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"STATUTORY" AND "HORTATORY" PROVISIONS OF THE LOUISIANA CONSTITUTION OF 1974

*Lee Hargrave**

During the campaign to adopt the 1974 constitution, much was made of the fact that the drafters had reduced the number of words in the constitution from 255,500 to under 35,000.¹ This reduction of words and the elimination of detailed provisions was no small accomplishment, and it was not achieved without difficulty. Nevertheless, the 1974 constitution is still too long and detailed. It is interesting to speculate as to why this is so—why the "good government" forces that in another state would be supporting flexibility in the legislature are instead wanting to freeze their "reforms" in the constitution to protect them from legislative "tampering." For example, the experience during the pro-Long/anti-Long political divisions, in which an Earl Long-dominated legislature repealed the statutory civil service reform that had been adopted during the Sam Jones governorship, is the oft-cited reason why the details of a civil service system remain in the state's constitution.²

One also can speculate as to why the convention adopted so many "unnecessary" constitutional provisions that are without binding effect or are worded simply to encourage action rather than to command it or that ultimately give the legislature the discretion to act as it chooses. The purpose of this article—to select a number of these statutory and hortatory provisions and discuss their construction and application—is more concrete.

Of course, a complete catalogue and explanation of these provisions would result in an article longer than the 1921 constitution. Hence, the following provisions, which appear to invite litigation, were selected:

Sovereign Immunity and Enforcement of Judgments

Forced Heirship and Trusts

Property Related Provisions

Limits on Local and Special Laws

Retirement Benefits

Gambling and Lotteries

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1. PUBLIC AFFAIRS RESEARCH COUNCIL, PAR'S VOTER'S GUIDE TO THE 1974 PROPOSED CONSTITUTION 1.

2. IX RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 [hereinafter cited as RECORDS]; CONVENTION TRANSCRIPTS, Dec. 6, 1973 at 2600-01.

Cultural Rights
Meetings and Records
Codes
Capital
Natural Resources

SOVEREIGN IMMUNITY AND ENFORCEMENT OF JUDGMENTS

ARTICLE XII, SECTION 10

Immunity From Suit

Article XII, section 10(A) is a curious provision. It neither asserts nor denies the existence of a general sovereign immunity doctrine, but simply states that governmental agencies shall not be immune from suit "in contract or for injury to person or property." The section is thus only a small part, albeit one with tremendous financial impact, of the overall collection of rules in this area of the law. An understanding of the section requires an inquiry into both the state of the law at the time of the adoption of the constitution and the complex political process³ by which the section was put together. A literal textual approach might suggest that the specific waiver of immunity in contract and tort implies a prohibition of all other types of suits unless the sovereign consents. Unfortunately, the matter is not that simple.⁴

No Louisiana constitution has ever provided that the state is immune from suit. The courts adopted a version of sovereign immunity, and the reaction was to provide in the state's constitutions a procedure for the state to waive its immunity and provide for enforcement of judgments against it.⁵ Even now, there is no constitutional foundation to support a claim of general immunity from suit, and there are many areas in which it has never been questioned that the state is subject to suit.

3. The Baton Rouge *State Times* reported that the debate on sovereign immunity consumed more than five hours on July 26, 1973, with the group failing to reach accord on a proposal. Dickinson, *Suits Against State Spark CC 73 Debate*, *State Times* (Baton Rouge), July 27, 1973, at 1-A, col. 3.

4. One of the problems of the opinion in *Two O'Clock Bayou Land Co. v. State of La.*, 415 So. 2d 990 (La. App. 3d Cir. 1982), is its use of this rather simplistic analysis.

5. See generally *Board of Comm'rs v. Splendour Shipping & Enters. Co.*, 273 So. 2d 19 (La. 1973); *City of Natchitoches v. State*, 221 So. 2d 534 (La. App. 3d Cir. 1969); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

The ability to sue the state in some areas is crucial to judicial review and enforcement of bill of rights guarantees. If the state simply invaded or took over a tract of land owned by a private individual, it would be violating the constitutional provision against takings without due process, and to forbid the landowner from suing for just compensation would be to negate the constitutional guarantee. In this regard, "it has been established that where private property has been appropriated by the state 'for public purposes,' the right of the owner to recover adequate compensation will be entertained by the courts as an exception to the principle that the sovereign cannot be sued without its consent."⁶ Similarly, when riparian landowners are entitled to payment for land taken or destroyed for levee construction, their right would be virtually abrogated if they were not able to assert it against the state.⁷ This development with respect to expropriation is just one application of the general principle that protection of constitutional rights often requires that citizens be allowed to sue the state.⁸ While one can debate the breadth of it, the principle clearly exists, and nothing in the development of section 10(A) supports its abolition. The convention was working on this existing state of affairs and was seeking to expand the right to sue to new areas, rather than to limit it more than prior case law had done. Even beyond constitutional rights, many statutory rights have been enforced by mandamus, quo warranto, or other proceedings against individuals representing the state and acting for the state. In those instances, the legality of state action and legislation has been and can continue to be contested.⁹ Sovereign immunity was to no avail when city officials sued the state and some state officials for declaratory and injunctive relief against threatened enforcement of criminal sanctions. No waiver was required because the law "only requires waiver of im-

6. *Bernard v. State of La.*, 127 So. 2d 774, 777 (La. App. 3d Cir. 1961). See *Dupree v. Maryland Cas. Co.*, 238 La. 166, 114 So. 2d 594 (1959); *Angelle v. State*, 212 La. 1069, 34 So. 2d 321 (1948).

7. *Cf. Eldridge v. Trezevant*, 160 U.S. 452 (1896).

8. See *McCoy v. Louisiana State Bd. of Educ.*, 345 F.2d 720 (5th Cir. 1965). "For the second time in this case and for the seventh time in recent years, we hold that a state agency is not immune from suit to enjoin it from enforcing an unconstitutional statute." *Id.* at 721. Although this is a federal court case, the same principle should apply in state courts applying federal constitutional rights. In that regard, it would be anomalous for a state constitution that expanded the state Bill of Rights also to be construed to have deprived the state's citizens of the ability to enforce those rights in state courts.

9. LA. CODE CIV. P. arts. 3861-3866, 3901. In *Bussie v. Long*, 257 La. 623, 243 So. 2d 776 (1971), the supreme court recognized that the assessment practices of the state tax commission could be tested in a class action by taxpayers against the Louisiana Tax Commission and its individual members. At issue were state statutes requiring assessment at cash value and constitutional rights of equal protection.

munity where the liability sought to be enforced is historically immune from suit without legislative consent under the judicially-created doctrines recognizing the immunity (which commonly involves torts committed by governmental officers in the performance of purely governmental functions)."¹⁰ School boards, which were ordinarily immune from suits by citizens, were not immune from suits by other school boards involving disputes over sixteenth section lands.¹¹ Various devices, such as the nonstatutory action instituted against the state mineral board to remove cloud from title, have been used to functionally test the state's ownership of land and water bottoms.¹² Indeed, the celebrated cases of *Miami Corp. v. State*,¹³ *State v. Irwin*,¹⁴ and *Amerada Petroleum Corp. v. State Mineral Board*,¹⁵ familiar to any freshman property student, have inculcated the tradition that such litigation with the state over property ownership is the norm. During the convention debate on sovereign immunity, Delegate Triche referred to these cases and suggested that there be no immunity in such title disputes.¹⁶

In short, the convention did not adopt broad sovereign immunity in all suits, but it did assume that sovereign immunity existed in some areas. These areas were never defined. The author of the final compromise provision that became section 10(A) indicated that he did not know what other categories of suits would not be allowed, suggesting that such issues would be left to court development.¹⁷ Court development could continue in the approach of *Board of Commissioners v. Splendour Shipping & Enterprises Co.*¹⁸, recognizing judicial flexibility where neither the constitution nor a statute compelled certain results. In other words, the trend in the courts to abolish sovereign immunity in more areas still could continue.

One might wonder why the convention did not clearly abrogate all sovereign immunity. The simple answer is that there were not

10. *City of Natchitoches v. State*, 221 So. 2d 534, 539 (La. App. 3d Cir. 1969).

11. *Terrebonne Parish School Bd. v. St. Mary Parish School Bd.*, 131 So. 2d 266 (La. App. 1st Cir. 1961), *aff'd*, 138 So. 2d 104 (La. 1962).

12. Note, *Mineral Rights—Title Controversies With the State and Its Agencies—Sovereign Immunity From Suit*, 27 LA. L. REV. 124 (1966).

13. 186 La. 784, 173 So. 315 (1936).

14. 173 La. 507, 138 So. 84 (1931).

15. 203 La. 473, 14 So. 2d 61 (1943).

16. V RECORDS: CONVENTION TRANSCRIPTS, July 27, 1973 at 431. To the extent that *Two O'Clock Bayou Land Co. v. State of La.*, 415 So. 2d 990 (La. App. 3d Cir. 1982), rests on convention transcript argument to the contrary, its argument is incomplete and not a fair reflection of the debate.

17. V RECORDS: CONVENTION TRANSCRIPTS, July 27, 1973 at 431.

18. 273 So. 2d 19 (La. 1973).

enough votes to do so— attempts to do so were rejected.¹⁹ Aside from general ideological views about individual rights versus attacks on public treasuries,²⁰ the debate does disclose from Delegate Kean a statement that if sovereign immunity were abolished, it would have a spillover effect and perhaps abolish the immunity of public officials— judicial, legislative, and executive— for responsibility for their official conduct.²¹ This concern, expressed by a respected delegate, furnished a logical basis that may have swayed a few votes in the closely divided body to choose instead to enumerate the kinds of suits in which there clearly was to be an abolition of immunity. The concern of most of the proponents was with damage awards in tort and contract, and it was those concerns that were listed. Overall elegance of drafting was put aside in favor of a pragmatic political solution.

The result of this process is that three categories of suits related to sovereign immunity now exist: (1) suits which would have been allowed without obtaining consent of the state, (2) suits in contract and for injury to person or property which are clearly allowed without obtaining consent to sue, and (3) suits that don't fit (1) or (2) above and for which consent to sue are required. Distinguishing between the three categories is less than simple, and since the debate focused on such a small part of the overall problem (tort damages), it fails to give much guidance as to making these distinctions. A reference forbidding private landowners to claim the state capitol under old land grants might be an indication of the view that petitory actions are not allowed, although the reference is directed more to the issue of execution of judgments than to allowing suit. In addition, the debate included other approving references to *Miami* and *Amerada Petroleum* where title to property claimed by the state was litigated.²²

In any event, the provision represents an expansion of the right to sue governments, an expansion in accord with prior judicial policy. All of this would suggest an approach that gives the widest possible ambit to the rights of individuals to sue their governments, thus entailing a broad construction of the meaning of "contract" and "injury to person or property." This is especially so because the enforcement of judgments is still strictly limited by section 10(C), even if one

19. Proposals to abolish all immunity failed by votes of 49-65, 46-56, 43-57. An initial proposal to eliminate immunity for torts failed by only 50-51. The final proposal was adopted by a 59-50 vote. V RECORDS: CONVENTION TRANSCRIPTS, July 26, 1973 at 408, 412, 419; *Id.*, July 27, 1973 at 433.

20. The record is replete with references to "the rape of the state of Louisiana." V RECORDS: CONVENTION TRANSCRIPTS, July 26, 1973 at 403.

21. V RECORDS: CONVENTION TRANSCRIPTS, July 27, 1973 at 427.

22. *Id.* at 431.

obtains a money judgment against the state. The public fisc is more than adequately protected by that latter section.

Another basic fact is that the suits in category (3), in which consent to sue is needed, primarily will concern the governmental units in their private rather than their public capacities. In the former (private capacity), constitutional guarantees and mandamus suits against individuals will usually provide for the litigation without the need for consent. It is in the capacity as landowner and private manager that most suits will arise. Presumably, operating a facility in violation of Civil Code article 667 or article 2315 would result in damage to property and be the basis for a suit. However, if there is no such damage and no constitutional guarantee involved, consent would be needed. Nonetheless, this category of cases would be quite small, for damage to property could include small diminutions in value and damage to person could include mental distress.

