

# Louisiana Law Review

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Volume 49  
Number 2 *Developments in the Law, 1987-1988:*  
*A Faculty Symposium*  
November 1988

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Article 10

11-1-1988

## Louisiana Constitutional Law

John Devlin  
*Louisiana State University Law Center*, [john.devlin@law.lsu.edu](mailto:john.devlin@law.lsu.edu)

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# LOUISIANA CONSTITUTIONAL LAW

John Devlin\*

## THE CONSTITUTIONAL LAW OF A FISCAL CRISIS

During the past term, the appellate courts of Louisiana rendered several noteworthy decisions interpreting the state constitution, particularly in the areas of individual rights<sup>1</sup> and criminal law.<sup>2</sup> Yet no group of cases achieved more notoriety or more acutely raised basic constitutional issues regarding the legitimate powers of the state's political bodies and the role of judicial review than the series of cases in which the various legislative responses to the state's current fiscal crisis were upheld against constitutional challenges.<sup>3</sup> The most recent of these cases are: *Louisiana As-*

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\* Assistant Professor of Law, Louisiana State University.

1. These decisions include *Kirk v. State*, 526 So. 2d 223 (La. 1988), which held that the individual dignity (equal protection) clause of the state constitution precluded enforcement of a criminal statute that permitted prosecutors to obtain evidence but prevented defendants from doing likewise; *In re Grand Jury Proceedings (Ridenhour)*, 520 So. 2d 372 (La. 1988), which established guidelines regarding the conditions under which reporters will be required to disclose confidential information; *Gorman v. Swaggart*, 524 So. 2d 915 (La. App. 4th Cir. 1988), which held that neither the federal nor the state constitutional guarantee of religious freedom precluded an action for libel among church members in a matter involving church discipline, at least where the alleged libel was uttered outside of the confines of the church organization; *Ballaron v. Equitable Shipyards, Inc.*, 521 So. 2d 481 (La. App. 4th Cir. 1988), in which the court refused to find that employees enjoyed any constitutional right to refuse lie detector examinations required by their employers; and *Annison v. Hoover*, 517 So. 2d 420 (La. App. 1st Cir. 1987), which held that a zoning ordinance did not constitute a "taking" requiring compensation even though it had the effect of prohibiting existing uses.

2. These decisions include *State v. Spooner*, 520 So. 2d 336 (La. 1988), which held the criminal forfeiture provisions of Louisiana Revised Statutes 32:1550 (Supp. 1988) unconstitutional in part; *State v. Parns*, 523 So. 2d 1293 (La. 1988), which held that sobriety roadblocks operated by the police violate both the federal and state constitution unless the officers' discretion as to the detention of automobiles and administration of the test is governed by some written policy or other neutral criterion; and several decisions refining and implementing the United States Supreme Court's ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986) that criminal prosecutors may not exercise peremptory challenges in a racially discriminatory manner.

3. Since the state's fiscal crisis has been developing for several years, it is not surprising that the decisions considered here are only the latest in a series of cases that raise similar issues. Related cases decided prior to this past term include *State Bond Comm'n v. All Taxpayers*, 510 So. 2d 662 (1987), which held that revenue anticipation

*sociation of Educators v. Edwards*,<sup>4</sup> in which the court held that the state constitution did not require the legislature to fully fund the Minimum Foundation Program for public education; *State Bond Commission v. All Taxpayers*,<sup>5</sup> in which the court permitted the state to sell short-term revenue anticipation notes even though the money to repay those notes would not be received until the following fiscal year; and *Board of Directors v. All Taxpayers*,<sup>6</sup> in which the Louisiana Supreme Court validated the use of a special taxing district coterminous with the state as a mechanism to sell long-term bonds on the state's behalf despite the constitutional prohibition against the state selling such bonds directly.

In none of these cases did the court announce any new rules of constitutional law or interpretation. In each case, the court based its decision on the familiar principle that the legislature's plenary authority over state finances allows it to take any action relating to finances not expressly forbidden by the state constitution. Nevertheless, these cases are noteworthy because of the potentially expansive way the court interpreted this principle. In the wake of these cases it appears that, at least in areas so fully committed to legislative control, arguments based on the general structure of the constitution and its drafters' overall purposes do not suffice. Rather, a successful constitutional challenge to legislation regarding finances now requires something approaching an explicit constitutional prohibition of the specific action in the particular form that the legislature employed.

#### *Round 1: Minimum Funding and the Minimum Foundation Program*

*Louisiana Association of Educators v. Edwards*, the first of the three decisions to be handed down, is probably also the least controversial. The case concerned article VIII, section 13(B) of the Louisiana Constitution of 1974, which mandated that the legislature "shall appropriate funds sufficient to insure a minimum foundation program of education in all public elementary and secondary schools" and that those funds "shall be equitably allocated" among the state's school systems "according to

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notes payable within the same year that the notes are issued did not constitute "debt" subject to the limitations of La. Const. art. VII, § 6, and *Bruneau v. Edwards*, 517 So. 2d 818 (1987), which held that the legislature could constitutionally delegate to the governor the power to withhold appropriated funds as a budget balancing measure. As is discussed at *infra* text accompanying notes 63-64, all of these cases raise similar issues regarding whether and to what extent the structure of the state constitution and the intent of its drafters limit the otherwise plenary prerogatives of the legislature, even though the drafters did not foresee, discuss, or explicitly provide for the particular action that the legislature took.

4. 521 So. 2d 390 (La. 1988), discussed at *infra* notes 7-29 and accompanying text.

5. 525 So. 2d 521 (La. 1988), discussed at *infra* notes 30-40 and accompanying text.

6. 529 So. 2d 384 (La. 1988), discussed at *infra* notes 41-63 and accompanying text.

formulas adopted by the state Board of Elementary and Secondary Education and approved by the legislature.”<sup>7</sup> The framers intended this section to continue, in a shorter and more flexible form, the state’s historic commitment to insuring at least some approximation of equality of educational opportunity for all students within the state.<sup>8</sup>

Pursuant to this constitutional mandate, the Board of Elementary and Secondary Education (“the board”) has from time to time adopted “equalization formulas,” which determine how the money appropriated pursuant to the Minimum Foundation Program will be distributed among needy schools. The most recent of these formulas was approved by the legislature in 1984.<sup>9</sup> The budget request submitted to the legislature each year by the state Department of Education includes a request for funding the Minimum Foundation Program. The dollar amount of the request is computed using the most recent legislatively approved formula, the number of pupils enrolled in each school district, and the statutorily required levels of instruction and expenditure so as to insure that each school will have enough funds to meet minimum standards.<sup>10</sup> Prior to 1986, the

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7. La. Const. art. VIII, § 13(B) (1974), as it existed at the time this case was brought, provided in full as follows:

The legislature shall appropriate funds sufficient to insure a minimum foundation program of education in all public elementary and secondary schools. The funds appropriated shall be equitably allocated to parish and city school systems according to formulas adopted by the State Board of Elementary and Secondary Education and approved by the legislature.

Effective December 27, 1987, section 13(B) was amended to greatly restrict the authority of the governor and legislature to appropriate less than the amount called for by the formula and proposal submitted by the State Board of Elementary and Secondary Education (BESE). For the text of the section as amended, see *infra* note 18.

8. La. Const. art. XII, § 14, fifth (1921), as amended, provided that the legislature “must and shall provide . . . a minimum amount in [the] State Public School Fund of not less than Ten Million Dollars (\$10,000,000.00) per annum,” and of that amount:

One-fourth (1/4) of this State fund shall be apportioned and distributed to the parish school boards on the basis of equalization, so as to provide and insure a minimum educational program in the common public schools, which shall be set up by the State Board of Education for all parishes of the State

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On the purpose of section 13(B) to continue this historical state function of redistributing funds from statewide sources to relatively poorer districts, see 9 Records of the Louisiana Constitutional Convention of 1973, Convention Transcripts 2444-46 [hereinafter Records] (remarks of delegate Burson).

9. H.R. Res. 74, 10th Reg. Sess. (1984).

10. The minimum educational contents and expenditures have been specified by the legislature in Title 17 of the Revised Statutes. For example, Louisiana Revised Statutes 17:225 (1982) mandates generally that the school year comprise 180 days of instruction and Louisiana Revised Statutes 17:421.3(A) (Supp. 1988) lists minimum teacher salaries. In addition §§ 261, 262, 268, 273, and 274 of Title 17 all mandate various required subjects of instruction.

legislature apparently never refused to fully fund the Department's request for the Minimum Foundation Program.

