Local Government Law
Kenneth M. Murchison
LOCAL GOVERNMENT LAW

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During 1982-1983, state decisions in cases affecting local governments spanned the normal array of categories, including the state constitution's bar on local laws,1 the status of local governments vis a vis the state,2 Louisiana's annexation statutes,3 the rights and protections afforded to public officers4 and employees,5 the scope of the police

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1. City of New Orleans v. Treen, 431 So. 2d 390 (La. 1983); see infra notes 76-105 and accompanying text.
2. E.g., City of New Orleans v. State, 426 So. 2d 1318 (La. 1983); New Orleans Firefighters Ass'n v. Civil Serv. Comm'n, 422 So. 2d 402 (La. 1982); Ruby v. City of Shreveport, 427 So. 2d 1267 (La. App. 2d Cir.), writ denied, 433 So. 2d 154 (La. 1983); Spillman v. City of Baton Rouge, 417 So. 2d 1212 (La. App. 1st Cir. 1982), remanded, 430 So. 2d 92 (La. 1983) (reconsider in light of New Orleans Firefighters Ass'n); see infra notes 106-78 and accompanying text; see also City of Baton Rouge v. De Frances, 429 So. 2d 470 (La. App. 1st Cir. 1983) (state law governing qualifications for city judgeship prevails over less restrictive qualifications established in home rule charter).
3. E.g., Kel-Kan Inv. Corp. v. Village of Greenwood, 428 So. 2d 401 (La. 1983) (annexation statute does not authorize judicial review of a municipality's failure to act favorably on a deannexation petition filed by property owners whose property is located in the municipality); Bernelle v. Town of Richwood, 420 So. 2d 505 (La. App. 2d Cir. 1982) (30-day prescription statute applicable to suits challenging annexation ordinances does not apply to a suit where the municipality failed to prove that the ordinance was published as required by the statute to begin the running of the prescriptive period).
4. E.g., Detraz v. Fontana, 416 So. 2d 1291 (La. 1982) (LA. R.S. 42:261(E), which grants public officials who are sued for matters arising out of the duties of their office the rights to collect attorney fees if the suit is unsuccessful and to require that bond to cover attorney fees be posted before the case is tried, is unconstitutional because it denies potential plaintiffs equal protection, due process, and access to the courts); Lowry v. City of Oakdale, 429 So. 2d 236 (La. App. 3d Cir. 1983) (coroner's certification of his expenses as "necessary and unavoidable" when he testified under oath at trial was sufficient to require city to pay expenses that the court found were reasonable and necessary for the functioning of the parish coroner).
5. E.g., City of Kenner v. Pritchett, 432 So. 2d 971 (La. App. 5th Cir. 1983) (city had authority to discharge a police officer for single incident of sleeping on duty even though officer had five years of prior satisfactory service, and no permanent officer had previously been terminated for a single sleeping incident); Mixon v. New Orleans Parish Police Dep't, 430 So. 2d 210 (La. App. 4th Cir. 1983) (probationary employee bears burden of proof in age discrimination appeal to city civil service commission); Ivy v. Natchitoches Parish School Bd., 428 So. 2d 1332 (La. App. 3d Cir.), writ denied, 433 So. 2d 180 (La. 1983), cert. denied, 104 S. Ct. 279 (1983) (single vehicular accident could form the basis for dismissal of a tenured school bus driver); Dauser v. Department of Pub. Utils., 428 So. 2d 1176 (La. App. 5th Cir. 1983) (evidence that department had few or no women supervisors does not constitute proof of discrimination); Linton v. Bossier City Mun. Fire & Police Civil Serv. Bd., 428 So. 2d 515 (La. App. 2d Cir. 1983) (discharge authority may consider an employee's entire work record in determining his fitness for continued employment so long as charges are not so stale as to impugn the good faith of the appointing authority); Sampite v. Natchitoches Fire & Police Civil Serv. Bd., 426 So. 2d 729 (La. App. 3d Cir. 1983) (judicial review of a civil service board's refusal to recuse a member is limited to the statutory
power,\(^6\) local option elections,\(^7\) land use controls,\(^8\) public contracts,\(^9\) tort

standard of whether the decision "was made in good faith for cause"); Daniel v. Department of Police, 426 So. 2d 282 (La. App. 4th Cir. 1983) (police officer's failure to comply with ordinance requiring all city employees to live within city limits did not amount to "good cause" for his dismissal from the police force); George v. Town of Lutcher, 422 So. 2d 537 (La. App. 5th Cir. 1982) (Lawrason Act permits the mayor and board of aldermen of a municipality to terminate municipal employees for reasons other than the two grounds—misconduct and neglect of duties—for which the statute specifically authorizes dismissal); Tanner v. City of Baton Rouge, 422 So. 2d 1263 (La. App. 1st Cir. 1982), writ denied, 429 So. 2d 128 (La. 1983) (action in discharging a plumbing inspector for encouraging subdivision residents to resist city sewer tie-ins and to seek legal assistance did not violate the first amendment rights of the inspector); Bellard v. Department of Streets, 421 So. 2d 258 (La. App. 4th Cir. 1982), writ denied, 427 So. 2d 1208 (La. 1983) (by vesting general rule-making authority in civil service commissions, article X, section 10(A)(1) of the Louisiana Constitution supersedes the statutory requirement that a probationary employee be notified of her dismissal at least ten days prior to the expiration of the probationary period).

6. Hutchinson v. Board of Aldermen, 423 So. 2d 1229 (La. App. 5th Cir. 1982) (city ordinance that prohibited issuance of licenses to sell fireworks to anyone except existing retailers was a valid exercise of the city's police power that did not violate the equal protection or due process rights of unsuccessful applicants for a license); Metropolitan New Orleans Chapter v. Council of New Orleans, 423 So. 2d 1213 (La. App. 4th Cir. 1982), writ denied, 430 So. 2d 77 (La. 1983) (city does not have to hold hearings before approving monthly fuel adjustment charges of public utilities).

7. E.g., Rapides Merchants Assoc. v. Rapides Parish Police Jury, 421 So. 2d 955 (La. App. 3d Cir. 1982), writ denied, 426 So. 2d 174 (La. 1983) (Act 663 of 1980 allows local governing bodies to ban beverages containing less than 3.2% alcohol by volume); Gruner v. Claiborne Parish Police Jury, 417 So. 2d 18 (La. App. 2d Cir.), writ denied, 420 So. 2d 456 (La. 1982) (in determining whether a local option election satisfies the statute's requirement that it be conducted in substantial compliance with statutory requirements, courts will use the election code's general tests for judicial challenges to elections).

8. Morton v. Jefferson Parish Council, 419 So. 2d 431 (La. 1982) (language allowing a special use zoning district so long as it did "not seriously affect any adjoining property or the general welfare" provided inadequate standards to justify parish's denial of the special use permit requested by the plaintiff); Calcasieu Parish Police Jury v. Boullion, 432 So. 2d 1181 (La. App. 3d Cir. 1983) (where state health regulations were amended to require seafood processor to use an extra room, addition of a room to a seafood processing establishment did not constitute an impermissible enlargement of a nonconforming use); Hays v. City of Baton Rouge, 421 So. 2d 347 (La. App. 1st Cir.), writ denied, 423 So. 2d 1166 (La. 1982) (state law that governs location of "community homes" for retarded adults only applies to homes that provide resident services and supervision to fewer than six handicapped persons and does not supersede local ordinance insofar as it applies to a home designed to accommodate seven retarded adults); Terrytown Properties v. Parish of Jefferson, 416 So. 2d 323 (La. App. 5th Cir. 1982) (in refusing to rezone property from residential to commercial use, city may properly rely on the substantial opposition from the residents of the area as one basis for its decision); Wes-T-Err Dev. Corp. v. Parish of Terrebonne, 416 So. 2d 209 (La. App. 1st Cir.), writ denied, 421 So. 2d 251 (La. 1982) (police jury may exercise its police power to preclude a particular landowner from opening driveway without passing any general ordinance concerning driveways).

9. Louisiana Consumer's League v. City of Baton Rouge, 431 So. 2d 35 (La. App. 1st Cir. 1983) (even though mayor lacked authority to contract with consumer's league, city council ratified the contract by not repudiating it immediately upon learning of its existence); City of Covington v. Heard, 428 So. 2d 1132 (La. App. 1st Cir. 1983) (if contractor complies with the plans and specifications supplied by the city, he is not liable for any
liability, and the Open Meetings Law. In the same period, the United States Supreme Court issued an important opinion explaining the market participant exception to the limitations imposed on local governments by the Commerce Clause, and various decisions of the federal courts of appeals explored the impact of the recent Supreme Court decisions that have denied antitrust immunity to local governments.

In an effort to accommodate the conflicting needs for breadth of coverage and depth of analysis, the present article will examine the federal developments as well as two groups of state decisions: those concerning the state’s ability to control local governments and those dealing with the problem of imposing tort liability on local governments.

deficiency in the plans or in the materials that the plans allow to be used); cf. Bilongo v. Department of Health & Human Resources, 428 So. 2d 1021 (La. App. 1st Cir. 1983) (public bid law allows the state to contract with bidders whose bids contain “insubstantial” deviations from the bid proposals and grants the state wide discretion in determining whether the bid substantially varies from the proposal); Millette Enterprises v. State, 417 So. 2d 6 (La. App. 1st Cir.), writ denied, 417 So. 2d 363 (La. 1982) (public bid law prohibits contracting authority from rejecting all bids and rewriting specifications to prefer a particular bidder).


11. Eastwold v. Garsaud, 427 So. 2d 48 (La. App. 4th Cir. 1983) (civil service commission’s need to reach a decision by the end of the calendar year constituted an “extraordinary emergency” that authorized the commission to dispense with the normal notice provisions for a meeting scheduled to be held on December 29).


13. “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .” U.S. Const. art. I, § 8, cl. 3.

14. E.g., Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983); Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1983); Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982); Mason City Center Assoc. v. City of Mason, 671 F.2d 1146 (8th Cir. 1982); see infra notes 42-75 and accompanying text.

