Ruminations: Mandates in the Louisiana Constitution of 1974; How Did They Fare?

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I. INTRODUCTION

A threshold issue for a legislative drafter is the type of sanction to impose upon a violator of a proposed legal rule. The amount of pain the legislator chooses to impose will normally reflect the degree of deterrence that is sought, which in turn will reflect the perceived seriousness of injury or risk of harm that a violation of the rule entails. Criminal penalties, including death, imprisonment or fines, are usually the most severe sanctions available. Probation and parole may or may not be allowed. Administrative or civil penalties involving fines are possible. Injunctions and damage awards to private persons are common in civil litigation. Treble damages are a possibility. Rescission of agreements is a possibility. Some violations of contract rules produce absolute nullities with virtually no legal effect; others produce relative nullities that are given more effect.¹

At times, one also sees legislative documents that have no enforcement mechanism and impose no sanctions. A legislator who cannot find the votes, for example, to adopt a statute may be able to obtain a sense-of-the-house or sense-of-the-senate resolution that is only precatory. Attempts to force administrators of government departments to take some action often take that form.² Statements of intent and findings of fact may find their way into legislation before the enacting clause; they are not rules, but attempts to guide courts in construing the legal rules.³ On occasion, the Louisiana Legislature has attempted to interpret the purposes of prior legislatures, with little effect.⁴

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² 1996 Louisiana House Concurrent Resolution No. 98 was "A Concurrent Resolution to authorize and request the Department of Transportation and Development to erect signs on both the eastbound and westbound lanes of I-10 at the Cecilia-Henderson Exit and on the southbound and northbound lanes of I-49 at the Sunset-Grand Coteau Exit to notify the public that those exits provide access to Arnaudville."
³ Article III, section 14 of the Louisiana Constitution goes into great detail to preserve the rule that only that which follows the enacting clause is law. It provides "The style of a law enacted by the legislature shall be, 'Be it enacted by the Legislature of Louisiana.'"
⁴ A unique attempt was Act 727 of 1954 attempting to "interpret" Act 62 of 1912 to limit the effect of the earlier prescriptive statute that had been construed to allow private citizens to own beds of waterbodies. See 1954 La. Acts No. 727 and 1912 La. Acts No. 62. It was an attempt to discredit the then-recently decided case of California Co. v. Price, 74 So. 2d 1 (La. 1954). That attempt was criticized by Justice Summers, concurring in the denial of writs in State v. Cenac, 132
Some statements of rules found in traditional statute form are merely moral precepts without enforcement mechanisms, such as: “Married persons owe each other fidelity . . . .” Systematic codes contain definitions that are borrowed by other provisions, but which have no independent effect. It goes without saying that a sophisticated legal system will use these and other devices to prod citizens to act according to a standard or punish them to discourage them from violating a standard, with varying degrees of invasion of freedom. Courts must be sensitive to those ranges of sanctions to be accurate in reflecting the legislative goals in these matters.

In the same way, constitutional rules do not always apply with a uniform level of authority. Drafters of constitutional provisions write rules with different types of sanctions and enforcement devices. The informed group of sophisticated drafters in the Louisiana Constitutional Convention of 1973 (hereinafter “CC/73”) knew of these options quite well. If adherence to the purpose of the drafters

So. 2d 928 (La. 1961): “The Act of 1954 is an effort on the part of the legislature to render nugatory the settled judicial construction of the 1912 act, by declaring that what an entirely different Legislature had in mind over two generations before was a purpose and intent which is the very antithesis of what has been judicially declared to be the 1912 Legislature's 'manifest purpose.'” Id. at 929. Also, “It is also a fundamental rule of constitutional law that the interpretation and construction of legislative acts in litigation are matters exclusively within the province of the courts. It does not lie within the domain of the lawmakers to interpret their own laws.” Id. at 930. The court in Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1974), overruled Price, but did not decide the validity of the 1954 act.

5. La. Civ. Code art. 98. Comment (d) states, “Under R.S. 9:291 spouses may not sue each other during the existence of their marriage to enforce the obligations imposed by this Article.” Lack of fidelity may be grounds for a divorce, but here the enforcement mechanism is another statute, not Article 98.

6. Perhaps an unsophisticated system can make such differentiations also. Consider the laws requiring dogs to be kept on leashes at all times they are off the property of the owner. Such laws are characteristically enforced by a small number of employees who are on duty from 8 a.m. to 5 p.m. Owners quickly learn to let their dogs loose early in the morning and then again in the evenings.

7. Professor Mark T. Carleton described the delegates to the Louisiana Constitutional Convention of 1973 (hereinafter “CC/73”) as members of a public elite: “These educated, articulate, powerful, and relatively affluent Louisianians . . . .” Mark T. Carleton, Elitism Sustained: The Louisiana Constitution of 1974, 54 Tul. L. Rev. 560 (1980). He was referring in large part to the high education level of the delegates, the large numbers of office holders, and the large number of lawyers. His observation is accurate, but I hesitate to use the term “elite.” Perhaps so in the sense of there being office holders, lawyers and persons experienced in government affairs. But given the practical jokes, nightly poker games, and general tenor associated with the CC/73 delegates, it is difficult to think of them as elite in the sense of persons who would be welcome in the New Orleans Boston Club.

is an important value in construction of the constitution, persons construing provisions of the document must be sensitive to the degree of authority to give the different provisions.

In the United States experience, for example, preambles are known by drafters not to be a binding part of a constitution, but a statement of aspirations and hopes. They are not drafted as specific, clear rules for courts to apply. During CC/73 committee debates, the preamble was referred to as "a homely—it's motherhood and apple pie and all those things." In presenting the preamble to the convention, Committee Chairman Alphonse Jackson called it "a philosophical sermon" and explained, "My statement was based on prior court decisions and this was discussed at length and fully in the committee. And based on the court decisions that we considered, we make the statement that no Preamble has the force of law." The purist would provide for no other hortatory provisions in a constitution. All other provisions would be self-enforcing. This approach would have the document speak in one tone of voice for all provisions. However, CC/73 was not composed of technical purists. The delegates insisted on drafting the initial proposals themselves, resulting in a more politically-oriented document. In that process, a number of tones of voice emerged.

