

Louisiana Law Review

Volume 63 | Number 3

Is Civil Rights Law Dead? A Symposium

Spring 2003

Shedding Tiers "Above and Beyond" the Federal Floor: Loving State Constitutional Equality Rights to Death in Louisiana

Robert F. Williams

Repository Citation

Robert F. Williams, *Shedding Tiers "Above and Beyond" the Federal Floor: Loving State Constitutional Equality Rights to Death in Louisiana*, 63 La. L. Rev. (2003)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol63/iss3/11>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Shedding Tiers “Above and Beyond” the Federal Floor: Loving State Constitutional Equality Rights to Death in Louisiana*

Robert F. Williams**

The latest trend in American constitutional law is to use “equal protection” as a concept not to eliminate discrimination, but to justify it. As a nation, we all now have collective amnesia.¹

I. INTRODUCTION

Equality doctrine in state constitutional law has been important for many years. Within this larger context, Louisiana constitutional equality doctrine is important because the state of Louisiana added an equal protection clause to its state constitution in 1974.² Article I, section 3 of the Louisiana Constitution, the “Individual Dignity Clause,” provides:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.³

In 1996, the Louisiana Supreme Court interpreted this provision in *Louisiana Associated General Contractors, Incorporated v. State*

Copyright 2003, by LOUISIANA LAW REVIEW.

* “Art. I, Sec. 3 was intended to provide to the citizens of this state equal protection of the laws *above and beyond* that protected under the federal Constitution” *Louisiana Associated General Contractors, Inc. v. State*, 669 So. 2d 1185, 1198 (La. 1996) (emphasis added).

** Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey. This article is based on a presentation made by the author at the conference, “Is Civil Rights Law Dead?” held at Louisiana State University School of Law, March 13–14, 2003.

1. *Louisiana Associated General Contractors, Inc. v. State*, 669 So. 2d 1185, 1203 (La. 1996) (Johnson, J., dissenting).

2. Louis “Woody” Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. 9, 16 (1975); Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 6 (1974).

3. La. Const. art I, § 3 (1974).

of Louisiana, [*Louisiana Associated General Contractors*] to outlaw all forms of affirmative action which include race as a factor.⁴ John Devlin has provided an in-depth look at this case in the context of Louisiana's state constitutional history (or lack thereof) of equality.⁵ *Louisiana Associated General Contractors* should be evaluated on its own terms as well as in the broader context of state constitutional rights protections. Devlin's article provides both of these perspectives. I will add a few thoughts of my own.

II. STATE CONSTITUTIONAL EQUALITY DOCTRINE

Since the equal protection revolution of the Warren Court, state courts have tended to lose sight of the rich and varied equality provisions contained in their own state constitutions. Many state courts were mesmerized by the doctrines developed by the United States Supreme Court as it interpreted the Equal Protection Clause of the Fourteenth Amendment. These courts virtually ignored the following kinds of equality guarantees, often not contained in the Declaration of Rights, in their state constitutions:

- 1) The 1776-type provisions declaring that "[a]ll men are free and equal"⁶ Also included in this category are the less common types of clauses stating that government was created for the "common benefit" of its citizens. Based on such a clause, the Vermont Supreme Court in 1999 declared that the state had to permit either marriage or domestic partnership for same-sex couples.⁷

4. 669 So. 2d 1185 (La. 1996). The Court rejected an argument that the case was moot. Many questions of judicial enforcement, such as justiciability, standing, ripeness and mootness, are often much more loosely applied under state constitutions. For a thoughtful, in-depth treatment of these matters, see Helen Hershkoff, *State Courts and the "Passive Virtues:" Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833 (2001). See also Barbara Kritchevsky, *Justiciability in Tennessee, Part One: Principles and Limits*, 15 Mem. St. U. L. Rev. 1 (1984); *Justiciability in Tennessee, Part Two: Standing*, 15 Mem. St. U. L. Rev. 179 (1985); *Justiciability in Tennessee, Part Three: Timing*, 16 Mem. St. U. L. Rev. 177 (1986).