FEDERAL-LOCAL RELATIONS

Dormant Commerce Clause

For more than a century, the United States Supreme Court has adhered to the position that, by granting the power to regulate interstate commerce to Congress, the Constitution operates to displace state and local power in some situations where Congress has not exercised its power by passing federal legislation. The precise boundaries of this dormant Commerce Clause limitation on local power have varied over the years, and two conflicting trends have appeared in recent decisions. On the one hand, the Court has been noticeably more willing to strike down regulations with significant impacts on interstate commerce, especially when a disproportionate share of the burdens imposed by the regulation fall on interstate commerce. At the same time, the Court has allowed states to subsidize businesses owned by their own citizens and to grant their own citizens preferential treatment from state-owned businesses when the states act as "market participants" rather than as "market regulators." During the 1982 term, the Court confirmed and expanded the latter of these trends by explicitly including local governments within the ambit of the "market participant" exemption and by allowing the governmental entity to use its market power to control contractual relationships beyond the one to which it is a party. More specifically, White v. Massachusetts Council of Construction Employers allowed the mayor


22. Id. at 436.

23. 103 S. Ct. 1042 (1983). Justice Blackmun dissented from the dormant Commerce Clause holding and submitted a dissenting opinion that Justice White joined. He argued:

The legitimacy of a claim to the market participant exemption . . . should turn primarily on whether a particular state action more closely resembles an attempt
of Boston to require that bona fide residents of the city comprise at least one half of the work force for all construction projects financed with city funds.\textsuperscript{24}

The opponents of the mayor's hire-Boston order argued that the reach of the market participant exception should be established by using a balancing test essentially similar to the one used to determine whether local regulations have an unreasonable impact on interstate commerce, i.e., balancing the burden on interstate commerce against the need for the local action to achieve a valid objective.\textsuperscript{25} The Supreme Court emphatically rejected that approach, however. Instead, the Court described the "market participant/market regulator" question as a preliminary issue that precedes the balancing test used by the recent cases applying the dormant Commerce Clause; if the local government acts as a market participant, the Commerce Clause is irrelevant. According to the \textit{White} majority, the earlier decisions in \textit{Hughes v. Alexandria Scrap Corp.}\textsuperscript{26} and \textit{Reeves, Inc. v. Stake}\textsuperscript{27} established "the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause."\textsuperscript{28}

Having thus defined the issue, the Court proceeded to the conclusion that the hire-Boston order fell within the market participant exception without developing any clear test for separating market participation from market regulation. By carefully distinguishing the Alaska-hire statute that \textit{Hicklin v. Orbeck}\textsuperscript{29} ruled violative of the Privileges and Immunities to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.

\textit{Id.} at 1050. When judged by this standard, the mayor's order amounted, in Justice Blackmun's view, to regulation rather than market participation because it was "a direct attempt to govern private economic relationships" rather than an instance "of a seller's or purchaser's simply choosing its bargaining partners." \textit{Id.}

24. The order also applied to construction projects funded by federal grants that the city administered. The Court unanimously upheld the order insofar as it applied to the federally funded project on the ground that "the federal regulations for each program affirmatively permit[ted] the type of parochial favoritism expressed in the order." \textit{Id.} at 1047 (footnote omitted); \textit{accord id.} at 1048-49 (Blackmun, White, JJ., concurring and dissenting).

25. \textit{See, e.g., Raymond Motor Transp. v. Rice, 434 U.S. 429, 443 (1978) (evaluation of a state safety regulation challenged under the dormant Commerce Clause requires "a weighing of the asserted safety purpose against the degree of interference with interstate commerce"); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("the extent of the burden [on interstate commerce] that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities").


28. 103 S. Ct. at 1044.

Clause, the Court did suggest, however, that the government's use of its market power could amount to market regulation in extreme cases. The Alaska statute invalidated in Hicklin required preference for Alaska residents "in all work connected with oil and gas leases to which the State was a party;" by contrast, the application of the hire-Boston order in White did not "represent the sort of 'attempt to force virtually all businesses that benefit in some way from the economic ripple effect'" of the city's decision to enter into contracts for construction projects "to bias their employment practices in favor of the [city's] residents." Unfortunately, the opinion made no attempt to explain when market action less pervasive than the one invalidated in Hicklin might make the government's action one of market regulation rather than market participation. A footnote acknowledged that some limits circumscribed a "local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business." But the Court found no need in White "to define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract." Emphasizing that the mayor's hire-Boston order "cover[ed] a discrete, identifiable class of economic activity in which the city is a major participant," the majority declared that it fell "well within the scope of Alexandria Scrap and Reeves."

From a formal perspective, White makes analysis of Commerce Clause problems more rational by defining the steps of the analytic process. It unequivocally established a two-part test for analyzing dormant Commerce Clause challenges to the actions of local governments. One first determines if the government is acting as a market participant or a market regulator. If, as in White, the governmental action is classified as that of a market participant, the Commerce Clause becomes irrelevant, and no further analysis is needed. If, on the other hand, the government is acting as a regulator, one must then proceed to the traditional question involved in dormant Commerce Clause cases: whether the regulation imposes an unreasonable burden on interstate commerce.

By identifying market participation as a distinct, preliminary issue, the Court has provided a method for approaching dormant Commerce

30. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. In White, the Court unanimously remanded the case to the Supreme Judicial Court of Massachusetts without considering whether the mayor's order violated the Privileges and Immunities Clause. 103 S. Ct. at 1048 n.12; id. at 1049 n.1 (Blackmun, White, JJ., concurring and dissenting).
31. 103 S. Ct. at 1046.
32. Id. (quoting Hicklin v. Orbeck, 437 U.S. 518, 531 (1978)).
33. Id. at 1046 n.7.
34. Id.
35. Id.
36. Id.
Clause cases which lessens the possibility of confusing the participation/regulation distinction with the traditional reasonableness test. Nonetheless, the Court's failure to articulate a definite content for the participation/regulation distinction leaves a conceptual void with a significant number of practical implications. Because the economic impact of government subsidies and preferences seems identical to that of government regulation, the justification for the distinction must lie in certain noneconomic values. Unfortunately, the White opinion and its predecessors have done little to identify what those noneconomic values might be. Until the Court clarifies the bases of the market participant exception, application of the participation/regulation distinction must remain largely a matter of guesswork.

One can anticipate that the Court will have the opportunity to articulate and to refine the White distinction in the coming years. Local governments can frequently exercise a significant degree of control over private transactions if they have, or can obtain, dominant positions in local markets, and intuition suggests that they will sometimes use their power to prefer local citizens. For example, governments that own significant quantities of natural resources may try to use their market power to ensure that their citizens have an adequate quantity of the products that are ultimately produced from those resources, or governments that desire to avoid the importation of environmental problems may control those problems through market participation and subsidies rather than through regulation or prohibition. One suspects, and Justice Rehnquist's

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37. But see Anson & Schenkkan, Federalism, the Dormant Commerce Clause, and State-Owned Resources, 59 Tex. L. Rev. 71, 89-90 (1980) (the "primary redistributional effects" of proprietary activities fall on the state's own citizens, who are the "true individual owners" of resources that the state owns).

38. Reeves suggested two justifications for the market participant exception: "considerations of state sovereignty," 447 U.S. at 438, and an analogy to "'the long-recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal.'" Id. at 438-39 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)). Neither rationale is persuasive for explaining the scope of the exception that White recognizes. Although the Court has recently recognized state sovereignty as a constitutional value that merits judicial protection, the market participant exception turns the concept on its head. Decisions such as National League of Cities v. Usery, 426 U.S. 833 (1976), and United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), emphasize that state sovereignty protects states from congressional control only when they are exercising "'traditional governmental functions.'" By contrast, the market participant exception protects states when they are acting in their proprietary role, but not when they exercise governmental or regulatory powers. As for the second justification—the analogy to the rights of private traders—the White dissent demonstrates that the authority the majority confers on local governments goes beyond "'the right of traders in our free enterprise system'" to choose with whom they will deal. 103 S. Ct. at 1050 & n.4.

39. See Anson & Schenkkan, supra note 37, at 93-95 (discussing Louisiana and Texas statutes); cf. La. S. 529, 9th Reg. Sess. (1983) (requiring state mineral leases to obligate lessees to give preference and priority to Louisiana suppliers and labor in drilling, development, and operational activity).

40. For example, a local government might try to circumvent City of Philadelphia v.
dicta hints, that the Supreme Court will limit the ability of local governments to use the market participation exception to exercise control over interstate commerce. What remains impossible after White is confident prediction of the point where the line will be drawn.

**Antitrust Liability**

This section of last year’s faculty symposium analyzed the Supreme Court’s decision in *Community Communications Co. v. City of Boulder*, which held that the “state action” doctrine did not preclude a “home rule” municipality in Colorado from antitrust liability for adopting an ordinance that imposed a moratorium on the expansion of cable television services within its borders. That analysis criticized the Supreme Court’s decision, but it also noted that the ultimate impact of the decision would depend upon the manner in which future cases applied traditional antitrust doctrine to cases involving local governments. Although the Supreme Court has not yet issued any opinions applying *Community Communications*, a number of lower courts have rendered decisions clarifying the potential antitrust liability of local governments. In general, these decisions have limited the impact of *Community Communications* in two ways—by showing a willingness to find the state authorization necessary to bring local governments within the ambit of the “state action” doctrine and by applying various nonimmunity defenses that are available under the antitrust laws.

*Community Communications* indicated that local governments were entitled to the state action immunity from antitrust liability “to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy,” and the recent decisions of the courts of appeals have tried to explain what types of state statutes will satisfy this

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New Jersey, 437 U.S. 617 (1978), by obtaining a monopoly over waste (or hazardous waste) disposal facilities and then allowing only state residents to use those facilities.

41. See 103 S. Ct. at 1046 n.7 (“We agree with [the dissent] that there are some limits on a state or local government’s ability to impose restrictions that reach beyond the immediate parties with which the government transacts business. . . . [But, we] find it unnecessary in this case to define those limits with precision . . . .’’); see also Anson & Schenkkan, supra note 37, at 89-91 (arguing that Congress should limit a state’s ability to impose contractual conditions on sales of natural resources when the conditions extend beyond the immediate transaction in which the state is involved). Dicta in Reeves v. Stake, 447 U.S. 429, 448 (1980), suggests that the market participant exception may be inapplicable to sales of natural resources. In addition, the Court may also limit the market participant exception when a government uses its regulatory power to grant monopoly status to its own proprietary activity.

42. Murchison, supra note 15, at 463-68.

43. 455 U.S. 40 (1982).

44. Murchison, supra note 15, at 467.

45. 455 U.S. at 52.

46. See Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th
requirement. Perhaps the most thorough of these attempts is *Town of Hallie v. City of Eau Claire.* In this case, Judge Wisdom rejected three possible obstacles to a finding that a state policy was sufficiently clear and affirmative to immunize local governments from antitrust liability. First, he refused to require that the state specifically authorize "the monopolizing effect" that results from the local government's action; instead, he was willing to infer state approval of any "anticompetitive effect that is a reasonable or foreseeable consequence" of engaging in an activity that the state has authorized. Second, Judge Wisdom rejected an argument that local governments be required to "point to a state policy directing or compelling the challenged conduct" in order to claim the state action immunity. Any local action taken "pursuant to clearly articulated and affirmatively expressed state policy . . . to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition"—entitled a local government to antitrust immunity "because conduct pursuant to such a policy [constitutes] state action." Finally, he also declined to mandate "active state supervision" of a local government's conduct as a prerequisite to state action immunity; such a requirement would, he declared, amount to an unwise erosion of "the concept of local autonomy and home rule authority."

After these obstacles to state action immunity had been rejected, the court in *Town of Hallie* went on to analyze the Wisconsin statutes governing sewerage collection and treatment. It found them sufficiently precise to immunize the city from antitrust claims based upon a refusal to provide sewerage treatment facilities to areas in surrounding townships that would not agree to be annexed into the city. Other decisions have reached comparable conclusions with respect to various state statutes. For example, another panel of the Seventh Circuit held the Indianapolis city ordinances governing cable television licenses and franchises sufficiently related to the state policy involved to support the trial court's denial of a preliminary injunction based upon state ac-

Cir. 1983); *Town of Hallie v. City of Eau Claire,* 700 F.2d 376 (7th Cir. 1983); Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), cert. denied, 103 S. Ct. 2122 (1983); Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982); Mason City Center Assocs. v. City of Mason, 671 F.2d 1146 (8th Cir. 1982).