Indeed, if one were to conclude that a petitory action was precluded, the fact that a state agent was using the property or depleting it by producing oil and gas would be the basis for an assertion of damage to property and the basis for supporting the suit without consent. This suit would ultimately have to involve the underlying title question.

In any event, the tone of the foregoing discussion and the minute distinctions involved there further reinforce the view that a broad construction of the article would serve the aim of simplicity as well as the policy factors discussed earlier.²³

Immunity from Liability

Section 10(A) also provides that there shall be no governmental immunity from liability in contract or for injury to person or property. A distinction in the past allowed the immunity from suit but not immunity from liability to be waived. The distinction caused difficulty,²⁴ and the solution in a 1960 constitutional amendment was to indicate with certainty that a state waiver of immunity also provided for a waiver of the state's liability.²⁵ The new provision continues the language of this amendment in both 10(A) and 10(B), paragraph (A) providing the automatic waiver for contract suits and actions involving damage to person or property and paragraph (B) pro-

23. The supreme court seems to be taking this approach. See *Darville v. Associated Indem. Corp.*, 323 So. 2d 441 (La. 1975).

24. See McMahon & Miller, *The Crain Myth—A Criticism of the Duree and Stephens Cases*, 20 LA. L. REV. 449 (1960).

25. See 1960 La. Acts, No. 621, § 1 (proposing the amendment that became art. 3, § 35 of the constitution of 1921).

viding that a legislative waiver shall waive both immunity from suit and liability. Thus, whenever private citizens would be liable for certain conduct causing damage to person or property, the state and its agencies and political subdivisions also shall be liable for similar conduct.²⁶

This provision, however, does not upset the immunity that might exist for certain officials of the state, its agencies, or of other governmental units.²⁷

Enforcement of Judgments

The apparent liberality of abolishing most immunity from suit was offset by the continuation of a severe limitation on a private citizen's ability to enforce a judgment against the state, a state agency, or a local governmental entity. Article XII, section 10(C), while allowing the legislature to establish a procedure for suits against governmental units and to provide for "the effect of a judgment" in such cases, makes it clear that under such laws, "no public property or public funds shall be subject to seizure." Also, no money judgments against these units shall be "exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered."

Before some typical Louisiana constitutional tinkering, the ability to seize government-owned property was regulated by Civil Code principles. Things owned by government in its public capacity were exempt from seizure, whereas things owned by such units in their private domain were subject to be seized.²⁸ While the intricacies separating the public and private domain of governmental entities led to some nice games (municipal water system machinery parts were in the public domain),²⁹ the principle was at least well established. A 1960 constitutional amendment broadened the protection against seizure; it provided that no judgment "against the state or any other public body shall be exigible, payable or paid except out of funds appropriated for payment therefor."³⁰ The 1974 constitution tracks that

26. *Jones v. City of Baton Rouge*, 388 So. 2d 737 (La. 1980); *Segura v. Louisiana Architects Selection Bd.*, 362 So. 2d 498 (La. 1978); Murchison, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Local Government Law*, 40 LA. L. REV. 681, 712-15 (1980).

27. See V RECORDS: CONVENTION TRANSCRIPTS, July 27, 1973 at 431.

28. See A. YIANNPOULOS, PROPERTY § 34 in 2 LOUISIANA CIVIL LAW TREATISE 95-98 (2d ed. 1980). See also the corresponding discussion in the first edition, discussing the law applicable before the 1978 revision of the Civil Code property articles. A. YIANNPOULOS, PROPERTY §§ 38-39 in 2 LOUISIANA CIVIL LAW TREATISE 121-28 (1967).

29. *Town of Farmerville v. Commercial Credit Co.*, 173 La. 43, 136 So. 82 (1931).

30. 1960 La. Acts, No. 621 (adopted as LA. CONST. of 1921, art. 3, § 35). The committee proposal governing suits against the state would have provided nothing about

language and applies the rule to all public entities, making it clear that no government property or funds shall be subject to seizure, even if held by the governmental units in their private capacities.

The purpose of the constitutional provision was recognized in *Foreman v. Vermilion Parish Police Jury*,³¹ which held that a judgment against a police jury was not enforceable by seizure of the farm land it owned, even if that land was in the police jury's private domain. Such results are not particularly just or pleasing, but they seem to be compelled. What Delegate Kelly called a "true compromise" in reaching adoption of article XII, section 10 was to allow the suits, but to limit the means of enforcement of judgments in these actions. Although the court of appeal in *Fontenot v. State Department of Highways*³² was correct in stating that the courts have no power to compel a police jury to appropriate funds to pay a judgment, this fact should not necessarily relieve the police jury from having to submit to a judgment debtor examination under article 2451 of the Code of Civil Procedure. This provision allows a judgment creditor to "examine the judgment debtor, his books, papers or documents, upon any matter relating to his property." Such an order does not violate section 10(C), for it does not order an appropriation and thus is allowed.³³ The information is relevant to establishing the ability of the governmental defendant to pay and the reasons for failing to pay. Also such information is relevant and related to possible equal protection and due process claims.

The text of section 10(C) and the debate which produced it display a concern with damage awards against governmental agencies that result in judgments ordering payment of money. Little attention was given to other kinds of judgments, and the sole possible reference in 10(C) to such other judgments is the general provision that the legislature "shall provide for the effect of a judgment." What then of judgments that do other than award money, such as injunctions, declaratory judgments, and orders to bring petitory actions as part

enforcement of judgments; it was open for the legislature to so provide. However, the amendments to abolish sovereign immunity also generally included a provision protecting public property from seizure. Those combined amendments were not adopted during the long debate, but a simple amendment by Delegate Lanier adopting the basic 1960 language was adopted and then continued into the final compromise. V RECORDS: CONVENTION TRANSCRIPTS, July 27, 1973 at 420.

31. 336 So. 2d 986 (La. App. 3d Cir. 1976).

32. 358 So. 2d 981 (La. App. 1st Cir.), *rev'd*, 355 So. 2d 1324 (La. 1978). The supreme court opinion was printed prior to the appellate court opinion.

33. *Fontenot v. State Dep't of Highways*, 355 So. 2d 1324 (La. 1978). *Cf. Murchison, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Local Government Law*, 39 LA. L. REV. 843, 870 (1979) (where the author sees no relevant use for the information that would be provided).

of judgments in possessory actions? In the absence of specific legislation, the general laws on the subject would seem to be in force.

For example, if the plaintiff in a possessory action against the state proved his possession, the judgment would maintain the plaintiff in that possession and order the state to file a petitory action within a stated time or be precluded from doing so. If a private plaintiff in a petitory action against the state succeeded in proving good title, that title would be recognized and the state would be ordered to cease acts of possession on the property. If, as part of the title litigation, it were found that the state had taken fruits or products to which it was not entitled, the money judgment providing for compensation to the true owner for those wrongs would not be enforceable through seizure of public property, but would have to await an appropriation. However, if the private landowner elected to keep some state-made improvements and thus was required to compensate the state for its expenses or for the value of the improvements, that amount could be set off by whatever amounts the state owed the private landowner for taking fruits or products. Such a set-off would not need to be enforced by seizure of public property and would not depend on an appropriation.

If a declaratory judgment were rendered, there would be nothing to enforce—the judgment would simply have its declaratory effect. If later relief were requested, means of enforcement other than seizure of public property could be undertaken. Injunctions are not prohibited if the court does not order the payment of money. As long as no statute, such as the antitax injunction legislation, prohibits a certain type of injunction, this remedy is available against the state or governmental unit.

In effect, section 10(C) is aimed at protecting the public fisc and seeks to avoid governmental priorities being upset by the payment of substantial money judgments. It is not aimed at limiting the courts in a general manner in dealing with the state. Certainly, the attitude of the constitutional convention was to enlarge and protect individual rights, not to limit them. To interpret section 10(C) as some general prohibition against enforcement of judgments against the state would be inconsistent with that policy and would threaten the reach of judicial review, a review that was increased and strengthened during the convention.³⁴ Of course, the section also allows the legislature to enact legislation with respect to enforcement of judgments of all kinds against the state. Such legislation is valid if it comports with due pro-

34. See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 60 (1974); Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765, 794-806 (1977).

cess and equal protection and does not otherwise contravene some constitutional guarantees.

Legislation has been adopted to provide a procedure for payment of small judgments against the state and to provide for settlement of some claims against the state.³⁵ In addition, the state has an excellent record of appropriating funds to pay judgments rendered against it. The problems that have arisen in collecting money judgments involve payment of judgments by municipalities and parish governing authorities. No legislation exists to force them to pay their judgments, although pressure from the legislature to cut off various state funds if judgments are not paid has been successfully applied in the past to force governmental subdivisions to pay their judgments.³⁶ It is clear that section 10(C) does not require the state to pay judgments rendered against local government subdivisions, although it is also clear that the state could adopt legislation so providing or otherwise providing coercive measures to force local governments to pay judgments. In the absence of such legislation, there remains a serious problem with some local government units refusing to pay unpopular judgments, particularly judgments awarding substantial damages for negligence in constructing and maintaining public roads.³⁷ In the absence of legislation, the basic remedy is the use of threats from the state government—if the legislature is willing to use them.

Other alternatives for ordering payment of judgments against the state or its local subdivisions could come from the declaration of rights of the constitution, especially the equal protection guarantee. The Louisiana Constitution prohibits all discrimination based on race, religion, or political views; failure to pay judgments based on these classifications undoubtedly would be unsupported by any adequate basis. The remedy of injunction or declaratory judgment would be available for such violations, but a problem would arise with respect to granting relief in the form of a money judgment. It might be possible, by arguing that section 10(C) must be read in conjunction with other constitutional guarantees, to carve out an exception to section 10(C) for violations of constitutional rights and to order seizure or appropriations in these cases.³⁸ If the courts are unwilling to do this the private

35. LA. R.S. 13:5141-5157 (Supp. 1977).

36. *E.g.*, Morning Advocate (Baton Rouge), July 8, 1978, at 15-A, col. 1; Pursnell, *Ascension Parish Police Jury Won't Pay Judgment in Death*, Morning Advocate (Baton Rouge), July 7, 1978, at 7-C, col. 4.

37. *E.g.*, Penalber v. Blount, 405 So. 2d 1378 (La. App. 1st Cir. 1981).

38. *See* Penalber v. Blount, 407 So. 2d 1189 (La. 1981) (Lemmon, J., concurring in the denial of a writ). "However, this action should not be taken as approving the appellate court's implicit holding that a judgment creditor cannot petition the court

litigant's alternative is to pursue a federal court action based on denial of United States constitutional rights and recover under federal civil rights statutes.³⁹ Since that federal remedy would be available in any event, with the power to enforce by seizure,⁴⁰ this is further reason for the state to carve out an exception to section 10(C) for violations of equal protection.

More realistic, however, are failures to pay judgments based on classifications that are not as suspect as race, religion, or political affiliation. More probable is failure to pay judgments of plaintiffs who live outside the defendant's jurisdiction (and thus do not vote for the officials involved) while paying judgments of plaintiffs who do reside within the jurisdiction. Such a discrimination would appear to be without rational basis and might also run afoul of the first amendment, the dormant commerce clause, and the equal protection clause. Again, the state and federal equal protection guarantees ought to be adequate bases for judgment against the political unit involved. Under 42 U.S.C. § 1983, of course, there would also be room for personal liability of the members of the governing authority participating in the denial of federal constitutional rights.

This equal protection approach would not succeed, however, when there is a rational basis to support the classification and the classification involved does not invoke a high level of scrutiny. Within these lower scrutiny tests are matters related to finances. It would thus appear that a classification based on the amount of judgment would not be a denial of equal protection. If a municipality facing judgments it could not totally cover paid a uniform percentage of all judgments outstanding, the reasonableness criteria probably would be met. The development of some standard scale of paying graduated portions of judgments, the percentage of payment decreasing as the amount increases, ought to be permissible also. Indeed, limits on the total amounts payable per person may well meet the reasonableness standard of the equal protection guarantee if there are not sufficient funds to pay all judgments and still conduct a basic level of municipal services.

to compel a political subdivision to take action on the appropriation of funds for payment of a judgment." *Id.* Also see the problems raised by Justices Dennis and Lemon in the denial of writs in *De Laureal Eng'rs, Inc. v. St. Charles Parish Police Jury*, 410 So. 2d 758 (La. 1982).