5. John Devlin, *Louisiana Associated General Contractors: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights*, 63 La. L. Rev. 887 (2003).

6. Devlin, *supra* note 5; Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 Tex. L. Rev. 1195, 1199-1200 (1985).

7. *Baker v. State*, 744 A.2d 864 (Vt. 1999). See generally Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. Rev. 73 (2001).

2) The state constitutional provisions dating from the Jacksonian period, which took aim at government grants of special privileges.⁸

3) The provisions dating from the 1870's placing limitations on the legislative branch's ability to enact "special laws."⁹

4) The state constitutional provisions requiring uniformity in taxation.¹⁰

5) The state constitutional provisions requiring either thorough and efficient or uniform free public schools.¹¹

6) The state constitutional provisions barring discrimination against citizens in their exercise of civil rights.¹²

7) The state equal rights amendments ("state ERAs") adopted to provide equal rights for women.¹³

An examination of the Louisiana constitution makes it very clear that the 1974 "Individual Dignity Clause" is not the only equality clause to be found in that constitutional document. For example, article I, section 1, dating from 1921, provides that "[a]ll government, of right, originates with the people . . . and is instituted . . . for the good of the whole."¹⁴ Article I, section 12, also added in 1974, prohibits discrimination in public accommodations on similar grounds as those listed in the Individual Dignity Clause.¹⁵ Article III, section 12 prohibits the enactment of special laws by the legislature in an enumerated list of categories.¹⁶ Article VII, section 18 (A) requires uniformity in property taxation.¹⁷ In the Preamble to the

8. Williams, *supra* note 6, at 1206–08.

9. *Id.* at 1209–10; Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 Widener J. Pub. L. 161 (1993).

10. Williams, *supra* note 6, at 1216; Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to its State Constitutional Equality Doctrine*, 3 Widener J. Pub. L. 343, 353–57 (1993).

11. Williams, *supra* note 6, at 1214–16; Williams, *supra* note 10, at 357–61.

12. Williams, *supra* note 6, at 1210–12; Williams, *supra* note 10, at 361–69.

13. Williams, *supra* note 6, at 1212–14; Williams, *supra* note 10, at 369–73; Robert F. Williams, *Foreword: Continuing Developments in State Constitutional Law*, 74 Temp. L. Rev. 573, 575 (2001).

14. Lee Hargrave, *The Louisiana State Constitution—A Reference Guide* 21 (1991) (emphasis added).

15. *Id.* at 35.

16. *Id.* at 51–52.

17. *Id.* at 133. "Unequal application of the state taxes resulted from a lack of uniformity of assessment practices. This section was designed to provide statewide uniformity by requiring assessors, still locally elected officials under section 24, to assess property at the same percentage of value throughout the state." *Id.*

Education Article, article VIII, one of the goals of the public educational system is "that every individual may be afforded an *equal* opportunity to develop to his full potential."¹⁸ The Individual Dignity Clause includes a prohibition on discrimination on the basis of sex, making it also a state ERA.¹⁹ Thus, even before 1974, the Louisiana Constitution illustrated the point made by Paul Kahn: "no state constitution is indifferent to the principle of equality, even if the state text does not have an equal protection clause."²⁰

Each of these types of provisions is different from the federal equal protection clause, and should be interpreted according to its own text, history, and purpose. In other words, these kinds of clauses should be interpreted by the courts independently from the federal equal protection doctrine. Many state courts, however, have failed to accord these provisions their proper recognition, choosing instead to treat them separately, or sometimes lump them together, and apply the federal equal protection doctrine.²¹

Throughout the process of including these sorts of equality provisions, a number of states, including Louisiana in 1974, added "equal protection" clauses to their constitutions.²² When Louisiana included the equal protection provision in its new, revised constitution it is fair to ask whether it was *leading* its citizens by recognizing a new legal doctrine, or, rather if it was *following* its citizens by adopting a provision that reflected a change that had already taken place in society. In the words of Willard Hurst, provisions included in state constitutions often "did not *direct*, but merely *recorded*, the currents of social change."²³ John Devlin has argued very convincingly that this 1974 provision came after a substantial portion of the Civil Rights Movement had taken place and therefore may have "recorded" a change that had already taken place in at least some segments of society.²⁴

18. *Id.* at 145 (emphasis added). In 1985, the courts of Louisiana ruled that this Preamble was not self-executing and had little substantive effect. *Simmons v. Sowela Technical Inst.*, 470 So. 2d 913 (La. App. 3d Cir.), *writ denied* 475 So. 2d 1109 (La. 1985).

