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Local Government Law

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LOCAL GOVERNMENT LAW

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The 1981-82 term produced a fairly typical assortment of decisions in litigation involving local governments. As usual, the state decisions covered a variety of areas including state-local relations,[1] the scope of the police power,[2] land use regulations,[3] property assessments for

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1. *E.g.*, ACORN v. City of New Orleans, 407 So. 2d 1225 (La. 1981); State v. Foy, 401 So. 2d 948 (La. 1981); State v. Rollins Envtl. Serv. of La., Inc., 398 So. 2d 1122 (La. 1981). See notes 52-72 *infra*, and accompanying text. *See also* Bodet v. Broussard, 407 So. 2d 810 (La. App. 4th Cir. 1981), *writ denied*, 410 So. 2d 1132 (La. 1982) (adoption of State Code of Governmental Ethics does not preclude parish adoption and enforcement of ethics code applicable to parish employees); New Orleans Firefighters Ass'n v. Civil Serv. Comm'n, 406 So. 2d 752 (La. App. 4th Cir. 1981) (New Orleans Civil Service Commission must include supplemental pay paid by the state when computing the overtime pay of the city's firefighters); Corcoran v. Parish of Jefferson, 405 So. 2d 667 (La. App. 4th Cir. 1981) (state's Administrative Procedure Act requires parish council to offer participants in adjudicatory hearings the opportunity to cross-examine witnesses).

2. *See, e.g.*, Brousseau's, Inc. v. City of Baton Rouge, 400 So. 2d 1188 (La. 1981) (city can deny a liquor permit on the basis of evidence showing a detrimental impact on public health, safety, and morals, but the evidence before the city council with respect to plaintiff's application was insufficient to justify denial); Gilbert v. Catahoula Parish Police Jury, 407 So. 2d 1228 (La. App. 1st Cir. 1981) (parish ordinance declaring one-half of the property adjoining a gravel road to be an "open range" amounts to an unreasonable exercise of the police power).

3. *See, e.g.*, Furr v. Mayor of Baker, 408 So. 2d 248 (La. 1981) (city council's determination that a recording studio was not an establishment for retail sales was not unreasonable); Christopher Estates, Inc. v. Parish of East Baton Rouge, 413 So. 2d 1336 (La. App. 1st Cir. 1982) (local planning commission acted arbitrarily, capriciously, and unreasonably in refusing to approve a subdivision plat that reduced the street frontages of lots from 80 feet to 60 feet); Shenandoah Park Civic Ass'n v. Elizey, 409 So. 2d 354 (La. App. 1st Cir. 1981) (planning commission must notify adjacent landowners by certified mail of public hearings on whether to approve an amendment to a subdivision plat); City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc., 402 So. 2d 259 (La. App. 2d Cir. 1981) (group home for the mentally retarded was a one-family dwelling as that term was used in city zoning ordinance).

public improvements,[4] public contracts,[5] tort liability,[6] public meetings,[7]

4. Dorsey v. Iberia Parish Police Jury, 411 So. 2d 1249 (La. App. 3d Cir. 1982) (landowners are not entitled to a refund of a portion of their assessments when governmental entity decides not to implement design changes that landowners believe will lower the cost of the public work); Cronan v. City of Kenner, 410 So. 2d 790 (La. App. 4th Cir. 1981) (landowners are not entitled to a judicial determination of whether local governments can levy assessments that exceed cost of public works until an evidentiary hearing establishes that their assessments included such excess charges).

5. *See, e.g.*, Donahue v. Board of Levee Comm'rs, 413 So. 2d 488 (La. 1982) (once a local government has acquiesced in a judgment ordering it to award a contract to the lowest responsible bidder, it cannot later decide to reject all bids and readvertise the project); State v. City of Pineville, 403 So. 2d 49 (La. 1981) (Department of Highways can recover money advanced to city on an unjust enrichment theory even though the city's written agreement to repay the funds was unenforceable); Budd Constr. Co. v. City of Alexandria, 401 So. 2d 1070 (La. App. 3d Cir. 1981) (district court properly enjoined city from awarding contract when city failed to follow its own procedures in resolving a dispute as to which bidder had submitted the lowest bid).

6. *E.g.*, Jenkins v. Jefferson Parish Sheriff's Office, 402 So. 2d 669 (La. 1981); Alexander v. Rapides Parish Police Jury, 415 So. 2d 607 (La. App. 3d Cir. 1982); Robertson v. Parish of East Baton Rouge, 415 So. 2d 365 (La. App. 1st Cir. 1982); McCoy v. Franklin Parish Police Jury, 414 So. 2d 1369 (La. App. 2d Cir. 1982); McLeod v. Parish of East Baton Rouge, 414 So. 2d 1341 (La. App. 1st Cir. 1982); Greenhouse v. Great Southwest Fire Ins. Co., 413 So. 2d 352 (La. App. 3d Cir. 1982); Swain v. Sewerage & Water Bd. of New Orleans, 413 So. 2d 233 (La. App. 4th Cir. 1982); McNeal v. Division of State Police, 412 So. 2d 1123 (La. App. 1st Cir.), *writ denied*, 414 So. 2d 1252 (La. 1982); Carpenter v. State Farm Fire & Cas. Co., 411 So. 2d 1206 (La. App. 4th Cir.), *writ denied*, 415 So. 2d 951 (La. 1982); Bacile v. Parish of Jefferson, 411 So. 2d 1088 (La. App. 4th Cir.), *writ denied*, 415 So. 2d 950 (La. 1982); Goodlow v. City of Alexandria, 407 So. 2d 1305 (La. App. 3d Cir. 1981); Tappel v. Vidros, 407 So. 2d 789 (La. App. 4th Cir. 1981); Orazio v. Durel, 407 So. 2d 75 (La. App. 4th Cir. 1981); De Laureal Eng'rs, Inc. v. St. Charles Parish Police Jury, 406 So. 2d 770 (La. App. 4th Cir. 1981), *writ denied*, 410 So. 2d 758 (La. 1982); Sullivan v. Quick, 406 So. 2d 284 (La. App. 3d Cir. 1981); Curry v. Iberville Parish Sheriff's Office, 405 So. 2d 1387 (La. App. 1st Cir. 1981), *writ denied*, 410 So. 2d 1130, 410 So. 2d 1135 (La. 1982); Penalber v. Blount, 405 So. 2d 1378 (La. App. 1st Cir.), *writ denied*, 407 So. 2d 1189 (La. 1981); Hall v. City of New Orleans, 400 So. 2d 265 (La. App. 4th Cir. 1981); Martinez v. Reynolds, 398 So. 2d 156 (La. App. 3d Cir. 1981). See notes 73-145 *infra*, and accompanying text. *See also* Pratt v. State, 408 So. 2d 336 (La. App. 3d Cir. 1982) (police jury is entitled to protection of statutes limiting liability of owners of property used for recreational purposes even though fees were charged for use of the recreational facilities); Jolivette v. City of Lafayette, 408 So. 2d 309 (La. App. 3d Cir. 1981) (city is not liable for damages diver suffered as a result of collision with swimmer at public pool unless a city employee was guilty of negligence that was a cause in fact of the accident); Tompkins v. Kenner Police Dep't, 402 So. 2d 276 (La. App. 4th Cir. 1981) (city is liable for investigating officer's failure to summon medical assistance to person injured in an automobile accident).

7. Brown v. East Baton Rouge Parish School Bd., 405 So. 2d 1148 (La. App. 1st Cir. 1981) (school board violated Open Meetings Law when it used a selection procedure to reduce the number of applicants for superintendent's position while the board was sitting in executive session); Kennedy v. Powell, 401 So. 2d 453 (La. App. 2d Cir.), *writ denied*, 406 So. 2d 607 (La. 1981) (provision of Open Meetings Law requiring that suits to void actions taken in violation of the law be filed within 60 days establishes

and public employment.[8] In addition, the United States Supreme Court rendered important decisions concerning antitrust immunity,[9] the need for specificity in local business regulations,[10] and the scope of first amendment freedoms.[11] This article surveys the Supreme Court decisions on antitrust immunity and the need for specificity in business regulations as well as selected state decisions in the areas of state-local relations and the tort liability of local governments.

FEDERAL-LOCAL RELATIONS

The Supreme Court's opinions during the 1981-82 term provided conflicting signals to local governments. On the one hand, the Court emphatically reasserted that the "state action" doctrine did not inevitably shield local governments from antitrust liability under the Sherman Antitrust Act.[12] At the same time, the Court, by upholding two municipal ordinances against vagueness challenges, indicated its

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a rule of peremption that is not suspended by a plaintiff's lack of knowledge that the action has been taken).

8. Mixon v. New Orleans Police Dep't, 407 So. 2d 793 (La. App. 4th Cir. 1981) (Civil Service Commission's rule that denied right of appeal to persons alleging age discrimination defeated the legislative purpose of the civil service law and violated the equal protection guarantees of the state and federal constitutions); Reboul v. New Orleans Police Dep't, 407 So. 2d 509 (La. App. 4th Cir. 1981) (court of appeal has discretion as to whether to grant city a suspensive appeal of Civil Service Commission's decision ordering reinstatement of police officer); Jackson v. St. Landry Parish School System, 407 So. 2d 51 (La. App. 3d Cir. 1981) (plaintiff acquired status as permanent teacher under Teacher Tenure Law when school board failed to notify her of its intention not to rehire until after passage of three years from the date of her initial appointment); Linton v. Bossier City Mun. Fire & Police Civil Serv. Bd., 402 So. 2d 716 (La. App. 2d Cir. 1981) (three members of the board must concur before the board can render a decision that is subject to judicial review).

9. Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982). See notes 12-33 *infra*, and accompanying text.

10. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 102 S. Ct. 1186 (1982); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). See notes 34-51 *infra*, and accompanying text. *Cf.* State v. Farris, 412 So. 2d 1039 (La. 1982) (ordinance prohibiting a person from hunting or fishing on "any unenclosed land or waters" is unconstitutionally vague because it did not define the term "unenclosed land or waters" and the term does not have a generally accepted meaning such that a person of ordinary intelligence would know what conduct was prohibited).

11. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (municipal ordinance that placed a $250 limit on contributions to committees formed to support or oppose local referenda imposed an unconstitutional restriction on first amendment rights of association and expression). *See also* Godwin v. East Baton Rouge Parish School Bd., 408 So. 2d 1214 (La. 1981), *appeal dismissed*, 51 U.S.L.W. 3252 (U.S. Oct. 4, 1982) (rule prohibiting persons from bringing hand-held signs into board meeting is constitutional as a reasonable restriction on the time, place, and manner of exercising first amendment rights).

12. 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1976)).

willingness to grant local governments considerable leeway in regulating business establishments within their borders.

Antitrust Immunity

In its 1943 decision in *Parker v. Brown*,[13] the Supreme Court held that federal antitrust laws did not preclude a state from imposing anticompetitive restraints on private persons when the state was acting "as sovereign" and was imposing the restraints "as an act of government."[14] Thirty-five years later, the Court refused to grant local governments a similar immunity. In *City of Lafayette v. Louisiana Power & Light Co.*,[15] the Court ruled that the *Parker* doctrine did not shield a municipality from liability for violating the antitrust laws in its operation of an electric utility system.[16] According to the Court's opinion in *City of Lafayette*, *Parker* precluded municipal liability only when the municipality engaged in the challenged conduct "pursuant to state policy to displace competition with regulation or monopoly public service."[17]

This year's decision in *Community Communications Co. v. City of Boulder*[18] reaffirmed and expanded the *City of Lafayette* opinion by

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13. 317 U.S. 341 (1943).

14. *Id.* at 352. *Parker* involved a state "marketing program" under which regulated raisin growers in California could dispose of their crops. Although the statutory scheme upheld in *Parker* conflicted with the open-competition policy of the federal antitrust laws, the approach the state had chosen was similar to the one employed in federal New Deal statutes regulating other crops. *See id.* at 367-68.

15. 435 U.S. 389 (1978).

16. State statutes specifically authorized the city to provide electric utility service within or without its borders. *See* LA. R.S. 33:1326, 33:4162-4163 (1950). For a brief description of the Louisiana statutes involved in *City of Lafayette*, see Murchison, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Local Government Law*, 38 LA. L. REV. 462, 463-64 (1978).

17. 435 U.S. at 413.

18. 102 S. Ct. 835 (1982). For a discussion of the impact of *Community Communications* on antitrust law, see Conley, *Developments in the Law, 1981-1982—Antitrust*, 43 LA. L. REV. 283 (1982).

Justice Stevens added a brief concurring opinion emphasizing that the Court merely had denied local governments immunity from the antitrust laws and had not established the standards of liability that would apply in antitrust suits against governmental defendants. 102 S. Ct. at 844-45.

Justice Rehnquist dissented in an opinion in which the Chief Justice and Justice O'Connor joined. He argued that the Court had misconstrued the issue in *Community Communications* by defining the issue as a question of whether the state action doctrine exempted local governments from the antitrust laws. The exemption concept is appropriate, he argued, only when one is concerned with multiple enactments of a single sovereign. When the overlap involves a federal statute and state laws or local ordinances, rather than several federal statutes, the problem is one of preemption rather than exemption; that is, the question is whether "the federal government has

holding that *Parker*'s state action doctrine did not immunize a "home rule" municipality[19] from antitrust liability for adopting an ordinance that imposed a moratorium on the expansion of cable television service within its borders. According to Justice Brennan's majority opinion, the state action doctrine did not exempt the cable ordinance from antitrust scrutiny because neither of the tests recognized by prior decisions were satisfied. The local ordinance did not "constitut[e] the action of the [s]tate . . . itself in its sovereign capacity," nor did it amount to local action in "furtherance or implementation of clearly articulated and affirmatively expressed state policy."[20]

The city initially argued that its home rule status made the adoption of the cable ordinance "state" action within the meaning of *Parker*. The city based this argument on the home rule amendment to the Colorado Constitution,[21] which vested the city with "every power theretofore possessed by the [state] legislature . . . in local and municipal affairs."[22] According to the city, this constitutional grant of authority made its ordinance "state action" because the adoption of the ordinance amounted to "an 'act of government' performed by the city *acting as the state* in local matters."[23] The Supreme Court, however, rejected this claim as inconsistent with the federalism principle on which the state action doctrine was based. The Court declared

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occupied a particular field exclusively, so as to foreclose any state regulation." *Id.* at 846. Justice Rehnquist regarded the rephrasing of the issue as decisive in *Community Communications* because "[t]he presumptions utilized in exemption analysis are quite distinct from those applied in the preemption context." *Id.* In particular, he emphasized the presumption against preemption "absent the clear and manifest intention of Congress that the federal act should supersede the police powers of the state." *Id. See generally* Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1378-83 (1978).

Justice Rehnquist termed it "quite clear" that the "state action" doctrine concerned preemption because the issues raised in litigation about the doctrine "inevitably involve state and local regulation which, it is contended, are in conflict with the Sherman Act." 102 S. Ct. at 846. Moreover, he could see no reason to use a different rule of preemption for municipal ordinances than the one that the Court used for assessing state statutes. Thus, he would uphold a municipal ordinance "if it is enacted pursuant to an affirmative policy on the part of the city to restrain competition and if the city actively supervises and implements this policy." *Id.* at 850 (footnote omitted).

19. *See generally* O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW 95-103 (1982); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968). For a brief description of the Louisiana provisions on home rule, see Murchison, *Developments in the Law, 1980-1981—Local Government Law*, 42 LA. L. REV. 564, 573-75 (1982).

20. 102 S. Ct. at 841.

21. COLO. CONST. art. XX, § 6, *quoted in* 102 S. Ct. at 836.

22. 102 S. Ct. at 841 (quoting Denver Urban Renewal Auth. v. Byrne, 618 P.2d 1374, 1381 (Colo. 1980); Four-County Metro. Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962)).

23. 102 S. Ct. at 841 (emphasis in original).

that American federalism is a "duel system of government" with "no place for sovereign cities." As a result, the state action doctrine was properly limited to actions of states, with local governments partaking of the *Parker* exemption "only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy."[24]

The Court also rejected the city's argument that the home rule amendment's "guarantee of local autonomy" satisfied the requirement for a "clear articulation and affirmative expression" of state policy. In the majority's view, this contention failed because the state's relationship to the city's ordinance was "one of mere *neutrality*," and such an attitude of neutrality could never amount to affirmative endorsement of the local action. To hold otherwise would permit courts to find that conflicting local approaches were all enacted pursuant to the same clearly articulated and affirmatively expressed state policy and would thereby "wholly eviscerate the concepts of 'clear articulation and affirmative expression.' "[25]

From the perspective of local government law, the most obvious deficiency of the *Community Communications* opinion is its inaccurate description of the position in the federal system occupied by local governments with home rule charters. "Home rule" creates neither a third level of sovereignty within the United States nor a nation of city-states.[26] To the contrary, it represents one manner in which states may choose to exercise the measure of sovereignty that they possess under the federal system. Instead of requiring the state legislature to legislate as to "local matters," the state (normally through the state constitution) may vest whatever legislative power it has in a particular local governmental entity.

In light of the state choice involved in granting "home rule," a local government exercising home rule powers should satisfy both tests that Justice Brennan used to define the parameters of the state action doctrine. First, the local action is the action of the state. The power that the local government is exercising is the power of the state, and the entity exercising the power is the entity that the state has designated to exercise that power. Second, the local action also furthers a "clearly articulated and affirmatively expressed state policy," the policy that local governments should make the substantive decisions about matters of local concern. In essence, the majority has decided that the "state policy" exemption applies only to

24. *Id.* at 842.

25. *Id.* at 843.

26. American courts uniformly have rejected the idea that local governments have an inherent right to control their local affairs. *See generally* O. REYNOLDS, *supra* note 19, at 66-74.

substantive policies chosen by the state legislature. The state's right to enforce a procedural policy that vests the decision making authority at the local level is left unprotected.

Far more difficult than criticizing the conceptual deficiencies of the *Community Communications* opinion is predicting the impact the decision will have. If the Court applies the substantive rules[27] and treble damage remedies[28] normally used in antitrust cases, the dissent's dire predictions about hamstringing local governments[29] seem justified. Those dire predictions, however, may be a bit premature. A footnote in the majority opinion indicates,[30] and Justice Stevens' concurring opinion emphasizes,[31] that *Community Communications* merely denies the local government an exemption from the antitrust laws and the decision does not attempt to articulate the substantive standards of liability that will apply in suits against local governments. One could, for example, greatly restrict the potential for liability by refusing to apply the "per se" rules in cases against governmental defendants and by defining the rule of reason as incorporating the traditional reasonableness test used to evaluate the exercise of the police power by local governments.[32]

Several years are virtually certain to elapse before it becomes clear what direction the Court will choose to follow in establishing standards of liability for antitrust suits against governmental defendants. One unfortunate by-product of this delay will be the strengthening of the hand of developers and other entrepreneurs who are resisting local regulatory authority. Until the Court clarifies its approach on the antitrust liability issue, prudent local governments probably will compromise such suits to avoid confrontations that raise the spectre of treble damage awards. To minimize this threat to local

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27. For example, the Court has ruled that private parties cannot rely on noncompetitive factors, such as the promotion of safety, to justify the restriction of competition. *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978).

