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Louisiana Constitutional Law

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During the past two terms,[1] the Louisiana appellate courts have issued a number of decisions interpreting a variety of Louisiana constitutional provisions. Two themes, however, are pervasive. One is substantive, comprising the courts' continuing effort to define the talismanic concept of constitutional "privacy" in all of its manifestations: the right to be free from unreasonable searches and seizures,[2] the right to avoid collection and disclosure of personal information ("disclosural" privacy),[3] and the right to make certain choices about one's personal or family life ("autonomy" privacy).[4] The other theme is methodological; it involves the ongoing debate within the Louisiana Supreme Court regarding the relation between the federal and state constitutions,[5] and the limits which the state constitution places on the state legislature.[6]

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1. Since no discussion of Louisiana Constitutional Law was included in the last "Developments" issue, this article will consider decisions of both the 1991-1992 and 1992-1993 terms.

2. *See, e.g.*, State v. Tucker, 626 So. 2d 707 (La.), *aff'd*, 626 So. 2d 720 (1993), discussed *infra* at notes 52-73.

3. See discussion *infra* at note 126.

4. *See* State v. Perry, 610 So. 2d 746 (La. 1992), discussed *infra* at notes 7-47; Sudwischer v. Estate of Hoffpaiur, 589 So. 2d 474 (La. 1991), *cert. denied*, 112 S. Ct. 1937 (1992), discussed *infra* at notes 93-122. *See also infra* notes 87-88 & 123-128 discussing other applications of this concept to problems of criminal procedure and individual rights, respectively.

5. *Compare Perry*, 610 So. 2d 746 (La. 1992), in which the Louisiana Supreme Court ringingly declared its adherence to the principles of the "new judicial federalism," holding that where an appeal raises both federal and state constitutional issues, Louisiana courts should resolve the state constitutional issues first and reaffirming that interpretation of state constitutional rights should be independent from interpretation of cognate federal constitutional rights by federal courts, *with Tucker*, 626 So. 2d 707, *aff'd*, 626 So. 2d 720 (La. 1993), in which the same court, during the same term, appeared to abandon these principles, reinterpreting the definition of "seizure" under the Louisiana constitution so as to mimic recent changes in federal interpretation of the federal Constitution, rather than follow its own independent state-based precedents. These cases are discussed *infra* at notes 7-47 and 52-73, respectively, and accompanying text.

6. *Compare* Polk v. Edwards, 626 So. 2d 1128 (La. 1993), in which the state supreme court held, in effect, that the state constitutional provision which directs the legislature to "suppress" gambling did not place significant limits on that body's discretion regarding the extent to which gambling should be permitted, *with* Succession of Lauga, 624 So. 2d 1156 (La. 1993), holding that the state constitution precluded the legislature from radically modifying the rules of forced heirship—even though the constitution expressly gave the legislature power to determine who is a forced heir and what that heir's forced portion will be. These cases are discussed *infra* at notes 144-195 and accompanying text.

I. CRIMINAL PROCEDURE AND PRISONERS' RIGHTS

A. State v. Perry: *Of Insanity, Forced Medication, and the Primacy of the State Constitution*

The specific issue decided by the Louisiana Supreme Court in State v. Perry[7]—whether the Louisiana Constitution permits authorities to forcibly administer antipsychotic drugs to an insane prisoner under a sentence of death, and then to execute him while he is under the influence of those drugs—is a narrow one, unlikely to be often repeated.[8] Nonetheless, the case represents an important step in the Louisiana Supreme Court's ongoing relationship with its federal counterpart, and a significant milestone in the interpretation of the state constitution's guarantees of privacy and humane treatment of prisoners.

In 1983, Michael Perry stood trial for the murder of his parents and several other relatives. Despite a history of mental problems, the trial court found him competent to stand trial.[9] He was convicted on five counts of murder and sentenced to death. On appeal, the Louisiana Supreme Court affirmed his conviction, but indicated that further review of Perry's competency to be executed "might be in order."[10] Thereafter, the trial court convened a sanity commission and conducted hearings on that issue. The experts testified, and the trial court found, that Perry suffered from an incurable schizo-affective disorder "that causes his days to be a series of hallucinations, delusional and disordered thinking, incoherent speech, and manic behavior,"[11] but that these symptoms could be ameliorated by medication.[12] The trial court concluded that Perry was competent for execution only while he was taking that medication. It ordered

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7. 610 So. 2d 746 (La. 1992). A more detailed consideration of this case, and its implications, will be the subject of a student Note, which is currently scheduled to be published in a future issue of this Review.

8. Since a criminal defendant must be adjudged mentally "competent" in order to stand trial and be sentenced in the first instance, these problems ought only arise with respect to the presumably small number of death row inmates who were competent at the time of trial, but who become incompetent before sentence is carried out. Moreover, problems of forcible medication in order to execute will only arise if the condemned prisoner's insanity is of a type that responds to medication.

9. *Perry*, 610 So. 2d at 748. As the court noted, Perry was initially diagnosed as schizophrenic at the age of 16, twelve years before the murders. He was committed to mental institutions several times during the intervening years because of psychotic symptoms. The issue of Perry's competence to stand trial was raised at the outset of the criminal proceedings against him. The initial sanity commission, appointed by Judge Hymel, recommended that Perry be transferred to a state mental facility for evaluation. He was diagnosed as suffering from paranoid schizophrenia and treated with Haldol and other anti-psychotic drugs. Eighteen months later, Judge Hymel appointed a second sanity commission, which found that Perry was competent to stand trial. Over the objection of Perry's trial counsel, Perry was permitted to withdraw his initial plea of "not guilty by reason of insanity" and went to trial on a simple plea of "not guilty."

10. State v. Perry, 502 So. 2d 543, 564 (1986).

11. *Perry*, 610 So. 2d at 748.

12. The primary medicine prescribed was Haldol. *Id.* at 747.

that he be kept on medication, by force if necessary, and that the execution proceed. The Louisiana Supreme Court denied Perry's application for writs and dismissed his appeal.[13]

But the case did not end there. The United States Supreme Court granted Perry's application for certiorari.[14] After briefing and argument, the Court remanded for reconsideration in light of its then-recent decision in *Washington v. Harper*,[15] which permitted involuntary administration of anti-psychotic drugs to convicted mentally ill prisoners, where the prison authorities found those drugs necessary in order to avoid danger to prison staff or to other inmates.[16] After reconsideration, without additional evidence, the trial court in *Perry* reinstated its original order. Once again, Perry appealed. This time, the Louisiana Supreme Court granted writs[17] and reversed the trial court's order.

Justice Dennis' opinion for the *Perry* majority began by reiterating the familiar rule that a prisoner convicted of a capital offense cannot be executed unless he is mentally competent.[18] Though its origin and purposes are ob-

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13. State v. Perry, 543 So. 2d 487 (1989); State v. Perry, 543 So. 2d 487 (1989) (Dixon, C.J. and Calogero and Dennis JJ., dissenting as to the denial of writs).

14. Perry v. Louisiana, 494 U.S. 1015-16, 110 S. Ct. 1317 (1990).

15. 494 U.S. 210, 110 S. Ct. 1028 (1990).

16. *Id.* at 222-36. Harper's challenge was based wholly on the federal Constitution and had both substantive and procedural aspects. Harper's substantive claim was that he had a right, based in concepts of "autonomy" privacy which the Court had recognized in cases ranging from Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965) to Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 110 S. Ct. 2841 (1990), to refuse the medication, and that such right could not be overridden absent a showing that involuntary medication was closely related to a sufficiently important state interest. With Chief Justice Rehnquist writing for a five-judge majority, the Court held, in essence, that all federal constitutional rights of inmates, even those deemed "fundamental," can be overridden whenever the prison authorities meet the relatively low threshold of showing that the override is "reasonably related to legitimate penological interests." *Harper*, 494 U.S. at 223, 110 S. Ct. at 1037. Applying this principle, the Court held that the state has a legitimate interest in securing the safety of prison inmates and staff, and that the prison's drug treatment policy was rationally related to that goal of prison safety. *Id.* at 222-27, 110 S. Ct. at 1037-40. With respect to Harper's purely procedural claims, the majority concluded that Perry had a protected "liberty" interest to refuse medication but held that the procedures provided, even though they did not provide for representation by an attorney or for judicial review of the institution's decision to forcibly medicate an inmate, gave inmates a federally constitutionally sufficient opportunity to contest the necessity of that medication. *Id.* at 228-36, 110 S. Ct. 1040-44. Justices Stevens, Brennan and Marshall, dissenting in part, argued that the majority had undervalued the federal constitutional issues at stake. *Id.* at 237-38, 110 S. Ct. at 1045.

17. State v. Perry, 584 So. 2d 1145 (La. 1991).

18. State v. Perry, 610 So. 2d 746, 749-50 (La. 1992). The majority did not define the precise degree of mental competence required for execution since Perry, unmedicated, was clearly incompetent under any reasonable definition of the term. Justice Marcus, dissenting, argued for adoption of the two-pronged standard for competence for execution previously articulated by Justice Powell in the context of federal law—that a condemned prisoner cannot be executed absent "the ability of one to understand the death penalty and the reason one is to suffer that penalty"—as the standard to govern mental capacity to undergo execution in this state. *Id.* at 774 (citing Ford v. Wainwright, 477 U.S. 399, 420, 106 S. Ct. 2595, 2607 (1986) (Powell, J., concurring)). This

scure,[19] this prohibition has long been, and remains, an unchallenged postulate of both federal[20] and Louisiana[21] jurisprudence. The question thus became whether Perry could be forcibly medicated and then—after the medication took effect and he achieved the requisite degree of competence—executed. To resolve these issues, the court began by clearing the conceptual decks: reaffirming that state courts should, where possible, resolve cases on state rather than federal constitutional bases[22] and distinguishing *Harper*, primarily on the ground that medication for the purpose of readying an inmate for execution was not in the inmate's "best interests" and therefore could not be considered "medical treatment" as that term was used in *Harper*.[23] Considering the case as one of

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standard, if adopted, would constitute a lower threshold of capacity than is required in Louisiana to demonstrate an accused's competence to stand trial. *Compare* State v. Bennett, 345 So. 2d 1129, 1136-37 (La. 1977) (on rehearing), holding that when any mental defect is "so severe as to impair a defendant's capacity to understand the object, nature and consequences of the proceedings against him, to consult with counsel in a meaningful way, and to assist rationally in his defense, that defendant is, within the contemplation of our law, incompetent to stand trial."

19. As Justice Dennis noted, the traditional common law prohibition against executing the insane appears to be rooted in multiple moral, ethical, and theological considerations—including concerns that a person unable to make arguments on his own behalf might, for that reason, be wrongly executed, that it is mere cruelty to execute one who is not responsible for his actions nor able to understand what is happening to him, and that it is "uncharitable" to kill a person who his unable to make his peace with his maker. *Perry*, 610 So. 2d at 749. Put in more modern terms, it could be argued that executing the insane serves neither "deterrence" nor "retribution" functions. The insane cannot be deterred, and execution of an incompetent arguably lacks the quality of moral equivalence necessary to offset the initial murder. *Id. See generally* Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State and the Insane: Stay of Execution*, 9 UCLA L. Rev. 381 (1962); Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 La. L. Rev. 995 (1991).

20. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986), holding that execution of an insane prisoner would violate the Eighth Amendment's prohibition against cruel and unusual punishment.

21. *See, e.g.*, State v. Parker, 80 So. 2d 863 (La. 1955); State v. Allen, 204 La. 514, 15 So. 2d 870 (1943); State ex rel. Paine v. Potts, 49 La. Ann. 1500, 22 So. 738 (1897). Although the prohibition against executing the insane clearly predates the present Louisiana Declaration of Rights, the *Perry* court explicitly rooted this prohibition in La. Const. art. I, § 20, which extends beyond the federal Eighth Amendment to prohibit euthanasia and torture, as well as cruel, excessive, or unusual punishments. *Perry*, 610 So. 2d at 750.

22. *Id.* at 750-51.

23. *Id.* at 751-55. In support of the distinction, the majority noted that the program of forcible medication approved in that case was initiated by physicians and found to be in the prisoner's own best medical interests, as well as required for reasons of institutional safety. In contrast, the program of forcible medication at issue in *Perry* was initiated by the prosecutorial arm of the state and, since it would ultimately result in the patient's execution, not in his best interests, medical or otherwise. Moreover, the majority found that while the forcible medication approved in *Harper* was compatible with standard medical ethics, a physician would be placed in an impossible ethical position if he knew, as here, that the medication he was forcing on an inmate would proximately result in that inmate's death. For all these reasons, the court concluded that the forcible medication at issue in *Perry* simply did not constitute "medical treatment" of the sort authorized by *Harper*, but was rather an integral part of the process of execution, engaged in solely for the purpose of punishment. *But*

first impression under the Louisiana constitution, the court concluded that such forcible medication for the purpose of readying a prisoner for execution violated both the "privacy" guarantee of Section 5[24] and the "humane treatment" guarantee of Section 20[25] of the Louisiana Declaration of Rights.

1. On the Primacy and Independence of the Declaration of Rights

Potentially the most far-reaching aspect of *Perry* is its insistence on resolving the case on purely state, rather than federal constitutional, grounds.[26] Justice Dennis' majority opinion held that if an appeal raises both federal and state constitutional issues, Louisiana courts ordinarily should, as a matter of principle, resolve the state constitutional issues first.[27] Where such a state-

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see Justice Marcus, dissenting, arguing that the process of medication is conceptually distinguishable from the question of what the state may do to the prisoner after he attains the required degree of sanity. For Justice Marcus, that process of medication, viewed in isolation, is similar to that approved in *Harper*, which should govern this case. *Id.* at 775-77 (Marcus, J., dissenting).

24. *Id.* at 755-61.

25. *Id.* at 761-71.

26. Since the sole impetus and opportunity for the Louisiana courts' final round of opinions in *Perry* was the United States Supreme Court's remand for reconsideration in light of the federal constitutional rulings in *Harper*, the Louisiana court's choice to resolve the case on purely state grounds may appear to raise a problem regarding the "ratcheting" effect of sequential consideration of federal and state constitutional issues. If the state constitution were the only applicable source of rights, Perry would have been executed after the Louisiana Supreme Court denied writs in 1989. If the federal Constitution were the only applicable source of rights, Perry could be medicated and executed if, as the trial court found, the federal constitutional analysis articulated in *Harper* would so permit. Apparently, then, it was only by the interaction of the Louisiana and United States Supreme Courts and the two bodies of law that Perry was spared.

Such an objection is, however, more apparent than real. It is well established that, once a Louisiana appellate court has a case before it, it has the authority to consider any issue of law raised by the record on appeal and to "render any judgment which is just, legal, and proper upon the record on appeal," regardless of the particular grounds of appeal or whether the particular point was argued. La. Code Civ. P. 2164; Givens v. Richland-Morris Agency, Inc., 369 So. 2d 1184 (La. App. 2d Cir. 1979); Norman v. City of Shreveport, 141 So. 2d 903 (La. App. 2d Cir. 1962). Nothing in the Supreme Court's remand could or did foreclose the state courts from considering any relevant issues of state law. That the federal ruling gave the Louisiana courts a final opportunity to reconsider all issues in the case—state as well as federal—was nothing more than a happenstance that worked to Perry's benefit.

27. State v. Perry, 610 So. 2d 746, 750-51 (La. 1992). According to *Perry*, the only circumstance in which it would be "understandable" for a state court to decide a case on federal, and not state, constitutional grounds, would be if "well-settled, clearly applicable federal precedent is available." Even in these circumstances, however, failure to consider state constitutional claims first was characterized as "not entirely proper." *Id.* at 751. The court relied on four arguments to support this methodological principle: 1) that unnecessary decisions of federal law would be avoided; 2) that decisions based on state grounds are more "efficient" in that they are not subject to any further review in the federal Supreme Court; 3) that the state constitution may be more expansive in its protection of rights than the federal constitution; and 4) that the framers of the federal Constitution originally intended state courts and state constitutions to be the primary legal guarantors of liberty. *Id.* at 750-51.

based decision resolves the case, the federal claims need not be reached. Thus, *Perry* appeared to place Louisiana, if it was not already, clearly and squarely in the camp of those states which have asserted the primacy and independence of state constitutional analysis.[28]

The consequences of such a commitment—if sustained—should not be underestimated. To be sure, the outcomes of particular cases will remain the same regardless of the order in which state and federal constitutional claims are considered. Because of the supremacy of federal law, federal constitutional guarantees provide an irreducible minimum level of protection of those rights. State constitutional rights can add to this minimum, but only so long as those additional state-granted rights do not conflict with federally protected rights of other private parties.[29] These relations do not change depending on which source of rights is considered first. Nor is there any logical reason why a court that considered federal constitutional claims first could not apply wholly independent analyses to cognate state claims. Nonetheless, a practice of considering state constitutional issues first would force state courts to decide those issues in all cases in which they are raised, and might reduce, at least to some extent, the ingrained tendency of lawyers and judges to rely on federal

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Some counterarguments could be raised to such an approach, however. Passage of the Fourteenth Amendment clearly altered the original framers' perception of the respective roles of the state and federal governments as guarantors of rights. And, as Justice Cole implied in his *Perry* dissent, *id.* at 778 n.1, a court's decision to resolve a case on state rather than federal constitutional grounds could reflect no more than a state court's result-oriented disagreement with the federal Court and a strategic desire to shield its conclusions from federal review—an approach that has been criticized by some commentators as unprincipled and destructive because it tends to balkanize effective protection of basic rights. *See generally* Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 Denv. U. L. Rev. 85 (1985); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L.Q. 429 (1988); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995 (1985); Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. Kan. L. Rev. 305 (1985).

Despite these points, however, the weight of argument favors the position taken by the *Perry* majority. State courts have an independent responsibility to interpret their respective state constitutions, a duty which they should not seek to avoid. Excessive reliance on federal law—either to resolve a case so that state constitutional issues need not be addressed, or as a guide to interpretation of cognate state guarantees—could constitute just such an exercise in avoidance. Consideration of state constitutional issues first, in contrast, assures that state constitutional rights guarantees will receive the independent consideration they deserve, without losing the benefit of the "floor" of individual rights provided by the federal Bill of Rights. *See* discussion *infra* at notes 52-73 and accompanying text.

28. *But see* State v. Tucker, 626 So. 2d 707 (La.), *aff'd*, 626 So. 2d 720 (1993), discussed *infra* at notes 52-73 and accompanying text. The issues mentioned here—the extent to which state constitutional rights guarantees should be interpreted independently of federal analogues, and whether those state guarantees should be considered "primary" or merely "interstitial"—have engendered a substantial body of commentary. *See generally* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 G. L. Rev. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980).

29. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980).

precedent as defining the terms of constitutional debate.[30] Thus, *Perry*'s assertion of state constitutional primacy will, if heeded by litigants and courts, contribute significantly to the continued and independent development of Louisiana constitutional law.