39. 42 U.S.C. §§ 1981-1985 (1976 & Supp. 1980). Actions against municipal governments are permitted under § 1983. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978).

40. *Gary W. v. State of Louisiana*, 441 F. Supp. 1121 (E.D. La. 1977), *aff'd*, 622 F.2d 804 (5th Cir. 1980).

FORCED HEIRSHIP AND TRUSTS

ARTICLE XII, SECTION 5

The limit on trusts and the prohibition against abolishing forced heirship, provisions which first appeared in the 1921 constitution and which are continued in article XII, section 5, reflect the influence of the civil law preservationists. In an argument often more romantic than realistic, maintenance of the state's unique ties to French culture becomes merged with maintenance of the civil law and a number of its basic institutions. Forced heirship, provided in the state's civil codes from the earliest times, is part of this institutional backdrop and part of the preservationist creed.⁴¹

In the 1921 constitutional convention process, a 1920 statute authorizing trusts apparently provoked introduction of a provision to ban them and, as a related concern, to continue forced heirship.⁴² The compromise, which became article 4, section 16, did allow some trusts, but it also prohibited abolition of forced heirship. Subsequent amendments allowed more exceptions. In any event, the constitution adopted the principle, but it had little effect. Virtually any trusts were allowed, and the lesson of the jurisprudence was that the forced heirship provisions of the Civil Code could be amended and the rights of forced heirs lessened, as long as the institution was not "abolished."⁴³ To the extent that the cases left room for the argument that a substantial, although undefined, level of rights in forced heirs had to be preserved, the text of the new provisions and the record of the 1974 constitutional proceedings undercut this argument.

The text simply states that no law may "abolish" forced heirship. The normal meaning of the term *abolish* is complete destruction, and as long as any kind of forced portion to any class of forced heirs exists, forced heirship is not abolished. The second sentence of article XII, section 5 confirms this view, specifying that the legislature may determine who are forced heirs and the amount of the forced portion. There is not much else to determine. The legislature, under this provision, could limit the forced rights to minor, needy children or could make

41. See, e.g., Lemann, *In Defense of Forced Heirship*, 52 TUL. L. REV. 20 (1977); Nathan, *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 TUL. L. REV. 5 (1977). Nathan asserts that the prohibition on abolition resulted from "fear that this issue would be too hot a political potato for a constitution that was already highly controversial." Nathan, *supra*, at 5 n.1.

42. Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 LA. L. REV. 42, 67 & nn.131-32 (1941). See especially the comments of the sponsor of the constitutional provision. *Id.* at 68 n.134.

43. Succession of Earhart, 220 La. 817, 57 So. 2d 695 (1952).

the only forced heir the surviving spouse of the decedent. The conclusion is the same as that stated many years ago in a law review comment: "That nothing along these lines is even remotely foreseeable, barring certain proposed changes with respect to the parent's share of community property in a childless marriage, is due more to an almost emotional attachment of Louisiana law makers to the institution of forced heirship than to constitutional restrictions."⁴⁴

Members of the Judiciary Committee and the Committee on Bill of Rights and Elections had before them staff documents which suggested that the 1921 provision was not effective and did "not prevent the legislature from making changes in the categories of forced heirs or in the portion of the deceased's estate which constitutes the legitime."⁴⁵ While the language cited to support this view may have been dictum on the point, the language of *Succession of Earhart*⁴⁶ was accepted as the existing position of the jurisprudence: "The words, 'no law shall be passed abolishing forced heirship,' mean exactly what they say, in other words, that forced heirship cannot be done away with wholly, wiped out or destroyed. This provision does not prohibit the legislature from regulating or restricting the rights of forced heirs."⁴⁷

Delegate Stinson, representing the Committee on Bill of Rights and Elections, which proposed article XII, section 5, explained to the delegates: "Neither do they say that children will be forced heirs of fathers and mothers and their ascending line. It will be left up to the legislature."⁴⁸ Delegate Tobias stated, "As I presently read Louisiana constitution and statutes, the legislature could very simply say that each child is a forced heir to the extent of one dollar."⁴⁹ Delegate Dennery agreed with Delegate Avant, in that "[t]here would be a system of forced heirship, but what it consisted of, and all the refinements thereof, would be up to the legislature."⁵⁰

An examination of the convention transcript reveals an amazing lack of discussion of the underlying policy issues related to the institution of forced heirship. The explanation for this lack of discussion is probably that the section was ineffective and thus not related

44. Comment, *Forced Heirs, the Legitime, and Loss of the Legitime in Louisiana*, 37 TUL. L. REV. 710, 723 (1963).

45. Committee on Bill of Rights and Elections Staff Memo, July 31, 1973 at X RECORDS: COMMITTEE DOCUMENTS 134, 135. See also Judiciary Committee Staff Memo No. 21, June 6, 1973 at XI RECORDS: COMMITTEE DOCUMENTS 358.

46. 220 La. 817, 57 So. 2d 695 (1952).

47. 220 La. at 824-25, 57 So. 2d at 697.

48. IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 3, 1974 at 3073.

49. *Id.* at 3075.

50. *Id.* at 3078.

to the basic policy issues. In any event, the traditionalists were satisfied with a hortatory commitment to forced heirship, and the opponents were satisfied that the legislature was not truly limited in what it could do in this regard.

A court which would be inclined to ignore this legislative history (perhaps arguing that it does not necessarily reflect the intent of the voters who adopted the document) and hold that some reasonable fraction of legitime is required would be in a difficult position. There are simply no traditional legal standards as to what share (percentage or amount) of a deceased's patrimony is part of the forced portion, and there are no legal standards as to who must be forced heirs. Lack of certain judicial standards seems to be another reason supporting the view that the legislature can severely erode the institution, as long as it keeps some absolute minimum aspect of forced heirship.

PROPERTY RELATED PROVISIONS

ARTICLE IX, SECTIONS 3 AND 4

The strong Civil Code policy against private ownership of the beds of navigable water bodies, which became a constitutional rule through article 2, section 2 of the 1921 constitution,⁵¹ continues in article IX, section 3 of the 1974 constitution:

The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. This Section shall not prevent the leasing of state lands or water bottoms for mineral or other purposes. Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use.

It is clear by this provision that the state itself cannot alienate the bed of a navigable water body, and any attempt to do so is null. Moreover, the state cannot "authorize the alienation" by any other governmental agency or by a general statute. More broadly, section 3 is the basis for saying, consistent with traditional Civil Code principles, that these beds are out of commerce and unsusceptible of private ownership. Not only are sales or other contractual alienations impossible, but such property is incapable of acquisition by prescription or of seizure and sale by creditors of the state.⁵²

51. *California Co. v. Price*, 225 La. 706, 74 So. 2d 1 (1954), which allowed private ownership of the beds of navigable water bodies that were included in old land grants, has been overruled by *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576 (La. 1975).

52. LA. CIV. CODE art. 450. See A. YIANNPOULOS, PROPERTY §§ 41-48 in 2 LOUISIANA

In view of the constitutional reference to "navigable" water bodies and similar Civil Code provisions, a stream that becomes nonnavigable is no longer under this rule, and the state may alienate its bed or authorize its alienation.⁵³ The constitution does not provide for loss of state ownership in such a case, but the prohibition against alienation is lifted. Conversely, if a nonnavigable stream becomes navigable, it would cease to be susceptible of private ownership and would become property of the state. The argument that such a change in ownership may be a taking without due process (absent compensation)⁵⁴ probably falls because such a loss is not caused by the state itself. Rather, the loss is part of the natural changes in water bodies. Indeed, if this is a taking without due process, the entrenched institution of loss of land by dereliction⁵⁵ and by natural expansion of water bodies to cover more area⁵⁶ should be equally unconstitutional. Case law and recent legislation have treated man-made canals as private things, even if navigable.⁵⁷ Article IX, section 3 was not designed to affect those rules, and it probably would be a taking without due process for the state to take ownership of beds of *privately* dug navigable canals.

Although the convention did not adopt provisions similar to Louisiana Revised Statutes 9:1151,⁵⁸ which provides that rights under outstanding mineral leases are not affected by changes in ownership resulting from changes in water bodies, the statute remains in effect and is not prohibited by the constitution. Nothing is taken from the riparian landowner who has gained land by accretion if he obtains the land without the mineral rights; he had no vested interest in the land to begin with. Article IX, section 3 does not prohibit the state,

CIVIL LAW TREATISE 107-45 (2d ed. 1980). Seizure by creditors also is prohibited by LA. CONST. art. XII, § 10(C); prescription is also covered by LA. CONST. art. XII, § 13.

53. See A. YIANNPOULOS, PROPERTY § 41 in 2 LOUISIANA CIVIL LAW TREATISE 107, 112 (2d ed. 1980).

54. *Id.*, § 41 at 112-13.

55. LA. CIV. CODE art. 499.

56. *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936).

57. LA. CIV. CODE art. 450, *as amended by* 1978 La. Acts, No. 728, § 1, reflects this understanding, making a reference to "natural" navigable water bodies. This reflects prior jurisprudence, *National Audubon Soc'y v. White*, 302 So. 2d 660 (La. App. 3d Cir. 1964), and federal standards, *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979).

58. The relevant provisions from Committee Proposal No. 34 which were not adopted read as follows:

Section 6. Mineral rights to land formed or exposed by accretion or dereliction caused principally by acts of man, on a water body the bed of which is owned by the state, are retained by the state.

Section 7. Mineral rights to land lost by erosion caused principally by acts of man, on a navigable water body, are retained by the riparian landowner.

IV RECORDS: CONVENTION INSTRUMENTS 263.

which obtains land by dereliction, from obtaining less than full ownership, as no alienation or authorization of alienation has occurred.⁵⁹ Attempts to be more specific in the constitution with respect to accretion and dereliction caused "principally" by acts of man failed, partly because of the ambiguity of such proposals and partly because of the supreme court's reversal of position in *State v. Placid Oil Co.*⁶⁰ to a position more favorable to the state.

New to the constitution is the exception that permits the state to transfer the bed of a navigable water body to a riparian landowner reclaiming land lost through erosion. Although the committee proposed that this exception be limited to land lost during the most recent 10-year period,⁶¹ the convention adopted an amendment removing that restriction.⁶² Of course, the constitution does not require that such transfers be made; it simply allows such alienations. The legislature has adopted a statute allowing reclamation of land lost "through erosion by action of this navigable water body occurring on and after July 1, 1921."⁶³

While liberalizing reclamation by private riparian landowners, the constitution limits the power of governmental units to reclaim and otherwise fill in beds of navigable water bodies. The prior law allowed the state to alienate such beds "for purposes of reclamation,"⁶⁴ whereas the new document provides that "the bed of a navigable water body may be reclaimed only for public use." The limitation was proposed by the Committee on Natural Resources,⁶⁵ the chairman making it clear that past practices (particularly with respect to Lake Pontchartrain) of filling in the bed of a waterbody and then selling lots to private owners for home construction would not be permitted.⁶⁶ Indeed, an amendment supported by the delegates from the parishes

59. Although the rehearing opinion in the case made the discussion on the point moot, the original opinion in *State v. Placid Oil Co.*, 300 So. 2d 154 (La. 1974), suggested that LA. R.S. 9:1151 was constitutional.

60. 300 So. 2d 154, 172 (La. 1974).

61. Committee Proposal No. 34, § 4 at IV RECORDS: CONVENTION INSTRUMENTS 263.

62. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 18, 1973 at 2938. The statement in the *Transcripts* that the amendment was rejected is incorrect. See II RECORDS: JOURNAL AND CALENDAR, Dec. 18, 1973 at 1031 for the indication that the amendment was adopted.

63. LA. R.S. 41:1702 (Supp. 1978). Suggestions in 1975 LA. OP. ATTY GEN. 1602 (Jan. 8, 1976) that art. IX, § 3 of the constitution would not be applied to lands eroded before the effective date of the 1974 constitution are not supported by the constitutional convention record. There should be no doubt that LA. R.S. 41:1702 is constitutional in reaching back to 1921 for a starting point; it could have reached much further back had the legislature so decided.

