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STANDING TO SUE IN NEW YORK

WILLIAM J. QUIRK*

INTRODUCTION

In 1963, the New York Court of Appeals announced:

We have always held that the constitutionality of a State statute may be tested only by one personally aggrieved thereby . . . an unaggrieved citizen-taxpayer, such as appellant, lacks standing to challenge a statute's constitutional validity.1

New York, by this stark expression of the "no taxpayer standing" rule, took a position not shared by any of its sister states.2 New York adopted this strict rule while the federal restraints of the Mellon case were being loosened by the Supreme Court.3 Indeed, since 1872, New

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2New Mexico is a possible compatriot but its position seems arguable. State ex rel. Castillo Corp. v. New Mexico St. Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).

In Flast, the government argued that Frothingham "announced a constitutional rule" compelled by article III limitations (requirement of a case or controversy) and the doctrine of separation of powers. The taxpayer, on the other hand, argued that Frothingham expressed only a "policy of judicial self-restraint." The Court found that the case "rests on something less than a constitutional foundation". More recently, the Court reiterated that the standing issue did not involve the cases and controversies clause of article III but was only a question of statutory interpretation. Sierra Club v. Morton, 405 U.S. 727 (1972).

In New York, the St. Clair decision found that the standing doctrine was required by the constitutional separation of powers. A review of the earlier New York law, however, will show that standing had been regarded as an administrative convenience rather than a constitutional issue prior to the 1963 decision.

While the federal law of standing has plainly been liberalized its present status is hardly stable or satisfactory. The issue continues to consume the time of the Supreme Court, as well as the lower courts, which could more profitably be spent on issues of substance. The following four positions are set out to focus the problem:

I. Frothingham — The Frothingham position, as well as St. Clair, has the advantage of substantial clarity. It is held that only an aggrieved party can test the constitutional validity of governmental action and, more importantly, that a mere taxpayer is not an aggrieved party. As a consequence, the spending power is immune from test. This seems to have been the precise intent of Frothingham. (See note 12 infra). Other types of statutes, and exercises of power, are apt to turn up an aggrieved party in the
York has freely permitted taxpayer suits against city and other local officials to prevent “any illegal official act.”

The only area for dispute is what type of hurt, other than taxes, will result in aggrievement. The Frothingham position is widely viewed, although not by the Supreme Court, as resting on a constitutional foundation. The remaining three positions view standing as a policy issue rather than a constitutional one.

II. “Specific” Constitutional Violations—The rule of Flast seems to be that a taxpayer has standing if he alleges violation of “specific” constitutional prohibitions. The Establishment Clause was held specific in Flast. The distinction between specific and general prohibitions is difficult and the purpose of the distinction is not clear.

III. Judicial Discretion—This view holds that a plaintiff, without a “protected interest,” does not have a right to judicial review but that a court, in its discretion, may review the legal issue if it considers review to be in the public interest. Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971). The meaning of “protected interest” is not precise but would apparently not include a mere taxpayer. Standing would thus largely be left to judicial discretion, a result unsatisfactory to those who have become distrustful of government.

IV. Standing for any Injury-in-Fact—By this view any injury-in-fact, including the payment of taxes, gives a right to review. Davis, Standing: Taxpayers and Other, 35 U. Chi. Rev. 601 (1968). Injury in fact is considered to essentially mean economic harm, even if that harm be only a “trifle.” Id. It is recognized that in Baker v. Carr the Court found standing based on the dilution of one vote. However, under this view, an unagrieved person is held to have no standing. Certainly, this position, permitting taxpayer suits, is sufficient for most purposes. But the following examples may indicate the need for standing without restraints. Assume,

1. A Senator believes that the executive is illegally impounding appropriated funds in violation of Article II, section 3; or
2. A Senator believes that the executive has performed an illegal “pocket veto” of legislation when Congress has recessed rather than adjourned as provided in Article I, section 7; or
3. A citizen believes that a federal office lease has been awarded to a high bidder in a corrupt manner (assume that no unsuccessful bidder considers it expedient to pursue the matter); or
4. A citizen believes that the government has failed to prosecute an apparent violation of campaign contribution laws.
5. A citizen believes that the anti-trust laws are not being vigorously or consistently enforced by the Department of Justice.

Taxpayer standing is insufficient in these examples since in (1) the objection is not to illegal spending but to illegal non-spending; in (2) additional spending may also be involved depending on the nature of the bill vetoed; in (3) the objection is not to the expenditure but to the illegal selection process; and in (4) the disputed contributions are not public funds.

In these examples, is it a fair or honest answer to the Senator or citizen to say you are unaggrieved, you have no standing, the courts are closed to you, your proper and only recourse is political, you should make efforts to vote the bad people out. Does our system require this answer? The citizen’s complaint, after all, is not political, it is that the Constitution and laws are not being enforced.

V. Free Standing—The last position would permit any citizen to secure judicial review for the alleged governmental violation of the Constitution or statutes. Under this view, nothing is to be feared from judicial review.

Almost all discussions of standing are based on the unstated premise that dark forces will be unloosed if the doctrine is simply eliminated. It may be that the worst that will happen is that the Constitution and laws will be interpreted and enforced. Despite repeated efforts, after almost forty years, the legality of the TVA has not been determined. Neither, again despite repeated efforts and after almost ten years, has the legality of the war in Vietnam.

During recent years two traditional areas of state jurisdiction, criminal procedure and equal apportionment, have been largely preempted by Supreme Court interpretations of the fourteenth amendment. As a consequence, the state courts have been effectively reduced to jurisdiction over private litigants and the enforcement of the non-criminal provisions of state constitutions. It might be expected that a state court would be protective of its remaining powers. New York on the contrary, by the St. Clair decision, substantially granted away its state constitutional jurisdiction. The Court of Appeals became thereby an essentially non-public institution.

The Court of Appeals stated in St. Clair that "[w]e have always held" that a citizen—taxpayer lacks standing. A review of New York's constitutional history, however, shows that many of the state's major cases have been brought by persons not personally aggrieved.

The 1963 St. Clair decision is, consequently, fascinating in that all indications pointed to an opposite result. The decision adopted restraints against citizen actions (1) not found necessary by the rest of the states; (2) not found necessary by the cities and localities of New York; (3) while the federal law of standing was becoming more liberal; (4) while the court's jurisdiction had been sharply narrowed by the federal courts' and (5) not compelled by its own history.

Restrains on citizen standing to sue have been justified by a number of expressed rationales. Most commonly these include (1) a fear of multiplicity of suits, (2) a fear of judicial tyranny through the "supervision" of the legislative and executive branches, and (3) the

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8 The significant issues of state constitutional interpretation generally focus on the fiscal powers, i.e., budget-making, spending, taxing and borrowing.

9 See section III.

10 Doolittle v. Supervisors of Broome County, 18 N.Y. 155, 163 (1858).

11 This was the sole stated reason given in St. Clair. The court quoted from an earlier decision, Schieffelin v. Komfort, 212 N.Y. 520, 530, 106 N.E. 675, 677 (1914), as follows:

Jurisdiction has never been directly conferred upon the courts to supervise the acts of other departments of government . . . . the assumption of jurisdiction in any other case [than one involving a personally aggrieved party] would be an interference by one department with another department of government when each is equally independent within the powers conferred upon it by the Constitution itself.

St. Clair v. Yonkers Raceway, Inc., 13 N.Y.2d 72, 76, 192 N.E.2d 15, 16, 242 N.Y.S.2d 43, 45 (1963). A contrary view was taken by Hamilton in Federalist No. 78 where he wrote:

[The] judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; . . . . [T]he executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated . . . [t]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

The Federalist No. 78, at 483-84 (H. Lodge ed. 1888) (A. Hamilton).
necessity of an aggrieved party in an adversary context to properly bring out the issues.  

These stated rationales are self-refuting and are of only slight interest in an analysis of the standing question. More to the point is a study of the merits of those cases where the courts have refused to exercise their review power. The central fact is that a court's finding of no standing is a decision in favor of the challenged governmental action. This is evident to all concerned and raises the question, why does the court take this indirect and misleading route when it could simply hold for the government on the merits? The beginning point, as noted, is that the court, for various reasons, prefers not to interfere with the executive or legislative action. The court desires to avoid a written opinion for two major reasons: (1) there is little or no merit in the government's position, or (2) while meritorious, the government's position would require such a broad holding that the court is apprehensive about adopting it.

10 In Baker v. Carr, 369 U.S. 186, 204 (1962) the Supreme Court noted that the “gist of the question of standing” is:  

Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?  

The premise of this point is that only a personally injured party can be relied upon to vigorously contest the government's position. The premise is probably wrong and the situation is surely not aided by a rule which denies everyone the right to contest the governmental action. The point is, however, related to a matter of legitimate concern. If a taxpayer brings an action and mishandles the litigation it would seem that stare decisis would foreclose other taxpayers from bringing a similar action. This probably could be dealt with by requiring a publication when a taxpayer complaint is filed and permitting joinder by others.

11 For example, the government's position might be contrary to a clear constitutional prohibition.

12 The clearest example of this is Frothingham v. Mellon. 262 U.S. 447 (1923). Mrs. Frothingham contested the validity of the Maternity Act of 1921, ch. 135 42 Stat. 224. The act authorized appropriations “to be paid to the several States for the purpose of cooperating with them in promoting the welfare and hygiene of maternity and infancy,” Id. § 1. The act created a new federal board and required the states to file “detailed plans” for the approval of the board. Id. § 8. The states were further required to make matching contributions equal to any federal appropriations received. Id. § 2. Mrs. Frothingham took the position that the “appropriations are for purposes not national, but local to the state.” 262 U.S. at 479. Clearly, the enumerated powers granted Congress by article I, section 8 do not come close to authorizing the act in question. But what of clause 1 of section 8 which confers on Congress the “power to lay and collect taxes, duties, imports and excises, to pay the debts and provide for the common defense and general welfare?” A broad, or literal, reading of the general welfare clause would easily justify appropriations for the health of mothers and infants. The Court was presented with the central issue of American constitutional interpretation, the nature of the national government. The Court said Mrs. Frothingham had no standing. Professor Corwin reports that while the Constitution was pending some of its opponents charged that the “general welfare” clause was designed in conjunction with the “necessary and proper” clause as a “legislative joker” to vest Congress “with power to provide for whatever it might choose
The standing issue is one of power and the structure of government. Once a court adopts a clear no standing rule the legislature and executive are free to interpret the constitution as they will. This is clear from New York's experience and the development of the immune or non-challengeable statute. Obviously enough, if a personally aggrieved citizen is a prerequisite for judicial review a statute will be immune if drafted to avoid the creation of such a person. This is simply done as the following hypothetical case will show. The New York Constitution prohibits the creation of any state debt without a vote of the people. Assume that the Governor and legislature desire to construct a massive governmental and cultural complex in Albany which will require a billion dollars of debt. Assume further that the proponents of the program believe that the people have a different set of priorities and will vote down such a bond issue if it is submitted to them. This is evidently a quandary. The debt is necessary for the construction, a referendum is necessary for the debt, and there is no doubt that the referendum will be defeated. But St. Clair removes the difficulty. The legislature need only pass an immune statute providing, "[t]here is hereby created a public corporation to be known as the South Mall Authority which shall have responsibility for the construction of a governmental complex in Albany. The authority is hereby authorized to issue one billion dollars of debt." The use of a newly created public corporation is not required by St. Clair. Under St. Clair the state could itself borrow in contravention of the constitution in reliance upon

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14 At this point the hypothetical merges into historical fact. It is reported that the Governor and Albany County officials, in connection with the South Mall project, agreed to evade the referendum requirement, "everybody having assumed from the first that voters around the state would never approve a bond issue for a mall in Albany." Fortune, June 1971, at 94. Comptroller Levitt has referred to the constitutional evasion involved in the South Mall financing as "the rankest kind of subterfuge." N.Y. Times, Nov. 17, 1972 at 51, col. 7.
the "no standing" rule. This direct approach has not yet been taken, presumably on the theory that it would be excessively flamboyant. The hypothetical Authority bonds, however, lack security and are unattractive to bond purchasers. The immune statute would, therefore, further provide that "[t]he State of New York shall guarantee the payment of Authority bonds."\textsuperscript{15} The bonds are thus made marketable and the project proceeds to rise out of the Albany slums. Under St. Clair, the only conceivably aggrieved persons are those whose property is condemned by the Authority to clear the site. Of course, the Authority can acquire by purchase rather than by condemnation. Also, the Authority can select the site to avoid possibly intransigent owners. Moreover, this class is implausible in the role of defender of the constitution; it is apt to be easily disposed of by the payment of inflated sums for slum properties.\textsuperscript{16}

This essentially has been the procedure followed in New York over the past ten years.\textsuperscript{17} As of June 30, 1972 the state had outstanding

\textsuperscript{15} It is not to be reasonably argued that a guarantee is not "debt" within the meaning of the constitution nor need it be so argued. It is sufficient if the statute is immune.

\textsuperscript{16} Paradoxically, the personally aggrieved standard simplifies the drafting process as the number of persons to be deprived of their rights is increased, i.e. it is impossible to draft a statute depriving Mr. X of his rights without personally aggrieving him but it is not difficult to draft a statute which will deprive the public at large of its rights.

\textsuperscript{17} The text hypothetical is only slightly oversimplified. In fact, the South Mall scheme made use of a pre-existing entity, Albany County, in place of a new authority. In place of the statutory state guarantee the South Mall approach used lease-financing to provide the necessary state credit. Under this technique, the state is the tenant of a 40 year lease with Albany County the landlord. The state "rental payments to the county are calculated to reduce county obligations progressively over the lease period." Schuyler v. South Mall Constructors, 82 App. Div. 2d 454, 456, 303 N.Y.S.2d 901, 904 (3d Dep't 1969). As a South Mall prospectus puts it, the state's "rent" is an amount "sufficient to pay when due all installments of principal of, and interest on, all bonds issued by the County to finance the Project." Prospectus, County of Albany, New York, $70,000,000 South Mall Construction (Serial) Bonds, Series F, at 3 (August 1, 1971). By the end of the "lease" term, all of the county bonds will have been retired and the buildings and land will be conveyed to the state. In fact, the state's "lease" is a debt — a promise to pay principal and interest on the construction bonds — and Albany County acts simply as a conduit for the issuance and payment of state bonds.

[No use or expenditure of funds by the locality [Albany County] is actually involved and the entire operation is underwritten by a State indemnification against any "local" loss or expense. Investors in county bonds rely on the State's credit which stands behind the rental and indemnity provisions of the South Mall agreement.

\textit{Id.} at 457, 303 N.Y.S.2d at 904. It is apparent that Albany County could not support the borrowing since the expected Mall debt (one billion dollars) is almost twice the total assessed valuation of taxable real property in Albany County ($346 million). South Mall Prospectus at p. 11.

In his 1971 Annual Report Comptroller Levitt includes "Lease Purchase Obligations" directly beneath "State Debt" under the general heading "Debt Data." N.Y. DEP'T OF AUDIT AND CONTROL 1971 ANNUAL REPORT OF THE COMPTROLLER ii (1971). The Comptroller reports $1.846 billion of outstanding lease purchase obligations as of March 31, 1971, \textit{id}. In 1963, at the time of \textit{St. Clair}, there was outstanding $46 million of such debt. \textit{Id}. 

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\textsuperscript{5} The bonds are thus made marketable and the project proceeds to rise out of the Albany slums. Under St. Clair, the only conceivably aggrieved persons are those whose property is condemned by the Authority to clear the site. Of course, the Authority can acquire by purchase rather than by condemnation. Also, the Authority can select the site to avoid possibly intransigent owners. Moreover, this class is implausible in the role of defender of the constitution; it is apt to be easily disposed of by the payment of inflated sums for slum properties.
Comptroller Levitt has stated that the South Mall financing "circumvents the constitutional procedure which requires public approval of state debt by a voter referendum." N.Y. Times, June 7, 1971 at 48, col. 2.

Lease-financing, therefore, is one major method of evading the referendum requirement. The second major method involves the use of an Authority and so-called "moral obligation" debt. This evasion was pioneered by the Housing Finance Agency Act of 1969 (L. 1969 ch. 671) and has been subsequently emulated by the Urban Development Corporation Act (L. 1968 ch. 174) and the Battery Park City Authority Act (L. 1968 ch. 343-44; L. 1969 ch. 624; and L. 1971 ch. 877). Under this method, an Authority is created to undertake a project or series of projects. Conservative bond buyers, however, consider the projects too risky (e.g., middle income housing) and the bonds are unmarketable. Consequently, the statute provides that the state "shall" pay to the Authority any amount needed for the authority's debt service reserve fund. Housing Finance Agency Act — N.Y. Priv. Hous. Fin. Law. § 47 (1)(d) (McKinney Supp. 1972); Urban Development Corporation — N.Y. Unconsol. Laws § 6270 (3) (McKinney Supp. 1972); Battery Park City Authority — N.Y. Pub. Auth. Law § 1977-b. The language directing the state's payment to the fund is mandatory. There is, of course, no distinction to be made between a direct guarantee of the bonds and a guarantee of a fund out of which the bonds will be paid. The Comptroller classifies this type of debt as "Contingent Debt" of the state and reports $1.596 million outstanding as of March 31, 1971. 1971 ANNUAL REPORT at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18. The Comptroller's characterization was apparently accepted by the Appellate Division in Smith v. Levitt, 37 App. Div. 2d 418, 326 N.Y.S.2d 335 at 18.

