Touro Law Review

Volume 11 | Number 3 Article 40

1995

Gift or Loan of State Money

GIFT OR LOAN OF STATE MONEY

N.Y. CONST. art. VII, § 11:

[N]o debt shall be hereafter contracted by or in behalf of the state unless such debt shall be authorized by law . . . . No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all votes cast for and against it at such election . . . .

N.Y. CONST. art. VII, § 8, cl. 1:

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

N.Y. CONST. art. X, § 5:

Neither the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by . . . 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.

N.Y. CONST. art. VII, § 4(c):

Except as otherwise provided in this constitution, no county, city, town, village or school district described in this section shall be allowed to contract indebtedness for any purpose or in any manner . . . .

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

Colonial Life Insurance Co. of America v. Curiale[1]
(decided October 13, 1994)

Plaintiff, a commercial insurance company engaged in issuing health insurance policies to small groups, brought an article 78 proceeding against the New York State Superintendent of Insurance claiming that a pooling system he created violated articles I,[2] VII[3] and XVI[4] of the New York State Constitution in that it took property absent just compensation, illegally gave private organizations money from the State, and imposed an unconstitutional tax.[5] The Appellate Division, Third Department, held that the pooling system was constitutional.[6] It decided that it was a regulation instead of a tax, the State did not unjustly take money from the plaintiff, and there was no unauthorized money given to private organizations.[7]

In 1992, chapter 501 of the Laws of 1992[8] was enacted which created section 3231 of the Insurance Law.[9] Subdivision (a) of this section made it mandatory for a commercial insurer in New

---

1. 205 A.D.2d 58, 617 N.Y.S.2d 377 (3d Dep't 1994).

2. N.Y. CONST. art. I, § 7(a). This provision states: "Private property shall not be taken for the public use without just compensation." *Id.*

3. N.Y. CONST. art. VII, § 8(1). This provision states in pertinent part, "[t]he money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking." *Id.*

4. N.Y. CONST. art. XVI, § 1. This provision states in pertinent part: "The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review." *Id.*

5. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S.2d at 380.

6. *Id.* at 63-64, 617 N.Y.S.2d at 380.

7. *Id.*

8. 1992 N.Y. LAWS 501.

9. N.Y. INS. LAW § 3231 (McKinney 1992).

York to provide "open enrollment"[10] thereby affording anyone the ability to obtain an insurance policy and to use a "community rating"[11] in setting their insurance premiums.[12] The intent behind this statute was to make insurance rates more stable and to spread the risk of loss more evenly.[13] The Superintendent was then ordered to create regulations to implement this objective.[14] In response, the Superintendent created parts 360 and 361 of chapter 11 of New York City Rules and Regulations [hereinafter NYCRR].[15] These regulations collectively created a pooling system requiring insurers to split the risk of high priced claims.[16] The system contrasted the insurers risk in seven areas of New York.[17] It provided that insurers with low risk had to contribute money into the pool, while insurers with a high risk would be entitled to take money from the pool.[18] Petitioners claimed that

---

10. N.Y. INS. LAW § 3231(a) (McKinney 1992). Part of this section states:

> Any individual, and dependents of such individual, and any small group, including all employees of group members and dependents of employees or members, applying for individual health insurance coverage, including medicare supplemental insurance, must be accepted at all times throughout the year for any hospital and/or medical coverage offered by the insurer to individuals or small groups in this state.

Id.

11. *Id.* Part of this section states:

> No individual health insurance policy and no group health insurance policy . . . shall be issued in this state unless such policy is community rated . . . . For the purposes of this section, "community rated" means a rating methodology in which the premium for all persons covered by a policy or contract form is the same based on the experience of the entire pool of risks covered by that policy or contract form without regard to age, sex, health status or occupation.

Id.

12. *Colonial*, 205 A.D.2d at 62, 617 N.Y.S.2d at 379.

13. *Id.* at 61, 617 N.Y.S.2d at 379.

