Limits on Borrowing and Donations in the Louisiana Constitution of 1975

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I. INTRODUCTION

Louisiana's first constitution, adopted upon statehood in 1812, did not address borrowing of funds or management of state property. As in many other states, Louisiana's constitutional limits on borrowing and curbs on subsidies to private interests resulted from the Panic of 1837 and the depression that followed. New York had set the pattern for state use of its credit to finance internal improvements with the construction of the Erie Canal in 1817. Its success led to substantial state borrowing to finance canals, then railroads and other projects, fueled in large part by foreign capital.1

States were soon overextended, and nine states defaulted on bonds from 1841-42. 2 State constitutions attempted to stop the resulting financial chaos and to limit issuance of bonds by states, and then later, by local governments. These prohibitions have continued in various forms in many states. Few have attained their objectives of financial stability. A leading commentator concludes,

Since 1900, however, states have developed means of borrowing for public improvements that escape constitutional bans. Courts in constitutionally restricted states have ruled that constitutional prohibitions do not apply to debts created through specific types of debt instruments. This development has been so complete that most states are now able to borrow funds in any amount for nearly any purpose. 3

It is ironic that over the past few decades, courts have tended to construe limits on government action more broadly in the area of individual rights, "while at the same time reading the bars against government's allocation of public financial resources in aid of private businesses more and more narrowly." 4

In Louisiana, the limitations on borrowing and on subsidies appeared in the state's second constitution, adopted in 1845. Adoption of these and other anti-business limitations was also influenced by Anglo-Saxon Jacksonian Democrats melting into the existing conservative Creole-French society. As historian Roger W. Shugg put it, "The Panic of 1837 bred in them a lasting distrust of the ways of finance; it left a heavy state debt and ruined many banks. So they limited the legislative right to borrow money, prohibited public loans to internal improvement companies, banned the charter of banks, and restricted the life of all corporations to twenty-five years." 5

The state had engaged in substantial borrowing during the 1830s. "Most of the available capital went into a new kind of government loan—the internal improvement projects guaranteed by the credit of the individual states." 6 As Charles Gayarre put it, "At the beginning

3. Id. at v.
of the year 1839 the State owed to the Banks $75,000; at the
beginning of 1841 the debt amounted to $850,000; and it was
generally believed at the time, on the authority of persons who had
made the calculation, that the members of the Legislature, in their
private capacity, owed to those institutions about one million
dollars.” In addition, the state had issued bonds to subscribe to the
capital stock of several banks. In 1824, it chartered the Bank of
Louisiana, investing $2 million to obtain half of its stock. The
debt of the state’s banks in 1838 was $22,950,000. By 1842, Louisiana
had issued $24,450,000 of bonds on behalf of banks. In 1843, the
state defaulted on $1.273 million in state bonds. When the price of
cotton fell, repayment of foreign capital was difficult. Bank
“depositors and note holders alike rushed for their specie, and the
banks were forced to suspend.” During the debates on the 1845
Constitution, Judah P. Benjamin stated that only five banks in the
state survived the depression of 1837.

The response in the 1845 Constitution was draconian; among its
provisions were:

(1) The state shall not subscribe to the stock of any
corporation or joint stock company.
(2) The legislature shall not pledge the faith of the State for
the payment of any bonds, bills, or other contracts or
obligations for the benefit or use of any person or persons,
corporation, or body-politic whatever.
(3) Aggregate state debt shall not exceed $100,000.

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7. Charles Gayarre, History of Louisiana 660 (1885). He also stated, “This
simple statement suffices to show the danger of increasing too much the facilities
of borrowing.”
8. Caldwell, supra note 1, at 45-46.
10. Caldwell, supra note 1, at 102. Since some of the bonds were not yet sold,
total debt on behalf of banks was $18,250,000.
11. Judith K. Schafer, Reform or Experiment? The Louisiana Constitution of
1845, in In Search of Fundamental Law: Louisiana’s Constitutions, 1812-1974, at
12. Caldwell, supra note 1, at 55.
13. Proceedings and Debates of the Convention of Louisiana, New Orleans,
1845, at 861 (Robert J. Ker, Reporter; 1845); see 1 Alden L. Powell, A History of
Louisiana Constitutions, Part 1, Project of a Constitution for the State of Louisiana
14. La. Const. art. 121 (1845).
15. La. Const. art. 113 (1845). The article made an exception allowing new
bonds to refinance existing debts, but in no greater amounts and at no higher
interest rate.
16. La. Const. art. 114 (1845). Exceptions included (1) sums raised in case of
(4) No corporate body shall be hereafter created, renewed, or extended with banking or discounting privileges. ¹⁷

The extent of these constitutional curbs produced a counter reaction. New Orleans commercial and financial interests were dissatisfied with these limits on commerce and growth as the city’s trade was shifting to Savannah and Charleston. ¹⁸ The Whigs captured political power and called the Constitutional Convention of 1852. Roger W. Shugg typically overstates the point, “Under the efficient leadership of Judah P. Benjamin they proceeded first to grant the commercial interests everything they wanted and then to make changes in representation that might perpetuate the power of Whiggery.” ¹⁹ It was called a speculator’s convention: “Limitation of the state’s capacity to borrow money was wiped out; public subscriptions to internal improvement companies were authorized; and the General Assembly was empowered to charter conservative, specie-paying banks by special or general laws.” ²⁰

Foreshadowing future developments that led to longer and more detailed constitutional provisions, the changes in the 1852 Constitution were not simple ones. The drafters did not take the clear and easy approach of removing the old provisions in their entirety and returning to the language of the 1812 document. Exceptions and complications in existing provisions were adopted instead. The 1852 document provided:

(1) The state could not subscribe to the stock of a corporation EXCEPT to companies organized to make internal improvements up to 1/5 of the capital of the company. ²¹
(2) The state could not make a loan to, nor pledge its faith for the benefit of any corporation or joint stock companies EXCEPT to aid companies making internal improvements up to 1/5 of the capital of the company ²²
(3) Aggregate state debt could not exceed $100,000 ²³

¹⁷. La. Const. art. 122 (1845).
¹⁸. Caldwell, supra note 1, at 82-89.
¹⁹. Shugg, supra note 1, at 136.
²⁰. Id. at 137; Wayne M. Everard, Louisiana’s “Whig” Constitution Revisited: The Constitution of 1852, in In Search of Fundamental Law: Louisiana’s Constitutions, 1812-1974, at 38 (Warren M. Billings & Edward F. Haas eds., 1993); Caldwell, supra note 1, at 84.
²². Id.
²³. La. Const. art. 111 (1852).
(4) The state could charter banks, but could not subscribe to the stock of banking corporations.24

State largesse to private interests immediately increased in the Whig-dominated legislative session of 1853. As Alden Powell’s history states,

The State bought forty-eight thousand shares of stock in the New Orleans, Opelousas and Great Western Railroad Company, for which it paid one million, two hundred thousand dollars; spent one million, six hundred thousand dollars for sixty-four thousand shares of stock in the New Orleans, Jackson, and Great Northern Railroad Company; purchased thirty-two thousand shares in the Vicksburg, Shreveport, and Texas Railroad Company for eight hundred thousand dollars; and gave fifty thousand dollars for two thousand shares in the Grosse Tete and Baton Rouge Plank Road Company.25

State aid to private interests increased further under the carpetbag government after adoption of the 1868 Constitution. Shugg’s observations are typical, “Whether it was the creation of a new parish like Grant, for exploitation by carpetbaggers as notorious as the Twitchells, or the issue of railway, land, and improvement bonds, the telltale mark of fraud was upon each law.”26

In any event, the reaction to the excesses of Reconstruction followed and subsequent constitutions would continue some sort of limitation on the use of the state’s credit and on subsidies to developers, as well as attempts to prohibit corrupt transfers of state property. Remnants of these provisions remain in the 1975 Constitution. The purpose of this essay is to look at the modern limitations in their historical context and to analyze their effectiveness. This review will show that the provisions have not been especially successful. They are more the political fodder of editorial writers and legislative auditors than workable legal standards that can be effectively applied by courts.

The 1975 Constitution did not contain the dollar limits on total bonds issued, but other current provisions can be traced back to the language of the 1845 and 1852 constitutions, particularly:

(1) Neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise.27

25. Powell, supra note 13, at 233, 349.
(2) Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private. But exceptions are made for (1) social welfare programs; (2) employee pension and insurance programs; (3) bonds to meet public obligations as provided by law.

Behind these provisions are two basic policies. One is the protection of the state's fiscal stability—by avoiding investment in risky enterprises and avoiding issuance of bonds to finance speculative ventures that endanger the state's ability to fund current expenses and pay future debts. Another goal is prevention of corruption by insiders who would use state property and credit to benefit themselves, their friends and their supporters.

II. CONSTITUTIONAL CONVENTION OF 1973

The records of the Constitutional Convention of 1973 ("CC'73") do not exhibit a strong political or policy debate that might give a clear guide to interpreting the limitations. The floor debate on the issue takes up only six pages in the published transcripts, and the technical provision that was adopted, one that made little change, passed by a 91-1 vote.

The CC '73 Committee on Revenue, Finance and Taxation had to focus on numerous controversial political and policy problems, including income and ad valorem taxation, homestead exemptions, sales tax exemptions and supermajority votes for tax increases. Given the time constraints, it did not devote substantial attention to the problem of donating state property or using state credit for private interests. To the extent the committee dealt with problems and basic policies in this area, its concern was with the difficulty under the 1921 Constitution to secure funding for desirable programs, especially those related to social welfare and those benefitting from federal matching funds. Numerous constitutional amendments had been required to establish exceptions to the general prohibition in the previous constitution, and the committee's main policy initiative was to provide more legislative flexibility.

28. Id.
The result was a relatively simple proposal. Committee Proposal 15, Section 16(A) first stated the general rule of the 1921 Constitution\(^{31}\) with little change:

(A) The funds, credit, property or things of value of the state, or of any political corporation thereof, shall not be loaned, pledged, or donated to or for any person or persons, associations or corporations, public or private, nor shall the state nor any political corporation purchase or subscribe to the capital stock or stock of any corporation or association whatever or for any private enterprise.\(^{32}\)

However, new language was proposed in Section (B) to provide an exception to Section A that would grant more freedom to governmental entities:

(B) Nothing contained in this Section shall prevent intercooperation between the state and its political corporations or between political corporations, or between the state or its political corporations and the United States, or between the state or its political corporations and any public or private association or corporation or individual for a public purpose.\(^{33}\)

On its face, Section (B) allowed agreements with private interests for any public purpose and thus substantially relaxed the limitation in Section 16(A). The committee comments suggested as much:

It is the intention of this Section to allow the loan, pledge, or donation of property of the state or its political corporations only for public purposes. This Section represents a change in substance of the source provision, which prohibited any funds, credit, property or things of value of the state or its political corporations to be loaned, pledged or donated to any person for any purpose excluding certain exceptions contained within the source provision. Under this Section the term “public purpose” is left to interpretation by the judiciary so that there is sufficient flexibility for a lasting and workable document.\(^{34}\)

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33. Id.
When the proposal reached the convention floor, it was acknowledged by the committee's representative that opposition had developed to the proposal from members of the Committee on Local and Parochial Government. No vote was taken on the Revenue committee proposal. Debate instead centered on an amendment proposed by the chairman of the local government committee, Chalin O. Perez, which substituted language that had been developed in the Local and Parochial Government committee. The objections, which were more technical than substantive, centered on adoption of explicit exceptions to the general rule and language to guarantee the security of bonds that would be issued.