19. La. Const. art. I, § 3 (1974).

20. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147, 1159-60 (1993).

21. See Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 Conn. L. Rev. 675 (1992); Williams, *supra* note 10, at 346-48; Williams, *supra* note 6, at 1197, 1219.

22. Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 Rutgers L. J. (forthcoming 2004).

23. James Willard Hurst, *The Growth of American Law: The Lawmakers* 246 (1950) (emphasis added).

24. Devlin, *supra* note 5, at 899-903. It has been reported that because the

Although many state courts were mesmerized by federal equal protection analysis, some, by contrast, began to take note of the variety of equality-based provisions in their own state constitutions, each with a text, history and purpose different from the federal equal protection clause. These courts embarked on an independent analysis, sometimes reaching decisions beyond the national lowest common denominator, or "federal floor," enforced by the United States Supreme Court.²⁵

III. LOUISIANA EQUALITY DOCTRINE

The history of Louisiana's judicial interpretation of article I, section 3 reflects a transition between the two approaches, following federal doctrine and independent interpretation, observable in state courts. Initially, right after the adoption of the provision of 1974, the court interpreted it to be the same as the federal equal protection clause.²⁶ It was not until 1985, in the *Sibley* decision, that the Louisiana Supreme Court embarked on an independent interpretation of its provision.²⁷ There, in an opinion by Justice James Dennis, a delegate to the 1973 Constitutional Convention, the Court rejected the federal three-tier approach to equal protection analysis and relied on article I, section 3 to strike down a statutory cap on damages as an unconstitutional classification based on "physical condition."²⁸ Finally, in 1996, the Louisiana Supreme Court handed down *Louisiana Associated General Contractors*,²⁹ in which it outlawed all forms of affirmative action which take account of race. The Court

"Individual Dignity Clause" was included in the 1974 Louisiana Constitution, the document was supported by the NAACP. Hargrave, *supra* note 14, at 18.

25. See, e.g., *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?* 20 Wm. Mitchell L. Rev. 337 (1994); *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391 (Alaska 1997); Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?* 15 Alaska L. Rev. 209 (1998); Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 Alaska L. Rev. 1, 11-17 (1995); Michael B. Wise, *Northern Lights-Equal Protection Analysis in Alaska*, 3 Alaska L. Rev. 1 (1986); *Concerned Taxpayers of Kootenai County v. Kootenai County*, 50 P.3d 991, 994 (Idaho 2002). *But see* *Rudeen v. Cenarrusa*, 38 P.3d 598, 606-07 (Idaho 2001).

26. *Burmester v. Gravity Drainage Dist. No. 2*, 366 So. 2d 1381, 1386 (La. 1978); *Wolf*, *infra* note 46, at 1216 n.49.

27. *Sibley v. Bd. of Supervisors of Louisiana State University*, 477 So. 2d 1094 (La. 1985); Michael Lester Berry, Jr., Note, *Equal Protection—The Louisiana Experience in Departing from Generally Accepted Federal Analysis*, 49 La. L. Rev. 903 (1989).

28. *Sibley*, 477 So. 2d at 1104-09.

29. 669 So. 2d 1185 (La. 1996).

read the provision as though it was identical to California's Proposition 209, which states that the state "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race" ³⁰ The Court embraced the Individual Dignity Clause with such zeal and enthusiasm that it literally "loved" affirmative action options in Louisiana, and part of its equality doctrine, "to death."

