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LOUISIANA CONSTITUTIONAL LAW

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OF REVENUE ANTICIPATION NOTES, MINERAL RIGHTS AND MAXIMS OF CONSTITUTIONAL CONSTRUCTION

In this bicentennial year of constitutional celebration and controversial judicial nominations, fundamental questions concerning how courts should go about the task of construing constitutions are much in the air. Such issues of theory and method are as salient, and often as difficult and controversial, when disputed provisions of a state constitution must be construed as they are in the federal context.

In two "hard cases" from last term,[1] *State Bond Commissioner v. All Taxpayers*,[2] and *American Lung Association, Inc. v. State Mineral Board*,[3] the Louisiana Supreme Court wrestled with similar issues of interpretation of the 1974 Louisiana Constitution. In both cases, the constitutional provisions at issue operated to limit the otherwise plenary powers of the political branches of the state government. In neither case did the plain meaning of the provision's specific terms—"debt" in the former case, "sold" in the latter—necessarily apply to the particular facts at bar, nor in either case did the records of the 1973 constitutional convention indicate that the framers ever considered the specific issue presented. In both cases strong arguments were raised that a broad reading of those terms was necessary to prevent evasion of the constitution's apparent purpose and its framers' general intentions, but in both cases arguments of "policy"—exigent necessity in the former case, intuitive notions of fairness in the latter—favored a contrary result. And in both cases the court, perhaps not surprisingly, interpreted the constitution's prohibitory terms narrowly: in the *State Bond Commission* case, allowing the political branches to issue short term revenue anticipation notes

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1. Contrary to the epigrammatical pessimism of Lord Chief Justice Campbell and Justice Holmes, by referring to these as "hard cases," I do not necessarily imply that the substance of the decisions rendered constitute proverbial "bad law." Cf. Ex Parte Long (1854) 3 W.R. 19; Northern Sec. Co. v. United States, 193 U.S. 197, 24 S. Ct. 436 (1904). Rather, the point is that it is hard cases such as these—cases which pit received legal conceptions against the perceived demands of justice or public policy in a particular instance—that often bring questions about the propriety of the court's decision making methods most sharply into focus.

2. 510 So. 2d 662 (La. 1987).

3. 507 So. 2d 184 (La. 1987).

without complying with the constitutional restrictions on the issuance of state debt; and in the *American Lung* case, permitting them to effectively alienate state owned mineral rights.[4]

These decisions shed light on the continued propriety of reliance on traditional "maxims" of construction for guidance in interpreting the 1974 Louisiana Constitution. In both the *State Bond Commission* and *Lung Association* cases, the court, in the absence of definitive guidance from the 1973 convention records, justified its decision by reliance upon just such a traditional maxim of interpretation—that technical terms or legal terms of art are to be interpreted in accord with their received technical meaning.[5] In both cases the court justified its conclusions by categorizing the crucial words at issue as such technical terms or words of art, construing those terms by reference to extrinsic sources of legal definition, and then presuming that the framers were aware of these technical definitions and intended to incorporate them into the state constitution.[6] However appropriate it once may have been, such a technique of construction is today problematic in light of the much more extensive evidence avilable from the convention records regarding what the framers of the 1974 constitution actually did or did not intend and increasing judicial recognition of the validity of reliance on "policy" in deciding difficult cases. Indeed, in both cases, it appears that the court's reliance on "maxims" to justify its decision functioned as but a screen behind which the decision was actually reached on very different grounds, grounds which could have been discussed and defended openly.

State Bond Commission

In *State Bond Commission v. All Taxpayers*,[7] the Louisiana Supreme Court construed article VII, section 6 of the 1974 Louisiana constitution, which prohibits the state from incurring any "debt" unless that income is used for specified purposes (not including ordinary operating expenses)

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4. The cases are discussed infra at notes 7-27 and 28-38, respectively. In *State Bond Comm'n*, the court held that article 7, section 6 of the 1974 constitution, which prohibits the state from incurring any "debt" except through extraordinary means and for particularized purposes, did not apply to revenue anticipation notes repayable within the same year as issued, which the state issued last summer to tide itself over an anticipated temporary cash flow shortfall. In *American Lung Ass'n*, the court construed article 9, section 4 of the 1974 constitution, which mandates that the state retain mineral rights on any land which it has owned and then "sold," not to preclude transfer of state owned mineral rights to private parties in the course of a good faith "compromise" of a legal dispute over ownership of that land.

5. *State Bond Comm'n*, 510 So. 2d at 665. While the *American Lung Ass'n* court was not as explicit about its analytic methods, the logic of its opinion demonstrates reliance on the same maxim. See infra note 35 and accompanying text.

6. See infra notes 22-26 and 34-35 and accompanying text.

7. 510 So. 2d 662 (La. 1987).

and unless the issuance of that debt is approved by two-thirds majorities in both houses of the legislature.[8] The court held that these constitutional restrictions did not apply to, and thus did not prevent the state from freely issuing, revenue anticipation notes not backed by the state's full faith and credit and repayable within the same fiscal year as issued.

The facts of the case were not in dispute. In July 1987, the Louisiana state treasury anticipated a cash flow shortfall that threatened to prevent it from timely honoring all of the warrants for operating expenses that were to come due during the coming August and September. In response the legislature passed, by ordinary majority only, acts authorizing the State Bond Commission to issue and sell "revenue anticipation notes" sufficient to cover the expected temporary cash shortage.[9] The notes thus authorized were not to exceed twenty percent of the state's anticipated revenue for the remainder of the fiscal year, were not backed by the state's full faith and credit, and were to be repaid before the end of the fiscal year in which they were issued in preference to any general expenditures.[10] The Bond Commission brought a validation suit

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8. La. Const. art. VII, § 6 provides:

> (A) Authorization. Unless otherwise authorized by this constitution, the state shall have no power, directly or indirectly, or through any state board, agency, commission, or otherwise, to incur debt or issue bonds except by law enacted by two-thirds of the elected members of each house of the legislature. The debt may be incurred or the bonds issued only if the funds are to be used to repel invasion; suppress insurrection; provide relief from natural catastrophes; refund outstanding indebtedness at the same or lower effective interest rate; or make capital improvements, but only in accordance with a comprehensive capital budget, which the legislature shall adopt.
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> * * *
>
> (C) Full Faith and Credit. The full faith and credit of the state shall be pledged to the repayment of all bonds or other evidences of indebtedness issued by the state directly or through any state board, agency, or commission pursuant to the provisions of Paragraphs (A) and (B) hereof. The full faith and credit of the state is not hereby pledged to the repayment of bonds . . . which are payable from fees, rates, rentals, tolls, charges, grants, or other receipts or income derived by or in connection with an undertaking, facility, project, or any combination thereof. . . .
>
> (D) Referendum. The legislature, by law enacted by two-thirds of the elected members of each house, may propose a statewide public referendum to authorize incurrence of debt for any purpose for which the legislature is not herein authorized to incur debt.

9. *State Bond Comm'n*, 510 So. 2d at 662-64. The revenue anticipation notes were originally authorized by 1986 La. Acts No. 28, now codified at La. R.S. 39:1410.41 (Supp. 1987) et seq. No such bonds were issued before June 30, 1987, when the statutory authorization provided by Act 28 expired. The legislature thereafter enacted 1987 La. Acts No. 61, which amended these provisions to extend the expiration date until June 30, 1988. Both acts were passed by less than two-thirds majorities of the state legislature.

10. *State Bond Comm'n*, 510 So. 2d at 665. La. R.S. 39:1410.44 (limitation on amount of notes), 1410.45 (among other things, establishing procedures for preferred repayment of the notes), and 1410.50 (no full faith and credit) (Supp. 1987).

and several members of the state legislature appeared as defendants, challenging the constitutionality of the the revenue anticipation notes and the acts by which authority they were issued.[11]

The supreme court and the parties agreed that the determinative issue was whether the revenue anticipation notes should be held to constitute "debt" under the meaning of article VII, section 6. If so, they would violate the constitution for two reasons: structurally, since the purpose for which the money raised was to be used was not among the limited purposes for which state debt was authorized; and procedurally, because the acts authorizing the notes were not passed by the required two-thirds majority.[12] If not, no other constitutional provision would limit the legislature's plenary power to proceed.[13]

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11. *State Bond Comm'n*, 510 So. 2d at 662-63. Defendants argued, among other things, that the fact that the Bond Commission brought its action in the form of a bond validation action indicated that the notes at issue must have been "bonds" within the meaning of La. Const. art. VII, § 6. The supreme court brushed aside this argument, noting that its supervisory jurisdiction is plenary, thus rendering the form of the action unimportant.

12. La. Const. art. VII, § 6, quoted supra at note 8, establishes both procedural and substantive obstacles to the incurring of "debt" by the state. Procedurally, incurring debt requires an affirmative vote by two-thirds of the elected membership of both houses of the legislature, a procedural hurdle which also must be met before the state can obtain money by referendum (La. Const. art. VII, § 6(D)), or even before the state can make use of the small "emergency" borrowing provisions of La. Const. art. VII, § 7. The "structural" impediment is emplaced by the language in La. Const. art. VII, § 6 limiting the purposes for which the state can contract debt to one or another of the listed categories: invasion, insurrection, natural catastrophe, refunding existing debt or capital improvements. Since provision of operating capital to cover cash flow shortages is not one of the designated purposes, the consequencce of a decision by the court that the notes at issue were "debt" would be to disable any majority of the legislature, no matter how large, from acting directly in any manner to resolve the state's cash crunch.

Even were the legislature thus structurally disabled from acting directly, however, the state might not have been totally without recourse in the face of a temporary cash shortage. If the shortage could be fairly construed as "an event or occurrence not reasonably anticipated by the legislature," a small sum could have been borrowed through the Interim Emergency Board, as authorized by La. Const. art. VII, § 7. But see infra note 18. Alternatively the voters could by referendum authorize state debt in any amount, for any legitimate governmental purpose, including covering governmental cash shortages. La. Const. art. VII, § 6(D), quoted supra at note 8. However, the time it would take to set up such a referendum might render this mechanism unwieldy as a way of dealing with short term needs for operating capital.