14. *Id.*

15. N.Y. COMP. CODES R. & REGS. tit. 11, §§ 360, 361 (1992).

16. *Colonial*, 205 A.D.2d at 61, 617 N.Y.S.2d at 379.

17. *Id.* at 61, 617 N.Y.S.2d at 379.

18. N.Y. COMP. CODES R. & REGS. tit. 11, § 361.3(e)(3). This section states:

this regulation violated their rights under the New York State Constitution because it "imposes an unconstitutional tax, gives State money to private organizations and takes property without just compensation."[19]

The appellate division began its analysis by first determining whether or not the regulation imposed a tax.[20] It decided that payments into the pool were intended by the Legislature to be mandatory for all insurers in order to make the danger of high price claims equal for each insurer.[21] As a result, the

---

> For the second and third calendar quarter of 1993, a carrier participating in a demographic pool as of the beginning of a quarter shall pay to the demographic pooling fund a percentage of its premiums earned during each quarter, excluding premiums charged for anticipated payments to the demographic pooling fund, if its average demographic factor as of April 1, 1993 is projected to be less than the regional demographic factor for the pool area.

Id.

19. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S.2d at 380. The court in this case decided several issues other than constitutional ones. It determined that the Legislature did not intend the pooling system to apply only to policies created after the regulation was enacted, therefore part 361 of title 11 of the NYCRR was valid even though it applied to policies already in existence. *Id.* at 62, 617 N.Y.S.2d at 380. It decided that the Legislature did not intend the regulation to apply only to commercial insurers, hence part 361 of title 11 of the NYCRR was not invalid even though Empire Blue Cross and Blue Shield took part in the pooling system. *Id.* at 62-63, 617 N.Y.S.2d at 380. The court did, however nullify part 360.3(a)(1)(ii) and 360.4(c), because the Superintendent exceeded his authority in creating these sections. *Id.* at 64-65, 617 N.Y.S.2d at 381.

20. *Id.* at 63, 617 N.Y.S.2d at 380.

21. *Id.* (citing N.Y. INS. LAW §3233(c) (McKinney 1992)). This section states:

> Such regulations shall include reinsurance or a pooling process involving insurer contributions to, or receipts from, a fund which shall be designed to share the risk of or equalize high cost claims, claims of high cost persons, cost variations among insurers and health maintenance organizations based on demographic factors of the persons insured which correlate with such cost variations designed to protect insurers from disproportionate adverse risks of offering coverage to all applicants.

Id.

Superintendent could be given the power to collect the money.[22] The court determined that the Legislature had rightfully invoked its power to regulate through a pooling system.[23] In addition, it held that the mandate was a regulation, not a tax, because the intent of the Legislature was not to produce profits.[24]

In coming to the conclusion that the pooling system did not create a tax, the court cited several cases.[25] In *Health Insurance Ass'n of America v. Hartnett*,[26] the New York Court of Appeals stated that the Legislature had the right to create regulations for the insurance industry.[27] Thus it can be inferred that as long as

---

22. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S.2d at 380. In support of this proposition the court cited Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 81 N.Y.2d 574, 618 N.E.2d 127, 601 N.Y.S.2d 94 (1993), which stated that the Legislature has the sole power of taxation which can be "delegated to legislative bodies of municipalities and quasi municipal corporations." *Id.* at 580, 618 N.E.2d at 130, 610 N.Y.S.2d at 97. The court in this case held that it was unconstitutional for a Library District to be given the power to tax. *Id.* at 579, 618 N.E.2d at 130, 601 N.Y.S.2d at 97. The court also relied on Gautier v. Ditmar, 204 N.Y. 20, 97 N.E. 464 (1912), which confirmed that:

> While it would be incompetent for the legislature to leave to a state officer or department the power to determine whether a tax should be levied . . . it may be lawfully delegated to any ministerial officer or any department, or its appointee or other appointee other authority, the power of using the machinery, as and in the method created by it, for the collection of taxes it has levied.