64. LA. CONST. of 1921, art. 4, § 2.

65. Committee Proposal No. 34, § 4 at IV RECORDS: CONVENTION INSTRUMENTS 263.

66. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 18, 1973 at 2936.

of Orleans and Jefferson to allow more development along the lake was rejected by a sizable margin of 37-60.⁶⁷ The convention was more concerned with the interests of sportsmen and other users of water bodies than with development. Indeed, the basic decision is that areas subject to public use (as are all navigable water bodies) cannot be removed from public use. When reclamation does occur, the reclaimed land must be for some substitute public use.

As the debate on residential development demonstrates, the reference is not to "public purposes," the concept often used in expropriation matters⁶⁸ and which is broadly construed to include private ownership under urban renewal plans.⁶⁹ The reference is to a narrower "public use" concept borrowed from the Civil Code, with its traditional narrow definition of the concept.⁷⁰

It is of course true that an important interest of the state in regards to its lands, including beds of water bodies, is the revenue accruing from oil and gas production. This interest is reflected in article IX, section 3, which declares that the lease of state lands and water bottoms for mineral and other purposes is permissible. Although mineral servitudes of private owners expire upon ten years nonuse,⁷¹ article IX, section 4 makes it clear that the same is not true with respect to "lands and mineral interests" held by the state, a school board, or a levee district. The reference to mineral interests is to those rights that normally can be lost by liberative prescription of nonuse. Section 4 goes further, however, and refers to land, which never could be lost by liberative prescription.⁷² The reference makes sense only if it is construed to mean that lands of these enumerated bodies cannot be acquired by other persons by acquisitive prescription. The provision makes no distinction between land that would be classified as a public thing as opposed to a private thing; under the Civil Code, the latter would be subject to prescription.⁷³ The reference is not to all governmental land; the initial proposal referred to state

67. *Id.* at 2942.

68. LA. CONST. art. I, § 4 uses the traditional language in limiting expropriation to "public purposes."

69. *Berman v. Parker*, 348 U.S. 26 (1954).

70. *See, e.g.*, LA. CIV. CODE arts. 452, 455, 456. *Save Our Wetlands, Inc. v. Orleans Levee Bd.*, 368 So. 2d 1210 (La. App. 4th Cir. 1979), is probably correct in holding that construction of an airport available for use by the general public (although at a fee) is within the permissible public uses under LA. CONST. art. IX, § 3. *Cf.* LA. R.S. 9:1102.1 (Supp. 1975 & 1981). To the extent that such statutes would allow "leases" for long periods tantamount to alienation, they are suspect in light of the constitutional limitation.

71. LA. R.S. 31:27 (Supp. 1974).

72. *See* LA. CIV. CODE art. 481.

73. A. YIANNPOULOS, PROPERTY § 34 in 2 LOUISIANA CIVIL LAW TREATISE 95 (2d ed. 1980).

lands and minerals,⁷⁴ and floor amendments were adopted to include school boards and levee districts.⁷⁵ Municipalities and police juries and other governmental units are not included, although their lands classified as public things under the Civil Code are not subject to prescription. Their lands considered private things are prescriptable.⁷⁶

Land Use, Zoning, and Historic Preservation—Article VI, Section 17

In light of the general powers of municipalities,⁷⁷ it probably was not necessary to specify that they have the power to regulate land use, zoning, and historic preservation.⁷⁸ Article VI, section 17, however, began primarily as a means of ensuring the existing status of the Vieux Carre Commission, which had been established by a 1936 amendment to the 1921 constitution.⁷⁹ As the convention proceeded, the provision was made more general, and section 17 now allows all local governments to establish commissions and districts to control "use, construction, demolition, and modification of areas and structures."⁸⁰ Since "land use, zoning, and historic preservation" are public purposes, property can be expropriated for these purposes, but the reasonableness of any particular regulation is still subject to article I, section 4 and the rights there established to use one's property as one wants, subject only to "reasonable" restrictions.⁸¹

Tax Sales—Article VII, Section 25

Although the formal committee proposals were silent as to the means for enforcing payment of ad valorem taxes, Delegate Avant sponsored a floor amendment to continue provisions of the 1921 constitution designed to prevent forfeiture of property for nonpayment of taxes and to provide for redemption rights.⁸² After a series of attempts, he was successful in procuring the adoption of what became article VII, section 25. An attempt to pass a condensation of the prior

74. Committee Proposal No. 34, § 5 at IV RECORDS: CONVENTION INSTRUMENTS 263.

75. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 18, 1973 at 2943-44.

76. A. YIANNPOULOS, PROPERTY § 34 in 2 LOUISIANA CIVIL LAW TREATISE 95 (2d ed. 1980). See also LA. CONST. art XII, § 13; VII RECORDS: CONVENTION TRANSCRIPTS, Oct. 3, 1973 at 1566-69; LA. R.S. 9:5804 (1950) (the special statute regarding prescription of land owned by municipalities).

77. See LA. CONST. art. VI, §§ 7, 15.

78. LA. CONST. art. VI, § 17.

79. LA. CONST. of 1921, art. 14, § 22A (proposed by 1936 La. Acts, No. 139; adopted Nov. 3, 1936).

80. Comments to Committee Proposal No. 8, § 19 at I RECORDS: JOURNAL OF PROCEEDINGS, July 6, 1973 at 107-08.

81. See Hargrave, *Declaration*, *supra* note 34, at 12.

82. VIII RECORDS: CONVENTION TRANSCRIPTS, Nov. 6, 1973 at 2140-47; IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 12, 1974 at 3313.

article was met with objections about its uncertainty, so Delegate Avant returned with what he described as "word for word the provisions of Article X, Section 11 of the Constitution of 1921."⁸³ After final styling, section 25(C) has slightly different punctuation from its predecessor, making it uncertain and less than clear. Citing the constitutional convention purpose of continuing the prior jurisprudence, the court in *Kemper v. Dearing*⁸⁴ applied the new language in light of the predecessor provision so as to make no change in the law, and the procedure for annulling tax titles remains what it was before the 1974 constitution.⁸⁵

LIMITS ON LOCAL AND SPECIAL LAWS

ARTICLE III, SECTION 12

Local and Special Laws

An important innovation in article III, section 12 of the 1974 constitution is the prohibition against local or special laws "[d]efining any crime." Not proposed by the Committee on Legislative Powers and Functions,⁸⁶ this provision originated in a floor amendment proposed by Delegate Avant, a delegate appointed to represent wildlife and conservation interests.⁸⁷ Asserting those interests, he sought to end the existence of state laws which defined the crime of trespass differently in specified parishes, although he recognized that his proposal would apply to all state crimes.⁸⁸ *State v. LaBauve*⁸⁹ and *State v. Slay*⁹⁰ have been true to the prohibition, invalidating laws regulating

83. VIII RECORDS: CONVENTION TRANSCRIPTS, Nov. 6, 1973 at 2141.

84. 369 So. 2d 1208 (La. App. 2d Cir. 1979).

85. See Harrell, *Title Problems in Tax Sales*, 1980 INST. ON MIN. LAW 246.

86. See Committee Proposal No. 3, § 12 at IV RECORDS: CONVENTION INSTRUMENTS 8; also at I RECORDS: JOURNAL OF PROCEEDINGS [originally published as OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1973 OF THE STATE OF LOUISIANA], July 6, 1973 at 90; an earlier draft appears at X RECORDS: COMMITTEE DOCUMENTS 216.

87. In addition to 105 elected delegates, the convention was composed of twenty-seven delegates appointed by the governor. Twelve of those were required to represent certain interest groups, and fifteen were at-large appointments. See 1972 La. Acts, No. 2, providing for the holding of the constitutional convention. Delegate John L. Avant, an attorney often identified with labor interests, was appointed to represent "wildlife and conservation."

88. V RECORDS: CONVENTION TRANSCRIPTS, Aug. 1, 1973 at 487-90; IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 8, 1974 at 3188-91. For the patchwork criminal trespass statutes that existed at that time, see LA. R.S. 14:63 and 14:63.5 to 14:63.11 (repealed by 1981 La. Acts, No. 78, §§ 1 & 3).

89. 359 So. 2d 181 (La. 1978).

90. 370 So. 2d 508 (La. 1979).

the size of fish nets that were not uniformly applicable throughout the state. In *LaBarve*, the laws were not even uniformly applicable in two named parishes in which they partially applied.⁹¹ In other respects, section 12 is basically a continuation of the predecessor provision of the 1921 constitution⁹²—it contains a lengthy catalogue of subjects on which there can be no local or special laws. Nonuniform legislation touching on other subjects is allowed, however, and section 13 provides a notice and advertisement procedure for bills proposing permitted local or special laws. Section 13 requires a public notice in the affected area at least thirty days before the introduction of the bill. Since there will be no statewide application of the statute, thus less likelihood of statewide scrutiny during the legislative process, there must be the opportunity for local scrutiny in the area affected or by the subclass of citizens affected. This again is little change from the prior constitution. The convention earnestly sought a cleaner and shorter way of handling the problem of laws that do not apply uniformly. Communications between committees,⁹³ changes in drafts,⁹⁴ and postponement of the issue until the closing days of the convention⁹⁵ all were directed toward finding a workable formula. The Committee on Legislative Powers and Functions did propose the simple language of the Model State Constitution: "The legislature shall pass no local or special law when a general law is or can be made applicable."⁹⁶ However, the vagueness and uncertainty of that provision troubled many delegates.⁹⁷ This concern, along with the inertia

91. The regulation applied only to those parts of Lafourche Parish and Terrebonne Parish south of the Intracoastal Waterway. 359 So. 2d at 184 app. A.

92. See LA. CONST. of 1921, art. 4, §§ 4 & 6.

93. In response to a request by the Committee on Legislative Powers and Functions, the Judiciary Committee suggested the Model State Constitution approach plus an *illustrative* listing, whereas a subcommittee of the Committee on Revenue, Finance and Taxation suggested an *enumeration* similar to article 4, section 4 of the 1921 constitution. See X RECORDS: COMMITTEE DOCUMENTS 265.

94. Compare the final Committee Proposal No. 3, § 12 at IV RECORDS: CONVENTION INSTRUMENTS 8 with the earlier second committee draft at X RECORDS: COMMITTEE DOCUMENTS 216.

95. V RECORDS: CONVENTION TRANSCRIPTS, Aug. 1, 1973 at 491.

96. Committee Proposal No. 3, § 12 at IV RECORDS: CONVENTION INSTRUMENTS 8; also at I RECORDS: JOURNAL OF PROCEEDINGS, July 6, 1973 at 90.

97. Delegate Conroy explained the reasons for the retention of listing thusly: I think there has been a genuine concerted effort on the part of those on the committee, on the part of a number of delegates to come up with appropriate general language to cope with this problem. We have been unable to do so. Despite every effort and the amendment that you will see each of them opens new problems, causes new concerns; and we, those of us who have worked on this, really feel that the wisdom of the constitution in this case that we have is correct, is regrettable that it is so long, but we think that it shows what has happened historically in the state.

V RECORDS: CONVENTION TRANSCRIPTS, Aug. 1, 1973 at 486.

of the convention process, finally led to the adoption of the approach that the Louisiana State Law Institute had taken in its projet of a constitution. "The Institute considered that the limitations in the present [1921] constitution represented attempts to correct abuses that had actually occurred in Louisiana and, therefore, considered it wise to retain them."⁹⁸ That long list of limitations came primarily from the 1879 constitution, which had set a new high for statutory detail and which added 15 new sections of forbidden local and special laws. Most were reactions to legislation adopted during the Republican Reconstruction Government following the Civil War.⁹⁹

Related to article III, section 12 are several provisions in the local government article requiring general laws in a number of instances and prohibiting "local or special" laws in other instances. In this regard, article VI, section 3 specifically allows the legislature to "classify parishes or municipalities according to population or any other reasonable basis related to the purpose of the classification. Legislation may be limited in its effect to any of such class or classes." Article VI, section 44 also defines "general law," when used in that article, as "a law of statewide concern enacted by the legislature which is uniformly applicable to all persons or to all political subdivisions in the state or which is uniformly applicable to all persons or to all

98. 2 LOUISIANA STATE LAW INSTITUTE, PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA 392 (1954); V RECORDS: CONVENTION TRANSCRIPTS, Aug. 1, 1973 at 485.