47. 700 F.2d 376 (7th Cir. 1983) (Wisdom, Sr. Cir. J., sitting by designation).

48. *Id.* at 381; accord *Gold Cross Ambulance & Transfer v. City of Kansas City,* 705 F.2d 1005 (8th Cir. 1983).

49. 700 F.2d at 381.

50. *Id.*

51. *Id.*; accord *Gold Cross Ambulance & Transfer v. City of Kansas City,* 705 F.2d 1005 (8th Cir. 1983).

52. 700 F.2d at 384; accord *Gold Cross Ambulance & Transfer v. City of Kansas City,* 705 F.2d 1005, 1015 (8th Cir. 1983).

53. 700 F.2d at 382-83.
tion immunity.\textsuperscript{34} Similarly, the Tenth Circuit ruled that the Colorado statutes authorizing cities to operate airports clothed them with state action immunity for claims based on the anticompetitive nature of airport leases.\textsuperscript{35}

The opinions of the last year have also begun to explore how other doctrines of antitrust law will apply in cases involving local governments,\textsuperscript{16} and the preliminary results suggest that substantive defenses will prove significant in cases where immunity doctrine fails to bar the action. \textit{Mason City Center Associates v. City of Mason City},\textsuperscript{17} one of the first decisions handed down after \textit{Community Communications}, emphasized the plaintiff's duty to prove the existence of a causal relationship between an allegedly anticompetitive agreement and the injury that he suffered. In addition, in affirming the denial of a preliminary injunction, \textit{Omega Satellite Products Co. v. City of Indianapolis}\textsuperscript{18} suggested that the "rule of reason" would provide the substantive standard for evaluating antitrust claims against local governments. Furthermore, dicta in an Eighth Circuit opinion\textsuperscript{19} states that the Noerr/Pennington exception for lobbying activities\textsuperscript{20} will provide a defense to some claims.\textsuperscript{41} Although none of these decisions can be regarded as the final word on the doctrines they discuss, they do suggest that even when local governments cannot claim state action immunity they will often be able to avoid antitrust liability.

Because three of the recent decisions involving local governments arose in a single circuit, the Eighth Circuit, examination of these decisions as a group provides a useful overview of the present potential for antitrust liability. The most recent decision, \textit{Gold Cross Ambulance & Transfer v. City of Kansas City},\textsuperscript{42} confirmed that the state action immunity doctrine remains an important defense for local governments. It affirmed the dismissal of an action charging that Kansas City's decision to license a single ambulance company to serve the city\textsuperscript{43} violated the Sherman Act.\textsuperscript{44}

\begin{itemize}
\item 54. \textit{Omega Satellite Products Co. v. City of Indianapolis}, 694 F.2d 119 (7th Cir. 1982).
\item 55. \textit{Pueblo Aircraft Serv. v. City of Pueblo}, 679 F.2d 805 (10th Cir. 1982).
\item 57. 671 F.2d 1146 (8th Cir. 1982) (affirming judgment based on jury verdict).
\item 58. 694 F.2d 119 (7th Cir. 1982).
\item 59. \textit{Westborough Mall, Inc. v. City of Cape Girardeau}, 693 F.2d 733 (8th Cir. 1983).
\item 61. The Eighth Circuit held the Noerr/Pennington exception inapplicable to the specific facts before it. \textit{Westborough Mall, Inc. v. City of Cape Girardeau}, 693 F.2d 733, 745-46 (8th Cir. 1983); see infra notes 71-73 and accompanying text.
\item 62. 705 F.2d 1005 (8th Cir. 1983).
\item 63. For a description of the city's system for providing ambulance service, see \textit{id.} at 1008-10.
\item 64. 15 U.S.C. §§ 1-7 (1982).
\end{itemize}
Since Missouri statutes\(^6\) authorized the state's municipalities to use "single-operation ambulance system[s]" and the legislature had enacted the statutes with the "intent to displace competition,"\(^6\) the Eighth Circuit concluded that the state action defense exempted the city from Sherman Act liability.\(^6\) Moreover, the court's earlier decision in *Mason City Center Associates v. City of Mason City*\(^6\) emphasized that, even in situations where the city is not entitled to state action immunity,\(^6\) proof that a local government had entered into an anticompetitive agreement would not result in antitrust liability without proof that the anticompetitive agreement had caused the activity that harmed the plaintiff. Thus, the Eighth Circuit in *Mason City* upheld a jury verdict for the city on the ground that the evidence permitted a jury finding that the plaintiff had not proved the causal relationship between the city's agreement with plaintiff's competitor and the zoning decision that plaintiff challenged.\(^7\) However, the third Eighth Circuit decision, *Westborough Mall, Inc. v. City of Cape Girardeau*,\(^7\) suggests that antitrust liability remains a significant threat in extreme situations. Reversing the summary judgment granted by the district court, the Court of Appeals held that the plaintiff had offered sufficient evidence of a conspiracy between the city and rival developers to create a material issue of fact and thus to require a trial on the merits. Proof of the allegations of misconduct would, the court declared, negate the state action immunity: ""[e]ven if zoning in general can be characterized as 'state action,' . . . a conspiracy to thwart normal zoning procedures . . . is not in furtherance of any clearly articulated state policy.""\(^7\) Likewise, the Noerr/Pennington exemption for lobbying activities could not bar the action without a trial because the exemption protected only ""legitimate lobbying efforts,"" not lobbying activities that were ""accompanied by illegal or fraudulent actions.""\(^3\)

Considered together, the Eighth Circuit decisions provide a useful snapshot of the exposure to antitrust liability that local governments cur-

\(^{65.}\) Mo. Ann. Stat. §§ 67.300, 190.100-.195 (Vernon 1983 & Supp. 1983); see generally 705 F.2d at 1011-12, 1011 n.9, 1012 n.10.

\(^{66.}\) 705 F.2d at 1011.

\(^{67.}\) Id. at 1015.

\(^{68.}\) 671 F.2d 1147 (8th Cir. 1982).

\(^{69.}\) Mason City involved a challenge to the city's refusal to rezone property owned by one of the plaintiffs to permit the construction of a shopping center. The Court's only consideration of the state-action defense came in a footnote that noted the issue ""would be governed by [Community Communications]"" and that declared the district had ""accurately predicted the future course of the law"" when it rejected the defense. Id. at 1150 n.5.

\(^{70.}\) Id. at 1149.

\(^{71.}\) 693 F.2d 733 (8th Cir. 1983).

\(^{72.}\) Id. at 746. The court did, however, hold that the individual city defendants were immune from personal liability under the Sherman Act. Id. at 748 n.9 (citing Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 613-14 (8th Cir. 1980)).

\(^{73.}\) Id. at 746.
rently face, and they provide no support for predictions that Community Communications will have a catastrophic impact. Basically, they suggest that the federal courts are ready to read state statutes sympathetically to find state authorization for the anticompetitive consequences that inevitably flow from local regulatory activity. The federal courts are willing to do this in order to give local governments the protection of other defenses that are generally available to antitrust defendants; they are willing to impose liability only in egregious situations where local governments have engaged in action far beyond the scope of conduct normally appropriate to implement regulatory policies. Nonetheless, as last year's symposium suggested, even this limited exposure strengthens the hands of developers and others seeking to avoid the effect of local regulation. For one thing, the mere threat of expensive antitrust litigation will induce many local governments to choose compromise over conflict. In addition, the uncertainty inherent in the lack of Supreme Court precedent explaining how the major antitrust doctrines will apply to actions against local governments cautions local governments to minimize their exposure through compromise. Decisions of the next few years may significantly reduce this latter pressure for compromise, but the former will remain unless Congress chooses to amend the Sherman Act to overrule Community Communications.

STATE-LOCAL RELATIONS

During the 1982-1983 term, Louisiana's appellate courts rendered a number of significant decisions defining the scope of state authority over local governments. Although one of these decisions continued the recent trend toward limiting state authority to enact legislation directed at specific local areas, the others recognized a relatively broad state power to control local governments when the state regulations take a more general form.

Local Laws

One of the ways that the Louisiana Constitution limits state involvement in local affairs is by restricting the legislature's authority to pass local laws. Article III, section 12(A) lists ten matters that the legislature may not regulate by local act, and article VI, section 2 forbids most

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74. See Murchison, supra note 15, at 467-68.
76. Article III, section 12(A) provides:
   Except as otherwise provided in this constitution, the legislature shall not pass a local or special law:
local acts dealing with incorporation, merger, or dissolution of municipalities. The constitution permits the legislature to enact local laws

(1) For the holding and conducting of elections, or fixing or changing the place of voting.

(2) Changing the names of persons; authorizing the adoption or legitimation of children or the emancipation of minors; affecting the estates of minors or persons under disabilities; granting divorces; changing the law of descent or succession; giving effect to informal or invalid wills or deeds or to any illegal disposition of property.

(3) Concerning any civil or criminal actions, including changing the venue in civil or criminal cases, or regulating the practice or jurisdiction of any court, or changing the rules of evidence in any judicial proceeding or inquiry before courts, or providing or changing methods for the collection of debts or the enforcement of judgments, or prescribing the effects of judicial sales.

(4) Authorizing the laying out, opening, closing, altering, or maintaining of roads, highways, streets, or alleys; relating to ferries and bridges, or incorporating bridge or ferry companies, except for the erection of bridges crossing streams which form boundaries between this and any other state; authorizing the constructing of street passenger railroads in any incorporated town or city.

(5) Exempting property from taxation; extending the time for the assessment or collection of taxes; relieving an assessor or collector of taxes from the performance of his official duties or of his sureties from liability; remitting fines, penalties, and forfeitures; refunding moneys legally paid into the treasury.

(6) Regulating labor, trade, manufacturing, or agriculture; fixing the rate of interest.

(7) Creating private corporations, or amending, renewing, extending, or explaining the charters thereof; granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity.

(8) Regulating the management of parish or city public schools, the building or repairing of parish or city schoolhouses, and the raising of money for such purposes.

(9) Legalizing the unauthorized or invalid acts of any officer, employee, or agent of the state, its agencies, or political subdivisions.

(10) Defining any crime.

Subsection B of section 12 forbids the legislature from indirectly enacting local or special laws "by the partial repeal or suspension of a general law."

77. Article VI, section 2 provides:

The legislature shall provide by general law for the incorporation, consolidation, merger, and government of municipalities. No local or special law shall create a municipal corporation or amend, modify, or repeal a municipal charter. However, a special legislative charter existing on the effective date of this constitution may be amended, modified, or repealed by local or special law.

Article VI, section 44 defines the term general law as used in that article to mean "a law of statewide concern enacted by the legislature which is uniformly applicable to all persons or to all political subdivisions in the state or which is uniformly applicable to all persons or to all political subdivisions within the same class." The judicial definitions of the term general law, which have come in cases applying the restrictions now found in article III, have not included the requirement that the law be one "of statewide concern." See, e.g., State v. Slay, 370 So. 2d 508, 510 (La. 1979); State v. LaBauve, 359 So. 2d 181, 182 (La. 1978). But see City of New Orleans v. Treen, 431 So. 2d 390, 396 (La. 1983) (Dennis, J., dissenting) (Act 352 of 1982 is a general law because "the subject of the act in question is a matter of legitimate state concern rightfully amenable to regulation by the state within its police power").
with respect to other matters, but only if the sponsor of the legislation complies with the publication requirements of article III, section 13.

