Public Law: Local Government Law

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The 1977-1978 term produced a number of significant decisions in the field of local government law. In addition to the usual assortment of cases from the courts of appeal involving tort liability, public contracts, public employment, zoning,
local option elections, and other matters, the supreme court rendered important decisions concerning local laws, overlapping state law and local ordinances, municipal annexations,

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4. See, e.g., Trustees v. Town of West Lake, 357 So. 2d 1299 (La. App. 3d Cir.), cert. denied, 359 So. 2d 206 (La. 1978) (rezoning ordered when existing zoning of property did not conform to that of surrounding area and was apparently based on neighbors' desire that property remain vacant); Trapani v. City of Kenner, 357 So. 2d 910 (La. App. 4th Cir.), cert. denied, 359 So. 2d 1307 (La. 1978) (rezoning ordered when original zoning was six grades more restrictive than the classification recommended by the city's own expert); Konrad v. Parish of Jefferson, 352 So. 2d 361 (La. App. 4th Cir. 1977), cert. denied, 364 So. 2d 121 (La. 1978) (rezoning ordered when land was unsuitable for use under existing zoning classification).

5. See, e.g., Mikkelsen v. City of DeRidder, 357 So. 2d 14 (La. App. 3d Cir. 1978) (when electorate in a local option election banned sale of alcoholic beverages, city could ban their manufacture and distribution as well); Niette v. City of Natchitoches, 348 So. 2d 162 (La. App. 3d Cir.), cert. denied, 351 So. 2d 160 (La. 1977) (local option election invalid because it excluded an incorporated municipality and was not, therefore, a ward-wide election as required by the state statute); Ward v. West Carroll Parish Police Jury, 347 So. 2d 68 (La. App. 2d Cir.), cert. denied, 351 So. 2d 154 (La. 1977) (calling of separate ward-wide elections in each of the parish's five wards did not amount to the calling of a parish-wide election). See also State v. Twiner, 350 So. 2d 608 (La. 1977) (legality of local option election was conclusively presumed after expiration of 30-day period to bring suit challenging the election).

6. See, e.g., Seghers v. Community Advancement, Inc., 357 So. 2d 626 (La. App. 1st Cir. 1978) (private corporation administering anti-poverty programs was an "authority" as that term is used in the open meetings law); Javers v. City Council of New Orleans, 351 So. 2d 247 (La. App. 4th Cir. 1977), cert. denied, 354 So. 2d 200 (La. 1978) (city not required to conduct a referendum on a proposed ordinance that was patently unconstitutional).

7. State v. LaBauve, 359 So. 2d 181 (La. 1978); Davenport v. Hardy, 349 So. 2d 858 (La. 1977). See notes 13-38, infra, and accompanying text.


10. Fontenot v. State Dep't of Highways, 355 So. 2d 1324 (La. 1978), rev'g, 346 So. 2d 849 (La. App. 1st Cir. 1977) (see note 123, infra); Foster v. Hampton, 352 So. 2d 197 (La. 1977). See notes 122-71, infra, and accompanying text. See also Frank v.
tort liability of local governments,\(^\text{10}\) and paving assessments.\(^\text{11}\) Space constraints require a limitation of coverage to the supreme court decisions, and a recent case note has analyzed the paving assessment decision in detail.\(^\text{12}\) Therefore, this article will focus on the supreme court decisions in the remaining four areas.

**Local Laws**

The 1974 constitution\(^\text{13}\) continues Louisiana's tradition\(^\text{14}\) of restricting the legislature's authority to pass local or special laws.\(^\text{15}\) Article III contains a list of ten matters that the legislature may not regulate by local act;\(^\text{16}\) on all other matters the
legislature may enact local legislation, but only if the bill proposing the laws is publicized in the areas concerned prior to its introduction in the legislature. 17

A chief difficulty in applying the predecessor constitutional provisions has involved distinguishing local acts from general laws to which the constitutional provisions are inapplicable. Like courts in other states with prohibitions against local laws, 18 the Louisiana Supreme Court has held that a law may be a general law even though it applies in a single locality if the legislation is based on a reasonable classification. 19 Most other states have insisted that the class created by such legislation be an "open" one; that is, they have required that other localities be afforded the opportunity to join the class if they satisfy the criteria on which the class is based. 20 In Louisiana,
however, the supreme court has, without discussing the classification requirement, sustained what appears to be an extreme example of a closed class—an act’s covering only enumerated localities—on the ground that the legislature had a reasonable basis for limiting the statute to the specified areas.\textsuperscript{21}

\textit{State v. LaBauve}\textsuperscript{22} is the supreme court’s most recent attempt to distinguish local and general laws. \textit{LaBauve} concerned a statute establishing criminal penalties for using gill nets to fish in portions of Lafourche and Terrebonne parishes, and the court held that the statute violated the constitutional prohibition against passing local or special laws “[d]efining any crime.”\textsuperscript{23}

The court began its analysis of the statute by noting that, “[o]n its face, the [gill net act] is a local statute which (for no shown reason) applies only to portions of Lafourche and Terrebonne parishes.”\textsuperscript{24} According to the court, this limitation was sufficient to invalidate the law under prior decisions;\textsuperscript{25} and in any event, the debates of the 1973 constitutional convention reflected the delegates’ belief that limiting the use of gill nets in specific parishes would violate the constitutional ban.\textsuperscript{26}

In explaining its holding, the court noted that any law that applies only in certain parishes is “suspect as a local law,” although not every law whose operation is limited to specific localities is invalid. If the law applies in certain localities “solely through the effect of a reasonable general classification

\begin{itemize}
\item \textsuperscript{21} State v. LaBauve, \textit{La.}\textsuperscript{2} 216 So. 2d 774 (La. 1974).
\item \textsuperscript{22} See, e.g., Knapp \textit{v.} Jefferson-Plaquemines Drainage Dist., \textit{La.}\textsuperscript{2} 224 La. 105, 68 So. 2d 774 (1953); Kotch \textit{v.} Board of River Port Pilots Comm’rs, \textit{La.}\textsuperscript{2} 209 La. 737, 25 So. 2d 527 (1946), aff’d, \textit{U.S}\textsuperscript{.} 330 U.S. 552 (1947). In practice, the Louisiana decisions seem to reach results similar to those of states that prohibit local laws when a general law is or can be made applicable. See, e.g., \textit{Ill. Const.} art. IV, § 13.
\item \textsuperscript{23} 359 So. 2d 181 (La. 1978).
\item \textsuperscript{24} \textit{La. Const.} art. III, § 12(10).
\item \textsuperscript{25} Id., citing \textit{State v. Clement}, \textit{La.}\textsuperscript{2} 188 La. 923, 178 So. 493 (1938). \textit{Clement} invalidated a statute prohibiting trapping in marshlands within 160 miles of the Gulf of Mexico.
\item \textsuperscript{26} 359 So. 2d at 183, \textit{citing State of Louisiana Constitutional Convention of 1973 Verbatim Transcripts, Jan. 8, 1974}, at 25-29.
\end{itemize}
(such as population size or physical characteristics),"7 the law is general rather than local. On the other hand, if the limitation of the act's coverage occurs "solely by its specific designation of certain parishes,"8 the act is a local law covered by the constitutional provisions.

The result in LaBauve is unexceptional because it is consistent with the supreme court's prior decisions rejecting statutes imposing arbitrary geographic limits.9 Nonetheless, at first glance, the opinion appears to presage a change in Louisiana law. In several places, the court used language indicating that, to avoid the constitutional provisions concerning local legislation, the legislature must legislate by open classification rather than by the enumeration of specific localities to which the law will apply,10 and the citation of a treatise supporting the open classification requirement reinforces that impression.11 However, Davenport v. Hardy12 counsels against any such interpretation of LaBauve. In Davenport, which preceded LaBauve by nine months and was cited with apparent approval in LaBauve,13 the court held that a statute which regulated the terms of the constables in two New Orleans city courts was not local legislation.14 Since the Davenport statute specified the

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7. 359 So. 2d at 183.
8. Id.
10. In addition to the language quoted in the text, the court said:
[T]he factor which makes a statute special or local is that it operates in one locality without the possibility of extending its coverage to other areas should the requisite criteria of its statutory classification exist there or that it affects only a certain number of persons within a class and not all persons possessing the characteristics of the class . . . . [The LaBauve statute] does not fall within the rule that a statute is not local, even though truly applicable to only one locality, if it is general in its terms and its coverage can extend to other areas should the requisite criteria exist there as well.
359 So. 2d at 182-83 (emphasis added).
11. Id. at 183, citing J. Sutherland, Statutes and Statutory Construction §§ 40.02, 40.06 (Sands ed. 1973).
13. 359 So. 2d at 182.
14. The plaintiff in Davenport argued that the statute was unconstitutional because it violated the constitutional ban against local laws "[f]or the holding and
courts to which it applied, it would not have satisfied the dictum in LaBauve suggesting that the legislature must act by classification rather than by enumeration.

Like LaBauve, Davenport affirmed that a law "is not local or special, even though its enforcement may be restricted to a particular locality, simply because the conditions under which it operates do not prevail in every locality." But Davenport failed to incorporate the LaBauve language that the legislature must act by open classification rather than by enumeration; relying on several prior decisions that had upheld statutes as general laws even though they applied to specifically named local governmental entities, the Davenport opinion focused on whether the limitation of the Act's coverage to the New Orleans courts was reasonable and concluded that it was.