13. See infra note 42; *State Bond Comm'n*, 510 So. 2d at 664-65. Defendants also argued that, since La. Const. art. VII, § 6 prohibits state debt except as therein provided or "[u]nless otherwise authorized by this constitution," the proponents of the revenue anticipation notes' constitutionality should be required to demonstrate that they were "authorized" by some constitutional provision. However, as the supreme court correctly noted, a fundamental of state constitutional interpretation is that the legislature enjoys plenary authority to do all things not explicitly forbidden by the constitution. It is up to the opponents of legislative action to show that those acts are forbidden. If revenue

Defendants argued that an intention of the drafters of the 1974 constitution to prohibit the state from issuing short term notes of this type could be inferred from the convention records. Defendants drew that inference primarily from three factors. First, article VII of the 1974 constitution, of which section 6 formed a part, is an integrated whole, the evident overall intent of which was to limit the state's ability to contract debt. According to defendants, that article provided other means by which short term financial emergencies could be met, and to permit even short term obligations to be contracted by less than a two-thirds vote would radically weaken the safeguards against fiscal mismanagement which the framers wanted in place.[14] Second, the debates at the convention reveal that the intent of the committee which drafted the initial version of the article on government finance was to require all future state debt to be backed by the state's full faith and credit, thereby securing lower interest rates. The only exception introduced by the full convention into this plan was the express provision for revenue bonds made in paragraph (C) of section 6.[15] Defendants argued that this exception should be regarded as exclusive and that no other forms of indebtedness lacking the full backing of the state should be permitted. Finally, defendants noted that the Projet of a Constitution for the State of Louisiana (1954) [hereinafter "Projet"], a basic convention reference which was distributed to all delegates and convention staff and served as a source from which they worked, contained language expressly permitting the state to issue short term notes to cover cash flow shortfalls.[16]

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anticipation notes are indeed not "debt," no other constitutional provision would be applicable to prohibit their issuance. In any event, though the court did not rely on it, the records of the 1973 constitutional convention indicate that the "unless otherwise authorized" language on which defendants relied was put into section 6 primarily for another purpose: to ensure that the Interim Emergency Board could borrow small amounts in emergencies, subject to legislative approval. 9 Records of the Louisiana Constitutional Convention of 1973, Convention Transcripts at 2801 (remarks of Delegate Brown) [hereinafter Records].

14. The integrated constitutional scheme for controlling state indebtedness includes the balanced budget requirement of La. Const. art. VII, § 10(B), the centralization of authority in the State Treasury and the State Bond Commission (sections 8 and 9), requiring budgets, including a comprehensive capital budget (sections 6(B) and 11), the strict limits on state borrowing at issue here, and the referendum and emergency borrowing provisions of sections 6(D) and 7.

15. 9 Records, supra note 13, at 3366-71.

16. The Projet was drafted by the Louisiana Law Institute pursuant to legislative mandate, well before the 1973 convention was called. Its proposed section governing state debt, Projet art. IV, § 9, included among the purposes for which state debt could be incurred, in addition to those found in the 1974 constitution, debt instruments intended "to meet appropriations of any fiscal year in anticipation of the collection of the revenues of such year and to be repaid within one year. . . ." 2 Louisiana Law Institute, Projet of a Constitution for the State of Louisiana, 345 (1954). The Projet's survey of sister

Defendants argued that the failure of the drafting committee or full convention to include similar language in the constitution should be interpreted as an implied rejection of such authority.

These arguments have considerable force in that they demonstrate the overall purposes of the delegates to limit and control state indebtedness—purposes which would be furthered if the constitutional restrictions on state "debt" were broadly construed.[17] Nevertheless, they do not demonstrate that the framers ever explicitly considered, much less consciously rejected, the proposition that the legislature might remain authorized to issue revenue anticipation notes of the type at bar in *State Bond Commission*. Both the argument from the integrated nature of article VII and that from the express provisions governing revenue bonds somewhat beg this question. Demonstration that an integrated scheme for dealing with a certain class of questions is in place does not in itself provide much assistance in distinguishing those particular instances which fall within that scheme from those which do not. While section 7 of article VII does provide an alternative "emergency" mechanism for raising needed capital for the state, it is not obvious that that mechanism was intended or would be adequate to tide the state over forseeable periods of cash flow shortage.[18] And neither the convention's admitted concern to control bonding by generally requiring legislative

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state's constitutions also led to the observation that, generally, provision is made for short term borrowing to cover "casual deficits," and that Louisiana is said to have handled this problem by the predecessor of present article 7, section 7. Projet Vol. 1, Part 2 at 1131.

17. Revenue anticipation notes, if used to systematically evade the constitutional restraints on debt, could potentially lead the state into financial difficulties. Compare Gelfand, Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond, 63 Minn.L. Rev. 545, 559-69 (1979), detailing how New York City's misuse of revenue anticipation notes led in large part to its financial crisis. Louisiana's time to pay the piper may come at the end of the coming fiscal year if the anticipated revenues fail to materialize in the amounts hoped for. The notes, with first call on revenues, will be paid: But the state may then again lack sufficient operating funds. The unfortunate difference will be that, at the end of the fiscal year, it will be unable to repeat this process of short term borrowing and may then face a belt tightening all the more drastic for having been put off.

18. Though the "emergency borrowing" provisions of La. Const. art. VII, § 7 might have provided an alternative escape for the state from its cash flow crunch, two factors make it unlikely that reliance on that section would be effective. First, paragraph (B) of the section makes plain that, for purposes of triggering this borrowing provision, "an emergency is an event or occurrence not reasonably anticipated by the legislature." Since the state's cash shortage may well have been predictable, this provision might not apply. Moreover, paragraph (C) of section 7 severely limits the total amount of outstanding "emergency" indebtedness at any time to one tenth of one percent of the total state receipts for the preceding fiscal year. It may be doubtful that such an amount would be sufficient to sustain the government's operations until the anticipated revenue materializes.

supermajorities nor their equally clear desire to lower the interest rates on state obligations by generally mandating use of the state's full faith and credit proves that short term state obligations were necessarily intended to be subject to these constraints. Indeed, since such short term revenue anticipation notes do not involve very large total interest burdens regardless of the rate charged, and since they do not in any event burden future generations, an argument could be made that the constitutional limitations applied to long term state debt are quite unnecessary in this context. Some evidence exists that at least certain delegates to the constitutional convention had in mind just such a functional distinction between long and short term debt when section 6 was adopted.[19]

Finally, the inference which defendants sought to draw from the convention's failure to adopt the Projet's explicit authorization of short term revenue anticipation notes is also less than dispositive. The convention's Subcommittee on Public Finance, which drafted the original version of section 6, never explicitly considered the Projet language. Rather, it based its deliberations on a draft article on revenue and finance provided by the subcommittee's research staff.[20] Unlike the Projet, that draft contained no reference to casual debt or revenue anticipation notes, nor did the proposed article which the subcommittee presented to the convention.[21] Thus, while the delegates had in their possession materials from which this problem could have been considered, the convention records do not demonstrate that it was ever in fact specifically considered or that revenue anticipation notes were rejected by the drafting committee or the full convention.

But, in concluding that the revenue anticipation notes did not constitute "debt" in the constitutional meaning of that term, the Louisiana Supreme Court did not delve into questions of interpretation of the convention records or any other direct evidence of the drafters' intentions or lack thereof.[22] Rather, the court relied primarily on the traditional

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19. E.g., 9 Records, supra note 13, at 3320 (remarks of Delegate (now Governor-elect) Roemer equating "bonds" with "obligations of the future generations of this state. . . ")

20. 12 Records of the Louisiana Constitutional Convention of 1973: Committee Documents (1977), Subcommittee on Public Finance at 500-02.

21. Id. The draft from which the subcommittee worked would have permitted state debt in language similar to that eventually ratified in La. Const. art. VII, § 6: "to repel invasion; suppress insurrection; provide relief from natural catastrophes; refund outstanding indebtedness if it is in the best interest of the state; or make capital improvements." Unlike the Projet version, neither that draft nor any other actually considered by the subcommittee or the full convention contained any clear reference to revenue anticipation notes or casual deficits.

22. The court's only reference to direct evidence of the drafters' intentions was its single dismissive assertion that "[a] review of constitution records reflects" no intent to explicitly prohibit revenue anticipation notes. State Bond Comm'n v. All Taxpayers, 510 So. 2d 662, 666 (La. 1987.

axiom that, because the word "debt" allegedly constitutes a "term of art or technical term," it therefore must be "interpreted according to its received meaning and acceptation with those learned in the field of governmental finance."[23] Recognizing that this "term of art" had never been construed by Louisiana courts, the supreme court sought its "received meaning" by citation to a number of cases from other jurisdictions which construed similar provisions of other state constitutions so as not to restrict their respective legislatures' authority to issue short term revenue anticipation notes.[24] Despite the absence of direct evidence that this foreign jurisprudence was ever considered by the framers, the court argued that, since many of the cited authorities predated the 1973 convention, the technical distinctions they drew "may be presumed attendant to the consideration of our constitutional convention delegates

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23. Id. (citing La. Civ. Code art. 15.) With or without overt citation to the civil code or other source of such maxims of construction, the Louisiana courts frequently define legal terms as did the court in *State Bond Comm'n*, by finding or assuming that they are technical terms of art and referring to extrinsic bodies of law in which those terms have obtained a fixed technical meaning. Compare, New Orleans Firefighters Ass'n v. Civil Serv. Comm'n, 422 So. 2d 402, 412 (La. 1982) (determining whether a scheme of compensation for firefighters constituted a "minimum wage law" by looking to jurisprudence under the federal Fair Labor Standards Act). It is interesting to note that while Thomas Cooley, one of the leading scholars of the last century and a proponent of many of the traditional maxims of constitutional construction, recognized this principle of interpretation, he did not derive it from any argument concerning the inherent meaning of language. Rather, he defended the technical meaning of legal terms of art as a practical safeguard of liberty:

> But it must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. . . . The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.

Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 73 (4th ed. 1878).

24. *State Bond Comm'n*, 510 So. 2d at 665. The cases cited, including State ex. rel. La Follette v. Stitt, 114 Wis. 2d 358, 338 N.W.2d 684 (1983); Boneno v. North Carolina, 54 N.C. App. 690, 284 S.E.2d 170 (1981); Schmoldt v. Bolen, 183 Okl. 191, 80 P.2d 609 (1938); and Kelley v. Baldwin, 319 Pa. 53, 179 A. 736 (1935), are representative of a substantial body of law from many states distinguishing on functional grounds between long term state debt and short term anticipation of levied but uncollected revenues. Such reliance on sister states' jurisprudence to construe similar "technical" provisions in the Louisiana constitution is far from unprecedented. See, e.g., State ex rel. Kemp v. Baton Rouge, 215 La. 315, 323-29, 40 So. 2d 477, 480-81 (1949), in which the court relied on a legal encyclopedia and decisions from other states to determine the constitutionality of an amendment making several changes in the Plan of Government of Baton Rouge.

who drafted Article VII, sec. 6."[25] Finally, in the last paragraph of the opinion, the court further supported its "presumed intent" argument by drawing a functional distinction between obligations which, because they pledge the state to make repayments in future years, burden future legislatures and taxpayers, and other obligations (analogous to ordinary warrants for expenditures) which simply indicate how the state has chosen to spend its funds in a particular year.[26]

What is remarkable about the court's analysis is what does not appear. The court in *State Bond Commission* undertook no detailed analysis of what the convention records showed or of the consequences for interpretation of the delegates' apparent failure to consider the issue presented. Nor did the court overtly discuss the competing policy considerations—the conflict between the temporary disruption of government functions likely to ensue if the revenue anticipation notes were disallowed and the longer term danger posed by permitting a financing mechanism free of constitutional control—[27]which underlay its decision. Instead, the court relied upon a naked assertion that "debt" constituted a term of art and a traditional axiom of construction that the framers will be assumed to have intended such terms in their technical sense. It hypothesized a fictional "intention" on the part of the drafters, an "assumed" purpose to freely permit the legislature to issue revenue anticipation notes without satisfying the constitutional safeguards imposed on the creation of all other state debt. Since the direct evidence suggests that the assumed intention is indeed no more than a fiction, the relationship between the court's rationale and its result is tenuous at best.