In its budget request for the 1986-87 school year, the Department of Education sought \$976,876,802 to fund the Minimum Foundation Program. But this time the legislature, beset by insufficient revenues, appropriated only \$932,437,532, a reduction of approximately 4.55 percent.<sup>11</sup> The Louisiana Association of Educators and various individual plaintiffs sued, seeking a judicial declaration that the legislature was bound to fully fund the Minimum Foundation Program by the mandatory terms of article VIII, section 13(B) of the constitution. Plaintiffs argued that the formula which the legislature had previously approved and the budget request which was based upon that formula conclusively established the minimum level of funding necessary to fulfill the legislature's constitutional duty "to insure a minimum foundation program of education."<sup>12</sup> The district court granted plaintiffs' motion for summary judgment.

On the ensuing appeal, the supreme court reversed, holding that the legislature has the exclusive authority to determine how much money will be appropriated for the program and that the sole function of the equalization formula is to provide for equitable distribution of whatever money the legislature chooses to appropriate.<sup>13</sup> In reaching its conclusion, the court looked both to the familiar principle that absent explicit constitutional mandate the legislature enjoys plenary control over state finances,<sup>14</sup> and to the specific wording of section 13(B).<sup>15</sup>

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11. 1986 La. Acts No. 17. The action also challenged two executive orders of Governor Edwards, Exec. Order EWE 86-31, 12 La. Reg. 749 (1986) and Exec. Order EWE 86-36, 12 La. Reg. 752 (1986) that reduced the funds available for the program by an additional five percent to \$885,815,665. This latter set of cuts, however, was rescinded prior to the hearing before the District Court, and that portion of the suit was thereby mooted.

12. La. Const. art. VIII, § 13(B) (1974), quoted at *supra* note 7.

13. *Louisiana Ass'n of Educators*, 521 So. 2d 390, 394 (La. 1988).

14. *Id.* (citing *Woodard v. Reilly*, 244 La. 337, 378, 152 So. 2d 41, 56 (1963) and *Wall v. Close*, 203 La. 345, 389, 14 So. 2d 19, 34 (1943)).

15. 521 So. 2d at 392, 394. The court read the two sentences making up section 13(B) separately. As the court noted, the first sentence, which concerns appropriations, speaks only of the legislature. The second sentence, which refers to the BESE formula, speaks only of equitable distribution of funds, not the amount or source of those funds.

Though the court did not rely upon them, the records of the 1973 constitutional convention clearly support the court's reading of section 13(B). In the debates on the provision that was to become section 13(B), the delegates were quite explicit that the equalization formula adopted by the Board of Elementary and Secondary Education could not bind the legislature to appropriate any particular amount of money. The section was rewritten into its present form specifically to separate the two functions of appropriation, a function of the legislature alone, and equitable distribution, a shared responsibility of the legislature and the Board. 9 Records, *supra* note 8, at 2438 (remarks of delegate Womack), 2442 (remarks of delegate Burson), 2444 (remarks of delegates Rayburn and Burson).

While the court in *Louisiana Association of Educators* conceded that the state constitution may mandate the amounts of certain legislative appropriations,<sup>16</sup> the burden of the case appears to be that the legislature's judgment will prevail unless the allegedly mandatory constitutional provision at issue is very explicit indeed. In the situation presented in this case, where the constitution mandates that a program exist but sets no specific level of funding, it appears that no challenge will succeed unless it can be shown that the amount appropriated by the legislature is so low as to constitute an essential abandonment of the program.<sup>17</sup>

While this litigation was pending, section 13(B) was completely rewritten and ratified by the voters to more explicitly limit the power of the legislature with respect to the funding of the minimum foundation program. As that section of the state constitution now reads, the legislature retains its power to approve or reject any equalization formula proposed by the Board. However, the section now mandates that once the formula is adopted the legislature "shall" appropriate funds sufficient to fund the program "as determined by applying the approved formula . . . ." Moreover, the amended section now explicitly prohibits reductions in the appropriations for the program by the legislature or the governor except with the written consent of two-thirds of the legislature's members.<sup>18</sup>

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16. See, e.g., *State ex rel. Nunez v. Baynard*, 15 So. 2d 649, 658-59 (La. App. 1st Cir. 1943), holding that where the constitution sets the salary of governmental officers, the legislature must appropriate the funds necessary to carry out the constitutional mandate.

17. *Louisiana Ass'n of Educators*, 521 So. 2d at 394, stating that the legislature's discretion to set the level of funding is subject only to the requirement that the Minimum Foundation Program be preserved.

18. The amended provision, effective December 23, 1987, now provides:

Minimum Foundation Program. The State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems. Such formula shall provide for a contribution by every city and parish school system. Prior to approval of the formula by the legislature, the legislature may return the formula adopted by the board to the board and may recommend to the board an amended formula for consideration by the board and submission to the legislature for approval. The legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools. Neither the governor nor the legislature may reduce such appropriation, except the governor may reduce such appropriation using means provided in the act containing the appropriation provided that any such reduction is consented to in writing by two-thirds of the elected members of each house of the legislature. The funds appropriated shall be equitably allocated to parish and city school systems according to the formula adopted by the State Board of Elementary and Secondary Education, or its successor, and approved by the legislature prior to making the appro-

The evident purpose of the revision of section 13(B) was to prevent any future legislative reduction of funds for the Minimum Foundation Program; the difficult question is whether it will succeed. In light of the court's recent pronouncements regarding the legislature's plenary power over state finances, including those discussed herein, it seems at least possible that despite its evident intent the new section 13(B) will still not be interpreted to require the legislature to appropriate whatever funds the Board of Elementary and Secondary Education deems necessary, even if that budget request is based on an equalization formula previously approved by the legislature.

The Louisiana Supreme Court has repeatedly held, most recently in *Louisiana Association of Educators* and in *Bruneau v. Edwards*,<sup>19</sup> that the state legislature is the repository of the whole of the state's legislative power<sup>20</sup> and enjoys plenary and exclusive power over appropriation of state funds. Where it is specifically contemplated by a constitutional provision, the legislature may delegate certain appropriative functions to other governmental entities.<sup>21</sup> Examples of this include article IV, section 5(G)(2), which authorizes the governor's line item veto, or article VIII, section 13(B), which mandates a role for the Board in adopting an equalization formula.<sup>22</sup> Such delegation will be approved, however, only if the constitutional authorization extends to the particular power at issue and the delegated authority is exercised for the constitutionally contemplated purpose.<sup>23</sup>

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priation. Whenever the legislature fails to approve the formula most recently adopted by the board, or its successor, the last formula adopted by the board, or its successor, and approved by the legislature shall be used for the determination of the cost of the minimum foundation program and for the allocation of the funds appropriated.

La. Const. art. VIII, § 13(B) (effective December 23, 1987).

19. 517 So. 2d 818 (La. 1987).

20. La. Const. art. III, § 1.

21. *Bruneau*, 517 So. 2d at 826.

22. This specific constitutional authorization of Board participation in formulating the minimum foundation program would also appear to dispose of any challenge to the revised section 13(B) based on separation of powers principles. As the court in *Bruneau* noted with respect to article IV, section 5(G)(2), separation of powers is only required "except as otherwise provided by the constitution," and "[t]he constitution contemplates and expressly provides for exceptions to the separation of powers," in sections such as these. *Bruneau*, 517 So. 2d at 826, citing La. Const. art. II, § 2.

23. Thus in *Bruneau v. Edwards*, 517 So. 2d 818 (La. 1987), the court upheld those parts of 1986 La. Acts No. 10, 1st Ext. Sess., and 1986 La. Acts No. 38, 1st Ext. Sess. that authorized the governor to withhold expenditure of appropriated funds as a budget balancing measure, but struck down as unconstitutional those parts that purported to authorize the governor to "transfer funds from one budget unit to another." The court reasoned that the former power was constitutionally authorized, and the governor's discretion was sufficiently guided by La. Const. art. IV, § 5(G)(2), which provides for a

The revised section 13(B) raises no question of improper delegation of legislative authority to the Board since the constitution itself now explicitly grants some budget making authority to that body.<sup>24</sup> The court in *Louisiana Association of Educators*, however, drew a sharp distinction between the constitutional function of the legislature's appropriation, which sets the amount of money available for the program, and the Board's equalization formula, which only provides for allocation of the funds actually appropriated, whatever the amount. Thus, it might be argued that insofar as the Board attempts to use the formula to require a particular level of expenditure, it oversteps its proper authority under section 13(B), even as revised.

A second potentially serious problem is posed by the manner in which revised section 13(B) seeks to limit the legislature's discretion. To be sure the constitutional mandate of an equalization of expenditures does not, in itself, present a problem. Certainly the constitution can mandate particular appropriations,<sup>25</sup> and there is no inherent conceptual reason why this mandate cannot take the form of a required formula instead of a required dollar amount. Thus, for example, if the constitution required that appropriations for a particular purpose increase by a specified amount each year or vary according to a fixed formula based on state population, there is little reason to think that the legislature would have any discretion regarding the amounts of its appropriation.