The cumulative effect of LaBauve and Davenport is to make no significant change in Louisiana law. The supreme court continues to recognize that a law applicable only in a limited area is general if its coverage is defined by the operation of a reasonable classification scheme. When considering statutes that expressly limit their applicability to a single local government or small group of local governments, the court is more suspicious; nonetheless, such statutes may also be classified as general laws if the court concludes that the legislature's decision to limit the Act's coverage by enumeration was a reasonable one. It is difficult to follow the logic leading to the conclusion that a law applicable only to a specifically named conducting of elections, or fixing or changing the place of voting." 349 So. 2d at 863.

An intervenor contended that the statute was invalid because the legislature failed to comply with the publication requirements applicable to permissible local laws. Because the court concluded that the statute was a general law, it did not determine if it fell within the list of subjects for which local laws are prohibited or if the publication requirements had been followed.

36. 349 So. 2d at 863.
37. Id. at 864. The court stated:
   In the instant suit, although the constables of the First and Second City Courts are elected by voters from a limited area, they serve the community as a whole and not a certain number of persons within a class. The act does not give private advantage for the benefit of persons within a certain locality, but on the contrary it affects generally all persons who may have contact with the First and Second City court.
locality is not a local law, but the anomaly is one that Louisiana law has found tolerable for many years. In any event, the court's chief concern in all the cases appears to be one of reasonableness: it upholds the statute only if it concludes that the legislature adopted a means to limit the law's reach that was reasonable in light of the problem it was addressing.\textsuperscript{28}

**OVERLAPPING WITH STATE LAWS AND LOCAL ORDINANCES**

Under the 1921 constitution, Louisiana law normally recognized the supremacy of state law over local ordinances. Although special rules applied to certain local governments with home rule charters,\textsuperscript{39} the general rule invalidated a local ordinance if it conflicted with or was inconsistent with the state constitution or with a general state law.\textsuperscript{40} In applying this limitation on local power, Louisiana courts distinguished conflicts

\textsuperscript{28} Id. \textit{LaBauve} and \textit{Davenport} can certainly be reconciled on this ground. The \textit{LaBauve} enumeration was unreasonable because it covered only a portion of an area with essentially similar topography. 359 So. 2d at 183 n.3. On the other hand, the restrictive statute in \textit{Davenport} addressed a problem peculiar to the New Orleans courts, indeed, its "obvious purpose" in adjusting the terms of the New Orleans constables was to make their terms uniform with the terms of other constables in the state. 349 So. 2d at 860. See \textit{State v. Dalon}, 35 La. Ann. 1141 (1883), where it was stated:

The argument, that a law which relates solely to the machinery of a court of justice having jurisdiction over the territory of one parish only, is a local or special law, because it does not operate throughout the State and all the parishes thereof, is perfectly preposterous, and so hollow that it cannot stand criticism.

\textsuperscript{39} See La. Const. of 1921 art. XIV, § 3(a) (1946) (East Baton Rouge Parish); La. Const. of 1921 art. XIV, § 3(c) (1956) (Jefferson Parish). Under the home rule charters for East Baton Rouge and Jefferson parishes, local ordinances prevailed over contrary state laws with respect to "the structure, organization and particular distributions...of...powers and functions" within the parish. La. Const. of 1921, art. XIV, § 3(a)(2) (1946); La. Const. of 1921 art. XIV, § 3(c)(2) (1956). See generally \textsuperscript{39} \textit{Letellier v. Jefferson Parish}, 254 La. 1067, 229 So. 2d 101 (1969); \textit{Ware v. Cannon}, 248 So. 2d 19 (La. App. 1st Cir. 1971); \textit{LaFleur v. City of Baton Rouge}, 124 So. 2d 374 (La. App. 1st Cir. 1960). A 1974 decision of the supreme court refused to apply a similar limitation on state power for other home rule governments under the 1921 constitution. \textit{Bradford v. City of Shreveport}, 305 So. 2d 487 (La. 1974).

\textsuperscript{40} No single source imposed this rule on all local governments. Except for the special home rule charters cited in note 39, supra, this general rule proceeded from several sources. See, e.g., La. Const. of 1921 art. XIV, § 22 (1950) (city of New Orleans); La. Const. of 1921 art. XIV, § 40(d) (municipalities); \textit{Bradford v. City of Shreveport}, 305 So. 2d 487 (La. 1974) (city of Shreveport).
and inconsistencies. A conflict existed when a local ordinance contravened the express provisions of the constitution or a state statute. An inconsistency between a state law and a local ordinance occurred when the court perceived an implied conflict or a state intent to preempt the field. If the local ordinance interfered with the spirit of the constitution or statute without contradicting a specific provision, the courts found an implied conflict.

If the state legislation convinced the court that the legislature intended to withhold the power to act on the subject, the court found that the legislative action preempted any local attempts to govern the field.

The 1974 constitution significantly alters this framework. Article VI recognizes three types of local governments: existing home rule governments—those with home rule charters in existence on the date that the constitution was adopted; new

41. State ex. rel. Sutton v. Caldwell, 195 La. 507, 197 So. 214 (1940). The court stated: "A municipality cannot permit by ordinance what a statute forbids, or forbid what a statute expressly permits, but it may supplement a statute or cover any part of an authorized field of local legislation that is not covered by state legislation." Id. at 518, 197 So. at 217-18.

42. National Food Stores of La., Inc. v. Cefalu, 280 So. 2d 903 (La. 1973). Cf. City of Minden v. David Bros. Drug Co., 195 La. 791, 800, 197 So. 505, 508 (1940) ("It is fundamental that a municipality can not adopt ordinances which infringe the spirit of state law, or are repugnant to the general policy of the State.").

43. See, e.g., City of Alexandria v. LaCombe, 220 La. 618, 57 So. 2d 206 (1952) (state statute did not authorize municipality to enact an ordinance forbidding gambling that was not conducted as a business). The court stated:

We conclude that when the Legislature in its latest enactment removed from a municipality the power which it had previously given to it to define gambling and itself passed a law specifically defining it, it intended to occupy the whole field of legislation on the subject and merely left the municipality with the concurrent power to suppress it in the manner as defined by that law.

Id. at 630, 57 So. 2d at 210 (emphasis added). See also City of Pineville v. Tarver, 231 La. 446, 91 So. 2d 597 (1956) (state local option statute did not authorize city to enact an ordinance forbidding the possession of certain types of alcoholic beverages).

In both LaCombe and Tarver the court held that ordinances conflicted with state statutes on the same subject matter. In reality, the problem was not that the ordinances conflicted with state law but that they involved action in an area in which the court perceived a legislative intent to control the entire field. The result reached by the court was probably correct in both cases, but because of the comprehensive nature of the statutes in question, the question was one of preemption, not conflict. Cf. National Food Stores of La., Inc. v. Cefalu, 280 So. 2d 903 (La. 1973) (in finding implied conflict, court quoted extensively from the comprehensive statutory scheme enacted by the legislature).

44. LA. CONST. art. VI, § 4.
home rule governments—local governments that adopt home rule charters after the constitution went into effect; and "[o]ther local governmental subdivisions"—all local governments that do not fall within either of the first two categories. The new constitution allows new home rule governments to exercise all powers needed to manage their affairs so long as the powers are "not denied by general law or inconsistent with this constitution." Normally, "[o]ther local governmental subdivisions" are authorized to exercise "the powers authorized by this constitution or by law," a reference that appears to incorporate the earlier rule that governments are creatures of the state and have only those powers given to them by the legislature. These "other governments" can, however, broaden the scope of their powers: if a majority of the voters in the locality approve, the local governing authority can, "[s]ubject to and not inconsistent with this constitution," exercise any power "not denied by its charter or by general law." Finally, the constitution continues the charters and powers of existing home rule governments "except as inconsistent with this constitution." In addition, the constitution authorizes an existing home rule government, if its charter permits, to exercise the powers and functions given to "other local governmental subdivisions," presumably including the right to adopt all powers that are necessary for the management of its affairs and "not denied by its charter or by general law." One aim of the new constitutional framework seems to have been to reduce the number of situations in which state law

45. La. Const. art. VI, § 5.
46. La. Const. art. VI, § 7.
47. La. Const. art. VI, § 5(E).
48. La. Const. art. VI, § 7(A).
50. La. Const. art. VI, § 7(A).
52. Id.
53. La. Const. art. VI, § 7(A).
will invalidate local ordinances. For new home rule governments, the rule now is that the exercise of a power by the locality is invalid only if inconsistent with the constitution or denied by general law, and other localities can establish a similar rule with respect to any particular power if the local electorate approves. The continuation of the "inconsistent with" language with respect to the 1974 constitution suggests that the rules as to when the constitution invalidates local ordinances remain unchanged, but the more restrictive "not denied by" language used with respect to state statutes apparently manifests a desire to increase the ambit of local authority.