Id. at 28, 97 N.E. at 467.

23. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S.2d at 380. *See* Health Ins. Ass'n of Am. v. Harness, 44 N.Y.2d 302, 376 N.E.2d 1280, 405 N.Y.S.2d 634 (1978) (stating that regulation of the insurance industry could be done by the Legislature).

24. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S.2d at 380.

25. *Id.* at 63, 617 N.Y.S.2d at 380.

26. 44 N.Y.2d 302, 376 N.E.2d 1280, 405 N.Y.S.2d 634 (1978).

27. *Id.* at 309, 376 N.E.2d at 1284, 405 N.Y.S.2d at 638. In this case, the Legislature passed a program that had been submitted by the Governor into law. The law, entitled the Mandatory Maternity Care Coverage law, provided that all health insurance policies created after January 1, 1977 had to provide maternity care coverage. *Id.* at 306, 376 N.E.2d at 1282, 405 N.Y.S.2d at 636. The insurance companies sued the New York State Superintendent of Insurance, claiming that the statute was unconstitutional. *Id.* at 307, 376 N.E.2d at 1283, 405 N.Y.S.2d at 637. The court declared the statute

the pooling system is a regulation and not a tax, enacting the system is within the power of the Superintendent of Insurance.

In *United States v. Butler*,[28] the Supreme Court of the United States distinguished between a tax and a regulation.[29] This case presented the Court with the question of whether a processing tax imposed on cotton by the Secretary of Agriculture was valid.[30] In deciding the case, the Court articulated the rule that revenue collected by the government which was not used for the general welfare of the people but was given to a certain group is a regulation and not a tax.[31] The Court came to the conclusion that it was not a valid tax.[32] In so deciding, the Court stated that:

> A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the

---

constitutional as it was within the police power of the state to protect families from the high cost of maternity care. *Id.* at 309, 376 N.E.2d at 1284, 405 N.Y.S.2d at 638.

28. 297 U.S. 1 (1936).

29. *Id.* at 61.

30. *Id.* at 57. This case was based on § 9(a) of the Agriculture Adjustment Act enacted in 1933. *Id.* at 55. The Act came about as a result of an economic emergency caused by the enormous difference in price between the price of agricultural products and other goods. *Id.* at 53. This threatened a national public interest and placed a burden on commerce. *Id.* As a response to the emergency, the Agriculture Adjustment Act allowed the Secretary of Agriculture to impose a processing tax on agricultural commodities. *Id.* at 55. The purpose of the tax was to raise money for costs that resulted from this economic emergency. *Id.* at 55. The tax was to be paid by the processor on the commodity he was processing. *Id.* In July of 1933, the Secretary imposed the processing tax on cotton. *Id.* at 57.

31. *Id.* at 61. The Government argued that it was a tax because it was a measure to raise revenue. *Id.* at 57. They claimed that the money which was collected was deposited in the federal treasury and was available to be used for any reason. *Id.* The Court, however, concluded that the money they received from the processors was not available for general use by the government. *Id.* at 58-59. It stated that the revenue was being given exclusively to farmers so they would reduce their crops. *Id.* This was done to help the farmers during this emergency and to increase the price of their crops. *Id.* Therefore, since the money was taken from one group and given to another, it was a regulation and not a tax. *Id.*

32. *Id.* at 61.

> expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation as a matter in which both groups are interested and in respect of which there is power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation.[33]

The United States Court of Appeals for the First Circuit supported this proposition in *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*.[34] In this case, the court held that a mandatory periodic fee to be paid by a private company in order to provide cellular phone service in San Juan was a regulatory fee as opposed to a tax.[35] It stated that tax money is used for the general good of the public while a regulatory fee serves a specific purpose.[36] The court determined that because the money from the fee was being used to offset expenses incurred by the Puerto Rico Public Service Commission, it was not being spent on the entire community and hence was not a tax.[37]

In addition, the New York Court of Appeals in *Medical Malpractice Insurance Ass'n v. Superintendent of Insurance of*

---

33. *Id.*

34. 967 F.2d 683 (1st Cir. 1992). In this case, the Federal Communications Commission allowed a government firm and a private firm to supply San Juan with cellular phone service. *Id.* at 684. The private firm, however, had to pay 3% of its gross profits to the Public Service Commission of Puerto Rico in order to obtain their license. *Id.* The private firm argued that the fee was a tax. *Id.* at 684-85.