American Lung Association

In *American Lung Association v. State Mineral Board*,[28] the Louisiana Supreme Court interpreted article IX, section 4 of the 1974

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25. *State Bond Comm'n*, 510 So. 2d at 665. The court also argued that, since article VII, section 6(A) of the 1974 constitution essentially repeated in language and intent former article IV, section 2 of the 1921 constitution, the presumption that the framers intended to incorporate the foriegn state jurisprudence construing constitutional limitations on state debt is strengthened. If the framers had intended to avoid this judicial gloss, they could have done so explicitly; their failure to do so therefore reflects acceptance, or so the argument goes. Id. at 665-66. This argument however also depends upon the assumption that the framers were, or should be presumed to have been, aware that such a gloss had been placed on provisions of the type they reenacted. And it is the validity of that presumption, in light of the evidence of the convention records that the subject never came up, that is in issue.

26. Id. at 666. Compare supra note 19.

27. See supra note 17.

28. 507 So. 2d 184 (La. 1987).

constitution, which mandates reservation to the state of mineral rights on all land "sold" by the state, not to apply to land alienated by the state in the course of a good faith compromise of a legal dispute over title.[29]

As with the *State Bond Commission* case, the facts in *American Lung Association* were not in dispute. The land at issue was originally donated to the state in 1924 by the Lung Association's predecessor, without reservation.[30] In 1975, after the state had largely ceased to use the donated tract for its original charitable purpose, the Lung Association brought an action for revocation. That suit was settled by an apparently fair and good faith compromise dividing the disputed land between the Association and the state; each promising to cede to the other whatever rights it may have had in the other's portion and each executing appropriate documents to effectuate that compromise and exchange, again without any express mention of mineral rights. A few years later, the state Mineral Board laid claim to the mineral rights on that portion of the original tract which it had ceded to the Lung Association. The district court held for the Board and the court of appeal affirmed, holding that precedent and public policy required that section 4 be broadly construed to preclude any "alienation" of state-owned mineral rights by any means, including the compromise and exchange between the Lung Association and the state.[31]

The supreme court reversed, holding that the constitutional mandate did not, in these circumstances, prevent the Lung Association from regaining mineral rights on its compromise portion of the original disputed tract. The supreme court agreed with the court of appeal that important principles of public interest and a solid line of cases and academic authority precluded limiting the term "sold" in section 4 to

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29. La. Const. art. IX, § 4 provides:

(A) Reservation of Mineral Rights. The mineral rights on property sold by the state shall be reserved, except when the owner or person having the right to redeem buys or redeems property sold or adjudicated to the state for taxes.

(B) Prescription. Lands and mineral interests of the state, of a school board, or of a levee district shall not be lost by prescription.

30. At the time of the original donation of the disputed land to the state, the state's power to sell state owned mineral rights was governed by the predecessor of the present provision, article IV, section 2 of the Louisiana Constitution of 1921. That section provided, in pertinent part: "In all cases the mineral rights on any and all property sold by the State shall be reserved, except where the owner or other person having the right to redeem may buy or redeem property sold or adjudicated to the State for taxes." La. Const. art. IV, § 2 (1921).

31. *American Lung Ass'n*, 507 So. 2d at 184-87. The circuit court's opinion is reported at American Lung Ass'n v. State Mineral Bd., 490 So. 2d 343 (La. App. 1st Cir. 1986), rev'd, 507 So. 2d 184 (1987).

any narrow or technical definition.[32] Rather, the supreme court agreed that the constitutional mandate should be construed to reach any functional equivalent of a sale, "probably" including "conveyance of mineral rights to the state through a simple exchange of property."[33]

Nevertheless, the *American Lung Association* court refused to extend this rationale to the facts of the case before it. Instead, the court defined the essence of the transaction between the state and the Lung Association as a "compromise" rather than an exchange of property, and relied on technical distinctions drawn in the Louisiana Code of Civil Procedure and Planiol's Treatise on the Civil Law to conclude that a "compromise" ending a lawsuit is, in the civilian tradition, "something entirely different from a sale, and from an exchange."[34] The crucial technical distinction, according to the court and the civilian authorities, is between transactions which confer "new rights" and compromises which merely involve recognition of part or all of the other party's pre-existing right or claim. Thus, the court held, the constitutional prohibition on transfer of mineral rights when the state "sells" land does not apply to transactions in which the state "compromises" land away.[35] As nineteenth century French

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32. Prior cases have read the mineral rights reservation clauses broadly to prohibit loss of state owned mineral rights by acquisitive prescription, Shell Oil Co. v. Board of Comm'rs, 336 So. 2d 248, 254 (La. App. 1st Cir.), cert. denied, 338 So. 2d 1156 (1976), as well as to mandate reservation of mineral rights in land sold by state agencies such as levee districts. 336 So. 2d at 253; Lewis v. State, 244 La. 1039, 1047, 156 So. 2d 431, 434 (1963). Moreover, though the language used may have been broader than necessary to support their respective holdings, cases construing article IX, section 4 or its 1921 predecessor, as well as scholarly commentators, had fallen into the habit of regularly restating that the Louisiana Constitution mandated reservation of mineral rights on any land "alienated" by the state, apparently regardless of the mechanism by which that alienation took place. Board of Comm'rs v. S.D. Hunter Foundation, 354 So. 2d 156, 169 n.8 (La. 1977); *Shell Oil Co.*, 336 So. 2d at 254; *Lewis*, 244 La. at 1047, 156 So. 2d at 434; *American Lung Ass'n*, 490 So. 2d at 347-48, and scholarly articles cited therein.

These broad interpretations of the mineral reservation provisions reflect the strong public purpose which courts and commentators see the provision as furthering. King v. Board of Comm'rs, 148 So. 2d 138 (La. App. 3d Cir. 1962) (the purpose is to prevent plundering of state assets by insiders to the detriment of the people generally); Note, Mineral Rights—Alienation of Minerals by State Political Subdivisions and Agencies, 21 La. L. Rev. 271 (1960) (these provisions are needed to preserve state assets for the benefit of future generations).

33. *American Lung Ass'n*, 507 So. 2d at 189.

34. Id.

35. Id. at 189-91. It appears that the transaction between the state and the Lung Association was in essence a "compromise" as that term is defined in La. Civ. Code art. 3071. However, in Louisiana law the essential nature of a compromise appears to focus more on reciprocal concessions and the intent to end litigation, rather than on the distinction between new rights and recognition of pre-existing claims, for which the court cited Planiol. Compare 1 S. Litvinoff, Obligations, §§ 372-76 at 636 and §§ 388-93 at 654 in 6 Louisiana Civil Law Treatise (1969), with 2 M. Planiol, Treatise on the Civil

civil law commentators are not inherently relevant to problems of twentieth century constitutional interpretation, the court must be understood to be implying that the drafters of the 1974 constitution were or should have been aware of the the technical distinctions drawn by the civil code and Planiol between "compromises" and "sales," and that the court can validly assume that when the delegates drafted section 4 they chose the term "sold" advisedly, intending thereby to incorporate that distinction.

To be sure, a strong equitable case could be made in favor of the Lung Association. It is a charity, the land at issue was originally given to rather than purchased by the state, the state was in some sense reneging on its own free agreement to give back part of what the charity had given it, and the state legislature had indicated its desire to see the Lung Association prevail.[36] But the logic of the court's conceptual distinction between compromises and all other procedures by which land can be alienated is subject to criticism. From the time the Lung Association's predecessor gave the land to the state until at least 1975 when the Lung Association commenced its revocation action, the state held absolute title to the entire disputed tract. In 1974, the Lung Association had no ownership interest in that property, regardless of the potential merits of the Lung Association's future claim for revocation.[37] Since the Lung Association

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Law no. 2295 at 318 (La. St. L. Inst. Trans. 11th ed. 1959) (relied upon by the court). In any event, in the passage relied upon by the court, Planiol appears to be discussing not revocation of a donation but the very different circumstances of a case where the parties assert competing titles to ownership of the same property. In a case of that type it may well be that each party to a compromise receives no "new rights" from the other; each rather obtains only recognition of real rights that the party asserted all along. Here, in contrast, the Lung Association's only "right" prior to 1975 was its power to force the state to use the gift for its charitable purpose. See infra note 37.

36. In 1984 La. Acts No. 959 the legislature directed the state Office of Lands and Natural Resources to release and quitclaim all interest the state might have in the Lung Association's compromise portion of the tract to the Lung Association. By Concurrent Resolution No. 77, the legislature authorized the instigation and continuation of the Lung Association's suit against the state. Though neither of these legislative pronouncements affected the outcome of the case, *American Lung Ass'n*, 507 So. 2d at 186-87, they do indicate where the legislature's sympathies lay.

37. At the time of the donation, full title to the entire disputed tract passed to the state. La. Civ. Code, art. 1468. The Lung Association had a right to condition that gift on the fulfillment of the conditions, and to revoke the donation if those conditions did not continue to be met, La. Civ. Code art. 1568. But the Association's ability to insist on performance of the condition—here that the land continue to be used for its original charitable purpose—was at most a personal right rather than a real right in the property. Thus the real rights in its compromise portion which the Lung Association today enjoys are "new" in that they are distinct from any "right" it had prior to 1975. See A. Yiannopoulos, Property §§ 132, 134, in 3 Louisiana Civil Law Treatise (2d ed. 1989), distinguishing real and personal rights.

now possesses, as a result of the parties' transaction, some real and mineral rights to which it had no title in 1974, it appears that, contrary to the court's assertion, somewhere along the line the transactions between the state and the Lung Association did result in the creation of "new rights" in the Association at the expense of the state. Moreover, the court's ruling in this case eventually may come to be seen as questionable social policy. Though the court attempted to limit the force of its holding to "good faith" compromises of competing property claims,[38] this new loophole in what previously had been a nearly absolute preclusion of divestment of state owned mineral resources may in the future become the source of shady deals or at least difficult litigations necessary to separate the "bona fide" from the less so.

But again what is striking is that the analytic technique used in this case is equivalent to that in *State Bond Commission*. Though not as explicit about its methodology as it was in that case, the court in *American Lung Association* likewise proceeded by treating the crucial terms, here "sale" and "compromise," as technical concepts, and then applying the traditional maxim that such terms are presumed to have been intended by the the framers to be understood in their technical sense. As in *State Bond Commission*, the *American Lung Association* court made no apparent attempt to determine from the convention records whether the delegates had any actual intent as to the issue presented, if so what that intention might have been, or if not what the analytical consequences of their failure to consider the question might be. (As in *State Bond Commission*, the convention records indicate that while the delegates clearly intended that the prohibition on sale of state mineral rights should apply broadly, there is no indication that they ever considered the issue of whether compromises should be an exception to the general prohibition.[39]) Nor did the court openly discuss the competing policy considerations underlying its decision. Instead the court once again used formal axioms to guide it reasoning, constructing a "fictitious intent" that did not exist in fact, and construing the constitution accordingly.

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38. *American Lung Ass'n*, 507 So. 2d at 191.