Two recent cases discussed the problem of overlapping state and local ordinances, although neither decision found it necessary to explore the meaning of the new "denied by" language in the 1974 constitution. The Louisiana Supreme Court invalidated a city ordinance prohibiting gambling in City of Shreveport v. Kaufman. The basis for the decision was the state constitutional provision providing that "[g]ambling

54. The major thrust of the local government article was to eliminate the "state creature concept" of local governments (see City of Shreveport v. Brister, 194 La. 615, 194 So. 566 (1940), and note 49, supra,) and to grant local governments broad residual powers. See City of Shreveport v. Kaufman, 353 So. 2d 995, 996-97 (La. 1977); Kean, supra note 49, at 66. In addition, the home rule article also prohibits the state legislature from changing or affecting "structure and organization or the particular distribution and redistribution of the powers and functions" of any home rule government. La. Const. art. VI, § 6. This language appears to incorporate the protection that Louisiana courts had previously granted to the home rule governments of the parishes of East Baton Rouge and Jefferson. See note 39, supra. A later section of the article may, however, gut the impact of the prohibition of state legislation by specifically covering the area that has been most significant in the past—pay of police officers and firefighters. See La. Const. art. VI, § 14. Two commentators have argued that, notwithstanding the specific section covering pay matters, the prohibition of state laws affecting the structure and organization of home rule governments protects these governments from state interference in any pay matters. See Kean, supra note 48, at 67-70; Comment, Exclusive Powers of Louisiana Home Rule Municipalities and Parishes, 23 Loy. L. Rev. 961 (1977). Unfortunately, neither of these commentators documents his position by reference to the debates in the constitutional convention.

55. 353 So. 2d 995 (La. 1977). Chief Justice Sanders filed a dissenting opinion that Justice Summers joined. Id. at 998 (Sanders, C.J., dissenting). He concluded that the constitutional provision relating to gambling was not designed to grant the legislature the exclusive power to define gambling. He also argued that the majority's opinion required a holding that a municipality could not define gambling even when the legislature expressly authorized it to do so and that such a holding was untenable in the light of the constitutional debates. Id. at 999. But see note 74, infra.
shall be defined by . . . the legislature."\textsuperscript{55} The court held that this provision allows only the legislature to define gambling,\textsuperscript{57} and since the definition of gambling in the Shreveport ordinance differed from the legislature's definition,\textsuperscript{58} the local ordinance was inconsistent with the constitution.

\textit{City of Shreveport v. Curry}\textsuperscript{59} involved a Shreveport ordinance regulating frog gigging\textsuperscript{60} on Cross Lake.\textsuperscript{61} During the month of June, the ordinance permitted frog gigging within the 172 foot contour line mean gulf level and, by implication, prohibited it during the rest of the year.\textsuperscript{62} The defendants argued

\begin{itemize}
\item \textsuperscript{56} LA. CONST. art. XII, § 6.
\item \textsuperscript{57} 353 So. 2d at 997.
\item \textsuperscript{58} The state statute, LA. R.S. 14:90 (Supp. 1968), proscribes gambling only when it is conducted as a business. The Shreveport ordinance also prohibited gambling that would not be classified as a business. 353 So. 2d at 997.
\item \textsuperscript{59} 357 So. 2d 1078 (La. 1978). Chief Justice Sanders and Justices Marcus and Dennis dissented without opinion.
\item \textsuperscript{60} The court gave the following definition of frog gigging:
\begin{quote}
Frog gigging is a method of taking frogs with a mechanical device, an activity accomplished, pertinent to the case under consideration, while in a boat close to the shore line. The device is essentially a grabber triggered by a spring lever. It grabs or "gigs" the frog but does not puncture the frog's skin or redden its meat.
\end{quote}
\textit{Id.} at 1079 n.1.
\item \textsuperscript{61} The Shreveport ordinance (Section 14-19 of the Shreveport City Code) provided:
\begin{quote}
BE IT FURTHER ORDAINED, That the following recreational activities being dealt with in this section are fishing, boating, water skiing, hunting and frog gigging. Each activity mentioned above is subject to regulations as follows:
\end{quote}
\begin{itemize}
\item D. HUNTING
\end{itemize}
\begin{quote}
4. Frog gigging will be permitted within the 172 foot contour line mean gulf level from June 1 through June 30 using only approved mechanical devices and in accordance with existing State laws. Frog gigging will not be permitted where it conflicts with the exclusive right to use of property within the 172 foot contour line mean gulf level by the abutting property owners.

\textit{Any} person who shall violate the provisions of this ordinance shall upon conviction be fined not less than $10.00 nor more than $200.00, or be imprisoned not less than 10 days, nor more than 60 days, or shall suffer both fine and imprisonment at the discretion of the court.
\end{quote}
\textit{Id.} at 1079.
\item \textsuperscript{62} The ordinance contained no express prohibition of frog gigging at any time. Since the court concluded that the ordinance was an invalid exercise of police power, it found no necessity "to resolve in this instance whether the statute fails to proscribe the conduct with which these defendants are charged." \textit{Id.} at 1080.
that the Shreveport ordinance was invalid because the local regulation conflicted with a state law that forbade frog gigging during April and May and apparently permitted it during the rest of the year and because the state statute manifested an intent to preempt the field. Citing pre-1974 cases without alluding to the changes made by the 1974 constitution, the court declared that a municipal ordinance’s prohibition is valid only so long as “it does not forbid what the state legislature has expressly or implicitly authorized.” Since “the Shreveport ordinance proscri[be[d] what the state statute would permit (frog gigging . . . from January through March, and July through December),” the court would have found that “the area had been preempted by state law” if it had believed that the purpose of the Shreveport ordinance was “to regulate the taking of frogs.”

The court, however, reduced its analysis of the conflict issue to dictum by treating the Shreveport ordinance as designed to prohibit the activity of frog gigging rather than to stop the taking of frogs. As so construed, the ordinance did not conflict with the state law; instead, it raised the question whether the ordinance was a valid police regulation. The court held that it was not because it bore no “real and substantial relationship” to “the prevention of injury to the public or the

63. Id., citing National Food Stores of La., Inc. v. Cefalu, 280 So. 2d 903 (La. 1973); Broussard v. Ketchens, 231 La. 508, 91 So. 2d 775 (1956).
64. 357 So. 2d at 1080. One should note that the state statute, La. R.S. 56:330 (Supp. 1974), does not expressly provide that frog gigging is permissible from January to March and July to December. It prohibits frog gigging in April and May and provides that frogs may be taken during the open season by using certain gigging aids. The court found a positive legislative authorization for frog gigging implicit in the statutory scheme. See note 65, infra.
65. 357 So. 2d at 1080.
66. Id. The court gave the following explanation for this conclusion:
We believe . . . that the thrust of the Shreveport ordinance is not to prohibit the taking of frogs but to prohibit people from operating a frog gig, the apparent intent of the city being to discourage this type of human activity upon or near the edge of Cross Lake. We have this belief because the city makes no argument at all that the ordinance attempts to protect the frog or regulate the proliferation of frogs, and we can find no logical relationship between frog gigging as regulated by the ordinance and the life cycle or activity of frogs.

Id. at 1080-81.
promotion of the general welfare." According to the court, the "barren record" before it did not demonstrate "[j]ust what purpose relative to the public health, morals, peace or general welfare is served by prohibiting frog gigging eleven months during the year," and the ordinance itself offered no rationale for the prohibition. Although the city argued that it could proscribe frog gigging because "the sport . . . is done in small boats at night near the shoreline," this justification did not convince the court that the Shreveport ordinance was reasonable. The city permitted other recreational activities near the shoreline at night, and the city failed to demonstrate the reasonableness of prohibiting frog gigging while permitting these other activities. Accordingly, the court held the Shreveport regulation invalid as an unlawful exercise of the police power.

Neither of these decisions requires extensive discussion with respect to the merits. A recent case note has considered Kaufman in detail, and Kaufman's basic premise, that a positive grant of power to a legislative body can carry an implicit denial of that power to subordinate legislative bodies, is not novel in American law. For example, the United States Supreme Court has held that the federal constitution's grant to

67. Id. at 1081.
68. Id. at 1082.
69. Id. The court did note that "the preamble to the ordinance does relate that one of the purposes of the ordinance is to prevent the commission of nuisances upon the lake and in the buildings along its shoreline." Id.
70. Id.
71. The court gave the following summary of the other permissible activities:

[T]here is no argument advanced, and we can conceive of none, to differentiate the nocturnal activity of frog giggers in and around the lake as opposed to the activity of other boaters and hunters who can permissible under the ordinance enjoy their sport at night and near the shoreline under certain conditions. Boating is permitted from daylight to dark every month and to as late as 10:00 p.m. during some months, without limitations near the shoreline. Fishing is prohibited within one hundred feet of boat houses, but allowed along the shoreline. Water skiing is permitted on the lake. Hunting is permitted on the lake in accordance with federal and state laws. No suggestion is made by the city which demonstrates the reasonableness of prohibiting frog gigging while other recreational activities such as those mentioned above are permitted at nighttime (until 10 p.m. in some cases) along the shoreline.

Id. at 1082-83.
Congress of the power to regulate interstate commerce\textsuperscript{73} implies an analogous limit on state power to regulate that commerce.\textsuperscript{74} The \textit{Curry} decision is similarly unexceptional on the merits. Since the court explained its holding in terms of Shreveport's failure to prove the relationship between its ban on frog gigging and permissible governmental concerns, other localities (or even Shreveport itself) could successfully defend similar ordinances if they could prove that the public welfare requires the ban.\textsuperscript{75}

Perhaps the most significant aspect of the decisions is the court's handling of the conflict and preemption arguments in \textit{Curry}. This dictum is troublesome in at least two respects. In the first place, the court merged the arguments of implied conflict and preemption.\textsuperscript{76} Although the two arguments are similar because each urges that a local ordinance is invalid even though it does not expressly contradict the words of a state statute, the focus of each argument is quite distinct. Implied conflict relies on the spirit of the legislation\textsuperscript{77} to discover a legislative intent that the local ordinance has contravened. Preemption, on the other hand, relies on the pervasive nature of the state statutory scheme to manifest the legislative intent; because the state has legislated extensively in the field, the court infers that the legislature intended for its statute to be the final word concerning all matters in the general area that the statute covers. The lack of analytical precision in \textit{Curry}

\textsuperscript{73} U.S. \textit{Const.} art. I, \S 8, cl. 3.