35. *Id.* at 686.

36. *Id.* at 685. The court stated:

> The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id. (citations omitted).

37. *Id.* at 685-86.

New York[38] upheld a surcharge imposed by the Superintendent of Insurance on medical malpractice insurance.[39] In this case, the money collected from the surcharge would have been used by the Medical Malpractice Insurance Association if the insurance rates they were charging turned out to be insufficient.[40] The court held that this was a valid regulation of insurance.[41] Based on these decisions, the court in *Colonial* came to the conclusion that the pool was not a tax,[42] presumably because the money being collected from low risk insurers and redistributed to high risk insurers was being given to a specific group and was not being used for the general welfare of the public.

Next the court addressed whether distributing the pooled money to private insurance companies with a high risk of loss was a violation of article VII section 8(1) of the New York State Constitution.[43] This section of the State Constitution prohibits the state from loaning or giving money to private corporations.[44] The court came to the conclusion that the pooling system did not violate this constitutional provision in a two step analysis.[45]

38. 72 N.Y.2d 753, 533 N.E.2d 1030, 537 N.Y.S.2d 1 (1988), *cert. denied*, 490 U.S. 1080 (1989).

39. *Id.* at 763, 533 N.E.2d at 1035, 537 N.Y.S.2d at 6. The Medical Malpractice Insurance Association [hereinafter MMIA] was created in 1975 as a non-profit organization whose goal was to provide doctors with reasonable malpractice insurance. *Id.* at 757, 533 N.E.2d at 1031, 537 N.Y.S.2d at 2. In this case, pursuant to the Medical Malpractice Act of 1986, the Superintendent of Insurance set up rates which could be charged by the MMIA for their policies. *Id.* at 758, 533 N.E.2d at 1031, 537 N.Y.S.2d at 2. He was also authorized to impose a surcharge on this insurance of up to 8% if the rates proved to be inadequate. *Id.* at 758, 533 N.E.2d at 1032, 537 N.Y.S.2d at 3. The MMIA opposed these regulations on the grounds that they were unconstitutional. *Id.* at 759, 533 N.E.2d at 1032-33, 537 N.Y.S.2d at 4.

40. *Id.* at 758, 533 N.E.2d at 1032, 537 N.Y.S.2d at 3.

41. *Id.* at 763, 533 N.E.2d at 1035, 537 N.Y.S.2d at 6. In this case, the question of whether the surcharge on insurance was a tax never came up presumably because the money was not being used for the general welfare of the public. Therefore, it could not be a tax because it was being given to the MMIA.

42. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S.2d at 380.

43. *Id.* at 63, 617 N.Y.S.2d at 380.

44. N.Y. CONST. art. VII, § 8(1).

45. *Colonial*, 205 A.D.2d at 63-64, 617 N.Y.S.2d at 380-81.

First, the court acknowledged that the New York State Constitution provides that no requirement of the constitution can take the power away from the Legislature to guard people from the danger of sickness by providing insurance.[46] Accordingly, the Legislature instructed the Superintendent to create a regulation that would protect New Yorkers in this manner.[47] Therefore, because the Legislature gave the Superintendent the power to create the pooling system to protect New York citizens from the high cost of insurance, he had the right to give the pooled money to private insurance companies, regardless of the prohibition of giving state money to private corporations.[48] Hence, the pooling system was not a violation of article VII section 8(1) of the New York State Constitution.[49]

The last constitutional issue the court sought to answer was whether the pooling system constituted taking property without adequate compensation.[50] In deciding that the pooling system instituted by the Superintendent does not involve an unconstitutional taking of property, the court cited *Rochester Gas & Electric Corp. v. Public Service Commission of New York.*[51] In

---

46. N.Y. CONST. art. VII, § 8(2). This section states that "[s]ubject to the limitations or indebtedness and taxation, nothing in this constitution contained shall prevent the legislature from providing for . . . the protection by insurance or otherwise, against . . . sickness." *Id.*

47. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S.2d at 380.