Section (A) of the amendment restated the general rule, introduced by an exception clause:

(A) Except as otherwise provided in this constitution, the funds, credit, property or things of value of the state, or of any political subdivision thereof, shall not be loaned, pledged, or donated to or for any person or persons, associations or corporation, public or private, nor shall the state nor any political subdivision purchase or subscribe to the capital stock or stock of any corporation or association whatever or for any private enterprise.

Section (B), containing exceptions to the rule of Section A, was more detailed than the committee proposal. Perez explained

the extreme importance of this particular article. There are over two hundred pages in our present constitution as a result of what you would look at as Section (A) . . . because it is a prohibition and rightfully so against the funds, credit, property or things of value of the state from being loaned, pledged or donated. But when you get yourself into that position, then you have to make exceptions because of the fact that you could never issue a bond unless you made an exception for that purpose, and you could never have public welfare. You couldn't have your retirement benefits. You could not have intergovernmental cooperation.

The proposed Section (B) contained five exceptions to the general rule to permit:

(1) intercooperation among agencies and private associations for a public purpose;

36. Id.
(2) programs of social welfare and aid to the needy;  
(3) contributions to pension and insurance programs for  
public employees;  
(4) legislation allowing spending for a public purpose  
approved by a 2/3 vote of the legislature; and  
(5) pledge of the state’s credit with respect to issuance of  
bonds.

Apparently sensing the sentiment of the chamber, Perez removed  
Section (B)(4) from the proposal, the most far reaching exception  
which would have allowed substantially more legislative power to be  
exercised.

Delegate Jack Avant then objected to the breadth of the exception  
in Section (B)(1). His amendment, which was adopted, moved the  
reference to intergovernmental cooperation to a separate section so  
that it would not be an exception to Section (A). He explained that  
he did not object to cooperative ventures in general, but did not want  
to let them defeat the rule of Section (A):

That is the purpose of the amendment. In other words, this  
intercooperation would be acceptable and permissible and  
legal and fine, but you still can’t under the guise of  
cooperation do what the constitution has set out to prohibit,  
and that is: take public funds and give them or loan them or  
otherwise dispose of them to private entities.37

Thus, the general approach of the prior constitution remains in the  
new constitution, and the principles developed under the previous  
provisions remain relevant. Still open are the issues of what it means  
to make a donation and what it means to pledge the state’s credit.  
Also relevant is the inquiry into which state and local agencies are  
limited by the rule. A third level of inquiry must focus on the scope  
of the exceptions provided in Section (B), the list of which is growing  
in light of subsequent amendments.38 All of these issues arise in a  
rather generalized policy environment to which CC ’73 added little  
new information or authority.

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37. Id. at 2900.

38. Amendments to the 1975 Constitution added to the list of exceptions.  
They include: (4) return of property acquired by expropriation if no longer needed;  
(5) higher education institutions can acquire stock in exchange for intellectual  
property; (6) donation of blighted housing to tax-exempt organizations; (7) & (8)  
deduction of tax liens on blighted property; (8) investment in stock by wildlife  
refuge funds; (9) exchange of surplus movables by law enforcement units; (10)  
donation of used asphalt.
III. STOCK PURCHASES AND BUSINESS INVESTMENT

Neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise.

The limits on state investment in private companies can be traced to the 1845 provision that prohibited the state from becoming a "subscriber to the stock of any corporation or joint-stock company." The constitutions of 1852 and 1864 were more generous, allowing state investments in companies making internal improvements, up to 1/5 of the capital of each company. The absolute prohibition reappeared in the 1879 Constitution and was expanded to apply to local governments. The provision has remained in all subsequent constitutions.

By its terms, the limitation extends to providing initial capital to a corporation by subscribing to an issue of stock, as well as purchase of shares in existing corporations, either from shareholders or from the corporation. The underlying policy, in light of the history of the provision as discussed earlier, is to prevent the state from risking its public funds in shaky or unwise ventures. In addition, the history also suggests an anti-corruption policy to prevent dumping worthless stock on the state or local governments by intimates of persons in power.

Ostensibly, the basic provision could be stretched to prevent state retirement system funds from being invested in stocks, limiting the pension plans to more modest returns available from more conservative investments. However, the 1975 Constitution contains an exception in Article VII, Section 14(B) that exempts from the limits of Section 14(A) state "contributions of public funds to pension and insurance programs for the benefit of public employees." Even if it were concluded that this text in the exception only applies to the contribution of state funds to the systems and does not address the investments that can be made by the systems, the courts developed an exception for retirement system funds that allowed them to be invested in stocks.

39. La. Const. art. 121 (1845).
40. La. Const. arts. 109, 112 (1852).
41. La. Const. art. 56 (1879).
42. La. Const. art. 58 (1898); La. Const. art. 58 (1913); La. Const. art. IV, § 12 (1921); La. Const. art. VII, § 14 (1975). Most recently, the voters approved adoption of the amendment proposed by 1999 La. Acts No. 1402, which restates the text, "Except as otherwise provided in this Section, neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise." Then, it adds in Section B an exception that allows investments in stocks by two stated wildlife refuge trust funds.
An overly simplistic 1980 opinion by the Attorney General had relied on Section 14 in stating that the funds could not be invested in stocks.\(^3\) On request for a declaratory judgment by the state’s retirement fund boards, the district court disagreed with the Attorney General under two theories—(1) the boards were not the state nor the political subdivisions of the state limited by the constitutional provision; (2) the funds contributed by the state and by employees, once transferred to the retirement systems, were not public or state funds and thus were not within the prohibition. The court of appeal in *La. State Employees’ Retirement System v. State*,\(^4\) affirmed the lower court and held that it was permissible for retirement systems to invest in corporate stock.

The first analysis is the simplest, resting on a textual analysis of Section 14 which limits the state *qua* state and does not apply to agencies created under state law to act as trustees of retirement funds. That construction accords with the terminology of Article XII, Section 10 which distinguishes among the state, a state agency, and a political subdivision of the state.\(^5\) The result in the case is also supported by the policies reflected in Section B(2) that the state can make contributions of public funds to pension programs and its implication that the funds become subject to management by those systems instead of being managed by the state treasurer.

The second analysis would read into the second sentence of Section 14(A) the reference in the first sentence to public funds and public property. It would follow that once the funds are transferred to the trustees, the funds cease to be covered public funds or public property. The court stated “that the constitutional aim was to prohibit the use of public/state funds for private investment, but that funds belonging to these retirement systems are not public/state funds as contemplated by Article 7, Section 14(A) . . . .”\(^6\)

Constitutional amendments in 1987 to Article X, Section 29 further reinforce the decision to allow the retirement systems to invest in stock.\(^7\) In an attempt to move the retirement systems toward actuarial soundness, a plan was adopted to force the legislature to transfer additional funds to the systems. Part of that amendment, now E(5), provides that assets of the system “shall be . . . invested as authorized by law.”\(^8\) By law, the legislature allows investment in stocks.

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45. This argument is discussed further in *infra* Part II of this article.
46. 423 So. 2d at 75.
Though the result in the case of retirement systems seems clear, it nonetheless does put the state at some risk if poor investments are made by the retirement system boards. By virtue of the provisions of Article X, Section 29(A), even if the retirement system is structured through independent entities, "the state shall guarantee benefits payable to a member or retiree . . . ." Here, it is the state qua state that must guarantee the benefits. Also, that same provision also states that membership in a retirement system shall be a "contractual relationship between employee and employer," in the sense that state action changing the terms of the retirement benefits plans would be a violation of the contracts clause.49

Presumably, the state's interests are protected by the legislative power and oversight that is available, both in terms of types of investments permitted by law and in terms of the composition of the boards and agencies that govern the retirement systems. Also, investment in equities has the benefit of producing higher investment yields and relieving the state of coming forward with funds to fulfill its guarantees.50

Outside the stock purchases context, the 1961 case of Public Housing Administration v. Housing Authority of Bogalusa51 seems hard to justify since it involved neither the possibility of corruption nor of risky public investments. In that case, a local housing authority was bound by federal contract to insure its properties with the lowest bidder. Of two bids, the lower was from a mutual insurance company which provided coverage for a premium and, in addition, provided that the insured would share in the company's profits so as to reduce the cost of insurance. The court adopted the minority view in the United States and held this "investment" in a


50. Unfunded Liability of Systems Down, Baton Rouge Advocate, Oct. 4, 1999, at 8B; ("A recent preliminary report on the financial status of the state's three retirement systems contained some good news for a change. The report showed the unfunded accrued liability of the systems has been reduced by more than 25 percent by better-than-expected earnings from the stock market."); Bill McMahon, La. Retirement System Thriving in Bullish Market, Baton Rouge State Times, Jan. 26, 1987, at 12A ("During a bullish stock market, Louisiana's retirement system for state employees has been guided by money managers keen on common stock. The retirement system has also seen its earnings multiply under professional guidance. The system earned 11.9 percent on $1.7 billion in investments at the end of the last fiscal year, June 30, 1986, said Vernon Strickland, director of the State Employees Retirement System. More than a dozen years ago, the yield was just 6.9 percent on $322 million in investments, before the system turned to professional money managers to handle much of its money, Strickland said.")

51. 242 La. 519, 137 So. 2d 315 (La. 1961).
mutual company was a contribution to capital of a private company in violation of the constitution. The case was discussed in passing during CC '73, but the issue was not addressed as being too minor a point for a constitutional provision. The case has not been explicitly overruled, but was distinguished in *Louisiana State Employees' Retirement System v. State.* The attorney general has also issued an opinion allowing the purchase of insurance from mutual companies under the language of the 1975 constitutional provision.

Given the caselaw discussed above, it would appear that investments of what would otherwise be state funds can be made in corporate stock if the funds are transferred to private entities in trust for specific purposes. For example, the state matches private donations to endow chairs and professorships at state and private universities; these funds are transferred to private foundations and invested by them. They are able to invest in stocks by virtue of the principles just discussed.

Conversely, a number of (semi) trust funds have been established within the state treasury that remain subject to the treasurer's control. These monies would be state funds managed by the state and subject to the prohibition of stock investment. In typical Louisiana tendency for detail to breed detail, the constitution has been amended to create the funds and to specify in the amendments that the funds, or a part of them, may be invested in stocks.

Another area in which private trusts could probably have been used to invest money, as in the case of pension systems, was state universities entering into agreements with private entities to license patent rights and otherwise profit from the intellectual property

53. 423 So. 2d 73 (La. App. 1st Cir. 1982), writs denied, 427 So. 2d 1206 (1983) (The housing authority funds were public funds, but contributions made by state and by state employees left the state treasury and were private funds held in trust for members of the system.).
56. La. Const. art. VIII, § 10.1 (Louisiana Educational Quality Trust Fund); La. Const. art. VIII, § 10.2 (Wetlands Conservation and Restoration Fund); La. Const. art. VIII, § 10.3 (Revenue Stabilization/Mineral Trust Fund); La. Const. art. VIII, § 10.4 (Higher Education Louisiana Partnership Fund); La. Const. art. VIII, § 10.5 (Mineral Revenue Audit and Settlement Fund); La. Const. art. VIII, § 10.6 (Oilfield Site Restoration Fund); La. Const. art. VIII, § 10.7 (Oil Spill Contingency Fund). Also, La. Const. art. VIII, § 14(B) was amended to make an exception for the Rockefeller Refuge Trust and Protection Fund and the Russell Sage or Marsh Island Refuge Fund.
generated by research projects. Instead, the state's penchant for loading the constitution with extensive detail exhibited itself, and a constitutional amendment was adopted to create another exception in Section 14(B) to allow "acquisition of stock by an institution of higher education in exchange for any intellectual property."

