift has not been made. In the pre-1874 railroad cases, the town, in at least some instances, received value by inducing the railroad to come through the town. It was, however, value of an unascertainable sort and the constitution was amended to prohibit such transactions.” W. Quirk and L. Wein, “A Short Constitutional History of Entities Commonly Known as Authorities,” 56 *Cornell L. Rev.* 521, 583 (1971).

The defendants have made many assertions about the value of the consideration that private firms give in exchange for large cash grants. However, they are based on nothing but air. They are utter nonsense because they fail to take account of *opportunity cost*, the fundamental principle of economics that the defendants wish to ignore. See, Affidavit of W. Anderson, 245:17. However, the framers of the ban on subsidies were fully familiar with the concept and drafted a clause that encapsulated their insight. To quote Mayor Opdyke again:

“In the first place, whence came that money? It came from the pockets of the tax payers. Into whose pockets has it gone? If it has gone into the pockets of any one it has either gone into the pockets of the shareholders of that railroad, or into the pockets of the owners of the land in the district of the State through which it passes; but not a dollar has been returned to the pockets of the tax payers from whom it came. In other words, it is an act of legal robbery. It taxes the whole people for the benefit of a favored few.”

The defendants here cannot answer that critical question: whence came that money and they have no theory of cost at all. Thus, they cannot explain to any court how to ascertain the “value of the goods or services purchased.” That being the case, as Quirk and Wein conclude, there is no way for any court to determine that a gift was not made. That is also the conclusion reached by plaintiff’s expert, Professor Anderson: “it is difficult if not impossible to make any such measurements.” [244]

V. THE DEFENDANTS FAILED TO DEMONSTRATE THAT CASH GRANTS TO PRIVATE FIRMS SERVE A PUBLIC PURPOSE.

The defendants asked the trial court to find that economic development grants serve a public purpose. However, they failed to provide any expert testimony to that effect. Their primary proposed witness was Douglas G. Wehrle, an employee of Empire State Development Corporation. [120] He failed to state his qualifications to opine on economics. This Court should totally disregard his vague and unsupported opinions as to the beneficial effects of economic development grants.

The plaintiffs, in contrast, retained Professor William L. Anderson, a professor of economics as an expert witness. [243]

VI. THE PLAINTIFFS HAVE OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY.

The defendants rely heavily on the truism that legislation is presumed constitutional. To the extent that the determination of constitutionality rests upon factual matters such as legislative history or policy matters, the plaintiffs have met their burden of proof and

have presented documentation about the purpose and historical background of the constitutional ban on gifts. It was designed to ban subsidies for economic development. The plaintiffs have also logically demonstrated that the plain text of the clause at issue bans cash grants for economic development.

The plaintiffs have met their burden of proving that the budgetary enactments delineated in the complaint violate the constitution.

VII. THERE IS AN ISSUE OF FACT WHETHER CASH GRANTS TO PRIVATE FIRMS SERVE A PUBLIC PURPOSE.

If the Court holds that a public purpose can justify a grant of money for economic development, we contend that there is an issue of fact in that regard calling for a trial. We would request a trial to present that evidence and other evidence that will show there is no public purpose here, simply a transfer of wealth from taxpayers to private firms that leaves the economy in *worse condition*. See, *Denihan Enterprises, Inc. v. O'Dwyer*, 302 NY 451, 459-460 (1951); affidavit of W. Anderson [243, et seq.].

VIII. THE PLAINTIFFS HAVE STANDING.

The Appellate Division correctly held that the plaintiffs have standing. The State Finance Law allows the plaintiffs to join:

“as a party defendant the recipient or intended recipient of such a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property.” Section 123B(2).

The non-State defendants argue that they did not receive state funds because the money was first laundered through the state authority. That the Appellate Division properly rejected that argument is discussed in detail at Point III, above.

GlobalFoundaries claims that they did not receive state money but rather the proceeds of bonds issued by ESDC. They attach a convoluted, three page-long sentence from the inscrutable state budget in support of their claim. First, as the Appellate Division correctly noted, the allegations of the complaint are sufficient to confer standing. Second, the attachment does not unambiguously refer to GlobalFoundaries. Rather, we are expected to rely on an allegation in an appellate brief for that inference. Third, to the extent that any human being other than the person who wrote that budget provision can make any sense out of it, this appears to be an effort to add yet another layer of money-laundering to the policy of making illegal grants of state funds. From a fair reading of the passage, the state gives money to ESDC. ESDC borrows money. They give the money to private firms such as GlobalFoundaries. ESDC then pays off the loan with state funds. The bottom line is that state funds, highly processed and laundered by third parties, are going to private firms for economic development in violation of the constitution.

IX. THE COMPLAINT CONTAINS SUFFICIENT DETAIL TO ALLOW THE DEFENDANTS TO PREPARE A DEFENSE.

The purpose of a complaint is to give the defendants sufficient notice as to be able to defend the action. Plaintiffs did so here with an extremely detailed, fifteen-page complaint. As stated in the complaint, the plaintiffs filed two Freedom of Information requests to get information as to which firms were receiving or about to receive grants. [33, paragraph 42] Both were ignored. Since there is a short statute of limitations for Article 78 proceedings, plaintiffs could not afford to sue

to get that information but had to proceed with the best available information. It is unfortunate that it is so difficult for citizens to get information about how many millions of their tax dollars are being spent.

Thus, the complaint alleges that IBM and Advanced Micro Devices, now GlobalFoundries, were receiving or are about to receive illegal grants. In the case of Advanced Micro Devices, the complaint apparently erred in tying them in with a specific budget allocation for a computer research center. [32, paragraph 37] At it turns out, they were to receive another grant. However, in the case of each company, the complaint was sufficient to put them on notice that their receipt or prospective receipt of state funds for economic development was being challenged. Their detailed motions to dismiss prove that the complaint gave them adequate notice to prepare a defense.

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.

The courts have 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.

This Court should affirm the order of the Appellate Division and remand the case to the trial court for further proceedings and grant such further relief as to the Court may seem just and proper.

Dated: Buffalo, New York
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