The enabling statutes do not expressly provide that the State is either directly or secondarily liable on the obligations of UDC (cf. Public Authorities Law §§ 369, 1813, 1819). However, an examination of the said enabling statutes discloses in subdivision (3) of section 6270 that the State has obligated itself to maintain adequate reserve funds to pay the amount of principal and interest becoming due in each calendar year on all bonds of the UDC. Accordingly, the bonds of UDC might be classified as contingent liabilities on the part of the State of New York.

Id. at 421, 326 N.Y.S.2d at 338. In the court's language the "State has obligated itself" to pay into the reserve fund, which makes UDC bonds "contingent liabilities on the part of the State of New York." This also seems to be the belief of the financial community. Asked why UDC bonds (AA) were rated higher than New York City bonds, (Baa) Mr. Wade Smith, vice president of Moody's Investors Service, Inc., is reported as replying, "the Urban Development Unit's better rating resulted from its guarantees by New York State" (Dow Ticker, March 27, 1972, Phil Hawkins). The state's undertaking is unlawful since it violates three separate constitutional prohibitions.

Article VII, § 11 (1938), the referendum requirement, provides that "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law" and approved by the people. Plainly, "no debt" includes "repayment guarantees" and contingent liabilities.

The guarantee provision also violates Article VII, § 8, which prohibits the gift or loan of the "credit of the state" in aid of any "public or private corporation." This provision was added by the 1938 Constitutional Convention since otherwise "an authority ... unable to sell its securities ... could rush to the State for assistance." JOURNAL OF THE 1938 CONVENTION, Doc. No. 8. (For an example of what the draftsmen feared, see Battery Park memorandum requesting a state guarantee because of a down-turn in the real estate market. 1971 McKinney's Session Laws at 2406). The draftsmen further noted that the "committee feels strongly that the State's credit should be reserved for the use of the State only." Id. The provision also violates Article X, § 5, which provides that the state shall not "at any time be liable for the payment of any obligation issued by such a public corporation. . . .

Present defenders of the HFA pattern seem to take the position that despite the mandatory statutory language that state guarantee is not a guarantee at all. Bond counsel for Battery Park, in their opinion letter, write that the guarantee, does not bind or obligate the State Legislature to appropriate or obligate the
State to apportion and pay to the Authority, in any future fiscal year, the amount so certified by the chairman, but should a future Legislature elect to do so, it may legally make such appropriation, in which event the State is legally authorized to make such apportionment and payment.

Opinion of Messrs. Hawkins, Delafield & Wood, Prospectus, $200,000,000 Battery Park City Authority (April 20, 1972).

This intriguing view, however, offers no explanation as to why mandatory language, assuming it to be valid at all, does not "bind or obligate." Nor is any reference made to section 1978 of the Battery Park statute which goes to some lengths to make all bondholder prerogatives binding upon subsequent legislatures. It provides:

The state of New York does pledge to and agree with the holders of the bonds that the state will not . . . in any way impair the rights and remedies of such bondholders until (all the bonds are discharged). The "repayment guarantee" would seem to be the most significant right or remedy of a bondholder and § 1978 purports to prohibit future legislatures from any action which would "impair" such right. Its evident purpose is to create a vested right on behalf of the bondholders. But, in the view of Battery Park bond counsel, the vested right is a rather small right. The bondholders or the authority may petition the legislature requesting a special appropriation and the legislature may "elect" to make one. In fact, this much of a "right" would seem to exist in the absence of any statutory provision. How such a faint right can make otherwise unmarketable bonds marketable is puzzling.

Battery Park bond counsel adopts the elective appropriation approach in a salvage operation to save the Battery Park statute. Counsel seems aware that the statute as enacted can not stand — without the aid of exotic interpretations — since the state guarantee of authority debt violates both the constitutional referendum requirements and the prohibition of the gift or loan of state credit. Counsel's salvage effort fails, however, because the statutory language is unmistakably to the contrary. The effort further fails because it is incorrect to say, "should a future legislature elect to do so, it may legally make such appropriation." Article X, § 5, of the constitution was adopted in 1938 to make such an appropriation unlawful. It provides that neither the state nor any political subdivision,

shall at any time be liable for the payment of any obligations issued by such a public corporation heretofore or hereafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof . . . .

Consequently, the Legislature is constitutionally prohibited from making payment on authority bonds whether the statutory provision is mandatory, elective or non-existent. Article X, § 5, was intended to overrule the Court of Appeals decision in Williamsburgh Sav. Bank v. State, 243 N.Y. 231, 153 N.E. 58 (1926). In Williamsburgh, the court imposed liability, with legislative authorization, upon the state for the defaulted bonds of a supposedly independent entity, the Canaseraga River Improvement District. The court reasoned that although no legal liability existed, the state had created the District, set it on its course, and could not, therefore, deny liability when the venture failed. In the court's view, the state could not "stand unresponsive when asked to relieve those whom indirectly at least it has brought into an unhappy predicament, by retiring obligations which in essence and equity are its own." Id. at 246, 153 N.E. at 63. If the bonds of an independent river district were in "essence and equity" the state's similar result seemed inevitable in the case of authority bonds. The implied state liability of Williamsburgh became more serious with the increasing use of the authority device during the 1930's. By the time of the 1938 Constitutional Convention, the state had created 33 authorities. Mr. Abbott Low Moffat, Chairman of the Convention's State Finance Committee, sought to make clear that there should be no implied state liability for authority debt. In 1935, the Court of Appeals had upheld the legality of an authority as a separate entity, independent of the state that created it and free of the constitutional limits which restrain government itself. Robertson v. Zimmerman, 268 N.Y. 52, 196 N.E. 740 (1935). Particularly, an authority was free of the constitutional limits on the debt-making power — the referendum requirement at the state level and debt limit provisions at the local level. If one legislature could establish an independent authority to incur debt without a referendum (Zimmerman) and a subsequent legislature could authorize state liability for the
payment of such authority debt (Williamsburgh), the basic constitutional restraint was pointless. The 1938 Convention probably did not consider the use of a Battery Park type of guarantee as likely since such a guarantee would destroy the legality of the authority under Zimmerman in addition to violating the referendum requirement. The Convention was concerned with the "elective" action of a subsequent legislature. Moffat maintained that coherence must be restored to the Constitution's basic fiscal provisions. He said:

I think the State has got to set up certain policies as to what sort of government it is going to set up, how it is going to operate, and what basic financial principles it is going to approve.

3 Revised Record of the Const. Conv. of the State of N.Y. at 2267 (1938) [hereinafter 1938 Convention].

Of course, coherence could be restored by eliminating the referendum requirement, but that approach was not thought worthy of discussion. Instead, Moffat sought to give vitality to the court-sanctioned independence of the authority by making it exclusively responsible for its own debts. Existing statutory disclaimers of state and local liability were insufficient in view of Williamsburgh. Moffat noted:

Every single one of these authorities without exception provides in the statute that the State shall not be liable, or a political subdivision shall not be liable on the bonds of that authority. Yet, under the Williamsburgh Savings Bank case, it is perfectly possible that the Legislature might authorize [payment on the bonds].

1938 Convention at 2262-63.

The floor opposition to the Moffat proposal was led by Robert Moses who strongly argued that no constitutional restraints should be imposed on authorities. 1938 Convention at 2263-81. Williamsburgh, according to Moses, was "not a case in point." 1938 Convention at 2278.

Delegate George R. Fearon agreed with Moffat that authorities must be brought within the Constitution. Fearon observed:

The people of the State have consistently limited the power of the Legislature with respect to the pledging of the credit of the State and yet under these authorities up to date there has been a very serious question [that the Legislature might authorize payment on the bonds].

1938 Convention at 2274.

Fearon noted that the Moffat proposal would not prevent the use of authorities:

But it is proposed that there shall be certain restrictions, and it is proposed, at least in here in this provision, which up to date Mr. Moses in quoting from his political authority has very conveniently forgotten to mention, and when I mention it, you will see immediately why the bond authorities are against this proposal, and that is the proposal that neither the State nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by such public corporation hitherto or hereafter created, nor may the Legislature accept or impose liability upon the State, or any political subdivision in it. . . . . You know now why the bond attorneys are against it.

1938 Convention at 2275.

Robert Moses requested Fearon to yield the floor, but Fearon declined. He continued:

This comes right down to the question of whether or not you are going to protect the credit of the State . . . or whether you are going to give these authorities an absolutely wide open hand . . . because they are relying on the proposition that if the revenues of the enterprise are not sufficient to meet the interest and amortization, they can always . . . . . . get the Legislature to say in effect that the full faith and credit of the State is in back of it.

I believe that when people buy these bonds they should know definitely and certainly that the credit of the State of New York and that the credit of the municipality is not behind those bonds. There should not be any question about it . . . . If they want to buy them under those circumstances, well and good, but let us not have them buy those bonds and then come back to the Legislature and say: "Well, there has been a precedent established in this State under the Williamsburgh case. You did it in the Williamsburgh case, and have got to do it for us. You have got to bail us out."

1938 Convention at 2276.

The Convention adopted article X, § 5, shortly after the Fearon speech. 1938 Convention at 2282-91.
§3.4 billion of voter approved full faith and credit debt.\textsuperscript{18} At the same date, the state had outstanding $5.6 billion of illegal debt.\textsuperscript{19} By the use of immune statutes and the "no standing" rule the state has reached the point where illegal debt exceeds legal debt by 65 percent.

I. ST. CLAIR

The St. Clair case involved, in the view of Court of Appeals Judge Dye, "a patently unconstitutional gift of over $42,000,000 of the State's money to a private corporation."\textsuperscript{20} The litigation arose from the passage in 1956 of chapter 837 entitled, "An act to amend the pari-mutuel revenue law, in relation to capital improvements to harness race tracks."\textsuperscript{21} The act included legislative findings that the state's harness

\textsuperscript{18} N.Y. DEPT OF AUDIT AND CONTROL, COMPTROLLER'S STUDY ON DEBT-LIKE COMMITMENTS OF THE STATE OF NEW YORK, 2 (1973).

\textsuperscript{19} Id. at 3. Indeed the debt of one authority, the Housing Finance Agency, exceeds that of the state. Id. at 11. The $5.6 billion figure includes $2.7 billion of "moral obligation" commitments; $2.4 billion of lease-purchase agreements; and $5 billion of municipal lease-purchase agreements supported by State aid. The illegal debt is largely the product of the post-St. Clair period. As of December 31, 1962 there was outstanding only $24 million of lease-purchase obligations and $90 million of "moral obligation" debt. N.Y. DEPT OF AUDIT AND CONTROL, COMPTROLLER'S SPECIAL REPORT ON THE PUBLIC DEBT OF THE STATE OF NEW YORK, 1, 14 (February 1972).

Authorities are undoubtedly created to evade the constitutional limitations which restrain government itself. However for the scheme to succeed the authority must be given the indicia of an independent entity, separate from the state which created it. Gaynor v. Marohn, 268 N.Y. 417, 198 N.E. 13 (1935) and Robertson v. Zimmerman, 268 N.Y. 52, 196 N.E. 740 (1935). But the grant of independence necessary to evade the referendum requirement has severe political implications for the democracy. Although performing normal governmental functions the policies and personnel of an authority are not responsible to any elected official. Nor are its books and records subject to public disclosure. N.Y. Post Corp. v. Moses, 10 N.Y. 2d 199, 176 N.E.2d 709, 219 N.Y.S.2d 7 (1961). The Comptroller has recently suggested that the statewide authorities may be considered a "fourth branch of government." N.Y. DEPT OF AUDIT AND CONTROL, COMPTROLLER'S STUDY ON STATEWIDE PUBLIC AUTHORITIES: A FOURTH BRANCH OF GOVERNMENT? (November 1972). The authority branch of government is distinguishable from the other three since it is beyond the constitutional restraints which limit the old three. The Comptroller reported, for authority fiscal years ended in 1971, that statewide authorities held total assets of $13.3 billion, debt of $8.9 billion and gross revenues of $1.5 billion. Id. at 6. The Comptroller noted:

[T]hese quasi-governmental agencies have been operating on a scale so massive that, in some instances, they overshadow the fiscal operations of the State itself. Audits of Statewide authorities by my staff have demonstrated that this form of government operation is not inherently more efficient than the regular structure of State government. Nor are they necessarily self-sustaining — as a group, they have already received heavy assistance from the general taxpayer, and the commitments they are making may result in substantial future calls on the tax dollar.

Id. at 1-2.

\textsuperscript{20} 13 N.Y.2d at 81, 192 N.E.2d at 19, 242 N.Y.S.2d at 49. The constitution prohibits the gift of state funds or credit to a private corporation. Article VII, § 8, provides:

The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking:

The succeeding clause similarly prohibits the gift or loan of state credit.

\textsuperscript{21} L. 1956 ch. 837. Governor Harriman, on signing the act noted:

The Attorney General advises that although the constitutionality of this bill has
racing tracks had become "depreciated and inadequate" and thereby deprived the state of revenues "which would accrue from increased admissions and the deposit of larger sums in pari-mutuel pools." The legislature further found that plant modernization would result in increased attendance and larger state revenues. The tracks were, of course, free to improve their plants but appeared unable or unwilling to use their own funds for this purpose. Some approach to the state treasury was therefore considered essential. Prior to the passage of chapter 837 the state had taken as a tax eleven percent of the pari-mutuel pool and half the breakage. Chapter 837 did not repeal the existing tax provisions but provided for the tracks to share, on a 50-50 basis with the state, in any increased tax revenues over 1955 levels. The track's share of these revenues was to be used to reimburse the track for authorized capital improvements. Reimbursement was permitted only after completion of the capital improvement. The act provided that the track's share was to be placed in a special account in its own name followed by the words "construction account." Upon completion of the capital improvements and cost certification by the State Harness Racing Commission, the amounts in the special account would be annually transferred to the track's general funds.

The 1956 law had been improvidently drafted to provide that the track would be entitled not only to cost reimbursement but to all federal income taxes payable because of the inclusion of the reim-

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been questioned, he does not believe "that there are serious objections to its approval on grounds of constitutionality in its present form."

1956 McKinney's Session Laws at 1697.

22 L. 1956 ch. 837, § 1.


27 Id. § 10.

29 Id. § 5(a).

28 Id. § 5(a). The act also provided that the funds in the special account were not to be considered "public moneys." (§ 8). The Appellate Division summarized the act as follows:

"In essence, the 1956 law offers the tracks a formula under which the taxes otherwise payable to the State will be reduced, provided they exceed the 1955 tax plateau and the tax savings are channeled into capital improvements." Application of Blaikie, 11 App. Div. 2d 196, 204, 202 N.Y. S.2d 659, 668 (1st Dep't 1960).

29 L. 1956 ch. 837, §§ 6, 7, 10. In practice, the tracks would borrow to make the improvements and then look to the special account for reimbursement in future years. For example, if the track's share were three million annually and the cost of the improvement were eighteen million, the track would recoup its cost six years after completion. The act provided that interest on borrowing was not to be considered part of the track's cost. (§ 10). Dispute as to another element of the track's "cost," (federal taxes), led to the calling of a special session of the legislature and the major Court of Appeals case discussed in note 34 and pertinent text infra.
bursement in the track's gross income. This provision added at least fifty percent (the corporate tax rate) to the state's cost. The act took no account of the fact that the track had acquired a valuable capital improvement which would be depreciated and reduce federal taxes in future years. The state had second thoughts about the arrangement and in 1959 an Extraordinary Session of the legislature was called to amend the Pari-Mutuel laws. The track capital improvement program was eliminated. The legislature further provided that no track should be reimbursed for any income taxes paid to the United States with respect to any payments "heretofore or hereafter" made to a track from a special account. Finally, and perhaps disingenuously, the legislature recited that the foregoing was intended to "clarify" its 1956 intent.

Roosevelt Raceway had completed its capital improvement program in 1957 at a cost of $19,600,000. Also in 1957 Roosevelt had received $2,800,000 from its special account. Roosevelt notified the Racing Commission that receipt of such sum had resulted in an additional federal tax liability of $1,400,000 and requested that it be credited with this amount for future payment. The Commission refused stating its view that the track was not entitled to any reimbursement for federal taxes. Roosevelt commenced an article 78 proceeding to compel the Commission to correct its records. Roosevelt argued that the 1956 law provided for the reimbursement of federal taxes. This interpretation was accepted by all the courts involved in the litigation. Roosevelt further argued that the 1959 law could not alter its rights

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30 For example, if a reimbursement of 3 million were paid to the track, it would incur a federal tax liability of 1.5 million which would also be reimbursable. On this point, the 1956 act is not a model of clarity and was probably not intended to be. It provides: [payment shall be made out of the special account] until such date as the amounts paid to such harness race track from the construction account, less income taxes paid thereon to the United States by such harness track, equals the cost of the capital improvement.

Id. § 10.


32 Id.

33 Id. § 10.


35 Id.

36 Id. The subsequent litigation does not discuss where the state's commitment would end under this approach, i.e., the addition reimbursement would result in further federal taxes and so on.