The issue presented by revised section 13(B), however, is not so simple. The legislature is given express power to approve or disapprove any formula proposed by the board, so the section does not bind the legislature to any fixed level of funding or even any formula for computing the Minimum Foundation Program appropriation. This revised section 13(B), rather than mandating any fixed expenditure or formula, attempts instead to limit the legislature's discretion by requiring it to appropriate funds in accord with whatever formula it had most recently approved, prior to the appropriation at issue. But for this to function as a meaningful restriction, revised section 13(B) would have to be interpreted as with-

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gubernatorial line item veto for the purpose of assuring that "total appropriations for the year shall not exceed anticipated revenues for that year." The second power granted by those Acts, however, which simply permitted transfer of funds, was held to be outside the scope of permissible delegable power under section 5(G)(2).

24. La. Const. art. VIII, § 13(B), quoted at *supra* note 18.

25. For example, La. Const. art. XII, § 14 (1921), as amended, quoted at *supra* note 8, required an appropriation of at least \$10 million per year to fund the state's public schools. There can be little doubt that the legislature would be required to honor so explicit a requirement. See generally, *Bruneau v. Edwards*, 517 So. 2d at 826 n.4 (implying that the legislature could not delegate to the governor authority to withhold funds required for the operation of other constitutional branches of government); *State ex rel. Nunez v. Baynard*, 15 So. 2d 649 (La. App. 1st Cir. 1943) (discussing constitutionally mandated salary payments for executive officers).



drawing from the legislature the power to reconsider an equalization formula once approved; in effect, the section would have to deny the legislature the power to change its own mind. While that is certainly what the revised section seems intended to accomplish, that aim conflicts with the legislature's plenary authority granted by article III. Any possible reconciliation of these conflicting provisions might have to allow the legislature greater flexibility than revised section 13(B) purports to grant.<sup>26</sup> It is one thing to say that the legislature may delegate authority to produce a budget for a particular purpose, but it may be something quite different to argue that the legislature cannot withdraw that delegation if it later disagrees with its delegatee's exercise of that authority.

Finally, even if the above problems were to be resolved in favor of restricting the legislature's prerogatives, it would still be questionable whether the constitutional mandate regarding appropriations is judicially enforceable. Where the constitution specifically sets up a special fund for a designated purpose, the appropriation is regarded as self-executing and enforceable.<sup>27</sup> Where the constitution merely requires the legislature to take a particular action, however, as article 1, section 13 requires the legislature to establish "a uniform system for securing and compensating qualified counsel for indigents,"<sup>28</sup> the constitutional mandate is clearly not self-executing, and it may not be enforceable in court.<sup>29</sup> Revised section 13(B), which merely directs the legislature to make its appropriation

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26. It is well established that constitutional provisions should be construed to give effect to their clear purpose. See, e.g., *Board of Comm'rs v. Department of Natural Resources*, 496 So. 2d 281, 298 (La. 1986); *State ex rel. Guste v. Board of Comm'rs*, 456 So. 2d 604, 609 (La. 1984); *Barnett v. Deville*, 289 So. 2d 129, 146 (La. 1974). However, where one constitutional provision appears to conflict with another, as section 13(B)'s withdrawal from the legislature of the power to reconsider an equalization formula once approved appears to conflict with the legislature's broad authority under art. III, § 1, it is equally well established that the provisions must be interpreted so as to give each its proper scope and effect. *State ex rel. Guste*, 456 So. 2d at 609. Here such a reconciliation might be accomplished by interpreting section 13(B) as simply requiring the legislature to pass a resolution rejecting a previously approved equalization formula and agreeing with the board on a new and lower formula before appropriating an amount lower than originally requested. See generally, T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 152-54 (4th ed. 1878) (discussing irrepealable laws).

27. See, e.g., La. Const. Art. VII, § 9(B), establishing the Bond Security and Redemption Fund, which has first call on state revenues and a self-executing mandate to pay from those revenues "all obligations which are secured by the full faith and credit of the state and which become due and payable within the current fiscal year." The obligation to make such payments from this fund is judicially enforceable, even in the absence of legislative action.

28. La. Const. art. I, § 13.

29. *State v. Bryant*, 324 So. 2d 389, 392-93 (La. 1975). See generally Hargrave, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Louisiana Constitutional Law*, 38 La. L. Rev. 438, 441-42 (1978).

in accordance with the Minimum Foundation Program formula, appears to fit within the latter category.

### *Round 2: Revenue Anticipation Notes Revisited*

During its 1986-1987 term, the Louisiana Supreme Court considered for the first time the constitutional status of short term "revenue anticipation notes" issued by the state to cover anticipated cash flow shortfalls. In *State Bond Commission v. All Taxpayers (Bond Commission I)*,<sup>30</sup> the court held that because the notes at issue were not backed by the state's full faith and credit and because they were to be repaid during the same fiscal year as they were issued, the notes did not constitute "debt" under article VII, section 6 of the Louisiana Constitution of 1974 and could be issued free of the restrictions on state debt contained in that section.<sup>31</sup>

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30. 510 So. 2d 662 (La. 1987). The decision in this case was discussed in this space last year. Devlin, *Developments in the Law, 1986-1987—Louisiana Constitutional Law*, 48 La. L. Rev. 335 (1987).

31. This section reads:

(A) Authorization. Unless otherwise authorized by this constitution, the state shall have no power, directly or indirectly, or through any state board, agency, commission, or otherwise, to incur debt or issue bonds except by law enacted by two-thirds of the elected members of each house of the legislature. The debt may be incurred or the bonds issued only if the funds are to be used to repel invasion; suppress insurrection; provide relief from natural catastrophes; refund outstanding indebtedness at the same or a lower effective interest rate; or make capital improvements, but only in accordance with a comprehensive capital budget, which the legislature shall adopt.

(B) Capital Improvements. If the purpose is to make capital improvements, the nature and location and, if more than one project, the amount allocated to each and the order of priority shall be stated in the comprehensive capital budget which the legislature adopts.

(C) Full Faith and Credit. The full faith and credit of the state shall be pledged to the repayment of all bonds or other evidences of indebtedness issued by the state directly or through any state board, agency, or commission pursuant to the provisions of Paragraphs (A) and (B) hereof. The full faith and credit of the state is not hereby pledged to the repayment of bonds of a levee district, political subdivision, or local public agency. In addition, any state board, agency, or commission authorized by law to issue bonds, in the manner so authorized and with the approval of the State Board Commission or its successor, may issue bonds which are payable from fees, rates, rentals, tolls, charges, grants, or other receipts or income derived by or in connection with an undertaking, facility, project, or any combination thereof, without a pledge of the full faith and credit of the state. Such revenue bonds may, but are not required to, be issued in accordance with the provisions of Paragraphs (A) and (B) hereof. If issued other than as provided in Paragraphs (A) and (B), such revenue bonds shall not carry the pledge of the full faith and credit of the state and the issuance of the bonds shall not constitute the incurring of state debt under this constitution. The rights granted to deep-water port commissions or deep-water

In *State Bond Commission v. All Taxpayers (Bond Commission II)*<sup>32</sup> last term, the court confronted a challenge to the constitutionality of such notes for the second time. As was perhaps predictable, the notes approved in the first action only temporarily eased the state's cash flow problems. It became apparent toward the end of the state's 1987-88 fiscal year that the funds collected within the fiscal year would be insufficient to pay the warrants that would come due before the year's end. In response the legislature authorized the issuance of additional revenue anticipation notes that, unlike their predecessors, would not necessarily be repaid within the same fiscal year. Rather, the new notes could be repaid from "revenues which will accrue and be credited to the state general fund for the fiscal year in which the notes are issued but which will actually be received in the next succeeding fiscal year."<sup>33</sup>

The state bond commission brought an action to determine the validity of this latter series of notes. The defendants argued that since the notes would not be paid within the same year as issued, they fell outside of the constitutional safe haven previously outlined by the court in *Bond Commission I*. Moreover, the defendants contended, the issuance of the notes would violate article III, section 16 of the Louisiana Constitution of 1974, which prohibits the legislature from appropriating funds for longer than one year.<sup>34</sup>

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port, harbor, and terminal districts under the constitution shall not be impaired by this Section.

(D) Referendum. The legislature, by law enacted by two-thirds of the elected members of each house, may propose a statewide public referendum to authorize incurrence of debt for any purpose for which the legislature is not herein authorized to incur debt.

(E) Exception. Nothing in this Section shall apply to any levee district, political subdivision, or local public agency unless the full faith and credit of the state is pledged to the payment of the bonds of the levee district, political subdivision, or local public agency.

La. Const. art. VII, § 6.

32. 525 So. 2d 521 (La. 1988).