Section 14(A) is specific in forbidding the state and political subdivisions to subscribe to or purchase the stock of a corporation or association or for any private enterprise. Other forms of subsidy to private entities are allowed so long as they do not involve a purchase or subscription to stock. As will be shown later, the state can construct factories or port facilities and lease them to private entities. Long term leases have been allowed, putting the state at risk of loss that is as real as an investment in the entity's equity. In effect, though limits on stock purchase still exist, so many exceptions have been allowed and so many alternative devices exist to accomplish subsidies to private investments that the limits are not accomplishing what has been their historic purpose.

IV. CREDIT OF THE STATE?

... the credit... of the state or of any political subdivision shall not be loaned [or] pledged ... to or for any person, association, or corporation, public or private.

A. Revenue Bonds

In many states, debt limitations on the state and on local governments simply do not apply to special districts.57 The Louisiana Constitution, however, does extend its limits on pledging credit to political subdivisions, including local special districts. Nonetheless, the limits on pledging the credit of the state or political subdivisions have been held to apply only to borrowing supported by the full faith and credit of the state. Bonds secured by revenue from limited sources are allowed and are not limited by Section 14(A). The result in Louisiana is thus similar to that in other states in that constitutional limitations on borrowing have been circumvented by the issuance of substantial amounts of revenue bonds. Often in Louisiana, as in other states, the device used to establish this loophole is the special district.

These entities are established by government, usually for a specific purpose (such as providing water, drainage, etc.) to perform

57. M. David Gelfand, Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond, 63 Minn. L. Rev. 545 (1979).
services that could be performed directly by the government. These entities or authorities do not commit the full faith and credit of the state or the local government and are ostensibly not using the credit of the government. They commit their revenues to repayment of bonds, and the holders of their bonds must be satisfied with that resource. The cost of this device, arguably, is higher interest rates.\(^{58}\)

As a leading commentator put it in 1958,

> Practical politicians, then, would rather support the building authority device than a repeal or liberalization of the debt limit. Thus, in circumventing the debt-limit barrier to desirable public projects Americans have adapted their institutions to their moral slogans. In the process, they have paid, and pay, unnecessarily high interest rates—the price of apparent virtue.\(^{59}\)

Federal tax policy, which allowed local bonds of such entities to be free of federal income tax, also encouraged such governmental borrowing to support industrial expansion and installation of pollution control devices.

These devices became common in Louisiana without much question as to their legality.\(^{60}\) Indeed, the federal government encouraged the use of special districts as part of its PWA depression era public works projects; the federal government could contract directly with such districts.\(^{61}\)

CC '73 blessed the concept in Article VI, Section 19, giving the legislature broad powers to establish such districts and the power to authorize political subdivisions to establish such districts. Indeed, Article VII, Section 6(C) explicitly allows them to issue bonds and specifies that "such revenue bonds shall not carry the pledge of the full faith and credit of the state and the issuance of the

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58. Id. at 560.
60. Article VI, § 19 is in keeping with the national trend recognizing that a special district is a public agency created or authorized by the Legislature to aid the state in, or to take charge of, some public or state work, other than community government . . . . The governmental powers of special substate units may be defined on a functional as well as a geographical basis, and the size and complexity of the function performed by a special district may be such as to overlap with the functions and borders of counties, cities, and, occasionally, state or even international boundaries. Director of La. Recovery Dist. v. All Taxpayers, 529 So. 2d 384, 389 (La. 1988).
bonds shall not constitute the incurring of state debt under this constitution." The constitution also specifically states that the districts can be given the power to tax and to incur debt and issue bonds.

Perhaps the most extreme example of treating a special district of the state as not bound by limits on the state was the statewide taxing district approach. In *Board of Directors of the Louisiana Recovery District v. All Taxpayers*, the supreme court approved a plan whereby the legislature created a special district covering the entire territory of the state and allowed it to impose a one-cent sales tax throughout the state. This device would seem to have been prohibited by Article VII, Section 2 which requires, for a state tax increase, a two-thirds vote of the members of both houses. Even though the authority to establish special districts comes from Article VI on Local Government, the court reasoned that a statewide district was permitted by Article VI, Section 19. The court also reasoned that the statewide district was not a "local governmental subdivision" and not subject to limits on such subdivisions. The district, inspired by the device used to ameliorate New York City's fiscal crisis in the mid-1970s, was allowed to issue revenue bonds secured by the sales tax it levied, the bonds not being backed by the full faith and credit of the state. Thus, the agency of the state was allowed to do what the state qua state could not do. Though the constitution was amended to prevent the legislature from repeating such legislation, the reasoning of the case and its analysis remains largely intact. The amendment prohibited granting such powers without a two-thirds vote to authorities "whose boundary or combined boundaries are coterminous with the state." Other special districts are not covered by the amendment and presumably are allowed.

**B. Full Faith and Credit—What It Isn't**

As the previous discussion indicates, the evil sought to be avoided was state or local governments exercising in favor of private interests their power to borrow funds supported by a security interest that extended to all the resources and income of the entities. Incurring debt supported by bonds would certainly be the classic situation. Indeed, the law is so clear here that there are few litigated cases involving the stereotypical state issuance of bonds other than revenue bonds.

62. 529 So. 2d 384 (La. 1988).
63.  Id. at 392.
64.  Gelfand, *supra* note 57.
In one area, however, the concept of debt was limited by the courts in construing Article VII, Section 6(A) which requires a two-thirds vote to "incur debt or issue bonds." The court in *State Bond Commission v. All Taxpayers* 67 made Louisiana's law similar to that of other states in considering revenue anticipation notes payable within the fiscal year of issue not to be subject to debt limitations. 68

The court stated that the text of Article VII, Section 6(C) does not clearly prohibit the issuance of such notes, and though "An 'indebtedness' may be created in one sense but not a 'debt' historically understood to burden future legislatures and taxpayers and one which is secured by the full faith and credit of the state." 69

The court relied on the argument that debt constitutes a technical term of art that should be interpreted according to its meaning in the field of governmental finance. 70 The court extended the power of the legislature to revenue anticipation notes payable in the beginning of the fiscal year following the year in which they were issued. 71 At the time of the litigation, the State Bond Commission stated that in 1986, 105 public bodies in Louisiana borrowed a total of $601,538,048 in anticipation of collecting revenues. 72

Although they require substantial future resources, long-term lease contracts requiring rental payments by the state for several years are not considered debt and are allowed. The most extreme example is the financing arrangements for the Louisiana Superdome. 73 The scheme was adopted as part of a constitutional amendment, but its internal inconsistencies still posed a problem for

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67. 510 So. 2d 662 (La. 1987).
69. Gelfand, *supra* note 57, at 566.
73. Stadiums are often the object of contentious public/private arrangements. In *King County v. Taxpayers of King County*, 949 P.2d 1260 (Wash.), amending 938 P.2d 309 (Wash. 1997), the court allowed issuance of bonds to provide aid to the Seattle Mariners because it contained legally sufficient consideration and lacked donative intent. See Matthew Broderson, Comment, *Legislative Branch—Debt Limits*, 30 Rutgers L.J. 1478 (1999) for a commentary on the case and a listing of other recent litigation in the area. Writing earlier about the Washington caselaw, a writer concluded, "Over the last thirty years, however, the Washington State Supreme Court has broadened these formerly narrow exceptions to the point that few transactions are found unconstitutional." David D. Martin, *Washington State Constitutional Limitations on Gifting of Funds to Private Enterprise: A Need for Reform*, 20 Seattle U. L. Rev. 199 (1996).
determining full faith and credit. A special district was established
to issue bonds and to use the funds to construct the dome. The
district leased the dome to the state who then contracted with the
district for the management and operation of the arena. The rentals
under a lease of up to 40 years were the sum needed to pay the
bondholders, reduced by the net income from the dome and the
proceeds of a hotel occupancy tax. The court upheld the plan and in
dictum stated its belief that the payment of rentals is not the type of
activity prohibited by the predecessor of Article VII, Section 14.74
The 4-3 decision also depended on prior cases that allowed the state
to commit to payments of $5 million to a bridge authority for twelve
years—the plan did not involve the full faith and credit of the state.75
The Louisiana position in this regard is consistent with the general
view in the United States, going back to Lord Coke, that rents were
not debts.76

The supreme court took a similar position in a case without the
constitutional amendment complications of the domed stadium case.
In Board of Commissioners of Louisiana Municipal Power
Commission (LAMPCO) v. All Taxpayers,77 municipalities formed a
special commission to issue bonds and to build electric power
generation facilities. They also agreed by contract to buy power from
the commission; the contracts contained "take or pay" clauses that
required the cities to make the payments whether they took the power
or not. The court upheld the agreement, stating that there was no full
faith and credit of the cities pledged to secure the payments.

An unusual (and problematic) case is City of Port Allen v.
Louisiana Municipalities Risk Management Agency, Inc.78
Legislation authorized political subdivisions to form an association
to provide risk management for them, including pooling contributions
to manage risks, establish self insurance funds and to purchase
insurance. A provision in the statute addressed the problems if
insurance coverage was not adequate; it provided that all fund
members would be liable in solido for claims not paid under the plan.
The supreme court held that the provision was "unconstitutional, null
and void insofar as it purports to impose solidary liability upon local
government subdivisions."79 No bonds were involved; nor were any
other debt instruments. No existing funds were given to anyone.

74. Arata v. La. Stadium & Exposition Dist., 254 La. 579, 225 So. 2d 362
75. Smith v. Ascension-St. James Bridge and Ferry Authority, 241 La. 806,
131 So. 2d 902 (1961).
76. Morris, supra note 59, at 256-57.
77. 360 So. 2d 863 (La. 1978).
78. 439 So. 2d 399 (La. 1983).
79. Id. at 403.
There was the establishment of a contingent liability of each association member for the others’ worker compensation and tort claims if the pool arrangement did not pay those obligations. The court theorized that one city could not be constitutionally compelled to pay a claim incurred by another municipality. “Any such attempt by another municipality would be a donation or a gratuity. Otherwise, it could be a loan. Both are prohibited...”

Perhaps the simplest analysis would be to conclude that this risk undertaking was a pledge of credit in favor of other municipalities. But it was not a gratuity. It was part of a comprehensive plan in which each municipality obtained reciprocal rights from other municipalities. It is hard to understand the court’s suggestion that it was a donation. It is also difficult to discern the policies supporting the decision; the anti-corruption policy was not implicated, nor was there any suggestion that the system established involved substantial risk of loss as in the case of investment in shaky stock ventures. The case has not been expanded by the courts. The third circuit in *State v. Davis* stated, “While the opinion in the case contains some strong language suggestive of a broad holding prohibiting state agencies from transferring funds between them even for public purposes, we do not read the case to be that broad.” In effect, the court focused on the credit grant instead of the donation analysis. In *Davis*, the court allowed the State Department of Health and Hospitals to use federal aid funds to contract with district attorneys to pay them to enforce child support orders.

Another problematic issue stemming from the *Port Allen* analysis is the court’s statement that the constitutional provision is violated “whenever the state or a political subdivision seeks to give up something of value when it is under no legal obligation to do so.” That statement can make no sense without distorting the meaning of the words. The state obviously can give up funds to buy things even though it has no legal obligation to buy the thing. The state can invoke its credit to borrow money even though it has no obligation to borrow. Looking at the authorities the court cites to support its statement, it appears they were not on point, but dealt with intergovernmental transfers of funds and payment of moving expenses to owners of expropriated property. And of course, governments can make donations under any of the exceptions stated

80. *Id.* at 402.
81. 539 So. 2d 803 (La. App. 3d Cir. 1989).
82. *Id.* at 808.
83. *Port Allen*, 439 So. 2d at 401.
in Section B even if those are discretionary rather than being compelled. It probably would be simpler to analyze these matters in the traditional system used by the civil code since before statehood—donations are transfers based on a gratuitous cause as opposed to an onerous one.\textsuperscript{85} The \textit{Port Allen} risk management scheme was not based on a gratuity but on a system for uniting to generate greater leverage to secure insurance and self insurance management.

