Louisiana Law Review

Volume 63 | Number 3
Is Civil Rights Law Dead? A Symposium
Spring 2003

Louisiana Associated General Contractors: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights

John Devlin
Louisiana State University Law Center

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INTRODUCTION

In listening to the presentations that have been made by my colleagues over the last two days, I am struck once again by the virtually exclusive reference to and emphasis upon national sources of law: the national Constitution; national statutes; national courts and in particular the nine individuals who comprise the national Supreme Court. Certainly, this is not happenstance or oversight. If, as my colleague John White has asserted, modern Civil Rights law was "born" forty-nine years ago with the U.S. Supreme Court's decision in *Brown v. Board of Education*,[1] then it is also fair to say that it was born, at least in part, out of a largely justified loss of faith in state law processes as a primary guarantor of civil rights. For those of us who have studied—and usually, by doing so, promoted reliance on—state constitutional declarations of rights as primary sources of protection of rights, this may well be our dirty little secret. For the truth is, state constitutional rights guarantees proved, for much of the near-century from the abolition of slavery until the coming of *Brown*, largely incapable of protecting or promoting the civil rights of African American or other marginalized groups in society. As we all know, the battle cry of "states' rights" was and is more frequently invoked in opposition to, rather than in favor of, efforts to secure legal protection of civil rights. It remains rare for those who passionately support the civil rights agenda to also believe strongly in decentralization of the process of protection of civil rights by law. It appears equally rare for those who speak loudly of the need for states to return to their traditional role as primary protectors of rights to also believe strongly that such an independent tradition should emphasize real world protection of the interests of victims of societal discrimination. And, certainly, at least some state courts independently construing state constitutional or other sources of law in the area of civil rights have exhibited what appears to be unseemly glee in interpreting those state sources of law to make achievement of the goals of *Brown* more, rather than less, difficult.[2] Thus, there

* William Hawk Daniels Professor of Law, Louisiana State University.

1. Brown v. Bd. of Educ., 347 U.S. 483, 74 S. Ct. 686 (1954).
2. *See, e.g.*, Louisiana Associated Gen. Contractors, Inc. v. State, 69 So. 2d

surely are reasons to believe that those who might be tempted to rely on state law as a protector of civil rights would be casting their seed on stony ground indeed.

And yet . . . .

The last twenty years have shown that exclusive reliance on national law, national courts and the national Constitution to protect civil rights is no guarantee of progress either. The same quality of centralization that allowed progressive Justices to launch the civil rights revolution half a century ago, also—as several preceding speakers over the last two days have noted—allowed their successors to gradually convert the federal Fourteenth Amendment from its intended role as the basis of remedial civil rights legislation, into its new role as an obstacle to real world assistance for victims of structural unfairness in society.[3] As the very premise of this conference confirms, virtually exclusive reliance on federal law has not, in the long run, served to preserve the vision of civil rights protection that was birthed with such hope in *Brown*. It may well be time to reconsider the merits of a more *de*centralized approach.[4]

1186 (La. 1996), discussed *infra*.

3. The transformation of federal law in this area has been remarkable. The 14th Amendment was originally enacted, in large part, to provide retroactive constitutional justification for Congress' enactment of the Civil Rights Act of 1866, which certainly included class and race-specific efforts at improving the lot of the newly freed slaves. The "vision" of civil rights that has been identified with *Brown* certainly did not reject the idea that governmental efforts at overcoming the heritage of discrimination might sometimes require programs targeted to the disadvantaged group, even if that group was identified by race. More recent decisions, however, have often operated to transform the 14th Amendment from an authorization for into an obstacle to provision of targeted assistance to the disadvantaged by the government. *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040 (1976), by requiring proof of a specific discriminatory intent on the part of an identified bad actor, largely precluded use of the 14th Amendment as a tool to attack the structural bases of persistent inequality. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989) and *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 115 S. Ct. 2097 (1995), by interpreting the 14th Amendment to generally forbid not invidious "discrimination" on the basis of race, but rather any "classification" on the basis of race, appeared to treat race conscious efforts to reach out to or assist the disadvantaged as constitutionally indistinguishable from race conscious efforts to maintain or further racial inequality and subordination. There have recently been signs of a limited movement back in other direction, however. In *Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452 (2001), the Supreme Court upheld a districting plan that took race into account, as one factor among many in drawing Congressional district boundaries. In Grutter v. Bollinger, U.S. 123 S.Ct. 2325 (2003), decided after our conference was held, but while the written version of this article was in preparation, the Court upheld certain limited forms of affirmative action in the academic context.

4. The point may go even deeper. Progressives have, I think, often been blinded by the historic, though temporary, legal triumph represented by *Brown* and its immediate progeny. Perhaps in our hearts we keep yearning to recreate the

Accordingly, this paper attempts to begin a process of investigating whether *state* constitutions can serve as a source of principles which can be used to further the civil rights of those who are, to a greater or lesser degree, marginalized within our society. It will focus on the state constitutional tradition I know best, that of Louisiana. Unfortunately my conclusion will be that in Louisiana, at least, the prospect for robust independent state constitution based "voice" in civil rights is poor. There is little organic tradition of constitutional protection of civil rights in this state. Those provisions of the current Louisiana constitution which may have traction for this purpose are largely derived from federal sources and, not surprisingly, are unlikely to be interpreted in a manner that will provide a philosophical alternative to federal analysis of the Fourteenth Amendment's equal protection clause. Indeed, where the state judiciary has most notably departed from federal analysis of constitutional equality—in the Louisiana Supreme Court's decision in *Louisiana Associated General Contractors v. State ("LAGC")*[5] — it has done so in a way that mirrors and furthers certain basic presuppositions of current federal law. Because of that flawed analysis, the Louisiana Constitution, as interpreted in *LAGC,* not only provides no truly independent contribution to debate over civil rights but also, I am sorry to say, creates an additional obstacle to achievement of real world equality for traditionally disfavored groups.

In other states, however, the prospect may be brighter. The last part of this presentation provides a very preliminary sketch of why some other states may have a better opportunity to provide a viable alternative to current federal analysis of constitutional equality and its relation to the achievement of a more transformative vision of civil rights. Some states do enjoy an indigenous tradition of constitutional protection of human equality, one which developed and

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combination of forces and personalities that led the national Supreme Court to take the unusual step of becoming the standard bearer for progressive social change through law. It was wonderful while it lasted. But the reality is that the law and courts function far more often as protectors of the status quo than as forces for progressive change. The U.S. Supreme Court has, throughout its history, been more often dominated by the philosophies of a Taney, a Southerland, a Rehnquist, or a Scalia than by those of a Cardozo, a Warren or a Brennan. Those who argue for progressive change through law should, I think, bear in mind that they operate in fundamentally hostile territory. Perhaps we should learn to think more like guerillas, eschewing too much reliance on the single great national victory, in favor of a strategy of pursuing local successes wherever the possibility of progress— be it in the federal court or in state courts, through constitutional guarantees or through other sources of law—may appear. In the effort to promote a more just society through law, we cannot afford to ignore state constitutional or common law.

5. 669 So. 2d 1185 (La 1996). The case is discussed *infra* in notes 74–95.

has been interpreted independently of the federal Fourteenth Amendment. In these states, the prospect for a truly independent state constitutional contribution to the debate remains alive.

PROLOGUE: ON THE MEANING OF "CIVIL RIGHTS" AND THE *LAGC* DISASTER

I doubt that I am capable of defining what "civil rights" means, whether in some broader sense or in the particular sense that is the focus of this conference. However, I do feel confident in asserting that one aspect of that concept is and must be that the law is "purposive" with respect to the dignity and equality of citizens. Civil rights law (like the law of constitutional equality) should not be a mere system of formal rules divorced from social reality. Rather, I believe, the concept of civil rights under law that underlies *Brown* and its progeny includes an acceptance that one central purpose of civil rights law is to transform society, to destroy a social system that systematically subordinated certain groups of people and protected the de facto superior status of other groups. It follows, I think, that this notion of civil rights includes an acceptance that the law should not always be "blind" to race or any other characteristic that reflects or impacts on that system of subordination. According to this vision, law should instead remain aware of continuing social inequalities, and accept good faith race-conscious (as well as class-conscious, immigrant-conscious, age-conscious, gender-conscious, or any other relevant "conscious") efforts to undo those inequalities.[6]

If this is, indeed, what "civil rights" means, at least in part, then the 1996 decision of the Louisiana Supreme Court in *Louisiana Associated General Contractors v. State ("LAGC")*[7] stands as a strong and negative indication of the present utility of state constitutional law regarding constitutional equality in relation to civil rights.[8] In *LAGC*, discussed below, the Louisiana Supreme Court held that the state constitution's guarantee of individual dignity, section 3 of the Louisiana Declaration of Rights, absolutely prohibits the state from making any distinctions between persons on the basis of race and therefore precluded the state from establishing a set aside

6. It is this view of civil rights as transformative that is so directly opposed by and opposed to the current view, shared by the national Supreme Court and its Louisiana counterpart, that the essential principle of equal protection should be one that simply precludes any differentiation or classification of persons on the basis of race – regardless of the purpose or consequences of that differentiation. Thus affirmative action programs are treated as analytically indistinguishable from racial classifications that are used to create or perpetuate a system of racial subordination.