28. Clayton Act, § 4, 15 U.S.C. § 15 (1980).

29. 102 S. Ct. at 848-51 (Rehnquist, J., dissenting). For a recent decision of the Tenth Circuit holding that a state statute declaring the acquisition and operation of airport facilities to be "public governmental functions" operated to immunize local governments from antitrust liability, see Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982).

30. 102 S. Ct. at 843 n.20.

31. 102 S. Ct. at 844-45.

32. *See, e.g.*, Gilbert v. Catahoula Parish Police Jury, 407 So. 2d 1228, 1231 (La. 1981); City of Shreveport v. Curry, 357 So. 2d 1078, 1081 (La. 1978); Hi-Lo Oil Co. v. City of Crowley, 274 So. 2d 757, 762 (La. App. 3d Cir.), *writ denied*, 277 So. 2d 673 (La. 1973); *cf.* Moore v. City of East Cleveland, 431 U.S. 494, 513-21 (1977) (Stevens, J., concurring) (arguing that the reasonableness test is required by the federal guarantee of due process).

power, the Court needs to begin sketching the basic parameters of local liability as soon as cases raising the issues arise.

Whatever liability rules eventually emerge, *Community Communications* makes it clear that attorneys who advise local governments must understand the rudiments of antitrust liability. Although antitrust experts surely will assume leadership in shaping the rules to control governmental liability, generalists who represent local governments will have to advise their clients about a host of problems that now have antitrust overtones.[33] To discharge their duties competently, these attorneys will have to acquire at least a basic understanding of the intricate world of antitrust law.

Need for Precision in Local Regulations

In two other decisions, the Court adopted a far more deferential attitude to local decision makers than that displayed in the antitrust decision by rejecting vagueness challenges to local regulations of business. In *City of Mesquite v. Aladdin's Castle, Inc.*,[34] the Court upheld a municipal licensing ordinance requiring the chief of police to consider whether an applicant had any "connections with criminal elements." In addition, the Court, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[35] rejected a challenge to an ordinance establishing a licensing requirement for businesses that sold items "designed or marketed for use with illegal cannabis or drugs."

The ordinance[36] challenged in *City of Mesquite* required the police chief to review all applications "for coin-operated amusement establishment[s]" and to recommend to the city manager whether or not the application should be approved. The ordinance directed the police chief to "make his recommendation upon his investigation of the applicant's character and conduct as a law-abiding person" and specifically instructed him to "consider past operations, if any, [and] convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years." After receiving the chief's recommendation, as well as recommendations from the building inspector and the city planner, the city manager could approve the application or disapprove it "with written notation of his reasons for disapproval." If the city manager disapproved the application, the ap-

33. For an attempt (prior to *Community Communications*) to list some of the common areas that might raise antitrust problems, see Slawsky, *Can Municipalities Avoid Antitrust Liability?*, 14 URB. LAW. vii (no. 1, 1982).

34. 455 U.S. 283 (1982).

35. 102 S. Ct. 1186 (1982).

36. MESQUITE, TEX., CODE ord. no. 1353, § 6, *quoted in* 102 S. Ct. at 1072 n.2.

plicant could appeal the decision to the city council. When the basis for disapproval was the police chief's adverse recommendation as to the applicant's character, the applicant bore the burden of convincing the council that "he or it is of good character as a law-abiding citizen." The test of good character at this appeal was "substantially that standard employed by the Supreme Court of Texas in the licensing of attorneys."[37]

Reversing the Fifth Circuit,[38] the Supreme Court upheld the constitutionality of the ordinance's direction for the police chief to consider whether a license applicant had any "connection with criminal elements." In the Supreme Court's view, the vagueness of the phrase "connected with criminal elements"[39] did not invalidate the statute because the phrase does not establish "the standard for approval or disapproval of the application." The statute merely identified "a subject that the ordinance directs the Chief of Police to investigate before he makes a recommendation to the City Manager," and "the Federal Constitution does not preclude a city from giving vague or ambiguous directions to officials who are authorized to make investigations and recommendations."[40]

The Court's distinction between substantive standards and administrative directions is a pragmatic one that gives local governments considerable flexibility while protecting individuals from arbitrary administrative decisions. Requiring a local government to avoid vagueness in setting the standards it will use to decide whether or not to approve applications is necessary to preclude whimsical decisions in the granting of licenses. By contrast, upholding vague directions about the matters an administrator is to consider raises far fewer dangers of whimsical enforcement because the ultimate decision must be justified under substantive standards to which the constitutional requirement for precision will apply.

The regulation sustained in *Village of Hoffman Estates*, the other opinion rejecting a vagueness challenge to a local business regulation, involved the village's attempt to discourage the sale of drug paraphenalia within its borders. The ordinance banned the sale of any items "designed or marketed" for use with illegal drugs unless the seller first obtained a license from the local government; in addition,

37. MESQUITE, TEX., CODE ord. no. 1353, § 9, *quoted in* 102 S. Ct. at 1075.

38. 630 F.2d 1029 (5th Cir. 1980), *rev'd*, 102 S. Ct. 1070 (1982).

39. The Court assumed "that the definition of 'connection with criminal elements' in the city's ordinance is so vague that a defendant could not be convicted of the offense of having such a connection" and that the "standard is also too vague to support the denial of a license to operate an amusement center." 102 S. Ct. at 1075.

40. *Id.* at 1075-76.

it precluded the issuance of licenses to persons previously convicted of drug offenses and required licensees to maintain records of all sales of regulated items.[41] In upholding the ordinance against a contention that it was unconstitutional on its face, the Supreme Court rejected both overbreadth and vagueness arguments. The overbreadth claim failed because the ordinance did not reach "a substantial amount of constitutionally protected conduct." The vagueness claim failed because the ordinance was not "impermissibly vague in all its applications."

Although the plaintiff in *Village of Hoffman Estates* claimed that the ordinance was overbroad because it inhibited the exercise of first amendment rights by the plaintiff and others, the Supreme Court curtly rejected this contention for failure to show a substantial danger of inhibiting first amendment rights. Insofar as noncommercial speech was concerned, the village had not "directly infringed" anyone's rights; the ordinance did "not restrict speech as such, but simply regulate[d] the commercial marketing of items that the labels reveal may be used for an illicit purpose."[42] Insofar as commercial speech was implicated, the plaintiff could not rely on any alleged infringement of the rights of others "because the overbreadth doctrine does not apply to commercial speech."[43] Moreover, when one confined one's inquiry to the plaintiff's rights, the only restriction on the communication of information was to discourage "commercial activity promoting or encouraging illegal drug use," and that activity was one "which the government may regulate or ban entirely."[44]

The vagueness claim centered on the meaning of the phrase "designed or marketed for use." Although the Court conceded that this language could be ambiguous in many of its applications, it nonetheless rejected the plaintiff's facial challenge to the statute because the language was sufficiently precise to cover "at least some of the items sold by [the plaintiff]."[45] The phrase "designed for use" at least encompassed items that are "principally used with illegal drugs by virtue of [their] objective features, i.e., features designed by the manufacturer." As a result, the phrase was "sufficiently clear to cover at least some of the items that [the plaintiff] sold;" as examples of items adequately described, the Court mentioned "roach clips" and "a specially-designed pipe that [the plaintiff] marketed."[46] The Court

41. VILLAGE OF HOFFMAN ESTATES, ILL., CODE ord. no. 969 (1978), *reprinted in* 102 S. Ct. at 1197.

42. 102 S. Ct. at 1192.

43. *Id.* (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 565 n.8 (1980)).

44. 102 S. Ct. at 1192.

45. *Id.* at 1194.

46. *Id.* at 1195.

also found the "marketed for use" phrase sufficient to cover "a retailer's intentional display and marketing of merchandise." By incorporating this scienter requirement, the phrase satisfied the vagueness test because it provided the plaintiff "ample warning that its marketing activities required a license."[47]

The analytic virtue of *Village of Hoffman Estates* is its careful distinction of vagueness and overbreadth. When a statute is challenged as impermissibly vague the underlying concerns are the need to provide citizens with adequate warning of what conduct is criminal and the desire to avoid the arbitrary enforcement that becomes increasingly probable when inadequate notice is provided. The vagueness concept thus focuses on the particular individual who is challenging the statute; if he knows that the statute forbids his conduct, the notice requirement has been satisfied and the danger of arbitrary enforcement has been minimized. By contrast, overbreadth is a doctrine designed to limit governmental power to discourage persons from engaging in constitutionally protected conduct. When a statute is invalidated as overbroad, the aim is not to protect a particular individual but to prevent the government from inhibiting the public from exercising constitutionally protected rights. As a result, the question of whether the statute unambiguously covers a particular individual's conduct becomes irrelevant.

Once the vagueness-overbreadth distinction is acknowledged, the correctness of the *Village of Hoffman Estates* decision becomes apparent. Because the case involved a preenforcement challenge to the statute on its face, the vagueness doctrine required only that the statute provide fair warning as to some conduct, and the Court's conclusion that a person of ordinary intelligence would understand that the phrase "designed or marketed for use with cannabis or other illegal drugs" covered some items (for example, roach clips) seems unexceptional. On the other hand, the overbreadth argument failed because the statute did not tend to discourage any constitutionally protected activity.[48] The only "speech" it discouraged was advertising that promoted the use of illegal drugs, and the village had the constitutional authority to discourage that activity.