II. VARIOUS TONES OF VOICE

The simplest and most authoritative tone of voice for the drafter to use is to address a rule to the courts. Typical are bill of rights procedural guarantees. Every person is presumed innocent until proven guilty; excessive bail shall not be required; cruel, excessive or unusual punishment shall not be imposed. Also, provisions granting jurisdiction to courts are common, as "The supreme court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar." These provisions are self-enforcing in the sense that they do not require legislation to implement them. Of course, the legislature cannot alter them.

One tone of voice limits the rule to regulating state action. The constitution provides that "No law" shall restrain speech or religion. In a country that espouses judicial review, this formula sets a standard for courts to test the

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validity of laws. A rule can go beyond state action in the form of laws and cover the action of state officers and other state actors. Louisiana Constitution article I, section 4, for example, deals with searches and seizures by state agents, who are told that “Personal effects shall never be taken.”

The drafter can go further and extend the rule to relations between private citizens. Article I, section 12, for example, provides that in access to public accommodations, every person shall be free from discrimination. The rule, by its terms, is not only self-enforcing; it goes beyond state action and reaches individual action. It governs private conduct without the need for legislation.

Another variation has the drafter speaking conditionally. In establishing a right to keep and bear arms, Article I, section 11 begins with the strong statement, “The right of each citizen to keep and bear arms shall not be abridged . . . .” It continues with an exception, “but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.” The drafter granted the legislature the power to make an exception to the rule. But not a blanket exception. The legislature cannot prohibit the carrying of weapons being concealed in any other place. Normally, the legislature does not need to be empowered to act, but if in the case of an exception to a constitutional rule, it must be empowered. By the terms of the provision, the legislature is not required to make the exception; it is only empowered to do so.

The drafters used an even less authoritative tone of voice in Article I, section 13, “The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.” The statement is addressed to the legislature rather than to the courts or to the general population. It provides no sanction in case of the legislature’s failure to act. Perhaps not a preamble, but almost as general and without sanctions. Louisiana is by no means unique in adopting “the legislature shall” mandates.

For example, the constitution of Oklahoma provides that the legislature shall establish and maintain a system of free public schools; and shall make provision for decennial revisions of the statutes; and shall make a legislative reapportionment every ten years. There is no power in the court nor in any other department of the state government to compel affirmative legislative action, and provisions depending upon such action must to the extent of such dependence be directory.

The view that courts cannot order legislators to adopt legislation to reapportion themselves was the premise behind Article III, section 6, which provides that if the legislature does not reapportion itself, any elector can petition the supreme court to do so, and the court is required to do the reapportionment.

This solution is adopted rather than having the court order the legislature to do so. This is the pattern developed in the federal cases, in which federal courts reapportioned legislatures if the latter choose not to do so.\(^\text{18}\)

In any event, the authoritative tone of a provision is a matter of much nuance and complexity. The attentive interpreter of the constitution must work within the limits of these nuances if he wants to remain faithful\(^\text{19}\) to the purpose of the drafters.\(^\text{20}\) The purpose of this article is to investigate the extent to which the mandates of CC/73 have been construed consistently with the purpose of the drafters of those mandates.

III. COUNSEL FOR INDIGENTS—ARTICLE I, SECTION 13, SUBSECTION 2

*The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.*

Perhaps the most instructive example of how unenforceable mandates come about is the process by which the “counsel for indigent defendants” provision developed in CC/73. The Bill of Rights Committee, reflecting the approach of the legal experts, proposed a traditional, self-enforcing rule directed to the courts: “At all stages of the proceedings, every person shall be entitled to assistance of counsel of his choice, or appointed by the court in indigent cases if charged with an offense punishable by imprisonment.”\(^\text{21}\)

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\(^{18}\) See *Hays v. State*, 936 F. Supp. 360, 372 (W.D. La. 1996) (three-judge court): “Even now, the Legislature persists in defending the indefensible. In its record of doggedly clinging to an obviously unconstitutional plan, the Legislature has left us no basis for believing that, given yet another chance, it would produce a constitutional plan. It is therefore with regret and reluctance, but with no other choice perceived, that we hold as follows . . . ” The court then imposed its own redistricting plan.

\(^{19}\) For an exhaustive discussion, see *Symposium, Fidelity in Constitutional Theory*, 65 Fordham L. Rev. #4 (1977), which devotes 572 pages to the subject. To the extent that there exists a problem differentiating, with respect to the United States Constitution, “the distinction between semantic intention (what the Framers meant to say) and political or expectation intention (what they expected would be the consequence of their saying it),” the problem does not arise in dealing with the recently adopted Louisiana Constitution. See Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249, 1256 (1997). Only as one gets further away in time from the knowledge and understanding of the writers does the problem arise. *Id.*

\(^{20}\) Note the importance of the text and purpose of the rule in *Cotton v. Brien*, 6 Rob. 115 (La. 1843). The Mississippi constitutional provision provided “that the introduction of slaves into this State as merchandize, or for sale, shall be prohibited from and after the first day of May, 1833.” *Id.* at 116. This was a general prohibitory statement rather than a statement instructing the legislature to prohibit. The Louisiana Supreme Court construed the statute as self-enforcing, and that a contract of sale which violated the provision was unenforceable.