2. "Autonomy" Privacy and the Right to Refuse Psychoactive Drugs

In Hondroulis v. Schuhmacher,[31] the Louisiana Supreme Court held that Section 5 of the Louisiana Declaration of Rights[32] incorporates a guarantee of privacy in its "autonomy" sense; that this includes the right to determine whether to accept medical treatment; and that the state cannot burden an adult's right to make free and knowing choices in such areas of personal autonomy absent a compelling state interest.[33] In *Perry*, the Court reaffirmed these conclusions and extended them, holding that Perry retained some state constitutionally protected autonomy interests despite his status as a convicted prisoner,[34] and that, absent compelling justification, Section 5 precludes the government both from physically invading a person's body and from seeking to control a person's mind and thoughts by any means, however that might be accomplished.[35] The court concluded that involuntary administration of antipsychotic drugs would implicate Perry's Section 5 "autonomy" rights in three related, but distinguishable, ways—by "violat[ing] his bodily integrity, chemically alter[ing] his mind and will, and usurp[ing] his fundamental right to make decisions regarding his

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30. *See* Daniel R. Gordon, *The Demise of American Constitutionalism: Death by Legal Education*, 16 S. Ill. U. L.J. 39 (1991), decrying the tendency to see all constitutional issues in terms of federal constitutional analysis, and advocating revisions to standard constitutional law courses and casebooks as a necessary remedy.

31. 553 So. 2d 398 (La. 1989).

32. La. Const. art. I, § 5, provides, in pertinent part, as follows:

Section 5. Right to Privacy

Section 5. Every person shall be secure in his *person*, property, communications, houses, papers, and effects against unreasonable searches, seizures, or *invasions of privacy*. . . . (emphasis added).

33. *Hondroulis*, 553 So. 2d at 414-15. This constitutional aspect of *Hondroulis* was discussed, and the Court's conclusion that the state Constitution should be interpreted to include protection of autonomy rights defended, in a previous article in this series. John Devlin, *Louisiana Constitutional Law, Developments in the Law, 1989-1990*, 51 La. L. Rev. 295, 297-306 (1990). As the *Perry* court noted, many other state courts have likewise found that their respective state constitutions afforded their citizens a similar right to determine the course of their own medical treatment. State v. Perry, 610 So. 2d 746, 756 (La. 1992), and cases cited therein.

34. *Perry*, 610 So. 2d at 755-57. The Court acknowledged that an inmate's constitutional rights receive lessened protection and that even fundamental rights of inmates are "[s]ubject to the legitimate requirements of prison discipline and security." *Id.* at 757. Nonetheless, the court relied on both federal law and the concepts of "fundamental fairness" enshrined in the Due Process clause of the state constitution, La. Const. art. I, § 2, to conclude that inmates' state constitutional rights are not completely extinguished by their confinement. *Id.* at 757 (citing Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 4 (1974)).

35. *Perry*, 610 So. 2d at 757-58.

health or medical treatment."[36] Applying these conclusions to the specific facts before it, the court held that the state failed to demonstrate any compelling state interest sufficient to outweigh what it saw as the particularly severe violation of Perry's interests inherent in forcible administration of dangerous mind-altering chemicals.[37]

While one may argue with the conclusions that the *Perry* majority drew from its application of these legal precepts to the facts of this case,[38] it was surely correct to hold that the right of "autonomy" privacy originally recognized in *Hondroulis* extends to governmental invasions of an individual's body and to governmental efforts to chemically alter a person's mind and thoughts. The explicit guarantee of "privacy" in Section 5 of the Louisiana's 1974 Declaration of Rights was derived from federal law.[39] Analysis of that guarantee should begin with a determination of what that term of art meant in 1974, when it was explicitly incorporated into the state constitution.[40] As the Court noted, both

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36. *Id.* at 758.

37. *Id.* at 759-61. The court argued that the invasion of Perry's autonomy interests was particularly egregious primarily because the drugs at issue posed a risk of severe mental and physical side effects. *Id.* at 759-60. However, forcible administration of psychoactive drugs appears to present such an Orwellian potential for abuse that it would seem to present a proper case for exceedingly careful scrutiny in all circumstances, even absent such side effects.

The state proposed two justifications for its attempt to forcibly medicate Perry. First, it argued that Perry's insanity made him a danger to himself and others, and that therefore forcible medication would—like the medication approved by the federal Supreme Court in *Harper*—further both Perry's own medical interests and the state's interest in prison safety. Second, the state asserted that it had a compelling interest in medicating Perry "in order to further the social goals to be advanced by the death penalty" itself—that is, the goals of retribution and deterrence. *Id.* at 761. The court rejected both justifications; the first because it did not in fact motivate the state's decision and the second because the court disbelieved that those goals of deterrence and retribution would in fact be substantially furthered by the execution of a person in Perry's circumstances. *Id.*

38. Justice Cole, in dissent, appeared to accept the conclusion of *Hondroulis* that Section 5 guarantees rights of autonomy privacy, including the right of competent adults to determine the course of their own medical treatment. He argued, however, that an incompetent is by definition incapable of exercising such rights. Nor did Justice Cole agree that Perry was given a constitutionally protected right to refuse treatment either by the fact that successful treatment would ultimately lead to Perry's execution or the possibility of adverse side effects. *Id.* at 778-79 (Cole, J., dissenting). Justice Cole did not directly discuss the other autonomy rights which the majority found to be implicated in this case: the right to avoid physical intrusions into the body and to avoid efforts to alter one's mind.

39. *See generally* John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could* Roe v. Wade *be Alive and Well in the Bayou State?*, 51 La. L. Rev. 685, 689-707 (1991), tracing the process by which the express guarantee of privacy entered the state constitution.

40. Regardless of how one might approach the different and more difficult problem of interpretation of the *federal* Constitution, the proposition that *state* constitutions should be interpreted in accord with the understandings and intentions of those who drafted and ratified them is well accepted by commentators and by courts in this state. *See, e.g.*, L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 Fla. St. L. Rev. 567, 569-71 (1978); Robert E. Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 195-201 (1983); Board

of these additional aspects of personal autonomy had received protection under the federal Constitution before 1974.[41] Though none of the federal precedents involved facts similar to those in *Perry*, the argument for inclusion is straightforward.[42]

Moreover, even if those federal precedents did not exist, the argument that physical invasions of the body or attempts to alter a person's mind violate Section 5 would still remain strong. While federal law, as it existed in 1974, is the proper *starting point* for interpretation of the state constitution's privacy guarantee, the process of interpretation should not *end* there.[43] The meaning of the state constitution cannot be "frozen" in time, nor should state courts seek to avoid their responsibility to interpret and develop the basic principles thus incorporated into state law, or from applying those principles to new situations as they arise.[44] Even in the absence of relevant pre-1974 federal precedent, the

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of Comm'rs v. Department of Natural Resources, 496 So. 2d 281 (La. 1986). On the specific issues raised by adoption of the originally federally-developed right of privacy into state constitutions, see John Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources*, 3 Emerging Issues St. Const. L. 195, 226-45 (1990), arguing that, where state rights are adopted from federal sources, they should be interpreted in light of the broad general principles articulated in authoritative pre-adoption federal decisions. Such decisions are the best evidence of what the right meant at the time of its incorporation and thus, are the best evidence of what the framers and ratifiers of the state constitution intended.

41. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565-66, 89 S. Ct. 1243 (1969) (government attempts at thought control); Rochin v. California, 342 U.S. 165, 72 S. Ct. 205 (1952) (physical invasion of the body).

42. Justice Marcus, in dissent, would have resolved the case along the lines set out by the United States Supreme Court in *Harper*, which conceded that Perry had a "liberty interest" in avoiding unwanted medication, but held that such an interest can be overridden whenever the state shows a "legitimate penological interest"—such as, here, the deterrence and retribution interests which support the death penalty in general. *Perry*, 610 So. 2d at 775-77 (Marcus, J., dissenting). However, such reliance on *Harper* seems misplaced. The Supreme Court certainly has the power to ignore or reinterpret its own precedents mandating heightened scrutiny of autonomy violations, as it did in *Harper*. [discuss Harper dissent and commentaries] However, such post-incorporation vacillations in federal interpretation of federal rights provide little reason for state courts to vary interpretation of the state constitution. The starting place for interpretation of Section 5 should remain *Hondroulis* and *Perry* placed it—that is, the concept of constitutional privacy as it was interpreted at the time it was written into fundamental Louisiana law.

See infra notes 70-73 and accompanying text, discussing the problems inherent in efforts to interpret state constitutional guarantees in "lockstep" with changing interpretations of analogous federal rights.

43. Justice Dennis made precisely this point a little later in his majority opinion in *Perry*, in discussing the alternative ground for the court's holding in *Perry*: the state constitution's guarantee of "humane treatment." La. Const. art. I, § 20. *Perry*, 610 So. 2d at 762.

44. Interpretations that would limit the state privacy guarantee to only those specific circumstances to which the implicit privacy guarantee of the United States Constitution had been applied before 1974 may have some attraction for those who wish to limit state rights in general. Nevertheless, the arguments against such an approach are significant. First, as to many difficult issues, it is by no means self-evident what pre-1974 federal law *was*. Such an approach would also exact a high cost in loss of adaptability, depriving state courts of their traditional function of adapting

right to be free from government acts physically invading the body or attempting to influence one's thoughts seems proper for inclusion in any fully articulated concept of personal privacy and autonomy.

Finally, it should be noted that the strong autonomy-based right to refuse psychoactive drugs found in *Perry* will likely have a significant impact in contexts far removed from the specific facts of that case. It appears, for example, that *Perry* may require prison officials to demonstrate a higher degree of justification before they may forcibly medicate ordinary inmates (those not on death row), than would be required under federal law as interpreted in *Harper*.[45] Other issues that may arise include whether the state may force psychoactive medicine on a person accused of a crime, in order to render him mentally competent to stand trial,[46] and whether civilly committed psychiatric patients may invoke a similar right to refuse psychoactive drugs.[47] These issues, and others, remain unresolved in *Perry*'s wake.

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the constitution to changing historical circumstances. Finally, as many scholars have noted, federalism constraints and other institutional reasons often result in systematic "underenforcement" of federal constitutional rights. *See, e.g.*, Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959 (1985); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353 (1984). Any theory of interpretation that would require state courts to strictly adhere to federal interpretation of cognate provisions would thus prevent the state court from taking these differences into account in any meaningful way. *See generally* Devlin, *supra* note 40, at 237-42.

45. The majority opinion in *Perry* did not reject all possibility of a medical justification for forced medication of inmates. Rather, the Court found only that justifications of that type were not really at issue in Perry's case. *Perry*, 610 So. 2d 761. However, *Perry's* insistence that the state may not compel inmates to take psychotropic medication unless it shows a "compelling interest," does appear to require a greater showing of need than the federal Supreme Court required in *Harper*, which held any "legitimate penological interest" sufficient. *Id.* at 781-82 (Cole, J., dissenting) (noting the limits of the Court's holding).

46. As Justice Marcus pointed out in his dissent, the requirement that a criminal defendant have the mental capacity to undergo trial has been defined as requiring that he have the capacity to understand the proceedings against him and to assist counsel. *Perry*, 610 So. 2d at 774 (Marcus, J., dissenting) (citing State v. Bennett, 345 So. 2d 1129 (La. 1977)). Although these requirements seem significantly more rigorous than the requirements for mental capacity to undergo execution, any analysis of how *Perry* will apply to mentally incompetent defendants who refuse medication will require a similar balancing of state versus individual interests. Courts will have to consider such issues as the extent of the violation of autonomy in the particular case (including such sub-issues as whether medication can be justified, in part, as being in the defendant's own medical interest and the nature and extent of possible side effects) and whether the state's interest in trying such a defendant is sufficient to outweigh his right to refuse treatment.

47. A similar analysis would apply in these circumstances as well. *See generally* Catherine E. Blackburn, *The "Therapeutic Orgy" and the "Right to Rot" Collide: The Right to Refuse Antipsychotic Drugs Under State Law*, 27 Hous. L. Rev. 447 (1990); Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283 (1992).

3. The Right to Humane Treatment

The alternative basis for the court's holding in Perry was its conclusion that the combination of forcing psychotropic drugs on Perry and then executing him violated the guarantee of "humane treatment" of the Louisiana Declaration of Rights.[48] The court began its analysis with an extensive restatement of the philosophical and legal underpinnings of the state constitution's prohibitions against cruel, excessive and unusual punishments. The court identified one major principle—that punishments must not degrade the human dignity of those on whom they are inflicted—and three subsidiary principles—that punishments may not be arbitrarily inflicted, excessive, or unacceptable to modern society—as guides for interpretation of that right.[49] Applying these principles to the facts before it, the majority concluded: that forcing medication on Perry for the sole purpose of procuring his execution violated basic principles of human dignity by treating him as a mere vessel for his own demise, rather than as an autonomous being; that the unusual circumstances presented in this case rendered the sentence arbitrary; that the penalty is excessive both because forcible administration of antipsychotic drugs would cause Perry to suffer more than sane individuals who are simply executed, and because his death is not necessary to further social goals of retribution and deterrence; and that the penalty, in this case, violated general standards of medical ethics and penological practice.[50]

Reasonable minds can differ as to some or all of the majority's specific conclusions in its application of these principles to Perry's case.[51] Nonetheless, the court's exegesis of the principles underlying Section 20 remains important and should serve as the starting place for future analyses of these issues.

B. State v. Tucker*: Of Drugs, Seizures, and the Siren Call of Federal Precedent*

The Louisiana Supreme Court's commitment to the principles of independent interpretation of the Louisiana Declaration of Rights, announced in *Perry*, did not long survive that opinion, at least in any pure form. Within only a few months thereafter, the court handed down State v. Tucker,[52] an opinion in which Justice Kimball, speaking for a bare majority of the court, appeared to take a very different view of the persuasiveness of federal construction of federal

48. La. Const. art. I, § 20 provides as follows:
Section 20. Right to Humane Treatment
Section 20. No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.

49. *Perry*, 610 So. 2d at 762-65.

50. *Id.* at 765-71.

51. *See, e.g., id.* at 779-81 (Cole, J., dissenting).

52. 619 So. 2d 38, *superceded by*, 626 So. 2d 707 (La.), *aff'd*, 626 So. 2d 720 (1993).

rights for interpretation of cognate provisions of the Louisiana Declaration of Rights.

In March 1990, approximately twenty-five local and Louisiana State police officers conducted a coordinated drug sweep of an area of downtown Shreveport. During that sweep, two officers observed Tucker and another person standing together. When the two individuals saw the police approaching, they separated and began to leave the scene. The two officers approached to within several feet of the two men and ordered them to "halt" and "prone out." Tucker's companion complied immediately. Tucker took a few more steps, tossed away a plastic bag, and then complied. The plastic bag was recovered and found to contain forty-seven marijuana cigarettes. Tucker was arrested and subsequently convicted of possession with intent to distribute a controlled substance.[53] The Court of Appeals reversed Tucker's conviction, holding that the police officers' order to Tucker that he "halt" and "prone out" constituted a "seizure" because the officers had "display[ed] a show of authority which would cause a reasonable person to believe that detention [was] imminent, regardless of whether physical force ha[d] been applied to the person or whether he ha[d] submitted to a show of authority."[54] Since the court also held that the police lacked any reasonable articulable suspicion of Tucker sufficient to justify that seizure under Section 5 of the Louisiana Declaration of Rights, it concluded that the marijuana was therefore inadmissible in evidence as fruits of an illegal arrest.[55] The Louisiana Supreme Court granted the state's application for a writ and, on review, reinstated Tucker's conviction. In reversing the court of appeals, the supreme court did not dispute that the police lacked sufficient grounds to seize Tucker, or that fruits of an illegal seizure are inadmissible at trial. Rather, it disagreed solely on the question of whether Tucker had in fact been "seized" at the time he tossed away the bag containing the marijuana.

Before 1991, both the federal and state constitutions were construed to mean that an individual was "seized" under the meaning of their respective guarantees against unreasonable search and seizure[56] whenever police had, through a display of authority, acted so as to lead a reasonable person to conclude that he was about to be detained and was thus not "free to walk away"—a standard that applied regardless of whether or not the individual actually submitted to that show of authority.[57] In *California v. Hodari*

53. *Id.* at 40-41.

54. State v. Tucker, 604 So. 2d 600, 608 (La. App. 2d Cir. 1992).

55. *Id.* at 608-09.

56. U.S. Const. amend. IV; La. Const. art. I, § 5, quoted, in part, *supra* at note 32.

57. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 104 S. Ct. 1758 (1984); United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870 (1980) (seizure occurs when "a reasonable person would have believed that he was not free to leave"); Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877 (1968) (holding that Fourth Amendment protections are implicated "whenever a police officer accosts an individual and restrains his freedom to walk away"); State v. Belton, 441 So. 2d 1195, 1199 (La. 1983), *cert. denied*, 466 U.S. 953, 104 S. Ct. 2158 (1984) (holding that a person is seized when he reasonably believes himself no longer "free to disregard the encounter and walk away"); State v.

D.,[58] the United States Supreme Court changed this prior understanding with respect to federal law, holding that a "seizure" under the meaning of the Fourth Amendment does not occur until the arresting officer has applied "physical force" to the suspect, or the suspect has "submitted to the assertion of authority."[59]

In *Tucker*, the Louisiana Supreme Court acknowledged that the protection of privacy guaranteed by Section 5 of the state Declaration of Rights goes beyond the cognate protections afforded by the Fourth Amendment, and that *Hodari D.* did not necessarily control interpretation of that state constitutional provision.[60] The court in *Tucker* chose to adopt the federal Court's novel analysis in *Hodari D.* as correctly identifying "when, during a police encounter, an individual has been 'actually stopped'" under the meaning of the state constitution as well.[61] Section 5 was held to provide additional protections, beyond those given by the newly constricted Fourth Amendment, only insofar as Section 5 also applies to seizures which are "imminent" or "virtually certain" to occur, but have not yet ripened into an "actual stop."[62] Applying these

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Chopin, 372 So. 2d 1222, 1224-25 (La. 1979) (holding that "detention was imminent" and that constitutional protections attached when police swung their car into a suspect's path and stopped a few feet away); State v. Patterson, 588 So. 2d 392, 395-96 (La. App. 4th Cir. 1991) (privacy may be invaded regardless of whether the suspect submits to the police officers' show of authority). Only weeks before *Tucker*, a majority of the Louisiana Supreme Court had held that an investigatory stop constituted a seizure, for purposes of both state and federal law, because "a reasonable person would think he was not free to leave" under the circumstances presented. State v. Moreno, 619 So. 2d 62, 67 (La. 1993) (citing United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870 (1980)).

58. 499 U.S. 621, 111 S. Ct. 1547 (1991).