The real danger raised by the village's ordinance is the possibility that it might provide inadequate notice and invite arbitrary enforcement as to situations where the ordinance's applicability is admittedly ambiguous. Courts in future litigation, however, can protect

47. *Id.*

48. The village conceded that its aim was "to discourage the use of the regulated items." *Id.* at 1194 n.16. The plaintiffs failed to establish that their sales activities were constitutionally protected conduct.

adequately the individual's rights to fair notice and freedom from arbitrary enforcement either by strictly construing the ordinance[49] or by holding it unconstitutionally vague as applied.[50] The mere possibility of arbitrary enforcement in some other context should not preclude the village from using the ordinance in a situation where its application is clear.

Both *Village of Hoffman Estates* and *City of Mesquite* display an acceptance of, and sensitivity to, the need for local governments to regulate businesses that operate within their borders.[51] In light of this acceptance and sensitivity, perhaps one should pause before embracing the most pessimistic assessments of the impact that *Community Communications* will have on local regulatory authority. A Court that is reluctant to use the general language of the first and fourteenth amendments to limit local authority eventually may prove just as unwilling to use the general language of the antitrust laws to limit local authority.

STATE-LOCAL RELATIONS

Although the Louisiana Constitution of 1974 expands the ability of local governments to act in the absence of specific legislative authorization, it still forbids local governments from exercising powers and performing functions inconsistent with the constitution or denied by general law.[52] The Louisiana Supreme Court considered the scope of these limits on local power in two cases decided during the 1980-81 term.[53] By defining the limitations on local governmental power fairly

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49. *See, e.g.*, People v. Lutz, 73 Ill. 2d 204, 383 N.E.2d 171 (1978) (penal statutes are to be strictly construed in favor of the accused).

50. *See, e.g.*, United States v. Powell, 423 U.S. 87 (1975).

51. One commentator has identified "deference to local government self-rule" as one element of the "emerging pattern of Burger Court decisions." Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980s*, 21 B.C.L. REV. 763, 847 (1980).

52. LA. CONST. art. VI, §§ 4, 5, 7. For more complete descriptions of the constitution's allocation of power between state and local governments, see Murchison, *Developments in the Law, 1979-1980—Local Government Law*, 41 LA. L. REV. 483, 485-86 (1981); Murchison, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Local Government Law*, 39 LA. L. REV. 843, 851-53 (1979).

53. A third decision, State v. Foy, 401 So. 2d 948 (La. 1981), raised, but did not resolve, the question of the scope of article VI, section 9(a)(1) of the Louisiana Constitution, which provides that no local government shall "define and provide for the punishment of a felony." Following their arrest for breaking into a high school, the *Foy* defendants pleaded guilty in mayor's court to charges that they had violated TALLULAH, LA., CODE § 12-71, which made burglary a municipal offense. When the district attorney later charged the defendants with violating LA. R.S. 14:62, which makes burglary a felony under state law, they claimed that their convictions in the mayor's court barred their trial on the state charges. *See* Waller v. Florida, 397 U.S. 387 (1970). The state attempted to counter this claim by arguing that the defendants were never

narrowly, both decisions seem to advance a basic thrust of the 1974 constitution: to grant local governments a more responsible role in the state's governmental structure.

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placed in jeopardy because the mayor's court lacked jurisdiction to receive their pleas on a burglary charge. *See* LA. CODE CRIM. P. art. 595. This jurisdictional argument was, in turn, premised on LA. CONST. art. VI, § 9(a). Since state law made burglary a felony, the district attorney argued that section 9(a) denied local governments the power to define and punish burglary as a local offense, and the mayor's court lacked jurisdiction to accept a guilty plea to an unconstitutional ordinance.

Although the Louisiana Supreme Court held that double jeopardy barred the retrial of the defendants, it declined to reach the question of whether the city's ordinance was constitutional. Relying on the state statute granting the mayor's court jurisdiction over all violations of municipal ordinances, LA. R.S. 33:441 (1950), and the presumption of validity accorded to local ordinances, 401 So. 2d at 949 (citing State v. Skinner, 358 So. 2d 280 (La. 1978); State v. Everfield, 342 So. 2d 648 (La. 1977)), the court concluded that the state lacked standing to challenge the constitutionality of the ordinance. Once the proceedings in the mayor's court were complete, the court ruled, "[d]ouble jeopardy protection prevent[ed] the State from litigating a collateral constitutional question, as a prelude for retrying them under a different statute and punishing them a second time for the same offense." 401 So. 2d at 950.

In a concurring opinion on rehearing, Justice Dennis reached the constitutional issues, but concluded that the prohibition in article VI, section 9(A)(1) did not prevent a local government from punishing a crime that was a felony under state law. "[A]fter an extensive examination of the transcripts of the constitutional convention debates," he was unable to "find any solid evidence that it was the intention of either the delegates or the voters to exempt from local regulation all conduct which the state legislation punishes as a felony." As a result, he concluded "that the constitutional intent was merely to limit the power of municipalities to the imposition of punishment without hard labor for a violation of a municipal regulation." 401 So. 2d at 951. Recognizing that abuses could arise under this interpretation of section 9(a), he concluded with a plea for the legislature to adopt a statutory solution.

Justices Marcus and Lemmon dissented. In a one-paragraph opinion, Justice Marcus simply announced his acceptance of the state's argument. Since section 9(a) prohibited the city "from enacting an ordinance defining and providing for the punishment of a felony," the mayor's court lacked "jurisdiction to accept a guilty plea to a violation of the ordinance in question." *Id.* at 950. In a more extensive dissenting opinion filed on rehearing, Justice Lemmon discussed the constitutional issue in detail and reached the same result. He concluded that section 9(a) was designed to achieve "two related goals." The first of these goals was the one recognized in Justice Dennis's concurring opinion: "to prohibit a municipality from providing for imprisonment at hard labor as a punishment for conduct which is proscribed by municipal ordinance." *Id.* at 952. But Justice Lemmon also claimed that section 9(a) could be reasonably interpreted to achieve a second goal as well: "to assure preemption by the state of prosecution for criminal conduct which the Legislature has determined to be serious enough to warrant imprisonment at hard labor." *Id.* The double jeopardy implications of municipal convictions counseled, he argued, that the court should accept this reasonable construction. To hold otherwise would allow the defendants to escape district court prosecution for serious felonies by rushing into mayor's court, pleading guilty, and paying fines. Permitting that result, he urged, would conflict with a corollary logically implicit in section 9(a): "[W]hen the Legislature determines that certain conduct should expose a person to . . . imprisonment [at hard labor], the [local] government should be precluded from deciding that such conduct should be *less* severely punished." *Id.* (emphasis in original).

ACORN v. City of New Orleans[54] upheld the constitutionality of a New Orleans ordinance levying a "road use charge" that applied to automobiles registered in the parish as well as to other automobiles owned by persons residing or businesses located in the parish.[55] Article VII, section 5 of the 1974 constitution[56] expressly forbids municipalities from "impos[ing] a license fee on motor vehicles," and various residents challenged the New Orleans road use charge as being inconsistent with that section of the constitution. The supreme court rejected the challenge on the ground that the New Orleans charge was not a "license fee" imposed on motor vehicles. Instead, the court declared that it was "a specific tax on the ownership of motor vehicles" to which the constitutional prohibition did not apply.

The analytic basis for the *ACORN* decision was the court's careful differentiation between license fees and taxes.[57] The court defined the power to license as a part of the police power that gives a government the power to forbid persons or businesses from engaging in certain activities without first receiving the government's formal permission. Although this power to require formal approval often includes an incidental right to collect a consideration or fee for the privilege being granted, the essence of the power to license remains "the power

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54. 407 So. 2d 1225 (La. 1981). Justice Watson dissented, declaring that the New Orleans levy was "clearly a license fee and violative of the Louisiana Constitution." *Id.* at 1228.

55. NEW ORLEANS, LA., CODE ord. no. 7011 (1979), *quoted in* 407 So. 2d at 1227. Section I of the ordinance provided as follows:

> The Council of the City of New Orleans hereby ordains, that a road use charge be and is hereby levied on all motor vehicles registered in Orleans Parish, or owned by residents of Orleans Parish, or owned by persons, firms and/or corporations whose principal place of business is located in Orleans Parish for the year 1979 and for each year thereafter for the purpose of providing revenues to promote and benefit the health, safety and welfare of the citizens of the City of New Orleans including, but not limited to, the aiding of motor bus lines carrying passengers and other modes of public transit, which as a matter of public convenience and necessity, may be required to be maintained and continued in operation. The charge herein levied shall be according to the following classifications:
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> |---|---|
> | Motorcycles and other two wheeled vehicles | annually $ 25.00 |
> | Automobiles | annually $ 50.00 |
> | Trucks, vans and pickups | annually $100.00 |

Section II of the ordinance required the Director of Finance to establish procedures to collect the road use charge, and Section III limited the maximum liability of any single taxpayer to one thousand dollars a year.

56. The complete text of section 5 provides: "The legislature shall impose an annual license tax of three dollars on automobiles for private use, and on other motor vehicles, an annual license tax based upon horsepower, carrying capacity, weight, or any of these. No parish or municipality may impose a license fee on motor vehicles."

57. 407 So. 2d at 1228.

to regulate."[58] Thus, the licensing power (including the power to levy license fees) is distinct from the power to raise revenues by exercising the government's authority to tax and a ban on license fees does not bar a tax on the things or activities for which licenses cannot be required.

Applying this distinction to the case before it, the supreme court concluded that the New Orleans levy was "a specific tax," not "a license fee." According to the court, "a license fee on motor vehicles is a charge imposed for the privilege of using the streets."[59] The purpose of the fee is to defray the cost of registering and licensing the vehicles, and the government enforces the licensing requirement by forbidding the operation of unlicensed vehicles. By contrast, the purpose of the New Orleans charge was to raise revenue for the general needs of the city. Moreover, it applied whether or not the vehicle was used on the city's streets and the city had made no attempt to ban from its streets vehicles whose owners had not paid the road use charge.[60] On the basis of these characteristics, the court classified the road use charge as "a specific tax" and held that the constitutional restriction on the power to impose license fees was inapplicable.