That provision provoked little opposition or discussion, presumably because it expanded only slightly the existing state of the law under the federal cases.\textsuperscript{22} It simply addressed an indigent individual's right not to be tried without a free lawyer. It remains in the constitution as the basic rule. During floor debate on the proposal, Delegate Thomas A. Velazquez, not a member of the committee and not a lawyer, proposed an amendment that was aimed at further implementing the guarantee. His proposal added the language: "the legislature shall provide for a uniform system for securing counsel for indigents including qualifications and compensation." He stated, "This is not an attempt to suppress or supplant Section 12; it's rather a supplement. It puts the exact mechanism in the hands of the legislature where it belongs. It only mandates the legislature to provide for a uniform system. . . . It could be a combination of the old and the new. It could be a completely old system. It could be a completely new system."\textsuperscript{23}

As he stated, the drafter knew the proposal was not self-enforcing. But it was a proposal with political significance coming from a black delegate from New Orleans who stated, "This is a bill to help poor citizens who have been accused of crime. If the poorest citizen of this state can't receive justice, then no citizen is safe."\textsuperscript{24} Despite the use of the word "uniform," the proposal as he explained it did not require that the same system be implemented in every jurisdiction. Perhaps an odd use of the term uniform in this context; perhaps unnecessary. As he said in explanation, "you can pass an ice cream law that covers chocolate ice cream, vanilla ice cream, fudge ripple, and chocolate walnut, and it would still be a uniform ice cream law."\textsuperscript{25} More to the point, he stated he meant "Uniform in that justice is given to indigents. This is the basis of the uniformity, and the method is left to the legislature of which you are a member; and I'm sure that if you want that particular system, then you go to the legislature and you stress it."\textsuperscript{26}

A committee member pointed out that the proposal did not accomplish much that was not already provided for. The author's answer was, "As important as the letter of the law, is the spirit of the law. Indigents and the concept of indigent defense deserves constitutional treatment."\textsuperscript{27}

In the end, the grass roots politics prevailed over the technicians, and the admittedly unenforceable mandate was put into the document. Not a rule, but a "concept." Not a constitutional rule, but "constitutional treatment." As

\textsuperscript{23}. VII Records: Convention Transcripts, \textit{supra} note 10, at 1160.
\textsuperscript{25}. VII Records: Convention Transcripts, \textit{supra} note 10, at 1160.
\textsuperscript{26}. \textit{Id.}
\textsuperscript{27}. \textit{Id.}
Delegate Duval told the convention, "I think that this convention should go on record mandating the legislature to establish some type of uniform system with the hope that we will ultimately end up with a public defender system for indigent persons accused of crime." A "hope," but not a binding rule.

Soon after the constitution went into effect, attorneys appointed to represent indigent defendants without pay were the first to invoke the constitutional mandate. In State v. Bryant, appointed attorneys moved to stay the prosecution and revoke their appointments, or to order the state to pay them reasonable compensation. Their principal argument was that the existing system did not meet the uniformity requirement, some districts having public defenders and others using defender boards that appointed private attorneys. The supreme court denied the requests, citing the debates just mentioned to support the view that the system did not violate the uniformity requirement. The supreme court also would not allow lower courts to order payments to attorneys. In State v. Campbell, it reversed a lower court decision that ordered the Baton Rouge local government to make payments to appointed attorneys. In State v. Cummings, it reversed a judgment ordering the state and the state treasurer to pay attorney fees and expenses. Serving on the court at the time were Justices Albert Tate, Jr. and James L. Dennis, both of whom had served as delegates to the constitutional convention.

Several years later, attorneys sought compensation for their expenses and an hourly fee. Their argument combined the mandate's limited force with an argument based on the self-enforcing guarantee to adequate counsel. The argument was that uncompensated counsel was not effective and that attorneys were not required to provide free representation under the rules of legal ethics. Still, the court of appeal followed the Bryant rationale as to the unenforceability of the mandate; it noted "that the constitutional mandate to provide a system, or systems a la Bryant, to compensate counsel for indigent defendants in Louisiana is squarely directed at the Legislature." These developments are consistent with the convention debates. The delegates intended only a hortatory statement. But this is not to say that the mandate was not without some effect in the political realm. The legislature responded in 1976 to adopt a statewide system with a statewide board and a board in each judicial district. Each local board maintained a panel of volunteer attorneys and an involuntary panel. The law allowed the boards to adopt either a plan for appointment of attorneys or for an indigent defender system. Funding was provided by authorizing assessment of court costs for each felony conviction.

28. Id. at 1161.
29. 324 So. 2d 389 (La. 1975).
30. 324 So. 2d 395 (La. 1975).
31. 324 So. 2d 401 (La. 1975).
and misdemeanor violation, other than non-moving traffic violations. While
not truly uniform and not well-financed, it was an attempt by the legislature to
fund the mandate, partly at the urging of Robert G. Pugh, who himself was a
delgate to CC/73.

Concerns about the quality of legal representation of indigents, especially in
Orleans Parish, provoked the next round of litigation. This time, however, the
proponents did not rest so much on the unenforceable mandate, but on the
argument that appointed counsel were not able to provide effective assistance
because of the lack of resources. Assuming that was the case, they then argued
that the courts had the inherent power to force other branches of government to
provide more funds to provide adequate counsel, as had been done in some other
states.

In State v. Peart, the lower court judge, in a broad order, found that the
system was unconstitutional as applied to Orleans Parish and ordered the
legislature to provide funding for improved services. The supreme court reversed
the broad order, but it did agree that services of counsel were ineffective in
Section E of the Orleans Criminal Court. It remanded for hearings in individual
cases to determine if effective assistance was provided. If counsel was found to
be not effective, the judge “shall not permit the trial of such cases to be
conducted.”

In Peart, the supreme court reaffirmed the view that the mandate to establish
a uniform system for compensating counsel was not enforceable by an individual
criminal defendant. It did state, however, in a tip of the hat to the mandate, that
“the existence of this provision in the constitution may well bolster this Court’s
existing constitutional, supervisory and inherent authority to ensure that indigent
defendants receive the effective assistance of counsel the constitution guarantees
them.” It also stated that the provision does not require the legislature to fund
the system of compensation; it only requires the legislature to provide a uniform
system. In so doing, the legislature could require local governments to fund it.