33. 1988 La. Acts No. 14, § 1, 1st Ext. Sess., to be codified at La. R.S. 39:1410.45(A). Revenue anticipation notes were first authorized by 1986 La. Acts No. 28, codified at Louisiana Revised Statutes 39:1410.41 to 1410.53 (Supp. 1988). No such notes were issued before June 30, 1987, when the statutory authorization provided by this act expired. The legislature then enacted 1987 La. Acts No. 61, which amended those provisions to extend the expiration date until June 30, 1988. The most recent act further amended those provisions by: 1) extending the expiration date of the authorization to June 30, 1989; 2) deleting provisions limiting the face amount of notes issuable to twenty percent of anticipated revenues; and 3) permitting notes to be repaid from revenues credited to the state but not received in the fiscal year in which the notes were issued.

34. La. Const. Art. III, § 16(A) provides: "Except as otherwise provided by this constitution, no money shall be withdrawn from the state treasury except through specific appropriation, and no appropriation shall be made under the heading of contingencies or

The supreme court rejected these arguments. The court once again began its analysis with a reaffirmation of the legislature's plenary power over state finances, which required that legislative action be upheld absent a clear showing that the action is prohibited by some specific constitutional provision.<sup>35</sup> Applying this principle, the court reasoned that the extension of short-term borrowing across the boundary of the fiscal year was essentially nothing more than a change of accounting procedures. In the court's view, attributing both the expenditure of funds required to repay the notes and the revenues that would be used for that repayment to the current year in which they "accrue," rather than the following year in which the funds would be received and payment made, merely constituted a change from a cash basis accounting to an accrual basis.<sup>36</sup>

While the court was certainly correct in concluding that the state constitution permits the legislature to use any reasonable accounting procedures, it seems less certain that an accounting issue is all that was involved in the case. At a minimum it appears that the court also implicitly modified its prior definition of "debt" under the meaning of article VII, section 6 of the constitution. The court had previously relied heavily upon its perception of the section 6 term "debt" as a technical term of art, and upon equally technical features such as repayment within a fiscal year and absence of the state's full faith and credit to distinguish revenue anticipation notes from constitutional "debt."<sup>37</sup> By holding that revenue anticipation notes remain something other than "debt," even in the absence of one of these technically distinguishing features,<sup>38</sup> the court appears

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for longer than one year."

In addition to the arguments discussed in the text, the defendants also contended that the general commitment of funds not yet received to repay the notes during the following fiscal year constituted an impermissible withdrawal of money without the constitutionally required "specific appropriation." The court properly dismissed that argument, noting that specific appropriations were made regarding the disposition of the proceeds of the notes, and that merely repaying the notes as they came due involved no expense requiring a new appropriation. *State Bond Comm'n*, 525 So. 2d at 526.

35. 525 So. 2d at 525 (citing *Board of Elementary and Secondary Educ. v. Nix*, 347 So. 2d 147 (La. 1977)).

36. 525 So. 2d at 525.

37. *State Bond Comm'n v. All Taxpayers*, 510 So. 2d 662, 665 (La. 1987).

38. While the defendants did not argue directly that issuance of these notes violated article VII, section 6, the court nevertheless was required to consider whether the notes did or did not constitute "debt" under the meaning of that section. Defendants alleged that the extremely expedited procedure used to decide their challenge violated La. Const. art. VII, § 8(C), which provides that taxpayers have thirty days to contest a validation action brought with regard to any "[b]onds, notes, certificates, or other evidences of indebtedness of the state." The court held that section 8(C) must be read in conjunction with and was limited by the definition of "debt" under section 6(A). Since the revenue anticipation notes did not constitute debt under the meaning of section 6(A), section 8(C) did not apply to an action brought for their validation. Thus, the expedited schedule and

to be moving toward a more functional approach to determining the constitutionality of the state's efforts to cope with its fiscal crisis. Rather than focusing upon technical distinctions, the court is examining such practical questions as whether a particular mechanism generates new funds that the state would not otherwise receive, whether it entails additional expenditures, and whether it burdens future taxpayers and legislatures.<sup>39</sup> This functional approach appears to be a preferable way of assuring the legislature adequate flexibility in fiscal affairs while simultaneously respecting the intent of the framers and ratifiers of the 1974 constitution to limit the state's authority to contract debts to the detriment of future generations.<sup>40</sup>

### *Round 3: The Louisiana Recovery District Litigation*

In *Board of Directors v. All Taxpayers*,<sup>41</sup> the latest and most problematic of the term's trilogy of fiscal crisis cases, the Louisiana Supreme Court considered the constitutionality of Act 15 of the First Extraordinary Session of 1988. That act established the "Louisiana Recovery District" and authorized the district to levy and collect a statewide one percent sales-and-use tax without a tax election.<sup>42</sup> The Act further authorized the

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the permanent injunction that the court issued against other challenges to the notes' validity contravened neither section 8(C) nor the "open courts" guarantee of La. Const. art. I, § 22.

39. See *State Bond Comm'n*, 525 So. 2d at 526, relying on the absence of new funds or new expenditures to dismiss defendant's argument that the notes at issue there violated the "specific appropriations" requirements of La. Const. art. III, § 16. The argument that the essential difference between constitutionally limited "debt" and other fiscal mechanisms turns essentially upon the effect of the mechanism on future legislatures and taxpayers was also referred to in passing by the court in its initial revenue anticipation note case, *State Bond Comm'n*, 510 So. 2d at 666.

40. For a discussion of the integrated scheme of La. Const. art. VII and the conflict between methods of constitutional interpretation based upon "words of art" or other formal maxims and methods based upon more policy-oriented and functional approaches, see Devlin, *supra* note 32, at 339, 349-54.

41. 529 So. 2d 384 (La. 1988).

42. Louisiana Recovery District Act, 1988 La. Acts No. 15, 1st Ext. Sess., § 6. The Act provides, in pertinent part:

A. In order to provide funds for the purpose of assisting the state in reducing or eliminating its deficit or to remedy cash flow shortfalls of the state or pay obligations of the state in connection therewith, the district is hereby authorized, to levy and collect a sales and use tax not to exceed one percent, said tax to be effective on or after July 1, 1988; provided, however, that the district shall not be authorized to levy the tax authorized herein if the rate thereof, when combined with the rate of all other sales and use taxes levied on a statewide basis, exceeds four percent.

B. The tax so authorized shall be imposed by ordinance adopted by the district without the need of an election . . . .

District to sell long term bonds for the primary purpose of eliminating the state's accumulated operating deficit of approximately \$1.3 billion.<sup>43</sup> The notes are to be funded by that one percent tax, but not backed by the state's full faith and credit. The Act designated the district as both a "special taxing district" and a "political subdivision" of the state, and its boundaries were coterminous with those of the state.<sup>44</sup>

The District brought this action as a bond validation suit, and it was answered by a single individual. Defendant's primary assertion was that article VI, section 19 of the Louisiana Constitution of 1974, which deals with special districts and other political subdivisions of the state, permits the legislature to establish special districts and political subdivisions only in a manner "[s]ubject to and not inconsistent with" other more specific provisions of the state constitution.<sup>45</sup> Defendant alleged that this limitation requires, among other things, that such districts remain "local" in nature, and thus precludes special districts coterminous with the state.<sup>46</sup> In a related argument, the defendant also claimed that the taxing power given to the District violated certain specific provisions of article VI because

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D. The proceeds of the tax herein authorized shall be irrevocably pledged and dedicated for the following purposes and in the following order of priority: (i) for the payment of amounts due or to become due on bonds . . . ; (ii) for paying costs annually incurred that are associated with such bonds . . . ; (iii) to provide for the redemption, retirement, or purchase of the bonds issued hereunder in advance of their maturity as may be determined by the district; and (iv) to transfer such amounts as may be determined by the district to assist the state or any political subdivision in reducing its deficit or remedying cash flow shortfalls or paying obligations of the state in connection therewith or purchasing or retiring bonds of the state.

43. *Id.*, § 7.

44. *Id.*, § 2.

45. La. Const. art. VI, § 19 contains a general statement of the legislature's power to create special districts, providing as follows:

Subject to and not inconsistent with this constitution, the legislature by general law or by local or special law may create or authorize the creation of special districts, boards, agencies, commissions, and authorities of every type, define their powers, and grant to the special districts, boards, agencies, commissions, and authorities so created such rights, powers, and authorities as it deems proper, including, but not limited to, the power of taxation and the power to incur debt and issue bonds.