First, the Louisiana Court looked to the meaning of the word "discriminate," finding that it was "clear and unambiguous and must be applied as written."³¹ This textual and "plain meaning" approach to state constitutional interpretation has been one of the hallmarks of the New Judicial Federalism.³² The court equated the word "discriminate" with the word "classify," and concluded that under circumstances where "a constitutional provision is clear and unambiguous, and its application does not lead to absurd consequences, it must be applied as written without further interpretation in search of its intent."³³ As John Devlin has pointed out, however, the word "discriminate" is, under these circumstances, ambiguous.³⁴ In another context, he made the important point that "'clear and unambiguous' constitutional language usually exists only in the eye of the beholder."³⁵ Learned Hand put it bluntly:

There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen.³⁶

30. Cal. Const. art. I, § 31 (emphasis added). See Wolf, *infra* note 46, at 1228–29.

31. *La. Associated Gen. Contractors*, 669 So. 2d at 1196.

32. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 Rutgers L.J. 841, 847–48 (1991) ("[W]here . . . textual differences were substantial, they seemed to call for independent interpretation."). See also Joseph R. Grodin, *Commentary: Some Reflections on State Constitutions*, 15 Hastings Const. L.Q. 391, 400 (1988) ("The presence of distinctive language or history obviously presents the most comfortable context for relying upon independent state grounds."); Peter Linzer, *Why Bother with State Bills of Rights?*, 68 Tex. L. Rev. 1573, 1584–85, 1607–08, 1610 (1990).

33. *La. Associated Gen. Contractors*, 669 So. 2d at 1196.

34. Devlin, *supra* note 5, at 904-06. See also Wolf, *infra* note 46, at 1220–21, 1227.

35. Devlin, *infra* note 55, at 730 n.193.

36. *Cent. Hanover Bank & Trust Co. v. Comm'r*, 159 F.2d 167, 169 (2d Cir. 1947). The late Judge Frank expressed the same thought when he criticized "the

The meaning of the word “discriminate” was, of course, central to the well-known decision of the United States Supreme Court in *United Steel Workers of America v. Weber*.³⁷ There, Justice Brennan concluded that the word “discriminate” in Title VII of the 1964 Civil Rights Act was, in fact, ambiguous, and simply had not been used by the Congress in 1964 to outlaw affirmative action.³⁸ He observed the irony of the argument against affirmative action:

It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had “been excluded from the American dream for so long,” . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.³⁹

Exactly the same argument concerning irony could be made with respect to *Louisiana Associated General Contractors*. The Court’s decision, turning the words of the 1974 addition to the Louisiana Constitution against those it most likely sought to protect, was a cruel irony indeed.

Next, the Louisiana court looked at the structure of article I, section 3. Comparing the second and third sentences, the court observed that the ban on racial or religious discrimination had no qualifying words, while the provision in the third sentence concerning birth, age, sex, culture, physical condition or political ideas was qualified by the words arbitrary, capricious, or unreasonable.⁴⁰ Therefore, the court concluded, that the second sentence outlawed all affirmative action on the basis of race for whatever reason.⁴¹ Interestingly, this approach makes the United States Supreme Court’s decisions severely restricting affirmative action, in *Croson*⁴² and *Adarand*,⁴³ seem liberal by comparison!

Third, despite stating that the text was “clear and unambiguous” and therefore a search for intent was unnecessary, the Court did take a cursory look at the constitutional history behind the provision.

one-word-one-meaning fallacy, based on the false assumption that each verbal symbol refers to one and only one specific subject.” Jerome Frank, *Courts on Trial* 299 (1949).

37. 443 U.S. 193, 99 S. Ct. 2721 (1979).

38. *Id.* at 201–02, 99 S. Ct. at 2726–27.

39. *Id.* at 204, 99 S. Ct. at 2728. See also Wolf, *infra* note 46, at 1225–27.

40. *Louisiana Associated General Contractors, Inc. v. State*, 669 So. 2d 1185, 1197–98 (La. 1996).

41. *Id.*

42. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989).

43. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097 (1995).