Thus, the result was a traditional approach to the guarantee with individual
remedies, rather than adopting systemic remedies. The majority, however, did
cite other jurisdictions which undertook broader system remedies and noted
its inherent power and its supervisory jurisdiction. However, it stated, “We
decide at this time to undertake these more intrusive and specific measures
because this Court should not lightly tread in the affairs of other branches of

34. *Id.* Section 149 of the old statute and Louisiana Code of Criminal Procedure articles 512 and
513 have been amended and re-enacted.


36. Several amicus briefs were filed by activist organizations; see State v. Peart, 621 So. 2d 780,
789 n.7 (La. 1993).

37. 621 So. 2d 780 (La. 1993).

38. *Id.* at 783.

39. *Id.* at 786.

40. *Id.* at 790.
government and because the legislature ought to assess such measures in the first instance.\textsuperscript{41} Unstated in this discussion was the additional, and probably insurmountable, hurdle of Article III, section 16 which provides that “no money shall be withdrawn from the state treasury except through specific appropriation . . . .” As stated in a perceptive student note:

The weakness of these so-called mandates lies in the constitutional rule that there can be no expenditure of state funds without a legislative appropriation. Although the constitution may say that appropriations shall be made, it also leaves the power to do so in the hands of the legislature. Abuse of legislative discretion to dictate exactly “how much is enough” leads to a possible consideration of the inherent powers doctrine but, without enforceable constitutional or statutory language, the chances of a successful breach of the legislature’s powers of the purse are nonexistent.\textsuperscript{42}

Justice Lemmon in a short dissent, without citing authority, suggested that the legislature should be required to enhance supplemental funding “within a specified reasonable time, for compensating indigent defender attorneys according to uniform standards and guidelines so that at least minimally adequate programs will operate in all of the various judicial districts.”\textsuperscript{43} In a longer dissent, Justice Dennis stressed the duty to implement the state and federal right to counsel for indigents.

In any event, this convoluted development reinforces the view that the language “the legislature shall” in Article I, section 13 is a hortatory statement and cannot be enforced by courts ordering the legislature to enact legislation or to appropriate funds. Here, the development in the cases has been faithful to the text and to the purpose of the delegates. Other states have taken a similar view of mandates to provide social services.\textsuperscript{44}

\textsuperscript{41} Id. at 791.
\textsuperscript{43} Peart, 621 So. 2d at 792.
\textsuperscript{44} Montana’s constitution contains a high sounding provision that “the legislature shall provide for economic assistance and social rehabilitation services as may be necessary for those inhabitants who . . . may have need for the aid of society.” Mont. Const. art. XII, § 3(3). It has not been directly enforced by courts ordering statutes to be enacted by the legislature, but was one policy concern that led the court, in an equal protection analysis, to require higher-than-normal scrutiny of classifications. Butte Community Union v. Lewis, 712 P.2d 1309 (Mont. 1986). Also not directly enforced was a New York Constitution mandate to aid the needy “as the legislature may from time to time determine.” N.Y. Const. art. XVII, § 1: However, a legislative mandate to a commissioner was enforced. Jiggets v. Grinker, 553 N.E.2d 570 (N.Y. 1990). In such cases, “Unless the legislature has mandated the level of aid in its statute, courts have deferred to legislative and agency determinations of benefit levels despite the presence of a constitutional provision mandating aid.” See Rotunno, supra note 24, at 141.
This is not to say that there may have been some political and/or moral pressure generated by the mandate that propelled the legislature to act. Prodded by the chief justice and members of the bar, the legislature has recently adopted a new Indigent Defense Assistance Board and appropriated $7.5 million to supplement local funds generated from indigent defense programs.\(^{45}\)

IV. NATURAL RESOURCES ARTICLE IX, SECTION 1

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

As the title of the provision and the second sentence indicate, the first sentence of Article IX, section 1 is a statement of general policy aimed at the legislature rather than a self-enforcing rule directed to courts. The debate on the provision shows that the mandate to the legislature was not designed for court enforcement; it was adopted instead of a provision establishing a self-executing constitutional right.

The Natural Resources & Environment Committee had before it a recommendation from the Ecology Center of Louisiana to adopt "a Natural Resources Bill of Rights statement, enumerating these ideas—(1) the wise use of all resources be guaranteed to be for the benefit of all the people for all time; (2) that this be made the mandate of the legislature; [and] (3) that there be provision for redress in the courts to insure that this mandate is accomplished."\(^{6}\) Early in its debates, the committee posited the problem: "Mr. Hargrave pointed out that the crux of the issue is whether such a provision should be drafted to allow judicial review rather than merely to provide a legislative mandate."\(^{47}\) The committee had before it two contrasting provisions of the Illinois Constitution:

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Also, after a report by an advisory commission, the 1997 legislature established the Indigent Defense Assistance Board, La. R.S. 15:151, enacted by 1997 La. Acts No. 1361.

46. XIII Records of the Louisiana Constitutional Convention of 1973: Committee Documents 483 [hereinafter "Records: Committee Documents"].

47. XIII Records: Committee Documents, supra note 46, at 484 (Minutes of March 24, 1973).
Section 1. PUBLIC POLICY—LEGISLATIVE RESPONSIBILITY

The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.

Section 2. RIGHTS OF INDIVIDUALS

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

A legal aid attorney recommended an "environmental bill of rights" be adopted, one that did not use vague terms making the state a trustee. She recommended adoption of a provision providing, "The right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of the environment shall not be abridged." A special counsel in the Office of the Attorney General provided samples of self-enforcing provisions contrasted with statements of policy.

With this and other information providing a clear background, Delegate Derbes moved to add language, "In accordance with the public policy expressed herein, each person has a right to a healthful environment." The motion failed by a vote of 7 Yeas and 7 Nays and the self-enforcing right was not part of the committee proposal presented to the convention. Addressing the full convention, the chairman of the committee, Delegate Louis Lambert, a lawyer and a legislator, explained the policy statement on the environment. We took a presently existing statement in our constitution... in our present constitution which reads as follows: "The natural resources of the state shall be protected, conserved, and replenished." This particular language is found as a preamble to the present constitutional provision concerning the Wildlife and Fisheries Commission.