37 Roosevelt Raceway, Inc. v. Monaghan, 17 Misc. 2d 1065, 187 N.Y.S.2d 659 (Sup. Ct. N.Y. County), aff'd, 9 App. Div. 2d 621, 191 N.Y.S.2d 362 (1st Dep't 1959). This proceeding involved a motion to dismiss by the Racing Commissions on the grounds that the action should have been brought against the State Tax Commission. The Racing Commission's motion was denied.
since it had completed its capital improvement program in 1957 pursuant to the provisions of the 1956 laws. The supreme court agreed stating "[a] contract is created by action induced by or in reliance on state legislation." 38 The Appellate Division also agreed. 39 The Court of Appeals in an opinion by Judge Fuld, reversed. 40 Two dissenting judges, Desmond and Burke, considered the 1959 law (eliminating federal tax reimbursement), as interpreted by the majority, to constitute an impair-


39 11 App. Div. 2d 206, 202 N.Y.S.2d 646 (1st Dep't 1960). The Appellate Division decision was by 3-2 vote with Justices Stevens and Valente dissenting. At the Appellate Division level the Attorney General substantially broadened his position to argue that the 1956 law was unconstitutional in its entirety and hence could give rise to no rights. The Attorney General argued that state funds were involved and that article VII, § 8, of the constitution provides, "[t]he money of the state shall not be given or loaned to or in aid of any private corporation." The majority of the Appellate Division dismissed this argument on the grounds that no "money of the state" was involved, "[t]itle is always in the track." Id. at 207, 202 N.Y.S.2d at 648. The court, therefore, accepted the statutory disclaimer that moneys in the special account were not "public moneys." (§ 8). Dissenting Justice Valente also focused on the title question but believed that the state had acquired title when the funds were deposited "subject to divestiture" if certain conditions were met. Justice Stevens, in dissent, thought the problems ran deeper and were not particularly aided by an analysis of title. He noted that the 1956 law had been carefully tailored to avoid constitutional principles, the "question is whether such avoidance was successful, and the answer should be that it was not." Id. at 209, 202 N.Y.S.2d at 650. Justice Stevens found the 1956 law to be violative of five separate constitutional provisions. The issue of title had been purposely confused by the act's draftsman but Justice Stevens thought it was certainly clear that the funds in question had been "collected by virtue of the taxing power of the state." Id. at 210, 202 N.Y.S.2d at 652. The exercise of the power to tax necessarily implies the duty to use the proceeds for a public purpose, Weismer v. Village of Douglas, 64 N.Y. 91 (1876). In essence, the scheme of the 1956 law was that "prospective tax revenues are pledged to supply capital improvements" for a private corporation. Id. at 212, 202 N.Y.S.2d at 656. Justice Stevens noted that the track did not maintain that it had a right "of control and absolute disposition" over the special account. If the funds were public funds, as found by Justice Stevens, the 1956 law violated (1) article VII, § 8's prohibition of the gift or loan of state property or credit to a private corporation; (2) article III, § 22's requirement that every law imposing a tax shall distinctly state the object to which it is to be applied; (3) article VII, § 7's requirement that state funds be paid only by legislative appropriation; (4) article V, § 1's requirement that state funds be paid only after audit by the Comptroller; and (5) article XVI, § 1's requirement that the power of taxation can never be surrendered, suspended or contracted away. All these provisions were sought to be avoided by the statutory disclaimer that the funds in the special account were not "public moneys" and that the account be opened in the track's "own name." (§§ 5(a), 8). Justice Stevens found the disclaimer to be inaccurate.

The draftsman of the 1956 law had been presented with an insoluble problem. No one would question the legal power of the legislature to reduce pari-mutuel taxes. But if this were done the savings would be part of the general revenues of the tracks to do with as they would. Understandably, it was not thought prudent to make the money available to the tracks on a no-strings basis. On the other hand, no one would defend the legality of a scheme whereby the state collected taxes and made grants to the tracks for capital improvements or any other purpose. The draftsman sought to cure the problem by expressly placing title to the money in the tracks while leaving control largely in the state. Justice Stevens thought the effort a failure.

ment of contract in violation of the federal constitution. The dissenters noted, as was hardly arguable, that the state had induced large capital investment and that the law in effect when the investment was made provided for reimbursement of costs and federal taxes. Whether the investment was in reliance on the 1956 law was arguable. The majority maintained that a student of the State Constitution would have placed no reliance on the 1956 law since it was freely revocable. The notion of an irrepealable law is difficult to justify under our governmental theory and has been a source of trouble since Dartmouth College. Judge Desmond observed:

If this 1956 statute and petitioner's action in reliance thereon did not constitute an inviolable contract, it must be because the courts are abolishing an ancient rule of constitutional law which was founded on good morals and fair play and which has heretofore forbade the State's breaching such contracts.

Judge Burke agreed that the 1956 law "has all the elements of a contract." He noted, "an offer was addressed to a specific party and a

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41 The Federal Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. CONSt. art. 1, § 10.

42 The Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). The state constitution contains two express prohibitions of irrepealable laws: (1) article X, § 1 (added in 1846) provides that all laws relating to the formation of private or public corporations "may be altered from time to time or repealed"; (2) article XVI, § 1 (added in 1938) provides that all tax exemptions "may be altered or repealed" with certain exceptions not pertinent here.

In the absence of express constitutional prohibition there is substantial doubt as to the power of a legislature to bind the future even by express contract. Chief Justice Doe of the New Hampshire Supreme Court wrote that the state constitution vested the legislative power in the Senate and House of Representatives. Doe, A New View of the Dartmouth College Case, 6 HARv. L. REV. 161, 213 (1892). See N.Y. CONSt. art. III, § 1. The Chief Justice took the view that the Legislature had no power to contract away its delegated powers. He noted:

No one contends that the Senate and House can change the Constitution; no one denies that their valid contract, divesting them of the entire law-making power which the Constitution vests in them, would be an amendment of the Constitution; and they can no more amend it by destroying a part of that power than by destroying the whole of it.

6 HARv. L. Rev. at 214.

The Chief Justice continued:

On the second day of June, 1784, when the Constitution began to be in force, they [the New Hampshire legislature] had the whole legislative power, including the power of repeal; and from that day to this, by the true construction, they have been legally incapable of diminishing that power by contract or otherwise.

Id. at 215.

43 9 N.Y.2d at 319, 174 N.E.2d at 84, 213 N.Y.S.2d at 748. Judge Desmond believed that the legislative intent to create a contract was clear from another provision of the 1956 law. Prior to 1956, the Racing Commission was authorized to license operation of a harness track for no more than one year period. As part of the 1956 changes, the law was amended to permit licenses for terms up to 25 years, but not to exceed the time "necessary to amortize any loan for capital improvements." (§ 2).

44 Id. at 325, 174 N.E.2d at 87, 215 N.Y.S.2d at 752.
promise made to that party that, if it was approved by the State and if it completed improvements which had to receive a State certification, it would be reimbursed."\textsuperscript{45} Judge Burke continued:

The principle—that subsequent legislation cannot take away rights promised by prior legislation, especially after the promisee has acted in reliance upon the promise—protects respondent. Legislation by the State which violates section 10 of Article I of the United States Constitution is violative of the due process clause of section 6 of Article I of the State Constitution.\textsuperscript{46}

Judges Burke and Desmond’s belief that the 1959 law impaired a contract in violation of the Federal Constitution was not accepted by the Supreme Court which subsequently dismissed an appeal “for want of substantial federal question.”\textsuperscript{47}

Judge Fuld, for the majority, agreed that the 1956 law clearly provided for the track to be reimbursed for federal taxes.\textsuperscript{48} The 1959 law, however, clearly provided that they would not be so reimbursed. Was there any reason to hold the later law ineffective? The court thought not.

Judge Fuld approached the question by seeking to determine the precise nature of the contract which was said to be impaired. He expressed uncertainty as to what Roosevelt claimed the terms of its asserted contract with the state to be.\textsuperscript{49} Clearly, Roosevelt did not maintain that the contract contained a promise by the State to use state funds to construct the tracks. This was “manifestly necessary to overcome the impact of constitutional prohibitions,”\textsuperscript{50} since, if so interpreted, the contract would be totally illegal and Roosevelt would be entitled to no reimbursement. If the funds were public funds the act violated article VII, § 8 (gift and loan prohibition); article VII, § 7 (appropriation requirement); and article V, § 1 (comptroller audit requirement). Certainly, the contract did not provide for the use of track funds to construct the track since no contract was necessary for that. The only other possible interpretation of the contract was that it constituted a “contract for tax relief—a promise by the state to keep the reduction enacted in the 1956 tax formula intact and unchanged
until the track has been made whole. . . .” Constrained in this manner, the contract could not be binding upon the state because the state’s undertaking — to keep a tax exemption in effect — was in violation of the state constitution. Judge Fuld commented, “[s]uch contract, if not indeed void in its inception — and this is a question as to which we express no opinion — is at all times revocable by the State.” The contract was “at all times revocable” because the constitution provides that tax “[e]xemptions may be altered or repealed.” Judge Fuld continued:

Just as the “reserved power” to amend corporate charters, found in section 1 of article X of our Constitution, “prevents the charter from becoming a contract between state and corporation protected from impairment by the [federal] Constitution” (citation omitted), so section 1 of article XVI of our Constitution “prevents” the 1956 legislative promise to reduce the harness track’s taxes “from becoming a contract between state and corporation protected from impairment by the [Federal] Constitution.” (citations omitted). In other words, in view of the first sentence of section 1 of article XVI the State may not be said to have breached any contract or agreement with Roosevelt to maintain its State tax at the level provided for in 1956 for the reason that no one was empowered to enter into such an agreement on behalf of the State.54

51 Id. at 307, 174 N.E.2d at 76, 213 N.Y.S.2d at 737.
52 Id. Judge Fuld quoted from article XVI, § 1 of the constitution which provides in relevant part:

The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. . .

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes. . . .”

The question reserved by Judge Fuld — whether such a contract was void in its inception — is difficult. Clearly exemptions can be granted only by general law. For example, The Housing Finance Agency statute enacted in 1960, states that the “property of the agency and its income and operations shall be exempt from taxation.” N.Y. PRIV. HOUS. FIN. LAW 53. The Housing Finance Agency was created by special act (see N.Y. CONST. art. X, § 5) and the quoted provision is consequently void in its inception. The 1956 harness track law, however, seems to be a general law.

53 This language was added to the constitution in 1938. It was drafted by Mr. Martin Saxe of New York who was Chairman of the Committee on Taxation at both the 1915 and 1938 Conventions. In 1915 Saxe’s effort to insert similar language into the Constitution was defeated by the convention after objection by General Wickersham who doubted the wisdom of a “clause which would attempt to repeal contracts, solemnly made by the State.” 1915 RECORD at 957.

54 9 N.Y.2d at 307, 174 N.E.2d at 76, 77, 213 N.Y.S.2d 737. Judge Fuld’s reference to the reserved power of article X, § 1 will be noted. That section, added in 1846 to overrule Dartmouth College, provided that all laws relating to the formation of private or public corporations “may be altered from time to time or repealed.” The statute creating the Housing Finance Agency, a public corporation, is such a law. N.Y. PRIV. HOUS. FIN. LAWS § 43 (MClKinney Supp. 1972). Because of the constitutionally reserved power all provisions of this statute are freely revocable. Yet this statute contains a section entitled “Agreement with the State” which provides:
Judge Dye expressed "complete agreement" with Judge Fuld but, with foresight, desired to go further and treat the constitutionality of the 1956 law as a whole. Judge Dye found the 1956 act void in its entirety.

The state does hereby pledge to and agree with the holders of any notes or bonds issued under this article, that the state will not limit or alter the rights hereby vested in the agency to fulfill the terms of any agreements made with the holders thereof or in any way impair the rights and remedies of such holders until such notes or bonds . . . are fully met and discharged.

While the draftsman of the 1960 statute did not have the benefit of Judge Fuld's opinion, the language of article X, § 1, is perfectly clear. In Judge Fuld's language, "no one was empowered to enter into such an agreement on behalf of the State." A constitutional amendment would have been required. An intent to mislead prospective bond purchasers should not be imputed to the legislature. Also, the bondholders were capable of protecting their own interests. Nonetheless, the Housing Finance Agency statute was "void in its inception" and the bondholders hold illegal debt.

Judge Dye thought the issue should be met because the "problem is basic, involving as it does the reach of constitutional safeguards surrounding the use of public funds." Id. He had no doubt that the funds in question, raised by the taxing power, were public. Consequently, he found the 1956 law violative of five constitutional provisions: (1) article VII, § 8 (gift or loan of money or credit prohibition); (2) article XVI, § 1 (prohibition against contracting away of taxing power); (3) article III, § 22 (requirement for a law imposing a tax); (4) article VII, § 7 (appropriations requirement); and (5) article V, § 1 (Comptroller audit requirement).

The statutory disclaimer that the funds in the special account shall be held "not as public moneys" (§ 8) did not impress Judge Dye: "This characterization neither inhibits nor prevents the court from reaching a contrary conclusion . . . such labels . . . may not serve as a substitute for legislative power, which finds its source in the Constitution. If it were otherwise, the State would soon be divested of all its funds simply by labeling them as 'private.'" 9 N.Y.2d at 314, 174 N.E.2d at 81, 213 N.Y.S.2d at 743.

A similar statutory disclaimer is found in the Housing Finance Agency statute. L. 1960 ch. 671. That act provides that the state "shall not be liable" on the bonds of the agency and such bonds "shall not be a debt of the state." N.Y. Pub. Hous. Fin. Law § 46(8) (McKinney 1962). Disclaimers seem to appear when a draftsman is trying to shore up a structure which is not basically sound. The harness track law raised money by taxes and gave the state substantial control over its disposition. To attempt to prevent the obvious conclusion that public funds are involved, the draftsman inserted express language stating that the funds are held "not as public moneys." The Housing Finance Agency is a parallel situation. The disclaimer states that HFA Bonds "shall not be a debt of the state." But the HFA statute elsewhere provides that the state shall guarantee payment of the HFA bonds. Id. § 47(1)(d). It provides that if the HFA reserve for the payment of principal and interest is insufficient that the HFA shall state the needed amount to the Governor "and the amount so stated, if any, shall be apportioned and paid to the agency during the current state fiscal year." Consequently, the state guarantees the reserve fund out of which the bonds are payable. It will be noted that the state is given no discretion with respect to this payment; the statute uses the mandatory, "shall." The state therefore becomes liable on the HFA bonds if default appears imminent. This relationship would normally be described as a guarantee or contingent liability. The Comptroller believes the statute to create "contingent debt" on the part of the state. 1971 Ann. Rep. of Comptroller 18. But, the state, under New York's constitution cannot incur any debt, contingent or direct, without a referendum of the people. The constitution provides that "no debt shall be hereafter contracted by or in behalf of the state" except by a vote of the people. N.Y. Const. art. VII, § 11. The referendum requirement for state debt was added to the Constitution in 1846 following a constitu-
Roosevelt's appeal to the Supreme Court was dismissed in October of 1961 for want of a substantial federal question. The Supreme Court's action ended any lingering doubts on the impairment of contract issue. Roosevelt had fully performed under one set of rules. The state found the bargain disadvantageous and changed the rules. The Court of Appeals and the Supreme Court held that Roosevelt had no remedy.

The Roosevelt decision was one of the most significant in the history of the Court of Appeals. The court's hostility toward vested rights, impairment of contract theories and irrepealable laws was evident. All efforts to bind the future were rejected. No statute premised on such principles could reasonably expect to survive review by the court. Such a statute could only survive if the court's power of review were eliminated. The court itself performed this task in St. Clair. The pardoned statute in question is the Housing Finance Agency Act of 1960. The outstanding debt of this agency presently exceeds that of New York State.

This act makes a number of state and local commitments which are void in their inception including (1) the state guarantee of HFA bonds; (2) the exemptions of HFA property and income from state and local taxes; and (3) the tax exemption of interest on HFA bonds. The act asserts its irrepealability by providing that the "state does hereby pledge to and agree with the holders" of bonds that it will not "in any way impair the rights and remedies" of any bondholders until the bonds are discharged. The HFA act is constitutionally extravagant; what is void in its inception is said to be irrepealable.

1846 Debates at 946.
A disclaimer that debt is not debt cannot, in Judge Dye's words "serve as a substitute for legislative power, which finds its source in the Constitution." 9 N.Y.2d at 314, 174 N.E.2d at 81, 213 N.Y.S.2d at 743. The legislature had no power to undertake the guarantee found in the Housing Finance Agency statute.

68 N.Y. Dept. of Audit and Control, Comptroller's Study on Debt-Like Commitment of the State of N.Y. 11 (1973). The HFA's outstanding debt as of June 30, 1972 was $3.812 million while that of the State of New York was $3.378 million. Id. at 3.
60 Id. § 53 (McKinney 1962).
61 Id. § 54. This provision is clearly void since it purports to be irrepealable, providing that the interest "shall at all times be free from taxation."
62 Id. § 48.
In view of the questions expressly reserved by Judge Fuld in *Roosevelt Raceway*, some follow-up litigation was inevitable. Edward St. Clair, as a citizen and taxpayer, brought an action to prevent the alleged misapplication of $42,000,000 and for a judgment declaring § 45-a to be unconstitutional. St. Clair asserted that the provision violated article VII, § 8 of the constitution which prohibits the gift or loan of state money or credit in aid of "any private undertaking." The lower courts dismissed the complaint. The Court of Appeals affirmed in a brief opinion. Judge Burke, for the four man majority, noted that we "have always held that the constitutionality of a State statute may be tested only by one personally aggrieved." He continued: "Thus we have found anew that the rationale propounded in [*Doolittle* and *Komfort*] remains sound today." The remainder of the opinion consists of quotations from Judge Chase in *Schieffelin v. Komfort* and Justice Black in *Perkins v. Lukens Steel Co.* Both quotations emphasize that the *St. Clair* court propounded a constitutional principle i.e., that citizen standing violates the separation of powers. The quotation from Justice Black recites that the standing issue, does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Government.