However, the focus of this look was occupied primarily with demonstrating that Louisiana's Individual Dignity Clause was intended to "give the citizens of this state greater equal protection rights than are provided under the Fourteenth Amendment."⁴⁴ "Greater" in what sense? The court dismissed arguments based on differing meanings of the word "discriminate" in a footnote.⁴⁵

The court's assessment of the constitutional history of article I, section 3 was very selective. As has been demonstrated by the research of Mary Anne Wolf, there was a good deal more to the constitutional history than the court recognized.⁴⁶ This calls to mind the telling point made by Justice Scalia with respect to *legislative* history: "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."⁴⁷

Professor Harold Levinson has proposed standards for reliance on the records of state constitutional deliberative proceedings. He suggested that such materials are persuasive only if they reflect the "collective intent" of the body, based on "an examination of the *record as a whole* and a compilation of all parts of the record dealing with the specific point being examined."⁴⁸ He then proposed that the burden be on the party relying on such materials to search the record as a whole and that the court (with the aid of opposing counsel) independently review the record.⁴⁹

Constitutional history, or "original intent," has, together with textualism, been another hallmark of the New Judicial Federalism.⁵⁰ In any event, despite the conclusion reached by the Court in *Louisiana Associated General Contractors*, the constitutional history of article I, section 3 does not seem to point authoritatively in either direction.

A very important state constitutional interpretation technique used by many state courts, and used in the past by Louisiana courts,⁵¹ is to

44. *La. Associated Gen. Contractors*, 669 So. 2d at 1196. This was a key point in *Sibley*.

45. *Id.* at 1199 n.12.

46. Mary Anne Wolf, *Louisiana's Equal Protection Guarantee: Questions About The Supreme Court Decision Prohibiting Affirmative Action*, 58 La. L. Rev. 1211, 1216-19 (1998).

47. *Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring).

48. L. Harold Levinson, *Interpreting State Constitutions By Resort to the Record*, 6 Fla. St. U. L. Rev. 567, 570 (1978). See also Wolf, *supra* note 46, at 1223.

49. Levinson, *supra* note 48, at 570.

50. Tarr, *supra* note 32, at 848 ("If a divergent interpretation may be justified by reference to the distinctive origins or purpose of a provision, then state jurists must pay particular attention to the intent of the framers and to the historical circumstances out of which the constitutional provisions arose.")

51. Wolf, *supra* note 46, at 1224 n.100.

examine the intent of the state's voters who ratified either the revised constitution or a specific amendment. Of course, this assessment can be more difficult where the voters had a single vote to approve an entire revised constitution than where they are only asked to approve a specific amendment.⁵² This approach, referred to by the New Jersey Supreme Court as reliance on the "voice of the people,"⁵³ looks to a variety of different evidence.⁵⁴ None of this seems to have been investigated by the Louisiana Court in *Louisiana Associated General Contractors*, but it is a technique it has used in the past.⁵⁵ Obviously, the public perception in 1974 of what the word "discriminate" meant would be contested,⁵⁶ but it is far from obvious that the average voter in Louisiana in 1974 would have thought that the word "discriminate" would outlaw affirmative action. The Court provided no analysis of newspaper coverage before the referendum in 1974 to divine what the voters may have thought the provision would mean.⁵⁷ The Court had looked to this type of evidence in the past,⁵⁸ referring to it as "'public' intent."⁵⁹

In the states that have confronted the question, the courts prefer the likely view or understanding of the average voter over a more technical meaning of language gleaned from constitutional history materials, including debates and committee reports.⁶⁰ Although there are at least two Louisiana cases that appear to take this position,⁶¹ the possibility does not seem to have been considered in *Louisiana Associated General Contractors*.

IV. ALTERNATIVE APPROACHES

John Devlin has argued that the natural rights approach to interpreting state constitutional equality clauses might have some bearing on the question that was apparently resolved by the Louisiana Court.⁶² Clearly, article I, section 1 ("the good of the whole") of the

52. Levinson, *supra* note 48, at 570.

53. Vreeland v. Byrne, 370 A.2d 825, 830 (N.J. 1977).

54. Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U. L. Rev. 189, 194-97 (2002).