The preliminary issue that determines if these constitutional provisions are applicable is whether the statute under attack is a local act or a general law. In deciding that issue, the Louisiana Supreme Court has emphasized that a general law need not apply to every local government within the state; it may confine its coverage to a class or subset of local governments so long as the law applies to all members of the class and the method of classification the law uses is reasonable. Indeed, the court has repeatedly recognized that even a statute that applies to a single locality can be a general law if a reasonable classification would exclude all other localities; recent decisions, however, have declared that any law which applies only in specifically named localities is “suspect as a local law.”

The decision in City of New Orleans v. Treen followed the approach of these more recent cases by invalidating a statute that restructured the Audubon Park Commission and required the city of New Orleans to appropriate a fixed sum for the use of the new commission. The city had challenged the law, arguing that it was an invalid local law because it was not publicized in accordance with the requirements of article III, section 13. The supreme court agreed and ruled the statute unconstitutional.

78. The local government article expressly authorizes the legislature to “classify parishes or municipalities according to population or on any other reasonable basis related to the purpose of the classification” and to limit the effect of legislation “to any of such class or classes.” LA. CONST. art. VI, § 3.

79. Article III, section 13 provides:

No local or special law shall be enacted unless notice of the intent to introduce a bill to enact such a law has been published on two separate days, without cost to the state, in the official journal of the locality where the matter to be affected is situated. The last day of publication shall be at least thirty days prior to introduction of the bill. The notice shall state the substance of the contemplated law, and every such bill shall recite that notice has been given.


81. See, e.g., cases cited supra note 80.


83. 431 So. 2d 390 (La. 1983).


85. Justice Dennis dissented. 431 So. 2d at 395. He defended the section changing the composition of the park commission as a general law based on a reasonable classification that included only one member. Because of Audubon Park's status as “a major facility of state and national importance,” id. at 396, he argued the “legislation affecting it is not local legislation merely because [the park] is located in a single parish.” Id. To the
The Audubon Park statute invalidated in Treen was only the most recent in a series of state laws pertaining to the park. The first statute, Act 84 of 1870, established a park for New Orleans under the control of a board of commissioners appointed by the governor; it also required New Orleans to levy and collect a tax for the use of the commissioners. Subsequent statutes abolished the original board of commissioners and transferred authority over the park to the New Orleans City Council, but a later statute transferred the authority to a new entity, the Audubon Park Association. In more modern times, the terms of the 1914 amendment have governed the operation of the park. It vested control over the park in an Audubon Park Commission appointed by the mayor of New Orleans and directed the city to fund the commission through the sale of bonds.

In 1982, the legislature acted to restructure the control and financing of the park. The new statute made two general changes. First, it replaced the old Audubon Park Commission with a new “state agency” whose members were to be drawn from the New Orleans metropolitan area rather than exclusively from the city of New Orleans. Second, it required the contrary, “the subject of the act in question [was] a matter of legitimate state concern rightfully amenable to regulation by the state within its police power.” Id. Justice Dennis also contended that the Audubon Park legislation was not local “simply because the City of New Orleans is the only local government required to subsidize the facility’s operations.” Id. As a result of the park’s location within the city’s boundaries, the city “derives far more tax revenues generated by the facility than any other local government.” Id. Therefore, the “classification or limitation” of the “revenue contribution requirement to this local tax district” was a reasonable one, and the statute was a general, rather than a local, law.

For a more detailed description of the various amending statutes, see Treen, 431 So. 2d at 392-93. 86. Act 84 of 1870 amended and reenacted Act 83 of 1871. 87. 1877 La. Acts, No. 87; see also 1884 La. Acts, No. 103. Act 87 of 1877 also repealed the special tax that the city had been required to levy to support the park. 88. 1896 La. Acts, No. 130. This act also directed the city to use city funds to provide financing for the association. 89. 1914 La. Acts, No. 191. 90. Id. §§ 1-3. The 1914 statute established a 24-member commission, all of whom were appointed with the advice and consent of the city council. 91. Id. §§ 7-8. The statute also directed the city to pay the interest and principal of the bonds by annual appropriations for the “reserve fund” of the city budget. 92. La. R.S. 56:1761(B) (Supp. 1983), as added by 1982 La. Acts, No. 352, § 2. City of New Orleans v. Treen gave the following summary of the commission as reorganized by the 1982 legislation:

The new commission is composed of 24 members. The president of Friends of the Zoo is to be a member of the commission. The remaining 23 members are to be appointed by the Governor, 11 of whom are to be members of Friends of the Zoo. Twelve members of the commission are to be residents of New Orleans and 11 are to be residents from the five surrounding parishes.
New Orleans City Council to appropriate “not more than $700,000” annually for the operating expenses of the new park commission.94

Statutes dealing with Audubon Park had been regularly publicized as local laws95 since the origination of the publication requirement in the Louisiana Constitution of 1879,96 but the sponsors of the 1982 legislation chose not to advertise their bill. The state argued that the publication requirements of article III, section 13 were inapplicable; in its view, the statute was a general law because the statutory classifications it created were reasonable. Limiting the reorganization provisions to Audubon Park was reasonable, the state urged, because the park property contains the only significant zoo in the state; likewise, the state argued that imposing the funding obligation only on New Orleans was reasonable because the city receives special benefits from the park.97

The supreme court disagreed, ruling that the statute was a local act and holding the act unconstitutional. The basis for the court’s ruling was its conclusion that the act had “an immediate and significant impact only on the people of New Orleans,”98 even though “surrounding parishes . . . derive[d] substantial benefits from the park and [were] represented on the commission.”99 The court specifically mentioned two ways in which the statute had a special impact on New Orleans: (1) the funding requirement applied only to the city, and (2) the statute authorized the new park commission to assume control over two pieces of park property that were owned by the city.100 Because of these impacts, the court found that the statute did “not operate equally and uniformly upon all persons brought within the relations and circumstances for which it provides, that is, upon

94. LA. R.S. 56:1766(A), as added by 1982 La. Acts, No. 352, § 2. Because the court held the statute unconstitutional, it did not discuss whether Act 352 of 1982 required the city to make some minimum payment.

95. See 1914 La. Acts, No. 191; 1896 La. Acts, No. 130; 1884 La. Acts, No. 103; see also 1979 La. Acts, No. 55 (bill authorizing New Orleans to issue bonds for Audubon Park advertised as a local law). The supreme court summarized the prior Audubon Park statutes as follows:

Ever since control of Audubon Park was given to the City Council of New Orleans in 1877, each legislative act giving control of the park to another agency, with the exception of Act 352, has been published prior to its introduction in accordance with the constitutional requirement for local and special legislation.

431 So. 2d at 393 (footnote omitted).

96. LA. CONST. of 1879, art. 48. Earlier constitutions had banned certain types of local laws, but they did not include the publication requirement. See LA. CONST. of 1886, art. 113 (no special laws relating to adoption, emancipation, change of names, or divorce); LA. CONST. of 1864, art. 117 (same); cf. LA. CONST. of 1852, art. 114 (no legislative divorces); LA. CONST. of 1845, art. 117 (same).

97. 431 So. 2d at 394.

98. Id. at 395.

99. Id.

100. Id.
all persons and parishes deriving benefits from the park and represented on its commission... [and that] its limitation to New Orleans [was] not based on a reasonable classification."

At least three concerns seem to underlie the Louisiana Supreme Court's decision in *Treen*. First, *Treen* reflects the disfavor with which the present court views laws that single out specifically named localities for special burdens. Nearly all of the decisions since the passage of the 1974 constitution have viewed with suspicion statutes that specify the localities to which they apply, and *Treen* is consistent with the trend of those decisions. Second, by treating the Audubon Park statute as a local act, the court followed a century of legislative practice. Although not conclusive, such a uniform legislative practice offers persuasive precedent as to the nature of the law under consideration, particularly when the provision under review has been reenacted in successive constitutions. Third, treating the Audubon Park statute as a local act enabled the court to avoid other troublesome constitutional questions that challenged the substance of the statute.

In effect, precedent combined with legislative practice and prudence to encourage the court to declare the Audubon Park statute a local act. The *Treen* decision cannot, however, be generalized into a judicial preference for local governments in contests with the state. As the following group of cases makes clear, the court has tended to favor the state in such conflicts when the state action involves statutes of general applicability.

**Status of Local Governments**

Prior to the adoption of the 1974 constitution, Louisiana courts used the "state creature" concept to define the status of local governments vis a vis the state. Two important consequences followed from this ap-
proach: (1) local governments had only those powers expressly or implicitly conferred on them by statute, and (2) local ordinances that were inconsistent with state law were invalid.

Although the two issues are analytically distinguishable, early cases tended to merge them inasmuch as a conclusion that a particular local action was inconsistent with state law would inevitably mean that no state law authorized the local action. The distinction between authority to act and immunity from state control became important, however, as individual local governments received constitutional authority to adopt home rule charters. These charters gave local governments authority to act in a variety of situations without specific legislative permission and also gave them a much more limited immunity from state control.

Perhaps the most important of "home rule" amendments to the Louisiana Constitution of 1921 was a 1946 amendment authorizing the city of Baton Rouge and the parish of East Baton Rouge to adopt a home rule charter providing for a consolidated plan of government for the city and parish. The amendment provided that the charter could allow the new city-parish government to exercise any powers necessary for the management of its affairs, and it protected the city-parish government from state interference with "structure, organization, and [the] particular distribution or redistribution of [its] powers and functions among the several units of local government within the Parish." A 1960 decision of the first circuit, *La Fleur v. City of Baton Rouge,* ruled that the pay of firefighters fell within this "structure and organization" language; as a result, the court held that the provisions of a state statute governing pay of firefighters did not apply to the city-parish government. Nine years later, the Louisiana Supreme Court cited *La Fleur* approvingly in *Letellier v. Jefferson Parish Police Jury.* Held that similar "structure and organization" language in the authorization allowing Jefferson Parish to adopt a home rule charter allowed the parish to decline to follow the state statute establishing a civil service system for parochial firefighters.

The 1974 constitution significantly altered the traditional theory concerning the status of local governments vis-à-vis the state. For one thing,

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Union Sulphur Co. v. Parish of Calcasieu, 153 La. 857, 861, 96 So. 787, 788 (1923); B.W.S. Corp. v. Evangeline Parish Police Jury, 293 So. 2d 233 (La. App. 3d Cir. 1974). *But see* LA. CONST. of 1921, art. XIV, § 40 (d) (1952) (granting municipalities authority "to adopt and enforce local police, sanitary, and similar regulations, and to do and perform all other acts pertaining to its local affairs, property and government which are necessary and proper in the legitimate exercise of [their] corporate powers and municipal functions").


108. LA. CONST. of 1921, art. XIV, § 3(a) (1946).

109. *Id.* § 3(a)(2).

110. 124 So. 2d 374 (La. App. 1st Cir. 1960).


112. LA. CONST. of 1921, art. XIV, § 3(c) (1956).
article VI has, as a practical matter, largely eliminated the need for local
governments to seek legislative authorization to act. Section 4 confirms
the powers conferred on local governments by prior home rule charters, and section 5 authorizes both parishes and municipalities to adopt new
home rule charters that permit the exercise of any power necessary to
manage local affairs so long as the power is not inconsistent with the
constitution or denied by general law. Furthermore, section 7 permits
home rule governments without home rule charters to exercise similar
powers if the local electorate votes, in a referendum election, to permit
the local government to exercise the power.