Judge Fuld's dissent focused on the central issue, the enforcement of the Constitution. The denial of citizen standing "will in most instances prevent any challenge." He observed:

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63 The *St. Clair* majority, by Judge Burke, states that the complaint was dismissed "on the grounds that appellant lacks legal capacity to sue." 13 N.Y.2d at 15, 192 N.E. at 15, 242 N.Y.S.2d at 44. The lower court opinions, however, are not reported.

64 The Court of Appeals' opinion comprises only seven paragraphs, much of them made up of quotes from other cases. The divestiture of the court's constitutional review power was performed in a summary manner.

65 The four man majority consisted of Judges Burke, Desmond, Foster and Scileppi. The dissenters were Judges Fuld, Dye, and Van Voorhis. (These three, together with Judge Foster had formed the majority in *Roosevelt Raceway*; Judges Burke and Desmond had dissented along with Judge Froessel). Over the next 10 years the composition of the court was to change but the 4-3 split on citizen standing remained.

66 13 N.Y.2d at 76, 192 N.E.2d at 15, 242 N.Y.S.2d at 44.

67 Id.

68 212 N.Y. 520, 107 N.E. 675 (1914).

69 310 U.S. 113 (1940).

70 The language quoted from *Komfort* includes the following: "The assumption of jurisdiction in any other case [than a personally aggrieved suit] would be an interference by one department of government with another department of government when each is equally independent with the powers conferred upon it by the Constitution itself.

13 N.Y.2d at 76, 192 N.E.2d at 16, 242 N.Y.S.2d at 45.

71 Id. at 77, 192 N.E.2d at 16, 242 N.Y.S.2d at 45.
It hardly seems consonant with the Constitution itself that the enforcement of its provisions should have to turn on the meaning ascribed to it by members of the executive or administrative branch of government or on whether they choose to assert themselves.

It is self-evident that the denial of standing to a taxpayer will in most instances prevent any challenge to an expenditure of state funds as violative of the Constitution. Judge Fuld thought the "suggestions" of the majority opinion that the Attorney General may be relied upon to attack the validity of state laws "both unreal in fact and dubious in theory." Nor was Judge Fuld impressed by the majority's main premise, that citizen standing would be an "interference" by one department of government with another. He noted, "[f]undamental to our form of government is the principle that determination of the constitutionality of legislation is essentially a judicial function."

Judge Dye, in a separate dissent, stated that no court-made rule should "be interposed to give a benediction to a patently unconstitutional gift of over $42,000,000 of the State's money to a private corporation." Judge Dye further expressed his total disagreement with the "personally aggrieved" standard. He observed:

The personal monetary interest should not be the test, but whether, in fact, the Constitution of the State of New York is being flouted.

The predictions of the dissenters were accurate — the state entered a ten year period during which the executive customarily disregarded the constitution.

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72 Id. at 79, 192 N.E.2d at 18, 242 N.Y.S.2d at 47. Judge Fuld continued:

Certainly, our Constitution does not entrust the determination of constitutionality to the executive branch of government. . . .

The Constitution is a People's document and the hypothesis that a citizen-taxpayer has no "interest" in state expenditures is little more than a legal fiction.

Id.

73 Id. Judge Fuld believed it more appropriate for the Attorney General to defend challenged statutes rather "than initiate an attack of its own." The instant litigation was a case in point since the Attorney General appeared pro se allying himself with Yonkers in defense of the statute.

74 Id. In concluding his dissent Judge Fuld moved to a broader ground observing:

The apathy of the average citizen concerning public affairs has often been decried; under the court-made rule now reaffirmed, it is being compelled.

13 N.Y.2d at 81, 192 N.E.2d at 19, 242 N.Y.S.2d at 48. St. Clair removed the "People's document" from the hands of the people. The executive would henceforth determine the legality of its acts.

75 Id.

76 Id. at 82, 192 N.E.2d at 19, 242 N.Y.S.2d at 49.
II. Authority Considered by St. Clair

St. Clair — in its assertion that "[w]e have always held that the constitutionality of a State statute may be tested only by one personally aggrieved" — relied on only three cases, *Doolittle v. Supervisors of Broome County*; *Schieffelin v. Komfort*; and *Bull v. Stichman*. The court considered Judge Denio's 1858 decision in *Doolittle* as the fountainhead of the "no standing" rule in New York. As will be seen this belief arises more from certain broad language in the opinion rather than the actual holding.

In *Doolittle* it appears that the town of Chenango was, by act of the County Board of Supervisors, to be divided into three new towns. Seventeen residents of an alleged new town, Port Crane, brought this action to obtain a judgment declaring the act of the board of supervisors null and void. The proceeding, consequently, appeared to be one for declaratory judgment rather than mandamus. The substantive ground for the plaintiffs' complaint is not stated. Judge Denio, for purposes of his decision, assumed the County Board's action to be void. Plaintiffs' "grievance is that they are threatened to be subjected for the purposes of local administration to a jurisdiction not created according to law." Judge Denio thought this a wrong not only to the plaintiffs, freeholders of Port Crane, but to (1) all inhabitants of Port Crane; (2) all inhabitants of the other two supposed towns; (3) all the people of Broome County; and (4) all the people of the state. The wrong affected these classes with varying intensity depending on their distance from the center of the wrong, the illegal town. The freeholders of Port Crane and the other alleged towns were threatened with the most drastic harm since they were subject to taxation and imprisonment by the illegal officials. All residents of the towns, however, were "liable, in a variety of ways, to the action of the local magistracy." The liberties of the town residents were most directly endangered by the threat of illegal taxation and imprisonment. But all the people of Broome County were

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77 18 N.Y. 155 (1858).
78 212 N.Y. 520, 106 N.E. 675 (1914).
79 298 N.Y. 516, 80 N.E.2d 661 (1948). The Court of Appeals wrote no opinion in the *Bull* case. The appellate division is found at 273 App. Div. 311, 78 N.Y.2d 279 (3d Dep't 1948).
80 The facts are not fully stated in *Doolittle*.
81 18 N.Y. at 155 (headnote).
82 This may explain the fact that the *Collins* case, decided in 1837, is not cited in the opinion.
83 18 N.Y. at 157.
84 Id.
harm for in the "administration of justice and the management of the fiscal affairs of the county, the magistrates to be chosen in the new towns will be often called upon to perform duties" which will affect every town in the county. Moreover, to "a still slighter degree, but to an extent which may be appreciated, the substitution of pretended legal authority — for the rightful magistracy — works an injury to all the people." The state's public business requires the "co-operation of legal magistrates of every grade." An illegal change of the "local districts into which the State, for the purposes of administration, is divided and subdivided, would naturally be productive of extensive inconveniences and losses to individuals as well as to the state in its corporate character." The threatened harm, under Judge Denio's analysis, seemed grave enough. But was the plaintiff's action, however, premature? Judge Denio wrote:

The officers constituted under the new arrangement would have no rightful authority, and when the act should result in directly touching the property or the person of an individual citizen, his remedy for the wrong would be perfect in the ordinary course of justice. Hence, if the plaintiffs in this case are correct in their principal position; and they, or any of them shall be directly disturbed in their personal rights or pecuniary interest by any one acting under the resolutions of the board of supervisors, they have only to appeal to the courts for redress against the wrong-doer in the ordinary way. Up to this time no private interest of the plaintiffs has been invaded, and no injury peculiar to them is threatened. It is said that they may be assessed to pay taxes ... but, no valid tax can be imposed through its agency, and the plaintiffs are under no necessity to institute a suit on that account.

To this point Judge Denio's opinion hardly supports a "no standing" rule since he only requires a concrete wrong to perfect plaintiff's rights. The threat of an illegal tax was not sufficient. Any effort to enforce an illegal tax, however, would clearly necessitate judicial review. Under St. Clair, of course, a citizen-taxpayer has no right to question the enforcement of an illegal tax. The forcible exaction of a tax provides no opportunity to argue that the taxing statute has been enacted in disregard of the constitution.

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85 Id. at 158.
86 Id.
87 Id.
88 Id. at 158-59.
89 Presumably, the plaintiffs argued that the question was ripe since concrete harm would undoubtedly flow from the creation of the illegal town.
90 Conceivably, if a taxpayer is imprisoned in connection with tax collection pro-
The remainder of Judge Denio's opinion is devoted to the standing question with respect to the "actual wrong" done to plaintiffs, i.e., the creation of a town not according to law.\(^9\) Judge Denio viewed this as a public wrong and the "general rule certainly is that for wrongs against the public, whether actually committed or only apprehended, the remedy, whether civil or criminal is by a prosecution instituted by the State."\(^9\) Judge Denio noted the analogy of criminal prosecution, "criminal offenses of every grade, as is well known, are punishable only by prosecution at the suit of the people."\(^9\) Of course, where a crime "includes a private injury, the latter may, it is true, be prosecuted at the suit of the party injured but where there is no direct individual injury no action can be maintained."\(^9\) The action cannot be maintained despite the fact that "every citizen has an interest in the maintenance of order and the prevention of crime."\(^9\) Judge Denio's reference to "direct individual injury" is similar to his earlier phrases, "directly touching the property or person," "directly disturbed in their personal rights or pecuniary interest" and "actual wrong." This language indicates that Judge Denio's standing test was based on direct or personal injury in fact. Public wrong, of the sort incurred by a New York City resident when an upstate town is illegally created, should not give rise to litigation. The outcome of the litigation will more directly affect the residents of the illegal town and they are more appropriate parties to control the litigation. The direct injury-in-fact test assures that the action will be maintained by an appropriate party. There is no question that an appropriate party will appear since the new town is certain to assess taxes and asserts its jurisdiction in many ways. \textit{St. Clair} is based on contrary reasoning since it disregards a taxpayer's injury in fact. Further, \textit{St. Clair} is contrary since it adopts a test which assures that no party will be an appropriate party.

Judge Denio moves to broader language, more agreeable to \textit{St. Clair}, in his discussion of the doctrine of public nuisance and its special injury notions. He observed:

\begin{quote} Common or public nuisances, which are such as are inconvenient or injurious to the whole community in general are, as all are aware, indictable only, and not actionable; for as Blackstone says, "it would be unreasonable to multiply suits by giving every man a \end{quote}

\(^{91}\) 18 N.Y. at 159.
\(^{92}\) \textit{Id.}
\(^{93}\) \textit{Id.}
\(^{94}\) \textit{Id.}
\(^{95}\) \textit{Id.}
A plant which spews smoke and soot into the air injures everyone in the area. Injury in fact exists. But the public nuisance doctrine held that a plaintiff could not maintain an action unless he could prove special or additional injury. For example, a drapery shop might be able to maintain an action while an adjoining law office could not. Judge Denio noted that the determination of whether a special injury existed was "sometimes difficult" but that no problem existed in the present case because the "act of the supervisors has no bearing upon the plaintiff's individual interests."  

In discussing the policy aspects of the question Judge Denio moves even closer to St. Clair and seems to adopt a "no taxpayer standing" rule. This appears inconsistent with other aspects of the opinion and no reconciliation is attempted. In any case, Judge Denio noted that permissive standing would be "productive of very great inconveniences." The feared "inconveniences" included (1) suits against "the acts of any administrative board or officer in the State, and thus proceedings, which are intended to be summary and inexpensive, can only be perfected by" court action; (2) "the courts may regularly be called upon to revise all laws which may be passed"; (3) the courts may "be
required to enjoin the comptroller from drawing warrants on the treasurer"; and (4) the "State and county officers might be compelled to litigate the question of constitutionality with any taxpayer who should see fit to question a State or local tax in any and every case, and thus the fiscal business of the State would come to be transacted mainly in the courts." 100

Judge Denio's opinion is puzzling and ambiguous. It is fairly clear that he was not focusing on the St. Clair situation with its necessary conclusion that the most blatant unconstitutional acts are to be permitted. Further, it seems exaggerated to read the case as establishing a strict "no citizen-taxpayer standing" rule in New York. Certainly, the Court of Appeals, only nine years later, did not so view it. In the Halsey case the Court permitted a citizen and taxpayer to mandamus the Treasurer of Steuben county. 101 The Court noted that this "in no way conflicts with the decisions of this court" in Doolittle. 102 The distinction, between Doolittle and a case where an "individual acts as relator or representative of the people to redress a public wrong by mandamus," was, in Judge Fullerton's words, "strikingly apparent." 103 If Doolittle did intend to establish a strict "no taxpayer standing" rule it was quickly modified and limited by the Halsey decision. Halsey was not cited in the St. Clair opinion.

The second case relied on by the Court in St. Clair for its proposition that "[w]e have always held" against citizen standing in Schieffelin v. Komfort. 104 The St. Clair Court quoted with approval the following language of Judge Chase in Komfort:

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100 Id. at 162-63. Judge Denio concluded his opinion by discussing a group of earlier cases, distinguishing some and not following others. Even here the opinion is difficult to follow. In an English case, Bromley v. Smith, 57 Eng. Rep. 482, 1 Sim. 8 (ch. 1826), parliament had passed a private act permitting certain commoners to inclose the commons and associate and make rules and regulations for its cultivation and management. In addition, the act authorized appointment of a treasurer. Nine parishioners, on behalf of themselves and the other commoners, brought an action against the treasurer alleging misappropriation of funds and demanding an accounting. The suit was permitted and plaintiff's counsel in Doolittle apparently viewed the case as supporting taxpayer standing. Judge Denio, however, disagreed, noting, "[n]ow, the right of common is as strictly a private right as any other interest in land. It is an incorporeal hereditament, and it is not less a private and individual interest in real estate where lands subject to rights of common are allowed to be inclosed under private acts of parliament." 18 N.Y. at 167. But if the right of common is a "private" and "individual interest" permitting standing, why is not the title to a taxpayer's property given equal status?

101 37 N.Y. 344 (1867).

102 Id. at 347.

103 Id. at 348.

104 212 N.Y. 520, 106 N.E. 675 (1914). Lower court decisions are found at 163 App. Div. 741, 149 N.Y.S. 65 (1st Dep't 1914) and 86 Misc. 678, 149 N.Y.S. 254 (Sup. Ct. N.Y. County 1914).
Jurisdiction has never been directly conferred upon the courts to supervise the acts of other departments of government. The jurisdiction to declare an act of the legislature unconstitutional arises because it is the province and duty of the judicial department of government to declare the law in the determination of the individual rights of the parties.

The assumption of jurisdiction in any other case would be an interference by one department of government with another department of government when each is equally independent within the powers conferred upon it by the constitution itself.\(^{105}\)

On April 7, 1914, a special election was held on the question, "Shall there be a convention to revise the Constitution and amend the same?"\(^{108}\) The constitution provided for a constitutional convention if "a majority of the electors voting thereon shall decide in favor of a convention."\(^{107}\) The canvass of votes showed that the people favored a convention by the narrow margin of 1,253 votes.\(^{108}\) The canvass reported, out of 310,444 votes cast, 153,222 in favor and 152,969 opposed.\(^{109}\) The remaining 5,253 votes were either blank or void. Consequently, the meaning of a majority "voting thereon" as used in the Constitution became critical. If a majority of the votes cast, 310,444, was required the call for a convention was defeated.\(^{110}\) If a majority of "effective" votes was sufficient it was adopted. A further problem was election fraud, what Justice Samuel Seabury called the "shocking situation revealed by the evidence" in fourteen election districts.\(^{111}\) The frauds in these districts were, according to Judge Seabury, "so widespread as to utterly destroy the probative value of the returns made."\(^{112}\) Moreover, two additional legal questions of some substance were involved. First, the Constitution of 1894 granted suffrage to every man of twenty-one who had resided in the state for one year.\(^{113}\) In order to assure that the right of suffrage might be exercised, the constitution required, prior to any "election," that laws be enacted providing for "the registration of voters."\(^{114}\) It appeared that no registration of voters had taken place prior to the vote on the convention call. The failure to register was defended on the grounds that it was not an "election."\(^{115}\) If

\(^{105}\) 163 App. Div. at 742-43, 149 N.Y.S. at 666.

\(^{108}\) 163 App. Div. at 742-43, 149 N.Y.S. at 666.

\(^{107}\) 86 Misc. at 681, 149 N.Y.S. at 256.

\(^{106}\) The special election was held pursuant to L. 1913, ch. 819.

\(^{109}\) 86 Misc. at 691, 149 N.Y.S. at 262.

\(^{112}\) Id.

\(^{111}\) Id.


\(^{113}\) 163 App. Div. at 743, 149 N.Y.S. at 66.

\(^{114}\) Id. at § 4.

\(^{115}\) 163 App. Div. at 743, 149 N.Y.S. at 66.