I think that . . . as I said before, the desire of everybody was to try to make this a briefer constitution. But, I don't think anybody was able to come up with the language that would accomplish what we wanted to do and at the same time carry forward the types of prohibitions that the state has had and which I think have operated successfully in the state.

IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 8, 1974 at 3186.

99. A. POWELL, A HISTORY OF LOUISIANA CONSTITUTIONS in 1 LOUISIANA STATE LAW INSTITUTE, *supra* note 98, at 400. The 1954 Law Institute *Projet* listed the following Louisiana acts as indicative of the type of legislation that was to be prohibited.

- (a) Act 13 of 1876 declared legitimate the six children of Joseph Duvigneaud and his wife, Marie Julia Freed.
- (b) Act 22 of 1876 reduced the tax assessments on the property of the succession of E.C. Hart, deceased, for the years 1873 and 1874 and remitted all penalties and forfeitures for the said years.
- (c) Act 30 of 1876 changed the name of Caroline Vallee to Caroline Nott.
- (d) Act 3 of 1871 changed the venue in the case of David Fisher, J.C. Oliver, and Celestine Oliver, charged with murder, from Ascension Parish to Jefferson Parish.
- (e) Act 40 of 1871 incorporated the Alexandria, Homer, and Fulton Railroad Co. and granted State aid thereto.
- (f) Act 52 of 1871 granted to J. J. Warren and J. W. Crawford the exclusive right of keeping a ferry across the Atchafalaya River for ten years.
- (g) Act 46 of 1875 appropriated \$5000 for the relief of the widow and children of Judge John J. Morgan.

1 LOUISIANA STATE LAW INSTITUTE, *supra* note 98, at 402.

political subdivisions within the same class." These provisions in article VI tend to reflect the existing case law and the existing understanding of local or special laws.¹⁰⁰

Section 12 (B) of article III, which prohibits the indirect enactment of local or special laws "by the partial repeal or suspension of a general law," was added by floor amendment to "close the back door"¹⁰¹ and cement the protection against this kind of legislation. The addition continues a provision of the 1921 constitution and was probably not necessary, but its adoption does serve to indicate the depth and intensity of the concerns the convention had in this area.

The crucial issue, of course, is whether a statute is a local law or a special law, just as it was before the adoption of the new constitution. Courts have been less than clear in distinguishing between laws that are local and those that are special. Often, the term "local and special" is used as though it were one concept. However, the constitution does make a distinction between the two. The distinction probably is that "local" laws do not apply uniformly across the state, with the exceptions based on geography or location, and "special" laws do not apply uniformly, with the exceptions based on something other than geography or location.¹⁰² In a sense, local laws are a type of special law, the nonuniform standard being geography rather than age, sex, hair color, or some other standard. In any event, under the jurisprudence these issues involve classification in statutes and raise the same questions that are raised by the equal protection clause. In both instances, the question is the rational basis for the classification.

Local Laws—Territorial Uniformity

The convention debates suggest that a high level of justification ought to be required for statutes that do not apply uniformly throughout the territory of the state. Particularly suspect is a statute whose application depends on parish or other political boundaries. The 1921 constitution contained many "Orleans excepted" provisions; the

100. Since LA. CONST. art. III, § 12 begins with the usual "[e]xcept as otherwise provided in this constitution" formula, it is clear that more specific provisions in other sections of the document will prevail over section 12. It is also clear, by the references in section 12(A)(7) to "private" corporations, that this limitation does not affect governmental corporations.

101. The quotation is that of Delegate Drew, who proposed the amendment. IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 8, 1974 at 3187; V RECORDS: CONVENTION TRANSCRIPTS, Aug. 1, 1973 at 487. See LA. CONST. of 1921, art. 4, § 5.

102. See generally Comment, *General and Special Laws in Louisiana*, 16 LA. L. REV. 768 (1956).

1973 convention made a fetish out of eliminating these references.¹⁰³ Twice the convention expressed its disapproval of state criminal trespass statutes that varied from parish to parish.¹⁰⁴ The court decisions are in accord. A reapportionment statute that applied only to the Caddo Parish School Board was held unconstitutional,¹⁰⁵ as were a statute that applied only to areas in Lafourche and Terrebone Parishes south of the Intracoastal Waterway,¹⁰⁶ a statute that prohibited banks in nine parishes from opening on Saturdays while allowing banks in other parishes to remain open,¹⁰⁷ and a statute that required certain kinds of fish nets in some areas of the state and other nets in other areas.¹⁰⁸ Whether there is involved one named parish, a designated area of a parish, or several designated parishes, the statute ought to be considered a local law if the statute does not apply statewide. The inquiry then becomes whether the classification is reasonable. Article VI, section 3 suggests that with a reasonable basis for the classification, the distinction will be allowed. As in equal protection analysis, the question becomes largely a factual one aimed at the distinctions between the areas involved. With respect to fish nets, for example, if there had been sufficient biological or other factual reasons for using different nets in different waters with different kinds of fish, they probably would have supported different laws for those areas.¹⁰⁹ Of course, such classifications normally would have to be based on characteristics of the water bodies rather than parish boundaries. Indeed, the author of the amendment which added "defining any crime" to the list of prohibited local and special laws noted that if there were biological bases for different hunting and fishing regulations, they would serve as a sufficient basis for different game regulations in different areas.¹¹⁰ It has been suggested, for example, that rules relating to trapping in marsh areas might be adopted which are different than trapping rules for nonmarsh areas, although a statute that excluded some marsh areas and included others was not sustained.¹¹¹

103. This is evident in the debates concerning the reduction of the terms of Orleans district judges to make them uniform with the judges in all other judicial districts. See Hargrave, *Judiciary*, *supra* note 34, at 819.

104. See notes 88-91, *supra*.

105. *Caddo Parish School Bd. v. Board of Elections Supervisors*, 384 So. 2d 448 (La. 1980).

106. *State v. LaBauve*, 359 So. 2d 181 (La. 1978).

107. *State Through State Banking Dep't v. Acadiana Bank & Trust Co.*, 360 So. 2d 846 (La. 1978).

108. *State v. Slay*, 370 So. 2d 508 (La. 1979).

109. *Id.* at 511.

110. V RECORDS: CONVENTION TRANSCRIPTS, Aug. 1, 1973 at 490; IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 8, 1974 at 3188.

111. *State v. Clement*, 188 La. 923, 178 So. 493 (1938).

Classifications based on population are often upheld, with the differences in urban and rural conditions often considered the reasonable basis for the distinction in regulations. Article VI, section 3 suggests that population may be a valid basis of classification, as long as it is reasonable. The important element is that the category is not closed—the statute can apply to other areas that reach the stated population in the future. It is doubtful, then, that classifications based on the population as of the 1980 census are valid. Such classifications include only some areas as of an established time, without the prospect of other areas being covered when they meet the same conditions that support different treatment. Also questionable are the typical "Orleans excepted" provisions in statutes. As stated earlier, these exceptions are virtually gone from the constitution. If the "Orleans excepted" word formula was a substitute for a population classification, as may well have been true,¹¹² then it is required that the courts construe such exceptions to allow application to other cities and parishes when they reach the size of Orleans. However, some uncertainty might exist as to whether the population at the time of the adoption of the statute or the population at the present time is the basis for the classification. In any event, absent some kind of judicial legerdemain, the "Orleans excepted" provisions should be found to be invalid unless some rational basis to support the distinction in a particular statute can be found.

Special Laws—Equal Protection

The adoption of an equal protection clause in the 1974 constitution makes the prohibition against special legislation less important than it formerly was. Certainly, any classification based on race, religion, or political beliefs falls because the prohibition against such classifications is absolute.¹¹³ Other classifications are tested on a less rigorous basis, depending on the character of the classification involved and the strength of the state interest supporting the distinction. Since local and special analysis is similar to equal protection analysis in judging the reasonableness of classifications and discriminations, it would be simple to make the standards the same for both, resulting in greater simplicity and clarity in applying the constitution. Testing classifications by two different standards of reasonableness is not an ideal system. Simplifying this inquiry, though, presents problems.

The local and special provisions came from the Committee on Legislative Powers and Functions, and the equal protection guarantee

112. See Johnson, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Legislative Process*, 36 LA. L. REV. 549, 549-52 (1976).

113. See LA. CONST. art I, § 3; Hargrave, *Declaration*, *supra* note 34, at 6.

came from the Committee on Bill of Rights and Elections. The two committees did not relate the provisions to each other. The local and special provision is one of long standing in the constitution, with its own history and method of construction. The equal protection clause was an innovation in the 1974 constitution, drafted with federal constitutional equal protection precedents in mind.

The differences go beyond history; the text is difficult to bend to make the two concepts congruent. If a classification is determined to deny equal protection, that is the end of the analysis and the statute falls. However, if a statute is local or special, it automatically falls only if it touches certain subjects; otherwise, it can be valid if properly advertised. Application of the same reasonableness standards across the board thus would result in making all local or special laws fall, a result not consistent with section 13.

If one tries to minimize the difference in results by treating section 12 as concerned with local laws (geographic classifications) and construing the "special" category (all other classifications) as a narrow one better handled by equal protection analysis, one finds some support in section 13. Section 13 requires advertisement in the locality affected by a nonuniform law. If the law has statewide application to some classes (*i.e.*, nongeographic classifications), it is hard to see how section 13 can apply logically. Since the whole state is affected, is it necessary to advertise statewide in the official journal of the state?

The above approach also poses some problems, for the section 12 listing of forbidden subjects of local or special laws includes a number of subjects that do involve nongeographic classifications. Perhaps the solution to this lapse of consistency in drafting is to define as "special" only those types of laws enumerated in section 12. Beyond that, the scope of section 12 would be to apply to "local" laws which do not have geographic uniformity. If these are not prohibited by the equal protection guarantee or by section 12, the advertisement requirement makes sense. Other classifications would be tested under equal protection. If there is no rational basis for their classification, they fall. If there is such a basis, then the statute would be valid unless the subject matter was one listed in section 12. Thus, the suggested reconciliation would be to pursue the following analysis.

Determine whether the statute violates the equal protection clause of article I, section 3. If it does, the statute falls. If it does not violate equal protection standards (*i.e.*, there is a reasonable basis for the classification), the local and special analysis must be pursued.

If the statute is a geographic classification, it must be considered a prohibited local law unless there exists a very high level of justifica-

tion to support the distinction. (This is the same as applying article I, section 3's highest level of scrutiny; however, the trigger is article III, section 12, rather than the listing in article I, section 3. In this way, the two sections are complementary and not inconsistent.) If it is within the forbidden subjects listed in section 12, the statute falls. If it is not, then advertisement is necessary.

If the statute is a nongeographic classification and concerns one of the subjects listed in section 12, the statute should fall. (Here again, section 12's listing is complementary to article I, section 3—section 12 being the trigger to invoke high scrutiny. The result is the same as if article I, section 3 included these subjects as demanding higher scrutiny.) If the statute is not within the listing, the statute should not be considered special and should stand. No special laws would require advertising, which is consistent with section 13's indication that only geographic classifications invoke the advertising requirement.

This suggested approach differs somewhat from prior jurisprudence, but prior jurisprudence has not been particularly consistent.¹¹⁴ The approach is supported by the fact that the new constitution adopted an equal protection clause, which now must be read in relation to the similar policies of the local or special law provisions. The analysis also helps to solve the problem of applying section 13 to nongeographic classifications. It is also consistent with the attitude displayed in many courts that treat the "local and special" test as one requirement rather than two, for the analysis would limit the special test to the items enumerated in section 12 and focus on the local or geographic discrimination aspect.

Advertisement Procedure

Local or special laws on the subjects listed in section 12 are totally prohibited. Other local or special laws are allowed if the procedure of section 13—the essence of which is advertisement thirty days before introduction of the bill—is adhered to. The advertisement must be in the official journal "of the locality where the matter to be affected is situated."