46. Defendant argued that the initial phrase of La. Const. art. VI, § 19, "[s]ubject to and not inconsistent with this constitution," should be read as an implied limitation on the powers of the legislature that restricts its authority to create special districts to only those types of districts that are authorized or at least contemplated by other more specific constitutional provisions. Since several constitutional provisions appear to assume that "special districts" will be essentially local in their responsibilities, but no provision appears to contemplate such a district covering the entire state, defendant concluded that the legislature was impliedly precluded from creating district coterminous with the state.

the tax would be used for statewide rather than local purposes<sup>47</sup> and because the tax was levied without an election.<sup>48</sup> Finally, the defendant

47. La. Const. art. VI, § 30 provides:

A political subdivision may exercise the power of taxation, subject to limitations elsewhere provided by the constitution, under authority granted by the legislature for parish, municipal, or other local purposes, strictly public in their nature. This section shall not affect similar grants to political subdivisions under self-operative sections of this constitution.

Defendant argued that the reference to "parish, municipal or other local purposes" constituted a substantive limit on the power of a political subdivision to tax, precluding the use of such revenues for "statewide" purposes. Here, although some of the excess revenues of the Louisiana Recovery District might eventually be turned over to localities, it is evident that the proceeds of the bond sale would be used solely for "state" purposes, to pay off the state's accumulated deficit, and that the bulk of the district's revenues would be used for the "state" purpose of repaying the bonds.

48. La. Const. art. VI, § 29 requires "local government subdivisions," such as parishes and municipalities, to conduct a tax election before levying a sales tax. This section provides in pertinent part:

(A) Sales Tax Authorized. Except as otherwise authorized in a home rule charter . . . the governing authority of any local governmental subdivision or school board may levy and collect a tax upon the sale at retail, the use, the lease or rental, the consumption, and the storage for use or consumption, of tangible personal property and on sales of services as defined by law, if approved by a majority of electors voting thereon in an election held for that purpose. . . .

(B) Additional Sales Tax Authorized. However, the legislature, by general or by local or special law, may authorize the imposition of additional sales and use taxes by local governmental subdivisions or school boards, if approved by a majority of the electors voting thereon in an election held for that purpose.

Other provisions similarly require political subdivisions such as the Louisiana Recovery District to obtain voter approval before levying taxes to support public improvements or issuing general obligation bonds:

For the purpose of acquiring, constructing, improving, maintaining or operating any work of public improvement, a political subdivision may levy special taxes when authorized by a majority of the electors in the political subdivision who vote thereon in an election held for that purpose.

La. Const. art. VI, § 32.

(A) Authorization. Subject to approval by the State Bond Commission or its successor, general obligation bonds may be issued only after authorization by a majority of the electors voting on the proposition at an election in the political subdivision issuing the bonds. . . .

(B) Full Faith and Credit. The full faith and credit of political subdivision is hereby pledged to the repayment of general obligation bonds issued by it under this constitution or the statute or proceedings pursuant to which they are issued.

La. Const. art. VI, § 33. Defendant argued that these provisions preclude political subdivisions from imposing taxes unless those taxes are approved by the affected taxpayers in a tax election.

In a related point, defendant argued that the due process clause of the federal Constitution also requires electoral approval before new taxes can be imposed by a political subdivision or special district. In light of longstanding federal precedent, it is difficult to see how the argument could have prevailed. See, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141 (1915).

contended that Act 15 constituted an improper surrender of the legislature's taxing authority<sup>49</sup> and that it violated separation of powers principles by allowing a body dominated by the executive to exercise legislative powers.<sup>50</sup> The trial court held that the Recovery District Act was constitutional. The court of appeal did not reach the merits; instead it resolved the question procedurally, finding that the single defendant had no standing to contest the issuance of the bonds.<sup>51</sup>

After brushing aside the District's challenge to defendant's standing,<sup>52</sup> the supreme court began its discussion of the merits with yet another a

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49. This argument was based on La. Const. art. VII, § 1 which provides:

Except as otherwise provided by this constitution, the power of taxation shall be vested in the legislature, shall never be surrendered, suspended, or contracted away, and shall be exercised for public purposes only.

It has long been established that legislative delegation of its taxing power to local governmental entities does not constitute a prohibited "surrender" of that power. *Liter v. City of Baton Rouge*, 258 La. 175, 245 So. 2d 398 (1971); *Mouledoux v. Maestri*, 197 La. 525, 2 So. 2d 11 (1941). Nevertheless, defendant argued that the delegation was improper in this instance because the Louisiana Recovery District was neither a local government entity nor an otherwise properly constituted recipient of such delegated power.

50. La. Const. art. II commands that the executive, legislative and judicial powers of the state shall remain separate:

The powers of government of the state are divided into three separate branches: legislative, executive, and judicial.

La. Const. art. II, § 1.

Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.

La. Const. art. II, § 2. Defendant argued that since the governing Board of Directors of the Louisiana Recovery District consisted of gubernatorial appointees, and since it exercised a "legislative" taxing function, it impermissibly granted legislative power to an essentially executive entity.

51. *Board of Directors v. All Taxpayers*, 529 So. 2d 401, 403-04 (La. App. 1st Cir. 1988) (per curiam). In dismissing this action, the Court of Appeal relied on Louisiana Revised Statutes 13:5123 (Supp. 1988), which restricts the right to contest bond validation suits to "taxpayers, property owners and citizens . . . [or] other persons interested . . . or affected" by the issuance of such bonds. In her initial pleading, defendant alleged that she was in that class, an assertion that went unchallenged before or during the trial. Defendant neglected to put in any proof of her status. After the close of evidence, the state brought a peremptory exception raising the objection of no right of action because of this failure of proof.

The court of appeal sustained the state's exception and refused to remand for further evidence of defendant's standing, relying on its decision in *Smith v. Parish of East Baton Rouge*, 509 So. 2d 24 (La. App. 1st Cir. 1987), in which a similar bond validation defendant was dismissed without being afforded any opportunity on remand to fill in the missing evidence. The *Smith* decision was eventually overruled by the Louisiana Supreme Court and, on remand, the defendant was able to prove standing and litigate on the merits. *Smith v. Parish of East Baton Rouge*, 510 So. 2d 1 (La.), appeal after remand, 515 So. 2d 632 (La. App. 1st Cir.), writ denied, 515 So. 2d 1100 (1987).

52. The supreme court quite properly rejected this attempt by the state to lay a "trap



ringing declaration that the legislature's plenary power over state finances can be limited only by some particular express constitutional provision that shows "clearly and convincingly that it was the constitutional aim" to preclude the legislature from enacting the specific statute in question.<sup>53</sup> The court dismissed the defendant's arguments that limitations could also be "implied" from the constitution's history and structure as mere "speculation," which was insufficient to defeat the strong presumption of constitutionality of statutes.<sup>54</sup>

Applying these principles to the arguments raised by defendant, the court held first that article VI, section 19 of the state constitution does not in any way limit the legislature's freedom to create special districts or other authorities in any form and for any purpose that it chooses. On the contrary, the court viewed the section as mere surplusage, which the convention added solely to reassure potential bond purchasers.<sup>55</sup> The

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for the unwary" and thus short circuit challenges to the validity of bonds. The court did not dispute the rule that the defendant in a bond validation suit bears the burden of proving her standing. Rather, the court relied on the even more fundamental rule that in considering an exception of this type, the allegations of fact in a pleading "must be taken as true in the absence of evidence to the contrary." *Board of Directors*, 529 So. 2d at 386. Here the state, by failing to challenge the defendant's assertion of standing before the close of evidence, waived any right to challenge her assertion. This ruling, together with the supreme court's reversal and remand in *Smith v. Parish of East Baton Rouge*, 510 So. 2d 1 (La. 1987), should put to rest any further attempts by authorities bringing bond validation actions to rely on the first circuit's holding in *Smith* or to lull defendants into similar sorts of technical error. As Justice Calogero noted at the oral argument in *Board of Directors*, it is certainly preferable for all involved that any issues concerning the validity of bonds be resolved on the merits rather than dismissed on procedural grounds.

53. The quoted language is a part of a larger whole that is remarkable for its strong terms and near absolutist tone:

In its exercise of the entire legislative power of the state, the Legislature may enact any legislation that the state constitution does not prohibit. Thus, to hold legislation invalid under the constitution, it is necessary to rely on some particular constitutional provision that limits the power of the Legislature to enact such a statute.

Unless the fundamental rights, privileges and immunities of a person are involved, there is a strong presumption that the Legislature in adopting a statute has acted within its constitutional powers. . . . The party attacking such a statute has the burden of showing clearly that the legislation is invalid or unconstitutional, and any doubt as to the legislation's constitutionality must be resolved in its favor. . . . [I]t is not enough to show that the constitutionality is fairly debatable, but, rather, it must be shown clearly and convincingly that it was the constitutional aim to deny the Legislature the power to enact the statute.

*Board of Directors*, 529 So. 2d at 387-88 (citations omitted).

54. *Id.* at 388.