59. *Id.* The Supreme Court's alteration of prior law in *Hodari D.* and in a companion case, Florida v. Bostick, 111 S. Ct. 2382 (1991), has been the subject of severe academic criticism. *See, e.g.*, Gerald G. Ashdown, *Drugs, Ideology and the Deconstitutionalization of Criminal Procedure*, 95 W. Va. L. Rev. 1, 18-26 (1992); Hon. Constance Baker Motley, *Civil Rights-Civil Liberties in the U.S. Supreme Court—Are the State Courts Our Only Hope?*, 9 Harv. BlackLetter J. 101, 103-04 (1992); Patrick T. Costello, Casenote, California v. Hodari D.: *The Demise of the Reasonable Person Test in Fourth Amendment Analysis*, 12 N. Ill. U. L. Rev. 463 (1992); Randolph Alexander Piedrahita, Note, *A Conservative Court Says "Goodbye to All That" and Forges a New Order in the Law of Seizure*—California v. Hodari D., 52 La. L. Rev. 1321 (1992); James F. Heuerman, Note, Florida v. Bostick: *Abandonment of Reason in Fourth Amendment Reasonable Person Analysis*, 13 N. Ill. U. L. Rev. 173 (1992); Michael J. Reed, Jr., Comment, Florida v. Bostick: *The Fourth Amendment Takes a Back Seat to the Drug War*, 27 N. Eng. L. Rev. 825 (1993).

60. 619 So. 2d 38, 43, *superceded by*, 626 So. 2d 707, 711-12 (La.), *aff'd*, 626 So. 2d 720 (1993).

61. *Id.* Chief Justice Calogero and Justices Dennis and Ortique each wrote dissents, and Justice Marcus concurred.

62. *Id.* at 712-13. The Court articulated a non-exclusive list of factors to be considered in determining whether an actual stop is "virtually certain":

> (1) the proximity of the police in relation to the defendant at the outset of the encounter; (2) whether the individual has been surrounded by the police; (3) whether the police approached the individual with their weapons drawn; (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter; (5) the location and characteristics of the area where the encounter takes place; and (6) the number of police

standards, the court found that Tucker had not yet been actually stopped, and that arrest was not yet imminent or virtually certain to occur, at the time he discarded the contraband. It concluded that the bag was abandoned property, not the fruit of an improper seizure, and that the bag need not be excluded from evidence.[63]

Tucker may be subject to critique on several substantive grounds,[64] including that it substantially changed the prior law of this state by allowing police to rely on the fiction of "abandonment" to obtain evidence as a direct result of an investigatory stop that concededly was not supported by sufficient cause.[65] However, the most fundamental problem inheres in the *Tucker* majority's methodological approach to interpreting the state constitution. As was noted above, analysis of constitutional terms should at least begin with consideration of what the relevant language meant to those who drafted and ratified that language, at the time they acted.[66] "Seizure," like "privacy," is a constitutional term of art. Thus, analysis of the meaning of that term should at least begin with an inquiry into its meaning as a term of art in 1974.[67] As

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officers involved in the encounter.

Id. (footnotes omitted).

63. *Id.*

64. For example, scholars have argued that *Hodari D.* itself is simply wrong as a matter of logic and of federal law. *See, e.g.*, Ashdown, *supra* note 59; Costello, *supra* note 59; Piedrahita, *supra* note 59. If so, the *Tucker* Court's reliance on the wisdom of *Hodari D.* may be misplaced.

Alternatively, as Chief Justice Calogero pointed out in his dissent, even under the majority's novel construction of § 5, Tucker may well have been in a situation of "imminent" seizure at the time he disposed of the bag of marijuana. *Tucker*, 626 So. 2d 707, 715-16 (La.), *aff'd*, 626 So. 2d 720 (1993) (Calogero, C.J., dissenting). Unlike the situation in *Hodari D.*, Tucker was not in full flight at the time he threw away the bag; rather, he took only a few steps before complying with the order that he "prone out." He was accosted during a coordinated sweep involving many officers. Moreover, the armed officers who ordered him to halt were only a few feet away and were very capable of enforcing that order by force, if necessary. Even according to Justice Kimball's analysis, one could easily argue that his seizure was both "virtually certain" and "imminent" and that the protections of § 5 therefore attached.

65. For prior law precluding Louisiana police from reaping this evidentiary benefit from an illegal stop, *see, e.g.*, State v. Smith, 347 So. 2d 1127, 1128 (La. 1977) (citations omitted):

> If . . . officers do not have the right to make an investigatory stop, evidence seized or otherwise obtained as a result thereof cannot constitutionally be admitted into evidence against a criminally accused. . . . This inadmissibility extends to property dropped or abandoned in response to an illegal stop.

See also State v. Saia, 302 So. 2d 869 (La. 1974); State v. Lawson, 256 La. 471, 236 So. 2d 804 (1970). As the Louisiana Supreme Court later described it, "the foundation of *Saia* is the proposition that police officers may not reap the benefits of their unlawful intrusion into the citizen's freedom of movement." State v. Ryan, 358 So. 2d 1274, 1276 (La. 1978). *See generally* Eulis Simien, *Criminal Law and Procedure: 1991-92 in Review*, 53 La. L. Rev. 771, 778 (1993), noting the inconsistency between *Hodari D.* and prior Louisiana law.

66. See discussion *supra* at notes 40-44.

67. *See, e.g.*, American Lung Ass'n v. State Mineral Bd., 507 So. 2d 184, 189 (La. 1987), treating the word "sold" as used in the alienation of mineral rights section of the state constitution, La. Const. art. IX, § 4, as a "term of art" that must be construed in accordance with its accepted technical meaning at the time the state constitution was adopted.

Justice Dennis pointed out in his strongly worded dissent, earlier federal decisions and state statutory enactments had both, by 1974, provided a gloss on the meaning of "seizure" as a term of constitutional discourse—a gloss which would have given an objective but knowledgeable framer or ratifier good reason to understand that neither actual arrest nor submission to police authority would be necessary for a court to find that a "seizure" had occurred.[68]

It may be that this analysis is not conclusive and that contrary evidence of the meaning of constitutional "seizure" in 1974 could have been adduced. But, the majority made no inquiry into what the term might have been understood to mean in 1974, either as a term of art or otherwise.

Instead of looking to the understanding of 1974, the majority's argument in favor of adopting the narrow *Hodari D.* definition of "seizure" into Louisiana law appears to have rested solely on two grounds: its perception that the constitutional protections of privacy were outweighed by the seriousness of the drug problem in the state[69] and its conclusion that the acknowledged desire of the drafters and ratifiers of the state constitution for heightened privacy protection could be satisfied by doing no more than continuing prior caselaw to the effect that the state guarantee, unlike its federal counterpart, applies to "imminent" seizures that are "virtually certain" to occur.[70] However, in the absence of any convincing derivation of these new principles from Louisiana sources—either from the debates surrounding the drafting or ratification of the 1974 constitution, from some well established body of Louisiana caselaw,[71] or some unique factor of Louisiana culture or history—the court remains vulnerable to charges that its analysis reflects no more than a substitution of the court's own

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68. *Tucker*, 626 So. 2d 707, 716-17 (La.), *aff'd*, 626 So. 2d 720 (1993) (Dennis, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968); Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967); and La. Code Crim. P. art. 215.1(A), which was enacted in 1968 in order to adopt the analysis of *Terry* into state law).

69. *Id.* at 711.

70. *Id.* at 712. *See also id.* at 719 (Dennis, J., dissenting), arguing that extending protection to "imminent" arrests that are "virtually certain to occur" will make little real world difference.

71. The majority did cite one Louisiana case, State v. Belton, 441 So. 2d 1195 (La. 1983), *cert. denied*, 466 U.S. 953, 104 S. Ct. 2158 (1984), for the proposition that the Louisiana constitution protects suspects in situations of "imminent," as well as actual detention. *Tucker*, 626 So. 2d 707, 712 (La.), *aff'd*, 626 So. 2d 720 (1993). However, *Tucker*'s important holding was not that "imminent" seizures are covered by § 5, but rather that this additional protection is essentially the *only* difference between state and recently-narrowed federal law regarding when search and seizure protections attach. For this latter point, that the expansive effect of § 5 in this area goes no farther than this single distinction, the *Tucker* majority cited nothing.

The only other Louisiana case on which the majority heavily relied was State v. Ryan, 358 So. 2d 1274 (La. 1978), which was cited for the unexceptional proposition that contraband abandoned by a suspect can be retrieved and used in evidence against him. However, the facts of *Ryan* were crucially different than those in *Tucker*. In *Ryan*, there was no illegal "stop" of the suspect; the property was abandoned before the police made any effort to intrude upon the suspect's freedom of movement. In *Tucker*, there was apparently no question that the officers accosted the suspect without sufficient grounds to do so; the property was abandoned only as a result of that intrusion.

policy concerns for the understandings of those who wrote and adopted the state constitution,[72] or an uncritical adoption of federal precedent,[73] or both.

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72. The *Tucker* majority opinion was admirably candid in its explanation of the policy grounds that led it to adopt the *Hodari D.* analysis of when an actual "seizure" has taken place:

> [i]mplicit in the *Hodari D.* Court's break from its prior jurisprudence . . . is the Court's recognition of the severe problem with drug-related criminal conduct in America today. We too recognize the existence of this problem in our State. It is with this problem in mind that we address the balance of interests embodied in the rights against "unreasonable" searches and seizures protected by our constitution.
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> * * * *
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> Like the *Hodari D.* Court, we do not believe the constitutional protections against unreasonable searches and seizures were intended to shield the criminal activities of those involved with use and distribution of illicit drugs; particularly the typical situation which we frequently see in which drugs are "thrown down" in an attempt to evade police detection. . . . Thus, cognizant of the drug-related criminal problem in our State, we must today determine first whether our constitution would allow us to adopt *Hodari D.* . . .

Tucker, 626 So. 2d 707, 711 (La.), *aff'd*, 626 So. 2d 720 (1993) (citation omitted).

In arguing that application of traditional "search and seizure" protections to drug suspects would be bad policy for the state, the *Tucker* majority faithfully echoed the policy choices underlying *Hodari D.* But the question remains whether such policy arguments are an appropriate basis for constitutional decisionmaking. I have previously argued that policy arguments of this type may be appropriate when the court must decide issues which the framers and ratifiers clearly did not consider. *See* John Devlin, *Louisiana Constitutional Law, Developments in the Law 1986-87*, 48 La. L. Rev. 335, 353-54 (1987). However, as the Court has recognized on other occasions, the framers of the Louisiana Constitution of 1974 intended to expand, not contract, protections against unreasonable searches and seizures. Thus, it may be difficult to show that the issues presented in *Tucker* really constitute questions that the convention and ratifiers failed to consider. Moreover, even if this were an unconsidered case, reliance on policy arguments alone may be an insecure basis for constitutional interpretation. Judicial activism in pursuit of politically conservative goals is no less "activist"—or suspect—than its liberal twin.

73. State constitutional rights guarantees can be written to expand and contract in "lockstep" with the vagaries of federal court interpretation of analogous federal rights. Florida, for example, has done so, amending its state constitutional guarantee against unreasonable searches and seizures to explicitly provide that the rights it grants must be "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court," and that evidence obtained in violation of the state guarantee shall only be suppressed "if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution." Fla. Const. art. I, § 12 (1983). This amendment has been the subject of considerable controversy. *Compare, e.g.*, John C. Cooper, *Beyond the Federal Constitution: The Status of Constitutional Law in Florida*, 18 Stetson L. Rev. 241 (1989) (defending the amendment as a proper exercise of power by the people of the state), *with* Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 Fla. L. Rev. 653 (1987) (arguing that the amendment derogates from the proper role of the state courts and should be narrowly construed). Florida courts have broadly construed the amendment to make sure all evidence admissible under federal law is admissible in that state. *See, e.g.*, Bernie v. State, 524 So. 2d 988, 991 (Fla. 1988) (following post-adoption changes in federal law); State v. Hume, 512 So. 2d 185 (Fla. 1987) (rejecting the argument that other state constitutional provisions justified exclusion of evidence not excludable under § 12).

However, the Louisiana guarantee of privacy is not so limited. On the contrary, as the *Tucker* majority acknowledged, those who drafted and ratified the 1974 Constitution intended to assure themselves a degree of privacy protection greater than was available under federal law at that time.

This does not mean federal decisions are without persuasive impact, or that the majority could not have reached the same conclusions through an analysis of Louisiana Constitutional sources. But by taking the easier path of simply adopting a federal analysis that it happened to find congenial, rather than basing its argument firmly and squarely on any Louisiana tradition, the majority both weakened the persuasive force of its opinion and created an unfortunate interpretive precedent.

C. *Short Takes*

In other cases, Louisiana courts have issued a number of noteworthy decisions regarding the state constitutional law of criminal procedure. With respect to a criminal defendant's "right to counsel,"[74] courts held that an individual accused of speeding must be informed of his right to be represented by counsel,[75] but reaffirmed that the right is in the alternative—that, on appeal, a convicted defendant is entitled to be represented by counsel or to represent himself, but not both.[76]

Criminal defendants' state constitutional right to trial by jury[77] has also

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Tucker, 626 So. 2d 707, 711-12 (La.), *aff'd*, 626 So. 2d 720 (1993). *A fortiori*, § 5 should be interpreted to provide a *much* greater level of protection than is available under the significantly narrowed interpretations of federal law applied by the federal courts today. Thus, recent federal decisions significantly narrowing federal rights protections are *particularly* suspect as sources for interpretation of the state constitution.

74. La. Const. art. I, § 13, provides, in pertinent part, that "[a]t each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment."

75. State v. Fraychineaud, 620 So. 2d 338 (La. App. 5th Cir. 1993). The fifth circuit construed § 13 of the state constitution and Louisiana Code of Criminal Procedure art. 513 to require that a defendant charged with speeding must be informed of his right to counsel. The constitutional right to counsel attaches whenever, as here, an offense is potentially punishable by even a short term of imprisonment. The criminal code requires that any defendant subject to imprisonment be informed of his right to appointed counsel if he is indigent—and thus, implicitly of his right to counsel *simpliciter*—before he pleads. Thus, the trial court's failure to inform the defendant of these rights was reversible error.

76. In State v. Gene, 587 So. 2d 18 (La. App. 2d Cir. 1991) and State v. Hughes, 587 So. 2d 31 (La. App. 2 Cir. 1991), the second circuit declined to consider points raised in supplemental pro se briefs filed by criminal defendants, in part because each of those defendants was simultaneously represented by counsel. While there is little novelty in the rule that a defendant has the right to be represented by counsel or to represent himself, but not both, previous cases were decided on the basis of the United States Constitution and the Louisiana Code of Criminal Procedure. These appear to be the first cases that have construed § 13 of the state Declaration of Rights in similar fashion.

77. La. Const. art. I., § 17, provides as follows:

> Section 17. Jury Trial in Criminal Cases
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> Section 17. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more

produced appellate decisions, including cases construing the requirements for knowing and intelligent waiver of that right,[78] strictly construing constitutional mandates regarding the size of juries for particular offenses,[79] preventing trial judges from arbitrarily limiting defense counsel's opportunity to conduct extensive *voir dire* of potential jurors,[80] and precluding defense counsel from exercising peremptory challenges in a racially discriminatory manner.[81]

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than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

78. In State v. Owens, 596 So. 2d 829 (La. App. 2d Cir.), *writ denied*, 600 So. 2d 678 (1992), the court considered a case in which a defendant's waiver of a jury on retrial was induced by false statements by his own attorney that his sentence would be reduced if he waived his right to a jury. The court held that, under such circumstances, the waiver was not "knowing and intelligent" and that the conviction be reversed. *Id.* at 832.

79. In State v. Clark, 589 So. 2d 549 (La. App. 1st Cir. 1992), the first circuit strictly construed the requirements La. Const. art I, § 17, regarding the size of a criminal jury. It held that where a defendant is charged with both a crime that must be tried before a twelve-person jury and a crime that must be tried before a six person jury, the two cannot be jointly tried before a single twelve-person jury. If such error is made, the verdict of the wrong-sized jury is null, but the other verdict will be reversed only if the defendant shows he was actually prejudiced by the joint trial. *Id.* at 553. This follows the court's prior decision in State v. King, 524 So. 2d 1376 (La. App. 1st Cir. 1988).

80. State v. Hall, 616 So. 2d 664 (La. 1993), reversing defendant's conviction because the trial judge had prevented defense counsel from questioning prospective jurors in detail as to their understanding of and ability to apply nuances in the law. Blanket statements by jurors that they would follow the law as given by the judge were found to be insufficient to satisfy the constitutional requirement, especially since, in *Hall*, few facts were in dispute and the case turned on "complex" issues of law and application of law to fact. The legal points which the Court found to be crucial included whether the defendant's acts constituted murder or manslaughter, whether there was sufficient evidence to support the elements of first degree murder, and how concepts of "reasonable doubt" would apply. While these issues may have been "complex," they are certainly not unusual. It appears that the court's ruling in favor of expansive voir dire would apply to many, if not most, criminal prosecutions.

See also State v. Strange, 619 So. 2d 817 (La. App. 1st Cir. 1993), holding that a trial court's arbitrary limitation of defense counsel's voir dire to ten minutes constituted error requiring reversal of defendant's conviction. *Id.* at 820-21. The court drew upon a prior case, State v. Jones, 596 So. 2d 1360 (La. App. 1st Cir. 1992), in which the circuit had announced the principle that arbitrary preset time limits on voir dire presumptively violate § 17 of the state Declaration of Rights, but had found the error harmless on the precise facts of the case.

81. In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 172 (1986), the Court held that the Constitution precluded prosecutors from using peremptory challenges in racially biased manner. In Georgia v. McCollum, 112 S. Ct. 2348 (1992), the Court held that the Constitution also precluded a white criminal defendant from exercising peremptory challenges in a racially biased way so as to exclude blacks from the jury that would decide his case.

In State v. Knox, 609 So. 2d 803 (La. 1992), the Louisiana Supreme Court applied these recent federal decisions to hold that the *McCollum* rule also applied in the reverse situation, where black defendants used peremptory challenges to exclude whites from their juries. The decision in *Knox* is correct as a statement of current and binding federal law. As the *Knox* court noted, the United States Supreme Court has remanded a case involving a black defendant for reconsideration in light of

Louisiana and federal guarantees of procedural fairness at trial[82] have also been salient, with courts holding that trial judges may not arbitrarily limit the length of a defendant's closing argument,[83] that compelling a criminal defendant to appear at trial in prison garb is not "harmless error,"[84] that interpreters must

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McCollum. Georgia v. Carr, 113 S. Ct. 30 (1992). While this remand may not be dispositive in itself, cases involving racial classifications in other contexts make it clear that all state actions classifying on the basis of race must be justified according to the same "strict scrutiny" standard, regardless of whether those disadvantaged thereby are white or black. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989). There is little reason to suspect that, absent extraordinary circumstances, the federal Supreme Court would reach a different result in a case like *Knox* or *Carr*.