39. As originally presented to the convention by its drafting committee, the present article IX, section 4 merely restated the prior law. 9 Records, supra note 13 at 2942 (remarks of Delegate Lambert). That initial draft was then successively amended into its present form by adding language now comprising present paragraph (B) of that section, which prohibits loss through prescription of mineral rights belonging to the state or its organs. The evident purpose of this amendment was to maximize the constitutional protection of state mineral assets. Id. at 2942-43 (remarks of Delegate Shannon), 2944 (remarks of Delegate Burson). There is no indication that the delegates discussed or considered whether any particular types of transactions, by compromise or any other methods, would or should provide a mechanism by which the state could nevertheless divest itself of mineral rights.

As in *State Bond Commission*, the question is whether such techniques remain appropriate in light of the availability of evidence from which the framers' intentions or lack thereof can be better estimated, and the growing recognition by courts in this state that, where interpretation is not in fact constrained by a draftsman's intentions, the court may openly base its decision upon criteria of justice and sound public policy.

Techniques Of Constitutional Interpretation: Of Maxims, Records, Justice and Framers' Intent

Current debate concerning how constitutions should be interpreted has taken place almost exclusively with reference to the United States Constitution, not state constitutions. When theorists of "originalist" interpretation do academic battle with their "non-originalist" foes, when textualists struggle with intentionalists and when metaphysical strife rages over the level of abstraction at which constitutions should be read, the protagonists almost invariably speak of the Federal Constitution alone.[40]

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40. A good general summary of the various types of theories of constitutional interpretation can be found in Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980), from where the terminology used in this article is taken.

Briefly, "originalist" approaches to constitutional interpretation seek to discern the meaning which the constitutional language may have had for those who drafted and ratified it. Various practitioners of the art differ as to whether they would give primacy to the text of the document or to historical evidences of the framers' intentions, and as to the level of abstraction at which they are willing to interpret certain "open ended" language within the Federal Constitution. But all share a fundamental perception that the historical acts by which the framers drafted and the people ratified the Constitution give their understanding of the document at the time of adoption a political and philosophical legitimacy which later courts are not authorized to alter. See, e.g., T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 68-70 (4th ed. 1874); J. Ely, Democracy and Distrust: A Theory of Judicial Review 1-9 (1980).

Non-originalist approaches, in contrast, start from the equally valid premise that each generation gives its consent to the constitutional scheme according to its own understanding of what that document means. Such an approach typically sees the meaning of the text evolving over time in response to the needs of the time. In such theories, courts in effect act in dialectical partnership with the political branches and the populace to articulate that evolving understanding of the Constitution. See, e.g., Perry, Noninterpretive Review in Human Rights Cases: A Functional Justification, 56 N.Y.U.L. Rev. 278 (1981); Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975). Prominent examples of judicial decisions under the Federal Constitution which have been described as essentially non-originalist in method include Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954), in which the Court read into the fourteenth amendment a prohibition of the system of segregation which most of that amendment's framers and ratifiers apparently found acceptable (see, Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955)) and Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973), in which the Court relied upon evolving concepts of personal privacy arguably rooted in

This is unfortunate since similar issues regarding constitutional interpretation—whether and how closely a court should be bound to the legal conceptions entertained by the framers, how to determine whether the framers ever considered particular problems and how to discern their intentions if they did—recur in state constitutional cases as well.

Despite this relative lack of articulated theory with respect to state constitutions, it appears generally safe to assume that arguments favoring fidelity to the "original intentions" of the drafters, although developed with reference to the Federal Constitution, should apply even more strongly to state constitutions. To be sure, most state constitutions differ markedly in form and function from their federal counterpart. Theories of interpretation developed with regard to a short, difficult to alter document written two hundred years ago to grant limited powers to a new government may well not be directly transferable to recent, detailed, readily altered state constitutions such as Louisiana's. But to the extent that such differences exist, they appear to favor an even greater reliance on originalist modes of construction for state constitutions. Since the Louisiana Constitution was drafted only a relatively few years ago, interpretation of its language or its framers' beliefs is not hampered by changes over time in the meaning of terms or by changing social and political realities. Moreover, much better evidence is available from which the intentions of drafters of the state's constitution can be discerned. Unlike the delegates to Philadelphia, the drafters of the 1974 Louisiana Constitution left an extensive record of their debates and of the process by which specific provisions were written and rewritten into their final form; objections that the framers' intent (i.e., whether or not they had any intent as to a particular question, and if so what it was) cannot be discovered are far less persuasive here than for the Federal Constitution.[41] Since the state constitution is more readily amended by the legislature and voters, there is less need for the courts to take it upon themselves to adapt the document to changing times. And since state constitutions are typically far longer, more detailed and "statute-like" than is the United States Constitution—relatively less concerned with protecting fundamental rights or safeguarding the democratic process, and more devoted to enshrining particular policies and detailing gov-

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but not directly stated in the constitutional text to limit state control of abortions.

Differing "levels of abstraction" refers to the differing extent to which the constitutional interpreter conceives himself entitled to abstract from a particular provision certain underlying philosophical principles or concepts which can then be applied in ways that the framers never conceived, or even in ways that would produce particular results which the framers might have opposed. See, R. Dworkin, Taking Rights Seriously 133-37 (1977).

41. See Hargrave, Work of the Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law, 36 La. L. Rev. 533, 533-35 (1976), discussing the use of convention records in reference to Hainkel v. Henry, 313 So. 2d 577 (La. 1975).

ernment operations—it makes sense to construe them with more regard for their drafters' particular purposes and perhaps with less concern for natural law, grand issues of fundamental justice or other philosophical verities.[42]

The Louisiana Supreme Court has tended to justify its results in particular cases and express itself concerning how the state constitution should be interpreted without reference to such overtly philosophical considerations. Rather, the court has relied on a number of standard axioms of constitutional construction, a tool kit of formal rules which can be applied to yield results when the constitution's language and intent are unclear. Among the most frequently repeated are: that the state's political branches retain plenary authority to do all things not expressly forbidden by the constitution;[43] that constitutional provisions are to be interpreted by the same rules as ordinary statutes;[44] that construction should give effect to the provision's purpose as indicated by "a fair interpre-

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42. Though the 1974 Louisiana Constitution is much shorter and less "statutory" than its 1921 predecessor, it remains far longer and more specific in its provisions than the Federal Constitution. Of course, different types of constitutional provisions may well be interpreted at differing levels of abstraction. Guarantees of fundamental rights phrased in very general terms (e.g., the guarantees of "equal protection of the laws" or against "unreasonable searches and seizures" in the Federal Constitution, or the guarantee of "privacy" in article I, section 5 of the Louisiana Constitution) appear to call for interpretation at a relatively high level of abstraction. These guarantees embody general principles regarding the proper relationship between man and state that, if they are to be effective at all, must be protected from novel unanticipated threats as well as against the specific evils which the framers had in mind. Thus there is little debate that, for example, the federal fourth amendment applies to limit government wiretapping, although such possibilities were unknown to the framers.

On the other hand, constitutional provisions which set out detailed regulatory schemes, such as, for example, article X of the 1974 Louisiana Constitution regulating the state's civil service system, appear to be properly interpreted at a relatively low level of abstraction, at least in most circumstances. They typically embody specific rules rather than general principles, and too freehanded an approach by judges may well upset carefully chosen and balanced systems and compromises.

The provisions at issue in the cases discussed here appear to fall somewhere between these extremes, but closer to the latter. Cf. Tate, The Judge's Function and Methodology in Statutory Interpretation, 7 S.U.L. Rev. 147, 148 (1981) (noting that statutes vary along this same range, from narrow precept to general principle and should be interpreted accordingly).

43. This is probably the most consistently repeated maxim in the supreme court's armamentarium. E.g., Board of Comm'rs v. Department of Natural Resources, 496 So. 2d 281, 286 (La. 1986); Aguillard v. Treen, 440 So. 2d 704, 706 (La. 1983); New Orleans Firefighters Ass'n v. Civil Serv. Comm'n, 422 So. 2d 402, 406 (La. 1982); Board of Secondary and Elementary Educ. v. Nix, 347 So. 2d 147, 153 (La. 1977).

44. E.g., *Aguillard*, 440 So. 2d 704, 707 (La. 1983); Jones v. LaBarbera, 342 So. 2d 1125, 1127 (La. 1977); Barnett v. Deville, 289 So. 2d 129, 146 (La. 1974); Roberts v. Baton Rouge, 236 La. 521, 558-59 n.9, 108 So. 2d 111, 124 n.9 (1958); State ex rel. Kemp v. Baton Rouge, 215 La. 315, 343, 40 So. 2d 477, 486 (1949).

tation of the words used";[45] that "unambiguous" language precludes resort to any other method of construction;[46] that despite the foregoing, the position, drafting history and development of particular provisions, and the particular evils which constitutional provisions sought to correct, can all be legitimate sources of interpretation;[47] and that where dispute centers on a technical term or legal term of art, resort may be had to extrinsic sources of law and construction of similar provisions in other states' constitutions.[48]

Considered only as formal axioms, these pronouncements seem notably unlikely to yield determinate results in particular cases. To state that the legislature's authority is plenary unless constrained by the state constitution gives little guide to determining how broadly or narrowly those constraints will be interpreted, or what counts as evidence that a particular prohibition was intended. The analogy to statutory construction is also largely devoid of analytic content and is often used as no more than an introductory flourish prior to citation of and reliance on one or another of the civil code articles on construction—articles which themselves are not substantially different than the axioms of constitutional construction on which the courts rely independently of any such citation.[49] Similarly, "unambiguous" language and the "fair interpretation of the words used" are elusive beasts easy to postulate but difficult to identify in practice. As numerous dissents demonstrate, both concepts

45. *Board of Comm'rs*, 496 So. 2d at 298; State ex rel. Guste v. Board of Comm'rs, 456 So. 2d 605, 609 (La. 1984); *Barnett*, 289 So. 2d at 146.

46. *State ex rel. Guste* 456 So. 2d at 609; *Aguillard*, 440 So. 2d at 707; Bank of New Orleans and Trust Co. v. Seavey, 383 So. 2d 354, 356 (La. 1980); West v. Allen, 375 So. 2d 758, 759-60 (La. 1979); City of Baton Rouge v. Short, 345 So. 2d 37, 40 (La. 1977); Public Hous. Admin. v. Housing Auth., 242 La. 519, 531-32, 137 So. 2d 315, 320 (1962).

47. *Board of Comm'rs*, 496 So. 2d at 287-88 (looking to the overall structure of the 1974 constitution, the nature of the evil sought to be addressed and the records of the convention); *New Orleans Firefighters Ass'n*, 422 So. 2d at 407-09 (reliance on convention records); *Board of Elementary and Secondary Educ.*; 347 So. 2d at 150-51 (looking to history and development of disputed provision); *Jones*, 342 So. 2d at 1127 (looking to "the nature and object of the provision under consideration with all the light and aid of contemporaneous history"); *Barnett*, 289 So. 2d at 146 (structure, history and comparison with other provisions of the constitution); Stokes v. Harrison, 238 La. 343, 115 So. 2d 373 (1959) (comparing different constitutional provisions).