55. *Id.* at 389. In reaching this conclusion, the court relied heavily on the convention's overall purpose in rewriting what is now article VI, to remove restrictions on both local government and the legislature, and on specific comments by delegates noting that section

court held, for the first time, that the legislature may define political subdivisions functionally as well as geographically and that these entities may perform specified tasks statewide as well as locally.<sup>56</sup> While the court did not specifically discuss the “[s]ubject to and not inconsistent with” language that defendant relied upon, it apparently viewed that language as merely restating the truism that actions not prohibited by one constitutional provision may nonetheless be subject to other provisions.

Turning to defendant’s other arguments, the court held that the language of article VI, section 30 granting political subdivisions the power to tax “for local purposes” was likewise not intended to limit the legislature’s power to grant statewide taxing authority to a special district. That language requires only that taxes be used solely by the particular subdivision that raised them, rather than some other unit of government.<sup>57</sup> Similarly, the court refused to infer any general tax election requirement from the language of sections 29, 32 and 33 of article VI. Instead, the election requirements of each section were limited solely to the particular situation the section addressed: section 29 applies only to taxes levied by local governmental units, section 32 only to taxes intended to fund public improvements, and section 33 only to general obligation bonds. Since the District was structured to avoid these limitations (it is not a unit of local government, it is not engaged in public improvements, and it issues revenue bonds rather than general obligation bonds), the court found that a tax election was unnecessary.<sup>58</sup> The court rejected the defendant’s argument that these admittedly specific provisions covered all of the circumstances known to the framers in which special taxes might be levied, and thus

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19 was unnecessary. 7 Records of the Louisiana Constitutional Convention of 1973, Convention Transcripts at 1515-19.

56. Though the supreme court had implicitly approved a statewide “political subdivision” in a prior case, *Slay v. Louisiana Energy and Power Auth.*, 473 So. 2d 51 (La. 1985), it had never explicitly considered whether the legislature can create such subsidiary organs for statewide purposes pursuant to Article VI. The conclusion that it can seems unexceptional. As the court noted, section 19 explicitly contemplates that such districts may be created by “general law” applicable statewide. See *supra* note 45. However, to say that the legislature is not generally prohibited from creating such political subdivisions does not necessarily mean that this particular district was valid. See *infra* text accompanying notes 64-65.

57. 529 So. 2d at 390-91. In interpreting section 30, the court relied on convention debates and the language of parallel provisions of the 1879, 1898, and 1921 constitutions. The court, however, was also concerned that a reading of section 30 as a general limitation on the taxing authority of political subdivisions would draw the court into the morass of determining whether particular functions be properly construed as “local”—an area without clear standards and fraught with political conflict. In contrast, the standard adopted seems much easier to apply. See, e.g., *State ex rel. Town of Bossier City v. Padgett*, 211 La. 603, 30 So. 2d 555 (1946).

58. 529 So. 2d at 392. For the text of the constitutional provisions at issue, see *supra* note 48.

manifested a general intent on the part of the drafters to require an election before any special taxes of any kind can be levied. This argument, like defendant's previous points, was held to be inconsistent with the general principle of plenary legislative authority absent specific constitutional prohibition. Finally, the court dismissed defendant's arguments based on separation of powers and on the alleged surrender of the legislature's exclusive power to tax, relying upon a similarly broad construction of the legislature's unquestioned power to delegate taxing authority to political subdivisions.<sup>59</sup>

The Recovery District case is noteworthy not only for its narrow interpretation of constitutional provisions that could be interpreted as limiting the legislature's power to create special taxing districts, but even more so for its concentration on relatively technical questions concerning the proper scope and role of political subdivisions under article VI, the local government article, and for the absence of any discussion of the more general limitations placed upon the state's power to borrow under article VII, the revenue and finance article. Section 6 of article VII precludes the state from selling bonds except for certain enumerated purposes, of which funding an accumulated operating deficit is not one.<sup>60</sup> Indeed, though the argument was not pressed, defendant originally contended in her pleadings that the Recovery District Act constituted an improper attempt by the state to do indirectly what article VI, section 6 forbade it to do directly: sell bonds for the purpose of funding operating expenses. According to this argument, the Recovery District should thus be seen as nothing more than a straw man created by the legislature and

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59. 529 So. 2d at 391-92. The court rested its holding that the delegation of taxing authority was appropriate on a conclusion that the Recovery District's authority could be revoked by the legislature. This is questionable in light of the probable contractual rights of the bondholders. Nevertheless, if the Recovery District was properly constituted, there seems to be little reason to conclude that the legislature cannot delegate such authority. While the court did not specifically discuss the executive branch's alleged domination of the district's governing board, it appears that such a separation of powers theory could not be applied consistently without finding much of the state's administrative and local governmental machinery unconstitutional.

60. See La. Const. art. VII, § 6(A), quoted at *supra* note 31. As was discussed in this article last year, this express limitation upon the state's power to issue bonds was part of an integrated constitutional scheme whereby the drafters of the 1974 constitution sought to end fiscal mismanagement and lower the cost of borrowing funds for the state. See Devlin, *supra* note 32, at 339. Clearly, the bonds sold by the Louisiana Recovery District were not intended to repel invasion, suppress insurrection, provide relief from natural catastrophes or make capital improvements. Nor can these be considered bonds to "refund outstanding indebtedness." That language was intended to permit the state to issue bonds at a lower interest rate in order to buy back bonds previously issued at a relatively higher interest rate. The accumulated deficit which the recovery district was intended to eliminate was never "funded" at all; instead, it built up unacknowledged over a period of years. What was not initially "funded" cannot be "refunded."

the governor precisely for the purpose of evading the framers' intention that the state pay its current expenses out of its current revenues.<sup>61</sup>

This argument may well have had merit. To be sure, the records of the 1973 convention do not indicate that the delegates ever considered the use of special districts coterminous with the state as a mechanism to raise money on behalf of the state—indeed, such districts were unknown fifteen years ago—and the constitution does not explicitly outlaw such a mechanism. Nevertheless, it does appear that the framers intended to carefully limit the state's long-term borrowing by restricting both the purposes for which and the mechanisms by which such debt could be contracted.<sup>62</sup> And the language of section 6, which limits state borrowing "directly or indirectly, or through any state board, agency, commission or otherwise," certainly indicates an intent to restrict any innovative procedure that a future governor or legislature might use to borrow for purposes other than those expressly contemplated.<sup>63</sup>

Perhaps the result in the case might not have changed even if the court had focused on article VII as well as article VI. The state's need for some method of financing its accumulated deficit would have been no less pressing, and the political will behind the Louisiana Recovery District would have been just as great. And in view of the court's willingness to narrowly interpret the various article VI provisions on which defendant relied, it is likely that a similarly narrow reading would have been given to article VII, section 6. Despite that section's broad wording, the limitation on borrowing by "state" boards, agencies, commissions and other organs could have and perhaps would have been read not to apply to a political subdivision such as the Louisiana Recovery District.

But even if an explicit argument based on article VII might not have altered the ultimate outcome of the case, it is unfortunate that it was not addressed. Whatever the outcome, any discussion of the Revenue and Finance article would have forced the court to confront the reality that

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61. Amended paragraph 34 of defendant's "Amended Answer to Motion for Judgment" states, "Act 15 violates the provisions of Article VII, Sec. 6 of the Louisiana Constitution of 1974 in that this is an attempt to do indirectly what cannot be done directly, e.g. the incurring of debt for an unauthorized purpose." While defendant did not press the point on appeal, she did argue in passing that the state should not be permitted to "declare itself a 'subdivision' of itself to accomplish by indirection what it cannot do directly." Original Brief for Appellant at 26, *Board of Directors v. All Taxpayers*, 529 So. 2d 384 (La. 1988) (citing *Johnson v. Board of Elementary and Secondary Educ.*, 414 So. 2d 352 (La. 1982)).

62. 9 Records, *supra* note 8, at 2800-07, *passim*.

63. For the full text of La. Const. art. VII, § 6, see *supra* note 31. This expansive language was not added by accident. Rather, it was incorporated by amendment into what is now section 6 for the precise purpose of preventing the state from using some other entity to sell bonds that the state was prohibited from selling directly. See 9 Records, *supra* note 8, at 2801 (remarks of Delegate Brown).

the recovery district was designed and intended to avoid otherwise applicable constitutional restrictions on state debt. The court might still have concluded that section 6 was not specific enough to override the legislature's plenary power over state finances. To do so, however, the court would have been compelled to discuss and justify a principle of constitutional interpretation that is only implicit in the decision as rendered: that at least in areas where the legislature's power is generally broad, such as government finance, constitutional drafters and ratifiers who wish to limit that power must not only make their intentions reasonably clear, but must also anticipate and prohibit with considerable specificity the particular mechanisms future state governments may use to try to evade that purpose. Stated baldly, this principle is difficult to accept. Yet given the court's imprimatur upon the use of a statewide political subdivision to do indirectly what the state cannot do directly, the conclusion seems hard to escape.