\(^{116}\) N.Y. Const. art. II, § 1 (1894).

\(^{117}\) Id. at § 4.
the vote on the convention call was an "election" the constitution had not been complied with and the call was void. The second legal question was more technical and involved the same constitutional provision. In order to permit investigation of the right of voters to register the constitution required that registration be completed at least ten days prior to the election. Plaintiff claimed that 10 days had not elapsed.

Plaintiff brought an action to enjoin the boards of election and state election officials from taking steps preliminary to the nomination and election of delegates to the Constitutional Convention. This step, of course, could only be taken if the convention call had received a favorable vote. Justice Seabury, at Special Term, denied the motion for an injunction pendente lite noting that the questions raised were of the "gravest character." While the questions were grave the time pressure was harsh. The motion papers were finally submitted to Seabury on August 20 and his opinion is dated August 24. He hoped that his "speedy decision" would provide ample time for review by the appellate courts before the question became moot.

The Attorney General put forward several arguments which Judge Seabury felt could not be ignored since, "I am unwilling, even impliedly, to give assent." These included (1) the doctrine that the returns of election inspectors, even if fraudulent, are final; (2) the doctrine that equity will not take jurisdiction of election contests; and (3) that a citizen taxpayer has no standing. Judge Seabury commented on the "no standing" argument as follows:

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116 N.Y. CONST. art II, § 4 (1894). This seems to be an alternative argument to the failure to register point. In fact, it appears that the failure to register issue was not raised until the case reached the appellate division.

117 The issue depended on how you counted; if ten days was taken to mean 240 hours the constitution was not complied with since registration ended at 10:00 P.M., March 28 and the election commenced at sunrise on April 7, about 224 hours. Or the constitution was also violated if read to require 10 days after completion of registration and before election day. This seems a normal reading of the provision but March 29-April 6 is only nine days. Justice Seabury rejected plaintiffs argument maintaining that the date of election should be counted making ten days. 86 Misc. at 690, 149 N.Y.S. at 261. The plaintiffs argument, while technical, was not insubstantial. The constitution, for a legitimate purpose, requires a ten day elapsed period; it is not difficult to comply with and peculiar counting methods should not be resorted to.

118 It is not clear why plaintiffs counsel sought an injunction rather than a mandamus. There seems no practical difference and the mandamus had a highly successful history in the Court of Appeals. The severe time pressures of Komfort may be the explanation.

119 86 Misc. at 681, 149 N.Y.S. at 256.

120 149 N.Y.S. at 254. This language does not appear in the official report.

121 86 Misc. at 682, 149 N.Y.S. at 256. In fact, the Court of Appeals decided the case on October 23, a few days before the scheduled election of delegates.

122 Id.

123 Id. at 684, 149 N.Y.S. at 258. Judge Seabury stated:

The cases which hold that equity will not assume jurisdiction in election con-
Doubtless such an action might properly be brought by the Attorney General of the state but, if he does not initiate the action, I can see no reason why the door of the court should be closed to a citizen and taxpayer who asks of the court only such relief as the Constitution and justice require should be given to them.\(^{124}\)

Judge Seabury had no doubt as to his power to decide the case. He rejected the argument that a political question was involved: "Whether or not a majority did vote in favor of the proposition or against it is a question of fact, and presents a judicial and not a political question."\(^{125}\) The constitution prescribes the manner in which it may be amended. Any other method of amendment is "illegal and revolutionary."\(^{126}\) If a constitutional convention could be called by a fraudulent majority the same method could be used to adopt the proposed constitution. Judge Seabury was "unwilling to subscribe" to the idea that the "courts of justice are powerless in such an emergency."\(^{127}\)

However, Judge Seabury held for the state on the merits. He found that the constitutional requirement of ten days between the completion of registration and the election had been complied with.\(^{128}\) The remaining question was whether or not a majority had voted for the proposition.\(^{129}\) Judge Seabury excluded the returns of fourteen election districts on the ground of widespread fraud. With the returns excluded he was obliged "to determine by other legal evidence what the vote actually was."\(^{130}\) This would seem to be an ambitious task. Affidavits from voters in the excluded districts (from negative voters) and the Attorney General (from affirmative voters) were presented. The opinion does not state what percentage of voters were covered by affidavits. Judge Seabury in addition received undisputed proof from the Attorney General of arithmetical error in Kings County causing an understatement of 1,000 votes in favor of the proposition. Apparently the margin against the proposition based on the affidavits did not exceed 1,000 and Judge Seabury concluded that the convention call had received a majority vote. The additional 1,000 votes found by the Attorney General in Brooklyn, therefore, saved the election.

\(^{124}\) As previously noted the failure to register argument was not presented to Judge Seabury. See note 116 supra.

\(^{125}\) It does not appear that the question of what is a majority, i.e., the blank vote issue, was argued to Judge Seabury.

\(^{126}\) 86 Misc. at 691, 149 N.Y.S. at 262.
Only three days after Judge Seabury's opinion the appellate division rendered its opinion. Presiding Justice Ingraham, agreed with Judge Seabury as to the court's power: "I have no doubt as to the power of the court to intervene to prevent the election of delegates to a constitutional convention" if the constitution had not been complied with. The court also accepted Judge Seabury's factual determination that a majority of the effective votes cast was in favor of the proposition. Two new legal arguments remained to be discussed.

Article II, § 4 of the constitution required a "registration of voters ... before each election." In the instant case Judge Ingraham thought it clear that there "was no registration of voters." If, therefore, the convention call was an "election," the constitution had been violated. But Judge Ingraham was "inclined to think" that such a vote was not an election. Rather, he viewed it as a "meeting of electors to determine the question of the convention." Or, the "election specified in this article would seem to refer to the general elections whereby the electors of the state elect the officers who are to be elected by the people." This position is not persuasive. The authorizing legislation stated that a "special election shall be held." Moreover, the constitutional requirement was intended to assure that eligible voters be given the opportunity to vote. There is nothing to indicate that some narrow meaning of the word "election" was intended. No reason supports a rule which would require a registration before a vote for city council but exclude eligible voters on matters dealing with the state's fundamental law.

132 The constitution then created an exception to the general rule stating that such "registration shall not be required for town and village elections." This list of exceptions was presumably complete.
133 165 App. Div. at 743, 149 N.Y.S. at 66. The statute authorizing the convention call directed the inspectors in the various election districts to meet "for the purpose of revising and correcting the register of voters" L. 1913 ch. 819 § 1. This language apparently did not permit the original registration of new voters but only the correction of existing lists.
134 Id. The presiding Justice noted the "short time" available and his inability to make an "exhaustive examination of the authorities" Id. at 745, 149 N.Y.S. at 67-68.
135 Id. at 745-46, 149 N.Y.S. at 68.
136 Id. at 744-45, 149 N.Y.S. at 67.
137 L. 1913 ch. 819, § 1, quoted in 212 N.Y. at 525, 106 N.E. at 676.
138 In dissent, Judge Dowling thought it clear that "election" was "used in the broadest sense, as including any exercise of the franchise by the voters of the state, and not merely referring to their choice of officials." 163 App. Div. at 749, 149 N.Y.S. at 70. Judge Dowling noted that the state's penal provisions for the punishment of fraud only referred to elections. Fraud, "such as was practiced in this particular election" would therefore be immune unless "election" were given a broader meaning in a criminal statute than in the Constitution. Id.
The blank vote argument was briefly discussed and rejected by Judge Laughlin in a concurring opinion. The constitutional language, it will be recalled, required a majority of “electors voting thereon.” Judge Laughlin noted, “voting a void or blank ballot is doubtful voting at the election, but it is not voting on the proposition.”

The case was argued before the Court of Appeals on October 1 and decided on October 23. As it reached the Court of Appeals it presented a classic pattern where reliance on standing is to be expected. To rule against the government and overturn the election would plainly involve the court in political turmoil. On the other hand, the election did not seem worthy of support. Enough fraud had been found to exclude the return from fourteen election districts. Also, no registration of new voters had been permitted despite the clear constitutional requirement. In addition, the shortage of time was an aggravating factor.

The Court of Appeals, relying on Doolittle, held no standing. Judge Chase, for the Court, stated:

We are of the opinion that there is no inherent power in a court of equity to set aside a statute as unconstitutional except in a controversy between litigants where it is sought to enforce rights or to enjoin, redress or punish wrongs affecting the individual life, liberty or property of one or more of the litigants. The court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.

The rights to be affected must be personal as distinguished from the rights in common with the great body of people.

Judge Dowling also found that the ten day requirement had not been met since 10 full calendar days had not elapsed between the close of registration and the election.

139 N.Y. Const. art. XIV, § 2 (1894).
140 163 App. Div. at 748, 149 N.Y.S. at 69.
141 Komfort therefore presents a situation where the Court will be strongly drawn to a no standing position. In other cases it is almost certain that the Court will not rely on standing. For example, definite problems would arise were the Court to rule that it could not discuss the merits of the state's liberalized abortion law because of a lack of standing. The public would undoubtedly question the value of a Court which had so hamstrung itself that it could not discuss the legality of basic public issues. Both proponents and opponents of the disputed law accept the idea of judicial review. It is doubtful if an aggrieved person, in a St. Clair sense, could have been found or devised to test the abortion law. Mr. Byrn appeared before the Court to challenge the law asserting that he had been appointed guardian ad litem for all fetuses under 24 weeks gestation in the New York City hospitals. This extraordinary appointment was not questioned by the Court of Appeals. With no discussion of the standing issue it ruled on the merits of the law. Byrn v. N.Y. City Health & Hosp. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).
142 212 N.Y. at 529-30, 106 N.E. at 677. The court, reminiscent of Judge Denio, stated that courts should not assert jurisdiction to prevent public wrongs simply because there is “no other immediate remedy.” Id. at 536, 106 N.E. at 679. To clearly state the
Halsey, which sharply curtailed the authority of Doolittle, was not cited by the court. The court did, however, make one new argument in support of a no standing rule. It noted that the constitution specifically provided that apportionment “shall be subject to review by the Supreme Court, at the suit of any taxpayer.” In view of this provision, added by the 1894 Convention, the court reasoned that the Convention had focused on the standing question and determined that only in the apportionment area would citizen suits be permitted. The argument has considerable force but the particular does not seem to support the thesis. Seven years earlier, Judge Chase himself had written that the provision was intended to “set at rest” the claim that the “[l]egislature in passing an act reapportioning the state for legislative purposes is so far exercising a political, as distinguished from a legislative, power, that its action cannot be reviewed by the courts.” The provision consequently was concerned with the political question issue rather than standing.

“no standing” rule, however, it does not prohibit only “immediate” remedy, it prohibits any remedy.

439 N.Y. Const. art. III, § 5 (1894).
440 212 N.Y. at 529, 106 N.E. at 677. The specific provision, the court noted, is of itself evidence that it was not the intention of the people by the Constitution to confer upon the judicial branch of government general authority at the suit of a citizen as such to sit in review of the acts of other branches of government.

143 In re Sherill, 188 N.Y. 185, 195, 81 N.E. 124, 127 (1907).
144 The present Constitution contains three express provisions permitting citizen suits.
(1)Apportionment — Article III, § 5 contains the provision discussed in text in exactly the language added by the 1894 Convention.
(2) Comptroller — Article V, § 1 provides that the payment of any state funds “except upon audit by the comptroller, shall be void, and may be restrained upon the suit of any taxpayer with the consent of the supreme court.” The provision was added by the 1938 Convention after introduction by Judge Francis Bergan, who had written a lower court opinion in Kuhn and later became a Court of Appeals judge. He explained the intent of this provision as follows: This is designed to put some teeth into the requirement that the Comptroller shall audit all moneys of the State, and the provision in respect of the consent of the Appellate Division is to prevent unnecessary or vexatious suits.

1938 CONVENTION 2351.
Judge Bergan did not state whether the premise of his provision was (1) that a taxpayer suit was otherwise impossible or (2) that the status of taxpayer suits was unclear and a specific provision was needed to remove any question. The latter seems more likely particularly since Judge Bergan, in his 1944 Kuhn opinion, indicated a thorough knowledge of the mandamus cases.
(3) Forest Preserve — Article XIV (Conservation) of the constitution imposes a number of restraints upon the legislature including the requirement that the existing forest preserve “shall be forever kept as wild forest lands.” Art. XIV, § 1. Section 4 provides that a “violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the Attorney General at the suit of any citizen.” This provision was added to the constitution by amendment in 1913. 1938 Report, Vol. II at 574-75. No legislative history of interest has been found. See Oneida County Forest Preserve Council v. Wehle, 309 N.Y. 152, 128 N.E.2d 282 (1955).
In Komfort the court adopted a strong "no standing" position. It is not surprising that the St. Clair court would quote extensively from the opinion. But the court soon had to limit the authority of Komfort. The aftermath of both Doolittle and Komfort shows a remarkably similar pattern. Within nine years, Doolittle was severely qualified by Halsey; within twelve years Komfort was severely qualified by McCabe v. Voorhis. In Voorhis Judge Pound noted that standing was questioned relying "on some expressions" in the Komfort opinion. But Komfort had only held that a citizen could not maintain "an action in equity"; it in no way overruled the long line of authority which holds that a "citizen and elector has a sufficient interest to make the application for an order of mandamus to compel the performance by a public officer of a public duty." The court, therefore, returned to a more flexible position, away from the brittleness of "no standing." A "no standing" rule seems to have a life expectancy of about ten years. During that time its primary attributes appear: (1) the creation of an imbalance of power in favor of the executive and legislative branches and (2) a growing sense of futility with respect to the discarded constitution.

The final case relied upon by the St. Clair court is Bull v. Stichman. The Court of Appeals wrote no opinion in this case. Bull involved the well known "Blaine" amendment which provides that neither the state nor any subdivision "shall use its property or credit . . . in aid . . . any school . . . under the control of or direction of any religious denomination."

Governor Dewey, in 1946, sent a message to the legislature stating, "[t]he return of great numbers of veterans who interrupted their schooling to serve the Nation in time of war will place unprecedented demands upon the educational facilities of this State." The Governor recommended the passage of several bills to provide public aid for educational facilities and housing accommodations of higher educational institutions. The legislature appropriated $35,000,000 for these pur-
poses.\textsuperscript{154} Title to the state-constructed facilities was to remain in the state and the facilities were to be subject to removal at the end of the emergency.\textsuperscript{155} The litigation involved a state allocation of $128,000 to convert the Sister of Charity Hospital of Canisius College into classrooms.\textsuperscript{156} Canisius College was operated by the Jesuit Order of the Roman Catholic Church. Plaintiff asserted that the proposed rehabilitation amounted to an unconstitutional "gift" since the "architect's plans disclose that the State will not be able to remove any additions, appliances or improvements."\textsuperscript{157} He sought a preliminary injunction and declaratory judgment that the allocation was unconstitutional. His motion for injunction was denied and his complaint dismissed on the grounds that he had no standing.\textsuperscript{168} On appeal to the appellate division the lower court decisions were upheld in reliance on \textit{Doolittle} and \textit{Komfort}.\textsuperscript{169} No mention was made of \textit{Halsey} and \textit{Voorhis}. Plaintiff castigated the no standing rule, terming it "the last degenerate surviving fragment of the ancient belief in the divinity of kings."\textsuperscript{160} The appellate division considered the "no standing" rule as well established, noting that the "only semblance of assistance" for plaintiff came from \textit{Kuhn} and \textit{Heim}.\textsuperscript{161} In the first \textit{Kuhn} case the plaintiff brought an action for declaratory judgment declaring a law to be unconstitutional.\textsuperscript{162} Judge Bergan informed the plaintiff, in effect, that he had "bought the wrong writ." \textit{Doolittle} and \textit{Komfort} had held that declaratory judgment could not be maintained and the question "must be reached by some other remedy than this."\textsuperscript{163} Judge Bergan explained the success citizens had had in maintaining mandamus proceedings. He noted the theory that in "mandamus the compulsion was exercised at the instance of the people as the sovereign power having an interest in seeing to it that the law was carried out in public matters, and the people were moved to act at the

\begin{footnotesize}
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\item \textsuperscript{154} 189 Misc. at 593, 72 N.Y.S.2d at 204.
\item \textsuperscript{155} Id. at 593, 72 N.Y.S.2d at 204.
\item \textsuperscript{156} Id. at 593, 72 N.Y.S.2d at 205.
\item \textsuperscript{157} 273 App. Div. at 314, 78 N.Y.S.2d at 284.
\item \textsuperscript{158} 189 Misc. at 597, 72 N.Y.S.2d at 202 (Sup. Ct. Albany 1947) and 189 Misc. 602, 72 N.Y.S.2d 492 (Sup. Ct. Erie County 1947).
\item \textsuperscript{159} 273 App. Div. 311, 78 N.Y.S.2d 279 (5d Dept' 1948).
\item \textsuperscript{160} Id. at 316, 78 N.Y.S.2d at 283.
\item \textsuperscript{161} Id. at 314, 78 N.Y.S.2d at 281. \textit{Kuhn}, it will be recalled, established what this article calls the "important issue" exception. Chief Judge Lehman stated: "In view of the importance to the public of an authoritative determination of that question to the present time, we do not pause to consider whether this question is presented in appropriate proceedings" 294 N.Y. at 213, 61 N.E.2d at 515. The existence of the "important issue" exception should require a finding that an issue is unimportant if standing is to be denied.
\item \textsuperscript{162} Kuhn v. Curran, 184 Misc. 788, 56 N.Y.S.2d 737 (Sup. Ct. Albany County 1944).
\item \textsuperscript{163} Id. at 792, 56 N.Y.S.2d at 741.
\end{itemize}
\end{footnotesize}
suggestion or relation of one of the public." The plaintiff took Judge Bergan's advice and returned with a mandamus. Judge Bergan then held against the plaintiff on the merits. The Court of Appeals reversed Judge Bergan and the statute was held unconstitutional. The appellate division in Bull queried the validity of Judge Bergan's distinction: "grave doubts may be entertained as to the soundness of any attempted distinction between the two" actions. The appellate division was not impressed with the authority of Kuhn: "At best, the case merely holds that if the question is not raised and the matter is of great public exigency" the court may decide it. It is odd to view Kuhn as a case where the standing issue was "not raised." Further, assuming it to be such a case, a court adhering to a no standing rule would be obliged to dismiss, whether the issue was raised or not, since jurisdiction cannot rest on consent. The Court of Appeals' affirmance, without opinion, of the appellate division seems subject to at least three possible interpretations: (1) the affirmance indicates complete agreement with the reasoning of the appellate division; (2) the affirmance is based on Judge Bergan's reasoning in the first Kuhn case, i.e., that declaratory judgment could not be maintained; or (3) that the complaint was properly dismissed for failure to state a cause of action since, on the merits there could be no violation of the constitution. In St. Clair Judge Burke wrote that the Bull affirmance eliminated the "important issue" exception of Kuhn and "disposed of the theory that the rule regarding taxpayers' cases permitted exceptions."