What we attempted to do is to strike a balance, or find a happy medium between the environmentalists on one side, and the agri-industrial interest on the other side. We feel that we have found, hopefully, a policy statement that does this—that strikes a balance, that is not extreme one way or the other. We heard amendments by members of our committee who wanted to provide a citizen with the right to sue in our constitution. In other words, the right to file a suit

48. XIII Records: Committee Documents, supra note 46, at 526 (Statement of Doris Falkenheimer, Legal Aid Society of Baton Rouge.)
49. Id. at 532. See also id at 535.
50. Id. at 545.
to close, for example, to seek an injunction to close down some industry, let's say, or . . . [t]he majority of the members of our committee felt that this was an extreme position because there are provisions in our present law, in our civil code, our nuisance laws, class action provisions in our . . . Code of Civil Procedure, that provide this. 51

The convention adopted the committee mandate by vote of 98-0. 52

Given this background, it should be clear that the high-sounding statement is a generalized goal, but that the legislature is the ultimate determinant of the exact nature of the rules to be adopted. That view has been adopted in the construction of this provision by the courts. Though it is cited in a number of opinions, at base the mandate is relied upon to support a general policy favorable to environmental concerns and as an aid in construing statutes and regulations, rather than as an independent rule.

In this regard, the Louisiana courts' position is much like Pennsylvania's. There, a constitutional amendment provided, "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." The Pennsylvania Supreme Court held it was not a self-executing provision, but a moral directive to the legislature. 53

In Save Ourselves Inc. v. Louisiana Environmental Control Commission, 54 Justice Dennis referred to the mandate, along with many other authorities, to support finding an obligation on the Environmental Control Commission (ECC) to consider certain matters in granting permits. The rule put forth there is similar to the federal rule that was derived from statutes similar to the state statutes governing the ECC, 55 as well as from numerous policy arguments drawn from state statutes. As I stated elsewhere, in using the term "public trust doctrine" in relation to the mandate,

Justice Dennis is using it in a general policy sense and not in the strict sense of a court's power to control state use of sovereignty land absent a statute. Justice Dennis was a delegate to the Constitutional Convention of 1973 and voted for the proposal that became Article IX, Section

51. IX Records: Convention Transcripts, supra note 10, at 2912.
52. Id. at 2913.
54. 452 So. 2d 1152 (La. 1984).
Indeed, one of the basic uses of an unenforceable mandate is to support policy arguments for a particular construction of a statute. "Constitutional policy can provide a valuable aid in determining the legitimate boundaries of statutory meaning. Public policy which has a constitutional source can provide the basis for a broad or narrow interpretation of a statute. In like manner, it is possible to refer to analogous constitutional provisions to help shape the statute to accord with the statutory aim or objective." 

Justice Dennis was also trying to push the policy beyond its constitutional text by his restatement of the mandate. He quotes the mandate to "enact laws to implement this policy" but then explains that it is a mandate to "enact laws to implement fully this policy." It is up to the legislature to decide how fully to implement the policy. Similarly, the constitution simply states that various values shall be protected. Logically, it would follow that the protection is explained in the next sentence—by the legislature which makes laws. Justice Dennis, however, offers the explanation that the first sentence "imposes a duty of environmental protection on all state agencies and officials." Perhaps so, but not one enforceable directly by courts if the purpose of the drafters is followed. It is the legislature that is mandated. 

The legislature, of course, has adopted and amended a substantial body of legislation dealing with control of hazardous wastes and requiring permits for various activities harmful to the environment, and the courts have not been given an opportunity to innovate in a vacuum. Where there is uncertainty in the interstices, an area where policy concerns come into play, the constitutional mandate has been one useful source of the states' statements of policy.

A perceptive commentator properly views Dennis' opinion in Save Ourselves. "He then interpreted the pertinent constitutional and statutory provisions to derive a specific, judicially enforceable standard of care." The author later calls this a "constitutional-statutory standard." That is probably as accurate a statement that can be made of what was produced in that case, a result consistent with the purpose of the legislature. Courts not telling the legislature what to adopt, but construing states in light of the general policies stated in the Constitution and in other sources. Important additional sources of

58. Id. at 1156 (emphasis added).
authority used were federal laws: "For assistance in interpreting these require-
ments, the Save Ourselves opinion also referred the reader to federal and state
cases which have construed procedural requirements under NEPA and state acts
patterned after NEPA. Thus, the court clearly implied that the procedural
requirements of Louisiana's environmental laws are analogous to those of NEPA.
Indeed, in describing its standard, the court in Save Ourselves used language
nearly identical to that used in Calvert Cliffs to interpret NEPA's require-
ments." 62

In this regard, the Louisiana position accords with the general view in the
United States: "In whatever terms the constitutional policy of environmental
protection is set forth, almost all state constitutional provisions make reference
to the legislature in particular or state government in general as an agent for
carrying out the policy." 63

V. GAMBLING—ARTICLE XII, SECTION 6

Neither the state nor any of its political subdivisions shall conduct
a lottery. Gambling shall be defined by and suppressed by the
legislature.

The first sentence of the 1975 constitutional provision was a self-enforcing
prohibition which curbed the state and its subdivisions from conducting a lottery.
The ban reflected a continuation of anti-lottery sentiment that arose in the latter
part of the nineteenth century because of the corruption of the Louisiana Lottery
Company. The predecessor provision of the 1921 constitution was broader,
Article XIX, section 8 providing, "Lotteries and the sale of lottery tickets are
prohibited in this State." The new provision, however, only prohibited
governments from conducting lotteries; it did not prohibit licensing or otherwise
allowing a private lottery, which is what the Louisiana Lottery Company was.
No legislative attempt was made to permit a lottery without a constitutional
amendment. The present state lottery was authorized by an amendment adopting
Section 6(A).