Article VI of the 1974 constitution also contains two provisions that
immunize local governments from state interference in their affairs. Using
language drawn from the constitutional amendments construed in La Fleur
and Letellier, section 6 provides a special protection for governments
with home rule charters: it prohibits the legislature from enacting any

113. La. Const. art. VI, § 4. Section 4 provides as follows:
Every home rule charter or plan of government existing or adopted when this
constitution is adopted shall remain in effect and may be amended, modified,
or repealed as provided therein. Except as inconsistent with this constitution, each
local governmental subdivision which has adopted such a home rule charter or
plan of government shall retain the powers, functions, and duties in effect when
this constitution is adopted. If its charter permits, each of them also shall have
the right to powers and functions granted to other local governmental subdivisions.

114. Id. art. VI, § 5(e). Section 5(e) provides as follows:
A home rule charter adopted under this Section shall provide the structure and
organization, powers, and functions of the government of the local governmental
subdivision, which may include the exercise of any power and performance of
any function necessary, requisite, or proper for the management of its affairs,
not denied by general law or inconsistent with this constitution.

115. Id. art. VI, § 7(e). Section 7(e) provides as follows:
Subject to and not inconsistent with this constitution, the governing authority
of a local governmental subdivision which has no home rule charter or plan of
government may exercise any power and perform any function necessary, requisite,
or proper for the management of its affairs, not denied by its charter or by general
law, if a majority of the electors voting in an election held for that purpose vote
in favor of the proposition that the governing authority may exercise such general
powers. Otherwise, the local governmental subdivision shall have the powers
authorized by this constitution or by law.

Until a government that lacks a home rule charter holds an election, it can exercise only

delegate to the constitutional convention and a member of the committee on municipal and
parochial affairs); see also 12 Records of the Louisiana Constitutional Convention of
1973: Committee Documents 249 (1977) (letter from Alvin Eason to Walter Lanier, Jr.)
[hereinafter cited as Records].
law "the effect of which changes or affects the structure and organization or the particular distribution and redistribution of the powers and functions" of any local government operating under a home rule charter. In addition, section 14 provides additional protection for all local governments. It normally forbids laws "requiring increased expenditures for wages, hours, working conditions, pension and retirement benefits, vacation, or sick leave benefits" of local government employees from "becoming effective until approved by ordinance enacted by the governing authority of the affected political subdivision or until the legislature appropriates funds."

The constitution qualifies this local immunity from state interference in two important respects. First, the protection that section 14 provides with respect to laws requiring increased expenditures for employee-related expenses contains a major exception: it does not apply to laws "providing for civil service, minimum wages, working conditions, and retirement benefits for firemen and municipal policemen." Second, article VI, section 9(B) declares that "[n]otwithstanding any provisions of [article VI], the police power of the state shall never be abridged."

A central ambiguity of article VI concerns whether local governments with home rule charters must comply with state statutes regulating the pay and working hours of police officers and firefighters. The "structure and organization" language of section 6 suggests that the Constitutional convention meant to extend the La Fleur and Letellier holdings, which provided protection from state statutes concerning firefighters, to all local governments. Two other provisions in the text of article VI, however, allow arguments that would limit the reach of this language: (1) the declaration in section 9 that none of the provisions in article VI permit the abridgement of the state's police power, and (2) the exception that section 14 makes for the pay-related benefits of police officers and firefighters.

The argument based on section 9's prohibition of any abridgement of the police power is relatively straightforward. Since protection of the public safety, the traditional lodestone of the police power, provides the basis for state control over the pay of local firefighters and police officers, neither section 6 nor any other provision can limit state control in this area.

117. See, e.g., City of Shreveport v. Curry, 357 So. 2d 1078, 1081 (La. 1978); Hi-Lo Oil Co. v. City of Crowley, 274 So. 2d 757, 762 (La. App. 3d Cir. 1973).
118. See, e.g., 7 RECORDS: CONVENTION TRANSCRIPTS, Sept. 28 1973, supra note 116, at 1480-92. Delegate Stinson argued that "[i]t's a statewide protection and security that the citizens of Louisiana are entitled to." 7 id. at 1483. Delegate De Blieux declared that "the legislature ought to have something to say about how [fire and police departments] operate so that we can be sure that the lives and the property of all of our citizens are protected as much as possible." 7 id. at 1485. Delegate Roy urged that "when you deal
The issue of whether section 14 qualifies the protection from state control granted by section 6 turns on the interpretation of the police and fire exception found in section 14. If the exception is viewed (as its literal wording suggests) as simply a limit on the specific protection that section 14 extends to all local governments, it has no impact on the additional protection that section 6 grants to local governments with home rule charters. On the other hand, if the exception is construed as the convention’s affirmative determination that the legislature should control the pay-related benefits of police officers and firefighters, all local governments—whether or not they have home rule charters—are subject to state law governing these matters.

In recent years, both the Louisiana Supreme Court and the courts of appeal have managed to avoid decisions that directly addressed the questions of whether section 9 or section 14 qualify the protection afforded by section 6. However, a series of decisions during the last year has moved the supreme court closer to a definitive resolution of the issues. A second circuit decision expressly held that, despite section 6, local governments with home rule charters still must comply with state statutes relating to overtime pay for police officers, and dicta in two supreme court decisions provided support for the second circuit’s decision by emphasizing the plenary nature of the state’s power to control the pay-related benefits of police officers and firefighters.

The first case that attempted to raise the question of whether section 6 precluded state control over the pay of firefighters employed by local governments with home rule charters was Spillman v. City of Baton Rouge. However, the first circuit managed to duck the issue by deciding

with something on a statewide basis like for fire protection and police protection, all citizens of this state, all over [the] state are entitled to the protection.” 7 Id. at 1489. Cf. Littel v. City of Peoria, 374 Ill. 344, 347, 29 N.E.2d 533, 537 (1940) (Policemen’s Minimum Wage Act is sustained as action fulfilling the state’s duty “to preserve peace and order and [to] protect life, liberty and property”); Van Gilder v. City of Madison, 222 Wisc. 58, 76, 267 N.W. 25, 32 (1936) (state statute governing wages of police officers was an exercise of state power to enact measures for “the preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime”).


123. 417 So. 2d 1212 (La. App. 1st Cir. 1982), remanded for reconsideration, 430 So. 2d 92 (La. 1983).
the case on the basis of article XIV, section 26 of the 1974 constitution, a ground that was not argued by the parties. Section 26 declares that the 1974 constitution is not retroactive and does "not create any right or liability which did not exist under the Constitution of 1921 based upon actions or matters occurring prior to the effective date of this constitution." Since La Fleur excluded Baton Rouge from the state statute under the 1921 constitution, and the current statutes relating to police benefits were passed prior to the effective date of the 1974 constitution, the court concluded that section 26 forbade requiring Baton Rouge to comply with the statutes.

Shortly after the first circuit's Spillman decision, New Orleans Firefighters Association v. Civil Service Commission forced the Louisiana Supreme Court to consider the nature of section 14's exception relating to police officers and firefighters. Specifically, New Orleans Firefighters required the court to decide whether the New Orleans Civil Service Commission had to follow a state statute requiring it to include supplemental compensation paid by the state in computing the overtime pay of city firefighters, and the court followed a four-step analysis to its conclusion that the statute did bind the commission.

The first step in the court's analysis was its affirmation of the state legislature's "plenary power to enact laws providing for the minimum wages and working conditions of firemen." The premise for this affirmation was the constitutional provision vesting the state's legislative power in the legislature. As a result of this unconditional delegation of legislative power, the court concluded that the legislature "may enact any

124. Id. at 1216 (Lanier, J., dissenting from denial of rehearing).
125. Id. (opinion of the court).
126. 422 So. 2d 402 (La. 1982). Chief Justice Dixon submitted a dissenting opinion that Justice Blanche joined. In his view, the state supplemental pay for firefighters was "extra compensation" rather than "minimum wages." Therefore, he argued, it did not fall within the scope of the fire and police exemption to section 14's ban on laws requiring increased expenditures for wages of local government employees. Id. at 415.

Justice Marcus also dissented. Because he also considered the supplemental pay statute distinct from the constitutionally reserved authority to impose minimum wages, he concluded that "requiring the City to include state supplemental pay to the basis for computing overtime pay," id. at 416, violated article VI, section 14 "because the state [had] not appropriated funds to cover this expenditure." Id.

128. La. R.S. 33:2002 (Supp. 1983) (firefighters who have been regularly employed by a municipality, parish, or fire protection district for at least three months are paid a state supplement of no less than $150 per month).
129. 422 So. 2d at 406.
legislation that the state constitution does not prohibit,"' including laws regulating the minimum wages and working conditions of firefighters.

After clarifying the plenary character of the legislature's power, the court turned to the second step of its analysis: determining whether "some particular constitutional provision . . . limits the power of the legislature to enact the statute."' Because the commission, not the city council, sets the pay rates of New Orleans firefighters,' the case did not raise the question of whether article III, section 6' limited the legislature's power. The court did, however, consider and reject two other arguments. First, it dismissed the suggestion that article VI, section 14 somehow limited the legislature's powers. On the contrary, New Orleans Firefighters described the fire and police exception of section 14' as "not only an exception to the home-rule financial autonomy created by the remainder of the section, but also . . . a positive reaffirmance of the plenary power of the legislature to guarantee adequate fire and police protection for all citizens of Louisiana."' Second, the court also rejected the argument that the commission's constitutional power to adopt a uniform pay plan for city employees' limited the legislature's power to enact laws prescribing minimum wages and working conditions for firefighters. According to the majority, the commission has historically lacked any "political policy-forming functions or powers" because its primary functions are the "quasi-judicial" responsibilities of guaranteeing merit selection of city employees and preventing arbitrary or discriminatory dismissals.' By contrast, determining the minimum wage level of a fireman or municipal policeman was a "policy question . . . outside the ambit of [the commission's] quasi-judicial function[s],"' and the commission was bound to accept the legislature's judgment on such issues.

131. 422 So. 2d at 406.
132. Id.
133. LA. CONST. art. X, §§ 1, 2, 10(A).
134. Id. art. VI, § 6; see supra, notes 108-11, 116 and accompanying text.
135. LA. CONST. art. VI, § 14; see supra text accompanying notes 116, 119.
136. 422 So. 2d at 409 (emphasis added). "Since the constitution plainly calls for the legislature to establish statewide rules for the measurement of firemen's wages and working conditions, we conclude that its power in this regard is exclusive." Id. at 407 (emphasis added).
137. LA. CONST. art. X, § 10(A).
138. 422 So. 2d at 410.
139. Id. at 411. The court reiterated its position in unmistakable terms:

Ultimately, the question of the least amount a fireman should be paid in the State of Louisiana to assure adequate protection in all communities is a matter of public policy within the legislative prerogative of the Legislature; and the question of what plan should be adopted setting actual salaries of public employees to insure selection, promotion, and treatment of employees on the basis of merit, free from political influence, is a quasi-judicial function within the prerogative of the City Civil Service Commission.