However, the most instructive aspect of the case may be the concurring opinions which express their substantive disagreement with the result reached by the *McCollum* Court. As they point out, should the federal courts recede from the rule of *McCollum*, sound arguments could be made that the Louisiana Constitution would support a different result—one that would recognize that criminal defendants have more freedom than do criminal prosecutors to exercise peremptory challenges in a racially conscious manner. *Knox*, 609 So. 2d at 807-08 (Calogero, C.J., joined by Watson, J., concurring); *Id.* at 808-09 (Lemmon, J., concurring). As Chief Justice Calogero pointed out, Louisiana law makes relevant distinctions between criminal prosecutors and criminal defendants. For example, while a criminal defendant's right to peremptory challenges is established by the constitution, La. Const. art. I, § 17, a prosecutor's power to exercise such challenges is merely statutory in origin.

Moreover, there is no necessary reason to believe that the requirement of "state action" would be drawn the same way under the state constitution as it has been drawn under the federal constitution. Thus, a state supreme court would be free to conclude that, according to the state constitution, criminal defense attorneys are not "state actors" who are required to abide by constitutional norms. *Cf.* Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 Ga. L. Rev. 327 (1990) (arguing that the concept of "state action" should be construed more broadly under state constitutions than under the federal Constitution); John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 Rutgers L.J. 819 (1990); Jennifer Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 Hastings Const. L.Q. 111 (1990).

82. La. Const. art. I, § 16, provides as follows:

> Section 16. Right to a Fair Trial
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> Section 16. Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify on his own behalf.

83. State v. Washington, 614 So. 2d 711 (La. 1993), holding that the trial judge had abused his discretion by arbitrarily limiting defense counsel to fifteen minutes to present his closing arguments.

84. State v. Brown, 585 So. 2d 1211 (La. 1991). The practice of compelling a criminal defendant to appear at trial while dressed in identifiable prison garb has long been held to violate the state constitution's guarantee of fair criminal procedure. *Brown* moved beyond that prior law by squarely holding that such a violation did not constitute "harmless error," despite the trial judge's admonition to the jury that it should attach no significance to those clothes. In so doing, the court purported to apply the new approach to harmless error analysis set out by the United States Supreme Court in Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, *reh'g denied*, 111 S. Ct. 2067

be appointed to assist hearing-impaired criminal defendants,[85] and that revocation of probation on the basis of post-release criminal conduct requires actual proof that the parolee committed those alleged crimes.[86]

The substantive Louisiana constitutional rights of privacy and equal treatment have also required consideration in the criminal law context. In *State v. Pierre*,[87] the Third Circuit held that the state constitutional guarantee of individual privacy[88] did not prevent a court from ordering a defendant who was indicted on rape charges to submit to DNA testing, in order to determine the probability that he was the father of a child born as a result of that rape.[89] The court also held that no separate "probable cause" hearing was required before the testing could be ordered; existing criminal procedural protections, notably including the fact of indictment, adequately demonstrate the requisite probable cause.[90] In other cases, circuit courts held that neither Louisiana Revised Statutes 14:80(A)(1), which defines criminal carnal knowledge of a juvenile so as to make the prohibition apply only to males, nor Louisiana Revised Statutes 40:981.3, which enhances punishments for drug offenses committed within 1,000 feet of school property, violates the state constitutional guarantee of equal protection of the laws.[91]

(1991). It would be more consistent with the intentions of the framers and ratifiers of the state constitution if the courts were to apply pre-*Fulminante* "harmless error" analysis to violations of the state constitution. *See* John Devlin & David Hilburn, *Louisiana Constitutional Law, Developments in the Law, 1990-1991*, 52 La. L. Rev. 575, 600-01 (1992). Nonetheless, it appears that either analytic approach would lead to the same result in this case.

Compare State v. Claxton, 603 So. 2d 247 (La. App. 1st Cir. 1992), reiterating that a system of assigning judges for criminal trials which effectively permitted prosecutors to choose the judge that would preside violated defendants' due process rights, but holding that, where no actual bias was evident, the error was "harmless."

85. *See, e.g.*, State v. Barber, 617 So. 2d 974 (La. App. 4th Cir. 1993) (finding that the defendant was handicapped in assisting in his defense, despite his statements that he could read lips); State v. Decuire, 602 So. 2d 194 (La. App. 3d Cir. 1992) (hearing-impaired defendant entitled to new trial even though the handicap was not brought to the trial court's attention until sentencing).

86. State v. Dabney, 594 So. 2d 581 (La. App. 5th Cir. 1992). In *Dabney*, the parolee's release was revoked solely on the basis of testimony that he had been arrested for certain alleged offenses. Though the issue was not raised on appeal, the Fifth Circuit held, *sua sponte*, that parole revocation on these grounds requires proof that the parolee either had been convicted of or had committed the alleged offenses.

87. 606 So. 2d 816 (La. App. 3d Cir. 1992).

88. La. Const. art. I, § 5, quoted in part *supra* at note 32.

89. *Pierre*, 606 So. 2d at 818.

90. *Id.* at 818-21.

91. State v. Vining, 609 So. 2d 984 (La. App. 4th Cir. 1992) (upholding carnal knowledge of a juvenile statute); State v. Brown, 606 So. 2d 586 (La. App. 5th Cir. 1992) (upholding enhanced drug penalties). Interestingly, in reaching their conclusions, both cases relied on federal and pre-1985 state precedent. Neither cited Sibley v. Board of Supervisors, 477 So. 2d 1094 (La. 1985), the Louisiana Supreme Court's leading opinion on interpretation of the Louisiana equality guarantee, La. Const. art. I, § 3, quoted *infra* at note 129. See discussion *infra* at note 131.

II. INDIVIDUAL RIGHTS

A. Sudwischer v. Estate of Hoffpauir:[92] *Of Filiation, Privacy, and State Action*

Paul Hoffpauir died intestate, survived by his widow, an adopted son and a daughter, Rosemary Hoffpauir Schuh. While his estate was still in administration, plaintiff Alana Sudwischer sued to establish filiation, contending that the deceased was her natural father and that therefore she too was entitled to a portion of the estate.[93] By Louisiana law, she was required to establish her claim by "clear and convincing evidence."[94] Sudwischer sought to meet this standard and prove filiation through several lines of evidence, including comparative DNA tests.[95] Since the alleged biological father was deceased (and

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92. 589 So. 2d 474 (La. 1991), *cert. denied*, 112 S. Ct. 1937 (1992).

93. The Equal Protection clause of the federal Constitution, U.S. Const. amend. XIV, has been construed to require that, unless other good reasons supervene, an illegitimate who can prove filiation is entitled to be treated equally with legitimate siblings. The cases are legion. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 103 S. Ct. 2199 (1983) (illegitimate children must be treated equally with legitimate children in relation to the reception of child support); Trimble v. Gordon 430 U.S. 762, 97 S. Ct. 1459 (1977) (statute precluding unacknowledged illegitimate from becoming intestate heir of her father struck down); Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872 (1973) (statute requiring a man to support his legitimate but not illegitimate children was struck down); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 92 S. Ct. 1400 (1972) (the definition of the word "children" in the Louisiana workman's compensation laws was found unconstitutional in that it included only legitimate children, stepchildren, legitimate posthumous children, and acknowledged illegitimate children); Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1968) (laws must permit illegitimate children to sue for the wrongful death of their mother).

The equality provision of the Louisiana constitution, La. Const. art. I, § 3, expressly provides that no law may arbitrarily, capriciously, or unreasonably discriminate against a person because of "birth," a term which was intended to and has been construed to prohibit discrimination against illegitimates. *See, e.g.*, Succession of Bartie, 472 So. 2d 578 (La. 1985) (striking down so much of state forced heirship laws as excluded illegitimate children); Jordan v. Cosey, 434 So. 2d 386 (La. 1983) (Civil Code article limiting amount of a donation by a father to an illegitimate child to 1/4 of the father's property, if the father was survived by legitimate descendants or siblings, held unconstitutional); Succession of Brown, 388 So. 2d 1151 (La. 1980), *cert. denied sub nom.* Brown v. Brown, 450 U.S. 998, 101 S. Ct. 1703 (1981) (Civil Code article providing that acknowledged illegitimates could not come to intestate successions if the deceased parent was survived by legitimate descendants held unconstitutional); Succession of Thompson, 367 So. 2d 796 (La. 1979) (Code article excluding illegitimate children from receiving the mother's legacy if legitimate were in existence held unconstitutional).

94. "A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf . . . ." La. Civ. Code art. 209(B).

95. Sudwischer also proffered testimony that the deceased recognized her as his daughter during his lifetime, but the Supreme Court noted that scientific testing would be useful to corroborate this evidence. *Sudwischer*, 589 So. 2d at 475. As the court noted, it is undisputed that scientific tests comparing the DNA characteristics of blood samples are highly accurate and useful means of establishing or disproving biological relationships among people. *Id.*, and authorities cited.

his blood was therefore unavailable for testing), Sudwischer sought a judicial order compelling the deceased's only surviving blood relative, Schuh, to submit to the drawing of a small blood sample for use in that DNA test. Schuh resisted, asserting that her constitutionally protected right of privacy would be violated if she were compelled to submit to the blood test.[96] The trial court denied Sudwischer's motion to compel Schuh to submit to blood testing, without reaching the constitutional issues.[97]

In *Sudwischer v. Estate of Hoffpauir*,[98] the Supreme Court reversed, acknowledging that the test infringed on Schuh's constitutionally protected privacy interests, but holding that Sudwischer "has a constitutional right to prove filiation to a deceased father" which, under the circumstances, outweighed Schuh's privacy interest.[99] Justice Dennis dissented, arguing that while the

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96. The right to be free from unjustifiable government intrusions into one's body—whether in the form of unwanted medical treatment or, as here, court ordered sampling of bodily fluids—has been held to be protected by both the federal Constitution and the Louisiana constitution. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 110 S. Ct. 2841 (1990) (right to refuse medical treatment and countervailing state interests both recognized); Hondroulis v. Schuhmacher, 553 So. 2d 398, 414-15 (La. 1989) (construing La. Const. art. I, § 5, quoted *supra* at note 32). The privacy right does not, however, always prevail over countervailing interests. *See, e.g.*, State v. Pierre, 606 So. 2d 816 (La. App. 3d Cir.), *writ denied*, 607 So. 2d 568 (La. 1992) holding that state constitutional guarantee of privacy did not prevent a court from ordering a defendant who was indicted on rape charges to submit to DNA testing in order to determine the probability that he was the father of a child born as a result of that rape).

97. The trial court never reached the constitutional issues raised in this case, holding instead that La. R.S. 9:396—which specifically provides for court-ordered DNA testing of blood samples, when necessary to resolve issues of paternity—does not authorize blood tests of siblings. *Sudwischer*, 589 So. 2d at 474.

La. R.S. 9:396(A) (1990) provides, in relevant part, as follows:

> Notwithstanding any other provision of the law to the contrary, in any civil action in which paternity is a relevant fact . . . the court . . . shall order the mother, child, and alleged father to submit to the drawing of blood samples and shall direct that inherited characteristics in the samples, including but not limited to blood and tissue type, be determined by appropriate testing procedures. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

Justice Cole agreed with the trial court and argued, in dissent, that since the statute authorizes blood tests only of the alleged illegitimate, the alleged biological father, and the mother, but does *not* specifically authorize blood tests of alleged siblings, the court was without statutory authority to order the tests in this case. *Sudwischer*, 589 So. 2d at 479. The majority opinion and Justice Lemmon, concurring, argued that the statute should not be read as exclusive and that the statute does not purport to limit the authority that the judge would have under ordinary discovery principles to order blood tests in appropriate cases. *Sudwischer*, 589 So. 2d at 474-77 (Lemmon, J., concurring).

98. 589 So. 2d 474. For a thorough discussion of the statutory and policy issues raised by this case, see J.E. Cullens, Jr., Note, *Should the Legitimate Child be Forced to Pay for the Sins of Her Father?:* Sudwischer v. Estate of Hoffpauir, 53 La. L. Rev. 1675 (1993).

99. *Sudwischer*, 589 So. 2d at 476. In performing the balance, the court characterized Sudwischer's interests as substantial: "She [Sudwischer] has an overriding emotional and financial interest in knowing her father's identity." Schuh's interests, in contrast, were characterized as being only minimally infringed: "[Schuh] has asserted no physical or religious obstacles to a blood test.

right to privacy is fundamental and substantive, there is no countervailing substantive "right to prove filiation" *per se*. Rather, he argued, the right of illegitimates recognized in prior federal and state cases is more limited, consisting only of a right to be free from restrictive laws or other forms of state intervention into family or social relations that unreasonably and unnecessarily distinguish between legitimate and illegitimate children.[100] According to Justice Dennis, the source of the obstacle to Sudwischer's ability to prove filiation was not any form of state action, but rather the unilateral choice of a private party, Schuh. Thus, Sudwischer's constitutional rights were not implicated, and the constitutional balance should have been struck only between Schuh's acknowledged and important privacy rights on the one hand and the *state*'s interest in forcing her to submit to a blood test on the other—a balance which Justice Dennis had no difficulty in striking in favor of Schuh.[101]

The substantive rights of Ms. Sudwischer were not in dispute; Louisiana law is clear that an illegitimate child is entitled to a share in her biological father's succession.[102] However that right could attach only if she were able to prove that biological relationship, and do so by the required "clear and convincing" evidence. Thus the novel question was, as Justice Dennis pointed out, whether Sudwischer enjoys any constitutionally protected "right to prove filiation" which would be infringed by the state if it failed to order Schuh to submit to a blood test. This latter question lies at the intersection of "substantive" and "procedural" constitutional law. Resolution requires consideration of at least three related, but separable, issues. The first is a question of constitutional law; whether the

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The invasion of [her] privacy is minimal. [She] has the alternative of conceding a relationship to [Sudwischer]." *Id.* at 476 (citations omitted).

100. *Id.* at 477-78 (Dennis, J., joined by Calogero, C.J., dissenting).

101. *Id.* at 478-79 (Dennis, J., joined by Calogero, C.J., dissenting). Justice Dennis characterized the state's legitimate interest in requiring blood tests to help prove filiation as being limited to the admittedly valid purpose of securing support for needy children. Since Sudwischer could derive no support from the deceased, Justice Dennis saw the state's interest in this case as "minimal" and outweighed by Schuh's privacy rights. *Id.*

Cf. In re J.M., 590 So. 2d 565 (La. 1991), denying putative father's declaratory action seeking to declare statutes authorizing blood tests in paternity cases unconstitutional. Similarly to *Sudwischer*, the court in *J.M.* unanimously reaffirmed that a court-ordered blood test is a search and seizure but that it is only "minimally intrusive." The court, including Justice Dennis, went on to hold that the father's privacy interests here were outweighed by the state's compelling interest in securing the welfare of children and avoiding the need for public support. The court also held explicitly what was implicit in *Sudwischer*, that procedural due process requires that the applicant must make a prima facie case of paternity before the tests will be ordered.

102. La. Civ. Code art. 888 was revised in 1981 to remove prior language that had limited succession rights to "legitimate" descendants. *See also*, to the same effect, La. Civ. Code art. 3506(8), defining "children" to include those "whose filiation to the parent has been established in the manner provided by law. . . ." A number of federal Supreme Court decisions have likewise held that, where the fact of a biological relationship has been shown, state laws which unjustifiably discriminate against illegitimates violate the equal protection clause of the Fourteenth Amendment. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459 (1977); Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872 (1973); Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1968).

state or federal constitution should be interpreted to confer on Sudwischer some sort of right to a "reasonable opportunity to show" that she is a daughter of the deceased. If so, a second question of application of law to facts arises; whether the combination of a statutory requirement that a claimant prove filiation by "clear and convincing" evidence, combined with an inability to procure blood for DNA testing, effectively deprives that litigant of a reasonable opportunity to demonstrate her status. If so, a third "state action" question arises; whether a court's failure to order the blood tests could be considered, on the facts of this case, to constitute an interference *by the government* with that right.

The first sub-question should be answered in the affirmative, thus granting illegitimates the right to a "reasonable opportunity to show" filiation, for several reasons. First, as the *Sudwischer* majority may have implied, such a right could be seen as a conceptually necessary procedural derivative from the substantive right at issue—here, the substantive right of illegitimates to equal treatment with respect to the administration of estates. The *Sudwischer* majority's assertion that the plaintiff enjoyed a constitutional right to *prove* filiation to her deceased father was supported only by a single citation, *Trimble v. Gordon*,[103] a federal case construing the federal Equal Protection clause. While Justice Dennis is correct that *Trimble* did not articulate a "right to filiate" per se, the Court was required in that case to balance the state's interest in orderly administration of estates and in preclusion of spurious claims of paternity against the individual illegitimate's interest in having a fair opportunity to prove her relation to the deceased. As the *Trimble* court concluded, the state's asserted interests are legitimate, and may be furthered by rules of procedure and proof that impose some burdens on purported illegitimates,[104] but restrictions cannot "be made into an impenetrable barrier that works to shield otherwise invidious discrimination."[105] So too with respect

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103. 430 U.S. 762, 97 S. Ct. 1459 (1977), *cited in Sudwischer*, 589 So. 2d at 476.

104. *Id.* at 770, 97 S. Ct. at 1465 (recognizing that laws governing succession are a mixture of substantive and procedural rules, and that problems of proof may be particularly troublesome in cases like this).

105. *Id.* at 771, 97 S. Ct. at 1466 (quoting Gomez v. Perez, 409 U.S. 535, 538, 93 S. Ct. 872, 875 (1973)). It could be argued that *Trimble* is inapposite because the actual issue was not, as here, the prior question of what opportunity the alleged illegitimate child must be given to prove a biological relationship to a non-marital parent, but rather the subsequent question of whether the law could discriminate against one who had already demonstrated that biological relationship. It could further be argued that the issues in *Sudwischer* are more closely analogous to those in cases like Michael H. v. Gerald D., 491 U.S. 111, 109 S. Ct. 2333 (1989) and Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983), in which the federal Supreme Court upheld laws which in some sense precluded the plaintiff from demonstrating such a relationship. This argument has some force. It does not, however, undercut the thrust of the argument made here, because neither *Michael H.* nor *Lehr* involved a pure "access to proof" issue of the sort that was at stake in *Sudwischer*. Rather both, like *Trimble*, involved what were, at bottom, issues of substantive law.

In *Michael H.*, the issue at bar was whether California could apply a statutory conclusive presumption (that a child born to cohabiting, potent, married parents was a child of the marital father) to cut off the opportunity of another man to prove that he was in fact the child's biological father. In upholding the statute, the Court in *Michael H.* correctly noted that such a conclusive presumption

to the Louisiana constitution.[106]

This result should not be surprising. A substantive right to equal treatment for illegitimates (or any other class) would be little more than an illusion if the state were permitted to erect barriers of proof or procedure that effectively precluded plaintiffs from demonstrating the predicate facts that would entitle them to constitutional protection. Thus, the substantive guarantees of equal treatment that have been found to be implicit in the federal Constitution and that are expressly stated in the state constitution could reasonably be interpreted to include a derivative right to a reasonable opportunity to demonstrate the facts necessary to support a claim that those rights have been violated in a particular case.