7. 669 So. 2d 1185 (La. 1996).

8. The case is discussed *infra* in notes 74–95.

program for minority contractors. The court went beyond federal law to hold that the state constitutional prohibition against such an affirmative action program is absolute, regardless of whether a particular program might be shown to be narrowly tailored to serve a compelling government interest—such as, for example, society's compelling need to redress the continuing effects of prior discrimination. The decision in *LAGC* has had and will continue to have a profound impact on the ability of state institutions in Louisiana to fulfill promise of *Brown.* Race-conscious affirmative action in Louisiana has largely ceased, except insofar as such efforts are directly mandated by federal law.

For one who, like me, both advocates a vision of civil rights and constitutional equality that would encourage rather than prohibit good faith efforts to target remedial programs for the benefit of those still suffering from the continuing effects of a history of discrimination, and who also hopes for a more pluralistic legal dialogue on the meaning and application of deep constitutional ideas, the decision in *LAGC* is problematic indeed. I applaud the apparent desire of the Louisiana Supreme Court to develop an independent body of doctrine regarding the meaning of "human dignity" as defined and guaranteed by the state constitution. However, as one who also believes that at least some forms of affirmative action are necessary to achieve real world equality, I mourn the actual result of *LAGC.* Thus the problems that this presentation seeks to address: how is it that a state constitution that was born in the early 1970s, during the last flowering of traditional civil rights ideology, came to be interpreted instead as an obstacle to real-world progress on these issues? Was the unfortunate result in *LAGC* inevitable? Are the factors that led to *LAGC* unique to Louisiana or are they likely to plague efforts in other states to use state constitutional sources to develop a more progressive vision of what a guarantee of equality means? To these questions we turn.

PART I: THE ROAD TO *LAGC*: CIVIL RIGHTS AND EQUALITY GUARANTEES IN THE CONSTITUTIONS OF LOUISIANA

Before examining the reasoning of the *LAGC* decision, it is necessary to trace a bit of Louisiana's constitutional history. Louisiana leads the nation in number of constitutions, having adopted no less than eleven constitutions in the last 190 years. Despite this plethora of constitutions, however, concepts of human rights in general, and constitutional equality in particular, appeared only lately and remained, until recently, controversial in Louisiana law.

A. Of Rights and Reaction: The Louisiana Tradition Before 1974

Unlike the original constitutions of many other states, the original Louisiana Constitution of 1812 contained no separate Declaration of Rights. Perhaps reflecting the Spanish and French heritage of the territory, the government it created has been termed a "government of gentlemen" in which the franchise was limited to free white property owning or tax paying males—a requirement that limited voting rights to approximately one-third of the free adult males.[9] Despite the absence of a separate Declaration of Rights, the 1812 Constitution did contain some particular provisions protecting certain individual rights, including limitations on the definition and proof of treason,[10] adoption of Anglo-American rules of criminal procedure,[11] prohibition against *ex post facto* laws,[12] protection of the freedom of the press and of speech,[13] and protection of the right of emigration from the state.[14] Conspicuous by their absence were any provisions relating to inherent rights of individuals, equality or due process of law.

The Louisiana Constitutions of 1845 and 1852 reflected the Jacksonian democratic revolution that swept the United States in the 1830s and 40s. The main thrust of both documents was to extend suffrage to more free white adult males, to replace appointed officials with elected officers, to reform and democratize the judiciary, and to authorize extensive state participation in "internal improvements" within the state.[15] These constitutions also lacked any separate state Declaration of Rights, but the "General Provisions" articles of both did continue the specific guarantees and prohibitions of the 1812 original, as well as adding a few more minor rights-related provisions.[16] Once again, these Jacksonian constitutions demonstrated

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9. Lee Hargrave, The Louisiana State Constitution: A Reference Guide (Greenwood Press, New York 1991), at 2–3.

10. La. Const of 1812, art. VI, § 2. Old Louisiana constitutions are available from a variety of sources. One of the most convenient, which collects all of the superceded versions is Benjamin Wall Dart, Constitutions of the State of Louisiana and Selected Federal Laws (Bobbs Merrill Co., Indianapolis, 1932).

11. La. Const of 1812, art. VI, secs. 18 (right to be heard, counsel, confrontation, compulsory process, indictment or information, speedy jury trial, freedom from compelled self-incrimination), 19 (bail, habeas corpus).

12. La. Const. of 1812, art. VI, § 20.

13. La. Const. of 1812, art. VI, § 21.

14. La. Const. of 1812, art. VI, § 22.

15. Hargrave, *supra* note 9 at 3–6. Alden L. Powell, A History of Louisiana Constitutions, Project of a Constitution for the State of Louisiana, with Notes and Studies, Vol. One, Part I, La. St. L.I. (Baton Rouge 1954) [hereinafter "Powell"] at 297–99, 334–41.

16. A separate bill of rights was proposed but rejected by the convention. *Powell, supra* note 15, at 299. Regarding specific rights guarantees added, see,

the state's continuing resistance to any general importation of the common law tradition,[17] and continued to lack any reference to preexisting human or civil rights, equality, or due process of law other than in the context of criminal procedure.

Louisiana's secession constitution of 1861 made no substantive changes in the law, confining itself to a substitution of the Confederate States for the United States of America as the object of the state's national allegiance. In contrast, the Louisiana Constitution of 1864—called for by the fiat of Union General Nathaniel Banks and enacted by representatives of the City of New Orleans and of that rump portion of Louisiana hinterland then occupied by federal troops—did make at least a few rights-related changes.[18] The Constitution still lacked any separate Declaration of Rights and continued to limit the franchise to free white males.[19] However, the constitution of 1864 did abolish slavery and involuntary servitude, one year before the Thirteenth Amendment accomplished the same result in the rest of the nation.[20] In addition, the new constitution prohibited bills of attainder, prohibited laws impairing the obligation of contracts or divesting vested rights, unless for public use and with adequate compensation,[21] prohibited unreasonable searches and seizures,[22] guaranteed that courts would be open and that "every person, for any injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without denial or unreasonable delay."[23] Criminal penalties were required to be "proportioned to the nature of the offense,"[24] and the legislature was authorized to provide for change of venue in both civil and criminal cases.[25] In many, though surely not all, of these changes, the influence of the federal Bill of Rights as a model can readily be seen. More to the point, while enactment of these provisions shows that the drafters of 1864 did adhere to some aspects of the ideology of human rights, the 1864

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e.g., La. Const. of 1845, Title VI, art. 109, protecting unspecified "vested rights;" and Title VI, art. 107, requiring that criminal proceedings start with an indictment or information. Not all changes were pro-rights, however. The constitution of 1852;, among other things, greatly limited the right to bail. La. Const. of 1852, a rt. 104 (denying bail for any person accused of a crime punishable by hard labora.

17. La. Const. of 1845, art. 120, prohibiting the legislature from adopting any "system or code of laws" by general reference.

18. Hargrave, *supra* note 9, at 7–8; Powell, *supra* note 15, at 350–54.

19. La. Const. of 1864, Title III, art. 14.

20. La. Const. of 1864, Title I, arts. 1 & 2.

21. La. Const. of 1864, Title VII, art. 109.

22. La. Const. of 1864, Title VII, art. 108.

23. La. Const. of 1864, Title VII, art. 110.

24. La. Const. of 1864, Title VII, art. 94.

25. La. Const. of 1986, Title VII, art. 115.

constitution continued to avoid any reference to "equality" or to the inherent (substantive) rights of man.