### *Interpreting the Limits of Legislative Power*

As the cases discussed above demonstrate, the proposition that state legislatures wield original sovereign powers and thus may do anything not expressly forbidden by the state constitution is an important truth, but one that provides no more than a starting place for analysis of the propriety of particular legislative actions. While that proposition has often been recited by commentators<sup>64</sup> and relied upon by courts,<sup>65</sup> it gives no practical guidance for resolving the hard questions that are usually at stake in these cases. Parties always agree that the legislature can do whatever is not prohibited; they usually disagree about how restrictively courts should interpret the basic constitutional themes and particular constitutional provisions that supposedly constitute the operative prohibition in the specific case. Thus, the fiscal crisis cases will probably be more significant for the lessons they hold regarding the court's interpretation of similar prohibitory constitutional language in the future than they will be for any of the particular arrangements approved therein.

At the outset, it is important to distinguish between two types of constitutional challenges to legislative action. In the first type, opponents

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64. Probably the most cited fountainhead of this principle is the nineteenth century treatise writer Thomas Cooley. See, e.g., T. Cooley, *supra* note 26, at 106-10. Modern commentators accept it as a self evident starting point for discussion. See, e.g., Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 178-79 (1983).

65. The Louisiana Supreme Court frequently cites and relies upon this principle. In addition to each of the fiscal crisis cases discussed above, see *Board of Comm'rs v. Department of Natural Resources*, 496 So. 2d 281, 286 (La. 1986); *Aguillard v. Treen*, 440 So. 2d 704, 706 (La. 1983); *New Orleans Firefighters Ass'n v. Civil Serv. Comm'n*, 422 So. 2d 402, 406 (La. 1982); and *Board of Elementary and Secondary Educ. v. Nix*, 347 So. 2d 147, 153 (La. 1977).

typically claim that the challenged legislative action violates article II, sections 1 and 2 of the state constitution, which require separation of powers,<sup>66</sup> because that action results in one of the three constitutional branches of government exercising powers that properly belong to another. While the leading cases in the analogous federal context have tended to involve what the courts have perceived as attempts by Congress to exercise powers properly belonging to the executive branch,<sup>67</sup> the leading Louisiana cases have involved the converse situation: alleged attempts by the legislature to surrender some part of its policymaking role or institutional autonomy to the governor.<sup>68</sup> In recent cases involving challenges of this type, the Louisiana courts have tended to be relatively lenient. They have narrowly interpreted article II and broadly interpreted specific constitutional grants of gubernatorial authority that allegedly constitute exceptions to article II, thus validating institutional arrangements negotiated by the political branches.<sup>69</sup> The recent trilogy of cases discussed above indicates

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66. For the text of these sections, see *supra* note 50.

67. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181 (1986); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1975).

68. See, e.g., *Cross v. Alexander*, 498 So. 2d 740 (La. 1986) (holding unconstitutional an act that gave an executive agency power to veto employment decisions of coordinate branches); *State ex rel. Guste v. Legislative Budget Comm.*, 347 So. 2d 160 (La. 1977) (approving an act that permitted the governor to appoint members of a special joint legislative committee); *Carso v. Board of Liquidation of State Debt*, 205 La. 368, 17 So. 2d 358 (1944) (declaring unconstitutional an act that conferred appropriational authority on an executive agency as a budget balancing measure). See also *Bruneau v. Edwards*, 517 So. 2d 818 (La. App. 1st Cir. 1987) (approving in part an act that gave the governor power to withhold appropriated funds and transfer funds among accounts).

69. See, e.g., *State ex rel. Guste*, 347 So. 2d 160, and *Bruneau*, 517 So. 2d 818. In both cases, though the legislature yielded some authority to the executive, the delegation was supported by clear constitutional grants of similar authority directly to the governor. In *Guste*, the governor's legislatively-granted power to appoint legislative members to a special committee was at least related to his general power of appointment, and in *Bruneau*, the legislatively-granted power to withhold appropriated funds was arguably similar to the governor's constitutional line item veto power. Most important, however, was the courts' apparent perception in both cases that the grant of the particular power at stake was not so extensive as to threaten the core of the legislature's policymaking functions or its institutional autonomy.

Recent cases in which legislative action has been declared unconstitutional on separation of powers grounds have all tended to involve the question of whether an executive officer or agency may be permitted to have final authority over the employment of staff by the other branches. See, e.g., *Cross*, 498 So. 2d 740. This is a special and distinguishable problem that is more closely related to the question of whether the legislature must appropriate sufficient funds to keep constitutionally mandated bodies operating than it is to the question of separation and allocation of executive, legislative and judicial functions *per se*. Compare the authorities cited *supra* with *Board of Elementary and Secondary Educ. v. Nix*, 347 So. 2d 147 (La. 1977) and *State ex rel. Nunez v. Baynard*, 15 So. 2d 649 (La. App. 1st Cir. 1943) (both holding that the legislature must appropriate sufficient funds to pay the salaries of constitutionally designated officers).

no retreat from that lenient tendency.<sup>70</sup>

The second category of challenges to legislative action, which includes the fiscal crisis decisions, involves claims that the challenged legislative action violates the terms of a particular constitutional provision addressing that specific issue. Typically, the constitutional language does not explicitly refer to the particular challenged act; rather the statute is alleged to violate the spirit, the meaning, or the intent of the constitution as revealed in its generalized language, its structure, or the convention records. The infrequency of explicit prohibitions should not be surprising. The clear intent of the drafters of the 1974 constitution was to reduce the bulk of the constitution and to substitute general statements of principle for overly specific and "statutory" language.<sup>71</sup> Moreover, in light of the reality of social change, only a constitutional draftsman of superhuman prescience could foresee all the policy issues that might arise in the future and explicitly validate or prohibit all arrangements to resolve those issues. Similarly, only a legislative draftsman of uncommon dullness would find it difficult to construct and phrase a bill so as to avoid the few explicit constitutional prohibitions that do exist.

Thus, the real question for cases of this second type cannot be solely whether or not a legislative scheme is expressly prohibited by the state constitution. Rather, the question is how broadly the court should interpret clauses of the constitution that bear upon a particular problem in order to arrive at a fair estimation of the drafters' and ratifiers' will and intent regarding the fundamental policy issues at stake in the challenged legislative act. If the state constitution is to function as envisioned—as a broad statement of binding principles rather than a mere repository for "super statutes"—then the concept that there are implied,



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70. In *Louisiana Ass'n of Educators v. Edwards*, 521 So. 2d 390 (La. 1988) and *State Bond Comm'n v. All Taxpayers*, 525 So. 2d 521 (La. 1988), separation of powers issues were apparently not pressed. In *Board of Directors v. All Taxpayers*, 529 So. 2d 384 (La. 1988), the challengers vigorously contended that the District violated separation of powers principles since the board of directors of the Recovery District would be dominated by executive appointees, and since the District exercised such core legislative powers as the power to adopt ordinances and levy taxes. The court gave this contention short shrift, however, simply noting that the legislature was empowered to delegate such powers to subordinate administrative entities. Whatever may be read into the court's refusal to dwell more on the challenger's arguments regarding executive aggrandizement, it certainly does not indicate any stiffening of the court's attitude regarding such separation of powers problems.

71. The success of the drafters of the 1974 Constitution in eliminating statutory material can be measured by the reduction in the document's bulk. The desire to eliminate the rigidity imposed by unnecessary incorporation of detailed or statutory material has been a recurrent theme of state constitutional reform. See generally, Grad, *The State Constitution: Its Function and Form for Our Time*, 54 Va. L. Rev. 928, 942-47 (1968).

as well as express, constitutional limits on legislative action cannot be regarded as invalid in principle.<sup>72</sup>

Despite its frequent reiteration of the familiar principle that statutes are presumed valid in the absence of some particular prohibitory constitutional provision, the Louisiana Supreme Court has been receptive in the past to arguments that a particular statute contravenes implied constitutional limits. For example, the court in *Board of Elementary and Secondary Education v. Nix*,<sup>73</sup> while ratifying other aspects of legislation shifting certain administrative authority from the Board to the superintendent of education, held that the challenged act's attempt to repeal the Board's authority to employ necessary staff was unconstitutional. The court reasoned that the constitution's grant of at least some policymaking functions to the Board necessarily implied the right to employ such staff as was necessary to carry out that constitutional function.<sup>74</sup>

Moreover, even when the court has in the past rejected similar challenges based upon limitations that could only be implied from the constitutional text, it has not done so on the basis of any general requirement that the constitutional text refer explicitly to the particular legislative act at issue. Instead, the court has consistently shown itself willing to carefully consider claims of implicit prohibition and the arguments from the constitution's structure, drafting history, or underlying themes on which such claims have been based.<sup>75</sup> Even those cases typically

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72. That there may be such implied constitutional limits on state legislative powers is well accepted, even by those commentators most insistent on the legislature's otherwise plenary power. See, e.g., T. Cooley, *supra* note 26, at 107, Williams, *supra* note 64, at 178-79, 202-03.