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operates and should be analyzed as an issue of substantive rather than procedural law. *Michael H.*, 491 U.S. at 119-21, 109 S. Ct. at 2340-41. In other words, the California law did not cut off plaintiff's access to proof so much as it made the predicate fact that he was trying to prove legally irrelevant.

In *Lehr*, the issue at bar was whether New York had an obligation to notify plaintiff of adoption proceedings concerning his alleged biological child. The Court's conclusion that the state's conduct did not violate the federal Constitution did not, however, turn on any argument that an alleged biological parent may be precluded from generating proof of his relationship to the child. Rather, the Court's majority found that since the plaintiff had failed to register himself as the child's father (a simple step that would have guaranteed him notice of adoption or similar proceedings) and had never had any significant custodial, personal or financial relationship with the child, he lacked any protectable "liberty interest" in his relationship with the child. Thus, the procedural protections of the federal due process clause never attached at all. *Lehr*, 463 U.S. at 261-65, 103 S. Ct. at 2993-95. Any issue regarding the *scope* of his procedural rights thus could never arise.

The contrasts between *Sudwischer* and *Michael H.* and *Lehr* are thus apparent. Unlike in *Michael H*, the fact which Ms. Sudwischer was trying to prove—her biological relationship to the deceased—remained outcome-determinative under Louisiana law. And, unlike the plaintiff in *Lehr*, Ms. Sudwischer had a clear "property interest" at stake in her attempts to participate in her alleged father's estate—thus providing, for her, the requisite predicate for attachment of procedural rights under the federal and state due process clauses. In short, in none of these cases has the federal Supreme Court squarely addressed the question that was presented in *Sudwischer*, that is, whether laws which grant substantive rights to those who succeed in proving a biological relation to another also give rise to some derivative right to access to the proof required to fulfill the statutory condition. In such circumstances, the language from *Trimble* regarding the impropriety of erecting an "impenetrable barrier" to an alleged illegitimate's assertion of her substantive rights—distinguishable on the facts though that case may have been—remains a valid statement of the law, and one on which the Louisiana Supreme Court was entitled to rely.

106. *See, e.g.*, Succession of Grice, 462 So. 2d 131 (La. 1985), upholding a 19-year prescription period for filiation claims. Though the court in *Grice* concluded that the procedural restriction at stake in that case was valid, it did so only after carefully considering, in light of *Trimble* and other cases, whether that procedural restriction violated equality principles. While *Grice* can be criticized for its failure to consider whether the state constitution provides *greater* protection for illegitimates than does the federal Constitution, see discussion *infra* at notes 129-135 and accompanying text, it makes clear that the state constitution provides at least the same degree of derivative protection of the right to prove one's status against unreasonable procedural restrictions. *Cf.* Gauthreaux v. Rheem Mfg. Co., 588 So. 2d 723, 725 (La. App. 5th Cir. 1991), *writ denied*, 592 So. 2d 409 (La. 1992), suggesting that the Louisiana Supreme Court should reexamine whether permitting a statute of limitations to expire during a potential plaintiff's minority violates principles of equal protection, due process, and access to courts under the state and federal constitutions.

Alternatively, this same asserted right to a reasonable opportunity to demonstrate one's relationship to the deceased might be founded on the due process clauses of the state and federal constitutions[107] or on the state constitution's guarantee of access to courts.[108] The core of the due process clause is a right to notice and an opportunity to be heard. And, as has been recognized in other contexts, the right to be heard includes a right to a reasonable opportunity to present evidence on one's own behalf, in order to demonstrate relevant facts.[109]

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107. La. Const. art. I, § 2, provides, "No person shall be deprived of life, liberty, or property, except by due process of law." U.S. Const. amends. V & XIV, provide similarly.

108. La. Const. art. I, § 22 provides as follows:

> Section 22. Access to Courts
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> Section 22. All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

As Professor Hargrave has noted, this provision has been interpreted as "essentially a second due process clause and not a substantial expansion of flexible due process rights." Lee Hargrave, The Louisiana Constitution: A Reference Guide 42 (1991). However, its plain text would appear to go somewhat beyond a mere "due process" clause, and to do so in a way that has relevance to situations like that presented in *Sudwischer*. The core of a due process guarantee appears to be phrased as a "negative" right—that is, a right to be free from actions by the state that have the effect of depriving one of, for example, property without observing proper procedures. The "access to courts" provision is at least facially susceptible to a broader interpretation—as a "positive" right requiring the state to affirmatively act to provide fair procedures for redress of acts by private parties that have the effect of, for example, wrongfully depriving one of property.

109. Such a due process-based right to a reasonable opportunity to prove one's case has been recognized by Louisiana and federal courts in a number of similar contexts. *See* City of New Orleans v. United Gas Pipeline, 436 So. 2d 704 (La. App. 4th Cir.), *writ denied*, 442 So. 2d 452 (La. 1983), and cases cited therein. A further analogy could be drawn to another set of cases lying at the intersection of due process and equal protection concerns: the doctrine of irrebuttable presumptions. At the time when the present Louisiana Constitution was adopted, it was already well understood that the federal Fourteenth Amendment precluded governments from adopting laws that cut off the ability of a litigant to show that the factual presumptions underlying the generally reasonable distinctions drawn by the law did not in fact obtain in that litigant's particular case. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974) (public school teacher must be given an opportunity to prove her ability to continue employment after her fourth month of pregnancy); Sugarman v. Dougall, 413 U.S. 634, 93 S. Ct. 2842 (1973) (alien cannot be refused public employment without being afforded an opportunity to show that citizenship is not required for that job); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 92 S. Ct. 1400 (1972) (state workers compensation law could not preclude illegitimate child from receiving survivor benefits unless that child is given an opportunity to prove actual dependence on deceased); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972) (unmarried father cannot be deprived of parental rights in a custody proceeding without being given a chance to show his fitness as a parent). *See generally* Laurence H. Tribe, American Constitutional Law 1619-24 (2d ed. 1988). Though commentators disagree about the ultimate foundations of this body of law, it can be seen as reflecting an important insight about due process—that a reasonable opportunity to demonstrate relevant facts is a necessary part of that "hearing" to which litigants are, in all but extraordinary cases, entitled.

Note, however, this analogy may not be exact. Irrebuttable presumptions have been likened to rules of substantive law, and their constitutionality has been judged accordingly. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 119-21, 109 S. Ct. 2333, 2340-41 (1989).

Though the point is less certain, it appears that the second sub-question—whether an inability to procure blood for DNA testing would effectively deprive plaintiff of any reasonable opportunity to meet the statutory requirement that a claimant prove filiation by "clear and convincing" evidence—could be answered in the affirmative as well. In a case involving somewhat similar issues, *Little v. Streater*,[110] the federal Supreme Court held that where state law places a strict evidentiary burden on the defendant in a paternity suit,[111] the state was required to pay for blood grouping tests sought by an indigent named as defendant in such a suit. As the Court argued:

> Under Connecticut law . . . the defendant in a paternity suit is placed at a distinct disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case. Among the most probative additional evidence the defendant might offer are the results of blood grouping tests, but if he is indigent, the State essentially denies him that reliable scientific proof by requiring that he bear its cost. . . . Yet not only is the State inextricably involved in paternity litigation such as this and responsible for the imbalance between the parties, it in effect forecloses what is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause.[112]

So too, it would seem, in *Sudwischer*. While full analysis of this issue would require consideration of what other sources of evidence would be available to plaintiff Sudwischer, her situation seems broadly similar to that of the indigent defendant in *Little*. In both cases, state law imposed a burden of proof that could not be readily satisfied without resort to scientific evidence. In both cases, access to that evidence was cut off, thus depriving the parties attempting to carry that evidentiary burden of a realistic opportunity to prove their case.

The third sub-question—whether a court's failure to order the blood tests involves the kind of "state action" which is necessary to trigger constitutional protection of Sudwischer's interests—may be more difficult to resolve. It is axiomatic that the rights guaranteed by the federal Bill of Rights apply only to the actions of governments; private parties are generally subject to constitutional

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110. 452 U.S. 1, 101 S. Ct. 2202 (1981).

111. Connecticut law provided that, where an unwed mother consistently accuses the defendant of paternity, her accusation constitutes prima facie proof of paternity. The reputed father was then required to bear the burden of proving his innocence and do so "by other evidence than his own." *Id.* at 10-11, 101 S. Ct. at 2207 (quoting Mosher v. Bennett, 144 A. 297, 298 (1929)).

112. *Id.* at 12, 101 S. Ct. at 2208-9. The Court went on to judge the validity of the state law under the balancing test of Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976). It concluded that the Connecticut statute (requiring the individual seeking blood grouping tests to pay for them) may be valid in most cases but that its application in this case deprived the defendant of an effective opportunity to be heard. *Little*, 452 U.S. at 13-17, 101 S. Ct. at 2209-11.

restraint only if they are directly influenced by, act in concert with, or stand in the place of some government entity or official.[113] And, while the issue is

113. As the federal courts have phrased it, the "state action" limit on the scope of federal constitutional rights posits an "essential dichotomy . . . between deprivation by the State, subject to scrutiny under [the Constitution], and private conduct, 'however discriminatory or wrongful; against which the Fourteenth Amendment generally offers no shield.'" Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 95 S. Ct. 449, 453 (1974) (quoting Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 842 (1948)). With the single exception of the Thirteenth Amendment to the federal Constitution, which prohibits slavery, all federal constitutional rights have been held to apply only in the context of "state action."

With respect to the federal Constitution, the textual basis for this dichotomy between public and purely private action is clear. The federal Bill of Rights was originally conceived as limiting only the actions of the newly formed federal government. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). The primary textual warrant for extending its prohibitions to other possible actors is found in the Fourteenth Amendment, which provides that "No *State* shall" deprive persons within its jurisdiction of fundamental rights. U.S. Const. amend. XIV (emphasis added).

The hard question, not surprisingly, has been how to define the nature and degree of connection between governments and assertedly private actors that is sufficient to allow a finding of state action, thus triggering application of the substantive protections of the federal Constitution. The federal Supreme Court has identified a number of rationales to determine when state action will be found, all of which were initially interpreted expansively. One such rationale, the "public function" doctrine, posited that a private party will be subject to constitutional restraint when it supplants the state as a provider of necessary public facilities. Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486 (1966) (privately owned municipal park); Terry v. Adams, 345 U.S. 461, 73 S. Ct. 809 (1953) (private political "club" that effectively controlled local politics); Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276 (1946) (company town). Alternatively, state action could be found if there was a sufficiently close connection between some government entity and the assertedly private wrongdoer. This connection could take the form of official authorization, encouragement, or enforcement of the private party's unconstitutional action. Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S. Ct. 2744 (1982) (private creditor caused clerk of court to issue writ of attachment); Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627 (1967) (state constitutional amendment found to have effect of "encouraging" private discrimination); Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836 (1948) (state court enforcement of restrictive covenant among private parties). Alternatively, the requisite connection could be found based on government subsidy of or other "entanglement" with the private actor. Gilmore v. City of Montgomery, 417 U.S. 556, 94 S. Ct. 2416 (1974) (entanglement found where city gave private school privileged access to city parks); Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856 (1961) (private restaurant operated symbiotically with public parking garage).

More recently, the federal Supreme Court has redefined each of these rationales so as to generally restrict the number of assertedly private parties who will be required to observe federal constitutional norms. The "public function" doctrine has been redefined to apply only to entities that provide services or wield powers traditionally and exclusively reserved to the State or traditionally associated with sovereignty. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 107 S. Ct. 2971 (1987) (U.S. Olympic Committee not performing "public function"); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449 (1974) (power company not performing "public function"). The Court has similarly redefined the degree of state "encouragement" of or "entanglement" with private actors necessary to trigger constitutional scrutiny. A plaintiff must ordinarily show either that a state official was directly (albeit perhaps only ministerially) involved in carrying out the challenged deprivation, or that the state is "responsible," because of its coercive power or other significant encouragement, for the "specific conduct" alleged to be unconstitutional. Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764 (1982) (private school not bound by constitution despite receiving virtually all of its funds and students from public authorities); Moose

considerably less clear, the Louisiana Declaration of Rights has been held to incorporate similar, though not necessarily identical, restrictions.[114] In *Sudwischer*, unlike *Little*, access to the necessary scientific evidence was denied by the unilateral choice of an adverse private party, not by any decision or policy that could be directly attributed to the state—a fact which in Justice Dennis' opinion precluded finding of any infringement of Sudwischer's *constitutional* rights.[115] However, this private choice cannot be realistically divorced from government involvement in the events which effectively deprived the plaintiff of her "right to prove filiation." Sufficient government involvement to warrant a finding of constitutional infringement can be found on the facts of *Sudwischer*—sufficient to satisfy both the stricter requirements of federal law, and what may be less restrictive state-based analysis of the "state action" concept.

Assuming first that the state guarantees of equality and due process would not apply in the absence of state action, as federal courts define that term, one could argue that *Sudwischer* demonstrates sufficient official involvement in the events at issue to trigger constitutional protections. The federal case chiefly relied upon by Justice Dennis, *Flagg Bros., Inc. v. Brooks*,[116] does hold that, under ordinary

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Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965 (1972) (private club pervasively regulated by the state through liquor licenses was not a state actor).

114. The question of whether and to what extent application of the Louisiana Declaration of Rights of 1974 can apply to restrict non-governmental infringers has not been directly or comprehensively addressed by the Louisiana Supreme Court. There are, however, indications that some form of state action requirement should be read into that Declaration. The very first section of the Declaration states that: "The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state." La. Const. art. I, § 1. A reading of this section as incorporating a "state action" restriction on the application of the state Declaration of Rights could be supported by considerations such as that the framers' debates contain indications that they presupposed that constitutional rights generally bind only governments and that where the framers wanted state constitutional rights guarantees to apply against private infringers, the particular provisions say so explicitly. *See, e.g.*, La. Const. art. I, § 3 (most of the prohibitions are phrased in terms of restrictions on the state in its lawmaking capacity ("No law shall . . ."), but the prohibition on slavery is phrased without that restriction so as to make it applicable to private actors) and La. Const. art. I, § 12 (right to freedom from discrimination specifically intended and phrased to apply to private actors). For these reasons, among others, some state courts have held or implied that particular state rights guarantees apply only to governmental actors. Clark v. State, 434 So. 2d 1276, 1278 (La. App. 1st Cir.), *writ denied*, 492 So. 2d 452 (1983) (equality protections of the state constitution, like its federal counterpart, apply to "every kind of state action"); Vangraff, Inc. v. McCearley, 314 So. 2d 483 (La. App. 1st Cir.), *writ denied*, 318 So. 2d 51, *and application denied*, 320 So. 2d 549 (1975) (due process protections of the state constitution, like its federal counterpart, apply only if there is state action).

On the other hand, there are countervailing indications that the rights protected by the Louisiana Constitution are not limited by any requirement of state action, or, if some version of the doctrine is required, that the doctrine will not be interpreted as narrowly as the federal courts have interpreted it. See discussion *infra* at notes 120-122.

115. It is noteworthy that, in considering the "state action" issue in *Sudwischer*, Justice Dennis cited only federal precedent.

116. 436 U.S. 149, 98 S. Ct. 1729 (1978). In *Flagg*, a private warehouseman took advantage

circumstances, private parties cannot be held to be clothed with state action merely because government organs have passively acquiesced in their choices.[117] However, the government's relationship to the events in *Sudwischer* goes beyond mere acquiescence in a private decision, privately enforced. In a line of federal cases exemplified by *Edmondson v. Leesville Concrete Co., Inc.*[118] and *Shelley v. Kraemer*,[119] the federal Supreme Court has consistently found state action present when the alleged deprivation of rights takes place in the context of a judicial proceeding or is enforced by the actions, however ministerial, of the courts. In *Sudwischer*, the potential deprivation of the illegitimate's rights inhered not solely in any inability to perform a blood test on Schuh, but rather in the consequences of that inability—the erection of an effective obstacle to sharing in her alleged father's estate. As in *Edmondson*, this deprivation of a share in the estate took place in the context of a judicial proceeding and was enforced by a judicial decree. As in *Edmondson*, a strong case for the existence of state action could be made, even under the normally restrictive definition employed by federal courts.

Moreover, even if federal definitions of state action were not satisfied under the facts of *Sudwischer*, the Louisiana Declaration of Rights might apply anyway. Good reasons exist why portions of the Louisiana Declaration of Rights should be interpreted to apply even in the absence of "state action" or, if some version of the doctrine is required, why it should not be interpreted as narrowly for purposes of the state constitution as it has been interpreted for purposes of the federal Constitution. First, many of the substantive rights guarantees of the state constitution are phrased not as restrictions on the state,[120] but rather as statements of an absolute right containing no textual restriction as to the nature of possible infringers. For example, Section 5 of the state Declaration is phrased in absolute terms, stating only that "[e]very person shall be secure" from infringements of their privacy rights. Perhaps for this reason, Louisiana courts have on occasion interpreted the state constitution to apply to private actors in situations where "state action" in the federal sense was not present.[121] Moreover, if the Louisiana

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of a state law permitting him to satisfy a lien on goods in his possession by selling them. Plaintiff claimed that the sale deprived her of property without due process of law in violation of the federal Fourteenth Amendment. The Court held that plaintiff showed no state action and thus no violation of federal constitutional rights.

117. *Id.* at 164-66, 98 S. Ct. at 1737-38 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449 (1974) and Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965 (1972)).

118. 111 S. Ct. 2077 (1991), holding that a civil litigant could not exercise peremptory challenges to jurors in a racially discriminatory manner. Although the "choice" at issue was wholly private, the context of a court proceeding and the necessary, though minimal, action of the judge in actually excusing challenged jurors were sufficient to find "state action."

119. 334 U.S. 1, 68 S. Ct. 836 (1948), holding that a private racially restrictive covenant could not be enforced by judicial injunction. Any act by the courts to enforce that racial exclusion would constitute state action, triggering the protections of the federal Equal Protection clause.

120. A typical phrasing, for example, might be one that states that "no law shall" derogate from the rights granted in that particular provision.

121. *See, e.g.*, Ahlum v. Administrators of Tulane Educ. Fund, 617 So. 2d 96 (La. App. 4th Cir.), *writ denied*, 624 So. 2d 1230 (1993) (holding that student disciplinary decision by private

Supreme Court were to squarely hold that portions of the state constitution apply in the absence of "state action" in the relatively narrow federal sense, that court would not be standing alone. Rather, it would be in the tradition of a number of courts in other states which have rejected or relaxed state action limits on the application of their respective state constitutions.[122]

Finally, regardless of the technicalities of federal or state "state action" analysis, recognition that the events in *Sudwischer* violated plaintiff's constitutional rights seems intuitively appropriate. It was the state that chose to impose on plaintiff the burden of proving her case by "clear and convincing" evidence. In such circumstances, it seems inappropriate—as the *Sudwischer* majority implicitly agreed—to permit the state to claim that it is "not involved" when it allows an opposing litigant to block plaintiff's access to evidence needed to carry this state-imposed burden.