In contrast, the Louisiana Constitution of 1868, enacted at the flood tide of radical reconstruction[26] did, for the first time, feature a state Bill of Rights.[27] In addition to collecting and continuing the individual rights provisions that had gradually been enacted in previous constitutions, the new Bill of Rights contained, for the first time, several provisions that embodied a robust commitment to equality and civil rights for all the state's citizens. It began, fittingly enough, with words taken from the Declaration of Independence:

> **Art. 1.** All men are created free and equal, and have certain inalienable rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

It continued with a strongly worded commitment to racial and legal equality (as well as to federal supremacy), in words that echoed, but in some ways went beyond, the language of the federal Fourteenth Amendment:

> **Art. 2.** All person[s,] without regard to race, color, or previous condition, born or naturalized in the United States, and subject to the jurisdiction thereof, and residents of this State for one year, are citizens of this State. The citizens of this State owe allegiance to the United States; and this allegiance is paramount to that which they owe the State. They shall enjoy the same civil, political and public rights and privileges, and be subject to the same pains and penalties.[28]

The drafters of the 1868 constitution went on to guarantee that public accommodations and utilities would be open to all, in language that,

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26. Despite the hopes of its drafters, the Louisiana Constitution of 1864 failed either to create a stable polity that could include both newly freed slaves and returning Confederate soldiers, or to satisfy the radical majority in the federal Congress. The federal Reconstruction Acts ultimately declared that no legal government existed in the state. General Phillip Sheridan, in his capacity as the federal military governor of the state, called for a new convention, delegates to which were to be elected by all adult males, of any race, who were willing to swear that they had not aided the Confederacy – a provision that effectively excluded half of the white population of the state. The constitutional convention thus elected had an equal number of white and black delegates, though many of the white delegates were widely viewed as carpetbaggers. Hargrave, *supra* note 9, at 8–9; Powell, *supra* note 15, at 369–70.

27. La. Const. of 1868, Title I.

28. La. Const. of 1868, Title I, art. 2.

again, echoed but went beyond the federal Reconstruction era Civil Rights statutes:

> **Art. 13.** All persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business, or of public resort, or for which a license is required by either State, parish or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color.[29]

Finally, in addition to new provisions guaranteeing freedom of worship[30] and outlawing attempts to limit freedmen's wages,[31] the Louisiana Bill of Rights closed, in words echoing the federal Tenth Amendment, with a reaffirmation of the natural law faith that human rights are inherent and pre-existing:

> **Art. 14.** The rights enumerated in this title shall not be construed to limit or abridge other rights of the people not herein expressed.

The vision of equality and inherent human and civil rights that was thus embodied in the 1868 Louisiana Bill of Rights was, from the outset, an alien interpolation rather than an outgrowth of any indigenous Louisiana tradition. The regime which enacted the 1868 constitution was supported, in large part, by federal bayonets. More importantly, the vision of human rights embodied in the 1868 Declaration of Rights had its roots in traditions of natural law and egalitarianism that were contrary to Louisiana's civilian legal code and its persistently elitist social traditions. Nonetheless, this new conception of human rights was given a hospitable reception in the Louisiana courts. In a series of cases in 1875 and 1876, the Louisiana Supreme Court construed Article 13, and the state statute enacted to enforce it,[32] as creating a substantive right to be free from invidious discrimination because of race in a broad range of areas of public accommodations, including eating and sleeping accommodations aboard a Mississippi River steamboat,[33] service in

29. La. Const. of 1868, Title I, art. 14.
30. La Const. of 1868, Title I, art. 12.
31. La. Const. of 1868, Title I, art. 11.
32. Act. No. 38 of the Louisiana Legislature (1869) entitled An Act "[t]o enforce the Thirteenth Article of the Constitution of this State . . . ," provided that "all persons" in the state must be afforded non discriminatory service by common carriers, public facilities and licensed businesses in the state, and provided that a party injured by an unjustified refusal of services could recover damages.
33. DeCuir v. Benson, 27 La. Ann. 1 (1875), *rev'd sub nom.*, Hall v. DeCuir, 95 U.S. 485 (1877). In *DeCuir*, the Louisiana Supreme Court upheld an award of

a New Orleans coffeehouse,[34] and attendance at a theater.[35] These decisions were quite progressive, anticipating in many respects both the reasoning and ideology of *Brown* and its progeny. In each case, the plaintiff brought his or her claim directly under Louisiana Act 38 of 1869, a statute enacted to enforce Article 13. However, the Louisiana Court made clear that the constitutional article was self-executing and embodied a substantive right that could be enforced regardless of the existence of any statute.[36] The court at least implicitly rejected arguments that provisions of equal but separate accommodations would suffice under Article 13[37] and upheld the award of very substantial damages, recognizing that the psychic injury that results from forced segregation is a very real form of personal humiliation and degradation.[38] It is also worthy of note that the court in *DeCuir,* in the course of rejecting the argument that forcing a private party's to provide nondiscriminatory service would offend that entity's property rights, relied on the common law tradition regarding the obligation of common carriers to provide service to all without preference or distinction.[39]

When white supremacist forces regained control of the state in the late 1870s, they lost little time in replacing the Constitution of 1868 with the so-called "Long Constitution" of 1879.[40] The Bill of Rights

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$1,000.00 to a wealthy of African-American lady, who suffered "mental pain, shame and mortification" when she was denied admittance to the main cabin aboard the steamboat "Governor Allen." In reversing, the United States Supreme Court acknowledged that Louisiana law outlawed discrimination, but held that application of state law to a steamboat engaged in commerce on a navigable river violated Congress' exclusive authority to regulate interstate commerce.

34. Sauvinet v. Walker, 27 La. Ann. 14 (1875). In *Sauvinet,* plaintiff also won a judgment of $1,000.00 when he was denied service in a New Orleans restaurant, solely because of his race.

35. Joseph v. Bidwell, 28 La. Ann. 382 (1876). In *Bidwell,* the plaintiff originally was awarded $5,000.00 when refused admission to a theater solely because of his race. The Supreme Court reduced the award to $300.00.

36. *See, e.g., DeCuir, supra* note 31, at 4 ("In truth, the right of the plaintiff to sue would be the same, whether act No. 38 existed or not . . . . "); *Bidwell, supra* note 33, at 383 ("[Article 13] of the constitution does not enunciate a mere abstraction, but it guarantees substantial rights. To facilitate enforcement of these rights the General Assembly has enacted laws, and it is the duty of the courts when called upon, to enforce them.").

37. *DeCuir, supra* note 31, at 3 (fifth assignment of error).

38. *See, e.g., DeCuir, supra* note 31, at 2, reciting indicia of plaintiff's gentility, and the humiliation that plaintiff suffered when she was refused permission to eat at the common table with other (white) passengers. Anticipating Justice Harlan's dissent in *Plessy v. Ferguson,* 163 U.S. 537, 552, 16 S. Ct. 1138, 1144 (1896), the Court in *DeCuir* was explicit in holding that a refusal of service based solely on race can never be "reasonable." *DeCuir,* 27 La. Ann. at 6.

39. *DeCuir,* 27 La. Ann. at 6.

40. So called because of the numerous restrictions that the constitution placed

was retained, along with the prohibition of slavery[41] and the reserved rights clause.[42] Provisions guaranteeing the right to bear arms and prohibiting quartering troops in private houses, closely modeled on the federal Second and Third Amendments, respectively, were also added.[43] However, the major change in constitutional protection of rights embodied in the 1879 constitution was repeal of the previous constitution's declaration of the free and equal rights of man, the guarantee of equal protection and the prohibition against discrimination in public accommodations and conveyances. It is an accurate reflection of the spirit of the 1879 constitution that, when Homer Plessy sought to challenge the Louisiana statute of 1890 that affirmatively *required* racial separation in public conveyances within the state, he relied only on the federal Constitution.[44] The Louisiana Constitution of that day no longer had any relevance to his case.

The Constitution of 1898 continued this counterrevolution, having as its primary purpose the disenfranchisement of black and poor white voters.[45] Changes in the Bill of Rights were few but significant, including insertion of a pure "due process" clause seemingly modeled directly on the federal Fifth and Fourteenth Amendments,[46] and perhaps surprisingly, repeal of the prohibition against slavery.[47] The Constitution of 1913, called amidst controversy and fiscal crisis, in an effort to fund the state's growing debt,[48] made no significant changes in rights protection.

The Louisiana Constitution of 1921 began as an effort at serious reform, but soon bogged down amidst the largely successful efforts of innumerable special interests to get their pet projects put beyond the reach of the legislature.[49] Like its 1913 predecessor, it made little overt change in the state Bill of Rights. However, a couple of intriguing cases from this era suggest that judges in Louisiana continued, at least occasionally, to provide remedies for violations of

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upon a legislature that had come to be seen as thoroughly tainted by scandal. Hargrave, *supra* note 9, at 9–11. *Powell, supra* note 15, at 383–86, 389, 400–05.