Id.
The third step of the analysis in *New Orleans Firefighters* was to determine if the law requiring supplemental pay to be included in computation of overtime pay fell within the legislature's power to enact laws providing for minimum wages and working conditions of firefighters. The court concluded that the supplemental salary law did fall within the scope of the legislature's power because it should "be read in pari materia with the firemen's minimum wage law." When so read, it was part of a statutory scheme whose "principal elements . . . closely resemble[d]" those of the Federal Fair Labor Standards Act, "the outstanding example of a minimum wage and working condition law." Therefore, it was "by all intents and purposes a law providing minimum wages and working conditions for firemen."

Finally, the court had to decide the impact of a previous decision holding that the firemen's minimum wage law could not constitutionally be applied to New Orleans. After dismissing the prior decision as involving "a different issue under a different constitution," the court decided that re-enactment of the statute was not required to make the state law applicable to New Orleans after the adoption of the 1974 constitution. Since the law had always been one "competent for the lawmakers to pass," the 1974 constitution's elimination of the "obstacle" to its application in the city operated to give it "the effect within the city which it had always had throughout the state."

Just three months after *New Orleans Firefighters* was rendered, the court had to address still another aspect of the state's ability to impose financial obligations on local governments. The issue in *City of New Orleans v. State* was the constitutionality of various statutes requiring

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140. *Id.* at 413.
141. *Id.* at 412.
143. 422 So. 2d at 412.
144. *Id.* at 411.
145. Barnette v. Develle, 289 So. 2d 129 (1974). The court also distinguished Louisiana Civil Serv. League v. Forbes, 258 La. 390, 246 So. 2d 800 (1971), which voided a state statute granting state troopers a pay raise, on two grounds: (1) The decision did "not resolve the question of whether the Legislature's plenary power to establish minimum wage laws setting a floor under wages, as opposed to the power to actually set each employee's salary, had been ceded to the Civil Service Commission," *New Orleans Firefighters*, 422 So. 2d at 413-14, (2) Article VI, section 14 of the 1974 constitution "expressly reserves to the Legislature the plenary power to enact minimum wage and working condition standards for firemen and municipal policemen." 422 So. 2d at 414.
146. 422 So. 2d at 414.
147. *Id.*
148. *Id.*
149. 426 So. 2d 1318 (La. 1983). Justice Dennis concurred and argued that article VI, section 6 did not apply because the challenged statutes were not laws affecting "the structure and organization or the particular distribution or redistribution of the powers and functions," *La. Const.* art. VI, § 6, of the city's government. In his view, these laws required
the city to pay salaries and other expenditures of various state officers who served within the city's boundaries. The court upheld the state legislation.

The city contended that the state statutes interfered with its "structure and organization" in violation of article VI, section 6. In rejecting this position, the court emphasized that the protection afforded by section 6 was qualified by section 9's preservation of the state's police power "notwithstanding any provision of . . . Article [VI]." According to the majority, the net effect of the two provisions was that "general legisla-

"the local government to subsidize functions of state government such as the administration of justice, law enforcement, assessment of taxes and voter registration." 426 So. 2d at 1322. Since the statutes did "not interfere with the internal management of local government or with the compensation of its employees," id., and since their subjects were "matters of statewide concern rightfully amenable to regulation by the state within its police power," id., section 6 did not restrict the state's power to pass them.

Justice Lemmon dissented without opinion. Justice Calogero also submitted a dissenting opinion arguing that the statutes violated article VI, section 6. Since they obligated the city "to subsidize state functions instead of funding municipal services," id. at 1323, the statutes altered the city's "structure and organization" by diverting funds from local municipal needs to meet these functions and dictates. Because they interfered "with the City's fiscal affairs, a matter at the very heart of the structure and organization of the City," id., he argued that the statutes were unconstitutional under section 6.

150. Persons who occupy offices created by the constitution or state law are state, not local, officers, even if they serve within the boundaries of a single locality. See, e.g., Hyhochuk v. Smith, 390 So. 2d 497, 501-02 (La. 1980) (constable of a ward in Calcasieu Parish); Mullins v. State, 387 So. 2d 1151, 1152 (La. 1980) (parish coroner); Foster v. Hampton, 352 So. 2d 197, 201 (La. 1977) (deputy sheriff); Cosenza v. Aetna Ins. Co., 341 So. 2d 1304, 1305 (La. App. 3d Cir. 1977) (clerk of city court).

151. For a listing of the statutes involved, see 426 So. 2d at 1319. The court gave the following summary of the statutes involved:

The acts . . . require the City to pay various sums, including salaries of: the messengers of the Criminal District Court; the coroner and his employees; the clerks and deputy clerks of the Criminal District Court; jury commissioners and secretory to the Board of Jury Commissioners of Criminal District Court; the clerk and other personnel of Juvenile Court; the Criminal Sheriff, deputies, assistants and clerks; the District Attorney, assistant district attorneys, clerks, stenographers, special officers and other expenses of that office. Additionally, the City must pay: additional compensation to each crier of Civil District Court; part of the salaries of permanent employees of the Registrar of Voters; a sum for salaries and other expenses of the Board of Assessors; and $350,000 annually to the City Park Improvement Association. The City is also required to provide quarters for the Orleans Parish juvenile court and the Criminal District Court. Id. at 1320.

152. The trial court had also held that three of the statutes violated article XIV, section 22 of the 1921 constitution, which granted New Orleans a home rule charter. The supreme court reversed this holding for two reasons: "(1) the New Orleans home rule charter itself was not a part of the 1921 Constitution; and (2) home rule [as established in the section granting New Orleans a home rule charter was] subject to other constitutional limitations." Id.

153. LA. CONST. art. VI, § 9(B); see supra note 118 and accompanying text.
tion enacted under the State's police power could limit the "autonomy of local governmental subdivisions with home rule charters."

The court next considered whether the state statutes violated section 14, which limits the legislature's power to require "increased expenditures for wages, hours, working conditions, pension and retirement benefits, vacation, or sick leave benefits of [local government] employees." Although City of New Orleans did not directly address the question of whether section 14 limited section 6, the majority indicated that section 14 did have that effect by beginning its discussion with the assertion that section 14 provided the constitution's "only restriction on the State's power to enact legislation requiring the expenditure of funds by local governments." Having thus framed the issue, the court held that, because section 14 applied only to employees of local governments, it did not protect the city with respect to the salary payments compelled by the statutes. Since the "salaries involved . . . [were] being paid to State employees and not to City employees," section 14 did not apply, and the statutes were therefore constitutional as "valid exercise[s] of the State's police power."

The second circuit's opinion in Ruby v. City of Shreveport represented the final attempt of the 1982-1983 term to explain the scope of local immunity from state interference with respect to matters involving the pay of local employees. Ruby required the court of appeals to decide the constitutional issues that the prior decisions had skirted—specifically, whether the "structure and organization" language of section 6 precluded requiring Shreveport to comply with the state statute mandating overtime pay for police officers who worked more than forty hours per week.

Relying on the supreme court's dicta in New Orleans Firefighters

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154. 426 So. 2d at 1321.
155. Id.
156. See supra note 119 and accompanying text.
157. 426 So. 2d at 1321 (emphasis added).
158. Id.
159. Id.
161. An earlier decision had held that the 1921 constitution did not provide Shreveport any protection from general state laws interfering with its affairs. See Bradford v. City of Shreveport, 305 So. 2d 487 (1974).
162. LA. R.S. 33:2213 (Supp. 1983). This statute is virtually identical to the firefighters statute involved in Spillman. See supra notes 127-28 and accompanying text. In the past, Louisiana's courts have used the police statute as a guide to the proper interpretation of the firefighters statute. See, e.g., Williams v. City of West Monroe, 403 So. 2d 842 (La. App. 2d Cir. 1981).
163. See 427 So. 2d at 1269-70 (quoting New Orleans Firefighters Ass'n v. Civil Serv. Comm'n, 422 So. 2d 402, 406-13 (La. 1982)).
DEVELOPMENTS IN THE LAW, 1982-1983

and City of New Orleans, the second circuit held that even local governments with home rule charters had to comply with the state statutes. According to the court of appeals, these decisions required that the police and fire exception of section 14 be interpreted as “an express reservation to the state of its plenary and/or police power to legislate minimum wages, working conditions and retirement benefits for municipal policemen.”

Moreover, the decisions also compelled the conclusion that this plenary power was applicable to local governments with home rule charters, “notwithstanding the provisions of Sections 5 and 6.” Having thus established the controlling principles, the Ruby court had little difficulty in applying them to the case before it. Since the statute prescribing overtime for police officers was an exercise of the state’s plenary power, the city had to comply with it.

Although the Louisiana Supreme Court has not yet directly addressed the problem of the potential conflicts between section 6 and sections 9 and 14, the dicta quoted above as well as the court’s recent summary decisions suggest that Ruby was correctly decided. Just a month after the Ruby opinion was rendered, the supreme court remanded Spillman to the first circuit for reconsideration in light of New Orleans Firefighters.

Even more recently, the court denied without opinion Shreveport’s writ application in Ruby.

One cannot, however, regard the question of the scope of section 6 as completely resolved without an express supreme court holding, and the importance of the issue to local governments makes it likely that they will continue to press it to a definitive conclusion. Moreover, one can

164. See 427 So. 2d at 1270-71 (quoting City of New Orleans v. State, 426 So. 2d 1318, 1321 (La. 1983)).
165. Id. at 1271.
166. Id.
167. The court of appeals described the city ordinance prescribing a different rule for overtime as “inconsistent with the constitution as well as being an ultra vires act.” Id. at 1271 & n.3 (citing Charles v. Town of Jeanerette, 234 So. 2d 794 (La. App. 3d Cir. 1970)).
168. 430 So. 2d 92 (La. 1983). Presumably, the basis for the remand was the New Orleans Firefighters holding that the legislature did not have to repass a statute to make it applicable to the city when the 1974 constitution eliminated the city’s prior immunity from complying with the state statute. See supra notes 145-48 and accompanying text.
169. 433 So. 2d 154 (La. 1983). Chief Justice Dixon and Justice Marcus dissented from the refusal to grant writs.
170. The problem of deciding whether the state or local governments should control the pay and working conditions of police officers and firefighters has arisen in a number of states. See, e.g., Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969); State ex rel. Heimig v. City of Milwaukee, 231 Ore. 473, 373 P.2d 680 (1962), and cases cited therein. For a decision applying a judicially created distinction that seems similar to Louisiana’s constitutional language immunizing a local government with a home rule charter from state interference, see City of La Grande v. Public Employees Retirement Bd., 281 Or. 137, 576 P.2d 1204, aff’d on rehearing, 284 Or. 173, 586 P.2d 765 (1978) (Oregon home rule provisions grant local governments significant autonomy with respect
weave together threads of argument to form the basis for a slight hope that the court might distinguish *New Orleans Firefighters* and *City of New Orleans*. All of the decisions favoring state control have divided the court. *New Orleans Firefighters* involved a four to three division of the court with Chief Justice Dixon and Justices Blanche and Marcus dissenting. The Chief Justice and Justice Marcus also dissented from the writ denial in *Ruby*. In addition, Justices Lemmon and Calogero dissented in *City of New Orleans*, and Justice Dennis, the author of the majority opinion in *New Orleans Firefighters*, filed a concurring opinion in *City of New Orleans* in which he cited *La Fleur* and *Letellier*, the cases holding that the “structure and organization” language in the 1921 constitution immunized Baton Rouge and Jefferson Parish from state control, with apparent approval. In short, only Justice Watson subscribed without qualification to both opinions. Thus, notwithstanding the writ denial in *Ruby*, the dicta in the supreme court opinions may not represent the final word on local immunity.