B. Short Takes

As has become typical over the last several years, Louisiana's constitutional guarantee of privacy[123] has produced a number of noteworthy decisions. Though

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university could be reviewed by the courts on an "arbitrary and capricious" standard); State v. Nelson, 354 So. 2d 540 (La. 1978) (departing from federal precedent to hold evidence resulting from an illegal search inadmissible, even though parties conducting search were private parties); Dumez v. Louisiana High Sch. Athletic Ass'n, 334 So. 2d 494 (La. App. 1st Cir.), *writ denied*, 337 So. 2d 225 (1976) (holding that private association was subject to constraints of state equal protection and due process guarantees).

122. Such decisions have arisen in the context of several types of state rights guarantees, including state guarantees of "privacy," Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989); Porten v. University of San Francisco, 134 Cal. Rptr. 839 (Cal. Ct. App. 1976), state guarantees of freedom of speech and assembly, Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74, 100 S. Ct. 2035 (1980); State v. Schmid, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100, 102 S. Ct. 867 (1982); Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); Jones v. Memorial Hosp. Sys., 746 S.W.2d 891 (Tex. Ct. App. 1988) (requiring state action, but departing from federal analysis), state guarantees of equality, Gay Law Students Ass'n v. Pacific Tel. and Tel. Co., 595 P.2d 592 (Cal. 1979); Hartford Accident & Indem. Co. v. Insurance Comm'r, 482 A.2d 542 (1984) (requiring state action, but departing from federal analysis), and state guarantees of due process, Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169 (N.Y. 1978) (requiring state action, but departing from federal analysis).

To be sure, many state courts have continued to hold that state rights guarantees may not be applied in the absence of state action in the federal sense. *See, e.g.*, Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz. Ct. App. 1988); Schreiner v. McKenzie Tank Lines, Inc., 432 So. 2d 567 (Fla. 1983); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); Under 21 v. City of New York, 482 N.E.2d 1 (N.Y. 1985); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986); Southcenter Joint Venture v. National Democratic Policy Comm'n, 780 P.2d 1282 (Wash. 1989); Jacobs v. Major, 407 N.W.2d 832 (Wis. 1987). However, arguments can be made that state constitutions differ from their federal counterpart in ways that make across-the-board adoption of federal state action precedent inappropriate. *See generally* Cole, *supra* note 81; Devlin, *supra* note 81; Friesen, *supra* note 81.

123. La. Const. art. I, § 5, quoted, in part, *supra* at note 32.

State v. Perry[124] and *Sudwischer v. Estate of Hoffpauir*,[125] both of which are discussed above, are certainly the most important, they are not alone. In other decisions, the Louisiana courts have upheld the "disclosural" privacy interests of participants in auto accidents,[126] but permitted the state to require a drug test of an employee who was reasonably suspected of using drugs,[127] and a blood DNA test of an individual indicted for rape.[128]

With respect to the equality guarantee of the state constitution,[129] the most interesting development appears to be the possibly uncertain status of *Sibley v. Board of Supervisors of Louisiana State University*.[130] In *Sibley*, the Louisiana Supreme Court established the method for analyzing such claims under the state constitution—a method which differed significantly from standard "tier" analyses of the cognate Equal Protection clause of the federal Fourteenth Amendment.[131]

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124. 610 So. 2d 746 (La. 1993), discussed *supra* at notes 33-51 and accompanying text.

125. 589 So. 2d 474 (La. 1991), discussed *supra* at notes 93-122.

126. DeSalvo v. State, 624 So. 2d 897 (La. 1993). The statutes at issue permitted police auto accident reports to be disclosed to third parties only for very limited purposes and specifically did not permit them to be disclosed to attorneys who might seek to use the information therein for direct mail advertising to potential clients. The statute was challenged as violative of the attorney's federal First Amendment and state equal protection rights. The court held that the legislature's desire to protect the participants' constitutionally recognized interest in avoiding disclosure of private information constituted a sufficient government interest to support the legislation under both federal "commercial free speech" and state equal treatment analysis.

127. Banks v. Department of Pub. Safety and Corrections, 598 So. 2d 515 (La. App. 1st Cir. 1992). *Compare* Phelps v. Louisiana State Racing Comm'n, 611 So. 2d 739 (La. App. 4th Cir. 1992), reaffirming the courts prior holding in Holthus v. Louisiana State Racing Comm'n, 580 So. 2d 469 (La. App. 4th Cir.), *writ denied*, 584 So. 2d 1162 (1991), that the Racing Commission's rules requiring jockeys and other racetrack workers to submit to random drug testing did not violate those employees' privacy rights under § 5. The failure of the court in *Holthus* to distinguish between federal and state constitutional privacy standards was criticized in a prior article in this series. John Devlin and David Hilburn, *Louisiana Constitutional Law, Developments in the Law, 1990-1991*, 52 La. L. Rev. 575, 589-92 (1992). In *Phelps*, the court noted that the state constitution is more protective of privacy rights than is the federal constitution and called for Louisiana Supreme Court review of the issue. *Phelps*, 611 So. 2d at 741.

128. State v. Pierre, 606 So. 2d 816 (La. App. 3d Cir. 1992), discussed *supra* at note 96.

129. La. Const. art. I, § 3, provides as follows:

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

130. 477 So. 2d 1094 (La. 1985).

131. *Id.* at 1104-1108. Briefly, the judicially constructed federal analysis applies one of three general standards of review—"strict," "intermediate" and "rational basis" review—depending on the nature of the classification or the right at issue. *See generally* John E. Nowack and Ronald D. Rotunda, Constitutional Law § 14.3, at 573-90 (4th ed. 1991).

Before *Sibley*, Louisiana courts interpreted and applied the state equality guarantee according to the same analysis as was applied by federal courts to the federal Equal Protection clause. In *Sibley*, the Louisiana Supreme Court looked to the more complete text of the state provision and derived a

While many recent appellate cases have continued to cite and apply *Sibley* when analyzing claims under the state equality guarantee,[132] others have not done so, and have instead interpreted the state constitution according to federal or pre-*Sibley* Louisiana precedents.[133] Moreover, even when Justices have relied upon *Sibley*, they have often tended to conflate its analysis with the analysis employed under the federal Equal Protection clause.[134] It is to be hoped that these latter cases do not

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significantly different analysis:

> (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

Sibley, 477 So. 2d at 1107-08. For a discussion of how the *Sibley* test has been applied, see Michael L. Berry, Jr., Comment, *Equal Protection—The Louisiana Experience in Departing From Generally Accepted Federal Analysis*, 49 La. L. Rev. 903 (1989); John Devlin, *Louisiana Constitutional Law, Developments in the Law, 1988-1989*, 51 La. L. Rev. 295, 306-12 (1990) (discussing analysis of distinctions based upon unenumerated categories under § 3 and *Sibley*).

132. *See, e.g.*, DeSalvo v. State, 624 So. 2d 897 (La. 1993) (upholding a statute denying auto accident information to lawyers seeking clients); Flagship Ctr., Inc. v. City of New Orleans, 587 So. 2d 154 (La. App. 4th Cir. 1991) (striking down ordinance distinguishing between cable television bingo proprietors and bingo hall owners). *See also* Succession of Lauga, 614 So. 2d 55 (La. 1993) (Kimball, J., dissenting), arguing that legislation defining "forced heirs" as only incompetents or children under the age of 23 did not constitute impermissible discrimination on the basis of age.

133. *See, e.g.*, Talley v. Succession of Stuckey, 614 So. 2d 55 (La. 1993) (striking down a statute providing for invalidation of a will if a legitimate—but not an illegitimate—child is subsequently born; analyzing state and federal constitutional challenges together and citing only pre-*Sibley* Louisiana precedent); Butler v. Flint Goodrich Hosp., 607 So. 2d 517 (La. 1992) (upholding a statutory cap on general damages in medical malpractice actions; citing *Sibley* in its discussion of the history of the damages cap issue, but failing to perform any *Sibley*-type analysis; relying instead primarily on federal and sister-state precedent); State v. Vining, 609 So. 2d 984 (La. 1992), *cert. denied sub nom.* Butler v. Medley, 113 S. Ct. 2334 (1993) (statute criminalizing carnal knowledge of a juvenile only if the perpetrator is male; relying solely on federal and pre-*Sibley* state precedent); State v. Brown, 606 So. 2d 586 (La. App. 5th Cir. 1992) (upholding enhanced penalties for drug crimes committed near schools; similar non-*Sibley* analysis); Gauthreaux v. Rheem Mfg. Co., 588 So. 2d 723 (La. App. 5th Cir. 1991), *writ denied*, 592 So. 2d 409 (La. 1992) (upholding statute permitting prescriptive period for tort action by minor to expire before plaintiff reached majority; citing *Sibley*, but treating federal and state equal protection analyses as identical).

134. A striking example of this phenomenon can be found in Justice Dennis' dissent in Talley v. Succession of Stuckey, 614 So. 2d 55 (La. 1993), in which the court considered Louisiana Civil Code article 1705. That article provided for automatic revocation of a testament in the event that a legitimate—but not an illegitimate—child of the testator was subsequently born. The majority found that article 1705 violated the equality guarantee of § 3 of the state Declaration of Rights and cured the defect by extending the conclusive presumption that the testator would have wished to modify the testament to cover illegitimates as well. *Id.* at 58-61. As noted *supra* at note 133, the majority's decision was based not on any analysis under *Sibley*, but rather on federal and pre-*Sibley* state precedents.

Equally instructive is the treatment of *Sibley* in the dissenting opinion of Justice Dennis, *Sibley*'s author. In that dissent, Justice Dennis discusses *Sibley* and correctly identifies the discrimination at

herald any sub silentio abandonment of *Sibley*. Whatever may be the merits of the particular analytic approach established in that case, the crucial reality is that the state equality guarantee was not written solely to mimic the federal Equal Protection clause. Interpretation of the state provision solely or even primarily by reference to federal precedents is untrue both to the plain language of Section 3 and to the intentions of those who wrote it.[135]

The guarantee of "due process" in Section 2 of the state Declaration of Rights[136] has also been the focus of significant decisions. In a case that will be of comfort to attorneys, the supreme court held that the "substantive" protections embodied in Section 2 require that attorneys who are involuntarily appointed to defend indigents in capital cases must be compensated.[137] While most statutes challenged on purely procedural due process grounds have been upheld,[138] courts have relied upon Section 2 to hold that an alleged biological father could not be estopped from denying paternity for purposes of a state's motion for a deficiency judgment arising out of a previously adjudicated award of support,[139] and that a law expanding the ability of workers compensation carriers to obtain reimburse-

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issue in *Talley* as subject to special scrutiny under § 3, which specifically prohibits laws which "arbitrarily, capriciously, or unreasonably discriminate against a person because of birth." La. Const. art I, § 3. However, Justice Dennis did not concentrate on performing the analysis called for in *Sibley*—i.e., examining the proofs offered by the proponents of the statute to see if they had affirmatively demonstrated that the classification has a reasonable basis. Instead, he appeared to amalgamate this category of analysis under *Sibley* with federal cases analyzing according to the "intermediate" tier of review under the federal Equal Protection clause. *Talley*, 614 So. 2d at 62 (Dennis, J., dissenting). In light of the *Sibley* court's vociferous rejection of federal "tier" analysis, *Sibley*, 477 So. 2d at 1105-07, this amalgamation seems curious, to say the least.

135. The textual differences between the state and federal provisions are self-evident. It is also clear that the expanded language of § 3 of the Louisiana Declaration of Rights was intended to provide more extensive protection for equality interests than is available under the federal Equal Protection clause. *See, e.g.*, W. Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 6-10 (1974).

136. La. Const. art. I, § 2, quoted *supra* at note 107.

137. State v. Wigley, 624 So. 2d 425 (La. 1993). *Compare* State Farm Mut. Auto. Ins. Co. v. Azhar, 620 So. 2d 1158 (La. 1993), upholding La. R.S. 22:658(A)(1), which requires insurers to make an unconditional tender of payment to insureds who suffer loss, but does not permit recovery of any overage from the insured if the loss is ultimately adjudicated to be less than the tender. The court did not expressly consider any constitutional challenges to the statute. It may be, however, that the statute works an unjustifiable forfeiture of the insurers' property in violation of the substantive protections of La. Const. art. I, § 2, or the protections of property rights set out in La. Const. art. I, § 4, or both. The *Azhar* decision will be the subject of a forthcoming student note in this review.

138. *See, e.g.*, Martin v. Rush's Fabricare Ctr., Inc., 590 So. 2d 707 (La. App. 3d Cir. 1991) (upholding new workers' compensation statute against procedural due process and equal protection challenges); Gauthreaux v. Rheem Mfg. Co., 588 So. 2d 723 (La. App. 5th Cir. 1992) (upholding statute permitting running of prescription of minor's tort claim during his minority against challenges based on state guarantees of procedural due process and access to courts, La. Const. art I, §§ 2, 14).

139. *In re* Brisco, 598 So. 2d 591 (La. App. 4th Cir. 1992). The court so held even though the putative father had never previously contested paternity despite eleven prior court appearances on the matter, stretching over the course of 14 years.

ment from funds recovered by workers in third-party actions cannot be applied retroactively to claims arising out of pre-amendment events.[140]

Other individual rights guaranteed by the Louisiana Declaration of Rights also received some attention. Included are several recent decisions regarding the state guarantee of property rights,[141] the state guarantee against laws impairing the obligation of contracts,[142] and the state guarantee of the right to vote.[143]

III. INTERPRETIVE METHODOLOGY

A. Of Gambling, Forced Heirs and the Constitutional Restraints on Legislation

In two recent cases, *Polk v. Edwards*[144] and *Succession of Lauga*,[145] the Louisiana Supreme Court was required to determine the extent to which the legislature is constrained by state constitutional provisions which embody particular policy preferences of the framers and ratifiers of the state constitution. By coming to opposite conclusions in the two cases, the court sowed confusion regarding how such provisions should be interpreted, and may have left itself open to charges that its decisions in this area are more result-driven than analytically consistent. Nonetheless, the decisions can be seen as compatible and together may mark a new

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140. St. Paul Fire & Marine Ins. Co. v. Smith, 609 So. 2d 809 (La. 1992) (holding that amendment worked a "substantive" change in the law and thus could not be applied retroactively without violating La. Const. art. I, § 2).

141. La. Const. art. I, § 4, provides broad and extensive protection for property rights in this state. However, litigation has centered around only that portion of the section that concerns compensation for expropriated property. *See, e.g.*, State Dep't of Transp. and Dev. v. Chambers Inv. Co., 595 So. 2d 598 (La. 1992) (holding that property owners need not be compensated for delays imposed on owner's ability to develop land caused by highway construction on adjoining parcels; owner must tolerate inconveniences caused by appropriate activity on adjoining land); Packard's Western Store Inc. v. State Dep't of Transp. and Dev., 618 So. 2d 1166 (La. App. 2d Cir.), *writ denied*, No. 93-C-1961, 1993 LEXIS 3151 (La. Nov. 5, 1993) (lessee of expropriated property can recover for business losses for period after expiration of lease if it can show option or other reasonable expectation that the lease would have been renewed); Obermier v. State, 606 So. 2d 937 (La. App. 3d Cir.), *writ denied*, 609 So. 2d 257 (La. 1992) (holding that district attorney's actions in restricting access to building where murder took place during the criminal investigation did not constitute an expropriation requiring compensation); Lakeshore Harbor Condominium Dev. v. City of New Orleans, 603 So. 2d 192 (La. App. 4th Cir. 1992) (where substantial economic value remained, rezoning did not constitute taking for which compensation is due).

142. Andrepont v. Lake Charles Harbor & Terminal Dist., 586 So. 2d 722 (La. App. 3d Cir.), *reversed on other grounds*, 602 So. 2d 704 (1992), holding that termination of public employee's job by operation of law did not violate either the federal or state "contracts clause." La. Const. art I, § 23.

143. Branton v. Webster Parish Sch. Bd., 596 So. 2d 840 (La. App. 2d Cir. 1992), relying in part on the state constitutional guarantee of the right to vote, La. Const. art. I, § 10, to uphold special bond election in which all voters voted, against challenge that franchise should have been restricted to property taxpayers only.

144. 626 So. 2d 1128 (La. 1993).

145. 625 So. 2d 1156 (La. 1993).

level of sophistication in the court's analysis of constitutional provisions which assertedly restrain the legislature's freedom of action.

1. Polk v. Edwards *and the Legislature's Obligation to "Suppress" Gambling*

Religious-based opposition to gambling and the state's historical experience with the corruption which surrounded the nineteenth century Louisiana Lottery Company[146] led to a long series of state constitutional provisions outlawing lotteries in this state and, more generally, declaring gambling to be a vice which the legislature was directed to "suppress."[147] The Louisiana Constitution of 1974 followed its predecessors in this regard and, in Article XII, section 6, provides, "Gambling shall be defined by and suppressed by the legislature."[148] Despite that

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146. Lee Hargrave, The Louisiana State Constitution—A Reference Guide 9-10 (1991).

147. The first state constitutional provision outlawing lotteries appeared in Article 116 of the Louisiana Constitution of 1845. The prohibition was deleted from subsequent constitutions of 1852, 1861, and 1864, thus permitting the creation of the Louisiana Lottery Company and its resultant scandals. The Louisiana Constitution of 1879 contained two relevant provisions, the first continuing the Louisiana Lottery until 1895, and the second declaring gambling to be a vice and directing the legislature to "suppress" it:

> Art. 167
>
> The General Assembly shall have authority to grant lottery charters or privileges; provided, each charter or privilege shall not pay less than forty thousand dollars per annum in money into the treasury of the State; and provided further, that all charters shall cease and expire on the first of January, 1895, from which time all lotteries are prohibited in the State.
>
> . . . .
>
> Art. 172
>
> Gambling is declared to be a vice, and the General Assembly shall enact laws for its suppression.

La. Const. of 1879, arts. 167 & 172. The Louisiana Constitutions of 1898 and 1913 contained similar provisions absolutely prohibiting lotteries and directing the legislature to "suppress" the "vice" of gambling. La. Const. of 1898, arts. 178 & 188; La. Const. of 1913, arts. 178 & 188. In the Louisiana Constitution of 1921, the immediate predecessor to the present state constitution, these two provisions were combined into a single statement along with a prohibition on commodity speculation:

> § 8. Gambling; futures of agricultural products; lotteries
>
> Section 8. Gambling is a vice and the Legislature shall pass laws to suppress it.
>
> Gambling in futures on agricultural products or articles of necessity, where the intention of the parties is not to make an honest and bona fide delivery, is declared to be against public policy; and the Legislature shall pass laws to suppress it.
>
> Lotteries and the sale of lottery tickets are prohibited in this State.

La. Const. of 1921, art. XIX, § 8.