41. La. Const. of 1879, arts. 1–13. It is noteworthy, however, that the prohibition against slavery was, in the 1879 constitution, relegated to the position of inclusion among a miscellany of criminal procedure provisions. La. Const. of 1879, art. 5.

42. La. Const. of 1879, art. 13.

43. La. Const. of 1879, arts. 3, 162.

44. *Ex Parte* Plessy, 45 La. Ann. 80, 83, 11 So. 948–49 (La. 1892), *aff'd sub nom,* Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138 (1896).

45. Hargrave, *supra* note 9, at 11–12, Powell, *supra* note 15, at 426–30.

46. La. Const. of 1898, art. 2.

47. La. Const. of 1898, art. 9, continuing the provisions regarding criminal prosecutions from the 1879 Constitution, but deleting the prohibition against slavery.

48. Hargrave, *supra* note 9, at 11–13; Powell, *supra* note 15, at 447–50.

49. Hargrave, *supra* note 9, at 13–16.

a non-statutory, apparently inherent, principle of human dignity and of the right to be free from unjustifiable discrimination, at least in the sense of unjustifiable exclusion from ordinary public services or unnecessary imposition of public humiliation attendant upon such exclusion.[50] While these cases bear some conceptual similarity to the earlier cases decided under the 1868 Constitution, none of these cases referred directly to any constitutional provision, state or federal; and certainly none suggested any challenge to the then-prevailing system of racial apartheid. Indeed the cases do not agree among themselves regarding the legal basis of their holdings, being based in one case on Louisiana's Civil Code article 2315,[51] in another on asserted differences between Louisiana and common law regarding recovery of psychic damages for breach of contract,[52] and in another case on no cited legal rule at all.[53]

For anyone trying to find evidence of a tradition of protection of fundamental civil rights through state law, these cases are thin gruel indeed. None referred explicitly to the state constitution. Indeed, the cases did not even agree among themselves regarding the source of the rights they sought to protect. It may be that this very incoherence gives evidence of the survival of a basic idea of judicial protection of human dignity in Louisiana, despite the absence of explicit constitutional or common law authority, and despite the active repeal of those provisions of the 1868 constitution that might have provided grounding for such a tradition. Perhaps. But it never amounted to much.

B. The "Human Dignity" Guarantee of the Louisiana Constitution of 1974

The Louisiana Constitution of 1921, like many of its predecessors, was particularly long and statutory in its content. Many

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50. Thus, in *Malczewski v. New Orleans Ry. & Light Co.*, 156 La. 830, 101 So. 213 (1924), the Louisiana Supreme Court held that statutory guarantees of access to public accommodations did not preclude a street railway operator from excluding "jitneys" from a free parking lot at its proprietary amusement park, but that an official's use of rough language against the woman thus excluded inflicted unnecessary humiliation, and justified an award of damages. In *Planchard v. Klaw & Erlanger New Orleans Theaters Co.*, 166 La. 235, 117 So. 2d 132 (1928), a theater owner whose employees threw a patron out of a theater without reasonable cause committed an offense justifying a substantial award of damages. In *Vogel v. Saenger Theaters, Inc.*, 207 La. 835, 22 So. 2d 189 (1945) a theater owner who excluded a cripple from his theater was liable in substantial damages for the humiliation thus inflicted.

51. *Malczewski*, 156 La. at 835–37, 101 So. at 215.

52. *Vogel*, 207 La. at 842–44, 22 So. 2d at 191.

53. *Planchard*, 166 La. at 238–40, 117 So. at 133.

ordinary matters that should have been handled by the legislature could only be altered by constitutional amendment.[54] Between 1921 and 1972, the Louisiana Legislature proposed no less than 802 separate amendments for ratification by the voters. Of that total, 536 separate amendments were adopted by the voters and made part of the state constitution. In 1970, the legislature proposed fifty-three separate amendments for ratification. In 1972, it proposed forty-two more. Not surprisingly, the voters rebelled. The great majority of voters simply refused to vote on any of the amendments. Those few who did rejected all of the 1970 proposals, and all but six of those in 1972.[55] Clearly a crisis was at hand.

In response to this popular revolt, then newly elected governor Edwin Edwards called for a convention to draft a new, shorter and more workable constitution for the state. The legislature quickly passed enabling legislation and the Convention began meeting late in 1973. Its deliberations continued through the spring and early summer of 1974. In the fall of 1974, the voters of the state ratified the new charter, though by a notably slim majority.[56]

Though the basic impetus behind the Louisiana Constitution of 1974 had nothing to do with concerns about the protection of rights, the timing of the convention was propitious for friends of civil rights. The early 1970s were a time when popular acceptance of the civil rights agenda was running relatively high, both in the nation and in the state. By 1974, Louisiana was emerging from the era of "massive resistance" to *Brown v. Board of Education* and subsequent federal efforts to enforce its requirements. Governor Edwards, who supported the call for the convention and who exercised considerable influence over a large number of delegates, had recently been elected by a coalition of black, urban, Cajun and poor white voters—precisely the constituency which might be expected to favor use of the state constitution as an engine for aggressive protection of civil rights and for redressing the state's endemic racial and economic inequalities. White resistance to race based affirmative action programs had not yet reached nearly the same force that it would have later. In the legal community, the question of how civil rights and constitutional guarantees of equality should be defined was very much up in the air; scholars who argued that the essential requirement of constitutional equality was to affirmatively dismantle the structures and traditions of racial and gender subordination were at least as numerous as those who rejected affirmative action on the ground that equal protection required governments to be strictly

54. Hargrave, *supra* note 9, at 13.
55. Hargrave, *supra* note 9, at 16.
56. Hargrave, *supra* note 9, at 17–18.

"race-blind." The *Bakke* case,[57] which began the process by which the federal Supreme Court defined the Fourteenth Amendment guarantee of equal protection as requiring a compelling interest justification for any departure from race-blindness, and which therefore precluded most efforts at race-based affirmative action, was still four years in the future.

In accord with the spirit of the time, the majority of the delegates to the 1973 Convention clearly shared the view that the Louisiana Declaration of Rights should be substantially amended so as to bring it into compliance with the then-contemporary, expansive, Warren Court-era definitions and protections of rights.[58] Examples of such changes include the new Declaration's explicit guarantees of the right of privacy;[59] the right to vote;[60] the right to be free from

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57. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978). Though no opinion in *Bakke* garnered the support of a majority, Justice Powell's controlling opinion did apply "strict scrutiny" to the academic affirmative action program at issue there. The intimations of *Bakke* proved correct when a majority of the Court held that "strict scrutiny" applied to any governmental classification on the basis of race, including affirmative action programs, regardless of motive. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 109 S. Ct. 706 (1989).

58. It has become an article of faith in Louisiana that the Declaration of Rights of the Louisiana Constitution of 1974 was intended to afford citizens of the state even greater protection of rights than is available under federal law. *See, e.g.*, Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 1 (1974); Louis "Woody" Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. 9 (1975); State v. Perry, 610 So. 2d 746, 755 (La. 1992) ("[T]he Louisiana constitution provides greater protection of individual rights than does the federal Constitution..."); Guidry v. Roberts, 335 So. 2d 438, 448 (1976) (to same effect). This point was expressly made by the drafters of the Louisiana Declaration of Rights. *See, e.g.*, comments of Delegate Woody Jenkins introducing the draft Declaration of Rights, VI Records of the Louisiana Constitutional Convention of 1972: Convention Transcripts, (1977) [hereinafter "Records: Convention Transcripts"], p. 990, 37th day's proceedings, August 28, 1993 ("The only purpose of having a Bill of Rights in our State Constitution is to grant additional protection that is not given to us by the Federal Constitution.").

59. La. Const. art. I, § 5. This provision was intended to incorporate the federal *Griswold* line of "autonomy-privacy" cases explicitly into the state constitution. Hondroulis v. Schumacher, 553 So. 2d 398, 415 (La. 1988). *See generally* John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could* Roe v. Wade *be Alive and Well in the Bayou State?*, 51 La. L. Rev. 685, 698–707 (1991), detailing the drafting history of section 5.