The supreme court has since allowed the transfer of funds from a state college to an alumni federation and thence to a separate alumni foundation to support the latter’s work in aiding the college.\textsuperscript{86} These were discretionary transfers. The funds were transferred and arguably would meet the \textit{Port Allen} dictum. But they were allowed, presumably because they were not gratuitous; they went with the obligation to use them for university related purposes. In any event, the \textit{Port Allen} case seems inconsistent with the general trend.

\textbf{V. DONATIONS OF STATE PROPERTY}

\textit{funds . . . property, or things of value . . . shall not be . . . donated to or for any person, association, or corporation, public or private.}

The constitution does not define the term “donation” and leaves it open for court construction. Neither are the terms “funds”, “property,” or “things of value” defined. The last phrase might call up the very broad definition of “anything of value” in the Criminal Code theft provisions.\textsuperscript{87} However, there is no indication that it should be synonymous with the constitutional language. The definition in the Criminal Code was a 1942 legislative innovation, but the reference to “things of value” go back to the 1879 Constitution.\textsuperscript{88} The

\textsuperscript{85} La. Civ. Code art. 1523: There are three kinds of donations \textit{inter vivos}:

\begin{itemize}
  \item The donation purely gratuitous, or that which is made without condition and merely from liberality;
  \item The onerous donation, or that which is burdened with charges imposed on the donee;
  \item The remunerative donation, or that the object of which is to recompense for services rendered.
\end{itemize}

La. Civ. Code art. 1526: In consequence, the rules peculiar to donations \textit{inter vivos} do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services.

\textsuperscript{86} Guste v. Nicholls College Foundation, 564 So. 2d 682 (La. 1990).

\textsuperscript{87} La. R.S. 14:2 (1997).

\textsuperscript{88} La. Const. art. 56 (1879).
course of the caselaw has been to give a narrow definition of the term donation in keeping with the traditional civil code concepts going back to pre-statehood days. A donation is currently defined as a gratuitous act, one "which is made without condition and merely from liberality." The following sections examine the evolution of the decisions in this area. Again, the conclusion will be that the constitutional limitations are not effectively curbing various types of aid to private interests. The day of the social welfare state providing aid to the various types of needy persons and the age of industrial inducement by states seeking job creation are entrenched.

A. Conditional Transfers to the State

The prohibition against donation of property owned by a public body would not be violated if the property was initially obtained subject to a resolutory condition and the condition was fulfilled. Public ownership would not be complete if subject to the condition, and it would not be a gratuitous act for title to transfer upon happening of the condition. In Hero v. City of New Orleans, private owners donated land to an airport commission with a provision that the property would revert to the donors if it ceased to be used as a public airport terminal. When that use ceased, the resolutory condition was activated and the property was returned. No violation of the constitutional prohibition occurred since the property had initially been acquired with a limitation; the happening of the condition was not a donation. Neither the anti-corruption aspect of the prohibition nor the anti-speculative policies were violated. The state and the public benefitted from the beneficence of private persons and was able to use the property at no cost for a period of time.

A more difficult case arose in Reaux v. Iberia Parish Police Jury. Private owners sold land to the police jury in 1942, reserving a right to repurchase the property at the same price if the land ceased to be used as an airport. The police jury donated the land to the United States in 1955 for use as a military air station. The United States, to ensure its title, expropriated the inchoate rights in the land held by the vendors. When the United States no longer needed the property, it returned it to the police jury, which sought to develop it

89. La. Civ. Code art. 1523. When the state expropriates private property, it must compensate the owner "to the full extent of his loss." La. Const. art. I, § 4. This would include moving expenses in the appropriate case, contrary to some statements from a pre-1975 constitution case which suggests that moving expenses would be an improper donation. See Beaird-Poulan, Inc. v. La. Dept. of Highways, 362 F. Supp. 547 (W.D. La. 1973).
90. 135 So. 2d 87 (La. App. 4th Cir. 1961).
91. 454 So. 2d 227 (La. App. 3d Cir. 1984).
as an industrial park. At that point, the successors of the vendors sought to exercise the right to repurchase land then valued at $12,500 per acre, but whose 1942 sale prices were $180 per acre in one case and $1,840 per acre in another. The court reasoned that the resolutory condition had been destroyed by the expropriation by the United States. Hence, the police jury was not bound to return the property at the cheap price. To do so without being bound to do so would constitute a donation under Civil Code article 2464 which requires that a valid sale have a price not out of proportion with the value of the thing sold.

B. Leases and Use of Property

A facile reading of Section 14 suggests that it does not prohibit the leasing of state property to private interests. The normal meaning of “loan” and “pledge” refer to borrowing money, and would not cover leases. But could a right to use state property be a donation of a thing of value if title is not transferred? The leading case of *State v. Board of Commissioners* 92 suggests that the leases are permissible. In that case, the dock board leased a wharf and a warehouse from the United States when the U.S. apparently would not lease only the wharf. With no need for the warehouse, the dock board then subleased it, apparently at market rates, to private persons. The court found no constitutional violation. It would appear that the anti-corruption aspects of the prohibition were not invoked here, since the rental was paid, and that the anti-speculation aspects of the prohibition were not apparently involved. In such a case, it would appear that the focus would be on what was paid or exchanged to the government entity by the lessee.

The early case was relied on in *Miller v. Greater Baton Rouge Port Commission* 93 to support a much broader governmental program designed to aid private interests. The port commission issued tax exempt bonds to build port facilities which were then leased to private companies. It was argued that the transactions were in effect a loan of the credit of the state to private individuals and corporations, but the court instead reasoned that leases of public property were permitted since they were not donations of state property in the meaning of the constitutional provision. Here, with the prices assumed to be at market value, the anti-corruption policies were not invoked. But given the issuance of bonds for projects in aid of private business, the anti-speculation policies could well have been defeated by the outcome. The same analysis

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92. 153 La. 664, 96 So. 510 (1923).
93. 74 La. 387, 74 So. 2d 387 (1954).
was carried forward in *Kliebert v. South Louisiana Port Commission*. The port commission bought riparian property from a private company, Bayside, issued $8.5 million in tax exempt bonds to build a grain elevator on the land, and then leased the elevator for 40 years to Bayside. The court relied on *Miller* and allowed the transaction with little discussion. Perhaps the long term of the lease rendered the transaction less speculative than otherwise, but the possibility of insolvency of such a company is ever present, perhaps triggering the concern against use of government funds for speculative projects.

Use of public property by veterans organizations also has been allowed with minimal payments. In *City of New Orleans v. Disabled American Veterans*, the city sought to annul a lease that dated back to 1933. A special statute had allowed the city to lease or give by donation surplus buildings or land to the Disabled American Veterans for veteran relief or club purposes. The DAV leased eight lots on South Claiborne Avenue, a major thoroughfare, for 35 years with $1 per year rent. The lease agreement required the DAV to keep the buildings insured, to maintain them, and to assume responsibility for torts. Despite the nominal rent, the court relied on *State v. Board of Commissioners* and held that the lease did not violate Article IV, Section 12 of the 1921 Constitution. The court reasoned that a lease was not within the meaning of loan, pledge or grant of any fund, credit or thing of value. The court also concluded that the consideration for the lease was "serious" and thus the transaction was not a donation—more than $1 was involved, considering the other obligations incurred.

The fictions of the DAV case were continued in *Arnold v. Board of Levee Commissioners* when taxpayers sought to enjoin construction of museum and library on lakefront property leased from the defendant levee board. The F. Edward Hebert Foundation, a private group, planned to build the library named after a prominent congressman. The annual rent was $1 per acre. The court again found the "serious consideration" in addition to the payment included the obligations imposed on the foundation—constructing a building at a minimum cost of $300,000; design was subject to levee board approval; the board would obtain ownership at the termination of lease; the foundation had to maintain and insure the library.

94. 182 So. 2d 814 (La. App. 4th Cir. 1966).
95. 223 La. 363, 65 So. 2d 796 (1953).
96. 153 La. 664, 96 So. 510 (1923).
97. 366 So. 2d 1321 (La. 1978).
The lone exception in the lease cases was the factually intense decision in *Northeast La. Detachment v. Monroe.*\(^98\) A 3.21 acre tract of park land was leased for 99 years to a veterans organization for $1 and other valuable consideration. The group was required to erect a building; it released the city from warranty for vices or defects and assumed liability for damage claims. The property was used by the group’s members for social and civic functions. The court held the lease was a donation not supported by serious or sufficient consideration. There was no direct benefit to city or to the public generally, and there was no obligation to make premises available for public use. The court sought to distinguish the *DAV* case, where, it said, the obligations on the *DAV* were more substantial.

Another element of permissible state largesse to individuals resulted from oyster lease legislation. Originally, naturally occurring oysters on the beds of navigable water bodies or the seashore were things classified as res nullius available to all members of the public. Asserting its ostensible rights as owner of the waterbeds, the state withdrew that right from the public, and began leasing oyster growing sites to individuals at nominal rates. Presumably, this policy encouraged seeding the areas and led to greater production. In *State v. Guidry,*\(^99\) the supreme court determined that such leases did not violate Article 58 of the Constitution of 1913. It stated that the transactions were not loaning, pledging or granting of funds of the state.\(^100\)

The Fourth Circuit Court of Appeal, in *Jurisch v. Hopson Marine Service,*\(^101\) took the same approach. There, state oyster leases were granted for $1 or $2 per acre. Acknowledging that under Louisiana Civil Code article 2464, a sale at nominal cost would be a disguised donation, it nonetheless reasoned that when the rent is nominal, other obligations imposed by the lease may supply the requisite consideration. The court found “serious consideration.” Without explaining, the court concluded that the obligations incorporated in the leases were serious, not mere trifles; enacted into law meant they

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\(^98\) 253 So. 2d 107 (La. App. 2d Cir. 1971). *Cf.* Martin, *supra* note 73, at 201: “The Washington State Supreme Court has never found donative intent and, thus, has never scrutinized the adequacy of the consideration exchanged.”

\(^99\) 142 La. 422, 76 So. 843 (1917).

\(^100\) It relied on *State v. Authement,* 139 La. 1070, 72 So. 739 (1916), where with little discussion of constitutional issues, the court permitted administration of the leases and the establishment of the crime of taking oysters from another’s lease. It agreed with the lower court that the state has power to lease such part of natural oyster reefs as it sees fit and necessary for conservation and development of the oysters of the state.

\(^101\) 619 So. 2d 1111 (La. App. 4th Cir. 1993).
were not intended to be ignored. The court presumed that the legislature must have determined the obligations were serious.