\textsuperscript{74} See, e.g., \textit{Raymond Motor Trans. Co. v. Rice}, 434 U.S. 429 (1978); \textit{Dean Milk Co. v. City of Madison}, 340 U.S. 349 (1951); \textit{Southern Pac. Co. v. Arizona}, 325 U.S. 761 (1945). Acceptance of the commerce clause analogy would allow the court to avoid the holding feared by Chief Justice Sanders, that a local ordinance defining gambling was invalid even when the state legislature had specifically authorized the locality to define gambling. Modern federal decisions have allowed state regulations of interstate commerce when expressly authorized by Congress. See, e.g., \textit{Prudential Ins. Co. v. Benjamin}, 328 U.S. 408 (1946).

\textsuperscript{75} For example, a city might prove that frog gigging created a danger of injury to other individuals.

\textsuperscript{76} See notes 64-65, \textit{supra}, and accompanying text.

distorts any attempt to clarify this most confusing area of the law, for it is virtually impossible to anticipate how the court will apply a decision to other situations if one is unable to discern the rationale of the decision to be applied.

The second reason that Curry's handling of the conflict issue is disturbing is that it fails to acknowledge the linguistic change introduced by the 1974 constitution. By citing pre-1974 conflict cases with apparent approval, the court seems to suggest that the standards for determining when a state law invalidates a local ordinance were left unchanged by the 1974 constitution. Not only does this suggestion ignore the new "not denied by" language of the 1974 constitution, it also ignores Kaufman's implicit recognition that the "not denied by" phrase establishes a different test than the "inconsistent with" phrase that is used with respect to the relationship between the state constitution and local powers. It thus avoids a most difficult issue, determining the precise meaning of the "not denied by" phrase; but it avoids this issue only by disregarding the apparent intent of the framers of the constitution to enhance local authority vis-a-vis the state.

Although the records of the constitutional convention offer no precise definition of the "not denied by" language, several factors indicate that the convention intended for the test to be more protective of local power than the traditional conflict rule. First, the committee version of article VI used the "not denied by" language with respect to both the state constitution and state statutes. A series of floor amendments inserted the "inconsistent with" language to govern conflicts between the constitution and local ordinances, and the debate on these

78. 357 So. 2d at 1080, citing National Food Stores of Louisiana, Inc. v. Cefalu, 280 So. 2d 903 (La. 1973); Broussard v. Ketchens, 231 La. 508, 91 So. 2d 775 (1956).
79. See notes 39-54, supra, and accompanying text.
80. See City of Shreveport v. Kaufman, 353 So. 2d 995, 997 (La. 1977) ("local governments are authorized to exercise any power necessary . . . for local government—providing that such powers are not (a) inconsistent with the 1974 Constitution or (b) denied them by general legislation" (emphasis in original)). Perhaps Kaufman is more sensitive to the language of the 1974 constitution because the author of the opinion, Mr. Justice Tate, was a delegate to the constitutional convention.
82. 7 Records, supra note 49, at 1365-66, 1373, 1409.
amendments suggests that the delegates understood the constitutional test to be more restrictive of local power.\(^8\) Second, in the debate over attempts to amend the “not denied by” language of article VI, supporters of the amendments often referred to the phrase “not denied by” as requiring a specific or affirmative legislative denial.\(^4\) Third, the convention rejected an amendment that would have precluded local governments from exercising powers “preempted by general laws.”\(^5\) Fourth, the “not denied by” language in article VI was apparently derived from the Model Constitutional Provision for Municipal Home Rule,\(^6\) and the comments to the model provision indicate that the language requires that the legislature “expressly deny” a power to a local government.\(^7\)

Providing a precise definition for the phrase “not denied by” is a difficult assignment. A number of problems surface immediately. For example, can there ever be an implied denial of a power to a local government?\(^8\) If so, should the courts

\(^8\) Id. at 1409 (remarks of Delegate Kean). In an article written after the constitution was adopted, Mr. Kean argued that the language might be broad enough to permit a finding of implied denial or preemption in certain cases. See Kean, supra note 49, at 70-71.

\(^4\) 7 RECORDS, supra note 49, at 1363, 1366-67, 1410-11 (remarks of Delegate Jenkins); Id. at 1398-99 (remarks of Delegate Conroy).

\(^5\) Id. at 1410-12.

\(^6\) AMERICAN MUNICIPAL ASSOCIATION, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (1953). According to a draft of the committee proposal, the direct source for the section containing the phrase “not denied by” was the Model State Constitution. That constitution lists the American Municipal Association’s proposal as its source. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. VIII, § 8.02 (6th rev. ed. 1968). Moreover, a research memorandum prepared for the Committee on Local and Parochial Government quoted an article written by Jefferson Fordham, the author of the American Municipal Association’s home rule provision. 12 RECORDS, supra note 49, at 172, quoting Fordham, Home Rule-AMA Model, 44 MUN. REV. 140 (1955).

\(^7\) AMERICAN MUNICIPAL ASSOCIATION, supra note 86, at 20 (words “not denied by” mean “expressly limited”; locality can act so long as the state legislature does not “expressly deny” a power).

\(^8\) In one case, the court is almost certain to find an implied denial—when the local government attempts to contradict the express authorization of a statute. This situation would have arisen in Curry if Shreveport had tried to permit frog gigging during the months of April and May when the state prohibited it. The actual facts in Curry are more difficult. There was no direct conflict between the language of the statute, which prohibited frog gigging in April and May and authorized frogs to be taken during the open season with certain mechanical gigging devices, and the local
imply the denial of a power to local governments on the basis of the pervasive nature of the state's statutory scheme? The aim of the present discussion is not to provide a simple answer to these problems, because no simple answer exists. Instead, the foregoing comments attempt to demonstrate that uncritical application of prior conflict decisions is unfaithful to the constitution's text, the debates of the convention, and the sources of the constitutional language. Proper exercise of the judicial function requires more: it requires the court to consider all available sources to give a meaning to the new language that is faithful to the text and realistic in light of the constitution's approach to the power of local governments.

ANNEXATION

Louisiana's current annexation-by-ordinance provisions

ordinance, which allowed frog gigging only in June. To find an implicit denial of power to the local government, the court must conclude (1) that the legislature meant to authorize frog gigging from June to March (not just prohibit it in April and May and regulate the types of devices that could be used during the open season) and (2) that the legislature meant to deny local governments the power to prohibit frog gigging during any portion of the period for which the state had authorized frog gigging.

89. Preemption may well be the most logical basis for the court's comments on the conflict issue. Since the frog gigging section is part of a comprehensive statutory scheme regulating fish and wildlife found in title 56 of the Revised Statutes, it may be reasonable to assume that the legislature meant to exclude local ordinances changing the state rule. *Curry*, however, does not discuss the fact that the frog gigging provision is merely one part of a comprehensive regulation of fish and wildlife.

90. Historically, Louisiana law has provided two general methods by which a municipality may annex surrounding territory: by petition and election or by petition and municipal ordinance. In addition, the legislature has established special rules for Jefferson Parish, *La. R.S.* 33:172.1 (Supp. 1966), and has forbidden New Orleans from annexing any territory. *La. R.S.* 33:171, 33:172(A) (1950 & Supp. 1972). Prior to amendments by the legislature in 1972 *La. Acts*, No. 338, and 1976 *La. Acts*, No. 224, the annexation by election provisions were found in *La. R.S.* 33:151-60 (1950). When one-third of the property owners (by number and value) in an area adjacent to the municipality petitioned to be annexed, the governing authority of the municipality could call an election in the area proposed for annexation. *La. R.S.* 33:151 (1950). If a majority (by both number and property value) of the electors in the area to be annexed voted in favor of annexation, the municipality could then call an election within the municipality. *La. R.S.* 33:157 (1950). If a majority (by both number and property value) of the voters in the city favored annexation, the municipal authorities would issue a proclamation declaring the annexed area part of the municipality. *La. R.S.* 33:160 (1950).

Alternatively, *La. R.S.* 33:171-79 (1950) authorized a municipality to annex an
permit a municipality to adopt an ordinance annexing contiguous areas into its boundaries in three situations:

1. When ninety percent of the boundary of the area to be annexed is common to that of the municipality, the municipality may act on its own initiative to take in the territory by ordinance, although the action is subject to judicial review as to whether it is reasonable and serves the best interests of the overall community.

2. If twenty-five percent of the resident property owners in an area who also own twenty-five percent of the adjacent area by municipal ordinance without calling an election when the municipality was presented with a petition signed by twenty-five percent of the resident property owners in the area to be annexed and by owners of property equaling twenty-five percent of the value of the property in the area. LA. R.S. 33:172 (1950). The ordinance was not effective for 30 days after its publication, LA. R.S. 33:173 (1950), and during that time any interested citizen of the municipality or the area to be annexed could seek judicial review to determine the reasonableness of the proposed ordinance. LA. R.S. 33:174 (1950).