As section 13 is constructed, it specifies that no local or special law "shall be enacted" unless the intent to introduce such a law has been published. If a bill proposing a general law is introduced and then amended to make it local or special, it would seem that this is an enactment of a local or special law that is covered by section 13. If the notice of intent to introduce is not present, the law must fall. In short, one cannot adopt a local or special law by amendment of

114. See Comment, *supra* note 102.

a bill proposing a general law. An amendment to the committee proposal to adopt what became the final form of section 12 had the express purpose of preventing this amendment process. Delegate Lanier stated:

The problem here would be if you were to introduce a general law, then of course you would not be in violation of this prohibition that requires advertisement of local and special laws. But then, if on the floor it was amended into a local or special law, you could avoid the requirement of the advertisement procedure. So, to avoid this loophole, I think we should . . . put in "enacted by".

. . .¹¹⁵

This conclusion is supported by the adoption, by floor amendment, of article III, section 12(B), which prohibits "indirectly" enacting local or special laws.

RETIREMENT BENEFITS

ARTICLE X, SECTION 29

New to the constitution is an attempt to provide some assurance that governments will pay the benefits due under public retirement systems. Such a provision opens new ground, but the value and enforceability of the guarantee obtained is debatable.

Committee proposals on the subject took three approaches: (1) a "guarantee" by the state or the relevant political subdivision of benefits payable, (2) a declaration that membership in a public retirement system "shall be a contractual relationship between employee and employer," and (3) a statement that "accrued benefits" "shall not be diminished nor impaired."¹¹⁶ The convention debate generally consisted of labor and education forces urging some kind of constitutional protection for workers, although they were not certain of the contours of that protection, while the accountants and other experts tried to avoid uncertainty and ambiguity. The result was the adoption of proposals (1) and (2) and the defeat of proposal (3).¹¹⁷

Guarantee

Under article X, section 29(A), the state "guarantees" benefits payable to members of the teachers retirement system, and under 29(B), it "guarantees" benefits to members of a state retirement

115. V RECORDS: CONVENTION TRANSCRIPTS, July 26, 1973 at 397.

116. Committee Proposal No. 11, § 1 at IV RECORDS: CONVENTION INSTRUMENTS 149.

117. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 5, 1973 at 2560-93; *Id.*, Jan. 11, 1974 at 3284-86.

system.¹¹⁸ The state does not "guarantee" benefits payable to members of retirement systems established by political subdivisions.¹¹⁹ The scope of the guarantee is not specified, but its importance rests on the fact that the state's responsibility goes beyond making contributions to a fund which is invested and which is used to pay retirement benefits. Under this guarantee, the obligation to pay the benefits becomes one backed by the "full faith and credit" of the state. If the money in a retirement system fund is inadequate to pay the benefits, it is the obligation of the state to furnish the funds to make up the difference.¹²⁰

This protection is no small achievement, particularly in contrast to most private retirement systems. Nevertheless, the guarantee is not self-enforcing and there is no mechanism to make the legislature appropriate the funds needed to fulfill the guarantee.¹²¹ For example, the constitution does not provide to employees as strong a guarantee as it provides to bondholders. Article VII, section 9(B) automatically appropriates money to the Bond Security and Redemption Fund sufficient to pay the full faith and credit bonds of the state, "including principal, interest, premiums, sinking or reserve fund, and other requirements." Only after these are paid are funds transferred to the state's general fund. There is also no constitutional means to require the state to tax its citizens in amounts sufficient to pay the retirement benefits guaranteed,¹²² and in times of serious depression, the "guarantee" is by no means an absolute assurance of payment of benefits due.

A Contractual Relationship

Designating membership in a public retirement system "a contractual relationship" is an attempt to invoke the constitutional protec-

118. Teachers and related education employees are not employees of the state. They are employed by local school boards and state universities, but the state provides the teacher retirement system. A separate retirement system is in effect for other state employees, with different benefits and different regulations. See LA. R.S. 17:571-1342 (1950) (schoolteachers); LA. R.S. 42:541-691 (1950) (other state employees).

119. Although an amendment was adopted at one point to make the state the guarantor of benefits due under retirement systems established by political subdivisions, this was deleted at the close of the convention. In both instances, there was little discussion of the issue. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 5, 1973 at 2585; *Id.*, Jan. 11, 1974 at 3284-85.

120. Several references to the "full faith and credit" of the state were made during the debate in explaining the effect of the provision. See IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 5, 1973 at 2561, 2564.

121. See text at notes 28-40, *supra* (Enforcement of Judgments).

122. *United States v. City of Macon*, 99 U.S. 582, 591 (1878); *Meyer v. City of Eufaula*, Okla., 132 F.2d 648, 652 (10th Cir. 1942).

tion against impairment of the obligation of contracts.¹²³ The "contract" would be between employer and employee—employers including the state, state universities, local school boards, and subdivisions of the state. Making the relationship a "contract" precludes analogy to the federal social security program, which has been held not to establish a contractual or vested right, but one subject to change in benefits so long as minimal due process is afforded.¹²⁴ Presumably, the state is circumscribed to a greater extent because it is constrained not only by due process but by also the requirement that there can be no impairment of the obligation of contracts.¹²⁵

An initial inquiry relates to the strength of the contracts clause protection. The standard view is that expectations under contracts are not absolutely protected, but, rather, the state can "restrict a party to those gains reasonably to be expected from the contract."¹²⁶ The depression era debtor relief laws allowed reasonable statutes extending time periods for payment of debts. Under a similar analysis, the same relief probably could be provided the state in times of severe depression.¹²⁷

Although the reasonable expectations accrued under a contract are protected, prospective changes in the retirement systems are permitted. Delegate Flory stated in debate, with respect to legislative changes:

But, under the committee's proposal, what it mandates is that the benefits earned up to the time that the legislature makes a change, which it has every right to do, you can't change those benefits earned up to that point. But you could abolish the system after that, under this language. But what you are doing by your amendment, is taking away the vested right that employee has once he puts his money in that system. That's immoral.¹²⁸

123. LA. CONST. art. I, § 23; see also U.S. CONST. art. I, § 10.

124. "To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands." *Flemming v. Nestor*, 363 U.S. 603, 610 (1960). See also Wollenberg, *Vested Rights in Social Security Benefits*, 37 OR. L. REV. 299, 359 (1958).

125. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 5, 1973 at 2562-63 (especially the remarks of Delegate Jenkins).

126. *El Paso v. Simmons*, 379 U.S. 497, 515 (1965). However, the contracts clause does impose some limits upon the power of a state to abridge existing contractual relationships. "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

127. *Metropolitan Life Ins. Co. v. Morris*, 181 La. 277, 159 So. 388 (1935); *Wrenn v. Miller*, 161 So. 882 (La. App. 2d Cir. 1935).

128. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 5, 1973 at 2567.

Even after providing for several years, for example, that an employee accrues a two percent annuity for each year of covered employment, the legislature is not prohibited from amending the statute to provide a one percent per year accrual for the future. What is due under the existing contract—what is vested, in other words—is the accrued two percent formula for the prior years. Similarly, there should be no problem with changing the rate of the contribution that an employee makes to the retirement fund for the future. There is no vested right to keep contributing at the same rate for the future if the contract does not so provide. More difficult would be statutes changing the base from which the annuity is figured—changing from the “three highest years” formula common today to an “overall average” formula that normally would result in a smaller benefit. Changing the number of years service required before one is eligible to retire also would pose a problem.

It is arguable that one's vested interest when a statute is changed to a less favorable base is the base at the time of the change, as though the employee were to leave employment. Under the existing laws, for example, if one leaves state employment, one's percentage is fixed on that date and one's base is fixed at the three highest years at that time.¹²⁹ Arguably, one whose employment is continued should be no better off as a result. For the remaining period of work, the base would be figured under the new regulations, rather than the three highest years, which would likely come at the end of one's tenure and when one is under the new law. On the other hand, an analogy could be made to the division of pension benefits accorded spouses living under a community regime. The divorced or separated spouse gets a proportionate benefit based on the number of years of contribution or work, taking advantage of the higher base which was earned when the covered spouse was not married to the other person. Thus the divorced spouse gets the benefit of facts that occurred when there was no community.¹³⁰ To use the same approach here and give the benefit of the three highest years perhaps would be granting more than the reasonable expectations. Indeed, in this uncertain area, perhaps the best approach is to focus on defining reasonable expectations. In this regard, the uncertainty as to factors such as continued employment, the rate of inflation or deflation, and the possibility of devaluation of currencies would all suggest that there can be no reasonable reliance on concerns such as base salaries in the future.

129. LA. R.S. 42:710 (Supp. 1978).

130. *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *T.L. James & Co. v. Montgomery*, 332 So. 2d 834 (La. 1976).

There may be greater reliance and expectations placed on those parts of the system that determine the number of years service required before one is entitled to an annuity. If the minimum were changed from 20 to 25 years, for example, that would seem to be a greater invasion of the individual interest than changing the computation of the base. Also, since it is readily determined, it is more certain and more likely to be relied on and thus more "vested." In any event, the basic approach is to balance the intensity of the individual interest against the intensity of the governmental interest, in the style of the current flexible contracts clause analysis.

Diminishing or Impairing

The provision that "accrued benefits" "shall not be diminished nor impaired" was not clear to the accountants and experts. It arguably could have extended to preventing payment of current monies due to retirees if doing so reduced the retirement system fund such that there was less certainty of future retirees collecting their benefits when they retired.¹³¹ If, during one year, more was paid out of the fund than was paid in, future retirees' benefits arguably would be "impaired." Because of this uncertainty, the convention adopted an amendment by Delegate Lowe, a CPA who was also treasurer of the convention, to delete that language.¹³² The result of this action is to give the state and its retirement system managers flexibility in the management of retirement funds without fear that some investment policy or some short term losses might be an improper "diminishing" or "impairing" of members' ultimate benefits.

GAMBLING AND LOTTERIES

ARTICLE XII, SECTION 6

To the purist, provisions that are not self-executing or limitations on the legislature do not belong in a constitution. In the real world of constitutional conventions, however, such provisions become part of the document; the myth and the hope may be more important than the operative legal language. Tradition, compromise, last minute rushes, inertia, and fear of alienating some voters' sacred cows all came into play and resulted in a number of such "nonconstitutional" provisions in the 1974 constitution. Perhaps little ought to be said about them, since they have little legal effect. However, it is important to realize that these provisions are basically sermons and are

131. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 5, 1973 at 2565-66, 2570-74, 2578.

132. *Id.* at 2574, 2584.

not to be applied otherwise. The section on gambling and lotteries is the best example of the fact that the drafters of the constitution knew what they were doing when they provided unenforceable hortatory provisions.

The constitution prohibits government lotteries, but other aspects of gambling are uncontrolled. Article XII, section 6 provides that "[g]ambling shall be defined by and suppressed by the legislature," but this is a nonself-executing provision which leaves the legislature free to work its will with respect to the definition and mode of suppression. The development of this provision is a prime example of the state's accommodation to its pluralistic population, which balances north and south, Catholic and Protestant, Francophone and Anglofile, and black and white in a kind of detente that results in Byzantine politics that justify characterizing the state as the northernmost of the banana republics¹³³ and the most western of the Arab states.¹³⁴

References to gambling or lotteries can be found in most of Louisiana's constitutions. The 1879 document allowed the chartering of the Louisiana lottery, which resulted in an infamously corrupt period of the state's history,¹³⁵ while the other constitutions have prohibited gambling in various forms.¹³⁶ In the 1921 document, the exhortation was more moral than legal. Article 19, section 8, in addition to a prohibition against all lotteries and the sale of lottery tickets, stated, "Gambling is a vice and the Legislature shall pass laws to suppress it." This high-sounding injunction was recognized as nonself-executing in *Gandolfo v. Louisiana State Racing Commission*,¹³⁷ in which the supreme court allowed the legislature to provide for pari-mutuel betting at race tracks. The result was a high-sounding constitutional

133. See V.O. KEY, *SOUTHERN POLITICS* 156 (1950), where Huey Long's control of Louisiana is compared to that of a South American dictator.