Though not in the form of a contract of lease, free use of state property was allowed in *State v. Cumberland.*\(^{102}\) It upheld a statute that provided that telephone companies could place their lines on public lands at no cost. The court reasoned that such use was not within the limitation of the 1879 Constitution which referred to loan, pledge or grant . . . of funds, credit, property or thing of value of the state.\(^{103}\) A different meaning would require that useful improvements would have to stop at every line dividing private from state land. *State v. South Central Bell Telephone Co.*\(^{104}\) upheld a similar statute in 1993. The state argued that a right of use is sufficient to constitute a donation of state property. The court maintained a strict construction, pointing out that the state has not given up control over the land, and it retained all other ownership rights over the property. It cited Louisiana Civil Code article 1468 which defines a donation as an act by which donor divests himself, at present and irrevocably, of the thing given in favor of the donee. That definition was not met, since the state retained ownership and the right was not irrevocable. Presumably, the grant was also in the public interest of providing utility service to citizens. In other instances, the utilities were granted the power to expropriate private property to fulfill this public service.\(^{105}\)

The ultimate authority in this field involved the state's program of providing free school books to elementary and high school students, Huey Long's Free Text Book Act.\(^{106}\) It was contested in *Borden v. La. State Board of Education,*\(^{107}\) in part because of a violation of Article IV, Section 12 of the 1921 Constitution. The court allowed the use of funds for that purpose, reasoning that the books were not donated or granted to the students within the meaning of the section. The court stated that the program provided for the loan of books to students, followed by their return. It did not discuss whether the use itself was something donated or the fact that the

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103. Id. at 1416, 27 So. at 797.
104. 619 So. 2d 749 (La. App. 4th Cir. 1993).
105. La. Const. art. I, § 4 continues to allow the power of expropriation to be exercised by “any private entity authorized by law to expropriate.”
books would be destroyed by their use. Indeed, the Court spoke broadly of state power,

Where the granting or lending of anything of value, belonging to the state, or any political corporation thereof, is necessary in the reasonable exercise of the police power, Section 12 of article 4 of the Constitution was not intended to prevent the granting or lending. Were it otherwise, the state, or a municipal corporation, could not furnish, for instance, vaccine for the prevention of an epidemic. 108

When a government entity leases property to private interests, it of course retains ownership of the thing and has rights under the lease agreement. It may subordinate some of these rights as part of the administration of the lease. In Department of Culture, Recreation & Tourism v. Fort McComb Development Corporation, 109 the lessee mortgaged its leasehold interest to a bank, and the state agency contractually subordinated its rights to the bank. Later, after the lessee failed to pay the rent, the state agency sought a determination that it had no power to subordinate such rights. The court held that the arrangement did not violate the constitution, stating that the agency "has not loaned, pledged or granted anything." 110 Presumably, it did give up something of value, as part of an onerous transaction in which the public benefitted by having a private entity revitalize a historic site.

C. Gifts to Charities

An early supreme court decision prohibited donation of public funds to several charitable societies. In State ex rel Orr v. City of New Orleans, 111 the city appropriated $40,200 in 1896 to various private charities, asylums and homes in what appeared to be unrestricted grants. The appropriation was contested by a taxpayer whose children attended public schools that were to be closed early because of lack of funds. At that time, Article 56 of 1879 Constitution contained the usual language against funds of the city being granted to private corporations or associations. In a straightforward analysis of the language, the court held the donations

108. Borden, 168 La. at 1021, 123 So. at 661.
109. 385 So. 2d 1233 (La. App. 4th Cir. 1980).
110. Id. at 1236.
111. 50 La. Ann. 880, 24 So. 666 (1898). Accord: James v. Rapides Parish Police Jury, 113 So. 2d 88 (La. App. 2d Cir. 1959) (police jury could not pay $750 dues to a civic organization, the Red River Improvement Assn., dedicated to promoting the Red River Valley by encouraging levee projects, drainage, irrigation, reforestation, etc.).
to societies were not permitted. Chief Justice Nicholl’s opinion, however, suggested that providing direct aid to needy individuals would be allowed if performed by city employees or by private societies under contracts that controlled their use of public funds.

*Hardin v. City of Shreveport*[^12] is not a strong constitutional decision since it rests primarily on statutory construction of local government powers; nonetheless, it reflects, even in 1933, a narrow reading of the power to use public funds to provide social services. The supreme court found that the city had no power to use tax funds to pay the salary of a “service officer” who would provide advice and assistance to war veterans. The court cited Article V, Section 12 of the 1921 Constitution, which prohibited donation of state funds. However, it relied more on Article X, Section 5, which provided that the power of taxation of municipalities under authority granted by the legislature was limited to parish, municipal and local purposes. The funds here, the court argued, could not be justified on the basis of benefitting the indigent; the benefit here was not based on economic status, but was a benefit for a specified class of citizens, namely ex-servicemen and their dependents. It distinguished cases allowing direct payment of bonuses to veterans; those were made possible by state law provisions, not by local governments.

More recently, *State ex rel Porterie v. Housing Authority of New Orleans*,[^13] took a more tolerant approach to public welfare expenditures. A statute authorized a governmental entity, the Housing Authority of New Orleans, to construct housing and make it available at low rent to qualified poor persons. The city agreed to buy $1,050,000 in bonds issued by HANO to pay for the housing. The supreme court held that Article IV, Section 12 did not prohibit use of municipal funds for this purpose. Use of funds to protect health, morals and safety of inhabitants was permissible, and that purpose was the ultimate use of the funds through another governmental entity.[^14]

Of course, CC '73 broadened the scope of permissible state actions in this area, specifically authorizing in Article VII, Section 14(B) the use of public funds for programs of social welfare for the aid and support of the needy. No distinction is made between direct payments to individuals versus grants to organizations that would serve the needy. More recent cases also take a broader view of permissible social services. *Safety Net for Abused Persons v. Segura*[^15] suggests that it is permissible for the state to contract with

[^12]: 178 La. 46, 150 So. 665 (1933).
[^13]: 190 La. 710, 182 So. 725 (1938).
[^14]: Id. at 732, 182 So. at 733.
[^15]: 692 So. 2d 1038 (La. 1997).
a non-profit private corporation to provide counseling and shelter for victims of domestic abuse. Under the revised Sections 14(B) and (C), such social welfare programs are permissible. To the extent it was argued that "needy" in 14(B) should be construed to mean only "indigent," the court stated in footnote that there was no authority to support that contention.116

D. Benefits to Public Employees

Benefits to government workers have caused difficulty in cases. Presumably, payments of wages for doing no work would be some type of violation of the constitutional provision, but drawing the appropriate line is difficult, as displayed in a number of prosecutions for theft under the criminal code.117

Perhaps the archetypical case was McElveen v. Callahan,118 in which a marshal sued to recover payments made by his predecessor. The former marshal, about to leave office on December 31, issued checks to three employees totaling $11,000 for supposedly performing extra duties and for unpaid overtime. The court, however, concluded the payments were in fact prohibited bonuses disguised as compensation for extra services. It relied on Article IV, Section 3 of the 1921 constitution which specifically stated that the legislature had no power to grant extra compensation to employees.119 The force of McElveen may well have been reduced since the adoption of the 1975 constitution, which did not continue the provisions of Article IV, Section 3 and instead retains only the provisions of the prior Section 4 in Article VII, Section 14(A). The case was distinguished in Boneski v. City of Abbeville,120 in which the third circuit court of appeal allowed the city to make "supplemental payments" to attract applicants to its police department. The payments in effect were

116. But see Hardin v. City of Shreveport, 178 La. 46, 150 So. 665 (1933) which did, in passing, state that aid to veterans would not meet the test of aid to the needy, suggesting an economic test.

117. E.g., State v. Fruge, 251 La. 283, 204 So. 2d 287 (1967); State v. Gisclair, 382 So. 2d 914 (La. 1980). The broad definition of anything of value in the criminal code, La. R.S. 14:2, 67 (1997), has not been incorporated in the constitutional term "things of value."

118. 309 So. 2d 379 (La. App. 3d Cir. 1975).

119. The court also relied on Picard which prohibited extra payments to contractors beyond the contract price and on attorney general opinions which permit increased salary payments for future services but not for past services.

120. 745 So. 2d 1229 (La. App. 3d Cir. 1999). See also State v. Davis, 539 So. 2d 803 (La. App. 3d Cir. 1989) (payments of $42,000 an outgoing district attorney made to himself were found to be unearned bonuses in violation of Section 14(A); case is factually intense and may be weak authority).
salary increases given for future work, rather than retroactive extra payments for completed work.

An odd scenario occurred in Martin v. State.\textsuperscript{121} The plaintiff had obtained consent to sue the state for worker's compensation benefits and then obtained a favorable judgment. The state questioned the amount to be paid, specifically asking for an offset based on the fact that for twenty-five weeks he was paid his entire wage without rendering any services. That payment represented a difference of $5.28 per week above the amount of compensation the state could be compelled to pay. The state argued that paying the difference would be making a donation. In similar cases dealing with private employers, it was held that the excess paid was a gratuity, which the employer could not recover. From that reasoning, the lower court concluded that payment of the "gratuity" would violate Article IV, Section 12. The argument had a facile ring to it, and the court of appeal rejected it. Acceptance of such an argument by the court would result in discrimination in favor of the state and against an injured employee authorized to sue the state. Perhaps more to the point, Article III, Section 35 provided, as part of regulating suits against the state, for the manner in which judgment shall be paid. Included was the rule that authorized the legislature to establish a procedure and effect of judgments, the court presumably suggesting that power included making such payments even if not earned.

More typical are recent cases taking a more liberal approach to fringe benefits associated with state employment. This approach would seem to be fortified by the adoption in the 1975 Constitution of a specific exception allowing "contributions of public funds to pension and insurance programs for the benefit of public employees."\textsuperscript{122} In Morial v. Orleans Parish School Board,\textsuperscript{123} a teacher who became ill sued for payments for days missed in excess of accumulated sick leave days. Louisiana Revised Statutes 17:1201-2 provided for such compensation, but the school board argued the statute was unconstitutional; it was a salary payment without corresponding work and thus a gift in violation of Article IV, Section 12. The court reasoned that the sick leave was designed as a permissible fringe benefit related to work. "If Appellant's argument is taken literally then all situations in which a person received pay for hours or days not actually worked would have to be struck down as unconstitutional. This would include paid

\begin{footnotes}
\footnote{121} 25 So. 2d 251 (La. App. 1st Cir. 1946). \\
\footnote{122} La. Const. art. VII, § 14(B)(2). \\
\footnote{123} 332 So. 2d 503 (La. App. 4th Cir. 1976).
\end{footnotes}
vacations, minimum sick leave pay and sabbatical leave pay to name but a few."\textsuperscript{124}

\textit{Morial} was followed in \textit{Weaver v. Plaquemines Parish School Board}.\textsuperscript{125} The board had to pay a sum to a teacher despite his taking excess sick leave. The sum, determined by statute, was the difference between his (higher) salary and the cost of a substitute teacher. The court characterized the payment not as a gift, but a legislatively created benefit earned by virtue of the employment. Under that theory, it would appear that any bonus or severance package would be permitted, as is the case in private industry.

Even as late as 1985, the court of appeal in \textit{Crist v. Parish of Jefferson}\textsuperscript{126} disallowed a type of severance pay or terminal leave compensation. The parish would pay one month's pay for each year of service upon termination. With little discussion, the court held it was either a gratuitous or remunerative donation, and the constitution makes no distinction between types of donations; it forbids them all. That language is questionable in any event, for a remunerative donation is not in fact a gratuitous transfer if the value of the services given reaches a certain percentage of value of the property transferred.\textsuperscript{127} That court attempted to distinguish \textit{Morial} since facts there occurred before the 1975 Constitution, but that should make little difference since the changes in 1975 were designed to broaden the exception for employee fringe benefits. Also, in an opinion in which the constitutional issue was not fully discussed, and which would be supported on more conventional statutory construction bases, the court in \textit{Bouillion v. City of New Iberia},\textsuperscript{128} held that retroactive application of more liberal leave rules for employees was unconstitutional.