In sum, the cases relied on by St. Clair, Doolittle, Komfort and Bull do not establish a strong line of authority. Doolittle and Komfort were quickly qualified by the court and Bull's meaning is unclear in the absence of an opinion. The strength of the "no standing" rule in New York must rest on St. Clair itself.

III. PRE-ST. CLAIR HISTORY OF CITIZEN SUITS

A. Mandamus

"In theory the people are always the plaintiffs and they are actually so when individual right is out of the case." This early description
of the writ of mandamus and its successor, the article 78 proceeding, was
the most important source of citizen suits in the period prior to St. Clair.

Historically, the high perogative writ of mandamus "never issues
but to command the performance of some public duty."171 The nature
of the writ is evident from the style of its title — "The People of the
State of New York on the relation of" the citizen making application
against the defendant public officer. It is said that mandamus will com-
pel an officer to perform a "ministerial act."172 If the officer is vested
with discretion mandamus can only compel him to make a decision one
way or the other.178 While the remedy by mandamus was at law it was
considered necessary that "the person applying for it must be without
any other specific and legal remedy."174

In 1837, Justice Cowen explained the citizen's rights to maintain a
mandamus as follows:

In such cases the wrongful refusal of the officers to act is
no more the concern of one citizen than another, like many other
public offenses. It is, at least, the right if not the duty of every
citizen to interfere and see that a public offense be properly
pursued and punished and that a public grievance be remedied. In Rex v. White, Rep. T. Hardu. 92, speaking of a mandamus
for a public, as distinguished from a private object, Ld. Hardwicke
said: "The reason why we grant these writs is to prevent a failure
of justice, and for the execution of the common law, or of some
statute, or of the King's charter."176

The language of both Justice Cowen and Lord Hardwicke is congenial
to the citizen suit. The citizen is not considered as a vexatious litigator.
If there is no merit to his claim the writ will not issue. If there is merit,
the citizen has prevented a "failure of justice." In the Collins case the
legislature had authorized two state commissioners to lay out a public
road from the village of Earlville to a point near the "house now oc-
cupied by Hazard Wilcox, Jr." The act directed the Highway Commis-
sioners of the towns along the route to "open and work so much of the
highway as lay in that town." The Commissioners of the Town of
Smyrna refused. The state commissioners thereupon sought a manda-
asmus ordering the Town Commissioners to comply with the statute. The

Justice Barbour further noted that the writ "issues, in England, only from the king's
bench, in which the king did formerly actually sit in person; and in which, in con-
templation of law, by his judges, he is still supposed to sit." Id.
173 Id.
175 People v. Collins, 19 Wend. 56, 65.
Town Commissioners resisted arguing that the state commissioners had no interest in bringing the action which should be brought by the Attorney General, if anyone. Justice Cowen agreed that the state commissioners had "no interest beyond that of any other citizen in the State . . . and the question is whether anyone may inform and obtain a mandamus in such a matter." Justice Cowen thought any citizen could maintain an action ordering compliance with a statute, "here the people are the real party." The Justice did not consider the Attorney General to possess any monopoly powers with respect to the correction of public wrongs. He noted:

There are many other cases in the books moved by private persons, which were yet founded on matters of as general and public a nature as those presented by the case at bar. No doubt the Attorney General might very properly have moved in this case and had all private citizens refused to interfere and give information, it might have been necessary but, I cannot collect from any of the books or the reason of the thing that he alone has power to move.

To Justice Cowen, the Attorney General, rather than the decisive officer created by St. Clair, was a last resort. Under Collins, a citizen had no standing problem if remedy of mandamus was appropriate. That is, if he could frame his relief in the form of an order against a public officer requiring compliance with a statute or the constitution. The mandamus route has been a rich source of constitutional law — all brought by nonpersonally aggrieved citizens. The following are some of the more important examples:

1. *Kuhn v. Curran* 179 — Construction of the Judiciary Article of the constitution holding invalid legislation purporting to create a new judicial district.
2. *Koenig v. Flynn* 180 — Court declared invalid concurrent resolution of legislature redistricting state for upcoming election for House of Representatives. The Court held that legislation was required.
3. *McCabe v. Voorhis* 181 — Court held invalid, as conflicting with

176 Id. at 64-65.
177 Id. at 65.
178 Id. at 67.
180 258 N.Y. 292, 179 N.E. 705 (1932). The federal Constitution provides that the manner of holding elections for representatives "shall be prescribed in each state by the Legislature thereof." Art. I, § 4. The difference was the role of the Governor — he could veto legislation but had nothing to do with a concurrent resolution. The court held that the Governor was part of the legislative process.
181 243 N.Y. 401, 155 N.E. 849 (1926). The action arose by a mandamus against the City Board of elections to strike from the ballot a proposition submitting the local law
state regulatory scheme, a local law dealing with the 5¢ subway fare.

(4) *Daley v. Board of State Canvassers*\(^{182}\) — Court eliminated return for Dutchess County in election for state senator on the basis of election irregularities.\(^{183}\)

(5) *Anderson v. Rice*\(^{184}\) — Construction of Civil Service Article of Constitution holding invalid law purporting to authorize State Police Superintendent to appoint without competitive examination.\(^{185}\)

(6) *People v. Halsey*\(^{186}\) — Court issued mandamus to County Treasurer ordering his warrant for collection of a tax.\(^{187}\)

to the people. The court had earlier held that a local board of elections could not be reached by a taxpayer's action under present section 51 of the General Municipal Law. *In re Reynolds*, 202 N.Y. 430, 96 N.E. 87 (1911).

\(^{182}\) 129 N.Y. 449, 29 N.E. 255 (1891).

\(^{183}\) In reaching this conclusion, Judge Peckham noted:

> It is a matter in which the public has an interest quite as great, perhaps as the individual, and in such event any citizen has the right to invoke the proper judicial tribunal to compel the performance by a public officer of a public duty.

*Id.* at 454, 29 N.E. at 356.

\(^{184}\) 277 N.Y. 271, 14 N.E.2d 65 (1938).

\(^{185}\) Objection was made to the plaintiff's standing since he had made no application for a state police job. Chief Judge Crane rejected this argument, stating:

> He is of age to make such application, but, more than that, he is a citizen and resident of the state of New York, and being such, is capable of presenting to the courts his petition for the enforcement by officials of their mandatory duties.

*Id.* at 281, 14 N.E.2d at 69.

\(^{186}\) 37 N.Y. 344 (1867).

\(^{187}\) The case arose before the enactment of what is now § 51 of the General Municipal Law. In 1851 the state imposed a tax on debts owed to non-residents. In Steuben County three non-residents, including the Earl of Craven, reported $5,505 owed to them by residents of the town of Fremont. The assessors, however, determined that $50,000 was the correct amount owed to this group and that a $2,126 tax was due. The County Treasurer, relying on the reported $6,505, refused to proceed with collection of the larger figure. The Court of Appeals ordered collection on the basis of the larger figure. The mandamus was sought by one Stephens, a citizen and taxpayer of Steuben County. The court observed that the propriety of such a proceeding had been established in the "well-considered" *Collins* case. But in between *Collins* (1837) and *Halsey* (1867) had come *Doolittle v. Supervisors of Broome County*, 18 N.Y. 155 (1858). *Doolittle* was considered by the *St. Clair* court to have established the "no-citizen standing" rule in New York. Did *Doolittle* overrule or limit *Collins*? The court thought not.

Inasmuch as the people themselves are the plaintiffs in a proceeding by *mandamus*, it is not of vital importance who the relator should be so long as he does not officiously intermeddle in a matter with which he has no concern. The office which a relator performs is merely the instituting of a proceeding in the name of the people and for the general benefit. The rule, therefore, as it is sometimes stated, that a relator in a writ of *mandamus* must show an individual right to the thing asked, must be taken to apply to cases where an individual interest alone is involved, and not to cases where the interest is common to the whole community . . . . the practice which has so long prevailed here, though never, so far as I can discover, passed upon directly by the court of last resort, where the objection was raised, seems to be a reasonable and convenient one, and ought now to be considered as settled.

This in no way conflicts with the decisions of this court in the case of *Doolittle v. Supervisors of Broome County* where it was held that an *action* could not be maintained by a person having no interest other than which was common to all the freeholders of a town, to have the act of a board of supervisors, in erecting a new town, declared void. The case was properly decided. The dif-
B. Citizen Suits Against Local Officials

Actions against local officials have been an important source of constitutional law in the state. This route takes on new importance since *St. Clair*’s general restraint on standing. If a state scheme requires the action of local officials it is possible to challenge the scheme by suit against the local official. The local official relies on the state law for his authority and the state law consequently may be scrutinized (for example, the South Mall project in a state scheme which requires the issuance of Albany County bonds). The issuance of the bonds by the local officials would be unlawful if the basic state financing plan is unlawful. Consequently, the South Mall project could be challenged by an action against an Albany County official.

Since 1872, New York citizen-taxpayers have been permitted to sue city and other local officials to prevent “any illegal official act.”

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188 135 N.Y. 473, 31 N.E. 921 (1892).

189 The constitution required that each senate and assembly district “shall contain, as nearly as may be, an equal number of inhabitants.” The Apportionment Act of 1892 would be invalid if the quoted language required mathematical exactness or at least something close to it. The majority of the Court, however, found that the language “is a direction addressed to the legislature in the way of a general statement of principles upon which the apportionment shall be made.” *Id.* at 501, 31 N.E. at 929. Unless the legislature “grossly abused” the “discretion intrusted” to it, the apportionment would be sustained.

190 138 N.Y. 95, 33 N.E. 827 (1893).

191 The Board of Supervisors was directed by the statute to legally divide Kings County into 18 assembly districts. As divided, one district contained 81,000 and another, 102,000. The court observed that *Rice* had not been intended to sanction such variations. The writ of mandamus was granted ordering another division. *Rice* and *Baird* are discussed in 3 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 198-204 (1905).

192 The local suit involving state law does not seem to have been affected by *St. Clair*. At least to date, local officials have not argued that the legality of their authority cannot be questioned because of *St. Clair*, i.e., a citizen cannot do indirectly what he could not do directly.

193 N.Y. GEN. MUN. § 51 (McKinney 1965). This provision originated in an 1872 law (Act of April 2, 1872, Laws of N.Y. ch. 161 (1872). Curiously, *St. Clair* raises serious doubts as to the validity of General Municipal Law section 51. If the law is invalid, city and other local governments would seem entitled to the state’s *St. Clair* immunity. The continued validity of the statute seems questionable since *St. Clair* raises the standing issue to a constitutional status. We are informed by *St. Clair* that the “no standing” rule is required by the separation of powers, to prevent “interference” by the judiciary with the
The law was intended to provide a remedy for municipal taxpayers against the practice of local officials fraudulently issuing town bonds for the benefit of railroads.\textsuperscript{194} City and local officials would undoubtedly view the provision as a cause of some inefficiency in government. For example, new local laws or regulations may be inoperative pending the outcome of protracted litigation. This inefficiency, which greatly concerned Judge Denio in \textit{Broome}, however, seems acceptable to the local governments and the public.\textsuperscript{195}

A state law, which requires local action, is, consequently, subject to judicial attack because of § 51. If the state law is invalid, the local official's act is without lawful authority and may be restrained.\textsuperscript{196}

The local suit is further significant to the standing issue because it may form the basis for a direct suit against the state. In November, 1945, the people adopted an amendment to the constitution's civil service article providing for veterans' preferences.\textsuperscript{197} The amendment established an exception to the normal civil service requirement of appointment according to merit and fitness as determined by examination. The exception was to apply to veterans "whose disability is certified" by the Veterans Administration. The problem arose because the Administration would certify a veteran with a minor disability as 0-10\% disability. This certification had no apparent significance to the Administration since disability pensions were awarded only if the disability reached 10\%. It was, of course, significant in terms of New York's constitutional amendment. By its terms, the amendment applied to the "state and all of the civil divisions thereof." New York City was sued when it granted a disability preference to a veteran (certified 0\%-10\%) raising him from 134th on a Fire Department lieutenant's list to other branches. But if the "no standing" rule is a constitutional principle it obviously cannot be altered by a simple statute. General Municipal Law section 51 would therefore be unconstitutional. In fact, of course, the "no standing" rule had no constitutional pretensions until \textit{St. Clair}. Previously, the court had treated standing more as a procedural issue than a substantive one. Certainly, the passage of the original 1872 version of section 51 indicates that the draftsmen and legislature did not believe they were dealing with any constitutional principles.

\textsuperscript{194} See Matter of Reynolds, 202 N.Y. 430, 96 N.E. 87 (1911); Ayers v. Lawrence, 59 N.Y. 192 (1874).

\textsuperscript{195} It will be further noted that a city or local government is more susceptible to litigation than the state government would be. Each contact between government and a citizen is a potential source of litigation and local government touches the lives of its citizens far more frequently than the state government does or would. Police, fire, health, welfare, land and business regulation are all local functions. The state, on the other hand, builds highways and imposes taxes, but has comparatively little to do with the lives of its citizens. In short, the localities of the state have long carried a far heavier burden than the state would bear if \textit{St. Clair} were overruled.

\textsuperscript{196} Rathbone v. Wirth, 150 N.Y. 459, 45 N.E. 15 (1896).

\textsuperscript{197} N.Y. CONSR. ART. V, § 6.
first. The Court of Appeals interpreted the constitutional amendment
as requiring a disability of at least 10% before a veteran was entitled to
preference. 198

Subsequently, an action was brought against the State Tax Com-
mission asserting that it made the same mistake as had the City and
improperly granted preferences to less than 10% disabled veterans. 199
The Tax Commission replied that the plaintiff could obtain no relief
because the 1942 civil service list they claimed under had expired in
1948. Apparently the argument was made that since the plaintiffs could
not be aided by the outcome they had no standing. The Court agreed
with the Tax Commission that plaintiffs could not be personally bene-
fited by its decision. However, the merits of the question should be
reached because “as citizens and taxpayers” they are entitled to insist
upon the proper interpretation of the state constitution. The court
observed:

Even so, the erroneous appointments — though made in good
faith — ought to be open to attack by the petitioners, because as
citizens and taxpayers they are entitled to an opportunity to insist
upon the construction which this court placed upon the civil
service article of the State Constitution in Matter of Carey v.
Morton . . .” 200

The court held that the appointments had been improperly made and
ordered removal of the veterans unless special circumstances made
removal unfeasible.

The court therefore recognized the right of a citizen “to insist
upon the construction” which the court had placed upon the constitu-
tion. The case could be narrowly read as permitting citizen standing
only if the court had previously decided the precise issue involved. As
such, the rule only assured that local and state agencies would follow a

198 Carey v. Morton, 297 N.Y. 361, 79 N.E.2d 442 (1948). Almost forty years before,
the Court of Appeals had held that a municipal civil service commission is not subject to
§ 51 because its members carry out the provisions of the State Civil Service Law and “are
not the servants of the municipality.” Slavin v. McGuire, 205 N.Y. 84, 98 N.E. 405 (1942).
The plaintiffs alleged the unconstitutionality of an amendment to the civil service rules.
The court noted that a taxpayer’s action was an “inappropriate” remedy; the commis-
sion’s acts are executive and ministerial and “therefore are to be reached, when they
become the subject of judicial inquiry, by writ of mandamus.” Id. at 87, 98 N.E. at 406.
(See section A, supra). Nonetheless, the court determined the merits of the litigation on
the grounds that it is in the “interest of the state that litigation should cease and because
the question is of some public importance.” Id. The standing issue was not discussed in
the Carey case but the plaintiffs appear to have been personally aggrieved.
of the improperly appointed veterans and appointment of themselves. The court found
the second part of the relief sought impossible because the civil service list that the
plaintiffs claimed under had expired. Consequenlty, the plaintiffs could not be “personally
aggrieved” in a St. Clair sense.
200 Id. at 261, 93 N.E.2d at 836.
uniform construction. But two years later, the court held that such a narrow reading was not intended. And that the rule would permit citizen standing based on the constitution whether or not the court had previously construed the language or determined the issue.