148. La. Const. art. XII, § 6. As originally enacted, Section 6, like its predecessors, also precluded the state from conducting lotteries.

> Section 6. Lotteries; Gambling
>
> Section 6. Neither the state nor any of its political subdivisions shall conduct a lottery.
>
> Gambling shall be defined by and suppressed by the legislature.

In 1990, Section 6 was amended to permit the state to conduct a lottery, but the prior language directing the legislature to define and suppress gambling was retained. Today the provision reads,

constitutional directive, the legislature in 1991 passed four statutes which together provided for licensing of gambling in a wide variety of contexts, including: at a land-based casino in New Orleans;[149] on cruiseships operating out of New Orleans;[150] on riverboats operating on certain rivers in the state;[151] and by means of video poker machines located throughout the state.[152] Not surprisingly, suit was brought challenging these statutes on a number of grounds. The trial court rejected all but one of these arguments, holding unconstitutional only so much of the Casino Act as provided that Louisiana Economic Development and Gaming Corporation (the "Gaming Corporation"), a state organ created to oversee that Act, would not be subject to the provisions of the Louisiana Civil Service laws.[153]

After initially denying expedited handling,[154] the Louisiana Supreme Court took the cases from the court of appeal and consolidated them for review. On review, the supreme court affirmed the trial court in all respects. It agreed that the Casino Act was unconstitutional insofar as it purported to exempt employees of the Gaming Corporation from the requirements of the state Civil Service laws,[155] but

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in relevant part, as follows:

> Section 6. Lotteries; Gambling
>
> Section 6. *(A) Lotteries.* The legislature may provide for the creation and operation of a state lottery. . . .
>
> * * *
>
> *(B) Gambling.* Gambling shall be defined by and suppressed by the legislature.

149. The Louisiana Economic Development & Gaming Corp. Act (the "Casino Act"), 1992 La. Acts No. 384, La. R.S. 4:601-686 & 14:90(E) (Supp. 1993).

150. The Cruiseship Gaming Act (the "Cruiseship Act"), 1991 La. Acts No. 289, La. R.S. 14:90(B) (Supp. 1993).

151. The Louisiana Riverboat Economic Development and Gaming Control Act (the "Riverboat Act"), 1991 La. Acts No. 753, La. R.S. 4:501-562 & 14:90(D) (Supp. 1993).

152. The Video Draw Poker Devices Control Law (the "Video Poker Act"), 1991 La. Acts No. 1062, La. R.S. 33:4862.1-4862.19 (Supp. 1993).

153. Polk v. Edwards, 626 So. 2d 1128, 1128 (La. 1993).

154. Polk v. Edwards, 613 So. 2d 981 (La. 1993).

155. La. Const. art X, § 1(A), provides, in relevant part, as follows:

> Section 1. Civil Service Systems
>
> (A) State Civil Service. The state Civil Service is established and includes all persons holding offices and positions of trust or employment in the employ of the state, or any instrumentality thereof. . . .

Since the constitution thus requires that all state employees be covered by the state Civil Service, the only issue was whether the Gaming Corporation is an instrumentality of the state. The Court had no trouble concluding that the corporation is such a state instrumentality, noting the following: that the corporation is owned by the state; that it was established by law to carry out a public purpose; that its organic statute recites that it is "accountable to the governor, the legislature, and the people of the state," La. R.S. 4:4602(A) (1992); that its board of directors is appointed by the governor and confirmed by the Senate; that the Governor must approve the board's choice of its president; that the corporation operates according to the Louisiana Administrative Procedures Act and the state Procurement Code; that the fees charged by the corporation are subject to approval by the governor; and that the corporation was statutorily vested with substantial administrative powers—including the power to issue rules defining what forms of gambling will be permitted and how they may be operated and the power to hear complaints charging violations of the Casino Act or of the

concluded that those provisions were severable from the remainder of the Act.[156] It rejected more general challenges based on claims that the Casino, Cruiseship and Riverboat Acts contravened state constitutional restrictions on local or special laws,[157] that the composition and powers of the Gaming Corporation violated the state constitution's requirement of separation of powers and its prohibition against

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corporation's rules. Polk v. Edwards, 626 So. 2d 1128, 1145-57 (La. 1993). Since such broad regulatory powers cannot constitutionally be delegated to any non-governmental agency, any body holding such powers must be deemed an instrumentality of the state. *Polk*, 626 So. 2d at 1147 (citing State Licensing Bd. of Contractors v. State Civil Serv. Comm'n, 110 So. 2d 847, 849 (La. App. 1st Cir. 1959), *aff'd*, 240 La. 331, 123 So. 2d 76 (1960)).

156. *Polk*, 626 So. 2d at 1147-48. The statute contained no express statement regarding severability. The court reaffirmed that, in such circumstances, "[t]he test for severability is whether the unconstitutional portions of the statute are so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention manifested by the legislature in passing the act." *Id.* at 1148 (quoting State v. Azar, 539 So. 2d 1222, 1226 (La.), *cert. denied sub nom.* Azar v. Louisiana 493 U.S. 823, 110 S. Ct. 82 (1989) and citing La. R.S. 24:175. Here, the court correctly saw imposition of Civil Service protection for Gaming Corporation employees as no bar to the central thrust of the Acts and, indeed, argued that such protection would to some extent further the legislature's intent to maintain public confidence that gaming operations would be free from corruption.

157. La. Const. art. III, § 12, provides, in relevant part, as follows:

> Section 12. Prohibited Local and Special Laws
>
> Section 12 (A) Prohibitions. Except as otherwise provided in this constitution, the legislature shall not pass a local or special law:
>
> * * *
>
> (7) Creating private corporations . . .; granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity.
>
> * * *
>
> (10) Defining any crime.
>
> (B) Additional Prohibition. The legislature shall not indirectly enact special or local laws by the partial repeal or suspension of a general law.

Since the statutes at issue created a corporation and affected the definition of the crime of gambling, the only question was whether they constituted "local" or "special" laws. Plaintiffs argued that they were, pointing out that they were introduced in accordance with the requirements of La. Const. art III, § 13, which governs the procedure for such acts, and that the Casino, Cruiseship and Riverboat Acts all were limited in their application to particular geographic locations or waterways.

In rejecting these arguments, the supreme court initially refused to place significance on the fact that the Acts were introduced as if they were local or special laws. As the court noted, such procedures may be followed out of an abundance of caution and do not determine the nature of the law. Polk v. Edwards, 626 So. 2d at 1128, 1133 (La. 1993) and cases cited therein. On the harder question of how to define "local" and "special" laws, the Court began by noting that these terms are not constitutionally defined and that state courts had previously defined them in multiple inconsistent ways. *Id.* at 1134. After an extensive review of authorities, the court concluded that the essence of the restriction does not turn upon whether a statute's primary effects are geographically limited. Rather, the question is whether the statute seeks to further private or special interests, or instead, the general health, safety and welfare interests of the state as a whole. *Id.* at 1134-37. The court concluded that, since the power to define and regulate gambling falls within the police power of the state and since the institution of gambling will affect the economic interests of the state as a whole, the gaming laws fell into the latter category. *Id.* at 1136-38.

unfettered delegation of legislative authority,[158] and that the statutes violated various constitutionally guaranteed rights and powers of the city of New Orleans.[159]

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158. La. Const. art. II, §§ 1 and 2 divide the powers of the state government into three branches and prohibit any person holding office under any one of those branches from exercising powers belonging to any of the others. Plaintiffs contended that statutory provisions giving the Gaming Corporation power to determine what types of games could be operated—and thus which forms of gambling would be excepted from general laws criminalizing gambling—violated the constitution, both because the power to define gambling was one which the legislature could not delegate and because such a power could not be exercised by a body composed of executive appointees. The court brushed these objections aside without extended analysis. Polk v. Edwards, 626 So. 2d 1128, 1141-42 (La. 1993). They may have been more difficult, however, than the court's opinion indicated.

Unlike the federal Supreme Court, Louisiana courts have continued to enforce limits on the power of the legislature to delegate its lawmaking functions to executive officials or administrative agencies. While the legislature may empower administrators to fill in the details of the legislative scheme or to apply a statute to particular instances, the legislature must itself provide the "standards" according to which that discretion is to be exercised. This rule of non-delegation of legislative power has traditionally been applied with particular stringency with respect to definitions. *See, e.g.*, State v. Broom, 439 So. 2d 357 (La. 1983) (and cases cited); State v. All Pro Paint and Body Shop, 618 So. 2d 962 (La. App. 1st Cir. 1993) (holding improper a delegation of power to determine what constituted "hazardous waste" for purposes of criminal prosecution). Here, the court did not explain whether or how the relevant statutes provided significant standards to guide the Gaming Corporation in its efforts, and thus the non-delegation challenge would appear to have merit.

Though the *Polk* court did not directly so argue, it may be that an analytic distinction can be drawn between administrative acts defining crimes and those which merely permit administrative officers to grant an exception to otherwise applicable general criminal statutes. *See, e.g.*, State v. Morgan, 238 La. 829, 116 So. 2d 682 (1959) (upholding statute criminalizing introduction of certain specified items of contraband into prisons, unless authorized by the officer in charge of that prison, against non-delegation challenge), which was cited by the court in *Polk*. Nonetheless, unfettered administrative discretion to grant exceptions to criminal law could itself become problematic and some appropriate standards should be required in such circumstances as well. Alternatively, though the *Polk* court did not argue the point, it appears that the legislature's intentions regarding what types of games were to be permitted at the casino and on the gambling boats were made sufficiently clear in the governing statutes. La. R.S. 4:504(10) (respecting riverboat gambling) and La. R.S. 4:607(12) (respecting casino gambling) may well define "Game" in sufficient detail to give the Gaming Corporation and the reviewing courts adequate guidance as to what sorts of gambling the legislature intended to permit.

159. La. Const. art. VI, § 4 confirms the powers of local governments, such as the city of New Orleans, which operate under "home rule" charters. Since New Orleans' charter grants it the general power to levy taxes and license fees, petitioners argued that so much of the challenged statutes as limited the power of the city to tax gambling operations violated that constitutional guarantee. As the court noted, however, the charter emanates from the legislature and such legislative delegations can always be modified or rescinded by the legislature. Polk v. Edwards, 626 So. 2d 1128, 1142-43 (La. 1993) (citing La. Const. art. VI, § 9(B); Francis v. Morial, 455 So. 2d 1168 (La. 1984); City of New Orleans v. State, 426 So. 2d 1318, 1321 (La. 1983)).

La. Const. art. VI, § 14(A), provides, in relevant part, that "[n]o law requiring increased expenditures for wages, [or] hours . . . of political subdivision employees . . . shall become effective until approved by ordinance enacted by the governing authority of the affected political subdivision or until the legislature appropriates funds for the purpose to the affected political subdivision. . . ." The *Polk* court construed this constitutional provision narrowly, distinguishing between state laws that directly mandate increased local expenditures, which are governed by §14(A), and state laws that impose only incidental burdens on local governments, which are not. Polk v. Edwards, 626 So. 2d

In addition, in what may be the most far-reaching aspect of its opinion, the court rejected plaintiffs' argument that such a wholesale opening of the state to video poker and casino-type gambling violated the constitutional directive that the legislature "suppress" such activity. The court began its analysis by reciting familiar boilerplate that "all statutory enactments are presumed to be constitutional," that the legislature, as representative of the state's citizenry, "may enact any legislation that the state constitution does not explicitly prohibit," and that a litigant attacking the constitutionality of legislation, "must establish clearly and convincingly that the constitutional aim was to deny to the legislature the power to enact the legislation" at issue.[160] In concluding that the constitution's directive to "suppress" gambling did not constitute such an "explicit" limit on the legislature's discretion, the Court relied on three related arguments. First, it characterized the directive as non-self-operating;[161] that is to say, as merely "hortatory" rather than mandatory in nature.[162] Second, the Court relied upon prior jurisprudence, which had construed similar language from the constitution of 1921 as having the effect of delegating, "to the Legislature and the Legislature alone, the power to suppress gambling, and to determine how, when, where and in what respects gambling shall be prohibited or permitted."[163] Finally, and apparently most important, the court relied on both the evident familiarity of the constitutional drafters with that prior jurisprudence and extensive excerpts from the debates on the floor of the constitutional convention of 1973 to demonstrate that the framers of the 1974 constitution did not understand or intend that Section 6 would prevent the legislature from passing laws permitting gambling activities of this type.[164]

1128, 1143-45 (La. 1993).

Finally, La. Const. art. VI, § 17, provides that local governments may "adopt regulations for land use, zoning, and historic preservation . . . ." The court brushed aside challenges based on this section, professing itself unable to see how a major gambling casino in the heart of New Orleans would adversely affect the city's ability to enforce zoning and similar regulations. Polk v. Edwards, 626 So. 2d 1128, 1143-44 (La. 1993).

160. Polk v. Edwards, 626 So. 2d 1128, 1132 (La. 1993) (citing, among other cases, Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, 529 So. 2d 384 (La. 1988) and State Bond Comm'n v. All Taxpayers, 525 So. 2d 521 (La. 1988)).

161. Polk v. Edwards, 626 So. 2d 1128, 1138 (La. 1993). The court contrasted the direct prohibition of lotteries contained in the original version of § 6, quoted *supra* at note 148, with that section's merely directory language regarding other forms of gambling. While the former sentence apparently would have been construed to be mandatory and self-operative, the latter sentence was not.

162. *See* Lee Hargrave, *"Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974*, 43 La. L. Rev. 647, 677-81 (1983), describing the decision to continue the state constitution's prior directive against gambling as essentially a "sermon" which the delegates added solely to defuse potential opposition to the new charter, rather than because they expected that it would have any specific legal effect.

163. Polk v. Edwards, 626 So. 2d 1128, 1139 (La. 1993) (quoting Gandolfo v. Louisiana State Racing Comm'n, 227 La. 45, 78 So. 2d 504, 514 (1954), which had held that the 1921 constitution's directive to the legislature to "suppress" gambling did not preclude the legislature from authorizing pari-mutuel betting on horse races in the state).

164. Polk v. Edwards, 626 So. 2d 1128, 1139-41 (La. 1993). The court's argument with respect to framers' intent rested on three legs. First, the court argued that whether or not *Gandolfo* had been

2. Succession of Lauga *and the Prohibition Against Laws that "Abolish" Forced Heirship*

In 1920, the Louisiana legislature passed laws authorizing citizens of this state to establish trusts, of the sort that had been developed at common law. In response, proponents of Louisiana's civil law tradition inserted a provision into the 1921 constitution which limited the legislature's power to authorize such trusts and prohibited laws "abolishing forced heirship."[165] Article XII, section 5 of the Louisiana Constitution of 1974 continued this prohibition in modified form, retaining the prohibition on any law which would "abolish" forced heirship, but specifically leaving "determination of forced heirs, the amount of

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correctly decided as a matter of first impression, it was the law at the time the 1974 constitution was drafted. Since the drafters were aware of that decision and chose to retain essentially the same language in the new constitution, their intention to adopt *Gandolfo*'s result into the new constitution could be presumed. *Id.* at 1138-40, 1141. Second, the court quoted colloquies from the convention floor between delegates Jenkins and Gravel, and between delegates Zervignon and Chatelain, to show that the convention understood that the legislature would retain power, despite § 6, to permit even "Nevada-type, completely open gambling" in Louisiana. *Id.* at 1139-41 (quoting IX Records of the Louisiana Constitutional Convention of 1973: Verbatim Convention Transcripts [hereinafter "Records: Convention Transcripts"] 3223, 3228-29, 113th Day Proceedings, January 9, 1974). Finally, this understanding of the drafters' intent was strengthened by the convention's specific handling of the floor proposal that eventually became § 6. As originally proposed, that section would have directed that gambling be defined and "prohibited," rather than "suppressed" by the legislature. That language was changed by the convention, apparently in an effort to avoid changing the *Gandolfo* result. *Id.* at 1140-41 (citing Records: Convention Transcripts, at 3233).

165. *See generally* Lee Hargrave, *supra* note 146, at 188. As originally enacted, the 1921 constitution provided, in relevant part, as follows:

> Section 16. No law shall be passed abolishing forced heirship or authorizing the creation of substitutions, fidei commissa or trust estates; except that the Legislature may authorize the creation of trust estates for a period not exceeding ten years after the death of the donor; provided, that where a natural person is the direct beneficiary said period may be made to extend until ten years after his majority; and provided further, that this prohibition as to trust estates or fidei commissa shall not apply to donations strictly for educational, charitable or religious purposes.

La. Const. of 1921, art. IV, § 16. This section was thereafter amended several times, in order to loosen the restrictions on the legislature with respect to trusts and to address specific problems such as the treatment of adopted children. The prohibition on laws "abolishing" forced heirship was, however, retained. As of the time of the Constitutional Convention of 1973, the section provided as follows:

> § 16. Trusts; forced heirship; abolition prohibited; adopted children
>
> Section 16. The legislature may authorize the creation of express trusts for any purpose. . . . Substitutions not in trust are and remain prohibited; but trusts may contain substitutions to the extent authorized by the Legislature. No law shall be passed abolishing forced heirship; but the legitime may be placed in trust to the extent authorized by the Legislature. Children lawfully adopted shall become forced heirs to the same extent as if born to the adopter and shall retain their rights as heirs of their blood relatives, but their blood relatives shall have their rights of inheritance from these children terminated.

La. Const. of 1921, art. IV, § 4, as amended.

the forced portion, and the grounds for disinherison" for decision by the legislature.[166] In 1989 and 1990, the legislature passed laws which greatly modified the definition of forced heirs.[167] Whereas prior law defined any "child" as a forced heir, the new provisions restricted that status to a much smaller class—descendants who had not reached twenty-three years of age or who could demonstrate that they lacked capacity to manage their affairs.[168] Predictably, suit was brought challenging these statutes on a number of grounds. The trial court declared amended Civil Code article 1493 unconstitutional on two grounds: because it violated Article XII, section 5; and because it constituted an arbitrary, unreasonable and capricious discrimination on the basis of age, in violation of Article I, section 3 of the state constitution.[169]

On review, the supreme court affirmed the trial court, amending the judgment below only to declare the amendatory acts of 1989 and 1991 unconstitutional in their entirety,[170] and to base its ruling solely on Article XII,

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166. La. Const. art. XII, § 5 provides as follows:

> Section 5. Forced Heirship and Trusts
>
> Section 5. No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinherison shall be provided by law. Trusts may be authorized by law, and a forced portion may be placed in trust.

The locution "provided by law" was used by the drafters of the 1974 constitution to mean "provided by legislation." In the absence of limiting language, such language was intended by the constitution's drafter's to confer discretion on the legislature to deal with the referenced issue as it chose. Lee Hargrave, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term: Louisiana Constitutional Law*, 38 La. L. Rev. 438, 442 (1978) (quoting Justice Tate, the Chairman of the Convention's Committee on Style and Drafting, writing in Board of Elementary and Secondary Educ. v. Nix, 347 So. 2d 147, 151 (La. 1977)).