At the same time CC/73 adopted the self-operative provision banning
lotteries, it adopted a less authoritative command in addressing other forms of
gambling. It simply instructed, in the second sentence, that the legislature define
and suppress gambling. This provision was the result of a debate which showed
the delegates knew they were adopting an unenforceable mandate. The 1921
constitution had also provided in Article XIX, section 8, "Gambling is a vice and

62. Id. at 1571.
63. Bruce Ledewitz, The Challenge of, and Judicial Responses to, Environmental Provisions in
A. McLaren, Comment, Environmental Protection Based on State Constitutional Law: A Call for
the Legislature shall pass laws to suppress it." The supreme court, however, concluded that the provision was not self-executing and that the only prohibited gambling was what the legislature defined as such. In *Gandolfo v. Louisiana State Racing Commission*, the court approved pari-mutuel betting at horse race tracks. Indeed, the legislature has never banned all gambling; the criminal code simply punished gambling conducted as a business. The result was a high-sounding constitutional sermon that nonetheless allowed gambling blessed by the legislature.

The CC/73 debate was quoted at length in *Polk v. Edwards*, the unanimous supreme court decision permitting the legislature to allow casino gambling, riverboat casinos and video poker. The decision is consistent with the record of debates, and indeed, the court could render no other principled interpretation of the constitutional language.

But, might one ask how so apparently deceptive a provision could be adopted? A provision that is quoted in the popular press who castigate the courts and legislature for violating its spirit? To the purist, of course, provisions that are not self-executing or limitations on the legislature simply do not belong in a constitution. In the real world of constitutional conventions, however, such provisions become part of the document; the myth and the hope may be more important than the operative legal language.

The committees of CC/73, facing a provision which had no important effect, and desiring to shorten the document, took no action to continue the 1921 provisions on gambling. No committee proposals on the subject were introduced, resulting in a situation in which lotteries and other forms of gambling could be permitted by law. Attention focused on this narrow topic as the convention approached its closing deadline amid long workdays and late-night sessions. A proposal by Delegate Planchard sought simply to add that neither the state nor a political subdivision could conduct a lottery. He referred to the growth of lotteries in the northeastern United States and stated his aim to stop such developments in Louisiana. Delegate Burns then introduced an amendment to return to the language of the former constitution. The debate then burst open. Delegate Burns explained that his purpose was more political and moral than a concern with a legal rule. He stated, after the obligatory reference to the Louisiana Lottery Company scandals:

Now, I don't think where an amendment is not going to change anything, it's not going to add anything on to the present law, it's not going to put any further restrictions over and above what we already have and as I say we're people that like horse racing, they're enjoying horse racing, they're enjoying pari-mutuel betting. The people that like bingo games are enjoying them, so why by the actions of this commit-

64. 227 La. 45, 78 So. 2d 504 (1954).
66. 626 So. 2d 1128 (La. 1993).
tee, or this convention, especially with reference to the lottery article, why do we want to go out of our way and invite the open and active opposition of that larger percentage of the citizens of this state who are absolutely, definitely opposed to lottery, that just as sure as we do it, we're going to get that opposition and I'm not saying that as a threat because they have documents here to show their sentiment. 67

But Delegate Burns knew that his proposal did not define gambling and that it was up to the legislature to do so. He said, "This is not going to change one thing that we don't have at the present time except that it will keep it in the constitution and satisfy the voters when they go to the polls to vote on this constitution." 68 Delegate Smith supported the proposal and emphasized the political value of the provision in north Louisiana:

Well, I'm not an expert on the definition of gambling, but I know that we should put this in—whether you're from North Louisiana or South Louisiana—our people feel very strongly about this up in our area and this is one of the things they will want in there. So, gentlemen, I feel like we're going to hurt ourselves if we don't put this in our constitution. 69

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

So, I don't think it will have any material effect on the operation of the state. I think it's a purely pragmatic matter; it may facilitate the passage of this document . . . . Therefore, for a purely pragmatic reason, because it does not change the law at all, because we will operate as we always have been operating, I urge that we adopt the amendment. 70

A combination of pragmatists and moralists, worn out at the end of the day, adopted the Burns amendment and restored the 1921 language. The next day, Delegate Gravel proposed a compromise provision that was more straightforward in that it omitted the moral condemnation of gambling as a vice and simply stated the rule that was adopted.

68. IX Records: Convention Transcripts, supra note 10, at 3214.
69. Id.
70. Id. at 3217.
Perhaps one could conjure a reverse-cynicism theory to deal with such hortatory statements that might lead some voters to believe the language really does something. Perhaps the courts could enforce them and require the legislature to act. A type of estoppel theory that would penalize the delegates for adopting such misleading provisions? But are they truly misleading? Statements of aspiration may be used to determine the state’s policies, as with the environmental mandate. More important, what principled and precise standards could the courts develop to determine which types of gambling to define as improper and which to allow? To outlaw all gambling, under some generic definition the court might weave out of common law principles, would make the provision self-enforcing and thus deceive other voters who were knowledgeable and wanted to adopt, as Mr. Burns put it, the situation as it existed at the time.

On a more serious level, a study of decisionmaking in CC/73 by Edward D. Grant III in a Ph.D. dissertation71 explains the desire to take the middle ground in constitutional reform, as in this provision. He suggests the delegates had two main goals—to adopt some reforms and to get them approved by the voters. He states: “It is plausible, intuitively, that newly proposed documents which contain either minor or major amounts of change will be rejected by the voters. Only documents proposing a moderate degree of reform will be approved at the polls.”72 The formula for voter approval appeared to be a proposed constitution graced with a moderate degree of reform.73 “Almost everywhere, conventions scrambled to protect the enshrinement of various ‘sacred cows,’ depending upon local habit and prejudice.”74 As Delegate Lance Womack stated, he would be content if the document merely laid out the blueprint for “pretty good government.”75 Not necessarily good government, but “pretty good” government. The unenforceable mandate was a useful device to accomplish these goals of the delegates.