The constitution provides that appointments to the civil service shall be made according to merit and fitness ascertained as far as practicable, by examinations which "shall be competitive." On October 22, 1949, the New York City Civil Service Commission held a promotional examination for the position of electrical engineer. The exam required complex mathematical calculations and candidates were consequently permitted to bring in handbooks, tables and other literature. The difficulty arose because five of the exam questions were taken directly from a popular cram course booklet written by "one William Glendinning." It was unknown whether any of the candidates had the Glendinning book with them but it seemed probable. The Commission attempted to cure the taint by holding a supplemental exam for those who had answered the Glendinning questions (50 out of 92 candidates). The results of the supplemental questions were combined with the untainted answers on the original. The plaintiffs, failed candidates, then brought an action to set both exams aside. Judge Van Voorhis, for the Appellate Division, held that the merits of the plaintiffs' claim, the injustice of the supplemental exam, need not be reached because they were not aggrieved parties. They were not aggrieved parties since they had failed the first exam, which had been graded on an absolute standard, even with the tainted questions included. All this was too much for the Court of Appeals which reversed, throwing out both exams, on the grounds that the constitutionally required competitive examination had not been given. The court observed:

Whether the petitioners who were unsuccessful candidates are personally aggrieved is a question we need not decide. For as citizens of the State they may insist upon competitive civil service examinations as required by section 6 of article V of the State Constitution.

203 While the original exam had contained a number of questions from which the candidate could choose, the supplemental exam contained no options. This was the basis of the plaintiffs complaint that they had been denied the right of election which had been enjoyed by those who had avoided the tainted questions on the original exam.
204 Because the test had been graded on an absolute standard, Judge Van Voorhis did not believe the plaintiffs had been hurt, even if others had been aided by Glendinning's book. In Judge Van Voorhis' view, the plaintiffs should not have been permitted to take the supplemental exam.
Chironna therefore held that any citizen, aggrieved or nonaggrieved, had a right to insist on compliance with the constitution. The fact that a local body (immune from § 51) was involved, rather than the state, seems clearly immaterial in view of Cash v. Bates. It further seems immaterial that Chironna involved the constitutionality of governmental actions rather than a statute. No meaningful distinctions can be drawn between the two. Consequently, Cash v. Bates had been intended to establish a broad principle. It was not necessary that the court had previously determined the precise issue or even that the court had construed the constitutional article involved. The case held that a citizen could "insist" that government adhere to the constitution. That doctrine would not seem startling until overruled by the repressive St. Clair case.208

C. Important Issue Exception

In a 1912 decision the Court of Appeals held that it would determine the merits of a constitutional question despite the fact that the action could not be maintained and had been properly dismissed below. The court explained, "as it is for the interest of the state that litigation should cease and because the question is of some public importance," the merits would be decided.207 This is perhaps the earliest expression of the important issue exception. The doctrine reached its fullest expression in the language of Chief Judge Lehman as follows:

In view of the importance to the public of an authoritative determination of that question at the present time, we do not pause to consider whether the question is presented in appropriate proceedings. Sufficient, at present, that a controversy exists between the parties to the proceedings immediately affecting them, and that all parties entitled to be heard in regard to the question involved are here represented.208

The essential idea of the important issue exception seems simple and unarguable. If a "controversy exists between the parties" and the issues have been properly presented technicalities should not prevent a decision. Major constitutional issues should be resolved; indeed, such resolution is the highest business of the court. The important issue doctrine considers standing to be a technicality; a constitutional principle could not be waived.

208 The St. Clair court did not cite Chironna.
In 1909 the legislature enacted § 14 of the Labor Law providing that all public works by the state or its subdivisions shall employ only United States citizens and that preference be given to New York citizens. Each public works contract was to provide that if aliens were hired in violation of § 14, the contract was void. Shortly thereafter contracts were let for the construction of an expanded New York City subway system. The contracts were let by the Public Service Commission, a state body with jurisdiction over the construction of City subways.

In the course of construction, large numbers of aliens were employed; the aliens were "subjects of the King of Italy." The Supreme Court later found that it was "necessary" to employ the aliens to perform the contract at the contract price ($250 million) and that apparently this was known to all involved. The Court further found that the contracts were in various stages of execution, some 75 percent completed, and that termination of the contracts would result in a "waste of money to the city." Heim, as a taxpayer, sought to enjoin the Public Service Commission from declaring the contracts void. Heim asserted that forfeiture would cause irreparable loss to the city.

After defeat at Special Term, Heim appealed to the Appellate Division. The Appellate Division noted that Heim's position might be tenuous in view of the Court of Appeals recent Komfort decision. However, it observed:

In the present case, however, this objection is not raised by the respondent, and since it is represented to us that the matter is one of great public exigency, as to which all parties interested seem to desire a speedy determination, we have concluded to pass upon the appeal upon its merits.

The Appellate Division found that statute excluding aliens to violate both the state constitution and the fourteenth amendment of the Federal Constitution.

Surprisingly, the Court of Appeals reversed the Appellate Division on the basis of an opinion by Judge Cardozo. Cardozo held that the state could "discriminate in the distribution of the public wealth in

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209 L. 1909 ch. 36.
210 Heim v. McCall, 239 U.S. 175, 193 (1915).
211 Id. at 181.
212 Id. at 181-82.
favor of the citizen.” The case was appealed to the United States Supreme Court which agreed with Cardozo. Before reaching the merits, however, the Court commented on standing. It noted that Heim was neither a contractor nor an excluded laborer. The Court continued:

The appellate division felt that there might be objection to the right, under the holding of a cited case. The court of appeals, however, made no comment, and we must—certainly may—assume that Heim had a right of suit; and, so assuming, we pass to the merits.

The failure of Judge Cardozo to comment on the standing question is, of course, regrettable. But it is at least clear from his silence that he did not consider standing to be a constitutional issue. If, as the St. Clair court held, the no-standing objection is rooted in the constitutional separation of powers, it is evident that the Appellate Division was wrong in reaching the merits whether or not the issue was of “great public exigency.” Judge Cardozo, however, acquiesced in the Appellate Division standing approach although reversing on the merits. Similarly, the Supreme Court took the position that it was permitted to reach the merits. Consequently, neither the Supreme Court nor the Court of Appeals viewed standing as did the St. Clair court. It was not premised on a constitutional, and therefore non-waivable, principle. It was a rule of convenience. If the parties did not make an issue of it, or if the question was important, a lack of standing would be disregarded and the merits reached.

A further aspect of the “important issue” doctrine requires, at least implicitly, a finding that a given issue is unimportant before standing can be considered. St. Clair has blocked consideration of the Constitution’s essential fiscal provisions, e.g., violations of the referendum requirement for state debt and the use of lump sum budgets. There should not be any question that these issues are “important.” Kuhn and Heim were expressly rejected by the St. Clair court.

IV. POST ST. CLAIR—BUDGET PROCEDURE AND DEBT

New York, by an amendment of 1928, adopted what is known as an executive budget system. Under this system the preparation and

\[\text{215}\text{ 214 N.Y. at 163, 108 N.E. at 429-30. Judge Cardozo noted:}

the common property of the state belongs to the people of the state. . . . The construction of public works involves the expenditures of public moneys. To better the condition of its own citizens, and, it may be, to prevent pauperism among them, the Legislature had declared that the moneys of the state shall go to the people of the state.

\[\text{Id. at 162, 108 N.E. at 429.}

\[\text{216 239 U.S. 175 (1915).}

\[\text{217 Id. at 186-87.}
submission of the budget are the responsibilities of the Governor.\textsuperscript{218} The constitution provides that the head of each department shall furnish to the Governor "estimates," in such form and at such times as he may require, of the department's budget needs for the coming fiscal year.\textsuperscript{219} Copies of these estimates are to be furnished to the appropriate legislative committees.\textsuperscript{220} The Governor shall then hold hearings and require the attendance of department heads.\textsuperscript{221} Designated members of the legislative committees may attend and take part in the hearings. However the budget for the judicial and legislative departments does not follow this procedure. Instead, they make "[i]temized estimates of their financial needs" which shall be transmitted to the Governor, not later than December 1, "for inclusion in the budget without revision but with such recommendations as he may deem proper."\textsuperscript{222} On or before February 1,\textsuperscript{223} the Governor shall submit to the legislature "a budget containing a complete plan of expenditures . . . and all moneys and revenues to be available therefor."\textsuperscript{224} The

\textsuperscript{218} The need for improved fiscal management developed in the early 1900's as the state undertook responsibilities for highways and parks and became more active in education and social welfare. The operation of the pre-1928 appropriation system has been explained as follows: It became apparent to many people that spending on such an enlarged scale necessitated a change in the existing haphazard fiscal policies of the State. Public-spirited citizens pointed with scorn to weaknesses in the existing system of legislative control over appropriations and the means of financing them. It was revealed that even though the various administrative services were required to submit to the Legislature estimates of their fiscal requirements, these represented merely individual requests for funds. The collection and computation of requests for appropriations in advance of the legislative session was not attempted. No administrative officer acquainted with the entire business of the State reviewed these estimates or compared them with previous outlays for the respective departments. No balanced budget was ever submitted to the Legislature. Every member of the Legislature was permitted to introduce at any time as many appropriation bills as he pleased. Nor was there any responsible officer to call attention to possible discrepancies between the State's income and outgo resulting from the daily enacted appropriation bills. The debate on appropriations was uninformed and superficial. Minor appropriation bills, amounting to considerable sums, which were passed after general appropriation bills received little scrutiny and no debate. Since the Governor was not permitted to veto part of an item in a bill, the Legislature passed dubious and essential appropriations within a single item so as to prevent a possible veto. In short, the essence of a budget system, that is a well formulated fiscal program with balanced receipts and expenditures so necessary in this day of wide State activities was completely lacking.

N.Y. \textit{STATE CONSTITUTIONAL CONVENTION \textsc{Comm., Report: Problem Relating to Taxation and Finance} 9-16 (1938). A clear picture of legislative supremacy is presented. Any threat of a Governor's veto was eased by lumping "dubious and essential appropriations within a single item."

\textsuperscript{219} N.Y. \textsc{Const. art. VII, § 1.}

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} \textit{Id.}

\textsuperscript{222} \textit{Id.}

\textsuperscript{223} \textit{Id.} February 1 is the date fixed in case of a newly elected Governor. Otherwise, the budget is to be submitted on the second Tuesday after the legislature meets. \textit{Id.} art. VII, § 2. The legislature meets the "first Wednesday after the first Monday" in January. \textit{Id.} art. XIII, § 4.

\textsuperscript{224} \textit{Id.} art. VII, § 2.
Governor, consequently, is to submit a balanced budget to the legislature. The budget itself has no legal significance. But at the time of submitting the budget the Governor shall also submit a “bill or bills containing all the proposed appropriations and reappropriations included in the budget.” An appropriation is necessary for the payment of any state funds and “shall distinctly specify the sum appropriated and the object or purpose to which it is to be applied.” Within 30 days the Governor may amend or submit supplemental bills. If the legislature consents the Governor may amend or submit supplemental bills any time before adjournment. If requested by the legislature the heads of departments shall appear and answer relevant inquiries. To this point, the constitutional provisions are largely procedural and do not seem to require constitutional status to be accomplished. When the amendment reaches the power of the legislature, however, basic constitutional principles are involved. The legislative power with respect to the Governor’s appropriation bill is described as follows:

1. The Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose.

The analytical difficulty with the section is that the prohibition “may not alter an appropriation bill”—is followed by broad exceptions, i.e., the power to strike, reduce, or add items. It will be noted that all of the legislative power focuses on what are called “items,” an undefined term.

The constitution provides that such an appropriation bill when passed shall become a law immediately without further act of the Governor. However, “separate items added” by the legislature and the judicial and legislative appropriations require the Governor’s approval.

In addition to its power with respect to appropriations submitted

225 Id. § 3.
226 Id. § 7.
227 Id. § 3.
228 Id.
229 Id.
230 Id. § 4.
231 Article IV, § 7 provides the Governor with an item veto; he may “object to one or more items [in an appropriation bill] while approving of the other portion of the bill.” In such case the objected to item shall not take effect unless two-thirds of the legislature overrides the Governor’s action.
by the Governor, the legislature retains its independent appropriation power. But the constitution requires that such appropriations must be made "by separate bills each for a single object or purpose."  

On January 30, 1939 Governor Lehman submitted to the legislature his budget and proposed appropriation bills. The proposed budget called for expenditures of $415 million while existing taxes were expected to collect $355 million. The Governor's budget therefore required new taxes to meet a deficit of $60 million. The legislature resisted the new taxes and determined to reduce expenditures. The Governor's appropriation for each department was divided into two main categories, personal service expenses and maintenance and operations expenses. The personal service category included the "line items," an accompanying itemized schedule showing amounts available for "each of the various positions or groups of positions" for each department. Similarly the maintenance and operation category included "an itemized statement accompanying the schedule showing the amounts which were to be available for various expenses." The Court of Appeals later noted that the Governor's submission "was in accordance with the Constitution." The legislature was now obliged to exercise its constitutional power. It seemed clear that § 4, quoted above, authorized the legislature to strike out or reduce any item or to "strike them all out." In some instances the legislature did strike them all out and substituted a lump sum appropriation. For example,

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232 Id. art. VII, § 6. The language seems drawn from the basic referendum requirement provision that any debt of the state must be "for some single work purpose, to be distinctly specified."

233 People v. Tremaine, 281 N.Y. 1, 5, 21 N.E.2d 891, 893 (1939).

234 NEVINS, A., HERBERT LEHMAN AND HIS ERA 202 (1963) [hereinafter NEVINS].

235 Id.

236 281 N.Y. at 6, 21 N.E.2d at 893.

237 Id.

238 Id.

239 Id.

240 NEVINS, supra note 234, writes: "The able Abbot Moffat and other party leaders reclassified the itemized appropriations of the budget into large groups, determined the costs for each group according to Lehman's figures, and then slashed three-fourths of these groups. Their aggregate cuts came to about $26,000,000." Id. at 202. Of course, the legislature could have selectively cut enough individual Lehman items to reach a $26,000,000 reduction. And this approach would have been legally unassailable since the legislature clearly had the power to strike out or reduce any item or to "strike them all out." In some instances the legislature did strike them all out and substituted a lump sum appropriation.
an itemized appropriation for the Banking Department was stricken and the following substituted.

For general expenses of maintenance and operation; including personal service and travel outside of State not to exceed $3,000

$965,000.241

The Attorney General brought an action, on behalf of the people, to declare the legislative act unconstitutional and to restrain the Comptroller from making any payments pursuant to it.242

The defendants basically thought that the itemization language of the 1928 amendment was intended to bind the Governor rather than the legislature. In other words the Governor must submit itemized appropriations in aid of the legislature; but the legislative power was not restrained, it could operate on items or lump them as it saw fit. They thought that legislative supremacy over the appropriation process had been fairly well established since the Stuart kings. Language in the earlier Tremaine case supported their view as follows:

Long and interesting is the history of the struggle between the Executive and the Legislature for the control of the public moneys. It is, however, so well settled that the State legislature is supreme in all matters of appropriation that the recital of the details of the strife for legislative supremacy would serve no useful purpose.243

However, the Court of Appeals determined that the 1928 amendment had intended to alter the traditional legislative power. The legislature retained control of the purse strings in the sense that it need but legally perilous. The lump sum approach in essence gave the department head the power to use the reduced amount to the best advantage.

241 281 N.Y. at 9, 21 N.E.2d at 895. Governor Lehman informed the legislature that he was allowing the bill to become law without affirmative action on his part "for the sole purpose of having this issue of constitutionality" tested. People v. Tremaine, 257 App. Div. 117, 120, 13 N.Y.S.2d 125, 128, (3d Dep't 1939). A more recent example of a lump sum appropriation is found in the 1972 proposed appropriation bill for the Office of General Services. As submitted by the Governor this bill contained a line "Real Property Services — $35,727,000" Brief of Comptroller at 7, Levitt v. Rockefeller, 69 Misc. 2d 337, 329 N.Y.S.2d 976 (Sup. Ct. Albany County 1972). The Comptroller thought this was divisible into at least 26 items ranging from $8,827,000 for leasing space in the World Trade Center and $2,822,000 for the operation and maintenance of the South Mall. Id. The bill as submitted gave no indication of what interesting items were buried in the $35,727,000.

242 Standing was consequently not in question. The Attorney General is mandated to "[p]rosecute and defend all actions and proceedings in which the state is interested." N.Y. EXAC. LAw § 63 (1) (McKinney 1972). In New York the Attorney General is generally allied with the Governor. The Tremaine situation, where the legislature and Governor are in dispute, is the only time that the Attorney General may be expected to challenge the constitutionality of a statute.

make no appropriation. But if it attempts to make an appropriation, its "method of action" is limited by the constitution. It could not strike out all the items in an appropriation bill and substitute lump sums. That would be to "revert to the old system which years of agitation and endeavor have sought to abolish."