48. N.Y. CONST. art. VII, § 8(1).

49. *Colonial*, 205 A.D.2d at 63-64, 617 N.Y.S.2d at 380-81.

50. *Id.* at 63-64, 617 N.Y.S.2d at 380-81.

51. 71 N.Y.2d 313, 520 N.E.2d 528, 525 N.Y.S.2d 809 (1988). This case stemmed from a finding by the Public Service Commission of New York that a large amount of natural gas within the state was unavailable because small local producers could not get the gas to their customers. *Id.* at 318, 520 N.E.2d at 529, 525 N.Y.S.2d at 810. As a result, the Legislature gave the Commission the power to order gas utilities to transport gas to customers from the local producers if they had extra room in their pipelines. *Id.* at 318, 520 N.E.2d at 529, 525 N.Y.S.2d at 810-11. Rochester Gas & Electric Corp. sued the Commission claiming that their property was taken without just compensation because they were forced to allow the public to use their pipelines. *Id.* at 319, 520 N.E.2d at 530, 525 N.Y.S.2d at 811. The court concluded that there was no constitutional violation. *Id.* at 317, 520 N.E.2d at 529, 525 N.Y.S.2d at 810.

this case, the New York Court of Appeals concluded that a private corporation could be regulated by the Legislature "through the exercise of police power to promote the general welfare."[52] The court stated that while the Legislature could regulate private corporations, if the regulation impermissibly affects the expectations or economic interests of the corporation, it would be considered an unconstitutional taking.[53] The court listed three factors to be considered in making this determination.[54] These include: the financial impact of the government regulation; the public purpose for the regulation; and whether the expectations of the corporation had been thwarted.[55] The court thus held that the regulation which required gas utilities to transport gas to their customers from local producers, if they had extra room in their pipelines, was not an unconstitutional taking because it did not interfere with the plaintiff's expectations, it had little economic effect on the plaintiff, and it did not require the plaintiff to do anything other than its original function of transporting gas.[56] The court also cited *Birnbaum v. State*[57] which stated that in order to decide whether an

52. *Id.* at 321, 520 N.E.2d at 531-32, 525 N.Y.S.2d at 813. The court stated that "the Constitution does not guarantee citizens the unrestricted privilege of conducting or engaging in business as they please. The State may, in the reasonable exercise of its police power, condition or restrict private businesses or prohibit the operation of some businesses entirely to further its policies." *Id.* at 322, 520 N.E.2d at 532, 525 N.Y.S.2d at 813 (citations omitted).

53. *Id.* at 324, 520 N.E.2d at 533, 525 N.Y.S.2d at 815.

54. *Id.*

55. *Id.*

56. *Id.* at 324-25, 520 N.E.2d at 533-34, 525 N.Y.S.2d at 815-16.

57. 73 N.Y.2d 638, 541 N.E.2d 23, 543 N.Y.S.2d 23 (1989), *cert. denied*, 494 U.S. 1078 (1990). In this case, the executors of the decedent's estate wanted to sell the nursing home that was part of the estate because it was operating at a loss. *Id.* at 641-42, 541 N.E.2d at 24, 543 N.Y.S.2d at 24. The State filed suit to prevent the nursing home from closing until it gave notice to the next of kin of each patient and received the Commissioner of Health's approval. *Id.* at 642, 541 N.E.2d at 24, 543 N.Y.S.2d at 24. The Commissioner was appointed as the receiver to run the nursing home by the supreme court. *Id.* at 643, 541 N.E.2d at 25, 543 N.Y.S.2d at 25. The executors of the decedent's estate claimed that property was taken from them

unconstitutional taking had in fact occurred, it must "assess whether respondents were alone required to shoulder a public burden which, in fairness, should have been the responsibility of the public as a whole."[58]