48. E.g., State ex rel. Kemp v. Baton Rouge, 215 La. 315, 40 So. 2d 477, 480-81 (1949) (looking to decisions on similar provisions from other states).

49. E.g., *State ex rel. Guste*, 456 So. 2d at 609; Roberts v. Baton Rouge, 236 La. 521, 558-59 & n.9, 108 So. 2d 111, 124 & n.9 (1958). Compare the maxims listed in, for example, *Barnett*, 289 So. 2d at 146 with articles 13 through 21 of the civil code regarding statutory construction and with the maxims of construction discussed in T. Cooley, supra note 40, at 48-86.

seem to reside primarily in the eye of the beholder.[50] And to authorize resort to surrounding or contrasting provisions within the constitutional text, to drafting history or to extrinsic sources of interpretation gives little guidance as to how a court should choose among these various guides when, as is often the case, they tend toward differing conclusions.

Although these heterogenous maxims might give the impression of being no more than a body of alternative rationales that can be trotted out when needed to justify results, they do share an essential unity of focus. Fairly employed, each attempts to direct the court's attention to one or another source of indirect evidence concerning the meaning which the provision's drafters wanted to convey. The "plain meaning" of ordinary language or commonly understood meanings of legal terms of art, drafting history, the relationship of one provision to the rest of the text, historical evidence of the evils which the drafters intended to address, construction of similar provisions by other courts—these are all techniques which can, at least in some cases, provide clues from which the intentions of a document's writers might be reconstructed.[51]

The difficulty, of course, is that the evidence afforded by these maxims of construction and equivalent formal interpretive techniques is indirect and uncertain at best. They may well have had a legitimate function as "rules of thumb" from which the drafters' intentions could be estimated, though with questionable accuracy, in an era when courts typically had little access to direct evidence of that intent. But if that is their legitimate role, it appears that they should be considered to have continuing value only so long as they elucidate, rather than contradict, what is in fact known about the drafters' intentions or, as in the *State Bond Commission* and *American Lung Association* cases, the framers' apparent lack of intention as to particular issues.[52] Where the

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50. E.g., *State ex rel. Guste*, 456 So. 2d at 611-12 (Calogero, J., dissenting); *Aguillard*, 440 So. 2d at 711-16 (Dixon, C.J., dissenting and Watson, J., dissenting); *New Orleans Firefighters Ass'n*, 422 So. 2d at 415 (Marcus, J., dissenting); *City of Baton Rouge*, 345 So. 2d at 41-42 (Calogero, J., dissenting); *Public Housing Admin.*, 242 La. at 542-68, 137 So. 2d at 324-33 (Hawthorne, J., dissenting and Sanders, J., dissenting); State v. Bradford, 242 La. 378, 141 So. 2d 378 (1962) (Summers, J., dissenting).

51. See T. Cooley, supra note 40, at 68, explaining the purpose of construction and the maxims which guide it as "to give effect to the intent of the people in adopting" the constitution.

52. To be sure, individual statements made by delegates to the constitutional convention are no infalliable guide to the intentions of that body as a whole. See, e.g., West v. Allen, 375 So. 2d 758, 759-60 (La. 1979) (rejecting such an argument on the ground that various statements by different delegates could give rise to differing inferences as to the intentions of the drafters as a whole). Nevertheless, the Louisiana courts have frequently recognized, since the records of the 1973 convention became available, that those records can in many cases provide a uniquely good insight into the actual understandings and purposes of the framers of the 1974 constitution. E.g., *Board of Comm'rs*, 496 So. 2d

direct evidence indicates that the drafters never considered a particular issue, it seems futile for the court to use such techniques in order to assume a "fictional intent" that never existed in reality. In those circumstances, reliance on formal maxims of construction and the fictional intent they reflect serves as little more than a screen behind which the decision is reached covertly on other, non-interpretive, grounds of public policy, the requirements of justice and fairness in particular cases, or other factors.

Justice Tate has persuasively argued that such concepts of policy or justice may well provide appropriate grounds for interpretation of ambiguous statutory provisions, particularly where the legislature's intent is unclear or where it appears that the legislators never considered the particular problem presented.[53] There appears to be no inherent reason why similar principles should not be applied to interpretation of state constitutions, particularly in light of the tradition in this state that statutes and the state constitution should be interpreted similarly.[54] If

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at 288 (relying heavily on convention proceedings in construing the takings clause of article I, section 4 to safeguard only private property); *New Orleans Firefighters Ass'n*, 422 So. 2d at 407 (relying on the convention debates and on negative inferences drawn from the defeat of alternative formulations, including an amendment which would have embodied the claim at bar); *Board of Elementary and Secondary Educ.*, 347 So. 2d at 150-51 (explicit reliance on convention debates). Such arguments have not always carried the day, however. See, e.g., *Aguillard*, 440 So. 2d at 715 (Watson, J., dissenting) (unsuccessfully urging inference from the convention's rejection of an amendment that would have more clearly given the legislature control over educational policy); *West*, 375 So. 2d at 758; *City of Baton Rouge*, 345 So. 2d at 41-42 (Calogero, J., dissenting). See generally Hargrave, supra note 41.

53. The theme is one to which Justice Tate returned several times in his published writings. Throughout he maintained his steady commitment to the proposition that the legislative text and intention were entitled to great respect and deference, and consistently rejected any substitution of a judge's subjective sense of fairness for the clear command of the lawgiver, if any such clear rule could be found. But his writings show him equally clear that deference is owed only when the legislature has actually exercised its authority. Judges owe no obeisance to fiction, or to the accidental wording of law by a lawgiver who failed to consider how that wording might apply to a particular case. Where such mere fictions were opposed to the needs of public policy or valid claims of justice and fair play in particular cases, Justice Tate argued that judges should be willing to free themselves from formal processes of legal reasoning and construe the law instead in the light of good sense, justice and sound public policy. See, e.g., Tate, "Policy" in Judicial Decisions, 20 La. L. Rev. 62 (1959); Tate, The Justice Function of the Judge, 1 S.U.L. Rev. 250 (1975); Tate, The "New" Judicial Solution: Occasions for and Limits to Judicial Creativity, 54 Tul. L. Rev. 877 (1980); Tate, The Judge's Function and Methodology in Statutory Interpretation, 7 S.U.L. Rev. 147 (1981). The difficulty, of course, is in determining whether the lawgiver has in fact considered a particular problem or problems of that type.

54. Though directly concerned with conflicts between "justice" and the commands of precedents, statutes or codal materials rather than constitutions, Justice Tate's reflections

so, decisions reached on such grounds should be explained and defended openly by the court, not hidden behind the worn out masks of traditional maxims of construction or other subterfuges. Such judicial forthrightness should lead to better decisionmaking in particular cases, a more coherent development of legal doctrine, and clearer communication between the judiciary and those bodies—legislature, drafters of constitutional amendments or voters—that enjoy the primary political authority to make or change the law.[55]

From this analysis, it appears that while the results in the *State Bond Commission* and *American Lung Association* cases may well be defensible—indeed, may have been mandated by the policy and equitable considerations present—the justification which the court gave in each case is less so. In both cases, the method of interpretation by axiom used by the court had ceased to be a process by which the court makes an educated guess as to what the drafters actually intended. Instead the traditional tool was employed as a formalistic substitute for inquiry into that intent or the analytic consequences of the lack of intent, and as a device to avoid open discussion of other factors which appear to have contributed more to the actual process of decision. And in one case, the misuse of those formal methods of construction led to a decision apparently at odds with both logic and sound public policy.[56] These "hard cases" demonstrate the difficulties likely to ensue when fictional "intent" is allowed to substitute for inquiry into the real thing.

CRIMINAL LAW

In two different areas, interpretation of criminal statutes and enforcement of criminal penalties, the Louisiana appellate courts last term confronted claims that raised basic issues of fairness and equal protection in the administration of the criminal laws.

Overbreadth and Equal Protection in Public Gambling

In *State v. Griffin*,[57] the Louisiana Supreme Court considered for the first time the constitutionality of La. R.S. 14:90.2, which prohibits

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seem relevant in this context as well. Louisiana courts have long declared that the state constitution should be interpreted by the same techniques as are statutes. See supra note 44. And the basic problem of the legitimacy of judicial lawmaking when the politically empowered authorities—be it legislature or convention—fail to consider or to speak clearly regarding particular problems is the same in both circumstances.

55. See Perry, supra note 39 at 293-96 for a discussion of the legitimacy of the courts as dialectical partners of the political authorities in the law-making process.

56 See supra notes 37-38 and accompanying text.

57. 495 So. 2d 1306 (La. 1986).

gambling in public,[58] and held that the statute was on its face neither void for vagueness nor overbroad. This statute was enacted in 1979 as an addition to Louisiana's long-standing criminal code provisions outlawing gambling conducted as a business,[59] but seldom has been construed since.[60] In upholding the constitutionality of the public gambling statute, while at the same time attempting to assure Sunday golfers that side bets on the fourteenth hole would remain decriminalized, the court may well have created equal protection and due process problems ultimately more difficult than those it tried to solve.

The bill of information at issue in *Griffin* was, to say the least, terse, and since it was quashed by the district court and no trial was held, the supreme court had few facts available to guide its review of the challenged statute. All that was known was that the defendant allegedly "intentionally gamble[d] in open view of the public in a public parking lot."[61] The supreme court's consideration was thus confined to the facial validity of La. R.S. 14:90.2; no question of whether the statute was properly applied to the particular defendant was discussed.

The *Griffin* court began its analysis of the statute's facial validity with a reaffirmation of the legitimacy of the state's interest in regulating gambling. The court's reliance on article XII, section 6 of the state constitution as additional support for the importance of this state interest is less than compelling in the circumstances since the convention records

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58. La. R.S. 14:90.2 (1986) provides:

A. Gambling in public is the aiding or abetting or participation in any game, contest, lottery, or contrivance, in any location or place open to the view of the public or the people at large, such as streets, highways, vacant lots, neutral grounds, alleyway, sidewalk, park, beach, parking lot, or condemned structures whereby a person risks the loss of anything of value in order to realize a profit.

B. This Section shall not prohibit activities authorized under the Charitable Raffles, Bingo and Keno Licensing Law, nor shall it apply to bona fide fairs and festivals conducted for charitable purposes.

C. Whoever commits the crime of gambling in public shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

59. The general provision against gambling as a business, originally enacted in 1870, is presently found at La. R.S. 14:90 (1986), which provides in relevant part:

A. Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

60. The only reported case prior to *Griffin* in which the interpretation of section 90.2 was at issue was the second circuit's decision in State v. Young, 457 So. 2d 205 (La. App. 2d Cir. 1984) (held that defendants who were gambling within a laundromat were not doing so "in public" for purposes of the statute, even though their activities were in fact fully visible from the street).

61. *Griffin*, 495 So. 2d at 1308.

demonstrate that the delegates who adopted that provision were primarily concerned with political symbolism, "commercial" gambling and preventing the state from instituting a lottery,[62] issues that were not involved in the case at bar and are dealt with elsewhere in the law. Nevertheless, the basic proposition that the state may regulate gambling is scarcely controversial.[63] Nor does it answer the question of whether a blanket prohibition of gambling in any public location can comport with the constitution.