60. La. Const. art. I, § 10. Previous Louisiana constitutions had expressly limited suffrage, imposing an imposing set of residency, character, literacy, and age requirements on the right. In rejecting most of those restrictions and instead guaranteeing a right to vote for all mentally competent non-incarcerated citizens over the age of 18, the drafters of the 1974 Declaration clearly drew upon ideas found in the federal 14th and 15th Amendment, and on the federal Voting Rights Act of 1965.

discrimination in public accommodations;[61] the right to a *Miranda* warning before interrogation;[62] and the right to assistance of counsel in criminal proceedings.[63] As is evident from this list, the drafters of the Declaration of Rights of the Louisiana Constitution of 1974 were inspired by and wished both to emulate and to expand upon ideas about protection of rights that were initially articulated by the federal Supreme Court interpreting the federal Bill of Rights and federal statutory law.

Another manifestation of the desire of the framers of the 1974 Declaration to emulate and go beyond then-current federal law can be found in the Declaration's treatment of the guarantee of equal protection of the laws. In one sense, the Convention's treatment of this issue can be seen as manifesting a desire to depart from federal law. The Convention rejected a proposal that would have simply guaranteed "equal protection of the laws" in words virtually identical to those used in the federal Fourteenth Amendment[64], and adopted instead a proposal containing very different language indeed:

> Section 3. Right to Individual Dignity
> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.[65]

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61. La. Const. art. I, § 12. This new section applies to privately as well as publicly owned facilities, and was directly inspired by the federal Civil Rights Act of 1964. *See generally* Hargrave, *supra* note 9, at 35.

62. La. Const. art. I, § 13.

63. *Id.*

64. Records: Convention Transcripts, *supra* note 58 at 1022–28, 38th day's proceedings, August 24, 1973.

65. La. Const. art. I, § 3. As originally proposed by the Committee on Bill of Rights and Elections, the text prohibited any "discrimination" based on any of the enumerated bases, reading as follows:

> Section 3. Right to individual dignity.
> Section 3. No person shall be denied the equal protection of the laws, nor shall any law discriminate against a person in the exercise of rights on account of birth, race, age, sex, social origin, physical condition , or political or religious ideas. Slavery and involuntary servitude are prohibited, except in the latter case as a punishment for crime.

IV Records: Convention Transcripts, *supra* note 58, at 1015–16. Many delegates expressed concern that this provision would preclude reasonable and necessary distinctions based on age or gender. *See, e.g., id.* at 1016–17 (colloquy of Mr. Rayburn and Mr. Roy, regarding Mr. Rayburn's concern that the provision would abolish mandatory retirement provisions); *Id.* at 1019 (statement of Miss Perkins,

In another sense, however, the influence of federal law, and of federal Supreme Court precedent, can be readily seen. The first and fourth sentences of section 3 are essentially copied verbatim from the federal Fourteenth and Thirteenth Amendments respectively. The second sentence explicitly singles out discrimination based on race or religion for special treatment, just as federal jurisprudence had, at the time, identified government acts which distinguished of such grounds as requiring the highest degree of scrutiny.[66] The third sentence lists a series of other possible grounds for classification, most of which had been proposed as candidates for some form of heightened scrutiny under federal law, but which had not yet clearly achieved such a status.[67] Indeed, the very organization of the middle

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expressing concern that language requiring gender equality would adversely affect a divorced woman's entitlement to alimony). Defenders of the proposed article emphasized throughout that the prohibition on "discrimination" was not intended to forbid *all* distinctions based on the enumerated categories, but rather only those which the state could not show to be "reasonable." Debate continued without resolution, however, until the close that day's session.

When the convention reconvened the next morning, the Committee on Bill of Rights and Elections proposed, as a substitute, the language now found in § 3. VI Records: Convention Transcripts, *supra* note 58 at 1029, 39th day's proceedings, August 30, 1979. The substitute proposal was intended "to account all that was said yesterday" and respond to the concerns raised. *Id.* (remarks of Mr. Dennery). The substitute was adopted by the convention with virtually no further debate. *Id.* at 1030.

66. The federal doctrine of "strict scrutiny" originated in *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944), and was refined and defined in a series of subsequent cases, including *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967). Today, it seems clear that government acts which classify on the basis of race, and which visit harms upon minorities will seldom, if ever, pass constitutional muster. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879 (1984).

67. As of 1974, federal law was unclear as to the standard of review that should be applied, in cases brought under the 14th Amendment, to government acts that allegedly discriminated on the basis of, for example, sex, age, or illegitimacy. In *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971), the court purported to apply only "rational basis" scrutiny to a state law that favored men over women as administrators of estates. In *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764 (1973), a plurality of the court favored treating women as a "suspect class" and subjecting laws discriminating against women to "strict" scrutiny. It was not until 1976 in *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 45 (1976) that the Supreme Court settled on the current standard of "intermediate" scrutiny for claims of gender discrimination brought under the federal Equal Protection Clause. Similarly, in the early 1970's, the federal Supreme Court gave conflicting signals regarding whether discrimination against non-marital children would receive "rational basis" scrutiny or something more. *Compare, e.g.*, Levy v. Louisiana, 391 U.S. 68, 71, 88 S. Ct. 1509, 1511 (1968) (stating that the test is whether "the line drawn is a rational one," though noting that the court was "extremely sensitive" to discrimination on such a basis) *and* Labine v. Vincent, 401 U.S. 532, 91 S. Ct. 1017 (1971) (applying a very low standard of review), *with* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 92 S.

two sentences of section 3 structurally mirrors the federal "tier" system of review as that system was beginning to emerge in the 1970s, with race and religion separated out and identified as being the least acceptable bases of distinction among persons, certain other bases of classification separated out for review under a lesser, but still meaningful, standard, and, impliedly, all other bases for classification relegated to a third and even lower standard of review. Though the language of section 3 clearly differs from its federal model, that difference in language consists, to a large degree, merely in making explicit what had already been held to be implicit in the federal Fourteenth Amendment.

It is certainly clear that the framers of section 3 did intend to go beyond then-current federal law in certain substantive respects—by establishing some form of serious scrutiny for all the bases of discrimination listed, by identifying classifications based on "culture" and "physical condition" as candidates for some form of special scrutiny and, with respect to classifications based on race or religion, using language that appears to go beyond even the federal "compelling interest" standard and impose instead an absolute prohibition against "discrimination" on those grounds. Nonetheless both the language of section 3 and the constitutional history of Louisiana, outlined above, make it equally clear that the basic ideas embodied in that section—that equality is a basic right, that race and religion are particularly inappropriate bases for classification, that certain other bases of classification, such as those based on gender or legitimacy of birth, also require some significant scrutiny—were derived from federal models, rather than from any indigenous Louisiana tradition.

Louisiana courts were slow to recognize the potential implications of the unique language of section 3. From 1974 until 1985, Louisiana courts simply followed federal precedent in interpreting section 3, adopting and applying the federal "tier" system of review despite the historical and textual distinctions that could be drawn between the federal Fourteenth Amendment and its Louisiana analogue.[68] In *Sibley v. Board of Supervisors*[69] the Louisiana

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Ct. 1400 (1972) (appearing to provide a stronger standard) *and* Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459 (1977) (to same effect). It was not until 1988, in *Clark v. Jeter*, 486 U.S. 456, 108 S. Ct. 1910 (1988) that the court finally settled on its current "intermediate" level of security for claims of this type. With regard to discrimination based on age, lower federal courts had, as of 1974, reached varying results. It was not until *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976) that the court finally held that the 14th Amendment provided only "rational basis" review of distinctions based on age.

68. *See, e.g.*, the original Supreme Court decision in *Sibley v. Bd. of Supervisors*, 462 So. 2d 149 (La. 1985), in which the court analyzed plaintiff's

Supreme Court, for the first time, rejected the federal "tier" model for analysis of equal protection issues. Relying on the unique language of section 3 and on the expressed intent of the drafters of the 1974 Declaration to provide constitutional protection for members of groups not adequately protected by existing federal constitutional jurisprudence,[70] the *Sibley* court instead constructed an analysis of section 3 that would subject almost all assertions of violation to single standard of review: whether the challenged government action "suitably furthers a legitimate state purpose."[71] The categories enumerated in the third sentence of section 3 were distinguished from other "unenumerated" bases of classification by a shifting burden of proof. If the government is shown to have discriminated against a person on the basis of one of the enumerated categories, the government bears the burden of proof on the issue of whether the discrimination is "arbitrar[y], capricious[]or unreasonabl[e]" or whether it instead suitably furthers an appropriate governmental purpose. If the alleged discrimination is on some other basis, plaintiff bears the burden of proof.[72]

The court in *Sibley* also addressed the second sentence of section 3, which separates out government discrimination on the basis of race or religion for special treatment. As the court noted, the convention modified the original draft of section 3, as proposed by the drafting committee, which originally grouped "race" and "religion" with all the other enumerated categories.[73] The court concluded that the

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section 3 claim in a manner indistinguishable from federal analysis of similar claims alleging violation of the 14th Amendment.