The legislature in 1972 La. Acts, No. 338, and 1976 La. Acts, No. 224, amended the annexation provisions to establish the annexation-by-ordinance rules discussed in the text and to change the annexation-by-election rules for certain cities. The effect of these changes was to dilute the distinction between the two methods by introducing the element of an election into the annexation-by-ordinance provisions. Despite the amendments, annexation by ordinance is still the more common procedure because the requirements in that method are less onerous than in the annexation-by-election method.

91. When the ordinance follows an election in the area to be annexed or when it annexes an area that has ninety percent of its boundaries common with the city, the statute requires that the territory annexed be contiguous to the municipality. LA. R.S. 33:172(C), (D) (Supp. 1972). An Attorney General's opinion has implied a similar condition for other annexations based on the perception that the "legal idea of a municipality is that of 'oneness' and that of a collective body, and not of several bodies." 1944-46 LA. Op. Atty Gen. 503 (Feb. 27, 1946). See also 1946-48 LA. Op. Atty Gen. 549 (June 17, 1947). Quaere whether the subsequent reenactment of section 172 with express requirements of contiguity in subsections B and D implies a legislative intent that the requirement not apply to subsection A. LA. R.S. 33:172(C) (Supp. 1972).

92. The provision for judicial review in section 172(C) is broader than the general review provision for annexation ordinances, which merely requires that the annexation be reasonable. LA. R.S. 33:174 (1950). Section 172(C) expressly imposes on the city the burden of proving that the ordinance is reasonable and that it serves the best interest of the community. Under the section authorizing judicial scrutiny of other annexation ordinances, LA. R.S. 33:174 (1950), the parties challenging the ordinance bear the burden of proving unreasonableness. Kansas City So. Ry. v. City of Shreveport, 354 So. 2d 1362, 1369 (La. 1978), cert. denied, 99 S. Ct. 103 (1978).
value of all resident-owned property in the area petition a municipality to call an annexation election, the municipality may call a special election in the affected area. If a majority of those voting in the election favor annexation, the city may then adopt an ordinance annexing the area. 93

3. The municipality may adopt an annexation ordinance without holding an election, if “prior to adoption” of the ordinance, a majority of the registered voters in the area to be annexed and a majority of the resident property owners in the area who also own twenty-five percent of the value of the resident-owned property in the area give their “written assent” to the annexation. 94

The first alternative listed above was apparently designed to enable the city of Monroe to meet a particular problem, 95 and it does not appear to have been widely used. 96 In all other situations, the effect of the last two provisions is to require the municipality to secure the approval of the voters in the area to be annexed 97 as well as a substantial portion of the property owners who reside in the area before it can adopt an annexation ordinance.

Perhaps because it is less expensive to circulate petitions than to hold a special election, 98 the most common method of

96. The statute does not expressly limit its coverage to the city of Monroe, and thus other municipalities might also find it useful. For example, if opposition to annexation were concentrated in one area, the city might use the other annexation-by-ordinance methods to annex the areas surrounding the site of the opposition and then use section 172(C) to annex the area in which the opponents of annexation lived. Of course, any annexation under section 172(C) is subject to judicial review to determine if it is reasonable and serves the best interest of the overall community. See note 92, supra, and accompanying text.
98. Section 172(D)’s procedure of securing petitions and then holding a special election is less onerous in two respects. One need not secure approval of a majority of the resident property owners, and one need only secure approval of a majority of those actually voting in the special election rather than a majority of the registered voters.
annexation is to secure a petition signed by a sufficiently large number of voters and resident property owners to permit immediate annexation; this was the route followed by the supporters of annexation for the Cooper Road area of the northern part of the city of Shreveport in the annexation that was the subject of the supreme court's decision in Kansas City Southern Railway v. City of Shreveport. During the fall of 1976, a group of residents in that area began circulating two types of annexation petitions, one entitled "registered voters" and the other entitled "property owners." Persons who fell within both categories were asked to sign both petitions.

The city advertised that the petitions had been filed with it in May 1977, and in October the city attorney certified that a majority of the registered voters in the Cooper Road area had signed the petitions. A month later, the parish assessor certified the property assessments of each of the owners signing the petitions. Since the certifications indicated that the petitions contained the requisite number of signatures, the city council adopted the ordinance on first reading and scheduled a public hearing. Opponents of annexation then sought a preliminary injunction prohibiting the city from acting on the petitions. After a hearing on the issue, the district court denied relief, but it did allow some persons who had signed the petitions to withdraw their signatures. As a result of these withdrawals, the number of signatures on the "registered voters" petition fell below a majority. However, the city attorney determined that a number of registered voters had signed only the "property owners" petition, and the city counted these signatures with the ones on the "voters" petition to secure the requisite majority of registered voters.

One hour before the public hearing was to begin, a number of other persons who had signed the annexation petitions asked that their names be withdrawn. Had these requests been

However, judging from the reported cases, these advantages do not seem to have outweighed the considerable financial savings of the petition-and-ordinance procedure. Kansas City So. Ry. v. City of Shreveport, 354 So. 2d 1362 (La. 1978), cert. denied, 99 S. Ct. 103 (1978). The city had granted prior requests to withdraw signatures—including those made at a judicial hearing a week earlier. Id. at 1366.
granted, the petitions would not have satisfied the statutory requirements because they would not have contained a majority of the resident property owners in the area to be annexed.\textsuperscript{101} The city, however, refused to honor the requests; instead, it proceeded with the public hearing and passed the ordinance on final reading.

Opponents of annexation challenged the annexation ordinance, contending that the petitions did not contain enough signatures to permit the city to adopt the ordinance because the withdrawal requests submitted on the day of the public hearing should have been granted. They also argued that the petitions were invalid because they were not signed by a majority of the registered voters in the area to be annexed.\textsuperscript{102}

The supreme court rejected both arguments.\textsuperscript{103} The majority held that determining the validity of the withdrawal requests required a “balancing of conflicting interests, with due regard for recognizing individual rights of . . . [those] opposed to annexation, while preserving the workability of the annexation process.”\textsuperscript{104} Judging the Shreveport annexation by

\textsuperscript{101} Id. If earlier withdrawals had reduced the percentage of signatures to less than a majority, it is unclear whether the city could have relied on the petitions as sufficient to authorize it to call a special election on the annexation question. To give the city this discretion, one would have to conclude that the “written consent” of section 172(A) is the substantial equivalent of the request for an annexation election required in section 172(D). The question might have practical significance in a situation such as that involved in the text; although the percentage of property owners dropped below a majority, the city apparently still had the approval of a majority of the registered voters, the only persons entitled to participate in the special election. See note 98, supra.

\textsuperscript{102} In addition to the arguments discussed in the text, the court also rejected four other contentions advanced by the plaintiffs. The court held that the assessor’s certification was correctly limited to resident property owners, that the assessor’s use of 1976 assessment roles was reasonable since the certification process had begun before the 1977 assessment roles were filed, that the annexation ordinance was reasonable, and that the preference for resident property owners was constitutional. 354 So. 2d at 1368-70. For a more detailed analysis of the constitutional issue, see notes 118-20, infra.

\textsuperscript{103} 354 So. 2d 1362 (La. 1978), cert. denied, 99 S. Ct. 103 (1978). At the request of the city, the Louisiana Supreme Court granted supervisory writs “in effect directing that the appeal by plaintiffs by-pass the court of appeal.” 354 So. 2d at 1366. The city requested the expedited review because a special election on a proposed new city charter was scheduled for May and the normal appeal process would not have been completed by the date of the special election.

\textsuperscript{104} Id. at 1367.
this standard, the majority concluded that the withdrawals on the day of the public hearing "came too late," although it refused to set "a specific deadline for withdrawals."\textsuperscript{105} The majority emphasized the "considerable legislative and executive time [that] must be expended" before the governing body can be "adequately informed and prepared for the final vote on adoption of the ordinance."\textsuperscript{106} The public hearing in the Shreveport case marked "the culmination, and not the beginning, of extensive municipal government activities and deliberations."\textsuperscript{107} Moreover, the opponents of annexation had been given an "ample amount of time" to secure withdrawals at an earlier stage of the proceedings.\textsuperscript{108} In light of these considerations, the majority reasoned that permitting these withdrawals "would produce havoc and interfere unduly with the legislative process in completing the annexation procedure."\textsuperscript{109}

\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. Justice Summers dissented on the ground that the city should have granted the withdrawal requests. \textit{Id.} at 1371 (Summers, J., dissenting). He criticized the majority opinion for ignoring the language of the statute and misapplying the holding in \textit{Barbe v. City of Lake Charles}, 216 La. 871, 45 So. 2d 62 (1950). He found a right to withdraw "implicit in the statute because there is nothing in the law which prevents a timely withdrawal." 354 So. 2d at 1371. In defining the time of withdrawal, he relied heavily on the statutory phrase "prior to adoption." Since the statute permitted the city to enact an annexation ordinance only if it secured the written consent of the resident property owners "prior to adoption" of the ordinance, he argued that the withdrawals occurring before the city's final adoption of the ordinance destroyed the statutory requirement of a petition signed by a majority of the resident property owners. He also contended that the majority position was inconsistent with the \textit{Barbe} decision. \textit{Barbe}, he argued, had "permitted withdrawal at any time prior to the hearing required to be held prior to adoption" of an annexation ordinance. 354 So. 2d at 1371. Since the Shreveport withdrawals occurred before the public hearing, they were timely under the \textit{Barbe} rule. \textit{Id.}