73. 347 So. 2d 147 (La. 1977).

74. *Id.* at 155, citing *Branton v. Parker*, 233 So. 2d 278, 286-87 (La. App. 1st Cir.), writ denied, 256 La. 359, 236 So. 2d 497 (1970) and *State ex rel. Nunez v. Baynard*, 15 So. 2d 649 (La. App. 1st Cir. 1943). See also *Tanner v. Beverly Country Club*, 217 La. 1043, 47 So. 2d 905 (La. 1950) (provisions in the Constitution of 1921 setting forth one mechanism by which the legislature could alter the territorial scope of judicial districts precluded by implication an attempt by the legislature to alter the court's territorial jurisdiction in any other manner).

75. See, e.g., *Board of Comm'rs v. Department of Natural Resources*, 496 So. 2d 281 (La. 1986) (carefully considering arguments that an act returning certain land to its original owners violated the implicit restrictions imposed by several different constitutional provisions); *Aguillard v. Treen*, 440 So. 2d 704 (La. 1983) (rejecting, after careful consideration of the drafting history of the provision at issue and the constitutional history of BESE and its predecessors, an argument that the constitutional delegation of power to the Board to determine educational policy impliedly precluded the legislature from requiring the study of "creation science"); and *New Orleans Firefighters Ass'n v. Civil Serv. Comm'n*, 422 So. 2d 402 (La. 1982) (resting its conclusion that the legislature may mandate the items that go into the computation of minimum wages and overtime for New Orleans firefighters, despite the city's home rule powers, on a careful consideration of extrinsic sources and the necessary implication that the legislature's power to set minimum wages, to be effective, must be both comprehensive and exclusive).



cited for the proposition that constitutional limits on the legislature must be narrowly construed exhibit a careful consideration by the court of possible grounds from which certain limitations might have been implied.<sup>76</sup>

Against the background of these well-established principles, the constitutional disputes engendered by the state's recent fiscal crisis may mark something of a departure in both the rhetoric and the results of judicial construction of constitutional limitations on legislative action. To be sure, the first two of the cases decided last term, *Louisiana Association of Educators* and *State Bond Commission*, are compatible with traditional methods of analysis. In both cases, the court's refusal to find an implied limit on the power of the legislature was well supported by the overall structure of the constitution, which clearly was intended to give the legislature general authority over allocation and disbursement of state funds. Because the legislative schemes at issue in these cases did not result in any real increase in the funds available to the state or any real shift of burden from the present generation of taxpayers to the future, neither case involved any of the overriding policy choices—such as the basic requirement that the state pay its operating expenses as it goes—that the framers incorporated into the structure of the 1974 constitution.

However, the court's opinion in the Louisiana Recovery District case may well be subject to a very different interpretation. The repeated emphasis in the opinion that legislative power is presumed absent "some particular constitutional provision" that limits it, that the legislature has all powers not "specifically" denied it, that the party attacking legislation has the burden of showing "clearly and convincingly" that the constitutional limits apply, and that the challenger failed to point to any constitutional provision which "expressly" forbade the legislature from creating the Recovery District,<sup>77</sup> could certainly be taken as announcing a new standard of construction which rejects in principle the possibility that constitutional limits on legislative action may be implied as well as express.<sup>78</sup> The substance of the decision is equally troubling. The court

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76. Thus, in *In Re Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement*, 297 So. 2d 663 (La. 1974), the court considered whether the state constitution implicitly incorporated a concept of case or controversy that would preclude a court from hearing an ex parte application for instructions from a trust administrator, and in *Buras v. Orleans Parish Democratic Executive Comm.*, 248 La. 203, 177 So. 2d 576 (1965), the court carefully weighed the overall structure of the state constitution and the interactions of several provisions before concluding that an act setting the date for political primaries did not conflict with either the letter, spirit, or intent of the constitutional New Orleans home rule provisions.

77. *Board of Directors*, 529 So. 2d at 387-88.

78. That such a requirement of constitutional specificity would be a novel departure

validated a legislative scheme that was clearly intended to and will have the effect of evading a clearly understood and central policy choice that was embedded in the state constitution by its drafters and accepted by its ratifiers: that the state cannot borrow money to pay for operating expenses. The court's willingness to allow this borrowing to nevertheless occur by indirection, notwithstanding a strong prohibition against it, may well be taken as further proof that only an express prohibition of a particular legislative action will be binding in fact.

Such an interpretation would be unfortunate. The claim that plenary legislative power can only be restrained by "express" prohibitory language fundamentally misconceives the function of the state constitution and the need for reform that motivated the substitution of the 1974 constitution for its predecessor. If a constitution is to avoid the bulk and rigidity that marred the Louisiana Constitution of 1921, it must be allowed to use general principles rather than specific, statute-like commands. And if the general principles contained in the constitution are to be effective, they must be interpreted fairly. They must bind the legislature not only on those rare occasions when the legislature contravenes their express terms, but also when that body passes statutes that violate policies which can be clearly inferred from the constitution's structure, history, or general language. This principle pervaded the court's previous cases interpreting constitutional limits on legislative action, and no reason for fundamental change appears.

For these reasons, the Louisiana Recovery District case should not be read, despite its language and result, as imposing any new, more rigorous, standard for judicial review of alleged constitutional limitations on legislative action. In light of the special circumstances surrounding the case, particularly the manifest need for some method to deal with the state's unfunded operating deficit and the complete agreement be-

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is made evident by an examination of the cases that the court cited to support its strict phrasing of the standard. *Swift v. State*, 342 So. 2d 191, 194 (La. 1977) (the source of the statement that the legislature has all powers not "specifically" denied it; involved an attempt by the legislature to add to the minimum retirement benefits for judges established by the constitution of 1921). No argument was raised that anything in the underlying policies, structure, language, or history of the constitution could be construed as any sort of prohibition against such generosity. Similarly, although the court in *Buras v. Orleans Parish Democratic Comm.*, 248 La. 203, 177 So. 2d 576, did state that doubts as to a statute's constitutionality must be resolved in its favor, it nonetheless carefully considered whether the statute violated the spirit or intent, as well as the letter, of the constitutional New Orleans home rule provisions. And while both *Ancor v. Belden Concrete Prod.*, 250 La. 372, 256 So. 2d 122 (1972) and *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 2d 485 (1938), also restated the general principle that statutes are presumptively valid, neither involved any serious claim that the state constitution embodied any basic principles, implied or express, at war with the statutes there considered.

tween the political branches regarding the expediency of this solution,<sup>79</sup> the case should rather be considered as a unique response to a unique set of facts.

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79. The fiscal difficulties which have beset the state in recent years are not unique to Louisiana. On the contrary, many states have faced similar problems of cash flow shortages, operating deficits and the need to resort to new methods in order to reduce expenditures. See generally, Kirkland, "Creative Accounting" and Short-Term Debt: State Responses to the Deficit Threat, 36 Nat'l Tax J. 395 (1983). Caught between the hard necessities of fiscal crisis and the restrictive balanced budget and anti-borrowing provisions common in state constitutions, many state courts have approved evasive legislation, often involving creation of separate governmental units that can borrow on behalf of the state or its subdivisions, that would almost certainly not have been approved in other circumstances. See Williams, *supra* note 64, at 219 ("In this century the history of government borrowing . . . has been a history of evasion of constitutional restrictions"); Pinsky, State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach, 111 U. Pa. L. Rev. 265, 289-90 (1963) (the perceived urgency of the need is a major factor determining whether innovative borrowing schemes will be upheld against state constitutional challenge); Morris, Evading Debt Limitations With Public Building Authorities: The Costly Subversion of State Constitutions, 68 Yale L.J. 234, 263 (1958) ("the entire history of debt limits is one of evasion"). Thus, if the Louisiana Supreme Court were to consider these issues *sui generis*, it would certainly appear to have much distinguished company.

Unfortunately, as this article goes to press, it appears that the supreme court may be relying on the Louisiana Recovery District case as setting the general standard for judging constitutional challenges to legislation. See, e.g., *Cajun Elec. Power Coop., Inc. v. Louisiana Pub. Serv. Comm'n*, 532 So. 2d 1372 (1988), reh'g granted. This trend is particularly notable in the concurring opinion of Justice Cole, which explicitly quotes and relies on the Recovery District case as establishing the "heavy burden" of demonstrating explicit constitutional prohibition, which challengers must carry. *Id.* at 1378 (Cole, J., concurring).