ACORN's immediate impact on the finances of Louisiana's local governments is likely to be minimal for two reasons. First, the 1974 constitution requires legislative authorization before a local government can enact taxes not specifically authorized by the constitution,[61] and most local governments lack a broad taxing authorization similar to the one contained in the New Orleans charter.[62] Second, the antitax mood that dominates the contemporary American political scene makes it unlikely that many local governments will initiate new taxes, even if they are authorized to do so.[63]

Despite the limited influence *ACORN* will have in the immediate future, the refusal to constitutionalize current political attitudes was nonetheless an important decision that deserves praise. The decision

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58. *Id.*

59. *Id.* (citing LA. R.S. 47:536 (1950) (operation of an unregistered vehicle is a criminal offense punishable by a maximum sentence of a $100 fine and imprisonment for 30 days)).

60. 407 So. 2d at 1228 ("the only sanction for failure to pay the road use charge is a legal obligation enforceable by a civil action").

61. LA. CONST. art. VI, § 30.

62. *See* 1936 La. Acts, No. 388, § 1 (amending the New Orleans charter to confer on the city of New Orleans "the right to levy, impose and collect any and all kinds and classes of taxes or licenses or fees that may be imposed that are necessary for the proper operation and maintenance of the municipality, provided same is not expressly prohibited by the Constitution of the State of Louisiana").

63. In August 1980, New Orleans repealed its road use charge "for the year 1981 and for each year thereafter." 407 So. 2d at 1228 n.6 (citing NEW ORLEANS, LA., CODE ord. no. 7747 (1980)).

is important because it preserves the political option for proponents of new taxes. If they eventually can carry the day politically, they will not lose their political victory in the courts. The decision deserves praise because even though the license-taxation distinction on which the court relied is narrow and technical,[64] it is a distinction that has long been recognized in Louisiana,[65] as well as in other states.[66] Since the distinction antedates the adoption of the 1974 constitution, it seems reasonable to conclude that the drafters used the term "license fee" in its technical sense and, therefore, did not intend to proscribe all local taxes relating to motor vehicles.[67]

State v. Rollins Environmental Services of Louisiana, Inc.,[68] the other decision that reached the merits of a challenge to local government power, arose in the context of a criminal prosecution for keeping and burning offensive and injurious substances in violation of a parish code. The argument raised in *Rollins* was a claim of preemption by state law. To phrase the issue in the language of the 1974 constitution,[69] the *Rollins* plaintiffs claimed the state's adoption of a comprehensive statute covering hazardous wastes denied the local government the power to enforce its code. The trial court accepted the preemption argument and quashed the bills of information, but the Louisiana Supreme Court reversed and ruled that the record established for the motion to quash did not reveal any infringement on the state's regulatory authority over hazardous wastes.

The *Rollins* opinion began its analysis of the preemption issue by reaffirming a 1979 decision[70] that recognized the state's "exclusive

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64. In a suit involving the same parties, the court has given an analogously narrow and technical construction to the constitution's limits on the ad valorem taxes that local governments may impose. *See* ACORN v. City of New Orleans, 377 So. 2d 1206 (La. 1979). For an analysis of the first *ACORN* decision, see Murchison, *Developments, supra* note 52, at 499.

65. *See, e.g.*, Ewell v. Board of Supervisors, 234 La. 419, 100 So. 2d 221 (1958); Mouledoux v. Maestri, 197 La. 525, 2 So. 2d 11 (1941).

66. *See generally* O. REYNOLDS, *supra* note 19, at 324-25.

67. The language of section 5 authorizes the state to levy a "license tax," while forbidding any local government from imposing a "license fee." This language can obviously be interpreted in two ways: (1) the drafters of the constitution intended to forbid only local government exactions that are properly labeled as "fees," not those that are appropriately described as taxes; or (2) in restricting local power, the constitution used fees in a generic sense to encompass all mandatory payments (whether or not they would qualify as taxes). In light of this linquistic ambiguity, the court's decision to define the words "license fees" and "taxes" as they had been defined in prior judicial decisions seems eminently reasonable.

68. 398 So. 2d 1122 (La. 1981).

69. *See* LA. CONST. art. VI, §§ 5, 7. *See generally* Murchison, *Developments, supra* note 52, at 485-86.

70. Rollins Envtl. Serv. of La., Inc. v. Iberville Parish Police Jury, 371 So. 2d

jurisdiction over the regulation of hazardous wastes."[71] Nevertheless, the court refused to dismiss the charges in the case before it because the record failed to demonstrate that the local ordinance infringed on the state's regulatory authority. Although Rollins claimed that it was being prosecuted for keeping and burning hazardous wastes, it had offered no proof that the state had classified the substances at Rollins' disposal site as hazardous wastes[72] or that the noxious odors stemmed from hazardous wastes. Without such evidence, the supreme court ruled, the record contained no basis to support the trial court's quashing of the bills of information as an infringement on an area under the exclusive jurisdiction of the state.

The *Rollins* decision merits commendation. Although a fuller record may well support the trial judge's original decision to quash the bills, the supreme court was wise to defer its decision until it had an adequate basis for judgment. Granting persons who handle hazardous wastes a blanket exemption from parish regulations affecting solid wastes goes further than is necessary to preserve state control over hazardous wastes. For example, a hazardous waste facility also may handle wastes that have not been classified as hazardous. In such a situation, only a complete factual record will enable the court to know whether parish regulation of the nonhazardous wastes can be continued or whether the parish regulations would interfere with the state's regulation of hazardous wastes. In effect, demanding a complete record enables the court to fine tune the preemption doctrine. When enforcement of an ordinance would interfere with the state's regulatory scheme, the court can proscribe enforcement. But when enforcement of the ordinance would not interfere with the state program, the local ordinance can be enforced. Such a flexible approach is desirable because it meets the twin goals of the 1974 constitution: giving local governments wide leeway to handle local problems and preserving the supremacy of state law in cases of conflict.

TORT LIABILITY

The Responsible Governmental Entity

Confusion continues to shroud the question of what governmental entity will be held responsible for torts committed by deputy

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1127 (La. 1979). For critiques of the earlier *Rollins* decision, see Murchison, *Developments, supra* note 52, at 486-90; Murchison, *Recent Environmental Developments Affecting Louisiana Petroleum Operations*, 26 INST. ON MIN. L. 54, 76-84 (1980).

71. 398 So. 2d at 1123.

72. *Id.* (citing LA. R.S. 30:1133(2) (1979) (including within the definition of hazardous wastes only those substances that the Louisiana Department of Resources "identified and designated" as hazardous wastes)).

sheriffs.[73] Although a functional answer would impose liability on the sheriff's office,[74] that answer seemed foreclosed when Louisiana's courts faced the issue in the second half of the 1970s and recognized the long-standing American traditions declaring that the sheriff held a personal office and that the office was not a governmental entity.[75] Faced with this conceptual barrier to imposing liability on the sheriff's office and unwilling to impose personal liability on the sheriff, the Louisiana Supreme Court eventually ruled that the state, not the sheriff's office or the parish governing authority, was the governmental entity that should be treated as the deputy sheriff's "employer" in tort actions based on the alleged negligence of the deputy.[76]

The Louisiana Supreme Court's new rule rendered the state liable for all negligent acts committed by deputy sheriffs, even though the state had no effective means for controlling the conduct of the deputies. The legislature, however, acted quickly to change the judicial rule. A 1978 act[77] deleted the statutory provision limiting the sheriff's liability for the acts of his deputies to the amount of the bond furnished by the deputy[78] and added a new section to the Revised Statutes declaring that the state was not liable for the acts of deputy sheriffs.[79] Unfortunately, the 1978 legislation contained no express overruling of the alternate basis for the supreme court's holding that the sheriff was not liable for the torts of his deputies—the nonstatutory rule that the sheriff was liable only for the "official acts" of his

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73. The question of which governmental entity is responsible for the torts of a local official has arisen most frequently with respect to deputy sheriffs, but the issue also can arise in cases involving other state officers who serve within the boundaries of a single local government. *E.g.*, Hryhorchuk v. Smith, 390 So. 2d 497 (La. 1980) (constable); Mullins v. State, 387 So. 2d 1151 (La. 1980) (coroner); Cosenza v. Aetna Ins. Co., 341 So. 2d 1304 (La. App. 3d Cir. 1977) (clerk of city court); Honeycutt v. Town of Boyce, 341 So. 2d 327 (La. 1976) (town marshal). *See also* Murchison, *Work of the Louisiana Appellate Courts, supra* note 52, at 877 n.162.

74. *See* Foster v. Hampton, 352 So. 2d 197 (La. 1977).

75. *See* LA. CONST. art. V, § 27; Liberty Mut. Ins. Co. v. Grant Parish Sheriff's Dep't, 350 So. 2d 236, 238-39 (La. App. 3d Cir. 1977); 1 W. ANDERSON, A TREATISE ON THE LAW OF SHERIFFS, CORONERS, AND CONSTABLES WITH FORMS, §§ 6, 20, 42-44 (1941); W. HARLOW, DUTIES OF SHERIFFS AND CONSTABLES, §§ 1-3 (3d rev. ed. 1907).

76. In Foster v. Hampton, 352 So. 2d 197 (La. 1977), the court held that neither the sheriff nor the parish was liable for the torts of a deputy sheriff and suggested in dicta that the state would be liable. Two years later, the court converted the dicta on state liability into an express holding. Foster v. Hampton, 381 So. 2d 789 (La. 1980). For analyses of the two *Foster* decisions, see Murchison, *Developments, supra* note 52, at 518-19, 522-23; Murchison, *Work of the Louisiana Appellate Courts, supra* note 52, at 871-79.