Turning to the question of whether the statute was impermissibly vague, the court noted that most of the challenged terms had previously been held to be sufficiently well understood to satisfy due process in cases and other sources involving La. R.S. 14:90, the statute outlawing gambling "as a business."[64] The only novel term in the challenged statute was "public," a word which the court also held to have a well understood meaning derivable both from common usage and from prior jurisprudence.[65]

On the final and most difficult question, whether the statute was overbroad, the court stated as an apparent absolute that no such challenge could succeed unless the statute attempted to prohibit or regulate an area of personal conduct which has been granted constitutional

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62. Article XII, section 6 of the 1974 Louisiana Constitution provides: "Neither the state nor any of its political subdivisions shall conduct a lottery. Gambling shall be defined by and suppressed by the legislature." As to the purposes for which this section was enacted, see 9 Records, supra note 14, at 3214-15 (remarks of Delegates Avant and Smith indicating that the proposed constitutional language would not prohibit, for example, country club poker games, crap games at a fish fry, charitable "Las Vegas Nights," bingo or pari-mutuel betting, but rather is directed, in accordance with the only criminal anti-gambling then extant, only against gambling "operated as a business"). But see id. at 3227-28 (remarks of Delegates Kean and Gravel indicating that under the "define and suppress" clause, the state legislature could in the future outlaw additional forms of gambling other than the comercial variety). A more general underlying idea that such a provision did not really belong in a constitution, but was being included to appease voters who might take its absence as condonation of vice, appears throughout the discussion of this section.

63. See, e.g., Theriot v. Terrebonne Parish Police Jury, 436 So. 2d 515 (La. 1983) (holding that state regulation of gambling in general had a rational relationship to a legitimate state interest and thus did not violate substantive due process).

64. *Griffin*, 495 So. 2d at 1309 (relying on State v. Varnado, 208 La. 319, 23 So. 2d 106 (1944)), which upheld the gambling "as a business" statute, La. R.S. 14:90, against constitutional challenge, and the Reporter's Comment to that statute).

65. In holding that the phrase "open to the view of the public or the people at large" was sufficiently well defined and commonly understood, the court relied on prior jurisprudence construing similar language in the state's obscenity law, State v. Muller, 365 So. 2d 464 (La. 1976), and on State v. Young, 457 So. 2d 205 (La. App. 2d Cir. 1984).

protection.[66] Analogizing to to the United States Supreme Court's decision last term in *Bowers v. Hardwick*,[67] which upheld Georgia's anti-sodomy statute, the *Griffin* court ruled that an individual has no more constitutionally protected "right" to engage in gambling than in sodomy. Neither right is "deeply rooted in this Nation's history and tradition," nor is either "implicit in the concept of ordered liberty," and thus neither could support an overbreadth challenge to criminal regulation on federal constitutional grounds.[68] Indeed, the court argued that the gambling statute at issue in *Griffin* was a fortiori to *Bowers* since no right to "privacy" can be implicated in regulation of "public" gambling. Finally, the court noted that no state constitutional "right to gamble" sufficient to justify an overbreadth attack could be inferred, since the state constitution itself indicates hostility to gambling, directing the legislature to define and suppress that activity.[69]

Having stated these broad-reaching conclusions and upheld a statute that on its face prohibits all public gambling of any type by anyone anywhere, the court in *Griffin* pulled back, and in a curious passage appeared to go out of its way to assure certain friendly wagerers that they, at least, could probably continue to gamble publicly without fear:

> [I]t appears from the bill of information [that] defendant Griffin is more similar to the player of marbles in the school yard than the Sunday golfer. Because more social ills result from street games than from the pastoral setting of a golf game, the legislature may have had only the former in mind when it enacted

66. "In order for the principle of overbreadth to apply, a constitutionally protected right must be claimed in the prosecution." *Griffin*, 495 So. 2d at 1310 (citing State v. Tucker, 354 So. 2d 1327 (La. 1978) and State v. Cox, 352 So. 2d 638 (La. 1977)).

67. 106 S. Ct. 2841 (1986).

68. *Griffin*, 495 So. 2d at 1310. Though the *Griffin* court's analysis faithfully tracks that employed in *Bowers*, such a focus on whether specific activities individually enjoy constitutional protection may well miss the point. The question of the proper level of generality at which a constitutional provision is to be interpreted cannot be avoided. As Justice Blackmun pointed out in his *Bowers* dissent, protection of individual rights under the due process clause involves not just discrete "rights" to, for example, watch obscene movies, place bets from telephone booths, engage in homosexual sodomy or gamble in public. It is trivially true that the framers of neither the Federal nor the Louisiana Constitution likely had any conscious desire to protect these specific activities—indeed, they probably never considered them at all. Rather what is at stake in all such cases is a more fundamental generalized "right to be left alone"—"privacy" in the sense that there should be a sphere of private or consensual activity, which does not directly impact on public order and in which individuals should be allowed to engage free of governmental interference. *Bowers*, 106 S. Ct. at 2851-53 (Blackmun, J., dissenting). It may be that criminal regulation of the public gambling at issue in *Griffin* would not have offended such a "right to be let alone," but the Louisiana Supreme Court, relying on the *Bowers* majority, avoided the need to make that determination.

69. But see supra note 62 and accompanying text.

> La.R.S. 14:90.2, and the police may enforce it with that understanding. Nevertheless, as established above, nothing prevented the legislature from concluding public gambling of any type constitutes enough of a social ill to warrant suppressing it as a general matter. Moreover, the possibility Georgia might enforce its sodomy laws only against homosexuals, though the statutory language is broad enough to also cover heterosexuals, hardly deterred the majority of the Court in Hardwick from rejecting the defendant's overbreadth challenge.[70]

This passage is troubling for several reasons. First, the court's willingness to assume without cited evidence that the legislature "may" have had some such distinction in its collective mind when section 90.2 was adopted, and that the statute can be enforced in light of that apparently unexpressed understanding, may render the statute, clear on its face, impermissibly vague in its application. Moreover, it puts the court's imprimatur on what the court apparently understands to be a pattern of discriminatory enforcement, by which the police customarily apply the law's full rigor to certain friendly wagerers, those who play their games on the public streets and sidewalks, while exempting those who do their gambling on the public fairways. This particular pattern of selective enforcement carries with it an unfortunate odor of class discrimination. In a world where golf course wagerers are likely to be wealthier and whiter than their street-gambling counterparts, such a distinction in the law may come too close to an impermissible violation of constitutional guarantees of equal protection.

As the *Griffin* court recognized, a criminal statute will be held unconstitutionally vague unless it both gives individuals of ordinary intelligence adequate notice of what conduct is and is not forbidden, and provides adequate standards for determination of guilt or innocence.[71] And as the opinion in *Griffin* demonstrated, all of the terms of section 90.2, as that statute was written, satisfy these requirements.[72] However, by suggesting that the legislature "may" have meant something different and more limited than what the plain terms of the statute state, and by suggesting that the statute may permissibly be enforced according to that understanding rather than as written, the court may well have undermined its previous demonstration. If some kinds of public gambling are permissible and others not, the statute must spell them out. Otherwise a potential friendly wagerer would have no notice of what is or is not permitted, and a court would have no articulable standard by which to determine guilt. If the statute as written is offensive

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70. *Griffin*, 495 So. 2d at 1310.
71. Id. at 1309-10.
72. See supra notes 64-65 and accompanying text.

to a sufficient number of friendly wagerers, and is enforced according to its terms rather than some vague common understandings of the officials, the political means for correction are available.[73]

The other potential constitutional infirmities of section 90.2, as interpreted in *Griffin*, inhere in the discretion which a broadly written but irregularly enforced statute gives to officials to choose the law's targets, and in the court's suggestion that it would be permissible for this discretionary power to be systematically employed to distinguish between social groups.

As Judge Rubin pointed out in *Scott v. District Attorney*,[74] an opinion on which the *Griffin* court expressly relied,[75] the evil of an overbroad statute inheres not only in potential chilling of constitutionally protected conduct, but also, "perhaps more ominously, [in] that it gives enforcement officials the power to select certain citizens" for punishment.[76] This discretion, unbounded by statute, can itself be a source of constitutional infirmity. To be sure, police and prosecuting officials must be allowed a degree of discretion in deciding whether to prosecute a violation in a particular case, and the exercise of that discretion will ordinarily not be subject to constitutional challenge unless it is based upon some impermissible classification such as race.[77] But as the Louisiana Supreme Court recently noted, such official discretionary power cannot constitutionally be employed "arbitrarily, capriciously or maliciously but must be used to further the ends of justice."[78] Given the procedural framework in which the *Griffin* case came to the court, posing only a facial challenge to the statute, there could be no assertion of any arbitrary exercise of discretion in that particular case. But given the court's express distinction between wagering on the highway and wagering on the fairway, the question remains whether a consistent exercise of official discretion to enforce the law against one set of

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73. "I know of no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution." U.S. Grant, quoted in D. Kin, Dictionary of American Maxims (1955). When a burdensome law is only selectively enforced against a political minority, the political will to repeal it may never be generated, thus short circuiting the political process on which the federal and state constitutions rely and which they are intended to protect.

74. 309 F. Supp. 833 (E.D. La. 1970).

75. *Griffin*, 495 So. 2d at 1309.

76. *Scott*, 309 F. Supp. at 838.

77. E.g., United States v. Batchelder, 442 U.S. 114, 125 n.9, 99 S. Ct. 2198, 2205 n.9 (1979) ("the equal protection clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion or other arbitrary classification'"), Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 667-68 (1978).

78. State ex rel. Guste v. K-Mart Corp., 462 So. 2d 616, 620 (La. 1985).

wagerers but not against another would itself be arbitrary or capricious.[79]

In the passage quoted above, the *Griffin* court tentatively justified selective enforcement of the public gambling statute in two ways, relying on certain unspecified "social ills" allegedly more likely to result from gambling on the streets, and on the United States Supreme Court's apparent acceptance of similar selective enforcement in *Bowers*. The first justification suffers from the lack of any indication of what those feared "social ills" might be, any evidence that they are sufficiently more likely to result from one gambling tradition than another, or any demonstration that the legislature in fact had such a distinction in mind when it enacted section 14:90.2. Certainly the face of the statute and the official comments give little support to the distinction. *Bowers* too provides only limited support, since no actual threat of criminal prosecution any longer existed in that case, and since the *Bowers* majority carefully avoided considering whether the Georgia sodomy statute could be applied against heterosexual or married couples engaging in the same acts.[80] *Griffin*, by contrast, was itself a criminal action, and the court there embraced the idea that the statute could be employed against some of those within its literal terms, but not against others.

But on a deeper level, the *Griffin* court was quite correct in its interpretation of and reliance on *Bowers*. That case was presented as an appeal from dismissal of the plaintiff's complaint, thus obligating the Court to consider any possible ground on which the Georgia sodomy statute might be held unconstitutional.[81] And the state's willingness to admit that it fully intended to apply the statute only against homosexuals, despite its facial applicability to all, surely raises the issue of the propriety of selective enforcement of criminal statutes.[82] Thus the majority's decision may have to be interpreted as indicating that five justices believed that, unless a criminal statute infringes upon a "fundamental right"—a concept that henceforth may be very restricted in meaning—or unless the group subjected to intentional discriminatory enforcement is a traditional "suspect class," then nothing in the United States Constitution prohibits the authorities from enforcing a broadly worded statute only against selected categories of individuals.