VI. FORCED HEIRSHIP; ARTICLE XII, SECTION 5

No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinherison shall be provided by law. Trusts may be authorized by law, and a forced portion may be placed in trust.

The self-enforcing first sentence, read in its normal sense, allowed the legislature to do anything to forced heirship other than “abolish” it. The second
sentence elaborated that, in addition, the legislature was empowered to determine without any limitations the persons who would be forced heirs and the amount of the forced portion. Furthermore, the convention debates revealed the understanding that the legislature was given full discretion to structure the institution of forced heirship as it chose, so long as something remained. No principled means of determining what had to remain was provided.

The section contrasted with the tone of voice used in Article I, section 5, the provision dealing with the right to keep and bear arms. It also begins with a strong statement: "the right of each citizen to keep and bear arms shall not be abridged." That statement is also then qualified: "but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." But here, the exception to the right which empowers the legislature to limit the right is itself limited: legislative action to limit carrying concealed weapons is limited to weapons "concealed on the person." In contrast, the language in Article XII, section 5 gives the legislature power to determine forced heirs and the forced portion and the grounds for disinherison without such a limitation. The structure of the two articles thus indicates that the legislative power over forced heirship was meant to be greater than the power to legislate with respect to gun control.

Members of the Judiciary Committee and the Committee on Bill of Rights and Elections had before them staff documents which suggested that the 1921 Constitution provision on forced heirship was not an effective limitation on legislative power and did "not prevent the legislature from making changes in the categories of forced heirs or in the portion of the deceased's estate which constitutes the legitime." 76 While the language cited to support this view may have been dictum on the point, the language of Succession of Earhart 77 was accepted as the existing position of the jurisprudence: "The words, 'no law shall be passed abolishing forced heirship,' mean exactly what they say, in other words, that forced heirship cannot be done away with wholly, wiped out or destroyed. This provision does not prohibit the legislature from regulating or restricting the rights of forced heirs." 78

Delegate Ford Stinson, representing the Committee on Bill of Rights and Elections which proposed Article XII, section 5 toward the end of the convention, explained to the delegates: "Neither do they say that children will be forced heirs of fathers and mothers and their ascending line. It will be left up to the legislature." 79 Delegate Max Tobias stated, "As I presently read Louisiana constitution and statutes, the legislature could very simply say that each child is

76. Hargrave, supra note 67, at 659; Committee on Bill of Rights and Elections Staff Memo, July 31, 1973 at X Records: Committee Documents 134, 135. See also Judiciary Committee Staff Memo No. 21, June 6, 1973 at XI Records: Committee Documents, supra note 46, at 358.
77. 220 La. 817, 57 So. 2d 695 (1952).
78. Id. at 824, 57 So. 2d at 697.
a forced heir to the extent of one dollar.\textsuperscript{80} Delegate Dennery agreed with Delegate Avant, in that "[t]here would be a system of forced heirship, but what it consisted of, and all the refinements thereof, would be up to the legislature."\textsuperscript{81} As I stated in 1983:

A court which would be inclined to ignore this legislative history (perhaps arguing that it does not necessarily reflect the intent of the voters who adopted the document) and hold that some reasonable fraction of legitime is required would be in a difficult position. There are simply no traditional legal standards as to what share (percentage or amount) of a deceased's patrimony is part of the forced portion, and there are no legal standards as to who must be forced heirs. Lack of certain judicial standards seems to be another reason supporting the view that the legislature can severely erode the institution, as long as it keeps some absolute minimum aspect of forced heirship.\textsuperscript{82}

Opponents of this view, depending primarily on a word analysis of the term "abolish", argued there was some minimum level of forced heirship that had to be kept. They recognized, of course, "The difficulty is in determining that point."\textsuperscript{83} Moreover, the convention debate on forced heirship was cursory, without considering the policy concerns that were sought to be preserved\textsuperscript{84} and which might otherwise have been used to explain what the minimum provisions to be kept would be. The absence of such a debate is explained by the fact that the delegates knew they were adopting an unenforceable mandate, and that the issue was to be left to the legislature.

When the legislature sought to limit forced heirship by statute, it kept descendants as the favored persons, but limited the class to descendants under 23 years of age or who were incapacitated.\textsuperscript{85} Though the language was not clear, apparently the forced portion was not changed.

The supreme court, by a 4-3 decision in \textit{Succession of Lauga},\textsuperscript{86} however, found the statute violated the constitutional provision because it abolished the "essence" or "core values" of forced heirship, which it determined included equality among descendants regardless of age or need. Justice Dennis wrote for the majority and Justice Kimball wrote a strong dissent.\textsuperscript{87} The disagreement between the justices was largely one of philosophy: fidelity to constitutional text and purpose versus protecting fundamental rights defined in non-constitutional

\textsuperscript{80.} \textit{Id.} at 3075.
\textsuperscript{81.} \textit{Id.} at 3078.
\textsuperscript{82.} Hargrave, \textit{supra} note 67, at 660.
\textsuperscript{84.} \textit{Id.} at 416.
\textsuperscript{86.} 624 So. 2d 1156 (La. 1993).
\textsuperscript{87.} Justices Marcus and Hall also dissented. \textit{Id.} at 1183.
Indeed, the majority opinion spends most of its efforts on historical sources of forced heirship and on the 1921 constitutional provision. From those sources, it draws out the core values of forced heirship which are not stated in the 1975 constitutional text or in the debates during CC/73.

Indeed, the most interesting part of the opinion is its refusal to accept the message of the convention debates on the basis that such recourse is not necessary when the meaning of the text is clear. This is hardly the approach of the court in scores of other cases, especially the approach in *Polk v. Edwards*.

As Professor John Devlin wrote at the time, "By coming to opposite conclusions in the two cases, the court sowed confusion regarding how such provisions should be interpreted, and may have left itself open to charges that its decisions in this area are more result-driven than analytically consistent." Prof. Devlin, *Louisiana Constitutional Law*, 54 La. L. Rev. 683, 717 (1994).