77. 1978 La. Acts, No. 318.

78. *Id.*, § 1, *amending* LA. R.S. 33:1433 (Supp. 1972).

79. 1978 La. Acts, No. 318, § 2, *adding* LA. R.S. 42:1441.

deputy[80]—and its attempt to eliminate state liability was arguably inconsistent with the constitutional provision abrogating governmental immunity.[81]

During the 1981-82 term, the appellate courts of the state struggled to determine the impact of the 1978 act on the prior judicial ruling which made the state responsible for a deputy's torts. The general thrust of these opinions has been to bend legal doctrine to accommodate it to functional reality; that is, to find ways to hold the sheriff's office rather than the state liable for the actions of the sheriff's deputies.

The accommodation of legal doctrine to functional reality began with the Louisiana Supreme Court's decision in *Jenkins v. Jefferson Parish Sheriff's Office*,[82] a 1981 decision involving an accident that occurred after the effective date of the 1978 statute discussed above. After noting the "questionable constitutionality" of the statutory attempt to eliminate state liability,[83] a divided court held that the 1978 statute was at least partially effective. The statute rendered the sheriff

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80. *See* Foster v. Hampton, 352 So. 2d 197, 200-01 (1977) (approving prior decisions that held that the negligent operation of a motor vehicle is not an official act of a deputy).

81. LA. CONST. art. XII, § 10; *see* Murchison, *Work of the Louisiana Appellate Courts*, *supra* note 52, at 878.

82. 402 So. 2d 669 (La. 1981). Justice Blanche filed an opinion concurring in part and dissenting in part, while Justices Marcus and Watson both filed dissenting opinions.

Justice Blanche agreed with the majority that "Act No. 318 . . . sought to legislatively overrule" the judicial decisions recognizing the state as a deputy sheriff's employer, that "[t]his legislation left the way open for the imposition of respondeat superior liability on a sheriff for the delictual acts of his deputy," and that the plaintiff's allegations were sufficient to state a cause of action against the defendant sheriff. Nonetheless, he regarded a holding "that this sheriff was the employer of this deputy" premature, because the record contained no "evidence" to "prove an employment relationship," and he also wished to "pretermit a decision determining the source of funds" for satisfying any judgment until the issue was properly presented. 402 So. 2d at 673.

The dissenting justices objected to the majority's conclusion that the sheriff was liable for the torts of his deputies in his official capacity as sheriff. Justice Marcus's one-paragraph opinion argued for continued adherence to the "official act" doctrine that makes the sheriff "only responsible for acts and omissions of deputies when they are acting in performance of their official duties." *Id.* at 673 (citing Gray v. DeBretton, 192 La. 628, 188 So. 722 (1939)). Justice Watson's longer opinion focused more specifically on the 1978 Act and rejected the majority's conclusion that it imposed liability on the sheriff. In his view, the law simply removed certain limitations on the sheriff's liability; nothing in the Act's title or body made "sheriffs . . . employers of their deputies" or rendered them responsible for a deputy's torts. 402 So. 2d at 657 & n.9 (citing Murchison, *Work of the Louisiana Appellate Court*, *supra* note 52, at 877-78). As a result, he argued, the prior judicial rule that the sheriff was not the employer of his deputies applied.

83. 402 So. 2d at 670.

liable for the torts of his deputies, but only "in his official capacity as employer of [the deputies]."[84]

According to the majority opinion, two factors convinced the court to impose liability on the sheriff. First, the court reassessed the realities of the actual employment situation of deputies in light of modern tort law. On the basis of that reassessment, the court concluded that, notwithstanding prior decisions to the contrary, "[t]he reality of the situation is that there does exist an employment relationship between a sheriff and his deputies."[85] Second, the court relied on the 1978 Act, which "clearly indicated [the legislature's] intention that governmental responsibility for torts committed by a public employee should be placed on the public officer most closely related to the tortfeasor."[86] Since "neither the state nor the parish (the other logical entities on which liability might be imposed) exercises any significant control over sheriff's deputies," the *Jenkins* majority concluded that the sheriff was "the appropriate governmental entity on which to place responsibility for the torts of a deputy sheriff."[87]

The court hastened to preclude the possibility of a sheriff being held personally liable for the torts of his deputies.[88] Emphasizing that "the sheriff acts solely in his official capacity" in the employment relationship with his deputies,[89] the *Jenkins* court held that the sheriff's vicarious liability arising from that relationship also must be limited to his official capacity. "[H]e is liable only because he is sheriff and is only liable to the extent that he holds that office. He is not liable personally, and his personal funds and property cannot be subjected to execution of a judgment decreeing that liability."[90] Explicitly

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84. *Id.* at 669.

85. *Id.* at 671. The court's summary of the employment relationship is quoted below:

> The sheriff, and not the state, hires and fires deputies, exercises direct and indirect supervision and control over them, fixes their time and place of work, and generally allocates their responsibility and assigns their duties. Although the money for the operation of the various sheriffs' departments may come from various sources of public funds (primarily fees as tax collector and in civil and criminal matters), the sheriffs disburse the allocated funds and actually pay most of the salaries of the deputies with these funds. No one but the sheriff can realistically be viewed as the employer of the deputies.

Id.

86. *Id.*

87. *Id.*

88. Traditionally, a sheriff's liability always has been regarded as personal. *See* Murchison, *Work of the Louisiana Appellate Courts, supra* note 52, at 871-72.

89. 402 So. 2d at 671.

90. *Id.* (footnote omitted). In the deleted footnote, the court emphasized that *Jenkins* did "not involve the sheriff's liability for his own negligence, as might occur, for example, when the sheriff sends a deputy out on patrol in a motor vehicle when the sheriff actually knew that the deputy was intoxicated." *Id.* at 671 n.3. In such a case,

recognizing that this approach presented practical problems of enforcement,[91] the *Jenkins* opinion concluded with a plea for "[a]n overall legislative plan of action . . . to resolve the problem of which governmental entity is responsible in this type case so that the appropriate entity may set aside funds to cover that responsibility with liability insurance."[92]

The conceptual basis of *Jenkins* is its *sub silentio* redefinition of the "sheriff" as a "governmental entity,"[93] rather than the holder of a public office whose benefits and burdens are personal in nature.[94] In functional terms (if not in legal theory),[95] *Jenkins* overrules prior precedents holding that the "office of the sheriff" is not an entity capable of being sued,[96] for no practical distinction exists between suing the "office" and suing the "sheriff" but limiting enforcement of any judgments to the public funds that the sheriff controls in his public capacity.

The various decisions in the courts of appeal[97] were consistent with the *Jenkins* approach in that they sought to impose liability upon the sheriff's office rather than the state. For example, the first circuit held that since the state's liability as employer was derivative, the state was entitled to indemnification from the deputy and from any insurer whose policy covered his actions.[98] Now that *Jenkins* has concluded that "the realities of the employment situation" require recognition of the sheriff as the deputy's employer, the state may be able to get indemnity from the sheriff as well.[99]

The third circuit has gone even further than the supreme court

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the sheriff would remain personally liable. For a case containing such allegations of personal negligence, see Nolen v. State, 377 So. 2d 586 (La. App. 3d Cir. 1979), *criticized in* Murchison, *Developments*, *supra* note 52, at 519-20, 523-24.

91. 402 So. 2d at 671-72.

92. *Id.* at 672 & n.6 (citing Murchison, *Work of the Louisiana Appellate Courts*, *supra* note 52, at 878).

93. 402 So. 2d at 671.

94. See note 75, *supra*.

95. The court did not consider whether the "Jefferson Parish Sheriff's Office" was a proper defendant because the plaintiff did not challenge the dismissal of his suit against that office. 402 So. 2d at 669 n.1.

96. *See* Liberty Mut. Ins. Co. v. Grant Parish Sheriff's Dep't, 350 So. 2d 236, 238-39 (La. App. 3d Cir. 1977).

97. In addition to the cases discussed in the text, the first circuit held that the state was a deputy's employer under the worker's compensation law, Phillips v. State, 400 So. 2d 1091 (La. App. 1st Cir. 1981), and the fourth circuit ruled that the city of New Orleans was not liable for an injury caused by an Orleans Parish deputy sheriff, Johnson v. Doe, 410 So. 2d 365 (La. App. 4th Cir. 1982).

98. Phillips v. State, 400 So. 2d 1091 (La. App. 1st Cir. 1981). Presumably, any indemnity judgment against the sheriff would make him liable only in his official capacity.

99. 402 So. 2d at 671.

in two opinions upholding the constitutionality of the 1978 statute's elimination of state liability for the torts of deputy sheriffs. *Martinez v. Reynolds*,[100] which was issued before the supreme court's decision in *Jenkins*, is the more comprehensive of the two opinions. *Martinez* upheld the statute as an exercise of the "valid legislative function" of regulating "causes of action, including replacement and even abolition of causes of action that one person may have against another for personal injuries."[101] Since the 1978 statute also removed "the former limitations on the liability of sheriffs," the legislature had provided "an adequate remedy" and merely was compelling persons injured by deputies "to seek . . . relief from the parties who were in the best position to prevent such injuries."[102] After the supreme court decision in *Jenkins*, the third circuit reaffirmed its *Martinez* holding as consistent with the intervening supreme court opinion. The new opinion in *Sullivan v. Quick*,[103] however, did not reanalyze the issue in any detail; it simply relied on the authority of its own precedent and that of the supreme court.