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79. As the cases cited supra in note 77 show, disrimination in criminal enforcement on a constitutionally impermissible ground is forbidden regardless of whether the burden falls on the disfavored group as a whole or on a single individual because he is a member of the disfavored group.

80. *Bowers*, 106 S. Ct. 2841-42 n.2, 2846 n.8 (noting that, since Georgia had no history of enforcing its sodomy laws against heterosexuals, two married plaintiffs were dismissed as parties and that the remaining defendant did not assert an equal protection challenge to the statute).

81. Id. at 2849 (Blackmun, J., dissenting).

82. Id. at 161-65 (Stevens, J., dissenting).

But this need not be the end of the inquiry. The Louisiana Constitution is an independent source of rights that may limit the authorities' discretion to selectively enforce criminal laws in this state. In light of the state constitution's explicit directive to the legislature to define and suppress gambling,[83] the *Griffin* court summarily rejected the idea that the due process article of the Louisiana Constitution might in the circumstances be interpreted to give greater substantive rights than the federal due process clause.[84] But the issue remains whether the implicit message of *Bowers* regarding equal protection challenges to discriminatory enforcement of criminal laws—that such challenges will succeed only if the discrimination is directed against a traditional "suspect class"—also restricts such a challenge under the equal protection article of the state constitution.

After considerable debate, the delegates to the 1973 Louisiana constitutional convention adopted an equal protection article for the state constitution that was worded quite differently than its federal counterpart.[85] The language eventually adopted was intended to embody the concerns of the delegates to protect groups other than traditional racial or religious minorities while still leaving the state government able to make reasonable distinctions where necessary.[86]

In *Sibley v. Board of Supervisors*,[87] the Louisiana Supreme Court recognized that the thrust of the state constitution's equal protection article was to provide greater protection against arbitrary discrimination to groups which the federal courts had failed to protect, and that the

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83. See supra note 62 and accompanying text.

84. *Griffin*, 495 So. 2d at 1310. The Louisiana Constitution's guarantee of due process is found in article I, section 2, which provides, in language virtually identical to that found in the Federal Constitution, "No person shall be deprived of life, liberty, or property, except by due process of law." There is evidence in the convention records that the framers of the 1974 Louisiana Constitution had no intention that the state's guarantee of due process would go beyond the federal guarantee. Records, supra note 13 at 1001 (remarks of Delegates Jack and Vick).

85. La. Const. art. I, § 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.

The convention debate over this provision, and how it should be worded, stretched over two days of the convention's plenary session. Records, supra note 13, at 1016-30. See generally, Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 6-10 (1974) (discussion of the article's origin and meaning).

86. Records, supra note 13, at 1029-30 (remarks of Delegate Dennery). Hargrave, supra note 85, at 80.

87. 477 So. 2d 1094 (La. 1985).

"tier" model of federal review of equal protection challenges was inappropriate as a guide to deciding such challenges under the state constitution.[88] Instead, the *Sibley* court announced a very different standard of review under the state constitution's equal protection article:

> Article I, Section 3 commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (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 the disadvantaged class shows that it does not suitably further any appropriate state interest.[89]

Measured against this test, selective enforcement of the public gambling statute seems subject to challenge. Though the intended meaning of the state constitutional prohibition of unreasonable classifications based on "culture" is somewhat obscure, there is nothing in the constitutional language to suggest that it could not be applied to the very real cultural distinctions that separate those who do their friendly wagering on the basis of skill with a golf club from those who pit instead their skill with cards or dice.[90] Though not as unique or developed a

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88. Id. at 1108.

89. Id. at 1107 (footnotes omitted).

90. As originally proposed by its drafting committee, the equal protection article did not use the word "culture," but instead prohibited discrimination based on "social origin" among other things. 6 Records, supra note 13, at 1016. The proponents were not very responsive to questions from the floor regarding what "social origin" was intended to mean. See, e.g., id. at 1018 (Delegate Roy responding to Delegate Roemer's question by simply asserting that "social origin speaks for itself"). However, it was clear that the delegates believed that the Louisiana provision would protect more rights than did the Federal Constitution. E.g., id. at 1020 (remarks of Delegate Burson to the effect that the Louisiana provision would prohibit, for example, arbitrary discrimination between new and used car dealers).

The committee's original proposal was extensively rewritten over the night of August 29-30 to appease the concerns of various delegates that necessary and reasonable legal distinctions might be prohibited. As rewritten, the term "social origin" was dropped and the term "culture" was substituted as a ground on which unreasonable discrimination was expressly forbidden. Id. at 1029 (remarks of Delegate Dennery). In response to questions from the floor, the drafters of the rewritten article were equally unable to define "culture." They did, however, give an example: "Culture is obvious. There can be certain reasonable discriminations there. For instance, the English language can be the official language of the state, and therefore, that is a reasonable discrimination against the French

"culture" as, for example, Louisiana's French heritage, the "culture" of inner cities or particular socio-economic groups can be seen a separate way of life with, among other things, a distinct set of typical pastimes. And even if such matters of popular culture or class-based differences in style of life are not to be included in the state constitution's reference to discrimination based on "culture," discriminatory enforcement of the criminal laws may remain impermissible under *Sibley*'s third category if it does not suitably further an appropriate state interest. Though the *Griffin* court did conclusorily assert that more social ills result from one form of public gambling than the other, it is a little difficult to see what the difference might be. Surely a public golf course is no less public than a public street. Nor could the difference be based on a desire to foreclose organized crime or the operation of a gambling business, since these problems are more directly dealt with in La. R.S. 14:90. In any event, it seems that if a defendant were to mount a challenge to the selective enforcement of the public gambling laws on these grounds, the state would have to come forward with a greater showing of need for the distinction than has thus far been articulated.

Jail Time in Lieu of Fines for Indigent Defendants

Last term also saw substantial judicial discussion of the question of whether and when an indigent criminal defendant may be sentenced to additional jail time in default of payment of a criminal fine or court costs.

In a series of decisions over the last sixteen years, the United States Supreme Court has held that, in some circumstances, the Federal Constitution prohibits automatic imposition of additional jail terms on indigent criminal defendants unable to pay assessed fines or court costs. In *Williams v. Illinois*,[91] the Court held that such additional terms were impermissible if they resulted in an aggregate sentence exceeding the statutory maximum provided for the underlying crime. *Morris v. Schoonfield*,[92] originally set for argument with *Williams*, was remanded without full opinion. But three justices, concurring, used the opportunity to

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language." Id. at 1029 (remarks of Delegate Dennery).

As indicated by reference to the French language, it may have been that the delegates apparently understood the reference to "culture" in the equal protection article as a specific protection for Louisiana's French heritage. Hargrave, supra note 85, at 9. But the language they adopted and the voters ratified cannot easily be given so restrictive a meaning. The language is subject to a broader construction, one that would protect from unreasonable discrimination the varied lifestyles of all of the state's residents. The framers intended to draft and adopt a broad provision, one that would extend protection beyond the federal guarantee. Id. at 6.

91. 399 U.S. 235, 90 S. Ct. 2018 (1970).

92. 399 U.S. 508, 90 S. Ct. 2232 (1970).

reiterate that in their view the principles of *Williams* prevented any automatic conversion of a fine into additional jail time if the reason for nonpayment was the defendant's inability to do so.[93] In *Tate v. Short*,[94] the Court held that default incarceration of indigents was unconstituional if the underlying crime was punishable only by fine. And in *Bearden v. Georgia*,[95] the Court ruled that inability to pay restitution and fines could not be grounds for automatic revocation of parole. However, the Court in each case resisted generalization of the principle. Where the predicate criminal law authorizes jail as a sanction and where the aggregate sentence including default time is below the statutory maximum, the United States Supreme Court has thus far refused to hold that sentencing judges may never sentence indigents as well as wealthier individuals to jail if they fail to pay criminal fines or court costs.

Until 1986, the law of Louisiana on this issue was well settled. Louisiana Code of Criminal Procedure article 884 not only permitted but commanded that in all serious cases a criminal sentence including a fine or costs "shall provide" for additional imprisonment for up to one year if the defendant fails to pay the fine or costs assessed.[96] No statutory exception for indigents exists. While it was recognized that imposition of additional time in lieu of payment of an indigent would be constitutionally impermissible if it would result in a total sentence exceeding the statutory maximum,[97] and that in egregious cases a substantial fine could amount to an excessive punishment if imposed on one lacking any ability to pay that fine,[98] no general rule limited the discretion of a sentencing court to impose such penalties on indigents.

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93. Id. (White, J., concurring) (joined by Brennan and Marshall, JJ.).

94. 401 U.S. 395, 91 S. Ct. 668 (1971).

95. 461 U.S. 660, 103 S. Ct. 2064 (1983).

96. La. Code Crim. P. art. 884 (1984) provides:

> If a sentence imposed includes a fine or costs, the sentence shall provide that in default of payment thereof the defendant shall be imprisoned for a specified period not to exceed one year; provided that where the maximum prison sentence which may be imposed as a penalty for a misdemeanor is six months or less, the total period of imprisonment upon conviction of the offense, including imprisonment for default in payment of fine or costs, shall not exceed six months for that offense.

97. E.g., State v. Coon, 475 So. 2d 33 (La. App. 2d Cir. 1985).

98. E.g., State v. Perry, 472 So. 2d 344 (La. App. 3d Cir. 1985) (a fine of $5,000 and default term of one year, imposed in addition to a basic term of four years at hard labor on an indigent convicted of a single count of attempted distribution of a counterfeit controlled substance, held excessive; fine and default term vactated); State v. LaGrange, 471 So. 2d 1186 (La. App. 3d Cir. 1985) (indigent pleaded guilty to one count of distribution of marijuana, sentenced to a fine of $7,500 with a default term of one year, in addition to a basic term of six years at hard labor; fine and default term vacated as excessive).

In three 1986 rulings, *State v. Williams*,[99] *State v. Garrett*,[100] and *State v. Pinkney*,[101] the Louisiana Supreme Court affirmed convictions but amended the sentences to delete provisions imposing additional jail terms in lieu of payment of fines or costs. Though these rulings were delivered without opinion, the court made clear the essence of its concern in each case by citing *Williams v. Illinois*, *Morris v. Schoonfield*, *Tate v. Short* and *Beardon v. Georgia*. None of the cases confronted by the Louisiana Supreme Court appeared to include any of the special circumstances present in the United States Supreme Court cases cited. In each, the predicate criminal statute permitted incarceration, the total sentence imposed was within statutory limits and no question of parole was raised. Thus by amending the sentences in the three cases before them, the Louisiana Supreme Court could be understood to be announcing, cryptically but effectively, a new more general rule forbidding the imposition of default jail terms on indigents in virtually all circumstances. Since these decisions were without opinion, however, it has been left to the lower courts to work out the implications of this new dispensation.