A bizarre argument was made in \textit{Hays v. La. Wildlife \& Fisheries Commission}.\textsuperscript{129} The plaintiff had been illegally discharged by the commission and was reinstated after four years of litigation. The commission resisted payment of back wages on the ground that such a payment would be a donation. The court rejected the argument, holding plaintiff was entitled to lost wages, including automatic step and merit increases he would have been entitled to if employed. The court supported its conclusions in part based on the civil service provisions in the constitution, from which one can infer a right to such payments upon invoking the civil

\begin{footnotesize}
\textsuperscript{124} \textit{Id.} at 505.
\textsuperscript{125} 627 So. 2d 724 (La. App. 4th Cir. 1993).
\textsuperscript{126} 470 So. 2d 306 (La. App. 5th Cir. 1985).
\textsuperscript{127} La. Civ. Code art. 1523.
\textsuperscript{128} 657 So. 2d 397 (La. App. 3d Cir. 1995).
\textsuperscript{129} 153 So. 2d 562 (La. App. 3d Cir. 1963).
\end{footnotesize}
service procedures for improper dismissal. Plaintiff was entitled to a mandamus for payment of the judgment.

Williams v. Orleans Parish School Board\textsuperscript{130} also involved a claim for back wages, which the school board resisted on the grounds that it was an unconstitutional gratuity. There, the plaintiff was an instructor in a Junior ROTC program. Under a contract between the United States Army and the board, the latter was required to pay plaintiff a minimum sum that depended on military rank. The army determined that plaintiff was entitled to a promotion earlier than his actual promotion, and he was retroactively promoted. He sought back wages based on services already rendered, when he should have had the higher rank. The court affirmed a judgment for $6,000. The analysis was sparse, with the court distinguishing McElveen on the facts and disregarding an opinion of the attorney general, OAG 89-190, which prohibited retroactive compensation.

Shows v. Morehouse General Hospital\textsuperscript{131} concerned a public hospital's contract with its director. Under the contract, funds were paid for pension and insurance programs. The court concluded simply that the funds were authorized by Article VII, Section 14(B) as a plan providing deferred compensation. Upon termination of employment, the plaintiff was entitled to obtain complete control of an annuity bought with the funds. In Shows, the court did not decide whether the constitution prohibits severance pay equal to two years of salary, instead resolving that issue on statutory construction.

E. Revocation of Dedications

Long standing real estate practice allows local governments to abandon or terminate dedications of streets and parks made by private persons in favor of the public. Under property law, dedication of such ownership by private persons is possible and often is mandatory as part of subdivision development.\textsuperscript{132} Normally, the municipality or police jury acquires ownership of the streets and parks.\textsuperscript{133} However, legislation going back to 1958 in one instance\textsuperscript{134} and 1938 in another\textsuperscript{135} allows setting aside the dedications when the parks or streets are abandoned or no longer needed for public use. In such a case, the ownership of the park reverts to the donor; the ownership of the streets goes to the then contiguous landowners.

\textsuperscript{130} 560 So. 2d 642 (La. App. 4th Cir. 1990).
\textsuperscript{131} 463 So. 2d 884 (La. App. 2d Cir. 1985).
\textsuperscript{132} La. R.S. 33:5051 (2000).
\textsuperscript{133} Arkansas-Louisiana Gas Co. v. Parker, 190 La. 957, 183 So. 229 (1938).
\textsuperscript{134} La. R.S. 33:4718 (1988).
Such revocations of dedications in effect allow return of title to the donor once the public use interest ceases, almost as if the dedication had been conditioned on continued use as a public place. Although no compensation is paid by the donors or contiguous landowners, it may not be analyzed as a simple donation. Indeed, a literal construction of the terms in Article VII, Section 12 might characterize a “revocation” as not within the reference to donations, loans or pledges. It is a special kind of abandonment of rights which does not implicate the anti-corruption or anti-speculation policies of the constitutional provision. That such is the custom would seem supported by thousands of instances in which such revocations have occurred as a matter of course. It is also supported by dictum in *Emery v. Orleans Levee Board*,\(^1^3^5\) where the court stated flatly without much discussion, “Section 12 of Article IV of the Constitution [of 1921] is not applicable where property had been dedicated and set aside for public use.”\(^1^3^7\) There, property was made part of the Bohemia Spillway after being adjudicated to the state for nonpayment of taxes. An attempt to redeem the property under existing law was thwarted because of the dedication of the property, the court reasoning that transfer of the property to a levee board was not prohibited by the limitation of donation of state funds to a public corporation.

On the other hand, two questionable cases hint at some constitutional limitation. *Parish of Jefferson v. Noble Drilling Corporation*\(^1^3^8\) is perhaps the easiest to distinguish. There, a landowner dedicated land for a park in 1910 as part of a subdivision development. It apparently was used as a park although there appeared to be no formal acceptance of the dedication. In 1947, the police jury adopted a resolution stating that the dedication had never been accepted and thus the land was subject to private ownership. Then the police jury quit-claimed any right it had in the park in favor of the property. In 1949, however, the governing authority rescinded the 1947 resolution and claimed ownership of the property. It appears that the property had become more valuable due to mineral production. The supreme court ruled in favor of the parish, holding that the initial dedication was effective and that the police jury had no right to renounce and disclaim its title to the park because of Article IV, Section 12. Perhaps the case could be rationalized because the city was not entitled to revoke the dedication under the limits of the statute, or that the 1947 resolution was not a revocation but some other type of quit-claim or attempted transfer that would be

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\(^{136}\) 207 La. 386, 21 So. 2d 418 (1945).

\(^{137}\) *Id.* at 399, 21 So. at 422.

\(^{138}\) 232 La. 981, 95 So. 2d 627 (1957).
prohibited by the constitutional provision. In any event, the court's discussion of the constitutional limitation is sketchy and not well developed.

Also difficult is *Boagni v. State.*\(^{139}\) The constitutional claim was tangential under the facts, namely a claim by a landowner for compensation for expropriated property. The landowner claimed ownership of a street on the basis of a revocation of a dedication he had made earlier. With little discussion, the court stated that upon substantial compliance with Louisiana Revised Statutes 33:5051, a statutory dedication occurs and "a local governing authority has no legal right to disclaim title to them."\(^{140}\) The court cited Article VII, Section 14 and the *Noble Drilling* case. That quoted statement was probably not accurate when made, and certainly not since amendment of 33:5051 made clear that a developer cannot impose on a governmental entity the obligation to accept the dedication and the burden of maintaining streets that it does not choose to maintain. Further, if the court were to be taken seriously, there could be no revocations as provided under Louisiana Revised Statutes 47:701. In any event, the court's language is dictum, since there had been no revocation of the dedication. The landowner proceeded on the theory that the initial dedication was not effective for lack of compliance with the statute, and the court found instead that there was substantial compliance resulting in a title transfer.

**F. Maintenance of Roads; Servitudes**

The prohibition of donations to private interests by local governments first appeared in the 1879 Constitution.\(^{141}\) At that time, there existed Section 3368 of the 1870 revised statutes, which provided that upon maintenance of a private road for three years by a police jury, the road became subject to public use. Cases applying the statute determined that the public acquired a servitude interest in the land. That statute, with slight changes, remains in effect today.\(^{142}\)

Ostensibly, the use of public gravel and the labor of public workers on maintaining private roads would seem to violate the constitution. But, if it is done for three years without objection by the landowner, does it produce a public right? Perhaps this is Louisiana's equivalent to Mississippi's prohibition of alcoholic beverages while taxing such beverages at the same time.

\(^{139}\) 399 So. 2d 813 (La. App. 3d Cir. 1981).

\(^{140}\) *Id.* at 817.

\(^{141}\) La. Const. art. 56 (1879).

Numerous attorney general opinions conclude that maintenance of private roads violates Section 14(A), the very volume of such opinion requests indicating that such local government services in rural areas are in demand by citizens and popular with politicians.\textsuperscript{143} Presumably, there is an element of corruption here in the policy jury members promoting their re-election with such services. However, some opinions support an exception to the rule if the maintenance of a school bus turnaround is involved, even if located on private property. It is said that supporting school transportation is a permissible public purpose.\textsuperscript{144}

At the same time, numerous cases have applied Louisiana Revised Statutes 48:491 and protected the public right to use such roads upon proof of the required maintenance.\textsuperscript{145} And after three years of maintenance, the road is public, and this continued maintenance is not prohibited since it is in pursuance of public servitudes.\textsuperscript{146}

In a sense, this problem is a trivial matter and the apparent inconsistency of the two provisions is not a practical problem. The constitutional violations go on and the public gets to use the roads thus maintained. Logic gives way to necessity and the discretion of prosecutors to worry about more important matters, but the problem can demonstrate larger concerns and principles.

At the least, it demonstrates that the drafters of the constitutional provisions over the years must have conceived of the constitutional prohibition as being a flexible one that would not prohibit such maintenance. The statute has remained on the books and has been commonly applied after five constitutional revisions which repeated the limitations on donations of property to private interests. It is the basis for courts applying a flexible analysis rather than a rigid determination of what a donation is and what “things of value” refers to. In a conventional analysis, reference to other laws co-existing at the time of the adoption of the limitations would be of use in determining the extent of the constitutional limits.


\textsuperscript{145} The leading cases are collected in Lee Hargrave, Louisiana Civil Law Property: Cases & Materials 24-27 (Law Center Publications Inst. of the LSU Law Center 1996).

\textsuperscript{146} 92 Op. Att’y Gen. 811 (1992) (if road made public by three year maintenance, police jury could continue to maintain without constitutional violation).
Going further, the fact that the state or local government acquires some property rights—a servitude—in return for the expense it has incurred suggests that the expense is not a donation. At least after the period is complete, the state acquires something in exchange for its expenses, suggesting an onerous transaction rather than a donation. Perhaps it becomes overly rigorous to characterize this in doctrinal terms as a condition being fulfilled and retroactively justifying the conduct. But there is the acquisition of some kind of inchoate right with each expenditure, a right that does become a servitude. Perhaps the corruption aspect of the policy is lessened if the public is gaining some rights in the process. If the local authorities were to discriminate against some citizens by withholding benefits because of political views, the persons harmed could invoke Article I, Section 3 which prohibits discrimination based on “political ideas or affiliations.”

Another possible argument in support of such public expenditures is an analogy to Article VI, Section 24 which allows the public, represented by local governments, to “acquire servitudes of way by prescription in the manner prescribed by law.” Granted that Louisiana Revised Statutes 48:491 is not termed as a prescriptive period, it nonetheless requires a type of activity over time as in the case of acquisitive prescription.

G. Aid to Private and Parochial Schools

Public education, of course, is a basic duty of the state, and the 1975 Constitution contains Article VIII, which mandates and regulates public education from elementary schools to universities. Certainly, free public schooling was contemplated.

Private school students were also contemplated as beneficiaries of the state’s largesse, and aid to them is not a prohibited donation. Any state aid to private schools would have to meet the test of Article VII, Section 10(D) that “No appropriation shall be made except for a public purpose.” The constitution suggests that school aid is a permissible purpose. Indeed, Article VIII, Section 13 mandates the legislature provide aid to school children: “The legislature shall appropriate funds to supply free school books and other materials of instruction . . . to the children of this state at the elementary and secondary levels.” That language in Section 13(A), which refers to aid to children, rather than to schools, was designed to include children attending private schools. This intent is confirmed in the

contrasting reference in Section 13(B) to funding a minimum foundation program in "public elementary and secondary schools." A subsequent constitutional amendment creating a trust fund for support of education states that one permissible use of funds from the trust is the support of "research efforts of public and private universities in Louisiana."148

CC '73 changed the religion clauses of the 1921 Constitution to allow more flexibility in aid to parochial schools. Article I, Section 8 simply paraphrases the First Amendment of the United States Constitution, "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof." The provision was adopted by a 104-0 vote, with little debate and with no amendments submitted, and with the knowledge that it was deleting the 1921 provisions which were more stringent and more precise in prohibiting use of state money for parochial schools.149

The provisions of the previous constitution prohibiting aid to religious schools were quite specific and reiterated in three separate articles. In addition to a general provision in the Bill of Rights,150 Article IV, Section 8 prohibited appropriations "directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof...." Article XII, Section 13 also stated that no public funds could be appropriated to "any private or sectarian school." All three provisions were relied on by the Louisiana Supreme Court in Seegers v. Parker,151 which held unconstitutional legislation providing grants to teachers of secular subjects in church schools. The delegates chose not to continue this unique approach and instead opted to follow the federal constitutional pattern. The controlling federal constitutional authority at the time, Lemon v. Kurtzman152 and Tilton v. Richardson,153 were well-known and discussed during CC '73 and seemed to provide an acceptable solution to the problem of state aid.