The court observed that there are "small lump sum appropriations which are necessary because of the uncertainty of events." But the constitution clearly required itemization if possible. The court noted:

The Constitution means that the budget, and the appropriation bills accompanying it, shall be broken down into items sufficient to show what money is to be expended, and for what purpose.

After quoting § 4, the court explained further:

When, therefore, we are told that the Legislature may not alter an appropriation bill submitted by the Governor, except to strike out or reduce items therein, we expect the appropriation bill to contain items. As stated before, the items must be sufficient to furnish the information necessary to determine whether in the judgment of the Legislature all that is demanded should be granted or is required.

The court's almost casual comment that "we expect the appropriation bill to contain items" did not foresee a time when the Governor would submit appropriation bills without items and maintain that his bills were non-challengable because of St. Clair.

The court noted the direction of the constitutional language and the need for good faith to make the system work. The key to the system was appropriate itemization, neither overly detailed nor lumped. But "item," after all, was not defined and could not be defined. The court relied on observance of the "spirit of the Constitution." It noted:

The present Constitution emphasizes the necessity of items, not lump sums, for an entire department or bureau. On the other hand there are cases in which it would be impracticable, if not impossible, to itemize the sum required. Departments with uncer-

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244 281 N.Y. at 11, 21 N.E.2d at 895.
245 Id. at 10, 21 N.E.2d at 895.
246 Id. The reverse argument, i.e., that the 1928 amendment had conferred plenary powers on the Governor was not contemplated by the court or parties.
247 Id. at 8-9, 21 N.E.2d at 894.
248 Id. at 5, 21 N.E.2d at 893.
249 Id.
tain contingent expenses or seasonal occupations, building or road construction may require lump sum appropriations. We expect in all these matters that the spirit of the Constitution shall be observed and that good sense in its application will govern. . . . It is easier to state a rule than to apply it. Many conditions arise which create doubts. The utmost we can do is to state the fundamental principles in hopes that the parties acting under them will give a practical and useful application. As said before, it is the extreme which causes disputes or danger. . . . Again, the lump sum appropriation may be carried to the extreme so that the theory of the Constitution is evaded. Here, too, the way is clear. In between the two extremes we must rely upon the Executive and Legislative branch of the government to provide a budget sufficiently itemized to comply with the spirit and words of the Constitution, and yet containing lump sum appropriations when experience in the line of work or in the department shows that details and items in a budget would be almost impossible — unworkable.251

Chief Judge Crane plainly went to considerable length to point out that clean line drawing was not possible in this difficult and imprecise area. We “must rely upon the Executive and Legislative branch” to observe the intent of the Constitution. Such reliance was not well placed. Tremaine, in view of the long history of plenary legislative power over money bills, could be considered an arguable case. But the Court held that the legislature could not lump. Tremaine was perfectly clear, however, that the 1928 amendment was not intended to reverse 300 years of history and reestablish a period of executive supremacy. The executive was, of course, bound to itemize. Yet came an executive who thought he had the power to lump. And if the power to lump was insufficient he also had the power to “interchange,” i.e., the power to shift funds from one category to another.252 The interchange power is even more interesting than the lump sum power since it makes meaningless even a properly itemized appropriation.253

251 281 N.Y. at 7, 11-12, 21 N.E.2d at 894.
252 An interchange provision is quoted in the Comptroller’s brief in Levitt v. Rockefeller as follows:
   Amounts shown within an appropriation schedule are estimated costs and are interchangeable among the several categories.
   Brief for appellee at 37.
253 Chief Judge Fuld, dissenting in Hidley, observed:
   In other words, while the aggregation of a number of items into a lump sum hinders the Legislature in exercising its power to reduce or strike out items in a budget bill, the free interchange provisions eliminate that power in its entirety. They enable the executive branch, even after a legislative decision has been made, to directly contravene and override the Legislature’s intent by shifting funds from one item to another.
28 N.Y.2d at 448, 271 N.E.2d at 536, 322 N.Y.S.2d at 694.
The resurrection of executive supremacy over money bills is attributable to the combination of a strong executive and the *St. Clair* decision. If the executive can control the legislature he may do as he will since no citizen can challenge the resulting laws whether they be unconstitutional on their face or not. The sincerity of any legal theory, aside from *St. Clair*, supporting such extravagant executive power seems questionable. The Governor's appropriation bills for 1969-70 and 1971-72 were protected from judicial scrutiny because of *St. Clair.*

In reaching these decisions a majority of the Court determined that a legislator, seeking an opportunity to exercise his constitutional duty to strike, reduce, or add items, had no standing.

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254 The 1969-70 fiscal year was involved in Posner v. Rockefeller, 26 N.Y.2d 970, 259 N.E.2d 484, 311 N.Y.S.2d 15 — 1971-72 was involved in Hidley v. Rockefeller, 28 N.Y.2d 439, 271 N.E.2d 530, 322 N.Y.S.2d 687. In *Posner*, Judges Fuld, Breitel and Jasen concurred "under constraint of *St. Clair.*" One year later, in *Hidley*, the constraint was broken and the three judges dissented.

255 26 N.Y.2d 970, 259 N.E.2d 484, 311 N.Y.S.2d 15. The court further determined that the legislator had no standing even if the lump sum bill was still pending when he sought judicial redress. Following *St. Clair*, and the abandonment of the procedural approach previously taken, it became necessary to develop a law of standing, a body of law which would distinguish the personally aggrieved from the nonpersonally aggrieved.

In the following cases the plaintiff was found to have standing: (1) Levitt v. Rockefeller, 69 Misc. 2d 337, 329 N.Y.S.2d 976 (Sup. Ct. Rensselaer County 1972) (Comptroller held to have standing to challenge validity of appropriation bills submitted by Governor); (2) Beaux Arts Prop., Inc. v. United Nations Dev. Corp., 69 Misc. 2d 785, 328 N.Y.S.2d 16 (Sup. Ct. N.Y. County 1972) (Dictum indicating that owner of condemned land would have standing); (3) Semple v. Miller, 38 App. Div. 2d 174, 327 N.Y.S.2d 929 (4th Dep't 1972) (Residents, guardians, and parents of residents had standing to challenge state action closing school for mentally retarded because of budget cuts); (4) Bloom v. Mayor of City of New York, 28 N.Y.2d 952, 271 N.E.2d 919, 323 N.Y.S.2d 436 (1971) (City real property taxpayer has standing to dispute mode of taxation even though state bodies involved — Judge Schleppe joined the usual three dissenters to form a majority in this case); (5) Ofenloch v. Gaynor, 66 Misc. 2d 185, 320 N.Y.S.2d 362 (Sup. Ct. Nassau County 1970), aff'd, 34 App. Div. 2d 913, 317 N.Y.S.2d 267 (2d Dep't 1970) (City real property taxpayer permitted to challenge "lease" between contractor and Board of Cooperative Educational Services — lower court quoted with approval Chief Judge Fuld's dissent in *St. Clair*); (6) Application of Triolo, 65 Misc. 2d 424, 318 N.Y.S.2d 589 (Sup. Ct. Albany County 1970) (Licensed retail liquor store owner had standing to challenge order limiting hours issued by Albany County Alcoholic Beverage Control Board); (7) Varacchi v. State Univ. of N.Y. at Stony Brook, 62 Misc. 2d 1005, 310 N.Y.S.2d 751 (Sup. Ct. Suffolk County 1970) (University day-employee had standing to challenge constitutionality of parking regulations because, having paid parking fee, he was personally aggrieved); (8) Saratoga Harness Racing Ass'n, Inc. v. Agriculture and Horse Breeding Dev. Fund, 22 N.Y.2d 119, 228 N.E.2d 799, 281 N.Y.S.2d 799 (1967) (Licensed private horse racing corporation heard on merits in challenge to law requiring payment of "breakage" moneys to Horse Breeding Fund — court stated that we "shall assume" the plaintiff has standing for the purposes of reaching the merits, an approach unauthorized by *St. Clair*); (9) Sleepy Hollow Valley Comm. v. McMorran, 20 N.Y.2d 190, 228 N.E.2d 32, 282 N.Y.S.2d 242 (1967) (Property owners had standing to challenge highway deviation by State Superintendent of Public Works from statutory course); (10) Board of Educ. of Central School Dist. No. 1 v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), aff'd, 342 U.S. 336 (1968) (Local school board had standing to challenge constitutionality of law authorizing loan of text books to children in private schools — Judge Keating joined the usual three dissenters to
form a majority in favor of standing); (11) Byrn v. N. Y. City Health & Hosp. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 890 (1972) (Guardian ad litem for fetuses under 24 weeks gestation in New York City hospitals held to have standing to challenge abortion law, L. 1970 ch. 127); (12) Norwich v. Rockefeller, 70 Misc. 2d 923, 334 N.Y.S.2d 571 (Sup. Ct. N.Y. County 1972) (Citizen had standing to challenge legality of legislation passed pursuant to alleged spurious “message of necessity.” N.Y. Const. art. III, § 14 requiring that bill be upon desks of legislators for 3 days prior to final passage unless Governor “shall have certified under his hand and the seal of the state, the facts which in his opinion necessitate an immediate vote”); and (13) Finger Lakes Racing Ass'n v. New York State Off-Track Pari-Mutuel Betting Comm'n, 30 N.Y.2d 207, 282 N.E.2d 592, 331 N.Y.S.2d 625 (1972) (licensed race-track owners had standing to challenge constitutionality of offtrack betting law, L. 1970 chs. 143, 144).

In the following cases the plaintiff was found to have no standing: (1) Hidley v. Rockefeller, 28 N.Y.2d 439, 271 N.E.2d 530, 322 N.Y.S.2d 687 (1971) (Fired state civil servants could not challenge validity of 1971-72 appropriation bills since “real quarrel is with the amount of the appropriations, not with the form or method whereby they were requested or enacted”); (2) Tobin v. Ingraham, 67 Misc. 2d 990, 326 N.Y.S.2d 51 (Sup. Ct. Monroe County 1971) (Citizen had no standing to require Commissioner of Health to perform inspections and other statutory duties with respect to migrant labor camps); (3) Posner v. Rockefeller, 26 N.Y.2d 970, 259 N.E.2d 484, 311 N.Y.S.2d 15 (1970) (Assemblyman has no standing to challenge 1969-70 appropriation bills “and it matters not whether such bills have been passed by the Legislature or were still pending before that body at the time the proceeding was instituted”); (4) Glen v. Rockefeller, 61 Misc. 2d 942, 307 N.Y.S.2d 46 (Sup. Ct. N.Y. County) aff'd, 34 App. Div. 2d 990, 313 N.Y.S.2d 938 (1st Dep't 1970) (Citizens, who would be obliged to pay increased transit fare, had no standing to raise question whether statute required MTA to hold a hearing before imposing such increase); (5) Filkins v. State, 63 Misc. 2d 580, 311 N.Y.S.2d 154 (Sup. Ct. Oneida County 1970) (Property owners, whose damages were non-compensable, had no standing to challenge road construction); (6) Nickerson v. Rockefeller, 162 N.Y.L.J. 61, Sept. 24, 1969 at 15, col. 5 (Sup. Ct. Nassau County) (Public official had no standing to challenge alleged corrupt act of Governor); (7) Petition of Robinson, 51 Misc. 2d 480, 273 N.Y.S.2d 450 (Sup. Ct. Albany County 1966) (Citizen had no standing to challenge rules and criteria promulgated under Medicaid statutes); (8) Donohue v. Cornelius, 17 N.Y.2d 390, 218 N.E.2d 285, 271 N.Y.S.2d 231 (1966) (Plaintiff, who had passed a challenged police exam and was later dismissed from the department had no standing, as a citizen, to challenge validity of state police regulations governing promotions and competitive exams); (9) City of Buffalo v. State Bd. of Equalization and Assessment, 26 App. Div. 2d 113, 272 N.Y.S.2d 168 (2d Dep't 1966) (Mayor of City had no standing to challenge state law conferring exemption from City tax on railroads); (10) Suffolk County Retail Wine & Liquor Dealers Ass'n v. New York State Liquor Authority, 23 App. Div. 2d 552, 256 N.Y.S.2d 663 (1st Dep't 1965) (Association of liquor dealers, not a licensee, had no standing to challenge validity of recently adopt SLA rules and regulations); and (11) National Ass'n of Harness Drivers v. New York State Racing Comm'n, 57 Misc. 2d 135, 291 N.Y.S.2d 475 (Sup. Ct. N.Y. County 1968) (Association of Harness Drivers had no standing to challenge different tax treatment of flat tracks and harness tracks).

The proposed constitution of 1967, which was heavily rejected by the people, contained the following provision in its Bill of Rights, Article I:

§ 2. Any citizen of the State shall have the right to maintain a judicial action or proceeding against any officer, employer or instrumentality of the state or political subdivision thereof to restrain a violation of this constitution or the constitution of the United States, including unconstitutional expenditures.

Whether the citizen's right was to be dependent upon legislative action is not entirely clear.

Secondary material on standing is found at 3 Davis Administrative Law Treatise 208-94 (1958); Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971); Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970); Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 Yale L.J. 816 (1969); Bittker, Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen,
The Comptroller is the chief fiscal officer of the state.\textsuperscript{256} He is elected by the people at the same general election as the Governor and Attorney General.\textsuperscript{267} In early 1972 the Comptroller brought an action against the Governor seeking a declaratory judgment that the appropriation bills accompanying the 1972-73 Executive Budget were in an unconstitutional form. The Governor moved to dismiss the complaint on the grounds, \textit{inter alia}, of no standing. On March 14, 1972 Supreme Court Judge Foreman held that the Comptroller had standing and that an answer should be served so that the merits of the case might be reached.\textsuperscript{268} On March 17, 1972 the Comptroller announced that settlement had been reached whereby the Governor agreed to delete interchange authority and to itemize the appropriation bills.\textsuperscript{259} The case consequently, was dropped.\textsuperscript{260} The immediate collapse of the Governor's position when the Comptroller was found to have standing demonstrates that \textit{St. Clair} was the sole line of defense.\textsuperscript{261}

Laws have been enacted not because they are believed constitu-

\begin{itemize}
\item \textsuperscript{256} N.Y. CONS. art. V, § 1.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Levitt v. Rockefeller, 69 Misc. 2d 337, 329 N.Y.S.2d 976 (Sup. Ct. Rensselaer County 1972).
\item \textsuperscript{259} N.Y. Times, March 18, 1972 at 34, col. 1.
\item \textsuperscript{260} The case would have presented severe problems for the Court of Appeals. In rejecting the Posner suit the court had already held that a public officer, attempting to perform public duties, had no special claim to standing. Its holding seems directly applicable to the Comptroller. On the other hand, to hold that the state's chief fiscal officer has no standing to challenge the constitutionality of budget bills is to court ridicule.
\item \textsuperscript{261} At times, the Attorney General's efforts on behalf of the no-standing rule place a strain on the patience of the people. The assertion that the state's chief fiscal officer had no standing to challenge the budget bills is one example. Another is the position taken in Committee for Pub. Educ. and Rel. Liberty v. Rockefeller, 322 F. Supp. 678 (S.D.N.Y. 1971). The Attorney General there sought to block the convening of a three-judge district court to hear a challenge to a $28 million state appropriation to non-public schools. The Attorney General urged the doctrine of abstention, \textit{i.e.}, that the federal courts should not adjudicate the validity of a state statute until the state courts have had a reasonable opportunity to determine the matter. The court rejected the Attorney General's claim noting, "this court ought not here abstain, since under the law of New York plaintiffs have no standing to litigate the state constitutional question in New York courts" 322 F. Supp. at 688. It seems quite likely that the federal courts will ultimately intervene if the Court of Appeals continues to adhere to \textit{St. Clair}. Cf. Posner v. State of N.Y., 340 F. Supp. 321 (N.D.N.Y. 1972).
tional but because St. Clair is thought to assure that no court will have the power to determine their invalidity. The lump sum appropriation bills are one example. The numerous state guaranteed authorities are believed to be others. For example, the Constitution and case law are so clear with respect to the 1960 Housing Finance Agency law that it is inconceivable that it is based on any sincere legal theory. It and its successor statutes are based only on St. Clair. In reliance on these and related statutes some $6 billion of debt have been issued.

CONCLUSION

The Governor and legislature, as well as the courts, have a responsibility to the Constitution. The Constitution is intended to protect the people against the government. This is obvious in the bill of rights provisions and is equally true in the fiscal area. State government in the mid-nineteenth century brought the state to the edge of bankruptcy by its unrestrained borrowing policies. The debt was paid by taxes imposed upon the people. But, by the 1846 Constitution, the referendum requirement was added, to assure that in the future, "that whenever the people were to have their property mortgaged for a state debt, that it should be done by their own voice and by their own consent." Subsequent Constitutional Conventions similarly thought they were engaged in meaningful work and imposed further restraints on the state's power to borrow. All this was and is futile under St. Clair. A statute is easily designed to avoid the creation of a "personally aggrieved" party. The Attorney General will only rarely have any interest in having a statute declared unconstitutional. The St. Clair list of proper parties to raise a constitutional issue is thereby exhausted. If a citizen cannot claim the protection of the Constitution it is inaccurate to say that constitutional government exists.

"The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation." 2

The "People's document" should be returned to the people.

262 M. Hoffman, 1846 Convention 946.
263 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).