The dissent's criticisms of the majority opinion distort both the clarity of the statutory language and the holding of \textit{Barbe}. The statute requires the municipality to obtain the written assent of a majority of the registered voters "prior to adoption" of the annexation ordinance. However, this language does not compel the conclusion that the city must have the written assent at the time the ordinance is adopted. An equally logical interpretation of the statute is that if the city obtains the written assent at any point "prior to adoption," the statutory requirement has been satisfied. Judged by this latter interpretation, Shreveport had satisfied the statute because it had obtained the written assent of a majority of the registered voters at the time of the certification by the city attorney.
The court also approved the counting of the registered voters who had signed only the "property owners" petition to determine if the city had secured the "written assent" of a majority of the registered voters in the area to be annexed. The lack of a statutory requirement to divide "the petitions into two categories" meant that no one had to sign a particular petition. The use of two petitions merely served the purpose of "convenience" and did not, therefore, "preclude consideration of every registered voter who signed any petition."110

Although the majority reached a just result in the case before it, its handling of the withdrawal issue fails to offer clear guidance for the future. Barbe v. City of Lake Charles111 had previously allowed a municipality to reject requests for withdrawals that came after the holding of a public hearing but before the final vote on the annexation ordinance. In explaining its decision, the Barbe court emphasized that "the [city] council had jurisdiction, and had acted" prior to the submission of the requests for removal.112 The Kansas City Southern opinion commendably dropped the confusing references to the "jurisdiction" of the city council in Barbe,113 but it failed to specify precisely the point at which the right to withdraw expires. Language in the opinion suggests that withdrawals are untimely after the certifications of the signatures of the registered voters and resident property owners.114 That language is

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110. See, e.g., Barbe v. City of Lake Charles, 216 La. 871, 891, 45 So. 2d 62, 69 (1950), where it is stated: "[T]he petitions for withdrawal, presented after the council had jurisdiction and had acted, came too late . . . . (Emphasis added.)"
111. Id. at 891, 45 So. 2d at 69.
113. 354 So. 2d at 1368.
114. The court emphasized Barbe's concern with "the effect on this statute if withdrawals were allowed to interfere with the legislative process, once begun . . . ."
inconsistent, however, with the court’s implicit approval of the withdrawals permitted by the trial court during the two week interval following the adoption of the ordinance on first reading and the public hearing. Moreover, the majority opinion emphasized the court’s desire to follow the Barbe example in limiting its holding to the facts of the specific case before it.

This failure to delineate the point at which withdrawals are no longer permitted introduces an undesirable ambiguity into a detailed statutory scheme. What if the withdrawal requests that reduce the majority to a minority come one day prior to the public hearing? What if they come a week earlier? What if they come immediately after the first reading or immediately before the first reading? The Kansas City Southern opinion furnishes no sound basis for a city attorney or lower court to resolve those questions. Although predictability may not be the only goal of the law, it is surely an important one. By failing to identify the precise basis of the Kansas City Southern decision, the court has needlessly continued the uncertainty surrounding annexations in Louisiana.

The legislature should end this uncertainty by amending the annexation statute to clarify the time at which the right of withdrawal expires. In at least one other election statute, the legislature has expressly made the reasonable choice of permitting withdrawals until the signatures are certified. That ap-

354 So. 2d at 1367 (emphasis added). Later the opinion labelled the Shreveport hearing as the “culmination . . . of extensive municipal government activities and deliberations.” Id. That “process,” the majority declared, “was begun with the certified assent of a majority of the registered voters and the resident property owners . . . .” Id. (Emphasis added.)

115. Id. at 1366. Had the withdrawal requests at the preliminary injunction hearing been untimely the court would not have had to consider the question of the city’s authority to count the signatures of registered voters who had signed only the “property owners” petition. Until the district court allowed those withdrawals, the “registered voters” petition contained signatures of a majority of the registered voters. Id. at 1368.

116. Id. at 1367. The court stated: “In the present case we also hold that the withdrawals came too late. Without delineating a specific deadline for withdrawals, we reason that allowing withdrawals on the day of the final vote on adoption . . . would interfere . . . unduly with the legislative process . . . .” Id. (Emphasis added.)

117. See, e.g., La. R.S. 42:343(B) (Supp. 1978) (recall elections). See generally Coleman v. Allen, 347 So. 2d 84 (La. App. 3d Cir. 1977). It is interesting to note that this legislative action followed a judicial decision establishing a much less precise text
proach establishes an easily identifiable point allowing an individual petitioner to reconsider his decision while the petitions are still circulating, while recognizing the municipality’s valid interests once it has become extensively involved in the process.

Of course, any legislative tinkering with the annexation statute should also consider the more fundamental question of the possible constitutional infirmities of the Louisiana statutes. Recent Supreme Court decisions have invalidated legislation restricting the franchise to property owners in elections of general interest, and one federal court of appeals has held unconstitutional a state annexation statute granting special voting rights to property owners. The rationale of those deci-

for withdrawals. See Hawthorne v. McKeithen, 216 So. 2d 899 (La. App. 1st Cir. 1968) (governor has discretion concerning removal of a name from recall petition).

118. Kansas City Southern raised the constitutional issue in an oblique fashion. The railroad argued that the statutory provisions giving resident property owners in the area greater rights than nonresident property owners deprived them of property without due process of law in violation of the fourteenth amendment. The Louisiana Supreme Court rejected this argument and upheld the statutory scheme as “a valid exercise of legislative power” because “the statute’s requirement of reasonableness” adequately protects the due process rights of property owners. 354 So. 2d at 1370. The court continued by noting that Kansas City Southern’s complaint was “perhaps more properly considered in terms of denial of equal protection to nonresident property owners because of unreasonable classification between property owners.” Id. The court, however, refused to find the statutory discrimination in favor of residents “constitutionally offensive” because the preference for residents “only the initiating of the annexation process” and not “the decision for approval or disapproval.” Id.

In a footnote, the author of the Kansas City Southern opinion, Judge Lemmon of the Fourth Circuit who was sitting as justice ad hoc, explained his personal view that the statutory preference for residents “treat[ed] property owners unequally without reasonable classification.” Id. at 1370 n.12. Nonetheless, he concluded that the railroad’s “exclusion by classification [was] not a denial of equal protection” because the statutory provision that allows property owners “to defeat annexation which is otherwise reasonable” was itself unconstitutional. Id., citing Cipriano v. City of Houma, 395 U.S. 701 (1969). See note 121, infra.


sions would appear to proscribe the Louisiana requirements that a certain percentage of resident property owners sign the petition initiating the annexation proceeding.\footnote{121}

**TORT LIABILITY**

**Enforcement of Judgments**

Notwithstanding the abolition of governmental tort immunity in the 1974 constitution,\footnote{122} confusion continues to

\footnote{121. *But see* Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978) (South Carolina statute authorizing a city to annex by ordinance when presented with a petition signed by seventy-five percent or more of the freeholders in the area is constitutional).

The most obvious characteristic distinguishing the Louisiana statute from the situations described in the text accompanying notes 119-20, supra, is that it involves a petition and not an election. However, the Fourth Circuit's decision in *Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978), emphasizes that the decisive factor is not the form of the statute but its substance. *Hayward* invalidated a statutory requirement that a majority of the property owners approve the annexation before the annexation was submitted to the voters in an election. The statute was unconstitutional, the court ruled, because its effect was to grant "to some individuals—who are identified on the basis of ownership of realty—the right to nullify a vote for annexation by the electorate at large." *Id.* at 189. This emphasis on the substance of the statutory scheme indicates that the Louisiana statute may also be unconstitutional because its effect is similar to the South Carolina provision invalidated in *Hayward*: it permits property owners to stop the electorate at large from completing an annexation. Note, however, that in *Berry* the Fourth Circuit refused to extend *Hayward* to invalidate a requirement that annexation be initiated by a super majority of property owners.

One might argue that the Louisiana statute is distinguishable on still another ground. Because section 172(D) allows the registered voters an alternate avenue to overcome the opposition of property owners, one might argue that section 172(A) simply provides a less expensive alternative when all those living in the area to be annexed favor annexation. However, this position fails to recognize that section 172(D) itself gives resident property owners a favored position by allowing them to defeat annexation if they oppose annexation by a super majority, i.e., if more than seventy-five percent of the resident property owners or if owners of more than seventy-five percent of the value of all property owned by resident property owners oppose annexation. *Cf.* Hill v. Stone, 421 U.S. 289, 297 (1975), where it is stated: "[A]s long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." (Emphasis added.)

\footnote{122. *La. Const.* art. XII, § 10. See generally *Local Government Law*, supra note 77, at 474 n.73. In a decision rendered after this article was written, the supreme court held that the constitutional waiver of immunity invalidates the statute exempting state and local governments from the payment of most court costs. Segura v. Louisiana Architects Selections Bd., 362 So. 2d 498 (La. 1978), rev'd 363 So. 2d 330 (La. App. 1st Cir. 1977).}
shroud the question of whether successful tort litigants can force local governmental entities to pay judgments. In *Fontenot v. State Department of Highways*\(^\text{123}\) the successful plaintiff in a tort action against the Ascension Parish Police Jury obtained a district court order requiring the police jury to submit to a judgment debtor examination. On application of the police jury, the First Circuit required the district judge to recall his order. Beginning with the premise that the examination could be required only in aid of execution of a judgment,\(^\text{124}\) the appellate court rejected both methods that Fontenot suggested he might use to enforce his judgment. First, rely on *Foreman v. Vermilion Parish Police Jury*,\(^\text{125}\) the court ruled that Fontenot could not seize police jury property to satisfy his judgment. Second, the court considered the possible availability of mandamus to compel payment. Without citing any specific cases, the court concluded that mandamus was not available because “[t]he appropriation of funds by a legislative body has been almost universally held to be discretionary, not ministerial.”\(^\text{126}\) Since the court rejected both suggested ave-

\(^{123}\) 358 So. 2d 981 (La. App. 1st Cir.), rev’d, 356 So. 2d 1324 (La. 1978). For the appeal on the merits of Fontenot’s claim, see Fontenot v. State Dep’t of Highways, 346 So. 2d 849 (La. App. 1st Cir. 1977). The supreme court opinion was printed prior to the appellate court opinion. Furthermore, the reference to 346 So. 2d 849 in the supreme court opinion is an error. The citation in the supreme court opinion of the lower court decision is to the decision on the Merits and not the judgment debtor examination at issue. The appropriate cite should be 358 So. 2d 981.