Debate on the section occupies a meager two pages in the transcript of the proceedings. Delegate Gerald Weiss, in introducing the committee proposal, specifically referred to the standards of Lemon and Tilton:

148. La. Const. art. VII, § 10.1 (D)(a). The failure to use that "public and private" formula in the companion paragraphs (b), (c) and (d) suggests that those other categories of grants cannot be extended to private universities.
149. VI Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts at 1126-27 (Sept. 6, 1973). The standards of the federal jurisprudence were expected to be continued. Id.
The court applies two guidelines, it's my understanding, in dealing with religious and secular matters. First is, a law or program must have a secular purpose neither advancing nor inhibiting religion in making decisions in this regard. Second, it must not involve the government—federal, state or local governments—with excessive entanglement with religion.\textsuperscript{154}

The impact of the adoption of the proposal and the deletion of the more explicit sections of the prior constitution is to provide a more flexible standard with regard to government aid to religion than was provided in the old document.\textsuperscript{155} The federal limits on aid have recently been liberalized by the United States Supreme Court. In \textit{Mitchell v. Helms},\textsuperscript{156} a case arising in Louisiana, the court expanded the range of permissible aid, extending it to materials and equipment including library books, computers, computer software, slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings. Presumably, the state courts will be guided by the federal standards in construing the state provisions, as the purpose of the constitutional change was to adopt the federal standard.\textsuperscript{157}

\textbf{VI. COOPERATIVE PROJECTS}

In the 1923 case of \textit{Union Sulphur Co. v. Parish of Calcasieu},\textsuperscript{158} Justice Dawkins concluded it was permissible to use tax funds of a local government to contribute to a federal project to build a navigation canal, the Intracoastal Waterway. The court agreed that the government of the United States was not considered a corporation within the language of the constitution prohibiting donations to corporations, public or private. He added that in expending funds for such a project,

\begin{itemize}
\item \textsuperscript{154} VI Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts at 1127 (Sept. 6, 1973).
\item \textsuperscript{155} See Victor A. Sachse, Jr., \textit{Article VIII: Does it Change the Status Quo?}, 21 Loy. L. Rev. 1123 (1975).
\item \textsuperscript{156} 530 U.S. 793, 120 S. Ct. 2530 (2000).
\item \textsuperscript{157} Writing for the 4-3 majority in \textit{Seegers v. Parker}, Justice Barham noted the similarity of Article I, Section 4 of the 1921 constitution to the federal guarantee and said the court would be guided by United States Supreme Court decisions construing that amendment. 241 So. 2d 213, 216-17 (1970). An Opinion of the Attorney General stated it was permissible for a religious school's football team to use public school stadiums for football games and to use public school buses. 77 Op. Att'y Gen. 153 (1977).
\item \textsuperscript{158} 153 La. 857, 96 So. 787 (1923).
\end{itemize}
the parish is not donating, lending or granting anything to the federal government, within the meaning of this article, although great advantage may accrue to it in the way indicated. The government merely becomes the agent, perforce of circumstances, of the parish for the accomplishment of an undertaking which the parish itself could not fully or conveniently perform.\textsuperscript{159}

When CC '73 was deliberating, the concern of the Committee on Revenue, Finance and Taxation was the other side of federal state cooperation—allowing state and local governments to meet the conditions and commitments attached to the growing level of federal aid to them. As stated earlier, the committee had proposed the language of what is now Section 14(C) as an exception to the general limitation of Section 14(A). The convention moved the language to a separate paragraph so that the general rule could not be defeated simply by having an agreement between government agencies or with private interests.\textsuperscript{160} Still, the language is clear in allowing agreements between state governmental entities with each other, with the federal government and with private interests. The simple limiting factor, in addition to Section 14(A), is that the cooperative agreements must be for a "public purpose."

Even though the history of Section 14(C) indicates that cooperative agreements involving governmental entities are not exempt from the limits of Section 14(A), it is nonetheless clear that such agreements with private associations are permitted and encouraged. There is some far reaching language in that regard in the case of \textit{Guste v. Nicholls College Foundation}.\textsuperscript{161} The college collected fees from students, after approval of the fee in a student referendum, designated for the Nicholls Alumni Federation, a nonprofit corporation. The money was placed in the general operating account of the university and transferred to the federation in one lump payment each semester. It would follow, as the court then concluded, that these were public funds in the control of a state college. The court then concluded that it was permissible for the

\textsuperscript{159} \textit{Id.} at 883, 96 So. at 796.

\textsuperscript{160} \textit{City of Port Allen v. Louisiana Mun. Risk Management Agency, Inc.}, 439 So. 2d 399, 402 (La. 1983). The court stated:

Section 14(C) does not help the state, either. There is no indication that it is meant to be an exception to the rule of § 14(A); the exceptions are clearly contained in § 14(B). Thus, even if political subdivisions cooperate for a public purpose, they still may not give away their assets to other political subdivisions, the United States government or public or private associations or corporations, to individuals merely for a "public purpose."

\textsuperscript{161} 564 So. 2d 682 (La. 1990).
college to transfer funds to the federation in pursuit of public purposes. In addition, the federation transferred some of the funds to a separate entity, the Nicholls College Foundation, a separate nonprofit entity. The court reasoned that the foundation's purpose was to promote the university's interests, so "We can, therefore, assume that the transmission from the Federation to the Foundation was in furtherance of the Federation's discharging its constitutional or legal duties of furthering public education; i.e., it must have been given by the Federation in pursuit of the Federation's legally endowed goals."  

The court also stated that the transaction "constitutes a transfer of public funds (rather than simply a donation which is prohibited by La. Const. art. 7, § 14(A))." Because the objectives of the Federation, the Foundation and the University coincide in the furtherance of a governmental purpose, and because a simple donation would be illegal under Louisiana Constitution article 7, Section 14(A), we find that the money was given and accepted "under authority of the constitution and the laws of this state" in furtherance of a governmental purpose. It was not a donation in the sense contemplated by Louisiana Constitution article 7, Section 14(A). Presumably, the money was being spent for the same educational purposes for which the college would have spent it, and thus the college was doing indirectly what it could do directly, much as in the Segura case.

State v. Davis approved agreements between district attorneys and the Louisiana Department of Health and Human Services to implement a federally funded program to assist in enforcing child support obligations. The agreements included payment of additional compensation to the district attorneys for their participation in the program. In the same way, the attorney general has suggested that district attorneys could transfer funds to public schools in cooperative

162. Id. at 688.
163. Id. See Seghers v. Community Advancement, Inc., 357 So. 2d 626, 627 (La. App. 1st Cir. 1978) (transfer of public funds to a nonprofit private entity to use in anti-poverty programs).
164. The language here seems to repudiate the dictum expressed in City of Port Allen v. Louisiana Mun. Risk Management Agency, Inc., 439 So. 2d 399 (La. 1983) that a donation occurs whenever the state or a political subdivision seeks to give up something of value when it is under no legal obligation to do so. See the text in Part III.
165. Guste, 564 So. 2d at 688.
166. Safety Net for Abused Persons v. Segura, 692 So. 2d 1038 (La. 1997) (government agency could contract with a non-profit private corporation to provide counseling and shelter for victims of domestic abuse).
167. 539 So. 2d 803 (La. App. 3d Cir. 1989).
activities, "such as law enforcement, drug education and crime prevention."168

The court's language in Nicholls, however, seems quite broad, perhaps too much so. John Devlin and David Hilbun suggest, "The court's construction of the constitutional term 'donation' as not including 'transfers' in furtherance of shared purposes follows current developments in this and other states, the general tendency of which has been to loosen restraints on the mechanisms by which public bodies may use public funds for public purposes."169 They conclude, "Nonetheless, unless limited by future cases, this construction may create an expansive exception to the constitutional prohibition of La. Const. art. VII, § 14."170 But it does appear acceptable if the interposed entity obtaining the funds uses them for purposes for which the governmental entity could use them. In such a case, the transfer will be allowed.

Given the breadth of the extent of this cooperation, it is surprising that legislators thought there was a need for the last two constitutional amendments that were adopted to allow donations. Section 14(B)(9) now permits the state to donate asphalt which has been removed from state roads and highways to parishes or municipalities pursuant to a cooperative endeavor.171 A new Section 14(E) was also adopted to state, "Nothing in this Section shall prevent the donation or exchange of movable surplus property between or among political subdivisions whose functions include public safety."172 Again, the Louisiana constitutional pattern proves that detail breeds more detail.

VII. WHO IS LIMITED? WHAT IS THE STATE? WHAT IS A SUBDIVISION OF THE STATE?

The structure of Section 14 indicates that the three limitations—on stock investments, on donations and on pledging credit—apply to the "state" and to a "political subdivision" of the state.173 As the discussion up to this point discloses, substantial aid in the form of donations and credit to private entities is possible under the various exceptions provided for in the constitution and in the

173. The 1845 Constitution simply limited the state, but subsequent constitutions expanded the limitations to include the state and political corporations. See La. Const. arts. 113, 121 (1845); La. Const. art. 56 (1879); La. Const. art. 58 (1898); La. Const. art. 58 (1913); La. Const. art. 4, § 12 (1921).
caselaw. With those doctrines available, the courts have not been required to elaborate in depth on the exact meaning of the terms state and political subdivision. But that issue is still a relevant one, for if some agency is not the state or a political subdivision of the state, it is not limited by Section 14.

The reference to a political subdivision of the state is essentially a straightforward reference to local governments. As defined in Article VI (Local Government), the narrower term “[l]ocal governmental subdivision” means a parish or a municipality, but “political subdivision” is a broader term including a parish or municipality, but also “any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions.” 74 Virtually all special districts established by cities and municipalities are thus covered. 75 The definition can also encompass, surprisingly, some special districts with statewide application. The supreme court allowed the legislature to establish under Article VI, Section 19 the statewide Recovery District with the power to impose a statewide sales tax and use the proceeds to pay off bonds that were sold to finance a state deficit. In Board of Directors of the Louisiana Recovery District v. All Taxpayers, 76 the court stated that such a district “is a valid political subdivision and that it may be granted the power to tax.” 77 A power generating authority providing services in many parts of the state was found to be a political subdivision and its property was not subject to ad valorem taxation. 78

The simple reference to the state, however, raises a more complex issue, primarily whether it means only the state qua state or also includes some or all state agencies and corporations. The reference in Article VII, Section 14 to the state and in Article XII, Section 13 to the state in granting immunity against the running of prescription, and to the state in Article I, Section 4, right to property, contrasts with the many other references that suggest the term state does not include all state agencies. Consider the following contrasting

174. La. Const. art. VI, § 44. Public Housing Admin. v. Housing Authority of Bogalusa, 242 La. 519, 137 So. 2d 315 (1961) held that a local housing authority was subject to the prohibition of investment in stock. James v. Rapides Parish Police Jury, 113 So. 2d 88 (La. App. 2d Cir. 1959) held that a parish police jury was limited by the section. Varnado v. Hosp. Ser. Dist. No. 1, 730 So. 2d 1066 (La. App. 1st Cir. 1999) applied the limitations to a local hospital service district in Assumption Parish.