If a majority of the court wishes to avoid following its recent dicta, explaining away the *New Orleans Firefighters* and *City of New Orleans* opinions should not be overly difficult. *New Orleans Firefighters* itself indicates that the state’s “plenary power” over the minimum wages and working conditions of police officers and firefighters can be restricted by a “particular constitutional provision that limits the power of the legislature to enact the statute appealed.” Therefore, a holding that section 6 restricts the legislature’s power to control wages and working conditions of police officers and firefighters could be entirely consistent with *New Orleans Firefighters*, if it were premised on a holding that section 6 is a provision that limits the legislature’s plenary power as granted by article III, section 1 and reaffirmed by article VI, section 14. One can also distinguish the *City of New Orleans* language describing section 14 as “[t]he only restriction on the State’s power to enact legislation requiring the expenditure of funds by local [governments].” Since that language was not necessary to the court’s holding that neither section 6 nor section 14 forbade state mandates requiring local governments to help

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171. 426 So. 2d at 1322. Statutes requiring local subsidies for salaries and expenses of state officers “do not interfere with the internal management of local government or with the compensation of its employees. Compare the statutes at issue to those found unconstitutional in *LaFleur v. City of Baton Rouge*, 124 So. 2d 374 (La. App. 1st Cir. 1960) and *Letellier v. Parish of Jefferson*, 254 La. 1067, 229 So. 2d 101 (1969).” *Id.*

172. See 422 So. 2d at 406.

173. *Id.; see also id. at 409. But cf. id. at 407. The legislature’s power to ‘‘establish statewide rules for the measurement of firemen’s wages and working conditions . . . is exclusive.’’ *Id.* (emphasis added).

174. 426 So. 2d at 1321.
fund state officers who serve within local boundaries, it need not control the separate issue of whether section 6 immunizes local governments from state requirements regarding the pay of local employees.

The real problem lies, however, not in the court's language but in the ambiguity of sections 6, 9, and 14 of article VI. As a previous symposium suggested, the search for an irrefutable basis for decisions is a vain one. The language of section 9 begs the important question—the scope of the police power—and section 14 is similarly ambiguous. A literal reading of the text indicates that the police and fire exception of section 14 applies only to the section in which it is contained; but the inclusion of the exception in a section applicable to all local governments, the adoption of the exception after the convention had passed the home rule protections of section 6, and certain passages in the legislative history support the argument that section 14 qualifies section 6 with respect to the pay of police officers and firefighters.

Because neither the text of the constitution nor the legislative history provides a clearly correct result, the ultimate decision will probably turn on the court members' individual interpretations of the general balance of power that article VI strikes between the state and local governments and on their personal views of the most desirable allocation of that power. As the foregoing discussion has documented, the 1982-1983 cases hint, but stop short of holding, that the state will retain ultimate control over the pay of police officers and firefighters. What local authorities need now is a definitive resolution of the issue. Even though budgeting for overtime pay may strain local resources, its impact on effective government is less deleterious than the uncertainty that clouds current planning. The first circuit's decision following the Spillman remand will offer the supreme court the perfect chance to settle the issue, and the court should not neglect that opportunity.

TORT LIABILITY

Legislative Proposals

On the legislative front, the most notable aspect of local tort liability during the past year was what did not happen. Although the Louisiana Municipal Association tried to convince the legislature to limit the tort liability of local governments, the effort failed. The association supported two approaches: (1) placing a ceiling on the amount for which a local

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175. Id.; id. at 1322 (Dennis, J., concurring).
176. Murchison, supra note 120, at 579.
177. Kean, supra note 116, at 70.
178. See, e.g., 7 RECORDS: CONVENTION TRANSCRIPTS, Sept. 28, 1973, supra note 116, at 1483 (statement of Delegate Stinson), 7 id. at 1485 (statement of Delegate DeBlieux); 7 id. at 1489 (statement of Delegate Roy).
government could be held liable\textsuperscript{179} and (2) imposing a notice or constructive notice element in suits based on Civil Code article 2317.\textsuperscript{180} Although prominent legislators publicly acknowledged the need to provide relief for local governments, the legislature adjourned without passing either bill.\textsuperscript{181} Moreover, recent judicial decisions may have blunted the drive for legislative relief by applying existing doctrines in a fashion that makes the liability of local governments somewhat less absolute. The material below provides an overview of those judicial developments.

\textbf{Judicial Developments}

\textbf{Article 2317}

Decisions of the courts of appeals during 1982-1983 have reaffirmed that, despite Jones v. City of Baton Rouge,\textsuperscript{182} Civil Code article 2317\textsuperscript{183} does not render a government absolutely liable for all injuries whenever one can draw a chain of causation from the injury to a "thing" in the government's control. Essentially, the decisions have continued the trend of the previous two years\textsuperscript{184} and have limited governmental liability by emphasizing that liability attaches only when the thing causing injury presents an unreasonable risk of harm and by relieving the government of liability when the court determines that the "legal cause" of the injury is "victim fault" or the act of a third party rather than the defective thing.

During the past year, three separate decisions in three different circuits refused to hold governmental defendants liable on the ground that the thing causing injury was not defective. Although the state was the defendant in two of these cases, all of them are nonetheless significant

\textsuperscript{179} La. H.R. 200, 9th Reg. Sess. (1983). One objection to such a statutory ceiling on damages is the argument that it violates the 1974 constitution's abrogation of governmental immunity. For a suggestion as to how a statutory scheme might be drafted to avoid this problem, see Murchison, 1977-1978 Term, supra note 80, at 878-79.


\textsuperscript{182} 388 So. 2d 737 (La. 1980), analyzed in Murchison, supra note 120, at 588-89.

\textsuperscript{183} Article 2317 provides in pertinent part: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of things which we have in our custody." For a brief summary of the elements of a cause of action under article 2317, see Murchison, supra note 120, at 588.

\textsuperscript{184} See generally Murchison, supra note 15, at 483-86; Murchison, supra note 115, at 490-92.
for local governments since all governmental defendants are held to the same standard of reasonableness in determining whether the thing causing injury is defective. In *Williams v. Parish of East Baton Rouge*, the driver of an automobile lost control of his vehicle when it struck a pothole in a parish street; the parish was unaware of the pothole even though it had a program for checking major streets, like the one on which the accident occurred, for potholes. In light of this evidence, the first circuit ruled that the existence of the pothole did not make the street a defective thing under article 2317 because it did not create an unreasonable risk of harm. Similarly, in *Booth v. Potashnick Construction Co.*, the second circuit held that the state's nonnegligent excavation of a road shoulder in connection with a highway construction project did not make the highway a defective thing under article 2317. Emphasizing "the obvious necessity of such road construction projects," the court of appeals held that the excavation was not a defect or vice within the meaning of article 2317 because it did not "create an unreasonable risk of harm to the public." The third decision holding that governmental property was not defective was *Cloud v. State*. In *Cloud*, the court concluded that a one-eighth inch variation in the riser heights of the outside steps to a state hospital building did not make the steps defective when expert testimony indicated that the steps met "modern architectural principles and standards." According to the court of appeals, the minor "irregularities" that the plaintiff proved "did not rise to the dimension of presenting an unreasonable risk of harm."

In two other cases, local governments did not fare so well. In *Jones v. Sewerage & Water Board*, the fourth circuit held the sewerage board liable for injuries that occurred when the plaintiff stepped into an open drain cleanout on a city sidewalk. According to the appellate panel,
the defect in the drain cleanout "was the easy removability of the cover, which under the circumstances of this case constituted an unreasonable risk of harm to others." The court, however, stopped short of holding that an easily removable cover would always render a drain cleanout defective. The evidence in Jones showed that neither the drain nor the drain cleanout had ever been used. Because the governmental defendants failed to show any "necessity for the existence of this drain cleanout cover. . . . [t]he risk of harm created by its easy removability was not justified in any way." The other decision holding a local government liable under article 2317 was Deville v. Calcasieu Gravity Drainage District No. 5. In Deville, the plaintiff fell into a manhole when a storm drain cover gave way when she stepped on it. Although the plaintiff could not point to a specific defect in the cover, the third circuit nonetheless concluded that "this accident would not have happened had the storm drain cover not been defective." Relying on the Louisiana Supreme Court's opinions in Marquez v. City Stores Co. and Jones v. City of Baton Rouge, the court of appeals ruled that the accident itself constituted an "unusual occurrence" and thus furnished the necessary evidence that the thing causing the injury was defective.

Taken together, the decisions of the past year confirm the recent trend towards blurring the distinctions between the standard of care under article 2317 and the standard of care applicable in negligence actions based on Civil Code article 2315. They continue to expose local governments to liability for public works that are unnecessary or that are poorly designed or maintained, while relieving them of liability from prudently designed and maintained public improvements that are needed to fulfill the responsibilities entrusted to government. As a result, the best liability protection for a local government may well be an aggressive safety program that documents the government's attempts to minimize the risk of injury from public improvements.

Other decisions of the past year have absolved local governments from article 2317 liability when the negligent or intentional act of another party

drain cover: (1) the location of the drain "in a sidewalk owned by the City," id. at 1067, and (2) the city's heavy involvement "in the management of the board especially through the appointment power of the mayor." Id.
195. Id. at 1065.
196. Id. at 1066 (distinguishing Goodlow v. City of Alexandria, 407 So. 2d 1305 (La. App. 3d Cir. 1981)).
197. 422 So. 2d 631 (La. App. 3d Cir. 1982).
198. Id. at 634.
200. 388 So. 2d 737 (La. 1980).
201. 422 So. 2d at 633-34.
interrupts the chain of causation from the injury to the allegedly defective thing. Furthermore, courts have relieved governmental defendants from liability when the act was committed by the victim as well as when it was committed by a third party.

Although the exact parameters of the "victim fault" defense to article 2317 liability remain unclear, the recent cases seem to require that the danger of injury from the defective thing be apparent to a reasonable person in the position of the victim. Using this rationale, the first circuit held that a motorist's election to cross a bridge where the danger of collapse was obvious constituted victim fault, and the fourth circuit held that a postal carrier's decision to use an uneven sidewalk after he was aware of its defective character barred recovery under article 2317. By contrast, the third circuit ruled in Deville that stepping on the defective drain cover did not amount to victim fault because "it was not unreasonable for the plaintiff to forget about the presence of the cover" as she was checking her mail. In effect, the issue seems to turn on ad hoc determinations as to how obvious the danger would have been to a reasonable person under the circumstances.

The courts have also shown a willingness to allow the acts of a third party to break the chain of causation between a defective thing and an injury. Williams, for example, held that, even assuming that the pothole created a defective condition in the street, the driver's negligent operation of his vehicle—not the defective street—constituted "the cause in fact of this accident." Similarly, Brown v. Merz held that the negligence of the automobile driver was sufficiently independent of the obstruction of the stop sign on the inferior street that the driver's negligence should be treated as the sole legal cause of the accident. The exact rule that these decisions employ remains unclear, but they seem to turn on a case-by-case evaluation of whether the presence of the defective thing induced or enhanced the negligence of the third party.