55. See *City of New Orleans v. Bd. of Comm'rs of the Orleans Levee Dist.*, 640 So. 2d 237, 246-47 (La. 1994); *Succession of Lauga*, 624 So. 2d 1156, 1165 (La. 1993); John Devlin, *Louisiana Constitutional Law*, 54 La. L. Rev. 683, 726-31 (1994) (citing Louisiana cases).

56. Wolf, *supra* note 46, at 1221.

57. Williams, *supra* note 54, at 196-97.

58. *City of New Orleans*, 640 So. 2d at 246-47, 252.

59. *Id.* at 251.

60. Williams, *supra* note 54, at 200-01.

61. *City of New Orleans*, 640 So. 2d at 246-47; *Lauga*, 624 So. 2d at 1168.

62. Devlin, *supra* note 5, at 912-14. Williams, *supra* note 6, at 1200-03. See

Louisiana Constitution provides a textual springboard for this kind of argument. In addition, it is possible that one could rely on the variety of other equality provisions in the Louisiana Constitution, in addition to article I, section 3, to support a generalized argument based on the historic concerns about equality, classification and discrimination which did not reflect any concern about classifications based on race if they are to remedy past disadvantage. Developing such an argument is beyond the scope of this Comment. Suffice it to say that reasoned criticism of the *Louisiana Associated General Contractors* decision is a useful enterprise not only for its academic importance and its use in other equality cases, but also based on the possibility that as a *constitutional* precedent *Louisiana Associated General Contractors* is more likely to be overruled in the future than other forms of precedent.⁶³

V. A NEW ALTERNATIVE: STATE COURTS AS AGENTS OF FEDERALISM?

The Louisiana Supreme Court might have taken an entirely different approach from its *Louisiana Associated General Contractors* decision, or it may do so in the future. Let us assume that the Court, rather than embracing the thrust of *Croson* and *Adarand*, and extending it in *Louisiana Associated General Contractors*, actually disagreed with those federal constitutional interpretations and viewed the failure of the United States Supreme Court to protect affirmative action as an *abuse* of national power to the detriment of minority people, particularly those in Louisiana. What might the Court have done?

Professor Jim Gardner has recently argued in two important articles that state courts may act as “agents of federalism” to help protect their state citizens from being abused by the federal government.⁶⁴ He first notes that a federal system is conceived to set up a permanent struggle between states and the national government

notes 6–7, *supra*, and accompanying text. See also the Louisiana Constitution “unenumerated rights” clause, La. Const. art. I, § 24 (1974): “[t]he enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state.” For an assessment of these kinds of provisions, see Louis Karl Bonham, *Unenumerated Rights Clauses in State Constitutions*, 63 Tex. L. Rev. 1321 (1985).

63. Williams, *supra* note 54, at 227–29.

64. James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 Wm. & Mary L. Rev. 1725 (2003) [hereinafter “Power and Interpretation”]; *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 92 Geo. L.J. (forthcoming 2004) [hereinafter “Functional Theory”].

as one of the mechanisms to protect the liberty of the people.⁶⁵ Under this view, states are part of a single, integrated structure set up under the federal constitution.⁶⁶ We are familiar with the federal government, through the United States Supreme Court (as well as the Congress and Executive), policing both the federal constitutional limits on the *federal* government's authority, as well as the federal constitutional limits on what *states* may do. The federal constitution, of course, contains a number of specific restrictions on state authority both in its original version and in the Civil War Amendments. The state constitutions, by contrast, do not contain limitations on the national government. Still, state legislatures and executive branch officials have various tools, both formal and informal, for resisting inappropriate exercises of national power. What about state courts? Gardner argues that the state courts may serve *indirectly* as agents of federalism in resisting abuses of national power by interpreting state constitutional provisions in such a way as to enable, rather than inhibit, the state legislative and executive branches in resisting the abuse of national power by the Supreme Court in *Croson* and *Adarand*. It is not obvious, and in any event is beyond the scope of this Comment to analyze fully, whether there is anything in the Louisiana Constitution which, through judicial interpretation, could enable rather than inhibit the legislative and executive branches in resisting, through various means, the outcomes in *Croson* and *Adarand*.⁶⁷ Assuming either of those branches were so inclined, however, this illustrates Professor Gardner's first example of how state courts can serve as agents of federalism in using their (admittedly limited, and indirect) powers of state constitutional interpretation to help resist perceived abuses of national power.