134. A.J. LIEBLING, *THE EARL OF LOUISIANA* 18 (1961). See also a quotation attributed to New Orleans mayor Martin Behrman, "You can make prostitution illegal in Louisiana, but you can't make it unpopular." T.H. WILLIAMS, *HUEY LONG* 131 (1969). Perhaps the final result is apt recognition of what the King told Alice: "If there is no meaning in it, that saves a world of trouble, you know, as we needn't try to find any." L. CARROLL, *ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 115 (Schocken ed. 1978).

135. C. DUFOUR, *TEN FLAGS IN THE WIND: THE STORY OF LOUISIANA* 215-16 (1967).

136. Lotteries were constitutionally allowed from 1864-1898: LA. CONST. of 1864, art. 116; LA. CONST. of 1879, art. 167. No mention of the lottery is made in the 1868 constitution. Other constitutions have prohibited gambling: LA. CONST. of 1845, art. 116; LA. CONST. of 1852, art. 113; LA. CONST. of 1898, art. 178; LA. CONST. of 1913, art. 178; LA. CONST. of 1921, art. 19, § 8.

137. 227 La. 45, 78 So. 2d 504 (1954). Although not technically relevant to the constitutional question, the Civil Code's provisions against the enforcement of gambling debts do make exception "for games tending to promote skill in the use of arms, such as the exercise of the gun and foot, horse and chariot racing." LA. CIV. CODE art. 2983.

guarantee that placated some fundamentalist interests, while allowing those who wanted to gamble to do so.

The committees of the constitutional convention, facing a provision which had no important effect and desiring to shorten the document, took no action to continue the prohibition. No committee proposals on gambling were introduced, resulting in a situation in which lotteries would not be prohibited. Attention focused upon this narrow topic as the constitutional convention approached its closing deadline amid marathon workdays and late night sessions. A proposal by Delegate Planchard sought to simply add that "[n]either the state nor any of its political subdivisions shall conduct a lottery."¹³⁸ While acknowledging that his provision would allow private lotteries¹³⁹ and admitting that the term "lottery" was unclear,¹⁴⁰ the delegate referred to the expansion of state lotteries in the eastern United States and stated that his aim was to stop that from occurring in Louisiana. Delegate Burns then introduced an amendment to return to the language of the 1921 constitution, and the debate burst open. Delegate Burns clearly stated that his purpose was more political and moral than concerned with establishing a legal rule. He stated, after the obligatory reference to the Louisiana lottery scandals:

Now, I don't think where an amendment is not going to change anything, it's not going to add anything on to the present law, it's not going to put any further restrictions over and above what we already have and as I say we're people that like horse racing, they're enjoying horse racing, they're enjoying pari-mutuel betting. The people that like bingo games are enjoying them, so why by the actions of this committee, or this convention, especially with reference to the lottery article; why do we want to go out of our way and invite the open and active opposition of that large percentage of the citizens of this state who are absolutely, definitely opposed to lottery, that just as sure as we do it, we're going to get that opposition and I'm not saying that as a threat because they have documents here to show their sentiment?¹⁴¹

But Delegate Burns knew that his proposal did not define gambling and that it was up to the legislature to do so. He said, "[T]his is not going to change one thing that we don't have at the present time except that it will keep it in the constitution and satisfy the voters

138. Delegate Proposal No. 17 at IV RECORDS: CONVENTION INSTRUMENTS 299. See IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 8, 1974 at 3211-12, for the reading of the proposal.

139. IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 8, 1974 at 3213.

140. Planchard admitted, for example, that while off-track betting would be considered a form of lottery, bingo would not. *Id.* at 3212.

141. *Id.* at 3214.

when they go to the polls to vote on this constitution."¹⁴² Delegate Smith supported the proposal and emphasized the political value of the provision in North Louisiana:

Well, I'm not an expert on the definition of gambling, but I know that we should put this in—whether you're from North Louisiana or South Louisiana—our people feel very strongly about this up in our area and this is one of the things they want in there. So, gentlemen, I feel like we're going to hurt ourselves if we don't put this in our constitution.¹⁴³

Some younger lawyer delegates were more explicit. Delegate Fayard said: "If you think that it's politically expedient and it's necessary to adopt this to pass this constitution, I can see the reason why you would vote this way. But, don't get up here and say it does anything; it does nothing . . ."¹⁴⁴ Delegate Jenkins referred to it as "simply moralist preaching" and "hypocritical."¹⁴⁵ Delegate Duval admitted it was pragmatic:

So, I don't think it will have any material effect on the operation of the state. I think it's a purely pragmatic matter; it may facilitate the passage of this document Therefore, for a purely pragmatic reason, because it does not change the law at all, because we will operate as we always have been operating, I urge that we adopt the amendment.¹⁴⁶

He was even more succinct: "I don't want to intellectually defend this thing now; it's purely politically [sic]."¹⁴⁷

In any event, a combination of pragmatists and moralists adopted the Burns amendment and restored the language proclaiming gambling a vice. Worn out at the end of the day, the delegates also quickly adopted an amendment by Delegate Velasquez (a "have your cake and eat it too" amendment) that added that if gambling activities do exist, "they shall be taxed."¹⁴⁸

The next day, Delegate Gravel proposed a compromise provision that was more straightforward in that it omitted the moral condemnation of gambling as a vice and simply stated: "Neither the state nor any of its political subdivisions shall conduct a lottery. Commercial gambling shall be defined by and prohibited by the legislature."¹⁴⁹

142. *Id.*

143. *Id.*

144. *Id.* at 3216.

145. *Id.*

146. *Id.* at 3217.

147. *Id.*

148. *Id.* at 3217-19.

149. IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 9, 1974 at 3227.

When confusion developed over the meaning of "commercial," that word was dropped. An amendment was then adopted to use "suppressed" rather than "prohibited" to continue the existing jurisprudence under the old word choice.¹⁵⁰ An amendment by Delegate Nunez to add that nothing in the constitution should be construed to prohibit gambling by "charitable, benevolent, civic or religious" organizations was also defeated.¹⁵¹

Article XII, section 6 and many other provisions demonstrate that the constitution is a political document, a statement of aspirations by some people, a type of sermon. Some provisions are not binding legal rules that compel or prohibit certain conduct. Such provisions exist for political reasons, and they should not be the basis for courts establishing constitutional doctrine and constitutional limitations.

The legislature has defined gambling in terms of activities conducted as a business, thus excluding nonbusiness gambling activities.¹⁵² This has been held to be a preemption of the field, prohibiting local governments to go beyond the state statute and make nonbusiness gambling criminal.¹⁵³ The precise definition of "lottery" is still uncertain, and it could come into question if a municipality or the state attempted to sponsor certain activities. Delegate Planchard did admit that a municipality could sponsor a poker tournament, but he also suggested that off-track betting would be a "form of lottery that you sell the lottery tickets for."¹⁵⁴ However, the mere sale of tickets is hardly within the traditional definition of "lottery"; neither is pari-mutuel betting. Under court construction of the 1921 constitutional prohibition of lotteries, pari-mutuel betting was not a lottery, and it would seem that continuation of the old rule in this respect was a purpose of the new provision. In bingo, one puts up money for a chance to win something, thus perhaps meeting the definition of lottery. However, the idea that church bingo is not prohibited runs throughout the debate. Perhaps the most certain approach is to recognize that the prohibition has two primary roots: (1) antipathy toward the Louisiana Lottery Company and the current expansion of state lotteries in the eastern United States, and (2) the desire to allow other forms of gambling if the legislature so provides. The constitution does have independent force in this respect, for if something is a lottery, the legislature cannot otherwise define it and allow the state or a governmental agency to conduct it.

150. *Id.* at 3233. *See also id.* at 3229-30.

151. *Id.* at 3230, 3233.

152. LA. R.S. 14:90 (Supp. 1979). *See also* LA. R.S. 14:90.1-90.2 (Supp. 1979).

153. *City of Shreveport v. Kaufman*, 353 So. 2d 995 (La. 1977).

154. IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 8, 1974 at 3212.

CULTURAL RIGHTS

ARTICLE XII, SECTION 4

Article XII, section 4 provides that "the right of the people to preserve, foster, and promote their respective historic linguistic and cultural origins is recognized." An initial problem is the impact of the statement that a right of the people is "recognized." In other sections of the constitution, rights were established¹⁵⁵ or prohibitions were adopted.¹⁵⁶ It seems anomalous then to use an ambiguous word formula and state that a right "is recognized." This imprecise language results from the fact that section 4 was a floor amendment adopted during the last hectic days of the convention. A realistic analysis of the concept behind the proposal would suggest that some right was sought to be established, and it would be overly cynical to simply "recognize" a "right" as a statement of aspirations and hope and not as a binding rule. Although the section resulted from a floor amendment, it does have a long legislative history in the Committee on Bill of Rights and Elections, which first adopted and then rejected a similar proposal.

Proponents of the section were primarily Francophones concerned with the protection of the French Acadian culture. Representatives of the Council for the Development of French in Louisiana appeared before the committee several times to urge some recognition of cultural rights, and delegates from Lafayette and Lake Charles worked strongly for the proposal.¹⁵⁷ Although the ultimate wording is much broader and although one staff research memorandum suggested that preservation of black culture would also be protected by such a proposal, the preservation of French culture was the driving force.¹⁵⁸

An early proposal by Delegate Weiss discloses a concern for language preservation:

People within the state having a distinct language or culture

155. *E.g.*, LA. CONST. art. I, § 4: "Every person has a right to acquire . . . property."

156. *E.g.*, LA. CONST. art. I, § 9: "No law shall impair the right of any person to assemble peaceably"

157. See Committee Proposal No. 35 at IV RECORDS: CONVENTION INSTRUMENTS 268 (no reference was made to cultural rights); IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 4, 1974 at 3099-3100 (Delegate Corne's amendment was adopted); Committee on Bill of Rights and Elections (CBRE) Staff Memo No. 31, May 2, 1973 at X RECORDS: COMMITTEE DOCUMENTS 110. Several attempts to place a cultural rights provision in the Bill of Rights draft were made. See X RECORDS: COMMITTEE DOCUMENTS, June 14, 1973 at 18, 71.

158. See CBRE Staff Memo No. 31, May 2, 1973 at X RECORDS: COMMITTEE DOCUMENTS 110.

have the right to conserve the same. This includes the right of the people of a political subdivision to use the language or languages of their choice in their local schools and other public institutions. Private schools are free to teach in any language.¹⁵⁹

While supporters sought to assure that adoption "would not mean the wholesale replacement of English by French in the parishes of Acadiana,"¹⁶⁰ there was some uncertainty about the reference to instruction in schools. As a result, the last two sentences were deleted in committee, and the proposal read simply, "[p]eople within the state having a distinct language or culture have the right to conserve the same." This cryptic language was criticized because, "[t]he inherent ambiguity in the terms 'distinct language or culture' would leave so much flexibility to court construction that the right guaranteed here [might] indeed be a hollow one."¹⁶¹ Rather than attempt to make the language more precise, the committee simply voted to delete all reference to the subject.¹⁶²

The matter seemed to have been dropped. Then Delegate Corne, a nonlawyer from Lafayette, introduced her amendment during the closing days of the convention. It passed by a 95-1 vote. In explaining her proposal, the author spoke in terms of encouraging bilingualism:

I really don't believe that it would give us a right to do anything that we don't want to do now. However, it would be an encouragement to preserve that which we tried once before to almost eliminate in the State of Louisiana and it would then be an encouragement for the people not to attempt this again.¹⁶³

Nevertheless, the language that was adopted is more than encouragement. It "recognizes" the "right" of the people to "preserve, foster and promote their respective historic linguistic and cultural origins." At issue are the rather ethereal questions of defining linguistic origins and cultural origins, as well as focusing on the conduct that is within the concepts of preserving, fostering, and promoting. The convention records clearly suggest that preserving a language is involved and that Francophones should be able to preserve their language and advance it. However, this has been a federally recognized right since

159. CBRE Tentative Proposal No. 98, May 5, 1973 at X RECORDS: COMMITTEE DOCUMENTS 61.

160. CBRE Staff Memo No. 31, May 2, 1973 at X RECORDS: COMMITTEE DOCUMENTS 110.

161. CBRE Staff Memo No. 46, June 7, 1973 at X RECORDS: COMMITTEE DOCUMENTS 125.

162. CBRE Tentative Proposal No. 164, June 14, 1973 at X RECORDS: COMMITTEE DOCUMENTS 71.

163. IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 4, 1974 at 3100.

Meyer v. Nebraska.¹⁶⁴ The development of the proposal indicates there hardly would be a right to have the public schools teach that language. At best, this provision might be seen as a particularization of those principles protecting the rights of association that have been grafted onto the first amendment, encompassing a right to unite and associate for promotion of certain values and causes. The freedom of thought and expression here involved become close analogues to those federal rights.¹⁶⁵

In any event, a direct power is granted to the courts, for the section is more than an aphorism or appeal to the legislature to act. It is within the scope of the courts to develop and define the terms used, in light of the convention purposes, and develop the scope of the rights to be protected. However, as with its first amendment cousin, it is unlikely that the section would be invoked to protect all cultural origins, such as allowing a member of the Thugs who emigrated to Louisiana to foster his origins by committing ritualistic robbery and murder.¹⁶⁶ The rights covered by the section are vague ones that can be balanced against other interests. Such a narrow construction would be supported at least by the author's stated intent to encourage bilingualism rather than make a drastic innovation.