\(^{124}\) See LA. CODE CIV. P. art. 2451.

\(^{125}\) 336 So. 2d 986 (La. App. 3d Cir.), cert. denied, 339 So. 2d 846 (La. 1976).

\(^{126}\) 358 So. 2d at 982. See also Local Government Law, supra note 77, at 475 n.76. The court may have overestimated the universality of the holdings that appropriation is a discretionary act. As one of my students, Mr. Peter Meisner, brought to my attention, both the supreme court and the First Circuit have denied mandamus relief based on the principle that “a want of funds is a complete answer to a petition for mandamus.” State *ex rel.* Ascension Red Cypress Co. v. New River Drainage, 148 La. 603, 605, 87 So. 310, 310 (1921); Delaune v. West Baton Rouge Parish School Bd., 264 So. 2d 672, 673 (La. App. 1st Cir. 1972). Those decisions would not appear to preclude mandamus if a judgment debtor examination revealed that a local government had sufficient funds to pay the judgment. Cf. Penny v. Bowden, 199 So. 2d 345 (La. App. 3d Cir. 1967) (city ordered to fund police pension fund as required by state statute). One should also note that other jurisdictions have been willing to mandamus appropriations in exceptional circumstances. See, e.g., Tate v. Antosh, 3 Pa. Commw. Ct. 144, 281 A.2d 192 (1971) (city ordered to appropriate sufficient funds to implement arbitration decisions).
nues of execution, it held that the "police jury should not be required to submit to a judgment debtor rule."\(^\text{127}\)

In a brief per curiam order, the Louisiana Supreme Court reversed and reinstated the district court's order, but it disclaimed any intention to determine if the plaintiff had the right to execute his judgment by seizure or mandamus.\(^\text{128}\) The exact meaning of the court's order is difficult to decipher. Although the order counsels against any assumption that it was considering any issue but that of the judgment debtor examination, it is difficult to see why the court would order the examination if it could provide no practical benefit for the plaintiff. Perhaps the most logical appraisal of the court's opinion is that it continues to give the legislature the opportunity to enact a statute requiring local governments to pay judgment creditors, but at the same time it hints that Foreman may not be the last word if the legislature fails to act.\(^\text{129}\)

Identification of the Responsible Governmental Entity

Last year's symposium noted the conflicting approaches that Louisiana courts have used in identifying the governmental entity that is responsible for the torts of public officers who serve local governments.\(^\text{130}\) The problem surfaced again this year in *Foster v. Hampton*\(^\text{131}\) where the precise issue was who is liable for the negligent acts of a deputy sheriff.

American law has traditionally regarded the sheriff's position as a personal office rather than as a governmental body.\(^\text{132}\)
One consequence of that conception has been that in Louisiana, as well as in other American jurisdictions, the defense of governmental immunity from tort liability has not applied to the sheriff. As early as 1872, a Louisiana court imposed personal liability on a sheriff for the wrongful actions of his deputy, and a 1940 statute codified this jurisprudential rule. The sheriff's liability was not unlimited, however. Before and after the statutory imposition of liability, the Louisiana courts limited the sheriff's liability to acts committed by a deputy while performing an official duty or acting in an official capacity. The legislature further limited the sheriff's personal liability in a 1950 amendment to the statutory provisions making the sheriff responsible for his deputies. The amendment required all deputy sheriffs to post a $5000 bond “for the faithful performance of their duties,” and it limited the sheriff's liability for the acts of his deputy to the amount of the bond except when the “deputy sheriff, in the commission of the said act or tort, acts in compliance with a direct order of, and in the personal presence of, the said sheriff, at the time the act or tort is committed.”

SHERIFFS AND CONSTABLES §§ 1-3 (3d rev. ed. 1907). A recent decision of the Third Circuit confirms that Louisiana law does not treat the sheriff's office as a governmental body. See Liberty Mut. Ins. Co. v. Grant Parish Sheriff's Dep't, 350 So. 2d 236, 239 (La. App. 3d Cir. 1977) (“The 'Parish Sheriff's Department' is not a legal entity capable of suing and being sued.”).

133. See Foster v. Hampton, 352 So. 2d 197, 202 (La. 1977).
138. 1950 La. Acts, No. 426, § 1. For the version of the statute containing the
In Foster the plaintiff alleged that a deputy sheriff in East Baton Rouge Parish injured him when the deputy made an illegal left turn. He further alleged that, at the time of the accident, the deputy was driving a vehicle belonging to the sheriff’s department and was "acting in his official capacity." \(^{139}\) He joined both the deputy and the sheriff as defendants, but the district court granted the sheriff’s exception of no cause of action and dismissed the action against him.\(^{140}\) Foster then amended his petition to join the parish as a defendant, but the court also dismissed the claim against the parish on an exception of no cause of action.\(^{141}\)

The First Circuit sustained the decisions of the trial court,\(^{142}\) and the supreme court granted Foster’s application for a writ of review.\(^{143}\) On the merits, the supreme court also affirmed the trial court’s dismissals of the sheriff and the parish, but, in dictum, the court strongly suggested that the state was the proper governmental defendant.\(^{144}\) Mr. Justice Dixon’s majority opinion first analyzed the question of the sheriff’s liability and concluded that both the judicial limitation of liability to official acts and the statutory provision limiting liability to the sheriff’s bond protected the sheriff with respect to Foster’s claim. Recognizing that the jurisprudential rule had “its genesis in the common law rather than Louisiana statutory law,”\(^{145}\) he nevertheless confirmed its continuing validity; he specifically cited with approval prior decisions holding that the sheriff is not responsible for his deputy’s negligent operation of a motor vehicle because the driving of an automobile is not an “official” act of the deputy.\(^{146}\) In addition, the majority opinion

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\(^{139}\) Foster v. Hampton, 352 So. 2d 197, 199 (La. 1977).

\(^{140}\) Id. Foster also joined the liability insurer who insured both the deputy and the sheriff.

\(^{141}\) Id. Foster also joined the parish’s liability insurer. After dismissing the parish, the court also dismissed its insurer.

\(^{142}\) 343 So. 2d 219 (La. App. 1st Cir. 1977).

\(^{143}\) 345 So. 2d 906 (La. 1977).

\(^{144}\) 352 So. 2d 197, 201-02 (La. 1977).

\(^{145}\) Id. at 200. See generally W. Anderson, supra note 132, §§ 60-63; W. Harlow, supra note 132, § 17.

\(^{146}\) 352 So. 2d at 200-01, citing Gray v. De Bretton, 192 La. 628, 188 So. 722
held that the sheriff was protected from personal liability even if the deputy's actions involved an official act because the statute limited his liability to the amount of the deputy's bond except when the deputy was complying with a direct order of, and was acting in the personal presence of, the sheriff. Since Foster had not alleged that the deputy's actions satisfied the requirements of the exception, "the sheriff [could not] be held liable under the [statutory] provisions." Justice Dixon also rejected Foster's argument that the statutory limitation of liability established an immunity for sheriffs that could not survive the abolition of governmental immunity in the 1974 constitution. He held that the statutory provisions only limit the personal liability of the sheriff and do not, therefore, involve the question of governmental immunity.

The supreme court next considered Foster's contention that the parish was liable for the actions of the deputy sheriff. Adopting the opinion of the First Circuit on this point, the court specifically rejected Foster's "argument that deputy sheriffs must be considered civil service employees of the city-parish government in East Baton Rouge Parish" as having "no support in the law." Under the "unique metropolitan form" of the city-parish, the sheriff's office is entirely separate from

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(1939), and Nielson v. Jefferson Parish Sheriff's Office, 242 So. 2d 91 (La. App. 4th Cir. 1970). The issue of a sheriff's liability for the negligent operation of a motor vehicle has arisen frequently in American jurisdictions, but the decisions display no clear pattern of uniformity. Most cases have protected the sheriff from liability. See, e.g., Waters v. McClary, 344 F.2d 75 (6th Cir. 1965) (applying Tennessee law); Usrey v. Yarnell, 181 Ark. 804, 27 S.W.2d 988 (1930); Aetna Cas. & Sur. Co. v. Clark, 136 Tex. 238, 150 S.W.2d 78 (1941). A few decisions have permitted recovery when the defendants were responding to emergency calls or transporting prisoners. See Duran v. Mission Mortuary, 174 Kan. 565, 258 P.2d 241 (1953); Poole v. Brunt, 338 So. 2d 991 (Miss. 1976); Hanratty v. Godfrey, 44 Ohio App. 360, 184 N.E. 842 (Ct. App. 1932). In New York, the critical distinction in determining liability is whether the deputy was performing a civil or a criminal function. See Reck v. County of Onondaga, 61 Misc. 2d 259, 273 N.Y.S.2d 146 (Sup. Ct. 1966).