69. 477 So. 2d 1094 (La. 1985). Plaintiff in *Sibley* was a young woman who suffered extensive physical injuries and massive brain damage as a result of the negligence of a hospital owned-and-operated by the state. By the time the case came before the court, the plaintiff's direct medical expenses alone had already almost reached $500,000. On rehearing, the Louisiana Supreme Court held that a statute which imposed a hard $500,000 cap on damage awards against state hospitals effectively distinguished between persons who suffered catastrophic injuries and those who suffered lesser harms by allowing only members of the latter group to obtain full recovery, and that such a distinction constituted a discrimination based on "physical condition" under the meaning of section 3. The court remanded the case to allow the state an opportunity to show that the discrimination was not, in this case, arbitrary, capricious, or unreasonable.

70. *Sibley,* 477 So. 2d at 1107–08. Justice Dennis, who authored the opinion in *Sibley,* was in a particularly good position to discern the intentions of the drafters of section 3. Justice Dennis had been a delegate to the Louisiana Constitutional Convention of 1973, and was a member of the committee on Bill of Rights and Elections, which drafted the present Louisiana Declaration of Rights, including section 3.

71. *Sibley,* 477 So. 2d at 1109.

72. *Sibley,* 477 So. 2d at 1108.

73. *See supra* note 65 for the text of the original proposal.

second sentence, as modified and enacted, requires that, "[w]hen the law classifies individuals by race or religious beliefs, it shall be repudiated completely."[74] Though only dictum in the context of *Sibley*, this language would later prove important indeed.

PART II: STATE CONSTITUTIONS, EQUALITY AND CIVIL RIGHTS: ON THE CONCEPTUAL HEGEMONY OF FEDERAL LAW AND THE POSSIBILITY OF AN INDEPENDENT STATE CONSTITUTIONAL VOICE

Having traced the development of Louisiana's constitutional guarantee of equality, it is now possible to address the central questions posed: why the decision in *LAGC* came out as it did; and whether that case holds implications for decisions on similar issues in other states.

A. Why Louisiana's Constitution Will Not Provide an Independent State Voice: LAGC *as a Case Study in the Intellectual Hegemony of Federal Law*

In *Louisiana Associated General Contractors v. State*[75] the Louisiana Supreme Court considered a complaint brought by an association of contractors, challenging the constitutionality of the then-applicable Louisiana Minority and Women's Business Enterprise Act.[76] That statute required state agencies to set aside up to ten percent of all construction or procurement contracts for bid by qualified minority-owned businesses, and up to two percent for bid by qualified women-owned businesses.[77] The challenged statute could well have been struck down under the federal Fourteenth Amendment since it imposed a relatively rigid quota, and therefore would likely be held insufficiently closely related to any demonstrated compelling governmental interest in remedying prior state sponsored discrimination.[78] However, in *LAGC* the Louisiana

74. *Sibley*, 477 So. 2d at 1107.

75. 669 So. 2d 1185 (La. 1996). This case has been analyzed in Mary Ann Wolf, Comment, *Louisiana's Equal Protection Guarantee: Questions About the Supreme Court Decision Prohibiting Affirmative Action,* 58 La. L. Rev. 1209 (1998).

76. La. R.S. 93:1951–91 (1989).

77. *La. Ass'n Gen Contractors,* 669 So. 2d at 1188.

78. The Louisiana statute at issue in *LAGC* was quite similar to the federal set-aside programs struck down in *Croson* and *Adarand*. For example, the statute was defined in part in terms of race, with no indication that the legislature had considered non-race-based alternatives. The program was structured as a relatively rigid "quota" system which required that a fixed percentage of construction contracts be designated as ones for which *only* certified minorities or women-owned businesses could compete. Such features made it highly likely that a court applying

Supreme Court took the opportunity to go significantly farther than even the federal Supreme Court had gone. The court interpreted section 3 of the Louisiana Declaration of Rights to absolutely prohibit any form of state sponsored race-based affirmative action—regardless of whether such activity was "necessary" to achieve any "compelling" governmental interest in remedying the effects of prior state sponsored discrimination.[79] According to the Louisiana Supreme Court, apparently, all forms of race conscious affirmative action are illegal in Louisiana, even when plainly necessary and narrowly tailored to remedy the current effects of past discrimination.

The court in *LAGC* was undoubtedly correct that the text of section 3 differs from the federal Fourteenth Amendment, and therefore may be subject to an interpretation that diverges from federal precedent. The court was also correct in holding that the intent of the framers of the Louisiana Declaration of Rights was to go beyond federal law and guarantee Louisiana's citizens greater protection of certain rights than would be available under the federal Bill of Rights. And, finally, the *LAGC* court was correct in concluding that the second sentence of section 3 does, by its plain terms, absolutely prohibit "discrimination" on the basis of race. Nonetheless, the result in *LAGC* is subject to criticism, on several levels.

The most salient flaw in the *LAGC* court's reasoning concerns the meaning of the word "discriminate," as that word is used in section 3. In *LAGC*, the court asserted that the meaning of the second sentence of section 3 was so "clear and unambiguous" as to preclude resort to the drafting history of the provision, the debate among the delegates to the convention, or any other source of guidance regarding the understanding of the framers as to what it means to "discriminate."[80] This claim seems difficult to justify. Surely the state's actions belie any contention that section 3 was clearly or widely understood, at the time it was enacted or for many years thereafter, to preclude affirmative action. On the contrary, the state engaged in various affirmative action programs for more than twenty years after the Declaration of Rights was enacted, without any indication that these practices might violate the state constitution.

More importantly, during the 1970s, the meaning of "discriminate" was a matter of significant legal and philosophical debate. There was certainly no consensus that race-conscious

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the *Croson* and *Adarand* analysis would reach a result similar to that reached in those cases.

79. *La. Ass'n Gen. Contractors*, 669 So. 2d at 1195–98.

80. *LAGC*, 669 So. 2d at 1196.

affirmative action programs constituted acts of "discrimination" against those not benefitted by such programs. To cite just one example, in *United Steelworkers v. Weber*[81] the United States Supreme Court would shortly hold that Title VII of the Civil Rights Act of 1964, which likewise made it unlawful for an employer to "discriminate against any individual" with respect to the terms and conditions of employment because of that person's race,[82] did *not* preclude an employer from adopting voluntary race-conscious affirmative action programs designed to remedy a persistent racial imbalance in its workforce. My point is certainly not that the court in *LAGC* necessarily should have been guided by *Weber* or any other particular federal precedent. Rather the point is simply that the meaning of "discriminate" was not, in 1974, so "clear and unambiguous."[83]

If one does look to the proceedings of the Louisiana constitutional convention, it is far from obvious that the framers of section 3 understood the word "discriminate" to include equally, without distinction, both traditional Louisiana patterns of subordination on the basis of race and subsequent efforts to remedy the continuing effects of that history of subordination. To be sure, some evidence does support the *LAGC* court's conclusions. As was noted above, the *Sibley* court stated, in passing, that the second sentence of section 3 prohibited any "classification" on the basis of race.[84] However, that case did not involve any issue of race, and did not analyze the question in any detail. A better source of support for the *LAGC* court's view—though one not cited in the decision—is a committee report by the Committee on Bill of Rights and Elections, which drafted the Declaration of Rights, which stated that an earlier draft of what ultimately became section 3 was intended, among other purposes, to prohibit "new forms of 'reverse discrimination' such as the imposition of quotas."[85] Certain comments made during the floor debate on section 3 could likewise be interpreted as indicating that the speaker thought that it would preclude all classifications on the basis of race or religion, regardless of the state's invidious or remedial purpose.[86] And in an article written soon after the new

81. 443 U.S. 193, 99 S. Ct. 2721 (1979).

82. 42 U.S.C. § 2000e–2(a) (2003).

83. *See* Wolf, *supra* note 75, at 1220–28 making, in greater detail, an argument similar to the argument made here.

84. *See supra* note 75, at 1224.

85. 1 Records of the Constitutional Convention of 1973: Official Journal of Proceedings, *supra* note 58, at 86.