Next, Professor Gardner addresses the area of rights protections.⁶⁸ "State constitutional rights . . . can be weapons of state resistance to national tyranny in a federal system of divided power."⁶⁹ He surveys the possibilities:

First, whenever a state court dissents from the reasoning of a U.S. Supreme Court decision it offers a forceful and very public critique of the national ruling, which can in the long run influence the formation of public and, eventually, official opinion on the propriety of the federal ruling. Second, state

65. Gardner, *Power and Interpretation*, *supra* note 64, at 1728; *Functional Theory*, *supra* note 64.

66. *Id.*

67. It is possible that such interpretations might have facilitated the state legislative and executive branches in meeting the kinds of proof of prior discrimination required to justify affirmative action under *Croson* and *Adarand*.

68. Gardner, *Functional Theory*, *supra* note 64.

69. *Id.*

constitutional rulings that depart from or criticize U.S. Supreme Court precedents can contribute to the establishment of a nationwide legal consensus at the state level, a factor which the Supreme Court sometimes considers in the course of its own constitutional decision making. Third, generous state interpretations of individual rights can more directly check national power by prohibiting state and local governments from exercising authority permitted them under the U.S. Constitution to suppress certain kinds of private behavior. In so doing, state courts create spaces in which otherwise prohibitable behavior may flourish. Finally, rights-protective rulings by state courts can help ameliorate the harm to liberty caused by narrow national rulings by providing protection for second-best alternatives to the types of behavior that such national rulings permit governments to suppress.⁷⁰

These possibilities, however, are quite limited in the *Croson* and *Adarand* situations because those cases found that the federal constitutional rights of nonminorities were violated by the affirmative action programs. They still may be seen by state courts as abuses of national power in terms of their impact on minorities. Gardner notes:

[W]hen we think about tyranny perpetrated by the national government, we tend to think about rights-invasive . . . abuses . . . by the legislative and executive branches. But liberty can also be abused by the judicial branch, most notably when federal courts refuse to acknowledge and accord protection to individual rights possessed by the people of the United States.⁷¹

Of course, in *Croson* and *Adarand* the Supreme Court did not *refuse* to recognize rights, but rather it mandated protection of nonminorities at the expense of minorities. Therefore, in Gardner's terms, "national standards prevail and there may be nothing states can do to limit their impact on the activities subject to federal regulatory standards."⁷²

It may be possible for the state government to ameliorate that harm indirectly by using its lawful powers to expand and protect liberty in other directions. One important way in which the state can accomplish that objective is by providing

70. *Id.* at (working draft p.6).

71. *Id.* at (working draft p.44).

72. *Id.* at (working draft p.67). "A state that views such an exercise of national power as an abusive invasion of liberty has at its disposal no fully legal means to undo directly the particular harm committed by the national government. A lawful exercise of national power, backed by the Supremacy Clause and the threat of enforcement, is enough to make that harm stick."

heightened protection under the state constitution to other liberties that are related to the liberty that national power has denied, or which might in some circumstances plausibly substitute for it.⁷³

Professor Gardner continues his explanation by using the United States Supreme Court's approach to affirmative action, including *Croson* and *Adarand*, as an example, noting the sharp restriction those decisions imposed on laws providing employment preferences for minorities. Under these circumstances, the "entire field of racial relations is so hemmed in on all sides by national law that it may prove exceedingly difficult for a state to counteract a national contraction of liberty by expanding liberty in any directly related area."⁷⁴ As a second-best alternative, then, Professor Gardner suggests that the state constitution could be interpreted to "confer upon minorities some kind of right to noneconomic opportunities, such as cultural integrity or cultural expression."⁷⁵ He presents this as an admittedly second-best, *indirect* response, but as an example of "state power . . . asserting itself against national power in the only way it can."⁷⁶