He then tried to supply some justification for the different results. Perhaps, he says, the case portends of movement away from the maxim of interpretation that the legislature prevails unless the constitutional limiting provision is "explicit." But that can hardly be reconciled with Justice Dennis' opinion in the bond district case.

To the extent that the convention debates must be replaced with a look at the intent of the voters rather than the delegates, he correctly points out that the best evidence of that is the intent of the members of the convention. Even if we were to accept the premise, there is evidence that convention debates were widely reported in the print and electronic media.

The argument that analysis of constitutional intent should focus on the voters' intent rather than that of the delegates rests on the notion that the two are different, a questionable assumption in light of the efforts made by the convention to inform the public about the document, in light of this important goal of securing approval.

CC/73's public information staff employed five full-time publicists. Their "contributions included publishing a weekly convention newsletter, compiling daily press releases, and producing informational spots for radio stations around the state." The state's major newspapers in New Orleans, Baton Rouge, Shreveport and Monroe, as well as the Associated Press, had reporters covering all convention sessions. On three occasions, April, June, and October 1973,

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88. 626 So. 2d 1128 (La. 1993).
90. Board of Directors of La. Recovery Dist. v. All Taxpayers, 529 So. 2d 384 (La. 1988). Although Article VII, section 6 of the Louisiana Constitution limits the state's ability "directly or indirectly" to incur debt, the court upheld the power of a special district with boundaries identical to that of the state to do so, under an expansive interpretation of legislative power.
91. Grant, *supra* note 7, at 136. "A professional staff member was assigned to each of three areas: television publicity, radio publicity, and newspaper coverage. The staff prepared and supplied TV films, radio spots, and news and feature stories to media organizations who did not have full-time reporters at the convention. Across the state, 130 newspapers received daily and weekly releases updating events in CC-73." Id. at 163.
92. Id.
special convention committees traveled throughout the state to hear testimony at public meetings and hearings. In April, it was the composite committee composed of Chairman E. L. Henry and the chairs of the eight substantive committees: “Packed houses met the delegates. Individual citizens and group representatives testified on ‘constitutional’ subjects as varied as taxes, the environment, an ombudsman for the state, racial discrimination, the court system, and the particularization of ‘God’s Will’ in a new document.”

This is not the place to reargue Lauga. Events since the decision have shown the danger of proceeding as the majority did to place its perception of fundamental values above constitutional text and purpose. This is especially true when a court is construing a relatively young constitution, since the likelihood of change in fundamental values in a short time is not great. After Lauga, the voters expressed their fundamental values again in a constitutional amendment which allowed changing forced heirship and limiting forced heirs to persons under the age of 24 or who are incapacitated. They expressed their fundamental acceptance of the change by a vote 68% in favor of the amendment, 758,608 for and 364,692 against, suggesting that four judges’ determination of those values inconsistently with the purpose of the delegates was in error.

The forced heirship provisions in the constitution present an additional problem that goes beyond the misplaced approach of Lauga. To the purist who would have preferred to have nothing on the subject in the constitution and to have relied on legislative action in the area, the new-version of Article XII, section 5 is even more difficult to deal with than the original. The amendment version now reads:

Section 5(A) The legislature shall provide by law for uniform procedures of successions and for the rights of heirs or legatees and for testate and intestate succession. Except as provided in Paragraph (B) of this Section, forced heirship is abolished in this state.

(B) The legislature shall provide for the classification of descendants of the first degree, twenty-three years of age or younger as forced heirs. The legislature may also classify as forced heirs descendants of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates. The amount of the forced portion reserved to heirs and the grounds for disinherison shall also be provided by law. Trusts may be authorized by law and the forced portion may be placed in trust.

93. Id. at 160.
94. La. Voters Reject Only Two Amendments, Baton Rouge Advocate, Oct. 23, 1995, at 10A, available in 1995 WL 6346300. The vote was 758,608 for and 364,694 against. It is ironic that the voters expressed in the same election a distrust of judges. Efforts by judges to secure a constitutional amendment to change their mandatory retirement age from 70 to 75 years by constitutional amendment failed. Only 38% of the voters favored that amendment. Id. Amendment no. 4 proposed changing the mandatory retirement age in Article V, section 23(B) from 70 to 75. It failed by a vote of 410,226 for, to 671,805 against.
The first sentence of 5(A) is unnecessary, since the legislature could adopt such legislation by virtue of its general powers. The "legislature shall" mandate is unenforceable to the extent it might be seen as requiring such legislation.

The second sentence of 5(A) is also arguably unnecessary if the object is to allow the legislature to abolish forced heirship. It could do so without this language. Presumably, though, the function of the sentence is as a lead in to 5(B) and part of an apparent attempt to require some forced heirship. But 5(B) does not establish a self-enforcing provision specifying the aspects of forced heirship that are required.

Indeed, 5(B) does not purport to determine the forced portion. It allows the legislature to determine the fraction or portion that a forced heir is entitled to receive.

Section 5(B) does purport to force continuation of some aspects of forced heirship with respect to determining who shall be forced heirs. But the constitution doesn't do so. It states that the "legislature shall" provide that descendants of the first degree who are under 24 years are forced heirs. But then, the "legislature may" name incapacitated descendants of any age as forced heirs. The latter provision, of course, is merely permissive. But the first provision presents the recurring problem of the unenforceable mandate. No enforcement mechanism to make the legislature so act is provided. Granted, the legislature did act to provide such legislation, but that could be repealed. In such a case, a Lauga analysis does not come into play. Lauga depended on the former language that forced heirship could not be abolished. That language is gone from the constitution, Section 5(A) now abolishing it except as provided in 5(B), and then 5(B)'s continuation is only a precatory mandate to the legislature.

In any event, this state of affairs, judicial and legislative, does not demonstrate careful drafting and clear determinations. It should be a general lesson that mandates, though politically necessary in some situations, are a poor substitute for clear and precise self-enforcing constitutional provisions. They should be avoided to the extent possible.