175. However, a municipality or a board could contract some of its functions to a private non-profit organization, as in the case of the Audubon Park Zoo. See Gregory Roberts, Ron Forman: His Animal Kingdom, The Times-Picayune, July 3, 1994, at A1.

176. 529 So. 2d 384 (La. 1988).

177. Id. at 388.

language that appears in the document in Article XII, Section 10, "Neither the state, a state agency, nor a political subdivision shall be immune from suit . . . ." Variants of that formula appear in the constitution at least 13 times. The implication of these references is that some state entities, such as boards and commissions and agencies, are not included in the reference to the state. Otherwise, the drafters would simply have referred to the state in all of these instances. Perhaps the argument is overly technical and assumes too much consistency in drafting, but nonetheless it is there.

The courts in applying the immunity from prescription have long distinguished between the state and its agencies. The supreme court stated that liberative prescription would run against the Board of Commissioners of the Port of New Orleans in a claim against a ship for damages to a wharf. It recently held that the Louisiana Department of Highways, established by law as a corporate body, "cannot claim the constitutional immunity from prescription, since it cannot be characterized as the 'State' for that purpose." A court of appeal determined that even though the Governor's Special Commission on Education Services was not itself a body politic or a body corporate,

it is, however, a part of the Department of Education, under LSA-R.S. 36:642(D)(2), and the Department of Education is a body corporate with the power to sue and be sued.

179. "state, its agencies, and political subdivisions," La. Const. art. III, §11; "the state, a political corporation, or political subdivisions," La. Const. art. V, §16; "by the state, or any board, department, or agency of the state," La. Const. art. VII, §2.1; "state shall have no power, directly or indirectly, or through any state board, agency, commission, or otherwise, to incur debt," La. Const. art. VII, §6; "by the state, directly or through any state board, agency, or commission, or by any political subdivision of the state," La. Const. art. VII, §8; "by a state board, agency, or commission," La. Const. art. VII, §9(6); "the state, its agencies, boards, commissions, and political subdivisions and their agencies," La. Const. art. VII, §17; "state, or any instrumentality thereof," La. Const. art. X, §1; "of the state and its political subdivisions," La. Const. art. X, §21; "state of Louisiana or any instrumentality or political subdivision thereof," La. Const. art. X, §29.1; "state, a state agency, nor a political subdivision," La. Const. art. XII, §10; "all state administrative and quasi-judicial agencies, boards, and commissions," La. Const. art. XII, §14.


LSA-R.S. 36:642(A). Like the Department of Highways in the City of Pineville case, the Department of Education is a distinct legal entity subject to claims of prescription. As part of the department, therefore, the Commission must be considered amenable to prescription.¹⁸²

The same rule was extended to the Department of Wildlife and Fisheries¹⁸³ and recently reiterated as to levee districts.¹⁸⁴

It would thus appear, based on textual inferences and the caselaw under a similar use of language, that the rule of Section 14 does not extend the meaning of state to these entities. The policy reason for such a conclusion is less clear. Perhaps it is that most true state agencies operate only upon appropriations from the legislature and that in practice there is little discretion to spend the money other than according to the use prescribed in the appropriation. Also, as the function of government has come to include social welfare and education services to citizens, the scope of the limitation should be narrowed so long as the corruption policies and risk to state credit are not implicated.

There is little case law involving the meaning of “state” in Section 14. Presumably this is because the issue has been subsumed in other issues that have allowed agencies to act. Particularly with respect to issuing bonds, even if the state or an agency is involved, revenue bonds that do not carry the full faith and credit are allowed and thus the argument about the meaning of state has not arisen.

In the context of investment in stocks, a court of appeal has held that a state agency administering pension funds was not limited by the section. The money transferred from the state to the pension fund, the court stated, were no longer stated funds controlled by Section 14.¹⁸⁵ This outcome subsists even though some such agencies may be public bodies for ethics or other purposes. But they are not the “state.” This approach, only partly policy driven, would result in substantial flexibility and in enormous sums of money in pension funds and other funds being outside the limits of the constitution. Also, it would seem that these agencies are not bound by the limitation on donations. They could, of course, be so bound by statutes.

¹⁸² State Through Governor’s Special Comm’n on Educ. Servs. v. Dear, 532 So. 2d 902, 905 (La. App. 5th Cir. 1988).
The education boards that govern universities could well be excluded from the meaning of state or political subdivisions of the state. They are considered as public corporations. Article VIII, Sections 6 and 7 of the constitution establish the education boards as "a body corporate." *Caldwell Bros. v. Board of Supervisors,* held that LSU could issue bonds without violating Article IV, Section 12 of the 1921 constitution. The court stated,

> The purpose of this article was not to hamper state agencies or boards in the exercise of their property functions, or in the conduct of their legitimate affairs, but to put an end to the practice of the Legislature to pledge the credit of the state to aid private enterprises.

Of course, in that case, it was LSU's credit that was at stake and LSU's obligation to repay, not the obligation of the state. Also problematic is the recent amendment to Section 14(B) to allow "acquisition of stock by an institution of higher education in exchange for any intellectual property." Presumably some drafters thought that higher education institutions were limited by Section 14(A).

*State ex rel Porterie v. Charity Hospital of Louisiana* allowed the hospital entity to issue bonds. The court reasoned that the bonds were not obligations of the state, but of the administrators of the hospital. It relied on earlier cases applying the same rules to levee districts. These cases reflect Louisiana following the conventional

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186. La. Const. art. VIII, §§ 6 & 7 establish the boards as "a body corporate." See *State ex rel Guste v. Nicholls College Found.*, 592 So. 2d 419 (La. App. 1st Cir. 1991), on remand after 564 So. 2d 682 (La. 1990) (foundation not a public body for purposes of the public records statute, La. R.S. 44:1(A)(1) but the state had a right to inspect records of public funds received by the foundation); *Caldwell Bros. v. Board of Supervisors of La St. Univ. & Agr. & Mech. College*, 176 La. 825, 147 So. 5 (1933) (LSU could issue bonds without violating Article IV, Section 12 of the 1921 constitution: "The purpose of this article was not to hamper state agencies or boards in the exercise of their property functions, or in the conduct of their legitimate affairs, but to put an end to the practice of the Legislature to pledge the credit of the state to aid private enterprises") (citing Benedict v. City of New Orleans, 115 La. 645, 39 So. 792 (1905) (permissible to use state and local funds to construct courthouse for Orleans Parish)).

187. 176 La. 825, 147 So. 5 (1933).

188. 182 La. 268, 161 So. 606 (1935).

189. *Excelsior Planting & Mfg. Co. v. Green*, 39 La. Ann. 455, 1 So. 873 (1887) (state could establish levee districts which could issue bonds that were not a debt of the state); *Fisher v. Steele*, 39 La. Ann. 447, 1 So. 882 (1887); *Board of Cmnr's of Caddo Levee Dist. v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1928); *Board of Cmnr's of Tensas Basin Levee Dist. v. Earle*, 169 La. 565, 125 So. 619 (1929); *Richardson & Bass v. Board of Levee Cmnr's of the Orleans Levee Dist.*, 231 La. 299, 1 So. 2d 353 (1956); *but see Picard Const. Co. v. Board of Cmnr's of Caddo*
approach of most states in permitting various entities to issue revenue bonds that do not have the full faith and credit of the state behind them. The cases may be distinguished on the grounds that the rationale supporting their result is that the bonds were not full faith and credit instruments and permitted on that ground rather than on the ground they were issued by entities that were not the state. Indeed, in one old case, *Picard Construction Company v. Board of Commissioners Of Caddo Levee District*, the court stated in dictum that the levee district could not donate property, although other cases allowed it to issue bonds. That case, however, is not strong authority, for it also relied on another constitutional provision then in existence which prohibited paying “extra compensation” to a contractor beyond the contract price. That language was not carried into the 1975 Constitution.

VIII. CONCLUSION—MORE AMENDMENTS AND BUREAUCRATIC SOLUTIONS

As stated earlier, the 1845 and 1852 constitutions sought to limit the bonded debt of the state to $100,000. Inflation, of course, would make such attempts unworkable, as similar attempts in other states failed. The 1974 Constitution did not include such a limitation on the total aggregate amount of state debt, neither as a maximum sum nor as a percentage of state revenues. A basic problem with such limitations is lack of flexibility on the one hand if simple limits are imposed, and a problem of complexity on the other if some legislative flexibility is allowed.

Louisiana’s fiscal crisis in the late 1980’s and early 1990’s resulted in high interest rates on state bonds and an unacceptably high general obligation debt load. The Public Affairs Research Council reported that 1987-88 debt service on general obligation bonds,
$388,610,000, was 10.02 percent of general fund revenues. This sum represented an increase from $91.6 million or 4.6 percent in 1976-77. The high level of debt resulted in downgrading of the state's credit rating by bond rating agencies. In April 1986, Standard and Poor's lowered the state's bonds from "AA" to "A."

A mini constitutional convention in 1992 sought to revise Article VII on revenue and finance, including establishing limits on debt. Numerous complex changes were presented to the voters by the convention as one proposal, which was rejected. Parts of the proposal were recycled and adopted as statutes in 1993. The essence of those statutes were also proposed as constitutional amendments and adopted in 1993. Section 6(F), added to Article VII, exhibits the extent of the complexity that is needed to obtain some kind of limitation, but still leave room for legislative initiatives to exceed the limits by two-thirds vote.

Section 6(F) limits apply to general obligation bonds and not to revenue bonds, which can continue to be issued as before.

While it can be stated with certainty that the amount of bond service allowed in a year cannot exceed 6 percent of the state's revenues, such a statement begs the question of which bonds are covered and how the state's revenues are to be determined. Addressing the first matter, the section leaves the determination of "net state tax supported debt" to be defined by law, rather than defined in the constitution. But, to limit the legislature somewhat to the definition provided by the "reform" legislature that proposed the amendment, it is provided that the definition can be changed only by two-thirds vote of each house of the legislature.

The amount of revenues estimated for a year and the determination of 6 percent of that sum is left to The Revenue Estimating Conference, a four person committee which by virtue of Article VII, Section 10 is composed of the governor (or his designee), the president of the senate (or his designee), the speaker of the house (or his designee) and a faculty member of a university or college in Louisiana with expertise in forecasting revenues.

Also, to avoid a drastic reduction in the amounts of bonds allowed, the amendment also provided that the 6 percent figure is to

195. Id. at 4.
198. La. Const. art. VII, § 10(A) allows changes beyond the four members by a law enacted by 2/3 vote of each house.
be applied only after 2003-2004, and that a gradual transition to that goal is made.\textsuperscript{199}

Once the determination is made as to the amount in bonds that can be issued in a given year, the legislature can still override the limit by “passage of a specific legislative instrument” adopted by 2/3 vote of each house.

Little difficulty has arisen in application of these provisions during recent good financial times, and the state’s bond rating has improved. The constitutional scheme has yet to be tested. Indeed, under current political leadership, the aim has been to issue less general obligation debt than the allowable constitutional limit. The State Bond Commission has a working rule that limits the annual issuance of general obligation bonds to $200,000,000 absent “a showing of demonstrated special circumstances and need.”\textsuperscript{200} The current limit on debt service for the fiscal year ending in June 2001 is 6.6 percent, but the actual percentage for that year is 5.2 percent.\textsuperscript{201} Per capita debt has decreased from $1,097 in 1991 to $555 in 1999.\textsuperscript{202} All of this more a result of political will than of a constitutional limitation.

\begin{itemize}
\item \textsuperscript{200} State Bond Commission, Status Report: Net Tax Supported Debt 2 (Apr.
\item \textsuperscript{201} \textit{id.} at 3.
\item \textsuperscript{202} \textit{id.} at 4.
\end{itemize}