The fourth judicial circuit appears to have been the earliest and most enthusiastic exponent of a generaliized prohibition of default incarceration of indigents. In *State v. Williams*[102] that court overturned a sentence of three years in prison and a $1,000 fine in default of which an additional six months would be served, imposed upon an individual guilty of possession of a firearm by a convicted felon. Though the defendant was represented by private counsel at trial, he was adjudged an indigent and provided with appointed counsel on appeal. After reviewing the federal precedents, and drawing "support" from the writs granted by the Louisiana Supreme Court in *Williams* and *Garrett*, the *Williams* court held that subjecting any indigent to a longer period of incarceration than he would have faced if he had been able to pay a fine violates his rights under the equal protection and due process clauses of the federal and state constitutions.[103] The court also held, alternatively, that imposition of the default term on an indigent constitutes excessive punishment.[104] The court in *Williams* was undeterred by the fact that the default had not yet occurred, and apparently required no greater proof of inability to pay the fine than the fact that the defendant had been defended by the public defender on appeal.

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99. 484 So. 2d 662 (La. 1986).
100. 484 So. 2d 662 (La. 1986).
101. 488 So. 2d 682 (La. 1986).
102. 489 So. 2d 286 (La. App. 4th Cir. 1986).
103. Id. at 291-92.
104. Id. at 293.

In subsequent cases, the fourth circuit reaffirmed and extended the *Williams* rule to preclude incarceration in default of payment of court costs as well as fines, and to default terms as short as thirty days.[105] While the court initially rested its results on grounds of excessiveness as well, the later cases appear to rely solely upon an equal protection rationale.[106] In all of these cases, the fourth circuit appears willing to accept the fact of appointment of counsel, without more, as proof not only of inability to pay fines or costs but also of the inappropriateness of imposing any penalty in addition to the basic jail term, in lieu of lump sum payment of the fine.[107]

The first circuit, in contrast, has been less enthusiastic. In *State v. Bohanna*[108] the court argued that a per se rule that indigents could never be incarcerated for failure to pay fines was neither mandated by federal precedent nor good policy, since it might well lead trial judges to impose longer fixed terms on indigents in lieu of now unenforceable fines. But the court reluctantly agreed that such a course was required by the Louisiana Supreme Court's actions in *Williams*, *Garrett* and *Pinkney*, and vacated a sentence of $6,000 or an additional jail term of twelve months at hard labor imposed, in addition to a basic term of five years hard labor, on an indigent convicted of one count each of marijuana and cocaine distribution.

Though the third circuit appears not to have directly confronted these issues in the last term, its recent decisions illustrate yet a different approach. In *State v. White*,[109] the apparently indigent defendant was

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105. State v. Jones, 492 So. 2d 1261 (La. App. 4th Cir. 1986) (vacating fine of $1000 and default term of thirty days); State v. Jackson, 492 So. 2d 1265 (La. App. 4th Cir. 1986) (vacating imposition of costs in the amount of $74 and default term of thirty days); State v. Barnes, 495 So. 2d 310 (La. App. 4th Cir. 1986) (vacating costs of $24 and default term of thirty days); State v. Barnes, 496 So. 2d 1056 (La. App. 4th Cir. 1986) (vacating costs of $74 and default term of thirty days); State v. Ellzey, 496 So. 2d 1090 (La. App. 4th Cir. 1986) (vacating costs of $80 and default term of thirty days).

106. Compare, State v. Jackson, 492 So. 2d 1265 (La. App. 4th Cir. 1986) (relying alternatively on an excessiveness rationale) with, e.g., *Barnes*, 496 So. 2d at 1059 (justifying vacature solely on due process and equal protection grounds).

107. In *Jackson*, 492 So. 2d at 1267, the fourth circuit did imply that the legality of the imposition of a fine and default jail term on an indigent would turn, in light of the United States Supreme Court precedents, on whether the additional jail time had been imposed "automatically" or rather whether the sentencing court had considered the particular individual's ability to pay and the propriety of other sanctions. If followed, this line of reasoning would lead not to a per se rule forbidding imposition of such sanctions on indigents but rather to a requirement of individualized hearings similar to those proposed by the second circuit in State v. Lewis, 506 So. 2d 562 (La. App. 2d Cir. 1987). However, despite this discussion, the court in *Jackson* in effect applied a per se rule, simply vacating the fine and default term imposed rather than remanding the case for further individualized consideration of these factors.

108. 491 So. 2d 756, 758-60 (La. App. 1st Cir. 1986).

109. 476 So. 2d 1162, 1168-69 (La. App. 3d Cir. 1985).

sentenced by the trial court to a term of four years at hard labor, a fine of $5,000 and a default jail term of an additional year, all on a guilty plea to a single count of conspiracy to distribute marijuana. Though acknowleging that a court cannot impose a fine as part of sentence and then automatically convert that fine into an additional jail term solely because of the defendant's inability to pay, the court based its decision overturning the default jail term upon its prior jurisprudence regarding excessive verdicts. The court thus avoided any per se rule of due process or equal protection, and focused instead upon the facts presented. It concluded there, as it had several times previously, that imposition of a substantial fine was excessive in light of all the facts, including the defendant's manifest inability to pay.[110]

The second circuit initially simply echoed the first circuit in unhappy resignation to what it took to be the Louisiana Supreme Court's new per se rule.[111] However, in its most recent decision on this issue, *State v. Lewis*,[112] the second circuit reexamined the state and federal supreme court decisions. On reconsideration it concluded that neither absolutely prohibited imposition of an additional jail sentence on indigents in all circumstances when they fail to pay a fine or costs. Rather, it concluded the state supreme court's cases give no guidance as to whether the rule should be applied per se and the federal precedents preclude only automatic imposition of such additional incarceration. The *Lewis* court proposed yet another approach ruling that henceforth, where a defendant fails to pay an assessed fine or costs and pleads inability to do so, the trial court must conduct a hearing to determine whether the defendant has made a good faith effort to pay and, if so, whether alternative sanctions such as installment payments or community service work would be appropriate in lieu of lump sum payment. If the sentencing court concludes that the defendant has failed to make a good faith effort or if other sanctions are determined to be insufficient, additional jail time may be imposed in default of payment, even if the defendant is unable to pay because of indigency.[113]

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110. Id. at 1168-69. See also, to the same effect, State v. Jones, 475 So. 2d 917, 918 (La. App. 3d Cir. 1985) (holding that financial ability of a defendant to pay must be specifically considered, along with other statutorily mandated sentencing guidelines, in setting any criminal fine).

111. This circuit apparently considered the impact of the Louisiana Supreme Court's actions in *Williams*, *Garrett* and *Pinkney* for the first time in State v. Roye, 501 So. 2d 916 (La. App. 2d Cir. 1987). Though it vacated fines of $5,000 and $500, with repective default terms of one year and sixty days on the indigent defendant, the court's unhappiness with what it perceived as a per se rule was plain from the opinion, which spoke repeatedly of how it was "compelled" and "bound" to follow the supreme court's apparent lead.

112. 506 So. 2d 562 (La. App. 2d Cir. 1987).

113. Id. at 564-65, granting the writ to the extent that

The Louisiana Supreme Court's reticence and the variation in approaches taken by the circuit courts leave several questions without definitive answers. The first is the question of where in the federal and state constitutions this protection is rooted. Does it arise at the interface of the guarantees of equal protection and due process or is it more properly considered as an aspect of the prohobitions against excessive punishments? An inquiry based on equal protection or due process concepts would focus the court's attention on the rationality or, conversely, the arbitrariness of the decision to in effect impose an extra term of incarceration on an indigent while a wealthier defendant is allowed to substitute payment of a sum of money. Among the relevant considerations would be whether in the particular case an additional jail term or other sanction is needed to fulfill the same penological purpose that a fine serves when imposed on a defendant with assets. Also relevant would be the reverse discrimination that might result if indigent defendants were regularly forgiven a portion of the sanctions uniformly imposed on others. Conversely, if the rule is seen as rooted in prohibitions against excessive punishment, such comparative measures would seem much less important. Instead the inquiry would focus on whether the amount of the fine imposed is disproportionate to the assets of the defendant and perhaps whether the sentence as a whole—jail term and fine, or jail term and additional default term—is disproportionate to the crime committed.

Though both the excessive punishment and the equal protection/due process rationals have utility, the latter would seem to provide a preferable foundation for the rule. Certainly, such a foundation is implicit in those rulings overturning imposition of even modest court costs on indigents. It is difficult to conceive that many defendants would be so utterly without resources as to render costs of $50 or $75 either beyond reach or disproportionate to the crime charged. And such a determination would seem to require a much greater showing of destitution than the mere fact that the defendant qualifies for appointed counsel. More importantly, only by basing this rule in such concepts of equal protection and due process can the court give sufficient attention

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if within the prescribed time defendant does not pay his fine and pleads inability to do so, the sentencing court shall hold a hearing to inquire into the reasons for failure to pay. If defendant willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the trial court may order execution of the jail sentences. If the defendant could not pay his fine despite sufficient bona fide efforts . . . the trial court must consider alternative measures of punishment other than imprisonment. Only if the alternative measures are not adequate to meet the State's interests in punishment and deterrence, for reasons articulated by the trial judge, may the trial court order execution of the jail sentences.

to what appears to be the central motivation behind all of these decisions, a fundamental perception that the severity of actual punishment should not depend on accidental factors unrelated to the crime, such as the defendant's wealth or poverty.

If the proper focus is thus on equalization of sanctions across economic disparities, then the second circuit's refusal to automatically amend sentences to delete fines imposed on the indigent, and its mandate that trial courts should consider alternative sanctions in place of unpayable fines, seem entirely proper. As the United States Supreme Court has recognized in dictum, it would be as inequitable and arbitrary to exempt the indigent from a sanction, the fine, to which the rest of the population is subject as it would be to subject him to an additional penalty in the form of default incarceration.[114] Thus a sentencing court faced with a plea of inability to pay a fine should be required to consider other equivalent sanctions such as deferred or installment payments or community service work. Here, the need for equity would seem to clearly outweigh the cost of any hearing required to make such a determination. The hardest question for the future will be whether circumstances can ever arise which would justify additional jail time when a defendant cannot pay a fine despite bona fide attempts. This awaits another day.

The final set of open issues is essentially procedural; whether inability to pay costs or fines should be presumed from the fact that a defendant qualifies for appointed counsel or whether a separate hearing should be held to determine the ability and efforts of the defendant to pay. Here, too, the second circuit's willingness to engage in case by case determination seems justified. The number of cases and consequent burden on the court would not appear to be great. And the correlation between qualification for appointed counsel and inability to pay costs or fines, on which the fourth circuit's per se rule evidently depends, is scarcely exact. Such a presumption can be both underinclusive, missing those who exhaust their resources on private counsel, and overinclusive, exempting defendants who, though poor enough to qualify for a public defender, nevertheless have the resources to pay reasonable costs or a moderate fine. Equity and avoidance of arbitrary sentencing require no less.

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114. See Williams v. Illinois, 399 U.S. 235, 244, 90 S. Ct. 2018 (1970).