Since the third circuit's decisions in *Martinez* and *Sullivan* conflict with an earlier decision of the fourth circuit on the constitutional issue,[104] the question remains unsettled. But, even though the supreme court's *Jenkins* opinion noted "the questionable constitutionality" of the attempt to eliminate state liability,[105] that opinion's rationale for imposing liability on the sheriff in his official capacity may also provide the basis for upholding the statute as constitutional. To the extent that the supreme court adheres to its declaration in *Jenkins* that the sheriff "is a governmental entity,"[106] the legislative provision does not seem to conflict with the constitutional provision abolishing governmental immunity. If the sheriff is a governmental entity, the state will not have eliminated the plaintiff's cause of action against the government but merely will have changed which governmental entity is liable for those damages.[107] On the other hand, if the Louisiana Supreme Court retreats from the *Jenkins* language to the traditional position that the sheriff's office is personal in nature, the 1978 statute

100. 398 So. 2d 156 (La. App. 3d Cir. 1981).

101. *Id.* at 160.

102. *Id.*

103. 406 So. 2d 284 (La. App. 3d Cir. 1981).

104. Carmouche v. Oubre, 394 So. 2d 805 (La. App. 4th Cir. 1981).

105. 402 So. 2d at 670. The third circuit's opinion in *Sullivan* made no reference to this language in *Jenkins*.

106. 402 So. 2d at 671.

107. In light of the Louisiana Supreme Court's reluctance to provide an effective means of enforcing judgments against governmental defendants, see notes 133-45 *infra*, and accompanying text, one might argue that the substitution of the sheriff for the state was impermissible because it reduced the likelihood that the plaintiff would be able to collect a large judgment.

is probably unconstitutional because it eliminates all governmental liability for torts committed by a deputy.[108]

The "questionable constitutionality"[109] of the 1978 statute serves to reiterate what has been apparent since the supreme court's initial decision making the state liable for the torts of deputies: what is really needed is a comprehensive legislative enactment to settle the liability issue.[110] Without such a legislative solution, the courts may modify existing doctrines to eliminate the most illogical of the current liability provisions. However, they are unlikely to devise a system that imposes liability on the proper governmental body and also guarantees injured persons a cause of action against a solvent defendant.[111] Legislative action almost certainly is required to achieve both of these goals.[112]

Liability Under Article 2317

Article 2317 of the Civil Code[113] renders a defendant liable for damages caused by things under his control. To establish a cause of action under 2317, a plaintiff must prove the following: the defendant had custody of the thing causing the injury, the thing was defective, and the defect caused the plaintiff's injury. Once these elements are established, the defendant can escape liability only if he can demonstrate affirmatively that the victim's fault, the fault of a third person, or an irresistible force should be regarded as the legal cause of the plaintiff's injury.[114]

In 1980, the Louisiana Supreme Court refused to create a governmental exception to article 2317.[115] The predictable response has been a spate of decisions as the courts of appeal try to define the extent

108. *See* Murchison, *Work of the Louisiana Appellate Courts, supra* note 52, at 878.

109. 402 So. 2d at 670.

110. *Accord id.* at 672 & n.6 (citing Murchison, *Work of the Louisiana Appellate Courts, supra* note 52, at 878).

111. Thus far, Louisiana's appellate courts have failed to develop an adequate method for enforcing judgments against governmental defendants. See notes 133-45 *infra*, and accompanying text.

112. For a suggestion as to one method for structuring a legislative solution, see Murchison, *Work of the Louisiana Appellate Courts, supra* note 52, at 878-79.

113. Article 2317 provides in pertinent part: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of things which we have in our custody."

114. Loescher v. Parr, 324 So. 2d 441 (La. 1975); *see also* Rodrique v. Dixilyn Corp., 620 F.2d 537 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). For an excellent article criticizing the recent decisions interpreting article 2317, see Malone, *Ruminations on Liability for the Acts of Things*, 42 LA. L. REV. 979 (1982).

115. Jones v. City of Baton Rouge, 388 So. 2d 737, 740 (La. 1980); *see also* Shipp v. City of Alexandria, 395 So. 2d 727, 729 (La. 1981). The *Jones* and *Shipp* cases are discussed in Murchison, *supra* note 19, at 588-92.

of this new liability. The opinions of the past year collectively have tended to limit local government liability under article 2317[116] by emphasizing the requirement that the governmental entity have custody of the thing causing harm, by defining as defective only things that produce an unreasonable risk of harm, and by holding actions of the plaintiff or third parties sufficient to supplant the defective thing as the legal cause of the plaintiff's injury.

McNeal v. Division of State Police[117] involved a traffic accident resulting from brake failure in a truck. Prior to the accident, the driver had reported the defective brakes to a city police officer, but the officer allowed the truck to be driven to state police headquarters. The plaintiffs argued that this action rendered the city liable under article 2317.[118] The first circuit, however, rejected this argument on the ground that custody was a prerequisite to liability under article 2317. Since the city did not have custody over the truck when the accident occurred, the first element of an article 2317 claim was lacking, and the court declared itself unwilling to expand the article to reach"cases in which a thing is not in one's custody, when the court feels it should be in one's custody."[119]

The Louisiana Supreme Court has held that a thing is defective within the meaning of article 2317 only if it presents an unreasonable risk of harm and that the unreasonableness issue is resolved by balancing the probability and magnitude of the risk against the utility of the thing.[120] During the 1981-82 term, the courts of appeal applied this

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116. In addition to the cases discussed in the text, see Garrison v. State, 401 So. 2d 528 (La. App. 2d Cir. 1981) (city's maintenance agreement with the state did not render it responsible for damages caused by a malfunctioning traffic light).

117. 412 So. 2d 1123 (La. App. 1st Cir.), *writ denied*, 414 So. 2d 1252 (La. 1982).

118. The plaintiff also argued that the city was liable for the officer's negligence in permitting the truck to remain on the highway. The court, however, ruled that any negligence on the part of the police officer was "too remote from the accident . . . to constitute an actionable cause of the accident" and offered the following factual summary to support this conclusion.

> After [the driver of the truck] left [the police officer], Gates drove the truck down the Airline Highway to a point opposite Troop A headquarters; he was permitted by the State Police to make a U-turn on Airline Highway to enter the Troop A parking lot; the brakes were inspected and found to be faulty; the State Police made no physical restraint upon the use of the vehicle, and Gates entered Airline Highway and proceeded down the same until the accident occurred. These acts and omissions replace any negligence of the City Police as the cause of the accident.

Id. at 1126.

119. *Id.* at 1128. *Cf.* Hall v. City of New Orleans, 400 So. 2d 265 (La. App. 4th Cir. 1981) (city properly dismissed where evidence revealed that thing causing the injury was in the custody of the Sewerage and Water Board).

120. *See* Kent v. Gulf States Utils. Co., 418 So. 2d 493 (La. 1982); Hunt v. City Stores, Inc., 387 So. 2d 585, 588 (La. 1980).

unreasonableness standard in a variety of circumstances, and the results they reached seem fairly consistent. When the thing causing the injury was poorly designed[121] or maintained,[122] the courts of appeal held the local government liable. On the other hand, when the injury occurred as the result of contact with a prudently designed and maintained public improvement, the courts of appeal ruled that any risk of harm was reasonable, precluding liability under article 2317.[123] As a practical matter, the cases seem to be using the defect issue to reestablish a negligence-type standard that will hold local governments liable under article 2317 only when they have failed to take all reasonable steps to minimize the dangers associated with carrying out their essential responsibilities.[124]

The fourth circuit proved willing in the past year to limit the reach of article 2317 further by treating the plaintiff's negligence or the actions of third persons as precluding liability under article 2317. In three decisions, the court held that the fault of the victim[125] or a third party[126] was sufficient to break the chain of causation between the defective thing and the plaintiff's injury. In essence, these opinions turned on the question of proximate cause. Although the defective thing remained a "but for" cause of the plaintiff's injury, the court judged the plaintiff's own negligence as sufficiently independent of the defect to justify regarding it as the sole legal cause of the accident.

A slightly different defense was urged successfully in *Swain v. Sewerage & Water Board*,[127] where the plaintiff was injured when she

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121. Bacile v. Parish of Jefferson, 411 So. 2d 1088 (La. App. 4th Cir. 1981), *writ denied*, 415 So. 2d 950 (La. 1982) (drainage grate into which a normal-sized, eleven-year-old child could fall up to her knees); *cf.* McCoy v. Franklin Parish Police Jury, 414 So. 2d 1369 (La. App. 2d Cir. 1982) (no sign at intersection).

122. Hall v. City of New Orleans, 400 So. 2d 265 (La. App. 4th Cir. 1981) (cracked drain cover for sewer catch basin).

123. Alexander v. Rapides Parish Police Jury, 415 So. 2d 607 (La. App. 3d Cir. 1982); McLeod v. Parish of East Baton Rouge, 414 So. 2d 1341, 1345 (La. App. 1st Cir. 1982); Greenhouse v. Great Southwest Fire Ins. Co., 413 So. 2d 352 (La. App. 3d Cir. 1982); Goodlow v. City of Alexandria, 407 So. 2d 1305, 1308-09 (La. App. 3d Cir. 1981).

124. The plaintiff does gain one procedural advantage of considerable significance under article 2317. He does not have to prove that the defendant knew or should have known of the defect. *See* Kent v. Gulf States Utils. Co., 418 So. 2d 493 (La. 1982); Jones v. City of Baton Rouge, 388 So. 2d 737, 739-40 (La. 1980).

125. Carpenter v. State Farm Fire & Cas. Co., 411 So. 2d 1206 (La. App. 4th Cir.), *writ denied*, 415 So. 2d 951 (La. 1982); Orazio v. Durel, 407 So. 2d 75 (La. App. 4th Cir. 1981).