147. 352 So. 2d at 201.
148. Id. at 202. The court stated that "the principle that a sheriff is liable only for the official acts of his deputy is subscribed to in jurisdictions throughout the country and nowhere is the theory of sovereign immunity relied upon in protecting the sheriff from liability." Id.
149. Id. at 203.
150. See LA. CONST. of 1921, art. XIV, § 3(a).
the metropolitan government. Since the city-parish exercises no power over the office, it is not liable for the actions of the sheriff's deputies.\(^{151}\)

The supreme court recognized that its decision appeared to deny Foster a responsible governmental defendant but suggested that the plaintiff himself had created this appearance by failing to sue the appropriate governmental defendant—the state. After rejecting the applicability of the doctrine of respondeat superior to the sheriff because "the relationship between the sheriff and his deputy is not one of master and servant or principal and agent," the court termed it "well settled that the deputy sheriff is an officer of the state."\(^{152}\) Accordingly, the court volunteered, the "doctrine of respondeat superior might be available to hold the State vicariously liable for the negligent torts of its employee in the course and scope of his employment."\(^{153}\) Perhaps to reinforce the point, the court added a footnote reference to the procedure required in suits against the state.\(^{154}\) Moreover, the court also bottomed its rejection of Foster's due process challenge to the statutory limitation on the conclusion that "Foster has a remedy against the deputy sheriff and may further be able to recover against the State, the proper party to sue as 'employer' of [the deputy]."\(^{155}\)

Judged by the principles on which a fault system of tort liability is based, the supreme court's decision is difficult to justify. One of the fundamental assumptions of such a system is that the tortfeasor could have avoided the accident if he had acted in a reasonable manner. A logical corollary of this principle would seem to be that the law should impose liability on individuals and entities capable of controlling the tortfeasor. In the case of the negligent deputy, the sheriff's office that hires,

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151. 352 So. 2d at 203.
152. Id. at 201.
153. Id. at 201-02.
154. Id. at 202 n.7.
155. Id. at 202. Foster took the court's suggestion and sued the state. That suit is now pending in the Nineteenth Judicial District. The supreme court also rejected Foster's claim that the statutory limitation violated his constitutional right to equal protection of the laws. Because the statute "applies to all persons in the same circumstances and conditions in a like fashion," the supreme court found that "the requirements of equal protection are met." Id.
fires, and supervises the deputy would be a more natural entity to bear liability than the state or parish, neither of which exercises any significant control over him.

Foster, however, must be viewed in the context of the Louisiana legal environment at the time the decision was rendered. Initially, one is faced with the fact that Louisiana law did not recognize the most logical defendant, the sheriff's office, as a governmental entity capable of being sued. Therefore, one had to look elsewhere for a defendant, and imposing liability on either of the other two potential defendants at the local level—the sheriff and the parish—appeared most unfair. The plaintiff would have faced a most unsatisfactory guarantee of a remedy if allowed to recover only against the sheriff; because of the statutory limitation of liability, he would have been limited to a $5000 bond and the personal assets of the deputy sheriff. As for the parish, subjecting it to liability would have required it to assume liability for the subordinates of an officer that is far more independent of parish control than are most other officials for whom it must accept responsibility.


157. LA. R.S. 33:1433 (Supp. 1978). See notes 15-16, supra, and accompanying text. The statutory limitation of liability was permissible because it affected the sheriff's personal liability and did not establish an immunity for any governmental defendant. One could make a strong argument that by eliminating the exceptions that the judiciary and the legislature have placed on a sheriff's liability for the acts of his deputy would treat the sheriff most unfairly. Other governmental officials are not normally forced to assume a similar liability for their subordinates. For example, a police chief is not personally liable for the negligence of his officers; he is personally liable only if he has committed a tort himself. But see LA. R.S. 33:1552 (Supp. 1952) (coroner responsible for the "acts" of his deputy); LA. R.S. 47:1902 (1950) (assessor responsible for the "acts" of his deputy).

158. See, e.g., Honeycutt v. Town of Boyce, 341 So. 2d 327 (La. 1976) (town liable for actions of elected town marshal); Jones v. City of Lake Charles, 296 So. 2d 914 (La. App. 3d Cir. 1974) (city liable for the tortious conduct of its police officers who were acting under the orders of the city's elected mayor). But cf. Cosenza v. Aetna Ins. Co., 341 So. 2d 1304 (La. App. 3d Cir. 1977) (parish not liable for tort of clerk of city court even though parish pays half of the clerk's salary). See generally Local Government Law, supra note 77, at 474-80. Although Foster manifests no desire on the part of the supreme court to overrule these decisions, it does suggest that the state might also be liable for the actions of an individual such as a town marshal who qualifies as a state official even though he serves a local government.

159. LA. CONST. art. V, § 27 (all parishes except Orleans). The legislature has
specifically immunizes him from the control of the general governing body of the parish and state legislation guarantees him a source of revenue for his duties. In light of these considerations, the court’s decision appears to be a reasonable one. Since the state created the constitutional and statutory framework that precluded imposition of liability on the logical party according to tort principles, it is just to require the state itself to assume liability.

The legislature recognized the significance of Foster, especially the possibility that it might be extended to other constitutional offices and the employees of those offices. Act 318 of the 1978 session attempts to overrule the court’s holding in Foster by eliminating the statutory provision restricting a sheriff’s liability to his deputy’s bond and by adding a new section to title 42 of the Revised Statutes that relieves the state of liability “for any damage caused by a district attorney, coroner, assessor, sheriff, clerk of court, or public officer of a political subdivision within the course and scope of his official duties, or damage caused by [their employees].” Unfortunately, the legislative response suffers from two defects: it does

160. See, e.g., La. Const. art. VI, § 5(G) (no home rule charter can contain any provision affecting the sheriff’s office that is inconsistent with the constitution).
161. La. R.S. 33:1423, 33:1428 (Supp. 1978); 33:1432 (Supp. 1976) (fees due sheriff as tax collector and in civil and criminal matters). The constitution grants him the right to collect state and parish ad valorem taxes, but it does not specify the fee he is to receive. La. Const. art. V, § 27.
163. Sheriffs, as well as district attorneys, clerks of court, coroners, and assessors, have the authority to appoint numerous subordinates. See La. R.S. 16:6 (Supp. 1973); 33:1552 (Supp. 1952); 47:1902 (1950); 47:1908 (Supp. 1978); La. Code Civ. P. art. 255. The rationale of Foster suggests that the state may also be the governmental entity that must assume liability for their torts as well.
not impose liability on the sheriff for the negligent operation of a motor vehicle by his deputy, and its provision with respect to state liability is probably unconstitutional. Although the legislation eliminates the statutory basis for relieving the sheriff of personal liability, it does nothing with respect to the court's alternate basis for its holding—the prior decisions establishing that the negligent operation of an official vehicle by a deputy is not an "official act" for which the sheriff is liable.\(^{166}\) Not only does the 1978 act fail to impose liability on the sheriff, but its attempt to limit the state's liability appears to fly in the face of the 1974 constitution's abolition of governmental immunity. Even if the sheriff were rendered liable, the plaintiff would still lack a governmental defendant to assume liability for the deputy's conduct because the sheriff's liability is personal and does not affect a governmental entity.\(^{167}\)

The legislature could, however, achieve its goal by adopting a slightly different approach.\(^{168}\) Instead of merely removing the statutory provision limiting the sheriff's liability to his deputy's bond, the legislature could overrule the "official act" doctrine of the courts and expressly impose liability on the constitutional officers for all torts committed by a deputy or other subordinate in the course and scope of his employment.\(^{169}\) To protect the officer from any personal exposure, the legislature could also authorize him to purchase liability insurance to cover the torts of his deputies and employees\(^{170}\) and limit his

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166. See notes 136, 146, supra, and accompanying text.
167. See notes 133, 148, supra, and accompanying text.
168. The most obvious approach to the problem would be to define the sheriff's "office" as a governmental entity capable of suing and being sued. The indirect approach suggested in the text seems preferable, however, to avoid the argument that such a legislative definition would conflict with the constitution's definition of a political subdivision. See La. Const. art. VI, § 44(2); note 132, supra, and accompanying text.
169. The courts have not ruled that the "official act" doctrine protects other constitutional officers from liability for the acts of their deputies, but the arguments favoring the doctrine with respect to sheriffs would seem equally applicable to other officers.
170. Louisiana law already specifically authorizes a sheriff to purchase liability insurance "to cover loss or damage from any negligent acts of the sheriff or his deputies, in the performance of the duties of his office . . . ." La. R.S. 33:1450.1 (Supp. 1977).
liability for the acts of his subordinates to a certain amount if he carries liability insurance in that amount. Finally, by exercising its constitutional power to provide for the “effect of a judgment” against a governmental defendant,171 the legislature could permit recovery against the state only for amounts that the plaintiff was unable to recover from the officer or his insurer. This approach would offer the plaintiff a solvent defendant and force the office that employs and controls the tortfeasor to bear the cost of damages caused by his actions. At the same time, it would enable the officer to avoid personal loss for the negligence of a subordinate, and it would limit the state’s liability to that of an excess coverage insurer in situations where the plaintiff’s damages exceed the amount of insurance that the officer is required to carry to avoid personal liability.

171. LA. CONST. art. XII, § 10(C).