The *Colonial* court considered these holdings when it held that there was no unconstitutional taking of property. They evaluated the three factors listed in *Rochester Gas* in deciding whether an unconstitutional taking had occurred and decided that the private insurance companies who had to contribute to the pool would not be adversely affected, economically or otherwise. The court also affirmed the reasoning of the trial court in rendering its decision.[59] The trial court reasoned that the insurance companies could obtain just compensation if they increased their rates to cover the amount they had to contribute to the pool.[60] Therefore, the court determined "that there has not been an unconstitutional taking of what petitioner contends is its low-risk value of its book of business."[61] The aforementioned reasons led the court to conclude that the state had not taken money from the insurance companies without just compensation.

The Fifth Amendment of the Federal Constitution also states that "private property [shall not] be taken without just compensation."[62] As the law currently stands, there seems to be no noticeable difference between the Federal Constitution and the New York State Constitution on this issue. The Supreme Court of the United States has resolved this issue in a similar manner. In *Yee v. City of Escondido*,[63] the Court held that if the government

---

without just compensation by virtue of the fact that they were forced to stay in business, *id.* at 644, 541 N.E.2d at 25, 543 N.Y.S.2d at 25, and operate at a loss. *Id.* at 645, 541 N.E.2d at 26, 543 N.Y.S.2d at 26. The court concluded that there was no unconstitutional taking. *Id.* at 647, 541 N.E.2d at 27, 543 N.Y.S.2d at 27.

58. *Id.* at 645, 541 N.E.2d at 26, 543 N.Y.S.2d at 26.

59. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S.2d at 380.

60. Colonial Life Ins. Co. of Am. v. Curiale, 159 Misc. 2d 221, 225, 603 N.Y.S.2d 263, 266 (Sup. Ct. New York County 1993).

61. *Colonial*, 205 A.D.2d at 63, 617 N.Y.S. at 380.

62. U.S CONST. amend V.

63. 112 S. Ct. 1522 (1992). In this case, the people of Escondido in California passed an ordinance that fixed rent levels and forbade rent increases

does not take physical possession of the property and only regulates how it can be used, the government is not required to provide compensation unless "considerations such as the purpose of the regulation or the extent to which it deprives the owner of economic use of the property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."[64] Since the federal standard seems to be closely linked to the state standard for taking without just compensation, this case would probably be decided in a similar fashion under the Fifth Amendment.[65]

The appellate division upheld all three constitutional challenges to the pooling system created by the Superintendent of Insurance.[66] The only similar challenge that could have been made under the Federal Constitution would have been a Fifth Amendment claim of taking property without just compensation. The federal[67] and state[68] standards to find this type of constitutional violation are similar in that they both focus on the purpose for the regulation and the extent to which the property owner is denied access to his property. Because the standards are so similar, it is likely that no constitutional violation would be found under the Fifth Amendment, since none was found under the New York Constitution. Therefore, the court determined that the insurance pooling system should be upheld as constitutional.

---

in mobliehome parks absent City Council approval. *Id.* at 1526-27. The plaintiffs filed suit on the grounds that their property had been taken from them unlawfully. *Id.*

64. *Id* at 1526. The Court decided that there was no per se taking in this case but left the issue if it was a regulatory taking to the courts of California. *Id.* at 1534.

65. U.S CONST. amend V.

66. *Colonial*, 205 A.D.2d at 63-64, 617 N.Y.S.2d at 380.

67. *See* Yee v. City of Escondido, 112 S. Ct. 1522 (1992).

68. *See* Rochester Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 71 N.Y.2d 313, 520 N.E.2d 528, 525 N.Y.S.2d 809 (1988).