126. Tappel v. Vidros, 407 So. 2d 789 (La. App. 4th Cir. 1981). *But see* Robertson v. Parish of East Baton Rouge, 415 So. 2d 365 (La. App. 1st Cir. 1982) (negligence of third party whose actions were conducted with the permission of the custodian did not preclude liability under article 2317).

127. 413 So. 2d 233 (La. App. 4th Cir. 1982).

fell into an uncovered water meter box. Although the defendant had custody of the meter box and the missing cover made it a defective thing, the board escaped liability under article 2317 because the defect was the fault of third parties (*i.e.*, children in the area who had removed the cover). Here the issue was one of responsibility rather than causation. The defective thing remained the cause of the accident, but the court held that the custodian should not have been held responsible for damages from a defect that was created by third persons.

The decisions of the past year reflect an increasing tendency of the Louisiana courts to blur the distinction between the traditional negligence theory and the "strict" liability imposed by article 2317.[128] But despite this tendency, one still can identify several differences between the two theories that may prove significant in lawsuits against local governments. First, article 2317 applies only when the local government has custody over the thing causing injury, while the negligence theory imposes no such prerequisite. Second, article 2317 eliminates the need for the traditional requirement[129] that the plaintiff prove either that the defendant knew of the defect or that he could have known of the defect if he had exercised reasonable care. Third, several decisions have recognized the "fault" of the victim or a third party as a complete bar to liability under 2317,[130] even though the Louisiana Civil Code's comparative negligence article[131] now applies to negligence claims. Fourth, a defendant still may be held liable under a negligence theory, even though a third party was responsible for the defective thing that caused the plaintiff's injury, if the local government negligently failed to discover and to correct the defect.[132] Because of these distinctions, proper analysis of tort cases against local governments still requires careful attention to the theoretical basis of the plaintiff's claim.

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128. *See generally* Kent v. Gulf States Utils. Co., 418 So. 2d 493 (La. 1982).

129. *See, e.g.*, Jones v. City of Baton Rouge, 388 So. 2d 737, 739-40 (La. 1980); Pickens v. St. Tammany Parish Police Jury, 323 So. 2d 430 (La. 1975). A recent decision of the supreme court in a lawsuit that did not involve a governmental defendant has emphasized this distinction as the most important difference between article 2317 and liability based on the defendant's negligence. Kent v. Gulf States Utils. Co., 418 So. 2d 493 (La. 1982).

130. Carpenter v. State Farm Fire & Cas. Co., 411 So. 2d 1206 (La. App. 4th Cir.), *writ denied*, 415 So. 2d 951 (La. 1982); Tappel v. Vidros, 407 So. 2d 789 (La. App. 4th Cir. 1981); Orazio v. Durel, 407 So. 2d 75 (La. App. 4th Cir. 1981). *But see* Dorry v. LaFleur, 399 So. 2d 559 (La. 1981) (whether contributory negligence of the victim will preclude liability under article 2317 must be decided on a case-by-case basis).

131. LA. CIV. CODE art. 2323. The supreme court has not yet addressed the issue of whether the comparative negligence statute can be applied in a 2317 action. *See generally* Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403 (1980).

132. *See* Swain v. Sewerage & Water Bd., 413 So. 2d 233 (La. App. 4th Cir. 1982).

Enforcement of Judgments

One factor that diminishes the impact of the recent decisions expanding the tort liability of local governments is the lack of a method to force a governmental defendant to pay judgments that are rendered against it. The 1974 constitution immunizes public property and public funds from seizures and provides that judgments against local governments shall not be paid "except from funds appropriated . . . by the . . . political subdivision against which the judgment is rendered."[133] In *Foreman v. Vermilion Parish Police Jury*,[134] the third circuit held that these provisions precluded execution of a tort judgment against any property owned by the parish, and the supreme court denied writs. As a practical matter, *Foreman* seemed to leave the successful tort plaintiff at the mercy of the governmental entity that was his adversary.

The Louisiana Supreme Court's decision in *Fontenot v. State Department of Highways*,[135] rendered in the year following the *Foreman* decision, hinted that the court might devise some method for enforcing judgments against local governments, perhaps by writ of mandamus.[136] The precise issue in *Fontenot* was whether a successful tort plaintiff could force a police jury to submit to a judgment debtor examination, and the supreme court ruled that the police jury had to submit. Although the court disclaimed any intent to decide whether the plaintiff had any right to execute his judgment,[137] one hardly would

133. LA. CONST. art. XII, § 10(c):

> The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

134. 336 So. 2d 986 (La. App. 3d Cir.), *writ denied*, 339 So. 2d 846 (La. 1976). For analyses of the *Foreman* opinion, see Murchison, *supra* note 16, at 475-76 and Note, *Enforcement of Judgments Against Governmental Entities: The New Sovereign Immunity*, 37 LA. L. REV. 982 (1977).

135. 355 So. 2d 1324 (La. 1978). For an analysis of the *Fontenot* opinion, see Murchison, *Work of the Louisiana Appellate Courts*, *supra* note 52, at 869-71.

136. The first circuit opinion refusing to order the judgment debtor examination had rejected the argument that mandamus was available. *See* Fontenot v. State Dep't of Highways, 358 So. 2d 981, 982 (La. App. 1st Cir.), *rev'd*, 355 So. 2d 1324 (La. 1978). The precedents on the mandamus issue may be somewhat more equivocal than the first circuit's *Fontenot* opinion suggests. *See* Murchison, *Work of the Louisiana Appellate Courts*, *supra* note 52, at 870 n.126; *cf.* Penalber v. Blount, 407 So. 2d 1189 (La. 1981) (Lemmon, J., concurring in denial of writ) ("The hackneyed expression that mandamus doesn't lie to compel performance of a ministerial duty does not address the visceral problem.").

137. 355 So. 2d 1325 ("[T]his order is not intended to affect proceedings beyond the judgment debtor examination.").

have expected the court to order the examination if its results could not benefit the plaintiff.

During the 1981-82 term, decisions of both the first and fourth circuits rejected creditors' attempts to enforce their judgments against local governments. In *Penalber v. Blount*,[138] the police jury voted to pay the plaintiff's judgment but then rescinded its resolution twelve days later.[139] The first circuit affirmed the trial court's denial of a writ of mandamus in a single sentence asserting that "appropriation of funds by a public body is a discretionary, not ministerial duty, and cannot be compelled by a writ of mandamus."[140] The fourth circuit's opinion in *De Laureal Engineers, Inc. v. St. Charles Parish Police Jury*[141] contained a somewhat longer analysis but reached the same result. "[A]ppropriation of funds is discretionary and not ministerial, and mandamus will not lie to compel payment of a judgment by a police jury."[142]

The Louisiana Supreme Court's denial of writs in *Penalber* and *De Laureal* suggests that the legislative arena will now be the focus of attempts to provide an effective means for enforcing judgments against governmental defendants. Although individual judges have suggested[143] that the fourteenth amendment's guarantees of equal protection and due process[144] might provide a means for compelling payments, the likelihood of obtaining such relief seems minimal. Unless a local government discriminates on racial or similar grounds, the federal courts will give the governmental decision only limited scrutiny to determine if it bears a rational relationship to a permissible governmental objective.[145] Since the decision not to pay always will be related

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138. 405 So. 2d 1378 (La. App. 1st Cir.), *writ denied*, 407 So. 2d 1189 (La. 1981).

139. The court of appeal also rejected the factual claim that the police jury had entered into a valid settlement agreement with the plaintiff. 405 So. 2d at 1379. The court, however, did not offer any explanation as to how a settlement agreement would confer any greater rights than a tort judgment.

140. *Id.* (citing Fontenot v. Department of Highways, 358 So. 2d 981 (La. App. 1st Cir. 1978)). The court failed to note that the Louisiana Supreme Court had overruled the *Fontenot* decision on other grounds. *See* 355 So. 2d at 1324. The reason for this omission may be the faulty references in the reports of the *Fontenot* decision. *See* Murchison, *Work of the Louisiana Appellate Courts, supra* note 52, at 870 n.123.

141. 406 So. 2d 770 (La. App. 4th Cir. 1981), *writ denied*, 410 So. 2d 758 (La. 1982).

142. 406 So. 2d at 772.

143. De Laureal Eng'rs, Inc. v. St. Charles Parish Police Jury, 410 So. 2d 758, 759 (La. 1982) (Dennis, J., concurring in denial of writ); Foreman v. Vermilion Parish Police Jury, 336 So. 2d 986, 989-90 (La. App. 3d Cir.), *writ denied*, 339 So. 2d 846 (La. 1976) (Miller, J., concurring); *see* Hargrave, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Louisiana Constitutional Law*, 39 LA. L. REV. 807, 819 (1979).

144. U.S. CONST. amend. XIV, § 1; *see also* LA. CONST. art. I, §§ 2, 3.

145. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). One form of discrimination—paying

to the valid objective of conserving governmental resources, the chances of obtaining judicial relief on an equal protection or due due process claim are slim.

Ironically, the failure of the courts to develop an effective means for enforcing judgments may provide the catalyst for passage of a comprehensive tort claims act applicable to local governments. If recent decisions expanding liability have worked as great a financial hardship on local governments as local officials claim, one can anticipate that at least some local governments will refuse, or fail, to pay judgments rendered against them. To the extent that this practice becomes commonplace, the plaintiff's bar and its political allies may compromise with local governments on a tort statute that modifies some liability rules but also provides a viable method of collection. Until that time, however, tort plaintiffs who prevail in their lawsuits apparently will remain dependent on the good faith of their government debtors.

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the claims of residents of the local government area but refusing to pay the claims of nonresidents—might be invalidated under the equal protection clause as an impermissible restriction on the constitutionally protected right to travel.