Article 2315

A number of decisions in the past year have also absolved local governments of liability for traditional negligence claims. The cases that rejected claims that government property was defective under article 2317

206. 422 So. 2d at 635.
207. 417 So. 2d at 484.
208. 429 So. 2d 463 (La. App. 4th Cir. 1983).
understandably also rejected claims that the government was guilty of negligence in controlling or maintaining the property. Indeed, a conclusion that the property did not present an unreasonable risk of harm (the standard of care under article 2317) leads almost inexorably to the conclusion that the government’s conduct with respect to the property was reasonable (the standard of care under article 2315). In addition, other decisions have relieved governments from liability on the ground that the government’s duty did not include the risk of the injury that the plaintiff suffered.

Perhaps the most important of the scope of the risk cases was *Patin v. Industrial Enterprises*, which defined the scope of a local government’s duty under its building codes. In *Patin*, the plaintiff’s decedent was a construction worker who was killed when a gutter he was holding came into contact with an uninsulated electric wire owned by a private utility company. Patin argued that the local building code obligated the city-parish to take all measures necessary to protect the public during construction and that the city-parish breached this duty by allowing a metal building to be constructed in close proximity to live electric wires.

The first circuit rejected this argument on the ground that the city-parish’s duty under the building code did not extend as far as Patin claimed. The court acknowledged that, in light of *Stewart v. Schmieder*, a building code could obligate a local government to protect the public during construction. Nevertheless, it concluded that the city-parish had not breached any such duty in *Patin*. In the court’s view, the purpose of any duty based on a building code is “to protect from harms inherent in a flawed or defective building,” and the “duty does not extend to risks which are outside the building site and have no teleological connexity therewith.” Since the city-parish fulfilled its duty under the building code by properly examining the plans and inspecting the building site, the court initially held that the plaintiff’s counsel had failed to take proper steps to make the building code a part of the record. *Id.* at 365. Nonetheless, it went on to reject the argument on the merits.

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209. *E.g.*, Booth v. Potashnick Constr. Co., 420 So. 2d 512 (La. App. 2d Cir. 1982), *writ denied*, 423 So. 2d 1183 (La. 1983); see also Hampton v. Orleans Parish School Bd., 422 So. 2d 202 (La. App. 4th Cir. 1982) (school board not liable under article 2315 or article 2317 for injury that occurred when student was struck by a rock thrown by another student who had picked the rock up on an unpaved portion of school playground); *cf.* Gordon v. City of New Orleans, 430 So. 2d 234 (La. App. 4th Cir. 1983) (carrier’s actions in walking on uneven sidewalk amounted to contributory negligence barring recovery under article 2315 and victim fault barring recovery under article 2317).

210. 421 So. 2d 362 (La. App. 1st Cir.), *writ denied*, 423 So. 2d 1166 (La. 1982).

211. *Baton Rouge, La., Building Code* § 103.1 (1982), *quoted in Patin*, 421 So. 2d at 364 n.1. The court initially held that the plaintiff’s counsel had failed to take proper steps to make the building code a part of the record. *Id.* at 365. Nonetheless, it went on to reject the argument on the merits.

212. 386 So. 2d 1351 (La. 1980), *analyzed in Murchison, supra* note 120, at 592-95.

213. 421 So. 2d at 365.

214. *Id.*
the appellate court held that it was not liable for injuries occurring as the result of risks that were outside the scope of its duty.214

Two other decisions of the fourth circuit also held that a particular injury fell outside of the scope of any duty the government owed to the injured party. In Ciko v. City of New Orleans,216 the court held that a police officer’s duty to obtain medical assistance for an accident victim does not include a duty to compel the victim to receive medical treatment if the officer feels the “victim is incapable of evaluating his need for assistance.”217 Since any adult has a right to refuse medical treatment,218 the duty owed by the police officer to an accident victim does not extend “beyond the offer of medical assistance.”219 In Allen v. Housing Authority,220 the fourth circuit adopted a similar approach to the scope of the housing authority’s duties to repair a tenant’s door and to provide a key to the deadlock. The risks encompassed by these duties did not include, the court ruled, the risk that the plaintiff would fall off the ledge of the apartment building as she tried to climb in a window after accidentally locking herself out.221 Although the duties breached by the housing authority were designed to protect the plaintiff, they were “not designed to protect [her] from the type of harm suffered,”222 and, therefore, the authority was not liable for her injuries.

Viewed as a group, the negligence cases reflect the same trend manifested in the article 2317 decisions described above. In both cases, the court seems to return to the traditional tort standard of reasonableness to establish limits to recent decisions expanding the scope of tort liability for local governments. If this analysis of the decisional trend is accurate, it seems likely that apprehensions concerning the catastrophic impact that recent tort decisions might have on local governments are a bit premature. Moreover, it suggests223 that local governments can mitigate the impact through risk management programs which identify those governmental duties that present significant dangers of harm to the public and which carefully review current procedures for carrying out those duties.

Workers’ Compensation

Since the 1977 decision in Foster v. Hampton,224 the Louisiana

215. Id. at 365-66.
216. 427 So. 2d 80 (La. App. 4th Cir. 1983).
217. Id. at 82.
218. Id. (citing LA. R.S. 40:1299.56 (1977)).
219. 427 So. 2d at 82.
220. 423 So. 2d 1291 (La. App. 4th Cir. 1982), writ denied, 430 So. 2d 74 (La. 1983).
221. The court also rejected the claim of a co-plaintiff, a friend who also fell while trying to assist the tenant to climb on the ledge.
222. 423 So. 2d at 1294.
223. See supra text accompanying note 202.
224. 352 So. 2d 197 (La. 1977), analyzed in Murchison, 1977-1978 Term, supra note 80, at 871-77.
Supreme Court has struggled to decide which governmental entity is liable for torts committed by state officers who serve within the boundaries of specific local governments. The court's recent opinions have taken a functional approach, moving from the court's original position that only the state was liable to a position that the sheriff is liable in his "official capacity." What these opinions have not done, however, is explain whether the new principles of tort liability will affect the exclusion of "an official of the state or a political subdivision thereof" from the coverage of the workmen's compensation statute. Recent decisions of the third circuit, however, suggest that the supreme court will have to face the issue in the near future.

Cloud v. State, the first of the third circuit decisions, held that the statutory exclusion precluded an acting coroner from receiving compensation benefits from the state. Relying on the definition of "public officers" in Louisiana Revised Statutes 42:1 and the supreme court's opinion in Mullins v. State, the court of appeals concluded that the coroner was a "public official and, as such, excepted from coverage against the state under the workers' compensation laws."

A few months later, the third circuit reaffirmed and expanded the Cloud holding in Broadnax v. Cappel. The issue in Broadnax was whether a deputy sheriff could collect compensation benefits from the state. In addition to the general exclusionary language quoted above, a 1981 amendment to Louisiana Revised Statutes 23:1034(B) expressly declares that "sheriffs' deputies are . . . appointed public officers and officials of their respective political subdivisions, the parish law enforce-

227. 420 So. 2d 1259 (La. App. 3d Cir.), writs denied, 423 So. 2d 1166, 1167 (La. 1982).
228. Although Dr. Cloud was merely an acting coroner when the accident occurred, the third circuit nonetheless held that he was a "public official" because the elected coroner had legally authorized him "to act in [the coroner's] stead." Id. at 1261.
229. LA. R.S. 42:1 provides:

As used in this title, the term "public office" means any state, district, parish or municipal office, elective or appointive, or any position as member on a board or commission, elective or appointive, when the office or position is established by the constitution or laws of this state.

"Public officer" is any person holding a public office in this state.

Act 25 of the 1981 Extraordinary Session amended LA. R.S. 23:1034(B) to provide that except for certain specified exceptions, the term public "officials" includes "all public officers as defined by R.S. 42:1."
230. 387 So. 2d 1151 (La. 1980), analyzed in Murchison, supra note 120, at 585, 587.
231. 420 So. 2d at 1263.
232. 425 So. 2d 232 (La. App. 3d Cir. 1982).
ment districts." On the basis of this language, the third circuit concluded that a deputy "has no cause of action against the State of Louisiana for workmen's compensation."

As a matter of statutory construction, Cloud and Broadnax merit no criticism. A long line of pre-Foster decisions held that the statutory exclusion in the workers' compensation statute applied to deputy sheriffs. Moreover, when a 1981 decision of the first circuit interpreted Foster to render the state liable for compensation benefits, the legislature immediately amended the worker's compensation statute to overrule the decision and to prevent its extension to other state officials. In light of this history, the Broadnax conclusion that the legislature "always has intended that deputy sheriffs are officials exempted from worker's compensation" is surely correct.

What remains troubling about these decisions concerns an issue that the parties appear not to have raised in Cloud and Broadnax—the constitutionality of the statutory exclusion of public officials from coverage under the worker's compensation statute. The abolition of governmental immunity in the 1974 constitution is not limited to tort actions; it eliminates immunity "from suit and liability in contract or for injury to person or property." The fourth circuit has expressly held that the provision encompasses worker's compensation claims. Moreover, the Louisiana Supreme Court has applied it to invalidate statutes and judicial rules that absolve governmental entities of any portion of the liability that private defendants incur. In light of these precedents, the logic of a constitutional attack on Louisiana Revised Statutes 23:1034 is straightforward: Since the worker's compensation statute imposes liability upon private defendants for the actions of their "officials," the legislative exclusion of "public officials" from compensation benefits is unconstitutional as

234. 425 So. at 236.
237. 425 So. 2d at 236.
238. La. Const. art. XII, § 10(A) (emphasis added).
241. Cf. La. R.S. 23:1035(A) (Supp. 1983) (provisions of workers' compensation law are mandatory except that "the bona fide president, vice-president, secretary, and treasurer of a corporation who owns not less than ten percent of the stock therein, or a partner with respect to a partnership employing him, or a sole proprietor with respect to such sole proprietorship may by written agreement elect not to be covered").
a legislative attempt to grant governmental entities\textsuperscript{242} a special immunity in suits "for injury to person."

Equitable considerations combine with the textual rationale described above to suggest that the Louisiana Supreme Court should declare Louisiana Revised Statutes 23:1034 unconstitutional when the issue presents itself. Inasmuch as the state has determined that the workplace should be governed by the lesser but more certain benefits of the compensation statute rather than by traditional tort theories, no equitable rationale justifies different treatment of public servants (whether they be labeled officers or employees). Whether the brunt of the inequity falls upon the governmental entity or the individual public servant will vary in individual cases,\textsuperscript{243} but the basic inequity will remain: those who work for the public will be governed by a different legal standard than those who work for private employers.

\textsuperscript{242} If the negligence of some other agent of the employer caused the injury and the employee was not also negligent, the employee would prefer the larger benefits of the tort claim. Workers who negligently injure themselves while working would prefer the certainty of workers' compensation benefits.

\textsuperscript{243} If the court follows its most recent tort decisions, the public official "in his official capacity" would be the "governmental entity" liable for the benefits due deputies and others who work for the public official. See Jenkins v. Jefferson Parish Sheriff's Office, 402 So. 2d 669 (La. 1981); Murchison, supra note 15, at 479-81.