MEETINGS AND RECORDS

ARTICLE XII, SECTION 3

The Committee on Bill of Rights and Elections proposed article XII, section 3, which gives all persons "the right to observe the deliberations of public bodies and examine public documents, except in cases established by law."¹⁶⁷ This noncontroversial section was adopted with no debate by a vote of 104-6, it being understood that the exception clause therein makes the "right" subject to legislative control. The sponsor admitted that the section established only the presumption of access and that "[o]ur statutes presently spell out which cases are denied."¹⁶⁸

Here again, the subject is under legislative control, and the constitutional provision is merely a precatory admonition. If the legislature were to repeal the existing laws that make exceptions to

164. 262 U.S. 390 (1923).

165. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 904 (1978).

166. See the discussion of the ritualistic Thugs in W. COHEN & J. KAPLAN, *CONSTITUTIONAL LAW* 417 (2d ed. 1982).

167. Committee Proposal No. 35, § 4 at IV RECORDS: CONVENTION INSTRUMENTS 268.

168. IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 3, 1974 at 3073.

open meetings and records, the definitions of "public bodies" and "public documents" would become an issue. In this regard, the convention records provide little guidance.

It should be clear, however, that the ambit of section 3 excludes the legislature. While the House and the Senate are without doubt public bodies, they are regulated by the more specific requirements of article III, section 15. That section requires that action by the House and Senate on any matter intended to have the effect of law shall be taken only in open, public meeting. It is also necessary that there be three separate "readings" of a bill in each house before passage. This device provides some delay for making information about the proposed bills available and prevents "quickie" passage of bills. There also must be a public hearing by a committee and a committee report before passage of a bill. These constitutional requirements are more specific than article XII, section 3 and cannot be abolished by law, as would be permitted if section 3 governed.

The rights of public access under section 3 do exist if the legislature does not provide otherwise. In such a case, section 3 does not provide a sanction for failure to recognize the right. On the other hand, section 15(A) makes clear that an action will not have "the effect of law" if it is not taken in open, public meeting. Prior practice also suggests that a lack of three readings will result in nullity. The close connection of these provisions with the public committee hearing and report also suggests that the failure to provide the hearing and report will result in nullity.

With respect to inspection of documents, a logical remedy is to order that inspection be allowed. But if a meeting was held at which action was taken, should that action be nullified? The history of section 3 does not specify, and, presumably, the existing state legislation that makes exceptions to open meetings governs as long as that legislation remains in effect. If that legislation were repealed, it would appear then that the courts would be able to devise the appropriate means of enforcing this right to have open meetings, and if less radical means are not sufficient, there would seem to be no prohibition against making actions then taken null.¹⁶⁹

It should also be clear that the right is to "observe" the deliberations of public bodies, not to participate or take part in the meetings. In addition, the ambit of the right extends beyond what may be called meetings and includes "deliberations," which would include nonmeetings where such deliberations may occur.

169. See Comment, *Entering the Door Opened: An Evolution of Rights of Public Access to Governmental Deliberations in Louisiana and a Plea For Realistic Remedies*, 41 LA. L. REV. 192 (1980).

CODES

ARTICLE VI, SECTION 10 AND ARTICLE XII, SECTION 14

Two provisions originating in floor amendments by Delegate Singleterry require codification and publication of ordinances and agency regulations. Article VI, section 10 requires the governing authority of a political subdivision to "have a code prepared containing all of its general ordinances" and to make the code generally available to the public. It also requires that "all general ordinances adopted after the approval of the code shall be amendments or additions to the code." Article XII, section 14 provides that any rules, regulations, and procedures adopted by state agencies, commissions, and boards "shall be published in one or more codes and made available to the public."

Both proposals were approved by wide margins (108-5 and 86-0) with little debate. The debate on section 14 occupies but five lines in the convention record, and the only opposition to section 10 related to whether the rule should have been constitutionalized or left to the legislature.¹⁷⁰ The purpose of the provisions was to make local laws and agency rules more accessible:

This section is intended to ease a gigantic problem—the problem of knowing what the local law is. . . . In my area, I must make a sixty mile round trip to the courthouse and look in the minute entries of the meetings of the police jury to find a police jury ordinance. If we are going to give local government more lawmaking power, then local government should, also, have the additional obligation to put that law into a form that people can get their hands on and read so that they will know what law they are subject to.¹⁷¹

The provisions do not expressly prevent a fee being charged to obtain copies,¹⁷² and the author suggested that "if this code were merely xeroxed, pages of the ordinances held together by a staple, I believe this would be in compliance with the section."¹⁷³ It is clear that coverage extends to "all" agencies, boards, and commissions in the case of section 14 and to "each political subdivision" in the case of section 10. It is also true that the rules do not apply to statutes adopted by the legislature. Indeed, section 14 does not expressly require agencies to adopt rules or procedure. It simply requires that

170. IX RECORDS: CONVENTION TRANSCRIPTS, Jan. 4, 1974 at 3099; VII RECORDS: CONVENTION TRANSCRIPTS, Sept. 27, 1973 at 1465-66.

171. VII RECORDS: CONVENTION TRANSCRIPTS, Sept. 27, 1973 at 1465.

172. *Accord id.* at 1465-66.

173. *Id.* at 1465.

those rules, regulations, or procedures that are adopted be published in one or more codes and made available to the public. On the other hand, the governing bodies of political subdivisions were required to codify, within two years of the effective date of the constitution (by January 1, 1977), all of their general ordinances. All subsequent general ordinances had to be amendments or additions to the code.

A threshold problem is the meaning of the term "code" in this context. It would be unrealistic to think of agency rules and procedures or local ordinances as being the material from which sophisticated, systematic codes in the traditional continental perspective are made. In light of the purpose behind making the ordinances and regulations accessible, the reference is more logically one to an arrangement of rules or ordinances by subject matter in a logical fashion—as titles in the Louisiana Revised Statutes or in the then existing city codes.¹⁷⁴

A more serious problem relates to the enforcement of these sections. No doubt, a mandamus remedy is available, since the obligations imposed are mandatory rather than discretionary and do not require implementing legislation to make them effective.

More difficult, however, is the issue of whether the relevant regulations or ordinances are effective if not organized into a code and published. The constitution does not specifically make them ineffective, although it is arguable that failing to comply with these publication requirements is a violation of the constitution itself, the sanction for which ought to be nullity.¹⁷⁵

One approach that limits the problem is the scope given to the definition of "code." If a loose standard is adopted, the fact that rules or ordinances are organized into similar subject matter titles may be sufficient. That approach would be consistent with the purpose of making law available to the public in a readily usable form.

Another step in the analysis of the ordinance requirement is the fact that only "all of its general ordinances" have to be codified, and only "all general ordinances adopted after the approval of the code" are covered by the "amendments or additions" category. However, only a rather small category of rules would not qualify as a "general ordinance." Perhaps a rule of internal management would not qualify

174. References to the availability of the codes of Baton Rouge, New Orleans, and Shreveport would suggest that the loose topical arrangement of those codes would be sufficient. *Id.*

175. With respect to publication, the problem does not exist because of other state laws that require publication before effectiveness—in the state register in the case of state agency rules, LA. R.S. 49:954.1 (Supp. 1974), or in the official journal in the case of local governing authorities, LA. R.S. 33:406 (1950). But what of the requirement that they be made into codes?

as one, but if a rule purports to have the effect of law on the general population, it would seem to be a general ordinance.

The purpose of these two sections would be seriously undermined if unorganized enactments not qualifying as codes were to be given effect. Forcing citizens to make a difficult search of agency records or minutes to find a rule causes the exact problems that the author of the provisions sought to avoid. Failure to make such ordinances null would be tantamount to ignoring the provisions, for no other effective sanction exists.

In a larger sense, the net impact of these sections is to fill the gaps in the laws governing promulgation of local ordinances and agency regulations.¹⁷⁶ Absent a general constitutional rule on this subject, these sections require publication, with the implication that lack of publication makes them ineffective. In addition, they require organization of the laws into a form that is readily accessible to the people. If laws are not in that form, the defect is akin to a lack of promulgation and should be so treated, resulting in nullity.

CAPITAL

ARTICLE XII, SECTION 1

"The capital of Louisiana is the city of Baton Rouge." Article XII, section 1 so provides. Indeed, the legislation calling the convention purported to forbid a change in the capital's location,¹⁷⁷ even though, as one might expect, there was no attempt to change the capital. Yet, the supreme court does not sit in Baton Rouge—it is located in New Orleans. That was so under the 1921 constitution, and the deletion of the requirement that the court sit in New Orleans did not purport to require it to move to Baton Rouge.¹⁷⁸ So, there once again exists a provision that makes one city the capital, but it doesn't require all government or even the most important arms of government to be domiciled there.

176. LA. CONST. art. III, § 19; LA. CIV. CODE arts. 4-7; LA. R.S. 24:173 (1950); LA. R.S. 43:24 (1950 & Supp. 1975); LA. R.S. 43:81 (1950 & Supp. 1975).

177. 1972 La. Acts, No. 2, § 4.

178. LA. CONST. of 1921 art. 7, § 4. Although Draft A submitted by Judge Tate (a Judiciary Department delegate) first included the domicile provisions, XI RECORDS: COMMITTEE DOCUMENTS 346, the provision was not carried forward into the committee proposal, Committee Proposal No. 6 at IV RECORDS: CONVENTION INSTRUMENTS 42, primarily for reasons of brevity and flexibility. See XI RECORDS: COMMITTEE DOCUMENTS, Apr. 20, 1973 at 249.

NATURAL RESOURCES

ARTICLE IX

As article IX, section 1 indicates by its title (Natural Resources and Environment; Public Policy), the section is a statement of policy with a nonbinding mandate that the legislature "shall enact laws to implement this policy." Committee comments indicated the provision would have no self-executing force. The chairman of the Natural Resources Committee introduced the proposal as a compromise under which one could not force the legislature to do anything, as the extent of protection was a matter that the legislature "in its wisdom" would decide.¹⁷⁹

Natural Gas—Article IX, Section 2

While article IX, section 2(A) does make a perfunctory statement about natural gas being "affected with a public interest," the main impact of the section is to allow the legislature to establish any regulatory authority it chooses to regulate natural gas. The Public Service Commission has no right to regulate natural gas. The Natural Resources Committee had proposed to allocate that power to the Commission, but a floor amendment was readily adopted to conform the proposal to legislation that had just been adopted during a special session of the legislature.¹⁸⁰

Section 2(B) does purport to prohibit the connection of an intrastate gas pipeline with an interstate pipeline without approval of some state agency to be established by law. This section reflects an attempt to keep natural gas from being shipped out of the state and thus subject to federal price regulation under the then existing federal statutes. It was basically ineffective as a means of accomplishing its purpose, for any attempts to keep the privately owned product out of interstate commerce would be a violation of federal constitutional law, as has been recognized in *Tenneco, Inc. v. Sutton*.¹⁸¹

179. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 18, 1973 at 2913.

180. IX RECORDS: CONVENTION TRANSCRIPTS, Dec. 18, 1973 at 2920.

181. 530 F. Supp. 411 (M.D. La. 1981).