Interestingly, Louisiana has one of the few, if not the only, state constitutions with explicit protection for "culture." Article I, section 3, the "Individual Dignity Clause," provides, *inter alia*, "[n]o law shall arbitrarily, capriciously, or unreasonably discriminate against a person because birth, age, sex, *culture*, physical condition, or political ideas or affiliation."⁷⁷ In addition, article XII, section 4 provides: "[t]he right of the people to preserve, foster, and promote their respective historic, linguistic and *cultural* origins is recognized."⁷⁸ The leading commentator on the Louisiana Constitution notes that the 1974 discussions of these provisions centered on Francophone culture and language.⁷⁹ He states that the latter provision was originally rejected in committee because of its "imprecision and ambiguity."⁸⁰ It was adopted, however, by a 95–1 vote as a floor amendment, leading Professor Hargrave to observe: "[t]he language, however, is broad, giving an *activist* court a basis to protect what it will develop

73. *Id.* at (working draft p.68).

74. *Id.*

75. *Id.*, citing Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

76. *Id.* at (working draft p.75).

77. La. Const. art. I, § 3 (1974) (emphasis added).

78. La. Const. art. XII, § 4 (1974) (emphasis added).

79. Hargrave, *supra* note 14, at 25, 187. For a recent analysis of Louisiana's state constitutional culture, see James T. McHugh, *Ex Uno Plura: State Constitutions and Their Political Cultures* 135–60 (2003).

80. Hargrave, *supra* note 14, at 187.

on a case-by-case basis as cultural and linguistic rights."⁸¹ Clearly the language is broad enough to support judicial protection of cultural and linguistic preferences of racial and other minorities. It is, of course, judicial *activism*, explicitly as a negative reaction to narrow United States Supreme Court decisions, that Professor Gardner advocates.

Gardner suggests that state constitutional interpretation techniques be expanded to include explicit consideration of whether there has been an abuse of national power by the United States Supreme Court through its interpretation of the federal constitution.⁸²

By treating state power as having an essential function derived in part from the national structure of federalism, the functional approach recognizes that state power always exists in relation to national power and never in isolation from it. A state constitution is a document fundamentally ordering the exercise of state power. Consequently, a state constitution must generally be interpreted with one eye on the U.S. Constitution and on the actions of the national government taken in reliance on it. Only by monitoring the operation of the national government can any organ of state government fulfill its responsibility to discover and resist abuses of national power. Certainly, the national government will be watching the state. Federalism requires that this practice be reciprocal. Where individual rights are concerned, this means that state courts should always be prepared to exercise independent judgment about the propriety of U.S. Supreme Court rulings, and, when appropriate, to resist and work to undermine those rulings of which they disapprove.⁸³

The Louisiana Supreme Court's decision in *Louisiana Associated General Contractors* contained no apparent consideration of the correctness of the United States Supreme Court's *Croson* and *Adarand* decisions. Had the majority of the Court considered those decisions to be incorrect interpretations of the federal constitution—abuses of national power by the Supreme Court—*Louisiana Associated General Contractors* would not have come out the way it did, closing off what little state constitutional space was left for affirmative action. In addition, the Louisiana Court could compensate partially for the irresistible reach of *Croson* and *Adarand* by construing other, related rights such as the protection of culture, broadly for the benefit of minorities. These perspectives offered by

81. *Id.* at 187–88 (emphasis added).

82. Gardner, *Functional Theory*, *supra* note 64, at (working draft p.80).

83. *Id.* at (working draft p.82).

Professor Gardner demonstrate an entirely new range of options available to a state court in similar circumstances, and even possibly to the Louisiana Supreme Court in the future.

VI. CONCLUSION

Hopefully, these brief observations on *Louisiana Associated General Contractors* specifically, and on state constitutional law more generally, will shed some light on Louisiana constitutional law, which has a very important role to play in protecting rights as an integral part of our system of constitutional federalism.