167. 1989 La. Acts No. 788 and 1990 La. Acts No. 147, codified at La. R.S. 9:2501.

168. The statutory revisions resulted in amendment of Louisiana Civil Code arts. 1492 through 1495. The core of the change was embodied in the revision of La. Civ. Code art. 1493. Prior to the revisions, that article provided as follows:

> Art. 1493. Disposable portion when children survive
>
> Donations *inter vivos* or *mortis causa* cannot exceed three-fourths of the property of the disposer, if he leaves, at his decease, one child; and one-half, if he leaves two or more children.
>
> Under the name of children are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent.

After revision, Article 1493 provided as follows:

> Art. 1493. Forced heirs; representation of forced heirs
>
> Forced heirs are descendants of the first degree who have not attained the age of twenty-three years, or of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates.
>
> For purposes of forced heirship, representation of a descendant of the first degree who predeceased the donor is permitted if that descendant would not have attained the age of twenty-three years at the donor's death.

The amount of the forced portion—one-quarter of the estate if there is one forced heir, one-half if there are two or more—was not changed, but specification was moved to La. Civ. Code art. 1495.

169. Succession of Lauga, 624 So. 2d 1156, 1157 (La. 1993).

170. *Id.*

section 5.[171] The supreme court began its analysis of Section 5 by reviewing the long history of forced heirship in the law of Louisiana, reciting the fundamental purposes and essentials of the concept—i.e., avoidance of accumulation of excessive fortunes, prevention of encumbrance of assets by the deceased, and equality of treatment of children—and reaffirming the importance of the institution to the state.[172] In concluding that the prohibition on legislation in Section 5—unlike the directive in Section 6, discussed above—*should* be read to limit the legislature's freedom of action, the Court relied on several arguments. First, it characterized as mere dictum, and thus refused to rely on, prior caselaw which had construed predecessor language from the constitution of 1921, also prohibiting abolition of forced heirship, as meaning only "that forced heirship cannot be done away with wholly, wiped out or destroyed," and that it "does not prohibit the legislature from regulating or restricting the rights of forced heirs."[173] Second, while recognizing that the legislature retained authority to modify the rules of forced heirship, the court argued that permitting too much leeway to the legislature would lead to the "absurd consequence" of reducing what the court saw as a clear constitutional limit on the legislature to merely hortatory status.[174] Finally, the court articulated at length a theory of constitutional interpretation that focused primarily upon the necessity of fidelity to the intentions of the ratifiers of the constitution,[175] and that those intentions can best be reconstructed by adherence to certain traditional rules: that "clear and unambiguous" constitutional provisions should generally be applied as written; that constitutional provisions should be construed as a whole, harmonizing all elements so as to give effect to each; and that where a provision is similar to a predecessor in a prior constitution, the latter section will be construed like the former.[176] Specifically, the court held that where, as assertedly was the

171. *Id.* at 1158. The court thus did not address plaintiff's age discrimination arguments.

172. *Id.* at 1159-61. The court relied heavily on a series of academic commentaries reaffirming the basic values behind, and importance of, the institution of forced heirship, and criticizing legislative acts which interfered unduly with its basic tenets. Prominent among these are: Katherine S. Spaht et al., *The New Forced Heirship Legislation: A Regrettable "Revolution"*, 50 La. L. Rev. 409 (1990); Thomas B. Lemann, *In Defense of Forced Heirship*, 52 Tul. L. Rev. 20 (1977); Gerald Le Van, *Alternatives to Forced Heirship*, 52 Tul. L. Rev. 29 (1977); Joseph Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 La. L. Rev. 42 (1941); and Harriet S. Daggett, *General Principles of Succession on Death in Civil Law*, 11 Tul. L. Rev. 399 (1937).

173. *Lauga*, 624 So. 2d at 1164 (discussing Succession of Earhart, 220 La. 817, 824, 57 So. 2d 695, 697 (1952)).

174. *Id.* at 1164.

175. *Id.* at 1165 (citing Devlin, *supra* note 39, at 689-90. The court was certainly correct that it was the act of ratification that gave the state constitution its binding force and that the ultimate touchstone of constitutional interpretation is the meaning that could reasonably be ascribed to a knowledgeable, but objective, ratifier. However, as will be developed below, this does not necessarily mean that clear, objectively manifested evidence of the intentions and understandings of the framers should be ignored. On the contrary, such evidence may be the best indication of what the intentions of the ratifiers were.

176. *Id.* at 1165 (citing cases and other authorities).

case in *Lauga*, the constitutional provision is "clear," debates among the constitution's drafters cannot be relied upon to interpret or modify that text.[177]

Applying these principles, the court held that the 1989 and 1990 amendments, unlike prior legislative modifications of forced heirship, abrogated core principles of the institution—primarily, each child's individual right to an equal share of the legitime—and thus constituted an effective "abolition" of the institution. Despite language from pre-1974 caselaw and the statements of some of the drafters of Section 6, the court found that the prohibitory language of Section 5 requires preservation of more than the vestigial remnant of forced heirship left after those amendments.[178]

3. Of Prohibitions, Mandates, and Implied Limits on Legislative Power

As should be apparent from the above recitation, the rhetoric and results in *Polk* and *Lauga* are difficult to reconcile. In both cases, the Court was required to construe a constitutional provision that both empowered the legislature (in Section 6 by authorizing the legislature to "define" gambling; in Section 5 by authorizing the legislature to determine the identity of "forced heirs [and] the amount of the forced portion") and purported to limit the legislature's discretion in exercising that power (in Section 6 by directing the legislature to "suppress" gambling; in Section 5 by forbidding the legislature from passing laws to "abolish" forced heirship). In both situations, caselaw interpreting analogous

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177. *Id.* at 1168-69 (citing cases).

The convention debates on what was to become art. XII, § 5, do not reflect any clear consensus among the delegates regarding how that section should be interpreted. Some speakers indicated that by guaranteeing forced heirship in the constitution, § 5 would effectively prevent the legislature from derogating from the essence of that institution. *See, e.g.*, remarks of Delegate Stinson introducing the proposal and describing the institution as one according to which "children cannot be, as in Texas, for example, be left a dollar or five dollars . . . ." IX Records: Convention Transcripts, 3073, 107th Day Proceedings, January 3, 1974. Other delegates, however, emphasized then-existing decisional law and the second sentence of § 5 as granting power to the legislature to define the class of forced heirs and the amount of their forced portion any way it chooses—even to the point of eliminating forced heirship as a practical reality. *See, e.g.*, the colloquy between delegates Fontenot and Stinson, reaffirming that the legislature has full power to determine the identity of forced heirs, IX Records: Convention Transcripts, 3073, 107th Day Proceedings, January 3, 1974, and the remarks of delegate Tobias: "As I presently read Louisiana constitution and statutes, the legislature could very simply say that each child is a forced heir to the extent of one dollar." IX Records: Convention Transcripts, 3075, 107th Day Proceedings, January 3, 1974.

178. *Lauga*, 625 So. 2d at 1169-70. This result does not imply that all substantial changes in the rules governing forced heirship will be held unconstitutional. *Compare, e.g.*, Succession of Williams, 593 So. 2d 658, 659 n.4 (La. App. 1st Cir. 1991), *rev'd on other grounds*, 608 So. 2d 973 (La. 1992), in which the courts construed a will in accord with 1981 La. Acts No. 442, which abolished forced heirship for ascendants. While it could be argued that the line between permissible and impermissible modifications of forced heirship is essentially arbitrary, it appears that the changes discussed in *Lauga* cut more closely to the heart of the institution than did the changes implicitly approved in *Williams*.

sections of the 1921 constitution had construed the legislature's power broadly,[179] and the delegates to the constitutional convention were aware of these prior constructions when they chose to phrase the 1974 constitution in similar terms. In both cases, the convention debates indicated that at least some of the drafters believed and intended that the limiting language of the constitutional provision would be merely hortatory, and would impose no substantial obstacle to legislative will.[180] But in both cases, a reasonable ratifier reading only the plain terms of the relevant provision could well have concluded that the limiting language did in fact substantially restrict how far the legislature could go in legalizing gambling or limiting forced heirship. Yet the court reached opposite results in the two cases. In *Polk* it emphasized the "empowering" language of the constitutional provision, the need for challengers to clearly and convincingly show an "explicit" constitutional provision by which the framers intended to limit the legislature, the persuasiveness of prior precedent, and the utility of convention records as an indication of framers' intent. In *Lauga*, it emphasized the limiting language of the constitutional provision, the need to interpret in light of what the ratifiers may have understood the "plain language" of the constitution to mean, the narrowness of precedent, and the unreliability of convention transcripts as indications of interpretive intent. In neither case did the court clearly articulate why it chose to rely on one set of arguments over the other.

To be sure, both *Polk* and *Lauga* were "hard cases" which presented the court with difficult issues of constitutional interpretation. However, they need not result in the proverbial "bad law." On the contrary, by forcing the court to confront basic issues regarding interpretation of express and implied constitutional limits on legislative action, these cases may have laid the foundation for a more consistent and better founded interpretive methodology.

Three useful principles, in particular, may be derived from these cases. First, *Lauga* recognizes that general statements of principle in the Louisiana constitution may serve as substantive, judicially enforceable restraints on legislative action. In doing so, it stands against the unfortunate trend of many recent cases, which have required challengers to carry the virtually impossible burden of showing an "explicit" constitutional provision which "clearly and convincingly" manifests that the framers and ratifiers intended to prohibit the

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179. *Compare, e.g*, Gandolfo v. Louisiana State Racing Comm'n, 227 La. 45, 78 So. 2d 504, 514 (1954) (upholding the legislature's power to legalize betting on horses), *with* Succession of Earhart, 220 La. 817, 824, 57 So. 2d 695, 697 (1952) (upholding a will which placed forced portion in trust).

180. *See* discussion *supra* at notes 164 & 177. Indeed, the argument that the framers intended to confer broad discretion on the legislature is even stronger with respect to § 5 than it is with respect to § 6. The language of § 5 differs from its 1921 predecessor primarily in that § 5 specifically empowers the legislature to determine the identity of forced heirs and the amounts of the forced portion—a power that was only implicit under the 1921 language.

legislature from enacting the precise statute which it enacted.[181] Nor does *Lauga* stand alone in its recognition of the possibility of implied state constitutional limits on legislative action. In *Chamberlain v. State*,[182] the court construed Article XII, section 10 of the state constitution, which provides that the state shall not be "immune" from suit and liability in contract and tort actions,[183] to also prevent the legislature from enacting a statutory cap of $500,000 on the general damages recoverable from the state in such actions. Justice Hall, writing for the majority, admitted that the constitution is "silent" on the precise issue of damage caps.[184] Yet that majority was willing to rely on what it saw as the historical underpinnings of Section 10(A), together with some rather venerable authority,[185] to hold that Section 10(A) should be read to *impliedly* forbid the legislature from enacting such a cap.[186]

Regardless of one's views of the precise results of *Lauga* and *Chamberlain*, the Louisiana Supreme Court should be applauded for beginning to move,

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181. *See, e.g.*, Cajun Elec. Power Coop., Inc. v. Louisiana Pub. Serv. Comm'n, 532 So. 2d 1372 (1988); Board of Directors of La. Recovery Dist. v. All Taxpayers, 529 So. 2d 384 (La. 1988); State Bond Comm'n v. All Taxpayers, 525 So. 2d 521 (La. 1988).

182. 624 So. 2d 874 (1993). The *Chamberlain* decision is more fully analyzed by my colleague, Professor Crawford, elsewhere in this issue. William E. Crawford, *Torts, Developments in the Law 1992-93*, 54 La. L. Rev. 807 (1994).

183. La. Const. art. XII, § 10 provides, in relevant part, as follows:

> *(A) No Immunity in Contract and Tort.* Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> *(B) Waiver of Other Suits.* The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.
>
> *(C) Procedure; Judgments.* 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. . . .

184. *Chamberlain*, 624 So. 2d at 886.

185. The majority opinion in *Chamberlain* relied on only a single precedent, Tanner v. Beverley Country Club, 47 So. 2d 905, 912-13 (1950), which held that provisions of the Louisiana Constitution of 1921 dividing the state into judicial districts and setting the jurisdiction of these district courts should be read to impliedly prohibit the legislature from enacting a statute which purported to allow plaintiffs in certain nuisance suits to sue in "any" district court of the state. *Chamberlain* also quoted *Tanner*'s discussion of Thomas Cooley, author of a noted 19th century treatise on state constitutional law, setting out the circumstances in which such an implied limitation might be found:

> "To create an implied prohibition there must be some express affirmative provision. * * *" Or, as otherwise stated by Cooley in his Treatise [citation omitted] ". . . the Constitution by its inherent terms may of necessity prohibit certain acts of a legislature by reason of the inherent conflict that would arise between the terms of the Constitution and the power claimed in favor of the legislature." . . . "*Every positive direction contains an implication against anything contrary to it*, or which would frustrate or disappoint the purpose of that provision." [Emphasis in original.]

Chamberlain, 624 So. 2d at 887 (quoting *Tanner*, 47 So. 2d at 913 (quoting Thomas Cooley, 1 Treatise on Constitutional Limitations 176 n.4 (8th ed. 1927))).

186. *Chamberlain*, 624 So. 2d at 879, 886-87.

however hesitantly, toward a recognition that not every claim that government action contravenes the state constitution must be always supported by reference to a "specific" text that "explicitly" forbids the precise act at issue. As has been argued previously in this series,[187] such a narrow view would be at odds with one of the basic intentions of the drafters and ratifiers of the Louisiana Constitution of 1974—that is, to replace an unwieldy constitution encumbered by myriads of detailed statute-like provisions with a streamlined document that manifests the intentions of those framers and ratifiers largely through statements of general principle rather than explicit commands and prohibitions.[188]

The second principle which may emerge from *Polk*, *Lauga* and their progeny could be a more sophisticated and consistent approach by Louisiana courts to the question of how to evaluate transcripts of the proceedings of the Constitutional Convention of 1973, or other indications of the intentions of the drafters of the current state constitution. *Polk* and *Lauga*, between them, probe the far ends of the spectrum of possible uses of such data: *Polk*, like many recent cases, embraced excerpts from the convention transcripts and relied heavily upon them in interpreting Article XII, section 6;[189] *Lauga*, in contrast, utterly rejected any reliance on such transcript colloquies and relied instead on an independent reconstruction of what the court believed the ratifiers of the current constitution should have understood it to mean.[190] But as is often the case, the optimal approach should probably incorporate elements of both of these extremes.

The court was undoubtedly correct when it held, in *Lauga*, that the ultimate touchstone of state constitutional interpretation should be the understanding that could be reasonably ascribed to the ratifiers, as opposed to the drafters, of that constitution.[191] However, that does not mean that a court should ignore evidence—whether culled from convention transcripts or from any other source—which may shed light on how the drafters of the constitution understood that their words would be interpreted. It must be remembered that the "intent" which is ascribed to the hypothetical objective but knowledgeable ratifier is an artificial construct, not a historical fact. In creating that construct, courts can and should rely on all useful sources of information regarding how the constitutional text was likely to have been understood at the time, *including* relevant evidence of the drafters' understandings. The reasons are evident. The convention delegates who wrote the constitution were not wholly "apart" from the people who ratified it; rather those delegates were appointed or elected from among the people, by the people, to represent the people. The delegates were the most

187. John Devlin, *Louisiana Constitutional Law, Developments in the Law 1987-88*, 49 La. L. Rev. 395, 414-420 (1988).

188. *See, e.g.*, Hargrave, *supra* note 34, at 17-18, describing the efforts of the drafters of the 1974 constitution to shorten the document by, among other things, replacing statutory detail with general statements of principle.

189. *See supra* discussion at note 165.

190. *See supra* discussion at notes 176-178.

191. *Lauga*, 624 So. 2d at 1164-65, and cases cited.

knowledgeable contemporary commentators on the constitution they drafted, in the best position to understand and articulate the nuances of meaning that were then attached to its words. Thus it may frequently be the case that the debates of the drafters will be the best available evidence as to how the constitution's language was likely to have been understood by the ratifiers. Courts should not cut themselves off from such a useful source of information.

Nor should courts be dissuaded by the old shibboleth that "the debates of a convention . . . cannot be resorted to for the purpose of varying the otherwise clear and unambiguous meaning of a constitutional provision."[192] Though the concept might be a legitimate one in the small number of cases to which it actually applies, the difficulty remains that few disputed constitutional provisions really possess such a "clear and unambiguous meaning." Certainly in a case like *Lauga*, where three justices read the disputed provision in a manner completely different than did the majority,[193] it would seem that one would be hard put to argue that the reading adhered to by either group of justices was so "clear and unambiguous" that extrinsic evidence of meaning should be ignored.

Finally, the results in *Polk* and *Lauga* can be reconciled and, as reconciled, suggest a possible refinement in the court's handling of the distinction between self-executing and non-self-executing constitutional provisions. Though sections 5 and 6 of Article XII both purport to limit the discretion of the legislature, they do so in crucially different ways. The limit imposed by Section 5 is phrased in negative, prohibitory terms—as a statement of what the legislature is not to do. In contrast, the limiting language of Section 6 is phrased in positive, mandatory or directory terms—as a statement of what the legislature is to do. Louisiana courts have long held that particular constitutional provisions directing the legislature to act are neither self-executing nor judicially enforceable.[194] In contrast, particularly where, as was arguably the case in *Lauga*, individual rights are at issue, constitutional provisions forbidding the legislature from doing certain things are generally construed to be both self-executing and judicially enforceable.[195] If such a distinction were to be made explicit and consistently enforced, those who draft and vote on amendments to the present state

192. *Lauga*, 624 So. 2d at 1165, citing numerous prior cases that have repeated the same maxim.

193. The dissenters were Justices Marcus, Hall, and Kimball. Justice Kimball wrote a detailed dissent, explaining why Article XII, section 5 should be read, as was Section 6 in *Polk*, to empower the legislature rather than to restrict its authority over the institution of forced heirship. *Lauga*, 624 So. 2d at 1184-1200. The argument here is not that either group of justices was correct or incorrect on the merits, but rather only to point out that "clear and unambiguous" constitutional language usually exists only in the eye of the beholder.

194. *See, e.g.*, State v. Campbell, 324 So. 2d 395 (La. 1975) (holding that the directive in La. Const. art. I, § 13, that the legislature "provide a uniform system for securing and compensating qualified counsel for indigent" was unenforceable); State v. Bryant, 324 So. 2d 389 (La. 1975) (same).

195. The supreme court made this point explicitly in *Chamberlain*, flatly stating that constitutional *prohibitions* on legislative action are self-executing. *Chamberlain*, 624 So. 2d at 881-82 (citing Cooley, *supra* note 185, at 167 n.1).

constitution—and who may in the future once again undertake the task of creating a new charter for the state—will have a better opportunity to predict the effect of their words, and to choose their words accordingly.