86. *See, e.g.*, the comments of delegate Dennery, explaining that "[t]he authors [of the adopted version of § 3] believe that there is absolutely no basis for any discrimination of any sort on the basis of, or account of race or religion." Records:

constitution was adopted, one of the delegates who served on the committee which drafted the Declaration of Rights described the effect of the second sentence of section 3 as requiring the state to be "blind" to the race and religion of the persons with whom it deals, and thus precluding "quotas."[87]

However, substantial evidence to the contrary also exists. To a certain extent, the evidence is negative. The official presentation of section 3 by the committee on the Declaration of Rights to the convention made no mention of any effect that section 3 would have on existing or potential affirmative action programs.[88] Nor did any subsequent speaker during the debate on section 3 suggest anything of the kind. It seems very unlikely that such a radical change in the law would have passed without comment if the delegates had understood or believed that section 3 "clearly and unambiguously" so required. On the contrary, the discussion, insofar as it focused on race, primarily concerned the need to overcome Louisiana's history of discrimination against racial minorities,[89] and on the need to give the state's black citizens a reason to vote for the new constitution.[90] It is hard to see how these expressed concerns can be squared with any supposed original intent by the Convention to forever outlaw race-based affirmative action in Louisiana.

In light of these interpretive difficulties and ambiguities, it is perhaps not too surprising that the court in *LAGC* ultimately rested its conclusion that section 3 outlawed any classifications based on race on an analogy to federal law, arguing that the state Declaration of Rights should be construed just like the federal Fourteenth Amendment as interpreted by the federal Supreme Court in *Croson*[91] and *Adarand,*[92] as making no analytic distinction between remedial and invidious uses of race.[93] Not surprising perhaps, but also not convincing. Cases decided fifteen or twenty years after the drafters of the Louisiana Declaration or Rights met are unlikely to shed much retroactive light on what they may have intended. And, in any event, since the crucial term, "discriminate," does not appear in the text of

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Convention Transcripts, *supra* note 58, at 1029, quoted in *LAGC,* 669 So. 2d at 1198 n.11.

87. Jenkins, *supra* note 58 at 17, cited in *LAGC,* 669 So. 2d at 1198.

88. Records: Convention Transcripts, *supra* note 58, at 1016 (remarks of Mr. Roy).

89. *See, e.g.*, statements of Delegate De Blieux, Records: Convention Transcripts, *supra* note 58, at 1029.

90. Records: Convention Transcripts, *supra* note 58 at 1026 (remarks of Mr. Jackson, the chair of the committee on Bill of Rights and Elections).

91. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989).

92. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097 (1995).

93. La. Ass'n of Gen. Contractors., 669 So. 2d at 1198 (extensively quoting and adopting the reasoning of *Adarand,* in particular).

the Fourteenth Amendment, federal cases construing that amendment will not provide much legitimate guidance as to how that term should be interpreted.

What then is one to make of *LAGC*? It may be tempting to see the case as reflecting politics as much as legal analysis, as the predictable result of an elected judiciary in a conservative state in an era of popular opposition to many aspects of the traditional civil rights agenda, affirmative action included. But the root causes of the *LAGC* court's failure to really grapple with the hard questions—what the word "discriminate" meant to the constitutional drafters of 1974, and how it should be interpreted today—reflects deeper issues. What the *LAGC* decision really demonstrates is how difficult it is for state courts interpreting state constitutions to escape from the concepts and reasoning of leading federal constitutional decisions. The court in *LAGC* was well aware that the framers of the Louisiana Declaration intended to guarantee citizens greater protection of rights than was available under the federal constitution;[94] the court acknowledged (indeed, stressed) that the text they were called upon to interpret differed from its federal counterpart; it proudly announced that the result it reached went beyond, and thus differed from, current federal law.[95] And yet, despite these protestations of independence, the power of federal decisions remained strong. On the central issue of the case, an interpretive issue which is simply not presented by the Fourteenth Amendment, the court in *LAGC* nonetheless seemed more influenced by Justice Scalia's arguments about the meaning of the 14th amendment in *Adarand* than by any full and open minded analysis of what the Louisiana draftsmen and delegates and voters may have actually understood and intended, back in 1974. This is independence only of a sort, independence of result but not real independence of thought or analysis.

It is possible, however, to lay too much blame at the feet of the Louisiana Supreme Court. The gravitational pull of federal constitutional law is always strongly felt by state courts interpreting

94. In this regard, *LAGC* also stands as a strong reminder of the weaknesses of the common metaphor for the interaction of federal and state rights guarantees. According to that metaphor, the federal Bill of Rights establishes a minimum level of rights protection; state rights guarantees can grant "more" rights but not "less" than the federal minimum. In *LAGC,* the court evidently thought it was "adding" to the rights of citizens by absolutely prohibiting any classification by race, for any purpose. However, the issue of affirmative action is one where legitimate claims conflict. By adding to rights of some, the court necessarily adversely affected the rights and expectations of others.

95. The divergence between Louisiana and federal law may have widened with the very recent decision in *Grutter v. Bollinger*, 123 S. Ct 2325 (2003), in which the Court upheld the admissions program of the Michigan Law School, a program which explicitly took race, among other factors, into account.

state constitutions. The categories and concepts of federal constitutional analysis are what we teach in the law schools; they form the language lawyers use when they discuss constitutional issues, whether in briefs or over beers. It is hard for any court to break free. It is even harder for a court to break free of federal models of analysis when, as in the case of Louisiana's constitutional guarantee of equality, the state constitutional text was derived from federal sources and models. As I have argued elsewhere, the mere fact that a state constitutional right was originally derived from federal sources is not sufficient reason for state courts to continue thereafter to interpret and reinterpret that state provision in conformity with the federal Court's changing interpretation of that original federal model.[96] However, it does make the temptation to do so greater, particularly when the language of the state provision provides a plausible basis for that interpretation and particularly where, as in Louisiana, there exists little indigenous tradition of state protection of equality rights to provide the basis for a coherent alternative vision. The decision in *LAGC* may have been flawed, but it may also have been predictable; Louisiana's (lack of) constitutional tradition may have simply failed to provide the court with the raw materials necessary for the creation of any truly independent analysis of the state's guarantee of equality.

B. Other States and Other Visions: Traditions of Natural Law and Human Dignity as a Possible Basis for an Independent Analysis

As has been pointed out by several scholars—one of whom, Bob Williams, is in this room and will be speaking after me—State Constitutional guarantees of equality and of the inherent rights of individuals are, to put it mildly, a mixed lot. Some provisions, like Louisiana's, are of recent vintage and closely mirror notions of equality and civil rights as those concepts have been articulated in federal jurisprudence. Others, however, are much older, and reflect different intellectual traditions.[97]

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96. John Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived From Federal Sources*, 3 Emerging Issues St. Const. Law 173, (1990).

97. The seminal article in the field is Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 Tex L. Rev. 1195 (1985). Williams notes that many state constitutions do not have express guarantees of "equal protection," but that most have language that, in one way or another, expresses notions of human dignity and equality. Thus, for example, many older state constitutions, particularly those dating from the founding decades, have language derived from natural law philosophy and from the assertion in the Declaration of Independence that "all men are created equal." *Id.* at 1199–1206. Another group of constitutions have language derived from Jacksonian ideas of popular democracy, and are typically

One of these independent traditions predates the founding of the nation and draws upon concepts of natural law and natural rights that were well known to the founders' generation. Examples of such guarantees can be found in the constitutions of Virginia, Kentucky, Massachusetts, Connecticut, and New Jersey, among others. The provisions vary in language, but all revolve around common themes of the inherent dignity and equality of all persons, and the rejection of government actions which would arbitrarily interfere with one's person, property, or autonomy. A couple of examples will suffice to give the flavor. The first of these, Section 1 of the Virginia Bill of Rights (adopted in 1776) provides:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[98]

The Equivalent provision of the Connecticut Constitution states that:

> All men, when they form a social compact, are equal in rights . . . .[99]

And in New Jersey, the constitution provides that:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.[100]

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phrased as prohibitions against the grant of special privileges to favored interests. *Id.* at 2007–08. Reform movements of the late 19th century produced constitutional language which generally prohibited "special" or "local" laws. *Id.* at 2009–10, and the 20th century brought still other provisions, often inspired by federal law, which forbade "discrimination" in the exercise of civil rights. *Id.* at 2010–12.

98. Va. Const. Bill of Rights § 1 (1776).

99. Conn. Const. art. I, § 1 (1965).

100. N.J. Const. art. I, ¶ 1 (1947). The language of the Massachusetts constitution was originally quite similar:

> All men are born free and equal, and have certain natural essential and inalienable unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.

The provision was amended in 1976 to replace the word "men" with "people," and to add the following as a second sentence: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Mass. Const. pt. 1, art. 1, § 2 (1947).

Such provisions had their origin in the colonies, but are not confined to the original thirteen states. Similar provisions exist in the constitutions of California, Kentucky, Florida and Alabama, among other states.[101]

The question is, whether such texts can provide any traction for an understanding of equality that can serve as a model to oppose the current federal Supreme Court's equation of "equal protection" with "non-classification." My answer, in brief, is that they haven't yet fulfilled that role, but that they can.

As Professor Suzanna Sherry has extensively documented,[102] state courts in the revolutionary era and thereafter had little doubt of their power and authority to declare invalid acts of government which were perceived as violating these fundamental principles of right and justice. However, in most cases, the actual issues involved were quite far afield from the concerns of "civil rights" as we understand that term today, and even further removed from issues of equality or affirmative action. Typical cases from this very early period would involve such issues as the taking of property without compensation, imposition of retroactive or *ex post facto* laws, or legislative extinguishment of debts.[103] Later cases from the Nineteenth and early Twentieth century focus more upon prohibition of legislative distinctions which struck the reviewing court as arbitrary or otherwise unrelated to any legitimate police power concern.[104]

Only in the last twenty years or so have there been any substantial number of state court cases which have relied on these sorts of "natural law/equal rights" provisions to address issues that can be

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101. Ala. Const. art. I, § 1 (1901); Cal. Const. art. I, § 1 (1879); Fla. Const. art. 1 § 2 (1968); Ky. Const. § 3 (1891). California also has a provision guaranteeing, among other things, a federally derived right to "equal protection of the law." Cal. Const. art. I, § 7. This latter provision has been amended to expressly prohibit bussing of students for purposes of desegregation, except when specifically required by federal law.

102. Suzanna Sherry, *Natural Law in the States*, 61 U. Cin. L. Rev. 173 (1992). *See also* Williams *supra* note 97, at 1201–06.

103. Sherry, *supra* note 102, at 185–221, discussing cases from Virginia, Massachusetts, New York, and South Carolina. *See also*, to similar effect, City of Janesville v. Carpenter, 46 N.W. 128 (Wis. 1890) (local ordinance depriving owner of beneficial use of his property); Billings v. Hall, 7 Cal. 1 (Cal. 1857) (general rule that a state cannot extinguish "vested rights").

104. Such cases were often phrased (and are today often dismissed because they were phrased) in terms of "substantive due process." One variant of this line of thinking involved a particular issue that *is* normally seen as related to civil rights, that is, those cases which struck down "separate but equal" school systems in certain northern states on the ground that such distinctions were neither authorized by the state constitution nor "reasonable." *See,e.g.*, Clark v. Bd. of Dir., 24 Iowa 266 (Iowa 1868); Roberts v. Boston, 59 Mass. 198 (Mass. 1849).

easily classified as "civil rights" cases. Such cases are beginning to crop up, however, in several contexts. For, example, several state courts relied on state constitutional provisions of this type to depart from prevailing federal law and strike down state restrictions on funding for abortions.[105] Others have relied on similar language to strike down state laws criminalizing consensual sodomy, particularly when the law distinguishes between heterosexuals and homosexuals.[106] And in one particularly relevant case, the Florida Supreme Court held that a proposed state constitutional amendment that would have outlawed affirmative action should not be placed on the ballot, in part because the proposal failed to inform the voters that such an amendment would affect the natural rights/equal rights guarantee of the Florida Bill of Rights.[107] The clear implication was that the state constitutional guarantee recognized the necessity of race-conscious remedies in some sorts of cases.

So then, do these cases suggest that an independent state constitutional analysis is on the way? The short answer, unfortunately, is "not yet." Many of these cases seem to largely follow federal equal protection analysis, differing from federal precedent only in the result.[108] Others do differ from federal modes of analysis in significant ways, but not necessarily in ways that would give much comfort to proponents of a robust view of civil rights. Thus in both *Right to Choose v. Byrne*[109] (an abortion funding case) and *Kentucky v. Wasson*[110] (a sodomy case), the respective state courts appeared to depart from federal "tier" analysis of equal protection and rely instead on a more unitary, free form, "balancing" approach. While this approach gave the New Jersey and Kentucky courts some rationale for differing from federal analysis of similar issues, the approach would seem susceptible of degenerating into the kind of loose "equity" analysis that Professor White discerns and decries in federal law. Perhaps a more hopeful sign is the decision of the Connecticut court in *Doe v. Maher*[111] (an abortion funding case).

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105. *See, e.g.*, Moe v. Sec. of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986); Hope v. Perales, 571 N.Y.S.2d 972 (N.Y. Sup Ct. 1991).

106. People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

107. Advisory Opinion to the Attorney General, 778 So. 2d 888 (Fla. 2000).

108. *See, e.g.*, Hope v. Perales, 571 N.Y.S. 2d 972 (N.Y. Sup. Ct. 1991) (striking down an abortion funding ban on state due process and equal protection grounds, but largely relying on Justice Brennan's dissenting opinions in *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2651 (1980)); Moe v. Sec. of Admin. & Fin., 417 N.E.2d 387 (1981) (striking down abortion funding restrictions on due process grounds).

109. 91 N.J. 287, 450 A.2d 925 (N.J. 1982).

110. 842 S.W.2d 487 (Ky. 1992).

111. 515 A.2d 134 (Conn. Super. Ct. 1986).

Here, the court largely followed federal conceptual framework in analyzing whether the state's decision to fund childbirth but not abortions for the indigent violated the state's "natural rights"-type equal protection guarantee. However, the Connecticut court showed itself much more willing than is the federal Supreme Court to consider the case in light of real world structural realities and asymmetries, as it took explicit note of the actual coercive impact of the state's choices on the life experiences of the poor.[112]

Nonetheless, however much one may welcome the outcomes and some of the analytic moves made in these cases, the net is far from any convincing independent state constitutional analysis of the basic issues of equal protection and civil rights. The outcomes in these cases have little grounding in the particular language or history of the state constitutional provision at issue. Divergent outcomes can be found in states with similar constitutional texts and histories, and similar outcomes have been reached in states with very different texts and histories. Moreover, even those courts which asserted most powerfully the differences between federal and state constitutional traditions have failed to connect up their present day analysis to any in-state tradition of interpretation of these "natural law" texts, or to any broader philosophic tradition regarding the meaning and interpretation of natural law and natural rights. The hard work of analyzing and expounding a natural law based notion of what "equal rights" really means has yet to be done.

On the other hand it appears, at least preliminarily, that an analysis of constitutional equality which authentically based a state constitutional tradition of protection of natural rights could well provide the basis for a truly different vision.

Three independent but related features of current federal analysis that make it so difficult to achieve progressive results in civil rights cases are: 1) the "individualist" focus of federal equal protection law, which rejects equalization of outcomes across groups as a permissible policy goal; 2) the definition of the core meaning of "equal protection" in terms of "classification" rather than in terms of "subordination;" and 3) the federal Supreme Court's insistence that plaintiffs alleging violation of the Fourteenth Amendment's guarantee of equal protection must show "intent," a requirement which makes it difficult for the federal courts to confront structural issues that reinforce subordination. A state constitutional natural rights-based analysis seems well suited to provide the foundation for an alternate vision, at least to some extent. Older versions of natural law analysis may be compatible with giving primacy to the moral and legal claims of certain kinds of "groups" (e.g., family or community)

112. *Id.* at 146–157.

over the claims of individuals. However, the language and enlightenment intellectual roots of the state constitutional provisions discussed above appear to contain a large bias toward individualist analyses. On other hand, nothing in the natural law tradition precludes an analysis that will avoid the other two characteristics of current federal analysis identified above. On the contrary, starting one's analysis with a base concept of the inherent dignity and worth of each person—as these natural law theories seem to start—seems perfectly compatible with a legal analysis of "equality" that takes as its lodestar the need to *create* a world in which the outcomes of a person's life will not correlate with their race, gender, or physical condition.

CONCLUSION

For the reasons set out above, the decision in *LAGC* appears to demonstrate that those who would try to use state courts and state constitutions as a basis for articulating and exploring a different vision of the meaning of equal protection—one that differs from that which currently prevails on federal Supreme Court—are not likely to succeed unless they can identify and articulate a truly independent tradition, in their state, regarding what these concepts mean. In Louisiana, such a tradition does *not* exist, except in weakest possible form, and except for a brief period when legal protection of civil rights was imposed from the outside, by military force. And as the decision in *LAGC* shows, the chance of an independent voice from the bayou is therefore correspondingly poor.

All is not bleak, however. Other states enjoy a more robust, well rooted tradition regarding the meaning and interpretation of these concepts. It appears that, in these states, the promise of a truly different vision of civil rights remains viable.